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9 **UNITED STATES DISTRICT COURT**  
10 **EASTERN DISTRICT OF CALIFORNIA**  
11 **FRESNO DIVISION**

12 )  
13 )  
14 **THE DELTA SMELT** )  
15 **CONSOLIDATED CASES** )

Case No.: 1:09-cv-00407-LJO-DLB

**Supplemental Declaration of Ren  
Lohofener In Support of Joint Motion  
To Extend The Remand Schedule**

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19 **THE CONSOLIDATED SALMONID CASES** )  
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Case No.: 1:09-cv-1053-LJO-DLB

1 I, Ren Lohofener, declare as follows:

2 1. I am the Regional Director of the Pacific Southwest Region of the U.S. Fish and  
3 Wildlife Service (“Service”). I previously submitted a declaration dated December 7, 2012 in  
4 support of Federal Defendants’ and the Department of Water Resources’ (DWR) joint motion for  
5 a continuance of the deadlines in the remand schedule. Doc. No. 1080-4.

6 2. I have reviewed the Court’s January 30, 2013 Order in response to the joint motion  
7 and I submit this supplemental declaration to address the Court’s questions raised in that Order.  
8 In particular, my declaration provides additional detail on the following three general subjects:  
9 (1) why there has been a significant change in factual conditions since the final judgment was  
10 entered; (2) why those changes in factual conditions make complying with the existing remand  
11 schedule detrimental to the public interest; and (3) how the requested three-year continuance is  
12 tailored to the first two items.

13 **I. Circumstances Have Changed Significantly Since the Judgment Was Entered**

14 3. The Court asked why the “Federal and State Proposal for Modification to the Remand  
15 Schedule and an Alternative Process for Development of Operational Strategies and A  
16 Collaborative Science and Adaptive Management Program” dated November 29, 2012  
17 (Proposal) was not incorporated or presumed in the original remand schedule.

18 4. I approved and signed the Service’s final 2008 Biological Opinion on the Long Term  
19 Operations of the Central Valley Project and State Water Project (2008 BiOp) that found  
20 jeopardy and adverse modification of designated critical habitat for the delta smelt, and I am  
21 familiar with the litigation that followed. During the course of the litigation, a number of  
22 motions for temporary restraining orders and preliminary injunctive relief were filed, including  
23 after the Court issued its decision on the parties’ summary judgment motions. As the litigation  
24 became increasingly adversarial, it became increasingly time consuming for agency staff.  
25 During this time, many parties to the litigation and others were focusing on the Bay Delta  
26 Conservation Plan (BDCP) as a way to develop more collaborative solutions for species  
27 protection and water supply, but negotiations were impacted by the adversarial and time-

28

1 consuming nature of the litigation and litigating positions, making collaborative solutions  
2 extremely difficult.

3 5. The Court also asked whether, since the final judgment was entered, there has been a  
4 paradigm change in the way the agencies work with each other and stakeholders and if so, what  
5 has changed. In my opinion, there has been a paradigm change in the way the agencies work  
6 with each other and stakeholders. Since the litigation has ended, many parties have focused their  
7 efforts on BDCP and on fostering communication between the formerly adversarial parties. This  
8 has led to movement in the BDCP effort, as demonstrated by the U.S. Secretary of the Interior  
9 and Governor of California's announcement in July, 2012. Increased communication between  
10 the formerly adversarial parties occurred this winter as the Service made several determinations  
11 affecting Central Valley and State Water Project operations under the remanded 2008 BiOp's  
12 reasonable and prudent alternative (RPA) to protect delta smelt. Despite the fact that exports  
13 have been constrained to low levels from mid-December 2012 through mid-February 2013, no  
14 litigation has ensued.

15 6. The above is a paradigm shift from the past, and there is no way the Federal  
16 Defendants could have predicted that the agencies and stakeholders would be able to come to the  
17 table in the way described in the Proposal at the time the Amended Judgment was issued. The  
18 current circumstance is the result of many hundreds of hours spent meeting with stakeholders  
19 and fostering collaboration.

20 **II. The Changes in Circumstances Make Complying With the Existing Remand**  
21 **Schedules Detrimental to the Public Interest**

22 7. The Court asked how the changes in circumstances make compliance with the original  
23 judgment more onerous, unworkable, or detrimental to the public interest.

24 8. Simply stated, effective collaboration and litigation are fundamentally incompatible.  
25 Continued litigation stalls constructive efforts to improve the health of the Delta and its species.  
26 The Service believes promoting a collaborative process is critical to breaking the Section 7  
27 consultation/litigation cycle in which we currently find ourselves. Breaking this cycle is in the  
28 public interest.



1 9. Under the Amended Judgment, the Service's new BiOp must be issued by December  
2 1, 2013. I am concerned that issuing the BiOp as ordered will lead to further litigation. The  
3 current remand schedules do not provide sufficient time for the agencies to work collaboratively  
4 with stakeholders to improve the state of knowledge and then incorporate that knowledge into  
5 the new remand BiOp. Thus, I do not anticipate a level of stakeholder buy-in to the new BiOp,  
6 which could help to avoid litigation. A return to litigation may prove severely detrimental to the  
7 BDCP, or any process which seeks to build consensus around potential solutions to provide  
8 additional protection for species and water supply reliability.

9 10. As noted in my December 7, 2012 declaration, the BDCP is a conservation plan  
10 being developed pursuant to the Endangered Species Act (ESA) and state Natural Communities  
11 Conservation Plan Act (NCCPA). BDCP is a high priority for the State of California, and the  
12 Federal government is being responsive to the State's needs by devoting substantial staff and  
13 resources to help the state to develop a scientifically rigorous plan. Federal Defendants believe  
14 that BDCP represents the opportunity for positive change in the Bay-Delta and the way water  
15 projects are operated in California.

16 11. The science that is developed as a result of the CSAMP will inform the BDCP and  
17 other processes intended to address water supply, water quality, and species protection in the  
18 Delta. Further, as I stated in my last declaration, the CSAMP is structured on the adaptive  
19 management process articulated in the BDCP. This three-year CSAMP process will put into  
20 practice and test the feasibility of the adaptive management process proposed in the BDCP.

21 12. Unfortunately, both the BDCP effort and the remand process for a new BiOp and  
22 National Environmental Policy Act analysis involve most of the same key staff from the State  
23 and Federal agencies. It is clear that only one of these processes may move forward on their  
24 current schedules. While Federal Defendants believe they can complete the BiOps and NEPA  
25 review in the time provided in the remand orders, to do so will likely result in another cycle of  
26 litigation, and will put off the work on the BDCP and its potential long term solution that much  
27 longer. Federal Defendants believe it is in the public interest to put the greatest effort into the  
28 potential long term solution, rather than another BiOp litigation cycle.

1  
2 13. The Court asked if the Service foresees any problems with the forthcoming BiOp and  
3 how the additional information that will be gained through the Proposal is likely to advance the  
4 “robustness” of the BiOp so as to avoid any such problems.

5 14. The Service believes at this time that it could issue a new smelt BiOp that meets the  
6 ESA’s best available science requirement according to the existing remand schedule. However,  
7 as I explained above, we envision the Proposal as a way to shift away from litigation to more  
8 constructive endeavors, namely helping to advance the state of science regarding some of the  
9 more contentious fish protective actions.

10 15. To accomplish this, the Proposal envisions the CSAMP as a means to identify key  
11 actions for further analysis, develop operational strategies around those key actions, implement  
12 the operational strategies through annual operations plans, and then monitor and evaluate the  
13 results of the operational strategies to reduce uncertainties. Those operational strategies will be  
14 designed to achieve equivalent or better biological outcomes as provided for in the 2008 BiOp  
15 RPA. By advancing the state of scientific understanding, we believe that the new smelt BiOp  
16 can be made more robust.

17 16. A fertile area for collaborative science is model development. Multiple independent  
18 peer reviews, including the National Research Council (NRC) review, have identified a lack of  
19 quantitative models as a major shortcoming in developing and implementing the 2008 BiOp.  
20 The collaborative science process offers the opportunity to work with the parties to use existing  
21 models that they have developed and to further develop those and other models. We can use  
22 those models to make predictions about system responses to management actions. The models  
23 are a quantitative description of our understanding of how the system works. The operational  
24 strategies should focus on testing that understanding. Collaboration on the models and  
25 development of operational strategies that test model predictions will accelerate model  
26 development. We need the models to better manage operations consistent with the existing RPA,  
27 to inform future actions that could be developed in response to the remand, and in developing  
28 and implementing the BDCP.

1 17. In addition to aiding in model development, the overarching Program and the  
2 CSAMP would benefit studies that are currently planned or already underway by agencies but  
3 that lack agency staff, funding, or true collaboration to make them successful. One example is  
4 the so-called FLASH study, which is being undertaken by the U.S. Bureau of Reclamation and  
5 the Service as part of the implementation of the Fall X2 action in the RPA. At this time, there is  
6 little involvement or participation by other agencies or stakeholders in this study. This is the  
7 type of study that the Service would like to see brought into the CSAMP, where it can be  
8 continued in a truly collaborative manner.

9 18. Another example of RPA actions that would benefit from the collaborative science  
10 process is the implementation of the actions designed to protect spawning delta smelt and their  
11 progeny. Water exports at the State and Federal pumps can reverse the direction of flows in Old  
12 and Middle rivers and create conditions that draw delta smelt into the southern Delta where they  
13 are likely to be entrained in the pumping and lost from the population. If too many delta smelt  
14 are lost, the impacts to the species could be severe, especially in years when the size of the  
15 population is estimated to be low. Models of the movement of turbidity and the behavioral  
16 response of smelt to local hydrology can inform implementation of the RPA actions designed to  
17 avoid drawing adult smelt into the southern Delta where they are vulnerable to entrainment at the  
18 pumps. Had the collaborative science process been in place last fall, and the turbidity models  
19 agreed upon and in use prior to the unusually pronounced turbidity movement that occurred in  
20 December 2012, we might have been able to avoid the relatively high level of entrainment  
21 experienced this winter by predicting the turbidity movement and adjusting real time operations  
22 accordingly.

23 19. While the CSAMP is intended to supplement the state of the science regarding some  
24 of the more contentious fish protective actions to determine if there are alternative methods of  
25 achieving equivalent or improved biological protection for listed species with less impact to  
26 water supply, the Proposal does not represent a backing away from the 2008 BiOp or the Federal  
27 agencies' obligations under the ESA. The 2008 BiOp RPA provides for operational ranges  
28 within many of the actions and includes a process for the Service to make determinations on



1 specific operations within those ranges in real time. The Service will continue to follow the RPA  
2 unless modified consistent with law.

3 20. We appreciate the Court's desire for specific details on how the CSAMP and CAMT  
4 will operate. However, not all of the specific details of the CSAMP are developed at this time,  
5 nor can they be, because in order to be truly collaborative, the parties to the process must work  
6 together to define those details once the process has been begun. Because defining the specific  
7 parameters of the CSAMP is part of the very process itself, those details cannot be developed  
8 ahead of time. What we can report to the Court at this time is that the CSAMP process will  
9 follow standardized and generally-accepted protocols for a collaborative science process. The  
10 agencies believe the process outlined in the Proposal and Supplement, a true and correct copy of  
11 which is attached hereto as Attachment 1, will provide the structure to allow for trust building  
12 amongst the agencies and stakeholders, foster shared understanding of key scientific questions,  
13 and provide greater transparency of agency decision making on management actions.

14 21. The agencies recognize that the CSAMP is a fledgling effort, but believe it holds the  
15 most promise for developing collaborative joint science that can be utilized in multiple  
16 processes. We learned through rounds of litigation that the courtroom is not the appropriate  
17 place to test scientific hypotheses and seek collaborative solutions. We believe that this  
18 fledgling effort needs time to develop to draw formerly adversarial parties from their respective  
19 corners to work together.

20 **III. A Three-Year Continuance Is Tailored To the Changes In Circumstances**

21 22. The Court asked why granting a three-year continuance to pursue the Proposal is  
22 more beneficial to the public interest than issuing a new smelt BiOp, which is currently due in  
23 December 2013.

24 23. As I explained above, I am concerned that issuing the BiOp as ordered will lead to  
25 further litigation, which is contrary to the public interest.

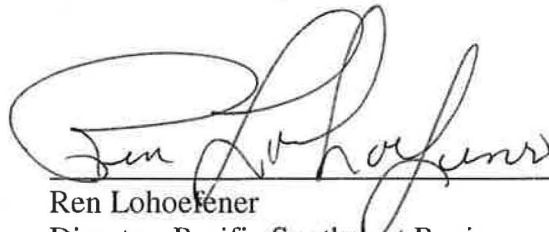
26 24. The Court also asked why DWR and Federal Defendants are asking for three years to  
27 pursue the Proposal.

1 25. The agencies' request for a three-year extension was deliberate, and based on the  
2 minimum time necessary to implement the CSAMP. In particular, the first year of the extension  
3 would be devoted to forming the CAMT, identifying key actions and questions, and forming  
4 experimental designs. The agencies envision that the first substantial operating plan would be in  
5 effect for the operating season of 2013-2014. After defining the actions and completing new  
6 experimental designs in the first year, two operating seasons then would be necessary to  
7 implement the operational strategies and monitor performance.

8 26. Given the complexities of biology, operations, hydrology, and other factors affecting  
9 an operational plan in any given year, more than two operating seasons to implement the  
10 strategies would be beneficial; however, the agencies believe that the two seasons allowed for in  
11 the Proposal are the minimum amount of time necessary to: (1) define the particulars of the  
12 CSAMP; (2) implement the experimental designs; (3) evaluate the Program's effectiveness; (4)  
13 update the state of knowledge on key actions; and (5) incorporate the updated understanding in  
14 new analyses for the remand BiOp. If the CSAMP is successful, the agencies envision the  
15 process lasting longer than three years and informing other efforts.

16  
17 I declare under the penalty of perjury under the laws of the State of California and the United  
18 States, that the foregoing is true and correct to the best of my knowledge.

19 Dated this 19<sup>th</sup> day of March, 2013

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21 

22  
23 Ren Lohoefer  
24 Director, Pacific Southwest Region  
25 U.S. Fish and Wildlife Office  
26  
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# **Attachment 1**

**Supplement to  
Federal and State Proposal for  
Modification to the Delta Biological Opinion Remand Schedules and  
Alternative Process for Development of Operational  
Strategies and a Collaborative Science  
and Adaptive Management Program  
3.15.13**

This supplement to the original Federal and State Proposal captioned above (“Proposal”, dated November 29, 2012, and submitted as Exhibit A to Document 1080 filed in Consolidated Delta Smelt BiOp cases and to Document 713 filed in the Consolidated Salmonid BiOp cases) is intended to address concerns raised by the District Court in its Order dated January 30, 2013. This supplement summarizes the Federal and State responses to many of the questions raised by the District Court. Most of the points generally summarized below are addressed in greater detail in supporting declarations prepared simultaneously with this supplement.

The Proposal introduced the Federal and State initiative to establish a Collaborative Adaptive Management Team (CAMT) comprised of diverse stakeholders that would assist the California Department of Water Resources (DWR), U.S. Bureau of Reclamation and the State and Federal fish agencies (U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife (formerly Department of Fish and Game)) in designing and implementing a multi-year, robust and collaborative science and adaptive management program (CSAMP) to develop key long-term information needs, questions to be answered to meet those needs, operational strategies to answer the key questions, and then monitoring and evaluating the results for the remanded Biological Opinions for the continued long term operation of the Central Valley Project and State Water Project (BiOps) and other programs. Without the CSAMP, the current process for developing the remanded BiOps likely would have adverse consequences through the continuation of the cycle of litigation over the BiOps that has lasted far too long and inefficiencies for the development and implementation of the Bay Delta Conservation Plan (BDCP).

The following information augments or clarifies elements of the CAMT and CSAMP first presented in the Proposal to better explain how the CAMT and CSAMP are new, represent a significant change for the processes available to develop the BiOps, will be useful for the BDCP and other processes, and would further the public interest.

## **I. Purpose of the CSAMP**

The overall goal of the CSAMP is to develop a robust science and adaptive management program, with collaboration of the scientists and experts from the Public Water Agencies (PWAs) and the NGO community, that will inform the development and implementation of the BiOps, BDCP, and other programs. It is believed that this engagement will result in a halt to the counter-productive litigation cycle through the development of common understandings of the science, joint fact-finding, increased transparency through information sharing, and a commitment to work together so that parties develop trust and no longer use the courts to solve disputed scientific and technical issues. The intent is to develop a durable science process and program that will be useful for implementation of existing RPAs, improvement of the next BiOps and the BDCP.

Specifically, with regard to the Delta BiOps, the goals are to:

- (a) Identify and evaluate management actions, including but not limited to actions set forth in the RPAs, to protect one or more of the listed species;
- (b) Develop a monitoring program to allow for the evaluation of costs and benefits and of alternative management actions; and
- (c) Support the development and adoption of an annual operational plan by no later than December 15 of each year.

With regard to the BDCP, since it is a long-term conservation plan and environmental conditions and scientific knowledge will change over time, the CSAMP will provide the means to incorporate new understanding of the applicable science to manage a complex environment into the future.



## **II. Function of the CSAMP**

Because this is a collaborative science effort that builds on existing interagency programs and will involve multiple agencies and diverse stakeholders, agreement on the specifics of the program will take some time and collaboration. This Supplement provides key elements of an action plan below to demonstrate to the court the steps that need to be taken to achieve the desired outcomes of the CSAMP:

- (a) Agreement on membership, structure and organization of the CAMT, including sub-teams on different technical issues;
- (b) Agreement on ground rules for participation in the CAMT, including provision for external facilitation and/or administrative support ;
- (c) Agreement on the key scientific issues of interest relative to actions under the BiOps or BDCP (examples of some of these already exist and are discussed in the various declarations, but other parties may want to add to the list);
- (d) Agreement on the technical questions that need to be answered, and the resources available internally or externally to answer them;
- (e) Agreement on existing or needed new conceptual models pertinent to key scientific issues;
- (f) Agreement on a prioritized list of testable hypotheses and strategies for testing the hypotheses;
- (g) Agreement on monitoring needs to support testing the hypotheses;
- (h) Agreement on process for establishment of priorities for funding for research, monitoring and modeling;
- (i) Agreement on the role of independent/external scientific advice and review; and
- (j) Agreement on resources for and management structure for implementation of agreed upon study plans.

### **III. Schedule for the CSAMP**

Three years is the minimum time necessary to demonstrate the achievements of an effective CSAMP and to gather enough information to support development of new BiOps. Our intent is that the CSAMP, by showing success, becomes the model for collaborative science in the Delta and although 3 years would support the development of the remanded BiOps, continuation of the program would support longer term science and decision-making needed for other programs.

The proposed schedule for the CSAMP is divided into three phases.

Phase 1 runs concurrently with phases 2 and 3. Phase 1 is the collaborative science development and implementation phase. Key milestones in this phase are: completion of new experimental designs by January 1, 2014; implementation of the first year of the operational strategies by June 30, 2014; implementation of the second year of the operational strategies and complete analysis and reporting of the first year results by June 30, 2015; and complete analysis and reporting of the second year's results by June 30, 2016. (See declarations for types of experiments.)

Phase 2 is Reclamation's new proposed action as part of a consultation package and NEPA phase. The key milestone in this phase is submission of a final consultation package, including a new proposed action and/or proposed RPA actions, to NMFS and USFWS by December 31, 2015. This milestone will allow Reclamation to include any final results developed as part of the first year of the collaborative science experiment into the consultation package.

Phase 3 is the final Biological Opinion phase. Integration of the results from the CSAMP will occur as the Services complete the Effects Analysis of the proposed action/RPAs for the BiOps.

### **IV. How CAMT and CSAMP represent significant changed circumstances -- a paradigm shift and also further the public interest.**

- Two years ago the Federal and State agencies, the Public Water Agencies, and NGOs were operating in a contentious climate. Public Water Agencies and NGOs felt that the Federal and State fish agencies were not listening to their concerns. Agencies and stakeholders lacked trust and litigation was

expected. That climate is unacceptable and will continue unless there is a shift away from litigation and towards collaboration to address long-lasting solutions to the decline in Delta fish species.

- Progress on the BDCP – the July 2012 announcement was a key milestone where Federal and State governments confirmed joint interests in addressing Delta fish, ecosystem, and water supply problems through a reconfigured BDCP. That announcement explained very significant change and progress from where things stood between the agencies two years ago.
- The intent now is to use the CAMT and CSAMP to strengthen and broaden the collaboration with the NGO and Public Water Agencies to achieve long-lasting solutions by doing the following:
  - Increasing transparency.
  - Building trust through joint fact-finding and shared understanding.
  - Reviewing and considering new or alternative scientific information or approaches.
  - Establishing stronger relationships with the broader community by involving non-agency scientists with applicable expertise.
- Currently, several small-scale, incipient efforts at collaborative science are underway in the Delta, but are threatened by lack of resources and the potential for further litigation. We believe the 3 year extension would provide the necessary time to allow those efforts to succeed using the resources and expertise of the Federal and State agencies. Additionally, the CAMT is needed to ensure those efforts are effectively integrated and implemented in the context of a more comprehensive Delta science program within which the BiOps and BDCP would operate.

## **V. Consequences of not getting the extension.**

- Existing collaborative efforts will either cease or face reduced engagement as resources will be focused on remand and/or litigation.
- Federal and State agency staff with special expertise on Delta issues would be unavailable for BDCP if they work under the current schedule for the remanded BiOps.



## **VI. Compliance with ESA during the interim period.**

The existing 2008/09 BiOps will continue to be in effect until new BiOps are issued and accepted, and the Agencies will fully implement the existing biological opinions during the remand period, including existing RPA actions and incidental take statements, unless modified or refined as allowed or required under the law. The Federal and State agencies have no intent to exceed their authority under the ESA, its implementing regulations or relevant and controlling case law. To the extent any contrary expectations may have been created by the Proposal, the statement here provides clarification. Key questions considered in the CSAMP will be focused on long-term science and development of the remanded BiOps and the BDCP and will also likely develop information useful for implementation of the existing RPAs.

## **VII. Periodic meetings.**

Notwithstanding the language in Key Element #6 in Exhibit A to Documents 1080 and 713, non-governmental organizations shall choose who will represent them in any such meetings, and their chief executive officers are not required or expected to attend such meetings.