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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
NORTHERN DIVISION

UPPER SOUTH EAST COMMUNITIES COALITION,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS, *et al*,

Defendants.

Case No.: 3:13-cv-403-MMD-WGC

FEDERAL DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

The United States Army Corps of Engineers, Lt. Gen. Thomas P. Bostick, Col. Michael J. Farrell, and Kristine S. Hansen ("Federal Defendants") submit this memorandum in opposition to Plaintiff's motion for preliminary injunction.

Plaintiff's claims under the National Environmental Policy Act ("NEPA") seek to create confusion between the two phases of the Southeast Connector project ("SEC"). Eliminating that confusion reveals that Plaintiff's NEPA claims are jurisdictionally deficient. Because Phase 1 of the SEC does not involve the federal government NEPA does not apply. As to the jurisdictional requirement for review under the Administrative Procedure Act ("APA") – "final agency action" – the only action that the federal government has taken respecting Phase 1 is to determine that, because it will not impact waters of the United States, Phase 1 lies outside the authority of the Corps of Engineers (the "Corps"). Plaintiff criticizes the Corps's determination but in doing so fails to state an actionable claim.

Phase 2 of the SEC is in its regulatory infancy; the Corps has only just received the application for a Clean Water Act permit to build Phase 2 by Defendant Regional Transportation Commission of Washoe County ("RTC"). Plaintiff's NEPA claim involving Phase 2 cannot succeed on the merits for want of final agency action, creating a jurisdictional defect that Plaintiff's invocation of the "segmentation" doctrine cannot cure.

Plaintiff's invocation of the Endangered Species Act ("ESA") is even flimsier. Plaintiff failed to give the government the required sixty days' notice before filing suit, which precludes this Court's exercise of jurisdiction. And Plaintiff's vague and conclusory allegations regarding ESA-listed species are wholly inadequate to state a cause of action under the ESA or to establish Plaintiff's standing to sue under the ESA.

For all of these reasons there is very little likelihood that Plaintiff's claims against the Federal Defendants will prevail on the merits and Plaintiff's motion for a preliminary in junction should for that reason be denied.

Plaintiff's inadequate allegations of injury, the balance of equities, and the public interest also preclude a preliminary injunction. The SEC (either Phase1 viewed alone, or the entire project) is a popularly-supported public works project[1] that will ease traffic congestion and that will serve the public safety by providing ingress and egress during flood events. Plaintiff's assertedly threatened injuries are so vague as to raise doubts about Plaintiff's standing to maintain suit at all; they most assuredly do not justify an emergency injunction derailing a public works project that has been decades in the making.

II. STATEMENT OF FACTS

RTC is a public agency created under the laws of the State of Nevada and is comprised of elected representatives from Washoe County, the City of Reno, and the City of Sparks. Functionally, the RTC serves as the Metropolitan Planning Organization, Public Transit Authority and Street and Highway agency for Washoe County. Oksol Decl. (ECF No. 48-2) ¶ 7. The SEC is a 5.5 mile stretch of highway that has been in planning for forty years and that will, if completed as planned, run from Greg Street (north of the Truckee River) to the Veterans Highway southwest of the town of Hidden Valley. *See* Pl.'s Mem. in Supp. of Mot. for Prelim. Inj. ("Pl.'s Mem.") (ECF No. 13), Ex. 10 at 2; Oksol Decl. (ECF No. 48-2) ¶ 12.

The original plan for the eastern end of the SEC contemplated relocating portions of Steamboat Creek; accordingly, RTC submitted to the Corps an application under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344(a). Declaration of Kristine S. Hansen (attached as Exhibit A) ¶ 4. Responding to public misgivings RTC redesigned the northeast end of the SEC so as to have no impact on waters of the United States, and told the Corps that the SEC would be built two phases. Hansen Decl. (Exh. A) ¶ 5; Affidavit of Matthew Setty (Exh. 2 to RTC Br.) (ECF No. 48-29) ¶ 7; Compl. (ECF No. 1) ¶ 40; Oksol Decl. (ECF No. 48-2) ¶¶ 31-33, 36, 60-61. In the Corps's

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[1] *See* Declaration of Paul Garth Oksol (Ex. 1 to RTC Opposition to Motion for Preliminary Injunction ("RTC Br.")) (ECF No. 48-2) ¶¶ 14-16.

view the original Section 404 permit application has been withdrawn. Oksol Decl. (ECF No. 48-2) ¶ 36.

Phase 1 of the SEC includes a bridge over the Truckee River and approximately one mile of highway construction. *See* Oksol Decl. (ECF No. 48-2) ¶ 5. On November 16, 2012, in response to an RTC inquiry, the Corps determined "that [Phase 1] would not result in the discharge of dredged or fill material within waters of the United States and does not involve work in navigable waters of the United States; therefore, a [Corps] Permit is not required for this work." Pl.'s Br., Ex. 17 (ECF No. 22) at 1; Hansen Decl. (Exh. A) ¶ 6; Compl. ¶ 43.[2]

In July, 2013 RTC submitted a CWA Section 404 permit application for Phase 2 of the SEC. Hansen Decl. (Exh. A) ¶ 7; *see* http://www.southeastconnector.com/usace-permit-application.[3] If for any reason Phase 2 cannot proceed as planned, Phase 1 will yield substantial benefits. Oksol Decl. (ECF No. 48-2) ¶¶ 42-45. In the absence of Phase 2 the Phase 1 component currently under construction could extend to either a Mill Street Extension or to Pembroke Drive and serve regional travel demands without impacting any waters of the United States. Oksol Decl. (ECF No. 48-2) ¶¶ 20-22, 35, 40-41, 57-59. The Phase 1 bridge will provide emergency access and an evacuation route that does not currently exist for communities such as the Hidden Valley/Meadows neighborhood that are now literally cut off from all egress during floods. Oksol Decl. (ECF No. 48-2) ¶¶ 21-24. *See also* Compl. ¶ 5 ("This area is prone to serious and repeated flooding.") Mitigation measures proposed for Phase 2 would yield net environmental benefits. Setty Aff. (ECF No. 48-29) ¶¶ 9-12; Oksol Decl. (ECF No. 48-2) ¶¶ 51-56.

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[2] CWA Section 404 allows the Corps to issue permits "for the discharge of dredged or fill material" into United States waters. *33 U.S.C. § 1344(a)*. Absent a discharge into United States waters, the CWA does not apply and the Corps has no regulatory jurisdiction. *See Save Our Cmty. v. U.S. EPA*, 971 F.2d 1155, 1163 (5th Cir. 1992); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 963 (9th Cir. 2006)

[3] A Section 404 permit is necessary because the approximately 29,040 feet of the project will impact some 1,700 feet (11.23 acres) of U.S. jurisdictional waters. Setty Aff. (ECF No. 48-29) ¶ 9; Compl. ¶ 34; Oksol Decl. (ECF No. 48-2) ¶¶ 49-50.

The Senior Regulatory Project Manager who will oversee RTC's Section 404 application for Phase 2 of the SEC indicates that the fact that Phase 1 has been built will have no influence over the Corps' processing of that application under applicable regulations and will not restrict the Corps's consideration of alternatives. Hansen Decl. (Exh. A) ¶ 10.

The entirety of the SEC (Phases 1 and 2) will be locally funded; no federal money will be used. The funds were raised through voter-approved bond sales in 2008. Oksol Decl. (ECF No. 48-2) ¶¶ 14-15.

III. LEGAL BACKGROUND

NEPA is a procedural statute that requires agencies carefully to consider the impacts of, and alternatives to, "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §§ 4321, 4332 (2) (C). Its purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Id.* at 350.

Because NEPA only applies to "major Federal actions," 42 U.S.C. § 4332 (2) (C), it has no application to state and local government initiatives and activities. *Ka Makani 'O Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 960 (9th Cir. 2002) ("Congress did not intend NEPA to apply to state, local, or private actions"), quoting *Atl. Coal. on Transp. Crisis, Inc. v. Atl. Reg'l Comm'n*, 599 F.2d 1333, 1344 (5th Cir.1979); *Rattlesnake Coal. v. U.S. EPA*, 509 F.3d 1095, 1101 (9th Cir. 2007). While a state or local project can be deemed "federal" for NEPA purposes, that will be so only where federal funding and control over the local project is "substantial." *Rattlesnake Coal.*, 509 F.3d at 1101; *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 329 (9th Cir.1975).

NEPA does not create a private right of action; instead, the only basis for federal court jurisdiction over NEPA claims is the Administrative Procedure Act, 5 U.S.C. §§ 551-708 ("APA"). *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005); *Ka Makani*, 295 F.3d at

959. To bring a claim under the APA, plaintiffs must identify a "final agency action" upon which the claim is based. 5 U.S.C. § 704; *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010). To be "final," an agency action "must mark the consummation of the agency's decisionmaking process-it must not be of a merely tentative or interlocutory nature." *Hells Canyon*, 593 F.3d at 930 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). It must also be an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Hells Canyon*, 593 F.3d at 930 (quoting *Bennett*, 520 U.S. at 178).

In order to prevail in an APA challenge to an agency's decision a plaintiff must show that the agency's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*), *rev'd on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The scope of review is narrow and the court is not to substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 29 (1983); *accord Earth Island Inst. v. Carlton*, 626 F.3d 462, 468-69 (9th Cir. 2010). And "[t]he 'agency's interpretation [of its own regulations] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1074 (9th Cir.2001) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The Endangered Species Act was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b). Section 7(a)(2) of the ESA prohibits federal agencies from taking any action that is likely to "jeopardize the continued existence of any endangered species or threatened species" or to destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). To this end, the ESA requires that federal "action agencies" (here, the Corps) consult with the Fish & Wildlife Service ("FWS") whenever the agency's action "may affect" a species listed as threatened or endangered. Formal

Consultation, 50 C.F.R. § 402.14(a) (2009).[4]

IV. ARGUMENT

A. Standard of Review Governing Motions for a Preliminary Injunction

A preliminary injunction is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). To obtain a preliminary injunction, a plaintiff must, at a minimum, demonstrate four elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of an injunction, (3) that the balance of equities tips in his favor, and (4) that the injunction is in the public interest. *Winter v. Natural Res. Def. Counsel, Inc.*, 555 U.S. 7, 20 (2008). A party *must* demonstrate a "likelihood of success on the merits" in order to obtain a preliminary injunction. *Munaf v. Green*, 553 U.S. 674, 690 (2008) (citations omitted). Further, a party seeking preliminary injunctive relief must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original) (rejecting the Ninth Circuit's "possibility" of irreparable harm standard); *see also Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("To the extent that our cases have suggested a lesser standard, they are no longer controlling, or even viable"). The Ninth Circuit has held that, notwithstanding the *Winter* decision, a preliminary injunction may issue if the plaintiffs can show "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (citation omitted).

B. Plaintiff is Unlikely to Succeed On The Merits Of Their NEPA Claim

Plaintiff argues that Federal Defendants somehow violated NEPA by "authorizing" construction of the SEC. Pl.'s Mem. at 9-12. The argument fails because the Federal Defendants

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[4] The ESA is administered by the Secretary of the Interior and the Secretary of Commerce, 16 U.S.C. § 1532(15), with the Secretary of the Interior generally responsible for terrestrial species. *Nw. Res. Info. Ctr., Inc. v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1060, 1065 n.5 (9th Cir. 1995). The Secretary of the Interior has delegated his responsibilities to FWS. *Id*.

have not "authorized" anything. Phase 1 of the SEC is being funded and built by RTC without any federal funding or authorization of any kind. This Court therefore lacks jurisdiction over any claim respecting Phase I because there is no "major federal action" impacting the environment such as could give rise to duties under NEPA. And as to Phase 2 of the SEC, Federal Defendants are in the early stages of processing RTC's application for a permit under Section 404 of the Clean Water Act, which mandates the conclusion that APA jurisdiction is lacking here as well: there will be no "final agency action" as to Phase 2 until and unless Federal Defendants issue a final permit that actually creates legal rights and responsibilities.

Plaintiff tries to breathe life into their NEPA claim through vague invocations of the "segmentation" and "federalization" doctrines, relying primarily upon the Fourth Circuit's decision in *Maryland Conservation Councíl, Inc. v. Gilchríst*, 808 F.2d 1039,1042 (4th Cir. 1986). But as the District of Columbia Circuit explained in *Karst Environmental Education and Protection, Inc. v. EPA*, 475 F.3d 1291 (D.C. Cir. 2007), the holding of *Gilchrist* cannot be reconciled with the APA's requirement of "final agency action." Analysis of the viability of Plaintiff's claims is correctly guided by the Fifth Circuit's decision in *Save Barton Creek Association v. Federal Highway Administration*, 950 F.2d 1129 (5th Cir. 1992), which is fully consistent with Ninth Circuit precedent and is cited with approval by the courts of the Ninth Circuit.

Because this Court lacks jurisdiction over Plaintiff's NEPA claim Plaintiff's suit is unlikely tpo prevail on the merits and Plaintiff's request for a preliminary injunction should be denied.

1. Any NEPA Challenge to Phase 1 of the SEC Will Fail for Want of a Major Federal Action (NEPA) and for Failure to State a Claim

Save Barton Creek involved two highway segments in the Austin area known as "MoPac South" and "Segment 3." As is true of Phase 1 of the SEC in this case, the segments under construction in *Save Barton Creek* were local government projects without significant federal involvement. 950 F.2d at 1135 ("[N]o federal funds have been requested or spent, and no federal

approvals have been given. The state is simply building some highways for its own use.") It was contemplated, however, that these highway segments would be integrated into larger highway systems that would likely require federal funding and approval. *Id*. "Segment 3," for example, was envisioned as constituting one piece of a beltway completely encircling Austin (the "Austin Outer Loop"). *Id*. at 1131. The facts of *Save Barton Creek* are thus on all fours with those in the instant case: in both cases strictly non-federal highway construction was underway and in both cases additional integrated construction was anticipated that would involve the federal government.

NEPA only applies to "major federal actions" significantly affecting the environment. 42 U.S.C. § 4332 (2)(C); *see also* 40 C.F.R. § 1508.18(a). Absent substantial *federal* involvement, state and local undertakings do not implicate NEPA at all. *Rattlesnake Coal.*, 509 F.3d at 1101, *and cases there cited*. The court in *Save Barton Creek* accordingly dismissed plaintiffs' NEPA challenge to "MoPac South" and "Segment 3."

> "Although desperate environmental plaintiffs have attempted to convert NEPA into a national land use statute, Congress did not intend section 102(2)(C) to apply to actions undertaken by state, local, or private concerns without any federal participation or approval." McGarity, *The Courts, the Agencies, and NEPA Threshold Issues*, 55 Tex.L.Rev. 801, 837 (1977) (footnote omitted). *See also Movement Against Destruction v. Volpe*, 361 F.Supp. 1360, 1383 (D.Md.1973), *aff'd*, 500 F.2d 29 (4th Cir.1974) ("Despite the breadth of the NEPA, its application is only to the decision making processes of the Federal government.") (citation omitted).
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> The undisputed facts are that Segment 3 and MoPac South have been financed with non-federal funds and have been designed and built without federal approval and authorization. We hold that these projects do not constitute nor are they are part of any project constituting "major Federal action" within the contemplation of 42 U.S.C. § 4332 (2)(C).

Save Barton Creek, 950 F.2d at 1138-39. In *Rattlesnake Coalition* the Ninth Circuit reached the same result on the same reasoning. 509 F.3d at 1101 (dismissing NEPA claim against wastewater treatment facility upgrade for want of "major federal action" even though the federal government was providing six percent of the project's funding). *See also West v. Sec'y of Dept. of Transp.*, 206 F.3d 920, 926 n. 6 (9th Cir. 2000) (*citing Save Barton Creek* on the "major federal action" issue.) As the

Ninth Circuit summarized the law in *Ka Makani*, a local project can only become "federal" for NEPA purposes where there is either "substantial federal funding" or the federal government exercises a significant "degree of decision-making power, authority, or control . . . ." *Ka Makani*, 295 F.3d at 960. Here there is neither: Phase 1 of the SEC is 100% locally funded and 100% controlled by local authorities, and Plaintiff does not allege otherwise.

Final agency action is the jurisdictional prerequisite for APA review. 5 U.S.C. § 704. "[F]inality is a jurisdictional requirement to obtaining judicial review under the APA . . .". *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008). Federal Defendants have issued no permits or other authorizations for Phase 1 and will provide no funding. The only "action" Plaintiff identifies respecting Phase 1 is the Corps's letter determination that Phase 1 will not impact United States waters. Pl.'s Mem., Ex. 17 (ECF No. 22) at 1.[5] Assuming (without conceding) that a this letter determination can be a "final agency action" under the APA, Plaintiff's allegations regarding the Corps's letter determination fail to state a claim for relief. Plaintiff alleges that the Corps's jurisdictional determination: was made "in violation of the APA, NEPA, the ESA, and the NEPA and ESA implementing regulations" (Compl. ¶ 2); was made "arbitrarily and capriciously" (*id.* ¶¶ 7, 71); and that it was "unaccompanied by any evidence, analysis, or reasoning to support its conclusion." *Id.* ¶ 43; *see also* ¶ 71. Plaintiff's allegations are deficient in at least two critical respects. First, Plaintiff nowhere alleges that the determination was incorrect. Plaintiff nowhere suggests that Phase 1 of the SEC will in fact impact the waters of the United States. *See* RTC Memorandum in Support of Motion to Dismiss (ECF No. 32) ("RTC Br.") at 7-11 (discussing how the Complaint studiously avoids any allegation that Phase 1 will result in the discharge of

[5] The Corps has established a formal procedure for "[a]ffected part[ies]" to solicit its official position about the scope of CWA regulatory jurisdiction. *See* 33 C.F.R. § 331.2. A jurisdictional determination is a "written Corps determination that a wetland ... is subject to regulatory jurisdiction under [the CWA]." *Id.*

materials into waters of the United States, the jurisdictional keystone of the Clean Water Act); RTC Br., Ex. 3 (ECF No. 48-32) (deposition of Kim Rhodemyre under Rule 30 (b)(6)) at p. 31 line 21 – p. 32 line 23 (Plaintiff has no knowledge whether Phase 1 has caused or will cause any impacts to waters of the United States); *id*. p. 82 lines 3-6 (same).

Second, Plaintiff nowhere provides a legal justification for this Court's reviewing the Corps's jurisdictional determination. The determination was made under the auspices of the Clean Water Act, but neither the Complaint nor the preliminary injunction motion alleges that the Federal Defendants have in any way violated the Clean Water Act. *See* Compl. ¶¶ 70-75 (criticizing the determination, but alleging no violation of the CWA). Instead, Plaintiff alleges that the Corps's determination somehow violates NEPA, but nowhere does Plaintiff explain how this determination can be viewed as a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § (2) (C). Nor could they; the Corps's determination has *no* effect on the environment. It is RTC that is building the SEC, and the Corps's determination neither created legal rights to do so nor removed any regulatory impediments.

For all of these reasons the complaint fails to state a claim regarding the Corps's determination that Phase 1 of the SEC will not impact waters of the United States. Because that determination is the *only* action Federal Defendants have taken regarding Phase 1, Plaintiff's NEPA claim as to Phase 1 must be dismissed and Plaintiff's preliminary injunction motion denied.

2. A NEPA Challenge to Phase 1 of the SEC is Not Saved By Plaintiffs' Segmentation Theory

There are situations where the federal courts require the administration to treat as a single project multiple project components that the administration had originally analyzed separately under NEPA. In these situations separate project components are defined as "connected" and on that basis NEPA analysis is required even as to individual actions that are not themselves "major." Where this happens it is said that the administration has improperly "segmented" its NEPA analysis, treating as

separate projects what are in reality two components of a single project. The segmentation doctrine has been codified in CEQ regulations, *see* 40 C.F.R. § 1508.25(a)(1), and has been long recognized by the Ninth Circuit. *See, e.g., Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1098 (9th Cir. 2012) ("The purpose of this requirement is to prevent an agency from dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact"), *quoting Great Basin Mine Watch*, 456 F.3d at 969.

As the Fifth Circuit noted in *Save Barton Creek*, the segmentation doctrine is almost always applied where both project components are federal rather than, as here, where the first component is completely non-federal.

> The case law which deals with such improper segmentation almost always involves a situation where a "major Federal action" is found to exist and then the segmentation is evaluated as an escape from the NEPA application which is otherwise immediate. *See, e.g., Macht v. Skinner*, 916 F.2d 13, 16 n. 4 (D.C.Cir.1990) ("Because we hold that the Light Rail Project does not involve 'major [F]ederal action,' we do not decide whether the district court correctly held that Maryland's segmentation of the Project was proper."). Segmentation cases consider only whether a federal project has been improperly segmented to avoid compliance with NEPA. *See, e.g., Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C.Cir.1987); *Swain v. Brinegar*, 542 F.2d 364 (7th Cir.1976) (*en banc*); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir.1973).

Save Barton Creek, 950 F.2d at 1139 (footnote omitted).

The case Plaintiff relies upon, *Maryland Conservation Councíl, Inc. v. Gilchríst*, is an exception. In *Gilchrist* the Fourth Circuit applied the segmentation doctrine where a state planned to build a highway through a federally-funded state park. Using state funds, the state had let construction contracts "to develop the two segments of [the proposed highway] entering and leaving the park, but not the middle segment, which would actually run through the park." *Gilchrist*, 808 F.2d at 1041. Building the segment traversing the park would inevitably require multiple federal approvals. *Id*. Finding that completion of the state-funded highway segments would narrowly constrain the federal government's consideration of alternatives, and noting that the two approaching segments, if completed, would "stand like gun barrels pointing into the heartland of the park . . ." the

Fourth Circuit required NEPA analysis for the entire highway. *Id*. at 1042-43 (citations omitted). The basis for the holding in *Gilchrist* is sometimes referred to as the "federalization" theory.

But as the District of Columbia Circuit held in *Karst*, there is a fatal flaw in *Gilchrist*. In *dicta* the DC Circuit had previously spoken approvingly of *Gilchrist*. *See Macht*, 916 F.2d at 19. But "at the time *Gilchrist* and *Macht* were decided," the court noted in *Karst*, it had not been clearly established that NEPA confers no private right of action and that NEPA suits must therefore be bought under the APA. *Karst*, 475 F.3d at 1297. It is now universally accepted that NEPA suits must be brought under the APA. *Ashley Creek*, 420 F.3d at 939; *Ka Makani*, 295 F.3d at 959; *San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091, 1097 (9th Cir. 2005) ("A fundamental and oft-quoted principle of environmental law is that there is no private right of action under NEPA") (citations omitted). The APA requirement of "final agency action" completely undermines the federalization theory of *Gilchrist*.

> Thus, although the federalization theory may have had merit when we decided *Macht*, it lacks vitality today given our . . . decisions reiterating the requirement that NEPA claims must be brought under the APA and allege final agency action. . . . Because Karst has failed to allege that either EPA or HUD engaged in final agency action, we shall affirm the district court's dismissal of the complaint against those two agencies.

Karst, 475 F.3d at 1297-98.

Even if Phase 1 of the SEC were a federal project, Plaintiff would have a difficult time succeeding on the merits of a segmentation claim because Phase 1 has independent utility. *See* Oksol Decl. (ECF No. 48-2) ¶¶ 42-45; Plaintiff's Exhibit 11 (ECF No. 16) at 7 ("The bridge and Phase 1 have not only a clear independent utility but also serve an important and very necessary safety function for our community"); ECF No. 48-32 (Plaintiff's Rule 30(b)(6) deposition) at p. 56 lines 22-24 (Plaintiff has no basis to dispute that Phase 1 has independent utility[6]); *Sensible Traffic Alternatives and Resources, Ltd.* v. 307 F.Supp.2d 1149, 1168 (D. Hawai'i 2004) (segmentation theory only applied where the segmented project has "*no* independent justification, no life of its own,

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[6] At the urging of counsel Plaintiff's witness later sought to qualify this answer (*id*. p. 57 line 9 –p. 58 line 18), but ultimately acknowledged RTC's point that Phase 1 could be made operational through connection either to Mill Street or Pembroke Street. *Id*. p. 58 line 21 – p. 59 line 12.

or is simply illogical when viewed in isolation . . .") (*quoting Save Barton Creek*, 950 F.2d at 1140). But Plaintiff's segmentation theory has zero chance of success because Phase 1 is wholly non-federal, depriving the court of APA jurisdiction.

3. Any NEPA Challenge to Phase 2 of the SEC Will Fail for Want of Final Agency Action

In *Bennett v. Spear* the Supreme Court stated that two criteria must be satisfied for agency action to be final:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision-making process -- it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

520 U.S. at 177-78 (internal citations omitted). RTC has only recently filed its application for a permit for Phase 2 of the SEC under Section 404 of the Clean Water Act. *See* Hansen Decl. (Exh. A) ¶ 7; RTC Memorandum in Support of Motion to Dismiss (ECF No. 32) at 6 (Section 404 permit application for Phase 2 filed July 19, 2013) (citing http://www.southeastconnector.com/usace-permit-application/). With respect to Phase 2 of the SEC, the Corps has taken no action that satisfies either prong on the *Bennett* test. *See Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 540 (9th Cir. 1996) (challenge to Nuclear Regulatory hearing dismissed for want of final agency action where hearing process had not reached its conclusion); *Cent. Delta Water Agency v. U.S. Fish & Wildlife*, 653 F.Supp.2d 1066, 1092 (E.D.Cal. 2009) ("the [notice of intent] and ongoing scoping activities are, by their very nature, not the agency's 'last word' on the [conservation plan]. The last word will be the final adoption of a finite and certain [conservation plan] that is intended to be implemented") (claim dismissed for want of final agency action); *W. Shoshone Nat'l Council v. United States*, 408 F.Supp.2d 1040, 1050 (D. Nev. 2005) (challenge to siting decision for nuclear waste repository dismissed for want of final agency action where, *inter alia*, "DOE still must apply for and receive a license before any nuclear waste can be shipped and stored . . ."); *Fairbanks N. Borough*, 543 F.3d at 591 ("Finality is a jurisdictional requirement to obtaining judicial review under the APA.") *W. Radio Serv. Co., Inc. v. Glickman*, 123 F.3d 1189, 1197 (9th Cir. 1997) ("Until the

Service actually makes a final decision regarding the road, a challenge to the access road under NEPA is not ripe for review.")

Because the Corps is only in the earliest stages of reviewing RTC's permit application, this case, as in *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1136 (9th Cir. 1998) "presents a situation where there is no identifiable agency order, regulation, policy or plan that may be subject to challenge as a final agency action") (citation omitted).

C. Because This Court Lacks Jurisdiction to Adjudicate Plaintiff's ESA Claims Those Claims Will Not Succeed on the Merits

In its first claim for relief, Plaintiff claims that the Corps has violated the ESA. As an initial matter, Plaintiff has nowhere explained to the Court or to Federal Defendants which portion of the ESA or its implementing regulations the Corps has violated. *See* Compl. ¶ 71 (alleging, without further explanation, that the Corps "[failed] to comply with . . . the ESA"). Indeed, Plaintiff argues that it is likely to succeed on the merits of its ESA "claim" without citing a single case addressing the ESA, and with only a single, parenthetical reference to the existence of federally protected species. Pl.'s Mem. 8-12. Plaintiff has thus failed to state an ESA claim upon which relief can be granted.

Even had Plaintiff articulated a valid ESA claim, this Court would lack jurisdiction to resolve Plaintiff's claims for two reasons: Plaintiff has failed to comply with the ESA's strict notice requirements, and Plaintiff has failed to demonstrate standing to bring this challenge. Assuming the Court did have jurisdiction over Plaintiff's claims, Plaintiff has failed to demonstrate the irreparable harm to protected species necessary for emergency relief in ESA claims.

1. Plaintiff Has Not Provided the Required Notice Under the ESA

Section 11 of the ESA mandates that citizen suits against alleged violators of the ESA may not be commenced "prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." 16 U.S.C. § 1540(g)(2)(A). Where the alleged violator is a federal agency, the notice provision operates as waiver of sovereign immunity. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26–28 (1989). As such,

the notice requirement "must be complied with strictly, and it cannot be avoided by equitable, 'flexible,' or 'pragmatic' considerations." *Id.* *See also Water Keeper Alliance v. Dep't of Def.*, 271 F.3d 21, 29-30 (1st Cir. 2001). The notice requirement is mandatory and jurisdictional in nature, and a claim brought without proper notice must be dismissed. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 721 (9th Cir.1988).

If a 60-day notice is to serve its intended purpose – *i.e.*, to facilitate the resolution of controversies without resort to litigation – the contents of the notice must not force its recipients to play a "guessing game" concerning the specific duties and violations at issue. *Ctr. for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 801 (9th Cir. 2009) (considering similar notice provision under CWA). Rather, the notice must describe the alleged violations in a fashion allowing both the Secretary and the alleged violator to evaluate and, if necessary, to amend their actions. Thus, although the "requirement of adequate notice does not mandate that citizen plaintiffs 'list every specific aspect or detail of every alleged violation,'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 399-400 (4th Cir. 2011) (quoting *Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir.1995), the notice must nonetheless "inform the [action] agency of the *exact* grievances against it." *Water Keeper*, 271 F.3d at 29-30 (emphasis added). *See also Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998).

In this case, Plaintiff has not acknowledged, much less fulfilled, the notice requirements of ESA Section 11. Plaintiff's first claim for relief purports to allege that the Corps has violated the ESA and NEPA. Compl. ¶ 70. Under ESA Section 11, therefore, Plaintiff was required to notify both the Secretary of the Interior and the Corps of its intent to sue by May 30, 60 days before the Plaintiff filed its complaint, to allow for a litigation-free window in which to attempt to resolve whatever alleged ESA claims Plaintiff might have articulated. 16 U.S.C. § 1540(g)(2)(A). Plaintiff provided no such notice, nor does it even purport to have provided the required notice in its pleadings

or in any subsequent filings. Indeed, Plaintiff's filings do not even mention the ESA citizen-suit provision or the accompanying notice requirement. Because Plaintiff has not satisfied the notice requirement of an ESA citizen-suit, this court must dismiss any ESA claims in Plaintiff's complaint for lack of jurisdiction.

Insofar as Plaintiff claims that its May 29, 2013 letter to RTC constitutes valid notice under Section 11, that argument is incompatible with the Letter's form and substance – and with Plaintiff's own characterization of the Letter. The letter literally begins and ends by purporting to provide notice of intent to sue under the CWA only. *Compare* Compl. Ex. 1 at 2 (noting the Letter regards a "60-day Notice of Intent to Sue for Violation of Section 404 of the Clean Water Act," *with id.* at 10 ("If the RTC does not act within 60 days to correct this violation of the CWA . . . the Coalition will seek relief in federal district court under the Clean Water Act's citizen suit provision, 33 U.S.C. §1365(a).").[7] Moreover, the letter addresses itself to RTC and is concerned with *RTC's* alleged failure to obtain a CWA Section 404 permit. Plaintiff's complaint, however, alleges ESA violations against the Corps, not against RTC. Because the Letter, by its own terms, is concerned only with RTC, it could not have provided the required notice to the Secretary or to the Corps.

Although the Letter does mention the ESA on six scattered occasions, these references – which merely describe the consultation requirements of ESA Section 7 – cannot fairly be read to allege that the Corps has violated the Act.[8] The Letter's fleeting and isolated references to the ESA

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[7] *See also* Compl. Ex. 1 at 2 ("This letter constitutes formal 60-day notice of intent to initiate litigation under the citizen suit provision of the CWA.") (citing 33 U.S.C. § 1365); *id.* at 3 ("Again, this letter is provided as formal 60-day notice under the CWA citizen suit provision, 33 U.S.C. § 1365, of our intent to file suit in federal court to enforce the CWA if the RTC does not act within the next 60 days to remedy these legal violations."); *id.* at 3-4 (listing "[t]he name, address, and phone number of the organization giving notice of intent to sue under the CWA"); *id.* at 10 ("The RTC is violating the Clean Water Act by engaging in construction of the SEC roadway project prior to obtaining a Section 404 permit.") (citations omitted).

[8] *See* Compl. Ex. 1 at 2 (noting that CWA Section 404 permits require consultation under ESA Section 7); *id.* at 3 (same); *id.* at 7 (same); *id.* at 8 (characterizing requirements of ESA Section 7(d)); *id.* at 9 (contemplating Section 7 consultation under an eventual CWA Section 404 permit); *id.* at 10

fail to imply any violations of the Act, much less provide the Corps and the Secretary with the necessary opportunity "to review their actions and take corrective measures if warranted." *Sw. Ctr. for Biological Diversity*, 143 F.3d at 520 (finding three letters, each purporting to provide notice under the ESA, were insufficient for that purpose where none of the letters informed the agencies that plaintiff "had a grievance" concerning species habitat).

If there is any doubt that the Letter was not composed to provide notice under the ESA, Plaintiff's own representations to the Court are dispositive: according to Plaintiff, the letter's sole purpose was to "[notify] Defendants of RTC's violation of the CWA and of Plaintiff's intent to sue under the CWA." Compl. ¶ 13. *See also id.* ¶ 14 (alleging that "neither *EPA nor NDELP*" has commenced an enforcement action within 60-days of the Letter's postmark) (emphasis added); Pl.'s Mem. 8 (describing a "60-day notice of intent to sue under the Clean Water Act"). Thus, as Plaintiff itself has indicated, nothing before the Court suffices to waive the Corps' sovereign immunity under the ESA. Accordingly any ESA claims articulated in Plaintiff's complaint are unlikely to prevail on the merits.

2. Plaintiff Lacks Standing to Bring its ESA Claims

The Court also lacks jurisdiction to hear Plaintiff's ESA claims because Plaintiff has not demonstrated that any of its members have standing to bring such a claim. The burden of proof to establish standing falls squarely on Plaintiff. *See Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 104 (1998). To establish Article III standing, a plaintiff must demonstrate that it has personally suffered an "injury in fact," which is an invasion of a legally protected interest that is "concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted). The injury must also be "actual or imminent," and not "conjectural or hypothetical." *Id.* Standing allegations are not "mere pleading requirements but rather an

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(claiming that RTC cannot cure *its* violations of the CWA until the Corps and FWS have consulted under ESA Section 7).

indispensable part of the plaintiff's case, [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus, at the emergency relief stage, a plaintiff cannot rest on mere allegations of injury, but must provide affidavits or other evidence showing, through specific facts, that it is among the injured, as opposed to merely possessing an interest in the subject matter at issue. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir.2010) (articulating "clear showing" as the burden of proving standing at the preliminary injunction stage).

When the plaintiff "is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009), quoting *Lujan*, 504 U.S. at 562. Here, the alleged objects of government action, with respect to any ESA claims, are the Lahontan cutthroat trout and the Cui-ui, both of which are listed as "endangered" under the ESA. To establish standing, Plaintiff must show that at least one of its members has a concrete interest of his own – such as a recreational or aesthetic interest – in these species, and that this interest existed at the time the Complaint was filed. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.* (TOC), Inc., 528 U.S. 167, 180 (2000) ("we have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation"); *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552, (1996) (setting forth requirements for "organizational standing").

Plaintiff has failed to allege any interest in the Lahontan cutthroat trout or the Cui-ui, let alone substantiated that interest through the submission of affidavits. Although Plaintiff's complaint and preliminary injunction motion mention the *existence* of these species (*see* Compl. ¶ 28, Pl.'s Mem. at 9) Plaintiff has nowhere indicated that its members derive recreational or aesthetic value from the species themselves. Indeed, Plaintiff never alleges that its member have observed these species, have attempted to observe them, or plan on observing them in the future. Instead, Plaintiff merely alleges

that its members "engage in recreation in areas that will be impacted by the Connector, including the Rosewood Lakes Golf Course." Compl. ¶ 26. These allegations fail to mention any specific interest in federally protected wildlife, and are therefore insufficient to demonstrate standing at the pleadings stage, much less when considering the extraordinary remedy of emergency relief. Nor has Plaintiff offered a single declaration purporting to show that even one of its members has an interest in the Lahontan cutthroat trout or the Cui-ui. Because Plaintiff has provided no evidence that any of its members might suffer an injury-in-fact with respect to these species the Court lacks jurisdiction to hear an ESA claim and Plaintiff has pled no ESA claim that can succeed on the merits. *Steel Co.*, 523 U.S. at 101.

D. Plaintiff's Failure to Allege Irreparable Injury, the Balance of Equities, and the Public Interest Likewise Militate Against an Injunction

1. NEPA

Plaintiff's allegations of likely injury are excessively vague. Compl. ¶¶ 18, 26. The only effort at specificity is a reference to the Truckee River (*id*. ¶ 18), with no clue given as to how Plaintiff's members' use of the river might be affected, and a reference to Rosewood Lakes Golf Course (*id*. ¶ 18), which sits near Phase 2 of the SEC, not Phase 1. Pl. Exh. 10 (ECF No. 15) at 2. Plaintiff has thus failed to "make a specific showing that the environmental harm results in irreparable injury to their specific environmental interests." *Davis v. Mineta*, 302 F.3d 1104, 1115 (9th Cir. 2002). Plaintiff's inability to allege environmental harm was confirmed at Plaintiff's August 23 deposition conducted under Fed. R. Civ. P. 30(b)(6). At that deposition Plaintiff's representative repeatedly admitted that Plaintiff has no basis for claiming that the SEC will cause environmental harm. ECF No. 48-32 at p. 25 line 24 – p. 26 line 14; p. 29 lines 20-24; p. 45 lines 5-23.

In asserting that irreparable injury will result absent injunctive relief Plaintiff's real focus is upon the claim that, once Phase1 is built, the Corps's consideration of alternatives for Phase 2 (or for a wholly different SEC) will be hamstrung. Pl.'s Mem. at 2, 4, 5, 9, 10, 12, 15); Compl. ¶¶ 6, 9, 29, 74, 79. Indeed, the relief Plaintiff requests includes a demand that the Court "[a]djudge and declare that the Corps may not consider the investment made in Phase 1 of the SEC by RTC before obtaining

a Section 404 permit in its subsequent analysis of reasonable alternatives to the SEC." Compl. at p. 14. But the only basis for believing that the Corps's consideration of alternatives will be in any way limited by the construction of Phase 1 is Plaintiff's naked assertion to that effect. Plaintiff's concern is in fact unfounded. Kristine S. Hansen, Corps Senior Regulatory Project Manager for the SEC, explains that Phase 1 will have no impact on the Corps's consideration of alternatives.

> My understanding of the requirements in the 404(b)(1) Guidelines and 33 CFR Part 325, Appendix B for consideration of alternatives is that the Corps' review of the SEC Phase 2 would not be constrained by the construction of the SEC Phase 1. The consideration of alternatives will not be limited to those that connect with the bridge and roadway built during Phase 1, and the fact that RTC will have invested substantial resources will not be a factor in the consideration of alternatives.

Hansen Decl. (Exh. A) ¶ 10. It is Plaintiff's burden to "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original). Plaintiff's unsupported assertions that injury will result from the Corps's inadequate consideration of alternatives fail to meet that burden, and also ask this Court to ignore the "presumption of regularity [that] attaches to [g]overnment agencies' actions." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001).

Plaintiff has thus completely failed to demonstrate likelihood of irreparable injury. Granting the requested injunction, by contrast, will cause substantial injury. The SEC promises numerous community benefits and is supported by the community. Oksol Decl. (ECF No. 48-2) ¶¶ 21-24, 42-45, 51-56. Enjoining Phase 1 would impose substantial costs on RTC. *Id*. ¶¶ 69-70. It could also cause significant environmental problems. *Id*. ¶ 71. In this situation the balance of equities tips in favor of completing the project. *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (district court properly denied preliminary injunction where multiple public benefits outweighed possible environmental harms to plaintiffs); *Cascadia Wildlands Project v. Conroy*, 159 Fed.Appx. 769, 2005 WL 3449061 at *2 (9th Cir. 2005) (same); *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505, 513 (9th Cir. 1988) (same). And Plaintiff's suggestion that environmental harms are inherently weightier is simply wrong. *Lands Council*, 537 F.3d at 1004 ("The district court [correctly] noted that Lands Council did not point to irreparable harm 'beyond the general allegation

that environmental harm is irreparable,' and refused to 'presume that in all environmental cases that irreparable harm will outweigh all other considerations'") (denial of injunction affirmed).

2. ESA

Notwithstanding this Court's lack of jurisdiction over Plaintiff's ESA "claims," Plaintiff's motion itself is meritless. Equitable relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter,* 555 U.S. at 22 (citation omitted). To obtain such extraordinary relief, Plaintiff must establish that "irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22 (emphasis in original); *Alliance for the Wild Rockies*, 632 F.3d at 1135 (even under the 9th Circuit's "sliding scale" test, plaintiffs must show that there is a *likelihood* of irreparable harm, not simply a possibility).

As a threshold matter, Plaintiff cannot articulate any harm stemming from the Corps' alleged violations of the ESA because, as noted above, Plaintiff has failed to explain such violations. {cross-cite to first page of section}. Plaintiff has not described how the Corps' actions allegedly violate the ESA beyond simply proclaiming as much, and it is therefore impossible to infer specific harms in connection with specific Corps actions.

Even if Plaintiff had alleged specific ESA violations, it has failed to show any harm to the *species* at issue here. It is-well settled that injunctions must be considered in view of the objectives of the relevant statute. *See Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944) ("For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief"); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 795-96 (9th Cir. 2005) (considering whether "injunctive relief was necessary to effectuate Congress's clear intent" expressed in the applicable statute). Here, the applicable standards are contained in the ESA, a statute that creates a public interest in protecting species, subspecies, or distinct population segments of species. 16 U.S.C. § 1533. The ESA does not create public or private rights in the protection of individual animals, which is why courts inquire whether a plaintiff demonstrates irreparable harm to a protected

species, subspecies, or distinct population segment, and not simply whether harm to individual animals is likely. *See Defenders of Wildlife v. Salazar*, 812 F. Supp. 2d 1205, 1209-10 (D. Mont. 2009) (noting that take of a single individual of a listed species does not amount to irreparable harm and would "produce an irrational result" when viewed under the purposes and objectives of the ESA); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*) ("[T]he Supreme Court has not established that, as a rule, any potential environmental injury merits an injunction.").[9]

Simply put, Plaintiff has nowhere alleged harm to federally protected *species* in its filings. The closest Plaintiff comes on this point is a claim that the "the water quality of the Truckee River affects Pyramid Lake, the sole habitat for the endangered Cui-cui." Pl.'s Mem. 16. This argument fails to explain how Phase I of the Project will affect the water quality of Pyramid Lake, or how that change would cause irreparable harm to the Cui-cui as a species. Similarly, Plaintiff claims that Phase I will affect "populations" of endangered trout, not the species itself. *Id.* *See also* ECF No. 48-32 at 9 (Plaintiff's 30 (b)(6) deposition) (Plaintiff has no basis for believing that the SEC will adversely affect any endangered species). These arguments are plainly insufficient to show irreparable harm under the ESA.

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[9] *See also Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) (clarifying that the irreparable harm standard depends on a showing of a definitive threat of future harm to the "protected species"); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d at 796 (holding that preliminary injunction is appropriate upon a showing of "irreparable harm to a threatened species"); *Humane Soc'y v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008) (finding death of hundreds to thousands of listed salmon did not constitute irreparable harm).

V. CONCLUSION

For the foregoing reasons Federal Defendants respectfully request that Plaintiff's motion for preliminary injunction (ECF No. 13) be denied.

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Date: September 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2013, I electronically filed the foregoing **FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** and **EXHIBITS** thereto, with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/Peter Kryn Dykema
PETER KRYN DYKEMA

September 6, 2013