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

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7 **THE CONSOLIDATED DELTA SMELT CASES**
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Lead Case:
1:09-cv-00407 LJO BAM

Member Cases:
1:09-cv-00422 LJO GSA
1:09-cv-00480 LJO GSA
1:09-cv-00631 LJO DLB
1:09-cv-00892 LJO DLB

Partially Consolidated With:
1:09-cv-01201-LJO-DLB

ORDER GRANTING RE MOTION TO
EXTEND REMAND SCHEDULE (Doc.
1153)

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14 The amended judgment in the *Consolidated Delta Smelt Cases* requires the U.S. Bureau of
15 Reclamation (“Reclamation”) to conduct certain analyses under the National Environmental Policy Act
16 (“NEPA”) by December 1, 2015. Doc. 1135. Reclamation released a draft Environmental Impact
17 Statement (“EIS”) pursuant to NEPA on July 31, 2015, and simultaneously commenced a 60-day public
18 comment period, which closed on September 29, 2015. *Id.* at 3. Reclamation maintains that it received a
19 large number of highly complex comments on or slightly before that deadline – “far more than it had
20 anticipated.” *Id.* On October 5, 2015, Reclamation moved for a six week extension of the December 1,
21 2015 deadline (to January 12, 2016), asserting that six weeks is the shortest amount of time in which it
22 believes it can fully address the volume of comments received, taking into consideration the intervening
23 holidays. The Court set an expedited schedule to resolve the matter and permitted any party to file an
24 opposition on or before October 7, 2015. Doc. 1154. No party has opposed the issuance of an extension,
25 although several (which also filed comments on the draft EIS) believe six weeks is an insufficient amount
26 of time for Reclamation to properly respond to the comments. *See* Docs. 1155-1159.
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1 Fed. R. Civ. P. 60(b)(5) authorizes the Court to “relieve a party or its legal representative from a
2 final judgment, order, or proceeding [if] applying it prospectively is no longer equitable.” A party
3 invoking Rule 60(b)(5) must satisfy a two-prong standard. *United States v. Asarco, Inc.*, 430 F.3d 972,
4 979 (9th Cir. 2005) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)). First, “[t]he
5 moving party must satisfy an initial burden of showing a significant change either in factual conditions or
6 in the law warranting modification of the [judgment].” *Id.* (citing *Rufo*, 502 U.S. at 384). Next, “the
7 proposed modification [must be] suitably tailored to resolve the problems created by the changed factual
8 or legal conditions.” *Id.* (citing *Rufo*, 502 U.S. at 391). If the movant can point to “significantly changed
9 factual conditions, ... it must additionally show that the changed conditions make compliance with the
10 [judgment] ‘more onerous,’ ‘unworkable,’ or ‘detrimental to the public interest.’” *Id.* (citing *Small v.*
11 *Hunt*, 98 F.3d 789, 795 (4th Cir. 1996) and quoting *Rufo*, 502 U.S. at 384).¹

12 Here, Reclamation asserts that it was surprised by the volume and complexity of the comments
13 received. Declaration of Pablo Arroyave, Doc. 1153-1, ¶ 5. Specifically, Reclamation received 35 well-
14 developed probing comment letters and emails and two comments at public meetings, totaling
15 approximately 860 individual comments that require responses. *Id.* All but three of these comments were
16 received on the closing day of the comment period. *Id.* Given the complexity and scope of the draft EIS
17 and the widespread interest in the issues it addresses, the Court finds it difficult to imagine why
18 Reclamation did not anticipate such a volume of public comment. Nevertheless, taking Reclamation at
19 its word for purposes of this motion, the Court concludes that the unexpected volume of complex
20 comments constitutes a “significantly changed factual condition” that renders compliance with the
21 December 1, 2015 deadline unworkable.

22 Reclamation requests a six-week extension of the deadline to January 12, 2016. As mentioned,
23 some parties object that this is insufficient and at least one party suggests that the Court *sua sponte*

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25 ¹ *Rufo* and *Asarco* concerned the modification of consent decrees entered in cases involving institutional reform. The Ninth
26 Circuit has confirmed that the standards set forth in *Rufo* provide a “general, flexible standard for all petitions brought under
the equity provision of Rule 60(b)(5).” *Bellevue Manor Associates v. United States*, 165 F.3d 1249, 1255 (9th Cir. 1999)
(emphasis added); see also *Conservation Cong. v. U.S. Forest Serv.*, 2010 WL 3636142 (E.D. Cal. Sept. 14, 2010) aff’d, 489
F. App’x 151 (9th Cir. 2012) (applying *Rufo* in Administrative Procedure Act case).

1 extend the deadline to December 1, 2016. *See* Doc. 1156 (Response of San Luis & Delta Mendota Water
2 Authority and Westlands Water District). The Court declines to do so. In general, a federal
3 administrative agency is entitled to deference regarding “the methods, procedures, and time dimension
4 of the needed inquiry” on remand. *Federal Power Commission v. Transcontinental Gas Pipe Line*
5 *Corporation*, 423 U.S. 326, 333 (1976) (emphasis added). Reclamation has not requested a year
6 extension and the Court will not create further delay where none has been justified by the record.

7 Accordingly, the Court GRANTS Reclamation’s request to extend the deadline for the issuance
8 of a Record of Decision under NEPA to on or before **January 12, 2016**. While this order is without
9 prejudice to further extension requests, Reclamation is warned that: (a) further extension requests must
10 be supported by specific showings of need and be accompanied by a demonstration that Reclamation has
11 a cogent plan for meeting future deadlines; and (b) further requests to consider such extensions on an
12 expedited basis will be viewed with disfavor.

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14 IT IS SO ORDERED.

15 Dated: October 8, 2015

/s/ Lawrence J. O’Neill
UNITED STATES DISTRICT JUDGE