IGNACIA S. MORENO, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
KRISTEN L. GUSTAFSON, Assistant Section Chief
LAWSON E. FITE, Trial Attorney, Ore. Bar No. 055573
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, DC 20044-7369
Phone: (202) 305-0217
Fax: (202) 305-0275
Email: lawson.fite@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE OTTER PROJECT and ENVIRONMENTAL DEFENSE CENTER,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the United States Department of the Interior, ROWAN GOULD, Acting Director of the U.S. Fish & Wildlife Service, UNITED STATES DEPARTMENT OF THE INTERIOR, UNITED STATES FISH & WILDLIFE SERVICE,

Defendants.

No. C 09-4610 JW

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT [Doc. No. 32]

Date: March 22, 2010
Time: 9:00 a.m.
Ctrm: 8, 4th Floor

The Honorable James Ware

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I. INTRODUCTION

In their opening brief, Federal Defendants Ken Salazar, Rowan Gould,[1] the U.S. Department of the Interior, and the U.S. Fish & Wildlife Service (collectively "FWS" or "Service"), demonstrated that this case should be dismissed because it seeks to compel the performance of duties that are not legally required. As such, this Court does not have jurisdiction under Section 706(1) of the Administrative Procedure Act. Specifically, the Service does not have a duty to amend its regulations for the translocation of southern sea otters because no such duty has been triggered by a determination on the success of the translocation program, and because a duty cannot otherwise be inferred from regulation or statute. Federal Defendants herein respond to Plaintiffs' Opposition (Doc. No. 35, Mar. 1, 2010) ("Pls.' Opp.).

Plaintiffs make three main arguments against dismissal. First they state that the plain text of the translocation regulations imposes a mandatory duty for the Service to evaluate the sea otter translocation program and make a determination whether the program has failed. As the Service previously demonstrated, the regulations' text cannot plausibly be read in the way Plaintiffs suggest. Second, Plaintiffs argue that even if the Service is right about the text of the regulations, then the Service has imposed a duty on itself by preparing various drafts of a failure determination. This argument fails because the Service has no duty to complete these drafts; indeed, Plaintiffs have not identified where such a duty could come from. Third, Plaintiffs argue that the Service must act because the structure of the ESA and of Public Law 99-625 compels it to do so. This argument should be rejected because it seeks to divine a host of commands from legislative silence.

The Service's opening brief also argued that Plaintiffs could not establish Article III standing as a matter of law, even taking the allegations in the First Amended Complaint ("FAC") as true, in light of the Service's suspension of any containment of sea otters. The Service

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[1] FWS director Sam Hamilton passed away on February 20, 2010. Acting Director Rowan Gould is substituted as a defendant pursuant to Fed. R. Civ. P. 25(d).

specifically noted that the FAC did not even allege that there were activities that would potentially injure sea otters in the management zone established by the translocation regulations. Plaintiffs have submitted declarations with their opposition that do make such allegations, and so the Service withdraws its standing argument at this stage of the litigation. The Service reserves the right to test Plaintiffs' standing allegations and to dispute Plaintiffs' standing at the summary-judgment stage, if appropriate.

II. ARGUMENT

A. The Translocation Regulations Do Not Require the Service to Evaluate the Translocation or to Make a Failure Determination.

As the Service previously demonstrated, the plain text of the regulations does not impose a duty on the Service either to evaluate the translocation program or to make a determination whether the program is a failure. The key portions of the regulation state that "[i]f, based on any one of these [failure] criteria, the Service concludes . . . that the translocation has failed to produce a viable, contained experimental population, this rulemaking will be amended to terminate the experimental population . . . ." 50 C.F.R. § 17.84(d)(8)(vi).[2] The regulations further state that the translocation program "would generally be considered to have failed" if any of the failure criteria occur and note that "[p]rior to declaring the translocation a failure, a full evaluation will be conducted into the probable causes of the failure" and "if the causes can be determined … consideration will be given to continuing [the translocation program]." 50 C.F.R. §§ 17.84(d)(8), (d)(8)(viii).

Nothing in the plain text of the regulations requires the Service to conduct an evaluation of the program in the first instance. The text states only that an evaluation will be conducted "prior" to a failure determination. Thus an evaluation is merely a prerequisite for a failure

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[2] Plaintiffs state, incorrectly, that the translocation regulations were promulgated under both ESA Section 10(j) and Public Law 99-625. Pls.' Opp. at 5. The Service promulgated the regulations only under Pub. L. 99-625. See 52 Fed. Reg. 29,754 (Aug. 11, 1987) ("This experimental population will be established and managed under the guidelines of Pub. L. 99-625, 100 Stat. 3500 (1986)").

determination. Plaintiffs cannot point to any language that requires the Service to undertake such an evaluation. See Pls.' Opp. at 15. Because a duty to undertake an evaluation undergirds all of Plaintiffs' allegations, the lack of such a duty is fatal to the Complaint and should lead the Court to grant the motion to dismiss. Because there is no duty to conduct, or initiate, an evaluation of the program, then there can be no duty to complete such an evaluation or to issue a determination on whether the program has failed.

Nor does the text of the regulation support Plaintiffs' contention that the Service has a required duty to make a failure determination. Plaintiffs' allegation is based almost entirely on the regulations' provision that the program "would generally be considered to have failed if one or more of the following conditions exist." 50 C.F.R. § 17.84(d)(8); Pls.' Opp. at 15. Plaintiffs' apparent argument is that "would generally be considered" creates an affirmative duty on the part of the Service because it uses a form of the word "will." Id. at 16-17. This cannot be a plausible reading of the regulation. "Would" is a conditional form of "will," not a command or an imperative.

Indeed, as the Service demonstrated in its motion to dismiss the FAC, this provision merely outlines general criteria to be applied in evaluating whether the program has failed; it cannot reasonably be read to require that evaluation. The only duty "would" can be plausibly read to impose on the Service is the "duty" to refer to the criteria in concluding whether the translocation has failed – in the event the Service undertakes an evaluation. As Plaintiffs acknowledge, Pls.' Opp. at 14, the regulation does not require one result or the other of such an evaluation. Statements in the regulations that the translocation "would generally be considered to have failed," 50 C.F.R. § 17.84(d)(8)(i) (emphasis added) and "if the causes can be determined … consideration will be given to continuing [the translocation program]," 50 C.F.R. § 17.84(d)(8)(vii), provide the Service with broad discretion to continue the program even if it undertakes an evaluation and even if it determines that one or more of the failure criteria have been met. From their start, the regulations make explicit that a decision on whether to make a

failure determination is entirely up to the Service, as Section 17.84(d)(8) states that the regulations will be amended only "[i]f" the Service concludes that the program is a failure.

Plaintiffs contend that "if" is merely a "condition precedent" to amending the regulations, and does not indicate that the Service has discretion on whether to make a determination of the program's success or failure. Pls.' Opp. at 17-18. But "if," like "would," is a conditional word, and thus cannot establish a requirement. Plaintiffs cannot point to anywhere else in the regulations that could show that the Service has an enforceable duty to make such a determination. Thus this Court should decline to construct a duty from whole cloth.

Moreover, even in their reading of the translocation regulations, Plaintiffs concede that any arguable duty to change the regulations has not been triggered because the Service has not made a determination that the program is a failure. Pls.' Opp. at 17; FAC, ¶¶ 1, 8, 12. The only uses of "will" in the regulations come after such a determination is made. 50 C.F.R. §§ 17.84(d)(8)(vii), (viii) Thus, even accepting Plaintiffs' argument that "will" is mandatory in these regulations, such a duty has not been triggered, and cannot be compelled. San Francisco BayKeeper v. Whitman, 297 F.3d 877, 885-86 (9th Cir. 2002). Because "will" only comes into play once the Service makes a failure determination, Plaintiffs' insistence that "will" is mandatory here is beside the point and cannot prevent their case from being dismissed.

B. Even if the Service Had Made a Failure Determination, It Would Not Be Required to Amend the Translocation Regulations.

Even if the Service had made a failure determination, and therefore triggered the "will" statements in the regulations, these statements in the regulations are permissive, not mandatory. As Plaintiffs acknowledge, words should be construed according to their ordinary meaning. See, e.g., Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 698 (9th Cir. 2004). "Will" can be either mandatory, in the sense of a command such as "you will do X," or just an expression or prediction of the intention, as in "if X happens, the regulation will be amended." In Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 72 (2004), the Supreme Court held that "'will do' projections of agency action set forth in land use plans . . . are not a

legally binding commitment enforceable under § 706(1)." Similarly, here the regulations' statement that this or that action "will" be taken is not a legally binding commitment.

Plaintiffs attempt to differentiate this case from SUWA by arguing that a land use plan is different from a regulation. Pls.' Opp. at 15, 17. While this argument is superficially plausible, it ignores the statutory scheme that was before the Supreme Court in SUWA. There, the statute (the Federal Land Policy & Management Act, "FLPMA") and regulations stated that "[t]he Secretary shall manage the public lands in accordance with land use plans" and that "[a]ll future resource management authorizations and actions ... shall conform to the approved plan"). 542 U.S. at 67 (quoting 43 U.S.C. § 1732a and 43 C.F.R. § 1610.5-3(a)) (emphasis, second bracket, and ellipsis added). Thus, the land use plan – if its text established a duty – had the force of law, just as the regulations have the force of law here. Accordingly SUWA's interpretation of "will" as a "projection[] of agency action," rather than an imposition of a duty, is applicable here. Accord Silver Dollar Grazing Ass'n v. FWS, No. 07-35612, 2009 WL 166924 at *3 (9th Cir. Jan. 13, 2009).

Plaintiffs also attempt to distinguish SUWA by stating that the Supreme Court explicitly declined to decide whether a court could enforce a duty that was imposed by regulation. Pls.' Opp. at 16. While this statement is accurate, it misses what the Court actually declined to decide, which was the discreteness of the cited regulation and the purported duty. The issue in the present case is not discreteness of the regulation but whether the regulation imposes any required action. Plaintiffs' argument would essentially confine SUWA's holding to documents that are neither statutes nor regulations. This flatly contradicts SUWA's central statement that "[t]he limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law)." 542 U.S. at 65.

Even where statutes or regulations say "shall," which is a stronger word than "will," that does not necessarily mean the provisions are mandatory. The Ninth Circuit held in Sierra Club v. Whitman, 268 F.3d 898, 904 (9th Cir. 2001), that "the use of 'shall' is not conclusive. …

Particularly when used in a statute that prospectively affects government action, 'shall' is sometimes the equivalent of 'may.'" Accord Trout Unlimited v. Lohn, 559 F.3d 946, 962 n.12 (9th Cir. 2009); Our Children's Earth Found. v. EPA, 527 F.3d 842, 851 (9th Cir. 2008). Thus Plaintiffs have a heightened burden where—as here—the regulations do not say "shall." Plaintiffs argue that this caselaw is inapplicable because it construed statutory non-discretionary duty provisions rather than Section 706(1). Pls.' Opp. at 16 n. 10. This argument is undercut by the Ninth Circuit's decision in Coos County Bd. of Comm'rs v. Kempthorne, 531 F.3d 792, 810 (9th Cir. 2008), which found a Section 706(1) claim to be the same as, and thus precluded by, an ESA citizen-suit claim when each claim sought performance of the same duty. The court undertook the same analysis under both the APA and the ESA citizen-suit provision, 16 U.S.C. § 1540(g), to determine whether the action was required, Id. at 810-11. Thus, caselaw finding that an agency did not have a "nondiscretionary duty" under the ESA is applicable to determining whether an action is "required" as defined in the APA.

Nor do Plaintiffs gain purchase by reference to two post-SUWA district court cases, Pls.' Opp. at 16, for the proposition that "will" necessarily means "must." In Wieler v. United States, 364 F. Supp. 2d 1057, 1062-63 (D. Alaska 2005), the regulatory structure focused on a regulation that stated that an answer to a challenge to a decision of the Interior Board of Land Appeals ("IBLA") "must be filed" within 30 days of filing of the complaint. 43 C.F.R. § 4.450-6 (emphasis added). The regulations further stated that if an answer was not timely filed, "the allegations of the complaint will be taken as admitted . . . ." 43 C.F.R. § 4.450-7(a). The court upheld treatment of both regulations as mandatory. 364 F. Supp. 2d at 1063. By contrast, here there is no categorical statement that any initial action "must" be taken. And the court in Wieler did not hold that the "will" regulation was necessarily mandatory—instead it upheld the IBLA's longstanding interpretation of the regulations, set forth in formal adjudications (each of which had the force of law) in light of established deferential principles. Thus, at most Wieler demonstrates that a "will" that is piled on top of a "must" could be considered mandatory. "Will" alone is not enough.

Plaintiffs' reliance on Arroyo Vista Tenants Ass'n v. City of Dublin, No. C 07-5794 MHP, 2008 WL 2338231 (N.D. Cal. May 23, 2008), is equally faulty. Pls.' Opp. at 16. In Arroyo Vista, the statute at issue, 42 U.S.C. § 1437p, provided that the U.S. Department of Housing & Urban Development "shall" approve an application for demolition of a housing project if the agency "certifies" that it "will" take certain actions. 2008 WL 2338231 at *4. The Court found that this certification process created mandatory duties, in part based on the use of "will." Id. at *13. Just like in Wieler, however, the "will" had a counterpart—the required certification. Thus had the statute stated that the actions "will" be performed, in the absence of any other requirements, it would not have created any obligation. Such is the case here.

C. The Service Has Not Imposed Any Duty Upon Itself.

As a fallback argument, Plaintiffs allege that the Service has imposed a duty on itself by "public statements of its intent to comply with that duty." Pls.' Opp. at 20. Plaintiffs cite to no authority that an agency may bind itself absent an underlying statutory or regulatory command. In both SUWA and the dicta cited in Soda Mountains Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1260 (E.D. Cal. 2006), the underlying statute—FLPMA—required that BLM act "in accordance with" its land use plans. There is no such requirement here. There can be no unreasonable delay or unlawful withholding of action that is not required.[3]

Moreover, Plaintiffs oversell the FWS's statements. First, Plaintiffs cite FWS's statements in the Federal Register notice that the criteria would be "critical to whether or not the experimental population . . . would have to be terminated." Pls.' Opp. at 20; 52 Fed. Reg. at 29,764. As the Service showed in its opening brief, this language is too roundabout to impose a mandatory duty. At most, it shows that the Service viewed the failure criteria as very important to the analysis, should it undertake one, of the translocation program. Plaintiffs also ignore the Service's response to Comment 25, where the Service noted that "[t]here must be flexibility to

[3] To the extent Plaintiffs intend to rely on APA Section 555(b), 5 U.S.C. § 555(b), that provision, which requires agencies to conclude matters "presented" to them within a reasonable time, does not apply. There is no matter presented to the Service as contemplated by Section 555(b).

deal with problems, if they arise." 52 Fed. Reg. at 29,762. Plaintiffs further quote certain Service statements reflecting its intent to evaluate the translocation program. Pls.' Opp. at 21. These statements say only that the Service "expects" or "anticipates" taking further action.[4] As such, they do not rise to the level of a "clear statement" that SUWA held is required for an agency to bind itself. As described above, the regulation clearly does not require any action to be taken at least until the Service has issued a failure determination. Thus, even if the Service had viewed the regulations as mandatory, which it clearly did not, such intent is not relevant under the Ninth Circuit's command that a court is "justified in considering administrative intent only if the regulation is ambiguous." El Comité Para El Bienestar de Earlimart v. Warmerdam, 539 F.3d 1062, 1072 (9th Cir. 2008).

D. Neither the ESA Nor Public Law 99-625 Requires the Service to Make a Failure Determination.

In a final attempt to rewrite the regulations here, Plaintiffs allege that the purposes of the ESA require that they be able to state a 706(1) claim. This assertion has no basis. First, a general statutory purpose is no substitute for the "specific statutory command" required by SUWA and its Ninth Circuit progeny. Second, Public Law 99-625, which is the exclusive authority for the translocation program, specifically details how the ESA is to apply to the translocation program, and thus the Service's actions in faithfully administering the special law

[4] Plaintiffs allege that the United States District Court for the Central District of California "explicitly relied" upon statements in a 2001 status report "in granting a voluntary dismissal of the case." Pls.' Opp. at 21 & Exh. H. Plaintiffs are incorrect. The parties to Commercial Fishermen of Santa Barbara v. Babbitt stipulated to dismissal of the case without prejudice pursuant to Fed. R. Civ. P. 41(a), and the court's approval of that stipulation relied only on the fact that the parties agreed to dismiss the case. No. 2:00-cv-04286-MMM (CWx), Doc. No. 51 (C.D. Cal. July 20, 2001) (attached hereto as Exhibit D to the Declaration of Lawson E. Fite) ("for the reasons set forth in the July 16, 2001 status report, the parties agree to stipulate to dismiss the action.") (emphasis added); id., Doc. No. 52 (July 31, 2001) (stipulation and order of dismissal without prejudice, attached as Exhibit E to the Fite Declaration).

cannot be considered inconsistent with the ESA.[5] As Plaintiffs acknowledge, the special law authorizes—but does not require—action on an experimental sea otter population. Furthermore, the Service has fastidiously complied with ESA Section 7 by suspending the containment portion of the translocation program when that portion was determined to jeopardize the continued existence of the species.

The translocation program was specifically authorized to further the recovery of the Southern Sea otter by facilitating the establishment of a second population far removed from the potential threats to the parent population. As the regulations make clear, the translocation is an experimental recovery action filled with expectations. Many of those expectations have yet to be fulfilled; the sea otter population at San Nicolas Island has not reached its anticipated population level, though it continues to reproduce and to expand slowly. Defs.' Exh. B at 2, Doc. No. 32-3 (stating that the experimental population numbered 42 in 2008 and was growing at an annual rate of 9%). Given the uncertainties inherent in carrying out the translocation, the Service carefully tailored the regulations so that they provide it with maximum flexibility in administering the program and deciding whether it should be terminated. 52 Fed. Reg. at 29,762 (stating that "[t]here must be flexibility to deal with problems, if they arise.") Thus, as shown above, the regulations do not mandate the Service conduct a failure evaluation in the first instance; they do not require the Service to find the program has failed even if one of the failure criteria have been met ("the program would generally be considered to have failed," 50 C.F.R. § 17.84(d)(8)). The regulations grant the Service discretion to consider continuation of the program—even in the event it finds the program has failed—if "legal and reasonable remedial measures" can be put in place. 50 C.F.R. § 17.84(d)(8)(vii). The structure of the regulations, which reflect the experimental nature of the translocation program, appropriately vest in the Service the discretion to continue to implement the program until and unless it concludes that the translocation has

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[5] Public Law 99-625, which authorized the development of the translocation plan as a means of furthering the recovery of the Southern Sea Otter, does not include a requirement that the Service make a failure determination.

failed to meet its recovery objective—to produce a viable, contained experimental population at San Nicolas Island. Thus this Court should find that it lacks jurisdiction over the instant action and dismiss Plaintiffs' FAC. As the Service previously stated, moreover, Plaintiffs are not without a remedy if the Service's motion is granted. At any time, they may file a petition to amend the translocation regulations under 5 U.S.C. § 553 which could obviate the need for this litigation.

E. The Service Reserves the Right to Challenge Plaintiffs' Standing In the Event the Case Proceeds to Summary Judgment.

In its opening brief, the Service established that the allegations in the Complaint—even taken as true—could not establish standing. This was because the allegations did not assert any actual harm to the species that would potentially be ameliorated by a change in the translocation regulations. With their opposition, Plaintiffs have filed four declarations which they claim establish their standing. Pls.' Opp. at 23-24. These affidavits include statements alleging specific projects and/or activities within the management zone that could negatively affect sea otters. Decl. of Steven Shimek, Doc. No. 35-10, ¶¶ 18-19; Decl. of Allison Ford, Doc. No. 35-12, ¶¶ 18-19. Although these statements were not fairly encompassed by the Complaint, they are likely sufficient to satisfy the relatively low standing bar at this stage of the litigation.

In the event that the case continues, however, the Court should require Plaintiffs to move for leave to amend to add allegations consistent with the affidavits. The Service also reserves the right to test Plaintiffs' standing allegations and to challenge Plaintiffs' standing in the event the case reaches summary judgment. The Service is especially concerned about the credibility of certain allegations that appear to be hearsay, and thus inadmissible under Fed. R. Evid. 802 & 805. See, e.g., Shimek Decl., ¶¶ 14-17; Decl. of Edward Cassano, Doc. No. 35-11, ¶ 7.

III. CONCLUSION

Because the regulations at issue here do not create a duty to evaluate the sea otter translocation program, to make a determination that the program has failed, or to initiate rulemaking, Plaintiffs' suit seeks to compel agency action that is not required. Additionally, any

regulatory action that would arguably be required has not been triggered because the Service has not made a determination that the program has failed. Accordingly, Plaintiffs fail to state a claim under Section 706(1) of the APA and their lawsuit should be dismissed.

Dated: March 8, 2010

Respectfully Submitted,

IGNACIA S. MORENO, Asst. Attorney General
JEAN E. WILLIAMS, Section Chief
KRISTEN L. GUSTAFSON, Asst. Section Chief

/s/ Lawson E. Fite

LAWSON E. FITE, Trial Attorney
Oregon Bar No. 055573
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, DC 20044-7369
Phone: (202) 305-0217
Fax: (202) 305-0275
Email: lawson.fite@usdoj.gov

Attorneys for Federal Defendants

Of Counsel:
Lynn Cox
United States Department of the Interior
Office of the Regional Solicitor
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE OTTER PROJECT, et al.,

Plaintiffs,

v.

KEN SALAZAR, et al.,

Defendants.

No. C 09-4610 JW

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2010, I electronically filed the foregoing REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT and DECLARATION OF LAWSON E. FITE AND EXHIBITS D-E THERETO with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Lawson E. Fite

LAWSON E. FITE

IGNACIA S. MORENO, Assistant Attorney General
JEAN E. WILLIAMS, Section Chief
KRISTEN L. GUSTAFSON, Assistant Section Chief
LAWSON E. FITE, Trial Attorney, Ore. Bar No. 055573
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
Ben Franklin Station
P.O. Box 7369
Washington, DC 20044-7369
Phone: (202) 305-0217
Fax: (202) 305-0275
Email: lawson.fite@usdoj.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE OTTER PROJECT, et al. Plaintiffs, v. KEN SALAZAR, et al., Defendants.	No. C 09-4610 JW **DECLARATION OF LAWSON E. FITE IN SUPPORT OF FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

I, Lawson E. Fite, hereby declare:

1. I am an attorney in good standing of the bar of the State of Oregon, and I am employed as a trial attorney with the United States Department of Justice, Environment and Natural Resources Division, Wildlife and Marine Resources Section. I am one of the attorneys of

record assigned to represent the Federal Defendants in this action. I submit this declaration in support of Federal Defendants' Reply in Support of their Motion to Dismiss the First Amended Complaint for lack of subject matter jurisdiction.

2. Attached hereto as **Exhibit D** is a true and correct copy of the civil minutes of the July 20, 2001 status conference in Commercial Fishermen of Santa Barbara, Inc. v. Babbitt, No. 2:00-cv-04286-MMM (CWx), Doc. No. 51 (C.D. Cal. July 20, 2001).
3. Attached hereto as **Exhibit E** is a true and correct copy of the stipulation and order of dismissal without prejudice in Commercial Fishermen of Santa Barbara, Inc. v. Babbitt, No. 2:00-cv-04286-MMM (CWx), Doc. No. 52 (C.D. Cal. July 30, 2001).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 8th day of March, 2010, at Washington, D.C.

/s/ Lawson E. Fite

LAWSON E. FITE

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SEND

CIVIL MINUTES - GENERAL

Case No.: CV 00-04286 MMM (CWx) Date: July 20, 2001

Title: *Commercial Fishermen of Santa Barbara, Inc. et al. v. Bruce Babbitt et al.*

DOCKET ENTRY

PRESENT:

HONORABLE MARGARET M. MORROW, UNITED STATES DISTRICT JUDGE

Anel Huerta	**David Salyer**
Deputy Clerk	**Court Reporter:**
Attorneys Present for Plaintiff:	**Attorneys Present for Defendants:**
Jeffrey Young	David Pinchas Donald Mooney

PROCEEDINGS: Telephone Status Conference

Telephone status conference is held and counsel are present. For the reasons set forth in the parties' July 16, 2001 supplemental joint status report, the parties agree to stipulate to dismiss the action. The court directs the parties to submit an appropriate stipulation and proposed order re dismissal without prejudice by July 30, 2001. In light of the impending dismissal and by stipulation of all counsel, the U.S. Fish and Wildlife Service is relieved of its obligation to prepare the administrative record.

Initials of Deputy Clerk AH

cc: Counsel of record (or parties)

EXHIBIT E

JOHN S. GORDON
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division
DAVID PINCHAS C.S.B. # 130751
Assistant United States Attorney
Room 7516 Federal Building
300 North Los Angeles Street
Los Angeles, California 90012
Telephone: (213) 894-2920
Fax Number: (213) 894-7819

Attorneys for Defendants

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

COMMERCIAL FISHERMEN OF SANTA BARBARA et al., Plaintiffs, v. BRUCE BABBITT, Secretary, of the Department of the Interior, et al., Defendants.	NO. CV 00-4286 MMM (CWx) STIPULATION RE DISMISSAL OF ACTION WITHOUT PREJUDICE AND ~~[proposed]~~ ORDER THEREON

Pursuant to Federal Rule of Civil Procedure 41(a), the parties to this action, by and through their respective attorneys of record, hereby stipulate that this action should

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//

//

be dismissed without prejudice. Each party herein shall bear its own attorneys fees and costs.

DATED: , 2001

LAW OFFICES OF JEFFREY S. YOUNG

JEFFREY S. YOUNG
Attorneys for Plaintiffs

DATED: 7.27 2001

JOHN S. GORDON
United States Attorney

DAVID E. PINCHAS
Assistant United States Attorney
Attorneys for Defendants
Bruce Babbitt and Jamie R. Clark

DATED , 2001

SOMACH, SIMMONS & DUNN

STUART L. SOMACH
Attorney for Intervenors

DATED , 2001

PERKINS COIE

DONALD BAUR
Attorney for Intervenors

DATED: , 2001

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Attorneys for Intervenors

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DATED: 7/23, 2001

LAW OFFICES OF JEFFREY S. YOUNG

JEFFREY S. YOUNG
Attorneys for Plaintiffs

DATED: , 2001

JOHN S. GORDON
United States Attorney

DAVID E. PINCHAS
Assistant United States Attorney
Attorneys for Defendants
Bruce Babbitt and Jamie R. Clark

DATED , 2001

SOMACH, SIMMONS & DUNN

STUART L. SOMACH
Attorney for Intervenors

DATED , 2001

PERKINS COIE

DONALD BAUR
Attorney for Intervenors

DATED: , 2001

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Attorneys for Intervenors

3

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DATED: , 2001

LAW OFFICES OF JEFFREY S. YOUNG

JEFFREY S. YOUNG
Attorneys for Plaintiffs

DATED: , 2001

JOHN S. GORDON
United States Attorney

DAVID E. PINCHAS
Assistant United States Attorney
Attorneys for Defendants
Bruce Babbitt and Jamie R. Clark

DATED 7/27, 2001

SOMACH, SIMMONS & DUNN

STUART L. SOMACH
Attorney for Intervenors

DATED , 2001

PERKINS COIE

DONALD BAUR
Attorney for Intervenors

DATED: , 2001

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Attorneys for Intervenors

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DATED: , 2001

LAW OFFICES OF JEFFREY S. YOUNG

JEFFREY S. YOUNG
Attorneys for Plaintiffs

DATED: , 2001

JOHN S. GORDON
United States Attorney

DAVID E. PINCHAS
Assistant United States Attorney
Attorneys for Defendants
Bruce Babbitt and Jamie R. Clark

DATED , 2001

SOMACH, SIMMONS & DUNN

STUART L. SOMACH
Attorney for Intervenors

DATED 27, 2001

PERKINS COIE

DONALD BAUR
Attorney for Intervenors

DATED: July 24, 2001

LAW OFFICES OF DONALD B. MOONEY

DONALD B. MOONEY
Attorneys for Intervenors

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ORDER

The foregoing stipulation is approved and IT IS HEREBY ORDERED:

1. Plaintiffs' Complaint and action in case No. CV 00-4286 MMM (Cwx) are dismissed in their entirety and without prejudice;

2. The parties shall each bear their own attorney's fees and costs of suit.

DATED:

JUL 30 2001

Margaret M. Morrow

UNITED STATES DISTRICT JUDGE