

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. OLIVER W. WANGER, JUDGE

NATURAL RESOURCES DEFENSE)
COUNCIL, et al.,)
)
Plaintiffs,)
)
vs.)
)
KIRK KEMPTHORNE, Secretary,)
U.S. Department of the Interior,)
et al.)
)
Defendants.)
_____)

No. 05-CV-1207-OWW
HEARING RE INTERIM REMEDIES
RULING

Fresno, California

Friday, August 31, 2007

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

Reported by: KAREN LOPEZ, Official Court Reporter

APPEARANCES OF COUNSEL:

For the Plaintiffs:

Earthjustice Legal Defense Fund
BY: TRENT W. ORR
426 17th Street
Fifth Floor
Oakland, CA 94612

Natural Resources Defense Council
BY: MICHAEL E. WALL
and KATHERINE POOLE
and SELENA KYLE
and ANGELI JAISWAL
111 Sutter Street
20th Floor
San Francisco, CA 94104

For the Federal
Defendants:

U. S. Department of Justice
BY: JAMES MAYSONETT
Wildlife & Marine Resources
P. O. Box 7369
Washington, D. C. 20044-7369

For the California Dept.
Of Water Resources:

State of California
Attorney General's Office
BY: CLIFFORD LEE
455 Golden Gate Avenue
Suite 11000
San Francisco, CA 94102-7004

State of California
Attorney General's Office
BY: DEBORAH WORDHAM
1300 I Street
Suite 1101
Sacramento, CA 94244-2550

For California
Farm Bureau:

Gibson, Dunn & Crutcher
BY: CHRISTOPHER H. BUCKLEY, JR.
1050 Connecticut Avenue Northwest
Suite 900
Washington, D. C. 20036-5303

CALIFORNIA FARM
BUREAU FEDERATION
BY: CHRISTIAN SCHEURING
2300 River Plaza Drive
Sacramento, CA 95833

APPEARANCES OF COUNSEL: (Cont' d)

For State Water
Contractors:

Best, Best & Krieger
BY: GREGORY K. WILKINSON
and STEVEN M. ANDERSON
3750 University Avenue
Suite 400
Riverside, CA 92501

For the Defendant Intervenor

Kronick, Moskowitz,
Tiedemann & Girard
BY: DANIEL J. O'HANLON
400 Capitol Mall
27th Floor
Sacramento, CA 95814-4416

Somach, Simmons & Dunn
BY: JACQUELINE L. McDONALD
813 Sixth Street
Third Floor
Sacramento, CA 95814-2403

1 Friday, August 31, 2007

Fresno, California

2 5:14 p.m.

3 THE COURT: All right. I'm going to start by
4 reviewing the law that applies in this proceeding. And as I
5 have said, based on the recent amendment by way of supplement
6 to the complaint, we have action that is alleged to be
7 unlawful or omission by an agency of the United States, the
8 DWR. I'm sorry, the Bureau of Reclamation as well as the
9 Department of the Interior. That the way in which the Central
10 Valley Project is being operated is both presenting present
11 jeopardy to the survival and recovery of the species and that
12 it is also impairing the critical habitat of the species.

13 And the ESA prohibits agency action that is likely to
14 jeopardize a continued existence of any listed species, and in
15 this case, the Delta smelt is listed as a threatened species.
16 And the regulations, that's 16 United States Code, Section
17 1536(a)(2) referred to as Section 7 of the ESA, 7(a)(2)
18 violation.

19 And the regulations that are at 50 CFR, Section
20 402.02 provide that this law prohibits any agency action that
21 reasonably would be expected, directly or indirectly, to
22 reduce appreciably the likelihood of both the survival and
23 recovery of a listed species in the wild.

24 The word "jeopardize" or "jeopardy" as it is used in
25 the act means to engage in an action that reasonably would be

1 expected, directly or indirectly, to reduce appreciably the
2 likelihood of both the survival and recovery of a listed
3 species in the wild by reducing the reproduction numbers or
4 distribution of that species.

5 The complaint also sought and a summary judgment in
6 the case has been entered that essentially found the 2004/2005
7 biological opinion that covered the operation of the OCAP for
8 the, if you will, day-to-day running of these coordinated
9 projects and operations of the State Water Project and the
10 Central Valley Project. That finding was that the biological
11 opinion was unlawful, arbitrary and capricious for the reasons
12 that are stated and they don't need to be stated now because
13 that has already been decided.

14 The further finding was that the decision of, in
15 addition to the biological opinion, that the remedial action
16 measures that had been adopted as part of that decision and
17 belated actions and also a take limit that has been
18 established as required by the Endangered Species Act was also
19 invalid.

20 After those findings, the Court set, in consultation
21 with the parties, this evidentiary hearing, which has now
22 consumed eight full court days, to determine what remedies, if
23 any, should be imposed by the Court to address the unlawful
24 actions by the Department of the Interior and the Bureau of
25 Reclamation, the latter is the action agency.

1 The State Department of Water Resources, which is a
2 coordinated operator of the State Water Project, which is
3 operated in tandem and cooperatively with the federal project
4 and, as the parties all know, the federal project has state
5 permits for its water entitlements that are used to perform
6 its operations both of water service, that is performed under
7 contract to water districts, who in turn have members who
8 contract for water.

9 And we have constituencies here, not only San Luis
10 and Delta-Mendota Water Authority, Westlands Water District,
11 Del Puerto Water District, Glenn-Colusa Irrigation District.

12 We have the State Water Contractors, who include not
13 only contracting districts, but also municipal and industrial
14 agencies who provide water service that isn't for agricultural
15 purposes, it is for municipal purposes.

16 And additional to those parties are the Farm Bureau,
17 who we have just heard from.

18 In addressing the remedial approach to the case, the
19 plaintiffs have sought initially for the invalidation of the
20 biological opinion and a vacatur of the take standards and all
21 aspects of the biological opinion. Today in argument, they
22 offered that if -- and I interpret the offer as a conditional
23 offer, the condition being that if the Court were to pronounce
24 and apply the remedies that are in the revised recommended
25 interim protection actions for Delta smelt that Dr. Swanson

1 has authored, if all of those are adopted as a remedy in the
2 case pending the reconsultation, remand and, if you will, the
3 correction and/or repromulgation of a lawful biological
4 opinion, that that would be acceptable to the plaintiffs.

5 The federal defendants have, after taking the initial
6 position that there was no entitlement to relief because there
7 were no violations of law, they haven't waived those
8 positions, say that if there are remedies to be imposed, that
9 for all the reasons that have been stated by their witnesses,
10 primarily Cay Goude, that the five featured action matrix
11 should be pronounced by the Court to be a remedy that is to be
12 operative in the interim period between today and the time
13 that a lawful biological opinion is issued concerning the OCAP
14 for the Central Valley Project and the State Water Project.

15 The Department of Water Resources, as intervenor,
16 essentially for the reasons stated by Mr. Lee, agrees with the
17 proposed action matrix of the Fish & Wildlife Service and
18 would modify to make, if you will, less stringent the flow or
19 water consumption requirements.

20 The State Water Contractors, without waiving their
21 position that the original BiOp was lawful and that no
22 remedies are needed, have proposed an alternative three-tiered
23 remedial approach. And they do not agree with the Fish &
24 Wildlife Service, I'm just going to call it the federal
25 defendants' proposed remedy and/or the modification to that

1 remedy proposed by the Department of Water Resources.

2 The Delta-Mendota Water Authority and Westlands Water
3 District intervenors, one, do not believe the BiOp is
4 unlawful, have not waived that position. They, joined by the
5 Farm Bureau, take the essential position that the evidence in
6 this proceeding, through Dr. Miller's testimony, has
7 established that there are a number of causes for the decline
8 of the Delta smelt, including but not limited to toxicity,
9 predation, the disappearance or reduction of the food supply
10 caused in material part by the invasion of alien species,
11 primarily two types of clam that filter the planktonic
12 organisms that are the food supply to the smelt, among others.

13 They also believe that In-Delta actions by other
14 diverters, who are not under the direct control or operation
15 of either the state agencies and meteorological conditions,
16 such as storms, winds, temperature changes and the like, all
17 have effects on the movement, the existence, the location and
18 the health of the species.

19 And so the San Luis and Westlands defendants agree to
20 nothing and essentially do not support any remedy. They say
21 there should be no remedy because the projects have no causal
22 relation that is significant to any of the problems the smelt
23 is now encountering or has encountered.

24 The Farm Bureau takes the same position, but
25 arguendo, if a remedy is going to be imposed, support the

1 federal defendants' five point action matrix as modified by
2 the Department of Water Resource proposals.

3 This case is also brought under Title 5 United States
4 Code, Section 702, et seq. United States Administrative
5 Procedure Act and it addresses action by an agency of the
6 United States that is arbitrary, capricious or unlawful, which
7 requires the intervention of Court to make such a finding.

8 And Mr. Wall was very accurate in his recitation of
9 the law. It is not the function nor necessarily the
10 jurisdictional authority. It might be the prerogative, but in
11 the eyes of this Court, deference is required by law to an
12 agency that has the expertise, the competence and the legal
13 charge that is essentially invested by the elected
14 representatives of the people who make the laws and then
15 charge experts in the executive branch to carry out the
16 functions of the agency, here the operation of the projects.

17 And so a judge, who is neither a scientist, a
18 biologist, an administrator or elected by the people,
19 ordinarily is confined to determining the legality of actions
20 and, if necessary, and appropriate -- and here, I take it that
21 because of the alternative positions that are taken by the
22 governments, and I'm more concerned with that of the federal
23 defendants because by their consent and waiver of any Eleventh
24 Amendment immunity, the state is here, they have acquiesced to
25 the jurisdiction and authority of the Court, there by removing

1 the jurisdictional objection.

2 My understanding is that by the position that the
3 United States has taken, they are in effect impliedly, if not
4 expressly consenting to the imposition of a remedy,
5 particularly one without waiving their legal position as to
6 the propriety and legality of their actions as to the BiOp.

7 And also with respect to any finding on the issues of
8 remand, vacatur and the status of the take limits, as I
9 understand the government position, their preference is to
10 consent to a remedy rather than face a remand with vacatur
11 where there will be no effective biological opinion or take
12 limits.

13 And we have looked for some time now at the law and
14 we have asked the parties to provide the law, and no party has
15 provided the law that says that the 1995 biological opinion,
16 which has obviously been superseded by the government's
17 2004/2005 BiOp. The Court has no understanding that it would
18 have the authority to, if you will, resurrect what is a
19 superseded and obviously outdated, and, if the current one is
20 unlawful, it has to be more unlawful than the current BiOp,
21 recognizing that the take limits in the '95 BiOp were 55,227
22 up to 224,409 Delta smelt per year in a dry year.

23 The current incidental take limit was 70,500 and, as
24 the parties all know, nobody knows what the population of the
25 species is, but the '05 BiOp could approach it and the '95

1 take limit very well could exceed it.

2 We have uncontradicted testimony of some experts on
3 the plaintiff side, Dr. Swanson, Ms. Goude, Dr. Hanson, even
4 Dr. Miller told us that the species is in a critical state.
5 It could become extinct within a year and it could become
6 extinct if everything that anybody's asked for here was
7 implemented, it could still become extinct if we put all these
8 measures into effect.

9 It appears to the Court, based on the facts most of
10 which have been discussed by counsel, that the most
11 responsible and the most prudent decision is -- and there's no
12 question that the BiOp has to be remanded and consultation has
13 been reinitiated for repromulgation in lawful form. And so
14 that is one of the remedies that the Court is going to order.

15 The next issue is whether the BiOp is remanded with
16 or without vacatur. And that then presents the Court with the
17 question do we leave the status quo, because the temporary
18 restraining order in this case was not granted and the
19 voluntary pumping cessation, or reduction would be the better
20 description, ended in June.

21 Do we leave the status quo where the agency is left
22 to manage the projects without any intervention by the Court
23 or does the Court impose, with the express or implied consent
24 of the action agencies, remedies that will address the Section
25 7(a) issues of the jeopardy to the species, its survival and

1 recovery, and the impairment or alteration of its critical
2 habitat.

3 And in looking at this question, I asked the parties
4 to consult among themselves and to determine if there was a
5 result they could reach that we could all be proud of. And
6 that effort apparently has not been one that has come to
7 fruition.

8 And so it devolves to the Court to determine what the
9 result should be now with regard to the issue of vacatur or
10 non-vacatur. And in the final analysis, the Court is
11 persuaded by science, which it must be, because the law
12 requires that the best available science be brought to bear on
13 the issues that are presented.

14 As the Court noted and the plaintiffs in their brief
15 on remedies repeated, the law doesn't give the Court a choice.
16 If the Court sees that agency action or inaction not only
17 threatens, but doesn't have to bring it to extinction, but has
18 that potential, then the law requires intervention. There
19 must be action taken by the Court.

20 In this case, given the history, which I have alluded
21 to earlier, that the approach the agencies were taking and
22 here the Court believes that the evidence shows that the
23 Department of Water Resources of the state essentially
24 deferred to the Bureau of Reclamation and Department of the
25 Interior for it to implement the Delta Smelt Recovery Action

1 Plan and the Delta Smelt Working Group, Water Operations
2 Management Team and the agency heads have certainly addressed,
3 they have spent time on and they have endeavored to remediate
4 the present jeopardy which has been defined as critical.

5 And that was agreed to by the operator, Mr. Milligan,
6 as well as the scientists. And that effort, all those
7 efforts, have been unsuccessful because we see continuing
8 declines and every survey that comes in that we have been
9 furnished in the last two years so shows that the condition of
10 the species is worsening.

11 And so contrary to -- and I do think it is a
12 selective study that was done by Dr. Miller. I'm not
13 criticizing his competence, his ability or the application of
14 his science as an engineer or water engineer, or Dr. Manly's
15 competence or renown as an ecological statistician. But as
16 has been indicated, the correlative studies that were
17 undertaken by those experts certainly provide a major issue
18 about cause. But I think that the answer I got from Mr.
19 Buckley is telling. The law recognizes concurrent causes,
20 even though it's a doctrine that has its origins in the law of
21 torts.

22 But here the Court can't find that the sole cause is
23 the food supply and that the absence of a statistical
24 correlation in the studies that Dr. Miller performed explains
25 the jeopardy of the species when there is indisputable

1 evidence of entrainment, of salvage, the pumps grind these
2 fish up. That's caused by, in some cases, the natural
3 migration of the fishes, it's caused by flow conditions in the
4 central Delta at the confluence of the Sacramento and San
5 Joaquin Rivers, it's caused going east from there, going north
6 from there, going south from there, and those are to the south
7 and into the Clifton Court Forebay areas of hazard.

8 And the evidence is uncontradicted. There isn't any
9 question about it, that these project operations move the
10 fish. Of course we don't know how many. But the fact is it
11 happens. And the law says that something has to be done about
12 it by the action agency.

13 Now, the Court from that concludes that it is under a
14 legal duty to provide a remedy. And if it is in the form of
15 an injunction, there would be two standards, the traditional
16 injunctive relief standard and the ESA standard.

17 The traditional standard looks at the likelihood of
18 success on the merits, it balances hardships, it looks at the
19 public interest; and the ESA standard essentially evaluates
20 the threat of harm to the species and discounts hardships of
21 an economic or other nature, except for human health and
22 safety.

23 And the Court recognizes that, as I said earlier
24 today, that that isn't just emergency water supplies for
25 schools, for hospitals, for fire departments. That can

1 include the absence of water if the supplies to contractors
2 are zero and land is fallowed, subsidence from groundwater
3 pumping which contributes to the fallowing or the absence of
4 water creates air pollution conditions. Those are threats to
5 human health and the environment, just as the absence of
6 emergency water service is.

7 How this is going to be accomplished is something
8 that the Court cannot prescribe. Because the law doesn't
9 permit it. I'm not going to tell the Bureau of Reclamation
10 how to run its agency, how its scientists should think, what
11 conclusions they should reach, what recommendations they
12 should make or how they should be implemented. But I do have
13 proposals that the parties are offering, and I'm going to use
14 those proposals they are offering to do the best in what the
15 Court views as an impossible situation.

16 In one of these water cases that have been going on
17 for over 30 years in the Eastern District of California
18 involving water supplies to the Central San Joaquin Valley and
19 the Sacramento and central Delta areas, and most of the
20 agencies that are involved in this litigation, Judge Trotter,
21 in one of the decisions said -- this was in the drainage
22 case -- that sometimes problems are so intractable, they're so
23 difficult that they're beyond the competence of the judiciary,
24 they are matters that need to be left to the legislative
25 branch for the legislature to address.

1 Well, it would be very nice if I could do that. But
2 I can't. Because the law requires otherwise. And I am going
3 to formulate an order and I am going to need the assistance of
4 the parties with this -- to not vacate the 2005 biological
5 opinion, but I am going to put into effect a preliminary
6 injunction.

7 And I recognize the difference between a mandatory
8 injunction and the law's preference for a prohibitory
9 injunction. And therefore I'm going it to phrase my
10 injunctive relief in prohibitory terms. I'm not playing a
11 game here in trying to exalt form over substance, but rather
12 I'm trying to comply with the law.

13 And the Court is going to order that Bureau of
14 Reclamation and the State Department of Water Resources take
15 no actions that are inconsistent with or that violate the
16 following remedial prescriptives.

17 First, there will be year round monitoring actions
18 that fully implement all current surveys that are being
19 conducted for the Delta smelt, which will include but not be
20 limited to the Spring Kodiak survey, the 20 millimeter survey,
21 the summer townet survey and the fall MWT.

22 There was a proposal in what is the second remedial
23 action which would increase the frequency of sampling for
24 entrained fish at the CVP protective facilities to a minimum
25 of 25 percent of the time, which is a minimum of a 15-minute

1 count per hour.

2 I'm going to also include within that, the measure
3 that was proposed by Dr. Swanson that steps be taken to
4 evaluate presence and condition of larval or juvenile Delta
5 smelt that are in the sub-20 millimeter size range,
6 recognizing that there are difficulties in doing that. But as
7 the Court understood it, it's entirely feasible based upon the
8 type of seine or net the interval that would be within the
9 physical test device itself.

10 I do recognize that at least two of the experts said
11 that any sampling could be further jeopardizing to the
12 species. But it appears that all parties, with the exception
13 of the San Luis and Delta-Mendota parties, agree that sampling
14 needs to continue and that it is feasible.

15 The trigger for this that was proposed by the Fish &
16 Wildlife Service was an increase in Delta outflow where the
17 Sacramento River flow at Freeport reached 25,000 cfs or in the
18 San Joaquin River more than 10 percent over a three-day
19 average. And in the fall midwater trawl and/or Kodiak survey
20 data on Delta smelt, where fish are moving upstream of the
21 confluence and into the Delta or by January 15th of the water
22 year, whichever comes first.

23 The next remedial action that will be implemented
24 is -- and I think that I have already in effect adopted action
25 number three of the Fish & Wildlife Service, which was to

1 implement a monitoring program for the protection of larval
2 Delta smelt with the trigger that is prescribed. I don't see
3 any reason to modify or to, if you will, change that. And I
4 should correct myself. I'm actually using, at this point, the
5 plaintiffs' remedial actions.

6 As to the remedial action number three that is
7 submitted by the Fish & Wildlife Service as proposed to be
8 modified by the DWR, the parties can correct me if I'm wrong,
9 but an area of -- and Dr. Hanson spent a lot of time on this.
10 For determining the upstream Old and Middle River flows,
11 rather than adopting a zero cfs as the lower range of that, I
12 remember a lot of discussion about a negative 750 to a
13 negative 2250 range. I recognize that this was not
14 necessarily addressing only larval and juvenile smelt, but the
15 Court is going to adopt the low end of that low range
16 at -- for the third proposed action by the Fish & Wildlife
17 Service at negative 750 to a negative 5,000 cubic feet per
18 second. And the Court thinks that 6,000 is an acknowledged
19 and undisputed area of jeopardy and recognizing that it's
20 easier to -- less consumptive to achieve, the Court is
21 concerned by what it believes are the legitimate reasons given
22 by Dr. Swanson. And in the interest of time, I'm going to let
23 the parties submit findings, which will document the reasons
24 for these choices of remedies.

25 Now, the fifth action is the same as the plaintiffs'

1 actions, which were, if I have them correctly, and the parties
2 can help me here, was it six and seven where we have the head
3 gates at the --

4 MR. ORR: Eight and nine, Your Honor.

5 MR. WALL: Plaintiffs' eight and nine.

6 THE COURT: Eight and nine. All right. Eight and
7 nine are the same, I think, all the parties have acknowledged
8 as Fish & Wildlife Service measure number five. So that would
9 be the next remedial.

10 If you want to do them as two, because I'm going to
11 ask for the parties to prepare an order that is faithful to
12 the decision that I am now announcing. So those remedies are
13 going to be also prescribed.

14 Now, in turning to the plaintiffs' action number four
15 and the triggers, the Court has determined that -- let me have
16 one -- Mr. Maysonett, if you would repeat, please, the
17 objection to plaintiffs' four so I have the basis for it. Or
18 Mr. Lee, either one of you can do that. Mr. Lee was most
19 specific about it. Do you want to address that right now, Mr.
20 Lee?

21 MR. LEE: Number four, as I understand it, is
22 designed to protect pre-spawning adults. I'm talking about
23 revised number four set forth in plaintiffs' proposal
24 contained in the August 13th, 2007.

25 THE COURT: That is correct.

1 MR. LEE: And that proposal would start out -- is
2 multi-part, as I understand it. They would have a zero cfs
3 requirement for a minimum ten days and then -- and then
4 following that, there would be a requirement that would have
5 Old and Middle River flows between 2750 and 4250 cfs.

6 We had objected to the zero flow because we did not
7 believe there was any science in the record to support it.
8 The zero flow, as I understand this requirement, is roughly of
9 the same nature as in action number one in US Fish & Wildlife
10 Service measure. And that had a negative 2,000 cfs, which we
11 believed science fully supported.

12 So we would have recommended that the Court adopt
13 action number one for that time period for -- under the US
14 Fish & Wildlife proposal.

15 As to the follow-on proposals, we submitted that,
16 first of all, the five-day running average was inappropriate,
17 it should be a 14-day running average or seven-day running
18 average subject to some bans and constraints.

19 But most importantly, we were of the view that the
20 range of flows was too narrow, that the flows should be,
21 according to our view, not in excess of -- sorry, make sure I
22 got right -- negative 5500 for a 14-day running average or
23 negative 6,000 for a seven-day running average. As you can
24 see, as the running average days get shorter, the band gets
25 larger. As the running average days get longer, the band, the

1 level of authorized exports, gets lower. So that was our
2 proposal for the protection of pre-spawning adults.

3 And our objection to action number four is we did not
4 believe it was supported by the regression analysis submitted
5 to the Court which we discussed in closing argument. Is that
6 clear?

7 THE COURT: That is clear. But you did have a
8 proposal that covered in part this time period?

9 MR. LEE: Yes, we did, Your Honor. The two -- the
10 two-part proposal, one would be action one in the US Fish &
11 Wildlife Service proposal. The other would be a modification
12 of action two of the US Fish & Wildlife proposal. And that
13 modification would read -- and I would just look at action two
14 and put in the State's modifications -- the daily net upstream
15 Old and Middle River flow not to exceed 5500 cfs. The low
16 will be a 14-day running average simultaneously, the seven-day
17 running average will not exceed 6,000 cfs. That would be the
18 proposal for this life stage of the smelt, which is the
19 pre-spawning adult smelt.

20 THE COURT: And the State Water Contractors have
21 proposed that this start December 1st. I'm going to leave it
22 at December 25th. I'm going to essentially reduce those flows
23 from 6,000 on the seven-day running average to 5,000 cubic
24 feet per second. And there was objection to the 14-day
25 running average -- well, you had proposed a 14-day running

1 average. Leave it at the seven-day running average and don't
2 do a 14-day running average.

3 MR. LEE: So, in effect, Your Honor, you're adopting
4 one-half of action two of the US Fish & Wildlife proposal?
5 They have a 4500 cfs average for a 14-day running average and
6 a 5,000 cfs for a 7-day running average. Are we abandoning
7 the 4500 cfs.

8 THE COURT: What does it add?

9 MR. LEE: I'm sorry?

10 THE COURT: What does it add?

11 MR. LEE: I would probably defer to the US
12 biologists. They are --

13 THE COURT: Do you know, Mr. Maysonett?

14 MR. MAYSONETT: Your Honor, my understanding is that
15 the targets of 4500, negative 4500 negative flow in the Old
16 and Middle River is 14-day average and that by -- the 14-day
17 average, of course, allows certain ebbs and flows of the tides
18 and the other influences that is hard for the projects to
19 operate to eliminate entirely.

20 The seven-day average at negative 5,000 would help to
21 limit the highs and lows a bit. So my understanding is that
22 the two work in tandem to ensure that flow levels remain in
23 certain -- within a certain range.

24 THE COURT: All right. Well, I'm going to order the
25 prescription that I've just described. And if we have to

1 adjust the language, we will.

2 As to action measure number ten. The Court is not
3 persuaded that the evidence preponderates here to support this
4 action. It was very well explained by Dr. Swanson. The
5 justifications were very articulately presented. It does not
6 appear to me that there is support necessarily in peer
7 reviewed or analysis by others who are studying this issue.

8 The Court certainly recognizes that water quality and
9 the improvement of habitat has the potential to increase
10 benefit to the species. But I am very impressed by the fact
11 that the Delta Smelt Working Group, one or two of whom
12 essentially were presented with this proposal in a different
13 form, in a different context, but didn't support it.

14 And because of the material uncertainty that is
15 described by reviewing scientists about the benefit at a very,
16 very large commitment and a -- resource commitment, the Court
17 does not believe that the evidence preponderates to justify
18 this measure and therefore it will not be included in the
19 remedies.

20 And so if I have it, then, we have those that I've
21 just gone over. And I'll now invite the parties to -- action
22 nine is the same as, I believe, five of the Government's Fish
23 & Wildlife Services, that is to prohibit installation at the
24 head of Old River barrier in connection with the triggers and
25 the end of the actions. Those are agreed on. And the other

1 management of the gates, which was, I'm going to
2 indicate -- well, I don't see it.

3 I don't see, Mr. Orr, number six, that's implementing
4 the Vernalis Adaptive Management Plan river flow and
5 enhancement, I am going to order that as a prescriptive
6 remedy.

7 And so I believe I have addressed the remedies that I
8 intend be prescribed as part of the injunctive relief. If
9 anybody wants to address anything now that you believe has
10 either been overlooked or not addressed, now is the time to do
11 it.

12 MR. WALL: Your Honor, I have a couple of clarifying
13 questions.

14 THE COURT: Yes.

15 MR. WALL: If I might. The first half of plaintiffs'
16 four parallels the Fish & Wildlife Service one and I didn't
17 hear if the Court was doing anything with that.

18 THE COURT: I'm adopting it.

19 MR. WALL: Fish & Wildlife Service one?

20 THE COURT: Yes.

21 MR. WALL: Okay. And the -- you were also adopting
22 the plaintiffs' eight and nine, which are the same as
23 plaintiffs' Fish & Wildlife Service five?

24 THE COURT: Yes. And six, that were agreed to by all
25 the parties except Mr. O'Hanlon's clients.

1 MR. LEE: Your Honor, just for the clarity of the
2 record, we did not agree to action six. The reason why
3 we -- oh, let's see. The reason why we did not agree to it is
4 because action six is basically the implementation of the
5 Vernalis Adaptive Management Plan. And that is mandated
6 already on the projects by water right decisions. We had
7 noted in our, I believe it was cross examination, that this
8 was unnecessary.

9 THE COURT: Well, it might be redundant, but out of
10 an abundance of caution, we have it. Let's include it in the
11 order.

12 MR. WALL: Your Honor, if I could, one other
13 clarifying matter. The Fish & Wildlife Service had action
14 four, which is post VAMP, and we had an action seven, which is
15 post VAMP. Did the Court intend anything for the post VAMP
16 period?

17 THE COURT: I thought that there was a -- let me have
18 what the Fish & Wildlife Service's proposal was on post VAMP.
19 It is number --

20 MR. WALL: Number -- Fish & Wildlife Service action
21 four.

22 THE COURT: Four. I had ordered that. And I had
23 not -- I modified it to take the low flow from zero to minus
24 750. Negative 750.

25 MR. LEE: Your Honor, it is my understanding that

1 action four, in its original format with the US Fish &
2 Wildlife Service, was intended to have flows similar to those
3 in action three. And we've mentioned that in, I believe,
4 footnote I, was that not the case? Of attachment B. If the
5 Court's view is that action four should simulate action three,
6 then --

7 THE COURT: The flow levels would be the same.

8 MR. LEE: The flow levels would be the same. Is that
9 your desire?

10 THE COURT: That is what I was attempting to
11 describe.

12 MR. WALL: So action three would be extended to last
13 until the end of -- the end date for action four? Basically
14 action three would continue on?

15 THE COURT: That is correct.

16 MR. WILKINSON: And Your Honor, those flows again
17 were a range of negative 750 to negative 5,000; is that
18 correct?

19 THE COURT: That is correct.

20 MR. LEE: Your Honor, mixing the two charts a little
21 bit sometimes leaves me a little lost. We have certain end of
22 action timings that are in the US Fish & Wildlife Service
23 proposal, and they are clearly not identical to those that are
24 in --

25 THE COURT: That is correct. And what I'm going to

1 suggest that you do is that you now reduce to writing the
2 orders that I have pronounced. The court reporter will
3 provide you the transcript. I'd prefer for there to be a
4 joint submission, but if you can't agree on it, then you can
5 submit competing proposed orders. And I'll resolve any
6 differences.

7 MR. LEE: All right.

8 THE COURT: All right? I intend for this injunctive
9 relief to be binding upon the United States Department of the
10 Interior, its Bureau of Reclamation, the State Department of
11 Water Resources, their agents, officers and employees and
12 those acting for, under and in concert with them and anybody
13 in those agencies who has actual notice of this order.

14 The order is to remain in effect pending entry of
15 final judgment in this case or further order of the Court.

16 Is there anything further?

17 MR. LEE: Your Honor, I think we'd like to look at
18 the transcripts and work on them.

19 THE COURT: You may. And the one other thing I'm
20 going to do is I'm going to ask for the parties to submit
21 proposed findings of fact and conclusions of law that support
22 this judgment that I have pronounced.

23 MR. LEE: What time frame, sir, are you talking
24 about?

25 THE COURT: It would be my preference that they

1 obviously be joint. You give me a reasonable time frame. I
2 think that there is concern that the order go into place. But
3 because we will not be starting any of the remedies September
4 1st, we don't have that level of urgency.

5 MR. LEE: Okay.

6 THE COURT: So what is reasonable?

7 MR. LEE: May we consult just for a moment on the
8 timing?

9 (Discussion among counsel, not reported.)

10 MR. LEE: Your Honor, I've had a chance to consult
11 with the United States, with San Luis and Delta-Mendota, with
12 the Farm Bureau and State Water Contractors, and given our
13 delayed vacations, Your Honor, we would like 60 days to get
14 the order -- get the findings of fact and conclusions of law
15 and the orders to you. That should give us time to consult
16 and see whether we can do something joint. If we can't, to
17 prepare alternate orders and findings of facts.

18 THE COURT: What's the plaintiffs' timetable?

19 MS. POOLE: Your Honor, we would propose something
20 much shorter than that. We were thinking more in the order of
21 two weeks.

22 THE COURT: Well, the court reporter is going to need
23 time to produce the transcript. And so she can give us her
24 transcript estimate now, as to what time.

25 THE REPORTER: I'd need 30 days.

1 THE COURT: She needs 30 days to produce the
2 transcript.

3 MS. POOLE: And Your Honor's order regarding the
4 rough transcripts, you'd like us to rely on the finals.

5 THE COURT: I will if -- I think we should have a
6 final official transcript for the preparation of the judgment.
7 At least the remedial aspect of the judgment that has been
8 announced today. And so, yes, let's do that. And my estimate
9 is that you at least need 20 days after you have the
10 transcripts in hand. And so that would be 50 days.

11 For findings and fact and conclusions of law, there's
12 going to have to be an official transcript. So let's make the
13 period 50 days. When is that? October 22nd, 2007.

14 Is there anything further?

15 MR. LEE: That's fine with the date, Your Honor.

16 MS. POOLE: We very much appreciate --

17 MR. WILKINSON: Thank you, Your Honor.

18 MS. POOLE: -- the time and effort you've devoted to
19 this, Your Honor.

20 THE COURT: Thank you very much. Thank the Court
21 staff, please, they're the ones who have had to stay way, way
22 past their hours of operation.

23 MR. LEE: Thank you.

24 THE COURT: Everybody have a good weekend. We will
25 stand in recess.

1 MR. MAYSONETT: Thank you, Your Honor.

2 MR. WALL: Thank you, Your Honor.

3 MR. O' HANLON: Thank you, Your Honor.

4 MR. BUCKLEY: Thank you, Your Honor.

5 (Off the record.)

6 THE COURT: I'd should add that the Department of
7 Water of Resources, the Bureau of Reclamation and the
8 Department of the Interior shall be reserved the right on
9 reasonable notice to deviate from the prescriptive remedies,
10 if necessary to protect public health, safety and the human
11 environment.

12 (The proceedings were concluded at 6:11 p.m.)

13

14 I, KAREN L. LOPEZ, Official Reporter, do hereby
15 certify that the foregoing transcript as true and correct.

16

17 DATED: _____
18 _____
19 KAREN L. LOPEZ

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