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17  
18 UNITED STATES DISTRICT COURT  
19 EASTERN DISTRICT OF CALIFORNIA

20 NATURAL RESOURCES DEFENSE  
COUNCIL, *et al.*,

21 Plaintiffs,

22 v.

23 SALLY JEWELL, U.S. Department of the  
24 Interior, *et al.*,

25 Defendants.

Case No. 1:05-cv-01207 LJO-EPG

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR LEAVE TO  
FILE A FOURTH SUPPLEMENTAL  
COMPLAINT**

Date: TBD

Time: TBD

Ctrm: 4

Judge: Lawrence J. O'Neill

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SAN LUIS & DELTA MENDOTA WATER AUTHORITY, <i>et al.</i> ,  Defendants-Intervenors.
ANDERSON-COTTONWOOD IRRIGATION DISTRICT, <i>et al.</i> ,  Joined Parties.

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**INTRODUCTION**

1  
2 Plaintiffs seek the Court’s leave to supplement their complaint against the U.S. Bureau of  
3 Reclamation (“Reclamation”) and the Sacramento River Settlement (“SRS”) Contractors to  
4 address ongoing violations of the Endangered Species Act (“ESA”) that imperil the survival and  
5 recovery of two salmon species indigenous to the Sacramento River and its tributaries. Under the  
6 Federal Rules of Civil Procedure, parties may supplement pleadings “to promote as complete an  
7 adjudication of the dispute between the parties as possible by allowing the addition of claims  
8 which arise after the initial pleadings are filed.” *William Inglis & Sons Baking Co. v. ITT*  
9 *Continental Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1982); Fed. R. Civ. Proc. 15(d). Recent  
10 developments in this litigation and in the implementation of the renewed SRS contracts give rise  
11 to Plaintiffs’ proposed claims. The filing of the Proposed Fourth Supplemental Complaint  
12 (“4SC”) will promote a comprehensive resolution of the disputes surrounding the SRS contracts  
13 and avoid wasteful and inefficient litigation of related matters in separate, duplicative cases.

14 On June 15, 2015, the Court stayed this litigation to allow Reclamation to reinitiate  
15 consultation on the renewals of the SRS contracts and other contracts at issue in this case.  
16 Reclamation subsequently requested reinitiation with the U.S. Fish and Wildlife Service (“FWS”)  
17 on the impacts of the SRS contract renewals upon delta smelt but did not request reinitiation with  
18 the National Marine Fisheries Service (“NMFS”) on the impacts of the same contract renewals on  
19 the endangered Sacramento River winter-run Chinook salmon (“winter-run Chinook”) and the  
20 threatened Central Valley spring-run Chinook salmon (“spring-run Chinook”), even though such  
21 reinitiation is required under Section 7(a)(2) of the Endangered Species Act of 1973 (“ESA”), 16  
22 U.S.C. §1536(a)(2), and the ESA’s implementing regulations, 50 C.F.R. §402.16. Because  
23 Reclamation has refused Plaintiffs’ requests that it reinitiate consultation with NMFS as well as  
24 FWS, Plaintiffs seek to add a claim to require Reclamation’s compliance with the ESA.

25 Plaintiffs also seek to add a related claim challenging Reclamation’s and the SRS  
26 Contractors’ ongoing violations of Section 9 of the ESA, 16 U.S.C. §1538, for illegal “take” of  
27 ESA-listed winter-run and spring-run Chinook that has occurred each of the last two years as a  
28 result of the implementation of the renewed SRS contracts. In 2014, Reclamation made excessive



1 deliveries to the SRS Contractors that depleted the cold water reserves in Shasta Reservoir,  
2 causing temperature increases that were fatal to the winter-run and spring-run Chinook during the  
3 species' spawning, egg incubation, and rearing periods. These deliveries, and the SRS  
4 Contractors' diversions, led to the near-total loss of an entire generation of winter-run and spring-  
5 run Chinook that hatched, or would have hatched, in the Sacramento River below Shasta Dam in  
6 the 2014 "brood year." This location is the last remaining spawning and rearing habitat for wild  
7 winter-run Chinook in the Central Valley, and Reclamation's actions caused devastating losses to  
8 this species, as well as the spring-run Chinook, which relies on similar areas for critical habitat.  
9 In 2015, in spite of Reclamation's assurances that it would not repeat the same catastrophic  
10 mistakes, Reclamation again made excessive deliveries to satisfy the SRS contracts that led to  
11 fatal temperature increases below Shasta Dam. Early data suggests that the impacts to the 2015  
12 brood year are even worse than in 2014, and that loss of a second consecutive generation of the  
13 species is likely. Salmonids generally live three years, spawning just once, so the loss of a third  
14 generation in 2016 could tip the species over the brink of extinction in the wild. Because neither  
15 Reclamation nor the SRS Contractors have authorization to take winter-run or spring-run  
16 Chinook, Plaintiffs seek to add a claim for violation of Section 9 of the ESA.

17 The proposed claims are inextricably intertwined with the existing claims in this litigation.  
18 It would make no sense to resolve only a subset of the issues regarding the renewed SRS  
19 contracts and Reclamation's obligations under the ESA. The most efficient path to a complete  
20 disposition of the dispute over the contracts is to allow Plaintiffs to file their proposed 4SC.

## 21 BACKGROUND

### 22 I. Status of the Litigation

23 Plaintiffs originally filed this lawsuit to challenge Reclamation's deficient consultation  
24 with FWS on the Long-Term Central Valley Project "Operations Criteria and Plan" ("OCAP"),  
25 which guides the coordinated operation of the Central Valley Project ("CVP") and State Water  
26 Project ("SWP"). *NRDC v. Kempthorne*, No. 1:05-1207, 2008 WL 5054115 ("*Kempthorne*"), at  
27 \*1 (E.D. Cal. Nov. 19, 2008) (Doc. 761). Reclamation intended that the OCAP would inform  
28 Reclamation's renewals of CVP water contracts that were expiring, including the 40-year renewals

1 of the SRS contracts at issue. *Id.* at \*5.

2 FWS issued a biological opinion on the impacts of the OCAP on the delta smelt on July 30,  
3 2004 (“FWS 2004 BiOp”), and then issued a revised biological opinion on February 16, 2005  
4 (“FWS 2005 BiOp”), which superseded the FWS 2004 BiOp. *Kemphorne*, 506 F. Supp. 2d 322,  
5 333 (E.D. Cal. 2007) (Doc. 323). Both BiOps concluded that the OCAP would *not* cause jeopardy  
6 to the delta smelt nor adversely modify its critical habitat. *Id.* In 2005, FWS sent several “letters  
7 of concurrence,” which relied exclusively upon the data and analysis in the FWS 2004 and 2005  
8 BiOps, concluding that renewing the SRS contracts for 40 years on certain negotiated terms would  
9 not cause jeopardy to the delta smelt. SAR<sup>1</sup> 3340 (covering 138 contract renewals); SAR 1660-97  
10 (Natomas Cent. Mut. Water Co.); SAR 289-331 (City of Redding); SAR 1-44 (Anderson-  
11 Cottonwood Irrigation Dist.).

12 Plaintiffs challenged the FWS 2005 BiOp and actions taken in reliance upon it, including  
13 the renewal of the SRS contracts. Pls.’ First Supp. Compl. (May 20, 2005) (Doc. 40-1). In 2007,  
14 this Court<sup>2</sup> invalidated the FWS 2005 BiOp on numerous grounds and ordered FWS to complete a  
15 new biological opinion. 506 F. Supp. 2d at 387-88; *Kemphorne*, No. 1:05-1207, 2007 WL  
16 4462391, at \*1 (E.D. Cal. Dec. 14, 2007) (Doc. 560). The Court determined, however, that it  
17 could not grant Plaintiffs’ requested injunctive relief as to the long-term contract renewals because  
18 some contractors were not parties to the lawsuit. *Kemphorne*, 539 F. Supp. 2d 1155 (E.D. Cal.  
19 2008) (Doc. 567). The Court directed Plaintiffs to file the currently operative Third Supplemental  
20 Complaint, which joined the parties to thirty-three additional high volume contracts as defendants.  
21 *Id.* at 1191-92; Doc. 575.

22 Plaintiffs subsequently moved for summary judgment on their claim that Reclamation  
23 violated Section 7(a)(2) of the ESA by executing the contract renewals based on FWS’s invalid  
24 consultation. Docs. 680-81. On November 19, 2008, the Court held Plaintiffs had standing to  
25 challenge the SRS contracts. *Kemphorne*, 2008 WL 5054115, at \*40. Although the Court

26 \_\_\_\_\_  
27 <sup>1</sup> Cites to “SAR” refer to the supplemental administrative record, lodged with the Court on June  
28 6, 2008. Doc. 657.

<sup>2</sup> During earlier district court proceedings in this case, Judge Oliver W. Wanger issued numerous  
rulings, many of which are referenced throughout this brief as rulings of the “Court.” After Judge  
Wanger’s retirement in September 2011, the case was reassigned to Judge Lawrence J. O’Neill.

1 eventually held (in a ruling that was reversed by the Ninth Circuit) that threshold issues precluded  
2 a ruling on Plaintiffs' claims, it found that Reclamation's consultations on the SRS contracts  
3 violated the ESA because FWS had relied exclusively on the "legally flawed OCAP BiOp which  
4 failed to competently and completely evaluate the impacts of water deliveries under the [SRS]  
5 Contracts on the Delta smelt." *Id.* The Court also found that Reclamation's reliance on the OCAP  
6 BiOp was arbitrary and capricious given the numerous "serious" and "obvious" flaws in the  
7 document. *Id.* at \*32. Nonetheless, the Court held that the ESA's consultation requirement did  
8 not apply to Reclamation's renewal of the SRS contracts because the original contracts left  
9 Reclamation without sufficient discretion to negotiate new terms that would benefit the delta  
10 smelt. *Kemphorne*, 621 F. Supp. 2d 954, 1000-01 (E.D. Cal. 2009) (Doc. 834).

11 After a divided three-judge panel of the Ninth Circuit affirmed, *NRDC v. Salazar*, 686 F.3d  
12 1092 (9th Cir. 2012), a unanimous en banc panel reversed. *NRDC v. Jewell*, 749 F.3d 776 (9th  
13 Cir. 2014) (en banc). The panel rejected the conclusion that Reclamation lacks discretion to  
14 renegotiate terms more protective of the delta smelt. *Id.* at 784-85. The panel explained that there  
15 is "nothing in the original Settlement contracts [that] requires the Bureau to renew the Settlement  
16 contracts" and, because "'Delta water diversions' are the most significant 'synergistic cause[]' of  
17 the decline in delta smelt," a decision not to renew the SRS contracts could benefit the delta smelt.  
18 *Id.* (quoting 58 Fed. Reg. 12854-01, 12,859 (Mar. 5, 1993)). Although the en banc panel held that  
19 the original contracts do not require renewal, it declined to decide "whether other legal obligations  
20 may compel [Reclamation] to execute renewal contracts." *Id.* at 785 n.1. Instead, the panel  
21 explained that, even were Reclamation obligated to renew the SRS contracts, Reclamation retained  
22 discretion that required ESA consultation because "[Reclamation] could benefit the delta smelt by  
23 renegotiating the Settlement contracts' terms with regard to, *inter alia*, their pricing scheme or the  
24 timing of water distribution." *Id.* at 785. The en banc panel remanded to this Court for "further  
25 proceedings consistent with [its] opinion." *Id.*

26 On remand, the Defendants moved to stay the litigation to allow Reclamation to reinitiate  
27 consultation under 50 C.F.R. §402.16. Doc. 955, 962. The Court granted the motion and stayed  
28

1 the case until December 15, 2015. Doc. 979 at 21.<sup>3</sup>

2 Subsequent to the Court's stay decision, Plaintiffs learned that Reclamation had requested  
3 reinitiation with FWS on the impacts of the SRS contract renewals to delta smelt, but not with  
4 NMFS on the impacts to winter-run and spring-run Chinook. Decl. of Katherine S. Poole ("Poole  
5 Decl.") ¶7. Plaintiffs requested that Reclamation expand its reinitiated consultation to include  
6 both agencies. *Id.* As of this filing, it appears that Reclamation is engaged in a reinitiated  
7 consultation with FWS, but has refused to reinitiate consultation with NMFS. *Id.* ¶8.

8 In the biological assessment ("BA") Reclamation submitted to FWS together with its  
9 request for reinitiation, Reclamation effectively denies that it has any discretion whatsoever to  
10 modify the contracts to benefit the delta smelt or its critical habitat. *Id.* Ex. 2B at 10-11  
11 (Supplemental Information to the Sacramento River Settlement Contractors Biological  
12 Assessment (July 2015)). This position directly contravenes the Ninth Circuit en banc panel's  
13 holding. For example, in spite of the en banc panel's ruling that Reclamation has discretion to  
14 alter the "timing of water distribution" to the SRS Contractors, *Jewell*, 749 F.3d at 785,  
15 Reclamation claims in the BA that it does not have discretion to "alter the . . . timing of SRS  
16 diversions from those set forth in the initial SRS contracts." Poole Decl. Ex. 2B at 10. And, in  
17 spite of the en banc panel's ruling that Reclamation has discretion to change the "pricing scheme"  
18 in the contracts to benefit the delta smelt, Reclamation claims in the BA that it "lacks discretion  
19 to set pricing terms in the SRS contracts for the sole purpose of protecting delta smelt." *Id.* at 11.

20 On October 20, 2015, NRDC sent a letter alerting FWS that Reclamation's assertions  
21 regarding discretion contradicted the en banc panel's ruling. Poole Decl. ¶5 & Ex. 4. NRDC also  
22 explained other deficiencies in the reinitiation package that Reclamation had submitted to FWS.  
23 *Id.* On October 28, 2015, NRDC alerted FWS of new environmental documents issued by  
24 Reclamation on October 26, 2015, demonstrating Reclamation's exercise of the very discretion  
25 that it denied it had in the BA: to modify the timing of deliveries under the SRS contracts. *Id.* ¶6  
26 & Ex. 5. Specifically, Reclamation authorized the modification of terms related to timing in the

27 \_\_\_\_\_  
28 <sup>3</sup> All pincites to docket entries use CM/ECF pagination, not the documents' internal pagination.

1 SRS contracts to allow for the extended use of diverted water. *Id.* Ex. 5. Neither Reclamation  
2 nor FWS has responded to Plaintiffs' input.

3 **II. Plaintiffs' Proposed Fourth Supplemental Complaint**

4 Plaintiffs propose to supplement the operative complaint with two new claims that are  
5 inextricably intertwined with the factual and legal questions already at issue in this case. First,  
6 the 4SC challenges Reclamation's failure to reinitiate consultation under Section 7 of the ESA  
7 with NMFS on the impacts of the SRS contract renewals to listed winter-run and spring-run  
8 Chinook. Second, the 4SC alleges that Reclamation and the defendant SRS Contractors violated  
9 Section 9 of the ESA by implementing the renewed contracts in a manner that caused unlawful  
10 and unauthorized take of listed Chinook.<sup>4</sup>

11 **A. Plaintiffs' Section 7(a)(2) Claim Against Reclamation for Failure to Reinitiate**  
12 **Consultation in Violation of the ESA's Implementing Regulations**

13 Plaintiffs' proposed 4SC alleges that Reclamation violated Section 7(a)(2) of the ESA and  
14 the ESA's implementing regulations, 50 C.F.R. §402.16, by failing to reinitiate consultation on  
15 the impacts of the SRS contract renewals on listed winter-run and spring-run Chinook. 4SC  
16 ¶¶145-50. The ESA's implementing regulations require an action agency, such as Reclamation,  
17 to reinitiate Section 7(a)(2) consultation if the agency has "discretionary Federal involvement or  
18 control over the action" at issue, and a triggering event occurs, including "[i]f new information  
19 reveals effects of the action that may affect listed species or critical habitat in a manner or to an  
20 extent not previously considered." 50 C.F.R. §402.16(b). The 4SC alleges that Reclamation is  
21 obligated to reinitiate consultation, that Reclamation has "new information" indicating that the  
22 listed Chinook and their critical habitat may be affected by the SRS contract renewals "in a  
23 manner or to an extent not previously considered," and that Reclamation has failed to reinitiate  
24 consultation. 4SC ¶¶116-21, 145-50.

25  
26 \_\_\_\_\_  
27 <sup>4</sup> The two additional proposed claims in the 4SC are brought by existing Plaintiffs NRDC, The  
28 Bay Institute ("TBI"), and San Francisco Baykeeper ("Baykeeper"), as well as proposed  
Plaintiffs, the Winnemem Wintu Tribe ("Winnemem") and Pacific Coast Federation of  
Fishermen's Associations/Institute for Fisheries Resources ("PCFFA"). The 4SC does not join  
Winnemem and PCFFA in the existing claims pertaining to delta smelt.

1 **1. The jeopardy finding in the 2009 NMFS OCAP BiOp and later**  
 2 **amendments is “new information” requiring Reclamation to**  
 3 **reinitiate consultation on the renewed SRS contracts**

4 The 4SC alleges that Reclamation violated the ESA and its implementing regulations, 50  
 5 C.F.R. §402.16, when it failed to reinitiate consultation with NMFS on the effects of the renewed  
 6 SRS contracts after NMFS replaced a no-jeopardy biological opinion, upon which the initial  
 7 consultation on the renewed SRS contracts relied, with a jeopardy biological opinion. 4SC  
 8 ¶¶118, 145-48, 150.

9 In 2004, NMFS issued a biological opinion determining that the OCAP *would not* cause  
 10 jeopardy to winter-run and spring-run Chinook and other anadromous species (“NMFS 2004  
 11 OCAP BiOp”). *PCFFA v. Gutierrez*, 606 F. Supp. 2d 1122, 1145-46 (E.D. Cal. 2008).  
 12 Reclamation subsequently requested consultation with NMFS on the effects of renewing the SRS  
 13 contracts on winter-run and spring-run Chinook. Poole Decl. Ex. 7 (Letter from Rodney McInnis,  
 14 NOAA Fisheries, to Michael J. Ryan, Reclamation (Jan. 10, 2005)). Relying exclusively on the  
 15 no-jeopardy finding of the NMFS 2004 OCAP BiOp, NMFS concluded that the SRS contract  
 16 renewals would not cause jeopardy to the winter-run and spring-run Chinook. *Id.*; 4SC ¶86.

17 After a federal court invalidated the NMFS 2004 OCAP BiOp and its no-jeopardy finding,  
 18 *Gutierrez*, 606 F. Supp. 2d at 1194, NMFS issued a new biological opinion on June 4, 2009  
 19 (“NMFS OCAP BiOp”). LoPresti Decl. Ex. A. This new biological opinion, in contrast to the  
 20 previous one, determined that the OCAP *would* cause jeopardy to winter-run and spring-run  
 21 Chinook, and adversely modify their critical habitat. *Id.* The NMFS OCAP BiOp, however,  
 22 expressly states that it does not analyze the impacts of Reclamation’s water contracts and directs  
 23 Reclamation to separately consult on those contracts. *Id.* at 35. The NMFS OCAP BiOp was  
 24 subsequently amended in 2011, and again in 2014 and 2015.<sup>5</sup>

25 <sup>5</sup> The NMFS OCAP BiOp was amended in 2011 to reflect the report of an independent review  
 26 panel, LoPresti Decl. Ex. B (Letter from R. McInnis, Reclamation, to D. Glaser, Reclamation  
 27 (Apr. 7, 2011)), and in 2014 and 2015 in response to Reclamation’s Drought Operations Plan and  
 28 Temporary Urgency Change Petitions that waived or modified requirements in the NMFS OCAP  
 BiOp and water quality standards in the Bay-Delta. *Id.* Ex. C (Letter from W. Stelle, NMFS, to  
 D. Murrillo, Reclamation (undated, but posted on Apr. 8, 2014), Ex. D (Letter from W. Stelle,  
 NMFS, to D. Murrillo, Reclamation and M. Cowin, DWR (Mar. 27, 2015)), Ex. E (Letter from W.  
 Stelle, NMFS, to D. Murrillo, Reclamation and M. Cowin, DWR (Jan. 31, 2014)).



1 Even though Reclamation’s consultation on the renewal of the SRS contracts relied  
2 exclusively on the NMFS 2004 OCAP BiOp, Reclamation did not reinitiate consultation after the  
3 NMFS 2004 OCAP BiOp was invalidated, nor after the NMFS OCAP BiOp was issued, nor after  
4 the NMFS OCAP BiOp was subsequently amended. 4SC ¶¶91. Plaintiffs’ proposed 4SC thus  
5 claims that the NMFS OCAP BiOp and amendments constituted “new information” triggering  
6 Reclamation’s mandatory duty to reinitiate consultation under 50 C.F.R. §402.16(b). 4SC ¶¶118,  
7 145-48, 150.

8 **2. Massive mortality of listed Chinook in 2014 and 2015 triggered**  
9 **Reclamation’s duty to reinitiate consultation on the renewed SRS**  
10 **contracts**

11 The proposed 4SC also alleges that Reclamation violated 50 C.F.R. §402.16 by failing to  
12 reinitiate consultation when Reclamation authorized diversions to the SRS Contractors that  
13 resulted in massive mortality to the 2014 and 2015 brood years of winter-run and spring-run  
14 Chinook. 4SC ¶¶119, 145-47, 149-50.

15 Winter-run Chinook inhabit the upper Sacramento River and its tributaries, where the  
16 flow of cold water throughout the summer allows for successful spawning, egg incubation, and  
17 rearing. LoPresti Decl. Ex. A at 79. Historically, winter-run Chinook relied on the McCloud, Pit,  
18 and Little Sacramento rivers, as well as Hat and Battle creeks, for habitat conducive to spawning,  
19 egg incubation, fry development, and juvenile rearing. *Id.* at 79-80. The construction of Shasta  
20 Dam blocked access to almost all of these waters. *Id.* Today, the upper Sacramento River below  
21 Keswick Dam is the sole remaining spawning and rearing area used by winter-run Chinook. *Id.*  
22 The survival of the winter-run Chinook is therefore completely dependent on Reclamation’s  
23 management of the temperature and flow conditions below Keswick dam.

24 Winter-run Chinook are particularly vulnerable during the “temperature management  
25 season,” which generally lasts from June through October. *Id.* at 79-81, 601. Adult winter-run  
26 Chinook migrate up the Sacramento River in the winter and spring and then hold below the  
27 Keswick Dam for several months before spawning. *Id.* During these critical months, the winter-  
28 run require cold water (between 41 and 56 degrees Fahrenheit) for spawning and development of  
fertilized eggs. *Id.* at 76-79. Warmer temperatures decrease egg viability and also contribute to

1 higher mortality at later life stages. *Id.* at 77-81; *id.* Ex. F at 4 (Evaluation of Alternatives for  
2 Sacramento River Water Temperature Compliance for Winter-Run Chinook Salmon (undated));  
3 4SC ¶52. Accordingly, reasonable and prudent alternative (“RPA”) 1.2.4 in the NMFS OCAP  
4 BiOp requires that Reclamation preserve enough cold water in Shasta Reservoir so that it can  
5 make timed releases throughout the hot summer and fall months of the temperature management  
6 season to maintain daily average water temperatures at or below 56 degrees at compliance  
7 locations between Balls Ferry and Bend Bridge from approximately May 15 through September  
8 30.<sup>6</sup> LoPresti Decl. Ex. A at 601-03.

9 In 2014, Reclamation made excessive releases for the purpose of meeting the terms of the  
10 SRS contracts, depleting the cold-water reserves in Shasta Reservoir. *Id.* Ex. O (daily Keswick  
11 release summaries for April-June 2014); 4SC ¶58. As a result, temperatures escalated to fatal  
12 levels for extended periods, resulting in near-total loss of the winter-run brood year and similar  
13 losses to spring-run Chinook. LoPresti Decl. Ex. J at 2 (Letter from M. Rea, NMFS, to R.  
14 Milligan, Reclamation (Feb. 27, 2015)); *id.* Ex. G at 11 (State Water Resources Control Board  
15 (“SWRCB”) Order approving temporary urgency change petition (“TUCP”) (Feb. 3, 2015)); *id.*  
16 Ex. R at 15-16 (SWRCB Order approving TUCP (July 3, 2015)); 4SC ¶58. Even though  
17 Reclamation lost temperature control by making excessive deliveries to the SRS Contractors, and  
18 caused massive mortality to listed salmonid species as a result, Reclamation did not reinstate  
19 consultation on the SRS contracts. *Id.* ¶119.

20 In February 2015, in reviewing Reclamation’s water supply allocation and related  
21 operations for 2015, NMFS stated that, “[i]n light of the high mortality (95%) associated with  
22 water temperatures observed in 2014 for juvenile winter-run Chinook salmon that spawned in  
23 upper Sacramento River, . . . [it is] important to conserve storage in Shasta Reservoir, and  
24 specifically the cold water pool, in order to provide for the needs of winter-run [Chinook] eggs  
25 and alevin throughout the temperature management season.” LoPresti Decl. Ex. J at 2. In spite of  
26 NMFS’s clear warning, Reclamation again made excessive releases from Shasta Reservoir in  
27

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28 <sup>6</sup> Although spring-run migration patterns are different than for winter-run, both species rely on cold-water for spawning, egg incubation, and rearing. LoPresti Decl. Ex. A at 77.



1 2015 to satisfy the terms of the SRS contracts. *Id.* Ex. P (daily Keswick release summaries for  
2 April-June 2015); *id.* Ex. I at 4, 9; 4SC ¶60. In fact, Reclamation *increased* Keswick releases  
3 from a total 604,083 acre feet in April and May of 2014, to a total 677,730 acre feet in April and  
4 May of 2015. *Compare* LoPresti Decl. Ex. O *with id.* Ex. P. After making these releases, and in  
5 spite of prior assurances to the contrary, Reclamation announced that it could not maintain water  
6 temperatures of 56 degrees at the Clear Creek compliance point during the temperature  
7 management season. *Id.* Ex. K at 2-3 (SWRCB Notice of Public Workshop (June 13, 2015)); Ex.  
8 Q at Slide 5-6 (SWRCB presentation at Public Workshop (June 24, 2015)). Indeed, the daily  
9 average water temperature at the compliance point has been above 56 degrees almost every single  
10 day of the temperature management season. *Id.* Ex. L (Sacramento River temperature reports  
11 showing temperatures at Clear Creek above 56 degrees for 29 days in June, 30 days in July, 28  
12 days in August, and 28 days in September). Reclamation’s releases again depleted the cold water  
13 pool and severely compromised the spawning and rearing habitat for the annual brood of winter-  
14 run Chinook in 2015. *Id.* Ex. I at 4, 9; 4SC ¶¶60-62.

15 In June 2015, NMFS’s analysis indicated that Reclamation’s April and May deliveries to  
16 the SRS contractors would cause a second consecutive year of disastrous impacts to winter-run  
17 Chinook. LoPresti Decl. Ex. I. NMFS explained that “the quantity and quality of the cold water  
18 pool[] will not provide for suitable winter-run [Chinook] habitat needs throughout their egg and  
19 alevin incubation and fry rearing periods” and that these harmful conditions “*could have been*  
20 *largely prevented through upgrades in monitoring and modeling, and reduced Keswick releases*  
21 *in April and May.*” *Id.* at 9 (emphasis added). As of October 22, 2015, preliminary data on  
22 winter run passage at Red Bluff Diversion Dam—an early indicator of brood year survival—was  
23 22% lower for the 2015 winter-run brood year than for the 2014 winter-run brood year. *Id.* Ex. M  
24 (FWS Bi-Weekly Report (Oct. 22, 2015)). In spite of the data and analysis showing that  
25 Reclamation’s operations to benefit the SRS Contractors are causing even worse levels of  
26 catastrophic mortality to winter-run Chinook this year than in 2014, Reclamation still has not  
27 reinitiated consultation on the SRS contracts. 4SC ¶119.

28 Plaintiffs’ proposed 4SC alleges that Reclamation violated 50 C.F.R. §402.16 by

1 repeatedly failing to reinitiate consultation in light of the excessive levels of take of winter-run  
2 Chinook associated with Reclamation's implementation of the SRS contracts in 2014 and 2015.  
3 *Id.* ¶¶119, 145-50.

4 **B. Plaintiffs' Section 9 Claim Against Reclamation and the SRS Contractors for**  
5 **Unauthorized Take of Winter-Run and Spring-Run Chinook**

6 Plaintiffs also allege in the proposed 4SC that, because neither Reclamation nor the SRS  
7 Contractors have authorization to take winter-run and spring-run Chinook to satisfy the terms of  
8 the SRS contracts, Reclamation's excessive releases to the SRS Contractors, and the SRS  
9 Contractors' diversions, violated ESA section 9. *Id.* ¶¶122-31, 151-55; 16 U.S.C. §1538(a)(1)(B).

10 Section 9 of the ESA prohibits the "take" of any endangered or threatened species of fish  
11 or wildlife. 16 U.S.C. §1538(a)(1)(B). The statute prohibits any person from directly taking any  
12 protected species and makes it unlawful to "cause to be committed" any take. *Id.* §1538(g).  
13 Congress defined take broadly to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap,  
14 capture, or collect, or to attempt to engage in any such conduct." *Id.* §1532(19). The ESA's  
15 implementing regulations further define "harass" to mean "an intentional or negligent act or  
16 omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to  
17 significantly disrupt normal behavior patterns which include, but are not limited to, breeding,  
18 feeding, or sheltering," and "harm" to include "significant habitat modification or degradation  
19 where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,  
20 including breeding, feeding, or sheltering." 50 C.F.R. §17.3. The Supreme Court has explained  
21 that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions."  
22 *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995). For  
23 instance, "harming a species may be indirect, in that the harm may be caused by habitat  
24 modification." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 924-25 (9th Cir. 1999).

25 Pursuant to Section 7(b)(4) of the ESA, a consulting agency may issue an "incidental take  
26 statement" if the agency concludes both that the federal action in question will not jeopardize a  
27 listed species, or can be carried out pursuant to an RPA without jeopardizing a species, and that  
28 the taking of the species is incidental to the action and will not cause jeopardy. 16 U.S.C.

1 §1536(b)(4)(A)-(B). “If the terms and conditions of the Incidental Take Statement are  
 2 disregarded and a taking does occur, the action agency or the applicant may be subject to  
 3 potentially severe civil and criminal penalties under Section 9.” *Ariz. Cattle Growers’ Ass’n v.*  
 4 *U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001).

5 The proposed 4SC alleges that Reclamation’s deliveries, and the SRS Contractors’  
 6 diversions, depleted the cold water in Shasta Reservoir that was critical to the spawning, egg  
 7 incubation, and rearing of the winter-run and spring-run broods in 2014 and 2015. 4SC ¶¶58-62.  
 8 The resultant loss in temperature control and massive mortality constitutes “take” within the  
 9 meaning of Section 9 of the ESA. 16 U.S.C. §1532(19); 50 C.F.R. §17.3. These deliveries and  
 10 diversions caused “significant habitat modification or degradation where it actually kills or  
 11 injures wildlife by significantly impairing essential behavioral patterns, including breeding,  
 12 feeding, or sheltering.” 50 C.F.R. §17.3; 4SC ¶¶58-62, 127.

13 Neither the NMFS OCAP BiOp, nor NMFS’s 2005 concurrence letter on the SRS  
 14 contracts, nor any other consultation, provides authorization to take listed Chinook for the  
 15 purpose of making deliveries to the SRS Contractors. 4SC ¶128-31. The NMFS OCAP BiOp’s  
 16 incidental take statement does not provide authority for incidental take caused by water deliveries  
 17 to the SRS Contractors, which the biological opinion characterizes as “nondiscretionary.”  
 18 LoPresti Decl. Ex. A at 35, 673, 729 (“any incidental take due to delivery of water to . . . a  
 19 contractor” that Reclamation identifies as “nondiscretionary” is not exempted from the BiOp’s  
 20 Section 9 take prohibition).<sup>7</sup> Similarly, NMFS’s 2005 concurrence letter on the SRS contracts,  
 21

22 <sup>7</sup> Even were Reclamation now to contend that quantities of deliveries to the SRS Contractors were  
 23 considered at the time of the NMFS OCAP BiOp to be “discretionary,” Reclamation and the SRS  
 24 Contractors have failed to comply with the protective measures required by NMFS to minimize or  
 25 avoid take. For example, in 2014, Reclamation reinitiated consultation with NMFS on the 2009  
 26 BiOp to assess the impacts of the joint Drought Operations Plan it submitted with DWR for the  
 27 operation of the CVP and SWP between April 1, 2014 and November 15, 2014. LoPresti Decl.  
 28 Ex. C (letter from W. Stelle, NMFS, to D. Murillo, Reclamation (undated, posted on Apr. 8,  
 2011). NMFS’s approval of the Drought Operations Plan was contingent on conserving storage  
 of cold water in Shasta Reservoir so that Reclamation could control temperatures throughout the  
 season. Specifically, NMFS required that Reclamation “limit[] releases from Keswick Dam to no  
 greater than 3,250 cfs . . . unless necessary to meet nondiscretionary obligations or legal  
 requirements.” *Id.* at 4. Reclamation, however, made releases from Keswick Dam between April  
 and early June 2014 far in excess of 3,250 cubic feet per second (“cfs”) that depleted the cold  
 water pool behind Shasta Dam and led to the loss of temperature control. *Id.* Ex. O.

1 which relied exclusively on the now-superseded NMFS 2004 OCAP BiOp, did not provide  
2 authorization for take. Poole Decl. Ex. 7 (“No additional take is authorized for these contract  
3 specific actions beyond the amount or extent of incidental take authorized in the October 22, 2004  
4 BiOp.”). Because NMFS has not provided authorization in the NMFS OCAP BiOp or elsewhere  
5 for the take of winter-run and spring-run Chinook caused by Reclamation’s water deliveries to the  
6 SRS Contractors, Plaintiffs’ proposed 4SC alleges that Reclamation and the SRS Contractors  
7 have violated, and are violating, Section 9 of the ESA by implementing terms of the SRS  
8 contracts that are causing massive mortality to the species and destroying their critical habitat.<sup>8</sup>  
9 4SC ¶¶122-31, 151-55.

## 11 ARGUMENT

12 Federal Rule of Civil Procedure (“Rule”) 15(d) provides that, “On motion and reasonable  
13 notice, the court may, on just terms permit a party to serve a supplemental pleading setting out  
14 any transaction, occurrence, or event that happened after the date of the pleading to be  
15 supplemented.” Plaintiffs seek to supplement their complaint to add claims based on events that  
16 occurred after the filing of their Third Supplemental Complaint.

### 17 I. Legal Standard

18 The purpose of allowing supplementation “is to promote as complete an adjudication of  
19 the dispute between the parties as possible by allowing the addition of claims which arise after the  
20 initial pleadings are filed.” *William Inglis & Sons Baking Co.*, 668 F.2d at 1057. Rule 15(d)  
21 implements “one of the basic policies of the [Federal Rules of Civil Procedure] . . . that a party  
22 should be given every opportunity to join in one lawsuit all grievances against another party  
23 regardless of when they arose.” *Wright & Miller*, 6A Fed. Prac. & Proc. §1506 (3d ed.). “The  
24 courts have generally granted motions to supplement under [Rule] 15(d) where a matter is still  
25

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26 <sup>8</sup> On August 10, 2015, pursuant to the notice requirements of Section 11(g) of the ESA, 16 U.S.C.  
27 §1540(g), Plaintiffs NRDC, Baykeeper, and TBI, and proposed Plaintiffs Winnemem and  
28 PCFFA, sent a sixty-day notice of intent to sue Reclamation and the SRS Contractors that are  
parties to this case for the above-described violations. 4SC Ex. 6.

1 pending, and final judgment has not yet been entered.” *W. Watersheds Project v. U.S. Forest*  
2 *Serv.*, CV-05-189, 2009 WL 3151121, at \*2 (D. Idaho 2009) (collecting cases).

3         Supplementation is “generally favored because it promotes judicial economy and  
4 convenience.” *Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 214 (N.D.  
5 Cal. 2015). Thus, courts consider whether supplementation would allow for disposition of the  
6 “entire controversy between the parties . . . in one action.” *Planned Parenthood of S. Ariz. v.*  
7 *Neely*, 130 F.3d 400, 402 (9th Cir. 1997). “[T]he matters stated in a supplemental complaint  
8 should have some relation to the claim set forth in the original pleading,” but they do not need to  
9 “arise out of the same transaction or occurrence nor involve common questions of law or fact.”  
10 *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988) (internal quotations omitted). When a  
11 supplemental complaint “raises similar legal issues to those already before the court,” leave to  
12 supplement is generally warranted to “avert[] a separate, redundant lawsuit.” *Fund For Animals*  
13 *v. Hall*, 246 F.R.D. 53, 55 (D.D.C. 2007). Relatedly, when a court has developed familiarity with  
14 the statutes, regulations, legal theories, scientific considerations, and facts of a case,  
15 supplementation to add like claims is favored as a means to judicial economy. *Ohio Valley Envtl.*  
16 *Coal. v. U.S. Army Corps of Eng’s*, 243 F.R.D. 253, 257 (S.D. W.Va. 2007); *San Luis & Delta-*  
17 *Mendota Water Auth. v. U.S. Dep’t of Interior*, 236 F.R.D. 491, 499 (E.D. Cal. 2006)  
18 (“SLDMWA”).

19         In addition to considerations of judicial economy, courts apply the same legal standard for  
20 granting or denying a motion to supplement under Rule 15(d) as they do for amending under Rule  
21 15(a)(2). *Lyon*, 308 F.R.D. at 214. Rule 15(a)(2) provides that a “court should freely give leave  
22 when justice so requires.” This policy is to be applied with “extreme liberality,” *Owens v. Kaiser*  
23 *Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001), and the “liberality . . . is not  
24 dependent on whether the amendment will add causes of action or parties,” *DCD Programs, Ltd.*  
25 *v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

26         Given this generous rule, “there exists a *presumption* under Rule 15(a) in favor of granting  
27 leave to amend,” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)  
28 (emphasis in original), and all inferences should generally be drawn in favor of amendment,

1 *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999). The burden is on the  
2 opposing party to show that amendment is inappropriate. *DCD Programs*, 833 F.2d at 187.  
3 Courts will consider whether: (1) the plaintiff unjustly delayed in seeking leave to amend; (2) the  
4 plaintiff seeks leave to amend in bad faith; (3) whether leave to amend would cause undue  
5 prejudice; (4) whether amendment would be futile; and (5) whether there has been repeated  
6 failure of previous amendments.<sup>9</sup> *Lyon*, 308 F.R.D. at 214 (citing *Foman v. Davis*, 371 U.S. 178,  
7 182-83 S.Ct. 227 (1962)). Among these factors, prejudice to the opposing party carries the  
8 greatest weight. *Eminence Capital*, 316 F.3d at 1052.

9 **II. Leave to File the Proposed 4SC Should Be Granted Because It Will Promote Judicial**  
10 **Economy and None of the Factors Precluding Leave Are Present**

11 **A. Leave to File the Proposed 4SC Will Promote Judicial Economy**

12 Supplementation would promote judicial economy because it would facilitate a complete  
13 adjudication of the entire controversy regarding the SRS contract renewals. It would waste  
14 judicial resources to resolve claims regarding consultation on the effects of the SRS contract  
15 renewals on delta smelt without addressing the interconnected effects of these same contracts on  
16 listed salmonid species. Further, Reclamation's failure to reinitiate consultation with NMFS on  
17 the SRS contracts is closely tied to Defendants' illegal take of salmonid species over the last two  
18 years.

19 Plaintiffs' proposed claim against Reclamation for failure to reinitiate consultation on the  
20 impacts of the SRS contract renewals on listed salmonid species would promote judicial economy  
21 because the claim "raise[s] legal issues that are similar to those already before the court" and  
22 would therefore "avert[] a separate, redundant lawsuit." *Fund For Animals*, 246 F.R.D. at 55.  
23 Further, Plaintiffs' proposed claim involves issues that are "closely and directly related to the  
24 issues decided in earlier stages of this litigation." *SLDMWA*, 236 F.R.D. at 498.

25 In its June 15, 2015 order, the Court stayed this litigation to provide Reclamation an  
26 opportunity to reinitiate consultation with FWS on the SRS and other contract renewals. Doc.

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27 <sup>9</sup> Because the events giving rise to the proposed 4SC arose after the filing of the Third  
28 Supplemental Complaint, the fifth factor addressing "repeated failure of previous amendments" is  
not at issue.



1 979 at 20-21. Reclamation argued, and the Court agreed, that the invalidation of FWS's no-  
2 jeopardy 2005 OCAP BiOp, upon which the concurrence letters for the contract renewals  
3 exclusively relied, and the subsequent release of FWS's 2008 OCAP BiOp, which found  
4 jeopardy, warranted reinitiation of consultation on the renewal contracts under 50 C.F.R. §402.16.  
5 *Id.* at 12, 16; Doc. 955 at 7, 12-13 (Fed. Defs.' Mem. of P. & A. in Supp. of Mot. to Stay ("Fed.  
6 Defs.' MTS Br.)); Doc. 970 at 14 (Fed. Defs.' Reply Br. in Supp. of Mot. to Stay). Plaintiffs  
7 continue to believe that the Court should assess whether a valid consultation was completed *prior*  
8 to the execution of the contracts, rather than allowing the agencies to engage in post hoc  
9 compliance with Section 7 by reinitiating consultation. *See Jewell*, 749 F.3d at 785. Nonetheless,  
10 just as the Court found that reinitiation of consultation with FWS was warranted with respect to  
11 the contracts' impacts on delta smelt, reinitiation of consultation with NMFS is also necessary.  
12 Analogous to the FWS history of consultation, here, the invalidation of NMFS's no-jeopardy  
13 2004 OCAP BiOp, upon which the concurrence letters for the SRS contract renewals exclusively  
14 relied, and the subsequent release of the NMFS OCAP BiOp in 2009, which found jeopardy,  
15 requires reinitiation of consultation with NMFS on the SRS contract renewals under 50 C.F.R.  
16 §402.16. Given that the analysis is virtually identical, it would promote judicial economy to  
17 address Plaintiffs' new reinitiation claim as part of the existing lawsuit, rather than requiring  
18 separate litigation. *See Fund For Animals*, 246 F.R.D. at 55; *Ohio Valley*, 243 F.R.D. at 257.

19 Reinitiation with both FWS and NMFS would also provide a more comprehensive  
20 consultation that would address the sometimes-competing needs of delta smelt and listed  
21 salmonid species in administration of these contracts. For instance, flow requirements necessary  
22 to maintain Delta conditions suitable for the delta smelt have been repeatedly waived during the  
23 drought for the ostensible purpose of allowing Reclamation to increase upstream storage in Shasta  
24 Reservoir to protect spawning and rearing habitat for listed salmonids. Doc. 967 (Rosenfield  
25 Decl.) ¶9; LoPresti Decl. Ex. G (SWRCB Order Approving TUCP (Feb. 3, 2015)). The NMFS  
26 OCAP BiOp similarly recognizes that "meeting the biological needs of winter-run and the needs  
27 of resident species in the Delta, delivery of water to nondiscretionary Sacramento Settlement  
28

1 Contractors, and Delta outflow requirements per D-1641, may be in conflict,”<sup>10</sup> particularly  
2 during extended periods of dry hydrology. LoPresti Decl. Ex. A at 600. The ESA Consultation  
3 Handbook states that when there is overlap in the subject matter of FWS and NMFS  
4 consultations, coordination “is critical to ensure any reasonable and prudent alternatives  
5 prescribed by both the Services . . . are compatible.” ESA Consultation Handbook at 2-14 (Mar.  
6 1998).<sup>11</sup> Indeed, after the 2008 FWS BiOp and the 2009 NMFS BiOp were issued, the  
7 Secretaries of Commerce and Interior announced the importance of taking a coordinated,  
8 interagency approach to consultation on Bay-Delta issues in the future. LoPresti Decl. Ex. N  
9 (Letter from K. Salazar, Sec’y of the Interior, and G. Locke, Sec’y of Commerce, to N. Sutley,  
10 Council on Env’tl. Quality (May 3, 2010)). There is every reason to take that approach here.  
11 Because the needs of delta smelt and listed salmonids interact, any action taken in response to one  
12 consulting agency’s reinitiated consultation will likely trigger reinitiation with the other agency.  
13 It is therefore most efficient to conduct these consultations in tandem.

14 Additionally, the viability of a federal action, such as the SRS contract renewals, depends  
15 on Reclamation’s compliance with ESA section 7 for *both* salmonids and delta smelt. 16 U.S.C.  
16 §1536(a)(2). Even if the reinitiated consultation scheduled to occur with FWS on delta smelt  
17 passes legal muster, the SRS contract renewals are not ESA-compliant unless and until there has  
18 been adequate consultation with NMFS on the impacts to salmonid species as well. Thus, it  
19 serves judicial economy to resolve the “entire controversy” over the renewals in one case that  
20 addresses both salmonids and smelt, rather than prolonging final resolution by requiring litigation  
21 of a second action. *Neely*, 130 F.3d at 402; *see also* *Wright & Miller*, 6A Fed. Prac. & Proc.  
22 §1506 (“[T]he usual effect of denying leave to file a supplemental pleading because it states a  
23 new ‘cause of action’ is to force plaintiff to institute another action and move for consolidation  
24 under Rule 42(a) in order to litigate both claims in the same suit, a wasteful and inefficient  
25 result.”).

26 \_\_\_\_\_  
27 <sup>10</sup> SWRCB’s Water Rights Decision 1641 (“D-1641”) contains requirements that Reclamation  
operate the CVP to meet applicable water quality standards. SWRCB Water Rights Order 2000-  
02.

28 <sup>11</sup> The ESA Consultation Handbook is available online at the web address:  
<[https://www.fws.gov/ENDANGERED/esa-library/pdf/esa\\_section7\\_handbook.pdf](https://www.fws.gov/ENDANGERED/esa-library/pdf/esa_section7_handbook.pdf)>.



1           Supplementation is also beneficial because resolution of Plaintiffs’ proposed reinitiation-  
2 of-consultation claim involves issues that are “closely and directly related to the issues decided in  
3 earlier stages of this litigation.” *SLDMWA*, 236 F.R.D. at 498. As explained *supra*, Background  
4 section I, the Ninth Circuit’s en banc panel reversed the district court’s ruling that Reclamation  
5 lacks discretion to make species-protective changes to the contracts’ terms. *Jewell*, 749 F.3d at  
6 785. Although the panel did not fully delineate the scope of Reclamation’s discretion, it gave  
7 specific examples of SRS contract provisions that Reclamation had discretion to change,  
8 including “their pricing scheme or the timing of water distribution.” *Id.* The BA that  
9 Reclamation submitted to FWS contains numerous assertions regarding discretion that directly  
10 contravene the en banc panel’s ruling. Poole Decl. Ex. 2B at 10-11.

11           The Court’s enforcement of the en banc panel’s ruling regarding Reclamation’s discretion  
12 will likely be key to the final resolution of Plaintiffs’ existing and proposed claims.  
13 Reclamation’s misrepresentation of its discretion may taint FWS’s consultation on the contract  
14 renewals by impermissibly limiting FWS’s analysis, conclusions, and any RPA it might put in  
15 place. If Reclamation is required to reinitiate consultation with NMFS on the renewed SRS  
16 contracts, the same or similar issues will be presented. The Court’s application and enforcement  
17 of the en banc panel’s order with respect to the current reinitiated consultation with FWS will  
18 likely also apply to the scope of any reinitiated consultation with NMFS. It is most efficient to  
19 address this issue one time in this litigation, rather than require additional duplicative litigation.

20           The addition of Plaintiffs’ Section 9 claim would serve judicial economy because it is  
21 related to Plaintiffs’ existing and proposed Section 7 claims and would “promote as complete an  
22 adjudication of the dispute between the parties as possible.” *William Inglis*, 668 F.2d at 1057.  
23 Reclamation’s loss of temperature control occurred in 2014 and 2015, largely if not entirely,  
24 because Reclamation made excessive releases to satisfy the terms of the SRS contract renewals  
25 that are the subject of Plaintiffs’ existing claims. Even though the NMFS OCAP BiOp makes  
26 explicit that it “does not address ESA section 7(a)(2) compliance for individual water supply  
27 contracts,” and that “Reclamation . . . should consult with NMFS separately on their issuance of  
28 individual water supply contracts,” LoPresti Decl. Ex. A at 35, Reclamation never reinitiated

1 consultation with NMFS. If Reclamation had reinitiated consultation on the SRS contract  
2 renewals prior to 2014, or after the near-total loss of the 2014 brood year, NMFS could have  
3 taken steps to prevent the devastating impacts that have occurred and are occurring.

4 In sum, Plaintiffs' proposed Section 7 and Section 9 claims "raise[] similar legal issues to  
5 those already before the court," and granting Plaintiffs' motion would avert the need for a  
6 "separate, redundant lawsuit." *Fund For Animals*, 246 F.R.D. at 55. Supplementation would  
7 "promote judicial economy and convenience," *Lyon*, 308 F.R.D. at 214, by allowing for a  
8 comprehensive resolution of the "entire controversy" over the SRS contracts, *Neely*, 130 F.3d at  
9 402.

10 **B. Leave Should Be Granted Because None of the Factors That Would Weigh**  
11 **Against Supplementation Is Present**

12 **1. There is no unjust delay or bad faith**

13 Plaintiffs have not unjustly delayed seeking to supplement their complaint and have not  
14 acted in bad faith. This Court's June 15, 2015 stay order, and Reclamation's recent actions, have  
15 created a need for claims addressing listed salmonid species.

16 Plaintiffs have not previously alleged that Reclamation failed to reinitiate consultation on  
17 the SRS contracts because Plaintiffs' position has been (and continues to be) that Reclamation  
18 improperly consulted on the original execution of the contract renewals. *See, e.g.*, Doc. 965 (Pls.'  
19 Opp. to Mtn. to Stay Proceedings) at 20-22. Plaintiffs have long argued that the contract renewals  
20 should be set aside and renegotiated to include appropriate species-protective terms. *Id.* at 36.  
21 Before any such renegotiated contract could go into effect, Reclamation would be required to  
22 consult with both FWS on impacts to delta smelt and with NMFS on impacts to listed salmonids.  
23 16 U.S.C. §1536(a)(2).

24 Rather than address the validity of Reclamation's consultation on the original contract  
25 renewals, the Court has allowed Reclamation to reinitiate consultation while leaving the existing  
26 contract renewals in place. Doc. 979. Although Plaintiffs do not agree that Reclamation should  
27 be permitted to engage in post-hoc compliance with the ESA, they contend that any reinitiated  
28 consultation on the contract renewals must involve both FWS and NMFS to assess the

1 interrelated impacts on delta smelt and listed salmonids. Indeed, the SRS Contractors also  
2 envisioned, in the wake of the Ninth Circuit’s en banc opinion, that Reclamation would reinitiate  
3 consultation with both FWS and NMFS, asserting as much to the Supreme Court. *See Glenn-*  
4 *Colusa Irrigation Dist. v. NRDC*, Reply Br. 5, Case No. 14-48 (Oct. 29, 2014) (“Remand in this  
5 instance entails a full Section 7(a)(2) consultation with the two federal resource agencies: the  
6 United States Fish and Wildlife Service (FWS) for delta smelt, and the National Marine Fisheries  
7 Service (NMFS) for salmonid species.”). In light of Reclamation’s refusal to reinitiate  
8 consultation with NMFS, Plaintiffs now seek to file the proposed 4SC to ensure that the  
9 reinitiated consultation properly assesses impacts to listed salmonids. 4SC ¶¶145-48, 150.

10 In addition to recent developments in this litigation, Plaintiffs seek leave to file the 4SC  
11 now because of Reclamation’s recent and repeated failures to maintain temperature control in the  
12 Sacramento River in order to satisfy the SRS contracts. As described *supra*, Background section  
13 II.A.2, after Reclamation’s excessive deliveries and loss of temperature control caused massive  
14 mortality to winter-run and spring-run Chinook in 2014, Reclamation represented that it would  
15 avoid a similar result in 2015. It has utterly failed to do so. The loss of a third consecutive  
16 generation in 2016 would be devastating to the survival and recovery of winter-run and spring-  
17 run Chinook, which generally live only three years. Plaintiffs seek to avoid a catastrophic third  
18 year of mortality by challenging both Reclamation’s and the SRS Contractors’ illegal take in  
19 violation of Section 9 and Reclamation’s failure to reinitiate consultation with NMFS on the SRS  
20 contracts. 4SC ¶¶145-47, 149-50.

21 Prior to the recent developments in this litigation and in Reclamation’s management of the  
22 CVP, there was simply no need to expand this litigation beyond the delta smelt. Plaintiffs have  
23 not unjustly delayed in seeking to supplement their complaint; rather, Plaintiffs are responding in  
24 real time to the changing circumstances of the litigation and Reclamation’s decision-making.

## 25 2. Filing the 4SC would not cause undue prejudice to Defendants

26 Plaintiffs’ proposed supplemental complaint will not cause undue prejudice to Defendants.  
27 “While prejudice to the non-movant is a valid reason for denying leave to amend, such prejudice  
28 must in fact be ‘undue.’” *Dove v. Wash. Metro. Area Transit Auth.*, 221 F.R.D. 246, 248 (D.D.C.

1 2004); *see also Abels v. JBC Legal Grp., P.C.*, 229 F.R.D. 152, 157 (N.D. Cal. 2005) (“To deny  
2 leave to amend, the prejudice must be substantial.”). “Undue prejudice is not mere harm to the  
3 non-movant but a denial of the opportunity to present facts or evidence which would have been  
4 offered had the amendment been timely.” *Dove*, 221 F.R.D. at 248. The Court will not, by  
5 granting leave to file the 4SC, deny Defendants an opportunity to present evidence or facts that  
6 would have been available had the proposed new claims been filed earlier.

7 Courts have sometimes found undue prejudice when a motion to amend or supplement is  
8 filed in the advanced stages of litigation. *See, e.g., Jacobson v. Rose*, 592 F.2d 515 (9th Cir.  
9 1978). Although eight years have passed since the filing of the Third Supplemental Complaint,  
10 most of the litigation to date has centered on jurisdictional and procedural issues. When Plaintiffs  
11 moved for summary judgment in 2008, this Court’s predecessor ruled that Plaintiffs lacked  
12 standing (as to claims involving some long-term contracts) and that Reclamation did not have  
13 sufficient discretion to trigger its obligations under the ESA as to the SRS contracts. Doc. 761 &  
14 834. Those rulings were not corrected until the Ninth Circuit’s en banc opinion was filed in April  
15 2014, *Jewell*, 749 F.3d 776, and the mandate was issued in November 2014, *NRDC v. Salazar*,  
16 09-17661 (Nov. 5, 2014) (App. Doc. No. 242). After the parties unsuccessfully attempted to  
17 settle, *see* Doc. 944, Plaintiffs requested that the Court set a briefing schedule for motions for  
18 summary judgment, Doc. 947 at 4-7. The Court instead stayed the litigation to allow  
19 Reclamation to reinitiate consultation. Doc. 979.

20 In some cases, supplementation may cause undue prejudice if it “substantially changes the  
21 theory on which the case has been proceeding and is proposed late enough so that the opponent  
22 would be required to engage in significant new preparation.” *Wright & Miller*, 6 Fed. Prac. &  
23 Proc. Civ. §1487 (3d ed.). That is not the case here. Plaintiffs’ proposed Section 7 claim asks the  
24 Court to apply the same reasoning regarding reinitiation of consultation as the one the Federal  
25 Defendants argued, and the Court agreed to, when staying the litigation. Although the 4SC  
26 introduces a Section 9 claim to the litigation, it is closely related to the Section 7 claims. *See*  
27 *supra* at Background sections II.A.2-II.B. The facts that form the core of Defendants’ Section 7  
28 arguments are also key to the proposed Section 9 claim. Thus, no defendant will be burdened by

1 extensive new legal or factual research. Indeed, when the “facts concerning [supplemental  
2 claims] are within defendants’ knowledge,” as they are here, there is “little prejudice to  
3 defendants by the addition of th[e] claim.” *Concerned Area Residents for the Env’t v. Southview*  
4 *Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993); *see also LaSalvia v. United Dairymen of Ariz.*,  
5 804 F.2d 1113, 1119 (9th Cir. 1986) (reversing district court’s denial of Plaintiff’s motion to  
6 supplement complaint because “most of the information on the added claim would be available in  
7 [Defendant’s] own files.”).

8 There is no undue prejudice that would prevent the Court from granting Plaintiffs’ motion  
9 to file the 4SC.

10 **3. Plaintiffs are likely to succeed on the new claims asserted in the 4SC**  
11 **and filing the 4SC would not be futile**

12 Futility of amendment is among the factors a court considers in determining whether to  
13 allow supplementation of a complaint. *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880-81 (9th  
14 Cir. 1999). Nonetheless, “[c]ourts rarely deny a motion for leave to amend for reason of futility.”  
15 *Hynix Semiconductor Inc. v. Toshiba Corp.*, No. C-04-4708, 2006 WL 3093812, at \*2 (N.D. Cal.  
16 Oct. 31, 2006); *see also* William W. Schwarzer, et al., *Cal. Practice Guide: Fed. Civ. Proc.*  
17 *Before Trial* §8:1515 (2012) (noting that denials based on futility are “rare”). “[The] proper test  
18 to be applied when determining the legal sufficiency of a proposed amendment is identical to the  
19 one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6).”  
20 *Asarco LLC v. Shore Terminals LLC*, No. C 11-01384, 2012 WL 440519, at \* 2 (N.D. Cal. Feb.  
21 10, 2012) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)). “To survive  
22 a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, ‘to state  
23 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
24 (quoting *Bell Atl. v. Twombly*, 550 U.S. 544, 580 (2007)). “A claim has facial plausibility when  
25 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
26 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.

27 **a. Plaintiffs’ failure-to-reinitiate claim**

28 As outlined *supra*, Background section II.A.1-2, Plaintiffs are likely to succeed on their

1 proposed claim that Reclamation violated Section 7(a)(2) and the ESA’s implementing  
2 regulations, 50 C.F.R. §402.16, when it failed to reinitiate consultation with NMFS on the effects  
3 of the SRS contract renewals to winter-run and spring-run Chinook. 4SC ¶¶145-50. A federal  
4 agency must reinitiate consultation when it retains “Federal involvement or control over the  
5 action,” and one of several triggering events occurs including that “new information reveals  
6 effects of the action that may affect listed species or critical habitat in a manner or to an extent not  
7 previously considered,” or “the identified action is subsequently modified in a manner that causes  
8 an effect to the listed species or critical habitat that was not considered in the biological opinion.”  
9 50 C.F.R. §402.16(b)-(c).

10 There can be no dispute that Reclamation retains the requisite “discretionary federal  
11 involvement or control” over the contracts to trigger reinitiation. *Id.* §402.16. The *Jewell* en  
12 banc panel in this litigation unanimously ruled that Reclamation retains discretion to take species-  
13 protective measures with regards to the SRS contract renewals. *Jewell*, 749 F.3d at 784-85.  
14 Further, this Court has granted Reclamation’s motion to stay proceedings to allow it to reinitiate  
15 consultation pursuant to 50 C.F.R. §402.16 to evaluate the impacts of the SRS renewals on the  
16 delta smelt, something the Court could not have done if Reclamation did not have the requisite  
17 discretion under that regulation. Doc. 979. Finally, in spite of Reclamation’s assertions in the  
18 BA that it submitted to FWS that it does not have discretion to change the timing of its deliveries  
19 to the SRS Contractors, it has repeatedly done so. 4SC ¶120. In fact, as recently as October 26,  
20 2015, Reclamation authorized temporary changes to the timing of deliveries to the SRS  
21 Contractors from the terms prescribed in the SRS contracts. Poole Decl. Ex. 5 at 1; *see also*  
22 LoPresti Decl. Ex. C at 2-3.

23 Reclamation also has extensive “Federal involvement” in the contract renewals’  
24 implementation. 4SC ¶121. Under the terms of the SRS contracts, Reclamation is not a passive  
25 participant, simply operating around diversions made by the SRS Contractors. Instead, the  
26 contract terms create an obligation for Reclamation to deliver specified quantities of water to the  
27 Contractors’ various diversion facilities throughout the year. *See, e.g., SAR 2695-2737 (Contract*  
28 *Between the United States and Glenn-Colusa Irrigation Dist., No. 14-060200-855A-R-1 (Feb. 28,*

1 2005)). Further, the contracts themselves require that Reclamation implement them in  
2 compliance with the ESA. *Id.*

3 The proposed 4SC describes events that clearly triggered Reclamation's mandatory duty  
4 to reinitiate consultation with NMFS. 4SC ¶¶58-62, 85-91, 118-19. First, when NMFS issued its  
5 2009 BiOp and subsequent amendments, which found that the OCAP would jeopardize listed  
6 salmonid species, it superseded the no-jeopardy NMFS 2004 BiOp, which serves as the sole basis  
7 for NMFS's existing consultation on the SRS contracts. *Id.* ¶¶85-91, 118. The NMFS OCAP  
8 BiOp and amendments constitute "new information" requiring Reclamation to reinitiate  
9 consultation. 50 C.F.R. §402.16(b). Second, Reclamation's obligations are also triggered by the  
10 near-total mortality to two consecutive brood years of winter-run and spring-run Chinook caused  
11 by excessive deliveries to the SRS Contractors in 2014 and 2015, triggering mandatory  
12 reinitiation. 50 C.F.R. §402.16; 4SC ¶¶58-62, 119.

13 **b. Plaintiffs' Section 9 claim**

14 As outlined *supra*, Background section II.B, Plaintiffs are also likely to succeed on their  
15 proposed claim that Reclamation's deliveries, and the SRS Contractors' diversions, caused  
16 massive unauthorized take in 2014 and 2015 in violation of Section 9. 16 U.S.C. §1538(a)(1)(B),  
17 (g); 4SC ¶¶151-55. These deliveries and diversions depleted the cold water reserve in Shasta  
18 Reservoir that was critical to the spawning, egg incubation, and rearing of the winter-run and  
19 spring-run broods. 4SC ¶¶58-62. As a result, Reclamation failed in its duty to control  
20 temperatures in the critical habitat for these species, causing near-total loss of the 2014  
21 generation, and likely similar losses in 2015. *Id.* ¶¶58-62, 127.

22 Reclamation and the SRS Contractors caused take of winter-run and spring-run Chinook  
23 in violation of Section 9, 16 U.S.C. §1538(a)(1)(B), (g), by "kill[ing]," "harm[ing]," and  
24 "harass[ing]" the species, *Id.* §1532(19). 4SC ¶127. Not only did the deliveries and diversions  
25 directly kill the species, they were "intentional or negligent act[s] or omission[s] which create the  
26 likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal  
27 behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." 50  
28 C.F.R. §17.3; 4SC ¶127. Further, they caused "significant habitat modification or degradation



1 where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,  
2 including breeding, feeding, or sheltering.” *Id.* As explained *supra*, Background section II.B,  
3 neither Reclamation nor the SRS Contractors had authorization to take any winter-run or spring-  
4 run Chinook for the purpose of delivering or diverting water pursuant to the SRS contracts. *See*  
5 *also* 4SC ¶¶128-31.

## 6 CONCLUSION

7 For the foregoing reasons, Plaintiffs request that the Court grant leave to file the proposed  
8 Fourth Supplemental Complaint.

9  
10 Respectfully submitted,

11  
12 DATED: November 9, 2015

By: /s/ Barbara Jane Chisholm  
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**PROOF OF SERVICE**

CASE: *NRDC v. Jewell, et al.*

CASE NO: U.S. Dist. Ct., E.D. Cal., Case No. 1:05-cv-01207 LJO-EPG

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. I hereby certify that on November 9, 2015, I electronically filed the following with the Clerk of the Court for the United States District Court for the Eastern District by using the CM/ECF system:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS’  
MOTION FOR LEAVE TO FILE A FOURTH SUPPLEMENTAL COMPLAINT**

All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this November 9, 2015, at San Francisco, California.

/s/ Barbara Jane Chisholm  
Barbara Jane Chisholm