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 REPLY IN SUPPORT OF JOINT MOTION TO EXTEND REMAND SCHEDULE

DATE: January 31, 2013
TIME: 8:30 a.m.
COURTROOM: 4

Judge: Honorable Lawrence J. O'Neill

Plaintiff-Intervenor California Department of Water Resources ("DWR") and Federal Defendants respectfully submit this joint reply in support of their joint motion to extend the remand schedule in this litigation ("Joint Motion"). *See* Dkt. 1080. A similar joint reply is being filed in the related *Consolidated Salmonid Cases*, Civ. No. 09-1053, in support of the joint

motion for extension of the remand schedule filed in that case. *See* Dkt. 713.

Pursuant to Local Rule 230, Federal Defendants and DWR have calendared a hearing date for the Joint Motions; however, Federal Defendants believe that the issues have been sufficiently developed in the briefs, and that disposition of the Joint Motion on the papers therefore would be appropriate. To the extent the Court will hold a hearing, however, counsel for Federal Defendants respectfully request that they be allowed to appear telephonically, pursuant to the Court's calendaring direction that such appearances are encouraged.

Introduction

The Court has remanded the 2008 delta smelt biological opinion ("BiOp") and its reasonable and prudent alternative ("RPA") without vacatur, and ordered the U.S. Fish & Wildlife Service ("FWS") to complete a new BiOp and the U.S. Bureau of Reclamation ("Reclamation") to complete analysis under the National Environmental Policy Act ("NEPA"), by specified dates. Dkt. 757 at 225; Dkt. 763 at 3; Dkt. Nos. 884, 1061, 1065. In their Joint Motion, DWR and Federal Defendants have moved the Court for a three-year extension of these deadlines. *See* Dkt. 1080. The Joint Motion seeks no substantive amendment of the Court's summary judgment Order, or to the Amended Judgment. Rather, as the Joint Motion explains, the moving parties simply seek an extension of time. The extension will allow the State and Federal agencies to pursue a vital opportunity to apply their limited resources more efficiently towards developing short-term actions and a long-term strategy for providing a sustainable water supply and successful ecosystem restoration in the Bay Delta Region, in ways that are most effective for the short and long-term protection of ESA-listed species. In particular, the extension will allow the parties to employ a robust science-based and adaptive management process, thereby providing an important opportunity to improve scientific understanding and increase the cooperation of relevant stakeholders. In so doing, the moving parties hope to break the cycle of

litigation that has consumed considerable party and judicial resources for the better part of the last decade.

No Plaintiffs oppose granting the requested extension. Several Plaintiffs – San Luis & Delta-Mendota Water Authority, Westlands Water District, and the Family Farm Alliance – have joined DWR and Federal Defendants in seeking an extension of the remand schedule. *See* Dkt. Nos. 1086, 1093.

Defendant-Intervenors oppose the Joint Motion, contending that the requested extension is not justified by Rule 60 and will "weaken[] the protections of the biological opinions" and overburden the Court. Def.-Ints' Opp. to Joint Mot. to Extend Remand Sched. at 1-2 (Dkt. 1092) ("DIs' Opp."). Defendant-Intervenors' arguments are to no end, and in any event, lack merit. As an initial matter, Defendant-Intervenors' attempt to prevent Federal Defendants from pursuing the alternative process that they have developed in close cooperation with DWR is contrary to bedrock principles of administrative law, which afford federal agencies the discretion to determine on remand how best to comply with the law following an adverse judicial decision.

Moreover, Defendant-Intervenors' assertion that an extension would weaken the protections provided by the BiOp and RPA is unfounded. The Joint Motion seeks no changes to the BiOp or its RPA. The RPA will remain in place during the extension, and the alternative process makes it clear that adjustments may be adopted and implemented "if they are likely to provide equivalent or improved biological protection for listed species." Dkt. 1080-1 at 3. Thus, granting the extension will not prejudice Defendant-Intervenors. While Defendant-Intervenors express concern about the legality of possible future adjustments to the RPA, no adjustments have been proposed, discussed or identified at this time. Thus, Defendant-Intervenors' opposition to the Joint Motion is both speculative and premature. Finally, contrary to Defendant-Intervenors' assertions, events have changed significantly from when the amended judgment was entered,

justifying the requested relief under Rule 60. Accordingly, for the reasons set forth in the Joint Motion and as further explained below, the Court should grant the Joint Motion and extend the deadlines in the Amended Judgment for a period of three years.

Argument

I. Defendant-Intervenors' Opposition Seeks to Impermissibly Foreclose Federal Defendants' Discretion on Remand

The Supreme Court has made it clear that, following an adverse judicial decision, a Federal agency retains the discretion to determine how it "may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops." *Federal Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333-34 (1976); *see also NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 (1974) ("[W]hen a reviewing court concludes that an agency invested with broad discretion . . . has apparently abused that discretion . . . remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course"); *Nat'l Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) ("We will not, indeed we cannot, dictate to the agency what course it must ultimately take.").

The Ninth Circuit has affirmed these principles, concluding that, where a "court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits." *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). The Ninth Circuit also has admonished that "intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible." *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). For a court to order an agency to adopt detailed procedural rules on remand "clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 544-45 (1978) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *accord INS v. Ventura*, 537 U.S. 12, 16 (2002) (noting that a "judicial judgment cannot be made to do

service for an administrative judgment" and that a reviewing court may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency").

In this case, the Court remanded the BiOp to FWS "for further consideration in accordance with this decision and the requirements of law," and subsequently ordered more detailed relief, namely that FWS must complete a new BiOp and Reclamation must complete analysis under NEPA, by specified dates. Dkt. 757 at 225; Dkt. 763 at 3; Dkt. Nos. 884, 1061, 1065. In the Joint Motion, DWR and Federal Defendants ask the Court to extend the remand deadlines so that Federal Defendants and DWR can pursue an alternative approach that also complies with the governing statutes but at the same time, allows for more science to be developed and provides a more comprehensive solution for the Region than the previous piecemeal approach that repeatedly has been met with legal challenge.

In opposing the Joint Motion, Defendant-Intervenors seek to eliminate Federal Defendants' discretion to pursue their collaborative-science approach with DWR, contrary to the case law discussed above. Instead, Defendant-Intervenors urge the Court to compel the agencies to produce a new BiOp and complete NEPA analysis according to the existing remand schedule. To that end, Defendant-Intervenors argue that the Joint Motion should be denied because Federal Defendants do not need additional time to meet the Court-ordered remand schedule. *See* DIs' Opp. at 4 (arguing that "Federal Defendants are on track to meet the current schedule.").[1] But the question is not whether Federal Defendants are capable of preparing a new BiOp and NEPA analysis by the Court-ordered deadline. Federal Defendants do not presently seek an extension of time simply to be able to meet the Court-ordered deadline. Rather, as DWR and Federal Defendants have explained, they seek an extension of the remand schedule to allow them to pursue an alternative process to that ordered by the Court.[2] As explained above, well-established

[1] Defendant-Intervenors note that, while they oppose the extension requested in the Joint Motion, they likely would not oppose a motion to modify the remand schedule if additional time is necessary to lawfully complete the remand "based on the best available science that is currently available." DIs' Opp. at 11 n.4.

[2] Because Federal Defendants do not presently seek an extension of time due to budget and staff limitations as Defendant-Intervenors assert, Defendant-Intervenors' reliance on *Ctr. for Biological Diversity v. Norton*, 304 F. Supp. 2d 1174, 1179-80 (D. Ariz. 2003), is misplaced. DIs' Opp. at 2-3. Furthermore, *Center for Biological Diversity* is inapposite because that case

principles of administrative law afford Federal Defendants the discretion to do so. To eliminate Federal Defendants' ability to proceed down their chosen path on remand as Defendant-Intervenors now request, would be an abuse of discretion. Granting the Joint Motion, on the other hand, is warranted under the case law authority cited above, which establishes that on remand, Federal agencies must have the discretion to determine the best course for coming into compliance with the law and a court's decision.

II. Extending the Remand Schedule Would Not Prejudice Any Party

As noted above, no party to whom relief has been granted in this case opposes the requested extension of the remand schedule. Dkt. Nos. 1086, 1093. Defendant-Intervenors oppose the requested extension; however they have not shown that they will be prejudiced if it is granted. Defendant-Intervenors' opposition is based on their concern about whether or not the BiOp and its RPA will be complied with during the period of the extension. DIs' Opp. at 1 (arguing that the Joint Motion "is ambiguous regarding compliance with the existing biological opinions during the requested three-year extension."). But there is no ambiguity on this point; DWR and Federal Defendants will comply fully with the requirements of the ESA during the

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involved an open-ended request for an extension that would have delayed implementing protections for an ESA-listed species, where the court previously had ruled that inadequate funding was an insufficient basis for failing to take such action. *See id*. at 1180 (extension of time was sought to comply with the court's order to designate critical habitat "until such time as the Defendant is of the opinion that it has sufficient funds to comply with its statutorily mandated and court-ordered duties."). By contrast, here the moving parties seek a time-limited, three-year extension during which the protections of the ESA for the listed species will remain in place, while they apply their limited resources more efficiently towards developing short-term actions and a long-term strategy for providing a sustainable water supply and successful ecosystem restoration in the Bay Delta Region in ways that are most effective for the short and long-term protection of ESA-listed species. Unlike in *Center for Biological Diversity*, here Defendant-Intervenors have not shown that the requested three-year extension would imperil any goal of the ESA.

Just as Defendant-Intervenors' reliance on *Center for Biological Diversity* is misplaced, so, too, is their argument that the requested extension is not tailored to the change in circumstances that precipitated the request (DI's Opp. at 10-11) because the argument is premised on the erroneous notion that Federal Defendants merely seek an extension to meet the Court-ordered deadline. As explained above, Defendant-Intervenors fail to acknowledge the true purpose of the extension, and as such their argument fails.

extended remand. In particular, the Court remanded the BiOp without vacating it. Dkt. 763 at 3 (ordering that the BiOp be "remanded without vacatur"); Dkt. 884 at 3 ¶ (G). The Joint Motion seeks no amendment of this Order. As such, Defendant-Intervenors will suffer no prejudice from an extension of the remand schedule, as they intervened in this case to uphold the BiOp and its RPA, which they agree avoid jeopardy to the delta smelt and adverse modification of its critical habitat.

Nevertheless, Defendant-Intervenors cite to statements made by several Plaintiffs regarding a desire to see adjustments or modifications made to the RPAs as a result of the collaborative-science process. DIs' Opp. at 1, 9. But those statements do not, indeed, cannot change the fact that the only relief being requested from the Court is an extension of time. Whatever authority currently exists to adaptively manage the RPA in the BiOp will simply be carried forward during the extended remand. *See* "Federal and State Proposal for Modification to the Remand Schedule and an Alternative Process for Development of Operational Strategies and a Collaborative Science and Adaptive Management Program" (Dkt. 1080-1) at 3 (stating that "the existing 2008 FWS BiOp and 2009 NMFS BiOps, including possible adjustments to RPAs as described below, will provide the legal framework for operations and operational strategies over this interim period," and that "[a]djustments may be adopted and implemented if they are likely to provide equivalent or improved biological protection for listed species . . ."). For this reason, Defendant-Intervenors' concern regarding future compliance with the ESA is not only unfounded, but entirely speculative.

Moreover, while DWR and Federal Defendants fully intend to meet their obligations under the ESA going forward, as Defendant-Intervenors themselves note, *any* party will remain free to seek relief from the Court in the future should they believe an action runs afoul of the law. Defendant-Intervenors' attempt to, in essence, assert an objection now regarding the legality of unidentified future actions is premature, and does not provide grounds for denying the Joint Motion.

III. Extending the Remand Schedule is Warranted Under Rule 60

Defendant-Intervenors argue that the Joint Motion should be denied because the moving parties have not made a sufficient showing under Rule 60 to justify an extension of time. DIs' Opp. at 4-8. Defendant-Intervenors first argue that the Joint Motion is untimely. DI's Opp. at 4-5. Rule 60(c)(1) does not set forth a concrete deadline within which relief may be sought under Rule 60(b)(5), but rather requires that a motion be made "within a reasonable time." Fed. R. Civ. P. 60(c)(1). What constitutes a reasonable time "depends on the facts of each case." *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989). Defendant-Intervenors list five cases in which Rule 60 motions were denied as untimely (DIs' Opp. at 5); however, Defendant-Intervenors fail to show that any of those cases are factually similar to this case. As such, the cited cases have no bearing on the timeliness of the Joint Motion in this case. Indeed, the magnitude, complexity, and procedural posture of this case are highly unique, leaving little room for comparison.

In determining timeliness under Rule 60, "[t]he courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and whether the moving party had some good reason for the failure to take appropriate action sooner." Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2866 (3d ed.). Here, as explained above, Defendant-Intervenors will not be prejudiced by any alleged delay in filing the Joint Motion. Nor have Defendant-Intervenors shown that Federal Defendants unreasonably delayed in filing the Joint Motion. Rather, Defendant-Intervenors argue that the motion is untimely "[g]iven the parties' stated preference to have a 'final, legal BiOp' in place as quickly as possible and the Court's interest in avoiding the 'extend[ed] uncertainty' and increased likelihood of 'intervention in annual water allocations.'" DIs' Opp. at 5. As explained below, the parties' positions on the appropriate length of the remand period have changed significantly, as evidenced by the fact that Plaintiff-Intervenor DWR is a co-movant with Federal Defendants on the Joint Motion, with joinder by San Luis & Delta-Mendota Water Authority, Westlands Water District, and the Family Farm Alliance. And the remaining Plaintiffs that have not joined in the Joint Motion do not oppose it. Given this change in position, and the lack of prejudice to any party, the Joint Motion is timely

under Rule 60(c)(1).

Defendant-Intervenors' further arguments that the moving parties have not made the requisite showing under Rule 60 misstate the applicable legal standard and otherwise lack merit. First, Defendant-Intervenors argue that the moving parties must meet the "heavy burden" standard. *Id*. at 3, 8. That is incorrect. As the Supreme Court found in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), the "heavy burden" standard applies only where it is "clear" that the party "actually" anticipated the changed circumstances at the time of the judgment:

> Respondents urge that modification should be allowed only when a change in facts is both "unforeseen and unforeseeable." Brief for Respondents at 35. Such a standard would provide even less flexibility than the exacting *Swift* test; we decline to adopt it. Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree.
>
> Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree . . . If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Id. at 385 (emphasis added); *United States v. Asarco*, 430 F.3d 972, 979 (9th Cir. 2005) ("A court should not ordinarily modify a decree . . . 'where a party relies upon events that actually were anticipated at the time it entered into a decree'") (quoting *Rufo*). In short, the "heavy burden" standard does not apply where, as Defendant-Intervenors wrongly assert, changes were merely "reasonably foreseeable." *Id*. at 2. Here, Defendant-Intervenors have not shown it was clear that the moving parties actually anticipated the changed circumstances, and thus the "heavy burden" standard does not apply.

Defendant-Intervenors further argue that the moving parties must show that compliance with the existing remand schedule is "impossible" or will cause "manifest injustice." DIs' Opp. at 5, 11. But neither showing is a necessary condition for the granting of a Rule 60(b) motion. In *Borne v. Flores*, 129 S. Ct. 2579 (2009), the Supreme Court set forth a revised "flexible" test for a Rule 60(b)(5) motion, the core of which is a "changed circumstances/public interest" standard:

> Federal Rule of Civil Procedure 60(b)(5) permits a party to obtain relief from a

> judgment or order if, among other things, "applying [the judgment or order] prospectively is no longer equitable." Rule 60(b)(5) may not be used to challenge the legal conclusions on which a prior judgment or order rests, but the Rule provides a means by which a party can ask a court to modify or vacate a judgment or order if "a significant change either in factual conditions or the law" renders continued enforcement "detrimental to the public interest."

Id. at 2593 (quoting *Rufo*).[3]

Here, the requested extension is in the public interest and warranted due to several changes in circumstances. As an initial matter, the parties' positions clearly have changed. Indeed, in their opposition, Defendant-Intervenors cite various arguments previously made by Plaintiffs and Plaintiff-Intervenor DWR in strong opposition to the length of the remand requested by Federal Defendants. DIs' Opp. at 3-4, 7. These prior positions, however, only underscore that there has been a significant change in circumstances. Indeed, Plaintiff-Intervenor DWR is a co-movant with Federal Defendants on the Joint Motion, with joinder from other Plaintiffs, and opposition by none. Obviously, this was not foreseen when the Amended Judgment was entered.

Yet, Defendant-Intervenors argue that, despite this sea change in positions, neither the development of the collaborative science program nor advances on the progress of the Bay Delta Conservation Plan ("BDCP") warrant an extension of the remand schedule. DIs' Opp. at 6-8. Defendant-Intervenors argue, for example, that the ESA must be based on information currently available, and that FWS cannot delay completion of the BiOp to improve science. *Id*. at 6. While this statement may generally be true, the ESA certainly does not preclude seeking additional time to improve science where, as here, the listed species remains protected in the interim. Seeking to improve existing science is particularly appropriate here, where Defendant-Intervenors (along with Federal Defendants) strongly defended the BiOp and RPA and, just as importantly, argued

[3] While the Ninth Circuit decision in *Asarco* does state that changed conditions that make compliance with a judgment "unworkable" can justify a Rule 60(b) motion, the decision makes it clear that "unworkability" is only one factor, and not the only factor, than can support such a motion. *Asarco*, 430 F.3d at 979 (moving party "must additionally show that the changed conditions make compliance with the consent decree 'more onerous,' 'unworkable,' or 'detrimental to the public interest.'"). In any event, as shown in our opening motion, the current schedule is unworkable in that it forecloses the agencies' ability to pursue valid alternative remand approaches.

they should be upheld and remain in place while critical scientific progress is made. *Natural Res. Def. Council v. Kempthorne*, Civ. No 05-1207-OWW, 2007 WL 4462395, at *21 (E.D. Cal. Dec. 14, 2007) (holding that "[a]ny interim remedial prescriptions must (1) not cause jeopardy . . . [or]; (2) adversely modify its critical habitat").

Defendant-Intervenors also argue that the collaborative science-based process is not a change in circumstances because an expanded and improved stakeholder process was contemplated prior to the entry of judgment. DIs' Opp. at 6. But Defendant-Intervenors have not shown it was clear that agreement to pursue the collaborative science process as a whole was actually anticipated, and even if they had, Defendant-Intervenors fail to show any prejudice that they may suffer from the collaborative science process and improved and increased involvement of stakeholders (which would include the Defendant-Intervenors). At bottom, the collaborative science-based process, which for the first time was developed jointly by the State of California and Federal Defendants in close communication with the other parties in this litigation – and is not opposed by Plaintiffs – is a new and relevant changed circumstance that counsels in favor of granting the extension.

Defendant-Intervenors also erroneously argue that the moving parties have not met their "heavy burden" of justifying an extension because the unprecedented changes to the BDCP preliminary proposal announced more than a year after entry of the Amended Judgment, were "foreseeable." DIs' Opp. at 7-8. As discussed above, Defendant-Intervenors' arguments are based on an incorrect legal standard and should be rejected. Regardless, the declaration from Dale Hoffman-Floerke, Chief Deputy Director of DWR, identifies significant and new proposed design changes for the delta conveyance facility described in the BDCP preliminary proposal. *See* Hoffman-Floerke Decl. at ¶ 3 (Dkt. 1080-2). Defendant-Intervenors provide no evidence that these changes to the BDCP preliminary proposal, or the United States' and the State of California's willingness to treat these design changes as a preliminary proposal, were actually anticipated.

Nor have Defendant-Intervenors shown how denial of the extension to allow agency staff to better concentrate on the BDCP, a habitat conservation plan being developed by DWR

pursuant to Section 10 of the ESA, is in the public interest. While Defendant-Intervenors suggest that pursuing "high profile initiatives" in lieu of the remand does not warrant an extension (DIs' Opp. at 8), they ignore the significant overlap between the BDCP and the remanded BiOp in this case. Defendant-Intervenors do not consider or dispute, for example, that the BDCP is intended to address long term solutions to the water resources and ecosystem issues in the Bay-Delta area, many of which have been identified in the BiOps and respective remands, or that the BDCP is expected to improve conditions for the ESA-listed species at issue in this case. Nor do they dispute that "proposals for adaptive management and monitoring programs that are being proposed for BDCP could be useful in developing scientific analyses for the remanded Biological Opinions." Hoffman-Floerke Decl. at ¶ 5.

Moreover, as explained in the Joint Motion, the requested extension will allow the federal and state staff engaged in the remand to better concentrate their efforts on completing the BDCP as described in the BDCP preliminary proposal announced in July 2012. But, contrary to Defendant-Intervenors' suggestion, this BDCP-driven reason for the requested extension is not a matter of funding, (DIs' Opp. at 8), but because "the number of staff at the federal and state agencies with expertise on Bay Delta environmental issues is limited and the BDCP work greatly overlaps with the work on the remanded Biological Opinions." Hoffman-Floerke Decl. at ¶ 4. More funding does not resolve the problem of limited Bay Delta expertise. Extending the BiOp completion dates, however, would allow for the more efficient use of limited state and federal environmental resources available to government agencies to find solutions to many of the water resources and ecosystem issues that have been identified in the BiOps and respective remands. It thus would benefit the public interest.

IV. Defendant-Intervenors' Suggestion That the Proposed Extension Will Not Conserve Judicial Resources Is Unfounded

Defendant-Intervenors correctly note that Plaintiffs and DWR have filed numerous motions for interim injunctive relief in the past, and then argue that the requested extension should be denied because it does not bar future motions for interim injunctive relief, and hence will not conserve judicial resources. DIs' Opp. at 8-10. As an initial matter, Defendant-

Intervenors miss the point. It is precisely because there has been extensive litigation regarding the implementation of the RPA that an alternative approach is warranted.

Furthermore, the institutionalized collaboration in the alternative approach is intended and expected to reduce the need for interim judicial relief. As the moving parties have explained, the requested extension will provide an opportunity for FWS and the National Marine Fisheries Service ("NMFS") to improve their scientific understanding of the species under their jurisdiction, while at the same time improving transparency and stakeholder participation. Defendant-Intervenors ignore the fact that DWR is a joint movant for this extension, and helped develop the Collaborative Adaptive Management Plan's provision for significant new opportunities for stakeholder participation (including both Plaintiffs and Defendant-Intervenors) in the development of operational strategies and other management actions in the Bay-Delta estuary. These expanded opportunities would include participation in the development of an Annual Operational Plan, seasonal operational updates, and real time operational responses. *See* Dkt. 1080-1 at 4, ¶ 4.

While there is no guarantee that this will lead to a reduction in litigation, that is the hope. The lack of certainty on this point is no reason to foreclose the attempt. Indeed, there certainly is no guarantee that the course of action Defendant-Intervenors advocate will avoid further litigation. To the contrary, if the past decade is any guide, continuing with the old paradigm of issuing a new BiOp based on the existing science is likely to spark a new round of litigation. Indeed, here the new BiOp will be accompanied by a new NEPA analysis, which could be subject to additional legal challenge. The Joint Motion seeks to break the cycle of litigation and the attempt should not be foreclosed because the outcome cannot be guaranteed. Furthermore, Defendant-Intervenors' assertion that extending the remand will increase litigation is undercut by the fact that, with or without an extension, the parties could move for interim injunctive relief during the remand period (which in this case will last 12 months even without an extension, and even longer in the related *Consolidate Salmon Cases*).

Defendant-Intervenors assert that "recent filings in this case demonstrate that during the remand period, the moving parties believe they must provide notice to the Court of all RPA

implementation," giving rise to the potential for litigation each and every time an RPA action is implemented or adjusted. DIs' Opp. at 10. Federal Defendants do not believe they are required to provide notice of all RPA actions; however, they have continued to do so in keeping with the practice of this case, and as a courtesy to the Court and the parties. Dkt. Nos. 1078, 1079, 1085, 1087. Specifically, the advance notice issue arose from a bench ruling on February 2, 2010 on Plaintiffs' motion for a temporary restraining order against implementation of RPA component one, action one. 2/2/10 Tr. at 32:3-6 (excerpted copy attached hereto). The Court denied the motion as premature because no RPA action had been triggered at the time, and in the particular matter before the Court, instituted a condition that Federal Defendants provide 48 hours advance notice before implementing the RPA action. This case has long since proceeded to entry of judgment and no notice requirement was included in the Court's December 2010 summary judgment ruling or May 2011 Amended Judgment. Therefore, Federal Defendants do not believe they are required to provide notice.

Providing 48-hours notice has proven considerably burdensome for Federal Defendants, and doing so significantly impedes Federal Defendants' ability to quickly and efficiently implement the RPA in real time, which is necessary to protect the delta smelt and its critical habitat. Therefore, as of the date of this filing, Federal Defendants will discontinue their practice of filing notices with the Court prior to RPA Action implementation or adjustment. Instead, FWS will provide advance notice via email to interested stakeholders prior to a determination by the Regional Director on implementation of an action and notice of such action once a final determination is made via the FWS website.

Conclusion

For the foregoing reasons, and those set for the in the Joint Motion to extend the remand schedule should be granted, and all deadlines in the smelt remand process should be extended for a period of three years.

Respectfully Submitted,

Dated: January 31, 2013

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By: *Clifford T. Lee*
CLIFFORD T. LEE
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DEPUTIES ATTORNEY GENERAL

ATTORNEYS FOR PLAINTIFF-IN-INTERVENTION CALIFORNIA DEPARTMENT OF WATER RESOURCES

Dated: January 31, 2013

IGNACIA S. MORENO, ASSISTANT ATTORNEY GENERAL
UNITED STATES DEPARTMENT OF JUSTICE, ENVIRONMENT & NATURAL RESOURCES DIVISION
SETH M. BARSKY, CHIEF
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CERTIFICATE OF SERVICE

I hereby certify that, on January 31, 2013, the foregoing, with supporting attachments, was filed with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record in this matter.

/s/ *Robert P. Williams*
Robert P. Williams, Trial Attorney

IDENTIFICATION OF COUNSEL

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