

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

CALIFORNIA FARM BUREAU  
FEDERATION, a California non-profit  
corporation; TED SHEELY, an individual  
farmer,

Plaintiffs,

vs.

ANNE BADGLEY, in her official capacity as  
Regional Director of the United States Fish and  
Wildlife Service, Region 1, *et al.*,

Defendants,

and,

NATURAL RESOURCES DEFENSE  
COUNCIL, *et al.*,

Intervenor-Defendants.

Case No. 1:02CV02328 RCL ECF

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO REOPEN LITIGATION AND  
SCHEDULE A STATUS CONFERENCE**

Plaintiffs filed their initial Complaint on November 22, 2002, and Defendants filed their Answer on January 27, 2003. Plaintiffs now seek to reopen this litigation and schedule a status conference because further judicial action needs to be taken in light of the U.S. Fish and Wildlife Service's ("Service") completed, signed delta smelt status review ("Final Review").

On June 13, 2003, this Court entered a minute order terminating this litigation on the Court's active docket because of the approved stipulated settlement agreement ("Settlement Agreement") entered into by Plaintiffs and Defendants. The minute order states that this litigation is subject to reopening if additional judicial action becomes necessary. In light of the Service's completion of the Final Review, and pursuant to ¶ 3 of the Settlement Agreement, Plaintiffs respectfully request that this Court grant their motion.

Effective April 5, 1993, the United States Fish and Wildlife Service ("Service") listed the delta smelt (*Hypomesus transpacificus*) as threatened under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* (hereinafter "ESA"). The ESA requires the Service to conduct, at least once every five years, a review of each species listed as threatened or endangered. 16 U.S.C. § 1533(c)(2)(A); 50 C.F.R. § 424.21. The purpose of the mandatory five-year status review is to determine if the listed species should either be removed from the list altogether or be changed in status from either endangered to threatened or threatened to endangered. 16 U.S.C. § 1533(c)(2)(B) – (B)(iii); *See also* 50 C.F.R. § 424.21.

Although the delta smelt was listed as threatened in 1993 (58 Fed. Reg. 12854 (March 5, 1993)), the Service did not complete a status review of this species until Plaintiffs filed this action. As a result of Plaintiffs' complaint, Plaintiffs and Defendants entered into a Settlement Agreement on April 25, 2003, requiring the Service to complete a status review of the delta smelt listing by March 1, 2004. The Settlement Agreement also requested the Court to schedule a

status conference upon completion of the status review "to address the scope of and schedule for any further proceedings in this litigation." Agreement at ¶ 3. The Court approved the Settlement Agreement on June 13, 2003.

On March 5, 2004, Defendants moved to amend the Settlement Agreement to extend the deadline for completion of the delta smelt status review, set forth in ¶ 1(b) of the Settlement Agreement, by thirty days, thereby making the date for completion of the status review March 31, 2004. On March 19, 2004, the Court granted Defendants' motion to amend the Settlement Agreement.

Mr. Steve Thompson, Manager of the Service's California/Nevada Operations Office, sent Plaintiffs a letter dated March 31, 2004 ("Transmittal Letter") summarizing the results of the delta smelt status review. The Final Review was attached to the Transmittal Letter. These documents have been attached as Exhibits 1 and 2 to Plaintiffs' First Supplemental Complaint. The Transmittal Letter acknowledged that "some of the original recovery criteria are outdated and in need of revision." Exh. 1 to Plaintiffs' First Supplemental Complaint at 2. Based on the Transmittal Letter, Plaintiffs anticipate that the Service will begin the process of updating the recovery criteria. In light of this potential development, Plaintiffs do not yet know whether further judicial action is necessary to address the second and third counts of the original Complaint. While the Service appears to be willing to revisit the recovery criteria, it has not committed to any specific process or timelines for revising them. Therefore, additional litigation may be necessary.

On April 1, 2004, Brenda Jahns Southwick, Managing Counsel for Plaintiff Farm Bureau, was made aware of potential problems with and misrepresentations in both the Transmittal Letter and the Final Review. As discussed more fully in Plaintiffs' Motion to File First Supplemental



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**[PROPOSED] ORDER**

In consideration of Plaintiffs' Motion to Reopen and Schedule A Status Conference, and any opposition thereto,

IT IS ORDERED that Plaintiffs' Motion to Reopen and Schedule a Status Conference is GRANTED. A status conference will be scheduled by the Court.

IT IS SO ORDERED

DATED this \_\_\_ day of \_\_\_\_\_, 2004

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United States District Court Judge

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**PLAINTIFFS' MOTION TO REOPEN LITIGATION  
AND SCHEDULE A STATUS CONFERENCE**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

The California Farm Bureau Federation and Ted Sheely ("Plaintiffs") hereby move the Court to reopen the above-captioned litigation to take additional judicial action as contemplated in the Court's June 13, 2003 Minute Order denying the Motions For Partial Summary Judgment and to Transfer Case. By this Motion Plaintiffs request that the Court put this case back on the active docket and schedule the status conference contemplated by ¶ 3 of the Stipulated Settlement Agreement and Order Regarding 5-Year Review of Delta Smelt. This Motion is supported by the accompanying Memorandum of Points and Authorities.

Pursuant to Local Civil Rule 7(m), Plaintiffs' counsel contacted Defendants' and Intervenor's Counsel to discuss this motion; Defendants' counsel stated that Defendants do not oppose the motion and Intervenor's Counsel stated that Intervenor reserve their opinion on the motion pending a review of it.

Dated: May 19, 2004

Respectfully submitted,

/s/

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