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COUNSEL IDENTIFICATION ON FINAL PAGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE DELTA SMELT CASES
SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al. v. SALAZAR, et al. (Case No. 1:09-cv-407)
STATE WATER CONTRACTORS v. SALAZAR, et al. (Case No. 1:09-cv-422)
COALITION FOR A SUSTAINABLE DELTA, et al. v. UNITED STATES FISH AND WILDLIFE SERVICE, et al. (Case No. 1:09-cv-480)
METROPOLITAN WATER DISTRICT v. UNITED STATES FISH & WILDLIFE SERVICE, et al. (Case No. 1:09-cv-631)
STEWART & JASPER ORCHARDS, et al. v. UNITED STATES FISH AND WILDLIFE SERVICE, et al. (Case No. 1:09-cv-892)
FAMILY FARM ALLIANCE v. SALAZAR, et al. (Case No. 09-cv-1201)

CASE NO. 1:09-cv-407-LJO-DLB
1:09-cv-422-LJO-DLB
1:09-cv-631-LJO-DLB
1:09-cv-892-LJO-GSA
PARTIALLY CONSOLIDATED WITH:
1:09-cv-480-LJO-GSA
1:09-cv-1201-LJO-DLB

JOINT MOTION TO EXTEND REMAND SCHEDULE AND MEMORANDUM IN SUPPORT

Judge: Honorable Lawrence J. O'Neill

Notice of Motion

To all parties and their counsel of record:

Notice is hereby given that, on January 24, 2013 at 8:30 a.m., or as soon as this matter may be heard in the Courtroom of the Honorable Lawrence J. O’Neill, Plaintiff-Intervenor California Department of Water Resources (“DWR”) and Federal Defendants will jointly move this Court for an extension of the deadlines in the Amended Judgment (Doc. 884). The Court previously has granted modest extensions of the remand schedule on September 30, 2011 (Doc. 1061) and November 2, 2011 (Doc. 1065).

Beginning on December 11, 2012, undersigned counsel conferred with counsel for the parties in this litigation. Their positions on the motion are as follows:

Plaintiffs San Luis & Delta-Mendota Water Authority, Westlands Water District, Metropolitan Water District of Southern California, Coalition for a Sustainable Delta, Stockton East Water District, Oakdale Irrigation District, Kern County Water Agency, State Water Contractors, South San Joaquin Irrigation District, Family Farm Alliance, Stewart & Jasper Orchards, Arroyo Farms, LLC, and King Pistachio Grove indicated various positions of either support or non-opposition to this motion. Several of these parties have indicated that they intend to file joinders or other statements regarding their specific positions of support or non-opposition.

Defendant-Intervenors Natural Resources Defense Council and the Bay Institute are still considering the motion and were not able to provide their position as of the date of this filing.

Points and Authorities in Support of Motion

I. Introduction

The remand in this matter requires the Federal Defendants U.S. Bureau of Reclamation (“Reclamation”) and the U.S. Fish & Wildlife Service (“FWS”) to complete certain analyses under the National Environmental Policy Act (“NEPA”) and consultation under the Endangered Species Act (“ESA”) regarding the proposed operations of the Central Valley Project (“CVP”) and State Water Project (“SWP”) by specified dates. Specifically, the final amended judgment requires Reclamation to complete its review of the draft smelt biological opinion (“BiOp”) in accordance with NEPA and requires FWS to complete a new smelt BiOp and any Reasonable and

1 Prudent Alternatives (“RPAs”) by December 1, 2013. Doc. 884. The Court also has entered a
2 remand Order in the related *Consolidated Salmonid Cases*, Civ. No. 09-1053, which requires
3 separate NEPA and ESA processes for the same set of proposed project operations. Specifically,
4 the remand Order in that case requires: (i) National Marine Fisheries Service (“NMFS”) to
5 transmit to Reclamation by October 1, 2014 a draft salmonid biological opinion (“BiOp”); (ii)
6 Reclamation to issue a draft Environmental Impact Statement (“EIS”) six months later, and a final
7 EIS, or other required documentation, by February 1, 2016; (iv) NMFS to complete a final
8 salmonid BiOp addressing the effects of these operations by February 1, 2016; and (v)
9 Reclamation to issue its Record of Decision by April 29, 2016. *Id.*

10 Federal Defendants and Plaintiff-Intervenor DWR jointly move for a three-year extension
11 of the Court-ordered remand schedule in this case (Docs. 884, 1061, 1065), to allow them the
12 time needed to best utilize their resources to develop short-term actions and a long-term strategy
13 for providing a sustainable water supply and successful ecosystem restoration in the Bay Delta
14 Region in ways that are more effective for the short-term and long-term protection of ESA listed
15 species.¹ More specifically, the requested extension will allow the parties to focus their resources
16 on a collaborative science-based process that the State of California and Federal Defendants have
17 developed in close communication with the other parties in this litigation. *See* “Federal and State
18 Proposal for Modification to the Remand Schedule and an Alternative Process for Development
19 of Operational Strategies and a Collaborative Science and Adaptive Management Program”
20 (attached hereto as Ex. A). This joint program includes a robust science-based and adaptive
21 management process that will amplify the agencies’ ability to address key issues by increasing the
22 cooperation of relevant stakeholders and improving scientific understanding. This revised
23 process also will improve NMFS’ and FWS’ understanding of the species under their jurisdiction,
24 and provide NMFS and FWS with a greater ability to respond quickly to real-time information
25 and employ effective adaptive management.

26 The extension also will allow the federal and state staff engaged in the remand to be better
27 able to concentrate their efforts on completing the Bay-Delta Conservation Plan (“BDCP”), a

28 ¹ The Federal Defendants and DWR are requesting an identical extension from this Court in the
Consolidated Salmonid Cases, Civ. No. 09-1053.

1 habitat conservation plan being developed by DWR pursuant to Section 10 of the ESA, with
2 substantial staff support from the Federal agencies. The BDCP is intended to address long term
3 solutions to the water resources and ecosystem issues in the Bay-Delta area, many of which have
4 been identified in the BiOps and respective remands, and is expected to improve conditions for
5 the ESA-listed species at issue in this case.

6 **II. Applicable Legal Authority**

7 The Court has the authority to grant the instant motion to extend the remand schedule
8 pursuant to Federal Rule 60, which allows a court to grant relief from a final judgment if a motion
9 is filed within a reasonable time of the entry of judgment. Fed. R. Civ. P. 60(b), (c)(1).² Rule
10 60(b)(5) authorizes this Court to “relieve a party or its legal representative from a final judgment,
11 order, or proceeding [when] applying it prospectively is no longer equitable.” A Rule 60(b)(5)
12 motion should be granted when there has been “either a significant change . . . in factual
13 conditions or in law.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 383-84 (1992). A
14 judgment may be modified when changed circumstances make compliance “more onerous,
15 unworkable, or detrimental to the public interest.” *U.S. v. Asarco, Inc.*, 430 F.3d 972, 979 (9th
16 Cir. 2005). This standard is “flexible,” *Jeff D. v. Kempthorne*, 365 F.3d 844, 854 (9th Cir. 2004),
17 and addressed to the sound discretion of the district court. *Thompson v. Housing Authority of the*
18 *City of Los Angeles*, 782 F.2d 829, 832 (9th Cir. 1986). “[O]nce a party carries this burden, a
19 court abuses its discretion ‘when it refuses to modify an injunction . . . in light of such changes.’”
20 *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 215 (1997))
21 (other internal citations omitted).

22 **III. Discussion**

23 Federal Defendants and DWR are requesting a three-year extension of the remand
24 schedule so that the agencies can use their limited resources in ways that are most effective for
25 the short-term and long-term protection of ESA listed species. McInnis Decl. ¶ 2. The three-year
26 extension is part of a plan that includes a robust science-based and adaptive management process
27 that will amplify the ability to address key issues through increasing the involvement of relevant

28 ² The Court previously granted limited extensions of the remand schedule on September 30, 2011,
(Doc. 1061), and November 2, 2011 (Doc. 1065).

1 stakeholders and will improve our understanding of the listed species' needs. *Id.*; Glaser Decl. ¶¶
2 8, 11; Lohofener Decl. ¶ 5. The collaborative science and adaptive management program
3 described in the attachment hereto is a more inclusive and transparent approach to the
4 development of operational strategies that will give NMFS and FWS a greater ability to respond
5 quickly to real-time information and employ effective adaptive management. McInnis Decl. ¶ 2;
6 *See also* Ex. A at 2-3. It is a science-based approach designed to reduce uncertainties and
7 improve performance from both biological and water-supply perspectives. Ex. A at 1-2. As part
8 of this process, the State and Federal Agencies will establish and implement a Collaborative
9 Adaptive Management Team ("CAMT") to assist DWR, Reclamation, and the State and Federal
10 fish agencies in designing, implementing, and evaluating a multi-year program to incorporate a
11 scientifically robust adaptive management process into the implementation of the NMFS (2009)
12 and FWS (2008) BiOps over the interim period. *Id.* at 2. The RPAs will be evaluated and refined
13 through the collaborative science and adaptive management program and may be modified
14 through administrative action or judicial approval as appropriate. *Id.* at 3. The operations and
15 operational strategies implemented under the collaborative science and adaptive management
16 program will incorporate adjustments, as determined by FWS or NMFS, using the flexibility
17 currently authorized by the RPAs or other appropriate administrative or judicial mechanisms. *Id.*

18 The collaborative science and adaptive management program will be helpful in two
19 primary ways. First, the program will provide the opportunity for all litigants to help design and
20 evaluate a scientifically robust adaptive management process for implementing key actions in the
21 RPAs through annual operations strategies. Lohofener Decl. ¶ 5. This program is intended to
22 help resolve key scientific uncertainties related to species protection and water availability in the
23 Delta. *Id.*; McInnis Decl. ¶ 8. Additional stakeholder and public engagement through the
24 Remand Stakeholder Engagement Process, the collaborative science and adaptive management
25 program to be developed pursuant to the Federal and State Understanding document, and the
26 ongoing NEPA process will lead to better scientific information and a greater understanding of
27 what actions are needed to protect species. Glaser Decl. ¶¶ 8, 11. Second, this program is
28 structured on an adaptive management process that is similar to what has been proposed for the

1 BDCP. Lohofener Decl. ¶ 5. This three-year process will provide a valuable proof-of-concept
2 for the adaptive management process proposed in the BDCP. *Id.*; McInnis Decl. ¶ 8.

3 Moreover, as detailed in the attached declaration of Dale Hoffman-Floerke, Chief Deputy
4 Director for DWR, changed circumstances and the overlapping subject matter of the BDCP are
5 significant and provide good cause to support the requested extension. Hoffman-Floerke Decl. ¶¶
6 1-6. For example, in the summer of 2012, the U.S. Secretary of the Interior, Governor of
7 California, and officials from NMFS jointly announced changes in the BDCP proposal and
8 planning process, which improved the federal and state agencies ability to move forward on the
9 plan. *Id.* ¶ 3. These included proposed design changes that would reduce the number of
10 Sacramento River intakes and total conveyance capacity by forty percent, and other proposals
11 designed to maximize energy efficiency and minimize environmental impacts of the BDCP. *Id.*
12 The extension requested in this motion would allow time for new scientific methodologies
13 proposed under BDCP, and any monitoring data obtained after it is approved, to be considered
14 and incorporated in the remanded BiOps, as appropriate. *Id.* ¶¶ 5, 6. In addition, because the
15 subject matter involved is complex and controversial, extending the time to develop the salmonid
16 and smelt BiOps while the BDCP is being completed will provide time to better develop
17 scientifically robust and consistent documents. *Id.* ¶ 6. In short, the above-described changed
18 circumstances and overlapping subject matter of BDCP provide good cause for the requested
19 extension.

20 The current remand schedule does not allow for this effort to move forward as agency
21 resources are focused on completing the ESA Section 7 consultation. McInnis Decl. ¶¶ 2, 7.
22 With the three-year extension, the same federal and state staff engaged in the ESA Section 7
23 consultation would be better able to concentrate efforts to complete BDCP, which is expected to
24 improve conditions for the same ESA listed species. *Id.* at ¶ 2. Additionally, the collaborative
25 science and adaptive management process will provide opportunities to design and evaluate a
26 scientifically robust adaptive management process for implementing key actions in the RPAs in
27 the FWS and NMFS BiOps, and allows NMFS and FWS to consider modifications to the RPAs
28 through adaptive management as provided within the BiOps, if necessary, or as may be allowed

1 by existing law and administrative procedures. *Id.* at ¶¶ 8, 10; Ex. A at 2-3. This process, which
2 is intended to help resolve key scientific uncertainties while continuing to provide equal or better
3 protection for listed species, will improve NMFS’ understanding about the species under its
4 jurisdiction and provide NMFS a greater ability to respond quickly to real-time information and
5 employ effective adaptive management. McInnis Decl. at ¶¶ 2, 8. The CVP and SWP, managed
6 for an additional three years under this proposed framework, will continue to avoid the likelihood
7 of jeopardizing the survival and recovery of the species and the destruction or adverse
8 modification of designated critical habitat. *Id.*

9 In addition, the parties are hopeful that, at the end of this extension, FWS and NMFS will
10 be better able to ensure consistency for the remanded salmonid and smelt BiOps.³ Lohofener
11 Decl. ¶ 6. Given the importance of conserving listed species while providing water security for
12 California, it is essential that the FWS and NMFS BiOp schedules allow the agencies to use the
13 best available scientific and commercial data and provide consistent approaches to avoiding and
14 resolving potential conflicts. *Id.*

15 Finally, the parties are hopeful that the requested extension will conserve judicial
16 resources as well as party resources. The enhanced processes for developing operational
17 strategies and collaborative science that would be possible as a result of the extended remand
18 schedules are intended to encourage a “time out” on litigation associated with annual SWP and
19 CVP Delta operations under the existing BiOps. Ex. A at 2, 6. Participants in the alternative
20 interim process would commit to the collaborative processes therein for developing annual
21 operational strategies and criteria, with the non-binding goal of avoiding litigation over annual
22 operations during the next several years. *Id.* All participants would acknowledge that the limited
23 resources available for the collaborative science process may be diminished if litigation continues
24 in this case or in a new case. *Id.*

25
26 ³ Nothing in this joint motion constrains any party’s rights to request that the Court establish a
27 single schedule to simultaneously complete the smelt and salmonid consultations by no later than
28 February 1, 2019, or set forth their views on whether it is necessary to continue consultation to
obtain new BiOps through the remand process, or inform the Court that consultation is no longer
necessary and request appropriate relief by motion.

1 **IV. Conclusion**

2 For the foregoing reasons, the joint motion to extend the remand schedule should be
3 granted, and all deadlines in the smelt remand process should be extended for a period of three
4 years.

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6 Dated: December 20, 2012
7
8 Respectfully Submitted,
9 KAMALA D. HARRIS, ATTORNEY GENERAL
10 OF THE STATE OF CALIFORNIA

11 By: Clifford T. Lee
12 CLIFFORD T. LEE
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17 INTERVENTION CALIFORNIA DEPARTMENT
18 OF WATER RESOURCES

19 Dated: December 20, 2012
20
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25 DIVISION
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SECTION
ATTORNEYS FOR FEDERAL DEFENDANTS

CERTIFICATE OF SERVICE

29 I hereby certify that, on December 20, 2012, the foregoing, with supporting attachments,
30 was filed with the Clerk of the Court using the CM/ECF system, which will send notification of
31 such to the attorneys of record in this matter.

32 /s/ Robert P. Williams
33 Robert P. Williams, Trial Attorney

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IDENTIFICATION OF COUNSEL

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