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8 *Department of Water Resources*

9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12 **THE DELTA SMELT CASES**

1:09-cv-407 OWW

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

Consolidated With:  
Case No. 1:09-cv-422 OWW GSA  
Case No. 1:09-cv-631 OWW GSA  
Case No. 1:09-cv-892 OWW GSA  
Case No. 1:09-cv-480 OWW GSA  
Partially Consolidated with:  
Case No. 1:09-cv-01201-OWW-DLB

15  
16 **STATE WATER CONTRACTORS v.  
SALAZAR, et al.**

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

**STIPULATION AND [PROPOSED]  
ORDER FOR PRELIMINARY  
INJUNCTION**

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20 **METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA v.  
UNITED STATES FISH AND WILDLIFE  
SERVICE, et al.**

Judge: Honorable Oliver W. Wanger

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

23  
24 **FAMILY FARM ALLIANCE v.  
KENNETH SALAZAR, et al.**

1 Pursuant to the Court's May 27, 2010 Findings of Fact and Conclusions of Law Re  
2 Plaintiffs' Request for Preliminary Injunction Against Implementation of RPA Component 2  
3 (a/k/a Action 3) (Doc. 704), finding that legal and equitable grounds for injunctive relief have  
4 been established by a preponderance of the evidence, and pursuant to the Minute Order from the  
5 May 28, 2010 telephonic status conference (Doc. 706), all parties now agree and stipulate to the  
6 following operational plan for the Central Valley Project (CVP) and the State Water Project  
7 (SWP) through June 30, 2010 or when water temperature reaches a daily average of 25 degrees  
8 Celsius for three consecutive days at Clifton Court Forebay, whichever occurs first. This  
9 operation plan shall be effective immediately upon entry of this Stipulation and Order by the  
10 Court.

11 1. The CVP and the SWP will jointly operate to maintain Old and Middle River (OMR)  
12 flows so as not to be more negative than -5,000 cubic feet per second (cfs).

13 2. The U.S. Fish and Wildlife Service (USFWS) may require the CVP and the SWP to  
14 maintain OMR flows less negative than -5,000 cfs where the following conditions have been met:

15 a. The daily cumulative extrapolated take of fish at the projects equals or exceeds the daily  
16 cumulative precautionary extrapolated take.

17 b. The cumulative precautionary extrapolated take has been determined by identifying the  
18 concern take level set forth in Table IT-4 (June table) of the Delta Smelt Biological Opinion (p.  
19 292) as determined by the Fall Mid-water Trawl (FMWT) index for the prior year. For purposes  
20 of this stipulation and order the FMWT index is 17 and the concern level is 561.

21 c. The daily cumulative precautionary extrapolated take is determined by dividing 561  
22 minus the 23 smelt taken as of June 1, 2010 (538) by the 30 days in June, resulting in a daily  
23 cumulative precautionary extrapolated take figure of 18. Attached as Exhibit A to this stipulation  
24 is a table setting out daily cumulative precautionary extrapolated take for each day in June.

25 d. Take each day will be totaled and the cumulative take to date will be subtracted from the  
26 precautionary take value for that day to determine the allowable take for the day. In all cases, the  
27 metric for measuring fish will be the expanded salvage value.

1 3. In the event that the actual cumulative take exceeds the cumulative precautionary  
2 extrapolated take figure for that date, the U.S. Bureau of Reclamation (Bureau), USFWS,  
3 California Department of Fish and Game (DFG), and Department of Water Resources (DWR)  
4 shall promptly meet to determine whether CVP and SWP operations should be altered to maintain  
5 OMR flows less negative than -5,000 cfs.

6 4. Targeted OMR flows are to be based on a 14-day running average, not to be exceeded  
7 by more than 25% on a five-day running average. Changes in operations under this stipulation to  
8 meet targeted OMR flows will begin within two days of the observed daily cumulative  
9 extrapolated take equaling or exceeding the daily cumulative precautionary extrapolated take or  
10 within two days of any final decision by USFWS.

11 5. If information shows a rising daily trend in smelt salvage that results in an imminent  
12 threat to the species or if a daily salvage event at the CVP's Jones Pumping Facilities results in an  
13 imminent threat to the species, then the USFWS, the Bureau, DWR, and DFG shall confer and,  
14 after such conferral, the USFWS may require a reduction in OMR flow to a level less negative  
15 than -5,000 cfs in order to avoid such an imminent threat to the species.

16 6. The Bureau, DWR, USFWS, and DFG shall review the necessity for any reduction in  
17 OMR negative flows less negative than -5,000 cfs on a daily basis after considering all relevant  
18 information, including but not limited to input from the Smelt Working Group, smelt salvage,  
19 smelt distribution within the Delta, and water temperature.

20 7. In the event the conditions of Paragraph 2, 5, or 6 above, are applicable, the final  
21 decision regarding the appropriate OMR flow rate shall be made by USFWS after consideration  
22 of all relevant information regarding the species' status, including the species' distribution within  
23 the Delta and real-time information regarding smelt salvage.

24 8. Execution of this stipulation shall not be deemed an admission of any issue of fact or law  
25 by any party, nor shall it be deemed a waiver of any claim or defense raised by any party. This  
26 stipulation is for the limited purpose of resolving CVP and SWP operations through the month of  
27 June, 2010, and shall not be binding or considered precedential for any other purpose. The  
28 parties enter into this stipulation in recognition of the Court's Findings of Fact and Conclusions

1 of Law on Plaintiffs' motion for a preliminary injunction. In so doing, the parties do not  
2 necessarily concede any of the findings or conclusions therein.

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Date: June 22, 2010

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of California  
ROBERT W. BYRNE  
Supervising Deputy Attorney General  
CLIFFORD T. LEE  
CECILIA L. DENNIS  
ALLISON GOLDSMITH  
Deputy Attorneys General

/s/ ALLISON E. GOLDSMITH  
ALLISON E. GOLDSMITH  
Deputy Attorney General  
*Attorneys for Plaintiff Intervenor California  
Department of Water Resources*

Dated: June 22, 2010

BEST, BEST & KREIGER LLP

/s/ GREGORY K. WILKINSON  
GREGORY K. WILKINSON  
*Attorneys for Plaintiff State Water Contractors*

Dated: June 22, 2010

DIEPENBROCK HARRISON

/s/ EILEEN M. DIEPENBROCK  
EILEEN M. DIEPENBROCK  
*Attorneys for Plaintiffs San Luis & Delta-Mendota  
Water Authority and Westlands Water District*

Dated: June 22, 2010

NOSSAMAN LLP

/s/ PAUL S. WEILAND  
PAUL S. WEILAND  
*Attorneys for Plaintiff Coalition for a Sustainable  
Delta and Kern County Water Agency*

Dated: June 22, 2010

MORRISON & FOERSTER LLP

/s/ CHRISTOPHER J. CARR  
CHRISTOPHER J. CARR  
*Attorneys for Plaintiff The Metropolitan Water  
District of Southern California*

1 Dated: June 22, 2010

PACIFIC LEGAL FOUNDATION

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3

/s/ BRANDON M. MIDDLETON

BRANDON M. MIDDLETON

*Attorneys for Plaintiffs Stewart & Jasper Orchards,  
Arroyo Farms, LLC, and King Pistachio Grove*

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5 Dated: June 22, 2010

THE BRENDA DAVIS LAW GROUP

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7

/s/ BRENDA W. DAVIS

BRENDA W. DAVIS

*Attorneys for Plaintiff Family Farm Alliance*

8

9 Dated: June 22, 2010

U.S. DEPARTMENT OF JUSTICE

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11

/s/ ETHAN C. EDDY

ETHAN C. EDDY

*Attorneys for the Federal Defendants*

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12 Dated: June 22, 2010

NATURAL RESOURCES DEFENSE COUNCIL

/s/ KATHERINE POOLE

KATHERINE POOLE

*Attorneys for Defendant Intervenor Natural  
Resources Defense Council*

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16 Dated: June 22, 2010

EARTHJUSTICE

/s/ GEORGE TORGUN

GEORGE TORGUN

*Attorneys for Defendant Intervenor The Bay Institute  
and Natural Resources Defense Council*

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**FOR GOOD CAUSE SHOWN, IT IS SO ORDERED:**

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Dated: June \_\_\_\_, 2010

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THE HONORABLE OLIVER W. WANGER  
U.S. DISTRICT COURT JUDGE

# **EXHIBIT A**

June Date	June 561-23 = 538 Precautionary Take Level
1	18
2	36
3	54
4	72
5	90
6	108
7	125
8	143
9	161
10	179
11	197
12	215
13	233
14	251
15	269
16	287
17	305
18	323
19	341
20	359
21	377
22	394
23	412
24	430
25	448
26	466
27	484
28	502
29	520
30	538

**EXHIBIT A**

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**DECLARATION OF SERVICE BY E-MAIL**

Case Name: **The Delta Smelt Cases**  
No.: **1:09-cv-407 OWW**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004; my e-mail address is sarah.gutierrez@doj.ca.gov.

On June 22, 2010, I served:

**STIPULATION AND [PROPOSED] ORDER FOR PRELIMINARY INJUNCTION  
by transmitting a true copy via electronic mail as follows:**

Dr. Thomas Quinn  
**E-Mail Address:** TQuinn@U.Washington.edu

Dr. Andre Punt  
**E-Mail Address:** ThePuntFam@aol.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 22, 2010, at San Francisco, California.

/s/ SARAH L. GUTIERREZ  
SARAH L. GUTIERREZ