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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 **THE DELTA SMELT CASES**

1:09-cv-407 OWW

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14 **SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY, et al. v. SALAZAR, et al.**

Consolidated With:
Case No. 1:09-cv-422 OWW GSA
Case No. 1:09-cv-631 OWW GSA
Case No. 1:09-cv-892 OWW GSA
Partially Consolidated With:
Case No. 1:09-cv-480 OWW GSA
Case No. 1:09-cv-01201-OWW-DLB

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16 **STATE WATER CONTRACTORS v.
SALAZAR, et al.**

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18 **COALITION FOR A SUSTAINABLE
DELTA, et al. v. UNITED STATES FISH
19 AND WILDLIFE SERVICE, et al.**

**STIPULATION AND [PROPOSED]
ORDER FOR INTERIM REMEDY
THROUGH JUNE 30, 2011**

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21 **METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA v.
22 UNITED STATES FISH AND WILDLIFE
SERVICE, et al.**

Date: February 25, 2011
Time: 8:30 a.m.
Courtroom: 3

Judge: Honorable Oliver W. Wanger

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24 **STEWART & JASPER ORCHARDS, et al.
v. UNITED STATES FISH AND
25 WILDLIFE SERVICE, et al.**

26
27 **FAMILY FARM ALLIANCE v.
KENNETH SALAZAR, et al.**

1 WHEREAS on December 14, 2010, the Court entered its “Memorandum Decision re Cross
2 Motions for Summary Judgment” (Doc. 757) in the above-captioned Consolidated Delta Smelt
3 Cases. The Memorandum Decision concluded that parts of the December 15, 2008 Biological
4 Opinion (BiOp) addressing the impacts of the coordinated operations of the federal Central
5 Valley Project (CVP) and the State Water Project (SWP) on the Delta smelt and its reasonable
6 and prudent alternatives were arbitrary, capricious, and unlawful;

7 WHEREAS on December 27, 2010, the Court entered an “Amended Order on Cross-
8 Motions for Summary Judgment” (Doc. 761). The Amended Order remanded the BiOp to
9 Defendant United States Fish and Wildlife Service (USFWS) without vacatur for further
10 consideration. This amended order remains in effect except as modified by this stipulation;

11 WHEREAS the parties seek to settle and compromise issues relating to the interim
12 operation of the CVP and the SWP related to effects to Delta smelt through June 30, 2011;

13 WHEREAS USFWS intends that its determinations regarding, and the CVP and SWP
14 compliance with, the OMR flow criteria identified in this stipulation will provide equivalent
15 protection for Delta smelt through June 30, 2011, as the protection set forth in the BiOp.

16 The parties hereby agree and stipulate to enter into the following agreement for interim
17 operations of the CVP and the SWP:

18 1. This agreement is for the limited purpose of resolving CVP and SWP operations
19 through June 30, 2011. This agreement shall become effective immediately upon entry of this
20 Stipulation and Order by the Court.

21 2. Operating Criteria for Interim Remedy

22 Once Action 2 or Action 3 is triggered under the BiOp by USFWS, the Interim Remedy
23 will provide for a 14-day average Old and Middle River (OMR) flow in a range between -1,250
24 cfs to -6,100 cfs. The simultaneous 5-day running average of the OMR requirements shall be
25 within 25 percent of the 14-day average. USFWS will set and may modify OMR flows within
26 this range based upon best available science using real time data concerning overall Delta smelt
27 distribution, turbidity, salvage, incidental take, temperature and other relevant physical and

1 biological factors. As of the date of this stipulation, no actions have been triggered under the
2 BiOp this year. If OMR flows are triggered, USFWS anticipates setting initial OMR flows within
3 a range of -5,000 cfs and -6,100 cfs in an experimental fashion if USFWS determines that the best
4 available science and consideration of all of the factors listed above indicate that such flows
5 would be adequately protective of smelt and consistent with avoiding jeopardy to listed species
6 and adverse modification to designated critical habitat. Any determination to change OMR flow
7 from the initial flow level will be based on best available science using real time data concerning
8 overall Delta smelt distribution, turbidity, salvage, incidental take, temperature and other relevant
9 physical and biological factors. USFWS will consider the technical information provided through
10 the enhanced coordination process set forth below in making its determinations. This agreement
11 does not affect Reclamation's obligation to operate the CVP to meet other legal requirements or
12 DWR's obligation to operate the SWP to meet other legal requirements.

13 3. Enhanced Coordination Process

14 The existing Smelt Working Group (SWG) and Water Operations Management Team
15 (WOMT) will be used to advise USFWS on smelt conservation needs and water operations. In
16 addition, a Delta Condition Team (DCT) consisting of scientists and engineers from the state and
17 federal agencies, water contractors, and environmental groups will meet on Monday mornings to
18 review the real time operations and Delta conditions, including data from new turbidity
19 monitoring stations and new analytical tools such as the Delta smelt behavior model. The
20 members of the DCT will provide their individual information to the SWG in accordance with a
21 process provided by the SWG, which will meet later on Monday morning to assess risks to Delta
22 smelt based upon Delta conditions and the other factors set forth in paragraph 2 above. The SWG
23 and individuals of the DCT may provide, in accordance with a process provided by the WOMT,
24 their information to the WOMT for its consideration in developing a recommendation to USFWS
25 for actions to protect Delta smelt and other listed fish. The WOMT will supply information for
26 USFWS to consider, including impacts to other species, and water supply impacts. After meeting
27 with the WOMT, USFWS shall make the final determination on OMR flow criteria to be

1 implemented by Reclamation and DWR and shall explain its determination in writing based on
2 the best available science. USFWS will increase the transparency of the decision process by
3 documenting the basis for decisions and providing all supporting documentation to interested
4 parties via USFWS's website. USFWS will finalize a determination regarding OMR flow criteria
5 and provide it to the Court consistent with the 48 hour notification described below.

6 4. Notice to the Court

7 USFWS will submit a notice to the Court 48 hours in advance of the implementation by
8 Reclamation and DWR of any determinations that will result in a change to OMR flows. The
9 notice to the Court will include an explanation for the change based on the factors identified in
10 paragraphs 2 and 3 above, and, to the extent that the WOMT has provided information to USFWS
11 on water supply impacts, the notice to the Court will include these impacts. If USFWS submits a
12 notice to the Court, any party may provide information on economic impacts and other
13 information that it deems relevant, through its own notice to the Court. Any party may seek
14 judicial review of and relief from such changes to OMR flows. Should any Plaintiff or Plaintiff-
15 Intervenor seek judicial review under paragraph 4 of this stipulation, the terms of this stipulation
16 shall immediately and henceforth become inoperative.

17 5. This agreement does not limit the rights of Plaintiffs and Plaintiff-Intervenor to seek
18 an interim remedy in the Consolidated Delta Smelt Cases for project operations after June 30,
19 2011. Nor does this agreement limit the rights of Plaintiffs and Plaintiff-Intervenor to move for
20 injunctive relief in the Consolidated Salmonid Cases (Case No. 1:09-cv-1053-OWW), nor does it
21 otherwise affect that case nor the 2009 Biological Opinion on the CVP and SWP issued by the
22 National Marine Fisheries Service that is at issue in that case. This agreement also does not limit
23 the rights of Federal Defendants and Defendant-Intervenors from raising any and all defenses to
24 any interim remedies and requests for injunctive relief put forward by Plaintiffs in this matter and
25 in the Consolidated Salmonid Cases.

26 6. Execution of this stipulation shall not be deemed an admission of any issue of fact or
27 law by any party, and shall not be deemed a waiver of any claim or defense or basis for appeal

1 raised by any party. This stipulation is for the limited purpose of addressing CVP and SWP
2 operations through June 30, 2011, and shall not be binding or considered precedential for any
3 other purpose. By entering into this agreement, the parties do not necessarily concede any of the
4 findings or conclusions contained in the Court's prior orders and decisions.

5 7. The parties request that the Court set a status conference on or about June 1, 2011, to
6 address the time frame within which the USFWS will complete consultation in order to issue a
7 new Biological Opinion and to set forth a schedule to determine criteria for interim operations
8 pending completion of that Biological Opinion.

9
10 Dated: February 24, 2011

Respectfully submitted,

11 KAMALA D. HARRIS
Attorney General of California
12 ROBERT W. BYRNE
Supervising Deputy Attorney General
13 CLIFFORD T. LEE
CECILIA L. DENNIS
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Deputy Attorneys General

15 */s/ Cecilia L. Dennis*
16 CECILIA L. DENNIS
Deputy Attorney General
17 *Attorneys for Plaintiff Intervenor California*
Department of Water Resources

18
19 Dated: February 24, 2011

BEST, BEST & KREIGER LLP

20
21 */s/ Gregory K. Wilkinson*

22 _____
GREGORY K. WILKINSON
23 *Attorneys for Plaintiff State Water*
Contractors

24 Dated: February 24, 2011

DIEPENBROCK HARRISON

25
26 */s/ Eileen M. Diepenbrock*

27 _____
EILEEN M. DIEPENBROCK
28 *Attorneys for Plaintiffs San Luis & Delta-*
Mendota Water Authority and Westlands
Water District

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Dated: February 24, 2011

NOSSAMAN LLP

/s/ Paul S. Weiland

PAUL S. WEILAND
Attorneys for Plaintiff Coalition for a Sustainable Delta and Kern County Water Agency

Dated: February 24, 2011

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/s/ Christopher J. Carr

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Dated: February 24, 2011

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Dated: February 24, 2011

THE BRENDA DAVIS LAW GROUP

/s/ Brenda W. Davis

BRENDA W. DAVIS
Attorneys for Plaintiff Family Farm Alliance

Dated: February 24, 2011

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Assistant Attorney General
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U.S. Department of Justice

/s/ Ethan C. Eddy

ETHAN C. EDDY
Attorneys for the Federal Defendants

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Dated: February 24, 2011

NATURAL RESOURCES DEFENSE
COUNCIL

/s/ Katherine Poole

KATHERINE POOLE
*Attorneys for Defendant Intervenor Natural
Resources Defense Council*

Dated: February 24, 2011

EARTHJUSTICE

/s/ George Torgun

GEORGE TORGUN
*Attorneys for Defendant Intervenor The Bay
Institute and Natural Resources Defense
Council*

**FOR GOOD CAUSE SHOWN,
SO ORDERED:**

Dated: February ____, 2011

THE HONORABLE OLIVER W. WANGER
U.S. DISTRICT COURT JUDGE

SA2009309047

