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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11

12 **COALITION FOR A SUSTAINABLE DELTA,
13 BELRIDGE WATER STORAGE DISTRICT,
14 BERRENDA MESA WATER DISTRICT,
15 LOST HILLS WATER DISTRICT,
16 WHEELER RIDGE-MARICOPA WATER
17 STORAGE DISTRICT, AND DEE DILLON,**

16 PLAINTIFFS,

17 v.

18 **JOHN McCAMMAN, DIRECTOR,
19 CALIFORNIA DEPARTMENT OF FISH AND GAME,**

20 DEFENDANT,

21 **CENTRAL DELTA WATER AGENCY, ET AL.**

22 DEFENDANT-INTERVENORS,
23

24 **CALIFORNIA SPORTFISHING
25 PROTECTION ALLIANCE, ET AL.,**

26 DEFENDANT-INTERVENORS.
27

1:08-CV-00397-OWW-GSA
(Related to Case Nos. 1:05-CV-022-GSA
and 1:06-CV-00245-OWW-GSA)

**STATE DEFENDANT'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT**

Date: March 22, 2010
Time: 10:00 a.m.
Courtroom: 3
Judge: The Honorable Oliver W. Wang

Trial Date: June 22, 2010

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INTRODUCTION

1
2 This case involves a challenge to the California striped bass sport fishing regulations
3 enforced by the defendant John McCamman, Director of the California Department of Fish and
4 Game (State Defendant). Plaintiffs allege that the State Defendant's enforcement of the
5 regulations causes increased striped bass predation on species listed under the federal Endangered
6 Species Act (ESA), resulting in the unlawful take of such species. The water district plaintiffs
7 base their claim of injury on the allegation that the State Defendant's enforcement of the
8 regulations has harmed ESA-listed species, causing federal fishery agencies to reduce State Water
9 Project (SWP) water deliveries to them. (State Defendant's Statement of Undisputed Material
10 Facts (UMF) No. 1). Plaintiff Dee Dillon, on the other hand, claims injury based solely on an
11 alleged impairment of his recreational, aesthetic, and conservation interests in the Sacramento-
12 San Joaquin Delta. UMF No. 2. To expedite consideration of the standing question, the parties
13 have stipulated that "[f]ailure by Plaintiffs to establish the standing of Plaintiff Dee Dillon shall
14 be deemed a failure to establish standing of all of the Plaintiffs." UMF No. 3.

15 The State Defendant respectfully requests that this Court grant summary judgment against
16 all plaintiffs because they cannot prove that plaintiff Dee Dillon has standing under Article III of
17 the United States Constitution. In light of Mr. Dillon's admissions in his deposition of December
18 1, 2009, the undisputed facts now demonstrate that plaintiffs cannot show that the State
19 Defendant's enforcement of the striped bass sport fishing regulations will affect any "specific or
20 concrete plan" of Mr. Dillon's to visit the Delta for recreational or conservation purposes, or that
21 the State Defendant's enforcement of the regulations does or will affect Mr. Dillon's experience
22 of the Delta. Accordingly, plaintiffs have suffered no actual or imminent injury from the State
23 Defendant's actions, and therefore lack standing. *Summers v. Earth Island Institute*, ___ U.S.
24 ___, 129 S.Ct. 1142, 1150-1151 (2009).

STANDARD OF REVIEW

25
26 Summary judgment is proper where there exists no genuine issue as to any material fact,
27 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Adickes v.*
28 *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Where the case turns on a mixed question of law

1 and fact, and the only dispute relates to the legal significance of the undisputed facts, the
2 controversy for trial collapses into a question of the law that is appropriate for disposition on
3 summary judgment. *Union School Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir. 1994). As the
4 Supreme Court has observed, “where the nonmoving party will bear the burden of proof at trial
5 on a dispositive issue, a summary judgment motion may properly be made in reliance solely on
6 the ‘pleadings, depositions, answers to interrogatories, and admissions on file.’” *Celotex Corp. v.*
7 *Catrett*, 477 U.S. 317, 323 (1986). “[A] complete failure of proof concerning an essential
8 element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 322.

9 To demonstrate a genuine issue as to a material fact, the opposing party “must do more than
10 simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec.*
11 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Supreme Court has stated that
12 “[w]here the record taken as a whole could not lead a rational trier of fact to find for the
13 nonmoving party, there is no ‘genuine issue for trial.’” *Id.* Moreover, “a motion for summary
14 judgment may not be defeated ... by evidence that is ‘merely colorable’ or ‘is not significantly
15 probative.’” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). If the nonmoving
16 party fails to produce evidence sufficient to create a genuine issue of material fact, the moving
17 party is entitled to summary judgment. *Nissan Fire & Marine Ins. Co. v. Fritz Co.*, 210 F.3d
18 1099, 1103 (9th Cir. 2000).

19 STATEMENT OF UNDISPUTED MATERIAL FACTS

20 Mr. Dillon is a relative newcomer to Sacramento and the Delta, having moved to
21 Sacramento in May 2001. UMF No. 4. Before moving to Sacramento, Mr. Dillon lived in
22 Fontana, in Southern California. UMF No. 5. Mr. Dillon began visiting the Delta for recreational
23 purposes in “approximately 2001.” UMF No. 6. The first time Mr. Dillon went fishing in the
24 Delta was in August 2001. UMF No. 7.

25 Mr. Dillon used to own a boat and take advantage of the numerous recreational activities
26 offered by the Delta. UMF No. 8. Mr. Dillon claims that he has enjoyed multiple recreational
27 activities in the Delta, including boating, swimming, fishing, kayaking, skiing, wake-boarding,
28 jet-skiing, snorkeling, water camping, and wildlife photography. UMF No. 9. He stated that he

1 has photographed salmon two or three times in the Delta (UMF No. 10), but also that he has only
2 seen three wild salmon in the Delta, two of which were dead, and one of which appeared to be
3 dying. UMF No. 11. He has never photographed a steelhead. UMF No. 12. In addition, Mr.
4 Dillon admits that the status of the listed species has not affected his ability to swim, kayak, ski,
5 wake-board, jet-ski, snorkel, go water camping, or take wildlife photography in the Delta. UMF
6 No. 13. He also admits that he has never visited the Delta for the purpose of photographing any
7 of the listed species. UMF No. 14.

8 Mr. Dillon stated that he enjoyed fishing, but in years past when he used to fish in the Delta,
9 he never caught a salmon or a steelhead. UMF No. 15. (As Mr. Dillon testified in his deposition
10 with respect to his fishing skills, "I fish a lot. I didn't say I was good." UMF No. 16.)¹

11 The aesthetic benefits Mr. Dillon claims to enjoy from the Delta include "the peace and
12 quiet of being near a running river. Just the atmosphere that being in a water environment that
13 supports many, many types of flora and fauna is aesthetic." UMF No. 20. He also claims to be
14 disturbed by the thought of the striped bass consuming native fish (UMF No. 21), although he
15 admits to never having studied striped bass biology and to not being an expert in striped bass
16 predation. UMF No. 22.

17 Although Mr. Dillon claims to enjoy a "sense of appreciation and satisfaction" whenever he
18 encounters one of the listed species (Plaintiff Dee Dillon's Responses to Defendant Donald
19 Koch's Interrogatories, Set One (Dillon Interrogatory Responses), Response No. 3 at 6:1-2), and
20 that his recreational activities gave him "significant exposure" to the listed species (Declaration of
21 Dee Dillon in Support of Plaintiffs' Motion for Summary Adjudication of Issues.(Doc. 57-5) at ¶
22 3), he admits to having never seen a steelhead, except possibly in a hatchery or picture (UMF No.
23 23), and only three salmon in the Delta (UMF No. 11), two of which were dead and one of which

24 ¹ Mr. Dillon was recruited by plaintiff Coalition for a Sustainable Delta (Coalition) about
25 two years ago, approximately the same time the Coalition was formed, after being contacted by
26 the Coalition's counsel, Paul Weiland. UMF No. 17. The purpose for contacting Mr. Dillon was
27 to enlist him as a plaintiff in this litigation, as evidenced by his understanding that his role in the
28 Coalition would involve recounting his fishing and recreation history, ultimately to a judge.
UMF No. 18. The extent of Mr. Dillon's involvement with the Coalition has been to review
documents "prepared with regards to the lawsuit" and review "work they've done on my behalf
with regards to preparing interrogatory responses and declaration." UMF No. 19.

1 was dying. *Id.* In addition, Mr. Dillon has admitted that he does not know one run of salmon
2 from another. UMF No. 24. Mr. Dillon also admitted to having only seen delta smelt at the SWP
3 salvage facility and in a container on a U.S. Fish and Wildlife trawl vessel. UMF No. 25. On
4 both occasions, the delta smelt were in containers and identified as delta smelt for Mr. Dillon.
5 UMF No. 26. He further admitted that he could not himself identify a delta smelt. UMF No. 27.
6 And when presented with photographs of six different fish, Mr. Dillon was unable to identify
7 which one was the delta smelt. UMF No. 28.²

8 According to Mr. Dillon, his enjoyment of the aesthetics of the Delta has been affected
9 because of the number of striped bass tournaments held in the Delta and the fishermen “running
10 their boats at 50, 60, 70 miles an hour en masse all over the place.” UMF No. 30. However, he
11 was unable to say whether removing the striped bass regulation would result in a decrease in the
12 number of striped bass fishing tournaments. UMF No. 31. In any event, in 2009, only
13 approximately 8 percent of fishing tournaments in the Bay-Delta were for striped bass. UMF No.
14 32.

15 The only other alleged aesthetic benefit Mr. Dillon claims to derive from the Delta is
16 recognition of a biosystem that is intact and healthy, which amounts to nothing more than a
17 generalized concern about the environment. UMF No. 33. Mr. Dillon also alleges vague
18 conservation interests “with regards to a healthy ecosystem.” UMF No. 34.

19 In January 2008, Mr. Dillon sold his boat as part of his retirement planning (UMF No. 35),
20 and he has no plans to purchase another boat. UMF No. 36. Since he sold the boat, his
21 recreational activities in the Delta have dropped off significantly. UMF No. 37. For example, Mr.
22 Dillon stated that he used to visit the Delta approximately 120 days per year, and fished on
23 average 40 to 50 times per year. UMF No. 38. However, in 2008, Mr. Dillon only went fishing
24 or engaged in recreational activities in the Delta three or four times (UMF No. 39), and in 2009
25 he had not been to the Delta at all by the time of his deposition on December 1, 2009, except once

26 ² As demonstrated by the Declaration of Marty Gingras, filed concurrently herewith in
27 support of this Motion for Summary Judgment, Exhibit 1002, shown to Mr. Dillon during his
28 deposition, is a delta smelt. UMF No. 29. Mr. Dillon was unable to identify it as such. UMF No.
28.

1 in the spring to photograph turtles. UMF No. 40. In fact, Mr. Dillon admitted that he had not
2 visited the Delta over the 2009 Labor Day weekend (UMF No. 41), despite his stated intent to do
3 so, as represented in his interrogatory responses³ – a representation on which this Court relied in
4 determining that the plaintiffs had alleged sufficient facts to support the “injury in fact”
5 component of Article III standing. (Memorandum Decision Denying Plaintiffs’ Motion for
6 Partial Summary Judgment [Doc. 57] at 31:13-18.) Mr. Dillon further admitted that his plans for
7 future visits to the Delta are tenuous. His stated reasons for selling the boat were planning toward
8 retirement (UMF No. 35), the expense of maintaining a boat, and because he and his wife are
9 “planning to do significantly more traveling.” UMF No. 42. He further stated that he and his
10 wife “don’t know what we’re going to do or what lies in our future,” and the most he could say
11 about any plans with respect to the Delta as part of their retirement plans is that “water will be
12 involved, one way or another.” UMF No. 43.

13 ARGUMENT

14 I. THE INJURY IN FACT COMPONENT OF ARTICLE III STANDING REQUIRES THE 15 PLAINTIFFS TO SHOW THAT THEY HAVE CONCRETE PLANS TO VISIT SPECIFIC 16 SITES IN THE DELTA.

17 As the Supreme Court has observed, the “irreducible constitutional minimum of standing”
18 consists of three elements:

19 (1) An injury in fact, i.e., an invasion of a legally protected interest which is

20 (a) concrete and particularized; and

21 (b) actual or imminent, not ‘conjectural or hypothetical’;

22 (2) A causal connection between the injury and the conduct complained of; and

23 (3) It must be likely, as opposed to merely speculative, that the injury will be redressed by a
24 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations
25 omitted).

26
27 ³ Plaintiff Dee Dillon’s Responses to Defendant Donald Koch’s Interrogatories, Set One,
28 Response No. 2 at 4:9-11. A true and correct copy of Dee Dillon’s interrogatory responses are
attached as Exhibit B to the Declaration of Deborah A. Wordham, filed concurrently herewith.

1 Plaintiffs have the burden to prove all elements of standing: “The party invoking federal
2 jurisdiction bears the burden of establishing these elements.” *Id.* at 561. The burden is to
3 demonstrate standing “with the manner and degree of evidence required at the successive stages
4 of the litigation.” *Id.*

5 The Supreme Court has most recently examined the “injury in fact” component of
6 constitutional standing in *Summers v. Earth Island Institute*, ___ U.S. ___, 129 S. Ct. 1142 (2009).
7 At issue in *Summers* was whether the plaintiff environmental organizations had standing to
8 challenge a U.S. Forest Service regulation that exempted small fire-rehabilitation and timber-
9 salvage projects from the Service’s notice, comment, and appeal process. *Id.* at 1147. Although
10 the plaintiffs had originally challenged the regulations and an individual salvage sale under the
11 regulations, the plaintiffs subsequently settled their dispute as to the individual salvage sale, thus
12 limiting the lawsuit to a facial challenge to the regulations. *Id.* at 1148. Noting the language in
13 *Defenders of Wildlife* that “it is substantially more difficult to establish” standing when “the
14 plaintiff is not himself the object of the government action,” the Supreme Court in *Summers*
15 concluded that the plaintiffs’ affidavits failed to establish that the plaintiffs had suffered the
16 concrete and particularized injury required of constitutional standing. *Id.* at 1149 (quoting
17 *Defenders of Wildlife*, 504 U.S. at 562).

18 First, the Court reviewed an affidavit in which one of the plaintiffs asserted that he had
19 suffered injury in the past from development on Forest Service land. The Court rejected this
20 factual claim as a basis for standing “because it was not tied to application of the challenged
21 regulations, because it does not identify any particular site, and because it relates to past injury
22 rather than imminent and future injury that is sought to be enjoined.” *Id.* at 1150. Second, the
23 Court found that the plaintiff’s claim that he “want[ed] to” visit specific sites in the Allegheny
24 National Forest was insufficient for lack of specificity. According to the Court, “[t]his vague
25 desire to return is insufficient to satisfy the requirement of imminent injury: ‘Such ‘someday’
26 intentions—without any description of concrete plans or indeed any specification of *when* the
27 some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases

28

1 require.” *Id.* at 1150-1151 (quoting *Defenders of Wildlife*, 504 U.S. at 564) (emphasis in the
2 original).

3 Thus, the *Summers* decision imposes two requirements on environmental plaintiffs when
4 establishing the injury-in-fact component of Article III standing: (1) the plaintiffs must identify a
5 “particular site” that they intend to visit; and (2) they must provide evidence of “concrete plans,”
6 ***including specific dates***, to visit such sites.

7 This “concrete interest” test requires a “geographic nexus between the individual asserting
8 the claim and the location suffering an environmental impact.” *Ashley Creek Phosphate Co. v.*
9 *Norton*, 420 F.3d 934, 939 (9th Cir. 2005). This geographic nexus must be site-specific. Citing
10 the Supreme Court decisions in *Summers* and *Lujan*, the Seventh Circuit has observed, “When
11 governmental action affects a discrete natural area, and a plaintiff merely states that he uses
12 unspecified portions of an immense tract of territory, such averments are insufficient to establish
13 standing.” *Pollack v. United States*, 577 F.3d 736, 742 (7th Cir. 2009). After *Summers*, the mere
14 “some day” possibility or “chance” that the plaintiffs may visit the affected site is insufficient to
15 meet this requirement. Instead, the plaintiffs bear the burden of showing the “likelihood” that
16 they will visit such sites. *Summers*, 129 S.Ct. at 1150-1151; *Ashley Creek Properties, LLC v.*
17 *Timchak*, 549 F.Supp.2d 1171, 1179 (D. Idaho 2009). These requirements are consistent with the
18 Ninth Circuit’s judgment that “repeated recreational use itself, accompanied by a ***credible***
19 allegation of desired future use, can be sufficient” to establish the injury-in-fact component of
20 standing. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir.
21 2000) (emphasis added.) Because, as shown below, Mr. Dillon’s deposition testimony
22 demonstrates that he cannot meet the standard for standing, Plaintiffs’ claims must be dismissed.

23 **II. PLAINTIFF DEE DILLON HAS FAILED TO ESTABLISH ANY CONCRETE INJURY FROM**
24 **THE SPORT FISHING REGULATIONS THAT IS ACTUAL OR IMMINENT; THEREFORE,**
25 **PLAINTIFF DEE DILLON AND ALL PLAINTIFFS LACK STANDING**

26 The undisputed material facts demonstrate that Mr. Dillon, the only plaintiff for whom
27 plaintiffs claim standing, lacks the requisite injury in fact to sustain a claim of standing to
28 challenge the State Defendant’s enforcement of the Fish and Game Commission’s striped bass

1 sport fishing regulation. The alleged injuries either are not tied to the State Defendant's actions
2 or relate exclusively to past injuries, and are not imminent and future injuries.

3 Because the plaintiffs cannot establish injury in fact, this Court should grant the State
4 Defendant's motion for summary judgment of the plaintiffs' standing.

5 **A. The Undisputed Material Facts Demonstrate that Plaintiffs Cannot**
6 **Establish Injury in Fact**

7 Mr. Dillon's alleged injuries are to his recreational interests, including boating, swimming,
8 fishing, kayaking, skiing, wake-boarding, jet-skiing, snorkeling, water-camping, and wildlife
9 photography. UMF No. 9. Of these interests, however, Mr. Dillon admitted that none, except
10 fishing, has been impaired by the status of the listed species.⁴ UMF No. 13. As to fishing, it is
11 true that Mr. Dillon claims that his ability to fish for salmon has been adversely affected by the
12 striped bass sport fishing regulation, among other factors. Dillon Interrogatory Responses,
13 Response No. 3 at 8:10-18. In particular, he cites the recent restrictions on recreational salmon
14 fishing imposed in 2009. *Id.* But he admits that he sold his boat in January 2008, and since then
15 has seldom, if ever, gone fishing in the Delta. UMF Nos. 35, 37-41. Even before he sold his boat,
16 he never caught a salmon, despite fishing on average 40 to 50 times per year. UMF Nos. 15, 38.
17 Thus, it is speculative whether his inability to fish for salmon is due to the striped bass regulations
18 or his lack of opportunity due to other reasons. Furthermore, because the salmon at issue in this
19 litigation – the Sacramento River winter-run and Central Valley spring-run – are listed as
20 endangered or threatened, the only salmon that Mr. Dillon can fish for legally is fall-run chinook.⁵
21 Therefore, the effect of the striped bass sport fishing regulation on the listed species has no
22 bearing on his ability to fish legally for salmon.⁶

23 ⁴ If Mr. Dillon wanted to photograph salmon, he testified that he thought it would be
harder because there are fewer of them, but he is not interested in doing so. UMF No. 14, 44.

24 ⁵ Salmon fishing is regulated by season, not by species. *See, e.g.*, California Code of
25 Regulations, tit. 14, § 7.00. It would be unlawful for Mr. Dillon to fish for salmon during the
26 season when Central Valley spring-run and Sacramento River winter-run, two of the listed
species at issue, are migrating through the Delta.

27 ⁶ Mr. Dillon wisely does not claim to fish for delta smelt. Delta smelt, tiny planktivores,
28 have never been known to take hooks and are not sought by sportfishers or recreational anglers.
UMF No. 45.

1 Mr. Dillon also alleges that he derives aesthetic benefits from the Delta. In part, he claims a
2 benefit from “a biosystem that is intact and healthy.” UMF No. 33. However, this alleged injury
3 is nothing more than a generalized concern for the environment, which has been rejected by the
4 courts as insufficient to confer standing. *Center for Biological Diversity v. Kempthorne*, 588 F.3d
5 701, 707 (9th Cir. 2009) (quoting *Summers, supra*, 129 S.Ct. at 1149).

6 Where a court has found that aesthetic interests are sufficient to confer standing, the
7 plaintiffs have alleged injury to their ability to observe and enjoy the environment threatened by
8 the government action. See e.g. *Center for Biological Diversity* at 707-708 (government action
9 threatens plaintiffs’ ability to view polar bears and walruses); *Sierra Club v. Morton*, 405 U.S.
10 727, 734-736 (1972) (construction of roads through the Sequoia National Park “would destroy or
11 otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and
12 would impair the enjoyment of the park for future generations”).

13 In this case, Mr. Dillon’s only tangible alleged aesthetic injury is to the peace and quiet he
14 enjoyed in the Delta, which he claims was disturbed by the striped bass tournaments that are
15 carried on there. UMF No. 30. But there is no evidence that the striped bass sport fishing
16 regulations have any relationship to the tournaments, except to limit the number and size of
17 striped bass that may be caught on any particular day. Further, Mr. Dillon was unable to say
18 whether removing the striped bass regulation would result in a decrease in the number of striped
19 bass fishing tournaments. UMF No. 31. There is no evidence as to what effect eliminating the
20 striped bass sport fishing regulations would have on the number of tournaments.⁷

21 Mr. Dillon also claims to have derived a sense of “appreciation and satisfaction” when he
22 viewed the listed species. Dillon Interrogatory Responses, Response No. 3 at 6:1-2. He claims
23 that, through his recreational activities in the Delta, he has gained “significant exposure to the

24 ⁷ Thus, in addition to their inability to show injury-in-fact, the plaintiffs also cannot
25 establish that their claim for relief would redress this alleged injury. As the Supreme Court has
26 observed, “[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into
27 federal court; that is the very essence of the redressability requirement.” *Steel Co. v. Citizens for a*
Better Environment, 523 U.S. 83, 107, (1998). A trial court must “have the ability to remedy the
28 alleged harm” in order to comply with this element of standing. *Nuclear Info. & Research Service*
v. Nuclear Regulatory Comm., 457 F.3d 941, 955 (9th Cir. 2006).

1 Sacramento River winter-run chinook salmon, Central Valley spring-run chinook salmon, Central
2 Valley steelhead, and delta smelt (“Listed Species”). Declaration of Dee Dillon in Support of
3 Plaintiffs’ Motion for Summary Adjudication of Issues (Doc. 57-5) at ¶ 3. Yet his deposition
4 testimony does not support this claim. Far from gaining “significant exposure” to the Listed
5 Species, Mr. Dillon testified in deposition that: he has never seen a steelhead, except maybe at a
6 hatchery or in a picture (UMF No. 23); he has only ever seen a delta smelt at a salvage facility or
7 in a container on a trawl vessel (UMF No. 25);⁸ and the only salmon he has seen in the Delta were
8 three that were dead or dying. UMF No. 11. Even if he actually saw a delta smelt in the water,
9 he would not be able to identify it (UMF Nos. 27-29), and he cannot tell one run of salmon from
10 another to say whether the three salmon he saw were among the listed species. UMF No. 24.

11 Finally, Mr. Dillon claimed in his interrogatory responses that “the Delta’s decline of the
12 overall ecology and decline of the listed species which he has personally witnessed over the last
13 seven years has reduced his use and enjoyment of the Delta’s aesthetic, recreational, and
14 conservation benefits, including negatively impacting his ability to encounter and interact with
15 the Listed Species.” Dillon Interrogatory Responses at 9:3-7. In light of his deposition
16 testimony, however, these claims by Mr. Dillon must be treated with skepticism. As noted above,
17 Mr. Dillon’s reduced use and enjoyment of the Delta’s aesthetic, recreational, and conservation
18 benefits are the result of his decision to sell his boat, which he made for retirement and costs
19 reasons and from a desire to enjoy more travel, and not because of any specious concern for the
20 ecology of the Delta or the listed species.

21 **B. Any Alleged Future Injury is Insufficient for Lack of Specificity**

22 In addition to failing to identify any imminent and actual injury that is tied to the regulation
23 at issue, the undisputed material facts in this case demonstrate that, while Mr. Dillon may have
24 enjoyed the Delta in the past, his future plans for spending time on the Delta are too vague and
25 speculative to confer standing in this case. Mr. Dillon claims to enjoy numerous recreational

26 _____
27 ⁸ Notably, Mr. Dillon only ever observed delta smelt in the context of his work as an
28 employee of the State Water Contractors. UMF No. 46. He has since left employment with the
State Water Contractors. UMF No. 47.

1 activities in the Delta but sold his boat in January 2008 and in 2009, had not visited the Delta at
2 all by the time of his deposition on December 1, 2009. Although he claimed in his deposition that
3 he still intended to visit the Delta sometime in December, in light of similar testimony belied by
4 the facts, this claim simply does not amount to “a credible allegation” or “concrete” plan for
5 future use. *Ecological Rights Foundation, supra*, 230 F.3d at 1149.

6 In their motion for summary adjudication on the issue of their constitutional standing claim,
7 Plaintiffs based Mr. Dillon’s injury claim on his declaration. The declaration gave only a
8 generalized discussion of Mr. Dillon’s past recreational activities in the Delta, without any
9 mention of specific dates or locations of those activities. Dillon Declaration at ¶¶ 2-5. Mr. Dillon
10 asserted that he had “definite plans to continue frequenting the Delta,” but failed to provide any
11 specifics. Dillon Declaration at ¶ 6. In response to interrogatories propounded by the State
12 Defendant, Mr. Dillon asserted that he had concrete plans to visit the Delta over the 2009 Labor
13 Day weekend. (See Second Declaration of Daniel Fuchs, filed in support of State Defendant’s
14 Opposition to Plaintiffs’ Motion for Summary Judgment, Doc. 69-2 at Ex. A.) This Court found
15 Mr. Dillon’s interrogatory response sufficient to satisfy the requirement for “concrete plans.”
16 (Memorandum Decision Denying Plaintiffs’ Motion for Partial Summary Judgment, Doc. 57, at
17 31:13-18.) *Summers*, 129 S. Ct. at 1151. But these plans turned out to be much less than
18 concrete, as Mr. Dillon did not, in fact, visit the Delta over Labor Day. UMF No. 48.

19 Mr. Dillon testified in deposition that he has standing plans to visit the Delta on a minimum
20 of three days per year, July 4th, Labor Day, and around Christmas. UMF No. 49. However, Mr.
21 Dillon’s alleged standing plans are not credible and additional testimony demonstrates that these
22 planned visits lack sufficient certainty to constitute concrete plans. Mr. Dillon testified that in
23 2009, his plans to visit the Delta on July 4 and on Labor Day did not materialize because of other
24 vacation plans. UMF No. 48. In addition, Mr. Dillon testified that one reason he sold his boat
25 was because “we are planning on doing significantly more traveling.” UMF No. 42. At most, Mr.
26 Dillon could say that his future plans will “involve” water, but ultimately, “we really don’t know
27 what we’re going to do or what lies in our future.” UMF No. 43. Much like the “vague desire to
28 return” to the Forest Service lands that the *Summers* court found insufficient to confer standing,

1 these “‘someday’ intentions—without any description of concrete plans or indeed any
2 specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’
3 injury that our cases require.” *Summers, supra*, at 1150-1151 (quoting *Defenders of Wildlife*,
4 504 U.S. at 564) (emphasis in the original).

5 CONCLUSION

6 Dee Dillon has failed to demonstrate that he has suffered any imminent or actual injury
7 giving him standing to maintain this action. His allegations of past injuries to supposed
8 recreational, aesthetic, and conservation interests are not credible in light of his deposition
9 testimony that the status of the listed species has not impaired his ability to engage in recreational
10 activities. He has never seen a steelhead or delta smelt in the Delta, and he is unable to say
11 whether the three salmon he has seen in the Delta are among the listed species. His only tangible
12 aesthetic interest in peace and quiet is unrelated to the State Defendant’s enforcement of the
13 striped bass sport fishing regulation. All other aesthetic interests are merely generalized interests
14 in the environment, which is not enough to confer standing.

15 Further, in light of Mr. Dillon’s voluntary abandonment of virtually all his activities in the
16 Delta for reasons wholly unrelated to the State Defendant’s enforcement of the striped bass sport
17 fishing regulation, and his testimony regarding noncommittal future plans to visit the Delta, his
18 allegations of future potential harm are not credible and do not confer standing.

19 Because Dee Dillon lacks standing, by stipulation all plaintiffs lack standing. Therefore,
20 the State Defendant’s motion for summary judgment should be granted and this matter dismissed.

21 Dated: February 22, 2010

Respectfully submitted,

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