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LEGAL PROCESS #12

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 CALIFORNIA STATE GRANGE; FOREST  
 11 LANDOWNERS OF CALIFORNIA; GREATER  
 EUREKA CHAMBER OF COMMERCE and SAVE  
 12 OUR SHASTA AND SCOTT VALLEYS, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 14 IN AND FOR THE COUNTY OF SACRAMENTO  
 (UNLIMITED CIVIL)

15 CALIFORNIA FORESTRY  
 16 ASSOCIATION, a California  
 corporation; CALIFORNIA  
 17 CHAMBER OF COMMERCE, a  
 California corporation; CALIFORNIA  
 18 CATTLEMEN'S ASSOCIATION;  
 CALIFORNIA STATE GRANGE, a  
 19 California corporation; FOREST  
 LANDOWNERS OF CALIFORNIA, a  
 20 California corporation; GREATER  
 EUREKA CHAMBER OF  
 21 COMMERCE, a California  
 corporation; and SAVE OUR  
 22 SHASTA AND SCOTT VALLEYS,  
 INC., a California corporation,  
 23  
 Petitioners and Plaintiffs,  
 24  
 vs.  
 25  
 CALIFORNIA FISH & GAME  
 26 COMMISSION; and CALIFORNIA  
 DEPARTMENT OF FISH & GAME,  
 27  
 Respondents and Defendants.  
 28

FILED BY FACSIMILE

No. 05CS00948

VERIFIED PETITION FOR WRIT  
 OF MANDAMUS (CODE OF  
 CIVIL PROCEDURE §1094.5,  
 1085, AND GOVERNMENT  
 CODE §11350) AND  
 COMPLAINT FOR  
 DECLARATORY RELIEF AND  
 PRELIMINARY AND  
 PERMANENT INJUNCTION

BY FAX



1 border was “warranted” under CESA, and (b) adopt, pursuant to the APA, a  
2 regulation listing the species as described, were not made in the manner  
3 required by law. Such actions were arbitrary and capricious, not supported  
4 by evidence in the record and exceeded the Commission’s jurisdiction.

5 3. The Commission abused its discretion and acted outside its  
6 authority in taking the above-described actions because (1) there were  
7 inadequate grounds upon which to find that the Coho salmon’s listing as  
8 “threatened” and/or “endangered” is “warranted” under CESA section  
9 2075.5 (or even that it “may have been warranted” in the first instance), and  
10 (2) the separate and independent act of adopting the listing regulation did  
11 not comply with either the listing criteria of CESA or the well-established  
12 rule-making standards and procedures of the APA.

13 4. Accordingly, pursuant to Government Code section 11350,  
14 Plaintiffs seek a declaration that the regulation adopted by the Commission,  
15 which lists the Coho salmon as a “threatened” species north of Punta Gorda  
16 and as an “endangered” species between Punta Gorda and San Francisco, is  
17 invalid. In addition, pursuant to Code of Civil Procedure sections 1094.5  
18 and/or 1085, and other applicable law, Plaintiffs seek to (i) set aside and  
19 vacate the (a) the Commission’s finding that the listing of the Coho salmon  
20 as a “threatened” and/or “endangered” species was “warranted” under CESA  
21 and (b) the Commission’s separate and independent decision to adopt the  
22 listing regulation pursuant to the APA, (ii) enjoin the Commission and/or  
23 the Department from undertaking any further action or activity which  
24 implements or is in any way based upon said finding that the listing was  
25 “warranted” and/or the adoption of said regulation, and (iii) compel the  
26 Commission and/or the Department to act in compliance with all applicable  
27 laws and regulations respecting any future decisions and/or findings

28

1 respecting the listing of the Coho salmon as “endangered” and/or  
2 “threatened.”

3 **JURISDICTION AND VENUE**

4 4. This Court has jurisdiction pursuant to Code of Civil Procedure  
5 sections 1094.5 and 1085, Fish & Game Code section 2076, and Government  
6 Code section 11350.

7 5. Venue is proper in this Court pursuant to Code of Civil  
8 Procedure §§ 393 and 395 because the Commission and the Department are  
9 located in Sacramento County.

10 6. Plaintiffs, all California corporations (with the exception of  
11 California Cattlemen’s Association), have exhausted their administrative  
12 remedies by participating fully at each stage of the administrative process,  
13 as described herein.

14 7. The Commission’s respective decisions to (a) find that the  
15 listing of the Coho salmon as “threatened” and/or “endangered” was  
16 warranted under CESA and (b) independently adopt the listing regulation  
17 pursuant to the APA are final for purposes of judicial review. There are no  
18 further administrative remedies available to Plaintiffs.

19 **PARTIES**

20 8. CFA is a non-profit trade association with approximately 200  
21 members, which own approximately 4 million acres of forest and  
22 agricultural land, and include forest landowners, professional resource  
23 managers, and producers of wood products and biomass energy throughout  
24 the State of California.

25 9. CCC is an organization comprised of private businesses located  
26 throughout the State of California. It currently has a membership of  
27 approximately 15,000 businesses, ranging from community-based companies  
28 with a handful of employees to large publicly held corporations.

1           10.   CCA is a voluntary, membership-dues-based trade association  
2 comprised of ranchers and beef producers throughout the State of  
3 California.

4           11.   CSG is an agricultural and rural public interest organization  
5 that serves businesses and private individuals in the agriculture industry  
6 and in rural communities. It is comprised of 18,000 members throughout  
7 the State of California.

8           12.   FLC is a private trade association that represents the interests  
9 of more than 30,000 family forest owners throughout the State of  
10 California.

11          13.   GECC is a private association that represents and promotes the  
12 interests of businesses in and around the area of Eureka, California.

13          14.   SOSS is a non-profit public benefit corporation dedicated to the  
14 protection and preservation of the cultural and natural heritage of the  
15 Shasta Valley and the Scott Valley in Siskiyou County California.

16          15.   Plaintiffs are beneficially interested in the issuance of a writ of  
17 mandamus and the other relief sought herein by virtue of the fact that the  
18 Commission's action is in violation of law and will, among other things,  
19 expose Plaintiffs and their respective members to unnecessary costs of  
20 compliance and resource management, and lost revenue resulting from  
21 unnecessary restrictions imposed as a result of the Commission's unlawful  
22 actions.

23          16.   Unless this Court grants the requested relief and compels the  
24 Commission to perform its legal duties, Plaintiffs and their respective  
25 members will suffer great and irreparable harm, as described herein.

26          17.   The Commission is an agency established and existing under  
27 Fish & Game Code section 101, whose powers include the power to regulate  
28 the taking or possession of birds, mammals, fish, amphibia and reptiles,

1 according and subject to applicable law and legal processes. See Cal. Fish  
2 & Game Code § 200.

3 18. The California Department of Fish & Game (the “Department”)  
4 is a California State agency established and existing under Fish & Game  
5 Code section 700, which is, among other things, charged with the duty of  
6 implementing regulations listing certain species as “threatened” or  
7 “endangered” after the required CESA and APA procedures, respectively,  
8 have been observed and said regulations have become effective.

9 **BACKGROUND AND APPLICABLE REGULATIONS**

10 19. Pursuant to Fish & Game Code section 2070, the Commission is  
11 charged with establishing and maintaining a list of “threatened” species and  
12 a list of “endangered” species. Section 2070 provides that “the  
13 [Commission] shall add or remove species from either list if it finds, upon  
14 the receipt of sufficient scientific information pursuant to this article, that  
15 the action is warranted.”

16 20. A species is only considered “endangered” where it is “in  
17 serious danger of becoming extinct throughout all, or a significant portion,  
18 of its range” due to (1) present or threatened modification or destruction of  
19 its habitat, (2) overexploitation, (3) predation, (4) competition, (5) disease,  
20 or (6) other natural occurrences or human-related activities. Fish & Game  
21 Code § 2062. A species is only considered “threatened” where, “although  
22 not presently threatened with extinction, is likely to become an endangered  
23 species [as defined above] in the foreseeable future in the absence of  
24 special protection and management efforts.” Fish & Game Code § 2067.

25 21. The Commission has adopted and published guidelines by  
26 which any interested person may petition the Commission to add a species  
27 to or remove a species from either the “endangered” or “threatened” list.  
28 The Commission has also adopted, pursuant to the recommendation of the

1 Department, criteria and procedures for determining if a species meets the  
2 foregoing definitions of “endangered” and/or “threatened.”

3 22. In order to be accepted by the Commission, a petition to add or  
4 remove a species from either list “shall, at a minimum, include [among  
5 other things] sufficient scientific information that a petitioned action may  
6 be warranted. Petitions shall include information regarding the population  
7 trend, range, distribution, abundance, and life history of a species, the  
8 factors affecting the ability of the population to survive and reproduce, the  
9 degree of immediacy of the threat, the impact of existing management  
10 efforts, suggestions for future management, and the availability and sources  
11 of information.” Cal. Fish & Game Code § 2072.3. In addition to the  
12 foregoing, a petition must also include “scientific information” on the “kind  
13 of habitat necessary for survival” and a “detailed distribution map.” Cal.  
14 Code of Reg., Title 14, section 670.1(d).

15 23. Once a petition is received from an interested individual or  
16 entity, the Commission must undertake a number of important procedural  
17 steps in evaluating the petition, including referring the petition to the  
18 Department for review, notifying all interested parties that the Commission  
19 is considering a petition by publishing a notice in the California Regulatory  
20 Notice Register, allowing such parties to submit relevant information to the  
21 Commission, and conducting a formal review of the petition at a meeting of  
22 the Commission.

23 24. Within 90 days after a petition is submitted, the Department  
24 must evaluate the petition and other relevant information the department has  
25 or receives, and submit to the Commission a recommendation that, based  
26 upon the above-stated requirements, either (a) “there is not sufficient  
27 information to indicate that the petitioned action may be warranted” or (b)

28

1 “there is sufficient information to indicate that the petitioned action may be  
2 warranted.” Cal. Fish & Game Code § 2073.5.

3         25. At the conclusion of that process, and after receiving the  
4 preliminary 90-day report from the Department, the Commission may accept  
5 the petition only if it finds that the petition provides sufficient information  
6 to indicate that the petitioned action “may be warranted.” If the  
7 Commission makes such a finding, it is required to publish a notice that the  
8 species at issue is being formally considered for inclusion on the list of  
9 endangered or threatened species, and said species officially becomes a  
10 “candidate” species. Cal. Fish & Game Code § 2074.4. If there is  
11 insufficient information to make such a finding, the petition must be  
12 rejected. Cal. Fish & Game Code § 2074.2. The designation of a species as  
13 a “candidate” for listing has regulatory significance in that, among other  
14 things, the “taking” of any such species is prohibited. Cal. Fish & Game  
15 Code § 2080, 2085.

16         26. Once a species is designated as a “candidate” for listing as  
17 “threatened” or “endangered,” the Department is then required to promptly  
18 commence a more exhaustive review of the status of the species at issue.  
19 The Department is required, within 12 months of the time the species  
20 becomes an official “candidate,” to provide a written report to the  
21 Commission, which indicates whether the petitioned action is, in fact,  
22 warranted.

23         27. Once the Commission receives a copy of the Department’s  
24 report, it is required to make a finding either that (a) the petitioned action  
25 is not warranted, or (b) that the petitioned action is warranted. If the  
26 Commission finds that the proposed action is warranted, it must publish a  
27 “notice of proposed rulemaking,” pursuant to Government Code section  
28 11346.4. Cal. Fish & Game Code § 2075.5(b). The Commission may



1 choose to postpone the required publication of a notice of proposed  
2 rulemaking in order to implement a species “recovery strategy,” but it must  
3 eventually publish said notice within 12 months of the decision that the  
4 listing is warranted (18 months if the commission chooses to fully extend  
5 the statutory period). Cal. Fish & Game Code § 2114.

6 28. Once the Commission publishes a “notice of proposed  
7 rulemaking,” all “[f]urther proceedings of the Commission on the petitioned  
8 action shall be made in accordance with [the rulemaking provisions of the  
9 APA].” The species is not officially listed unless and until the Commission  
10 formally adopts a regulation adding the species at issue to the list of  
11 “threatened” or “endangered” species in compliance with the rulemaking  
12 provisions of the APA (which are separate and independent from the CESA  
13 provisions that require the Commission to find that the listing is  
14 “warranted”), and said regulation is approved by the OAL pursuant to  
15 Government Code section 11349.1(a).

#### 16 ADMINISTRATIVE RULEMAKING

17 29. The substantive standards and procedures for administrative  
18 rulemaking are set forth in and governed by the APA. The APA requires,  
19 among other things, that, prior to formally adopting and enacting a  
20 regulation, the Commission determine, based upon the evidence in the  
21 record, that the contemplated regulation is (1) a “necessity,” and (2) does  
22 not serve “the same purpose as a state or federal statute or another  
23 regulation.” Cal. Gov. Code §§ 11349(a), 11349.1(a) and 11349(f). The  
24 APA also requires that the Commission submit “a final statement of  
25 reasons” for adopting a regulation, which must contain, among other things,  
26 “a determination with supporting information that no alternative considered  
27 by the agency would be more effective and less burdensome to affected  
28 private persons than the adopted regulation.” Cal. Gov. Code §

1 11346.9(a)(4). The APA, Government Code section 11346, provides that  
2 there are no exceptions to the application of these standards to rulemaking  
3 actions by state agencies such as the Commission: “Except as provided in  
4 Section 11346.1, the provisions of this chapter are applicable to the  
5 exercise of any quasi-legislative power conferred by any statute heretofore  
6 or hereafter enacted, but nothing in this chapter repeals or diminishes  
7 additional requirements imposed by any statute. This chapter shall not be  
8 superseded or modified by any subsequent legislation except to the extent  
9 that the legislation shall do so expressly.”

10 30. As set forth in more detail below, the Commission failed to  
11 comply with several of the above-stated requirements for (1) finding that  
12 listing the Coho salmon was “warranted under CESA” and (2) subsequently  
13 adopting a formal listing regulation respecting the Coho salmon pursuant to  
14 the separate and independent requirements of the APA.

15 **ADMINISTRATIVE PROCEEDINGS FOR THE LISTING OF THE**  
16 **COHO SALMON**

17 31. On or around July 28, 2000, the Salmon and Steelhead  
18 Coalition, pursuant to California Code of Regulations, Title 14, section  
19 670.1(a), submitted to the Commission a petition to list the Coho salmon as  
20 an endangered species. That petition patently failed to contain “sufficient  
21 information to indicate that the petitioned action may be warranted,” as  
22 required by Fish & Game Code sections 2072.3 and 2074.2. Among other  
23 things, the “scientific evidence” presented by the Salmon and Steelhead  
24 Coalition failed to address a number of required “candidacy factors,”  
25 including the habitat necessary for the survival of the Coho salmon  
26 (particularly with respect to water temperature) and the impact of existing  
27 management efforts on the continued survival of the Coho population.  
28 Furthermore, the petition failed to consider all available scientific data, and

1 did not undertake a quantitative comparison of the current and historic  
2 abundance of Coho salmon. See A.A. Rich and Associates, “Response to  
3 the Salmon and Steelhead Recovery Coalition Petition Submitted to the  
4 California Fish & Game Commission to List Coho Salmon (*oncorkynchus*  
5 *kisutch*) as an Endangered Species,” a copy of which is attached hereto as  
6 Exhibit A.

7 32. On or around April 27, 2001, despite the numerous patent  
8 deficiencies in the petition submitted by the Salmon and Steelhead  
9 Coalition, the Commission, based upon the Department’s preliminary 90-  
10 day review and recommendation, inappropriately found that the listing of  
11 the Coho salmon “may be warranted,” accepted the petition, and designated  
12 the Coho salmon as a candidate species pursuant to California Code of  
13 Regulations, Title 14, section 670.1(d)(2).

14 33. In or around April of 2002, despite the lack of supporting  
15 scientific information, the Department submitted a report (the  
16 “Department’s Coho Salmon Status Report”), which recommended that the  
17 Commission list the Coho salmon, from San Francisco to Punta Gorda, as an  
18 “endangered species,” and as a “threatened species” from Punta Gorda to  
19 the California-Oregon border. The Department’s Coho Salmon Status  
20 Report, however, failed to include a number of items of required  
21 information, including a statistically valid statement of how many Coho  
22 salmon currently populate California waters or what the population trend  
23 for Coho salmon has been in recent years. This omitted information goes to  
24 the very heart of whether the Coho salmon can rightly be considered  
25 “threatened” or “endangered.”

26 34. Additionally, the Department inappropriately evaluated the  
27 status of the Coho salmon as two separate populations: the Central  
28 California Coast (“CCC”) Coho Environmentally Significant Unit (“ESU”)

1 and the Southern Oregon-Northern California Coast (“SONCC”) Coho ESU.  
2 However, the CESA does not authorize the consideration or listing of  
3 separate ESUs because they are not separate “subspecies.” The  
4 Department’s Coho Salmon Status Report itself acknowledges that there is  
5 no biological basis to conclude that the two Coho salmon ESUs are, in fact,  
6 distinct “subspecies.” It provides, in relevant part, that “[n]o recent  
7 comprehensive study of coho salmon population genetics covering the range  
8 of coho salmon in California is available.”

9       35. Furthermore, the Department’s Coho Salmon Status Report (and  
10 the Commission’s finding, which was primarily based upon the  
11 Department’s Report), was founded in large part on biological data  
12 respecting Coho salmon populations that was collected during a drought  
13 year (2001), and that has nonetheless been superseded by more recent and  
14 more reliable data. Data collected since the Department’s report was  
15 prepared, and which was submitted to the Commission for consideration as  
16 part of the administrative rulemaking proceedings described herein, reveals  
17 that the picture painted by the Department in its report is simply not  
18 accurate. Specifically, the most recent and most reliable data in the record  
19 demonstrates that the Coho salmon population has actually increased in  
20 some streams since 2001. (For example, attached hereto as Exhibit B is a  
21 true and correct copy of the publication summarizing the above-referenced  
22 data, entitled *Central and Northern California Coho Salmon: Significant  
23 New Information, 2002 through 2004*, (Executive Summary).)

24       36. Even the Department admits that “2001 [the year from which its  
25 data was taken] was classified as a drought year on the north coast, and this  
26 undoubtedly affected distribution to a greater degree than if it were a  
27 normal, above normal, or wet year.” Department’s Coho Salmon Status  
28 Report, p. 55 (emphasis added). The Department further conceded that even

1 that unfairly stilted data “does not support a significant decline in  
2 distribution between the late 1980s and the present.” Department’s Coho  
3 Salmon Status Report, p. 2.

4 37. Plaintiffs and others made numerous other submissions to the  
5 Commission during its review demonstrating that coho salmon would not  
6 qualify as “endangered” or “threatened” as those terms are defined under  
7 CESA and that listing coho salmon as such was not warranted and would not  
8 comply with CESA. Cal. Fish & Game Code § 2067, 2068.

9 38. In light of the data and other information submitted to the  
10 Commission during its review, it is apparent that Coho salmon do not meet  
11 CESA’s definitions of “threatened” nor “endangered” under CESA and that  
12 listing the Coho salmon as such was not warranted.

13 39. Nonetheless, the Commission undertook its final review of the  
14 issue, and, on August 30, 2002, found that the listing of the Coho salmon  
15 was warranted under CESA. Significantly, at that time, the Commission did  
16 not publish a Notice of Proposed Rulemaking or otherwise proceed under  
17 the APA, as directed under CESA. See Cal. Fish & Game Code § 2075.5(2).

18 40. In contrast to the Commission’s typical practice and procedure,  
19 where the Commission proceeds from making a finding that a listing is  
20 warranted directly to the APA rulemaking process by proposing to list the  
21 species the Commission instead directed the Department to proceed directly  
22 with a “recovery planning process” pursuant to the “Recovery Strategy Pilot  
23 Program,” Fish & Game Code sections 2106, et seq.

24 41. Pursuant to the Recovery Strategy Pilot Program, the  
25 Commission is allowed to identify a very limited number of “candidate”  
26 species (only four in addition to the Greater Sandhill crane) for which  
27 “recovery strategies shall be developed and implemented.” Cal. Fish &  
28 Game Code § 2106. For each species identified, the department is required

1 to assemble a cooperative “recovery strategy team,” including  
2 representatives of affected local governments, affected landowners,  
3 representatives of environmental groups and people with relevant scientific  
4 expertise, “to aid the [Department] in developing the recovery strategy for  
5 that species.” Cal. Fish & Game Code § 2107. The Commission is allowed  
6 to pursue the recovery strategy in parallel with, or prior to pursuing, the  
7 formal APA process for adopting a formal listing regulation. However,  
8 “[i]f the Commission elects to authorize the preparation of a recovery  
9 strategy prior to or in conjunction with a decision to add a species to a list  
10 pursuant to [CESA] Section 2075.5, the required rulemaking pursuant to  
11 subdivision (b) of that section shall be delayed not more than one year,  
12 which the [Commission] may extend for not more than an additional six  
13 months, until a final decision is made on the recovery strategy.” Cal. Fish  
14 & Game Code § 2114 (emphasis added).

15 42. During the two-plus years after the Commission made its  
16 finding that the listing of the Coho salmon was warranted, the recovery  
17 planning process was completed, significant new information was made  
18 available to the Commission, and significant new efforts were employed to  
19 improve habitat protection and recovery, including those by Plaintiffs  
20 themselves. The Commission also mandated the implementation of  
21 additional regulatory controls during that time.

22 43. Despite all this, and well beyond the time limitations set forth  
23 in Fish & Game Code section 2114, the Commission belatedly decided to  
24 proceed with the rulemaking process. On February 26, 2004, the  
25 Commission first published its Notice of Proposed Rulemaking. Despite its  
26 failure to give adequate consideration to the significant intervening events  
27 and new information that had become available during these two years and  
28 to make proper findings that the adopted regulation (1) is a “necessity,” and

1 (2) does not serve “the same purpose as a state or federal statute or another  
2 regulation,” among other things, on August 5, 2004, the Commission  
3 formally adopted a new regulation listing the Coho salmon as “endangered”  
4 between San Francisco and Punta Gorda, and as “threatened” between Punta  
5 Gorda and the California-Oregon border. See California Code of  
6 Regulations, Title 14, § 670.5(a)(2). Even if the Commission had made the  
7 required findings, which it did not, the record simply does not provide  
8 substantial evidence to support such findings of “necessity” and “non-  
9 duplication” or to satisfy other applicable requirements of the APA. To the  
10 contrary, the record before the Commission clearly establishes that the  
11 adopted regulation was and is unnecessary and improper because, among  
12 other things, (a) the scientific data before the Commission did not support  
13 the listing and, in fact, reliable data presented to the Commission by  
14 Petitioners and others indicates that the Coho salmon population north of  
15 San Francisco in some streams is actually increasing, (b) the listing of Coho  
16 salmon by the Commission is not necessary to achieve the purposes of  
17 CESA and (c) the adopted regulation is duplicative of a host of existing  
18 state and federal statutes and regulations (for example, the Coho salmon is  
19 already listed as “threatened” under the federal ESA, which is more  
20 stringent and provides broader protection than is possible under the state  
21 listing), and will only serve to unnecessarily increase the regulatory  
22 burdens on the citizens and business of California.

23 44. Based upon the foregoing, it is not surprising that, in  
24 unlawfully adopting the implementing regulation, the Commission also  
25 failed to submit “a determination with supporting information that no  
26 alternative considered by the agency would be more effective and less  
27 burdensome to affected private persons than the adopted regulation.” See  
28 Cal. Gov. Code § 11346.9(a)(4). Although the Commission’s Final

1 Statement of Reasons for Regulatory Action contains one sentence which  
2 purports to be such a determination, there is virtually no information  
3 included in support of that purported determination. In fact, the  
4 Commission expressly stated that it did not consider the economic impact of  
5 the new regulation on affected California businesses. In any event, again,  
6 any determination that the benefits of newly adopted regulation weigh  
7 favorably against associated economic burdens is not supported by  
8 substantial evidence in the record.

9 45. Notwithstanding these flaws, the unlawful regulation was  
10 approved by the Office of Administrative Law and filed with the Secretary  
11 of State on February 28, 2005. The regulation listing the Coho salmon  
12 became effective on March 30, 2005. Thus, almost five years after the  
13 Salmon and Steelhead Coalition's deficient petition was submitted, and  
14 nearly three years after a finding that the listing was warranted, the adopted  
15 regulation went into effect.

16 **PRACTICAL EFFECT ON PLAINTIFFS**

17 46. If the listing of the Coho salmon is allowed to be implemented,  
18 Plaintiffs and their respective members will be adversely affected by  
19 unreasonable, costly, duplicative, and unnecessary regulatory burdens.  
20 Additional restrictions will be imposed and the economic impact will be far  
21 greater than the Department's statement of reasons portrays. For example,  
22 based upon the current (unlawful) regulatory environment, Plaintiffs and  
23 their respective members will be required to pay for and/or physically  
24 implement many of the measures that are purportedly necessary to "protect  
25 and restore" the Coho salmon population. Impacts to private property and  
26 timber harvesting practices associated with the listing/recovery of the Coho  
27 salmon (which are estimated to last at least 25 years) include: road  
28 decommissioning, road upgrading, relocation of roads in riparian areas,



1 implementation of additional management practices in road construction,  
2 limitation on the use of roads, removal of barriers to fish passage, and the  
3 implementation of riparian re-vegetation and other stream bank  
4 improvements. Such economic impacts are impossible to quantify  
5 precisely, but are estimated to cost private citizens roughly \$1 billion.  
6 Additionally, when businesses lose income as a result of such unnecessary  
7 regulatory requirements, there is a negative socioeconomic impact to local  
8 communities (particularly those in rural Northern California), primarily  
9 through job loss. Such negative socioeconomic impacts associated with  
10 timberland management changes, again, while impossible to quantify, are  
11 estimated to cost Californians as much as \$1.5 billion. Finally, Plaintiffs  
12 and their respective members will be exposed to greater liability and risk of  
13 enforcement action under CESA.

14 47. While Plaintiffs are mindful of the need to protect species and  
15 their obligations to be good stewards, neither Plaintiffs nor the North Coast  
16 economy can afford the new regulation—particularly where there is no  
17 reason for it. The existing regulatory framework is intended to ensure that  
18 regulations like those here for the Coho salmon are adopted only after  
19 careful consideration of scientific information and the impacts of the  
20 regulation. That did not happen here and the regulation should be  
21 invalidated.

22 **FIRST CAUSE OF ACTION**

23 **(Writ of Mandate – Code of Civil Procedure §§ 1094.5 and 1085, Fish &**  
24 **Game Code § 2076, and Government Code § 11350)**  
25 **(Against the Commission Only)**

26 48. Plaintiffs hereby incorporate by reference the allegations of  
27 Paragraphs 1 through 47.

28

1           49. In taking the actions complained of herein, the Commission  
2 acted in a capacity subject to judicial review pursuant to Fish & Game Code  
3 section 2076, Government Code section 11350 and Code of Civil Procedure  
4 section 1094.5 (or, in the alternative, section 1085).

5           50. Plaintiffs are entitled to a writ of mandate pursuant to Code of  
6 Civil Procedure section 1094.5 (or, in the alternative, section 1085) in that  
7 the Commission's decisions to (a) find that listing the Coho salmon as  
8 "threatened" or "endangered" was "warranted under CESA" and (b)  
9 thereafter adopt, pursuant to the separate and independent rulemaking  
10 provisions of the APA, a formal regulation listing the Coho salmon as a  
11 "threatened" and/or "endangered" species were, respectively, in excess of  
12 its jurisdiction, an abuse of discretion, arbitrary and capricious, not  
13 supported by substantial evidence, and violated other applicable state and  
14 federal law.

15           51. Plaintiffs have no other plain, speedy or adequate remedy in the  
16 ordinary course of law to compel the Commission to set aside the foregoing  
17 decisions or to ensure its compliance with all applicable laws and  
18 regulations.

19           52. Accordingly, Plaintiffs seek a writ of mandate under Code of  
20 Civil Procedure sections 1094.5 (or, in the alternative, section 1085) (i)  
21 setting aside and vacating the Commission's respective and independent  
22 decisions to (a) find that the listing of the Coho salmon as a "threatened"  
23 and/or "endangered" species was "warranted" under CESA, and (b) adopt a  
24 formal listing regulation pursuant to the APA, (ii) enjoining the  
25 Commission from undertaking any further action or activity which  
26 implements or is in any way based upon said finding that the listing was  
27 "warranted" and/or the adoption of said regulation, and (iii) compelling the  
28 Commission to act in compliance with all applicable laws and regulations

1 respecting any future decisions and/or findings respecting the listing of the  
2 Coho salmon as “endangered” and/or “threatened.”

3 WHEREFORE, Plaintiffs pray for judgment against the Commission  
4 as set forth below.

5 **SECOND CAUSE OF ACTION**

6 **(Declaratory Relief)**

7 **(Against All Defendants and Respondents)**

8 53. Plaintiffs hereby incorporate by reference the allegations of  
9 Paragraphs 1 through 52.

10 54. A real and actual controversy exists between the parties to this  
11 action concerning the rights and duties of the parties with respect to the  
12 Commission’s decisions to (a) find that the listing of the Coho salmon as  
13 “endangered” between San Francisco Bay and Punta Gorda, and as  
14 “threatened” between Punta Gorda and the California/Oregon border was  
15 “warranted” under CESA, and (b) adopt, pursuant to the APA, a regulation  
16 officially listing the Coho salmon as “threatened” and/or “endangered.”  
17 Plaintiffs are informed and believe that the Commission and/or the  
18 Department deny that the foregoing actions were unlawful, contrary to law,  
19 and unsupported by substantial evidence.

20 55. Plaintiffs seek a judicial determination of the parties’  
21 respective rights and duties concerning the actions described herein. In  
22 particular, Plaintiffs pray that this Court enter a declaratory judgment that  
23 the Commission’s decisions to (a) find that the listing of the Coho salmon  
24 as “endangered” between San Francisco Bay and Punta Gorda, and as  
25 “threatened” between Punta Gorda and the California/Oregon border was  
26 “warranted” under CESA, and (b) adopt, pursuant to the APA, a regulation  
27 officially listing the Coho salmon as “threatened” and/or “endangered”  
28 were, respectively, in excess of its jurisdiction, an abuse of discretion,

1 arbitrary and capricious, not supported by substantial evidence, and violated  
2 other applicable state and federal law.

3 56. Plaintiffs seek a further judicial determination that the  
4 Department may not take any further action implementing or enforcing the  
5 above-referenced regulation listing the Coho salmon as “threatened” and/or  
6 “endangered.”

7 WHEREFORE, Plaintiffs pray for a declaratory judgment against the  
8 Commission and the Department as set forth below.

9 **THIRD CAUSE OF ACTION**

10 **(Preliminary and Permanent Injunctive Relief)**

11 **(Against All Defendants and Respondents)**

12 57. Plaintiffs hereby incorporate by reference the allegations of  
13 Paragraphs 1 through 56.

14 58. Based upon the Commission’s unlawful decisions to (a) find  
15 that the listing of the Coho salmon as “endangered” between San Francisco  
16 Bay and Punta Gorda, and as “threatened” between Punta Gorda and the  
17 California/Oregon border was “warranted” under CESA, and (b) adopt,  
18 pursuant to the APA, a regulation officially listing the Coho salmon as  
19 “threatened” and/or “endangered,” respectively, Plaintiffs and their  
20 respective members have suffered irreparable harm. If such unlawful  
21 decisions are allowed to stand pending the final resolution of this action,  
22 and if the Department is allowed to implement and/or enforce the listing  
23 regulation, Plaintiffs and their respective members will continue to suffer  
24 irreparable harm. For example, based upon the current (unlawful)  
25 regulatory environment, Plaintiffs and their respective members will be  
26 required to pay for and/or physically implement many of the measures that  
27 are purportedly necessary to “protect and restore” the Coho salmon  
28 population. Impacts to private property and timber harvesting practices

1 associated with the listing/recovery of the Coho salmon (which are  
2 estimated to last at least 25 years) include: road decommissioning, road  
3 upgrading, relocation of roads in riparian areas, implementation of best-  
4 management practices in road construction, limitation on the use of roads,  
5 removal of barriers to fish passage, and the implementation of riparian re-  
6 vegetation and other stream bank improvements. Such impacts are  
7 impossible to quantify precisely, but are estimated to cost private citizens  
8 roughly \$1 billion. Additionally, when businesses lose income as a result  
9 of such mitigation efforts, there is a negative socioeconomic impact to local  
10 communities, primarily through job loss. Such negative socioeconomic  
11 impacts associated with timberland management changes, again, while  
12 impossible to quantify, are estimated to cost Californians as much as \$1.5  
13 billion. What is clear is many businesses will close or will be adversely  
14 affected and jobs will be lost.

15 59. Thus, in addition to the other items of relief sought by  
16 Plaintiffs, described above, Plaintiffs seek preliminary and injunctive relief  
17 to enjoin the Commission and the Department from undertaking any further  
18 action or activity which implements, enforces or is in any way based upon  
19 the listing of the Coho salmon as “threatened” and/or “endangered.”

20 PRAYER FOR RELIEF

21 WHEREFORE, Plaintiffs pray for relief against Defendants and  
22 Respondents as follows:

23 1. Upon hearing and determination of this Petition and Complaint,  
24 for issuance of a declaration that the regulation listing the Coho salmon as a  
25 “threatened” and/or “endangered” species is invalid and a writ of mandate,  
26 issued pursuant to Code of Civil Procedure section 1094.5 (or, in the  
27 alternative section 1085) (i) setting aside and vacating the Commission’s  
28 respective decisions to (a) find that the listing of the Coho salmon as a

1 “threatened” and/or “endangered” species was “warranted” under CESA,  
2 and (b) adopt a formal listing regulation pursuant to the APA, (ii) enjoining  
3 the Commission and the Department from undertaking any further action or  
4 activity which implements or is in any way based upon said listing and/or  
5 regulation, and (iii) compelling the Commission and the Department to act  
6 in compliance with all applicable laws and regulations respecting any future  
7 decisions to list the Coho salmon as “endangered” and/or “threatened.”

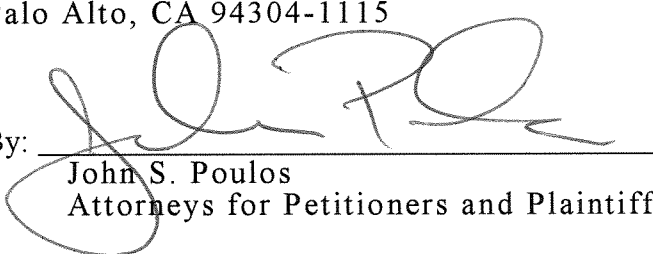
8 2. For an award of costs of suit, including reasonable attorneys’  
9 fees; and

10 3. For such other relief as the Court may deem just and proper.

11 Dated: June 28, 2005

PILLSBURY WINTHROP SHAW PITTMAN LLP  
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Sacramento, CA 95814

14 WAYNE M. WHITLOCK  
15 2475 Hanover Street  
16 Palo Alto, CA 94304-1115

17 By:   
18 John S. Poulos  
19 Attorneys for Petitioners and Plaintiffs

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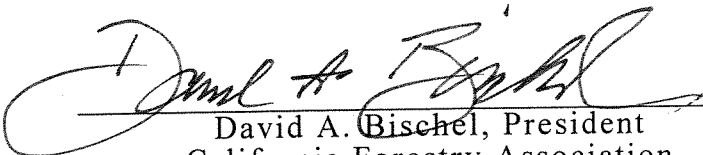
**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am the President of the California Forestry Association, a Petitioner and Plaintiff in this matter. I am authorized to make this verification for and on behalf of the California Forestry Association, and make this verification for that reason. I have read the foregoing Verified Petition For Writ of Mandamus and Complaint for Declaratory Relief and Preliminary and Permanent Injunction and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Sacramento, California.

  
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David A. Bischel, President  
California Forestry Association

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**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am the President and Chief Executive Officer of the California Chamber of Commerce, a Petitioner and Plaintiff in this matter. I am authorized to make this verification for and on behalf of the California Chamber of Commerce, and make this verification for that reason. I have read the foregoing Verified Petition For Writ of Mandamus and Complaint for Declaratory Relief and Preliminary and Permanent Injunction and know its contents. I am informed and believe that the matters stated therein are true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Sacramento, California.



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Allan Zaremberg, President  
and Chief Executive Officer  
California Chamber of Commerce



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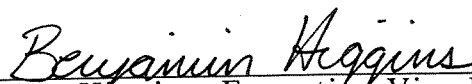
**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am the Executive Vice President of the California Cattlemen's Association, a Petitioner and Plaintiff in this matter. I am authorized to make this verification for and on behalf of the California Cattlemen's Association, and make this verification for that reason. I have read the foregoing Verified Petition For Writ of Mandamus and Complaint for Declaratory Relief and Preliminary and Permanent Injunction and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Sacramento, California.

  
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Ben Higgins, Executive Vice President  
California Cattlemen's Association

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**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am the Master of the California State Grange, a Petitioner and Plaintiff in this matter. I am authorized to make this verification for and on behalf of the California State Grange, and make this verification for that reason. I have read the foregoing Verified Petition For Writ of Mandamus and Complaint for Declaratory Relief and Preliminary and Permanent Injunction and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Sacramento, California.



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Thomas Stefanoni, Master  
California State Grange

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**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am the Executive Director of the Forest Landowners of California, a  
Petitioner and Plaintiff in this matter. I am authorized to make this  
verification for and on behalf of the Forest Landowners of California, and  
make this verification for that reason. I have read the foregoing Verified  
Petition For Writ of Mandamus and Complaint for Declaratory Relief and  
Preliminary and Permanent Injunction and know its contents. The matters  
stated in it are true of my own knowledge except as to those matters which  
are stated on information and belief, and as to those matters I believe them  
to be true.

I declare under penalty of perjury under the laws of the United States  
of America and the State of California that the foregoing is true and correct.

Executed on June 24, 2005 at Sacramento, California.

  
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Dan Weldon, Executive Director  
Forest Landowners of California

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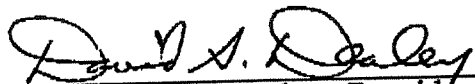
**VERIFICATION**

**STATE OF CALIFORNIA, COUNTY OF SISKIYOU**

I am the President of Save our Shasta and Scott Valleys, Inc., a  
Petitioner and Plaintiff in this matter. I am authorized to make this  
verification for and on behalf of Save our Shasta and Scott Valleys, Inc.,  
and make this verification for that reason. I have read the foregoing  
Verified Petition For Writ of Mandamus and Complaint for Declaratory  
Relief and Preliminary and Permanent Injunction and know its contents. I  
am informed and believe and on that ground allege that the matters stated in  
it are true.

I declare under penalty of perjury under the laws of the United States  
of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Yreka, California.

  
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David S. Dealey, President  
Save our Shasta and Scott Valleys, Inc.

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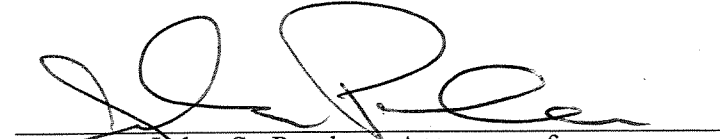
**VERIFICATION**

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am an attorney, whose office is located in Sacramento County, for the Greater Eureka Chamber of Commerce, a Petitioner and Plaintiff in this matter. Because the Greater Eureka Chamber of Commerce is located outside of Sacramento County, I am authorized to make this verification for and on behalf of the Greater Eureka Chamber of Commerce, and make this verification for that reason. I have read the foregoing Verified Petition For Writ of Mandamus and Complaint for Declaratory Relief and Preliminary and Permanent Injunction and know its contents. I am informed and believe that the matters stated therein are true.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on June 28, 2005 at Eureka, California.

  
\_\_\_\_\_  
John S. Poulos, Attorney for  
Greater Eureka Chamber of Commerce