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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PIT RIVER TRIBE; NATIVE COALITION FOR MEDICINE LAKE HIGHLANDS DEFENSE; MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER; and MEDICINE LAKE CITIZENS FOR QUALITY ENVIRONMENT,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR; CALPINE CORPORATION; and CPN TELEPHONE FLAT, INC.,

Defendants.

No. 2:19-cv-02483-JAM-AC

Hon. John A. Mendez

FEDERAL DEFENDANTS' MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: July 28, 2020
Time: 1:30 p.m.
Courtroom: 6

Action Filed: April 15, 2019
Trial Date: None

NOTICE

Notice is hereby given that the Bureau of Land Management and the U.S. Department of Interior (collectively "Federal Defendants") make the following motion in the above captioned case which is set for hearing, if the Court deems a hearing necessary, at1:30 p.m. on July 28, 2020, in Courtroom 6, or at a later date convenient to the Court.

MOTION

Federal Defendants hereby move to dismiss Plaintiffs complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. This motion is based on the memorandum in support and exhibits filed herewith, and the pleadings on file.

Date: May 21, 2020

Respectfully Submitted,

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MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Plaintiffs allege that the Bureau of Land Management, U.S. Department of Interior ("BLM") violated the Geothermal Steam Act ("Steam Act") in failing to terminate a single lease, CA12372, and a unit agreement called the Glass Mountain Unit agreement to which thirty-two other leases are currently committed. This is Plaintiffs' third challenge to the geothermal leases and unit agreement overseen by BLM in the Shasta-Trinity, Klamath, and Modoc National Forests.

The procedural and factual history of the Glass Mountain Federal Unit and related leases, along with other legal impediments, necessitate dismissal. As previously determined in the related cases, Plaintiffs' claims do not fall within the zone of interests for nondiscretionary duties under the Steam Act. And because Plaintiffs expressly waived similar claims for the same Unit and related leases, *Res judicata* precludes bringing these claims again. And the conduct that allegedly gives rise to Plaintiffs' claims occurred between approximately fifteen to thirty years ago, far outside the six-year statute of limitations. Finally, Plaintiffs fail to identify specific agency action that would enable judicial review under the APA. For all of these reasons, Plaintiffs fail to state a claim upon which this Court can grant relief and the Court lacks subject matter jurisdiction. Federal Defendants accordingly and respectfully request that the Court dismiss the complaint in its entirety.

II. Legal Standard

A. Federal Rule of Civil Procedure 12(b)(1)

"Federal courts … possess[] only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto." *Rivera v. Patel*, No. 16-cv-00304-PJH, 2016 WL 6427893, at *3 (N.D. Cal. Oct. 31, 2016). As a result, "federal courts have no power to consider claims for which they lack subject-matter jurisdiction." *Mehr v. Federale Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1055 (N.D. Cal. 2015). Plaintiffs have the burden to establish subject matter jurisdiction. *Gregory Vill. Partners, L.P. v. Chevron USA, Inc.*, 805 F. Supp. 2d 888, 895 (N.D. Cal. 2011).

A motion to dismiss for lack of subject matter jurisdiction can be a facial or factual attack. In a facial attack, a defendant asserts that the allegations in a complaint are insufficient on their face to invoke federal jurisdiction. *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1108 (N.D. Cal. 2007). "In resolving a facial attack, a motion will be granted if the complaint, when considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *Id.* (citation omitted). In a factual attack, the movant goes beyond the complaint. "In such a case, '[n]o presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims'" *Gregory Vill. Partners, L.P.*, 805 F. Supp. 2d at 895 (citation omitted). This motion presents both a facial and factual attack.

B. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of the claims alleged in the complaint." *Sun Microsystems Inc.*, 534 F. Supp. 2d at 1108 (citation omitted). "Review is limited to the contents of the complaint." *Id.* (citation omitted). "To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements" of Rule 8, which "requires only that the complaint include a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* (citing Fed. R. Civ. P. 8(a)(2)). For purposes of Rule 12(b)(6) review, a court may review judicially noticeable materials including matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted).

III. The Geothermal Steam Act

As enacted in 1970 and amended in 1988 and again in 2005, the Steam Act authorizes the Secretary of the Interior to "issue leases for the development and utilization of geothermal resources" in federal lands. 30 U.S.C. § 1002. Although issued earlier, Calpine's leases, at issue in this case, are subject to regulations that took effect on August 8, 2005.[1]

---

[1] Leases issued before August 8, 2005 are subject to the regulations in effect before that date with respect to royalties, the primary term, lease extensions, renewals, and diligence and annual work requirements. 43 C.F.R. § 3200.7(a)(1). However, holders of leases issued before August

A. 30 U.S.C. § 1005(a)

Under the 1988 version of the Act, lease terms were governed by the provisions of 30 U.S.C. § 1005. The first sentence of § 1005(a) provided: "Geothermal leases shall be for a primary term of ten years." Section 1005(a) also outlined the conditions requiring the Secretary to extend certain leases for a period of up to an additional forty years:

> If geothermal steam is *produced or utilized in commercial quantities within this term*, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years.

30 U.S.C. 1005(a) (1988) (italics added).

The italicized phrase—"produced or utilized in commercial quantities"—is defined as including not just actual production but also "completion of a well capable of producing geothermal steam in commercial quantities so long as the Secretary determines that diligent efforts are being made toward the utilization of the geothermal steam." 30 U.S.C. § 1005(d) (1988). Accordingly, "productive" wells includes geothermal wells on leases (and within "units," described below) that are not actually in commercial production so long as BLM has made the requisite findings.

The 2005 version of § 1005 provides a similar nondiscretionary duty to extend leases: "The Secretary shall extend the primary [ten-year] term of a geothermal lease for 5 years" if the lessee satisfies work commitment requirements or completes an annual payment. 30 U.S.C. §1005(a) (2005). Each lease is then extended for an additional five years if minimum work requirements are met annually. *Id.* In addition, § 1005(g) of the 2005 Steam Act confers such extensions to all leases that (in defined circumstances) are included in a cooperative or unit plan. Leases under these plans shall be extended for "five years and so long thereafter, but not more than thirty-five years, as geothermal steam is produced or utilized in commercial quantities." 30

8, 2005 were given until December 1, 2008 to elect to be subject to the 2005 regulations. *Id.* Calpine made that election on November 19, 2008.

U.S.C. § 1005(g) (2005). (The definition of "produced or utilized in commercial quantities" remains unchanged from previous versions of the Steam Act. *See* 30 U.S.C. § 1005(h)).

The Ninth Circuit succinctly stated the purpose for Congress's 2005 amendments: "the Geothermal Steam Act was amended in 2005, to provide (among other things) that lease extensions were mandatory, not discretionary, so long as the lessee met certain conditions unrelated to NEPA or NHPA obligations." *Pit River v. U.S. Forest Service*, 615 F.3d 1069, 1084 (9th Cir. 2010) (citation omitted). Thus, all lease extensions on leases subject to the 2005 regulations are nondiscretionary.

B. 30 U.S.C. § 1017

"The Geothermal Steam Act also authorizes the Secretary to approve 'cooperative or unit plan[s]' under which multiple leases are managed as a unit." *Pit River Tribe v. BLM (Pit River II),* 793 F.3d 1147, 1150 (9th Cir. 2015) (citing 30 U.S.C. § 1017 (1998); 43 C.F.R. § 3280.0–2 (1997)). The purpose of a Section 1017 unit plan is exploration and development of a common pool or field of geothermal resources. The original 1970 version of § 1017 broadly authorized the Secretary to include provisions encouraging leases to be developed cooperatively as part of a unit plan, but it did not provide detailed specifications for unit plans. 30 U.S.C. § 1017 (1970).

C. The Glass Mountain Federal Unit, Lease CA12372, and the 2017 Unit Review

The Forest Service consented to geothermal leasing in the Klamath and Modoc National Forests and BLM began issuing leases in 1982. *Pit River Tribe v. BLM*, Nos. 2:04-CV-0956-JAM-JFM, 2:04-CV-0969-JAM-JFM, 2013 WL 12057469, at *2 (E.D. Cal. July 30, 2013), *rev'd*, 793 F.3d 1147 (9th Cir. 2015). In May 1982, BLM approved the Glass Mountain Unit agreement, Compl ¶ 66. Leases were committed to the Unit in 1982 and following years, one of which, Lease CA12372, has a well capable of commercial production. *Pit River Tribe*, 2013 WL 12057469, at *2

BLM originally issued Lease CA12372 on June 1, 1982, and BLM later included it within the Glass Mountain Federal Unit. Compl. ¶ 70. On February 13, 1989, BLM made a "capable well determination" —finding that well 31-17 on Lease CA12372 was capable

of producing steam in commercial quantities. Compl ¶¶ 72-73; *see also Pit River II*, 793 F.3d at 1151. "In July 1991, under § 1005(a), BLM continued for up to 40 additional years," lease CA12372. *Id*.

IV. Procedural History

This case is the latest iteration of lawsuits that have been litigated for nearly twenty years, beginning with *Pit River Tribe. v. BLM (Pit River I)*, 306 F. Supp. 2d 929 (E.D. Cal. 2004) in 2002, which was reversed by *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768 (9th Cir. 2006). Decided on remand in 2008, *Pit River v. BLM*, No. 2:02-CV-1314-JAM-JFM, 2008 WL 5381779 (E.D. Cal. Dec. 23, 2008), the district court's order remanding the leases at issue to BLM was affirmed (with a technical correction). *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069 (9th Cir. 2010).

Plaintiffs filed a second suit, *Pit River II*, in 2004. 2013 WL 12057469. That matter was appealed and remanded in 2015 (793 F.3d 1147). This Court's 2016 rulings on remand were appealed and affirmed. *Pit River Tribe v. BLM*, 939 F.3d 962 (9th Cir. 2019). The allegations and opinions from *Pit River II* constrain Plaintiffs' ability to bring its claims in the instant matter.

A. *Pit River I*

Pit River I challenged five-year lease extensions under 30 U.S.C. 1005(g)(1) (1998) for two leases that were not at the time committed to the Glass Mountain Unit but that were near the Unit, and subsequent approvals by BLM and the Forest Service of a unit plan to develop a proposed power plant and transmission facilities called the Fourmile Hill Geothermal Development Project. This Court granted summary judgment for the government on all claims, but the Ninth Circuit reversed in 2006 and directed entry of summary judgment for the plaintiffs. *Pit River I*, 469 F.3d 768. The court ruled that BLM violated the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") by granting lease extensions that were discretionary under the terms of the provision in effect between 1988 and 2005 without preparing NEPA and NHPA analyses. *Id.* at 784, 787-788. This Court's order remanding the leases to BLM was affirmed in another appeal. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d at 1078-1079.

B. *Pit River II*

Pit River II was a consolidation of two complaints filed in 2004, challenging BLM's 1998 lease continuations within the Glass Mountain Unit and its approval of a development project (the "Telephone Flat Project") in 2002. *Pit River II*, 2013 WL 12057469. In 2013, This Court granted judgment on the pleadings on all claims challenging lease continuations. *Id.* The Court ruled that the zone-of-interests test precluded Plaintiffs from challenging the lease continuations under the Steam Act, because the mandatory terms of § 1005(a) (stating that a lease "shall continue" if geothermal steam is produced) did not encompass consideration of Plaintiffs' environmental, cultural, and spiritual interests. *Id.* at *4-6. In addition, because environmental, cultural, and tribal concerns could not affect BLM's decision, the court ruled that NEPA, the NHPA, and Indian fiduciary duty doctrine did not apply. *Id.* at *7-9.

On appeal, the Ninth Circuit reversed a portion of the district court's ruling. *Pit River II*, 793 F.3d at 1159. The court "agree[d] . . . that § 1005(a) is non-discretionary," and it did not disturb the ruling that plaintiffs' interests are not encompassed by that section. *Id.* Nonetheless, the court ruled that plaintiffs could challenge the lease continuations as violating the Steam Act because they had asserted a claim that the leases were only eligible for discretionary extensions under § 1005(g). *Id.* The court therefore remanded the case for a determination whether, as described by the court, BLM correctly determined that § 1005(a) applied or whether plaintiffs were correct that § 1005(g) governed, instructing that if plaintiffs established that the leases "were eligible only for extension under § 1005(g), BLM will be required to comply with NEPA and NHPA, including by consulting with affected tribes." *Id.*

On remand, this Court set aside BLM's May 1998 continued terms conferred under § 1005(a) for twenty-six leases committed to the Glass Mountain Unit. *Pit River II*, No. 2:04-cv-00956 JAM-AC, 2017 WL 395479, at *1 (E.D. Cal. Jan. 30, 2017). The Court remanded the decision of whether to extend or cancel the twenty-six leases back to BLM, as well as BLM's concurrent decision to rescind 1005(g)(1) extensions that had previously been granted to most of the leases. *Id.* The Court also noted that BLM's decision to continue Lease CA12372 for up to forty years, pursuant to 30 U.S.C.§ 1005(a) (1988), would not be affected by its Order. *Id.* at *2.

The Court's decision was recently affirmed by the Ninth Circuit. *Pit River Tribe v. BLM*, 939 F.3d 962 (9th Cir. 2019).

C. Waiver of Unit Review Claims pursuant to Stipulation in *Pit River II*

In its July 2013 Order, this Court noted that Plaintiffs waived claims alleged in their first amended complaint. *Pit River II*, 2013 WL 12057469 at *3 n. 2. Plaintiffs stipulated that they would "only assert causes of actions related to the May 18, 1998 lease extensions" (and a FOIA claim, not relevant here) despite having claims related to the validity of the Glass Mountain Unit in their amended complaint. Stipulation to Consolidate Cases, File Am., Consolidated Compl., & Withdraw Pending Mots., No. 2:04-cv-00956, ECF No. 44 at 2. Based on this stipulation, the Court found that Plaintiffs had waived paragraph 107(a) and (c) of its first amended complaint. The waived claims alleged that BLM violated the Steam Act and its implementing regulations by:

> (a) Unlawfully fail[ing] to terminate or eliminate leases from the Glass Mountain Unit when the Unit Operator failed to comply with reasonable diligence requirements of the approved Plan of Operation in 1995 and this violation is ongoing and continues to this day.
>
> (c) Unlawfully fail[ing] to terminate the 26 leases identified in paragraph 1 hereof for failure to comply with the "due diligence" and "bona fide efforts" requirements of the GSA, and this violation continues to this day[.]

No. 2:04-cv-00956-JAM-JFM, First Am. Compl. ¶¶ 107(a)-(c), ECF No. 48.

Plaintiffs did not challenge the waiver ruling in its 2015 appeal. The Ninth Circuit took note and stated that plaintiffs had "waived all of the claims alleged in Paragraph 107 of the complaint except for the claim in subparagraph (d) that BLM unlawfully continued the 26 unproven leases in May 1998," and left that ruling intact.[2] *Pit River II*, 793 F.3d at 1154-55.

[2] The waiver issue surfaced again in remand proceedings in 2016. This Court iterated that Plaintiffs had waived the above claims, that such waiver was recognized by the Ninth Circuit, and that a stipulation to waive any claim of an ongoing violation precluded Plaintiffs from making such an argument. *See* Transcript 27:4-9, No. 2:04-cv-00956-JAM-AC, ECF No. 139.

V. Argument

A. Plaintiffs' Claims are Not Within the Zone of Interests for the Steam Act

Plaintiffs previously alleged the same environmental, cultural, spiritual and aesthetic interests and injuries as they allege here, and this Court found that these interests do not fall within the zone of interest for nondiscretionary duties under §1005(a) of the Steam Act. *Pit River II*, 2013 WL 12057469, at *6. The Ninth Circuit did not disturb these findings. 793 F.3d at 1155-1157, 1159. Thus, Plaintiffs' first cause of action falls outside the zone of interests of § 1005(a). Plaintiffs' second cause of action (alleging failure to terminate the Unit) is likewise outside the zone of interest of 30 U.S.C. § 1017.

The Steam Act does not provide a private right of action. *Pit River II*, 2013 WL 12057469, at *4. To bring suit Plaintiffs must rely on the APA, 5 USC § 551, *et seq.*, which confers "standing to an 'aggrieved party' within the meaning of the substantive statute upon which the claim is based." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1102 (9th Cir. 2005) (quoting *Town of Stratford v. FAA*, 285 F.3d 84, 88 (D.C.Cir.2002) (citing 5 U.S.C. § 702)). The APA further requires that "[a] plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Determining whether a plaintiff's alleged injury falls within a statute's zone of interests requires a court "to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118,127 (2014) (citation and quotation omitted). Suit is foreclosed "when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue." *Id.* at 1389. In other words, a plaintiff whose alleged injuries lie outside the zone of interests protected by the statute invoked does not have a cause of action. *See id.* at 130 ("The zone-of-interests test is . . . an appropriate tool for determining who

may invoke [a] cause of action. . . ."). As a result, the complaint must be dismissed under Rule 12(b)(6).

In Pit River II, Plaintiffs claimed that BLM violated the Steam Act by failing to terminate or eliminate leases from the Glass Mountain Federal Unit, failing to terminate twenty-six other leases, and unlawfully continuing those twenty-six leases. *See* First Am. Compl. ¶¶ 106-108, ECF No. 48, No. 2:04-cv-00956-JAM-JFM (2013). This Court held that none of Plaintiffs' claims were within the zone of interests of § 1005(a) of the Steam Act. *Pit River II*, 2013 WL 12057469 at *5-6. Specifically, the Court found that BLM "considers environmental impacts when it makes significant *discretionary* decisions under the statute, like whether to issue *new* geothermal leases or approve development projects." *Id.* Those types of actions were not challenged in *Pit River II*, and therefore the Court held that Plaintiffs did not show how their "anti-development interests" were within the zone of interests of § 1005(a). *Id.* The Ninth Circuit "agree[d] . . . that § 1005(a) is non-discretionary," and did not disturb the district court's ruling that Plaintiffs' interests were not within § 1005(a)'s zone of interests. *Pit River II*, 793 F.3d at 1159. [3] The same analysis holds for §1017 and the Model Unit Agreement provisions that are implemented by the BLM as the agency charged with administration of geothermal leases and units.

Plaintiffs' complaint alleges that they use and derive spiritual, cultural, religious, environmental, and aesthetic benefits from the Medicine Lake Highlands. First Amended Complaint, ECF 63 (May 7, 2020 – "Compl.") ¶¶ 7-10. The four Plaintiffs here are also plaintiffs in *Pit River II*. *See* First Am. Compl., ECF No. 48, No. 2:04-cv-00956-JAM-JFM (2013). There, Plaintiffs alleged the same spiritual, cultural, religious, environmental, and aesthetic interests in the Medicine Lake Highlands. *Id.* at ¶¶8-10, 12. In short, the same Plaintiffs are re-alleging the same interests.

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[3] As noted, the Ninth Circuit held that the then-current provisions of Section 1005(g) would lead to a different result. *Pit River II*, 793 F.3d at 1158. Section 1005(g) is not at issue here, and, in all events, has been amended to make it nondiscretionary, like Section 1005(a). *Compare* 30 U.S.C. § 1005(g)(1988) *with* 30 U.S.C. § 1005(g)(2005).

Plaintiffs' first cause of action alleges that "Federal Defendants have violated, and continue to violate, their mandatory legal duty under the Geothermal Steam Act, 30 U.S.C. § 1005, its implementing regulations, and the Lease by unlawfully failing to terminate [Lease CA12372]." Compl. ¶ 79. The Ninth Circuit and previous litigation makes clear that Plaintiffs' alleged interests do not fall within the zone of interest of 30 U.S.C. §1005(a) (1988), because that section calls on BLM to take nondiscretionary action. BLM's action to continue the productive lease under both the 1988 and 2005 iterations of the statute are nondiscretionary. As a result, Plaintiffs' first cause of action to terminate Lease CA12372 must be dismissed because Lease CA12372 was issued and continued pursuant to the nondiscretionary requirements of 30 U.S.C. § 1005(a) (1988).

This Court should also dismiss Plaintiffs' second cause of action as it too falls outside the applicable zone of interests. The second cause of action alleges that "Federal Defendants have violated, and continue to violate, their mandatory statutory duty under section 1017 of the Geothermal Steam Act and its implementing regulations to terminate the Unit …". Compl. ¶ 82. Neither the 1988 or 2005 version of § 1017, however, provides for discretionary action that would require BLM to consider Plaintiffs' alleged environmental, spiritual, or cultural interests when determining whether a unit operator has complied with the requirements of a unit agreement. The 1988 statute does allow the Secretary of the Interior to require unit agreements at his or her discretion,[4] *see* 30 U.S.C. § 1017 (1988). But Plaintiffs are not challenging the establishment of a unit agreement. Plaintiffs, here, only challenge BLM's alleged failure to terminate the Glass Mountain Federal Unit. *See* Compl. ¶ 82.[5]

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[4] The 2005 version omits the phrase "at his discretion" and instead states, "[t]he Secretary may also initiate the formation of a unit agreement. . . if in the public interest." 30 U.S.C. § 1017(3) (2005). While BLM does approve unit agreement provisions, they are agreements initiated and developed among third party lessees, and the BLM is not a party. They are not applications for the conduct of ground-disturbing activities in the nature of a permit, and cannot result in environmental impacts.

[5] Plaintiffs' original complaint in this action also alleged a failure by BLM to conduct a "unit review" under Section 1017 and to remove unnecessary parcels from the Unit, but the First Amended Complaint dropped this claim following Federal Defendants' showing that the review

There is no provision for discretionary or nondiscretionary termination of a unit agreement within either version of § 1017. Thus, Plaintiffs' second claim is not even contemplated by the law. Plaintiffs cannot explain how § 1017 allows for termination of the unit agreement, or how their environmental or cultural interests would need to be considered if termination were allowed.

B. Plaintiffs' Claims are Barred by Waiver and Res Judicata

In addition to being precluded by the zone of interests test, Plaintiffs' claims are barred by *Res Judicata*. The purpose of claim preclusion is to "protect against 'the expense and vexation attending multiple lawsuits, conserve[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). To accomplish this goal, the law precludes parties "from contesting matters that they have had the full and fair opportunity to litigate." *Id.* This case fits squarely within the purpose of claim preclusion.

Res judicata bars "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties. . .on the same cause of action, if the prior suit concluded in a final judgment on the merits." *Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980). "Under the doctrine of claim preclusion (res judicata), a final judgment on the merits of an action precludes the parties…from relitigating the same claim that was raised in that action—or any claim arising of the same transaction or occurrence." *Shek v. Cal. Nurses Ass'n / C.H.E.U.*, No. C 10-4031 PJH, 2010 WL 4695486, *2 (N.D. Cal. Nov. 10, 2010) (citing *Taylor*, 553 U.S. at 892). In the context of a previous voluntary relinquishment of a claim, the doctrines of waiver and res judicata substantially overlap. *Rangel v. PLS Check Cashers of California, Inc*., 899 F.3d 1106, 1110 n.3 (9th Cir. 2018) (citation omitted).

Claim preclusion has three elements: "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*

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in question had in fact been conducted in 2017 (and Plaintiffs invited to participate). *See* ECF 31 at 16-17.

Regional Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002)).

In determining an identity of claims, courts consider whether the cases share "factual overlap, barring 'claims arising from the same transaction.'" *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, n.22 (1982)). The Ninth Circuit specifically looks to four factors:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Howard v. City of Boos Bay, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012))). The fourth criterion, whether two suits arise out of the same transactional nucleus of facts, "is the most important." *Id.*

A final summary judgment on the merits fulfills the second element of claim preclusion. *See Harris*, 682 F.3d at 1132 (citation omitted).

Finally, "[p]rivity exists when there is 'substantial identity' between parties, that is, when there is sufficient commonality of interest." *In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) (citing *United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980)). Identical parties are "quite obviously in privity." *Tahoe-Sierra Preservation Council, Inc.*, 322 F.3d at 1081.

1. Plaintiffs' first cause of action is barred by claim preclusion

Plaintiffs' first cause of action (to terminate Lease CA12372) meets all three elements of claim preclusion. As noted above, the Ninth Circuit looks to four factors to determine whether an identity of claims exists. *Howard*, 871 F.3d at 1039. With respect to claim one, all four factors militate finding an identity of claims. Indeed, Plaintiffs allege many of the same facts regarding lease productivity and unit formation in their complaint as they did in their first amended complaint in *Pit River II*. *Compare*, e.g., Compl. ¶¶ 55-58 *with* No. 2:04-cv-00956-JAM-JFM, First Am. Compl. ¶¶ 45, 53-57 ECF No. 48. And as noted, Plaintiffs allege the same

environmental, cultural, and spiritual interests in use in and benefits from the Medicine Lake Highlands in both suits.

Finally (and most importantly, *Howard*, 871 F.3d at 1039), the two suits arise out of the same transactional nucleus of facts — BLM's geothermal lease administration practices and unit formation and maintenance in the Shasta-Trinity, Klamath, and Modoc Forests in the 1980s and 1990s. In both matters, Plaintiffs plead facts allegedly establishing injury because of the same set of BLM practices under the Steam Act. Per the Court of Appeals, "[i]f the harm arose at the same time, then there was no reason why the plaintiff could not have brought the claim in the first action. The plaintiff simply could have added a claim to the complaint." *Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir. 2011).

Considering all four factors, and weighing the fourth most heavily, the element of identity of claims is established for Plaintiffs' first cause of action. The second two elements of claim preclusion are also met; *Pit River II* involves the same parties as this matter and that litigation reached a final judgment.

2. Plaintiffs previously alleged their second cause of action in *Pit River II*

Plaintiffs' second cause of action is also barred by *res judicata*. The same Plaintiffs bring the same claim (failure to terminate the Glass Mountain Unit) against the same parties (Interior, BLM, and Calpine) seeking the same relief (terminate or contract the Unit) and alleging the same facts (BLM practices, however misunderstood or mischaracterized) as they did in *Pit River II*. In *Pit River II*, Plaintiffs alleged that BLM "failed to terminate or eliminate leases from the Glass Mountain Unit" and "unlawfully failed to contract the Glass Mountain Unit Agreement to include only Lease CA12372." No. 2:04-cv-00956-JAM-JFM, First Am. Compl. ¶¶ 107(a)-(b), ECF No. 48. Rather than litigate those claims, Plaintiffs waived them through a stipulation. And rather than challenge the court's waiver finding on appeal, Plaintiffs remained silent. *Pit River II*, 793 F.3d at 1154-55. That matter reached a final judgment on the merits. *Pit River II*, 2013 WL 12057469. And the parties were identical. *Id.* Thus, all three elements of claim preclusion are met for Plaintiffs' second cause of action. Accordingly, it must be dismissed. *See Shek*,

2010 at *3 (finding an action must be dismissed where a plaintiff brought "the same claim…against the same party…seeking the same relief…as he did in [a previous] case.").

C. Plaintiffs do not Identify any Required Agency Action Omitted and therefore Cannot Bring Claims Under APA Section 706(1)

Plaintiffs' Complaint alleges its two causes of action under § 706(1) of the APA. Compl. ¶¶ 80, 83. Section 706(1) of the APA allows a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). But Plaintiffs cannot bring claims under Section 706(1) because Plaintiffs fail to identify any discrete and required agency action for the Court to review.

Whether a claim can proceed under APA 706(1) is a two part question. "A claim under § 706(1) can only proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.*" *Norton v. SUWA*, 542 U.S. 55, 64 (2004). In other words, an action must be both discrete and required by law. This limitation on 706(1) "rules out judicial direction of even discrete agency action that is not demanded by law." *Id.* at 65.

Plaintiffs' first cause of action does not pass muster. This claim alleges that BLM "unlawfully fail[ed] to terminate [] Lease [CA12372] for noncompliance with the 'diligent efforts' requirements of the Geothermal Steam Act." Compl. ¶ 99. BLM continued Lease CA12372 pursuant to 1988 version of § 1005(a) which states a "lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities." 30 U.S.C. § 1005(a) (1988). Plaintiffs do not identify a portion of §1005(a) that requires termination of a lease. Their claim, therefore, fails under APA 706(1).

Plaintiffs' second claim similarly fails to identify a discrete action withheld. It simply says the agency should have "terminated" the Unit because of certain alleged conditions. [6] Compl. ¶ 82. Plaintiffs' assertion that BLM should have terminated the unit agreement is not

[6] It is worth noting that the litigation history of this matter is a substantial reason why little activity (beyond maintenance and well integrity tests) have been conducted on the leases since completion of the development approvals for the two challenged power plants. BLM has issued suspensions of all lease and unit obligations and the running of the lease terms as a result of the litigation.

based in any identified law. No part of § 1017 calls for termination of an entire unit agreement. As a result, Plaintiffs' second cause of action fails to identify a discrete and legally mandated agency action subject to challenge under Section 706(1) of the APA.

D. The Statute of Limitations Precludes Review of Alleged Violations Before 2013

Finally, the statute of limitations bars any attempt by Plaintiffs to litigate claims addressing alleged violations occurring before 2013. 28 U.S.C. § 2401(a) bars every civil action commenced against the United States not filed within six years after the right of action first accrues. A claim first accrues when a plaintiff is aware of the wrong, but actual knowledge is not necessary. *Shiny Rock Mining Corp. v. United States*, 906 F.2d 1362, 1364-65 (9th Cir. 1990). Plaintiffs filed their complaint on April 15, 2019. Therefore, the statute of limitations bars all claims challenging any acts or omissions that occurred before April 15, 2013.[7]

Here, all of the events that purportedly give rise to Plaintiffs' claims occurred in the 1980s and 1990s and are therefore barred by the statute of limitations. Specifically, Plaintiffs' first claim (failure to terminate Lease CA12372) is eighteen years too late. Plaintiffs essentially argue that BLM should have terminated CA12372 on or before 1995. *See* Compl. ¶¶ 81-86. Plaintiffs' second cause of action (failure to terminate or contract the Unit agreement) also fails. It is for events that occurred at least twenty-four years ago, in 1995 and 1996 that Plaintiffs allege BLM failed to terminate or contract the Unit agreement. *Id*.

VI. CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant its motion to dismiss for failure to state a claim upon which relief can be granted, and for a lack of subject matter jurisdiction.

Date: May 21, 2020

Respectfully Submitted,

PREREK SHAH
Deputy Assistant Attorney General

/s/ Peter Kryn Dykema
PETER KRYN DYKEMA

[7] 28 U.S.C. § 2401(a) applies to APA claims. *Wind River Min. Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991).

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[PROPOSED] ORDER ON MOTION TO DISMISS

This matter having come before the Court on Federal Defendants' Motion to Dismiss and the memorandum of authorities in support thereof, it is hereby ordered that Federal Defendants' motion is GRANTED. All claims against Federal Defendants are hereby DISMISSED for failure to state a claim and alternatively for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: _____, 2020

_____
Hon. John A. Mendez
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I hereby certify that on May 21, 2020, I electronically filed the **NOTICE OF MOTION AND MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record registered with the CM/ECF system.

/s/ Peter Kryn Dykema
PETER KRYN DYKEMA