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**UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF CALIFORNIA
 FRESNO DIVISION**

THE DELTA SMELT
 CONSOLIDATED CASES

)
) Case No.: 1:09-cv-00407-OWW-DLB
)
) **Order Granting In Part and Denying In**
) **Part Defendant-Intervenors' and Federal**
) **Defendants' Motion to Strike New**
) **Material In Plaintiffs' Summary**
) **Judgment Reply/Opposition Brief**
)

Defendant-Intervenors' motion to strike new arguments raised for the first time in Plaintiffs' reply in support of summary judgment and opposition to Defendants' cross-motions for summary judgment (Doc. 733), which was joined by Federal Defendants (Doc. 735), was heard and considered by the Court at the hearing on cross-motions for summary judgment in this matter held on July 8 and 9, 2010. All parties were represented by counsel, as stated on the record.

For the reasons articulated by the Court on the record at the hearing, the Court hereby GRANTS IN PART and DENIES IN PART the motion to strike. The Court will not strike any arguments in Plaintiffs' reply briefs, but will permit the Federal Defendants and Defendant-

Intervenors to submit a supplemental brief in support of their motions for summary judgment to address arguments presented for the first time in Plaintiffs' summary judgment reply brief (Docket No. 697) regarding:

(1) Plaintiffs' assertions that the U.S. Fish and Wildlife Service ("Service") improperly relied on the Court's 2007 Interim Remedies Order in formulating the Reasonable and Prudent Alternative ("RPA") to the 2008 Delta Smelt Biological Opinion (pages 47-50 of Plaintiffs' summary judgment reply brief);

(2) Plaintiffs' assertions that the Coordinating Operating Agreement, Refuge Water Supplies, and State Water Resources Control Board Decision 1641 are non-discretionary (pages 59-63 of Plaintiffs' summary judgment reply brief); and

(3) critical habitat (pages 64-71 of Plaintiffs' summary judgment reply brief).

Federal Defendants and Defendant-Intervenors may also address in their supplemental brief the the question posed by the Court on Day 2 of the hearing of whether the Service is legally permitted under the Endangered Species Act to require the CVP and SWP to mitigate for the impacts of other stressors and baseline conditions when developing a reasonable and prudent alternative (RPA), or whether an RPA must be limited to addressing only the effects of the action under consultation. The Federal Defendants' and Defendant-Intervenors' supplemental brief shall be filed jointly no later than July 30, 2010, and shall be thirteen (13) or fewer pages.

For the reasons articulated by the Court on the record at the hearing, the Court also hereby permits the Plaintiffs and Plaintiff-Intervenor to submit up to ten (10) pages of supplemental briefing in support of their motions for summary judgment to address any arguments presented by the Federal Defendants and Defendant-Intervenors for the first time at the summary judgment hearing that have not been addressed in any briefs filed in this action to date.

The Court hereby also permits Plaintiffs and Plaintiff-Intervenor to file 3 pages of supplemental briefing addressing the question posed by the Court on Day 2 of the hearing of whether the Service is legally permitted under the Endangered Species Act to require the CVP and SWP to mitigate for the impacts of other stressors and baseline conditions when developing a reasonable and prudent alternative (RPA), or whether an RPA must be limited to addressing

1 only the effects of the action under consultation. All Plaintiffs' and Plaintiff-Intervenor's
2 supplemental brief shall be filed jointly no later than July 30, 2010.

3 The supplemental briefing described above shall be limited to thirteen (13) pages total
4 per side, with Federal Defendants and Defendant-Intervenors comprising one side, and Plaintiffs
5 and Plaintiff-Intervenor the other.

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7 **IT IS SO ORDERED.**

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9 Dated: December 17, 2010

10 /s/ OLIVER W. WANGER
11 UNITED STATES DISTRICT JUDGE
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