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2
3 UNITED STATES DISTRICT COURT
4 FOR THE EASTERN DISTRICT OF CALIFORNIA
5

6 DELTA SMELT CONSOLIDATED CASES

1:09-CV-00407 OWW DLB

7 SAN LUIS & DELTA-MENDOTA WATER
8 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

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

Partially consolidated
with:

1:09-cv-01201-OWW-DLB

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

MEMORANDUM DECISION RE
JURISDICTION TO CONSIDER
PLAINTIFFS' INJUNCTIVE
RELIEF PETITION RE FALL X2
ACTION.

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

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

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

20 I. INTRODUCTION

21 A December 27, 2010 Order on Plaintiffs' Motions for Summary
22 Judgment found that Federal Defendants violated the Endangered
23 Species Act ("ESA") and the Administrative Procedure Act ("APA"),
24 and that the 2008 Delta Smelt Biological Opinion ("BiOp") for the
25 coordinated operations of the Central Valley Project ("CVP") and
26 State Water Project ("SWP") and its Reasonable and Prudent
27 Alternative ("RPA") are "arbitrary, capricious, and unlawful."
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1 The BiOp was remanded without vacatur to the United States Fish
2 and Wildlife Service ("FWS"), with an express reservation of
3 jurisdiction, for further consideration "in accordance with this
4 decision and the requirements of law." Doc. 763. A December 2,
5 2009 Order found "that [the United States Bureau of] Reclamation
6 violated [the National Environmental Policy Act ("NEPA")] by
7 failing to perform any NEPA analysis prior to provisionally
8 adopting and implementing the 2008 BiOp and its reasonable and
9 prudent alternative." Doc. 457.

11 Final Judgment was entered March 28, 2011 and amended May
12 17, 2011. Doc. 884. The Amended Judgment states that the
13 district court "expressly retains jurisdiction during the period
14 of remand, to the extent permitted by law, in the event issues
15 arise concerning project operations." Doc. 884, ¶ I. On April
16 7, 2011, Defendant-Intervenors filed a notice of appeal. Doc.
17 853. Federal Defendants have not appealed.

19 Plaintiffs have noticed a motion for injunctive relief
20 against Federal Defendants' implementation of RPA Component 3
21 (Action 4), also referenced as the "Fall X2 Action," which
22 requires the Projects to be operated to maintain X2¹ during the
23 fall months at a location no greater than 74 km upstream from the
24 Golden Gate Bridge following wet water years, and no greater than

26
27 ¹ X2 is the location in the Delta where the salinity is two parts per
28 thousand, measured as the distance upstream from the Golden Gate.
Consolidated Delta Smelt Cases, 717 F. Supp. 2d 1021, 1029 (E.D. Cal. May 27,
2010).

1 81 km upstream following above normal water years. BiOp at 282-
2 283. This is a wet year and Plaintiffs estimate implementation
3 of the Fall X2 Action will require use of approximately 1,000,000
4 acre-feet of water. See Doc. 920 at 7. Defendants now maintain
5 that the district court does not retain jurisdiction to address
6 the requested injunctive relief. Doc. 909.
7

8 II. PREVIOUS RULINGS RE FALL X2 ACTION

9 A December 14, 2010 Memorandum Decision Re Cross Motions for
10 Summary Judgment ("12/14/2010 MSJ Decision"), Doc. 757, rejected
11 some of Plaintiffs' challenges to the BiOp's rationale for the
12 Fall X2 action, but found that the BiOp's X2 analysis was flawed
13 in two critical respects. The rationale for the action rests in
14 large part on a comparison of runs from two different computer
15 models for Project operations, Calsim II and Dayflow. The
16 Decision found that, in the absence of calibration of the two
17 models, which was not performed, "the Calsim II to Dayflow
18 comparison has the potential to introduce significant, if not
19 overwhelming, bias to the analysis that the BiOp nowhere
20 discussed or corrected." 12/14/2010 MSJ Decision at 125-26. The
21 X2 action was remanded to the agency for further consideration of
22 the implications of this error to the BiOp's findings. *Id.* at
23 220.
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26 The Decision further held that the BiOp violated the APA's
27 requirement that FWS "examine the relevant data and articulate a
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1 satisfactory explanation for its action including a rational
2 connection between the facts found and the choice made," *Motor*
3 *Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S.
4 29, 43 (1983), as well as FWS's own Consultation Handbook
5 implementing the ESA, which requires "a thorough explanation of
6 how each component of the [RPA] is essential to avoid jeopardy
7 and/or adverse modification," ESA Handbook at 4-43, because the
8 BiOp "fail[ed] to explain why it is essential to maintain X2 at
9 74 km and 81 km respectively, as opposed to any other specific
10 location." 12/14/2010 MSJ Decision at 126-27. The practical
11 result of the X2 Action is to allow large volumes of Project
12 water to escape into the ocean.
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15 III. DISCUSSION

16 *Natural Resources Defense Council v. Southwest Marine Inc.*,
17 242 F.3d 1163, 1164 (9th Cir. 2001), provides the governing
18 standard. In *Southwest Marine*, a marine repair and maintenance
19 company challenged the district court's modification of an
20 injunction while an appeal was pending. After trial, the
21 district court found Southwest Marine violated the Clean Water
22 Act and imposed an injunction as a civil penalty that included
23 water testing and storm water recapture requirements. *Id.* at
24 1165. The district court simultaneously issued a limited stay of
25 enforcement of the water testing and pier storm water recapture
26 requirements, asking for further argument and briefing on: (1)
27
28

1 whether the district court should substitute testing of the
2 surface "microlayer" for testing "at the surface," and (2)
3 possible engineering alternatives to pier storm water recapture.
4 *Id.* The district court eventually received further briefing and
5 held a hearing, but not until after Southwest Marine appealed the
6 original judgment, including the injunction. After the hearing,
7 the district court modified the injunction by substituting: (1)
8 testing of the surface "microlayer" for testing "at the surface,"
9 and (2) an 18-month deadline for the requirement of "reasonably
10 expeditious" construction of a facility to capture pier storm
11 water runoff. Southwest Marine later appealed the district
12 court's jurisdiction to modify the injunction. *Id.* at 1165-66.

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15 The Ninth Circuit reviewed the general legal framework:

16 Once a notice of appeal is filed, the district court is
17 divested of jurisdiction over the matters being
18 appealed. *Griggs v. Provident Consumer Discount Co.*,
19 459 U.S. 56, 58 (1982) (per curiam); *McClatchy*
20 *Newspapers v. Central Valley Typographical Union No.*
21 *46*, 686 F.2d 731, 734 (9th Cir. 1982). This rule is
22 judge-made; its purpose is to promote judicial economy
23 and avoid the confusion that would ensue from having
24 the same issues before two courts simultaneously.
25 *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956
26 (9th Cir. 1983); 20 James Wm. Moore, *Moore's Federal*
27 *Practice*, § 303.32[1] (3d ed. 2000). The principle of
28 exclusive appellate jurisdiction is not, however,
absolute. *Masalosalo*, 718 F.2d at 956; 20 Moore's §
303.32[2][b]. The district court retains jurisdiction
during the pendency of an appeal to act to preserve the
status quo. *Newton v. Consolidated Gas Co.*, 258 U.S.
165, 177 (1922); *Hoffman v. Beer Drivers & Salesmen's*
Local Union No. 888, 536 F.2d 1268, 1276 (9th Cir.
1976); *United States v. El-O-Pathic Pharmacy*, 192 F.2d
62, 79 (9th Cir.1951).

This exception to the jurisdictional transfer principle
has been codified in Rule 62(c) of the Federal Rules of
Civil Procedure, which allows a district court to

1 "suspend, modify, restore, or grant an injunction
2 during the pendency of the appeal upon such terms as to
3 bond or otherwise as it considers proper for the
4 security of the rights of the adverse party." This Rule
5 grants the district court no broader power than it has
6 always inherently possessed to preserve the status quo
7 during the pendency of an appeal; it "does not restore
8 jurisdiction to the district court to adjudicate anew
9 the merits of the case." *McClatchy Newspapers*, 686 F.2d
10 at 734. Thus, any action taken pursuant to Rule 62(c)
11 "may not materially alter the status of the case on
12 appeal." Allan Ides, *The Authority of a Federal*
13 *District Court to Proceed After a Notice of Appeal Has*
14 *Been Filed*, 143 F.R.D. 307, 322 (1992).

15 *Id.* at 1166 (emphasis added).

16 The Ninth Circuit first defined the status quo as of the
17 filing of the appeal:

18 The status quo as of the filing of Southwest Marine's
19 consolidated appeal required Southwest Marine to
20 conduct water column testing, including testing "at the
21 surface," and to take steps to capture storm water
22 runoff from piers "in a reasonably expeditious manner."

23 *Id.* The Appeals court next examined the purpose of the
24 injunction:

25 The purpose of the water column testing is to determine
26 whether blasting or painting operations conducted by
27 Southwest Marine on each vessel in dry dock or at pier
28 side is contributing to pollution levels in San Diego
Bay. The purpose of the storm water capture requirement
is to prevent Southwest Marine from discharging storm
water that degrades the marine habitat of its offshore
leasehold, which the district court found to be "devoid
of life."

29 *Id.* at 1166-67.

30 The Appeals Court reasoned that the district court's "post-
31 judgment modifications to the injunction were minor adjustments
32 that effectuated the underlying purposes of the original
33 requirements," and "did not materially alter the status of the
34 consolidated appeal." *Id.* at 1167. The Ninth Circuit also

1 emphasized that the modification "left unchanged the core
2 questions before the appellate panel deciding the [] appeal," *id.*
3 at 1167, namely "whether the district could permissibly (1)
4 require any water column testing, including testing 'at the
5 surface,' or (2) require the construction of a pier storm water
6 capture facility." *Id.* at 1167.
7

8 *Southwest Marine* distinguished *McClatchy Newspapers*, "where
9 the district court amended its original judgment, in which it had
10 affirmed an arbitrator's decision that a guarantee of lifetime
11 employment survived a sympathy strike, to require reinstatement
12 of the striking employees." *Id.* (citations omitted). The
13 *Southwest Marine* panel reasoned:
14

15 [In *McClatchy*] The reinstatement issue had not received
16 a full and fair hearing, was not before the appellate
17 court, and could not be undone by the appellate court's
18 ultimate reversal of the arbitrator's decision. *Id.* at
19 735 (noting that affirmance of the district court's
20 amended judgment "would affect substantial rights of
21 the parties after appeal"). Thus, the reinstatement
22 order had impermissibly altered the status of the case
23 on appeal.

24 *Southwest Marine's* case presented a very different
25 situation. If the core requirements of water column
26 testing and pier storm water capture were ultimately
27 reversed on appeal, the "microlayer" testing
28 requirement and the 18-month construction deadline
would also effectively be reversed, leaving none of
Southwest Marine's substantial rights affected after
the conclusion of the consolidated appeal. *Southwest*
Marine had a full and fair hearing on these core issues
before the district court and before the appellate
panel deciding its consolidated appeal.

26 *Id.*

27 *Southwest Marine* stands generally for the following
28 propositions:

1 (1) A district court may act to preserve the status quo
2 while an appeal is pending.

3 (2) The status quo is measured at the time the appeal
4 is filed.

5 (3) The district court may only act to effectuate the
6 underlying purposes of the original judgment and may
7 not materially alter the status of the appeal or change
8 the core questions before the appellate panel.

9 (4) It is impermissible to alter the status of the case
10 on appeal by taking further action that cannot be
11 undone by the appeal. In other words, the district
12 court's post-appeal action must be grounded upon an
13 issue that will receive a full and fair hearing before
14 the appellate panel, leaving the burdened party's
15 substantial rights unaffected if a reversal is issued.

16 Applying these principles to the facts of the present case, the
17 district court has jurisdiction to hear Plaintiffs' injunctive
18 relief petition.

19 The first step is to determine the status quo. Federal
20 Defendants point out that the BiOp and its RPA has been remanded
21 but not vacated. Therefore, they argue that the status quo is
22 operation of the projects pursuant to the RPA (including the Fall
23 X2 Action) as described in the BiOp. This position is a material
24 distortion of the record and cannot be adopted for two reasons.

1 First, Plaintiffs indicated their intent to move for injunctive
2 relief against the Fall X2 Action long before Final Judgment was
3 entered or the appeal was filed. Defendants strenuously resisted
4 immediate injunctive proceedings on the Fall X2 Action when a
5 hearing was requested by Plaintiffs, on the ground that, at the
6 time, it was not clear whether the Bureau would implement the
7 Fall X2 Action during the 2010-2011 water year; i.e., it was
8 premature for the district court to entertain an application for
9 injunctive relief before it was certain the Fall X2 Action would
10 be implemented based on this water year's hydrology.
11

12 Second, the 12/14/2010 Decision found the X2 Action was
13 unlawful and unjustified on several grounds. This Fall X2 Action
14 is unprecedented and had never before been implemented. Remand
15 was ordered with the Court's understanding that any future
16 unlawful action in Project operations would be the subject of
17 provisional remedy proceedings. In remanding without vacature,
18 the Court understood that, as has been the case throughout the
19 over five years of active litigation over the Delta Smelt, as
20 operational issues arise, the parties may seek and have sought
21 provisional remedies during periods of remand of biological
22 opinions to the Agency. The parties that sought remand without
23 vacatur never disclosed they intended to argue that a remand
24 without vacatur insulated CVP operations from judicial review
25 during an appeal.
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1 The disputed Fall X2 Action has never been triggered. The
2 status quo as of the filing of the appeal on April 7, 2011 is
3 that the implementation of the Fall X2 Action is an unprecedented
4 possibility, which is projected to take one million acre feet of
5 water from lawful users, and that Plaintiffs would have the
6 opportunity to move to enjoin the Action if its implementation
7 was reasonably certain.²

8
9 The next inquiry is whether acting upon Plaintiffs' request
10 for injunctive relief would effectuate the underlying purposes of
11 the original judgment. The answer is unquestionably yes. The
12 judgment found the Fall X2 Action was unlawful in a critical
13 respect, namely that the unprecedented specific water
14 prescription imposed, which requires huge amounts of Project
15 yield, was unjustified by the record. Permitting the Action to
16 be implemented without even considering the totality of its on-
17 the-ground consequences would undermine the purposes of the
18 judgment and the obligation of a court sitting in equity to

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21 ² In related cases, after biological opinions were remanded without vacatur,
22 no party has ever objected to the district court's assertion of jurisdiction
23 to grant interim injunctive relief. Here, Defendants first mentioned their
24 jurisdictional objection during discussions over the form of the final
25 judgment in this case. Federal Defendants argue that this changed position is
26 justified in light of the distinct circumstances here, where final judgment
27 has been entered and an appeal has been taken. But, Federal Defendants fail
28 to acknowledge the specific and repeated reservations of jurisdiction by the
district court. Federal Defendants' failure to disclose this position,
although they have taken no appeal, prevented the Court from fashioning the
remand order to express the Court's intent to condition the remand to the
Agency on the Court's ability to address ongoing operational issues. The
decision not to vacate the BiOp was based in part upon the assumption that the
district court would have continued jurisdiction to review application of the
RPA under ever-changing circumstances.

1 protect all competing human interests, health, and safety, not
2 only the species.

3 The district court may not materially alter the status of
4 the appeal, change the core questions before the appellate panel,
5 and/or take further actions that cannot be undone by the appeal.
6 Defendants argue that that Plaintiffs' merits brief rehashes
7 issues already decided in the 12/14/2010 Decision. A preliminary
8 review of the opening merits brief, Doc. 990, reveals that there
9 is considerable overlap between the arguments there advanced and
10 those addressed in the 12/14/Decision. *Southwest Marine* and
11 related cases prohibit the district court from reconsidering
12 issues already ruled upon, as this would impermissibly create a
13 "moving target" for the appeal. *See Britton v. Co-op Banking*
14 *Group*, 916 F.2d 1405, 1412 (9th Cir. 1990) (discussing the example
15 of *McClatchy Newspapers*, in which the district court's
16 modification of an order "reflected a change in the result of the
17 very issue on appeal; if allowed to stand, the appeals court
18 would be dealing with a moving target if it ruled on the revised
19 order or, alternatively, its ruling would be obsolete if it ruled
20 on the 'old' order").

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24 However, the procedural posture of the cross-motions for
25 summary judgment is distinct from a request for injunctive
26 relief. The 12/14/2010 Decision ruled in favor of Plaintiffs and
27 found the Fall X2 Action unlawful. Consideration of whether
28

1 injunctive relief is required to prevent new, never imposed,
2 operational prescriptions which may cause irreparable injury will
3 not revisit or in any way modify the final judgment. Nor does
4 the pending appeal preclude consideration of the strength of the
5 scientific bases for the X2 Action in deciding a request for
6 equitable relief. Considering whether the scientific rationale
7 for an action is weak is legally distinct from finding that the
8 agency violated the APA in advancing such a rationale.
9

10 *Hoffman for and on Behalf of N.L.R.B. v. Beer Drivers and*
11 *Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976),
12 explains that the general rule that an appeal to the circuit
13 court deprives the district court of jurisdiction as to matters
14 involved in the appeal "is not a creature of statute and is not
15 absolute in character."
16

17 It is our opinion that the rule should not be applied
18 in those cases where the district court, as here, has a
19 continuing duty to maintain a status quo, and where, as
the days pass, new facts are created by the parties and
the maintenance of the status quo requires new action.

20 *Id.* at 1276. This is such a case. New facts are constantly
21 being created by environmental conditions and continuing
22 operating requirements of the Projects. Such requirements may
23 change hourly. Maintenance of the status quo may require changes
24 to Project operations. The appeal does not remove the district
25 court's jurisdiction over the BiOp's remand to the Agency and the
26 ongoing operation of a federal Reclamation project.
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1 IV. CONCLUSION

2 For the reasons set forth above, the appeal does not
3 implicate whether the Court has jurisdiction to examine issues
4 arising out of the coordinated operations of the Projects. No
5 provisional remedial relief in this unique water year will affect
6 the Appeals Court's review of the issues raised by the judgment.
7 Any party has the right to seek injunctive relief against an
8 unlawful RPA Action, if the result of the Action in a given water
9 year causes irreparable injury to humans and/or the public
10 interest. Defendants' argument is that the Court cannot even
11 consider the nature and effect of the Fall X2 Action on all
12 affected parties and society at large. This is not a case where
13 the requested actions will change the judgment in any way. The
14 district court has jurisdiction to hear Plaintiffs' request for
15 injunctive relief against the Fall X2 Action. Briefing shall
16 proceed as scheduled.
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19 Plaintiffs shall submit a proposed form of order consistent
20 with this memorandum decision within five (5) days following
21 electronic service.
22

23 SO ORDERED
24 June 24, 2011

25 /s/ Oliver W. Wanger
26 United States District Judge
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