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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

THE DELTA SMELT CONSOLIDATED CASES	Lead Case: 1:09-cv-00407-LJO-DLB **Declaration of Eileen Sobeck In Support of Joint Motion to Extend the Remand Schedule**
THE CONSOLIDATED SALMONID CASES	Lead Case: 1:09-cv-1053-LJO-DLB

I, Eileen Sobeck, declare as follows:

1. I am the Deputy Assistant Secretary for Fish and Wildlife and Parks for the U.S. Department of the Interior (Department). I have held this position since 2009. Prior to 2009, I worked as a Deputy Assistant Attorney General in the Environment and Natural Resources Division of the U.S. Department of Justice. I have worked for the federal government for more than 33 years.

2. As Deputy Assistant Secretary, I am responsible for a variety of policy issues arising under the purview of the National Park Service and the U.S. Fish and Wildlife Service (Service). I have been part of the team addressing California water issues since I joined the Department. I have been involved with the regional Department staff on many issues, including the litigation over the biological opinions (BiOps) issued by the Service and National Marine Fisheries Service (NMFS) regarding operation of the Central Valley Project (CVP) and State Water Project (SWP). I have also been a member of the federal team working with the State of California in its efforts to develop the Bay Delta Conservation Plan (BDCP).

3. I have been the Department's point person for negotiation of the "Federal and State Proposal for Modification to the Remand Schedule and an Alternative Process for Development of Operational Strategies and A Collaborative Science and Adaptive Management Program," dated November 20, 2012 (Proposal), and the Supplement to the Proposal dated March 15, 2013 (Supplement). The Proposal and Supplement document the concept behind the Collaborative Science and Adaptive Management Program (CSAMP).

4. I have not previously provided a declaration in this matter. I submit this declaration to address questions raised in the Court's January 30, 2013, Order in response to the joint motion for a continuance of the deadlines in the remand schedule. In particular, in this declaration, I will document the numerous meetings and calls that I have conducted, both before and after the Court's Order, with many parties in the *Delta Smelt Cases* and *Consolidated Salmonid Cases* in an effort to negotiate the Proposal and Supplement.

5. In addition, this declaration is intended to articulate the Department's position on the importance of supporting the development of the BDCP. The BDCP is a Habitat Conservation

Plan (HCP) being developed by the State under Section 10 of the Endangered Species Act. The BDCP is intended to implement the shared vision of state and federal governments of improving conservation of species and water supply reliability for the State of California.

I. The Need for, and Development of, the CSAMP Proposal and Supplement

6. The Federal agencies are seeking to pursue the CSAMP for several reasons. First, a significant amount of collaboration has gone into developing the BDCP, which we view as a positive step forward. We have concerns that issuing new BiOps will send all parties back to their litigation corners, which will severely limit further efforts at collaboration. The problems facing the Delta and its imperiled species are numerous and complex, and returning to entrenched litigation positions will not help foster long-term solutions. Moreover, significant agency resources will go into defending litigation, making it difficult to pursue other departmental priorities.

7. The parties were in those entrenched positions when I joined the Department in 2009. However, I believe there has been a significant change in those positions since the District Court issued its summary judgment opinion in these cases. In particular, significant effort has gone into BDCP, and there has been an effort at increased collaboration amongst the formerly-adversarial parties. The progress in BDCP and increased collaboration led the agencies to pursue the CSAMP. I believe the CSAMP represents a key opportunity to break the cycle of litigation over the CVP and SWP BiOps by allowing the parties to work collaboratively towards the development of new scientific information with regard to ESA-listed species in the Delta.

8. However, because agency resources are already stretched thin due to multiple departmental and regional priorities, it is clear that preparing the remand BiOps and National Environmental Policy Act (NEPA) analyses, BDCP and the CSAMP are not likely to be able to be effectively pursued at the same time. Many of the staff with appropriate expertise from the Service, the U.S. Bureau of Reclamation (Reclamation) and NMFS are key to all efforts. Adding inexperienced or new staff will not significantly expand the agencies' capacity to undertake all these efforts at the same time. Additionally, because the CSAMP will inform both the remand process and BDCP, it makes sense to pursue that effort first. Therefore, because the current

remand schedules are likely to lead to additional litigation, and will prevent effective implementation of the CSAMP, which would improve scientific understanding and collaboration between the parties, I do not believe that adhering to the remand schedules is in the public interest.

9. I and others in the Department have devoted a considerable amount time and energy towards developing the CSAMP concept over the past six months. The Department first began earnest discussions with the California Department of Water Resources (DWR), California Department of Fish and Wildlife and NMFS on pursuing the development of a collaborative science process for use prior to BDCP implementation in September 2012. These discussions followed on the momentum of the joint announcement on BDCP by the Governor of California, the Secretary of the Interior, and the National Oceanic and Atmospheric Administration's Assistant Administrator for Fisheries in July 2012. The initial concept was to try to apply the collaborative science process being discussed as part of BDCP in the near term prior to BDCP to both test the BDCP concept and improve common understandings of key scientific uncertainties. These lengthy discussions resulted in the first drafts of the Proposal that was ultimately filed with the Court on December 20, 2012.

10. In October 2012, the agencies began sharing the draft Proposal with the Public Water Agencies (PWAs) (who were plaintiffs in the *Delta Smelt Cases* and *Consolidated Salmonid Cases*), and certain Non-Governmental Organizations (NGOs) (who were Defendant-Intervenors in those cases). Following the circulation of the draft Proposal, I, along with other members of the federal team including the Deputy Solicitor for Water, Counselor to the Deputy Secretary, the West Coast Salmon Coordinator for NMFS, Regional Directors for the Service and Reclamation and others, held no fewer than two dozen telephone and in-person discussions with the PWAs or NGOs to attempt to develop a Proposal that was acceptable to all parties. Based on these discussions, the draft Proposal went through a number of revisions. The state and federal agencies, along with the PWAs, agreed on the version that was submitted to the Court with our original joint motion.

11. I have reviewed the Court's order in response to our joint motion for extension, dated January 30, 2013. We have taken very seriously the Court's direction to try to get all the parties in agreement on the CSAMP. Several days after the Court's Order was issued (on February 5), I contacted a representative of the NGOs to discuss a possible way forward. I, along with members of the team mentioned above, and regional staff, also participated in several calls that week between the state and federal agencies to develop a document to address the Court's concerns.

12. The agencies then began a series of in-person meetings and conference calls with both the NGOs and the PWAs. Since the week of February 12, there have been at least 9 meetings, conference calls or email exchanges held with the NGOs to discuss the CSAMP (including calls and email exchanges on February 14, 19, 22, 25, 27 and March 1, 8, 12 and 14) and to receive comments on the Supplement.

13. Additionally, there have been many more one-on-one conversations and email exchanges between myself and other federal officials with individual representatives of the NGOs.

14. Despite the significant level of outreach, the NGOs have not agreed to support the Proposal and Supplement. Part of the difficulty during the discussions has been the agencies' desire that the CSAMP be a truly collaborative process, which necessitates that the parties to the CSAMP fill in the details by determining science needs, developing conceptual models, prioritizing a list of testable hypotheses, and finalizing study plans, among other things.

15. Some of the NGOs' concerns seem to have been overcome during the course of negotiations, but at the end of the day, at least one major obstacle remained, and the NGOs have not agreed to join in the joint motion to extend the remand schedules. Nonetheless, if the Court grants the joint motion, the Department will continue to work with the NGOs to include them in the CSAMP process, as we believe their buy-in will make the process more collaborative and ultimately successful.

16. In sum, the Department feels very strongly that the CSAMP described in the Proposal and Supplement is a positive step towards a collaborative science based approach to

management of Delta and its resources because there has been such a high level of disagreement regarding the scientific underpinning of agency management actions in the Delta. It is our hope that bringing the parties together to develop one or more conceptual models on each of the issues and developing prioritized lists of testable hypotheses will help build trust among the agencies, PWAs, and NGOs, that has been sorely lacking. While we recognize that the CSAMP is not a panacea for all the thorny issues in the Delta, it is clear that the cycle of Section 7 consultation followed by litigation does not serve to promote the goals of protecting resources while at the same time providing reliability to water users in California. Continuing this litigation cycle is not in the public interest because while parties spend resources fighting each other, real meaningful long-term progress on Delta issues cannot be achieved. For this reason, and as outlined above, the Department has worked very hard to create an alternative approach.

II. Bay Delta Conservation Plan

17. As I mentioned above, BDCP is a state-led effort to develop a HCP for the Delta. The federal agencies involved have contributed substantial technical assistance to this effort in the form of thousands of hours participating in meetings and reviewing documents. This administration is supportive of the state's effort to find a lasting and sustainable solution to California's aging and inadequate Delta water infrastructure while conserving threatened and endangered species.

18. This is an important year in the BDCP effort. Earlier this month, the state's consultants provided the federal agencies with preliminary administrative drafts of the BDCP (approximately 7,000 pages) and the accompanying Environmental Impact Statement(EIS)/Environmental Impact Report(EIR) (approximately18,000 pages). The federal agencies will need to extensively review both of these extremely lengthy documents before the drafts are released for formal public review and comment. As NEPA lead agencies, the federal agencies (Reclamation, the Service and NMFS) are responsible for assuring the adequacy of the draft EIS. At the time the Court issued the remand schedule orders in both the *Delta Smelt Cases* and *Consolidated Salmonid Cases*, there was significant uncertainty about the BDCP schedule

and we could not have predicted that the BDCP and EIS/EIR administrative draft review schedule would coincide with the significant staff needs for the remand schedule.

19. The responsibility for the BDCP effort and the remand process for a new BiOp and NEPA analysis falls upon most of the same key staff from the state and federal agencies. Given the amount of time required for these efforts, the limited number of staff with the requisite expertise, and the need to maximize efficiencies only one of these processes may effectively move forward at a time.

20. This administration believes it is in the public interest to continue to pursue a long-term solution to the long-standing and continuing Delta water issues. For this reason, the Department wants to be able to continue to assist the state with the development of a robust and scientifically supportable BDCP. The state and the water contractors that are funding the BDCP effort have made it clear that, at this point, timeliness is critical for the BDCP to succeed, and that any significant delay in processing BDCP documents is likely to cause significant increases in project costs. Because the Department believes that it will be extremely difficult if not impossible to carry out the necessary reviews of the BDCP and EIS/EIR in a timely fashion while the agencies are completing the remand BiOps and NEPA analyses for the *Delta Smelt Cases* and *Consolidated Salmonid Cases*, the Department believes the current remand schedules are contrary to the public interest.

21. In addition, I believe that the remand schedule is contrary to the public interest because litigation is likely to ensue if the delta smelt BiOp and NEPA analysis are released in December of this year as the remand schedule currently requires. The return of litigation would be detrimental to the future of the BDCP, and make it more difficult for the parties to meaningfully discuss or collaborate on science. Progress on BDCP was impaired by the litigation on the 2008/09 BiOps. By contrast, if the Court grants a three-year extension of the remand deadlines to allow the CSAMP to be implemented, I believe – based on my extensive conversations with the parties – that the likelihood of future litigation will be reduced as the parties will be more invested in the outcomes of jointly developed science. For this additional reason, I believe that granting the requested extension is in the public interest.

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

Dated this 15th day of March, 2013

Eileen Sobeck
Deputy Assistant Secretary for Fish, Wildlife and Parks
U.S. Department of the Interior