JEAN E. WILLIAMS
Deputy Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division
PETER KRYN DYKEMA D.C. Bar No. 419349
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Tel: (202) 305-0436
Email: peter.dykema@usdoj.gov

Attorneys for Federal Defendants

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' REPLY IN SUPPORT OF MOTION TO DISMISS

Hearing Date: October 13, 2020
Time: 1:30 p.m.
Courtroom: 6

Action Filed: April 15, 2019
Trial Date: None

Plaintiffs cannot avoid four facts: (1) as this Court and the Ninth Circuit have made clear, Plaintiffs' claims are not within the zone of interests of the relevant provisions of the Geothermal Steam Act ("Steam Act"); (2) because Plaintiffs' claims are factually entwined with E.D. Cal. Nos. 04-cv-956 and 969 (*Pit River II*) and could have been tried with that case they are barred by *res judicata*; (3) Plaintiffs fail to state a valid APA claim; and (4) Plaintiffs' claims are untimely.

A. Plaintiffs' Claims Lie Outside the Statute's Zone of Interests

It is Plaintiffs who "misconstrue[]" the Ninth Circuit's standing decision in *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147 (9th Cir. 2015). Plaintiffs' Opposition (ECF No. 75) ("Opp.") at 14. The Circuit held that Plaintiffs' claims fell within the zone of interests for one section of the 1988 version of the Steam Act — section 1005(g). The Circuit "agree[d] with [this Court] that, contrary to Pit River's argument, Pit River's ability to challenge the subject leases cannot be determined by looking to the broad objectives of the Geothermal Steam Act." *Pit River II*, 793 F.3d at 1157. Instead, the zone of interests test "is to be determined . . . by reference to the particular provision of law upon which the plaintiff relies." *Id*. (quoting *Bennett v. Spear*, 520 U.S. 154, 175-176 (1997)). The Circuit concluded that Plaintiffs' interest fell only within the zone of section 1005(g) of the 1988 version of the statute. *Id*. at 1158.

The Circuit followed this Court's reasoning that BLM "considers environmental impacts when it makes significant *discretionary* decisions under the statute" such as "whether to issue [a] new geothermal lease or to approve development projects." *Pit River II*, 2013 WL 12057469 at *5-6 (July 30, 2013). In that situation an appropriate NEPA/NHPA review of environmental interests may be fit. Here, because Plaintiffs do not allege violations of Steam Act provisions that contemplate similar discretionary review, their interests are not within the appropriate zone.

Plaintiffs' first claim states that because the lessee has allegedly not been diligent "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]." Amend. Compl. (ECF No. 63) ("Compl.") ¶ 79; see also Opp. at 7 (lease termination "mandated" by BLM regulations). Nothing in the Steam Act or its implementing regulations (whichever version is consulted) trigger NEPA or NHPA review when BLM is

assessing a lessee's diligence. Without scope for such review, Plaintiffs' suit is not within the Steam Act's zone of interests.

Similarly, Plaintiffs' challenge to the Glass Mountain Unit ("the Unit") 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. But no part of section 1017 mandates termination of a unit. Its only mandate is that "the Secretary shall" review the geographic scope of a Unit in five year increments, 30 U.S.C. § 1017(f)(1), a review that BLM conducted in 2017. ECF Nos. 31-1, 31-2.

Plaintiffs argue that the Steam Act "does not evince any congressional intent to preclude enforcement of its diligence requirements" by Plaintiffs. Opp. at 12. Not true. The Act assigns to the Secretary the duty to monitor diligence. Plaintiffs' standing allegations (Compl. ¶¶ 7-11) all refer to environmental values, which are nowhere reflected in, and therefore fall outside the zone of, the Steam Act's diligence requirements.[1]

Plaintiffs' heavy reliance on *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (Opp., *passim*) overlooks the fact that this Court found that *Patchak* is distinguishable -- and actually supports dismissal. 2013 WL 12057469 at 6.

B. The Identity of Claims Here and in *Pit River II* Preclude Plaintiffs' Suit

There are three elements to res *judicata*: (1) the same parties; (2) a previous final judgment on the merits; and (3) an identity of claims. *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 917 (9th Cir. 2012) ("*TIRN*"). Plaintiffs' argument focuses on the third element – identity of claims, but the identity of claims element exists here as well.

In *Pit River II*, Plaintiffs explicitly claimed that the Unit should have been terminated or contracted. *See* First Am. Compl. ¶ 107 ("Compl."), Prayer for Relief ¶ 1, ECF No. 48. And

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[1]Plaintiffs assert that the existence of lease 12372 and the unit somehow interfere with their use of these federal lands (Opp. at 13), but they do not and cannot substantiate this assertion. Forest Service lands are generally open to public use unless prohibited or a special use authorization is required. 16 U.S.C. § 551, 36 C.F.R. Parts 251 and 261; and for public lands, see 43 U.S.C. 1732, 43 C.F.R. Subpart 2920. No authorization has been denied Plaintiffs. They may use these lands (including those under lease) just as any other member of the public may use them.

lease CA12372 and the 26 leases challenged in *Pit River II* all fell within the Unit and were all continued because of the paying well determination on CA12372. Federal Defendants' Motion to Dismiss (ECF 64) ("Motion") at 4. Plaintiffs' allegations in this matter thus arise out of the same transactional nucleus of facts as those alleged in *Pit River II*.

Plaintiffs' response finely parses the claims asserted in the two cases, which misses the point. Plaintiffs note that their first claim here is focused on Lease 12372, whereas *Pit River II* targeted the *other* 26 leases comprising the Unit. As to their second claim here, Plaintiffs note that *Pit River II* targeted the leases comprising the Unit, not the Unit itself. Opp. at 18-23.

Plaintiffs' arguments, if valid, would support their bringing 28 sequential lawsuits, one each for the underlying leases and one for the Unit. That is not of course the law: "[W]hether the two suits arise out of the same transactional nucleus depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *TIRN*, 673 F.3d at 918 (quoting *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010)). "In most cases, 'the inquiry into the 'same transactional nucleus of facts' is essentially the same as whether the claim could have been brought in the first action.'" *Id.* (quoting *United States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir. 2011)).

The amended complaint in *Pit River II* shows how both suits are factually related. Lease CA12372 (the lease challenged here) is mentioned in 15 different paragraphs. *See* First Am. Compl. ¶¶ 4, 34, 45, 46, 49, 51, 53, 55, 57, 58, 65, 66, 68, 69, 107. As noted by the Ninth Circuit, Lease 12372 is integral to the existence of the Unit and to the continued viability of the 26 leases challenged in that case. *Pit River II*, 793 F.3d at 1152. Lease 12372, and its paying well determination, continuance, and operation, are thus all factually related to the 26 leases at issue in *Pit River II*; those 26 leases were extended pursuant to Lease CA12372's paying well determination. *Id.* These extensive factual overlaps are the transactional nucleus that fulfills *res judicata's* identity of claims element. *TIRN*, 673 F.3d at 918.

Plaintiffs argue that their first claim focuses on events (or non-events) occurring after *Pit River II* and that when filing *Pit River II* in 2013 "Plaintiffs possessed insufficient factual evidence of non-diligence on Lease 12372." Opp. at 20. This makes no sense: if Plaintiffs had

enough information to bring suit on the 26 leases within the Unit, they had enough information to bring suit on the 27th lease (12372) and the Unit as well. As Plaintiffs told the Court in 2016, their lack of diligence claim goes back to 1991 – long before they filed *Pit River II* in 2013: "I'd also like to point out that according to the record, there has been no activity on these leases since 1991. There's been no drilling on these leases. And to the best of our knowledge, even after 1998, there's not been activity on these leases."[2] Similarly, both the original Complaint (¶¶ 71-78) and the First Amended Complaint (¶¶ 55-64) in this action allege decades of inactivity on Lease 12372, including no exploratory testing since 1988 and no reports on diligence since 1995.

Plaintiffs' second claim (termination of the Unit) not only *could* have been brought in *Pit River II*, it *was* brought. Motion at 13. Plaintiffs asked the Court to declare that Federal Defendants "fail[ed] to timely terminate or contract the Glass Mountain Unit Agreement . . . and . . . such violation continues to this day[.]" *See* First Am. Compl. Prayer for Relief ¶ 1.[3] Because all three elements of *res judicata* are met, Plaintiffs' complaint must be dismissed.

C. Plaintiffs Cannot Maintain Suit Under APA Section 706(1)

To state a claim under 706(1), a plaintiff must identify a "discrete action that the law requires the agency to take." Opp. at 24. But Plaintiffs point to no statute or regulation that requires BLM to terminate either lease 12372 or the Unit.

Plaintiffs claim that 43 C.F.R. § 3207.15—a regulation that simply explains how a lessee can qualify for a production extension—requires BLM to terminate lease 12372. Opp., *passim.* Not so. Section 3207.15(g) only warns that BLM "will" terminate a lease if a lessee fails to produce or utilize geothermal resources in commercial quantities, *unless* the lessee meets the conditions set forth in § 3212.15 or § 3213.19.[4] A lease can also be suspended (as these have

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[2] April 26, 2016 Transcript, Case 2:04-CV-00956-JAM-AC (ECF No. 139) at 39-40. Plaintiffs (Opp. at 22) quote this Court's statement about "their next lawsuit." Respectfully, the statement does not reflect consideration of the elements of *res judicata* nor, naturally, does it reflect knowledge of the suit Plaintiffs would ultimately file as *Pit River III*.

[3] Since this claim was pled in *Pit River II*, it, along with BLM's alleged failure to terminate specific leases for alleged lack of diligence, were waived. *See* Motion at 7, 13.

[4] Section 3212.15 states that a lease can remain in effect if the lessee maintains royalty payments. 43 C.F.R. § 3212.15. Section 3213.19 allows a lessee to prevent termination if a violation is

been), *see* 43 C.F.R. § 3212.11, as can the obligations under a unit agreement. 43 C.F.R. § 3287.1. In short, the regulations provide alternatives to termination.[5]

Plaintiffs likewise fail to identify any statute or regulation requiring termination of a Unit agreement. Instead, Plaintiffs point to 43 C.F.R. § 3286.1 (a model version of a Unit agreement) which states a Unit agreement "shall terminate 5 years from [its] effective date *unless*" any of several conditions obtain. 43 C.F.R. § 3286.1 ¶ 18.1 (emphasis added). The model Unit agreement does not *require* termination. Rather, it specifies a Unit agreement is for a 5 year term, unless extended. 43 C.F.R. § 3286.1 ¶ 18.1(a).

To state a claim under APA Section 706(1), a plaintiff must "assert[] that an agency failed to take a *discrete* action that it is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Because Plaintiffs do not identify any statute or regulation that requires Federal Defendants to terminate either the lease or the Unit, this Court is left with no agency action to compel and, thus, without jurisdiction. *Cloverdale Rancheria of Pomo Indians of Cal. v. Jewell*, 593 F. App'x. 606, 608-609 (9th Cir. 2014).

D. Plaintiffs' Claims are Time-barred

The fact that Plaintiffs' allegations could have been (or were) made in the previous lawsuit shows that APA Section 706(1) is invoked to avoid *res judicata* and the statute of limitations, a tactic the courts reject. *Hells Canyon Pres. Council v. U.S. Forest Service*, 593 F.3d 923, 933 (9th Cir. 2010) ("Permitting plaintiffs' § 706(2) claim to go forward under the guise of a § 706(1) claim would undermine the important interests served by statutes of limitations, including evidence preservation, repose, and finality") (citation omitted).

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corrected in 30 days or the lessee shows that a violation cannot be corrected in 30 days but good faith attempts are made to correct the violation, or if the lessee appeals the a lease termination. 43 C.F.R. § 3213.19.

[5] As Calpine notes, Plaintiffs' arguments incorrectly apply after-the fact regulations.

CONCLUSION

Federal Defendants respectfully request that the Court dismiss the complaint in its entirety.

Date: October 6, 2020

Respectfully Submitted,

JEAN E. WILLIAMS
Deputy Assistant Attorney General

/s/ Peter Kryn Dykema
PETER KRYN DYKEMA D.C. Bar No. 419349
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044
Tel: (202) 305-0436
Fax: (202) 305-0506
Email: peter.dykema@usdoj.gov

Erica Niebauer
U.S. Department of Interior
Assistant Regional Solicitor

PROOF OF SERVICE

I hereby certify that on October 6, 2020, I electronically filed the foregoing 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