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9 UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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13 CENTER FOR BIOLOGICAL DIVERSITY) Case No.
14)
14 Plaintiff,)
15)
15 vs.) **COMPLAINT FOR DECLARATORY**
16) **AND INJUNCTIVE RELIEF**
16 U.S. FISH & WILDLIFE SERVICE, and)
17 KEN SALAZAR, Secretary of the Interior,)
18)
18 Defendants.)
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28 COMPLAINT

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I. INTRODUCTION

1. This case challenges the decision of the U.S. Fish and Wildlife Service (“FWS”) to strip the Sacramento splittail of the protections of the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (“ESA”), despite significant threats to the species’ survival and a lack of regulatory mechanisms to ensure that splittail population levels will not plummet well below sustainable levels. *See* Endangered and Threatened Wildlife and Plants; Proposed Notice of Remanded Determination of Status for the Sacramento splittail; Final, 68 Fed. Reg. 55140 (September 22, 2003) (“2003 Decision”). Most egregiously, there is evidence that the 2003 decision not to list the splittail was influenced by Julie MacDonald, former Deputy Assistant Secretary of the Interior, Fish, Wildlife and Parks, who at the time the decision was made had a manifest financial conflict of interest. Moreover, contrary to the requirements of the ESA that listing decisions be based on the best available scientific information and data, the Investigator General of the Department of the Interior found that the scientific information and data relied on in making the 2003 Decision was limited and manipulated at the behest of Ms. MacDonald. As a result, the integrity of the listing process was undermined and the Sacramento splittail was arbitrarily and capriciously denied the protections of the ESA.

II. JURISDICTION AND VENUE

18 2. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
19 question); and 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit
20 provision).

21 3. Venue is properly vested in this District Court pursuant to 28 U.S.C. § 1391(e)
22 and pursuant to 16 U.S.C. § 1540(g)(3)(A), because the species at issue is found in this District.

23 4. Plaintiff provided 60 days notice of intent to file this suit pursuant to the citizen
24 suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to each Defendant dated and sent
25 by certified mail and facsimile on August 28, 2007. Neither Defendant responded to the notice
26 of intent to sue nor have the Defendants remedied the alleged violations. Therefore, an actual
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1 controversy exists between the parties within the meaning of 28 U.S.C. § 2201. For all claims,
2 Plaintiff has exhausted all of the administrative remedies available.

3 **III. PARTIES**

4 5. Plaintiff the CENTER FOR BIOLOGICAL DIVERSITY (“the Center”), formerly
5 known as the Southwest Center for Biological Diversity, is a non-profit corporation with offices
6 in San Francisco, San Diego, Los Angeles, and Joshua Tree, California; Arizona; New Mexico;
7 and Washington, D.C. The Center is actively involved in species and habitat protection issues
8 throughout North American and the Pacific. The Center has over 40,000 members throughout
9 the United States, including many members who reside in California and live, visit, or recreate in
10 and near areas that serve as habitat for the Sacramento splittail. The Center’s board, members,
11 and staff have educational, scientific, biological, aesthetic, and spiritual interests in the
12 Sacramento splittail and its continued existence in the wild. The Center, its members and staff
13 have participated in efforts to protect and preserve the species and habitat essential to the
14 continued survival of the Sacramento splittail and use the habitat where the species is present.

15 6. Plaintiff’s board, staff and members live, work, visit, and/or recreate in the areas
16 in California where the species is found including habitat in Alameda, Contra Costa, Napa,
17 Sacramento, San Joaquin, Solano, Sonoma and Yolo counties. They use the habitat of the
18 Sacramento splittail for recreational, scientific, aesthetic, educational and conservation purposes,
19 including, but not limited to, hiking, bird watching, fishing, boating, aesthetic enjoyment,
20 photography, habitat restoration, nature study and wildlife observation. The Center’s board,
21 staff, and members intend to continue to do so on an ongoing basis in the future.

22 7. Plaintiff’s board, staff, and members believe that the health of the Sacramento
23 splittail is a critical indicator of the overall health of the Bay Delta ecosystems where they are
24 found. Defendants’ 2003 Decision not to list the Sacramento splittail as a threatened or
25 endangered species denied the species needed legal protections and may lead to the extinction of
26 the species in the wild. The 2003 Decision not to list the Sacramento splittail will deprive
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1 Plaintiff's board, staff, and members of the recreational, aesthetic, scientific, education,
2 conservation and other benefits.

3 8. Plaintiff's staff and its members have been and continue to be actively involved in
4 efforts to protect and restore the health of the habitat of the Sacramento splittail in the Bay Delta.
5 Plaintiff participated in the administrative process to list the Sacramento splittail and has
6 engaged with various state and federal agencies to urge increased protections for the Sacramento
7 splittail and the Bay Delta ecosystem on which it depends.

8 9. The above-described aesthetic, conservation, recreational, scientific, educational,
9 and other interests of Plaintiff's board, staff, and members have been, are being, and, unless the
10 relief prayed for herein is granted, will continue to be adversely affected and irreparably injured
11 by the Defendants' 2003 Decision not to list the Sacramento splittail and to strip away
12 protections afforded under the ESA.

13 10. The injuries described above are actual, concrete injuries suffered by Plaintiff's
14 staff and members. These injuries are caused by Defendants' 2003 Decision not to list the
15 Sacramento splittail under the ESA. The relief sought herein would redress Plaintiff's injuries.
16 Plaintiff has no other adequate remedy at law.

17 11. Defendant KEN SALAZAR is the Secretary of the Interior and is the federal
18 official in whom the ESA vests final responsibility for making decisions and promulgating
19 regulations required by and in accordance with the ESA, including listing decisions. He is sued
20 in his official capacity.

21 12. Defendant the UNITED STATES FISH AND WILDLIFE SERVICE ("Service"
22 or "FWS"), an agency within the Department of the Interior. FWS has been delegated the
23 responsibility for administering the ESA listing decisions with respect to freshwater species such
24 as the Sacramento splittail.

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1 **IV. FACTS**

2 **A. Legal Background.**

3 13. The ESA was enacted to “provide a program for the conservation of
4 ...endangered species and threatened species” and “to provide a means whereby the ecosystems
5 upon which endangered species and threatened species depend may be conserved, [and] to
6 provide a program for the conservation of such endangered species and threatened species”
7 ESA § 2(b), 16 U.S.C. § 1531(b). To receive the full protections of the Act, a species must first
8 be listed by the Secretary as “endangered” or “threatened” pursuant to ESA section 4. 16 U.S.C.
9 § 1533.

10 14. The ESA defines “endangered species” as “any species which is in danger of
11 extinction throughout all or a significant portion of its range.” ESA § 3(6), 16 U.S.C. § 1532(6).
12 A “threatened species” is “any species which is likely to become an endangered species within
13 the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

14 15. When determining if a species is threatened or endangered the ESA requires that
15 The Secretary shall make determinations...solely on the basis of the best scientific and
16 commercial data available to him after conducting a review of the status of the species
17 and after taking into account those efforts, if any, being made by any State or foreign
18 nation, or any political subdivision of a State or foreign nation, to protect such species,
19 whether by predator control, protection of habitat and food supply, or other conservation
20 practices, within any area under its jurisdiction, or on the high seas.
21 ESA § 4, 16 U.S.C. § 1533(b)(1)(A).

22 **B. The Sacramento Splittail and Its Habitat**

23 16. The Sacramento splittail (*Pogonichthys macrolepidotus*) is a cyprinid fish
24 endemic to the Central Valley of California with a range that centers on the San Francisco
25 Estuary. Moyle, et.al., *Biology and Population Dynamics of Sacramento Splittail (Pogonichthys*
26 *macrolepidotus) in the San Francisco Estuary: A Review*, SAN FRANCISCO ESTUARY AND
27 WATERSHED SCIENCE Vol. 2, Issue 2 (May 2004), Article 3 (available online at
28 <http://repositories.cdlib.org/jmie/sfew/s/vol2/iss2/>). It is readily recognized by the enlarged upper

1 lobe of the tail, tiny barbels at the corners of the slightly subterminal mouth, and small head on
2 an elongate body. The Sacramento splittail is one of the most distinctive cyprinids in North
3 America, assigned a genus shared only with the recently-extinct Clear Lake splittail (*P.*
4 *ciscoides*) from Lake County, California. *Id.* at 6. Sacramento splittail are endemic to the
5 sloughs, lakes, and rivers of the Central Valley. *Id.* In the early 1900's they were found in early
6 surveys as far up the Sacramento River as Redding (below the Battle Creek Fish Hatchery in
7 Shasta County), in the Feather River as high as Oroville, and in the American River to Folsom.
8 *Id.* Typically, adults migrate upstream in January and February and spawn on seasonally
9 inundated floodplains in March and April. *Id.* In May the juveniles migrate back downstream to
10 shallow, brackish water rearing grounds, where they feed on detritus and invertebrates for 1-2
11 years before migrating back upstream to spawn. *Id.*

12 17. The summer through fall distribution of adult splittail is primarily limited to tidal
13 fresh and brackish waters of the Sacramento-San Joaquin Delta, Suisun Bay, Suisun, Napa and
14 Petaluma marshes. Sacramento splittail inhabit areas within the jurisdictional boundaries of
15 eight counties in northern California including Alameda, Contra Costa, Napa, Sacramento, San
16 Joaquin, Solano, Sonoma and Yolo counties.

17 18. Sacramento splittail face increasing habitat loss and degradation primarily from
18 water conveyance through the Sacramento-San Joaquin delta ("Delta"). The species appears to
19 be restricted to a small portion of its former range, with dams and diversions preventing access to
20 upstream habitat in large rivers and streams beyond the valley floor. Endangered and Threatened
21 Wildlife and Plants; Notice of Remanded Determination of Status for the Sacramento splittail
22 (*Pogonichtys macrolepidotus*), 68 Fed. Reg. 55140 (September 22, 2003). As of 2003, the
23 distribution of splittail habitat had already been reduced *at least* 20% and may have already been
24 significantly more reduced in extent from the species' full historic range. *Id.* at 55142. Since
25 2003, available data (2003-2007) shows splittail abundance has largely continued to decline.

26 **C. Listing of the Sacramento Splittail**

27 19. Splittail populations are estimated using survey information gathered at seven
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13 20. In 1989, the FWS included the Sacramento splittail as a category 2 candidate
14 species for possible future listing as endangered or threatened. Endangered and Threatened
15 Wildlife and Plants; Animal Notice of Review, 54 Fed. Reg. 554 (January 6, 1989). The FWS
16 subsequently abandoned the multiple candidate categories and no longer considered candidate 2
17 species as eligible for listing. Endangered and Threatened Wildlife and Plants; Review of Plant
18 and Animal Taxa That Are Candidates for Listing as Endangered or Threatened Species, 61 Fed.
19 Reg. 7596 (February 28, 1996).

20 21. On November 5, 1992 FWS received a petition to add the Sacramento splittail to
21 the List of Endangered and Threatened wildlife. FWS published a 90-day finding on July 6,
22 1993 indicating that the requested action may be warranted. 58 Fed. Reg. 36184.

23 22. On January 6, 1994 the FWS published a proposed rule to list the splittail as a
24 threatened species and requested public comment. 59 Fed. Reg. 862. During its review, FWS
25 initially analyzed the data series collected at the seven sampling locations using a method
26 published by Meng and Moyle (1995). This analysis employed a statistical test known as an
27 unstratified Mann-Whitney U test. FWS filed multiple extensions for the comment period but
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1 failed to file a final rule. On May 29, 1998, the Southwest Center for Biological Diversity (now
2 the Center for Biological Diversity) filed suit in the Southern District of California alleging that
3 USFWS had failed to timely make a final determination regarding the splittail. The court found
4 in favor of the plaintiffs and ordered FWS to comply with Section 4's listing requirements by
5 publishing a proposed listing rule and issuing a final decision by a date certain. *Southwest*
6 *Center for Biological Diversity v. Babbitt*, No. 98-1009-IEG, Order (S.D. Cal, December 23,
7 1998).

8 23. On February 8, 1999 the Service published a final rule listing the Sacramento
9 splittail as threatened under the ESA. Endangered and Threatened Wildlife and Plants;
10 Determination of Threatened Status for the Sacramento Splittail (*Pogonichthys macrolepidotus*)
11 ("Listing Rule"), 64 Fed. Reg. 5963. In its decision to list the species, FWS relied on the best
12 available scientific analysis including a published peer reviewed paper by Meng and Moyle
13 (1995) which tracked Sacramento splittail abundance using an a statistical test known as a Mann-
14 Whitney U test. 64 Fed. Reg. 5964-67.

15 24. Subsequent to the publication of the final rule, two actions were filed in federal
16 district court challenging the listing of the splittail as threatened. *San Luis & Delta-Mendota*
17 *Water Authority v. Anne Badgley, et al.*, 136 F.Supp.2d 1136 (E.D. Cal., 2000) (consolidated
18 cases). The plaintiffs contended that FWS violated various provisions of ESA and of the
19 Administrative Procedure Act (5 U.S.C 551 *et seq.*), specifically that FWS failed to use the best
20 scientific and commercial data available. *Id.* at 1142.

21 25. On June 23, 2000, the court rendered summary judgment in the consolidated
22 cases, finding that the Service's promulgation of the final rule listing the splittail as threatened
23 was arbitrary and capricious. 136 F.Supp.2d at 1151.

24 26. On September 22, 2000, the court remanded the determination of whether or not
25 the splittail is a threatened or endangered species to FWS. The court ordered the determination
26 be completed within six months of the date of the remand order, and kept the listing rule in effect
27 during that period. *San Luis & Delta-Mendota Water Authority v. Anne Badgley, et al.*, No. CIV-

1 F-99-5658 at 6. (E.D. Cal., September 22, 2000) (judgment on the parties' cross motions for
2 summary judgment).

3 27. On January 12, 2001, the FWS re-opened the comment period for the proposed
4 listing of the Sacramento splittail previously published on February 8, 1999. 66 Fed. Reg. 2828.
5 This comment period was scheduled to close on February 12, 2001. *Id.*

6 28. On May 8, 2001, the FWS re-opened the comment period for the final rule on the
7 Sacramento splittail for a second time, seeking additional information on the status, abundance
8 and distribution of splittail in the Central Valley of California. 66 Fed. Reg. 23181. This
9 comment period was scheduled to close on June 7, 2001. *Id.*

10 29. On August 17, 2001 the FWS re-opened the comment period on the Sacramento
11 splittail for a third time on the again changed proposal. FWS invited comments and solicited
12 peer-review on a new statistical analysis completed by the FWS to re-analyze available splittail
13 abundance data. 66 Fed. Reg. 43145. The FWS presented a modification to the statistical test
14 originally used in the 1999 Final Listing Rule. *Id.* This comment period closed on October 1,
15 2001. *Id.* During the public comment period FWS received recommended analysis presented
16 by the California Department of Fish and Game (Rempel 2001) and the U.S. Bureau of
17 Reclamation (Michny 2001) entitled: A Sample Alternative Model of Sacramento Splittail
18 Abundance ("CDFG/UBR MLR Model").

19 30. On March 21, 2002 the FWS re-opened the comment period for a fourth time to
20 invite comments and to obtain peer review on yet another version of the statistical analysis by
21 FWS re-analyzing the available splittail abundance data. 67 Fed. Reg. 13095. FWS abandoned
22 the previous statistical tests to adopt the statistical analysis of the CDFG/USBR MLR model. *Id.*
23 This comment period was originally scheduled to close in error on October 15, 2002, but was
24 later corrected in the Federal Register to close on May 20, 2002. 67 Fed. Reg. 15337 (April 1,
25 2002).

26 31. On October 31, 2002 the FWS re-opened the comment period for the fifth time to
27 solicit comments on the factors affecting the splittail and the revised analysis used to analyze the
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1 abundance data available for splittail, and to seek public comments on the status of the species.
2 67 Fed. Reg. 66344, 66345 (October 31, 2002).

3 32. During the fifth comment period, FWS received peer review comments from Dr.
4 Peter Moyle, a preeminent fisheries biologist with expertise on the Sacramento splittail and other
5 Bay-Delta fishes, who argued that the MLR model employed in the revised rule was flawed. Dr.
6 Moyle noted that some of the published trends for the mid-water trawl survey data were not an
7 accurate indication of actual splittail numbers because the sampling methodology employed at
8 the mid-water trawls did not target splittail and only caught them as a byproduct of other
9 surveys. Dr. Peter Moyle, Professor, Fish Biology, Department of Wildlife, Fish and
10 Conservation Biology, U.C. Davis, Letter, Re: Sacramento splittail final rule, November 26,
11 2002 at 1. Furthermore, Dr. Moyle noted that several additional threats to splittail were not
12 accounted for in the final revised statistical analysis including, but not limited to, increased
13 selenium levels in splittail adults, invasive shrimp (*Exopaleomon modestus*) altering splittail food
14 abundance, and predatory adult striped bass (*Morone saxatilis*). *Id.* at 2-3. Dr. Moyle concluded
15 by stating: “In my professional opinion, there is too much uncertainty regarding the long-term
16 survival of splittail not to have it protected under the Endangered Species Act.” *Id.* at 3.

17 33. On September 22, 2003, the FWS issued a final rule declining to list the
18 Sacramento splittail as a threatened or endangered species thereby stripping the species of the
19 protections it had under the ESA for more than four years. Endangered and Threatened Wildlife
20 and Plants; Notice of Remanded Determination of Status for the Sacramento splittail
21 (*Pogonichthys macrolepidotus*); Final Rule 68 Fed. Reg. 55140-166 (“2003 Decision”). In this
22 final rule FWS employed a new scientific methodology to justify its conclusion that differed,
23 once again, from the tests described in the many published notices. The changes included, but
24 were not limited to, the following: FWS included new data for 2001 and 2002 and removed data
25 taken from one sampling location in 1979 from the analysis; data from the 2002 Suisun Marsh
26 otter trawl was not included; contrary to the original CDFG/USBR MLR model, FWS weighted
27 the 20 splittail abundance sets equally instead of weighting them according to relative

1 importance and reliability; and FWS also adopted a higher level of statistical significance for
2 detecting a downward trend (*Id.* at 55142-145).

3 **D. Julie MacDonald's Involvement in the Listing Decision**

4 34. During this same time period that the remanded listing rule was being considered
5 and re-drafted by FWS staff, then - Deputy Assistant Secretary of the Interior, Fish, Wildlife and
6 Parks Julie MacDonald was heavily involved in making changes to many decisions regarding
7 endangered species listings and critical habitat designations. *See generally* United States
8 Government Accountability Office, *Testimony before the Committee on Natural Resources,*
9 *House of Representatives, U.S. Fish and Wildlife Service, Endangered Species Act Decision*
10 *Making*, Statement of Robin Nazzaro, Director of Natural Resources and Environment, May 21,
11 2008, GAO-08-688T (“*GAO Report*”) (available at <http://www.gao.gov/new.items/d08688t.pdf>).
12 The GAO report noted that while in office Ms. MacDonald reviewed more than 200 ESA
13 decisions. *GAO Report*, p. 43 (slide 12).

14 35. Field office staff is generally responsible for initiating ESA decision-making
15 actions and all listing decisions and critical habitat designations are forwarded to regional and
16 headquarters offices for review. *GAO Report*, p. 41 (slide 10). The FWS headquarters then
17 forwards listing decisions and critical habitat designations to Interior's Office of Assistant
18 Secretary for Fish and Wildlife and Parks for review. The Office of the Assistant Secretary
19 reviews FWS decisions and makes a final determination. *Id.* The Assistant Secretary is expected
20 to give great weight to the FWS recommendation, but the Secretary has the ultimate authority to
21 make final decisions.

22 36. The GAO report found that Ms. MacDonald was directly involved in the 2003
23 decision regarding the Sacramento splittail: “After a federal court required the Service to re-
24 evaluate the species’ threatened status, Ms. MacDonald raised concerns about a statistical
25 approach the Service had applied in analyzing the species’ population. In the final decision she
26 edited information regarding the statistical analysis. Service staff said that these edits could
27 make it harder to use the scientific analysis in the future.” *GAO Report*, p. 64 (slide 33).

1 37. This was not the only instance of Ms. MacDonald interfering with the use of the
2 best available science in ESA decisions. There is significant evidence that she consistently
3 rejected FWS staff scientist’s recommendations to protect species under the ESA. *See, e.g.,*
4 “Bush Appointee Said to Reject Advice on Endangered Species” *Washington Post*, October 30,
5 2006 (www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900776.html).

6 38. In 2006, based on an anonymous complaint, the Department of the Interior Office
7 of Inspector General (“IG”) investigated Ms. MacDonald to determine whether or not she had
8 been involved in unethical and illegal activities. Specifically, the complainant alleged that
9 MacDonald “bullied, insulted, and harassed the professional staff” of the FWS, requiring them to
10 change documents and alter biological reports concerning the Endangered Species Program.
11 Department of the Interior, Office of Inspector General, Investigative Report on Allegations
12 against Julie MacDonald, Deputy Assistant Secretary, Fish, Wildlife and Parks (Washington,
13 D.C.: Mar. 23, 2007) (“*2007 IG Report*”), p. 2 (“special report” from 2007 available at
14 <http://www.doioig.gov/>) . After reviewing the pertinent documents and email and interviewing
15 staff, the IG confirmed that MacDonald had heavily edited, commented on, and reshaped
16 scientific reports submitted by the field staff. *Id.* During the investigation Ms. MacDonald
17 admitted that she had a degree in civil engineering but had no formal educational background in
18 the natural sciences, such as biology. *Id.* at 2.

19 39. Ms. MacDonald made sweeping changes in protections for endangered species
20 despite her lack of educational qualifications or any sound basis in science. For example, the
21 *2007 IG Report* details MacDonald’s involvement in an FWS study of the Southwestern willow
22 flycatcher, a bird with habitat in Arizona, New Mexico, and southern California. *Id.* at 16.
23 FWS employees noted that MacDonald had a particular interest in endangered species work in
24 California where she and her husband maintained a family ranch, and where she had previously
25 worked in several political appointments. *Id.*

26 40. The IG’s investigation also found that Ms. MacDonald had disclosed nonpublic
27 information to private sector sources. *Id.* at 18. The report details several email exchanges in
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1 which MacDonald improperly sent sensitive information to her personal email account, Pacific
2 Legal Foundation, the California Farm Bureau, and an email account ending in
3 *cheverontexaco.com*. *Id.* at 8-21.

4 41. The IG report following the investigation indicates that Ms. MacDonald violated
5 Title 5 of the Code of Federal Regulations including the Basic Obligations of Public Service,
6 Appearance of Preferential Treatment, 5 C.F.R. § 2635.101, and Standards of Ethical Conduct
7 for Employees of the Executive Branch, 5 C.F.R. §2635.703. *See 2007 IG Report* at 2. The
8 Standards of Ethical Conduct state that “An employee shall not . . . allow the improper use of
9 nonpublic information to further his own private interest or that of another, whether through
10 advice or recommendation, or by knowing unauthorized disclosure.” *2007 IG Report* at 22.

11 42. Following the IG’s investigation, FWS also conducted a separate extensive
12 internal review of all 200 endangered species decisions made by Ms. MacDonald. *See GAO*
13 *Report*, p. 2.

14 43. On April 30, 2007 Julie MacDonald resigned her post as Assistant Secretary.

15 44. On May 20, 2007 the Contra Costa Times reported on Ms. MacDonald’s
16 resignation. “Decision on Splittail Raises Suspicions,” *Contra Costa Times*, May 20, 2007
17 (available at http://www.contracostatimes.com/ci_5942663). The newspaper noted that “the [IG]
18 report said nothing about MacDonald’s participation in the decision to remove the Sacramento
19 splittail from protection under the Endangered Species Act.” The article stated that there was
20 evidence that Ms. MacDonald altered the language of the scientific conclusion in the September
21 22, 2003 Rule from saying the splittail “is likely” experiencing a population decline to say it
22 “may be” in decline. Furthermore, the article opined that Ms. MacDonald’s participation in any
23 stage of the decision making process may have violated conflict of interest rules because of her
24 husband’s ownership in an 80 acre farm in the Yolo bypass that contained suitable habitat for the
25 Sacramento splittail. *Id.*

26 45. Following the renewed media scrutiny of Ms. MacDonald’s financial interests, the
27 IG opened a second investigation to consider whether Ms. MacDonald’s involvement resulted in
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1 an improper withdrawal of the Service’s decision to list the Sacramento splittail as threatened.
2 *GAO Report*, p. 44 (slide 13, discussing earlier *2007 IG Report*). On November 27, 2007 the
3 investigation team report concluded that Ms. MacDonald stood to gain financially by the
4 decision and therefore should have recused herself from the listing review process. *GAO Report*,
5 p. 44 (slide 13).

6 46. On November 30, 2007 Senator Wyden, Chair of the U.S. Senate Subcommittee
7 on Public Lands and Forests, requested that the IG conduct a third inquiry to further investigate
8 18 endangered species decisions because he believed that the decisions may have been
9 improperly affected by Ms. MacDonald. *Id.* Senator Wyden’s request was followed by a request
10 from three members of the U.S. House of Representatives to investigate whether improper
11 influence played a role in decisions not to afford protect to the Virginia northern flying squirrel
12 and the Washington western gray squirrel. As a result, the IG reviewed a total of total of 20
13 FWS ESA decisions. Office of the Inspector General, Investigative Report, December 10, 2008
14 (“*2008 IG Report*”) at 1 (available at <http://www.doioig.gov/>; this special report listed under
15 “2009”).

16 47. On December 17, 2007, the General Accounting Office briefed the House
17 Committee on Natural Resources on a separate inquiry into Endangered Species Act Decision
18 Making at FWS. In this presentation, GAO noted findings of the 2007 IG investigations into
19 discrepancies in the decision regarding the Sacramento splittail and Ms. MacDonald’s
20 interference with the statistical approach used to assess the scientific data in the decision. *GAO*
21 *Report*, p.44 (slide 13).

22 48. A final summary of all investigations conducted by GAO and a published report
23 were presented to the House on May 21, 2008.

24 49. On December 15, 2008, the IG released the third Investigative Report on Julie
25 MacDonald entitled “The Endangered Species Act and The Conflict Between Law and Policy.”
26 *2008 IG Report*. The IG determined that Julie MacDonald “significantly participated in the
27 editing process for the splittail.” *Id.*, p. 3.

1 splittail listing and the protections of the ESA despite the weight of scientific evidence which
2 showed that such protections were sorely needed.

3 **B. Failure to Comply With the Notice Requirements of the ESA**

4 56. Between the time the initial listing proposal was reinstated pursuant to the
5 settlement and the final 2003 Decision, the FWS reopened the public comment period five times
6 and changed the statistical analysis detecting Sacramento splittail three times. FWS ultimately
7 relied on a stratified Mann-Whitney U test, an exponential decay model, a modified linear
8 regression and an altered modified linear regression test. Each time a new notice was published
9 the FWS purported that they were using the “best available science.” Even for the USBR/CDFG
10 MLR test described in the fourth draft rule, FWS continued to change the test itself up through
11 the final 2003 Decision. The analysis published in the final rule on September 22, 2003 differed
12 from the description of the USBR/MLR test in the proposal noticed on August 7, 2001 as well as
13 differing from the version of the analysis reviewed by the Peer Reviewers in March, 2002.

14 57. Section 4(b)(5) of the ESA requires the Secretary to “publish a general notice
15 and the complete text of the proposed regulation in the Federal Register.” 16 U.S.C. §
16 1533(b)(5). Section 533 of the APA requires public notice to include “either the terms or
17 substance of the proposed rule or a description of the subjects and issues involved,” and requires
18 the agency to give “interested persons an opportunity to participate in the rule making.” 5 U.S.C.
19 § 553(b), (c). The APA requirements guidance also apply to notice provided pursuant to the
20 ESA.

21 58. Due to the multiple and ongoing changes in the proposed rule up to and including
22 in the final 2003 Decision, FWS failed to provide accurate and meaningful notice to the public of
23 the Defendants’ intent to deny listing to the Sacramento splittail or the basis for such a
24 conclusion. Thereby, Defendants violated the notice provisions of the ESA.

25 **C. Failure to Consider Loss of Historic Range**

26 59. When determining whether to list a species under the ESA, the Act requires the
27 Secretary to determine whether a species is imperiled due to “destruction, modification, or
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1 curtailment of its habitat or range.” 16 U.S.C. §1533(a)(1)(A). The purpose behind this
2 provision is to identify species that are likely to become extinct because of dramatic declines in
3 their distribution across their historic range, as well as to fulfill the Act’s mandate to conserve the
4 ecosystems upon which threatened and endangered species depend.

5 60. In reaching the 2003 Decision not to list the Sacramento splittail, the FWS failed
6 to consider the loss of historic pre-European habitat and range for the species in areas outside of
7 the Delta (Moyle and Yoshiyama, 1992). Instead, FWS only looked at a small part of the
8 splittail’s historical range within the waterways of northern California after the major water
9 works projects of the 1960s were developed. Thus, the “baseline” population area excluded
10 reaches of the Sacramento and San Joaquin rivers upstream of major dams and did not
11 incorporate the entire historic range of the splittail. The ESA requires that the Secretary must
12 establish a proper baseline for determining whether loss of habitat amounts to a significant
13 portion of the species’ former range. *See* ESA §4(a)(1), 16 U.S.C.A. § 1533(a)(1); 50 C.F.R. §
14 424.11(c). It is insufficient to point to one area or class of areas where the splittail population
15 persists to support a finding that threats to the species and loss of habitat elsewhere are not
16 significant. This approach is contrary to the ESA, which recognizes that the loss of historically
17 occupied habitat or range—by itself—may be sufficient to warrant listing under the Act. *See,*
18 *e.g., Tucson Herpetological Society v. Salazar*, 566 F.3d 870, 876 (9th Cir. 2009).

19 61. The FWS failed to comply with the ESA in reaching its 2003 Decision not to list
20 the Sacramento splittail and, therefore, the decision must be set aside. *See* 16 U.S.C. § 1533.

21 **D. Improper Reliance on Speculative Conservation Programs**

22 62. In the 2003 Decision, FWS justified its decision to remove the Sacramento
23 splittail from the list of endangered species in part by relying on other conservation programs.
24 Although FWS admitted that many populations of splittail were then experiencing a decline,
25 FWS relied on these other conservation programs to mitigate for these losses. In reaching these
26 conclusions the FWS relied heavily on hypothetical offsets from the implementation programs of
27 both the California State and Federal Cooperative Program (CALFED) and the Central Valley
28

1 Project Improvement Act (CVPIA). The FWS concluded that “even considering our
2 conservative analysis of the apparent splittail population declines and the threats analysis, we
3 believe the conservation elements of the CALFED and the CVPIA programs adequately mitigate
4 for these threats.” *2003 Decision*, 68 Fed. Reg. 55139, 55147.

5 63. At best, even in 2003 the CALFED and CVPIA plans were speculative and
6 provided no concrete recovery mechanisms for declining splittail populations. Moreover,
7 CALFED incorporated conservation goals that were not enforceable and, in fact, were never
8 achieved. Since 2003, the implementation of the CALFED program has fizzled and the program
9 is universally acknowledged to have completely failed to adequately protect fish species and
10 their habitat in the Bay-Delta. As a result, major pelagic fish species in the Bay-Delta (including
11 the Sacramento splittail) as well as almost all anadromous fish species and populations now
12 appear to be in severe decline and/or at or near record low population numbers. In a 2007
13 Report, the Public Policy Institute of California (PPIC) notes that: “By December 2004, the
14 decade-old truce between water users and environmental groups, forged at the beginning of the
15 CALFED process, was all but over.” Jay Lund, Ellen Hanak, William Fleenor, Richard Howitt,
16 Jeffrey Mount, and Peter Moyle, *Envisioning Futures for the Sacramento-San Joaquin Delta*,
17 PPIC 2007, p. 87 (available at <http://www.ppic.org/main/publication.asp?i=671>). Furthermore,
18 the report notes the failure of the program: “The CALFED process, which has been responsible
19 for crafting solutions in the Delta since the mid-1990s, is now widely perceived as having failed
20 to meet its objectives.” *Id.* p. xx. Even given the facts known in 2003, FWS’ reliance on the
21 CALFED program as a conservation measure for the Sacramento splittail was inappropriate.
22 Reliance on the CALFED program was not a legally adequate substitute for granting protections
23 of the ESA to the imperiled Sacramento splittail.

24 64. In sum, FWS improperly relied on uncertain and unenforceable mechanisms in
25 other conservation programs to conserve the species in lieu of the ESA protections for listed
26 species. In this way, FWS largely ignored many imminent threats to the species when it
27 concluded that the Sacramento splittail population is “not in danger of extinction through all or a
28

1 significant portion of its range either now or in the foreseeable future.” *2003 Decision*, 68 Fed.
2 Reg. 55165. FWS made the decision not to list the species even though it admitted that

3
4 We recognize that the Sacramento splittail may be experiencing a decline in population
5 size based upon our conservative statistical analysis, and that the species continues to
6 face potential threats from habitat loss. We also recognize that the full implementation of
7 CALFED and the CVPIA restoration programs are not 100 percent certain. Finally, we
8 recognize other threats to the species, its habitat, and its prey exists, including effects of
9 drought and climate change on habitat; non-native competitors and predators; and
10 possible threats of disease and environmental contaminants.

11 *Id.* at 55165. Rather than properly analyze all of the threats in the listing decision and
12 realistically assess the ability of other conservation programs to protect the splittail, FWS
13 arbitrarily and capriciously turned a blind eye to these threats and attempted to minimize and
14 understate the risks of extinction for this imperiled species in violation of the ESA’s
15 requirements.

16 65. FWS’ acceptance of then-current splittail population levels as non-threatened
17 failed to account for current and future foreseeable threats to the species, including loss of
18 habitat, predation by exotic species, alteration of the ecosystem by invasive species, and impacts
19 to the splittail population from climate change.

20 66. Accordingly, on these bases and others, FWS’ decision to rely on the uncertain
21 protections that might be provided by the CALFED program as a substitute for listing the
22 Sacramento splittail under the ESA was arbitrary, capricious, and not based upon the best
23 available scientific information.

24 67. For these and other reasons, the FWS’ 2003 Decision violated the ESA, 16 U.S.C.
25 §1533 (b), and should be set aside.

26 **VI. CLAIM FOR RELIEF**

27 (Violation of the Endangered Species Act)

28 68. Each and every allegation set forth in the preceding paragraphs is incorporated
herein by reference.

1 (3) In order to protect the species pending review of the status of the species, publish
2 a proposed listing rule by a date certain and enjoin the Secretary of the Interior and the United
3 States Fish and Wildlife Service from issuing any conference opinion or other approval pursuant
4 to Section 7 of the ESA, for any actions that may harm the Sacramento splittail or cause
5 destruction or adverse modification to the Sacramento splittail habitat until the new listing
6 decision is made.

7 (4) Grant Plaintiff its fees, costs, expenses and disbursements, including reasonable
8 attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to
9 Justice Act, 28 U.S.C. § 2412; and

10 (5) Grant Plaintiff such additional and further relief as the Court deems just and
11 proper.

12 Respectfully submitted,

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14 

14 August 13, 2009

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