

1 Raphael Rosingana SBN 054447  
2 **ROSINGANA & ASSOCIATES**  
3 PO Box 1365  
4 Loomis, CA 95650-1365  
5 Telephone: (916) 652-7235  
6 Facsimile: (916) 652-9433

7 Attorney for Plaintiffs  
8 **BIG CREEK LUMBER CO., and**  
9 **CENTRAL COAST FOREST ASSOCIATION**

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SACRAMENTO

12 CENTRAL COAST FOREST )  
13 ASSOCIATION and BIG CREEK LUMBER )  
14 CO., )

Case No.

**05CS01617**

15 Plaintiff and Petitioner,

) **VERIFIED PETITION FOR WRIT OF**  
) **MANDAMUS; and,**  
) **COMPLAINT FOR DECLARATORY**  
) **JUDGMENT**

16 vs.

17 CALIFORNIA FISH & GAME )  
18 COMMISSION, )

19 Defendant and Respondent. )  
20

21 Plaintiff/Petitioners Central Coast Forest Association and Big Creek Lumber Company  
22 (hereinafter, collectively, "CCFA"), respectfully petition this Court for a writ of mandate pursuant  
23 to California Code of Civil Procedure sections 1094.5 and 1085, Fish and Game Code section  
24 2076, and Government Code section 11350, and bring this action for declaratory and injunctive  
25 relief against Defendant/Respondent California Fish and Game Commission (hereinafter  
26 "CFGC"). Plaintiff/Petitioners allege the following:

27 VERIFIED PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR  
28 DECLARATORY JUDGMENT

1 **Parties and Interests**

2 1. Defendant/Respondent CFGC a California agency charged with certain authority under the  
3 California Fish and Game Code.

4 2. Plaintiff/Petitioner Central Coast Forest Association is a California nonprofit association  
5 representing family landowners, independent foresters and private citizens of the central Coast.  
6 Central Coast Forest Association participates in public debate, takes positions in the County and  
7 State government forums, testifies at hearings and in legal actions, and generally pursues the  
8 cause of sound science in regulatory decisions affecting the interests of Association members.

9 3. Plaintiff/Petitioner Big Creek Lumber Company is a lumber company in Davenport,  
10 California which is owned and operated by the McCray family, which has made its living from the  
11 forests of the Santa Cruz Mountains for five generations. Plaintiff/Petitioner actively supports  
12 conservation forest in the Santa Cruz Mountains, and believes that the listing of non-native coho  
13 salmon threatens genuinely native species worthy of protection. Plaintiff/Petitioner, as a  
14 landowner in the Santa Cruz Mountains, is also threatened by legal restrictions on the use of its  
15 property as a result of the unlawful listing challenged herein.

16 **Jurisdiction and Venue**

17 4. This Court has jurisdiction pursuant to sections 1094.5 and 1085 of the California Code of  
18 Civil Procedure, section 2076 of the Fish and Game Code, and section 11350 of the Government  
19 Code.

20 5. Venue is proper in the Court pursuant to sections 393 and 395 of the Code of Civil  
21 Procedure because CFGC is located in Sacramento County.

22 6. There are no further administrative remedies available to Plaintiff/Petitioner

23 **Background**

24 7. Pursuant to section 2070 of the Fish and Game Code, CFGC is to “establish a list of  
25 endangered species and a list of threatened species.”

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1 8. Pursuant to section 2062 of the Fish and Game Code, "endangered species means a native  
2 species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious  
3 danger of becoming extinct throughout all, or a significant portion, of its range due to one or  
4 more causes, including loss of habitat, change in habitat, overexploitation, predation, competition,  
5 or disease."

6 9. Pursuant to section 2067 of the Fish and Game Code, "threatened species means a native  
7 species or subspecies of bird, mammal, fish, amphibian, reptile, or plant that, although not  
8 presently threatened with extinction, is likely to become an endangered species in the foreseeable  
9 future in the absence of special management and protection efforts required by this chapter."

10 10. Section 2052 of the Fish and Game Code declares that "it is the policy of the state to  
11 conserve, protect, restore, and enhance any endangered species or any threatened species and its  
12 habitat. ."

13 11. A "native" species within the meaning of sections 2062 and 2067 of the Fish and Game  
14 Code must refer to animals that at some relevant period in time (often understood to refer to a  
15 time prior to European settlement of California) formed a self-sustaining population within the  
16 state which might be "restored" pursuant to the general policy of the statute.

17 12. The species *Oncorhynchus kisutch*, commonly known as coho salmon, has no subspecies.  
18 The designation of coho salmon runs in a particular geographic area does not constitute a  
19 "species" or "subspecies" within the meaning of sections 2062 or 2067 of the Fish and Game  
20 Code.

21 13. CFGC appears to interpret the statutory term, "species" to refer to any group of  
22 interbreeding organisms that is reproductively isolated from other such groups. Under this  
23 interpretation, virtually any group of coho salmon within the species *Oncorhynchus kisutch* could  
24 be deemed a "species" for the purpose of the statute.

25 14. Effective December 31, 1995, CFGC asserted authority to list coho salmon within a  
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1 particular geographic region and listed "Coho salmon (*Oncorhynchus kistutch*) south of San  
2 Francisco Bay" as endangered.

3 15. No other species or subspecies declared to be threatened or endangered are defined by  
4 virtue of a geographic region.

5 16. On June 17, 2004, CCFA submitted a petition (attached as Exhibit A, and incorporated  
6 fully herein) to CFGC to delist the "Central California Coho Salmon ESU" by redefining its  
7 southern boundary to exclude the geographic region south of San Francisco.

8 17. On or about August 5, 2004, CFGC enacted the current listings of coho salmon, which appear  
9 at CCR Title 14, § 670.5(a)(2)(N), listing as endangered "Coho salmon (*Oncorhynchus kisutch*) south  
10 of Punta Gorda (Humboldt County), California", and (b)(2)(E), listing as threatened "Coho salmon  
11 (*Oncorhynchus kisutch*) from Punta Gorda (Humboldt County), California to the northern border of  
12 California."

13 18. The concept of an "ESU," or evolutionarily significant unit, was devised by the Federal Fish  
14 and Wildlife officials pursuant to Federal authority to "list distinct population segments under the  
15 Federal Endangered Species Act." Federal officials have listed coho salmon as defined in  
16 geographically based ESUs. CFGC has changed the coho listings to correspond to the Federal coho  
17 listings without regard to its lack of authority under the Fish and Game Code to pursue the listing of  
18 an ESU or other equivalent group of animals comprising less than a full species or subspecies.

19 19. In redefining the endangered listings for coho salmon (specifically the coho salmon south of  
20 San Francisco Bay) to "Coho salmon (*Oncorhynchus kisutch*) south of Punta Gorda (Humboldt  
21 County), California", CFGC did not address any of the information in CCFA's petition.

22 20. On March 17, 2005, CFGC issued a "Notice of Findings" document pursuant to § 2074.2  
23 of the Fish & Game Code in which it determined that "the petition does not provide sufficient  
24 evidence to persuade the Commission that the petitioned action may be warranted". A true copy  
25 of the "Notice of Findings" document is annexed hereto as Exhibit B, and incorporated fully  
26 herein.

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**I.**  
**FIRST CAUSE OF ACTION**  
**DECLARATORY JUDGMENT**  
**(AGAINST CFGC)**

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21. Plaintiff/Petitioners hereby incorporate, by specific reference, all allegations of paragraphs 1 through 20 as if set forth fully herein.

22. A real and actual controversy exists between the parties concerning CFGC's authority to list a group of coho salmon identified by their geographic presence south of San Francisco, insofar as Plaintiff/Petitioners contend that such a listing exceeds the powers conferred upon the CFGC by the Legislature. Plaintiff/Petitioners contend that those powers are limited to listing species and subspecies, and does not include listing of species by ESU, or other geographically designated areas.

23. CCFA seeks a declaratory judgment that CFGC's listing authority is limited to "species" and "subspecies" and does not include any "ESU" or other geographically-based unit for the species *Oncorhynchus kisutch*.

**II.**  
**SECOND CAUSE OF ACTION**  
**WRIT OF MANDATE**  
**(AGAINST CFGC)**

24. Plaintiff/Petitioners hereby incorporate, by specific reference, the allegations set forth in paragraphs 1 through 23 as if set forth fully herein.

25. CFGC's determination that CCFA's petition did not provide "sufficient information to indicate that the petitioned action may be warranted" within the meaning of section 2074.2 of the Fish and Game Code was arbitrary and capricious for reasons including but not limited to:

- a. A review of professional fisheries literature prior to 1906, when coho salmon hatcheries were introduced south of San Francisco, confirms that the coho salmon

1 were not regarded as native fish by professionals. CDFC's initial listing decision  
2 was made without reference to this literature, and relied solely upon secondary  
3 sources which erroneously interpreted the primary research. In its response to the  
4 petition, the Department of Fish and Game failed to weigh the primary evidence  
5 and continued to propagate the obvious errors.

6 b. Coho are absent from the archeological evidence south of San Francisco (though  
7 other salmonids are present), demonstrating the coho never formed any significant  
8 part of Native American diet prior to European settlement. In its response to the  
9 archeological evidence, the Department of Fish and Game stated that more data  
10 needed to be gathered before definitive conclusions could be drawn.

11 c. Natural environmental conditions in rivers and streams of the Santa Cruz  
12 Mountains are hostile to permanent coho salmon colonies. Occasional strays may  
13 spawn but the ephemeral populations will be extirpated within a few generations  
14 by one of the frequent, extreme climatic events such as floods and droughts. The  
15 Department of Fish and Game denied differences in environmental conditions as  
16 compared to areas north of San Francisco that are obvious from inspection of the  
17 climatic and hydrologic evidence.

18 d. Efforts to "recover" a species that was not historically present in the rivers and  
19 streams of the Santa Cruz mountains threaten genuinely-native species such as  
20 steelhead trout. The Department of Fish and Game offered no response to this  
21 concern.

22 e. An independent review of the CCFA petition by Dr. V. W. Kaczynski concluded  
23 that the best available scientific information supported a conclusion that coho  
24 salmon were not native to the rivers and streams of California south of San  
25 Francisco Bay. The Department of Fish and Game responded that Federal  
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1 fisheries scientists have supported an ESU for coho salmon that extends south of  
2 San Francisco Bay.

3 26. The CFGC determination failed to provide a minimally sufficient explanation of its  
4 rejection of the petition, including specific findings on the issues presented by CCFA. Instead, the  
5 CFGC noted the objections by the Department of Fish and Game, to the petition, and offered its  
6 conclusory opinion that it “could not reasonably conclude that there is a substantial possibility that  
7 the listing of coho salmon south of San Francisco was unfounded or in error such that delisting  
8 could occur.” This finding has no basis in evidentiary support, and was arbitrary and capricious.

9 27. Plaintiff/Petitioners are entitled to a writ of mandate directing CFGC (a) to accept CCFA’s  
10 petition pursuant to § 2074.2(a)(2) of the Fish & Game Code and proceed to further review as  
11 contemplated by §§ 2074.4 *et seq.* of the Fish & Game Code; and (b) to repeal Title 14, §  
12 670.5(a)(2)(N) of the Code of California Regulations until such time as CFGC can promulgate a  
13 listing concerning coho salmon in compliance with law.

14 28 Plaintiff/Petitioners have no plain, speedy and adequate remedy in the ordinary course of  
15 law.  
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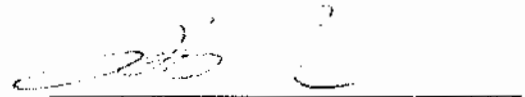
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1 **WHEREFORE, PLAINTIFF/PETITIONERS PRAY FOR JUDGMENT AS FOLLOWS:**

- 2 1. On its First Cause of Action, for issuance of a declaration that CFGC's listing  
3 authority is limited to "species" and "subspecies" and does not include any "ESU"  
4 or other geographically-based unit for the species *Oncorhynchus kisutch*;
- 5 2. On its Second Cause of Action, for a writ of mandate directing CFGC (a) to  
6 accept CCFA's petition pursuant to § 2074.2(a)(2) of the Fish & Game Code and  
7 proceed to further review as contemplated by §§ 2074.4 *et seq.* of the Fish &  
8 Game Code; and (b) to repeal Title 14, § 670.5(a)(2)(N) of the Code of California  
9 Regulations until such time as CFGC can promulgate a listing concerning coho  
10 salmon in compliance with law;
- 11 3. For an award of the costs of suit, including reasonable attorneys' fees;
- 12 4. For such other and further relief as the Court may deem just and proper.

13 Dated November 4, 2005

14 ROSINGANA AND ASSOCIATES

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16 RAPHAEL ROSINGANA  
17 Attorneys for Plaintiff and Petitioners  
18 BIG CREEK LUMBER CO., and  
19 CENTRAL COAST FOREST

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1 **VERIFICATION**

2 STATE OF CALIFORNIA)

3 COUNTY OF SACRAMENTO)

4 I, the undersigned, RAPHAEL L. ROSINGANA, have read the foregoing "VERIFIED  
5 PETITION FOR WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY  
6 JUDGMENT" to Plaintiff/Petitioners Big Creek Lumber Company and Central Coast Forest  
7 Association, and know its contents.

8 I am the attorney of record for Plaintiff/Petitioner Big Creek Lumber Company and  
9 Central Coast Forest Association, who is absent from this county on the date this verification is to  
10 be executed and I therefore execute this verification on Plaintiff/Petitioner Big Creek Lumber  
11 Company and Central Coast Forest Association's behalf.

12 The matters in the foregoing document are true and correct, except as to those matters  
13 alleged on information and belief, and as to those matters I am informed and believe that they are  
14 true and correct.

15 Executed on November 4, 2005, Loomis, California.

16 I declare under the penalty of perjury under the laws of the State of California that the  
17 above is true and correct.

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20 Raphael L. Rosingana  
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