

ORIGINAL
FILE E-filing

NOV 13 PM 2:23

RECEIVED BY THE CLERK OF THE DISTRICT COURT OF CALIFORNIA

99 154

MHP

1 Lisa T. Belenky (CA Bar No. 203225)
2 Jaclyn Lopez (CA Bar No. 258589)
3 CENTER FOR BIOLOGICAL DIVERSITY
4 351 California Street, Suite 600
5 San Francisco, CA 94610
6 Phone: (415) 436-9682 x.305
7 Facsimile: (415) 436-9683
8 Email: jlopez@biologicaldiversity.org
9 Email: lbelenky@biologicaldiversity.org

7 Attorneys for Plaintiffs

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

CV 09 5370

12 CENTER FOR BIOLOGICAL DIVERSITY,
13 and THE BAY INSTITUTE,

14 Plaintiffs,

15 v.

16 KEN SALAZAR, Secretary of Department of
17 the Interior, and U.S. FISH and WILDLIFE
18 SERVICE,

19 Defendants.

Case No.:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

I. INTRODUCTION

1
2 1. Plaintiffs CENTER FOR BIOLOGICAL DIVERSITY and THE BAY INSTITUTE
3 bring this action against Defendants KEN SALAZAR, Secretary of the Department of the Interior and
4 the U.S. FISH AND WILDLIFE SERVICE (collectively “the Secretary”) to remedy the Secretary’s
5 violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, related to the
6 Secretary’s failure to protect the San Francisco Bay Delta population of longfin smelt (“SFBD longfin
7 smelt”) as threatened or endangered under the ESA. *See* 16 U.S.C. §§ 1533(a)(1), (b)(1) & (b)(3)(B).

8 2. The longfin smelt (*Spirinchus thaleichthys*) is a medium sized, estuarine-anadromous
9 fish associated with estuaries along the eastern Pacific coast, found from the San Francisco Bay-Delta
10 Estuary north to Prince William Sound, Alaska. Its sides are a translucent-silver with an olive to pink
11 iridescent back. Mature males are typically darker than females, and have enlarged and stiffened
12 dorsal and anal fins. Its most distinctive characteristic is its long pectoral fin which gives the longfin
13 smelt its common name.

14 3. The San Francisco Bay-Delta population of longfin smelt, the subject of this complaint,
15 is the southernmost population in the species’ range and is by far the largest population in California.
16 It is suffering from ongoing declines caused by reductions in freshwater flows in the Bay Delta
17 estuary; lethal entrainment into federal, state, industrial, and local agricultural water diversions and
18 export facilities during spawning; other major physical disruptions of habitat; and exposure to toxic
19 pollution from the San Francisco Bay Area, in-Delta and upstream agricultural discharges, urban
20 runoff, and other discharges.

21 4. On April 9, 2009, the Secretary published its decision finding that the SFBD longfin
22 smelt “does not meet [its] definition of a distinct population segment,” and determining that listing of
23 the SFBD longfin smelt was not warranted. Endangered and Threatened Wildlife and Plants; 12-
24 Month Finding on a Petition to San Francisco Bay Delta Population of the Longfin Smelt (*Spirinchus*
25 *thaleichthys*) as Endangered, 74 Fed. Reg. 16169 (“12-month finding”).

26 5. In determining that the SFBD longfin smelt is not a listable entity, the Secretary
27 ignored the best available science, did not give the species the benefit of the doubt, and ignored its
28 own experts’ opinions.

1 6. Plaintiffs now seek judicial relief declaring that the Secretary failed to properly
2 determine whether the SFBBD longfin smelt should be protected under the ESA, and ask that the Court
3 remand the 12-month finding. Such relief is necessary to afford the SFBBD longfin smelt the full
4 protections of law to which it is entitled and so desperately needs.

5 **II. JURISDICTION and VENUE**

6 7. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)
7 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5
8 U.S.C. § 702 (the Administrative Procedure Act (“APA”)), and 28 U.S.C. § 1361 (mandamus). The
9 relief sought is authorized by 28 U.S.C. §§ 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive
10 relief), 16 U.S.C. § 1540(g) and 5 U.S.C. §§ 701-706.

11 8. As required by 16 U.S.C. § 1540(g), Plaintiffs provided the Secretary with written
12 notice of the violations alleged herein more than 60 days prior to commencement of this action. In
13 spite of such notice, the Secretary has failed to remedy the ESA violations.

14 9. An actual, justiciable controversy exists between the parties within the meaning of 28
15 U.S.C. § 2201.

16 10. Plaintiffs have no adequate remedy at law. The Secretary’s continuing failure to
17 comply with the ESA will result in irreparable harm to the SFBBD longfin smelt, to Plaintiffs and
18 Plaintiffs’ members, and to the public. No monetary damages or other legal remedy can adequately
19 compensate Plaintiffs, their members, or the public, for this harm.

20 11. Plaintiffs and their members are adversely affected or aggrieved by the federal agency’s
21 action and are entitled to judicial review of such action within the meaning of the ESA. The
22 Secretary’s failure to comply with the ESA’s mandates prevents the full implementation of measures
23 necessary to protect SFBBD longfin smelt pursuant to the ESA. Without the substantial protections of
24 the ESA, SFBBD longfin smelt are more likely to decline and become extinct. Plaintiffs are therefore
25 injured because their use and enjoyment of SFBBD longfin smelt and their habitat is threatened by the
26 decline and likely extinction of the fish. These are actual, concrete injuries to Plaintiffs, caused by the
27 Secretary’s failure to comply with the statutory provisions. The relief requested will fully redress
28 those injuries.

1 12. The federal government has waived sovereign immunity in this action pursuant to 16
2 U.S.C. § 1540(g) and 5 U.S.C. § 702.

3 13. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391 because the species is
4 found within this judicial district.

5 III. INTRADISTRICT ASSIGNMENT

6 14. The San Francisco or Oakland Division of this judicial district is the proper assignment
7 by virtue of Civil L.R. 3-2(d).

8 IV. PARTIES

9 15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”) is a non-profit
10 501(c)(3) corporation with offices in San Francisco and Los Angeles, California and elsewhere in the
11 United States. The Center works through science, law and policy to secure a future for all species
12 hovering on the brink of extinction. The Center’s members and staff are actively involved in species
13 and habitat protection throughout the United States and the world, including protection of the SFBD
14 longfin smelt. The Center has 43,000 members and over 220,000 online activists. The Center brings
15 this action on its own behalf and on behalf of its adversely affected members and staff.

16 16. Plaintiff THE BAY INSTITUTE (“TBI”) is a non-profit corporation based in Novato,
17 California. TBI is a research, education, and advocacy organization dedicated to protecting and
18 restoring the ecosystems of San Francisco Bay, the Sacramento-San Joaquin Delta, and the rivers,
19 streams, and watersheds tributary to the estuary. TBI has approximately 1,300 members in California,
20 who live primarily in the counties surrounding the San Francisco Bay and the Sacramento and San
21 Joaquin Valleys. TBI’s members use, on a continuing and ongoing basis, the San Francisco Bay, the
22 Delta, and the rivers of the Central Valley for recreational, educational, spiritual, and conservation
23 activities such as fishing, boating, swimming, aesthetic enjoyment, and nature study. They intend to
24 continue to do so on an ongoing basis in the future. Some of TBI’s members own or work for
25 businesses that are wholly or partially dependent on the fisheries of the Bay and Delta. The decline of
26 SFBD longfin smelt and the Delta ecosystem has had serious impacts on the fisheries that some TBI
27 members depend on for commercial or recreational fishing.

28 17. Plaintiffs’ members and staff include individuals with varying interests in SFBD

1 longfin smelt and their habitat ranging from scientific, professional, and educational to recreational,
2 aesthetic, moral, and spiritual interests. Further, Plaintiffs' members and staff have visited and intend
3 to visit in the future those areas of the San Francisco Bay-Delta where the longfin smelt is found.
4 Plaintiffs' members and staff utilize, on an on-going basis, the biological, scientific, research,
5 education, conservation, recreational and aesthetic values of the San Francisco Bay-Delta that provides
6 habitat for the longfin smelt. Plaintiffs' staff and members observe and study SFBD longfin smelt and
7 their habitat, and derive professional, scientific, educational, recreational, aesthetic, inspirational, and
8 other benefits from these activities and have an interest in preserving the possibility of such activities
9 in the future. An integral aspect of the Plaintiffs' members' use and enjoyment of SFBD longfin smelt
10 is the expectation and knowledge that the species is in its native habitat. For this reason, the Plaintiffs'
11 use and enjoyment of SFBD longfin smelt is entirely dependent on the continued existence of healthy,
12 sustainable populations in the wild. Plaintiffs bring this action on their own behalf and on behalf of
13 their adversely affected members and staff.

14 18. Concerned that the SFBD longfin smelt is at serious risk of extinction, the Center and
15 TBI submitted the petition at issue herein to list the species as endangered or threatened under the
16 ESA. Unless the SFBD longfin smelt is protected under the ESA, and threats to the species addressed,
17 the species is likely to decline and become extinct. Therefore, Plaintiffs' members and staff are
18 injured by the Secretary's failure to protect the species as is required by the ESA. This injury caused
19 by the Secretary's failure to comply with the ESA is actual, concrete, and imminent. The Secretary's
20 failure to comply with the ESA's requirements deprives the species of statutory protection vitally
21 necessary to its survival. The relief requested will redress these injuries.

22 19. Defendant KEN SALAZAR, Secretary of the Department of the Interior, is responsible
23 for the administration and implementation of the ESA with regard to the SFBD longfin smelt, and for
24 compliance with all other federal laws applicable to the Department of the Interior. He is sued in his
25 official capacity.

26 20. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is a federal agency within
27 the Department of the Interior and is required by law to protect and manage the wildlife of the United
28 States, including enforcing and implementing the ESA. FWS has been delegated authority by the

1 Secretary of the Interior to implement the ESA for the SFBF longfin smelt, including the
2 responsibility for making decisions and promulgating regulations, including proposed and final listing
3 decisions and the processing of petitions for such actions.

4 **V. LEGAL AND FACTUAL BACKGROUND**

5 **A. The Endangered Species Act**

6 21. The ESA is a federal statute enacted to conserve endangered and threatened species and
7 the ecosystems upon which they depend. 16 U.S.C. § 1531(b).

8 22. The ESA protects species listed as either “endangered” or “threatened” by the
9 Secretary. A species is “endangered” if it “is in danger of extinction throughout all or a significant
10 portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an
11 endangered species within the foreseeable future.” 16 U.S.C. § 1532(20).

12 23. The Secretary must list a species as endangered or threatened if it finds any of the
13 following factors with regard to a species:

- 14 (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- 15 (B) overutilization for commercial, recreational, scientific, or educational purposes;
- 16 (C) disease or predation;
- 17 (D) the inadequacy of existing regulatory mechanisms; or
- 18 (E) other natural or manmade factors affecting its continued existence.

19 16 U.S.C. § 1533(a)(1)(A-E).

20 24. The term “species” is defined broadly under the ESA to include “any subspecies of fish
21 or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife
22 which interbreeds when mature.” 16 U.S.C. § 1532 (16).

23 25. A distinct population segment (“DPS”) of a vertebrate species can be protected as a
24 “species” under the ESA even though it has not formally been described as a “species” in the scientific
25 literature. A species may be composed of several DPSs, some or all of which warrant listing under the
26 ESA.

27 26. The Secretary has published a policy for the recognition of DPSs for the purposes of
28 listing, delisting, and reclassifying species under the ESA. Policy Regarding the Recognition of

1 Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4722 (Feb.
2 7, 1996). Under this policy, once a population segment is found to be both “discrete” and
3 “significant,” then it is deemed a separate “species” for the purposes of the ESA and may be
4 considered for listing under the Act.

5 27. Under the Secretary’s DPS policy a population segment of a vertebrate species is
6 discrete if it satisfies *either* of the following conditions:

7 1. It is markedly separated from other populations of the same taxon as a consequence of
8 physical, physiological, ecological, or behavioral factors. Quantitative measures of
9 genetic or morphological discontinuity may provide evidence of the separation.

10 2. It is delimited by international governmental boundaries within which differences in
11 control of exploitation, management of habitat, conservation status, or regulatory
12 mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

13 61 Fed. Reg. at 4722, 4725.

14 28. The Secretary’s DPS policy requires that once a population is established as discrete,
15 then the biological and ecological significance is next considered. Each population segment’s
16 significance must be analyzed on a case-by-case basis. This consideration may include, but is not
17 limited to, the following:

18 1. Persistence of the discrete population segment in an ecological setting unusual or
19 unique to this taxon.

20 2. Evidence that loss of the discrete population would result in a significant gap in the
21 range of a taxon.

22 3. Evidence that the discrete population segment represents the only surviving natural
23 occurrence of a taxon that may be more abundant elsewhere as an introduced population
24 outside its historical range.

25 4. Evidence that the discrete population segment differs markedly from other populations
26 of the species in its genetic characteristics.

27 61 Fed. Reg. 4722.

28 29. In order to ensure the timely protection of species, Congress set forth the listing process

1 described below. The process includes mandatory, non-discretionary deadlines for the three required
2 findings that the Secretary must meet, so that species in need of protection do not languish in
3 administrative purgatory. The three required findings, described below, are the 90-day finding, the 12-
4 month finding, and the final listing determination.

5 30. Any interested person can begin the listing process by filing a petition to list a species
6 with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

7 31. Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum
8 extent practicable,” to make a finding as to whether the petition “presents substantial scientific or
9 commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533
10 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial
11 information indicating that the listing may be warranted, the Secretary then publishes in the Federal
12 Register a “90-day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A).

13 32. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review
14 of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12
15 months from the date that it received the petition, the Secretary must make one of three findings: (1)
16 the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned
17 action is warranted but presently precluded by other pending proposals for listing species, provided
18 certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second
19 determination is known as a “12-month finding.”

20 33. If the Secretary finds in the 12-month finding that the listing of the species is
21 warranted, then he must publish in the Federal Register a proposed rule, for public comment, to list
22 such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

23 34. Within one year of the publication of a proposed rule to list a species, the ESA requires
24 the Secretary to publish a final listing determination in the Federal Register. 16 U.S.C. §
25 1533(b)(6)(A). At such time, the Secretary must either list the species or withdraw the proposal. 16
26 U.S.C. § 1533(b)(6)(A)(i).

27 35. Once a species is listed, an array of statutory protections applies. For example, Section
28 7 requires all federal agencies to ensure that their actions neither “jeopardize the continued existence”

1 of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16
2 U.S.C. § 1536(a)(2).

3 36. Additionally, ESA Section 9 and its regulations prohibit, among other things, any
4 person from intentionally taking listed species or incidentally taking listed species without a permit
5 from the Secretary. 16 U.S.C. §§ 1538(a)(1)(B) & 1539.

6 37. “Take” is defined broadly under the ESA to mean to “harass, harm, pursue, hunt, shoot,
7 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §
8 1532(19).

9 **B. Longfin smelt in the San Francisco Bay Delta**

10 38. Longfin smelt are one of seven osmerid (member of the smelt family, *Osmeridae*) fish
11 species that occupy habitats in California estuaries and coastal waters. Historically, the SFBD longfin
12 smelt was considered to be a separate species from longfin smelt populations to the north. However,
13 genetic analyses has confirmed that SFBD longfin smelt are the same species as longfin smelt from
14 Lake Washington, Washington. However, the same genetic analyses also concluded that the gene pool
15 of the SFBD population is significantly different and isolated from the landlocked Washington
16 population of longfin smelt.

17 39. The distribution and range of the SFBD longfin smelt extends from Rio Vista (on the
18 Sacramento River in the Delta) and Medford Island (on the San Joaquin River in the Delta) through
19 Suisun Bay and Suisun Marsh, San Pablo Bay, and the South Bay, and into the Gulf of the Farallones,
20 just outside of the Golden Gate.

21 40. Based on meristic and genetic analyses, there is no evidence that large numbers of
22 longfin smelt migrate between populations within their eastern Pacific range or even along the
23 California coast. It is unknown whether the few longfin smelt that are occasionally captured in the
24 Russian River or Bodega Bay were spawned in the areas where they were captured or migrated from
25 the San Francisco estuary. It is highly unlikely that the SFBD population is sustained or even
26 supplemented by immigration from these other areas because these peripheral populations are so
27 small.

28 41. Longfin smelt are a pelagic (they live in open waters), estuarine-anadromous species.

1 They tolerate a wide range of salinities and are capable of living in fresh, brackish and marine waters.
2 Most of their life cycle is completed in brackish to marine waters, with most post-larval fish in the
3 SFBD population found in salinities from 15-30 practical salinity units.

4 42. The SFBD longfin smelt is found in open waters throughout the San Francisco estuary
5 and in the larger channels and sloughs of Suisun Marsh. During fall and winter, its numbers are
6 greatest in the northern estuary, although they are also found in shallow bays such as San Pablo Bay
7 and the South Bay. During the summer, higher densities are found in the Central Bay.

8 43. SFBD longfin smelt have a two-year life cycle. Spawning is believed to take place in
9 fresh or slightly brackish water over sandy or gravel substrates mainly downstream of Rio Vista on the
10 Sacramento River between January and March.

11 44. The historical principal prey for adult longfin smelt are believed to have been opossum
12 shrimp (*Neomysis mercedis*) and other small crustaceans (*Acanthomysis* sp.). Copepods and other
13 crustaceans are also important prey. SFBD longfin smelt are probably preyed upon by other fish,
14 birds, and marine mammals, but given their former abundance, they were believed to play a critical
15 role in the SF estuary food web.

16 45. During the 19th century, the SFBD longfin smelt was an important component of a
17 large smelt fishery in the San Francisco estuary. An extreme drought and record high water diversions
18 cause the sharp decline of SFBD longfin smelt abundance 1987-1992. Levels fell more than 80% in
19 two years, and remained at record low levels until wet hydrological conditions returned in 1995. Over
20 the next five years, the species partially recovered to levels that were approximately 50% of the
21 species' pre-drought abundance.

22 46. Since the late 1990s, the abundance of SFBD longfin smelt has been declining
23 throughout the San Francisco estuary, except in Suisun Marsh, where the species was never abundant.
24 By 2001, SFBD longfin smelt abundance was just 6% of the average levels measured during the late
25 1990s. Beginning in 2003, SFBD longfin smelt numbers fell to 1% of pre-drought levels for three
26 consecutive years. Unlike the previous population decline, which occurred during the multi-year
27 drought, hydrological conditions during the 2000s were moderate, indicating that other factors
28 contributed to this recent population decline.

1 47. Because SFBBD longfin smelt abundance is highly correlated with springtime fresh
2 water outflow from the delta, much of the observed inter-annual variation reflects the watershed's
3 variable hydrology and the effects of water management operations. Failure of the species to fully
4 recover following improved hydrological conditions may reflect lower resilience attributable to its
5 extremely low population numbers as well as degraded habitat conditions associated with continued
6 high levels of water diversions and exports, the invasive clam's impact on the planktonic food web,
7 and the numerous other threats to the species, including entrainment losses at agricultural and
8 industrial diversions, toxics, dredging, and pile driving.

9 48. The SFBBD population is almost certain to be reproductively isolated from other
10 conspecific population units because of the large distance between the San Francisco estuary and the
11 location of the nearest self-sustaining population. Given this spatial isolation and its position at the
12 southern extreme of the species' range, this population represents an important component of the
13 evolutionary legacy of the species; due to its size relative to other longfin smelt populations in
14 California and along the Pacific Coast, the conservation of this population may be essential for the
15 evolutionary diversity of the species.

16 C. The Longfin smelt Petitioning Process

17 49. On August 8, 2007, the Center and TBI submitted a formal, detailed petition to list the
18 SFBBD longfin smelt under the ESA ("Petition").¹ On May 6, 2008, the Secretary made a positive 90-
19 day finding on the Petition in which it concluded the Petition provided substantial information
20 indicating that listing the SFBBD longfin smelt as a DPS may be warranted and initiating a 60-day
21 public comment period. Endangered and Threatened Wildlife and Plants; Petition to List the San
22 Francisco Bay-Delta Population of the Longfin Smelt (*Spirinchus thaleichthys*) as Endangered, 73
23 Fed. Reg. 24911-24915.

24 50. Only after the Center sent the Secretary a notice of its intent to sue for its failure to
25

26 ¹ On that same day, The Bay Institute, the Center for Biological Diversity, and the Natural Resources
27 Defense Council petitioned the California Fish and Game Commission ("Commission") to list the
28 longfin smelt as an endangered species under the California Endangered Species Act ("CESA"). See
Cal. Fish & Game Code §§ 2070-2079. On March 5, 2009 the Commission agreed to list the longfin
smelt as threatened throughout their range in California.

1 publish a timely 12-month finding, the Secretary published its decision on April 9, 2009, determining
2 that listing the SFBD longfin smelt was not warranted because it “does not meet our definition of a
3 distinct population segment.” Fed. Reg. 16169. The Secretary simultaneously announced that it was
4 initiating a status assessment of the longfin smelt, and is soliciting information on the status of the
5 species range-wide.

6 51. By written notices to the Secretary, sent via facsimile and certified mail on August 17,
7 2009, Plaintiffs informed the Secretary of the violations set forth in their Complaint as required by the
8 ESA. 16 U.S.C. § 1540(g).

9 **D. The Listing Determination**

10 52. As detailed in the Secretary’s 90-day finding, the Petition “presents substantial
11 scientific or commercial information to indicate that the San Francisco Bay-Delta population of
12 longfin smelt may be a DPS based on its separation from other populations of longfin smelt, the
13 unique setting in which it occurs, and potential genetic differences between the San Francisco Bay-
14 Delta population and other longfin smelt populations.” Endangered and Threatened Wildlife and
15 Plants; Petition To List the San Francisco Bay-Delta Population of the Longfin Smelt (*Spirinchus*
16 *thaleichthys*) as Endangered, 73 Fed. Reg. 24911, 24914.

17 53. Yet, in its 12-month finding, published April 9, 2009, the Secretary completely and
18 inexplicably reversed course, finding that the SFBD longfin smelt does not meet its definition of a
19 DPS and on that basis does not warrant listing. 74 Fed. Reg. 16169.

20 54. Under the DPS policy, if the Secretary determines that a population is discrete, the
21 Secretary must then consider its significance. If a population is determined to be both discrete and
22 significant, then the Secretary must determine whether it meets the five factors for listing. 61 Fed.
23 Reg. 4725. In this instance, the Secretary erroneously found that the SFBD longfin smelt was not
24 discrete and failed to undertake any analysis of its significance or of the other listing factors.

25 55. The Secretary’s “not warranted” determination for the SFBD longfin smelt is arbitrary,
26 capricious, unsupported by the evidence in the record, and otherwise unlawful because it: (1) did not
27 rely on the best available science; (2) did not give the species the benefit of the doubt; and (3) ignored
28 its own experts’ opinions.

VI. VIOLATIONS OF LAW

1
2 56. The Petition presented substantial scientific information indicating that the SFBD
3 longfin smelt is a DPS. 73 Fed. Reg. 24911, 24914. Dr. Peter Moyle, an expert on SFBD longfin
4 smelt, and a biologist whose work is frequently cited in the 12-month finding, asserts that the SFBD
5 longfin smelt is a discrete population warranting ESA protections. Furthermore, all available scientific
6 information and monitoring data indicate that the abundance of longfin smelt in all major estuaries in
7 California, the southern extent of the species' range, has declined severely in the past two decades; the
8 SFBD population has reached record low levels; and that in some smaller estuaries to the north, the
9 species may already be extirpated.

10 57. Congress did not define "distinct population segment" in the ESA, but in 1996, the
11 Secretary issued a policy interpreting the phrase that requires the consideration of (1) the discreteness
12 of the population segment in relation to the remainder of the species to which it belongs; (2) the
13 significance of the population segment in relation to the species to which it belongs; and (3) the
14 population segment's conservation status in relation to the ESA's standards for listing. Policy
15 Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species
16 Act, 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996).

17 58. Under the DPS policy a population segment of a vertebrate species is discrete if it: (1)
18 is markedly separated from other populations of the same taxon as a consequence of physical,
19 physiological, ecological, or behavioral factors; *or* (2) is delimited by international governmental
20 boundaries within which differences in control of exploitation, management of habitat, conservation
21 status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.
22 Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered
23 Species Act, 61 Fed. Reg. 4722 (Feb. 7, 1996).

24 59. In authorizing the listing of a DPS under the ESA, Congress recognized "that there may
25 be instances in which FWS should provide for different levels of protection for populations of the
26 same species." S. Rep. no. 96-151, 96th Cong., 1st Sess. (1979), reprinted in *A Legislative History of*
27 *the Endangered Species Act*, 97th Cong., 2d Sess. 1397 (1982).

28 60. The SFBD longfin smelt is a discrete population as its geographic isolation makes it

1 highly unlikely that it migrates between populations within its range and likely that it is reproductively
2 isolated from other population units. Therefore, the Secretary's finding that the SFBD population is
3 not discrete is in violation of the ESA because it did not rely on the best available science, give the
4 species the benefit of the doubt, and it ignored its own experts.

5 61. The Secretary acknowledges that the SFBD longfin smelt is the southernmost self-
6 sustaining population, with its nearest neighboring, relatively-small, and possibly no longer existing,
7 populations found in the lower reaches and estuaries of the Klamath, Eel, Van Duzen, and Russian
8 Rivers, and that it is unknown how far longfin smelt are able to swim in the open ocean. 74 Fed. Reg.
9 at 16172.

10 62. The best science available indicates that longfin smelt were once found in many
11 estuaries, but the Bay-Delta system now likely holds the only self-sustaining population in California.
12 The best science available also indicates that "the subpopulation of longfin smelt in the San Francisco
13 Estuary...has been isolated from other populations of longfin smelt for a long period of time."
14 Reclamation: Managing Water in the West, *Spawning, Early Life Stage, and Early Life Histories of*
15 *the Osmerids Found in the Sacramento-San Joaquin Delta of California*, v. 38 (Oct. 2007), citing P.B.
16 Moyle, *Inland Fisheries of California*, 2002.

17 63. In contrast, the best scientific evidence does not support the Secretary's findings in the
18 12-month decision that smelt are being moved or transported via currents between the San Francisco
19 Bay-Delta estuary and other unnamed estuaries to the north, that it is likely that "individuals have the
20 ability to swim into and out of ocean currents and into and between estuaries outside of the San
21 Francisco Bay-Delta estuary," or that the SFBD longfin smelt might be able to reach rivers that are
22 from 75 to 300 miles north of the Bay-Delta. 74 Fed. Reg. 16172-16173. More importantly, it is
23 unlikely that any longfin smelt from these remote estuaries are able to migrate to the Bay-Delta, or do
24 so frequently enough to contribute to the population dynamics of the SFBD longfin smelt. Yet, without
25 any scientific evidence, and in fact, with evidence to the contrary, the Secretary made these assertions
26 in support of its conclusion that the SFBD longfin smelt is not discrete.

27 64. The swimming performance and behavior of SFBD longfin smelt have not been
28 studied. There is no evidence that either the swimming capacity or swimming behavior of SFBD

1 longfin smelt is similar to that of salmonid smolts, as suggested by the Secretary. 74 Fed. Reg. 16171.
2 However, the SFBBD longfin smelt *is* of similar size and morphology to delta smelt, another osmerid
3 from the San Francisco estuary which is partially sympatric with longfin smelt. Published research on
4 delta smelt swimming performance and behavior show these fish are unsteady swimmers, capable of
5 only moderate maximum sustained swimming speeds, and prefer low velocity routine swimming
6 speeds. Swanson, C., P.S. Young, and J.J. Cech, Jr. 1998. Swimming performance of delta smelt:
7 maximum performance, and behavioral and kinematic limitations of swimming at submaximal
8 velocities. *Journal of Experimental Biology* 201:333-345.

9 65. Because of the distances involved, it is highly unlikely that SFBBD longfin smelt from
10 the San Francisco estuary regularly migrate to and reproduce in watersheds far to the north of the
11 estuary. In fact, Plaintiffs are informed and believe and based thereon allege that there is no evidence
12 supporting the Secretary's conclusion that this is possible, and the best available science supports the
13 contrary. Furthermore, because of the orientation of the currents, it is even more unlikely that fish
14 from populations to the north migrate and reproduce within the San Francisco estuary with sufficient
15 frequency to erode the marked separation between the SFBBD population and any other population.

16 66. The Secretary is required to use the best scientific and commercial data available. 16
17 U.S.C. § 1533(b)(1)(A). The Secretary violated this standard by ignoring the best available science
18 that indicates that the SFBBD longfin smelt is geographically isolated, and by instead relying on
19 information not supported by the evidence on record. The Secretary does not offer any published or
20 unpublished papers to refute the conclusions of the best available science.

21 67. To the extent that there is uncertainty about what constitutes best available science, the
22 species must be given the benefit of the doubt. Deference to the Secretary is only warranted where it
23 utilizes, rather than ignores the analysis of its experts.

24 68. In 1995, the Secretary stated that the SFBBD longfin smelt "is isolated from other
25 populations." 1995 Sacramento/San Joaquin Delta Native Fisheries Recovery Plan, pp. 47-65. The
26 Secretary does not offer any explanation for reversing its previous determination in this 12-month
27 finding. Rather than give the species the benefit of the doubt and rely on the best available science,
28 and its own experts' opinions that the population is isolated, the Secretary inexplicably and

1 impermissibly adopted an untested hypothesis that the SFBF longfin smelt may be able to swim 75 to
2 300 miles through the Pacific Ocean to other estuaries and is therefore not discrete.

3 69. The Secretary also unlawfully ignored the findings of the Stanley study, the only
4 available study on longfin smelt that indicates that the San Francisco Bay-Delta population is
5 markedly genetically separate from other populations of longfin smelt and should be managed as an
6 isolated and genetically distinct entity. 74 Fed. Reg. 16173.

7 70. Under the Secretary's DPS policy, a population is discrete if it is "markedly separated
8 from other populations of the same taxon." Such separation may be evidenced by "[q]uantitative
9 measures of genetic or morphological discontinuity." 61 Fed. Reg. 4725. In making this finding, the
10 Secretary cannot dismiss a study because it is anecdotal or its design is less than ideal for the particular
11 application.

12 71. The Secretary dismissed the Stanley study that compared two sampling locations
13 because "[a] more appropriate comparison would have been to analyze longfin smelt from a series of
14 locations with access to the open ocean." 74 Fed. Reg. 16173.

15 72. The Secretary cannot ignore credible evidence such as the Stanley study which indicates
16 the SFBF longfin smelt is markedly genetically separate from other populations of longfin smelt.
17 Therefore, the Secretary also violated the ESA by failing to adequately consider the best available
18 evidence which shows that the SFBF longfin smelt is discrete and warrants listing as an endangered or
19 threatened species.

20 73. As a DPS, the SFBF population of longfin smelt meets the criteria for listing as an
21 endangered species due to ongoing declines caused by reductions in freshwater flows in the Bay-Delta
22 estuary; lethal entrainment into federal, state, industrial, and local agricultural water diversions and
23 export facilities during spawning; other major physical interruptions of habitat, such as dredging; and
24 exposure to toxic pollution from the San Francisco Bay area, in-Delta and upstream agricultural and
25 urban runoff and discharges.

26 74. Despite these ongoing declines and the critical need to protect the SFBF longfin smelt,
27 the Secretary's erroneous finding that the SFBF population is not a DPS has unlawfully denied
28 critically needed ESA protections to this species.

VII. CLAIM FOR RELIEF

(Against all Defendants for Violations of the Endangered Species Act)

1
2
3 75. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this
4 Complaint, as though fully set forth below.

5 76. On April 9, 2009, the Secretary published a 12-month finding that the SFBD longfin
6 smelt does not meet the Secretary's definition of a distinct population segment and on that basis found
7 listing not warranted. 74 Fed. Reg. 16169.

8 77. The Secretary violated the ESA by finding that the SFBD longfin smelt is not a distinct
9 population segment and that listing the species as threatened or endangered was not warranted.

10 78. The Secretary's finding that the SFBD longfin smelt is not a distinct population
11 segment and that listing the species as threatened or endangered was not warranted was arbitrary,
12 capricious, and inconsistent with the law because the Secretary failed to utilize the best available
13 scientific data as required by the ESA. 16 U.S.C. § 1533(b)(1)(A).

14 79. The Secretary's finding that the SFBD longfin smelt is not a distinct population
15 segment and that listing the species as threatened or endangered was not warranted was arbitrary,
16 capricious, and inconsistent with the law because the Secretary did not give the species the benefit of
17 the doubt.

18 80. The Secretary's finding that the SFBD longfin smelt is not a distinct population
19 segment and that listing the species as threatened or endangered was not warranted was arbitrary,
20 capricious, and inconsistent with the law because the Secretary ignored its own experts' opinions.

21 81. The Secretary's finding that the SFBD longfin smelt is not a distinct population
22 segment and that listing the species as threatened or endangered was not warranted was arbitrary,
23 capricious, and unsupported by the evidence in the record. The Secretary's violation of the ESA is
24 subject to judicial review under the ESA, 16 U.S.C. § 1540(g)(1)(C), and the APA, 5 U.S.C. §§ 701
25 through 706.

PRAYER FOR RELIEF

26
27 For the reasons stated above, Plaintiffs respectfully request that the Court grant the following
28 relief:

1 1. Declare that the Secretary's finding that the SFBF longfin smelt is not a distinct
2 population segment and that listing the species as threatened or endangered was not warranted, is
3 arbitrary, capricious, violated the ESA, and is unlawful;

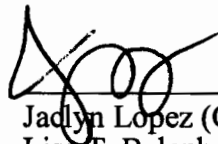
4 2. Remand the 12-month finding to the Secretary for an adequate finding that complies
5 with all requirements of the ESA by a date certain;

6 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees under the
7 citizen suit provision of the ESA and/or the Equal Access to Justice Act; and

8 4. Grant Plaintiffs such other relief as the Court deems just and proper.

9
10 Dated: November 13, 2009

Respectfully submitted,

11
12 

13 Jadyn Lopez (CA Bar No. 258589)
14 Lisa T. Belenky (CA Bar No. 203225)
15 CENTER FOR BIOLOGICAL DIVERSITY
16 351 California Street, Suite 600
17 San Francisco, CA 94104
18 Phone: (415) 436-9682 x. 305
19 Facsimile: (415) 436-9683
20 Email: jlopez@biologicaldiversity.org
21 Email: lbelenky@biologicaldiversity.org

22
23
24
25
26
27
28 Attorneys for Plaintiffs

JS 44 (Rev. 12/07) (and rev 1-16-08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, rules or local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of filing the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

E-filing

<p>I. (a) PLAINTIFFS Center for Biological Diversity and The Bay Institute</p> <p>(b) County of Residence of First Listed Plaintiff San Francisco County (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) Center for Biological Diversity 351 California St., Ste. 600 San Francisco, CA 94104 415-436-9682 x. 305, Jaclyn Lopez</p>	<p>DEFENDANTS Ken Salazar, Secretary of the Department of the Interior, and U.S. Fish and Wildlife Service</p> <p>County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known) CV 09 5370 MHP</p>
--	---

MHP

CV 09 5370 MHP

5370

<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%;"> <tr> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> <td></td> <td style="text-align: center;">PTF</td> <td style="text-align: center;">DEF</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td style="text-align: center;"><input type="checkbox"/> 1</td> <td>Citizen of This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Incorporated or Principal Place of Business In This State</td> <td colspan="2"></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Incorporated and Principal Place of Business In Another State</td> <td colspan="2"></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> <tr> <td colspan="2"></td> <td style="text-align: center;">Foreign Nation</td> <td colspan="2"></td> </tr> </table>	PTF	DEF		PTF	DEF	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4			Incorporated or Principal Place of Business In This State			<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen of Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5			Incorporated and Principal Place of Business In Another State			<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6			Foreign Nation		
PTF	DEF		PTF	DEF																																
<input type="checkbox"/> 1	<input type="checkbox"/> 1	Citizen of This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4																																
		Incorporated or Principal Place of Business In This State																																		
<input type="checkbox"/> 2	<input type="checkbox"/> 2	Citizen of Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5																																
		Incorporated and Principal Place of Business In Another State																																		
<input type="checkbox"/> 3	<input type="checkbox"/> 3	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 6	<input type="checkbox"/> 6																																
		Foreign Nation																																		

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<p>CONTRACT</p> <p><input type="checkbox"/> 110 Insurance</p> <p><input type="checkbox"/> 120 Marine</p> <p><input type="checkbox"/> 130 Miller Act</p> <p><input type="checkbox"/> 140 Negotiable Instrument</p> <p><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment</p> <p><input type="checkbox"/> 151 Medicare Act</p> <p><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)</p> <p><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits</p> <p><input type="checkbox"/> 160 Stockholders' Suits</p> <p><input type="checkbox"/> 190 Other Contract</p> <p><input type="checkbox"/> 195 Contract Product Liability</p> <p><input type="checkbox"/> 196 Franchise</p>	<p>TORTS</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 310 Airplane</p> <p><input type="checkbox"/> 315 Airplane Product Liability</p> <p><input type="checkbox"/> 320 Assault, Libel & Slander</p> <p><input type="checkbox"/> 330 Federal Employers' Liability</p> <p><input type="checkbox"/> 340 Marine</p> <p><input type="checkbox"/> 345 Marine Product Liability</p> <p><input type="checkbox"/> 350 Motor Vehicle</p> <p><input type="checkbox"/> 355 Motor Vehicle Product Liability</p> <p><input type="checkbox"/> 360 Other Personal Injury</p> <p>PERSONAL INJURY</p> <p><input type="checkbox"/> 362 Personal Injury—Med. Malpractice</p> <p><input type="checkbox"/> 365 Personal Injury—Product Liability</p> <p><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability</p> <p>PERSONAL PROPERTY</p> <p><input type="checkbox"/> 370 Other Fraud</p> <p><input type="checkbox"/> 371 Truth in Lending</p> <p><input type="checkbox"/> 380 Other Personal Property Damage</p> <p><input type="checkbox"/> 385 Property Damage Product Liability</p>	<p>FORFEITURE/PENALTY</p> <p><input type="checkbox"/> 610 Agriculture</p> <p><input type="checkbox"/> 620 Other Food & Drug</p> <p><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881</p> <p><input type="checkbox"/> 630 Liquor Laws</p> <p><input type="checkbox"/> 640 R.R. & Truck</p> <p><input type="checkbox"/> 650 Airline Regs.</p> <p><input type="checkbox"/> 660 Occupational Safety/Health</p> <p><input type="checkbox"/> 690 Other</p> <p>LABOR</p> <p><input type="checkbox"/> 710 Fair Labor Standards Act</p> <p><input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act</p> <p><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act</p> <p><input type="checkbox"/> 740 Railway Labor Act</p> <p><input type="checkbox"/> 790 Other Labor Litigation</p> <p><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act</p> <p>IMMIGRATION</p> <p><input type="checkbox"/> 462 Naturalization Application</p> <p><input type="checkbox"/> 463 Habeas Corpus - Alien Detainee</p> <p><input type="checkbox"/> 465 Other Immigration Actions</p>	<p>BANKRUPTCY</p> <p><input type="checkbox"/> 422 Appeal 28 USC 158</p> <p><input type="checkbox"/> 423 Withdrawal 28 USC 157</p> <p>PROPERTY RIGHTS</p> <p><input type="checkbox"/> 820 Copyrights</p> <p><input type="checkbox"/> 830 Patent</p> <p><input type="checkbox"/> 840 Trademark</p> <p>SOCIAL SECURITY</p> <p><input type="checkbox"/> 861 HIA (1395ff)</p> <p><input type="checkbox"/> 862 Black Lung (923)</p> <p><input type="checkbox"/> 863 DIWC/DIWW (405(g))</p> <p><input type="checkbox"/> 864 SSID Title XVI</p> <p><input type="checkbox"/> 865 RSI (405(g))</p> <p>FEDERAL TAX SUITS</p> <p><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)</p> <p><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609</p>	<p>OTHER STATUTES</p> <p><input type="checkbox"/> 400 State Reapportionment</p> <p><input type="checkbox"/> 410 Antitrust</p> <p><input type="checkbox"/> 430 Banks and Banking</p> <p><input type="checkbox"/> 450 Commerce</p> <p><input type="checkbox"/> 460 Deportation</p> <p><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations</p> <p><input type="checkbox"/> 480 Consumer Credit</p> <p><input type="checkbox"/> 490 Cable/Sat TV</p> <p><input type="checkbox"/> 810 Selective Service</p> <p><input type="checkbox"/> 850 Securities/Commodities/Exchange</p> <p><input type="checkbox"/> 875 Customer Challenge 12 USC 3410</p> <p><input type="checkbox"/> 891 Other Statutory Actions</p> <p><input type="checkbox"/> 892 Agricultural Acts</p> <p><input type="checkbox"/> 892 Economic Stabilization Act</p> <p><input checked="" type="checkbox"/> 893 Environmental Matters</p> <p><input type="checkbox"/> 894 Energy Allocation Act</p> <p><input type="checkbox"/> 895 Freedom of Information Act</p> <p><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice</p> <p><input type="checkbox"/> 950 Constitutionality of State Statutes</p>
--	---	---	---	---

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
Endangered Species Act, 16 U.S.C. 1531-44

Brief description of cause:
Defendants violated the ESA by failing to list the San Francisco Bay Delta longfin smelt as an endangered species.

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE".

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY) SAN FRANCISCO/OAKLAND SAN JOSE

DATE: November 13, 2009 SIGNATURE OF ATTORNEY OF RECORD: 