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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**DELTA SMELT CONSOLIDATED CASES**

1:09-CV-00407 OWW DLB

**SAN LUIS & DELTA-MENDOTA WATER  
AUTHORITY, et al. v. SALAZAR,  
et al. (1:09-cv-00407 OWW DLB)**

1:09-cv-00480-OWW-GSA

1:09-cv-00422-OWW-GSA

1:09-cv-00631-OWW-DLB

1:09-cv-00892-OWW-DLB

**STATE WATER CONTRACTORS v.  
SALAZAR, et al. (1:09-cv-00480-  
OWW-GSA)**

Partially consolidated  
with:

1:09-cv-01201-OWW-DLB

**COALITION FOR A SUSTAINABLE  
DELTA, et al. v. UNITED STATES  
FISH AND WILDLIFE SERVICE, et  
al. (1:09-cv-00422-OWW-GSA)**

MEMORANDUM DECISION AND  
ORDER RE DEFENDANT-  
INTERVENOR/ APPELLANTS'  
CERTIFICATION RE  
TRANSCRIPTS NECESSARY  
FOR APPEAL (DOC. 897)

**METROPOLITAN WATER DISTRICT v.  
UNITED STATES FISH AND WILDLIFE  
SERVICE, et al. (1:09-cv-00631-  
OWW-DLB)**

NINTH CIRCUIT CASE  
NO: 11-15871

**STEWART & JASPER ORCHARDS, et  
al. v. UNITED STATES FISH AND  
WILDLIFE SERVICE (1:09-cv-  
00892-OWW-DLB)**

**FAMILY FARM ALLIANCE v.  
SALAZAR, et al. (1:09-CV-01201-  
OWW-DLB)**

**On April 7, 2011, Defendant-Intervenors Natural  
Resources Defense Council and The Bay Institute**

1 ("Appellants") filed a notice of appeal to the United  
2 States Court of Appeals for the Ninth Circuit in this  
3 action. Doc. 853. The following day, Federal Defendants  
4 filed a motion to alter or amend the judgment, Doc. 856,  
5 which stayed the deadlines for the appeal until its  
6 resolution on May 4, 2011, Doc. 875.  
7

8 Pursuant to Circuit Rule 10-3.1(a), Appellants  
9 notified the parties on May 16, 2011 that they intended  
10 to order the following district court transcripts (or  
11 portions thereof) for the appeal:

- 12 (1) October 2, 2009 hearing on cross-motions for  
13 summary judgment;
- 14 (2) October 19, 2009 hearing on motions to  
15 supplement the administrative record and motions  
16 to allow expert testimony;
- 17 (3) April 2 & 5-7, 2010 hearing on motion for  
18 preliminary injunction; and
- 19 (4) July 8-9, 2010 hearing on cross-motions for  
20 summary judgment.

21 Doc. 891-1 at 1 ("Transcript Notice").

22 The Transcript Notice lists the following as the  
23 issues Appellants intend to pursue on appeal:

- 24 (1) Whether the district court erred in considering  
25 extra-record evidence in challenges to the 2008  
26 biological opinion for the delta smelt under the  
27 Endangered Species Act ["ESA"] and  
28 Administrative Procedure Act ["APA"]?
- (2) Whether the district court erred in determining  
that the U.S. Fish & Wildlife Service failed to  
rely on the best available science or that the

1           2008 biological opinion for the delta smelt was  
2           otherwise arbitrary and capricious under the  
3           [ESA] and [APA]?

- 4           (3) Whether the district court erred in determining  
5           that the U.S. Bureau of Reclamation was required  
6           to conduct environmental review of the 2008  
7           biological opinion for the delta smelt under the  
8           National Environmental Policy Act [("NEPA")]  
9           prior to provisionally adopting and implementing  
10          the biological opinion?

11          *Id.* at 1-2.

12          On May 26, 2011, Plaintiffs State Water Contractors,  
13          Coalition for a Sustainable Delta, Kern County Water  
14          Agency, the Metropolitan Water District of Southern  
15          California, San Luis & Delta-Mendota Water Authority, and  
16          Westlands Water District ("Water Agency Appellees")  
17          responded to the Transcript Notice pursuant to Circuit  
18          Rule 10-3.1(b), arguing that "[t]o paint an undistorted  
19          picture of the district court's proceedings, the  
20          transcripts for all of the approximately thirty-five  
21          hearing dates conducted by the trial court are necessary  
22          to the appeal for the purpose of assisting the Court with  
23          an effective review of the issues." Doc. 891-2 (emphasis  
24          added). Water Agency Appellees identify the following 27  
25          additional transcripts as "necessary" to the appeal:

- 26          (1) May 15, 2009 telephone conference regarding  
27          Appellants' Motion to Intervene in the May 22,  
28          2009 preliminary injunction hearing;  
29          (2) May 22, 2009 hearing regarding a motion for  
30          preliminary injunction;

- 1 (3) June 10, 2009 hearing regarding an Old and Middle  
2 River flow decision;
- 3 (4) June 19, 2009 scheduling conference;
- 4 (5) July 10, 2009 scheduling conference;
- 5 (6) August 12, 2009 hearing re motion for extension of  
6 time;
- 7 (7) October 6, 2009 conference regarding Federal Rule  
8 of Evidence 706 court-appointed experts ("706  
9 Experts");
- 10 (8) October 8, 2009 conference regarding 706 Experts  
11 and setting an extended hearing on motions for  
12 summary judgment;
- 13 (9) November 19, 2009 scheduling conference regarding  
14 [NEPA] remedies, 706 Experts, and intervention by  
15 the California Department of Water Resources;
- 16 (10) November 25, 2009 scheduling conference regarding  
17 NEPA remedies;
- 18 (11) December 7, 2009 hearing regarding motion for  
19 entry of judgment;
- 20 (12) January 11, 2010 order to show cause hearing  
21 regarding consolidation of Plaintiff Family Farm  
22 Alliance's claims;
- 23 (13) January 26, 2010 telephonic status conference  
24 regarding schedule for motions for temporary  
25 restraining order, preliminary injunction, and  
26 summary judgment;
- 27 (14) February 2, 2010 hearing regarding motion for  
28 temporary restraining order;
- (15) February 10, 2010 hearing regarding motion for  
temporary restraining order;
- (16) February 12, 2010 telephonic status conference  
regarding motion for preliminary injunction;
- (17) March 16, 2010 telephonic scheduling conference  
regarding motion for summary judgment;
- (18) March 30, 2010 hearing regarding motions for  
preliminary injunction and temporary restraining  
order;
- (19) March 31, 2010 hearing regarding motions for  
preliminary injunction and temporary restraining  
order;

- 1 (20) April 1, 2010 hearing regarding motions for  
2 preliminary injunction and temporary restraining  
3 order;  
4 (21) May 4, 2010 telephonic status conference regarding  
5 hearing dates;  
6 (22) May 28, 2010 telephonic status conference  
7 regarding imminence of harm to Delta smelt;  
8 (23) January 4, 2011 status conference regarding  
9 further hearings;  
10 (24) February 9, 2011 telephonic scheduling conference  
11 regarding motion for preliminary injunction;  
12 (25) February 23, 2011 hearing regarding motion in  
13 limine to exclude witnesses;  
14 (26) February 25, 2011 telephonic status conference  
15 regarding stipulation for interim remedies;  
16 (27) April 27, 2011 hearing regarding motion to amend  
17 judgment.

18 Appellants do not agree that these transcripts are  
19 necessary to the appeal. The Ninth Circuit Rules provide  
20 a procedure for resolving such disputes. Circuit Rule  
21 10-3.1(d) provides:

22 In ordering the transcripts, appellant shall  
23 either order all portions of the transcript  
24 listed by both appellant and appellee or certify  
25 to the district court pursuant to subsection (f)  
26 of this rule that the portions listed by  
27 appellee in the response to appellant's initial  
28 notice are unnecessary.

Circuit Rule 10-3.1(f) provides:

If appellee notifies appellant that additional portions of the transcript are required pursuant to Circuit Rule 10-3.1(b), appellant shall make arrangements with the court reporter to pay for these additional portions unless appellant certifies that they are unnecessary to the appeal and explains why not.

If such a certificate is filed in the district court, with copies to the court reporter and

1           this court, the district court shall determine  
2           which party shall pay for which portions of the  
3           transcript. Appellant may ask the Court of  
4           Appeals for an extension of time to make  
5           arrangements with the court reporter to pay for  
6           the transcripts pending the district court's  
7           resolution of the issue.

8           Appellants argue that only the four transcripts they  
9           identified in their initial Transcript Notice are  
10          necessary for the appeal:

- 11           • The October 19, 2009 hearing on motions to  
12           supplement the administrative record and motions  
13           to allow expert testimony, and well as the four  
14           days (April 2 & 5-7, 2010) of the second  
15           preliminary injunction hearing during which the  
16           Court heard testimony from witnesses for the  
17           Water Agency Appellees and took evidence that  
18           was the subject of the October 19, 2009 motion,  
19           are relevant and necessary to Appellants'  
20           challenge to the district court's consideration  
21           of extra-record evidence.
- 22           • The October 2, 2009 and July 8-9, 2010 hearings  
23           on cross-motions for summary judgment directly  
24           concern whether the Bureau of Reclamation's was  
25           required to conduct environmental review of the  
26           2008 biological opinion under the NEPA, and  
27           whether the U.S. Fish & Wildlife Service failed  
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1 to rely on the best available science or whether  
2 the 2008 biological opinion was otherwise  
3 arbitrary and capricious under the ESA and APA.

4 Appellants offer the following objections to the  
5 additional 27 transcripts identified by Water Agency  
6 Appellees:  
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- 8 • Items 1, 4, 5, 7, 8-10, 13, 16, 17, 21-24, 26 are  
9 scheduling or status conferences which did not  
10 concern the issues on appeal.<sup>1</sup>
- 11 • Items 3, 6, 11, 12, 25, and 27 are hearings on  
12 matters unrelated or only very tangentially related  
13 to the issues on appeal. See *id.*, items 3 ("June 10,  
14 2009 hearing regarding an Old and Middle River flow  
15 decision"), 6 ("August 12, 2009 hearing re motion for  
16 extension of time"), 11 ("December 7, 2009 hearing  
17 regarding motion for entry of judgment"), 12  
18 ("January 11, 2010 order to show cause regarding  
19 consolidation of Plaintiff Family Farm Alliance's  
20 claims"), 25 ("February 23, 2011 hearing regarding  
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23  
24 <sup>1</sup> There is no merit to Water Agency Appellees' omnibus objection that  
25 Appellants' certification is insufficient because Appellants failed  
26 to explain "why" the 27 additional transcripts are unnecessary to  
27 the appeal. Appellants explained generally why they believe the  
28 transcripts are unnecessary. Although Circuit Rule 10-3.1(f) does  
require appellant to "explain why" the additional transcripts are  
unnecessary, the Rule does not set forth any specificity  
requirements for that explanation. Appellants' explanations are  
sufficient to permit resolution of this dispute.

1 motion *in limine* to exclude witnesses"); 27 ("April  
2 27, 2011 hearing regarding motion to amend  
3 judgment").

- 4 • The remaining six transcripts from hearings on  
5 motions for temporary restraining order or  
6 preliminary injunction. Appellants already  
7 identified transcripts from four days (April 2 & 5-7,  
8 2010) of the second preliminary injunction hearing.  
9 Those days concern the admission of extra-record  
10 evidence. The remaining days of that hearing, items  
11 18-20, primarily involved testimony related to  
12 injunctive relief requests in the Consolidated  
13 Salmonid Cases. The earlier injunctive relief  
14 proceedings (items 2, 14, 15) likewise do not  
15 directly relate to the issues on appeal.  
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18 Doc. 891 at 2-3.

19 Water Agency Appellees respond generally that  
20 "[b]ecause Appellants have broadly cast the issues on  
21 appeal as relating to the Court's findings and  
22 conclusions related to extra-record evidence, application  
23 of the best available science standard, and [NEPA]...  
24 Appellees cannot possibly determine at this stage what  
25 the specific nature of Appellants' arguments will be, nor  
26 the support they will rely upon in making these  
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1 arguments." Doc. 897 at 1. But, the requirement that  
2 transcripts be deemed "necessary to the appeal" see  
3 Circuit Rule 10-3.1(b), must be given some meaning.  
4 Although caselaw interpreting this rule is limited, one  
5 district court in Alaska required appellees to cover  
6 approximately half the costs of transcript production  
7 where the appellees demanded inclusion of all testimony  
8 from a trial, deeming this "the most expensive way to  
9 proceed." *Lumbermens Mut. Cas Co v. Luciano Enterp.,*  
10 *LLC*, 2005 WL 1203021, \*2 (D. Alaska, May 15, 2005). The  
11 district court reasoned that "[w]hile most of the  
12 testimony is important, certainly not all of it is worth  
13 transcribing. [Appellee] could have made, but chose not  
14 to make, an effort to be more precise and frugal in its  
15 designation witness, warranting at least a sharing of  
16 costs by the party making such a demand." *Id.*

19 Here, Appellees cannot demonstrate that "most" of the  
20 transcribed proceedings are "important." The most  
21 specific rationale offered is that "[a]mong the broadly-  
22 framed issues raised by Defendant-Intervenors on appeal  
23 is the admission of extra-record evidence." Doc. 897 at  
24 2. According to Water Agency Appellees, this issue "was  
25 addressed repeatedly during the district court  
26 proceedings and, on each occasion, the Court provided  
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1 assurance to the parties that it was aware of the  
2 limitations on the admission of extra-record evidence and  
3 would apply those limitations to the specific  
4 circumstances at hand." *Id.* Water Agency Appellees  
5 argue that "[t]he limited range of transcripts selected  
6 by Appellants is unlikely to permit Water Agency  
7 Appellees to make a showing of the continuing awareness  
8 by the Court of the relevant restrictions on the  
9 admission of such evidence. Inclusion of the entire  
10 range of transcripts on appeal, on the other hand, will  
11 allow such a showing to be made." *Id.* The law regarding  
12 the use of extra-record evidence was reviewed in great  
13 detail during the hearings designated by Appellants. See  
14 October 19, 2009 hearing transcript. It has also been  
15 the subject of at least one written order. See Doc. 462.  
16 In a technical sense, the additional transcripts are not  
17 "necessary" to address this issue on appeal.

20 The rules do not provide the district court with  
21 authority to completely exclude transcripts from the  
22 appellate record. Rather, the district court is only  
23 authorized to apportion the costs of transcript  
24 production. See Circuit Rule 10-3.1(f). Because the  
25 additional requested transcripts are not technically  
26 necessary to the appeal, Water Agency Appellees must pay  
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1 for their production and inclusion in the appellate  
2 record.

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SO ORDERED  
Dated: June 8, 2011

/s/ Oliver W. Wanger  
United States District Judge