Deborah A. Sivas (CA Bar No. 135446)
Matthew J. Sanders (CA Bar No. 222757)
ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
Crown Quadrangle, 559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 725.8571
Facsimile: (650) 723.4426
dsivas@stanford.edu
matthewjsanders@stanford.edu

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendant.

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Date: Oct. 13, 2020
Time: 1:30 p.m.
Court: 6, 14th Floor
Judge: Hon. John A. Mendez

TABLE OF CONTENTS

INTRODUCTION 1

LEGAL STANDARD 4

THE PRESENT COMPLAINT 4

ARGUMENT 9

I. Plaintiffs' APA Claim for Ongoing Violation of the GSA's Legal Requirements More than Satisfies the Undemanding Zone-of-Interests Test. 9

II. Plaintiffs' APA Claims for Ongoing Violation of the GSA's Requirements Are Not Barred by the Doctrine of Res Judicata. 16

III. Plaintiffs Have Stated Colorable APA Section 706(1) Claims for Ongoing Failure to Act in Compliance with the GSA Legal Mandates. 23

IV. Plaintiffs' APA Claims for Ongoing Violation of the GSA's Requirements Are Not Barred by any Statute of Limitations. 26

V. Plaintiffs Do Not Seek Relief Directly Against Calpine. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Laboratories v. Gardener,
387 U.S. 136 (1967) 10

Am. Canoe Ass'n v. EPA,
30 F.Supp.2d 908 (E.D. Va. 1998) 27

Appalachian Voices v. McCarthy,
989 F. Supp. 2d 30 (D.D.C. 2013) 27

Association of Data Processing Serv. Org., Inc. v. Camp,
397 U.S. 150 (1970) 10, 15

Bank of America Corp. v. City of Miami, Fla.,
137 S.Ct. 1296 (2017) 11

Bankers Tr. Co. v. Pac. Employers Ins. Co.,
282 F.2d 106 (9th Cir. 1960) 19

Barlow v. Collins,
397 U.S. 159 (1970) 10

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 11, 12

In re Bluewater Network,
234 F.3d 1305 (D.C. Cir. 2000) 27

California v. Trump,
963 F.3d 926 (9th Cir.) 12

Cent. Delta Water Agency v. United States,
306 F.3d 938 (9th Cir. 2002) 16, 17

Clarke v. Securities Industry Assn.,
479 U.S. 388 (1987) 10, 12

Defs. of Wildlife v. Jewell,
No. CV-14-02472-TUC-JGZ, 2015 WL 11182029 (D. Ariz. Sept. 30, 2015) 27

Earle v. District of Columbia,
707 F.3d 299 (D.C. Cir. 2012) 27

Frank v. United Airlines, Inc.,
216 F.3d 845 (9th Cir. 2000) 17

Fund for Animals v. Lujan,
962 F.2d 1391 (9th Cir. 1992).....17

Gallagher v. Frye,
631 F.2d 127 (9th Cir. 1980).....19

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982).....28

Hells Canyon Pres. Council v. U.S. Forest Serv.,
403 F.3d 683 (9th Cir. 2005).....17, 19, 21, 22

Howard v. City of Coos Bay,
871 F.3d 1032 (9th Cir. 2017).....17, 20

Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.,
No. 07-CV-358-PK, 2007 WL 4117978 (D. Or. Nov. 16, 2007).....27

Kawi Fun Wong v. U.S.,
373 F.3d 952 (9th Cir. 2004).....25

Lawlor v. Nat'l Screen Serv. Corp.,
349 U.S. 322 (1955).....17

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014).....10, 11, 15

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,
567 U.S. 209 (2012)..... *passim*

Media Rights. Techs. v. Microsoft Corp.,
922 F.3d 1014 (9th Cir. 2019).....17

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973).....13

Mobil Oil Exploration & Producing Se., Inc. v. United States,
530 U.S. 604.....25

Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.,
480 F.3d 410 (6th Cir. 2007).....27, 28

Nat'l Wildlife Fed v. Espy,
45 F.3d 1337 (9th Cir. 1995).....1, 28

Navarro v. Block,
250 F.3d 729 (9th Cir. 2001).....25

Norton v. S. Utah Wilderness All.,
542 U.S. 55 (2004).....12, 24, 25

Pit River Tribe v. Bureau of Land Management ("Pit River II"),
939 F.3d 962 (9th Cir. 2019)..... *passim*

Pit River Tribe v. U.S. Forest Service ("Pit River I"),
469 F.3d 769 (9th Cir. 2006)..... *passim*

Platte Anchor Bolt, Inc. v. IHI, Inc.,
352 F. Supp. 2d 1048 (N.D. Cal. 2004) 29

Pub. Citizen, Inc. v. Mukasey,
No. C08-0833MHP, 2008 WL 4532540 (N.D. Cal. Oct. 9, 2008) 27

S. Appalachian Biodiversity Project v. U.S. Fish and Wildlife Serv.,
181 F.Supp.2d 883 (E.D. Tenn. 2001) 27

S. Utah Wilderness Alliance v. Norton,
301 F.3d 1217 (10th Cir. 2002).....27

Save the Valley, Inc. v. United States EPA,
223 F.Supp.2d 997 (D. Ind. 2002) 27

Shiny Rock Mining Corp. v. United States,
906 F.3d 1362 (9th Cir. 1990).....28

Sierra Club v. Trump,
929 F.3d 670 (9th Cir. 2019).....11

Singh v. Napolitano,
909 F. Supp. 2d 1164 (E.D. Cal. 2012).....16

Sprewell v. Golden State Warriors,
266 F.3d 979 (9th Cir. 2001).....4

Stanbury Law Firm v. IRS,
221 F.3d 1059 (8th Cir. 2000).....29

Susan B. Anthony List v. Driehaus,
573 U.S. 149 (2014).....11

United States v. City of Redwood City,
640 F.2d 963 (9th Cir. 1981).....25

United States v. JP Morgan Chase Bank Account Number,
835 F.3d 1159 (9th Cir. 2016).....11

Vietnam Veterans of America v. Central Intelligence Agency
811 F.3d 1068 (9th Cir. 2016).....24

Waterkeepers N. Cal. v. AG Indus. Mfg., Inc.,
375 F.3d 913 (9th Cir. 2004).....4, 25

Whole Woman's Health v. Hellerstedt,
136 S. Ct. 2292, 195 L. Ed. 2d 665 (2016) 20

Wilderness Soc'y v. Norton,
434 F.3d 584 (D.C. Cir. 2006) 27

Wind River Mtn. Corp. v. United States,
946 F.2d 710 (9th Cir. 1991).....28

Statutes

5 U.S.C. § 551(13) 1

5 U.S.C. § 706(1) ..... *passim*

12 U.S.C. § 36.....12

28 U.S.C. § 2401(1) 4

30 U.S.C. § 1005(a) 5, 14, 15, 18

30 U.S.C. §§ 1014(c), 1026, 1027 12

30 U.S.C. § 1016.....12

30 U.S.C § 1017(a) 7

Other Authorities

43 C.F.R. Part 3280.....3, 15, 25

43 C.F.R. § 3200.1 6

43 C.F.R. § 3202.1-3.....5

43 C.F.R. § 3207.15 ..... *passim*

43 C.F.R. § 3280.1 7

43 C.F.R. § 3280.2 .....7, 8, 26

43 C.F.R. § 3282.3 8

43 C.F.R. § 3282.5 8

43 C.F.R. § 3284.3 .....8, 25

Fed. Rule of Civ. Proc. 11.....20

Fed. Rule of Civ. Proc. 12(b) 4, 25

Fed. Rule of Civ. Proc. 12(f).....29

Fed. Rule of Civ. Proc.19.....28

INTRODUCTION

Defendants' motions to dismiss are premised on the erroneous notion that the present lawsuit attempts a second – or third – bite at the same claims Plaintiffs already successfully litigated. Defendants are simply wrong, on both the facts and the law. The First Amended Complaint ("Complaint") in this case states two discrete claims for relief that have never before been pled or adjudicated. These new claims are legally cognizable under section 706(1) of the Administrative Procedure Act. The Court should, therefore, deny Defendants' motions to dismiss in their entirety.

The present case challenges the Bureau of Land Management's ("BLM") ongoing failure to comply with the requirements of the Geothermal Steam Act ("GSA"), 30 U.S.C. § 1001 et seq., in administering the only remaining lease within the Glass Mountain Unit, which is located in the Medicine Lake Highlands of northeastern California. That lease is denominated as Lease CACA 12372 (hereinafter "Lease" or "Lease 12372"). The Complaint alleges that leaseholder Calpine failed to undertake diligent efforts to produce geothermal resources on Lease 12372, as required by the GSA, for at least the last 15 years, and that BLM has unlawfully failed to terminate the Lease for this non-compliance. Complaint at ¶¶ 78-80. The Complaint also alleges that BLM is legally required to terminate the Unit for various reasons, including Calpine's lack of diligent efforts toward production of geothermal resources on the remaining Lease or elsewhere in the Unit. Id. at ¶¶ 81-83. These two narrowly-tailored claims are premised on BLM's ongoing failure to act in compliance with specific legal duties under the GSA and are cognizable under the Administrative Procedure Act ("APA"), which provides that a "reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).[1] The Complaint names Calpine Corporation and CPN Telephone Flat, Inc. (collectively "Calpine") solely for the purpose of obtaining complete relief. Complaint at ¶ 16; see Nat'l Wildlife Fed v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995).

Notably, this case expressly does not challenge BLM's 1982 decision to issue Lease 12372 or its 1991 decision to continue Lease 12372. Nor does it challenge the formation or expansion of the

[1] An "agency action" under the APA includes "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent, or denial thereof, or failure to act." 5 U.S.C. § 551(13) (emphasis added).

Glass Mountain Unit. Complaint at ¶¶ 2, 56. Plaintiffs' only legal contention in the present action is that the long dormancy on Lease 12372 and within the Unit over the last two decades triggers BLM's legal duty to terminate Calpine's conditional public land use rights for non-compliance with the GSA. The continuously-accruing claims pled here were not at issue – or adjudicated – in the two prior Pit River cases before this Court. Nor could they have been.

The first Pit River case involved two other GSA leases (Lease Nos. CA 21924 and CA 21926) outside the original Glass Mountain Unit on which Calpine proposed to develop the so-called Fourmile Hill Geothermal Development Project. BLM "extended" those two leases for a period of five years in a 1998 administrative decision, and then subsequently approved the project on them in May 2000. Plaintiffs successfully challenged those agency decisions under section 706(2) of the APA in Pit River Tribe v. U.S. Forest Service ("Pit River I"), 469 F.3d 769 (9th Cir. 2006). In a separate 1998 administrative action, BLM also "continued" 26 other geothermal leases within the Glass Mountain Unit (then held by California Energy Corp.) for an additional 40 years and thereafter approved the so-called Telephone Flat Geothermal Development Project on some of those leases in 2002. Plaintiffs separately and successfully challenged those agency decisions under APA section 706(2) in Pit River Tribe v. Bureau of Land Management ("Pit River II"), 939 F.3d 962 (9th Cir. 2019). Both cases adjudicated the legality of BLM's discrete actions in 1998 to either "extend" or "continue" the 28 non-producing geothermal leases without the requisite environmental review and tribal consultation; they also successfully challenged the validity of BLM's subsequent project approval decisions in reliance on the 28 underlying leases.

In contrast, the present case does not raise any claim relative to the 28 invalidated leases or the administrative decisions at issue in Pit River I and Pit River II. In fact, it does not challenge a BLM action or decision of any kind to issue, extend, continue, or renew a lease or agreement. The first cause of action here alleges that (1) BLM's current "production extension" regulations (which are codified at 43 C.F.R. section 3207.15 and implement current GSA sections 1005(g)-(h)) impose a continuing "diligent efforts" requirement on all lessees and require BLM to terminate leases when these diligent efforts are not satisfied; (2) Calpine, as the holder of Lease 12372, is not satisfying these requirements; and (3) BLM is, therefore, legally obligated to terminate Lease 12372, but has

failed to do so. Complaint at ¶¶ 29-35, 57-64, 79-80. The second cause of action alleges that (1) the Glass Mountain Unit Agreement and the current "unit agreement" regulations (which are codified at 43 C.F.R. Part 3280 and implement GSA section 1017) impose an obligation on the operator to engage in continuous exploration efforts to produce geothermal resources and require BLM to terminate the unit when the public interest in diligent exploration, development, and production requirements is not satisfied; (2) Calpine, as the operator of the Unit, is failing to satisfy these requirements; and (3) BLM is, therefore, legally obligated to terminate the Unit, but has failed to do so. Complaint at ¶¶ 37-41, 47-54, 65-73, 82-83. These straightforward "ongoing violation" claims under APA section 706(1) concern lack of activity on Lease 12372 and within the Unit over the last several years; as such, they are wholly independent of Plaintiffs' prior section 706(2) challenges to BLM's 1998 administrative lease extension decisions in Pit River I and Pit River II.

Federal Defendants' new counsel seems particularly confused about what was at issue and what transpired in Pit River II. As the Court will recall, the amended complaint filed in Pit River II alleged that BLM unlawfully failed to eliminate 26 non-producing leases from the Unit [¶ 107(a)]; unlawfully failed to contract the Unit to exclude those 26 non-producing leases, leaving only the remaining Lease 12372 within the Unit [¶ 107(b)]; unlawfully failed to terminate the 26 non-producing leases for lack of diligent efforts [¶ 107(c)]; unlawfully continued the 26 non-producing leases in 1998 [¶ 107(d)]; and unlawfully failed to ensure that activity on the 26 non-producing leases would protect natural resources [¶ 107(e)]. Pit River II, ECF Dkt Entry 44-1 at 22-23. Those claims exclusively targeted the 26 non-producing leases. In paragraph 107(d), Plaintiffs sought to invalidate the unlawful 1998 continuation decisions for these 26 leases. In the alternative paragraphs, Plaintiffs sought to terminate the same 26 non-producing leases for lack of diligent efforts, to eliminate them from the Glass Mountain Unit, and to contract the Unit to the only remaining valid leasehold, Lease 12372. It is thus crystal clear from the pleadings that Plaintiffs in Pit River II did not assert any claim relative to Lease 12372 or seek to terminate the Glass Mountain Unit for any reason.

Why? Because the present ongoing violation claims alleged in this case were not ripe for adjudication in Pit River II. Years earlier, in 1991, BLM had separately continued Lease 12372 on entirely different grounds, in an entirely different administrative decision. When Plaintiffs

challenged the 2002 Telephone Flat project decision and the 1998 continuation of the underlying 26 non-producing leases, any claim regarding the legality of the 1991 continuation for Lease 12372 had long since expired under the general six-year federal statute of limitations. 28 U.S.C. § 2401(1). Plaintiffs, therefore, could not assert a viable claim concerning the legality of the 1991 BLM decision continuing Lease 12372 – and properly did not do so. At that time, moreover, Calpine was still expressing a firm intent to develop the approved Telephone Flat project on Lease 12372, paying rent on the leasehold, and planning for the development. It was not until years later, in 2012, that BLM publicly disclosed Calpine's withdrawal from the Telephone Flat development effort. In the intervening years since then, Calpine did not conduct additional diligence on Lease 12372, obtain approval for a new plan of development, or submit the necessary annual reports to satisfy the GSA's diligent efforts requirements. Yet BLM stood by silently, refusing to exercise its legal obligation to terminate the long-dormant Lease 12372 and the useless Unit agreement. With no end to this inaction in sight, and with Pit River II now finally resolved, Plaintiffs brought this new lawsuit under section 706(1) of the APA to hold BLM accountable for its ongoing failure to take action with respect to Lease 12372, which has never been the subject of any litigation. The termination of Lease 12372 would, in turn, mean that the Unit no longer covers any valid leases or serves any public purpose.

The Court should reject Defendants' attempt to rewrite the history of the Pit River litigation and to misapply the concepts of prudential standing, res judicata, APA agency inaction, and statute of limitations. Plaintiffs respectfully request that the Court deny the motions to dismiss.

LEGAL STANDARD

On motions to dismiss under Federal Rule of Civil Procedure 12(b), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). An "allegation is sufficient to confer jurisdiction." Waterkeepers N. Cal. v. AG Indus. Mfg., Inc., 375 F.3d 913, 921 (9th Cir. 2004) (finding ongoing violation claims alleged in good faith are sufficient to confer jurisdiction).

THE PRESENT COMPLAINT

First Cause of Action. The first cause of action in the Complaint states a colorable claim for relief concerning Lease 12372. BLM entered into this Lease in 1982. Complaint at ¶ 26; Declaration

of Deborah A. Sivas ("Sivas Decl."), Exh A. The Lease was effective for a primary term of ten years and for up to 40 years thereafter "so long as geothermal is produced or utilized in commercial quantities." Sivas Decl., Exh. A at 2. In 1989, BLM concluded that test well 31-17, drilled on the Lease in 1988, "has demonstrated its capabilities of producing unitized substances in paying quantifies." Complaint at ¶ 56; Sivas Decl., Exh. B. Based on this conclusion, BLM "continued" the Lease in 1991 for "so long as the operator is making diligent efforts to commence production or utilization of geothermal resources in commercial quantities," but not longer than 40 years after the end of the primary term, pursuant to former GSA section 1005(a) and former implementing regulations at 43 C.F.R. § 3202.1-3. Complaint at ¶ 56; Sivas Decl., Exh. C (emphasis added). Consistent with its regulations, BLM required as a condition of the continuation that the lessee "shall, at least 60 days prior to the anniversary date of the lease, provide the authorized officer a description of the diligent efforts completed for the lease year." Sivas Decl., Exh. C at 2.[2]

Congress substantially revised the GSA in 2005, rewriting section 1005(a), which no longer contains the "for so long thereafter as" clause authorizing lease continuances. See 30 U.S.C. § 1005(a). In response, BLM rewrote former section 3202.1-3 of the regulations in 2007. The new regulations governing so-called "production extensions" – no longer called "continuances" – are found at 43 U.S.C. § 3207.15. Under the revised regulations, lessees holding pre-2005 leases may remain under the former regulations or elect to be governed by the revised regulations. Id. § 3200.7(a). As Defendants indicate, on November 19, 2008, Calpine elected to have all of its Glass Mountain leases governed by the new regulations. Fed. Defs. MPA at fn.1; Sivas Decl., Exh. E.

Relevant to, and as alleged in, the present lawsuit, the new regulations provide that, in order to allow a production extension for a geothermal lease, BLM must determine that a lease either (1)

[2] The Lease mimicked the regulatory language, which provided that a lease "shall continue for so long thereafter as geothermal resources are produced or utilized in commercial quantities or so long thereafter as the operator is making diligent efforts to commence production or utilization of geothermal resources in commercial quantities." 43 C.F.R. § 3202.1-3. The regulatory language, in turn, reflected and implemented the statutory language of then-existing GSA section 1005(a), which provided in its totality: "The Geothermal leases shall be for a primary term of ten years. If geothermal steam is produced or utilized in commercial quantities within this term, such lease shall continue for so long thereafter as geothermal steam is produced or utilized in commercial quantities, but such continuation shall not exceed an additional forty years."

has a well this is actually producing geothermal resources in commercial quantities or (2) has completed a well that is capable of producing geothermal resources in commercial quantities and the lessee is "making diligent efforts toward utilization of the resource." 43 C.F.R. § 3207.15(b); Complaint at ¶ 30. To satisfy the ongoing diligent efforts requirement associated with a production extension for those leases, like Lease 13272, where there is no actual resource production, the lessee must "demonstrate on an annual basis" that the lessee is "making diligent efforts toward utilization of the resource." 43 C.F.R. § 3207.15(c) (emphasis added); Complaint at ¶ 31. The lessee must provide information showing the lessee's diligent actions and other relevant conditions, such as actions the lessee has taken to identify and define the geothermal resource on the leasehold or to negotiate marketing arrangements, sales contracts, and drilling agreements, and BLM must annually evaluate and determine sufficient diligent efforts for continuation. 43 C.F.R. § 3207.15(e); Complaint at ¶ 32.

Under the regulations, production extensions may continue for up to 35 years but only "as long as the geothermal resource is being produced or utilized in commercial quantities." 43 C.F.R. § 3207.15(g). The term "commercial quantities," in turn, is defined by the regulations to mean (i) for an individual lease, a sufficient volume (in terms of flow and temperature) of the resource to provide a reasonable return after the lessee meets all costs of production or (ii) for a unit, a sufficient volume (in terms of flow and temperature) of the resource to provide a reasonable return after the operator meets all costs of drilling and production. 43 C.F.R. § 3200.1; Complaint at ¶ 33. Thus, the production extension regulations provide that, in order to maintain a lease that has been continued under a production extension where no actual production or utilization has occurred (as is the case for Lease 12372), BLM must determine as part of its annual review process that the lessee is engaged in diligent efforts toward utilization of the resource at a volume of flow and temperature that will provide a reasonable return after all costs of production. Complaint at ¶ 34. If the lessee fails to satisfy the diligent efforts requirements, the production extension regulations provide that BLM "will" terminate the lease. 43 C.F.R. § 3207.15(g); Complaint at ¶ 35.

In the Complaint, Plaintiffs allege that (1) BLM has made no attempt to verify the continuing commercial capability of well 31-17 since 1989; (2) BLM has made no determination that Lease 12372 can presently provide a reasonable return after the operator meets all costs of drilling and

production; (3) the lessee has not submitted an annual report of diligent exploratory efforts for the Lease in many years; (4) no drilling has occurred on Lease 12372 since completion of the test well in 1988; (5) no other exploratory activity has occurred on the Lease since completion and testing of that well; (6) neither Calpine nor any former holder of the Lease has performed any activity to bring the test well into production; (7) the test well is no longer capable of producing geothermal resources in commercial quantities and Lease 12372, therefore, no longer contains a well capable of supporting a continued production extension; and (8) after BLM approved a geothermal development project on the Lease in 2002, Calpine abandoned plans to develop this project and has not undertaken any effort to develop geothermal resources on the Lease since then. Complaint at ¶¶ 57-64. Because BLM has failed to terminate the Lease for non-compliance with the statutory diligent efforts requirements, as mandated by the GSA production extension regulations, Plaintiffs state a cause of action under section 706(1) of the APA. Complaint at ¶¶ 78-80.

Second Cause of Action. The second cause of action in the Complaint likewise states a colorable claim for relief concerning the Glass Mountain Unit. BLM approved the Glass Mountain Unit Agreement in 1982 and this agreement largely reflects the so-called "Model Unit Agreement" found in the GSA regulations. Complaint at ¶ 54; Sivas Decl., Exh. D. A "unit agreement" is defined as a "cooperative plan of development or operation" that allows multiple leaseholders to unite in exploring and developing a single geothermal reservoir or field. 30 U.S.C § 1017(a); Complaint at ¶ 38. Under the GSA's regulations, a "unit agreement" is an agreement for the exploration, development, production, and utilization of "separately owned interests" in a geothermal reservoir, field, or like area which provides for the allocation of costs and benefits on a basis defined in the agreement or plan. 43 C.F.R. § 3280.2. Thus, a unit agreement is intended to efficiently allocate risk and reward to separately-owned leases that are exploring and developing a common pool geothermal resource. Complaint at ¶ 40.

BLM has promulgated unit agreement regulations that govern the review, approval, and administration of a unit agreement. 43 C.F.R. § 3280.1; Complaint at ¶ 39. Under these regulations, BLM must ensure that the "public interest" is protected and that the agreement conforms with applicable laws and regulations, where "public interest" is defined as operation of a unit in a way that

results in diligent development; efficient exploration, production and utilization of the resource; conservation of natural resources; and prevention of waste. 43 C.F.R. § 3280.2; Complaint at ¶ 41. All unit agreements must include certain minimum unit obligations, including drilling requirements, an initial plan of development, and provisions for contraction and termination of the unit. Id. § 3281.14-15. The regulations require that the unit operator submit "plans of development" to address all future activities conducted throughout the term of the unit agreement until a producible well is completed and to identify additional activities thereafter for utilizing the produced resource; these requirements apply until the unit begins commercial production. Id. § 3281.16. In particular, plans of development must identify the activities that the unit operator will conduct in diligent pursuant of unit exploration and development. Id. § 3281.17. BLM, in turn, must ensure that these plans meet the GSA's public interest requirements. Id. § 3281.18. If the unit operator does not meet these unit obligations, BLM will deem the unit agreement void and will retroactively void any lease extensions based upon the existence of the unit. 43 C.F.R. § 3284.3; Complaint at ¶ 47.

After BLM determines that the unit has drilled a well potentially capable of producing or utilizing geothermal resources in commercial quantities, the unit operator has 60 days to submit an application for the so-called "participating area" within the unit from which resources will be produced. 43 C.F.R. § 3282.3; Complaint at ¶ 43. This application must be supported by documentation concerning production and injection wells necessary for unit operations, the area each well drains, data from well testing, and interpretations of well performance and reservoir geology and structure to document what lands are reasonably proven to produce geothermal resources in commercial quantities. 43 C.F.R. § 3282.5; Complaint at ¶ 44.

Consistent with these regulations, the Glass Mountain Unit Agreement mandates that the unit operator "continue diligent exploration" in the Glass Mountain Unit until discovery of a commercially viable geothermal pool; and thereafter, the unit operator must either continue to "timely drill" wells as provided in the initial plan of operation for the Unit or submit and implement acceptable subsequent plans of operation "[u]ntil there is actual production" of geothermal steam. Complaint at ¶ 66; Sivas Decl., Exh. D at ¶ 11.7. The Unit Agreement provides that the unit

operator's failure to cure a default in these requirements within a reasonable time "shall . . . result in automatic termination" of the Unit Agreement. Complaint at ¶ 67; Sivas Decl., Exh. D at ¶ 11.7

The Complaint alleges that Calpine purchased all remaining leases in the Unit in 2001 and became the sole leaseholder in the Unit, as well as the Unit operator, thereby negating any public interest in having "separately owned leases" combined into a unit. Complaint at ¶ 65. Since then, Calpine has not submitted annual reports of diligent exploratory efforts for the Unit, has not drilled any well or undertaken any other exploratory activity in Unit, does not have a current and approved plan of development in place to identify necessary future diligent exploratory and development activities that will be result in commercial production, and has never engaged in actual production or commercial utilization of geothermal resources within Unit. The Unit, therefore, is not in compliance with the GSA regulations or Unit Agreement and should have automatically terminated. Complaint at ¶¶ 68-73. As set forth in the second claim for relief, because the Unit is not in compliance with applicable diligence requirements, and because the Unit does not contain a well capable of producing a sufficient volume of geothermal steam to provide a reasonable rate of return after drilling and production costs, BLM should have terminated the Unit, and its failure to do so states a cause of action under section 706(1) of the APA. Complaint at ¶¶ 81-83.

ARGUMENT

I. Plaintiffs' APA Claim for Ongoing Violation of the GSA's Legal Requirements More than Satisfies the Undemanding Zone-of-Interests Test.

Defendants' first grounds for dismissal – that Plaintiffs' claims fail the "zone-of-interests" test for prudential standing – is deeply flawed. Defendants' argument turns on a fundamental misapprehension of both the prudential standing doctrine and the holding in Pit River II. Indeed, Defendants neglect even to mention the most salient Supreme Court and Ninth Circuit jurisprudence on prudential standing, and they misconstrue the only high court opinion they do cite. As the Supreme Court has repeatedly explained, the zone-of-interests test "is not meant to be especially demanding." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (quoting Clarke v. Securities Industry Assn., 479 U.S. 388, 399 (1987)). This is particularly true where, as here, the claim at issue seeks to enforce an agency's substantive legal

obligations through the Administrative Procedure Act. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014). The Ninth Circuit's decision in Pit River II does not hold otherwise – or in any way implicate Plaintiffs' prudential standing in the present lawsuit.

The Supreme Court first employed the prudential standing inquiry – as distinct from constitutional standing analysis – in Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150 (1970), and Barlow v. Collins, 397 U.S. 159 (1970). In Data Processing, the Court recognized that the APA provides "generous review provisions" for any person "adversely affected or aggrieved by" agency conduct, a phrase that the Court has construed "not grudgingly but as serving a broadly remedial purpose." 397 U.S. at 156. The Court added a judicial "gloss" only to ensure that the interests sought to be vindicated by adversely-affected parties are "arguably" within the "zone of interests" protected or regulated by the statute. Clarke, 479 U.S. at 395-96. The zone-of-interests inquiry thus provides "a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." Id. at 399.

In articulating the test's contours over the years, the Supreme Court has been keenly aware that "the trend is toward enlargement of the class of people who may protest administrative action" and that Congress set a low bar for judicial review under the APA. Data Processing, 397 U.S. at 154, 156-57 (quoting 1945 House Report – "[t]o preclude judicial review under [the APA,] a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it."). Accordingly, "there is no presumption against judicial review and in favor of administrative absolutism." Id. at 157. To the contrary, "judicial review of administrative action is the rule" and "nonreviewability an exception that must be demonstrated" by "'clear and convincing evidence' of contrary legislative intent" in the underlying statutory scheme. Barlow, 397 U.S. at 166-67; see also Abbott Laboratories v. Gardener, 387 U.S. 136, 140 (1967) (explaining that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.").

In recent years, the Court has reiterated this low bar: "We do not require any 'indication of congressional purpose to benefit the would-be plaintiff.' And we have always conspicuously

included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." Patchak, 567 U.S. at 225 (quoting Clarke). Thus, the zone-of-interests test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Id. (emphasis added). This "lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." Lexmark, 572 U.S. at 130 (quoting Patchak).

With its 2014 Lexmark decision, the Supreme Court thus reinforced the federal courts' commitment to hear cognizable claims within their jurisdiction notwithstanding the prudential standing doctrine, recognizing that the doctrine "is in some tension with our recent reaffirmation of the principle that 'a federal court's 'obligation' to hear and decide' cases within its jurisdiction 'is 'virtually unflagging.'" Lexmark, 572 U.S. at 126 (quoting Sprint Communications, Inc. v. Jacobs, 571 U.S. 69, 77 (2013)). Following Lexmark, the Supreme Court and the Ninth Circuit have repeatedly called into question the continuing viability of the zone-of-interests test. E.g., Susan B. Anthony List v. Driehaus, 573 U.S. 149, 167 (2014) (declining to resolve whether the zone-of-interests test has any "continuing vitality" in light of Lexmark's reaffirmation of a federal court's obligation to decide cases within its jurisdiction); Bank of America Corp. v. City of Miami, Fla., 137 S.Ct. 1296, 1302-03 (2017) (interpreting Lexmark as limiting the inquiry solely to "whether the statute grants the plaintiff the cause of action he asserts" in non-APA cases and finding that economic injuries fall within the statute's protections against racially discriminatory practices); United States v. JP Morgan Chase Bank Account Number, 835 F.3d 1159 (9th Cir. 2016) (observing that the "prudential-standing addendum to the Article III standing inquiry has fallen into disfavor in recent years"); Sierra Club v. Trump, 929 F.3d 670, 700-705 (9th Cir. 2019) (questioning test's continuing applicability).

The presumption of reviewability for APA claims may only be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent" to affirmatively preclude suit. Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984).

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Id. at 345. "[A]t bottom the reviewability question turns on congressional intent, and all indicators helpful in discerning that intent must be weighed." Clarke, 479 U.S. at 400. Thus, courts "are not limited to considering the statute under which respondents sued, but may consider any provision that helps [them] to understand Congress' overall purposes." Id. at 401 (concluding that defendant's argument "focuses too narrowly on 12 U.S.C. § 36, and does not adequately place § 36 in the overall context of the [statute]").

The statute at issue here does not evince any congressional intent to preclude enforcement of its diligence requirements. Those requirements are designed to ensure that public lands are not indefinitely tied up by idling lessees, to the detriment of other potential uses. Congress directed BLM to administer the GSA "under the principles of multiple use." 30 U.S.C. § 1016. Multiple use principles aim to "strik[e] a balance among the many competing uses to which land can be put, including but not limited to range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." Norton v. S. Utah Wilderness All., 542 U.S. 55, 58 (2004) (internal quotation marks omitted; alteration in original). Moreover, Congress sought to protect the kind of non-development interests that Plaintiffs assert by prohibiting geothermal leasing on environmentally sensitive and culturally important public lands. See 30 U.S.C. §§ 1014(c), 1026, 1027. To operationalize multiple use principles, Congress directed BLM to issue regulations that protect the environment and the public interest. Id. § 1023(c), (f), (i) (requiring regulations to protect the "public interest," "surface use," "water quality," and "other environmental qualities"). As explained above, this lawsuit seeks to enforce those regulations through the APA.[3] Plaintiffs' claims are thus squarely within the GSA's zone of interests, as that test is articulated by the courts.

[3] Defendants' statement that the GSA does not provide a private right of action is of no moment. "Where a statute imposes obligations on a federal agency but the obligations do not 'give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." California v. Trump, 963 F.3d 926, (9th Cir.) (quoting San Carlos Apache Tribe v. U.S., 417 F.3d 1091, 1099 (9th Cir. 2005)).

In Patchak, for instance, the Supreme Court held that a non-Indian landowner affected by use of neighboring property purchased for an Indian tribe had prudential standing to assert violations of section 465 of the Indian Reorganization Act, which authorizes the Interior Secretary to acquire property rights "for the purpose of providing land for Indians." See 25 U.S.C. § 465. No provision of the statute addresses the interests of neighbors; rather, "[t]he intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973). "Section 465 thus functions as a primary mechanism to foster Indian tribes' economic development." Patchak, 567 U.S. at 226. Despite the statute's narrow scope, however, affected neighbors who were not themselves beneficiaries or intended targets of the law could nevertheless challenge agency noncompliance with section 465 because future use of the acquired land may impact their economic, environmental, or aesthetic interests. Id. at 226-28.

So too here. Plaintiffs assert a deep and abiding interest in preserving the integrity of the Medicine Lake Highlands for spiritual, cultural, religious, health, environmental and aesthetic benefits. Complaint, ¶¶ 7-11. Collectively, they share an interest in "the orderly and lawful administration of geothermal resources in the Medicine Lake Highlands area, including the timely review and termination of leases and other agreements relating to lands that cannot be or are not being used to produce geothermal steam." Id. at ¶¶ 11. This is so because "[t]he unlawful continuation of such leases and other agreements with private parties prevents Plaintiffs from fully accessing the public lands at issue in this case and from pursuing their interest in long-term protection and sustainable management of these lands and their natural resources." Id.; see also id. at ¶ 77 ("Plaintiffs are injured and harmed by Defendants unlawful actions because the continuing existence of the Lease and the Unit prevents the Forest Service's full implement of the Medicine Lake Highlands Historic Properties Management Plan developed in 2007 and impedes Plaintiffs' ability to use and enjoy the unitized lands as otherwise permitted under the multiple and open use statutory mandates for public lands within the Unit"). Accordingly, the Complaint alleges that the Lease and Unit are no longer serving the public interest, as required by the GSA, and that Federal Defendants are violating their legal duty to terminate the Lease and Unit for non-compliance with statutory

diligence requirements. Id. at ¶¶ 79-80, 82-83. The requested relief will serve Plaintiffs' interest in freeing up these public lands for other multiple use purposes.

Defendants nevertheless argue that Pit River II warrants dismissal of Plaintiffs' ongoing violation claims. Utterly misconstruing the Ninth Circuit's prudential standing decision, Defendants suggest that the GSA protects Plaintiffs' interests only when BLM takes discretionary action. But the Ninth Circuit said no such thing. Indeed, such a holding would prevent the public from ever enforcing BLM's GSA duties under the APA.[4] As this Court knows, the central question in Pit River II was whether BLM possessed legal authority under former section 1005(a) of the GSA, as it existed in 1998, to "continue" non-productive leases for up to 40 years past their original primary terms. In particular, Plaintiffs challenged the legal validity of BLM's 1998 decision affirming continuations for these non-producing leases, as well as BLM's failure to undertake environmental review and tribal consultation in connection with that decision. BLM defended its action by claiming that, under former section 1005(a), it had no choice but to continue the leases; that is, continuation of the non-producing leases was "automatic" and the agency, therefore, did not possess any discretion that would trigger environmental review and tribal consultation obligations. Based on this theory (which this Court and the Ninth Circuit subsequently rejected at the merits phase), BLM argued as a threshold matter that because former section 1005(a) automatically continued the leases by operation of law, Congress did not authorize any judicial challenge to such continuations, and Plaintiffs thus could not satisfy the zone-of-interests test. See Answering Brief at 28, Case No. 13-16961, ECF Dkt. Entry No. 21-1 at p. 37 of 81 (arguing that former GSA section 1005(a) encouraged development "by offering an automatic lease continuation as a reward for substantial progress during the primary ten-year term").[5]

[4] Elsewhere in their motion, Defendants argue that the Court can only enforce non-discretionary legal duties under the APA. Thus, Defendants' startling position seems to be that concerned public land users cannot obtain judicial review of either discretionary or non-discretionary agency action.

[5] The government's argument here seems to reflect a fundamental misunderstanding of its own prior legal theory. In Pit River II, prior counsel did not argue that a mandatory legal duty under the GSA (or any other statute) was unenforceable through an APA claim due to lack of prudential standing – and the Court did not address that issue. Rather, BLM argued that because former section 1005(a) automatically continued the non-producing leases, by operation of law, the agency's hands were tied

Contrary to Defendants' assertions, the Ninth Circuit in Pit River II did not decide how the zone-of-interests test applied to former section 1005(a) – much less that third parties cannot assert APA claims to enforce BLM's legal duties. Instead, the Court found that because Plaintiffs "plainly" challenged "whether BLM had lawfully vacated its earlier § 1005(g) extension decisions and changed its interpretation of § 1005 to continue the leases for up to 40 years," their claims unquestionably fell within the GSA's zone of interests. Pit River II, 793 F.3d at 1158. In so holding, the Ninth Circuit did not directly address or interpret former section 1005(a), nor did it say anything about Plaintiffs' ability to enforce the GSA statutory obligations when BLM fails to comply with its legal duties. It did, however, strongly affirm the Supreme Court's admonition in Data Processing, Patchak, Lexmark, and other cases that the zone-of-interests test "should be applied consistent with Congress's intent 'to make agency action presumptively reviewable' under the APA," and it also reiterated the Supreme Court's "consistent statement" that the prudential standing doctrine only forecloses suit when the claims are "so marginally related to the statute" that Congress could not reasonably have intended APA enforcement. Pit River II, 793 F.3d at 1155-56.

In any event, the present case is not in any way about section 1005(a), which no longer provides for "automatic" continuation of any lease. To repeat, in the first cause of action, the Complaint alleges that (1) BLM's current "production extension" regulations, (codified at 43 C.F.R. section 3207.15), which implement the "diligent efforts" obligations of GSA sections 1005(g) and (h), impose ongoing requirements on lessees; (2) the lessee here has failed to satisfy these requirements; and (3) BLM is, therefore, legally obligated to terminate the Lease but has failed to do so. FAC at ¶¶ 29-35, 57-64, 79-80. The second cause of action in the Complaint alleges that (1) the Glass Mountain Unit Agreement and current GSA section 1017, implemented through the unit agreement regulations codified at 43 C.F.R. Part 3280, require BLM to ensure that the Unit is administered in the public interest, including through diligent exploration, development, and production, and to terminate units when these requirements are not satisfied; (2) the unit operator has

by Congress, which therefore could not possibly have intended to allow an APA challenge in that circumstance. That argument is starkly different than present counsel's sweeping new theory that nobody has prudential standing to enforce BLM's mandatory legal duties under the GSA.

failed to satisfy these requirements; and (3) BLM is, therefore, legally obligated to terminate the Unit but has failed to do so. FAC at ¶¶ 37-41, 47-54, 65-73, 82-83. These causes of action are typical APA "failure to act" claims, actionable under section 706(1) of the APA, which "empowers" a court "to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter.'" Singh v. Napolitano, 909 F. Supp. 2d 1164, 1171 (E.D. Cal. 2012).

Nothing in Pit River II even hints that Plaintiffs' run-of-the-mill APA claims seeking to enforce BLM's statutory obligations fall outside the GSA's "zone of interests." The phantom holding that Defendants try to graft onto Pit River II would undermine the ability of the public and the courts to hold an agency accountable under the APA for compliance with law – a result the Supreme Court has firmly and repeatedly rejected in its zone-of-interests cases. The GSA established fixed lease terms and diligent efforts requirements so that lessees will either timely explore and develop the leased federal lands or expeditiously return them to other public uses. Here, as the Supreme Court recognized in Patchak, "neighbors to the [use of the land at issue] . . . are reasonable – indeed, predictable – challengers" to the agency's non-compliance with the GSA's requirements, and their interests satisfy the undemanding zone-of-interests test. 567 U.S. at 227-28.

II. Plaintiffs' APA Claims for Ongoing Violation of the GSA's Requirements Are Not Barred by the Doctrine of Res Judicata.

Defendants' res judicata arguments are even less tethered to reality. Defendants insinuate that Plaintiffs are engaged in the kind of vexatious litigation that the res judicata doctrine is designed to prevent, claiming that "this case fits squarely within the purposes of claims preclusion." Fed. Def. MPA at 11. To support these conclusory factual assertions, however, they offer nothing but rote recitations of the legal test. As discussed at length above, the concrete and specific claims for ongoing violations of law alleged in the present case were not previously pled or litigated in any prior case, could not have been adjudicated in Pit River II's (or Pit River I's) challenge to the 1998 lease extension decisions, and continue to accrue right now, in real time,.

While Defendants correctly state the basic claim-preclusion test, they neglect to explain how it works when, as here, the new claim is one for ongoing violation of law. Claim preclusion only bars a later claim where "(1) the same parties, or their privies, were involved in the prior litigation, (2) the

prior litigation involved the same claim or cause of action as the later suit, and (3) the prior litigation was terminated by a final judgment on the merits." Cent. Delta Water Agency v. United States, 306 F.3d 938, 952 (9th Cir. 2002) (citing Blonder–Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313, 323-24 (1971)). And, of course, res judicata does not bar claims that were pled but voluntarily dismissed and not adjudicated. Hells Canyon Pres. Council v. U.S. Forest Serv., 403 F.3d 683, 691 (9th Cir. 2005). Because Pit River II reached final judgment with some of the same parties named here, Defendants' motion turns solely on the second factor – whether the case involves the "same" claim or cause of action previously adjudicated, often called "identity of claims."

In determining whether there is an "identity of claims" sufficient to find claim preclusion, courts consider four factors:

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

Howard v. City of Coos Bay, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting Harris v. Cty. of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012)). The last of these criteria is the most important. Id. In applying this test, the Court "must narrowly construe the scope of [the] earlier action." Cent. Delta Water Agency, 306 F.3d at 953; see, e.g., Fund for Animals v. Lujan, 962 F.2d 1391, 1398 (9th Cir. 1992) (holding that prior NEPA action alleging failure to prepare an EIS in connection with agency action allowing bison to leave a protected wilderness area did not preclude later NEPA suit for failure to prepare an EIS for agency's proposed plan to preserve the size of a bison herd in Yellowstone National Park, "even though the harm alleged was the same" in both cases).

It is also axiomatic that "[a] claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim." Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000); see also Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 328 (1955) ("While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case."). Thus, even when claims are factually similar, res judicata cannot bar "claims that accrue after the filing of the operative

complaint." Howard, 871 F.3d at 1039-40; Media Rights. Techs. v. Microsoft Corp., 922 F.3d 1014, 1021, 1023-24 (9th Cir. 2019) (holding that *res judicata* could not bar plaintiffs' second copyright infringement lawsuit because defendants continued to sell offending products after plaintiffs filed the first suit). As alleged in the Complaint, Defendants' violations of law accrue anew each and every day that BLM fails to terminate Lease 12372 and the Unit for ongoing non-compliance with the GSA. See Complaint at ¶¶ 80, 83. These new, distinct, continuously-accruing claims for ongoing violation of law are not in any way barred by the doctrine of res judicata.[6]

First Cause of Action. As explained above, Plaintiffs' first cause of action alleges that BLM has a legal duty to terminate Lease 12372 for non-compliance with the GSA's diligent efforts requirements. Plaintiffs have never challenged the ongoing validity of Lease 12372 – or anything else about this Lease – in Pit River I, in Pit River II, or in any other case. And Defendants do not actually claim otherwise. Instead, they complain that the Complaint alleges "many of the same" background facts regarding "lease productivity and unit formation" and "the same environmental, cultural, and spiritual interests" alleged in Pit River II. Fed. Def. MPA at 12-13. Accurate but irrelevant. Such historical background allegations are not "claims" and thus do not factor into the claim-preclusion test.

Without bothering to actually apply the claim-preclusion test, Defendants simply declare that "[c]onsidering all four factors, and weighing the fourth most heavily," the test is met. Fed. Def. MPA at 13. But not a single one of the four factors in the "identity of claims" test applies here:

(1) Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action? **No.** *Pit River II established that BLM unlawfully extended 26 non-producing leases. The first cause of action here alleges that BLM has unlawfully failed to terminate potentially-productive Lease 12372. The two claims are unrelated in subject matter, legal violation, or time.*

(2) Whether substantially the same evidence is presented in the two actions? **No.** *In Pit River II, BLM produced an administrative record to support its 1998 administrative decision to continue the 26 non-producing leases and its 2002 approval of the Telephone Flat project. Although some of those documents may shed historic light on BLM's early management of the Glass Mountain area, the relevant evidence in support of Plaintiffs' first cause of action in the present case will concern Calpine's and BLM's ongoing activities and actions, especially during the two decades since the Pit River II record was closed.*

[6] See also Argument IV, infra, regarding claim accrual and the statute of limitations.

(3) Whether the two suits involve infringement of the same right? **No.** *Pit River II adjudicated whether BLM lawfully could continue the 26 non-producing leases for up to 40 years pursuant to former GSA section 1005(a). The first claim in the present case will adjudicate whether the holder of potentially-productive Lease 12372 is making diligent efforts toward development and, if not, whether BLM is required by law to terminate the Lease pursuant to current GSA sections 1005(g)-(h) and the implementing regulations.*

(4) Whether the two suits arise out of the same transactional nucleus of facts? **No.** *In Pit River II, the transactional nucleus of facts centered on the 1998 administrative decision to continue the 26 non-producing leases. The transactional nucleus of facts for the first claim in this case concerns the current actions and inactions of Calpine and BLM in connection with diligent efforts to develop the potentially-productive Lease.*

Ignoring this required four-part analysis, Defendants focus on the fourth factor, but even there, they get it wrong. Defendants argue: "In both matters, Plaintiffs plead facts allegedly establishing injury because of the same set of BLM practices under the Steam Act." Fed. Def. MPA at 13 (citing Liquidators of European Fed. Credit Bank for the proposition that "if the harm arose at the same time, then there was no reason why plaintiff could not have brought the claim in the first action"). This statement is both factually and legally wrong. Factually, Plaintiffs here do not allege or rely on "the same set of BLM practices." Pit River II challenged BLM's decision in 1998 to extend 26 non-producing leases for 40 years because of their location in the Unit; this case, in stark contrast, challenges BLM's current ongoing practice of allowing Lease 12372, a lease extended years before on different grounds, to remain in effect when no diligent efforts have occurred for decades. These quite different "wrongs" did not arise out of the same BLM conduct.

And legally, res judicata does not preclude claims merely because a plaintiff potentially could have joined them in the prior suit. As the Ninth Circuit has explained, "the phrase 'claims that were raised or could have been raised,'" as used in the identity-of-claims test, "refers to legal theories arising out of the same transactional nucleus of facts, rather than to distinct causes of action." Hells Canyon, 403 F.3d at 691, fn.2. That is, the only claims precluded are those arising out of the same legal theory and nucleus of facts. "The contrary reading," the Court noted, "would suggest that any cause of action that could have been joined in the original action would be precluded, a point we rejected over four decades ago." Id. (emphasis added); Bankers Tr. Co. v. Pac. Employers Ins. Co., 282 F.2d 106, 111 (9th Cir. 1960) (holding "res judicata requires identical causes of action. . . The test of a cause of action for res judicata purposes is the identity of facts essential to maintaining the

two suits; if the facts show only one right of the plaintiff and one wrong by the defendant involving that right, there is only one cause of action."); Gallagher v. Frye, 631 F.2d 127, 130 (9th Cir. 1980) ("This Circuit has refused to apply res judicata to bar a second suit on a claim related to an earlier claim when the second claim could, but was not required, to have been joined in the first action.").

Here, Plaintiffs likely could not have challenged the ongoing validity of Lease 12372 for lack of diligent efforts when they filed Pit River II because Calpine had only recently purchased Lease 12372, BLM had only recently approved a massive development project on the Lease, and Calpine continued to pay rent on the Lease and profess its plans to go forward with the development. At that time, Plaintiffs possessed insufficient factual evidence of non-diligence on Lease 12372 to satisfy their pre-filing Rule 11 obligations. It was not until Calpine subsequently filed bankruptcy in 2006 and BLM later disclosed in 2012 its withdrawal of project approval for Lease 12372 that Plaintiffs came to understand the full magnitude of the Lease's dormancy. As the Supreme Court has explained, when subsequent factual development shows harm that was too remote or speculative to afford relief in an earlier suit, claims based on events that postdate the filing of the initial complaint are not barred by res judicata. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2305, 195 L. Ed. 2d 665 (2016); see also Howard, 871 F.3d at 1040 (plaintiff has no obligation to amend initial complaint to add claims that later accrued in order to avoid claim preclusion).

Second Cause of Action. Defendants spend even less effort on their argument that Plaintiffs' second cause of action – seeking termination of the Unit for several reasons – is barred by claim preclusion. Rather than apply Howard's identify-of-claims test to this cause of action – perhaps because none of the four factors are satisfied here – Defendants resort to outright falsehoods. First, they argue that Plaintiffs' second cause of action here is "the same claim" that Plaintiffs pled and abandoned in Pit River II. Fed. Def. MPA at 13 (citing Pit River II First Am. Compl. ¶¶ 107(a)-(b)). This statement is manifestly untrue, as even a cursory look at the cited paragraph shows. In those paragraphs, Plaintiffs alleged that BLM (1) "Unlawfully failed to terminate or eliminate the Leases from the Glass Mountain Unit Agreement" and (2) "Unlawfully failed to contract the Glass Mountain Unit Agreement to include only Lease CA12372." Pit River II, ECF Dkt Entry 44-1, First Amended Complaint at ¶¶ 107(a)-(b) (emphasis added). The capitalized term "Leases" is explicitly defined as

the 26 non-producing leases, not including Lease 12372 – the only lease at issue in the present case. Id. at ¶ 1.[7] In other words, Plaintiffs asserted in Pit River II that the Court should terminate the 26 non-producing leases and eliminate them from the Unit, thereby reducing the size of the Unit to include only Lease 12372. Plaintiffs did not plead a cause of action that the Unit itself should be terminated for lack of diligence on remaining Lease 12372 or for any other reason. Nor could they have done so at that time. Because the validity of Lease 12372 was not at issue in Pit River II and Calpine was preparing to construct the Telephone Flat generating plant on that remaining Lease, there simply was no colorable claim at that time for terminating the entire Unit.

Building on this demonstrably false premise that the prior and new claims are identical, Defendants then engage in a classic act of misdirection. They argue that Plaintiffs have forever "waived" any right to challenge the continuing validity of the Unit because they abandoned their claim in Pit River II to eliminate the 26 non-producing leases from the Unit. The non-identity of the past and current claims discussed above should end the inquiry. Plaintiffs could not possibly have forever "waived" a claim they never brought.

But even taken at face value, Defendants argument is wholly specious. Let's assume, contrary to the plain facts, that the Pit River II complaint did seek to terminate the entire Glass Mountain Unit. During the 2013 hearing on Defendants' motions for judgment on the pleadings, this Court held that, pursuant to the parties' stipulation for filing of the First Amended Complaint in Pit River II after withdrawal of the Telephone Flat project, Plaintiffs had voluntarily "abandoned" the claims in paragraphs 107(a) and (b) relating to the elimination of the 26 leases from the Unit and its contraction to include only Lease 12372. See Pit River II Reporter's Transcript (July 10, 2013), ECF Dkt. Entry 80, at 1-3. In its written decision following the hearing, the Court stated: "During the hearing, plaintiffs explained that those paragraphs [107(a), (b), (c) and (e)] are alleged only as facts supporting their claim that the May 18, 1998 lease continuation was unlawful, and acknowledged that the statute of limitations precludes relief for those allegations as violations of the Geothermal Steam Act in their own right." Pit River II, 2013 WL 12057469 at *3, fn.2, ECF Dkt. Entry 84, at page 5 of

[7] By erroneously omitting the capitalized and defined term "Leases" from their direct quote of the Pit River II complaint, Fed. Def. MPA at 13, Defendants are playing very fast and loose with the truth.

9, fn. 2 (July 30, 2013).

The law is clear that such voluntary abandonment of claims prior to adjudication does not implicate the res judicata doctrine. Hells Canyon, 403 F.3d at 691. There, the Court held that res judicata did not bar a claim that plaintiffs voluntarily withdrew at oral argument because that claim "was no longer before" the court at the time of final judgment on the merits. Id. at 686. The Court explained that "the final judgment prong of the res judicata test is claim-specific." Id. That is, "res judicata doctrine focuses on an identity of *claims,* specifying that 'a valid final adjudication *of a claim* precludes a second action *on that claim* or any part of it.'" Id. (quoting Baker ex rel. Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 n. 5 (1998)). Accordingly, even if Plaintiffs' had pled a claim to terminate the entire Glass Mountain Unit in 2004 – again, the record is clear that they did not – voluntary abandonment before trial cannot have any preclusive effect.

Trying to avoid this dispositive precedent, Defendants imbue some magical power to the Court's use of the word "waived" in its written decision (as opposed to its use of the word "abandoned" at oral argument), although they offer no legal authority to support such a consequential distinction. The Court used those words interchangeably to mean that Plaintiffs agreed by stipulation not to pursue a claim for elimination of the 26 leases from the Unit or for the Unit's contraction to include only Lease 12372. Based on that voluntary stipulation, the Court did not adjudicate any question regarding Calpine's diligent efforts on the 26 non-producing leases, and it certainly never suggested that Plaintiffs were precluded from raising future legal claims about ongoing diligence within the Unit. To the contrary, at the April 19, 2016 summary judgment hearing on the GSA claim, the Court and Plaintiffs' counsel engaged in the following colloquy:

> MS. TAKEMOTO-CHOCK: . . . I'd also like to point out that according to the record, there has been no activity on these [26] leases since 1991. There's been no drilling on the leases. And to the best of our knowledge, even after 1998, there's not been activity on these leases. So for these reasons, we believe that these leases should have already expired.
>
> THE COURT: That's your other lawsuit though. That's your next lawsuit. That's not this lawsuit. This lawsuit is only about whether what they did in 1998 was legal, valid, and I've said no.

Reporter's Transcript, ECF Dkt. Entry 139, at 39-40. After this Court, affirmed by the Ninth Circuit, held that the 26 non-producing leases were unlawfully extended and set them aside, Plaintiffs had no

need pursue a new suit concerning non-diligence on those now-invalidated leases.

But more to the point here, the Court's conclusion in Pit River II that Plaintiffs' voluntarily agreed to forego any claim that BLM should have terminated the 26 non-producing leases and eliminated them from the Unit – whether styled as stipulation, abandonment, or waiver – has no bearing on the current claim that the whole Unit should now be terminated for lack of diligence on Lease 12372 during the many years since then. Simply put, there is no "identity of claims."

III. Plaintiffs Have Stated Colorable APA Section 706(1) Claims for Ongoing Failure to Act in Compliance with the GSA Legal Mandates.

Defendants' next argument – that the Complaint fails to state a claim for relief under APA section 706(1) – is equally meritless. Federal Defendants contend that Plaintiffs do not identify any provision of law that requires termination of the Lease or the Unit. Fed. Def. MPA at 14-15. This argument is flatly wrong. As discussed at length above, the Complaint meticulously identifies the source of BLM's legal duties and the alleged facts to support BLM's violation of those duties.

For its part, Calpine repeats BLM's erroneous contention that "Plaintiffs cite no specific regulation" that requires termination, but then goes further; it contends that (1) the current GSA regulations do not apply to Plaintiffs' claims and (2) even if they do apply, BLM has "broad discretion" not to comply with them. Calpine MPA at 8-9. The first of Calpine's additional arguments is factually incorrect. As Federal Defendants concede in their memorandum (Fed. Def. MPA at fn.1), Calpine affirmatively elected to have the administration of its leases governed by the current regulations, which are the ones Plaintiffs are seeking to apply here. Indeed, in earlier litigation before this Court, and then later before the Ninth Circuit, Defendants touted this election when they thought it would serve their ends. Sivas Decl., Exh. E; see also Pit River I, 615 F.3d 1069, 1084 (9th Cir. 2010) (subsequent appeal where Court found that noting that Calpine exercise the § 3200.7 election in 2008). Now, Calpine pretends it never made that election.[8]

[8] Calpine cleverly attempts to avoid making outright falsehoods to the Court by stating that "BLM's continuation decision for Lease CA12372 is governed by the version of BLM's regulations which were in place when the 1991 lease decision was made—not the current regulations." Calpine MPA at 8, ll. 14-16. But of course, the present case is not at all about "BLM's continuation decision" in

Calpine's second argument goes to the merits of Plaintiffs' legal claims and is not properly resolved on a motion to dismiss. Unsurprisingly, Defendants disagree about the scope of BLM's legal duties under the GSA and its implementing regulations, but that dispute is a question to be adjudicated by the Court after factual development and full briefing of the merits. In the Complaint, Plaintiffs more than adequately allege legal duties that may be compelled under the APA.

In particular, under APA section 706(1), a reviewing court may compel an agency to take any discrete action that the law requires the agency to take, and the term law "includes, of course, agency regulations that have the force of law." Norton, 542 U.S. at 65. An agency's ability to exercise discretion in discharging its duty does not defeat a section 706(1) claim. Id. (explaining that if "the manner of its action is left to the agency's discretion, a court can compel the agency to act"). Although a plaintiff cannot compel compliance with the kind of "broad statutory mandates" at issue in Norton, plaintiffs adequately state a claim under section 706(1) where they "have alleged both a legal duty to perform a discrete agency action and a failure to perform that action." Vietnam Veterans of America v. Central Intelligence Agency 811 F.3d 1068, 1079 (9th Cir. 2016). In Vietnam Veterans, plaintiffs alleged that (1) the applicable regulations imposed a legal obligation on the Army to warn past test subjects, "on an ongoing basis," about "newly acquired information regarding their health as that information becomes available," id. at 1075-76, and (2) the Army had "refused to perform that duty." Id. at 1079. In affirming the trial court's grant of summary judgment for plaintiffs, the Court acknowledged that the Army necessarily exercises discretionary judgment in how to identify and notify past subjects, but held that "discretion in the manner in which the duty may be carried out does not mean that the Army does not have a duty to perform a 'discrete action' within the meaning of § 706(1) and [Norton]." Id.

The claims in the instant case closely track those in Vietnam Veterans. With respect to the first cause of action, the Complaint contains detailed allegations concerning (i) BLM's legal obligations under the current production extension regulations (at 43 C.F.R. section 3207.15), which implement GSA section 1005(g)-(h), to ensure lessee compliance with the statute's diligent efforts

1991; as explained above, this case exclusively concerns ongoing administration of the Lease 12372 under the current regulations.

requirements and (ii) BLM's ongoing failure to satisfy these legal obligations. See supra, at pp.5-8; Complaint ¶¶ 29-35, 57-64, 79-80. In particular, where, as here, there has never been any actual production on the Lease, the regulations require that the lessee "must demonstrate on an annual basis that you are making diligent efforts toward utilization of the resource," 43 C.F.R. § 3207.15(c), and they provide that the "production extension" will continue only "as long as" those diligent efforts are being demonstrated. Id. § 3207.15(g). If the lessee fails to make the requisite annual demonstration of diligent efforts, "BLM will terminate [the] lease unless you meet the conditions set forth in § 3212.15 or § 3213.19." Id. (emphasis added). Tracking these legal duties, the Complaint alleges that Calpine has not and cannot demonstrate compliance with the diligent efforts requirements and thus BLM is legally obligated to terminate the Lease – a "specific, unequivocal command" that the Court can order an agency to follow. Norton, 542 U.S. at 63 (quoting ICC v. New York, N.H. & H.R. Co., 287 U.S. 178, 204 (1932)).[9] Nothing further is required to withstand a motion to dismiss. See, e.g., Waterkeepers, 375 F.3d at 921 (rejecting defendant's argument "that citizen plaintiffs must prove a violation of the [law] before jurisdiction attaches" and holding that "an *allegation* is sufficient to confer jurisdiction").

With respect to the second cause of action, the Complaint contains detailed allegations concerning (i) BLM's legal obligations under the Glass Mountain Unit Agreement and current unit agreement regulations (at 43 C.F.R. Part 3280), which implement GSA section 1017, to ensure that units remain in the public interest and (ii) BLM's ongoing failure to satisfy these legal obligations.

[9] On the merits, of course, Defendants may – and undoubtedly will – try to show that they are in compliance with the GSA and its implementing regulations or are otherwise entitled to some exemption, but those arguments depend upon the development of facts, and a motion to dismiss for failure to state a claim under Rule 12(b)(6) is not the proper venue to resolve any such factual dispute. See, *e.g.*, Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001) ("A claim may be dismissed only if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"); United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) ("[E]ven if the face of the pleadings indicate that recovery is very remote, the claimant is still entitled to offer evidence to support its claims."); Kawi Fun Wong v. U.S., 373 F.3d 952, 962 (9th Cir. 2004) ("[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

See supra, at 8-10; Complaint at ¶¶ 37-41, 47-54, 65-73, 82-83.[10] Specifically, the Glass Mountain Unit Agreement requires that the Unit operator continue diligent exploration through timely drilling under an approved plan of operation until there is actual production of geothermal resources, and it specifies that failure to comply with these requirements "shall" result in automatic termination of the Unit Agreement. Complaint at ¶¶ 66-67. The regulations likewise provide that if the unit operator fails to drill wells as specified in the Unit Agreement, "BLM will deem the unit agreement void." 43 C.F.R. §3284.3. Additionally, GSA section 1017 and the implementing regulations allow a unit only where it is deemed in the "public interest," which "means operations within a geothermal unit resulting in: (1) Diligent development; (2) Efficient exploration, production and utilization of the resource; (3) Conservation of natural resources; and (4) Prevention of waste." Id. § 3280.2. The Complaint alleges that BLM is legally obligated to terminate the Glass Mountain Unit because there has been no annual diligence report or exploratory drilling in the Unit for more than two decades, there is no approved plan of development or operations for the Unit, there has never been any actual production, and continuation of the Unit to accommodate a single leasehold and single lessee is no longer in the public interest. Id. ¶¶ 68-73. Again, Defendants may contest these factual allegations on the merits or alleged legal excuses for their noncompliance, but Plaintiffs have alleged violation of specific and discrete legal obligations sufficient to state a claim under APA section 706(1).[11]

IV. Plaintiffs' APA Claims for Ongoing Violation of the GSA's Requirements Are Not Barred by any Statute of Limitations.

In their final attempt to block judicial scrutiny of BLM's ongoing violation of its statutory mandates, Defendants resort to a strange "statute of limitations" argument that seems more confused than cogent. They argue that Plaintiffs claims are "eighteen years too late" or accrued "twenty-four

[10] As the Supreme Court has explained, binding regulations can be sources of legal duties that support a section 706(1) claim, Norton, 542 U.S. at 65, as can contracts and agreements. See Mobil Oil Exploration & Producing Se., Inc. v. United States, 530 U.S. 604, 608 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (internal quotation marks omitted)).

[11] Moreover, with respect to the second claim to terminate the Unit, if Plaintiffs prevail on their first cause of action and invalidate the last remaining Lease 12372, there will no longer be any valid lease to hold the Glass Mountain Unit in place.

years ago" (Fed. Def. MPA at 15) and that these claims are an "end run" around an untimely challenge to BLM's continuation of Lease 12372 in 1991 or BLM's original approval of the Glass Mountain Unit in 1982 (Calpine MPA at 10-11). The Court need not expend much effort on these fatuous arguments. The Complaint makes crystal clear: "Plaintiffs do not here challenge BLM's issuance of the Lease in 1982, BLM's conclusion in 1989 that the Lease at that time contained a well capable of producing geothermal steam in commercial quantities, or BLM's decision in 1991 to continue the Lease for so long thereafter as Calpine undertakes diligent efforts to produce and utilize geothermal in commercial quantities." Complaint at ¶ 2; see also id. at ¶ 56. To repeat, Plaintiffs only challenge BLM's ongoing failure to act, not a distinct agency action that triggers a statute of limitations. Current GSA sections 1005(g)-(h) and the implementing regulations at 43 C.F.R. § 3207.15 allow a production extension for Lease 12372 only for "so long as [BLM] determines that diligent efforts are being made toward the utilization of the geothermal steam." The law thus imposes an ongoing duty on the lessee to undertake diligent efforts and an ongoing duty on BLM to conduct annual reviews to ensure that such efforts occur.[12]

No statute of limitations applies to Plaintiffs' ongoing violation claims. This is so because such claims "do[] not complain about what the agency has done but rather about what the agency has yet to do." Wilderness Soc'y v. Norton, 434 F.3d 584, 589 (D.C. Cir. 2006). Thus, BLM's ongoing failure to satisfy its legal obligations under the GSA accrues continually until the agency complies with the law. Earle v. District of Columbia, 707 F.3d 299, 307 (D.C. Cir. 2012) (holding that where a statute "imposes a continuing obligation to act, a party can continue to violate it until that obligation is satisfied and the statute of limitations will not begin to run until it does") (quoting AKM LLC dba Volks Constructors v. Sec'y of Labor, 675 F.3d 752, 763 (D.C. Cir. 2012)); Appalachian Voices v. McCarthy, 989 F. Supp. 2d 30, 44 (D.D.C. 2013) (holding that where statute imposed continuing obligation to review regulations, agency "continue[s] to violate it until that obligation is satisfied").[13]

[12] Lease 12372 and the 1991 continuation decision reflect the same continuing duties. Sivas Decl., Exh. A at 1 ("Sec. 2 Term") and Exh. C at 2.

[13] See also In re Bluewater Network, 234 F.3d 1305, 1312-15 (D.C. Cir. 2000) (finding no time bar where claims did not arise from past conduct but from "what the Coast Guard has since failed to

This jurisprudence is entirely logical because where the statutory violation is a continuing one, any "staleness concern disappears." Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982).[14]

Implicitly conceding this basic point, Defendants instead assert half an argument: "The Statute of Limitations Precludes Review of the Alleged Violations Before 2013." Fed. Def. MPA at 15. This argument is meaningless where, as here, Plaintiffs seek only future injunctive relief and abatement of the violation, not damages for past conduct. The factual history of Calpine's and BLM's conduct, before and after 2013, is not a "claim" barred by the statute of limitations, but merely evidence of Defendants' ongoing violation. The Court may properly consider the factual history of Defendants' conduct on the Lease and in the Unit in deciding whether BLM is today, in

---

do"); S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1232 (10th Cir. 2002) (observing that an agency's ongoing failure to act results "in an ever-green cause of action for failure to act"); Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth., 480 F.3d 410, 419 (6th Cir. 2007) (finding that an ongoing failure to act claim "manifests itself each day the plan operates"); Defs. of Wildlife v. Jewell, No. CV-14-02472-TUC-JGZ, 2015 WL 11182029, at *9 (D. Ariz. Sept. 30, 2015) (holding that "[b]ecause Plaintiffs have alleged an ongoing failure on the part of the [agency] to perform a duty that is required by statute, Plaintiffs have alleged sufficient facts to state a claim under the ESA and the APA"); Pub. Citizen, Inc. v. Mukasey, No. C08-0833MHP, 2008 WL 4532540, at *7 (N.D. Cal. Oct. 9, 2008) (holding that "there is no limitations period specifically applicable to unreasonable or unlawful delay claims under the APA"); Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv., No. 07-CV-358-PK, 2007 WL 4117978, at *6 (D. Or. Nov. 16, 2007) (concluding that "each day that [the agency] does not designate critical habitat for the Oregon chub as required constitutes a single, discrete violation of the statute"); Save the Valley, Inc. v. United States EPA, 223 F.Supp.2d 997, 1001 n. 1 (D. Ind. 2002) (concluding that "a failure to act cannot logically ever trigger a statute of limitations"); S. Appalachian Biodiversity Project v. U.S. Fish and Wildlife Serv., 181 F.Supp.2d 883, 887 (E.D. Tenn. 2001) (explaining that "statute of limitations commences to run anew each and every day that the Service does not fulfill the affirmative duty required of it"); Am. Canoe Ass'n v. EPA, 30 F.Supp.2d 908, 925 (E.D. Va. 1998) (finding no time bar for a section 706(1) claim because "application of a statute of limitations to a claim of unreasonable delay is grossly inappropriate").

[14] Defendants' reliance on Shiny Rock Mining Corp. v. United States, 906 F.3d 1362 (9th Cir. 1990), and Wind River Mtn. Corp. v. United States, 946 F.2d 710, 713 (9th Cir. 1991), is misplaced. Those cases challenged agency action, and the Court correctly found that the general six-year statute of limitations began to run on the date of the action or the date that plaintiff had constructive notice of the action. Here, there is no action – only ongoing inaction by BLM. Where an agency engages in such a series of "repetitive discrete violations" by failing to act in compliance with law, each new day of inaction constitutes an "independently actionable individual causes of action" under APA section 706(1) and thus no statute of limitation accrues until and unless the agency takes the required action. Nat'l Parks Conservation Assoc. 480 F.3d at 417-18 (distinguishing such ongoing violations from the different circumstance under the "continuing violation doctrine" where courts impose liability outside the applicable statute of limitations because a single violation is continuing over time).

2020, acting in ongoing dereliction of its continuing duties.

V. Plaintiffs Do Not Seek Relief Directly Against Calpine.

Finally, Calpine suggests that the Complaint improperly attempts to compel relief against a non-federal party, under the APA. Calpine MPA at 11-15. In particular, Calpine contends: "Because Plaintiffs' *only* basis for naming the Calpine Defendants as defendants in this case is as Rule 19 indispensable parties under *Espy*, Plaintiffs are barred from seeking any specific relief against them. The Court should therefore dismiss Plaintiffs' request for relief against Calpine in Plaintiffs' First and Fifth Prayer for Relief." Id. at 15. Much like Defendants' odd statute-of-limitations argument, this request is both perplexing and nonsensical.

The Complaint does not assert any claims against Calpine. Rather, it alleges: "Calpine is properly named as a defendant in this action because, in its absence, complete relief cannot be afforded to Plaintiffs. National Wildlife Federation v. Espy, 45 F.3d 1337, 1344 (9th Cir. 1995)." Complaint at ¶ 16. Calpine's inclusion in the case is necessary because Plaintiffs seek termination of a Lease and Unit Agreement to which Calpine is a party. Calpine does not dispute the propriety of being named or seek to have itself dismissed from the case. Indeed, Plaintiffs filed identical pleadings as to Calpine in Pit River I and Pit River II, and Calpine never objected; instead, it actively and vigorously participated in those cases to protect its interests.

Likewise, the Complaint does not seek any relief against Calpine. The First, Second, and Third Prayers ask the Court to find and declare, based on the facts and law that Plaintiffs will be put forward, that Calpine is not in compliance with its statutory and regulatory obligations under the Lease and Unit Agreement and that BLM, therefore, remains in ongoing violation of its legal duties by failing to terminate the privileges granted int these documents. Complaint at 18. Nothing in these paragraphs seeks "specific relief against" Calpine; they merely request predicate findings of fact. The Court has the inherent power to make factual findings necessary to adjudicate Plaintiffs APA claims against BLM. It is thus unclear what Calpine seeks to accomplish in asking the Court "to dismiss Plaintiffs' First Prayer for Relief in its entirety." Calpine MPA at 15.

Equally puzzling is Calpine's request that the Court "dismiss Plaintiffs' Fifth Prayer for Relief as it applies to Calpine." Calpine MPA at 15 (emphasis added). The Fourth Prayer seeks an order

directing "Federal Defendants to terminate the Lease and Unit," and the Fifth Prayer seeks to "[e]njoin any further activity in reliance on the Lease or Unit Agreement." Complaint at 18. Here again, it is unclear what Calpine means or seeks to accomplish in asking the Court to "dismiss" this Prayer "as it applies to Calpine." If the Court terminates the Lease and Unit and grants injunctive relief against further activity in reliance on them, no party may act in contravention. By seeking to limit this Prayer for Relief, does Calpine intend to exercise the invalidated Lease or Unit rights in violation of any injunction the Court might order? Calpine's request to "dismiss" the Fifth Prayer "as it applies to Calpine" is nonsensical and pointless.[15]

CONCLUSION

Despite their "kitchen sink" motions, Defendants do not offer a single legitimate basis for dismissing Plaintiffs' two well-pled, specific, and narrowly-tailored claims. This case has now been delayed for 18 months by Defendants' meritless procedural maneuvering. Accordingly, Plaintiffs respectfully ask the Court to deny the pending motions to dismiss and allow the case to proceed to the discovery phase.

Date: Sept. 29, 2020

Respectfully submitted,

ENVIRONMENTL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: _____
Deborah A. Sivas

Attorneys for Plaintiffs Pit River Tribe, et al.

[15] Because a Prayer for Relief is not a cause of action, a motion to dismiss does not appear to be the proper vehicle for whatever Calpine is hoping to accomplish. Perhaps Calpine intended to bring a motion to strike under Rule 12(f), which allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Such motions are highly disfavored. See, e.g., Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th Cir. 2000) (because "striking a party's pleadings is an extreme measure," such motions "are viewed with disfavor and are infrequently granted"). They "should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation" and then only when "prejudice would result to the moving party from denial of the motion." Platte Anchor Bolt, Inc. v. IHI, Inc., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004) (denying motion and explaining that such motions are frequently used as stalling tactics). In any event, Calpine did not timely bring a motion to strike and it is too late to do so now. Fed. Rule of Civ. Proc. 12(f).

CERTIFICATE OF SERVICE

I, Deborah A. Sivas, hereby certify that on September 29, 2020, I electronically filed the foregoing **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record registered with the CM/ECF System.

/s/
Deborah A. Sivas