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2 **COUNSEL IDENTIFICATION ON FINAL PAGE**

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4 **UNITED STATES DISTRICT COURT**
5 **EASTERN DISTRICT OF CALIFORNIA**

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10 **THE CONSOLIDATED DELTA SMELT CASES**

Lead Case:
1:09-cv-407-LJO-DLB

Member Cases:
1:09-cv-422-LJO-DLB
1:09-cv-631-LJO-DLB
1:09-cv-892-LJO-GSA

Partially Consolidated With:
1:09-cv-480-LJO-GSA
1:09-cv-1201-LJO-DLB

**SUPPLEMENTAL BRIEF IN
SUPPORT OF JOINT MOTION TO
EXTEND THE REMAND
SCHEDULE (Doc. 1098)**

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19 **THE CONSOLIDATED SALMONID CASES**

Lead Case:
1:09-cv-1053-LJO-DLB

Member Cases:
1:09-cv-1090-LJO-DLB
1:09-cv-1378-LJO-DLB
1:09-cv-1520-LJO-DLB
1:09-cv-1580-LJO-DLB
1:09-cv-1625-LJO-SMS

**SUPPLEMENTAL BRIEF IN
SUPPORT OF JOINT MOTION TO
EXTEND THE REMAND
SCHEDULE (Doc. 728)**

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25 Pursuant to the Court’s Order of January 30, 2013 (Doc. No. 1098 (*Consolidated Delta*
26 *Smelt Cases*, Civ. No. 09-407); Doc. No. 728 (*Consolidated Salmonid Cases*, Civ. No. 09-
27 1053)), Plaintiff-Intervenor California Department of Water Resources (“DWR”) and Federal
28 Defendants (collectively, “Movants”) respectfully submit this supplemental memorandum in
support of their joint motion to extend the remand schedule (“joint motion”). Although Movants

1 previously requested that the Court decide the joint motion on the papers, in light of the
2 questions raised in the Court's Order, Movants now respectfully request that the Court schedule
3 a hearing on the Joint Motion at its earliest convenience so that they may be heard.
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1 **I. INTRODUCTION**

2 A fundamental change has taken place in this litigation since the original remand
3 schedules were entered in the above-captioned cases. At the point of entry of judgment, years of
4 litigation had created an atmosphere so polarized and contentious that months of intensive
5 negotiations could not bring about agreed-upon remand schedules in either case. The polarized
6 and contentious atmosphere continued even after the judgments were entered, as the parties
7 continued to litigate over post-judgment relief. In both cases, in fact, Plaintiffs opposed Federal
8 Defendants' proposed remand schedules as unacceptably lengthy. Now, however, Movants, who
9 themselves were once party opponents squarely at odds over the appropriate length of the
10 remand schedules, have come together to jointly ask the Court to postpone the Court-ordered
11 deadlines for new biological opinions ("BiOps") and National Environmental Policy Act
12 ("NEPA") analyses regarding the Central Valley and State Water Projects ("CVP" and "SWP,"
13 respectively). This extension, as further discussed below, embodies a good-faith attempt to
14 break the cycle of litigation that has followed the issuance of previous BiOps and consumed
15 tremendous agency resources for most of the last decade. In particular, in lieu of continuing the
16 past practice of issuing new BiOps based on contested science, which has lead to litigation,
17 Movants seek to undertake a newly-developed, collaborative science and adaptive management
18 program ("CSAMP"), which will increase the level of stakeholder involvement and cooperation
19 in the development of new science.

20 In its January 30, 2013 Order, the Court found that, while the CSAMP may represent a
21 "sound policy choice," Movants "have not yet met their burden under Fed. R. Civ. P. 60(b)" to
22 justify a continuance of the remand schedules. Order at 4-7.¹ As requested by the Court, this

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24 ¹ As an initial matter, in a case, as here, involving administrative review of agency action, a
25 change in policy direction, standing alone, is sufficient to constitute a changed circumstance
26 warranting modification of a remand order. In contrast to many of the Rule 60 cases cited by
27 Defendant-Intervenors that involved the Court's supervision of judgments entered in general
28 civil litigation, this case involves a remand order in the context of review of administrative
action. In the administrative review context, generally the Court's role stops once the error is
found and the action is returned to the Federal agency to determine how it "may best proceed to

1 supplemental memorandum and the declarations submitted herewith provide additional detail in
2 support of Movants' request for a continuance, further explaining how: (1) circumstances have
3 changed in significant, unforeseen ways since the judgments were entered; (2) the changed
4 circumstances make compliance with the remand schedules contrary to the public interest; and
5 (3) the requested continuance is tailored to the changed circumstances. *See* Fed. R. Civ. P. 60(b).

6 Movants have taken very seriously the Court's direction for "all Parties to work together
7 toward the development of a joint detailed revised [Collaborative Science and Adaptive
8 Management ("CSAMP")] proposal." Order at 8; Sobeck Decl. ¶ 11. In the months prior to
9 filing the joint motion, Deputy Assistant Secretary for Fish and Wildlife and Parks for the U.S.
10 Department of the Interior Eileen Sobeck, and other members of the federal team, including the
11 Deputy Solicitor for Water, Counselor to the Deputy Secretary, the West Coast Salmon
12 Coordinator for the National Marine Fisheries Service ("NMFS"), Regional Directors for the
13 U.S. Fish & Wildlife Service ("FWS") and U.S. Bureau of Reclamation ("Reclamation"), and
14 others, had made a considerable effort to develop a Proposal that was acceptable to all parties,
15 holding no fewer than two dozen telephone and in-person conferences with representatives on
16 behalf of the Plaintiffs as well as Defendant-Intervenors. Sobeck Decl. ¶ 10. In the days
17 following the Court's Order, Deputy Assistant Secretary Sobeck, along with members of the
18 team mentioned above and regional staff, resumed those efforts, contacting a representative of
19 the Defendant-Intervenors to discuss a possible way forward, and subsequently holding a series
20 of in-person meetings and conference calls with both the Plaintiffs and Defendant-Intervenors.

21
22 develop the needed evidence and how its prior decision should be modified in light of such
23 evidence as develops." *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326,
24 333-34 (1976); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 954 (D.C. Cir. 2007) ("It is a
25 basic tenet of administrative law that when an agency action is found to be arbitrary and
26 capricious because of a failure to exercise reasoned decisionmaking, the agency is free to adopt a
27 new policy on remand, provided it supplies a reasoned explanation for its actions"). Thus, a
28 desire to change policy direction during the remand proceedings, in and of itself, can represent a
significant change in circumstance for Rule 60 purposes. In any event, as shown below, several
significant changes in circumstances since entry of the judgment warrant adjustment of the
remand schedule.

1 *Id.* ¶ 11. Since the week of February 12, 2013, no fewer than seven in-person meetings and/or
2 conference calls took place. *Id.* ¶ 12. The agencies also prepared a supplement to the original
3 CSAMP Proposal to augment and clarify elements of the CSAMP and address any
4 misunderstandings that may have arisen regarding compliance with the Endangered Species Act
5 during the remand period. Attach. 1 to Supp. Lohofener Decl. Unfortunately, despite the
6 significant level of outreach, Defendant-Intervenors have elected not to support the Proposal. As
7 Movants explained in our joint reply in support of the joint motion, Defendant-Intervenors’
8 objections to the Proposal – that it will weaken species protection during the remand and
9 increase the risk of litigation – are unwarranted. *Id.* To the contrary, the Proposal will provide
10 equivalent or improved biological protection to the listed species, Rea Decl. ¶ 9; Supp.
11 Lohofener Decl. ¶ 19, and decrease the risk of litigation, both in the near and long-term. In
12 short, pursuing the CSAMP is in the public interest, and if the Court grants the joint motion,
13 Federal Defendants will continue to work with Defendant-Intervenors to include them in the
14 process, as participation by all stakeholders will make the process more collaborative and
15 ultimately more effective.

16 **II. DISCUSSION**

17 **A. The CSAMP Is A Significant Change In Circumstances That Makes The** 18 **Existing Remand Schedule Detrimental To The Public Interest**

19 Generally speaking, the Court’s Order sought additional detail with respect to three basic
20 issues related to the CSAMP: (1) why development of the CSAMP concept is a “significant
21 change in factual conditions” (*i.e.*, why it was not “incorporated or presumed in the original
22 schedule”); (2) why development of the CSAMP concept makes the existing remand schedules
23 “more onerous,” “unworkable,” or “detrimental to the public interest”; and (3) how the requested
24 three-year continuance is tailored to the aforementioned items in the smelt and salmonid
25 litigation, respectively. Order at 5-6. We address each issue in turn.

26 **1. The Development Of The CSAMP Concept Is A Significant Change** 27 **In Circumstances**

28 As an initial matter, the development of the CSAMP concept is a significant change in

1 circumstances because it did not exist at the time the judgments in either case were entered. In
2 fact, the CSAMP concept could not have been developed at that time given the significant time
3 pressures facing the parties and, perhaps more fundamentally, the adversarial litigation posture of
4 the parties in both cases over the appropriate length of the remand schedules and implementation
5 of the reasonable and prudent alternatives (RPAs) during that period. Given the parties'
6 disagreement, even if the CSAMP concept could have been contemplated, it is highly unlikely
7 that an agreement could have been reached to extend the remand schedule by three years to allow
8 it to be implemented.

9 As discussed further below, the litigation history of the *Smelt* and *Salmonid* cases shows
10 at least three things. First, that it would not have been possible for the parties to develop the
11 CSAMP concept at the time the judgments were entered in either case, much less agree to extend
12 the remand schedules by three additional years to implement it, given the time constraints and
13 the adversarial position of the parties. Supp. Lohofener Decl. ¶ 4; Sobeck Decl. ¶ 7. Second, it
14 shows that a significant change in factual circumstances has taken place since the final
15 judgments were entered, given that DWR, which previously opposed both proposed remand
16 schedules, is now a co-movant with Federal Defendants in requesting an extension of the remand
17 schedule, joined by several Plaintiffs, with opposition from no other Plaintiff. Supp. Lohofener
18 Decl. ¶ 5; Sobeck Decl. ¶ 7; Rea Decl. ¶ 3. Finally, the years of intensive litigation, which
19 culminated in fully briefed motions on competing remand schedules, shows that the subsequent
20 development of the CSAMP concept and the current alignment of the parties with respect to the
21 remand schedules were neither foreseen nor reasonably foreseeable at the time the judgments
22 were entered. Supp. Lohofener Decl. ¶ 5; Rea Decl. ¶¶ 3-4 (explaining unanticipated changes
23 in party position and results of scientific studies and reviews completed after Final Judgment was
24 entered).

25 While the Court noted that the remand schedule is an issue that was previously litigated
26 by the parties and resolved, in actuality, greater context is necessary. For example, in the *Delta*
27 *Smelt Cases*, the Court initially gave the parties just ten days to submit a final judgment (1:09-
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1 cv-407, Doc. 782) while they were in the midst of reviewing the Court's recently-issued 225-
2 page summary judgment opinion (1:09-cv-407, Doc. 757) and preparing for a three-day
3 evidentiary hearing scheduled for Plaintiffs' motion for further injunctive relief against
4 implementation of the remanded smelt BiOp's RPA (1:09-cv-407, Docs. 766-779).

5 Compounding this short turn-around (occurring in the midst of hearing preparation) was the fact
6 that the parties were wholly at odds over the appropriate length of the remand schedule, with the
7 Defendant parties seeking a longer remand schedule and the Plaintiff parties seeking a shorter
8 schedule.

9 Despite two extensions of time to attempt to resolve these basic differences over the
10 remand schedule (1:09-cv-407, Docs. 807, 835), the parties were unable to reach agreement. As
11 such, Federal Defendants, joined by Defendant-Intervenors, submitted a proposed final judgment
12 on their behalves, which requested eight months to prepare a partial BiOp that deferred certain
13 analyses, and did not include a deadline to complete NEPA analysis (1:09-cv-407, Doc. 846-1).
14 The Court did not adopt Defendants' proposed schedule. Instead, notwithstanding Defendants'
15 request to be heard on the matter, the Court, without hearing from any party, entered an
16 abbreviated schedule that gave Federal Defendants just six months to issue a complete BiOp that
17 included the analyses Defendants had sought to defer, and two months thereafter to complete
18 NEPA analysis. *Delta Smelt Cases*, 1:09-cv-407, Doc. 851. That schedule prompted further
19 motion practice. Finding the Court's schedule impossible to comply with, Federal Defendants
20 moved to alter or amend the judgment to allow eight months to prepare a draft BiOp, 30 months
21 thereafter to complete the NEPA analysis, and one month thereafter to complete the BiOp. *Id.*,
22 Doc. 856-2. Plaintiffs opposed, and proposed instead a schedule to complete NEPA analysis that
23 was 10 months shorter than that requested by Federal Defendants. Doc. 864. DWR joined in
24 Plaintiffs' opposition, stating that it did not oppose a remand of 20-30 months to complete ESA
25 and NEPA analysis. *Id.*, Doc. 865. While the Court granted Federal Defendants' motion to
26 amend the judgment, it did not adopt Federal Defendants' requested schedule, but rather one
27 shortened by five months. *Id.*, Doc. 875.

1 As in the *Smelt Cases*, years of litigation on the salmonid BiOp had created a polarized
2 atmosphere between NMFS and the litigants, including DWR, and very different perspectives on
3 what constitutes best available science and what was required of the agencies on remand. Rea
4 Decl. ¶ 3. This ultimately led the *Consolidated Salmonid Cases* down a similarly contentious
5 path to the entry of final judgment and a remand schedule. Specifically, on September 20, 2011,
6 the Court issued its extensive, 279-page memorandum decision on the merits of the parties' ESA
7 claims, and ordered Federal Defendants to provide a proposed date to file a new BiOp within
8 five days. *Consolidated Salmonid Cases*, 1:09-cv-1053, Doc. 633. Federal Defendants did so,
9 providing an estimated completion deadline of October 2017. Plaintiffs objected, arguing the
10 proposed schedule was too lengthy. DWR suggested that the Court allow the parties 30 days to
11 narrow their differences, and on September 29, 2011, the Court issued an Order pursuant to its
12 summary judgment opinion as well as an Order providing the parties 30 days to reach agreement
13 on a new proposed remand schedule.

14 Although the parties stipulated to extend the discussion period until December 2, 2011, as
15 in the *Delta Smelt Cases*, they were unable to reach agreement. Instead, the parties submitted
16 competing proposed remand schedules and final judgments, and Plaintiffs sought a hearing on
17 the matter. On December 7, 2011, the Court denied Plaintiffs' request for a hearing, but
18 encouraged the parties to file stipulations resolving any interim operational issues. The Court
19 further ordered a joint status report on January 6, 2012, which would advise the Court of any
20 remaining disagreements and the need for, and timing of, any motions for further injunctive
21 relief. On December 12, 2011, the Court entered final judgment and set a remand schedule that
22 was shorter than that requested by Federal Defendants, but longer than that proposed by
23 Plaintiffs. For the following month, the parties negotiated and, except for the Defendant-
24 Intervenors, stipulated to alternative interim water operations in April and May 2012, in place of
25 RPA Action IV.2.1. The Court entered the stipulation on January 19, 2012.

26 At bottom, this change in circumstances and the parties' positions with respect to the
27 remand schedule was not arrived at overnight by the Movants. Rather, the CSAMP concept and
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1 the current alignment of the parties is the result of months of outreach and extended negotiations
2 amongst the parties. Sobeck Decl. ¶¶ 9-10; Supp. Lohofener Decl. ¶ 6. Although the CSAMP
3 concept is a deliberate effort to chart a new, more productive course for the CVP and SWP
4 BiOps, as noted above, there would be nothing inappropriate about the agencies simply
5 “chang[ing] their minds about how they wish to go about gathering information for use in
6 preparing the revised BiOps.” Order at 4. As Movants explained in the joint motion, Rule 60
7 should not be interpreted to foreclose the discretion afforded to a Federal agency to determine
8 how it “may best proceed to develop the needed evidence and how its prior decision should be
9 modified in light of such evidence as develops.” *Fed. Power Comm’n*, 423 U.S. at 333-34; *Nat’l*
10 *Tank Truck Carriers v. EPA*, 907 F.2d 177, 185 (D.C. Cir. 1990) (“We will not, indeed we
11 cannot, dictate to the agency what course it must ultimately take”) (citations omitted). Thus,
12 regardless of how its origin is characterized, the CSAMP represents a significant change in
13 circumstances that should be accommodated.

14 **2. The Development Of The CSAMP Concept Makes The Existing**
15 **Remand Schedules Contrary To The Public Interest**

16 As noted above, the Court found that the CSAMP concept may represent a “sound policy
17 choice,” but requested additional explanation regarding how it is in the public interest. Order at
18 4. In particular, the Court asked Movants to identify any concerns they have regarding the
19 sufficiency of the new BiOps and/or NEPA analyses under the existing scientific record and
20 explain how implementing the CSAMP will address those concerns. *Id.* at 5. The Court also
21 inquired why a three-year extension of the remand schedule to pursue the CSAMP will benefit
22 the public interest more than issuing a new smelt BiOp in December 2013 as currently required.
23 *Id.* at 6.

24 As an initial matter, Federal Defendants are currently prepared to meet the remand
25 schedules in both the smelt and salmon cases and, with or without an extension, produce BiOps
26 and NEPA documents that they believe meet all applicable legal requirements. *See* Rea Decl. ¶
27 8; Supp. Lohofener Decl. ¶ 14. However, Federal Defendants’ goal is not simply to produce

1 documents that will withstand legal challenge, but rather to issue documents that—because of
2 increased stakeholder collaboration and scientific exploration—do not prompt such challenge in
3 the first place. As discussed below, Movants believe that the CSAMP provides a means to
4 accomplish this goal and break the decade-long cycle of litigation. For this and other reasons
5 discussed below, pursuing CSAMP is in the public interest. By contrast, holding Federal
6 Defendants to the current remand deadlines would be contrary to the public interest because it
7 will limit pursuit of the CSAMP process and thereby the development of new scientific data, and
8 is likely to lead to further litigation.

9 **a. Implementing The CSAMP Will Decrease The Possibility Of**
10 **Further Litigation, Whereas The Existing Remand Schedules**
11 **Will Increase It**

12 The decade-long litigation over the CVP and SWP BiOps has been a significant drain on
13 agency resources and has diverted agency staff from working to fulfill the agencies' core
14 missions. Moreover, litigation is in conflict with effective collaboration and stalls constructive
15 efforts to improve the health of the Delta and its species. Supp. Lohofener Decl. ¶ 8; Sobeck
16 Decl. ¶ 16; Rea Decl. ¶ 7. As detailed in the accompanying declarations and discussed below,
17 the collaborative CSAMP process is critical to breaking the current Section 7
18 consultation/litigation cycle over CVP and SWP operations. Sobeck Decl. ¶¶ 7, 16; Rea Decl. ¶
19 7. Breaking this litigation cycle will allow the agencies to focus limited resources in ways that
20 are most effective for the short and long-term protection of ESA listed species. *Id.* Because the
21 CSAMP aims to avoid further litigation over the CVP and SWP BiOps and NEPA analyses, it
22 provides a significant benefit to the public interest. *Id.*

23 The CSAMP aims to avoid further litigation by improving scientific understanding over
24 the long term, and using new information gained from this process in implementing, and
25 adaptively managing, the existing RPAs within the BiOps over the short term. Rea Decl. ¶ 15.
26 By improving scientific understanding while simultaneously increasing the participation of
27 stakeholders, the CSAMP is not only intended to lead to less litigation, but also more effective
28 protection of ESA-listed species over both the long and short run. *Id.* ¶ 7. In particular, the

1 collaborative science and adaptive management process embodied in the CSAMP will better
2 utilize the cooperation and expertise of non-agency stakeholders and scientists to identify and
3 inform key areas of uncertainties related to species needs and CVP/SWP water operations,
4 through carefully planned experiments, analyses, and adaptations. *Id.* ¶ 9. In addition, the
5 CSAMP will put into practice and test the feasibility of the collaborative science processes
6 currently contemplated for the Bay Delta Conservation Plan (“BDCP”) (*id.* ¶ 10); synthesize and
7 oversee critical ongoing Delta science efforts, such as the South Delta Salmonid Research
8 Collaborative (“SDSRC”) (*id.* ¶ 12); define additional expectations or guidelines for adaptive
9 management experiments with respect to use of conceptual models, requiring independent peer
10 review, and open and transparent solicitation of proposals (*id.* ¶ 13); and could track and advise
11 on baseline scientific analyses that are being planned now in anticipation of the BDCP being
12 finalized, *id.*

13 By contrast, issuing the smelt BiOp and NEPA analysis in December 2013 as currently
14 ordered would be contrary to the public interest for several reasons. First, issuing those
15 documents as scheduled would almost certainly lead to further litigation, as Plaintiffs have
16 indicated that they will file a lawsuit if the smelt BiOp and NEPA analysis are issued in their
17 current form (and they have indicated as much in the salmon case as well). *See, e.g.,*
18 *Consolidated Delta Smelt Cases*, Civ. No. 09-407, Doc. No. 1096 (Reply by San Luis & Delta-
19 Mendota Water Auth., Westlands Water District and Fam. Farm Alliance to Opp. to Jt. Mot. to
20 Extend Remand Sched.); Supp. Lohofener Decl. ¶ 9 (FWS does not anticipate a level of
21 stakeholder buy-in to the new BiOp, which could help to avoid litigation); Sobeck Decl. ¶ 6. If
22 litigation were to ensue over the smelt BiOp and NEPA analysis, the parties would return to an
23 adversarial posture, thereby jeopardizing the likelihood that the CSAMP, or any process that
24 seeks to build consensus around potential solutions to provide additional protection for species
25 and water supply reliability, would be implemented in the future. Sobeck Decl. ¶¶ 6, 16. A
26 return to litigation also could adversely affect the BDCP, because it could prevent the parties
27 from meaningfully discussing or collaborating on science. Sobeck Decl. ¶ 22.

1 Second, preparing the BiOp and NEPA analysis would limit Federal Defendants' ability
2 to pursue the CSAMP and realize its potential benefits. Supp. Lohofener Decl. ¶ 12; Sobeck
3 Decl. ¶ 8. While Federal Defendants do not believe there are "deficiencies" or "problems" with
4 producing legally defensible BiOps as the Order suggests (Order at 5), they do believe that, by
5 advancing the state of scientific understanding through this expert collaboration, the CSAMP can
6 make the remand BiOps more "robust." Movants envision the CSAMP as a means to identify
7 key actions for further analysis, develop operational strategies around those key actions,
8 implement the operational strategies through annual operations plans, and then monitor and
9 evaluate the results of the operational strategies to reduce uncertainties. Supp. Lohofener Decl.
10 ¶ 15; Rea Decl. ¶¶ 8-9. Those operational strategies will be designed to achieve equivalent or
11 better biological outcomes as provided for in the BiOps' RPAs. Supp. Lohofener Decl. ¶ 15;
12 Rea Decl. ¶ 9.

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

25 In addition to aiding in model development, the CSAMP would benefit studies that are
26 currently planned or already underway by agencies but that lack agency staff, funding, or true
27 collaboration to make them successful. *Id.* ¶ 17; Rea Decl. ¶ 17. For example, it is anticipated
28

1 that the CSAMP will provide a role in synthesizing and overseeing ongoing Delta science
2 efforts, such as the SDSRC, which has been formed by NMFS and DWR as an outgrowth of the
3 joint stipulation supported by the court last year and implemented in April and May 2012 (1:09-
4 cv-1053, Doc. 660), the delta smelt turbidity entrainment prediction tools, fall and summer
5 outflow studies, and existing monitoring programs. Rea Decl. ¶ 12. The three-year extension
6 would allow NMFS to fully staff the SDSRC, which will establish a comprehensive plan to guide
7 research on factors affecting survival of salmonids transiting the south Delta, and yield “vital
8 information” needed to support a new or revised BiOp. Schiewe Decl. ¶ 10. This time would
9 also allow the SDSRC to fully implement its scientifically robust research agenda, and give
10 CSAMP time to review and synthesize this research with other ongoing efforts. *Id.* at ¶¶ 11-13.

11 One such ongoing study that would benefit from the CSAMP is the so-called FLASH
12 study, which is being undertaken by Reclamation and FWS as part of the implementation of the
13 Fall X2 action in the RPA. Supp. Lohofener Decl. ¶ 16. At this time, there is little involvement
14 or participation by other agencies or stakeholders in this study. *Id.* This is the type of study that
15 FWS would like to see brought into the CSAMP, where it can be continued in a truly
16 collaborative manner. *Id.*

17 Another example of RPA actions that would benefit from the CSAMP is the
18 implementation of the actions designed to protect spawning delta smelt and their progeny. *Id.* ¶
19 18. Models of the movement of turbidity and the behavioral response of smelt to local
20 hydrology can inform implementation of the RPA actions designed to avoid drawing adult smelt
21 into the southern Delta where they are vulnerable to entrainment at the pumps. *Id.* Had the
22 collaborative science process been in place last fall, and the turbidity models agreed upon and in
23 use prior to the unusually pronounced turbidity movement that occurred in December 2012, we
24 might have been able to avoid the relatively high level of entrainment experienced this winter by
25 predicting the turbidity movement and adjusting real time operations accordingly. *Id.*

26 Other examples of studies and analytical tools that are still in their early phases and can
27 potentially be fully realized through the CSAMP process include the salmonid BiOp’s Six-Year
28

1 Acoustic Tag Steelhead Experiment; ongoing Vernalis Adaptive Management Plan (“VAMP”)
2 studies; life-cycle models being developed at NMFS’ Southwest Fisheries Science Center; and
3 DWR behavioral models of salmonid migration through the Delta. Schiewe Decl. ¶¶ 19-25. All
4 of these studies will contribute “significant new understanding of the interaction between water
5 export and factors directly or indirectly affecting” species survival. *Id.* ¶ 19.

6 In sum, the CSAMP represents a vital, newly-presented opportunity to increase
7 collaboration and scientific understanding while avoiding future litigation, maintaining
8 protection for species, and providing water supply reliability. If given three years, the agencies
9 will be able to play an important role in CSAMP and influence the direction of new and
10 refocused research of issues that are vital to completing a new or revised BiOp. Without the
11 extension, the agencies will not be in a position to participate in either CSAMP or the SDSRC,
12 and the future of the SDSRC without NMFS co-leadership is uncertain. *Id.* ¶ 26. In addition, the
13 results from route entrainment and survival studies currently being conducted will not be
14 available; new behavioral models will not be an option to evaluate alternative operations; and it
15 is unlikely that results of new salmonid studies will be available for consideration by agency
16 staff evaluating the proposed action in the *Consolidated Salmonid Cases*. *Id.* Failing to take
17 advantage of these new data, study results, and life-cycle and behavioral models will contribute
18 to the same environment of continued uncertainty that fueled the current unproductive cycle of
19 litigation. *Id.*

20 **b. The CSAMP And CAMT Will Follow Standardized And**
21 **Generally-Accepted Protocols For A Collaborative Science Process**

22 The Court has inquired about specific details on how the CSAMP and Collaborative
23 Adaptive Management Team (“CAMT”) will operate. Order at 4-5. Not all of the specific
24 details of the CSAMP are developed at this time, nor can they be, because in order to be truly
25 collaborative, the parties to the process must work together to define those details once the
26 process has begun. Supp. Lohoefer Decl. ¶ 20; Rea Decl. ¶ 11. Because defining the specific
27 parameters of the CSAMP is part of the very process itself, those details cannot be determined

1 ahead of time. Supp. Lohofener Decl. ¶ 20. While the details of the CAMT will necessarily be
2 worked out through the CSAMP process, the CSAMP process will follow standardized and
3 generally-accepted protocols for a collaborative science process. *Id.* To that end, the CAMT
4 will likely utilize a nine-step adaptive management approach similar to that described in the draft
5 Delta Plan developed by the Delta Stewardship Council. Rea Decl. ¶ 11, Ex. 1 (describing
6 approach). Beyond that, the agencies believe the process outlined in the Proposal and
7 Supplement will provide the structure to allow for trust building amongst the agencies and
8 stakeholders, foster shared understanding of key scientific questions, and provide greater
9 transparency of agency decision making on management actions. Supp. Lohofener Decl. ¶ 20.
10 The agencies recognize that the CSAMP is a fledging effort, but believe it holds the most
11 promise for developing collaborative joint science that can be utilized in multiple processes. *Id.*
12 ¶ 21; Sobeck Decl. ¶ 16. The Federal agencies learned through rounds of litigation that the
13 courtroom is not the appropriate place to test scientific hypotheses and seek collaborative
14 solutions. *Id.* They believe that this fledgling effort needs time to develop to draw formerly
15 adversarial parties from their respective corners to work together. *Id.*

16 **c. The Current Remand Schedules Are Contrary To The Public**
17 **Interest Because They May Limit Implementation Of The CSAMP**

18 As FWS Regional Director Ren Lohofener and NMFS Central Valley Office Supervisor
19 Maria Rea explain, the limited number of agency personnel with technical expertise in Bay Delta
20 matters will not be able to pursue the CSAMP without the requested extension because those
21 staff members are currently occupied with meeting the remand deadlines for new BiOps and
22 NEPA analyses. Supp. Lohofener Decl. ¶ 12; Rea Decl. ¶ 16 (“[g]iven limited technical staff
23 resources, NMFS [also] cannot commit to the CSAMP process and also meet the current remand
24 schedule); *see also* Sobeck Decl. ¶¶ 8, 19. This would have several negative consequences,
25 including preventing the agencies from developing the scientifically robust and statistically
26 rigorous information that could be prepared in the CSAMP, and foreclosing agency participation
27 in a transparent and collaborative environment with scientists and technical staff from all

1 stakeholder groups. Schiewe Decl. ¶¶ 9, 26; Sobeck Decl. ¶ 20.

2 In addition, if the agencies cannot participate in the CSAMP, the significant benefit of
3 avoiding continued litigation, which, as discussed above, stalls constructive efforts to improve
4 the health of the Delta and its species, will be foreclosed. Supp. Lohofener Decl. ¶ 8; Rea Decl.
5 ¶¶ 7, 14; Sobeck Decl. ¶ 21. Finally, foreclosing the CSAMP will hinder the BDCP, contrary to
6 the public interest. Supp. Lohofener Decl. ¶ 9; Sobeck Decl. ¶¶ 8, 20. The science that would
7 be developed through the CSAMP will inform the BDCP and other processes intended to address
8 water supply, water quality, and species protection in the Delta. Supp. Lohofener Decl. ¶ 11.
9 For instance, the three-year CSAMP process would put into practice and test the feasibility of the
10 adaptive management process proposed in the BDCP. *Id.*

11 3. The Requested Continuance Is Tailored to Implementing the CSAMP

12 The Court's Order asked why a three-year extension of the remand schedules is tailored
13 to the development of the CSAMP. Order at 5-6. As detailed in the supplemental CSAMP
14 proposal and accompanying declarations, the request for a three-year extension was deliberate,
15 and based on the minimum time necessary to implement the CSAMP. Supp. Lohofener Decl. ¶
16 20, Attach. 1, ¶ 24; Rea Decl. ¶¶ 18-24 (discussing three phases schedule); *id.* Ex. 3.
17 Specifically, the first year of the extension would be devoted to forming the CAMT, identifying
18 key actions and questions, and forming experimental designs. Supp. Lohofener Decl. ¶ 24. The
19 agencies envision that the first substantial operating plan would be in effect for the operating
20 season of 2013-2014. *Id.* After defining the actions and completing new experimental designs
21 in the first year, two operating seasons then would be necessary to implement the operational
22 strategies and monitor performance. *Id.*

23 Given the complexities of biology, operations, hydrology, and other factors affecting an
24 operational plan in any given year, more than two operating seasons to implement the strategies
25 would be beneficial; however, the agencies believe that the two seasons provided for in the
26 Proposal are the minimum amount of time necessary to: (1) define the particulars of the CSAMP;
27 (2) implement the experimental designs; (3) evaluate the Program's effectiveness; (4) update the
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1 state of knowledge on key actions; and (5) incorporate the updated understanding in new
2 analyses for the remand BiOp. *Id.* ¶ 25; *see* Rea Decl. ¶¶ 21-24. If the CSAMP is successful, the
3 agencies envision the process lasting longer than three years and informing other efforts. *Supp.*
4 *Lohofener Decl.* ¶ 25.

5 The Court also asked why a three-year extension is appropriate in both the smelt and
6 salmon cases, given that a new smelt BiOp is due in December 2013 and a new salmon BiOp is
7 more than three years away. *Id.* As explained above, three years is the minimum time necessary
8 to implement the CSAMP. This is not altered by the different status of the remands in the smelt
9 and salmon cases. Moreover, it is imperative that Movants be granted three years to implement
10 the CSAMP *before* the smelt BiOp is issued because a principle goal of the CSAMP is to avoid
11 the litigation that appears likely to occur if the smelt BiOp is issued according to the existing
12 remand schedule.

13 With respect to the salmon litigation, Movants do not maintain that three years are
14 necessary to “incorporate” the CSAMP into the BiOp as the Court suggests. Order at 6. As
15 explained above, implementing the CSAMP requires that the limited number of agency
16 personnel with technical expertise in Bay Delta matters be allowed to devote their time and
17 energy to implementing the CSAMP *in lieu of the work they otherwise would be doing to*
18 *complete a new salmonid BiOp.* Rea Decl. ¶¶ 18-20. After the CSAMP has been in place for
19 three years, the existing remand schedule would simply resume. *Id.* at ¶ 18. The amount of
20 work that remains to complete a new salmonid BiOp and NEPA analysis would not change if
21 that work is postponed for three years while the CSAMP is implemented. Thus, the time that
22 currently remains in the existing remand schedule would be utilized as previously anticipated.
23 *See* Rea Decl. ¶¶ 18-24, Exh. 3. Moreover, integration of the results from the second year of the
24 collaborative science experiment will occur as NMFS drafts the effects analysis by August 25,
25 2016. Rea Decl. ¶ 24. Were the remand schedule any shorter, it would jeopardize NMFS’
26 ability to implement the CSAMP and also complete the new salmonid BiOp. For these reasons,
27 a three-year extension is warranted of both the smelt and salmonid deadlines irrespective of their
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1 current status.

2 **B. The Collaborative Science And Adaptive Management Proposal CSAMP Is**
3 **A Significant Change In Circumstances That Makes The Existing Remand**
4 **Schedule Detrimental To The Public Interest**

5 Like with the CSAMP, the Court's discussion of the BDCP in its Order sought additional
6 detail with respect to three general issues: (1) how there has been an unforeseen "significant
7 change in factual conditions" with respect to BDCP when planning for BDCP has been
8 underway for several years; (2) how the changes with respect to the BDCP make the existing
9 remand schedules "more onerous," "unworkable," or detrimental to the public interest"; and (3)
10 how a three-year continuance is tailored to the aforementioned items. Order at 6-7. More
11 specifically, the Court requested "details about the nature of the scientific methodologies
12 proposed under the BDCP, how the current approaches being taken in the preparation of the
13 BiOps are incompatible with those proposed under the BDCP, how the CSAMP might be
14 integrated with those methodologies, how the three year timeframe will be utilized to accomplish
15 any such integration, and why an additional three years (as opposed to one or two or none) is
16 "suitably tailored" to enhance consistency." *Id.* at 7.

17 The BDCP process has undergone significant changes since the entry of judgment in the
18 salmon BiOp and smelt BiOp cases. On July 1, 2012, the Secretary of the Interior, the Governor
19 of California and officials from NMFS jointly announced for the first time proposed design
20 changes to the preliminary proposal for a new Delta conveyance facility in the BDCP. First
21 Hoffman-Floerke Decl. ¶ 3; Second Hoffman-Floerke Decl. ¶ 2. The very purpose of this
22 announcement was to disclose significant design changes to the BDCP, which in turn triggered
23 an intensive new collaboration between state and federal agencies to reach agreement on the
24 remaining key elements of the plan. Second Hoffman-Floerke Decl. ¶ 2. This joint effort has led
25 to, among other matters, work towards the development of the operational rules for the new
26 conveyance facilities, and the conduct of the adaptive management planning process to be
27 followed under the BDCP. *Id.*

28 An immediate consequence of this new federal and state collaboration has been to apply

1 the BDCP collaborative science process to near term Delta issues in order to test the BDCP
2 concept and improve common understanding of key scientific uncertainties regarding the Delta.
3 Sobeck Decl. ¶ 8. In fact, the CSAMP discussed above is structured on the adaptive
4 management process articulated in the BDCP. Supp. Lohofener Decl. ¶ 11.

5 The BDCP anticipates a full suite of scientific research in order to refine the operational
6 criteria for the proposed Delta conveyance facility, and to implement other conservation
7 measures. This scientific research includes work to be conducted through CSAMP. This
8 collaborative science would include: 1) scientific research considering salinity metrics such as
9 Delta outflow and the delta smelt; 2) research addressing the factors affecting salmonid survival
10 during their migration through the Delta; 3) research regarding delta smelt and turbidity
11 conditions; and 4) the development of life-cycle models for both the delta smelt and the Central
12 Valley salmonids. Second Hoffman-Floerke ¶¶ 16-19. As is apparent, these scientific endeavors
13 overlap with the science relevant to NMFS and FWS in preparing the remanded BiOps. While
14 scientific research on complicated biological issues is never fully complete and finalized, DWR
15 anticipates that, if the collaborative efforts are allowed to move forward in a timely fashion,
16 meaningful data and information on these topics will likely be forthcoming during the 2014-2016
17 time period. Second Hoffman-Floerke Decl. at ¶¶ 7, 9, 11, and 14. Such research could
18 therefore provide scientific benefits to NMFS and FWS in the reconsultation process, but only if
19 the current deadlines in the BiOp judgments are extended.

20 Conversely, failure to extend the current deadlines would force both federal and state
21 agencies to limit their current collaborative efforts for the simple reason that the agencies'
22 limited staff would have to be re-assigned to prepare and review the remanded BiOps and the
23 associated environmental documents, and would therefore be unavailable to work on the
24 identified scientific research. Supp. Lohofener Decl. ¶ 12; Sobeck Decl. ¶ 20; First Hoffman-
25 Floerke Decl. ¶ 4. Moreover, these limits on the collaborative science process would deny all
26 parties the scientific benefit of the synergy that would result from bringing all of the parties to
27 the table to address the issue of best available science before agency decisions are made.

1 The recent BDCP developments therefore further support the requested three-year
2 extension of time for completion of the BiOps. The federal and state collaborative efforts that
3 have followed from the July 2012 joint federal/state announcement could not have been
4 anticipated at the time the judgments were entered in this case. These collaborative efforts are in
5 furtherance of an historic effort by the state and federal governments to address long-standing
6 and important California water issues, and, assuming the requested extension is granted, the
7 federal fishery agencies reviewing the remanded BiOps will likely benefit from the proposed
8 collaborative research agenda.

9 **III. CONCLUSION**

10 For the foregoing reasons, and those set forth in the Joint Motion and Reply in support
11 thereof, all deadlines in the *Consolidated Delta Smelt Cases* and *Consolidated Salmonid Cases*
12 remand schedules should be extended for a period of three years.

13 Dated: March 15, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on March 15, 2013, the foregoing, with supporting attachments, was filed with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record in this matter.

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