Legal Update April 25, 2013—Tori Sundheim, Legal Intern

I. Court Response to Request for Extension of New FWS Biological Opinions: Consolidated Fish (Delta Smelt and Salmonid) Cases

On April 9, 2013 the U.S. District Court for the Eastern District of California published the Memorandum Decision and Order Re Motion to Extend Remand Schedule (Doc. 703, lead case: 1:09-cv-00407 LJO BAM). This is the same extension for the BiOps that I have been reporting for the past few meetings. The motion was granted, with some limitations.

History of Extension Process: Early in January, US Fish and Wildlife Services (FWS) and the Department of Water Resources (DWR) requested a three-year extension for the Biological Opinion regarding the impact of the CVP and SWP (Projects) on the delta smelt, originally due December 1, 2013. On January 30, 2013, the court remanded the request until March. On March 15, DWR filed their updated extension request, and on April 9 the order granting a staged extension was published.

Reason for Extension: The collaborative science and adaptive management program (CSAMP) and recent changes to the BDCP would allow for further collaboration for a better Biological Opinion and set the standard for future BiOps.

Relevance to Council: CSAMP will follow standardized and generally accepted protocols for a collaborative science process, which will likely involve a nine-step protocol developed by the Delta Stewardship Council. Also, the BiOps control permits for project operations so there is a direct correlation to water supply reliability.

Notable: For the original December deadline, FWS already has completed and transmitted to Reclamation a draft revised Smelt BiOp, *see Smelt* Doc. 1069, and Reclamation has begun the related scoping process under NEPA, *see* 77 Fed. Reg. 18,858 (Mar. 28, 2012).

Holding – Staged Extension: (Judge Lawrence J. O'Neill) Given that the CSAMP is targeted to form and develop key questions and experimental designs by January 1, 2014, approximately nine months from now, <u>all deadlines in both the *Smelt* and *Salmonid* cases are extended by one year</u>. Rather than granting Movants a three-year blank check, the Court will grant a staged extension:

<u>Joint Status Report</u>: On or before February 15, 2014, the parties shall submit a joint status report to the Court detailing progress that has been made in connection with the CSAMP as well as providing additional information about CSAMP's future activities and how any results will be incorporated into the consultation processes.

- As part of any such submission, the Court expects to see detailed schedules describing how CSAMP and the consultation processes in both cases will proceed.
- Concurrent with the filing of the joint status report, the Court will entertain a request to extend the remand schedule by an additional year.

Extending for a Second Year (2014 for 2015): if substantial progress has been made along the lines outlined by Movants, such an extension will be granted. No further extensions if substantial progress has not been made.

Extending for a Third Year (2015 for 2016): Extension of the deadlines by a third year will require a similar showing at the end of the second year.

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II. FURTHER INFORMATION- THE COURT'S ANALYSIS

The court's ability to interfere: Normally under federal law the reviewing court should not interfere with an agency's determination about remand. But according to Ninth Circuit precedent there is, since there is a history of failing to comply with the ESA there is a substantial justification exception allowing the court to interfere with the agency's wishes for a remand schedule. *Federal Power Commission v. Transcontinental Gas Pipe Line Corporation*, 423 U.S. 326, 333 (1976); *NWF v. NMFS*, 2005 WL 2488447 (D. Or. Oct. 7, 2005) *aff'd*, 481 F.3d 1224 (9th Cir. 2007) *opinion amended and superseded*, 524 F.3d 917 (9th Cir. 2008) and *aff'd*, 524 F.3d 917 (9th Cir. 2008).

Asarco-Rufo Standard: A party invoking Rule 60(b)(5) must satisfy a two-prong standard . *United States v. Asarco, Inc.*, 430 F.3d 972, 979 (9th Cir. 2005)*; Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

Prong 1: Significant Change in Circumstances (Circumstances have changed significantly since judgment): First, "[t]he moving party must satisfy an initial burden of showing a significant change either in factual conditions or in the law warranting modification of the [judgment]."

a. CSAMP Description: CSAMP will follow standardized and generally accepted protocols for a collaborative science process, which will likely involve a nine-step protocol developed by the Delta Stewardship Council.
    i. CSAMPs goals are to:
        1. Identify and evaluate management actions, including but not limited to actions set forth in the [BiOps' Reasonable and Prudent Alternatives ("RPAs")], to protect one or more of the listed species;
        2. Develop a monitoring program to allow for the evaluation of costs and benefits and of alternative management actions; and
        3. Support the development and adoption of an annual operational plan by no later than December 15 of each year.
b. Foreseeability of Changed Factual Conditions: Declarations have universally indicated that circumstances related to collaborative scientific action have changed significantly since entry of judgment.
    i. No way the Fed Defendants could have predicted the agencies and stakeholders could have come to the table in this way. Litigation over the 2008 BiOp ended and focus shifted toward BDCP, leading to movement in the BDCP effort and increased communication between formerly adversarial parties. (Ren Lohoefener, Regional Director of FWS Pacific Southwest Region; Maria Rea, NMFS Central Valley Area Office Supervisor; Eileen Sobeck, Deputy Assistant Secretary for Fish and Wildlife and parks for US DPO and point person for negation of CSAMP Proposal; Dale Hoffman-Floerke, Chief Deputy Director of DWR)

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Prong 2. Public Interest (Allowing CSAMP to proceed has the potential to advance significantly the public interest): "the proposed modification [must be] suitably tailored to resolve the problems created by the changed factual or legal conditions." If the movant can point to "significantly changed factual conditions, … it must additionally show that the changed conditions make compliance with the [judgment] … 'detrimental to the public interest.'"

a. Breaking the Cycle of Litigation: Greater collaboration in the development of scientific information related to these species will reduce the likelihood of further litigation in the future. This interest in pursuing CSAMP represents a solid step away from the pattern of litigation, and if that is successful then CSAMP would advance the public interest.
b. Advancement of Relevant Science: CSAMP will allow BiOps to be more robust. E.g. lack of quantitative life cycle models as a major shortcoming in development of the 2008 Smelt BiOp. *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 881-85 (E.D. Cal. 2010); *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 834-45 (E.D. Cal. 2011).
    a. a three-year extension will permit NMFS a much better opportunity to take advantage of a salmonid life cycle model currently being developed by NFMS.
    b. Rumsfeld should not serve as a bar to the extension. *Rumsfeld* concerned an unlawful "no jeopardy" determination that permitted development activities to proceed on the uncertain promise of future corrective action. Here, the agencies seek to delay making a decision as to the existence of jeopardy and/or any required mitigation measures in order to develop better scientific information. Movants are trying to make a more robust (and possibly less contentious) jeopardy determination. The Court is unaware of any authority that prohibits affording agency decision makers a reasonable amount of time to engage in such a process. *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1154-56 (D. Ariz. 2002)
c. Inability to Pursue CSAMP and Current Remand Schedules Simultaneously, involves same staff members and hiring more will not help.
d. Implementation of RPAs during Remand Period: Existing BiOps have not been vacated and any modifications still have to be procedurally consistent with law.

Prong 3: Suitably Tailored: Whether the proposed modification is "suitably tailored" to the changed factual conditions.

- CSAMP process has not yet begun, so there are no details of the process, likely accomplishments and the consultation process. "This lack of detail provides the Court with little assurance that CSAMP will proceed as envisioned, let alone that CSAMP will actually result in scientific progress, as opposed to 'collaborative gridlock.'"

We will continue to monitor the progress of this case.

The Human Right to Water

Relevance: In September of 2012 Assembly Bill 685 ("AB 685") became law within § 106.3 of the California Water Code. The law declares that it is the established policy of the state that *every human being has the right to safe, clean, affordable and accessible water*.

General Facts:

On Friday, April 19th, a federal official from the United States Environmental Protection Agency ("EPA") announced that the State of California has failed to spend $455 million of safe drinking water funds. According to the EPA, the State can lose these federal funds if they are not put to use addressing contamination threats. The State is being given 60 days to submit a corrective plan, which if not accepted could result in suspended payments.

Discussion:

This unspent safe-drinking-water fund is important because there are areas within California that desperately require the money to address serious contamination issues with their water. For example, in the San Joaquin Valley, there are over 250,000 people in rural towns with inadequately safe drinking water.

A study out of the University of California at Davis (2012) suggests that some of the San Joaquin's worst drinking-water problems (for example nitrates from fertilizers) could be addressed and cleaned up for a fraction of the amount the State still has "sitting on the table."

Why hasn't the money been spent? It is less about finding a need for it, and more about developing an adequate plan, procedure and mechanism for distributing the money in a responsible fashion. For example, some of the smaller and most needy water systems simply do not have the capacity to handle the money provided to them – therefore allocated funds can remain stagnant for years at a time.

The EPA is particularly interested in this issue due in part to their involvement in the San Joaquin Region. The Agency held meetings with the California Department of Public Health throughout 2012 to identify the water needs of small rural communities. The EPA hopes to bring 21 water systems in the Valley into compliance each year for the next three years. They are willing to provide the funding, however the state is responsible for implementation and allocation of the funds.

Conclusions:

It is not clear what the implications of this issue are. It is not certain whether legislative action would be useful in helping to address this problem – perhaps something

more than last year's bill that merely asserts that there is a "human right to water." We will continue to monitor this case and my successors may provide updates if they arise….