

1 2-2-10. TRO. Smelt and salmon cases.

2 ROUGH DRAFT

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5 THE CLERK: The Court calls the Delta smelt  
6 consolidated cases, case 09-CV-407 and the Salmon consolidated  
7 cases, case 09-CV-1053. Motions for temporary restraining  
8 orders.

9 THE COURT: Will the parties please enter their  
10 appearances.

11 MR. O' HANLON: Good afternoon, Your Honor, Daniel  
12 O' Hanlon appearing on behalf of the San Luis and Delta-Mendota  
13 Water Authority and the Westlands Water District.

14 THE COURT: If you could wait one moment, we're going  
15 to try to get the parties who are appearing telephonically.

16 (Off the record.)

17 THE COURT: Can the parties who are appearing  
18 telephonically hear us?

19 MR. LEE: Yes, we can, Your Honor.

20 THE COURT: All right. Well then we're going to  
21 continue having the parties who are present in the courtroom  
22 enter their appearances. Mr. O' Hanlon has just entered his  
23 appearance.

24 MS. DIEPENBROCK: Good afternoon, Your Honor, Eileen  
25 Diepenbrock of Diepenbrock Harrison also on behalf of the San

1 injunction materials into the temporary restraining order  
2 proceeding?

3 All right. Hearing none, do the federal defendants  
4 wish to respond?

5 MS. McNEIL: Very briefly, Your Honor. In the salmon  
6 cases, I'll -- you have our arguments. I would just add that  
7 we certainly are prejudiced. There is no mention of the  
8 environmental baseline issue in the discussion of likelihood  
9 of success on the merits in plaintiffs' TRO motion.

10 Frankly, it was all we could do to provide the  
11 substantive response on the particle tracking method within  
12 the very short time allowed. There are numerous other merits  
13 arguments advanced to the PI motion. They have filed a  
14 separate scheduling order in support of the PI motion, leaving  
15 blank dates for further PI briefing, further PI hearing on  
16 those other issues.

17 Frankly, we had no notice that environmental baseline  
18 or orcas or any of these other issues they raised would be at  
19 issue today for the likelihood of success on the merits of the  
20 TRO motion. We submit that we are prejudiced if you include  
21 those other issues in today's proceedings.

22 THE COURT: All right. Thank you.

23 MR. EDDY: Your Honor, if I may add, on the smelt  
24 side, to be perfectly honest, Your Honor, I'm not sure why any  
25 of us are even here on the smelt side. As the Court pointed

1 out, component one has not yet been triggered and so  
2 operationally, there is literally nothing for this Court to  
3 restrain.

4 And as the Court is aware, last year action one was  
5 never triggered and that may prove to be the case again this  
6 year. We've mentioned to the Court and to the parties that we  
7 will provide at least 24 hours notice of the implementation of  
8 any such trigger. But for some reason, the plaintiffs jumped  
9 the gun and filed this motion anyway.

10 And normally when you have a TRO, it's to preserve  
11 the status quo until the preliminary injunction can be heard.  
12 But what's happening here really turns that on its head, Your  
13 Honor. And since we have a preliminary injunction motion  
14 that's fully briefed in this case, but the hearing on that has  
15 now been continued twice, I think this is exactly the type of  
16 situation that the local rule 65-231 comes into play to  
17 prevent. If the hearing had gone forward in December as  
18 originally scheduled by the Court, the injunction could have  
19 been fully heard before Dr. Deriso had his unfortunate medical  
20 event. And so the PI hearing was postponed until mid January,  
21 when the plaintiffs requested a second continuance. And while  
22 we sympathize with Dr. Deriso, it's become clear in the  
23 meantime that the extension was additionally sought because  
24 another of the plaintiffs' expert witnesses, Dr. Hilborn, is  
25 abroad and unavailable, and that's something that has been

1 the distribution is favorable, the Smelt Working Group has the  
2 discretion to suspend, in this case, potentially indefinitely,  
3 action one. And so to say that it's likely, it really is  
4 conjecture. Right now, the turbidity at that third station is  
5 actually trending downward. As plaintiffs most recent  
6 submission indicates.

7 And just one other point, quickly, Your Honor. It is  
8 true that the family of plaintiffs have mentioned throughout  
9 the past couple of months that they wanted to -- or intended  
10 to seek a temporary restraining order --

11 THE COURT: I believe the words were, as I recollect  
12 them, we were reserving the right.

13 MR. EDDY: That's correct.

14 THE COURT: -- to seek temporary injunctive relief.

15 MR. EDDY: I'm sorry, Your Honor. But I would  
16 submit that the mere recitation of that reservation of right  
17 does not relieve the plaintiffs of the obligation that they  
18 would otherwise have to bring the preliminary injunction  
19 proceeding as quickly as possible under the local rule and  
20 under the case law that we cited in our brief. Thank you.

21 THE COURT: You thank you. Is the matter submitted?

22 MR. TORGUN: Yes, Your Honor.

23 THE COURT: The standards that apply to the granting  
24 of a temporary restraining order are identical to those that  
25 pertain to the grant of a preliminary injunction. And under

1 the leading authority of Winter -- which is NRDC, the most  
2 recent Supreme Court decision of 2008, which modified and, in  
3 effect, overturned the more lenient standard that the Ninth  
4 Circuit had been following in general injunction cases, the  
5 requirements are likelihood of success on the merits,  
6 likelihood the moving party will suffer irreparable harm  
7 absent injunctive relief, balance of equity favors the moving  
8 party, and the injunction is in the public interest. There  
9 are four separate factors.

10           The timeliness and the urgency of the totality of  
11 circumstances is considered by the Court in the decision to  
12 grant or deny a temporary restraining order. And, of course,  
13 this was not sought ex parte, it was on the basis of notice to  
14 the other sides and additionally giving the other parties some  
15 chance, although certainly, the Court agrees that because I've  
16 not only been reading the moving papers, but I've been reading  
17 the opposing papers, which substantially exceed 100 pages.  
18 And those didn't come in until noon yesterday. And we, of  
19 course, are in court all day on Monday in other cases.

20           The local rule provides that could the plaintiff have  
21 sought relief by a motion for preliminary injunction at an  
22 earlier date without the necessity of seeking the more urgent  
23 temporary restraining order. And the arguments are made --  
24 besides delay and prejudice that we have heard and have  
25 discussed, the arguments are made that it was known from the

1 time that the salmon BiOp was instituted that the alternative  
2 that is numbered roman numeral IV.2.3 was to become effective  
3 January the 1st.

4 The plaintiffs, in effect, have contended that  
5 although there was that in futuro statement about -- that's  
6 I-N F-U-T-U-R-O, two words, that the effectiveness of that RPA  
7 was January 1st, that it did not become controlling, according  
8 to the operator of the projects, the Bureau who implements,  
9 until the 20th of January. And that that's when they moved.

10 I think that it is appropriate to analyze these two  
11 requests separately in the two consolidated cases.

12 The urgency is that there is alleged to be water that  
13 would be available and that would not jeopardize any species,  
14 but, in effect, is wasted in that it cannot be captured under  
15 the lower pumping regime because essentially it isn't pumped  
16 where it can be at the necessary volume subject to movement by  
17 the pumps.

18 The Court believes that the absence in the smelt case  
19 of any imminent action or any action of the species at this  
20 time in -- we're now in the 2nd of February, with the, on the  
21 one hand, the alleged urgency that this RPA and its stages,  
22 because there are, in effect, three alternates. And I'm not  
23 going to go through them because they're complicated. But  
24 that that will, in effect, deprive plaintiffs of water which  
25 produces what they have described as irreparable harm, which

1 we're going to get to in the hearing.

2           However, because the action hasn't occurred and  
3 because there isn't a present likely or imminent  
4 implementation of these alternatives in the smelt cases and  
5 there is no operative order to enjoin or action to enjoin in  
6 the smelt cases, it is hard to understand why, where there is,  
7 in effect, the status quo favors the plaintiff, the status quo  
8 is what the plaintiffs seek, and that is to have pumping  
9 without restraint or restriction. And so because there is no  
10 restraint or restriction and given the timing of this, the  
11 Court believes essentially that the inference favors one  
12 finding no urgency and that the conditions that underlie the  
13 invocation of a temporary restraining order, which is an extra  
14 ordinary and a drastic remedy and one that requires  
15 irreparable harm.

16           And where there is no harm occurring and no action to  
17 enjoin, the Court believes that this motion can be heard on,  
18 if you will, further notice if there is -- because there's now  
19 a commitment to give at least 24 hours notice. And I'm going  
20 to ask that that be expanded to 48 hours notice in the event  
21 that the Smelt Working Group determines that it is to be  
22 implemented. Because the triggers -- again, it is all  
23 discretionary under the RPAs and that is within the choice of  
24 the operating agency, the Bureau.

25           And so I am going to sustain the objections insofar

1 as the smelt cases and determine that at this time, the  
2 urgency is not present and there are questions which need to  
3 be addressed, and we haven't even discussed the issues of  
4 record versus extra record evidence and the circumstances that  
5 go to the merits of the complaints about the smelt BiOp.

6 But there is one very troubling request in the  
7 plaintiffs' papers. They are asking that, in effect, the  
8 Court return conditions to the state that they describe as  
9 pre-illegal action, which would be the 1995 BiOp. And the  
10 plaintiffs may have forgotten that the 1995 BiOp is itself  
11 illegal and was invalidated by the Court and is not a state of  
12 lawful activity. And so we can't go back there. But even if  
13 we could, at this time, without action, there is no necessity  
14 for the intervention of equity.

15 So the objections are sustained and the Court will  
16 entertain, on shortened notice if it's necessary, the  
17 plaintiffs' application on the smelt cases when and if, in  
18 this water year, that becomes a matter that is potentially  
19 going to do them harm.

20 On the salmon cases, the Court finds that, yes, the  
21 plaintiffs have known about the conditions that exist this  
22 year, but we are dealing with an inherently unpredictable,  
23 unforecastable set of circumstances. The Courts don't control  
24 the weather, nor do the parties. And no one has any power  
25 over the weather and the presence or absence of the hydrologic



1 conditions that are going to require the RPAs to be in place.  
2 And therefore, the Court believes that we would have had the  
3 same response if the plaintiffs had come in earlier because  
4 the RPAs weren't in effect initially in January. They were  
5 not on notice that they were going into effect. And  
6 therefore, given the presence of water -- and we're not  
7 talking about its nature or its quality, but just the presence  
8 of the depravation, which had the potential, at least it's  
9 claimed, we'll decide that, to produce irreparable harm, the  
10 Court believes that there is sufficient urgency to justify the  
11 delay and given all the other work that's going on in the  
12 cases, the Court believes that the parties' time have been  
13 more productively spent on other issues, settling the  
14 pleadings, getting the preliminary injunction in place. And  
15 it may well be that the preliminary injunction, depending upon  
16 when we hear it, will precede the spawning period for the  
17 smelt, which I understand occurs sometime in March, nobody  
18 knows exactly when. But that is, as the Court understands it,  
19 a more crucial time for the RPA to be operating.

20 So I'm going to overrule the objections on the salmon  
21 cases. And we will proceed to hear the plaintiffs' motion.

22 Ms. DiEpenbrock, you may proceed.

23 MS. DIEPENBROCK: Thank you, Your Honor. I do want  
24 one point of clarification, if I may, with respect to the  
25 smelt case. That the notice that will be given to the

1 plaintiffs has been, in fact, expanded to 48 hours if there  
2 will be any part of component one triggered.

3 THE COURT: That's by order of the Court. I'm going  
4 to essentially direct that if there is going to be an  
5 implementation of the smelt RPA, that 48 hours notice be given  
6 to the plaintiffs and to the Court.

7 MS. DIEPENBROCK: Thank you, Your Honor.

8 MR. BIRMINGHAM: Excuse me, Your Honor.

9 THE COURT: Yes.

10 MR. BIRMINGHAM: Just one matter of clarification.  
11 In the Court's comments related to its ruling, which I'm not  
12 going to address, Your Honor refers to having invalidated the  
13 1995 biological opinion.

14 THE COURT: Oh, excuse me.

15 MR. BIRMINGHAM: Concerning Delta smelt.

16 THE COURT: The 2005 BiOp is what was invalidated.  
17 Thank you.

18 MR. BIRMINGHAM: Thank you.

19 MS. DIEPENBROCK: Okay. Thank you, Your Honor.  
20 Again, this is Eileen Diepenbrock and we will move now to the  
21 arguments in the salmon case.

22 THE COURT: But so that we can put that to rest for  
23 ever, the conditions that are the subject of the operative  
24 orders and rulings in the smelt cases that precede this series  
25 of cases, the Court has no evidence and I don't understand