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8  
 9 IN THE UNITED STATES DISTRICT COURT  
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA  
 11

12 **THE DELTA SMELT CASES**

1:09-cv-407 LJO-DLB

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 14 **SAN LUIS & DELTA-MENDOTA WATER  
 AUTHORITY, et al. v. SALAZAR, et al.**

Consolidated With:  
 Case No. 1:09-cv-422 LJO-GSA  
 Case No. 1:09-cv-631 LJO-DLB  
 Case No. 1:09-cv-892 LJO-DLB  
 Partially Consolidated With:  
 Case No. 1:09-cv-480 LJO-GSA  
 Case No. 1:09-cv-01201-LJO-DLB

15 \_\_\_\_\_  
 16 **STATE WATER CONTRACTORS v.  
 SALAZAR, et al.**

17 \_\_\_\_\_  
 18 **COALITION FOR A SUSTAINABLE  
 DELTA, et al. v. UNITED STATES FISH  
 AND WILDLIFE SERVICE, et al.**

**SECOND DECLARATION OF DALE  
 HOFFMAN-FLOERKE**

Judge: Honorable Lawrence J. O'Neill

20 \_\_\_\_\_  
 21 **METROPOLITAN WATER DISTRICT  
 OF SOUTHERN CALIFORNIA v.  
 UNITED STATES FISH AND WILDLIFE  
 SERVICE, et al.**

23 \_\_\_\_\_  
 24 **STEWART & JASPER ORCHARDS, et al.  
 v. UNITED STATES FISH AND  
 WILDLIFE SERVICE, et al.**

25 \_\_\_\_\_  
 26 **FAMILY FARM ALLIANCE v.  
 KENNETH SALAZAR, et al.**

1 I, Dale Hoffman-Floerke, declare that:

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3 1. I am the Chief Deputy Director of the California Department of Water Resources  
4 (DWR). I have worked for DWR for 33 years and hold a Bachelor of Science degree in Fisheries  
5 Biology from Humboldt State University. Prior to my appointment as Chief Deputy Director in  
6 July 2012, I served as acting Deputy Director for Delta and Statewide Water Management,  
7 overseeing, among other DWR offices and divisions, DWR's Bay-Delta Office and the Division  
8 of Environmental Services. My duties also included working with National Marine Fisheries  
9 Service (NMFS), U.S. Fish and Wildlife Service (FWS) and the U.S. Bureau of Reclamation  
10 (BOR) in the implementation of the delta smelt and salmonid biological opinions (BiOps), and  
11 serving as the Program Manager for the Bay Delta Conservation Plan (BDCP). In my current  
12 capacity as Chief Deputy Director, I continue to work with NMFS, FWS and BOR in the  
13 implementation of the BiOps and oversee the development of the BDCP.  
14

15 2. Over the last six months, there has been a significant breakthrough in the  
16 development of the BDCP, resulting from intensive and fruitful collaboration between the state  
17 and federal agencies on design of the BDCP conveyance facilities and other key elements in the  
18 BDCP. The BDCP is intended to be a long-term plan, based on a comprehensive, multi-species  
19 conservation strategy that seeks not only to avoid jeopardy but to contribute to recovery of the  
20 delta smelt, salmonids and other aquatic species. In July 2012, the Secretary of the Interior, the  
21 Governor of California, and officials from NMFS announced significant design changes to the  
22 BDCP, including a reduction in the number of intakes from five to three, a reduction of capacity  
23 from 15,000 to 9,000 cfs, and design changes to reduce electricity consumption through gravity  
24 flow. These changes in the proposed BDCP design in turn triggered an intensive collaboration  
25 between the state and federal agencies to reach agreement on the remaining key elements of the  
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1 plan, including, e.g., the operational rules for the new conveyance facilities, and the conduct of  
2 the adaptive management planning process to be followed under BDCP.

3 3. In recent months, these discussions have become increasingly collaborative, and  
4 have resulted in the federal and state agencies involved in BDCP recognizing the considerable  
5 benefits of working together to achieve shared goals and solve shared problems. This improved  
6 atmosphere has also spilled over into the discussions of the implementation of the RPAs. As a  
7 result of both the BDCP negotiations as well as the common work on the science underlying the  
8 RPAs, there has been a genuine “paradigm shift.” At both the management and the biologist  
9 levels, DWR joins the federal agencies in the belief that collaborative scientific efforts will  
10 achieve more protection for the fishery resources, as well as more efficient use of scarce water  
11 supplies.  
12

13  
14 4. The following will describe the recent science developments associated with RPA  
15 implementation and some of the scientific issues DWR wants to pursue through the Collaborative  
16 Science and Adaptive Management Program (CSAMP). Completion of this research will require  
17 the extended remand schedule that DWR and the United States have requested from this Court.  
18

#### 19 **Science Developments in Implementation of the BiOps**

20 5. DWR entered into litigation over the current Biological Opinions as a result of  
21 disagreements over their scientific underpinnings. While the scientific disagreements have not  
22 been resolved, there has been a marked improvement in the state and federal agencies’ ability to  
23 work collaboratively to resolve them. Implementation of the RPAs has produced substantial new  
24 scientific information and analysis that is important for the implementation of the existing RPAs  
25 as well as to the development of the new BiOps. The scientific developments include (but are not  
26 limited to) information developed as part of implementation of the “Fall X2” RPA in the delta  
27 smelt BiOp, implementation of the Old and Middle River (OMR) restrictions in the delta smelt  
28 BiOp, and implementation of Actions IV.2.1 and IV.2.3 in the salmonid BiOp. While these

1 scientific developments are welcome and important, there is still a significant need for additional  
2 collaborative science as described below.

3 **Science for the Fall X2 RPA**

4 6. Implementation of the “Fall X2” RPA in the delta smelt BiOp was the subject of  
5 significant scientific debate during the litigation. Underlying this RPA is a conceptual model  
6 based on the belief that the “low salinity zone” (LSZ) is a biologically important area for delta  
7 smelt, and that the LSZ may have greater benefits when its geographic location is further  
8 downstream (seaward) during fall. The Fall X2 action provides for X2 in September and October  
9 to be maintained at 81 km in above normal years and at 74 km in wet years. The BOR initiated a  
10 study on the effectiveness of this action in 2011, based on the first implementation of the fall X2  
11 action, as modified by an Order of this Court. The CSAMP anticipates the expansion of the  
12 existing experimental effort, to refine the conceptual model and answer other questions related  
13 to desirable delta smelt habitat attributes. The BOR study includes an adaptive management plan,  
14 with a conceptual model and hypothesized outcomes or predictions. Extensive information has  
15 already been collected; however, it is too early in the study to produce conclusive results. This is  
16 unsurprising given that the study is in the first year of what is intended to be a multi-year effort.

17 7. The CSAMP would broaden participation by all parties to the litigation and is  
18 intended to improve study design, and analysis of Fall X2 implementation. CSAMP would also  
19 allow for a broader range of investigation of other related subjects, including investigation of the  
20 adequacy of current monitoring programs to capture delta smelt location and abundance,  
21 development of quantitative estimates of delta smelt abundance, survival, growth and  
22 reproductive success as a function of salinity and habitat use, and assessment of the importance of  
23 additional environmental factors such as zooplankton availability, water velocities, nutrients,  
24 competition with other species and predation. CSAMP will take several years to develop  
25 information from these studies, but the program is likely to produce meaningful data and  
26 information by 2016 relevant to the BiOp reconsultation.

**Development of Turbidity Triggers for Smelt Protection**

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2 8. The increased research and collaboration offered under CSAMP may also allow  
3 for the use of better tools to predict turbidity movement, which could affect the way RPA actions  
4 intended to reduce the entrainment of delta smelt are implemented. These RPA actions are  
5 designed to reduce delta smelt entrainment and what the BiOp describes as the “indirect pumping  
6 effects” on the species. While disagreement exists about the extent to which entrainment has an  
7 effect on delta smelt population abundance, reduction of delta smelt entrainment to the extent  
8 possible is a desired goal. Currently the RPA reduces entrainment primarily through mandated  
9 restrictions on negative flows in Old and Middle rivers, restrictions that have the effect of  
10 reducing project pumping in the South Delta. However, it is hypothesized that delta smelt can  
11 sometimes be induced to avoid the project pumps altogether by a combination of management  
12 actions that affect the turbidity plume which appears to trigger upstream migration. There are  
13 several ways to manage the turbidity plumes, which typically result from early and/or heavy  
14 rainfall events, involving reservoir releases and coordinated pumping operations. Successful  
15 implementation of this management action will require a thorough understanding of how turbidity  
16 moves through the system as well as the physical location of the majority of the delta smelt at the  
17 time of a turbidity event.

18 9. While there is growing confidence that turbidity management is a useful tool, there  
19 is still a need to test and refine the model to better predict when turbidity in the south Delta is  
20 going to increase, and how to reduce net reverse flows in advance of such time to minimize  
21 entrainment of adult delta smelt into the South Delta. Additionally, there is a need to better  
22 understand South Delta hydrodynamics, to understand how turbidity behaves once it has entered  
23 the South Delta. This winter much new information has been collected and is being analyzed to  
24 better understand the hydrodynamics in the South Delta and how best to operate to minimize  
25 turbidity attraction by delta smelt. The Metropolitan Water District of Southern California has  
26 developed a model to predict turbidity movement, and has begun working with FWS to assess the  
27 utility of the model for project operations and turbidity management. CSAMP will address and  
28 coordinate research as to the turbidity trigger issue and will allow a broad participation by all of

1 the parties to the litigation, thus increasing the likelihood of consensus over this management  
2 action. CSAMP involvement in this scientific effort will likely yield new data and information by  
3 2016 that will assist in the BiOp reconsultation.

#### 4 **Development of Life Cycle Models for Delta Smelt and Salmonids**

5 10. This Court and independent scientific reviews of Delta water management actions  
6 have called for the development and use of “lifecycle models” (LCMs). *In re Consolidated*  
7 *Salmonid Cases*, 791 F.Supp.2d 802, 841 (E.D. Cal. 2011); *In re Consolidated Delta Smelt Cases*,  
8 760 F.Supp.2d 855, 885 (E.D. Cal. 2010). These models allow predictions of population level  
9 benefits to certain species in relation to specific conservation measures or management actions.  
10 For delta smelt, which typically live only one year, a lifecycle model could predict the benefits of  
11 taking action in different months or seasons of the year depending on which developmental stage  
12 of the fish is present at that time. However, there is not as yet a widely accepted lifecycle model  
13 for delta smelt. Presently, there are multiple, independent efforts underway to develop a delta  
14 smelt lifecycle model. Collaboration among these efforts would undoubtedly increase the  
15 efficiency of efforts to develop a delta smelt lifecycle model, hasten its completion and build  
16 greater confidence in its efficacy. Similarly, for salmonids, a lifecycle model could help to  
17 better define the role of river flows, State Water Project (SWP) and Central Valley Project (CVP)  
18 exports, OMR reverse flows, Delta inflow and outflow, tidal hydrodynamics and hydrologic  
19 conditions overall as factors affecting the migration route, migration rate, and overall survival of  
20 juvenile salmonids. NMFS is developing a lifecycle model for winter-run Chinook salmon which  
21 could also benefit from stakeholder input through CSAMP.

22 11. The CSAMP anticipates establishing a modeling group, which could serve as a  
23 forum for exchange of information about the development, structure and use of lifecycle models  
24 for both delta smelt and salmonids, with the objective of transparency. I anticipate that the  
25 modeling group could hold periodic meetings to describe the status of different LCM efforts,  
26 comment on LCMs being developed by others and collaborate with others on model  
27 development, develop common data sets and assumptions to use in the models; and conduct joint  
28 investigations of possible management actions to evaluate the population level relationship or

1 significance of these stressors or proposed actions. The new LCMs could be completed by the  
2 middle of 2014, and initial results from their use to evaluate benefits could be available by 2015.

3 **Science to Improve Understanding of Salmonid Survival**

4 12. Last year, NMFS and DWR jointly established the South Delta Salmonid Research  
5 Collaborative in response to questions about the study that was undertaken in spring 2012 under  
6 the 2012 stipulation agreement in the Salmonid BiOp cases. The purpose of the 2012 study was  
7 to generate information to improve understanding of how pumping rates, Old and Middle River  
8 flows, and juvenile steelhead migrations relate to one another. The 2012 study included the  
9 installation of a rock barrier at the head of Old River, a predator control study, operation and  
10 maintenance of an acoustic receiver array in the lower San Joaquin River and Delta, fish tagging  
11 releases, adaptive management of Old and Middle River (OMR) flows, and data analysis and  
12 report writing. The study was initiated by DWR in February 2012, with field work occurring  
13 between April and June. An Independent Review Panel convened by the Delta Science Program  
14 reviewed the study and found a number of defects in the study design. Rather than repeat the  
15 effort in 2013, the state and federal agencies agreed to use this year to develop a more robust  
16 study plan, including the development of conceptual theories, analysis of existing data sets,  
17 development of modeling tools and other research needs, all for implementation of a new study  
18 plan in spring of 2014. The goal is for the study plan for 2014 to be finalized by August 2013.

19 13. CSAMP is anticipated to provide the strong collaborative process needed to  
20 develop conceptual models to explain how hydrologic conditions affect juvenile salmonids as a  
21 framework for future investigations. The framework can then be used for a collaborative  
22 compilation and synthesis of data from previous studies to identify areas of agreement and areas  
23 of disagreement or uncertainty that would affect managed decisions. These key areas of  
24 disagreement or uncertainty would then be the subject of development of specific experimental  
25 designs to test specific hypotheses and alternative hypotheses as part of the development of the  
26 research program. Specific areas that DWR would like to see investigated are:

- 27 a. Location and timing of inserting tagged fish into the system  
28 b. Identification of specific reaches and areas of reduced survival in the Delta

1 c. Monitoring of steelhead abundance and distribution to determine the abundance and  
2 dynamics of steelhead produced on the San Joaquin River tributaries, sources of mortality, effects  
3 of river flows and exports on migration and survival.

4 14. Many of these studies are already under discussion in the South Delta Salmonid  
5 Research Collaborative, which I co-chair along with Maria Rea of NMFS. However, this effort  
6 thus far is hindered by the lack of staff resources. This collaborative effort would have to be  
7 greatly curtailed if staff were redirected to revise the Salmonid BiOp under the current remand  
8 schedule. If the South Delta Salmon Research Collaborative is allowed to proceed, DWR  
9 anticipates that it will be able to provide meaningful data and information regarding salmonid  
10 survival by late 2014. This data and information could then be used in developing the remanded  
11 Salmon BiOp RPAs and other related aspects of the BiOp.

#### 12 **New Science Relationship to BDCP**

13 15. DWR is drafting the BDCP for submission to the FWS, NMFS, and California  
14 Department of Fish and Wildlife, as part of its application for incidental take permits under  
15 Section 10 of the federal Endangered Species Act (ESA) and under the State Natural Community  
16 Conservation Planning Act (NCCPA) for the Delta operations of the SWP, as modified. The BOR  
17 will use the BDCP as part of its Biological Assessment in requesting an Endangered Species Act  
18 section 7 Biological Opinion for operations of the CVP. The BDCP is in the planning stage and  
19 no final decisions on any proposed conveyance facility can be made prior to the completion of  
20 regulatory and environmental review under the California Environmental Quality Act, National  
21 Environmental Policy Act, ESA, and NCCPA.

23 16. An administrative draft of the BDCP and the related Environmental Impact  
24 Report/Statement (EIR/S) were released in February 2012. Revised administrative drafts of the  
25 Plan and the EIR/S have been under preparation since the July 2012 announcement regarding  
26 changes in conveyance facilities, and will include new operational rules and a description of the  
27 BDCP Adaptive Management Program. A revised administrative draft Plan will be released  
28



1 during the next few months, with the official public review draft of the Plan and the EIR/S  
2 expected to be released sometime this summer. The final Plan and EIR/S are expected to be  
3 complete in 2014, with permit issuance to follow soon thereafter. Many of the science issues  
4 associated with implementation of the RPAs have also been aired in the course of developing the  
5 biological goals and objectives and conservation measures in the BDCP. For example, should the  
6 Fall X2 RPA be included in the BDCP operational rules for the new facility? The BDCP  
7 establishes a decision tree process, which is intended to be a structured scientific review of the  
8 disagreements and questions associated with Fall X2 measure. The decision tree process will  
9 determine the outflow requirements to be in effect by the time the new facilities are ready to  
10 operate (approximately a decade from now). The BDCP will also be looking closely at other  
11 scientific questions as to how to provide more high quality habitat for delta smelt, including tidal  
12 marsh restoration, which will depend on monitoring and analysis of many of the same factors as  
13 will be evaluated for the Fall X2 RPA.

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16 17. Another related issue under consideration is entrainment, which in the BDCP will  
17 be dealt with primarily through reliance on the new conveyance facilities instead of the existing  
18 South Delta pumps during times of concern over delta smelt and other species' presence in that  
19 area. Additional improvements in the south delta pumping operations may still be possible,  
20 however, and the turbidity management methods described above will provide considerable  
21 benefit to operations under the BDCP.

22  
23 18. BDCP has established aggressive survival objectives for salmonids, but there are  
24 some questions as to whether and how best the objectives can be achieved, given uncertainties in  
25 current survival rates in different areas of the Delta. The work of the South Delta Collaborative  
26 described above will be an important part of a more comprehensive monitoring and analysis  
27 program that will be needed for BDCP implementation.  
28

1           19.     The development of agreed upon lifecycle models for delta smelt and salmonids  
2 has also been identified as an important need for the BDCP science and adaptive management  
3 program, both to help guide implementation of operational rules as well as to evaluate the  
4 efficacy of other kinds of conservation measures.

5  
6                           **Structure of the Collaborative Science and Adaptive Management Program**

7           20.     It would be presumptuous for any of the parties to the litigation to delineate now in  
8 detail all the elements of the collaborative science program, because by definition the science  
9 questions to be answered, as well as the process used to answer them, must be developed  
10 collaboratively. Given the number of science questions and diversity of parties involved in this  
11 litigation, such an effort will necessarily be a multi-year effort. Not only is the science itself  
12 complicated, but a significant amount of time will be required to negotiate a process that all  
13 interests engaged in the litigation will have confidence in. Having said that, I will describe three  
14 key steps the CSAMP could undertake: 1) development of agreed upon hypotheses, or scientific  
15 questions, regarding alternative operational strategies and/or management actions; 2) review and  
16 synthesis of existing scientific information for the purpose of determining additional science  
17 needs and informing the design of alternative operations strategies; and 3) development of new  
18 modeling and other predictive tools with which to evaluate the effects of current and alternative  
19 strategies for protection and increased abundance of delta smelt and salmonids. The first two  
20 steps are immediate, while the third represents a somewhat longer-term science effort.

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23           21.     As stated earlier, the state and federal agencies have made tremendous progress  
24 towards a more collaborative relationship that will be critical to moving forward on the science  
25 issues pertinent to both the RPAs and BDCP. What is still missing, however, is integration of the  
26 Public Water Agencies and the NGOs – some of whom have commissioned or prepared scientific  
27 work on the above topics. The November 29, 2012 joint proposal lays out general elements of the  
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1 Collaborative Science and Adaptive Management Program. Additional collaborative work will  
2 be needed, among other things, to define the membership of one or more of the working groups  
3 described above, the ground rules for participation, agreement on the conceptual models to be  
4 developed and provisions for independent scientific input/review.

5  
6 22. An extended schedule for developing the Biological Opinions would allow time  
7 during which new scientific methodologies proposed under BDCP, and perhaps any monitoring  
8 data obtained after it is approved, could be considered and incorporated in the remanded  
9 Biological Opinions. The subject matter of these documents is complex and controversial.  
10 Extending the time to develop the salmonid and smelt BiOps while the BDCP is being completed  
11 will provide time to better develop scientifically robust and consistent documents.

12  
13 23. This declaration is based upon my personal knowledge and if called as a witness I  
14 could and would testify consistently with this declaration.

15 I declare under penalty of perjury that the foregoing is true and correct, and that this  
16 declaration is executed this 15th day of March, 2013 at Sacramento, California.

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DALE HOFFMAN-FLOERKE

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