

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CALIFORNIA FARM BUREAU
FEDERATION, a California non-profit
corporation; TED SHEELY, an individual
farmer,

Plaintiffs,

vs.

ANNE BADGLEY, in her official capacity
as Regional Director of the United States
Fish and Wildlife Service, Region 1, *et al.*,

Defendants,

and

NATURAL RESOURCES DEFENSE
COUNCIL, *et al.*
Intervenors-
Defendants.

Case No. 1:02CV02328 RCL ECF

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

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2 Plaintiffs CALIFORNIA FARM BUREAU FEDERATION (“FARM BUREAU”) and
3 TED SHEELY (“SHEELY”) (collectively “Plaintiffs”) hereby supplement their Complaint For
4 Declaratory And Injunctive Relief Under The Endangered Species Act, 16 U.S.C. §§1531, *et seq.*, And
5 The Administrative Procedures Act, 5 U.S.C. §§551, *et seq.*, by alleging as follows:
6

7 **INTRODUCTION**

8 1. The FARM BUREAU is a non-governmental, non-profit, voluntary membership
9 California corporation based in Sacramento. The FARM BUREAU’s purpose is to protect and improve
10 the ability of farmers and ranchers engaged in production agriculture to provide a reliable food and
11 fiber supply through responsible stewardship of California’s resources. Its members consist of 53
12 county farm bureaus and, through them, more than 89,000 farm families and individual members.

13 2. In this action, Plaintiffs challenge the United States Fish and Wildlife Service’s
14 (“Service”) recently completed status review for the delta smelt (*Hypomesus transpacificus*) as
15 arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence.

16 3. The Endangered Species Act (“ESA”), 16 U.S.C. §§1531, *et seq.*, requires the Service
17 to conduct a status review of each listed species at least once every five years. 16 U.S.C.
18 §1533(c)(2)(A). The status review must employ the best scientific and commercial data available. 50
19 C.F.R. § 424.21(d). The purpose of the mandatory status review is to determine if the listed species
20 should either be removed from the list of threatened and endangered species or be changed in status
21 from either endangered to threatened or threatened to endangered. 16 U.S.C. § 1533(c)(2)(B) – (B)(iii);
22 *see also* 50 C.F.R. § 424.21.

23 4. On November 22, 2002, Plaintiffs filed the current action challenging Defendants’
24 failure to complete a status review for the delta smelt. As a result of Plaintiffs’ complaint, Plaintiffs
25 and Defendants entered into a Stipulation and Settlement Agreement (“Agreement”) on April 25, 2003.
26 This Agreement required the Service to complete the delta smelt status review by March 1, 2004.
27 Agreement ¶ 1(b). The Court approved this Agreement on June 13, 2003.

28 5. On March 5, 2004, Defendants moved to amend the Agreement to extend the deadline

1 for completion of the delta smelt status review to March 31, 2004. The Court granted Defendants'
2 motion to amend the Agreement on March 19, 2004.

3 6. Mr. Steve Thompson, Manager of the Service's California/Nevada Operations Office,
4 sent Plaintiffs a letter dated March 31, 2004 (the "Transmittal Letter"), attached hereto as Exhibit 1,
5 summarizing the results of the final, signed delta smelt status review ("Final Review"). The
6 Transmittal Letter concluded that the delta smelt populations remain at historically low levels, and that
7 delta smelt should retain their status as threatened under the ESA.

8 7. The Final Review was attached to the Transmittal Letter and is attached hereto as
9 Exhibit 2. The Final Review acknowledged that the Service's body of knowledge of delta smelt life
10 history and population dynamics has increased since the 1993 listing. The Service acknowledged in the
11 Final Review that further research is necessary to understand the relationship between the delta smelt's
12 physical habitat and population status. Additionally, the Service admitted in the Final Review that it
13 does not know the net effect of delta smelt mortality caused by the operation of the Central Valley
14 Project and State Water Project facilities on the delta smelt population structure.

15 8. Plaintiffs have received an e-mail communication sent from Ms. Julie A. MacDonald,
16 Deputy Assistant Secretary of Fish, Wildlife and Parks, Department of the Interior, to Mr. Thompson
17 and other Service officials involved in the Final Review. Southwick Declaration. A true and correct
18 copy of this e-mail is attached hereto as Exhibit 3. The e-mail states that, contrary to the conclusions of
19 the Transmittal Letter and the Final Review, the Service agreed in private, internal discussions that: 1)
20 the original 1993 listing decision and 1996 recovery plan with respect to the delta smelt were based on
21 flawed assumptions and data; 2) the Service does not have and has never had any good estimates of
22 delta smelt population numbers; 3) the Service does not understand how the various factors within the
23 Suisun Bay and the Sacramento-San Joaquin estuary, referred to as the "Delta," affect delta smelt
24 populations; and 4) all of the data used by the Service to estimate the population of delta smelt are
25 flawed. *See* Exh. 3. The e-mail concludes by stating that the Transmittal Letter and the Final Review
26 "provide an oversimplified and misleading characterization . . . and are . . . inconsistent with [the
27 Service's] discussions." *Id.*

28 9. Notwithstanding these facts and the new scientific information submitted by Plaintiffs

1 and others as part of the public comment period associated with the delta smelt status review, the
2 Service concluded in the Final Review that the delta smelt should remain listed as threatened under the
3 ESA and that its overall population trend is negative.

4
5 **FOURTH CAUSE OF ACTION**

6 **(PURSUANT TO 5 U.S.C. §706(2)(a))**

7 **THE DELTA SMELT FINAL STATUS REVIEW**

8 **IS ARBITRARY AND CAPRICIOUS**

9
10 10. Plaintiffs hereby reallege and incorporate by reference each and every allegation
11 contained in paragraphs 1 through 9 above, as though fully set forth herein.

12 11. The Final Review's threats analysis concludes that "[t]he threats of other natural or
13 manmade factors affecting the delta smelt's continued existence as described in the original listing
14 remain and will increase." Exh. 2 at 27. This conclusion is unsubstantiated by the Final Review.
15 Indeed, the Final Review acknowledges that "the threats of disease and predation have still not
16 been sufficiently studied to determine their effects on delta smelt," and further concludes that
17 "[f]uture research efforts will hopefully draw more conclusions regarding the relationship between
18 physical habitat and population status," and that "the net effect of . . . mortality on the delta smelt
19 population structure is difficult to predict at this time." *Id.* at 22-23, 25.

20 12. The Final Review's conclusion that the threats to the delta smelt described in the
21 original listing "remain and will increase" is also directly contradicted by the facts presented in the
22 private, internal discussions among high-ranking Service staff, referred to in paragraph 7 above.
23 *See* Exh. 3. As Exhibit 3 makes clear, the Service agreed in private, internal discussions that the
24 **original listing decision and recovery plan were based on flawed assumptions and data**; the
25 Service has never had any good estimates of delta smelt population numbers; the Service does not
26 understand how the various factors affect delta smelt populations; and all of the data used by the
27 Service to estimate the delta smelt population are flawed. *See* Exh. 3. The Final Review does not
28 assert that new scientific information justifies a listing of the delta smelt. Rather, the Final Review

1 concludes that “the threats . . . described in the **original listing decision** remain and will likely
2 increase.” Exh. 2 at 27 (internal citation omitted) (emphasis added). This conclusion is arbitrary
3 and capricious, and unsupported by both the documentation of internal discussions between high-
4 ranking Service officials and the analysis contained in the Final Review.

5 13. The Final Review is arbitrary and capricious, an abuse of discretion, and
6 unsupported by substantial evidence. 5 U.S.C. § 706(2)(A).

7 WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the
8 following relief:
9

10 A. Issue a Declaratory Judgment that the March 31, 2004 delta smelt status review is
11 arbitrary and capricious, an abuse of discretion, and unsupported by substantial evidence;

12 B. Issue a Mandatory Injunction requiring Defendants, and each of them, to commence
13 a delisting process immediately with respect to the delta smelt, to be concluded within eighteen
14 months as required by 16 U.S.C. § 1533(b);

15 C. Allow plaintiffs to recover costs and attorney fees attendant to bringing this action;
16 and

17 D. Grant such other equitable and legal relief as the Court considers just and proper.
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19 Dated: October 1, 2004

Respectfully submitted,

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22 1610)

_____/s/_____
CHRISTOPHER H. BUCKLEY, JR. (DC Bar #

RACHEL A. CLARK (DC Bar # 474203)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
Telephone: (202) 955-8500

Counsel for Plaintiff
CALIFORNIA FARM BUREAU FEDERATION

1 Brenda Jahns Southwick
2 Ronda Azevedo Lucas
3 2300 River Plaza Drive
4 Sacramento, California 95833
5 Telephone: (916) 561-5665
6 Facsimile: (916) 561-5691

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Of Counsel

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Attorneys Entitled to be Notified:

JAMES A. MAYSONETT, Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Wildlife and Marine Resources Section
Benjamin Franklin Station, P.O. Box 7369
Washington, D.C. 20044-7369
Telephone: (202) 305-0216
Facsimile: (202) 305-0275

CHRISTOPHER H. BUCKLEY, JR.
RACHEL A. CLARK
Gibson, Dunn & Crutcher L.L.P.
1050 Connecticut Avenue, N.W., Suite 900
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

BRENDA JAHNS SOUTHWICK
RONDA LUCAS
2300 River Plaza Drive
Sacramento, California 95833
Telephone: (916) 561-5665
Facsimile: (916) 561-5691

TRENT W. ORR
953 Clayton Street, #5
San Francisco, California 94117
Telephone: (415) 665-2185
Facsimile: (415) 665-2592

LAURA M. ROBB
DEBORAH S. REAMES
Earthjustice
426 17th Street, 5th Floor
Oakland, California 94612
Telephone: (510) 550-6725
Facsimile: (510) 550-6749

HOWARD I. FOX
Earthjustice
1625 Massachusetts Ave. NW, Suite 702
Washington, D.C. 20036
Telephone: (202) 667-4500
Facsimile: (202) 667-2356