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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**SOUTHWEST CENTER FOR  
BIOLOGICAL DIVERSITY, et al.,**  
  
**Plaintiffs,**  
  
**vs.**  
  
**JIM BARTEL, et al.,**  
  
**Defendants,**  
  
**and**  
  
**BUILDING INDUSTRY LEGAL  
DEFENSE FOUNDATION, et al.,**  
  
**Intervening Defendants,**  
  
**and related Counterclaim.**

**CASE NO. 98-CV-2234-B(WVG)**  
  
**ORDER SETTING HEARING TO  
SPREAD MANDATE**

The Ninth Circuit Court of Appeals filed a memorandum decision on January 18, 2011 that instructed this Court to vacate the injunction as moot. The Court will spread the mandate at a hearing on April 4, 2011 at 11:30 a.m. in Courtroom 2. In anticipation of that hearing and to expedite the final resolution of these lengthy proceedings, the Court sets forth below its proposed amended judgment and order for the parties to consider.

Background

The Court’s injunction (issued in this case on October 13, 2006 and amended on December 15, 2006) stated in relevant part:

The Court immediately enjoins the City of San Diego’s Incidental Take Permit (No. PRT-830421, dated July 18, 1997, and issued by the United States Fish

1 and Wildlife Service) for those pending and future development projects that  
2 “take” any of the seven vernal pool species – San Diego fairy shrimp  
3 (*Branchinecta sandiegonensis*); Riverside fairy shrimp (*Streptocephalus*  
4 *wootoni*), Otay mesa mint (*Pogogyne nudiuscula*); California Orcutt grass  
5 (*Orcuttia californica*); San Diego button celery (*Eryngium aristulatum var.*  
6 *parishii*); San Diego mesa mint (*Pogogyne abramsii*); and spreading navarretia  
7 (*Navarretia fossalis*) – as defined and governed by the Endangered Species  
8 Act. 16 U.S.C. §§ 1531-44. Specifically, the Court enjoins (1) any and all  
9 pending applications for development of land containing vernal pool habitat;  
10 (2) those projects where the City has granted permission, but the development  
11 has not yet physically begun to destroy vernal pool habitat; and (3) any further  
12 development where the permittee is presently engaged in the destruction of  
13 vernal pool habitat. The Court orders Defendant City of San Diego to serve a  
14 copy of this Order forthwith on all applicants and permittees affected by the  
15 injunction as noted above. The Court will not stay this immediate injunction.

16 *Southwest Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1161-62 (S.D. Cal.  
17 2006), *dismissing and remanding*, 2011 WL 148785.

18 The Ninth Circuit dismissed the appeal as moot because the City of San Diego  
19 relinquished the portions of its ITP covering the vernal pool species, and the FWS cancelled  
20 those portions of the permit.

#### 21 Tentative Amended Judgment and Order

22 To comply with the Ninth Circuit’s instructions, the Court notifies the parties that it  
23 intends to issue an “Amended Judgment and Order Following Remand by the Ninth Circuit.”

24 Pursuant to the memorandum decision of the Ninth Circuit Court of  
25 Appeals in the above-captioned matter (filed Jan. 18, 2011), the Court **vacates**  
26 the Injunction issued in this case (filed on Oct. 13, 2006 and amended on  
27 Dec.15, 2006). The Injunction is moot as to the City of San Diego’s Incidental  
28 Take Permit (“ITP”) (No. PRT-830421, dated July 18, 1997, and issued by the  
United States Fish and Wildlife Service (“FWS”)) pursuant to Section 10 of the  
Endangered Species Act, 16 U.S.C. § 1539, as to the seven vernal pool species  
involved in this litigation. Those seven vernal species are (1) San Diego fairy  
shrimp (*Branchinecta sandiegonensis*); (2) Riverside fairy shrimp  
(*Streptocephalus wootoni*), (3) Otay mesa mint (*Pogogyne nudiuscula*); (4)  
California Orcutt grass (*Orcuttia californica*); (5) San Diego button celery  
(*Eryngium aristulatum var. parishii*); (6) San Diego mesa mint (*Pogogyne*

1               *abramsii*); and (7) spreading navarretia (*Navarretia fossalis*)). On March 8,  
2               2010, the City of San Diego relinquished the portions of the ITP covering those  
3               seven vernal pool species. On May 14, 2010, the FWS cancelled the portions  
4               of the ITP as it applied to the seven vernal species. Therefore, that permit  
5               cannot be used or relied upon in any way with respect to those endangered and  
6               threatened species.

7               The Court orders the City of San Diego to serve a copy of this Amended  
8               Judgment and Order forthwith on all persons affected by the Ninth Circuit's  
9               decision (including those whom the received the City's original notice in  
10              December 2006.) *See* Doc. No. 276 (Ex. A).

11              The Clerk shall close this civil action.

12   Briefing Schedule and Appearances

13              Any party who objects to the proposed language or who offers alternative language  
14              may file a response on or before **March 14, 2011**. If responses are filed, any party may file  
15              a reply brief on or before **March 21, 2011** and counsel shall appear at the April 4, 2011  
16              hearing for further discussion. (Parties who wish to appear by telephone shall contact  
17              Chambers on or before **March 29, 2011** to make the necessary arrangements.)

18              *If no objections are filed, then the parties need not appear at the April 4, 2011 hearing*  
19              *to spread the mandate;* instead, the Court will file the Ninth Circuit's decision and file an  
20              order with the language set forth above.

21   Conclusion

22              The Court will spread the mandate from the United States Court of Appeals for the  
23              Ninth Circuit on **Monday, April 4, 2011 at 11:30 a.m. in Courtroom 2**. Parties who wish  
24              to appear by telephone shall contact Chambers on or before **March 29, 2011**.

25              DATED: March 3, 2011

26   

27   Hon. Rudi M. Brewster  
28   United States Senior District Judge