

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DELTA SMELT CONSOLIDATED
CASES

1:09-CV-1053 OWW DLB

SAN LUIS & DELTA-MENDOTA
WATER AUTHORITY, *et al.* v.
SALAZAR, *et al.*

MEMORANDUM DECISION AND
ORDER RE DOCUMENTS SUBMITTED
FOR IN CAMERA REVIEW.

STATE WATER CONTRACTORS v.
SALAZAR, *et al.*

COALITION FOR A SUSTAINABLE
DELTA, *et al.* v. UNITED
STATES FISH AND WILDLIFE
SERVICE, *et al.*

METROPOLITAN WATER DISTRICT
v. UNITED STATES FISH AND
WILDLIFE SERVICE, *et al.*

STEWART & JASPER ORCHARDS *et*
al. v. UNITED STATES FISH
AND WILDLIFE SERVICE.

I. INTRODUCTION

A June 21, 2010 Memorandum Decision and Order required Federal Defendants to lodge thirteen documents under seal (Documents 1-9 and 60-63) for the Court's in camera review, to determine whether Federal Defendants properly asserted the attorney-client privilege as to each document. Docket 401. The documents were lodged on June 28, 2010. Docket 408.

In re Grand Jury Investigation, 974 F.2d 1068, 1071 n. 2 (9th Cir.1992) (quoting *United States v. Margolis (In re Fischel)*, 557 F.2d 209, 211 (9th Cir. 1977)). The party asserting the privilege bears the burden of proving each essential element. *United States v. Munoz*, 233 F.3d 1117, 1128 (9th Cir. 2000).

(Footnote omitted).

III. ANALYSIS

A. Documents 1-9.

These documents consist entirely of comments and edits to various portions of the 2009 NMFS Biological Opinion ("BiOp") made by NOAA counsel, Melanie Rowland. These comments were communicated to co-counsel and staff at NMFS. They contain confidential legal advice from Ms. Rowland on issues raised by the BiOp. There is no suggestion that the attorney-client privilege has been waived as to these documents, nor is there any way that non-privileged portions of the material could be disclosed without disclosure of privileged material.

It is of no moment that Federal Defendants conceded in the McInnis Declaration, Doc. 227-2 ¶7, that not all of these comment were incorporated into the final draft of the BiOp, as there is no requirement that the advice of counsel be accepted for such advice to be privileged.

These documents were properly withheld under the attorney-client privilege.

1 B. Documents 60-63.

2 These documents consist of notes from meetings
3 between NMFS staff (clients) and counsel at NOAA and
4 emails following up on issues raised by counsel. These
5 documents discuss confidential legal advice from counsel
6 on issues raised by the BiOp. As with Documents 1-9,
7 there is no suggestion that the attorney-client privilege
8 has been waived as to these documents, nor would it be
9 possible to segregate non-privileged portions of the
10 material from privileged material.
11

12 These documents were properly withheld under the
13 attorney-client privilege.
14

15 IV. CONCLUSION

16 Documents 1-9 and 60-63 were properly withheld under
17 the attorney-client privilege. Plaintiffs' motion to
18 supplement the administrative record with these documents
19 is DENIED.
20

21 SO ORDERED

22 Dated: June 30, 2010
23

24 /s/ Oliver W. Wanger
25 Oliver W. Wanger
26 United States District Judge
27
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