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 9 California Department of Water Resources

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 11 **IN THE UNITED STATES DISTRICT COURT**
 12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 NATURAL RESOURCES DEFENSE
 14 COUNCIL, et al.,

15 Plaintiff,

16 v.

17 DIRK KEMPTHORNE, Secretary, U.S.
 Department of the Interior, et al.,

18 Defendants,

19 SAN LUIS & DELTA-MENDOTA WATER
 20 AUTHORITY and WESTLANDS WATER
 DISTRICT; CALIFORNIA FARM BUREAU
 21 FEDERATION; GLENN-COLUSA
 IRRIGATION DISTRICT, et al.;
 22 CALIFORNIA DEPARTMENT OF WATER
 RESOURCES, and STATE WATER
 23 CONTRACTORS,

24 Defendant-Interveners.

Case No. 05-CV-01207 OWW (LJO)

**DECLARATION OF PERRY
 HERRGESELL IN SUPPORT OF THE
 FEDERAL DEFENDANTS' FRCP 60(b)
 MOTION**

Date: August 29, 2008

Time: 9:00 a.m.

Courtroom: 3

Judge: Hon. Oliver W. Wanger

25 I, Perry Herrgesell, declare as follows:

26
 27 1. I am the Bay Delta Water Policy Coordinator for the California Department of Fish
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1 and Game (DFG) and have worked for DFG for almost 34 years. Among other degrees, I have a
2 Ph.D. in Aquatic Ecology.
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5 2. Previous to my current assignment, I was the Chief of the Central Valley-Bay Delta Branch of
6 DFG. In that capacity I participated in policy development, implemented department policies and
7 programs, and provided policy guidance for numerous programs within the Bay-Delta estuary,
8 including the CALFED Program and the Interagency Ecological Program. I recommended and
9 implemented department policies and procedures relating to the conservation and protection of
10 the biological and natural resources affected by the state's water development projects, and other
11 fish and wildlife activities within the San Francisco Bay/Sacramento-San Joaquin Delta estuary. I
12 provided advice to DFG's Director, the California Resources Agency, and the Governor's Office
13 on issues relating to water quality and quantity, and maintenance and restoration of fish and
14 wildlife resources in the estuary. As Branch Chief, I supervised the Department's delta smelt
15 projects, as well as other field and scientific projects in the Delta.
16

17 3. I am the Department's representative on the Interagency Water Operations Management Team
18 (WOMT), the body responsible for recommending changes to State Water Project (SWP) and
19 Central Valley Project (CVP) Delta operations for the protection of fish species listed as
20 threatened and endangered under the Federal Endangered Species Act (ESA) and the California
21 Endangered Species Act (CESA), including delta smelt which are listed as threatened under both
22 Acts. I recently led the Department's presentation recommending that the California Fish and
23 Game Commission consider making longfin smelt (*Spirinchus thaleichthys*) a candidate for
24 listing under CESA and worked on formulating an emergency regulation allowing take of longfin
25 smelt during the candidacy period. As a member of WOMT, I am familiar with day to day
26 operations of the SWP and CVP, the biology of delta smelt, and the Federal Biological Opinions
27 that regulate protection of the listed species.
28

1 4. DFG and the U.S. Fish and Wildlife Service (USFWS) regularly coordinate on the monitoring,
2 evaluation, and management of jointly-listed species like delta smelt. DFG also coordinates with
3 its federal partner, the National Marine Fisheries Service (NMFS), on the monitoring, evaluation,
4 and management of jointly-listed salmonid species, like winter-run and spring-run Chinook
5 salmon.
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8 5. On behalf of DFG, I was required to make a weekly assessment of how or whether project
9 operational changes required to protect delta smelt in accordance with the Interim Remedial
10 Order issued in the above-captioned case could also protect longfin smelt, a related species. This
11 is one example of how the Biological Opinions and measures implemented in relation to those
12 Biological Opinions can directly impact DFG's mission as the trustee for the fish and wildlife of
13 the State of California. Because the delta smelt Biological Opinion will set forth the mandatory
14 obligations of the SWP and the CVP with regard to the protection of these imperiled fish under
15 federal law, it is imperative that USFWS be allowed adequate time to analyze the BA and issue
16 the most thorough Biological Opinion possible.
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19 6. I am aware of the United States Bureau of Reclamation (USBR) request to extend the date that
20 the Court has set for completion of the delta smelt Operation Criteria and Plan (OCAP) Biological
21 Opinion of September 15, 2008. I have also reviewed the June 27, 2008 letter from the USFWS
22 to the USBR regarding the biological assessment (BA) submitted on May 16, 2008. (See Exhibit
23 A to Katherine F. Kelly Declaration.) The USFWS letter identifies "deficiencies, incomplete
24 analysis, inaccuracies and omission of necessary information" in the BA. While DFG has not
25 reviewed all of the information submitted to reach the same conclusion as the USFWS about the
26 overall adequacy of the BA, DFG has reviewed sufficient, related information to conclude that
27 this BA is one of the most complicated DFG has encountered and the resulting Biological
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1 Opinions are likely to be some of the most complex ever issued. Because of the critical
2 importance of the Biological Opinions as underpinnings for the management of ESA/CESA listed
3 species, like delta smelt, the fish and wildlife resources of the State will benefit from the
4 additional time requested by USBR to allow the USFWS to prepare the final Biological Opinion.
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7 7. DFG believes that additional time is needed to address the many issues identified in the
8 above-referenced June 27, 2008 letter from USFWS to USBR. In particular, further explanation
9 to clarify future Vernalis Adaptive Management Plan and Article 21 allocations is needed. It is
10 my understanding that additional modeling is also necessary as some of the modeling assumptions
11 used to analyze operational impacts were incorrect and that the Department of Water Resources
12 and USBR are working to fix the problem and update the data. Resolution of these issues is
13 important for determining effective species management.
14

15 8. Additionally, more information is needed in the assessment regarding basic biology and life
16 history of delta smelt. This includes data from 2002 until the current year. Information included
17 in the BA and reflected in the resulting Biological Opinion will establish basic assumptions
18 regarding, and affecting future management of, both the delta smelt and longfin smelt and
19 therefore a thorough analysis based on the most current information is critical.
20

21 The above issues lead me to believe that more time is clearly needed to revise the assessment and
22 for the USFWS to complete a Biological Opinion.
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24 I declare under penalty of perjury under the laws of the State of California and the United States,
25 that the foregoing is true and correct. Executed in Mammoth Lakes, California, this 30th day of
26 July, 2008.
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By: Perry L. Herrgesell
PERRY HERRGESELL
BAY DELTA WATER POLICY
COORDINATOR FOR THE CALIFORNIA
DEPARTMENT OF FISH AND GAME