ROSEMARY ANTONOPOULOS
Vice President and Assistant General Counsel
Calpine Corporation
3003 Oak Road, Suite 400
Walnut Creek, CA 94597
Telephone: (925) 557-2283
Facsimile: (925) 479-9608
rantonopoulos@calpine.com
CA Bar No. 191400

THOMAS L. SANSONETTI (admitted *pro hac vice*)
ANDREW C. EMRICH (admitted *pro hac vice*)
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Telephone: (303) 290-1061 (T. Sansonetti)
(303) 290-1621 (A. Emrich)
Facsimile: (303) 290-1606
tlsansonetti@hollandhart.com
acemrich@hollandhart.com

Attorneys for Defendants
CALPINE CORPORATION &
CPN TELEPHONE FLAT, INC.

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 ENVRONMENT,

Plaintiffs,

v.

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

Defendants.

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

Hon. John A. Mendez

CALPINE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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

INTRODUCTION

In their Motion to Dismiss, Defendants Calpine Corporation and CPN Telephone Flat, Inc. (collectively, "Calpine") joined the Federal Defendants' Motion to Dismiss and separately explained why Plaintiffs are not entitled to either declaratory or injunctive relief against Calpine even if Calpine is required to remain in the case to ensure complete relief between the Plaintiffs and Federal Defendants under *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337 (9th Cir. 1995). ECF No. 67. While Plaintiffs now deny they are seeking any relief directly against Calpine (ECF No. 75 at 29-30), this newly-minted denial is belied by the plain language of their Complaint. Additionally, Plaintiffs fail to offer any support for their requested declaratory relief against a private party in a suit under the Administrative Procedure Act ("APA"). Plaintiffs have no standing to obtain declaratory or injunctive relief against Calpine.

Moreover, Plaintiffs have still failed to show any discrete duty that BLM was required to take, but has not yet taken, with regard to either Lease CA 12372 (the "Lease") or the Glass Mountain Unit ("GMU"). Instead, Plaintiffs now attempt to unwind BLM's 1991 decision to continue the Lease for forty years by suggesting that BLM is required to reverse course under regulations that were (a) promulgated sixteen years later, and (b) contain no mandatory duty for BLM to take any discrete action regarding the Lease. Plaintiffs' similarly fail to identify any mandatory, unmet, BLM duty to terminate the GMU, which contains a well capable of producing steam in commercial quantities. Plaintiffs' claims must be dismissed under *Norton v. SUWA*, 542 U.S. 55, 64 (2004).

ARGUMENT

I. Plaintiffs' prayers for relief against Calpine must be dismissed.

In the face of binding authority that Plaintiffs may not seek any specific relief against Calpine (ECF No. 67 at 11-15), Plaintiffs oddly now claim that their "Complaint does not seek any relief against Calpine" and reiterate that Calpine is simply named as a defendant under *Espy* because without Calpine as a party defendant, "complete relief cannot be afforded to Plaintiffs." ECF No. 75 at 29. Neither Plaintiffs' factual denial nor their reliance on *Espy* has merit.

As an initial matter, Plaintiffs' current denial is undermined by the plain language of their

1 Complaint's First Prayer for Relief in which they ask the Court to "Declare that Calpine is not in
2 compliance with the requirements of the Geothermal Steam Act, its implementing regulations,
3 the Lease, and the Unit Agreement and that such violations continue to this day." ECF No. 59 at
4 18, ¶ 1. Plaintiffs' First Prayer for Relief is an unambiguous request for declaratory relief against
5 Calpine. *See* 28 U.S.C. § 2201(a) (empowering court to "declare the rights and other legal
6 relations of any interested party seeking such declaration" and providing that "[a]ny such
7 declaration shall have the force and effect of a final judgement or decree and shall be reviewable
8 as such."); *see also* ECF No. 59 at 2, ¶ 5 (Plaintiffs assert jurisdiction under the Declaratory
9 Judgement Act, 28 U.S.C. § 2201). Plaintiffs attempt to run away from the plain language of
10 their Complaint fails the straight face test.

11 Furthermore, Plaintiffs have failed to offer <u>any</u> authority to support their request for
12 declaratory relief against Calpine. As Calpine explained at length, Plaintiffs cannot show that
13 there is an actual case or controversy between Plaintiffs and Calpine (ECF No. 67 at 11-12) and
14 none of the statutes cited in Plaintiffs' Complaint vest this Court with subject matter jurisdiction
15 to entertain a request for relief against a private, non-federal, party such as Calpine (*id*. at 12-14).
16 Plaintiffs have therefore forfeited their right to seek declaratory relief against Calpine.
17 *Medimmune v. Genetech*, 549 U.S. 118, 126-27 (2007) (clarifying that relief under the
18 Declaratory Judgment Act, 28 U.S.C. § 2201, is only available where an actual case or
19 controversy under Article III of the U.S. Constitution exists between the parties); *Wickland Oil*
20 *Terminals v. Asarco*, 792 F. 2d 887, 893 (9th Cir. 1986) ("Jurisdiction to award declaratory relief
21 [under 28 U.S.C. § 2201] exists only in 'a case of actual controversy.'") (internal citations
22 omitted).

23 Plaintiffs' reliance on *Espy* is similarly unavailing. *See* ECF No. 75 at 36. *Espy* <u>only</u>
24 permits a non-governmental party to be named as an indispensable party defendant in actions
25 brought under the APA where plaintiffs do <u>not</u> have a direct cause of action against the non-
26 governmental defendants. 45 F.3d at 1344-45. As the Ninth Circuit later clarified, "[j]oinder of
27 the [non-federal party] does not, and cannot, create any substantive rights that the [plaintiff] may
28 enforce against the [non-federal party]". *Equal Emp't Opportunity Comm'n v. Peabody W. Coal*

1 *Co*., 400 F.3d 774, 783 (9th Cir. 2005). Courts within the Ninth Circuit have been adamant that
2 a "[p]laintiff may only join the non-federal Defendants so long as Plaintiff seeks no affirmative
3 relief against them." *Quechan Indian Tribe v. U.S. Dep't of the Interior,* 2007 WL 2023487, at
4 *8 (D. Ariz. July 12, 2007) (emphasis added). Because Plaintiffs have specifically named
5 Calpine as an "indispensable party" under Rule 19 and *Espy* (ECF No. 59 at 6, ¶ 16), Plaintiffs
6 are prohibited from seeking any affirmative relief against Calpine.

7 Plaintiffs are also foreclosed from seeking injunctive relief against Calpine. *Gen. Bldg.*
8 *Contractors Ass'n v. Pennsylvania,* 458 U.S. 375, 399 (1982) (denying injunctive relief against a
9 party joined under Rule 19 because the relevant law "offers no support for the imposition of
10 injunctive relief against a party found not to have violated any substantive right of respondents");
11 *Quechan Indian Tribe*, 2007 WL 2023487, at *8 (dismissing claim for injunctive relief against
12 non-federal defendants under Rule 12(b)(6)).

13 Finally, contrary to Plaintiffs' unsupported assertion (ECF No. 75 at 30, n. 15), a motion
14 under Rule 12(b)(6) is the appropriate vehicle for disposing of invalid requests for relief. *Huynh*
15 *v. Northbay Med. Ctr*., 2018 WL 4583393, at *4 (E.D. Cal. Sept. 25, 2018) ("Rule 12(b)(6) is the
16 appropriate vehicle for asserting challenges to improper claims for relief."); *Whittlestone Inc. v.*
17 *Handi-Craft Co*., 618 F.3d 970, 974 (9th Cir. 2010) (holding that a motion to dismiss under Rule
18 12(b)(6)—and not a motion to strike under Rule 12(f)—is the appropriate means of disposing of
19 an improper claim for relief). The Court should therefore dismiss Plaintiffs' First Prayer for
20 Relief in its entirety and their Fifth Prayer for Relief to the extent it seeks injunctive relief
21 against Calpine.

22 **II. Plaintiffs have failed to state a claim for relief under Section 706(1) of the APA.**

23 In their effort to avoid dismissal of their claims for failing to meet the demanding
24 standards of Section 706(1) of the APA, Plaintiffs can point to no provision of the Geothermal
25 Steam Act ("GSA"), 30 U.S.C. §§ 1005(a) or 1017, which establishes a "discrete action" that
26 BLM is "required to take" with regard to either the Lease (Plaintiffs' first claim) or the GMU
27 (Plaintiffs' second claim). *See* ECF No. 75 at 23-26. Instead, Plaintiffs' base the defense of
28 their first claim on a misunderstanding of which regulations governed BLM's 1991 decision to

continue the Lease. ECF No. 75 at 23. Plaintiffs' defense of their second claim relies on opaque regulatory and statutory references and irrelevant paragraphs in their Complaint. Plaintiffs cite to no specific law which requires BLM to take discrete action regarding the GMU.

Calpine has explained at length why neither GSA § 1005(a) (1988), nor the implementing regulations governing BLM's 1991 decision to continue Lease CA 12372 for forty years, 40 C.F.R. § 3203.1-3 (1988), provide the basis for a claim under APA §706(1). ECF 67 at 6-9. In response, Plaintiffs rely entirely on certain requirements articulated in 43 C.F.R. § 3207.15: a regulation that came into effect sixteen years after BLM continued the Lease. Plaintiffs conveniently ignore the fact that the Ninth Circuit has already decided that the BLM regulations in effect in 1991 governed BLM's decision to continue the Lease under GSA §1005(a). *Pit River Tribe v. BLM*, 793 F. 3d 1147, 1152, n. 9 (9th Cir. 2015) (confirming that "43 C.F.R. § 3203.1-3 implements the lease-continuation requirements of 30 U.S.C. § 1005(a) and (d).").

BLM's current production extension regulation, 43 C.F.R. § 3207.15, is designed to implement the thirty-five-year production extension established in the revised GSA § 1005(g): not the forty-year continuation decision in the previous GSA §1005(a). 72 Fed. Reg. 24358, 24368 (2007) (explaining that "[f]inal sections 3207.14 and 3207.15 implement the 5-year and 35-year production extensions provided for in the statute at 30 U.S.C. 1005(g)"). And even where a lessee such as Calpine has elected to be governed by the new regulations under 43 C.F.R. § 32007(a)(2) for BLM's prospective administration of their leases, there is no provision in BLM's new GSA regulations—and Plaintiffs cite to none—that requires BLM to revisit a 40-year lease continuation decision (such as the one granted to Calpine in 1991) which the agency made fourteen years prior to the 2005 statutory amendments to the GSA and sixteen years before BLM issued its revised GSA regulations.[1]

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[1] Even if the new GSA regulations were to apply to the Lease, BLM's new regulations provide no basis for Plaintiffs' requested relief under APA § 706(1). *See* ECF No. 67 at 8-9. Significantly, the diligence requirements in 43 C.F.R. § 3207.15 (the regulation cited by Plaintiffs) must be met to BLM's satisfaction "[b]efore granting a production extension." *Id*. at § 3207.15(b) (emphasis added). Similarly, the lease termination provision in § 3207.15(g) only applies to lessees which "fail to produce or utilize geothermal steam in commercial quantities"—a requirement BLM concluded that Calpine satisfied in 1991. *See* § 3207.15(b)(2).

1 Plaintiffs effort to rescue their second claim fares no better. Rather than offer a specific
2 legal citation for any discrete action which BLM was required to take regarding the Glass
3 Mountain Unit, Plaintiffs provide a scatter-shot of Complaint citations, most of which provide no
4 legal citation whatsoever. Tellingly, the very few citations offered by Plaintiffs do not identify a
5 specific, non-discretionary duty which BLM was required to take, but has not yet taken, with
6 regard to the GMU. *See* ECF No. 75 at 25-26.

7 For example, the regulation on which Plaintiffs rest their case for unit termination—43
8 C.F.R. §3284.3—only applies to units where the "initial minimum unit obligations are not met,"
9 including where a "unit operator does not drill a well designed to produce or utilize geothermal
10 resources in commercial quantities". *Id*. at § 3284.3(a). Because the GMU contains a producing
11 well (as Plaintiffs' admit, ECF No. 59 at 13, ¶ 56), none of the remaining provisions of § 3284.3
12 applies.

13 The remaining citations vaguely referenced by Plaintiffs provide no discrete duties that
14 BLM is required to take (and has not yet taken), but instead entrust BLM with considerable
15 discretion in its administration of geothermal units, including the GMU. *See, e.g*. 30 U.S.C. §
16 1017 (providing overview of unit administration); 43 C.F.R. § 3280.2 (providing definitions
17 applicable to BLM's approval and administration of geothermal units, but no establishing no
18 mandatory duties for BLM). In short, Plaintiffs have identified no provision in the GSA or its
19 implementing regulations that could give rise to a claim for relief under APA §706(1). Plaintiffs
20 attempt to undue actions BLM took decades ago under the guise of APA § 706(1) claims must be
21 rejected. *Hells Canyon Pres. Council v. U.S. Forest Service*, 593 U.S. 923, 933-34 (9th Cir.
22 2010) (Plaintiffs may not avoid six-year statute of limitations by disguising APA §706(2) claims
23 as § 706(1) claims).

24 **CONCLUSION**

25 Plaintiffs' Complaint (ECF No. 59) should be dismissed in its entirety. However, at a
26 minimum, the Court must dismiss Plaintiffs' First Prayer for Relief against Calpine and
27 Plaintiffs' Fifth Prayer for Relief to the extent is seeks injunctive relief against Calpine.
28

Dated: October 6, 2020

CALPINE CORPORATION &
CPN TELEPHONE FLAT, INC.

By: Rosemary Antonopoulos
Calpine Corporation

s/ *Andrew C. Emrich*
Thomas L. Sansonetti (admitted *pro hac vice*)
Andrew C. Emrich (admitted *pro hac vice*)
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Telephone: (303) 290-1061 (T. Sansonetti)
(303) 290-1621 (A. Emrich)
Facsimile: (303) 290-1606
tlsansonetti@hollandhart.com
acemrich@hollandhart.com

Attorneys for Defendants
CALPINE CORPORATION &
CPN TELEPHONE FLAT, INC.

CERTIFICATE OF SERVICE

I, Andrew C. Emrich, hereby certify that on October 6, 2020, I electronically filed the **CALPINE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS** 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/ *Andrew C. Emrich*