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11 **IN THE UNITED STATES DISTRICT COURT**
 12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13
 14 NATURAL RESOURCES DEFENSE
 COUNCIL, et al.,

15 Plaintiffs,

16 v.

17 DIRK KEMPTHORNE, Secretary, U.S.
 18 Department of the Interior, et al.,

19 Defendants,

20 SAN LUIS & DELTA-MENDOTA WATER
 AUTHORITY and WETLANDS WATER
 21 DISTRICT; CALIFORNIA FARM BUREAU
 FEDERATION; GLENN-COLUSA
 22 IRRIGATION DISTRICT, et al.; CALIFORNIA
 DEPARTMENT OF WATER RESOURCES,
 23 and STATE WATER CONTRACTORS,

24 Defendants-Interveners.
 25

05 CV 01207 OWW (LJO)

**DEFENDANT-INTERVENER
 DEPARTMENT OF WATER
 RESOURCES' JOINDER IN THE
 FEDERAL DEFENDANTS' FRCP 60
 (b) MOTION**

Date: August 29, 2008

Time: 9:00 a.m.

Courtroom: 3

Judge: The Honorable Oliver W. Wanger

26 The defendant-intervener California Department of Water Resources (DWR) joins with the
 27 federal defendants in the above-entitled action in support of the federal defendants' motion to
 28 modify the Court's December 14, 2007 Interim Remedial Order Following Summary Judgment

1 and Evidentiary Hearing (Doc. 560) to extend the time for the U.S. Fish and Wildlife Service
2 (USFWS) to issue a new Biological Opinion on the Long-Term Central Valley Project
3 Operations Criteria and Plan (OCAP) from September 15, 2008 to December 15, 2008. As the
4 following will show, the primary purposes of the Federal Endangered Species Act and changed
5 circumstances fully support the federal defendants' request under Rule 60(b) of the Federal Rules
6 of Civil Procedure for modification of this order.

7 Rule 60(b) of the Federal Rules of Civil Procedure allows a district court to modify any
8 order that it has issued where there is "newly discovered evidence," where application of
9 prospective relief is "no longer equitable," and for "any other reason that justifies relief."
10 Fed.R.Civ.P. 60(b). According to the U.S. Supreme Court, this rule provides a "flexible
11 standard" under which "sound judicial discretion may call for the modification of the terms of an
12 injunctive decree if circumstances, whether of law or fact, obtaining at the time of its issuance
13 have changed, or new ones have since arisen." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S.
14 367, 380 (1992). A district court may modify such a decree "when changed factual conditions
15 make compliance with the decree substantially more onerous" or "when a decree proves to be
16 unworkable because of unforeseen obstacles." *Id.* at 384; *See also Pyramid Lake Tribe of Indians*
17 *v. Hodel*, 878 F.2d 1215, 1216 (9th Cir. 1989; *United States v. Oregon*, 769 F.2d 1410, 1416 (9th
18 Cir. 1985); *Anderson v. Central Point School Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984).
19 The district court retains this power to modify a decree or order "to accomplish the primary goals
20 of the decree." *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990).

21 In the present case, the primary purpose of the Court's December 14, 2007 order and prior
22 rulings was the defendants' compliance and implementation of the ESA, in particular the
23 preparation of an adequate OCAP Biological Opinion. Completion of this task requires the
24 finalization by the U.S. Bureau of Reclamation (Reclamation) of an adequate Biological
25 Assessment. According to Perry Herrgesell, a California Department of Fish and Game official
26 whose declaration is submitted concurrently with this joinder memorandum, the "BA [Biological
27 Assessment] is one of the most complicated DFG [Department of Fish and Game] has
28 encountered and the resulting Biological Opinions are likely to be some of the most complex

1 ever issued.” Herregesell Declaration at 4. Dr. Herrgesell concludes that “[b]ecause of the
2 critical importance of the Biological Opinions as underpinnings for the management of
3 ESA/CESA listed species, like delta smelt, the fish and wildlife resources of the State will
4 benefit from the additional time requested by USBR to allow the USFWS to prepare the final
5 Biological Opinion.” *Ibid.* The requested extension of time for the issuance of the OCAP
6 Biological Opinion would therefore be in furtherance of the purposes of the ESA and this Court’s
7 order by allowing for preparation of biological opinion based upon best available scientific
8 information.

9 Moreover, changed factual circumstances further support the requested extension. As the
10 Declaration of Katherine F. Kelly discloses, factual issues have arisen in the course of
11 Reclamation and DWR’s preparation of the OCAP Biological Assessment that the parties and the
12 Court could not have anticipated at the time of the remedy proceedings in this case. Ms. Kelly is
13 the DWR official responsible for providing the modeling and other information to Reclamation
14 necessary for the preparation of the Biological Assessment. In a June 27, 2008 letter, the
15 USFWS has informed Reclamation and DWR that the agencies will have to provide considerable
16 additional biological and operational information in order for the USFWS to prepare an adequate
17 opinion. Declaration of Katherine F. Kelly at 3-4. According to Ms. Kelly, the USFWS
18 information request will require significant time and effort by DWR staff. DWR will provide
19 responses to the bulk of the information requests by August 1, 2008. *Ibid.* at 4.

20 For the above reasons, defendant-intervener DWR joins with the federal defendants and
21 respectfully requests that this Court modify its December 14, 2007 order and extend the time for
22 USFWS’ issuance of the OCAP Biological Opinion until December 15, 2008.

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Dated: July 29, 2008

Respectfully submitted,

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