

SETTLEMENT AGREEMENT

Coalition for a Sustainable Delta, et al. v. John McCamman, Director,

California Department of Fish and Game

U.S. District Court, Eastern District, Case No. 08-CV-00397-OWW-MJS

This settlement agreement (Settlement Agreement) is entered into by and between the Coalition for a Sustainable Delta, Belridge Water Storage District, Berrenda Mesa Water District, Lost Hills Water District, Wheeler Ridge-Maricopa Water Storage District, and Dee Dillon (Plaintiffs), on the one hand, and John McCamman, Director, California Department of Fish and Game (State Defendant), on the other. Plaintiffs and the State Defendants are also individually referred to as Party, and collectively as the Parties.

RECITALS

- A. The California Fish and Game Commission (Commission) has adopted the striped bass sport fishing regulation, California Code of Regulations, title 14, section 5.75 (the striped bass sport fishing regulation), which establishes, among other limitations, the size of striped bass an angler may keep (size limit) and the number of striped bass an angler may keep on any given day (bag limit).
- B. The California Department of Fish and Game (DFG) is mandated by California law to enforce the regulations adopted by the Commission, including but not limited to the striped bass sport fishing regulation.
- C. The Director of DFG is the senior executive officer responsible for administering DFG and ensuring that the duties, responsibilities, and policies of DFG, including, but not limited to, the enforcement of regulations adopted by the Commission, are carried out in accordance with the law.
- D. The Sacramento River winter-run chinook salmon is listed as “endangered,” and the delta smelt, the Central Valley spring-run chinook salmon, and the Central Valley steelhead are listed as “threatened” under the federal Endangered Species Act, 16 U.S.C. § 1533 (the listed species).
- E. Striped bass prey on fish, including the listed species.
- F. On January 29, 2008, the Plaintiffs filed a complaint for declaratory and injunctive relief. On August 22, 2008, the Plaintiffs filed a First Amended Complaint for Declaratory and Injunctive Relief, which is the operative pleading. The Plaintiffs contend that DFG’s enforcement of the striped bass sport fishing regulation, without incidental take authorization from both the NOAA National Marine Fisheries Service (NOAA Fisheries) and the United States Fish and Wildlife Service (USFWS),

constitutes a “take” of the listed species in violation of section 9 of the federal Endangered Species Act, 16 U.S.C. § 1538.

- G. The State Defendant disputes that DFG’s enforcement of the striped bass sport fishing regulation constitutes a “take” of any of the listed species. The State Defendant disputes that DFG is required to obtain incidental take authorization from NOAA Fisheries or the USFWS for DFG’s enforcement of the striped bass sport fishing regulation.
- H. On May 29, 2008, the Court granted the motion of Central Delta Water Agency, South Delta Water Agency, Honker Cut Marine, Inc., Rudy Mussi, and Robert Souza, Sr. (Central Delta Defendant Intervenors) to intervene as a matter of right.
- I. On July 14, 2008, the Court granted the motion of California Sportfishing Protection Alliance, California Striped Bass Association, and Northern California Council of the Federation of Flyfishers (CSPA Defendant Intervenors) to intervene as a matter of right. The Central Delta Defendant Intervenors and the CSPA Defendant Intervenors are collectively referred to in this Settlement Agreement as “Intervenors”.
- J. On January 3, 2011, the Plaintiffs and the State Defendant reached agreement on the principles for a settlement agreement.

The Plaintiffs and the State Defendant now desire to formally enter into this Settlement Agreement.

AGREEMENT

Stay of Litigation

- 1. The Parties stipulate and agree that this action shall be stayed as of the date of entry of the Court’s order approving the Settlement Agreement, subject to the terms set forth below.

Regulatory Proposal

- 2. The State Defendant shall develop a proposal based upon the best available scientific information to modify the striped bass sport fishing regulation to reduce striped bass predation on the listed species, as described in paragraph 3 below, to be submitted to the Commission with a recommendation that the Commission modify the striped bass sport fishing regulation consistent with the proposal. In developing the proposal, the State Defendant will collaborate with NOAA Fisheries and the USFWS to develop a joint “Regulatory Proposal” to consist of:
 - a. changes to title 14, section 5.75(b) and (c) (bag limit and size limit, respectively) of the California Code of Regulations to reduce striped bass predation on the listed species;

- b. an adaptive management plan that will include research and/or monitoring designed to (i) determine the effect, if any, of the changes on striped bass abundance, striped bass predation on the listed species, mesopredator release, and abundance of the listed species and (ii) inform future revisions of title 14, section 5.75(b) and (c) to reduce the impact of predation by striped bass on the listed species; and
- c. a description of the approvals required to implement the Regulatory Proposal and an estimate of the time required to obtain such approvals, including any approvals required under the California Environmental Quality Act.

Consultation with Plaintiffs and Intervenors

- 3. Representatives of the State Defendant will meet with representatives of the Plaintiffs and the Intervenors prior to development of the Regulatory Proposal to solicit their input and provide them an opportunity to present scientific information relevant to the development of the Regulatory Proposal. These meetings shall occur within thirty (30) days of the date of entry of the Court's order approving the Settlement Agreement.
- 4. The State Defendant will provide a draft Regulatory Proposal to the Plaintiffs and the Intervenors within thirty (30) days of the date of the last meeting held pursuant to Paragraph 3 above.
- 5. The Plaintiffs and the Intervenors shall have ten (10) days to provide written comments to the State Defendant regarding the draft Regulatory Proposal.
- 6. If Plaintiffs recommend modifications to the Regulatory Proposal, the State Defendant and Plaintiffs will have thirty (30) days from the State Defendant's receipt of the recommended modifications to reach agreement on an alternative proposal.
- 7. If NOAA Fisheries or USFWS refuse to support the joint Regulatory Proposal or if the Plaintiffs disapprove the Regulatory Proposal, the stay will be lifted and the Court will set new pretrial and trial dates.
- 8. If the State Defendant and the Plaintiffs reach agreement on the Regulatory Proposal, the State Defendant shall provide the Plaintiffs and the Intervenors with the State Defendant's draft staff report in support of the Regulatory Proposal within fifteen (15) days of receipt of the Plaintiffs' written approval of the Regulatory Proposal. Neither the Plaintiffs nor the Intervenors shall have the opportunity to edit or alter the draft report. If the Plaintiffs inform the State Defendant they object to the draft staff report within fifteen (15) days of receipt of the draft staff report, the stay will be lifted and the Court will set new pretrial and trial dates.
- 9. If Plaintiffs approve the Regulatory Proposal, or the State Defendant and the Plaintiffs agree on an alternative proposal, and the Plaintiffs do not object to the draft staff report pursuant to Paragraph 8, the State Defendant will recommend, at the next public meeting of the Fish and Game Commission after the conclusion of the process set forth in this

paragraph and consistent with applicable notice requirements, that the Commission adopt the proposal to which the State Defendant and Plaintiffs agreed (Final Regulatory Proposal). A final staff report will accompany the recommendation. The final staff report will not differ materially from the draft staff report. If the final staff report differs materially from the draft staff report, Plaintiffs shall have 10 days from receipt of the final staff report to provide the State Defendant with notice of objection. The State Defendant shall have 10 days to revise the report to the Plaintiffs' satisfaction. In the event that the Plaintiffs still contend that the final staff report differs materially from the draft staff report, the State Defendant and the Plaintiffs shall jointly request the Court to determine whether the revision(s) to the final staff report constitute a material alteration to the draft staff report. If the Court finds that the revision(s) to the final staff report constitutes a material alteration, and if the State Defendant declines to revise the material alterations in accordance with the Court's findings in a timely manner, then Plaintiffs or State Defendant will provide notice to the Court, after which the Court shall lift the stay and schedule pretrial and trial dates.

Dismissal of Litigation Upon Final Commission Action / Re-openers

10. Once the Commission takes final action on the Final Regulatory Proposal (by making a final decision to approve, modify and approve, or reject the Final Regulatory Proposal), the Plaintiffs shall promptly take all necessary steps to dismiss their First Amended Complaint with prejudice. This paragraph will become null and void if the stay is lifted under paragraph 7, 8, or 9.
11. If the Commission does not take final action on the Final Regulatory Proposal within twelve (12) months of the Plaintiffs' approval of the draft Regulatory Proposal, and Plaintiffs believe State Defendant has not acted in good faith in pursuing the Final Regulatory Proposal before the Commission, Plaintiffs may petition the Court to lift the stay.
12. If the Commission does not take final action on the Final Regulatory Proposal within twenty-one (21) months of Plaintiffs' approval of the draft Regulatory Proposal, Plaintiffs or State Defendant will provide notice to the Court, after which the Court shall lift the stay and set new pretrial and trial dates. Upon a showing of good cause, the State Defendant can seek to extend the stay.

Covenant Not to Sue

13. Plaintiffs agree not to initiate, participate in, or fund any legal action against or involving DFG, the Director of DFG, or any officials or employees of DFG in state or federal court pertaining to the existing striped bass sport fishing regulation and/or any striped bass sport fishing regulations adopted by the Commission in response to the Final Regulatory Proposal arising under the federal Endangered Species Act, the California Endangered Species Act, or the California Public Trust Doctrine. In any California superior court action brought by the Plaintiffs over the existing striped bass sport fishing regulation or any striped bass sport fishing regulations adopted by the Commission in response to the Final Regulatory Proposal, the State Defendant understands, agrees, and recognizes that

DFG or the Director of DFG is not an indispensable party to such an action within the meaning of section 389 of the California Code of Civil Procedure or common law. In the event Plaintiffs secure a final superior court judgment holding the existing striped bass sport fishing regulation or any striped bass sport fishing regulations adopted by the Commission in response to the Final Regulatory Proposal invalid or void under state law, *or an appellate court has made a determination that the enforcement of such regulations is prohibited by federal law or federal regulations*, the State Defendant agrees not to enforce such regulations. The Plaintiffs agree not to name DFG or the Director of DFG as a real party in interest in any litigation challenging the existing striped bass sport fishing regulation or any striped bass sport fishing regulations adopted by the Commission in response to the Final Regulatory Proposal unless and until the court determines that inclusion of DFG or its Director is necessary for such action to proceed. This paragraph will become null and void if the stay is lifted under paragraph 7, 8, 9, 11, or 12.

14. Nothing in this Settlement Agreement is intended to limit or foreclose the ability of Plaintiffs to initiate, participate in, or fund any legal action other than against DFG, the Director of the DFG, or any officials or employees of DFG pertaining to the existing striped bass sport fishing regulation and/or any striped bass sport fishing regulations adopted by the Commission in response to the Final Regulatory Proposal.

Restrictions on Disclosure or Use of Settlement Documents, Statements or Other Communications

15. The State Defendant and the Plaintiffs agree that all documents, oral statements, or other communications created and rendered as part of settlement discussions, including but not limited to the Final Regulatory Proposal and supporting documents, may not be offered by the State Defendant or the Plaintiffs for any purpose in this action.
16. The State Defendant, Intervenors, and Plaintiffs agree that all documents, oral statements, or other communications rendered as part of settlement discussions (1) are confidential and shall not be made publicly available prior to the submission of the Final Regulatory Proposal to the Commission except as otherwise required by law and (2) are no longer confidential following submission of the Final Regulatory Proposal to the Commission except as otherwise required by law. Failure to agree to the confidentiality requirement set forth in this paragraph shall preclude the party that declines to agree with the confidentiality requirement from participating in the meetings described in paragraph 3, from receiving or commenting on the draft Regulatory Proposal described in paragraphs 4 and 5 or any modification of the draft Regulatory Proposal, or receiving the draft staff report described in paragraph 8.

Funding, Creation, and Purpose of Independent Scientific Review Panel

17. The State Defendant will reserve and set aside \$1,000,000 in existing appropriated and available funds within 90 days of the date of entry of the Court's order approving the Settlement Agreement. If the stay is lifted under paragraph 7, 8, or 9, the funds will revert to DFG. Otherwise, upon State Defendant's receipt of Plaintiffs' notice that they

do not object to the final staff report or that any objections have been resolved to Plaintiffs' satisfaction, the funds will be used to support research projects regarding predation on one or more fish species listed under the federal and/or California Endangered Species Acts in the Delta and/or the anadromous waters of the Sacramento and San Joaquin river watersheds. One or more research projects will be selected by an independent scientific review panel (Panel) upon approval by three Panel members to receive funding. The Panel shall be composed of Marty Gingras, Charles Hanson, Dennis Murphy, Pat Coulston, and a fifth member to be determined jointly by Plaintiffs and the State Defendant as soon as possible and no later than ten days after entry of the Court's order approving the Settlement Agreement. Any of the above-named Panel members (but not including the fifth member) may be replaced with the joint approval of Plaintiffs and State Defendants. To be eligible, a research project (1) must present an experimental design that (a) tests explicit alternative hypotheses about the role(s) of predation as it may affect the demographic status and trends of one or more of the listed species and (b) samples across salient spatial and temporal gradients in the Delta and/or the anadromous waters of the Sacramento and San Joaquin river watersheds and (2) cannot direct funding to an activity or activities that DFG or any consortium with which DFG is affiliated is already undertaking or obliged to undertake. As a condition of funding, researchers must issue a written final report including the following sections: summary; introduction; materials and methods; results; conclusions; literature cited; appendices including at least tables of all data collect; metadata for all data tables. DFG will consider the results of the reports in implementing the adaptive management plan. The Panel shall have the authority to establish a process for soliciting project proposals and, upon approval by four Panel members, shall have the authority to refine and further specify the scope of projects eligible for funding. Panel members are precluded from obtaining funds or participating in research projects unless they obtain prior written approval of both the State Defendant and Plaintiffs. Up to a total of \$25,000 of the funds may be used to reimburse the Panel members for costs incurred during the project review and selection process. All other procedures necessary to the implementation of this paragraph shall be determined jointly by Plaintiffs and the State Defendant.

Attorney Fees and Costs, Expert Witness Fees and Costs

18. Plaintiffs, Intervenor, and the State Defendant shall each pay their own attorneys' fees and costs and expert witness fees and costs, and the Plaintiffs, Intervenor, and State Defendant agree that neither shall be entitled to nor shall they seek from the Court any payment for any such fees and/or costs from the other.

Miscellaneous

19. No Admissions. By entering into this Settlement Agreement, the State Defendant does not admit that the enforcement of the striped bass sport fishing regulation constitutes a take of any species listed as endangered or threatened under the federal Endangered Species Act or the California Endangered Species Act, for which authorization is required, or that it constitutes any violation of any federal or state law or policy, including the Public Trust Doctrine. The Plaintiffs do not admit that the proposed Regulatory Proposal, or any regulatory proposal ultimately adopted by the Commission

modifying the striped bass regulation, will absolve the State Defendant or DFG of their obligation to obtain incidental take authorization from NOAA Fisheries and USFWS.

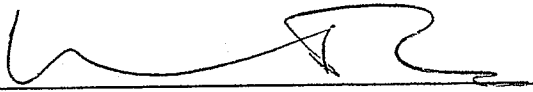
20. Authority. Each of the Parties represents that: (1) it has the authority to execute and enter into this Settlement Agreement; (2) the individual executing this Settlement Agreement on behalf of the Party has the authority and has been specifically authorized to execute and deliver this Settlement Agreement on behalf of such Party; (3) the Party is authorized to implement this Settlement Agreement, without further action by the Party or its governing body, board of directors, or any other person or entity, as the case may be; and (4) the execution and entry into this Settlement Agreement and the implementation of its terms by the Party is not in violation of any applicable law or any other contract or agreement by which it is bound or to which it is a party.
21. Successors and Assigns. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, legal representatives, successors and assigns. No Party may assign its rights under this Settlement Agreement without the prior written consent of the other parties.
22. Governance. This Settlement Agreement shall be construed under and enforced in accordance with the substantive laws of the State of California.
23. Mutual Preparation. The Parties each cooperated in the drafting and preparation of this Settlement Agreement and the language of all parts of this Settlement Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any party as the drafter thereof.
24. Severability. If any provision, or any part of any provision, of this Settlement Agreement is found to be invalid, unenforceable, or contrary to any public policy or law, the remainder of the Settlement Agreement shall not be affected thereby and shall remain valid and fully enforceable. Notwithstanding the above, in the event that a provision or any part of a provision that is found to be invalid, unenforceable or contrary to public law or policy goes to the essence of the Settlement Agreement, thereby depriving a Party or Parties to the benefit of their bargain, the entire Settlement Agreement shall be deemed void and unenforceable.
25. No representations or warranties. Each Party represents and declares that in executing this Settlement Agreement, it has relied solely upon its own judgment, belief and knowledge, and on the advice and recommendations of its independently selected counsel, concerning the nature, extent and duration of its rights and claims and that it has not been influenced to any extent whatsoever in executing the same by any representations or statements covering any matters made by any of the Parties or by any person representing them or any of them. Each Party acknowledges that no other Party nor any of their representatives has made any promise, representation, or warranty whatsoever, written or oral, as any inducement to enter into this Settlement Agreement, except as expressly set forth in this Settlement Agreement.

whatsoever, written or oral, as any inducement to enter into this Settlement Agreement, except as expressly set forth in this Settlement Agreement.

26. Not Binding on Non-Parties. This Settlement Agreement is not intended to, nor shall it (1) bind any non-party persons or entities as to any claims or defenses they may otherwise now or in the future hold, or (2) waive any claims or defenses any party hereto may have now or in the future against any non-parties.
27. Voluntary and Knowing. Each Party represents and warrants that it has thoroughly read and considered all aspects of this Settlement Agreement, that it understands all provisions of this Settlement Agreement, that it has had the opportunity to consult with counsel throughout this process, and that it is voluntarily entering into this Settlement Agreement, without duress or coercion of any kind.
28. Independent Investigation. Each Party has made such investigation of the facts pertaining to this Settlement and this Settlement Agreement and of all matters pertaining thereto as it deems necessary.
29. Counterparts. This Settlement Agreement may be executed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement, provided each signing party shall have received a copy of the signature page of each other party.
30. Entirety of Agreement; No Amendment. This Settlement Agreement sets forth the entire agreement among the Parties and supersedes all prior oral or written agreements, negotiations, discussions, or understandings concerning the subject matter hereof. The terms of this Settlement Agreement may not be altered, amended, waived or modified, except by a further written agreement signed by all parties hereto.
31. Additional Documents. The Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement.
32. Effective Date: This Settlement Agreement shall become effective, and the dates set forth herein shall be calculated from, the date an order approving it issues from the Court.

Date: 2-7-11.

COALITION FOR A SUSTAINABLE DELTA

By: 

William D. Phillimore

Date: _____

BERRENDA MESA WATER DISTRICT

By: _____

Greg A. Hammett

Date: _____

LOST HILLS WATER DISTRICT

By: _____

Philip D. Nixon

Date: 2-4-2011

WHEELER RIDGE-MARICOPA WATER
STORAGE DISTRICT

By: Robert J. Kunde

Robert J. Kunde

Date: _____

CLIFFORD D. "DEE" DILLON

Date: _____

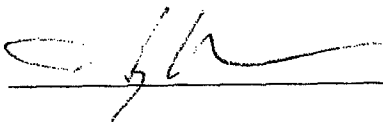
JOHN McCAMMAN, DIRECTOR, CALIFORNIA
DEPARTMENT OF FISH AND GAME

By: _____

Date: _____

BELRIDGE WATER STORAGE DISTRICT

By: _____

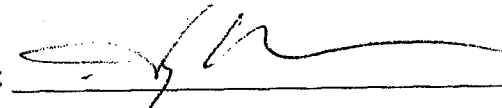


Greg A. Hammett

Date: _____

BERRENDA MESA WATER DISTRICT

By: _____

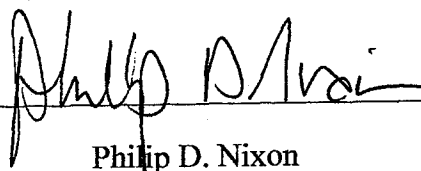


Greg A. Hammett

Date: _____

LOST HILLS WATER DISTRICT

By: _____



Philip D. Nixon

Date: _____

WHEELER RIDGE-MARICOPA WATER
STORAGE DISTRICT

By: _____

Robert J. Kunde

Date: _____

CLIFFORD D. "DEE" DILLON

Date: _____

BELRIDGE WATER STORAGE DISTRICT

By: _____

Greg A. Hammett

Date: _____

BERRENDA MESA WATER DISTRICT

By: _____

Greg A. Hammett

Date: _____

LOST HILLS WATER DISTRICT

By: _____

Philip D. Nixon

Date: _____

WHEELER RIDGE-MARICOPA WATER
STORAGE DISTRICT

By: _____

Robert J. Kunde

Date: Jan. 12, 2011

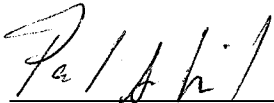
CLIFFORD D. "DEE" DILLON

_____

APPROVED AS TO FORM:

Date: 2/8/2011

NOSSAMAN LLP

By: 
Paul S. Weiland

Attorneys for Plaintiffs
Coalition for a Sustainable Delta, Belridge
Water Storage District, Berrenda Mesa Water
District, Lost Hills Water District, Wheeler
Ridge-Maricopa Water Storage District, and
Dee Dillon

Date: _____

KAMALA D. HARRIS
Attorney General of the State of California

By: _____
Clifford T. Lee, Deputy Attorney General

Attorneys for the State Defendant

APPROVED AS TO THE CONFIDENTIALITY PROVISIONS SET FORTH IN SECTION 16:

Date: _____

CENTRAL DELTA WATER AGENCY, SOUTH
DELTA WATER AGENCY, HONKER CUT
MARINE, INC., RUDY MUSSI, AND ROBERT
SOUZA, SR.

By: _____

[Name and title]

Date: _____

CALIFORNIA SPORTFISHING PROTECTION
ALLIANCE, CALIFORNIA STRIPED BASS
ASSOCIATION, AND NORTHERN
CALIFORNIA COUNCIL OF THE FEDERATION
OF FLYFISHERS

By: _____

[Name and title]

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