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16 Attorneys for Plaintiff

17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

19 HOMER T. MCCRARY,

20 Plaintiff,

21 v.

22 CARLOS M. GUTIERREZ, in his official  
23 capacity as Secretary of Commerce,  
24 the NATIONAL MARINE FISHERIES  
25 SERVICE, and RUSS M. STRACH, in  
26 his official capacity as Assistant  
27 Regional Administrator of the Protected  
28 Resource Division of the Southwest  
Region of the National Marine Fisheries  
Service,

Defendants.

No.

COMPLAINT

For their complaint, plaintiff alleges:

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**Parties and Jurisdiction**

1. HOMER T. MCCRARY is an individual residing in Davenport, California, who owns land and timber interests along the California coast south of San Francisco, and has suffered economic loss as a result of the listing, pursuant to 16 U.S.C. § 1533, of the so-called Central California Coast Evolutionarily Significant Unit (ESU) of coho salmon. He is an "interested person" within the meaning of 5 U.S.C. § 553(e).

2. CARLOS M. GUTIERREZ, is the U.S. Secretary of Commerce, who has statutory authority over Endangered Species Act (ESA) decisions concerning the coho salmon; the NATIONAL MARINE FISHERIES SERVICE is a subunit of the U.S. Department of Commerce to which, upon information and belief, CARLOS M. GUTIERREZ has delegated his ESA authority with respect to coho salmon, and RUSS M. STRACH is the Assistant Regional Administrator of the Protected Resource Division of the Southwest Region of the National Marine Fisheries Service who has primary responsibility for formulating the position of the NATIONAL MARINE FISHERIES SERVICE with respect to the issues raised by this action.

3. This Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e), as the defendant RUSS M. STRACH is located in this district, and the acts or omissions complained of occurred, in part, in this district.

**CLAIM FOR RELIEF—AGENCY ACTION WRONGFULLY WITHHELD**

4. On or about November 6, 2003, plaintiff transmitted to defendant NATIONAL MARINE FISHERIES SERVICE a petition to redefine the southern boundary of the California Central Coast Coho ESU, a true copy of which is attached hereto as Exhibit 1 and incorporated as if set forth herein.

5. Pursuant to 16 U.S.C. § 1533(b)(3)(A): "To the maximum extent

1 practicable, within 90 days after receiving the petition of an interested person under  
2 section 553(e) of Title 5 . . . to remove a species from[] either of the lists published under  
3 subsection (c) of this section, *the Secretary shall make a finding as to whether the*  
4 *petitioner presents substantial scientific or commercial information indicating that the*  
5 *petitioned action may be warranted.*" (Emphasis added.)

6  
7 6. By letter of September 4, 2004, the NATIONAL MARINE FISHERIES  
8 SERVICE acknowledged receipt of the petition "in November 2003", offered excuses for  
9 its delay in processing the petition, and declared that it "will make a determination  
10 whether the petitioned action is warranted and then prepare a notice for publication in the  
11 Federal Register no later than November 6, 2004".

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13 7. More than ninety days has passed since November 6, 2003, and no such  
14 notice of determination has yet been received or published in the Federal Register,  
15 although there have been continuing communications between the parties. It is and was  
16 practicable for defendants to issue such a finding within 90 days of receipt of the petition,  
17 and certainly by November 6, 2004, and such action has been unlawfully withheld or  
18 unreasonably delayed within the meaning of 5 U.S.C. § 706(1).

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20 8. Plaintiff has no adequate remedy at law, and will suffer continuing and  
21 irreparable injury unless defendants are compelled to make the 90-day finding required  
22 by law.

23 WHEREFORE, plaintiff prays for judgment as follows:

24 A. For a declaration that defendants' failure to provide the ninety-day finding is  
25 unlawful and an injunction requiring defendants to provide the ninety-day finding;

26 B. For their reasonable attorney fees and costs pursuant to Equal Access to  
27 Justice Act; and

28 C. Awarding plaintiffs such other and further relief as the Court may deem just

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and proper.

Dated: January 12, 2006

**MURPHY & BUCHAL LLP**

JAMES L. BUCHAL /s/  
JAMES L. BUCHAL  
Attorneys for Plaintiff

Dated: January 12, 2006

**NAGELEY, MEREDITH & MILLER, INC.**

ANDREA M. MILLER /s/  
ANDREA M. MILLER  
Attorneys for Plaintiff