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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF BERKELEY; MAYOR AND MEMBERS OF THE CITY COUNCIL OF THE CITY OF BERKELEY, Plaintiffs, v. UNITED STATES POSTAL SERVICE; PATRICK R. DONOHOE AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE; TOM A. SAMRA, VICE PRESIDENT-FACILITIES OF THE UNITED STATES POSTAL SERVICE; DIANA ALVARADO, DIRECTOR, REAL ESTATE, Service PACIFIC REGION, Defendants.	Case No.: CV-14-04916 WHA FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT Date: March 19, 2015 Time: 8:00 am

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INTRODUCTION

Plaintiffs' claims are moot as a consequence of the prospective buyer's (Hudson McDonald) decision to terminate the proposed purchase and sale agreement and this case should therefore dismissed. It is clear the controversy initially raised concerning the proposed sale has now ceased to exist and the requested injunctive and declaratory relief to set aside that particular sale can no longer be given. *See* Pls.' Compl., ECF No. 1. That the lawsuit is moot is no less true for Plaintiffs' Amended Complaint (ECF No. 46), which now raises much the same National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("NHPA") claims found in the original complaint. Plaintiffs' amended request for relief—that this Court "prevent and enjoin" some hypothetical future sale and a decision to relocate services—ignores the fact that federal court jurisdiction must be based upon a live case or controversy. And Plaintiffs cannot demonstrate that either the "voluntary cessation" or "capable of repetition but evading review" exceptions to the mootness doctrine apply.

Plaintiffs' efforts to salvage their lawsuit by relying on free-floating grievances with the Postal Service's NHPA and NEPA determinations also do not present ripe controversies. Absent a final action to sell the building, the Postal Service's compliance with either statute has no tangible effects on Plaintiffs' existing interests. Should the Postal Service rely on the NHPA and NEPA documents in the context of any future sale, Plaintiffs may attempt to challenge that final decision in much the same manner that they challenged the now-terminated sales agreement with Hudson McDonald.

Even if this Court concludes that Plaintiffs' lawsuit is neither moot nor unripe, their Complaint fails for the fundamental reason that they have not identified a private right of action to sue the Postal Service. Congress specifically excepted the Postal Service from the Administrative Procedure Act's ("APA") judicial review provisions, and neither the NHPA nor NEPA provides a private right of action. Should this Court nonetheless accept Plaintiffs' contention that the APA does apply and that the Postal Service took "reviewable final agency action" when it entered into the purchase and sales agreement, then dismissal is likewise warranted, given that the very basis of any APA review has since been terminated.

I. Factual Background

A. Postal Service's proposal to sell

On March 7, 2012, the Postal Service's Pacific Area Vice President, Tom A. Samra, signed a Facility Optimization Study which found that the Berkeley Post Office, located at 2000 Allston Way, Berkeley, CA was underutilized and costs savings could be achieved by selling the property and relocating to a smaller facility. Decl. of Diana Alvarado, ¶ 2 ("Alvarado Decl.") (ECF No. 24). After consideration of the public input received, the Postal Service announced its decision to relocate retail services at the Berkeley Post Office in April 2013.[1] Alvarado Decl., ECF No. 24, ¶¶ 4-5. In response to concerns that the Postal Service failed to comply with NEPA and the NHPA with regard to the relocation of services, the Postal Service pointed out that it "has not yet identified the potential relocation site and thus it is premature to evaluate potential impacts" under NEPA. ECF No. 24-1 at 2. The Postal Service also acknowledged that it would engage in Section 106 consultation prior to any sale of the Berkeley Post Office to consider potential impacts on the identified historic properties. *Id.*

In or around October 2013, the Postal Service began consideration of a plan in which non-retail operations would be relocated, while retail services would continue at the Berkeley Post Office following any sale. Alvarado Decl., ECF No. 24, ¶ 8; Decl. of Joseph D. Lowe, ¶ 3 ("Lowe Decl.") (ECF No. 25). That plan was ultimately incorporated into the agreement reached with Hudson McDonald, discussed below. *Id.*

B. Purchase and Sales Agreement

In October 2013, the Postal Service's broker began marketing the Property. The marketing materials discussed, among other things, the Postal Service's interest in leasing back 3,500 square feet on the ground floor for retail operations. Lowe Decl., ECF No. 25, ¶¶ 4-5. In September 2014, the Postal Service entered into an Agreement to Sell and Purchase the Berkeley Post Office with Hudson McDonald, LLC. *Id.* at ¶ 6.

[1] In this context, "retail services" refer to the services the Postal Service offered to the general public at this location on a walk-in basis, such as postage sales, and acceptance of mail and parcels for delivery. Non-retail services include mail preparation and other operations incidental to mail processing and delivery.

The sales agreement included, among other provisions, a leaseback provision requiring the purchaser to provide for the Postal Service's continued occupancy of retail space at the Berkeley Post Office for an initial term of five years, with three five-year renewal options that the Postal Service can exercise at its sole discretion. *Id*. ¶¶ 6-7. As a result, the Postal Service concluded there would be little, if any, change of use for the average postal customer and the public would retain regular access to many, if not all, of the historic features. *Id*. ¶ 7d. On December 3, 3014, Hudson McDonald terminated the Sales Agreement. *See* Joint Status Report on the Cancellation of the Sales Agreement and Notice of Withdrawal of the Preliminary Injunction Motion, ECF No. 38, Attachment A ("Termination Letter"). As a consequence, there is no sale pending.

C. Plaintiffs' Lawsuit

On November 5, 2014, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief (ECF No. 1) and a motion for a temporary restraining order and preliminary injunction (ECF No. 3), to enjoin the named Federal Defendants from completing a sale of the Berkeley Post Office. Plaintiffs' original Complaint sought "declaratory and injunctive relief . . . to prevent and enjoin the proposed sale by defendants of the Berkeley Main Post Office," Pls.' Compl., ECF No. 1, ¶ 1. As a basis for review, Plaintiffs argued that the Postal Service "established reviewable final agency action" when it represented on its website that "it is now 'in contract' to sell the Berkeley Post Office to an undisclosed purchaser." Pls.' Mem. In Supp. Of Temp. Restraining Order and Prelim. Inj., ECF No. 3 at 2; *see also id.* at 1 (stating in a sub-header that "Entering Into a Sale Agreement Creates a Reviewable Final Agency Action.").

Following Hudson McDonald's cancellation, this Court held a hearing on whether Plaintiffs' Complaint was rendered moot by that cancellation, and allowed Plaintiffs an opportunity to amend their Complaint. Plaintiffs amended their Complaint on December 30, 2014. Pls.' Am. Compl., ECF No. 46. As currently pled, Plaintiffs' Amended Complaint requests this Court "prevent and enjoin" the Postal Service from "implementing [its] decision to relocate and sell the Berkeley Main Post Office." *Id.* ¶ 1. Plaintiffs' Amended Complaint includes both an NHPA claim, *id.* ¶¶ 40-46, and a NEPA claim, *id.* ¶¶ 47-56. According to Plaintiffs, unless this Court enjoins the Postal Service from relocating and selling

the Post Office, Plaintiffs will suffer injury in the form of "loss of service to them and all Berkeley Citizens of use of the Post Office, loss of access to the architectural and artistic features of its interior lobby, diminution (if not outright removal) of its contribution to the Berkeley . . ." *Id.* ¶ 56.

Plaintiffs seek the following relief:

(1) Adjudge and declare that defendants cannot proceed with any relocation or sale of the Berkeley Main Post Office unless and until the USPS proceeds as required by the NHPA;

(2) Adjudge and declare that defendants cannot proceed with any relocation or sale of the Berkeley Main Post Office unless and until the USPS fully complies with NEPA, including the preparation of an environmental assessment and EIS;

(3) Grant an injunction against defendants proceeding with any relocation or sale of the Berkeley Main Post Office unless and until the USPS proceeds as required by the NHPA; and,

(4) Grant an injunction against defendants proceeding with any relocation or sale of the Berkeley Main Post Office unless and until the USPS fully complies with NEPA, including the preparation of an environmental assessment and EIS.

Id. (Prayer for Relief).

II. Standard of Review

Defendant moves to dismiss both Plaintiffs' NEPA claim and the NHPA claim. Defendants' motion as to mootness and ripeness is made pursuant to Federal Rule of Civil Procedure 12(b)(1), while Defendants' motion to dismiss because Plaintiffs have failed to identify a private right of action is premised on Rule 12(b)(6).

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

The plaintiff, as the party invoking federal jurisdiction, has the burden of proving its existence. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) may attack either the facial sufficiency of the allegations of the complaint or the existence of subject matter jurisdiction in fact. *See Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). If, as here, a motion to dismiss challenges subject matter jurisdiction in fact, the court may

consider materials outside the pleadings. *Id*. Accordingly, the consideration of evidence concerning the issue of jurisdiction does not convert a Rule 12(b)(1) motion into one for summary judgment. *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). In resolving such factual disputes, the Court does not presume that the allegations of the complaint are true, and plaintiff maintains the burden of establishing subject matter jurisdiction through affidavits or other appropriate evidence. *See id.*; *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

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

A defense arguing that a statute does not create individually enforceable rights is properly evaluated as a failure to state a claim. *See, e.g., Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011). A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the pleadings set forth in the complaint. *Vega v. JPMorgan Chase Bank, N.A.*, 654 F.Supp.2d 1104, 1109 (E.D. Cal. 2009). The court accepts "all facts alleged as true and construes them in the light most favorable to the plaintiff." *County of Santa Clara v. Astra USA, Inc.*, 588 F.3d 1237, 1241 n.1 (9th Cir. 2009). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir.2007) (citation and quotation marks omitted). The court is "not, however, required to accept as true conclusory allegations that are contradicted by documents referred to in the complaint, and [the court does] not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1071 (9th Cir. 2009) (citations and quotation marks omitted).

III. ARGUMENT

Plaintiffs' Amended Complaint presents two possibilities for judicial review: judicial review of the since-cancelled purchase and sale agreement or judicial review of some future sale governed by an agreement that has yet to be negotiated (and may very well provide Plaintiffs with the continued postal services they desire). Neither scenario, however, presents a live case or controversy, as required by Article III of the Constitution. Any controversy associated with the Hudson McDonald sales agreement

is now moot, and the case does not present one of the exceptions to the mootness doctrine. Any controversy associated with some future, hypothetical sale and decision to relocate services is not ripe for judicial review.

Even if this Court concludes that a live case or controversy exists, the Amended Complaint suffers from another fatal flaw: Plaintiffs have not identified a cause of action to sue the Postal Service. The Amended Complaint asserts a right to review under the APA. But Congress has excepted the Postal Service from the APA's judicial review provisions and Plaintiffs do not identify any other avenue to challenge the Postal Service's NHPA and NEPA compliance. Plaintiffs' argument that the APA provides the requisite private right of action and should nonetheless apply also exposes another significant contradiction: Plaintiffs' previous contention that the Postal Service's entry into the proposed sales agreement was the "reviewable final agency action" runs headlong into Hudson McDonald's termination and the well-established principle that the APA provides federal courts with the limited authority to review agency action so long as it final. There is currently no "final agency action" to sell the building and, accordingly, Plaintiffs' Amended Complaint should be dismissed.

A. Hudson McDonald's Termination of the Purchase and Sales Agreement Renders This Case Moot.

To maintain jurisdiction over this lawsuit "it is not enough that a dispute was very much alive when suit was filed;" the controversy must be continuing, ongoing, and persist throughout all stages of litigation. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1157 (9th Cir. 2006). A case becomes moot when an intervening event occurs that prevents the Court from granting effective relief. *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997); s*ee also Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (quoting *Nw. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988)) ("[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted").

In the context of agency action review, the Ninth Circuit has consistently held that a case becomes moot when the challenged agency decision at issue is rescinded, superseded or has expired. *See e.g.*, *Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1096 (9th Cir.2003) (challenge to a

Biological Opinion is moot when opinion has been superseded by a later opinion); *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 815 (9th Cir.1995) (case rendered moot when challenged lease sale was cancelled due to lack of bids and Department of Interior had no "concrete future plan" to lease portions of the area); *Aluminum Co. of Am. v. Bonneville Power Admin.*, 56 F.3d 1075, 1078 (9th Cir.1995) (challenge to an agency decision was moot when challenged record of decision expired). This case is no different.

Though Plaintiffs previously requested in the original Complaint that this Court "prevent and enjoin the *proposed* sale" of the Berkeley Post Office, *see* Compl. (¶ 1) (emphasis added), and now amend their complaint to prevent "*any* relocation or sale," Am. Compl. (Prayer for Relief), they fail in their attempt to salvage the complaint. As a result of Hudson McDonald's decision to cancel the purchase and sale agreement, there remains no "live" controversy, and therefore no basis for meaningful relief, whether injunctive or declaratory in nature. *See Ctr. for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007). The relief that Plaintiffs request illustrates the point.

First, Plaintiffs' request for injunctive relief is moot because there currently no sale for the Court to enjoin. *See* Am. Compl. Prayer for Relief at 19-20 (requesting this Court "[g]rant an injunction against defendants from proceeding with any relocation or sale . . ."). Any request that this Court permanently enjoin the Postal Service from entering into some future sale rests on a contingent, and at this point entirely hypothetical, agreement, the very contours of which have yet to be negotiated. And, because there is currently no sale, any harm to Plaintiffs—which would be necessary for any injunctive relief—is simply hypothetical. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184 (9th Cir. 2011) (noting that even in NEPA cases plaintiff must establish it has suffered an irreparable injury before a court can award permanent injunctive relief). Even an injunctive order for additional studies or further consultation would still require the impossible showing of how such relief would resolve or mitigate the harms caused by a sale that may never occur. *See Headwaters, Inc. v. Bureau of Land Mgmt.*, 893 F.2d 1012, 1015 n.6 (9th Cir. 1989) (distinguishing between cases in which relief could mitigate effects of legal violation with ongoing and concrete adverse effects and those in which it could not). Thus, there is no basis for a contention that Plaintiffs are currently harmed in a manner that would trigger federal court

jurisdiction. *Nome Eskimo Cmty.*, 67 F.3d at 816 (observing that with mootness, similar to considerations of standing, "[t]he federal courts lack power to make a decision unless the plaintiff has suffered an injury in fact, traceable to the challenged action, and likely to be redressed by a favorable decision.") (citing *Snake River Farmers' Ass'n v. Department of Labor*, 9 F.3d 792, 795 (9th Cir.1993)).

Second, Plaintiffs request for declaratory relief is similarly based upon a harm that no longer exists and is therefore outside the Court's jurisdiction. *See* Am. Compl. (Prayer for Relief) (Plaintiffs request that this Court "adjudge and declare that defendants cannot proceed with any relocation or sale unless and until the USPS fully complies with NEPA [and the NHPA]."). For the claims for declaratory relief to be reviewable under Plaintiffs' apparent theory of the case, Plaintiffs must, despite termination of the sales agreement, still face a "continuous, remediable harm that concretely affects their 'existing interests.'" *Feldman*, 518 F.3d at 643 (quoting *Headwaters*, 893 F.2d at 1015)). Where courts have concluded that declaratory relief would nonetheless remedy the alleged harm, the "common thread" throughout these cases was that "the violation complained of may have caused continuing harm and . . . the court can still act to remedy such harm by limiting its future adverse effects." *Feldman*, 518 F.3d at 643 (citing *Nw. Envtl. Def. Ctr.*, 849 F.2d at 1244). No such situation exists here.

The Ninth Circuit was faced with similar circumstances in *Nome Eskimo Cmty*., where the plaintiff challenged the government's proposed sale of leases for gold dredging. Plaintiffs filed their lawsuit a month after bidding was opened and on the last day on which bids were due. The government did not receive any bids, and the leasing attempt failed independently of the lawsuit. The Court observed that "[i]n the absence of any present or concrete future plans to lease portions" of the challenged area, the plaintiffs' claims were moot. 67 F.3d at 816. In the Court's view, it would be impossible to determine the issue of the agency's purported infringement of plaintiffs' rights "without first knowing the scope and nature of the proposed lease activity." *Id.* at 816.

Such is the case here. Plaintiffs have provided no explanation for how the harms to which they cite—*viz.* loss of service within this Post Office and the potential loss of access to the architectural and artistic features of the lobby, Am. Compl., ECF No. 46, ¶ 56—continue in the absence of a sales agreement. Indeed, the alleged harms may well be mitigated or altogether avoided by a future purchase

and sale agreement that retains retail services in the present location and allows the public regular access to the historic features. *See* Lowe Decl., ECF No. 25, ¶ 7. Much like *Nome Eskimo Cmty.*, therefore, neither Plaintiffs nor this Court can identify the tangible harms required under the Ninth Circuit's standard without first knowing the scope and nature of any hypothetical future sale.

The hypothetical future "relocation and sale" upon which Plaintiffs rely does not constitute the type of substantial controversy between the parties that is "of sufficient immediacy and reality" such that a judicial declaration would provide meaningful relief. *See Lohn*, 511 F.3d at 963. How exactly the Postal Service will address any future sale is simply "too uncertain, and too contingent" upon the Postal Service's discretion "to permit declaratory adjudication predicated on prejudice on [Plaintiffs'] 'existing interests.'" *See Headwaters, Inc.*, 893 F.2d at 1016; *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 558 (9th Cir. 2009). If the Postal Service decides to relist the property, and if a buyer emerges on terms acceptable to the Postal Service, it would need to undertake a variety of actions—including ensuring that the sale complies with NEPA and the NHPA.

The concern that the Postal Service will attempt to "hide behind the mootness doctrine" simply does not exist in this case. *Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001). To the extent the Postal Service enters another sales agreement at some future point, Plaintiffs can then attempt to raise any challenges they may have to that specific project in much the same manner as they did here and other plaintiffs have in similar actions, such as *National Post Office Collaborate v. Donahoe*, No. 3:13-cv-1406, 2014 WL 6686691 (D. Conn. Nov. 26, 2014) (challenging the Postal Service's entry into a sales agreement for a post office in Connecticut). But the prospect of this possible future litigation does not provide a basis for Plaintiffs' complaint that is no longer grounded in a "concrete and particularized factual context" but instead rests on a "free-floating, ethereal grievances." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010).

B. No exception to the doctrine of mootness applies

There are two recognized exceptions to the mootness doctrine. The first is for the voluntary cessation of allegedly unlawful conduct; the second pertains to conduct that is "capable of repetition yet

evading review." *See City of Los Angeles v. Lyons*, 449 U.S. 934, 935 n.1 (1980). Neither exception applies here.

The "voluntary cessation of allegedly illegal conduct" exception does not apply on its face because the termination of the sales agreement was a consequence of a decision by the potential buyer, not the Postal Service. *See* Termination Letter, ECF No. 38. For the exception to apply, "the defendant's voluntary cessation must have arisen *because of* the litigation." *Pub. Utilities Com'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996) (emphasis in the original) (citing *Nome Eskimo Cmty.*, 67 F.3d at 816); *see also Sze v. I.N.S.*, 153 F.3d 1005, 1008 (9th Cir. 1998) (same). A third party's termination of an agreement that affects the agency action subject to challenge does not provide grounds for application of the voluntary cessation doctrine. *See Or. Natural Res. Inc. v. Grossarth*, 979 F.2d 1377, 1379 (9th Cir. 1992) (finding that the agency's cancellation of the timber sale "was not a voluntary cessation within the meaning of that doctrine, but was instead the result of the [plaintiff's] successful administrative appeal."); *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 893 (10th Cir. 2008) (finding "[n]othing in the record presented to us indicates the BLM's termination of the leases at issue constitutes a 'voluntary cessation' of illegal conduct," but instead concluding that "the terminations for nonpayment resulted from the actions of a third party . . . ."); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222 (10th Cir. 2005) ("A defendant cannot be said to have voluntarily ceased allegedly illegal conduct where, as here, the controversy has become moot through the normal course of events rather than through the unilateral action of the defendant.").

Nor can Plaintiffs argue that the "capable of repetition, yet evading review" exception can save their claims. The "repetition/evasion" exception "is a narrow one, and applies only in 'exceptional situations'" that are not present here. *Headwaters*, 893 F.2d at 1016. Under this exception, federal courts may exercise jurisdiction over otherwise moot matters when: 1) there is a reasonable expectation that the same complaining party would be subjected to the same action again; and 2) the challenged action is so short in duration that it cannot be fully litigated prior to its cessation or expiration. *Id.* (citations omitted). The Supreme Court has stated that the exception applies only in exceptional

situations, and only when *both* factors are present. *Spencer v. Kemna*, 523 U.S. 1 (1998); *see also Weinstein v. Bradford*, 423 U.S. 147 (1975). Plaintiffs cannot demonstrate the presence of either.

First, there is no reasonable expectation that the Postal Service will reach an agreement for the sale of the building, let alone with this specific buyer under the same terms of the cancelled purchase and sales agreement.[2] *Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1244 (9th Cir. 1991) ("A case becomes moot when a court cannot grant effective relief, and where it is unlikely that the *precise conditions* of the case could ever recur.") (emphasis added). Indeed any argument that the alleged harms will recur is particularly ironic given the lengths to which *Plaintiffs* have gone to prevent any relocation and sale. For example, on September 30, 2014 (after the Postal Service had entered into the purchase and sale agreement), the City of Berkeley adopted City Ordinance No. 7,370-N.S. ("Ordinance"), which added Chapter 23E.98, Civic Center District Overlay, to the Berkeley Municipal Code. The Ordinance creates a far more restrictive zoning overlay in the Civic Center District, a small, nine-parcel section of Berkeley's downtown, which includes the Post Office. The zoning overlay now prohibits all residential and most private commercial uses of property within the District. The zoning overlay goes so far as to permit only the following new uses in the Civic Center District: libraries; judicial courts; museums; parks and playgrounds; public safety and emergency services; government agencies and institutions; public schools/educational facilities; non-profit cultural, arts, environmental, community service and historic organizations; live performance theatre; and a public market. *Id.* § 23E.68.030; Berkeley, Cal., Downtown Area Plan LU-3 (2012). Indeed, every indication suggests that the establishment of the Civic Center District zoning overlay was explicitly designed to prevent the Postal Service's sale of, and relocation of services from, the Post Office.[3] Any

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[2] Plaintiffs contend that the Postal Service continues to list the Berkeley Post Office for sale. Am. Compl., ECF No. 46, ¶ 39 (relying on http://www.uspspropertiesforsale.com). Not so. That listing is no longer on the site. *See* Second Decl. of Joseph D. Lowe ("Second Lowe Decl.") ¶ 3 (attached).

[3] In a July 16, 2013, memorandum from City Councilmember Jesse Arreguin to the Mayor and fellow Councilmembers, Mr. Arreguin states that "[t]he establishment of a Civic Center District zoning overlay will not only limit uses of properties in the district to those consistent with the character of the district, but it will also ensure that the Downtown Post Office can only be utilized for a civic or community-oriented use, and may help influence the USPS to decide a more favorable future for the building." Agenda for Oct. 2, 2013, meeting of the City of Berkeley Planning Commission (page 15),

future decision to relist the property is further complicated by the size, scale, and scope of the type of sale here and the limited universe of prospective buyers amenable to such a purchase. *See* Lowe Decl. ¶ 4. Thus, both the City's enactment of an ordinance specifically designed to thwart the Postal Service's efforts to sell the building, as well as the Postal Service's conclusion that it requires additional time to consider the financial and operational implications of maintaining retail service at the Berkeley Post Office, underscore that any future recurrence of Plaintiffs' alleged injuries is speculative at best. *See* Second Lowe Decl, ¶ 4.

Second, even if there were a "reasonable expectation" Plaintiffs would be subjected to the same agency conduct it complains of here, there is no basis for finding that the underlying action would be certain to "run its course" before this Court could give the case its full consideration. *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 453–54 (9th Cir.1994). The inquiry turns on whether something inherent exists in the nature or structure of the governmental action that makes it necessarily of short duration. *See e.g.*, *Turner v. Rogers*, 131 S.Ct. 2507, 2515, 180 L.Ed.2d 452 (2011) (imprisonment for a statutory maximum of one year for civil contempt); *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 943 (10th Cir. 2002) (temporary regulatory orders that by statute cease to be in effect no later than ninety days after issuance). For example, the Ninth Circuit in *Native Americans for Enola v. U.S. Forest Serv.*, concluded that an NHPA challenge to a Forest Service permit was moot and did not fall within the aforementioned exception because permits issued by the Forest Service "are not inherently of such short duration that challenges to their validity will go unreviewed." 60 F.3d 645, 646 (9th Cir. 1995).

If another sale were to be authorized, Plaintiffs could then try to seek judicial review of, and injunctive relieve preventing, the Postal Service's compliance with NEPA and the NHPA, just as they did with their original complaint. *See also Nat'l Post Office Collaborate*, 2014 WL 2014 WL 6686691; *cf. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1168 (9th Cir. 2011)

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available at http://www.ci.berkeley.ca.us/Planning_and_Development/Commissions/Commission_for_Planning/2013-10-02_Agenda_Page.aspx (last visited Jan. 22, 2015) (to access the referenced document, click on the link for "PDF of Entire Agenda" at the top of the webpage).

(finding that exception did not apply "because there is no reason to suppose that any similar subsequent denial would be unreviewable").

Accordingly, because Plaintiffs' claims are moot, and neither of the exceptions to the mootness doctrine apply, the Court lacks jurisdiction and should dismiss Plaintiffs' claims.

C. Alternatively, Plaintiffs' Claims are Not Ripe.

Even if a future sale of the Berkeley Post Office were on the horizon, Plaintiffs' case would still have to be dismissed because it is not ripe absent an effective purchase and sales agreement authorizing the sale of the Post Office.

Ripeness is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic Social Services*, Inc., 509 U.S. 43, 57, n.18 (1993)). "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hosp. Ass'n*, 538 U.S. at 807–08 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)).

The Ninth Circuit has instructed that "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 793 (9th Cir. 2012) (*quoting Texas v. United States*, 523 U.S. 296, 300 (1998)). "That is so because, if the contingent events do not occur, the plaintiff likely will not have suffered an injury that is concrete and particularized enough to establish the first element of standing." *Id.* (quoting *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009)).

To determine whether a controversy is ripe, a court considers: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Here, Plaintiffs' claims are unripe under all three prongs of this test.

First, postponing review until a sale has been reached that threatens injury to one of its members would not harm Plaintiffs because they would be able to raise their NHPA and NEPA objections (like any other objections) through any available channels for judicial review, to the extent such review is available against the Postal Service. *Infra* Part III.D. The NHPA and NEPA documents do not themselves authorize any action to be taken, and focusing challenges on an actual sale will not harm Plaintiffs. Without a decision to relist, let alone a buyer or an agreement, there can be no sale, no transfer of title, and Plaintiffs remain free to avail themselves of continued retail services and access and enjoy the architectural and artistic features of the building. Am. Compl., ECF No. 46, ¶ 56 (citing to the loss of postal services and access to the building as an "irreparable injury").

That Plaintiffs' challenge now rests on purported injuries associated with the relocation of postal services, *Id.*. ¶ 56, further highlights the premature nature of their challenge. As the Postal Service explained, it intends to retain current retail operations at the Berkeley Post Office, Alvarado Decl., ECF No. 24, ¶ 7. Accordingly, waiting until there actually is a Postal Service action to review will cause no hardship to Plaintiffs, and may, in fact, demonstrate little to no harm to their asserted interests. *See Municipality of Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992) ("noting that the 'mere potential for future injury does not overcome the interest of the judiciary in delaying review.'") (internal quotation omitted).

Second, absent approval of a sale or some other irreversible commitment of resources by the Postal Service, Plaintiffs' challenge merely presents an abstract disagreement not appropriate for judicial review. Even assuming the Postal Service relists the property (which is by no means guaranteed), the Postal Service will need to consider whether additional evaluation is warranted under NEPA and/or the NHPA. As the Supreme Court has explained, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas*, 523 U.S. at 300.

Third, this Court would benefit from deferring consideration of any challenge, whether on NEPA or NHPA grounds. Indeed, a final purchase and sale agreement is necessary for any challenge to a sale to proceed. Without any proposal, neither this Court nor Plaintiffs can assess whether some future sale

will injure Plaintiffs "because the nature and effect of that sale cannot yet be assessed" or if the Postal Service action complied with NEPA and the NHPA. *Grossarth*, 979 F.2d at 1379 (finding the NEPA challenge to a future sale not ripe). Waiting until that sale is reached, a decision that may very well retain retail services and ensure public access, may make "resolution of the dispute . . . unnecessary." *Fla. Power & Light Co. v. E.P.A.*, 145 F.3d 1414, 1421 (D.C. Cir. 1998). Thus, because the proposal to sell entails no commitment of resources that have any on-the-ground effect, judicial consideration of the sufficiency of the Postal Service's NEPA and NHPA analyses standing alone would be abstract and premature. *Texas*, 523 U.S. at 301 ("The operation of [a challenged] statute is better grasped when viewed in light of a particular application.").

D. Even If Plaintiffs' Claims Are Not Moot, Plaintiffs Cannot Bring an Action To Challenge the Postal Service's Compliance with NEPA or Section 106, Either Through an Implied Cause of Action or Through the APA.

Even if the Court were to assume jurisdiction—which it should not—Plaintiffs' arguments suffer from an additional legal deficiency: they have not identified a valid private right of action for Claims One and Two. It is well-established that for Plaintiffs to bring suit against the executive branch, they must identify a waiver of sovereign immunity, subject matter jurisdiction, **and** a private right of action. *Presidential Gardens Assocs. v. United States ex rel. Sec'y of Housing & Urban Dev.*, 175 F.3d 132, 139 (2d Cir. 1999); *see FDIC v. Meyer*, 510 U.S. 471, 483-86 (1994) (explaining that, even with a waiver of sovereign immunity, plaintiffs filing suit against the federal government must still identify an "avenue for relief" within the "source of substantive law upon which the [plaintiff] relies"). Though Plaintiffs have satisfied the first two criteria, they cannot satisfy the third.[4] This is not merely some "academic" disagreement as Plaintiffs would have it, Pls.' Reply in Supp. of Mot. for Inj. Relief ("Pls.' Reply") (ECF No. 32) at 2-3, but instead a reflection that, in *Alexander v. Sandoval*, the Supreme Court reaffirmed that private enforcement of public laws must be clearly expressed by Congress. 532 U.S. 275

[4] The "sue and be sued" clause found at 39 U.S.C. § 401, waives the Postal Service's sovereign immunity, *Currier v. Potter*, 379 F.3d 716, 724 (9th Cir. 2004), and subject matter jurisdiction is provided by both 38 U.S.C. § 409(a) and 28 U.S.C. § 1331.

(2001). Plaintiffs cannot obtain judicial review of the present complaint, because the Postal Service "is exempt from the APA's general mandate of judicial review of agency actions" by virtue of the Postal Reorganization Act, *Currier*, 379 F.3d at 725, and neither NEPA nor the NHPA by their own force create a private right of action, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006).

The question does not turn on whether the substantive provisions of NEPA or the NHPA apply to the Postal Service, as Plaintiffs suggest. Pls.' Reply, ECF No. 32 at 2-3.[5] The question is instead whether there is any private right of action that enables Plaintiffs to sue the Postal Service for alleged violations of the statutes they have identified. It is well-established in the Ninth Circuit that neither NEPA nor the NHPA include a private right of action. *See Gros Ventre*, 469 F.3d at 814 ("Neither statute [NHPA or NEPA] provides a private right of action; therefore the [Plaintiffs] must rely on the APA to state a claim."); *see also Karst Envtl. Educ. and Prot., Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("[B]ecause NHPA, like NEPA, contains no private right of action, we agree with the Ninth Circuit that NHPA actions must also be brought pursuant to the APA.").

Recognizing that NEPA and the NHPA do not contain private rights of action, Plaintiffs rely to no avail upon the APA. To be sure, Chapter 5, Section 702, of the APA provides a cause of action through which to challenge federal agency decision-making, and the APA remains the standard course for judicial review of agency action under NEPA and the NHPA. *Gros Ventre Tribe*, 469 F.3d at 814. But what Congress gives, it can also take away. And Congress has explicitly excepted the Postal Service from large portions of the APA, including its judicial review provisions found in Chapter 5, Section 702. *See* 39 U.S.C. § 410(a)[6]; *Currier*, 379 F.3d at 725; *see Mittleman v. Postal Regulatory*

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[5] We are aware of no court decision that holds, in light of Section 410(a), that Section 106's procedural requirements do apply to the Postal Service, in whole or in part. *See* 39 U.S.C. § 410(a) ("no Federal law dealing with public or Federal . . . property . . . shall apply to the exercise of the powers of the Postal Service."). The Postal Service believes that Congress intended in § 410(a) that Section 106 would not apply to the Postal Service's disposal of its own real property. The Postal Service voluntarily follows, as matter of policy, the procedures set forth in Section 106 when undertaking real property disposals. *See, e.g.*, 39 C.F.R. § 241.4(d). The Postal Service's voluntary compliance with a process that would not otherwise be required by law, however, would not create a cause of action through which the Plaintiffs could challenge the Postal Service's actions. *Sandoval*, 532 U.S. at 291.

[6] 39 U.S.C. § 410(a) reads: "Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the

Comm'n, 757 F.3d 300, 305 (D.C. Cir. 2014) (explaining that the D.C. Circuit and several other Courts of Appeals have "observed that the Postal Service is exempt from review under the Administrative Procedures Act.") (internal quotation marks and citation omitted). Thus, the APA does not provide a cause of action for Plaintiffs' complaint and Plaintiffs have failed to meet their burden.

Chelsea Neighborhood Ass'ns v. U.S. Postal Serv., 516 F.2d 378 (2d Cir. 1975) and *Akiak Native Cmty. v. U.S. Postal Serv.*,213 F.3d 1140 (9th Cir. 2000) are not to the contrary. As an initial matter, both *Akiak* and *Chelsea* predate the landmark decision in *Alexander v. Sandoval*, where the Supreme Court underscored its disavowal of the authority of federal courts to infer a private right of action, finding that "private rights of action to enforce federal law must be created by Congress." 532 U.S. at 286-87. The Court in *Sandoval* went on to explain that "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy," and that without a statutorily-prescribed remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be . . . ." *Id.* Four years later, the Ninth Circuit, in *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097-98 (9th Cir. 2005), was the first court to consider the existence of a private right of action under the NHPA in a post-*Sandoval* world. Although two federal courts had previously concluded that Section 106 of the NHPA provided for a private right action,[7] relying on *Sandoval*, the Ninth Circuit departed from the precedent set by its sister circuits, holding that the NHPA does not provide a private right of action and that "invocation of the APA is a longstanding means to challenge agency action." 417 F.3d at 1095.[8] Only one year earlier, however, the Ninth Circuit had concluded that the Postal Service is excepted from the judicial review provisions of the APA. *Currier*, 379 F.3d at 725.

Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, *including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service*." (emphasis added).

[7] *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991); *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989).

[8] Indeed, the Ninth Circuit's cases make clear that NHPA claims are reviewed under the APA. *E.g., Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1998); *Presidio Golf Club v. National Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 804 (9th Cir. 1999).

Both *Chelsea* and *Akiak* are also silent on the issue of whether a cause of action existed for the NEPA claims in those cases. The question before the Second Circuit in *Chelsea* was whether Congress intended in the Postal Reorganization Act that the Postal Service comply with NEPA. *See id.* No party appears to have raised a cause of action argument, and the Second Circuit did not address whether NEPA provides the requisite cause of action.[9] Likewise, in *Akiak* the parties did not raise, and the Ninth Circuit therefore had no occasion to address, whether (regardless if NEPA applied) there is a mechanism for judicial review. Nonetheless, the Court's decision in *Sandoval* and the Ninth Circuit's decision in *San Carlos* both call into question what Plaintiffs appear to believe was the Ninth Circuit's assumption in *Akiak* that the Postal Service's adoption of certain provisions of NEPA via its regulations subjected it to a cause of action under the APA. The mere fact that the Postal Service has incorporated aspects of NEPA and the Section 106 process into its regulations cannot undo Congress' intentional exception of the Postal Service from the APA's general mandate of judicial review of its actions. *Currier*, 379 F.3d at 725. And it is "most certainly incorrect," on the other hand, to "say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Sandoval*, 532 U.S. at 291.

The recent decision by a district court in Connecticut in *National Post Office Collaborate* does not alter the analysis. Relying primarily on its interpretation of precedent in that circuit (*Chelsea*), the court concluded that whether the NEPA claim was reviewed "under the APA or another source of a private right [was] not material, because the 'arbitrary and capricious' standard of review indisputably applie[d]." 2014 WL 6686691 at * 6. The court did not conclude that the APA or NEPA provide a private right of action against the Postal Service. And, in the Ninth Circuit, the notion that review of the Postal Service's decisions may still apply when the APA does not is not so clear. Though given the opportunity in *Currier*, the Ninth Circuit "decline[d] to override the PRA's express removal of APA review of the Service's actions by imputing an implicit Congressional intent to preserve common-law

[9] The district court opinion in *Chelsea* did not address the cause of action argument, *see Chelsea Neighborhood Ass'ns v. U.S. Postal Serv.*, 389 F.Supp. 1171 (S.D.N.Y. 1975), which is a waivable argument. The Second Circuit would have therefore been unable to address the issue.

principles of judicial review." (citing *Carlin v. McKean*, 823 F.2d 620, 623 (D.C.Cir.1987) for the proposition that "common-law administrative review may not survive PRA's explicit removal of APA review").

Congress's decision to except the Postal Service from judicial review under the APA also comports with "Congress's intent to insulate the Postal Service from administrative challenges and to place the Service on a business like footing." *Currier*, 379 F.3d at 725-26. Because the Amended Complaint fails to identify any other alternative enforcement mechanism (*i.e.* a private right of action) for Plaintiffs to seek judicial review of the Postal Service's compliance with NEPA and the NHPA, their claims should be dismissed in the alternative on this basis.

Lastly, even if the Court were to conclude that the APA does apply, there would still be one last hurdle that Plaintiffs cannot clear: the APA provides federal courts with the limited authority to review only those agency decisions that are "final agency action" pursuant to 5 U.S.C. § 704. *Or. Natural Desert Ass'n. v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). Taking as true Plaintiffs' argument that entry into a sales agreement was the "reviewable final agency action," ECF No. 3 at 2-3, there is no longer a final agency action for this Court to review.[10] Thus, the very basis for even Plaintiffs' purported private right of action no longer exists and proves fatal to Plaintiffs' Amended Complaint.

CONCLUSION

The Court lacks jurisdiction over Claims One and Two because the claims do not present a live case or controversy under Article III, whether as a matter of mootness or ripeness. Further, the APA's judicial review provisions do not apply to the Postal Service and Plaintiffs have not identified any viable cause of action for Counts One and Two. Should this Court conclude that the APA does apply, Plaintiffs cannot demonstrate that there exists a reviewable, final agency action.

[10] One of the cases Plaintiffs cite in support of judicial review illustrates this very point. *See Comm. for Pres. of Seattle Fed. Reserve Bank Bldg. v. Fed. Reserve Bank of San Francisco*, No. 08-1700-RSL, 2010 WL 1138407 at *2-3 (W.D. Wash. Mar. 19, 2010) (finding, in the context of a NEPA and NHPA challenge to the Federal Reserve's proposed sale of a building, that the Federal Reserve took final agency action when it entered into a "binding purchase and sale agreement.").

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, I filed the above pleading and its attachments with the Court's CMS/ECF system, which will send notice of such to each party.

s/ Kenneth D. Rooney
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