

1 KATHERINE POOLE (SBN 195010)
DOUGLAS ANDREW OBEGI (SBN 246127)
2 NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
3 San Francisco, CA 94104
Telephone: (415) 875-6100
4 Facsimile: (415) 875-6161
kpoole@nrdc.org; dobegi@nrdc.org

5 Attorneys for Plaintiff NRDC

6 HAMILTON CANDEE (SBN 111376)
7 BARBARA JANE CHISHOLM (SBN 224656)
TONY LOPRESTI (SBN 289269)
8 ALTSHULER BERZON LLP
177 Post St., Suite 300
9 San Francisco, CA 94108
Telephone: (415) 421-7151
10 Facsimile: (415) 362-8064
hcandee@altber.com; bchisholm@altber.com; tlopresti@altber.com

11 Attorneys for Plaintiff NRDC

12 TRENT W. ORR (SBN 77656)
13 EARTHJUSTICE
50 California St. Suite 500
14 San Francisco, CA 94111
Telephone: (415) 217-2000
15 Facsimile: (415) 217-2040
torr@earthjustice.org

16 Attorneys for Plaintiffs and proposed Plaintiffs

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, in her official capacity
24 as Secretary of the Interior, *et al.*,

25 Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION TO LIFT STAY**

Date: December 7, 2015
Time: 8:30 a.m.
Ctrm: 4
Judge: Lawrence J. O'Neill

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND..... 3

 A. The Ninth Circuit’s En Banc Decision and Remand 4

 B. This Court’s Stay of Proceedings..... 4

 C. Reclamation’s Flawed Biological Assessment and Request to Reinitiate Consultation with FWS 6

 D. Reclamation’s Decision Not to Reinitiate Consultation with NMFS Regarding the Long-Term Contracts 6

 E. Plaintiffs’ Motion for Leave to File a Fourth Supplemental Complaint..... 7

III. ARGUMENT 8

 A. Standard for Lifting Stay..... 8

 B. The Stay Should Be Lifted to Allow Plaintiffs to Have Their Motion to Supplement Resolved by the Court..... 8

 1. Current Circumstances Support Lifting the Stay 8

 2. Lifting the Stay Will Allow Plaintiffs to Pursue Claims on Which They Are Likely to Succeed..... 10

 3. The Balance of Hardships Weighs in Favor of Lifting the Stay 10

 4. Lifting the Stay Will Promote Efficient Litigation 11

IV. CONCLUSION 12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Akeena Solar Inc. v. Zep Solar Inc.,
No. C 09-05040 JSW, 2011 WL 2669453 (N.D. Cal. July 7, 2011)8

Alaska Survival v. Surface Transp. Bd.,
704 F.3d 615 (9th Cir. 2012).....8

Leiva-Perez v. Holder,
640 F.3d 962 (9th Cir. 2011).....8

Nken v. Holder,
556 U.S. 418 (2009).....8

NRDC v. Jewell,
749 F.3d 776 (9th Cir. 2014) (en banc).....1, 4, 6

NRDC v. Kempthorne,
2008 WL 5054115 (E.D. Cal. Nov. 19, 2008).....4

NRDC v. Kempthorne,
506 F. Supp. 2d 322 (E.D. Cal. 2007).....4

STATUTES

Section 7(a)(2) of the Endangered Species Act, 16 U.S.C. §1536(a)(2) *passim*

REGULATIONS

50 C.F.R. §402.165, 6

50 C.F.R. §402.16(b)7

1 **I. INTRODUCTION**

2 Plaintiffs request that the Court lift the current stay of proceedings for the limited purpose
3 of permitting them to file a Motion for Leave to File a Fourth Supplemental Complaint (“Motion
4 to Supplement”).¹ The stay now in place was issued by the Court on June 15, 2015, and was
5 intended to permit the U.S. Bureau of Reclamation (“Reclamation”) time to address the Ninth
6 Circuit Court of Appeal’s ruling that, pursuant to Section 7(a)(2) of the Endangered Species Act
7 (“ESA”), 16 U.S.C. §1536(a)(2), Reclamation was obligated to consult with the U.S. Fish and
8 Wildlife Service (“FWS”) regarding the impacts of renewing certain long-term water contracts,
9 including those with the Sacramento River Settlement (“SRS”) Contractors, on the delta smelt
10 and its habitat. *See* Doc. 979 (Order Granting Mot. to Stay and Denying as Moot Mots. to
11 Bifurcate) at 20-21²; *NRDC v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (en banc). Reclamation
12 asked the Court to stay litigation and proposed that during the stay it would reinitiate consultation
13 on the renewed long-term contracts. *See* Doc. 955 (Fed. Defs.’ Mem. in Support of Mot. for
14 Stay) at 12, 13-14. This Court granted Reclamation’s request for a stay on the grounds that
15 Reclamation should be given the first opportunity to address the en banc decision and to cure its
16 flawed consultation on the contract renewals, and on the grounds that allowing Reclamation to re-
17 initiate consultation might avoid the need for further litigation. Doc. 979 at 20-21.

18 The circumstances that may have supported a stay of proceedings in June 2015 do not
19 apply to Plaintiffs’ request to have the Court resolve their motion for leave to file a supplemental
20 complaint. Reclamation justified its request for the stay of this matter on the basis that it needed
21 time to update the administrative record relating to delta smelt and its habitat and to reinitiate
22 consultation regarding the long-term contracts’ effects on the delta smelt. Doc. 955 at 9-10. That
23 justification does not apply to Plaintiffs’ proposed additional claims, which concern

24 _____
25 ¹ The Motion to Supplement is filed concurrently with this motion. The proposed Fourth
26 Supplemental Complaint is attached to that motion as Exhibit 1. Current plaintiffs seeking to file
27 the additional proposed claims in the supplemental complaint are the Natural Resources Defense
28 Council, The Bay Institute, and San Francisco Baykeeper; the supplemental complaint would also
add as plaintiffs for the additional proposed claims the Winnemem Wintu Tribe (“Winnemem”) and Pacific Coast Federation of Fishermen’s Associations/Institute for Fisheries Resources (“PCFFA”). The proposed Fourth Supplemental Complaint does not join Winnemem and PCFFA in the existing claims pertaining to delta smelt.

² All pincites to docket entries use CM/ECF pagination, not the documents’ internal pagination.

1 Reclamation’s obligations with respect to the effects the renewed SRS contracts have on ESA-
2 listed Chinook salmon species and their habitat; effects which Reclamation, to date, has refused
3 to address through an updated review and reinitiation of consultation.

4 Plaintiffs seek to add two new claims: first, that Reclamation has violated Section 7(a)(2)
5 of the ESA and the ESA’s implementing regulations by failing to reinitiate consultation with the
6 National Marine Fisheries Service (“NMFS”) regarding the renewed SRS contracts’ impacts on
7 the endangered Sacramento River winter-run Chinook salmon (“winter-run Chinook”) and the
8 threatened Central Valley spring-run Chinook salmon (“spring-run Chinook”), despite
9 overwhelming new information in Reclamation’s possession regarding the adverse effects the
10 contracts have on the listed species; and second, that Reclamation and the defendant SRS
11 Contractors’ implementation of the renewed contracts has resulted and is resulting in unlawful
12 take of listed Chinook. Plaintiffs formally notified Reclamation of these violations in August
13 2015 and specifically requested that the ongoing reinitiated consultation with FWS regarding the
14 impacts of the renewed SRS contracts on delta smelt be coordinated with a reinitiated
15 consultation with NMFS regarding impacts on listed Chinook. Reclamation, however, has taken
16 no action in response. There is an urgent need to address the adverse impacts of the renewed SRS
17 contracts on the viability of the winter-run and spring-run Chinook, and the current stay should
18 not block the Court from hearing and resolving Plaintiffs’ request to add these claims.

19 Further, Reclamation’s conduct during the stay – in preparing a biological assessment
20 (“BA”) and reinitiating consultation with FWS regarding the SRS contract renewals’ impacts on
21 the delta smelt – belies its assurances to the Court that there would be a meaningful reconsultation
22 with FWS, and the accompanying intention that such a reconsultation might bring the current
23 litigation to a close. Instead, and despite the Ninth Circuit’s ruling to the contrary, Reclamation’s
24 BA expressly disclaims any discretion to alter terms of the renewed SRS contracts in a manner
25 that would benefit the delta smelt and its habitat. There is thus little chance the current stay will
26 have the desired result of ensuring that Reclamation has the time and opportunity to complete a
27 valid consultation with FWS regarding contract terms that may be harming the species and may
28 need to be modified to provide for the species’ survival and recovery.

1 The current circumstances thus do not warrant maintaining the stay so as to prohibit
2 Plaintiffs from moving to supplement their complaint. Further, Plaintiffs' likelihood of success
3 on their new claims and the balance of hardships weigh in favor of lifting the stay. As set forth in
4 the accompanying Motion to Supplement, Plaintiffs are likely to be successful on their claims that
5 Reclamation has violated Section 7(a)(2) of the ESA and the ESA's implementing regulations by
6 failing to reinitiate consultation with NFMS regarding the impacts of the renewed SRS contracts
7 on listed Chinook and has violated Section 9 by implementing those contracts in a way that has
8 resulted and is resulting in unlawful take of Chinook. Mem. in Support of Mot. to Supplement
9 ("Motion to Supplement") at 22-24. The balance of hardships also supports Plaintiffs' request:
10 Reclamation's failure to reinitiate consultation on the SRS contracts' impacts on listed Chinook
11 has placed those species in peril, as continued releases of water pursuant to the contracts' terms
12 threaten to wipe out entire generations of the species and possibly entire populations. *See id.* at 8-
13 13. Neither Reclamation nor the defendant SRS Contractors would be unduly prejudiced were
14 the Court to consider and grant Plaintiffs' motion to supplement the complaint. These defendants
15 will have the opportunity to respond to Plaintiffs' claims in this ongoing case, and adding the
16 claims to the current litigation ensures that the parties will not engage in the unnecessary and
17 duplicative work associated with filing a separate action. Further, lifting the stay to resolve
18 Plaintiffs' Motion to Supplement need not impact the ongoing reinitiated consultation regarding
19 the delta smelt, but Plaintiffs' filings do provide Defendants with notice and the opportunity to
20 address fatal deficiencies in that ongoing consultation before it is completed.

21 Plaintiffs seek leave to file their supplemental complaint so that the legal challenges
22 regarding the renewed SRS contracts can be adjudicated in a timely and efficient manner, and in
23 one case, not two separate matters. Plaintiffs therefore respectfully request that the Court lift the
24 present stay and resolve Plaintiffs' Motion to Supplement.

25 **II. FACTUAL AND PROCEDURAL BACKGROUND**

26 The factual and procedural background relevant to Plaintiffs' Motion to Supplement is set
27 forth in detail in that motion. The following is a shorter explanation of the circumstances giving
28 rise to Plaintiffs' request to lift the stay for the purposes of resolving the Motion to Supplement.

1 **A. The Ninth Circuit’s En Banc Decision and Remand**

2 This case involves Plaintiffs’ challenge to Reclamation’s decision to execute renewals of
 3 long-term water contracts, including the SRS contracts, without first engaging in a valid
 4 consultation pursuant to Section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), regarding the impacts
 5 of the contract renewals on the delta smelt and its habitat. Reclamation’s only consultation on the
 6 renewal of the SRS contracts was based exclusively on FWS’s Long-Term Central Valley Project
 7 Operations Criteria and Plan (“OCAP”) 2005 Biological Opinion regarding delta smelt, a
 8 biological opinion this Court invalidated in an earlier phase of this litigation. However, this Court
 9 in 2008 held that Reclamation had no obligation to engage in a Section 7 consultation regarding
 10 the renewed SRS contracts.³ *NRDC v. Kempthorne*, 506 F. Supp. 2d 322, 387-88 (E.D. Cal.
 11 2007); *NRDC v. Kempthorne*, 2008 WL 5054115, at **32, 40 (E.D. Cal. Nov. 19, 2008).

12 In 2014, a unanimous en banc decision by the Ninth Circuit Court of Appeal reversed and
 13 held that because Reclamation “retained some discretion to act in a manner that would benefit the
 14 delta smelt,” it “was therefore required to engage in Section 7(a)(2) consultation prior to renewing
 15 the Settlement Contracts.” *NRDC v. Jewell*, 749 F.3d 776, 785 (9th Cir. 2014) (en banc) (internal
 16 quotation marks omitted) (explaining that nothing in original SRS contracts obligated
 17 Reclamation to renew them but that, even if Reclamation were so obligated, it could still “benefit
 18 the delta smelt by renegotiating the Settlement contracts’ terms with regard to, *inter alia*, their
 19 pricing scheme or the timing of water distribution”). The en banc panel remanded the case to this
 20 Court for “further proceedings consistent with [its] opinion.” *Id.* at 785.

21 **B. This Court’s Stay of Proceedings**

22 Following the remand, Plaintiffs proposed to litigate any remaining merits issues and the
 23 question of remedy. *See* Doc. 947 (2/26/15 Joint Scheduling Report) at 5-6; Doc. 965 (Pls.’ Opp.
 24 to Defs.’ Mot. to Stay) at 18, 20-29. Plaintiffs advocated for a “set-aside” remedy to ensure that
 25 Reclamation would not engage in a sham consultation and that it would actually consider
 26 modification to the terms of the renewed, long-term contracts that would be more consistent with

27 _____
 28 ³ 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 Reclamation’s obligations under the ESA and protective of the delta smelt and its habitat. *Id.*
2 Such a remedy would also have precipitated a new consultation with NMFS on new proposed
3 replacement contracts. Reclamation, however, contended that the Court should defer to its
4 internal administrative processes, that it should be permitted the first opportunity to address the
5 Ninth Circuit’s ruling and the consultation requirement, and that it needed time to update the
6 administrative record and reinitiate consultation on the contracts. Doc. 955 at 12, 14-16. As one
7 of its arguments, Reclamation explained that reinitiation of consultation was warranted under 50
8 C.F.R. §402.16, because FWS’s 2008 OCAP Biological Opinion and its jeopardy finding
9 constituted new information regarding impacts that had not previously been considered. *Id.* at 7,
10 12-13; Doc. 970 at 14.

11 On June 15, 2015, this Court granted Reclamation’s requested stay, agreeing with
12 Reclamation that it should have an opportunity to reconsult on the renewed contracts and that
13 ensuring it had time and resources to do so might avoid the need for further litigation. Doc. 979
14 at 20-21. The Court cited Reclamation’s assurances that it would consult with FWS regarding
15 whether “Contract renewal will cause jeopardy or adverse modification” and that FWS would
16 “examine ‘whether any different terms are needed in the renewed contracts to avoid jeopardy to
17 the species.’” Doc. 979 at 12 (quoting Doc. 970 at 10).

18 The stay approved by the Court is limited to six months, and any request for an extension
19 of the stay must be raised in a formal motion. Doc. 979 at 21. Further, in permitting Reclamation
20 to pursue its preferred course of simply reinitiating consultation on the existing contracts – as
21 opposed to litigating the question of whether the contracts should be set aside so that Reclamation
22 would have a clean slate from which it could negotiate revised terms that were more protective of
23 the smelt – the Court explained that it was assuming Reclamation had authority to either require
24 renegotiation of existing contract terms or unilaterally to impose new terms. *Id.* at 12 n.4.⁴ For
25 this reason, “as a condition of imposing the stay,” the Court required Reclamation to
26 “substantiate” the assumption that it has “authority to impose new terms on already-executed

27 ⁴ If Reclamation does *not* have such authority, its proposal to “re-consult” on the renewed
28 contracts, while leaving those contracts in place, would not be an adequate substitute for the
consultation required by the Ninth Circuit.

1 contracts or require re-negotiation of those contracts.” *Id.* In other words, the Court appeared to
2 seek assurances that Reclamation’s reconsultation on the existing terms would not be a sham.

3
4 **C. Reclamation’s Flawed Biological Assessment and Request to Reinitiate
Consultation with FWS**

5 In a letter dated July 30, 2015, Reclamation requested that FWS reinitiate consultation on
6 Reclamation’s decision to renew more than 150 long-term water contracts, including the SRS
7 contracts. Decl. of Katherine S. Poole in Supp. of Mot. to Lift Stay and Mot. for Leave to File
8 4th Supp. Compl. (“Poole Decl.”) Ex. 2A. The request for reinitiation was accompanied by a BA
9 prepared by Reclamation. *Id.* Exs. 2B, 3. The BA includes a lengthy description of
10 Reclamation’s legal position regarding its discretion to modify terms of the original SRS
11 contracts in a manner that might benefit the delta smelt. *Id.* Ex. 2B at 10-11. In direct
12 contravention of the Ninth Circuit’s ruling, Reclamation effectively denies in the BA that it has
13 any discretion whatsoever to modify the contracts to benefit the delta smelt or its critical habitat.
14 *Compare id.* at 10-11 *with Jewell*, 749 F.3d at 785. For example, despite the Ninth Circuit’s
15 ruling that Reclamation has discretion to alter and negotiate favorable terms regarding the “timing
16 of water distribution” to the SRS Contractors, *Jewell*, 749 F.3d at 785, Reclamation claims in the
17 BA that it does not have discretion to negotiate timing of SRS diversions that would differ from
18 those set forth in the original SRS contracts. Poole Decl. Ex. 2B at 10. Similarly, despite the
19 Ninth Circuit’s ruling (following extensive briefing on the issue) that Reclamation has discretion
20 to change the “pricing scheme” in the contracts in a manner that could benefit the delta smelt,
21 *Jewell*, 749 F.3d at 785, Reclamation claims in the BA that it has no such discretion. Poole Decl.
22 Ex. 2B at 11. Plaintiffs notified FWS that the BA and its description of Reclamation’s discretion
23 to negotiate terms that would benefit the smelt and its habitat conflict with the Ninth Circuit’s
24 decision and undermine the legitimacy of the reconsultation. *Id.* Ex. 4.

25
26 **D. Reclamation’s Decision Not to Reinitiate Consultation with NMFS Regarding
the Long-Term Contracts**

27 Following the Court’s stay decision, it became clear to Plaintiffs that, while Reclamation
28 had requested reinitiation with FWS regarding the impacts of the SRS contracts on the delta

1 smelt, it did not intend to reinitiate consultation with NMFS on the contracts' impacts on winter-
2 run and spring-run Chinook. Poole Decl. ¶¶7-8. Yet, just as Reclamation contends that FWS's
3 2008 OCAP Biological Opinion regarding delta smelt constituted a basis for reinitiating
4 consultation on the SRS contracts, NMFS's 2009 OCAP Biological Opinion regarding listed
5 Chinook, as well as other new information, provides a parallel basis for reinitiating consultation
6 with NMFS on the same contracts. *See* 50 C.F.R. §402.16(b). Plaintiffs therefore sent a 60-day
7 notice to Reclamation on August 10, 2015, outlining Plaintiffs' intent to file suit against the
8 agency for its failure to reinitiate consultation with NMFS regarding the renewed SRS contracts'
9 impacts on winter-run and spring-run Chinook. Poole Decl. Ex. 6. That same letter gave notice
10 of Plaintiffs' intent to assert a related claim against Reclamation and the SRS Contractors that are
11 parties to the existing litigation for unauthorized take of winter-run and spring-run Chinook
12 caused by implementation of the renewed SRS contracts. *Id.*

13 **E. Plaintiffs' Motion for Leave to File a Fourth Supplemental Complaint**

14 Plaintiffs seek to lift the stay for the purposes of filing a motion for leave to file a Fourth
15 Supplemental Complaint. Plaintiffs' motion for leave to file details the bases for the
16 supplemental complaint. *See* Mot. to Supplement at 6-13 & Ex. 1 (proposed Fourth Supplemental
17 Complaint ("4SC")). The proposed supplemental complaint adds two claims that are closely
18 related to and intertwined with the factual and legal questions still at issue in this case and that are
19 therefore best litigated as part of this matter, not as a separate lawsuit. First, the proposed
20 supplemental complaint adds a claim against Reclamation for its failure to reinitiate consultation
21 with NMFS pursuant to Section 7(a)(2) of the ESA and the ESA's implementing regulations
22 regarding the impacts of the renewed SRS contracts on listed winter-run and spring-run Chinook.
23 *See* 4SC ¶¶145-50. Plaintiffs allege that Reclamation was obligated to reinitiate consultation on
24 the renewed SRS contracts given information indicating that listed Chinook and their critical
25 habitat may be affected in a manner and to an extent not previously considered by Reclamation.
26 *Id.* Second, the proposed supplemental complaint alleges that Reclamation violated Section 9 of
27 the ESA by implementing the renewed SRS contracts in a manner that has caused and is causing
28 unlawful take of listed Chinook. *Id.* ¶¶151-55.

1 **III. ARGUMENT**

2 **A. Standard for Lifting Stay**

3 ““The same court that imposes a stay of litigation has the inherent power and discretion to
4 lift the stay.”” *Akeena Solar Inc. v. Zep Solar Inc.*, No. C 09-05040 JSW, 2011 WL 2669453, at
5 *2 (N.D. Cal. July 7, 2011) (quoting *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64,
6 74 (D.D.C. 2002)). The same factors that are considered when granting a stay should be
7 considered upon a request to lift a stay. *Id.* They are:

8 (1) whether the stay applicant has made a strong showing that he is likely to
9 succeed on the merits; (2) whether the applicant will be irreparably injured absent
10 a stay; (3) whether issuance of the stay will substantially injure the other interests
in the proceeding; and (4) where the public interest lies.

11 *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418,
12 434 (2009)).

13 The “propriety of [a stay] is dependent upon the circumstances of the particular case.”
14 *Nken*, 556 U.S. at 433 (internal quotation marks omitted). “When circumstances have changed
15 such that the court’s reasons for imposing the stay no longer exist or are inappropriate, the court
16 may lift the stay.” *Akeena Solar*, 2011 WL 2669453, at *2 (quoting *Canady*, 271 F. Supp. 2d at
17 74); *see also Alaska Survival v. Surface Transp. Bd.*, 704 F.3d 615, 616 (9th Cir. 2012) (lifting
18 stay when, although court initially concluded that party raised serious merits questions supporting
19 stay, court subsequently found party was unlikely to succeed on merits and balance of hardships
20 no longer tipped in favor of stay).

21 **B. The Stay Should Be Lifted to Allow Plaintiffs to Have Their Motion to**
22 **Supplement Resolved by the Court**

23 **1. Current Circumstances Support Lifting the Stay**

24 The Court imposed the limited stay of proceedings in order to permit Reclamation to
25 pursue its chosen course of reinitiating consultation on the renewed contracts’ impacts on the
26 delta smelt and its habitat. The circumstances the Court found had warranted such a stay,
27 however, do not apply to Plaintiffs’ request to have their Motion to Supplement heard by the
28 Court.

1 Plaintiffs seek to add claims relating to Reclamation's failure to reinitiate consultation
2 regarding the effects of the SRS contracts on listed Chinook and Reclamation's and the SRS
3 Contractors' illegal take of listed Chinook. *See* Mot. to Supplement at 6-13; 4SC ¶¶145-55.
4 Although Plaintiffs have asked Reclamation to coordinate its reinitiated consultation regarding
5 the SRS Contracts' impacts on the delta smelt with a consultation regarding listed Chinook,
6 Reclamation to date has refused to do so. Poole Decl. ¶8. Thus, Reclamation's current
7 consultation with FWS regarding the SRS contracts' impacts on the delta smelt will not address
8 the issues raised in Plaintiffs' new and related claim regarding reinitiation of consultation with
9 NMFS.

10 Further, Reclamation's BA reflects that the efficiencies the Court hoped would be
11 achieved by staying litigation while Reclamation reinitiated consultation are unlikely to be
12 realized. Reclamation urged the Court to permit it to undertake its own, internal processes for
13 attempting to "cure [its] own mistakes," and to avoid wasting the Court's and the parties'
14 resources. Doc. 955 at 14, 15 (internal quotation marks omitted). The Court, in granting
15 Reclamation time to engage in its proposed reconsultation, relied on Reclamation's assurances
16 that the consultation would "examine 'whether any different terms are needed in the renewed
17 contracts to avoid jeopardy to the species.'" Doc. 979 at 12 (quoting Doc. 970 at 10). Yet, as
18 discussed above, the BA informs FWS that Reclamation now maintains it has no discretion to
19 alter or negotiate any terms in the renewed SRS contracts that would be beneficial to the delta
20 smelt or its habitat. Poole Decl. Ex. 2B at 10-11. Thus, Reclamation has already ensured that it
21 will *not* receive a full, unfettered, and valid consultation from FWS. The Court's stay was based
22 on the explicit assumption that Reclamation *could* require renegotiation of contract terms, Doc.
23 979 at 12 n.4, and the hope that permitting the reconsultation to proceed might mean that "the
24 Court's intervention [would] not be needed at all." *Id.* at 12; *see also id.* at 16 ("Federal
25 Defendants' proposal has the potential to resolve some of the disputes between the parties.").
26 Unfortunately, it is now clear that judicial intervention will be needed.

27 This Court issued a stay to ensure that Reclamation had an opportunity to conduct a valid
28 consultation regarding the impacts of the renewed long-term water contracts on the delta smelt

1 and its habitat. Lifting the stay to permit Plaintiffs to raise the related issue of whether
2 Reclamation should simultaneously reinitiate consultation on the SRS contracts' impacts on listed
3 Chinook will not undermine the purposes of the stay. Moreover, the suggestion that the Court
4 should not interfere with Reclamation's reconsultation efforts has less weight in light of
5 Reclamation's issuance of a BA that squarely contradicts the Ninth Circuit's ruling and disclaims
6 any discretion to negotiate new or revised terms that would benefit the smelt and its habitat.

7 **2. Lifting the Stay Will Allow Plaintiffs to Pursue Claims on Which They**
8 **Are Likely to Succeed**

9 As detailed in Plaintiffs' Motion to Supplement, Plaintiffs are likely to succeed on their
10 proposed new claims that Reclamation should reinitiate consultation with NMFS regarding the
11 renewed SRS contracts and that implementation of the contracts is resulting in unauthorized take
12 of listed Chinook. *See* Mot. to Supplement at 6-13, 22-24.

13 **3. The Balance of Hardships Weighs in Favor of Lifting the Stay**

14 Maintaining the stay to prevent Plaintiffs from having their supplemental claims presented
15 to the Court will result in irreparable harm to Plaintiffs' interests in protecting listed Chinook and
16 their critical habitat. *See* Mot. to Supplement at 8-13. Winter-run and spring-run Chinook have
17 had entire generations, or "brood years," devastated by excessive releases of water pursuant to the
18 renewed SRS contracts. *See id.* 8-11. And the failure of Reclamation to reinitiate consultation
19 regarding the SRS contracts' impacts on listed Chinook means that harmful provisions of the
20 contracts remain in place, with no consideration of whether they should be modified to ensure
21 that the contracts do not further jeopardize listed Chinook. *Id.* at 7-11. As explained in Plaintiffs'
22 Motion to Supplement, *id.* at 16-17, the measures taken to protect delta smelt can adversely affect
23 winter-run and spring-run Chinook, and vice versa. Thus, consultations on these species should
24 occur in coordination with one another. *Id.*; *see also* Decl. of Tony LoPresti in Supp. of Mot. to
25 Lift Stay and Mot. for Leave to File 4th Supplemental Compl. ("LoPresti Decl.") Ex. N (Letter
26 from K. Salazar, Sec'y of the Interior, and G. Locke, Sec'y of Commerce, to N. Sutley, Council
27 on Env'tl. Quality (May 3, 2010)). Given that Reclamation is currently engaged in a consultation
28

1 with FWS, but not NMFS, the opportunity for a coordinated consultation will slip away if
2 Reclamation does not also promptly request reinitiation with NMFS.

3 In contrast, lifting the stay for the limited purpose of permitting Plaintiffs to file their
4 Motion to Supplement will not prejudice Reclamation or the other proposed defendants, all of
5 whom are already parties in this case. If Plaintiffs cannot pursue their claims in this case, nothing
6 precludes them from asserting them in a separate lawsuit (which would likely be deemed related
7 to this matter). It is for the sake of efficiency and consistency that Plaintiffs seek to supplement
8 the complaint in this matter.

9 **4. Lifting the Stay Will Promote Efficient Litigation**

10 As explained in more detail in Plaintiffs' Motion to Supplement, Plaintiffs' additional
11 claims present legal and factual issues that significantly overlap and are intertwined with those
12 already presented by this case. *See* Mot. to Supplement at 15-19.

13 Reclamation's flawed BA has unfortunately closed the door on any hope that
14 Reclamation's reinitiated consultation would bring this case to a quick end without further
15 litigation. Reclamation has chosen to contradict the rulings of the Ninth Circuit, disavowing any
16 discretion to take any action to benefit the delta smelt. As a result, Plaintiffs anticipate that they
17 will soon need to litigate (again) the very issues that were presented and argued to the Ninth
18 Circuit, including Reclamation's authority to negotiate quantity, timing, pricing, and shortage
19 terms different from those set forth in the original SRS contracts.⁵ By instructing FWS that
20 Reclamation has no discretion to negotiate terms that could benefit the smelt and its habitat,
21 Reclamation has undermined the entire consultation process and flouted the unanimous view of
22 the Ninth Circuit's en banc panel. The legal questions presented by Reclamation's refusal to
23 acknowledge its discretion in this case are therefore almost certain to overlap with the legal issues
24

25 ⁵ Putting aside the question of Reclamation's current litigation position regarding whether it had
26 authority to negotiate terms different from those in the original SRS contracts, Reclamation has in
27 fact negotiated quantity, timing, pricing, shortage and other terms that differed from those in the
28 original contracts. *See* Poole Decl. Ex. 4 at 3 & nn. 5-7; *NRDC v. Salazar*, Case No. 09-17661,
Appellate Doc. 25-1 (Appellants' Op. Br. Corrected) at 79-84 (identifying multiple examples of
Reclamation exercising its discretion to negotiate different terms of the SRS contracts). Thus,
Reclamation's renewed (and rejected) claim that it could not have sought any terms other than
those set forth in the original contracts is simply untrue.

1 presented by Plaintiffs' challenge to Reclamation's decision not to reinitiate consultation with
2 NMFS regarding the renewed SRS contracts.

3 There are other practical reasons to litigate the questions presented by Plaintiffs' proposed
4 new claims with the existing claims in this matter. In particular, any proposed modifications to
5 terms of the SRS contracts should be evaluated for their potential benefits both for delta smelt and
6 for listed Chinook, and their respective habitats. Similarly, any decision *not* to seek modification
7 of the contract terms should be evaluated through the same lens. *See* Motion to Supplement at
8 16-17.

9 **IV. CONCLUSION**

10 For the foregoing reasons, the Court should grant Plaintiffs' motion to lift the stay for
11 purposes of permitting Plaintiffs to file and allowing the Court to resolve Plaintiffs' motion for
12 leave to file a Fourth Supplemental Complaint.

13 Respectfully submitted,

14
15 DATED: November 9, 2015

By: /s/ Barbara Jane Chisholm
Barbara Jane Chisholm

16
17 KATHERINE POOLE (SBN 195010)
DOUGLAS ANDREW OBEGI (SBN 246127)
NATURAL RESOURCES DEFENSE COUNCIL
111 Sutter Street, 20th Floor
San Francisco, CA 94104
Telephone: (415) 875-6100
Facsimile: (415) 875-6161
Attorneys for Plaintiff NRDC

18
19
20
21
22 HAMILTON CANDEE (SBN 111376)
BARBARA JANE CHISHOLM (SBN 224656)
TONY LOPRESTI (SBN 289269)
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
Attorneys for Plaintiff NRDC

23
24
25
26
27 TRENT W. ORR (SBN 77656)
EARTHJUSTICE
50 California St. Suite 500

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

San Francisco, CA 94111
Telephone: (415) 217-2000
Facsimile: (415) 217-2040
Attorney for Plaintiffs and proposed Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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-GSA

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 TO LIFT STAY

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