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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE CONSOLIDATED SALMON CASES

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, et al. v. GARY F. LOCKE, et al. (Case No. 1:09-cv-1053)

STOCKTON EAST WATER DISTRICT v. NOAA, et al. (Case No. 1:09-cv-1090)

STATE WATER CONTRACTORS v. GARY F. LOCKE, et al. (Case No. 1:09-cv-1378)

KERN COUNTY WATER AGENCY, et al. v. U.S. DEPARTMENT OF COMMERCE, et al. (Case No. 1:09-cv-1520)

OAKDALE IRRIGATION DISTRICT, et al. v. U.S. DEPARTMENT OF COMMERCE, et al. (Case No. 1:09-cv-2452)

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA v. NMFS, et al. (Case No. 1:09-cv-1625)

1:09-cv-1053-LJO-DLB
1:09-cv-1090-LJO-DLB
1:09-cv-1378-LJO-DLB
1:09-cv-1520-LJO-DLB
1:09-cv-2452-LJO-DLB
1:09-cv-1625-LJO-SMS

JOINT STIPULATION REGARDING CVP AND SWP OPERATIONS IN 2012

Judge: Honorable Lawrence J. O'Neill

1 **RECITALS**

2 1. On March 5, 2010, the Court entered its Memorandum Decision Re Cross-Motions
3 for Summary Judgment On NEPA Issues (Doc. 266), and on March 17, 2010 entered its Order
4 Granting In Part Motion for Summary Judgment On NEPA Issues (Doc. 288). This decision
5 found that the United States Bureau of Reclamation and the Secretary of the Interior have violated
6 the National Environmental Policy Act by failing to perform any NEPA analysis prior to adopting
7 and implementing the 2009 Salmonid Biological Opinion ("2009 Salmonid BiOp"). On
8 September 20, 2011, the Court entered its Memorandum Decision re Cross Motions for Summary
9 Judgment (Doc. 633) in these Consolidated Salmonid Cases regarding the 2009 Salmonid BiOp.
10 This decision found the 2009 Salmonid BiOp and its reasonable and prudent alternative ("RPA")
11 arbitrary, capricious, and unlawful. On September 29, 2011, the Court entered its Order Re
12 Cross-Motions for Summary Judgment (Doc. 643) and remanding without vacatur the 2009
13 Salmonid BiOp to the National Marine Fisheries Service ("NMFS") for further consideration in
14 accordance with the Court's rulings and the requirements of law. The September 29 Order
15 provides that the remand without vacatur is without prejudice to "the hearing or decision of any
16 provisional remedy justified in law or equity," and further that the Court "retains jurisdiction over
17 this matter to the fullest extent permitted by law."

18 2. On December 7, 2011, the Court issued a minute order in the Salmonid Cases
19 acknowledging the joint report filed by the parties to the litigation. In addition, the Court
20 indicated that parties may present stipulations on other matters, including project operations in
21 2012, to the Court and if agreement on such matters cannot be reached, the parties shall file a
22 joint status report no later than January 6, 2012, briefly summarizing the nature of any remaining
23 disputes and articulating the anticipated need for, and timing of, further motions practice. On
24 December 12, 2011, the Court issued a Final Judgment (Including Schedule for Remand) (Doc.
25 655) in the case in accordance with the Memoranda and Orders described above that included a
26 schedule for reconsidering the remanded biological opinion and compliance with NEPA.

27 3. Consistent with the Court's minute order, the parties have been engaged in
28 discussions to reach agreement on the manner in which the RPA will be modified and applied

1 during Water Year 2012. The parties executing this agreement have reached an agreement on
2 certain actions and agree to modifications to the RPA Action IV.2.1 as described below for April
3 1 through May 31, 2012 operations only. The parties intend to continue discussions regarding
4 other Water Year 2012 operations over the coming weeks, and intend to bring additional
5 settlement stipulation(s) on 2012 operations before the Court if agreement can be reached prior to
6 the onset of those operational actions. In addition to 2012 operations, the parties executing this
7 agreement have agreed upon specific monitoring, studies and other actions described below.

8 **STIPULATION**

9 In the context of the foregoing recitals, Plaintiffs San Luis & Delta-Mendota Water
10 Authority, Westlands Water District, State Water Contractors, Metropolitan Water District of
11 Southern California, Coalition for a Sustainable Delta, and Kern County Water Agency
12 ("Plaintiffs"), Oakdale Irrigation District, South San Joaquin Irrigation District, and Stockton East
13 Water District ("Stanislaus River Plaintiffs"), Plaintiff-Intervenor California Department of Water
14 Resources ("DWR"), and Federal Defendants by and through their respective counsel, hereby
15 stipulate and agree as follows:

16 1. All parties agree to the following operations of the Central Valley Project ("CVP")
17 and State Water Project ("SWP"), and related actions herein, for April 1, 2012 through May 31,
18 2012. This agreement was reached based on consideration of specific hydrologic, storage and
19 fish conditions. This agreement is not intended to be used as a basis for a new biological
20 assessment or biological opinion. The agreement in Section 2 below regarding 2012 operations is
21 limited to operation of RPA Action IV.2.1, and applies only if the barrier at the Head of Old
22 River is installed.

23 2. The CVP and SWP projects shall implement the following actions in 2012:

24 a. Operation at the Head of Old River from April 1 through May 31 if a rock
25 barrier is installed.

26 i. DWR will install a rock barrier at the Head of Old River, if flows at
27 Vernalis allow for its installation and maintenance from April 1 through May 31 [approximately
28 less than 6,000 cubic feet per second ("cfs")]. Up to eight culverts (of approximately the same

1 size and configuration as used in previous barrier designs) may be installed in the rock barrier.

2 ii. When the rock barrier is installed, the SWP and CVP shall be operated to
3 maintain Old and Middle River (“OMR”) flows between -1,250 and -3,500 cfs in April, and
4 between -1,250 and -5,000 cfs in May, depending on the real-time operations process described
5 below in subsections iii-vi. Nothing in this section is intended to, or does, prevent the projects
6 from operating more conservatively for delta smelt protection. While the rock barrier is in place
7 and the SWP and CVP are operating to the OMR flows as provided herein, the SWP and CVP
8 will not operate to the San Joaquin River Inflow to Export ratio described under RPA Action
9 IV.2.1.

10 iii. The exception procedure for health and safety in RPA Action IV.2.1 for
11 minimum combined SWP and CVP pumping of 1,500 cfs will be maintained.

12 iv. NMFS, DWR, and the U.S. Bureau of Reclamation (“Reclamation”) will
13 co-host a technical workshop in early February, with Delta Operations for Salmonids and
14 Sturgeon group (“DOSS”) members and other outside experts, to review data availability,
15 modeling tools and outputs and other scientific approaches for establishing real-time operations
16 screening criteria for OMR parameter selection within the specified ranges.

17 v. At least two weeks prior to April 1, 2012, NMFS, with information
18 submitted by members of the DOSS and other outside experts, will prepare a real-time operations
19 technical memorandum to guide weekly or daily decision-making. Real-time operations
20 screening criteria will be developed based on hydrodynamics and Particle Tracking Model
21 (“PTM”) runs, and other relevant available scientific information and considerations, such as:

22 (a) the fraction of particles that reach Chipps Island; (b) particle residence time; (c) results
23 showing particle capture at various diversions in the delta, and (d) relevant available information
24 from trawls and rotary screw trap information, salvage, hydrodynamics, empirical data from
25 previous VAMP studies, survival equations, and a modified Delta Passage Model. The DOSS
26 will advise the Water Operations Management Team (“WOMT”) and NMFS on the appropriate
27 OMR parameter within the specified ranges. The DOSS will consider all relevant available
28 scientific information, such as listed above, in determining its advice. The DOSS will provide its

1 information and advice to the WOMT for its consideration in developing a recommendation to
2 NMFS for actions to protect salmonids and green sturgeon. The WOMT will supply information
3 for NMFS to consider, including water supply impacts. NMFS shall make the final determination
4 on OMR flow within the specified ranges to be implemented by Reclamation and DWR, after
5 attempting to first meet with WOMT, and shall explain its determination in writing based on the
6 best available science. NMFS will increase the transparency of the decision process by
7 documenting the basis for its decisions and providing a written explanation of them and the basis
8 for them to interested parties via NMFS' website. All parties to this agreement agree that the
9 final determinations made by NMFS pursuant to this Section 2 are binding and in consideration of
10 this agreement hereby waive all rights to seek relief from the court from these determinations and
11 from operation of the projects by DWR and Reclamation in accordance with those
12 determinations; however, this stipulation shall not waive any party's right to raise other claims or
13 defenses as to other CVP and SWP operations or actions under the 2009 Salmonid BiOp.¹

14 vi. In order to facilitate availability of real-time information to the agencies,
15 DWR will convene a Delta Conditions Team ("DCT") consisting of scientists and engineers from
16 the state and Federal agencies, Plaintiffs, and Defendant-Intervenors to review the real time
17 operations and Delta conditions, including potential modeling utilizing the Delta Passage Model,
18 PTM, and other applicable modeling tools, in conjunction with the real time monitoring, to assist
19 in evaluating the potential effects of planned water operations on salmonids and sturgeon. The
20 members of the DCT will provide its individual information to DOSS in accordance with a
21 process provided by the DOSS, which currently meets on Tuesday mornings, to assess risks to
22 salmonids and sturgeon based upon Delta conditions and the other factors set forth above.

23 vii. In order to generate information on migration routes and survivals across
24 variable operating conditions in order to inform decision-making for project operations, DWR
25 and Reclamation agree to fund the development and deployment of a broadened acoustic tagging
26 and release program in 2012, which will track juvenile salmon and juvenile steelhead migrations

27 ¹ Furthermore, nothing in this agreement waives the right of any party to assert whatever
28 privileges may otherwise be available to it by law.

1 through the south Delta for the purpose of generating better information by which to manage
2 south Delta operations and other activities to improve fish survival efficiently and effectively.
3 The person or organization selected by the parties to conduct such studies will collaborate with
4 the NMFS-Southwest Fisheries Science Center (“NMFS-SWFSC”) in designing and conducting
5 these studies. To the extent any information from such studies is available for use in 2012, the
6 parties agree that the information will be used in the decision-making process in determining
7 2012 operations pursuant to this stipulation. Such an acoustic tag program may include:

- 8 1. Weekly releases of hatchery-origin steelhead and salmon at key
9 locations in the south Delta;
- 10 2. Deployment of monitoring capabilities to detect juvenile migrations
11 through the south Delta through various routes of migration;
- 12 3. Deployment of monitoring capabilities to develop improved
13 information on the effect of water operations of the SWP and the CVP on juvenile salmon and
14 juvenile steelhead migrations through the Delta under varying hydraulic conditions; and
- 15 4. Development of data gathering and reporting capabilities to support
16 improved in-season real time water operations over the course of juvenile migrations.

17 b. NMFS, the other Federal agencies, plaintiff-intervenor DWR, plaintiffs, and
18 defendant-intervenors have engaged in discussions pertaining to south Delta operations if flows at
19 Vernalis are greater than that which would allow a rock barrier to be installed at the Head of Old
20 River. This stipulated agreement for operation in lieu of RPA Action IV.2.1 in 2012 does not
21 address CVP and SWP operations under that scenario but parties may continue to meet to develop
22 possible operations under such high flow conditions where a rock barrier cannot be installed.

23 3. DWR will submit to NMFS and the California Department of Fish and Game
24 (“DFG”) a predator monitoring study for their review and permit compliance procedures, as
25 appropriate. If a rock barrier is installed, the predator monitoring study will evaluate predation
26 associated with the installation and operation of the rock barrier. If the rock barrier is not
27 installed, the predator monitoring study will evaluate predation at the scour hole downstream of
28 the junction of the San Joaquin River and the Head of Old River. In addition, predator

1 monitoring efforts will be implemented at location(s) to be determined, for example, at the CVP
2 export facility in front of trash racks, at the scour hole mentioned above, or in other location(s) in
3 the Delta. In addition, DWR commits to developing a study for a pilot predator removal and
4 control program that will be submitted to NMFS and DFG for review and comment.

5 4. NMFS will have an opportunity to be involved in design and development of studies
6 and will work with DWR, DFG and Public Water Agencies² to further refine the following
7 actions:

8 a. **Examination of other monitoring systems.** DWR and Reclamation will
9 commence in the first quarter of 2012 to examine the opportunities to deploy other monitoring
10 and tracking tools for tracking juvenile and adult migrations of salmonids and other fish species
11 within and through the Delta, utilizing PIT tags or other technologies as may be available. In
12 examining such opportunities, DWR and Reclamation agree to utilize the available expertise of
13 the fishery agencies, the university community, the consulting community and other sources of
14 expertise.

15 b. **Life-cycle modeling:** The parties agree that the timely development of a
16 Central Valley salmon life-cycle model is vital to inform Bay-Delta decision-making. The model
17 will be developed by and under the control of the NMFS-SWFSC, and, subject to the availability
18 of funding, the NMFS-SWFSC shall utilize a broad array of expertise outside of NMFS as
19 appropriate. Such an expanded program may also be guided by a panel of experts convened by
20 the Interagency Ecosystem Program or other appropriate expert agency. DWR and Reclamation
21 will consider providing funding to the NMFS-SWFSC to accelerate the development of the
22 model.

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24 _____
25 ² “Public Water Agencies” consist of state and federal water contractors who receive
26 water from the SWP and CVP and are Metropolitan Water Agency of Southern California, Kern
27 County Water Agency, San Luis & Delta-Mendota Water Authority, Westlands Water District,
28 and Santa Clara Valley Water District, and State Water Project Contractors Authority
 (“SWPCA”) and State and Federal Contractors Water Agency (“SFCWA”). The Stanislaus River
 Plaintiffs are also considered “Public Water Agencies” for the purpose of this stipulation and for
 the purposes of any engagement process related to ESA Section 7 consultation involving New
 Melones operations.

1 c. DWR and Reclamation will continue the Chinook salmon acoustic tag survival
2 studies that have been implemented through the Vernalis Adaptive Management Program, in
3 conjunction with the 6-year acoustic tagging experiment.

4 5. DWR, Reclamation and the Public Water Agencies agree to work with NMFS to
5 design, develop, and fund a program to provide additional fish tagging and monitoring that could
6 further inform Bay-Delta decision-making.

7 6. As authorized under the State Water Resources Control Board Decision 1641,
8 Reclamation and DWR may divert or redivert water of the SWP and CVP between Jones
9 Pumping Plant and Banks Pumping Plant in April and May to reduce fish losses and to benefit
10 fish. The CVP will develop and implement standard operating procedures to minimize longfin
11 and Delta smelt losses and salmonid losses, as specified in the 2009 BiOp, during the cleaning of
12 the louvers.

13 7. This stipulated agreement for operations does not address or include RPA Action
14 IV.2.3, which provides for OMR Flow Management from January through June 15. However, the
15 parties commit in 2012 to continue discussions to develop a monitoring-based trigger, or other
16 real-time operations approach, that would modify in 2013 the January 1 onset of Action IV.2.3.

17 8. By June 2012, DWR and Reclamation will submit to NMFS for review a list of
18 possible habitat restoration projects targeted to improve survival of steelhead migrating out of the
19 San Joaquin Basin. The parties expect that DWR and Reclamation will confer with DFG in
20 compiling this list.

21 **SO STIPULATED.**

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1 Dated: January 12, 2012

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6 Dated: January 12, 2012

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ORDER

Good cause appearing, and based on the stipulation of the parties, the court hereby orders as follows:

1. IT IS HEREBY ORDERED ADJUDGED, AND DECREED, that the Joint Stipulation Regarding CVP And SWP Operations in 2012 is approved.

2. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all actions in the Joint Stipulation Regarding CVP And SWP Operations in 2012 be carried out as described therein and that the parties to the stipulation have waived any right to seek relief from this court from such actions through May 31, 2012.

3. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, except as specified in the Joint Stipulation Regarding CVP and SWP Operations in 2012, all parties otherwise retain rights to seek further relief to the extent permitted by law.

IT IS SO ORDERED.

Dated: January 17, 2012

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