CENTER *for* BIOLOGICAL DIVERSITY

March 23, 2015

Hon. Tani Gorre Cantil-Sakauye, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: No. S217763 - *Center For Biological Diversity, et al. v. California Department of Fish and Game*

Plaintiffs and Respondents' Opposition to California Department of Fish and Wildlife's Request for Judicial Notice

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Plaintiffs and Respondents Center for Biological Diversity, et al., submit this opposition to Respondent and Appellant California Department of Fish and Wildlife's Request for Judicial Notice filed on March 16, 2015. The Court may take notice of any matter specified in Evidence Code Section 452 that is relevant to a material issue. (Evidence Code § 459(a); *People ex rel. Lockyer v. Shamrock Foods* (2000) 24 Cal.4th 415, 422, fn.2.) The documents the Department presents for judicial notice are extra-record evidence not relevant to any material issue in this case, and judicial notice should therefore be denied.

Arizona o California o Nevada o New Mexico o Alaska o Oregon o Minnesota o Washington o Washington, DC

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A. The Department's Request for Judicial Notice of Exhibits A and B Should be Denied as these Documents are Irrelevant Extra-Record Evidence

The Department contends that Exhibits A and B are relevant to the Department's Answer to Amicus Curiae Briefs ("Department Amicus Answer") because they show that the Department and the Natural Resources Agency "have adopted policies in furtherance of Governor Brown's Executive Order Number B-l0-11 (September 19, 2011), which makes it the policy of the state that every agency and department encourage communication and consultation with California Tribes." (Request for Judicial Notice at pp. 1-2.)

Because the Department adopted the policies described in Exhibits A and B *after* it approved the Project, the policies are irrelevant to the material issues in this case. (Exhibit A [Natural Resources Agency policy adopted November 20, 2012]; Exhibit B [Department policy issued October 2, 2014]; see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, 576.) The Department does not contend that it observed these policies when

it reviewed and approved the Project. Nor can it, because the policies did not exist at the time.[1]

The Department's argument that these documents are relevant to its response to the Amicus Brief submitted by the Karuk Tribe also fails. (Department Amicus Answer at p. 6.) The communication and consultation processes described in Exhibits A and B have no relevance to the Karuk Tribe's argument: that "widespread application" of the Court of Appeal's ruling on exhaustion of administrative remedies may buttress tribes' perceptions that state processes like

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[1] Even if the cultural resource policies had been in effect in 2010, the Department does not appear to have complied with them. For example, the Department has acknowledged that it delegated preparation of responses to comments on the Final EIR/EIS to Newhall. (Department Answer Brief at p. 34.) These responses rejected evidence based in Chumash oral and archeological history that the California condor was a cultural resource celebrated by the Chumash People prior to the arrival of European settlers. (AR:10733 [response]; 122797, 122799-801 [comment identifying current and historical cultural significance of condor to Chumash People based on oral history]; 123340 [Los Padres National Forest Ethnographic Report displaying Chumash cave painting depicting the Condor]; 123640 [Los Padres National Forest Ethnographic Report identifying Chumash sacred site with condor rock art in Project area].) The delegation of responses and rejection of evidence indicating that condors were culturally significant to Chumash People fails to follow the guiding principle in the Department's current policy that the Department will seek in good faith to "[a]cknowledge and respect California Native American cultural resources regardless of whether those resources are located on or off Tribal Lands." (Exhibit B at p. 3.)

CEQA are "stacked against them" by precluding tribal participation in the CEQA process at exactly the time when consultation often tends to occur. (Amicus Curiae Br. of the Karuk Tribe at p. 25.)

The Court should deny judicial notice of Exhibits A and B because they are post-decisional documents irrelevant to the Department's response to the Karuk Tribe's Amicus Brief or any other material issue in this case.

B. The Department's Request for Judicial Notice of Exhibit C Should be Denied as this Document is Irrelevant Extra-Record Evidence Offered for an Improper Purpose

The Department claims that Exhibit C, the United States Fish and Wildlife Service's 1985 Recovery Plan for the Unarmored Threespine Stickleback, is relevant because "it shows that collecting and relocating species in their native habitat is an established conservation method used by the U.S. Fish and Wildlife Service and the Department for stickleback." (Request for Judicial Notice at p. 2.) The Department further contends that recovery efforts described in the Recovery Plan "include rescue efforts for stickleback located in streams with low water levels and transplantation to establish stickleback in other waters." (*Ibid.*)

The Recovery Plan states that conservation includes transplantation of stickleback to establish new populations in other waters (Exhibit C at p. 25), but the establishment of new populations as a recovery measure is not at issue in this case. The Recovery Plan further notes that "some sticklebacks" from the Shay Creek population near Big Bear were rescued and placed in a laboratory at the University of Redlands as a precautionary measure. (*Id.* at p. 26.) The Recovery Plan portrays this rescue effort not as an "established conservation method," as the Department claims, but as a contingency measure in response to an emergency situation. (*Id.* at pp. 26-27.) The Department's ability to rescue stickleback in an emergency situation is likewise not at issue in this case, where stickleback will be placed in peril not by any emergency but by the Department's approval of the Project. (See Plaintiffs' Consolidated Reply Brief at pp. 15-16.)

Because the Recovery Plan is extra-record evidence that the Department could have produced at the administrative level and included in the record "in the exercise of reasonable diligence," it should not be admitted. (*Western States*, *supra*, 9 Cal.4th at p. 578.) Even if it were admissible, the Recovery Plan would not support the

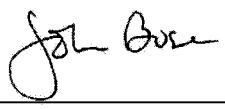
Department's claim that "translocation is key to the recovery effort for many fully protected species, and notably stickleback." (Department Amicus Answer at pp. 16-17.) The Recovery Plan does not state that translocation is "key" to the recovery of the stickleback, nor does it discuss translocation in any context relevant to this case, which involves translocation to mitigate the Project's adverse effects. (Exhibit C at pp. 25-27.)

Moreover, the Department appears to request that this Court take judicial notice of the truth of statements in Exhibit C. While courts may notice official acts and public records, they "do not take judicial notice of the truth of all matters stated therein." (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) "[T]he taking of judicial notice of the official acts of a governmental entity does not in and of itself require acceptance of the truth of factual matters which might be deduced therefrom, since in many instances what is being noticed, and thereby established, is no more than the existence of such acts and not, without supporting evidence, what might factually be associated with or flow therefrom." (*Ibid.* [quotation omitted].)

Accordingly, nothing in Exhibit C can be relied upon to contravene *record* evidence indicating that the stickleback transplantation efforts described in the Recovery Plan have failed or, at best, have an unknown status. (AR:108853 [U.S. Fish and Wildlife Service May 29, 2009 Five-Year Status Review of Unarmored Threespine Stickleback].) The 2009 Status Review cites the Project's stream channelization and urbanization as ongoing threats justifying the continued endangered status of the stickleback, but does not document any ongoing stickleback transplantation efforts, nor does it recognize that the Department's authorization of the capture and relocation of stickleback as mitigation for the Project is an "established conservation method." (AR:108861-62.)

The Court should deny judicial notice of Exhibit C as it is extra-record evidence not material to any issue in this case. The Court also should decline to take notice of the truth of any assertion therein.

March 23, 2015 By:



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PROOF OF SERVICE

I, Russell Howze, declare as follows:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen and my business address is 351 California St., Suite 600, San Francisco, CA 94104.

On March 23, 2015, I served the following document(s) entitled:

PLAINTIFFS AND RESPONDENTS' OPPOSITION TO CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE'S REQUEST FOR JUDICIAL NOTICE

by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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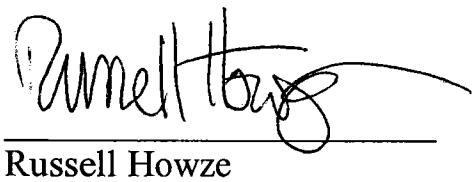
I served the document by enclosing copies in envelopes and delivering the sealed envelopes to a United States Postal Service collection location, prior to the last pick-up on the day of deposit, fully prepaid First Class Mail.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Proof of Service was executed on March 23, 2015, at San Francisco County, California.



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