

1 DANIEL J. O'HANLON, State Bar No. 122380
ANDREW P. TAURIAINEN, State Bar No. 214837
2 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation
3 400 Capitol Mall, 27th Floor
Sacramento, CA 95814-4416
4 Telephone: (916) 321-4500
Facsimile: (916) 321-4555

5 Attorneys for Plaintiffs SAN LUIS & DELTA-
6 MENDOTA WATER AUTHORITY and
WESTLANDS WATER DISTRICT
7

8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 SAN LUIS & DELTA-MENDOTA
11 WATER AUTHORITY and
WESTLANDS WATER DISTRICT,

12 Plaintiffs,

13 v.

14 U.S. DEPARTMENT OF THE
15 INTERIOR; GALE A. NORTON, as
Secretary of the U.S. Department of the
16 Interior; U.S. FISH AND WILDLIFE
SERVICE; STEVE WILLIAMS, as
17 Director, Fish and Wildlife Service, U.S.
Department of the Interior; STEVE
18 THOMPSON, as Operations Manager,
California/Nevada Operations Office,
19 Fish and Wildlife Service, Pacific Region,
U.S. Department of the Interior; ANNE
20 BADGLEY, as Regional Director, Fish
and Wildlife Service, Pacific Region,
21 U.S. Department of the Interior,

22 Defendants,

23 NATIONAL RESOURCES DEFENSE
COUNCIL, et al.,

24 Intervenor-Defendants.
25

CASE NO. CIV F-02-6461 OWW DLB

**FIRST SUPPLEMENTAL COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF UNDER THE ENDANGERED
SPECIES ACT [16 U.S.C. §§ 1531 et seq.]
AND THE ADMINISTRATIVE PRO-
CEDURE ACT [5 U.S.C. §§ 551 et seq.]**

26
27 Plaintiffs San Luis & Delta-Mendota Water Authority and Westlands Water
28 District (collectively referred to as "Plaintiffs") hereby supplement their Complaint for

1 Declaratory and Injunctive Relief Under the Endangered Species Act [16 U.S.C. §§ 1531 et seq.]
2 and the Administrative Procedure Act [5 U.S.C. §§ 551 et seq.], filed in this action on
3 November 22, 2002 (“Complaint”), by alleging as follows:

4 1. Plaintiffs reallege and incorporate by reference the allegations in
5 paragraphs 1 through 30, inclusive, of the Complaint.

6 2. The First Claim for Relief in the Complaint alleged that Defendants were
7 in violation of section 4(c)(2) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533(c)(2),
8 because they had not conducted a five-year status review of the delta smelt since its listing in
9 1993. As a result of the Complaint, Plaintiffs and Defendants entered into a Stipulated Settlement
10 Agreement and Order Regarding Five-Year Review of Delta Smelt, which the Court entered on
11 June 19, 2003. Pursuant to that agreement, and in order to resolve Plaintiffs’ First Claim for
12 Relief, the Defendants agreed to perform the overdue status review for the delta smelt.

13 3. On March 31, 2004, the defendant United States Fish and Wildlife Service
14 (“Service”) transmitted the results of its status review of the delta smelt to plaintiff San Luis &
15 Delta-Mendota Water Authority. A copy of correspondence transmitting the results of the
16 Service’s Status Review is attached hereto as Exhibit 1. In a document titled *Five-Year Review*,
17 and dated March 31, 2004 (the “Status Review”), the Service set forth its analysis and
18 conclusions concerning the status of the delta smelt. A copy of the Status Review is attached
19 hereto as Exhibit 2. According to the Status Review and the accompanying correspondence, the
20 Service does not recommend a change in the listing status of the delta smelt from its current status
21 as a threatened species.

22 4. On November 17, 2004, Plaintiffs provided notice pursuant to section
23 11(g)(2) of the federal Endangered Species Act, 16 U.S.C. § 1540(g), regarding the Status
24 Review and the Service’s determination based on the Status Review. A copy of the notice is
25 attached hereto as Exhibit 3. More than sixty days have passed since this notice was served on
26 Defendants. Defendants have not remedied the violations set forth in the notice.

27 ///

28 ///

1 **FOURTH CLAIM FOR RELIEF**

2 **(Violation Of ESA Subsections 4(c)(2), (a) and (b) – Status Review**
3 **Fails To Meet Requirements Of ESA And Is Arbitrary And Capricious)**

4 5. Plaintiffs reallege and incorporate herein, as if set forth in full, each and
5 every allegation contained in paragraphs 1 through 4, inclusive.

6 6. ESA subsection 4(c)(2)(B) requires the Secretary, on the basis of a status
7 review, to determine whether the listing status of a currently listed species should be changed.
8 Further, it requires that that determination “be made in accordance with the provisions of ESA
9 subsections 4(a) and (b).” Subsections 4(a) and (b) of the ESA govern listing decisions. The
10 Defendants’ analysis of and determination regarding the status of delta smelt, as described in the
11 Status Review, does not meet these requirements, and hence is contrary to law. Further, the
12 Service’s determination of the current status of the delta smelt, as reflected in the Status Review,
13 is arbitrary and capricious.

14 7. In making its determination that the listing status of the delta smelt should
15 remain unchanged the Service did not evaluate whether, in light of the best available data, the
16 delta smelt is more likely than not a species that is threatened with extinction. Instead, the
17 Service began with a presumption that the delta smelt is in fact threatened. It based this premise
18 on the analysis it did in 1993. The Service did not did not critically reexamine its 1993 rationale
19 for listing in light of the best scientific data available in 2004. The Service thereby ignored
20 significant doubt regarding the correctness of its 1993 analysis and understanding of the delta
21 smelt population, including doubt cast by the data that has become available since 1993. After
22 uncritically adopting the 1993 listing analysis and listing decision as its premise, the Service then
23 proceeded to ask whether the data and analysis gathered since 1993 are sufficient to prove a
24 negative proposition, i.e., that the delta smelt is not a threatened species. On that basis, it rejected
25 the data and analysis offered by the San Luis & Delta-Mendota Water Authority (“Authority”) as
26 inconclusive. By this illogic, uncertainty in the data, and a lack of understanding of smelt
27 population dynamics, are treated by the Service as affirmative support for a conclusion that the
28 smelt is in fact is threatened with extinction in the foreseeable future, and that it warrants

1 continued listing as a threatened species. The Service therefore failed to comply with the
2 mandates of ESA subsections 4(c)(2), 4(a) and 4(b).

3 8. The rationale on which the 1993 listing decision was based is contradicted
4 by the data developed since the listing, and accordingly is not persuasive today. Yet, the Service
5 offered no new rationale in the Status Review in place of that 1993 rationale to support a
6 determination that the delta smelt is threatened. Further, the so-called “Threats Assessment” in
7 the Status Review fails to acknowledge or address recent data and analysis indicating that the
8 Service has mistakenly focused upon entrainment of larvae and juveniles at the exports pumps of
9 Central Valley Project (“CVP”) and the State Water Project (“SWP”) as a major threat to the
10 delta smelt population. For these and other reasons, the Service’s Status Review and
11 determination based thereon is therefore flawed and incomplete, and is arbitrary and capricious
12 agency action.

13 9. This failing is compounded by the misleading impression of the Service’s
14 knowledge and understanding of the delta smelt’s status that is conveyed by the Status Review.
15 For example, in truth the Service has no idea whether the relatively high levels of abundance in
16 the 1970s are above, below or exactly at long-term historical averages. The surveys used to
17 measure abundance began in the 1960s. Accordingly, the levels in the 1970s may not provide an
18 appropriate comparison with levels seen in more recent years to conclude that the smelt are now
19 in danger of extinction. Yet, the Status Review repeatedly refers to the 1970s “pre-decline” level
20 of relative abundance as if the Service knows that it represents a long term and necessary
21 population level. Likewise, the Service does not know how many smelt there need to be to
22 sustain the population over time, nor how that number compares with how many there are today.
23 Yet, the Status Review conveys certitude that the smelt is in fact threatened, paradoxically while
24 relying on uncertainty in the data as the basis for not changing the smelt’s current listing status.
25 Further, the Service commissioned a supposed “peer review” of data and analysis offered by the
26 Authority. The Status Review presents the peer review as a basis for rejecting the Authority’s
27 evidence that the smelt is not in fact threatened. Yet, aspects of that review are indicative of bias
28 rather than fair evaluation. Among other things, the Authority and its experts were not allowed to

1 respond to the peer review, contrary to normal practice, and contrary to what a reader of the
2 Status Review would assume had occurred in a “peer review.”

3 10. In completing its Status Review and making its determination based
4 thereon, the Service failed to comply with nondiscretionary duties imposed under ESA section 4,
5 16 U.S.C. § 1533. Accordingly, the court has jurisdiction to review the Service’s actions and
6 failure to act and impose remedies therefor pursuant to ESA section 11(g), 16 U.S.C.
7 § 1540(g)(1)(C). In the alternative, the court may review the Service’s action pursuant to the
8 judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706.

9 WHEREFORE Plaintiffs pray for relief as set forth below.

10 **FIFTH CLAIM FOR RELIEF**

11 **(Violation of ESA subsections 4(f)(4) and (5) – Amendment Of Recovery Criteria**
12 **Without Public Notice Or Opportunity For Comment)**

13 11. Plaintiffs reallege and incorporate herein, as if set forth in full, each and
14 every allegation contained in paragraphs 1 through 10, inclusive.

15 12. The objective criteria for recovery of the delta smelt, as published in the
16 Recovery Plan, have been met. These objective criteria, which relate to delta smelt abundance
17 and distribution, and outflow were met over the five-year period beginning in 1998 and ending in
18 2002.

19 13. In the Status Review, however, the Service says it is not following the
20 objective criteria for recovery of the delta smelt established in the Recovery Plan.

21 14. ESA section 4(f)(4) provides that “the Secretary shall, prior to final
22 approval of a new or revised recovery plan, provide public notice and an opportunity for public
23 review and comment on such plan. The Secretary shall consider all information presented during
24 the public comment period prior to approval of the plan.” ESA section 4(f)(5) further provides
25 that “each federal agency shall, prior to implementation of a new or revised recovery plan,
26 consider all information presented during the public comment period under paragraph (4).”

27 15. The Service has declined to follow its existing objective recovery criteria
28 for delta smelt, but has not published nor allowed public comment upon any new or different

1 criteria.

2 16. By failing to follow its existing recovery criteria, without having amended
3 its recovery criteria in the Recovery Plan after first providing notice and an opportunity to
4 comment, the Service failed to comply with nondiscretionary duties imposed under ESA section
5 4, 16 U.S.C. § 1533. Accordingly, the court has jurisdiction to review the Service's actions and
6 failure to act and impose remedies therefor pursuant to ESA section 11(g), 16 U.S.C.
7 § 1540(g)(1)(C). In the alternative, the court may review the Service's action pursuant to the
8 judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 706.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs pray for judgment as herein set forth.

11 1. On the Fourth Claim, for a declaration that the Status Review and the
12 Service's listing determination based thereon fail to meet the requirements of law, are arbitrary,
13 capricious, an abuse of discretion, and are unsupported by substantial evidence, and for an order
14 vacating and setting aside the Status Review and the Service's determination based thereon that
15 the listing status of the delta smelt should remain unchanged;

16 2. On the Fifth Claim, for a declaration that the Service's *de facto* amendment
17 of the objective recovery criteria for delta smelt in the Recovery Plan without the notice and
18 opportunity for public comment required by ESA section 4(c)(4) was contrary to law, and for an
19 order vacating and setting aside that the Service's determination based thereon that the listing
20 status of the delta smelt should remain unchanged;

21 3. For a temporary, preliminary and permanent injunction against Defendants
22 prohibiting them or their agents from regulating or attempting to regulate CVP or SWP operations
23 on the basis of impacts to delta smelt;

24 4. Remand to the Service with direction to conduct further proceedings in a
25 manner consistent with the Court's ruling;

26 5. For costs of suit, including reasonable attorneys' fees; and

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

6. For such other and further relief as the Court may deem just and proper.

Dated: January 28, 2005

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Professional Corporation

By /s/ Daniel J. O'Hanlon
Daniel J. O'Hanlon
Attorneys for Plaintiffs SAN LUIS & DELTA-
MENDOTA WATER AUTHORITY and
WESTLANDS WATER DISTRICT