

1 **COUNSEL IDENTIFICATION ON FINAL PAGE**

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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10 THE DELTA SMELT CASES

11 SAN LUIS & DELTA-MENDOTA WATER  
12 AUTHORITY, *et al.* v. SALAZAR, *et al.*  
(Case No. 1:09-cv-407)

1:09-cv-407-LJO-BAM  
1:09-cv-422-LJO-GSA  
1:09-cv-631-LJO-DLB  
1:09-cv-892-LJO-DLB  
1:09-cv-480-LJO-GSA

13 STATE WATER CONTRACTORS v.  
14 SALAZAR, *et al.* (Case No. 1:09-cv-422)

Partially Consolidated With:  
1:09-cv-1201-LJO-JLT

15 COALITION FOR A SUSTAINABLE  
16 DELTA, *et al.* v. UNITED STATES FISH  
AND WILDLIFE SERVICE, *et al.*  
(Case No. 1:09-cv-480)

**STATEMENT OF NON-  
OPPOSITION TO THE JOINT  
MOTION TO EXTEND THE  
REMAND PERIOD**

17 METROPOLITAN WATER DISTRICT v.  
18 UNITED STATES FISH AND WILDLIFE  
SERVICE, *et al.* (Case No. 1:09-cv-631)

Judge: Honorable Lawrence J. O'Neill

19 STEWART & JASPER ORCHARDS, *et al.* v.  
20 UNITED STATES FISH AND WILDLIFE  
SERVICE, *et al.* (Case No. 1:09-cv-892)

21 FAMILY FARM ALLIANCE v. SALAZAR,  
22 *et al.* (Case No. 1:09-cv-1201)

1 The Metropolitan Water District of Southern California, the State Water Contractors,  
2 Kern County Water Agency, and the Coalition for a Sustainable Delta (collectively “State  
3 Contractor Plaintiffs”) have reviewed the “Federal and State Proposal for Modification to the  
4 Remand Schedule and an Alternative Process for Development of Operational Strategies and a  
5 Collaborative Science and Adaptive Management Program” recently submitted to this Court  
6 (Doc. 1080, Ex. A) (“Proposal”).  
7

8 The State Contractor Plaintiffs do not object to the Proposal. In expressing their non-  
9 opposition to the proposed schedule, the State Contractor Plaintiffs are cautiously optimistic that  
10 the Proposal will result in a more transparent and collaborative process and may lead to  
11 implementation of modifications to components of the reasonable and prudent alternatives  
12 (“RPAs”), including those specific components determined to be unlawful by this Court. If the  
13 Proposal is successful in these respects, the State Contractor Plaintiffs believe there will be no  
14 need to seek further judicial intervention.  
15

16 The State Contractor Plaintiffs agree that a genuinely collaborative scientific investigation  
17 undertaken by the Federal and State fish, wildlife, and resources agencies alongside other  
18 stakeholders can provide a beneficial alternative to the standard Endangered Species Act (“ESA”)  
19 consultation process. Such a process has the potential to facilitate the introduction of the “best  
20 available” science into the consultation process, along with a rigorous review and critique of  
21 proposed approaches. A truly open and collaborative process could lead to a long-lasting solution  
22 that not only draws upon and is supported by science, but also better protects the species than the  
23 existing RPAs.  
24

25 However, this process will only be truly collaborative if it provides ample opportunity for  
26 stakeholder input and requires genuine consideration on the part of the agencies of the best  
27 available data, analyses, and results. The current Proposal does not include all of the details  
28

1 regarding how this process will proceed; therefore creating an opportunity for all interested parties  
2 to shape those details. This opportunity will be critical to the success of the Proposal as it is those  
3 details that will determine whether the process will allow for genuine collaboration.

4           Despite some uncertainty about whether the Proposal will ultimately serve its purpose, the  
5 State Contractor Plaintiffs believe that it is worthwhile for the parties and the Court to give this  
6 collaborative alternative consultation process a chance to succeed.

7           There is a risk that the process may not be successful, and that the agencies may seek to  
8 impose during interim operations one or more of the components of the RPAs that were  
9 invalidated by this Court, despite the existence of scientific information that demonstrates their  
10 lack of efficacy. Thus, the State Contractor Plaintiffs emphasize for the Court that the Proposal  
11 being offered as the basis for the pending Motion to Extend Remand Schedule (Doc. 1080)  
12 includes a section entitled “Reservation of Rights” that explicitly authorizes “any party to the  
13 BiOp litigation to seek interim injunctive relief with respect to any other matter over which the  
14 district court has retained jurisdiction.” Proposal, p. 5.

15           This non-opposition to the Proposal is conditioned on the fact that the Proposal allows for  
16 flexibility in the implementation of interim operations, including variations from the RPA  
17 components. Because there is no guarantee that the State Contractor Plaintiffs will be able to  
18 reach an agreement with the State and Federal agencies regarding interim operations during the  
19 period of remand, an essential element of this non-opposition is retaining the right to seek interim  
20 injunctive relief or to ask the Court to revisit the remand schedule should the proposed  
21 collaborative process prove to be unworkable or unsuccessful.

22           With these explanations and reservations, the State Contractor Plaintiffs do not oppose the  
23 request for an extension of time to complete the remand of the biological opinions.  
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1 Dated: January 17, 2013

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