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

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

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

Hon. John A. Mendez

CALPINE DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: July 28, 2020
Time: 1:30 p.m.
Courtroom: 6

Action Filed: April 15, 2019
Trial Date: None

NOTICE OF CALPINE DEFENDANTS' MOTION TO DISMISS

PLEASE TAKE NOTICE that on July 28, 2020 at 1:30 p.m. in the Robert T. Matsui United States Courthouse, Courtroom # 6, Judge John A. Mendez presiding, Defendants Calpine

Corporation and CPN Telephone Flat, Inc. (collectively "Calpine") will, and hereby do, make the following Motion to Dismiss in the above captioned case.

CALPINE'S MOTION TO DISMISS

Calpine hereby moves to dismiss the Plaintiffs' Amended Complaint (ECF 63), filed with this Court on May 7, 2020, under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. As detailed in Calpine's Memorandum in Support of Motion to Dismiss, and Federal Defendants' Motion to Dismiss and Memorandum in Support, Plaintiffs' Amended Complaint should be dismissed in its entirety. However, should the Court not dismiss Plaintiffs' Amended Complaint in its entirety, Calpine respectfully moves this Court to dismiss Plaintiffs' First and Fifth Prayers for Relief against Calpine under Fed. R. Civ. P. 12(b)(6). This motion is made following the conference of counsel pursuant to the Court's standing order which took place on February 21, 2020.

Calpine's Motion to Dismiss is based on this notice of motion, the supporting memorandum of points and authorities, the proposed order, and such other written and oral argument or evidence as may be presented at or before the time this Motion is taken under submission.

Dated: May 21, 2020

By: Rosemary Antonopoulos
Calpine Corporation

s/ *Thomas L. Sansonetti*

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

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

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INTRODUCTION

Plaintiffs filed their initial complaint in this case on April 15, 2019 in the United States District Court for the Northern District of California. *Pit River Tribe, et al., v. Bureau of Land Mgm't, et al*., No. 4:19-cv-02002-PJH (N.D. Cal., filed April 15, 2019), ECF 1 ("*Pit River III*"). This marked the latest chapter in Plaintiffs' nearly 20-year assault on the Bureau of Land Management's ("BLM") administration of Calpine's federal geothermal leases located in the Glass Mountain Area of three national forests in Northern California. In response, the Federal Defendants moved to dismiss Plaintiffs' complaint on five separate grounds. *Id*., ECF 31. Defendants Calpine Corporation and CPN Telephone Flat, Inc. (collectively, "Calpine") joined the Federal Defendants' motion to dismiss and separately moved to dismiss Plaintiffs' two prayers for relief that were specifically directed against Calpine. *Id*., ECF 35. On November 27, 2019, the Northern District granted Calpine's separate motion to transfer Plaintiffs' case to this district without deciding either the Federal Defendants' or Calpine's (collectively, "Defendants") motion to dismiss. *Id*., ECF 49.

On March 23, 2020, Plaintiffs moved this Court for leave to file Plaintiffs' First Amended Complaint. *Pit River Tribe, et al., v. Bureau of Land Mgm't, et al*., No. 2:19-cv-02483-JAM-AC (E.D. Cal.) (also, "*Pit River III*"), ECF 59. The Court granted Plaintiffs motion on May 4, 2020. ECF 62. Plaintiffs filed their Amended Complaint on May 7, 2020. ECF 63, ("Amended Complaint"). In their Amended Complaint, Plaintiffs dropped their third cause of action after the Defendants demonstrated that this claim was moot after BLM had in 2017 completed the very review and boundary constriction of the Glass Mountain Unit ("GMU") which the Plaintiffs sought and had even invited Plaintiffs in 2016 to participate in the public comment period as this unit review was underway. *Id*., ECF 31 at 16-17. Plaintiffs now attempt to avoid dismissal of their remaining two causes of action by: (a) clarifying that Plaintiffs are no longer challenging decisions BLM made in the 1980s and 1990s (ECF 63, ¶¶ 2, 56) and (b) eliminating Administrative Procedure Act ("APA") § 706(2) as an alternative basis for relief (ECF 63, ¶¶ 80, 83). Notwithstanding these revisions, Plaintiffs' Amended Complaint suffers

from most of the same fundamental defects as those in their original complaint and should be dismissed in its entirety.

Likewise, Plaintiffs' Amended Complaint continues to improperly request specific relief against Calpine. *See* ECF 63, at 18 (First and Fifth Prayers for Relief). This Court, however, lacks jurisdiction to enter relief against a non-federal party in a suit brought under the APA. And this jurisdictional bar applies even where courts allow plaintiffs to name non-federal entities such as Calpine as defendants. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 2337, 1244 (9th Cir. 1995) (Plaintiffs allowed to name private parties as defendants "even though [plaintiffs] did not have a direct cause of action against the [non-federal party] under the APA."). If the Court allows either of Plaintiffs' two remaining claims to proceed in any measure, the Court should, at a minimum, dismiss Plaintiffs' requested relief against Calpine.

FACTUAL BACKGROUND

As detailed below, and as this court is well-aware, Plaintiffs have a long history in challenging BLM decisions related to Calpine's geothermal leases and the GMU. BLM approved the GMU in May 1982. ECF 63, ¶ 54. BLM issued Lease CA12372 on June 1, 1982 *Id*. ¶ 36. Upon issuance, BLM committed Lease CA12372 to the GMU along with other geothermal leases. In 1989, BLM determined that Lease CA12373 contained a well capable of producing steam in commercial quantities: Well 31-17. *Id*. ¶¶ 55-56. Based on this capable well determination, in July 1991, BLM granted a lease continuation for Lease CA12372 for up to forty additional years. *Id*. ¶ 56.

A. *Pit River I* Litigation

In 2002, the Pit River Tribe and other plaintiffs brought suit against BLM and other federal agencies alleging that BLM violated the National Environmental Policy Act, the National Historic Preservation Act, the Geothermal Steam Act ("GSA"), the National Forest Management Act, and the government's trust responsibility to the Pit River Tribe. *Pit River Tribe v. BLM*, No. 02-cv-01314-JAM-JFM (E.D. Cal., filed June 17, 2002) ("*Pit River I*"). In particular, the plaintiffs challenged (a) BLM's decision to grant lease extensions under the GSA for two leases

owned by Calpine, which are not implicated in the current litigation, and (b) BLM's subsequent approval of Calpine's Four Mile Hill plan of development. The district court entered summary judgment for defendants and plaintiffs appealed to the Ninth Circuit Court of Appeals. *Pit River I*, 306 F. Supp.2d 929 (E.D. Cal. 2004). The Ninth Circuit reversed the district court's grant of summary judgment and remanded the case to the district court holding, in part, that the federal agencies should have prepared an environmental impact statement prior to granting the 1998 lease extensions. *Pit River Tribe v. BLM*, 469 F.3d 768, 782-84 (9th Cir. 2006).

On remand, this Court enjoined the defendants from conducting any surface-disturbing activities on the affected leases until the federal agencies completed supplemental environmental and cultural resources analysis and consulted with the Native American tribes. 2008 WL 5381779, at *1-2 (E.D. Cal. Dec. 23, 2008). This Court also ordered the federal agencies to vacate the 1998 lease extensions, but confirmed that BLM had discretion to extend, vacate, or modify the leases after proper environmental evaluation and consultation was completed. *Id*. The plaintiffs again appealed to the Ninth Circuit and sought termination of Calpine's two geothermal leases in their entirety. The Ninth Circuit rejected plaintiffs' appeal and affirmed this Court's remand order. *Pit River Tribe v. BLM*, 615 F.3d 1069, 1080-82 (9th Cir. 2010).

B. *Pit River II* Litigation

In 2004, the same plaintiffs filed another legal challenge against BLM related to its management of twenty-six geothermal leases in Calpine's GMU.[1] *Pit River Tribe v. BLM*, No. 04-cv-0956 (E.D. Cal., filed May 17, 2004) ("*Pit River II*"). In particular, plaintiffs challenged the validity of BLM's May 18, 1998 decision to grant an additional forty-year term for twenty-six of Calpine's GMU leases and asked the court to terminate these leases. On July 30, 2013, this Court granted judgment on the pleadings in favor of the defendants and held that: (1) plaintiffs lacked prudential standing to bring their GSA claims; and (2) because the lease

[1] The Save Medicine Lake Coalition and other organizations separately challenged BLM's May 18, 1998 decision, among other things. *Save Medicine Lake Coal. v. BLM*, No. 2:04-cv-969 (E.D. Cal., filed May 18, 2004). The *Save Medicine Lake* and *Pit River II* cases were later consolidated into one action, collectively referred to herein as *Pit River II*.

extensions were mandated by the GSA, BLM lacked the administrative discretion that would trigger the environmental and other obligations that applied to BLM's leasing decision in *Pit River I*. *Pit River II*, 2013 WL 12057469, at *3-9 (E.D. Cal. July 30, 2013).

The plaintiffs appealed this Court's decision, and on July 20, 2015, the Ninth Circuit reversed the district court and held that plaintiffs had prudential standing to challenge BLM's May 18, 1998 decisions. *Pit River Tribe v. BLM*, 793 F.3d 1147 (9th Cir. 2015). On remand, this Court granted plaintiffs' motion for summary judgment and vacated BLM's May 18,1998 decision as a violation of the GSA. However, the Court declined to cancel Calpine's twenty-six leases. *Pit River II*, ECF 144, Order re: Cross-Motions for Summary Judgment and Remedy Order (E.D. Cal. Aug. 2, 2016); *see also id*., ECF 155, Order Granting Plaintiffs' Motion to Amend Judgment and Amended Order re: Cross Motions for Summary Judgment and Remedy (E.D. Cal. Jan. 30, 2017). Instead, the Court remanded BLM's May 18, 1998 decision (and BLM's related May 18, 1998 decision vacating previous extensions for these leases) to BLM for further consideration, including whether an alternative provision of the GSA could support extensions of the twenty-six leases at issue. *Id*. BLM appealed the Court's decision, which was recently affirmed by the Ninth Circuit Court of Appeals. *Pit River Tribe v. BLM*, 939 F.3d 962 (9th Cir. 2019).

C. The Instant Litigation (*Pit River III*)

In their Amended Complaint, Plaintiffs allege two causes of action related to Calpine's GMU, which include Lease CA12372 and the leases at issue in the *Pit River II* litigation: (1) BLM allegedly violated its mandatory legal duty under Section 1005 of the GSA, its implementing regulations, and Lease CA12372 by unlawfully failing to terminate the Lease for noncompliance with the "diligent efforts" requirements of the GSA for at least the last 15 years and by failing to verify the continuing commercial viability of Well No. 31-17; and (2) BLM allegedly violated its mandatory statutory duty under Section 1017 of the GSA and its implementing regulations to terminate the GMU for no longer being in the public interest and for lack of diligent efforts by Calpine. ECF 63, ¶¶ 79, 82. Plaintiffs allege that the above violations

are "ongoing and continue[], from day to day, to the present time." *Id*. Among other relief, Plaintiffs ask the Court to "[d]eclare that Calpine is not in compliance with the requirements of the Geothermal Steam Act, its implementing regulations, the Lease, and the Unit Agreement and that such violations continue to this day." *Id.* at 18 (First Prayer for Relief), and "[e]njoin and further activity in reliance on the Lease or Unit Agreement." Id. (Fifth Prayer for Relief).

STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1), a motion to dismiss for lack of subject matter jurisdiction will be granted if the complaint, on its face, fails to allege facts sufficient to establish subject matter jurisdiction. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). When a party brings a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden to prove jurisdiction exists. *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995). There are two standards that can apply to a motion to dismiss under Rule 12(b)(1) depending on the nature of a party's challenge. *Crisp v. United States*, 966 F. Supp. 970, 971-72 (E.D. Cal. 1997). If a party brings a facial challenge, the court accepts the factual allegations in the complaint as true akin to a Rule 12(b)(6) motion. *Doe v. Schachter*, 804 F. Supp. 53, 56 (N.D. Cal. 1992). If a party brings a factual challenge, the court does not accept the plaintiff's factual allegations as true. *Thornhill Publ'g. Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Here, the Calpine Defendants bring both a facial challenge and factual challenge.

B. Federal Rule of Civil Procedure 12(b)(6)

Under Rule 12(b)(6), a plaintiff's complaint may be dismissed for "failure to state a claim upon which relief may be granted." A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim" in the complaint. *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The dismissal of a claim under Rule 12(b)(6) is appropriate when the complaint either: (1) lacks a cognizable legal theory; or (2) lacks factual allegations sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A motion to

dismiss under Rule 12(b)(6) is the "appropriate vehicle" for dismissing prayers for relief. *Huynh v. Northbay Med. Ctr.*, 2018 WL 4583393, at *4 (E.D. Cal. Sept. 25, 2018); *see also Walker v. McCoud Comty. Servs. Dist.*, 2016 WL 951635, at *2 (E.D. Cal. Mar. 14, 2016). Under a Rule 12(b)(6) motion to dismiss, courts may take judicial notice of matters of public record. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). In order to survive a motion to dismiss for failure to state a claim, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

ARGUMENT

I. Plaintiffs' Claims Are Outside the Zone of Interests of the GSA and Are Barred by Waiver and *Res Judicata*

The Federal Defendants have demonstrated that both of Plaintiffs' claims fall outside the zone of interests of the GSA. ECF 64 at 8-10. It is now settled that the interests Plaintiffs' allege here—environmental, cultural, spiritual, and aesthetic interests—do not fall within the zone of interests of either GSA § 1005(a) or § 1017 relied upon by Plaintiffs for jurisdiction. *See* ECF 63, ¶¶ 7-10, 79, 82. Likewise, Plaintiffs in *Pit River II* waived their second claim here (*see id.* at 7, 13) and both claims are barred by *res judicata*. ECF 64 at 11-14. Plaintiffs' Amended Complaint should be dismissed under either (or both) of these grounds. Calpine incorporates the Federal Defendants' zone of interests and wavier and *res judicata* arguments in their entirety.

II. Plaintiffs Fail to State a Claim for Relief Under Section 706(1) of the Administrative Procedure Act.

In their Amended Complaint, Plaintiffs have abandoned their claims for relief under section 706(2) of the APA, and now only seek relief for their remaining two claims under section 706(1) of the APA, 5 U.S.C. § 706(1). ECF 63, ¶¶ 80, 83. Section 706(1), which directs a court to "compel agency action unlawfully withheld or unreasonably delayed" can "only proceed where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. SUWA*, 542 U.S. 55, 64 (2004) (emphasis in original). Plaintiffs' amended claims for relief must fail as Plaintiffs cannot identify *any* discrete agency action that Federal

Defendants were legally required to take, yet have not taken.

A. Plaintiffs' first claim fails to identify any specific legal obligation for BLM to terminate Lease CA12372.

In Plaintiffs' first claim, they suggest that Federal Defendants "fail[ed] to terminate the Lease [CA12372] for noncompliance with the 'diligent efforts' requirements of the Geothermal Steam Act for at least the last 15 years". ECF. 63, ¶ 79. However, Plaintiffs' first claim fails to identify any discrete statutory duty, but instead refers generically to "the Geothermal Steam Act, 30 U.S.C. § 1005 and its implementing regulations" as the ground for Plaintiffs' cause of action. *Id*. Such generic pleading does not satisfy the stringent requirements for relief under APA § 706(1). *Hells Canyon Pres. Council v. U.S. Forest Service*, 593 F.3d 923, 933 (9th Cir. 2010) ("Allowing plaintiffs' claim to proceed would invite us to compel the [federal agency] to do something. . . not clearly mandated in the Act.").

BLM's decision to continue Lease CA12372 for forty years was made in 1991 pursuant to GSA § 1005(a). Section 1005(a) as it existed at that time provided "[i]f 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." 30 U.S.C. § 1005(a) (1988). The statutory term "produced or utilized in commercial quantities" is defined to include both "the completion of a well producing geothermal steam in commercial quantities" as well as "the completion of a well capable of producing geothermal steam in commercial quantities so long as the Secretary determines that diligent efforts are being made toward the utilization of the geothermal steam." 30 U.S.C. § 1005(d). BLM issued a decision in 1991 to continue Lease CA 12372 for forty years and Plaintiffs can point to no provision in § 1005(a) (or elsewhere in the GSA) that requires BLM to take any further discrete action—let alone action to terminate the lease—following BLM's initial continuation decision.

Similarly, the regulations in effect when BLM made its lease continuation decision do not require BLM to take any further action once the agency has continued a geothermal lease under

GSA § 1005(a). *See* 43 C.F.R. § 3203.1-3 (1988) (describing the 40-year production continuation under GSA § 1005(a) as an "additional term" and requiring no further action by BLM once agency grants such lessee additional 40-year term). *See also* 43 C.F.R. § 3207.100(b) (1988) (in answering question "When may I get an additional lease term beyond the primary term?" BLM's regulations provide "[i]f, before the primary or extended term end, you have a well capable of producing geothermal resources in commercial quantities, BLM may continue your lease for up to forty years beyond the primary term."). In short, neither the GSA nor BLM's regulations in effect when BLM continued CA12372 impose *any* mandatory duty on BLM to take any discrete action *after* BLM made its decision to continue CA12372 for an additional forty-year term.

While Plaintiffs cite no specific regulation in their first claim (see ECF 63, ¶ 79), they suggest elsewhere in their Amended Complaint that BLM's *current* geothermal regulations require BLM to take specific action regarding Lease CA12372. *See* ECF 63, ¶¶ 30-36. Plaintiffs are wrong. First, as discussed above, 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. *Pit River Tribe v. BLM*, 793 F.3d 1147, 1152, n. 9 (9th Cir. 2015) (confirming that BLM's 1988 regulations governed continuation requirements of GSA § 1005(a) for Lease CA12372).

Second, even if the current GSA regulations govern BLM's post-continuation obligations for Lease CA12372, nothing in the current regulations require BLM to take any discrete action once BLM has already continued the lease. For example, 43 C.F.R. § 3207.15(b) describes the steps BLM must take "[b]efore granting a production extension". Similarly, § 3207.15(c) describes certain prerequisites "to qualify for a production extension under paragraph (b)(2) of this section". As noted above, "paragraph (b)(2) (i.e., § 3207(b)(2)) involves actions a lessee must take *before* BLM grants a production extension.

As importantly, the criteria in § 3207.15(c) are not mandatory as they only apply "unless BLM specifies otherwise". As such, this section—which affords BLM broad discretion as to

whether to apply the criteria at all—cannot form the basis of a claim under APA § 706(1). *Norton v. SUWA*, 542 U.S. 55, 64 ("[APA] § 706(1) empowers a court to compel an agency 'to perform *a ministerial or non-discretionary act*,' or 'to take action upon a matter, without directing how it shall act." (emphasis added) (*citing* Attorney General's Manual on the Administrative Procedure Act (1947)).

Finally, 43 C.F.R. § 3207.15(g), which directs BLM to terminate leases on which the lessee "fail[s] to produce or utilize geothermal resources in commercial quantities" does not apply to leases that are suspended or leases for which the lessee pays certain advanced royalties. Given the various options available to both BLM and the lessee under this section, there is simply no "ministerial" or "non-discretionary act" upon which Plaintiffs may predicate a claim for relief under APA § 706(1).

B. Plaintiffs' second claim fails to identify any obligation for BLM to terminate the Glass Mountain Unit.

Plaintiffs second claim fares no better than their first. Instead of citing any specific statute that requires BLM to terminate the GMU, Plaintiffs broadly claim that "Federal Defendants have violated, and continue to violate, their mandatory statutory duty under section 1017 of the Geothermal Steam Act and it implementing regulations to terminate the Unit for no longer being in the public interest and for lack of diligent efforts by the unit operator." ECF 63, ¶ 82. Contrary to Plaintiffs' broad attack on BLM's administration of the GMU Agreement, no provision of GSA §1017—and Plaintiffs cite none—compels BLM to terminate the GMU. *See* 30 U.S.C. § 1017.

Similarly, Plaintiffs cite no specific regulation in their second claim that requires BLM to terminate the GMU. They also cite to no provision of Calpine's 1982 GMU Agreement that sets forth Calpine's obligations for the GMU. Elsewhere in their complaint, Plaintiffs discuss various provisions from BLM's current regulations regarding the model unit agreement. *See* ECF 63, ¶¶ 38-52. But Calpine's unit obligations are governed not by BLM's model unit agreement, but by Calpine's specific GMU Agreement that was approved by BLM in 1982 under the regulations

that existed at that time. Plaintiffs acknowledge this fact, (ECF 63, ¶ 54), but nonetheless identify *no* provision in Calpine's GMU Agreement that requires BLM to terminate this Agreement. *See id*. Similarly, no provision in BLM's model unit agreement cited by Plaintiffs—or BLM's current regulation governing the administration of geothermal units—requires BLM to terminate the GMU.

Recognizing that no specific statute or regulation requires BLM to terminate the GMU under the current circumstances, Plaintiffs broadly suggest "[t]aken all together, the unit agreement regulations (including the Model Unit Agreement) provide a regulatory scheme whereby individual leases may satisfy their statutory diligence obligations through participation in, and timely compliance with, a BLM-approved unit agreement that requires diligent exploration of the unit lands and continuing BLM-oversight to ensure protection of the public interest." ECF 63, ¶ 53. Based on Plaintiffs' own telling, their second claim represents a broad programmatic attack on BLM's administration of the GMU of the sort explicitly rejected by the Supreme Court. *Norton v. SUWA*, 542 U.S. 55, 64 ("Respondent cannot seek wholesale improvement of this program by court decree" (*citing Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990)).

C. Plaintiffs' APA § 706(1) claims are an attempt to revive claims against BLM that are time-barred by the six-year statute of limitations.

Plaintiffs' unsuccessful attempt to identify *any* specific statutory obligation that would compel BLM to terminate Lease CA12372 or the GMU reveals that their real complaint is against BLM actions taken decades ago. Ultimately, Plaintiffs are unhappy with BLM's 1991 decision to grant an additional 40-year term to Lease CA12372 under GSA §1005(a) and BLM's 1982 decision to approve the GMU Agreement under GSA §1017. *See, e.g*, ECF 63, ¶¶ 55, 57 (questioning the basis for BLM's decision that well 31-17 on Lease CA 12372 satisfied the "capable of production" requirement). But the time to challenge BLM's original lease continuation decision and GMU approval have long since passed. *See* 28 U.S.C. § 2401(a) ("civil actions against the United Sates shall be barred unless claim is filed within six years after

the right of action first accrues."). Like in *Hells Canyon Pres. Council*, Plaintiffs "reliance on § 706(1) is an attempt to end run around an insurmountable problem: [Plaintiffs'] argument is better phrased as a claim that the [BLM's lease continuation and GMU approval decisions] [were] 'arbitrary and capricious." But that claim—based on § 706(2)—is barred by the statute of limitations." *Id*., 593 F. 3d 923, 933.

The Ninth Circuit has made clear that plaintiffs cannot disguise their challenge to a time-barred agency decision as a claim for relief under § 706(1): "Permitting plaintiffs' § 706(2) claim to go forward under the guise of a §706(1) claim would undermine the important interests served by the statutes of limitations, including evidence preservation, repose, and finality." *Id*. Plaintiffs in this case attempt to thwart the six-year statute of limitations by claiming BLM has a current obligation to reverse decisions the agency made decades ago even though the controlling law imposes no such obligation on BLM. Plaintiffs' effort must be rejected.

III. Plaintiffs' Prayers for Relief Against Calpine Must be Dismissed

A. Plaintiffs lack standing to request relief against the Calpine Defendants.

In their Amended Complaint, Plaintiffs seek declaratory relief against Calpine, as well as injunctive relief by seeking to "[e]njoin any further activity in reliance on the Lease or Unit Agreement." *See* ECF 63, at 18, First and Fifth Prayer for Relief. However, for Plaintiffs to obtain relief against the Calpine Defendants, their specific claims must constitute a case or controversy against the Calpine Defendants. To meet the jurisdictional case-or-controversy requirement under Article III of the Constitution, a party must suffer an injury in fact. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact must be: "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical…." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The injury must also be "fairly traceable to the challenged action of the defendant" and "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* Plaintiffs must establish these requirements at "each stage of litigation . . . ." *Cent. Delta Water Agency v.*

United States, 306 F.3d 938, 947 (9th Cir. 2002).

Here, Plaintiffs allege no injury at all—concrete, actual or otherwise—related to actions of the Calpine Defendants. Plaintiffs also do not attempt to trace their injuries allegedly caused by BLM to the Calpine Defendants. Even so, Plaintiffs cannot suffer an injury resulting from any action by the Calpine Defendants because: (1) Plaintiffs are not parties to Lease CA12372 or the GMU Agreement; (2) Plaintiffs have no rights under Lease CA12372 or the GMU Agreement; and (3) Plaintiffs are not third-party beneficiaries to Lease CA12372 or the GMU Agreement. If the Calpine Defendants did not comply with Lease CA12372 or violated provisions of the GSA, the lessor—the BLM—would suffer the injury. As a result, BLM is the only entity with the statutory, regulatory, and contractual rights to redress any injury. Therefore, Plaintiffs lack standing and cannot meet the case or controversy requirement for the Court to have jurisdiction over requests for relief against Calpine.

B. No statute provides this Court with jurisdiction over Plaintiffs' requests for relief against Calpine.

In their First Prayer for Relief, Plaintiffs seek declaratory relief against the Calpine Defendants. ECF 63 at 18, First Prayer for Relief. The Declaratory Judgment Act permits courts to act on an "actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). But the Act "does not create an independent jurisdictional basis for actions in federal court." *Marathon Oil Co. v. United States*, 807 F.2d 759, 763 (9th Cir. 1986); *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161-62 (9th Cir. 2005). Rather, Plaintiffs must establish another basis for jurisdiction over the Calpine Defendants that provides for declaratory relief. Plaintiffs' Amended Complaint alleges three potential bases for jurisdiction: (1) federal question jurisdiction; (2) United States as a defendant; and (3) suits brought by Indian Tribes. ECF 63, ¶ 5. As detailed below, none of these applies. Similarly, the APA, which Plaintiffs cite as the basis for their specific causes of action (ECF 63, ¶¶ 80, 83), only provides for review of federal agency actions and does not authorize claims or requests for relief against non-federal parties.

As an initial matter, the federal question doctrine does not give the Court jurisdiction

because no federal question exists against Calpine. Federal question jurisdiction exists "to the extent a statute or regulation creates a private right of action." *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995, 998 (7th Cir. 2000). Here, the relevant statute and regulations—the GSA and BLM's regulations implementing the GSA—do not provide a private cause of action against *any* party, let alone the Calpine Defendants. *See Wagner v. Chevron Oil Co.*, 321 F. Supp. 2d 1195, 1206 (D. Nev. 2004) (finding no federal question jurisdiction because the GSA created no private right of action). Likewise, the statutes granting jurisdiction over the United States as a defendant and suits by Indian Tribes do not confer jurisdiction over private parties. *See* 28 U.S.C. §§ 1346, 1362. Neither statute addresses the ability to sue a private, non-federal party under the circumstances of this case.

Nor does the APA confer jurisdiction over a non-federal party such as Calpine. The APA allows for "[a] person suffering legal wrong because of *agency action*, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, [to seek] judicial review thereof." 5 U.S.C. § 702 (emphasis added); *see also id*. § 704 ("*Agency action* made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review" (emphasis added)). By its plain terms, the APA provides no right of action against a non-federal party.

Rather, "[u]nder the terms of the APA, [a plaintiff] must direct its attack against some particular *agency action* that causes it harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (internal quotations omitted) (emphasis added). The term "agency action" does not include actions of private parties. U.S.C. § 551(13) ("'*agency action*' includes the whole or a part of an *agency* rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act") (emphasis added).

As private, non-governmental entities, the Calpine Defendants cannot perform an "agency action" which is the predicate for any case brought pursuant to the APA. *See* 5 U.S.C. §§ 702-704, 706; *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1298 (6th Cir. 2007) (affirming district court's dismissal against non-federal defendants because "nothing in the APA

authorizes claims against nonfederal entities"); *Jonas v. Geren*, 2009 WL 10664192, at *9 (W.D. Tenn. June 9, 2009) ("[N]on-federal defendants are not 'agencies' as defined by the APA and, therefore, cannot be sued under the APA.") (citing *Southwest Williamson Cty. Cmty. Ass'n Inc. v. Slater*, 173 F.3d 1053 (6th Cir. 1999)). As a result, the APA does not provide jurisdiction for Plaintiffs to pursue relief against Calpine. None of the statutes cited in Plaintiffs' Amended Complaint provides the Court with jurisdiction to declare whether Calpine has complied with its lease or unit duties.

Finally, while the Ninth Circuit has recognized that non-federal parties may be named as defendants in APA actions for the "sole purpose of making it possible to accord complete relief between those who are already parties," this exception does not vest the court with jurisdiction over any claim or request for relief against non-federal parties. *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344-45 (9th Cir. 1995) (quoting *Beverly Hills Fed. Sav. & Loan Ass'n v. Webb*, 406 F.2d 1275, 1279 (9th Cir. 1969)). The Ninth Circuit has made clear that the only rationale for allowing non-federal parties to be named as defendants in APA actions is Fed. R. Civ. P. 19's joinder of indispensable parties. *Espy*, 45 F.3d at 1344. Rule 19 does not, and cannot, create any substantive cause of action against non-federal parties. *Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co.*, 400 F.3d 774, 783 (9th Cir. 2005) ("Joinder of the [non-federal Indian Tribe] does not, and cannot, create any substantive rights that the EEOC may enforce against the [non-federal party]").

Since Plaintiffs named the Calpine Defendants as "indispensable parties" under Rule 19 (ECF 63, ¶ 16), Plaintiffs are explicitly precluded from seeking any affirmative relief against them. *Quechan Indian Tribe v. U.S. Dep't of the Interior*, 2007 WL 2023487, at *8 (D. Ariz. July 12, 2007) ("[J]oinder of the non-federal Defendants, against whom no cause of action exists, cannot create substantive right that Plaintiff may enforce against the non-federal Defendants. Instead, *Plaintiff may only join the non-federal Defendants so long as Plaintiff seeks no affirmative relief against them*.") (emphasis added); *Peabody*, 400 F.3d at 783 ("[B]y definition, parties to be joined under Rule 19 are those against whom no relief has formally been sought but

who are so situated as a practical matter as to impair either the effectiveness of relief or their own or present parties' ability to protect their interests.") (internal quotations omitted).

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. *Quechan Indian Tribe*, 2007 WL 2023487, at *8 (dismissing claim for injunctive relief against non-federal defendants under Rule 12(b)(6)).

CONCLUSION

For the reasons discussed above, and in Federal Defendants' Motion to Dismiss and supporting Memorandum (ECF 64), Plaintiffs' Amended Complaint should be dismissed in its entirety. However, at a minimum, the Court must dismiss Plaintiffs' First and Fifth Prayers for Relief against Calpine. This case involves Plaintiffs' dissatisfaction with the Federal Defendants. The causes of action are against the Federal Defendants. The Plaintiffs' alleged grounds for jurisdiction may, if not barred on other grounds,[2] grant the Court jurisdiction to hear claims against the Federal Defendants. But nothing in Plaintiffs' Amended Complaint or in the law gives the Court jurisdiction to award relief against Calpine. If the Court concludes that the Calpine Defendants should be retained in the case as indispensable parties under *Espy*, Plaintiffs must be precluded from seeking any relief against them. Therefore, if the Court declines to dismiss the Plaintiffs' Amended Complaint in its entirety, the Calpine Defendants respectfully ask the Court to dismiss Plaintiffs' First Prayer for Relief in its entirety and dismiss Plaintiffs' Fifth Prayer for Relief as it applies to Calpine.

[2] As discussed above and in Federal Defendants' Motion to Dismiss, this Court also lacks jurisdiction to hear Plaintiffs' claims against the Federal Defendants.

Dated: May 21, 2020

CALPINE CORPORATION &
CPN TELEPHONE FLAT, INC.

By: Rosemary Antonopoulos
Calpine Corporation

s/ *Thomas L. Sansonetti*

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

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

[PROPOSED] ORDER ON MOTIONS TO DISMISS

This matter having come before the Court on Federal Defendants' and Calpine Defendants' respective motions to dismiss, and the memoranda of authorities in support thereof, it is hereby ordered that Federal Defendants' and Calpine Defendants' Motions are GRANTED. All claims against the Federal Defendants and Calpine Defendants are hereby DISMISSED for failure to state a claim and alternatively for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: _____, 2020

_____
Hon. John A. Mendez
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Andrew C. Emrich, hereby certify that on May 21, 2020, I electronically filed the **CALPINE DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record registered with the CM/ECF system.

/s/ *Andrew C. Emrich*

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