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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE CONSOLIDATED DELTA SMELT CASES	Case No: 1:09-cv-0407-LJO-BAM **DEFENDANT-INTERVENORS' OPPOSITION TO SUPPLEMENTAL BRIEF IN SUPPORT OF JOINT MOTION TO EXTEND THE REMAND SCHEDULE**
THE CONSOLIDATED SALMONID CASES	Case No: 1:09-cv-01053-LJO-BAM **DEFENDANT-INTERVENORS' OPPOSITION TO SUPPLEMENTAL BRIEF IN SUPPORT OF JOINT MOTION TO EXTEND THE REMAND SCHEDULE**

Following issuance of the Court's Order re Motion to Extend Remand Schedule (*Consol. Delta Smelt Cases*, No. 1:09-cv-0407-LJO-BAM ("*Smelt*"), Doc. 1098; *Consol. Salmonid Cases*, No. 1:09-cv-01053-LJO-BAM ("*Salmon*"), Doc. 728) ("Order"), Defendant-Intervenors held several discussions with Federal Defendants and Plaintiff-Intervenor California Department of Water Resources ("DWR") (collectively, the "moving parties") in an attempt to develop a joint, detailed, and revised Collaborative Science and Adaptive Management Program ("CSAMP") proposal. *See* Order at 8. As the Court is aware from the moving parties' supplemental briefing in support of their request to add an additional three years to the existing remand schedules in both the *Smelt* and *Salmon* cases, the parties were unable to agree on a collaborative proposal. *See* Suppl. Br. In Supp. Of Joint Mot. to Extend the Remand Schedule (*Smelt*, Doc. 1101; *Salmon*, Doc. 731) ("Supp. Br.") at 3. For the reasons discussed in Defendant-Intervenors' original opposition briefs (*Smelt*, Doc. 1092; *Salmon*, Doc. 722), as well as the additional reasons below, Defendant-Intervenors respectfully urge the Court to deny the moving parties' Rule 60(b) motion to extend the remand schedules *with prejudice*.

First, there is no merit to the moving parties' assertion that "a desire to change policy direction during the remand proceedings, in and of itself, can represent a significant change in circumstance for Rule 60 purposes." Supp. Br. at 1 n.1; *see id*. at 7 ("there would be nothing inappropriate about the agencies simply 'chang[ing] their minds about how they wish to go about gathering information for use in preparing the revised BiOps.'"). The general principles of administrative law referenced in the cases cited by the moving parties – none of which involved a Rule 60(b) motion – are not at issue here. Consequently, while the moving parties remain free to determine how to "best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops," *Fed. Power Comm'n v. Transco. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), they have cited no legal authority that would allow the Court to ignore the requirements of Rule 60(b) or "cast aside settled expectations embodied in the judgments on this record" simply because the agencies changed their minds about how to proceed. Order at 7-8.

Second, there is no basis for the moving parties' assertion that the CSAMP concept represents a significant change in circumstances because "the adversarial position of the parties" at the time judgment was entered would have prevented its development. Supp. Br. at 3-4. As previously discussed, an expanded stakeholder process was explicitly contemplated in earlier filings with the Court in both the *Smelt* and *Salmon* cases, and numerous other scientific review and collaborative stakeholder processes are already underway. *See, e.g.*, *Smelt*, Docs. 1060, ¶ 5 ("Federal Defendants and some of the parties have discussed greater participation in the consultation process for a new delta smelt BiOp") and 1080-3, ¶ 6. While the Federal Defendants and DWR may have improved their working relationship over the past few months, DWR has not committed to refrain from seeking interim injunctive relief against the protections of the BiOps during an extended remand period, indicating that the relationship remains adversarial. Moreover, DWR continues to challenge the science underlying the BiOps on appeal to the Ninth Circuit. The remaining Plaintiffs also continue to contemplate filing motions for "interim injunctive relief" during the remand period. *See Smelt*, Doc. 1093 at 2; *Salmon*, Doc. 734 at 2. Given the moving parties' admission that "specific details" of the CSAMP proposal remain to be developed, Supp. Br. at 12; *id*. at 13 ("The agencies recognize that the CSAMP is a fledging effort"), and their request for an entire year to "identif[y] key actions and questions, and forming experimental designs," *id*. at 14, the moving parties have not carried their "heavy burden" to demonstrate that the CSAMP concept constitutes a significant change in circumstance that should relieve them from the current remand schedules. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992).

Third, the moving parties have failed to show that extending the existing remand schedules to develop the CSAMP concept is in the public interest. The moving parties admit that they "are currently prepared to meet the remand schedules in both the smelt and salmon cases, and with or without an extension, produce BiOps and NEPA documents that they believe meet all applicable legal requirements." Supp. Br. at 7. In effect, the moving parties now admit that their desire to develop the CSAMP concept does not conflict with the Court-ordered remand schedules or the implementation of lawful biological opinions for the operations of the Central Valley Project and State Water Project. However, the moving parties allege that a remand extension and

implementation of the CSAMP process is in the "public interest" because it will (1) decrease the possibility of further litigation, and (2) allow the agencies to more fully participate in the development of the Bay Delta Conservation Plan ("BDCP") process. Supp. Br. at 7-18. These arguments must be rejected.

Given the fact that many details of the CSAMP remain to be developed, as well as the parties' stated desire to retain the ability to seek "interim injunctive relief" during the extended remand period, there is no basis for the Court to find that implementation of CSAMP will decrease the risk of litigation. In fact, the parties' lack of any commitment to refrain from litigation during the extended remand periods appears wholly at odds with this allegedly "collaborative" process. *See, e.g., Smelt*, Doc. 1104 at 2; *Salmon*, Doc., 734 (Plaintiffs' joinder based on understanding that "the collaborative science and adaptive management process allows for modification and refinement of the RPA actions during the remand period consistent with appropriate administrative or judicial mechanisms, and that any party may seek injunctive relief during the remand period.").

Finally, the Court has already rejected the moving parties' assertions regarding BDCP. *See* Order at 6-7. Given the voluntary and uncertain nature of the BDCP process, shifting agency efforts from completing the legally-required biological opinions to the development of BDCP would not be in the public interest. Furthermore, the law is clear that the lack of adequate financial resources does not justify a motion to extend the remand timeline under Rule 60(b). *See Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1179-80 (D. Ariz. 2003) ("In short, regardless of budgetary constraints, Defendant shall comply with the deadlines set by this Court. Defendant may not avoid its mandatory duties under the ESA on the grounds that the budget and staff of the Department of Interior are inadequate.").

CONCLUSION

For the foregoing reasons, as well as those set forth in Defendant-Intervenors' original opposition briefs (*Smelt*, Doc. 1092; *Salmon*, Doc. 722), the Court should deny the moving parties' motions for a three-year extension of the remand period in both the *Smelt* and *Salmon* cases *with prejudice*.

DATED: March 29, 2013

Respectfully submitted,

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