

1 COUNSEL IDENTIFICATION AT END

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5 **UNITED STATES DISTRICT COURT**

6 **EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION**

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8 **THE DELTA SMELT CASES**

9 **SAN LUIS & DELTA-MENDOTA WATER**
10 **AUTHORITY et al. v. SALAZAR et al. (Case**
11 **No. 1:09-cv-407)**

12 **STATE WATER CONTRACTORS v.**
13 **SALAZAR et al. (Case No. 1:09-cv-422)**

14 **COALITION FOR A SUSTAINABLE DELTA**
15 **et al. v. UNITED STATES FISH AND**
16 **WILDLIFE SERVICE et al. (Case No. 1:09-cv-**
480)

17 **METROPOLITAN WATER DISTRICT v.**
18 **UNITED STATES FISH AND WILDLIFE**
19 **SERVICE et al. (Case No. 1:09-cv-631)**

20 **STEWART & JASPER ORCHARDS et al. v.**
21 **UNITED STATES FISH AND WILDLIFE**
22 **SERVICE et al. (Case No. 1:09-cv-892)**

1:09-cv-00407-OWW-GSA
1:09-cv-00422-OWW-GSA
1:09-cv-00631-OWW-GSA
1:09-cv-00892-OWW-GSA
PARTIALLY CONSOLIDATED WITH:
1:09-cv-00480-OWW-GSA

STIPULATION AND ORDER RE:
EXHIBITS, WITNESSES AND ORAL
ARGUMENT FOR MOTION FOR
INJUNCTIVE RELIEF

Judge: Honorable Oliver W. Wanger

Date: July 26-29, 2011

1 The parties, by and through their respective counsel of record, as identified below, hereby
2 have met and conferred and hereby propose the following schedule for the hearing on Plaintiffs'
3 Motion for Injunctive Relief scheduled for July 26-29, 2011:

4 1. The parties shall serve and filed their respective exhibit lists on **Wednesday, July**
5 **20, 2011**. The exhibit lists shall identify those exhibits to be used for each party's case-in-chief
6 and need not include exhibits that may be used for demonstrative, cross-examination and/or
7 rebuttal purposes. The exhibit lists shall identify the Administrative Record cite for each exhibit
8 from the Administrative Record. For exhibits not included within the Administrative Record, the
9 parties shall serve on each other copies of the exhibits by email with their exhibit lists or on disks
10 served by overnight delivery for receipt on **Thursday, July 21, 2011**. Service of exhibits on the
11 Federal Defendants shall be by disk by overnight mail only and not by email. The parties agree
12 to label their exhibits numerically using the following number ranges:

13 Plaintiffs: 0-300

14 Plaintiff-Intervenor: 301-500

15 Federal Defendants: 501-1000

16 Defendant-Intervenors: 1001-1500

17 The parties have agreed to submit Defendants' Motion to Strike on the papers unless the Court
18 has questions for the parties. The parties respectfully request that the Court rule on the Motion to
19 Strike prior to commencement of argument and evidence on the Motion for Injunctive Relief.
20 The parties propose that time set aside for consideration of the Motion to Strike, inclusive of the
21 time for the Court to share its views on and rule on the motions, and subject to the Court's
22 concurrence, be from 8:30 a.m. to 9:30 a.m. on July 26, 2011. The time not used by the Court
23 shall be divided evenly between (a) Plaintiffs and Plaintiff-Intervenor on the one hand, and (b)
24 Federal Defendants and Defendant-Intervenors on the other hand.

25 2. Based on the a court day of 8:30 a.m. to 5:00 p.m. each day and the Court's
26 routine practice of scheduling one 15 minute break each morning, one 90 minute break at lunch,
27 and one 15 minute break each afternoon, the parties anticipate that there will be 25 court hours,
28 after the Motion to Strike, for evidence and argument. Therefore, each side will be allocated a

1 total of 12.5 hours to be used by each side in its discretion among opening statements,
2 arguments, and direct, cross and rebuttal examinations, subject to not exceeding the total hours
3 per side per case. Any party may at its sole discretion cede all or a portion of its time to any
4 other party.

5 3. The parties have met and conferred regarding the order of witnesses. As
6 explained in the Defendants' pending motion to strike, Defendants' position is that Plaintiffs'
7 evidence of alleged irreparable harm is the only evidence that may be considered because the
8 merits of Action 4 have been fully adjudicated and a final judgment has been entered. *See*
9 Docket No. 947-1. Furthermore, because a likelihood of irreparable harm is a threshold showing
10 that must be made before the Court can issue injunctive relief, Defendants' position is that
11 Plaintiffs' testimony regarding alleged irreparable harm (*i.e.*, Mr. Erlewine and Mr. Leahigh)
12 should be presented first, prior to any testimony on the merits (*i.e.*, Drs. Deriso, Burnham,
13 Hanson, and Hutton), because if the Court finds no likelihood of irreparable harm, it need not
14 proceed to the merits witnesses, thereby conserving judicial and party resources. The Court
15 previously noted that such an approach made sense. *See* Docket No. 790 (summarizing the
16 Court's comments at a status hearing on Plaintiffs' previous injunction motion that "it makes
17 sense" for irreparable harm to be adjudicated prior to deciding whether to having the rest of the
18 evidentiary hearing). Plaintiffs do not agree that Messrs. Erlewine and Leahigh should be
19 presented first. They wish to present Drs. Deriso, Burnham, and Hanson first. Notwithstanding
20 Defendants' objections to presenting merits testimony first, in an effort to conserve judicial and
21 party resources and avoid a scheduling dispute, if the Court is inclined to allow merits testimony
22 to be presented first, Defendants are willing to proceed with Plaintiffs' preferred order of
23 witnesses as set forth below. However, this should not be construed as a waiver of any
24 objections raised by Defendants to date, including this Court's jurisdiction to hold an evidentiary
25 hearing and the objections made in Defendants' pending motion to strike. Defendants believe
26 the Court would be acting well within its discretion to compel Plaintiffs to present testimony
27 from Mr. Erlewine and Mr. Leahigh at the outset of the evidentiary hearing.

28 4. In response to Defendants' position regarding the order of witnesses, Plaintiffs

1 submit that they have coordinated many schedules of counsel and witnesses to accommodate the
2 wishes of Defendants leading up to these hearings. Plaintiffs do not agree that Defendants
3 should dictate the order that Plaintiffs put on their witnesses for this motion. Plaintiffs brought
4 this motion for interim relief in light of the Court's decision that the RPAs in the BiOp are
5 arbitrary and capricious, including the Fall X2 Action. It is Defendants' decision to proceed with
6 the Fall X2 Action notwithstanding the Court's ruling that has necessitated this hearing. All of
7 the testimony will go to the issue of harm, showing lack of harm to the species as well as the
8 harm to the state's water supply. Accordingly, Plaintiffs submit that the order of witnesses is
9 appropriate, meets individual scheduling needs, and will be the most efficient presentation to the
10 Court.

11 5. The following is the order of opening statements, witnesses and closing
12 arguments. This has been set based on the parties' best estimates of time for examinations. If
13 the examination of any witness finishes early, the next witness in order will be called to testify,
14 regardless of the date scheduled below.

15 **Tuesday, July 26, 2011**

- 16 • Opening Statements
- 17 • Dr. Richard Deriso
- 18 • Dr. Kenneth Burnham
- 19 • Dr. Charles Hanson

20 **Wednesday, July 27, 2011**

- 21 • Dr. Charles Hanson, continued, if necessary
- 22 • Dr. Paul Hutton
- 23 • Mr. John Leahigh
- 24 • Mr. Terry Erlewine

25 **Thursday, July 28, 2011**

- 26 • Mr. Frederick Feyrer
- 27 • Dr. Matthew Nobriga
- 28 • Dr. Jennifer Norris

Friday, July 29, 2011

- Dr. Jennifer Norris, continued
- Plaintiff rebuttal witnesses
- Closing Arguments

6. In addition to the foregoing live testimony, the parties further stipulate that the following witnesses may testify via their previously submitted declarations and that the parties will not raise a hearsay objection against the admissibility of such declarations on the grounds that the declaration is a statement that was made other than while testifying at the trial or hearing: James Snow, David Sunding, Rod Stiefvater, Jeffrey Mettler, Peter Gleick, and Jeffrey Michael. In so stipulating, the parties against whom the declarations have been offered do not stipulate that the facts stated within the declarations are undisputed or waive any other evidentiary objections.

7. The parties have agreed that they may submit to the Court and rely upon during the hearing updated evidence regarding project operations, flows, and status and location of the species.

SO STIPULATED

Dated: July 20, 2011

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1 **IT IS SO ORDERED.**

2 **Dated: July 21, 2011**

3 **/s/ Oliver W. Wanger**
4 **THE HONORABLE OLIVER W. WANGER**
5 **UNITED STATES DISTRICT JUDGE**
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