

1 ALAN N. BICK, SBN 151452, ABick@gibsondunn.com  
2 THOMAS A. MANAKIDES, SBN 229119, TManakides@gibsondunn.com  
3 GIBSON, DUNN & CRUTCHER LLP  
4 3161 Michelson Drive  
5 Irvine, California 92612-4412  
6 Telephone: (949) 451-3800  
7 Facsimile: (949) 451-4220

8 Attorneys for Plaintiff  
9 COUNCIL FOR ENDANGERED SPECIES ACT RELIABILITY

10 **THE UNITED STATES DISTRICT COURT**  
11 **EASTERN DISTRICT OF CALIFORNIA**

12 COUNCIL FOR ENDANGERED  
13 SPECIES ACT RELIABILITY, a  
14 nonprofit organization,

15 Plaintiff,

16 v.

17 KEN SALAZAR, as Secretary of the  
18 United States Department of the Interior;  
19 UNITED STATES DEPARTMENT OF  
20 THE INTERIOR; UNITED STATES  
21 FISH AND WILDLIFE SERVICE; SAM  
22 HAMILTON, as Director of the United  
23 States Fish and Wildlife Service, United  
24 States Department of the Interior; REN  
25 LOHOEFENER, as Regional Director of  
26 the United States Fish and Wildlife  
27 Service, Pacific Southwest Region,  
28 United States Department of the Interior,

Defendants.

Case No.: \_\_\_\_\_

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1  
2 1. In this civil action for declaratory and injunctive relief, Plaintiff  
3 COUNCIL FOR ENDANGERED SPECIES ACT RELIABILITY (“CESAR”)  
4 challenges the failure of Defendants UNITED STATES DEPARTMENT OF THE  
5 INTERIOR; KEN SALAZAR, as Secretary of the Interior; the UNITED STATES  
6 FISH AND WILDLIFE SERVICE (“FWS”); SAM HAMILTON, as Director of the  
7 FWS; and REN LOHOEFENER, as Regional Director of the FWS, Pacific Southwest  
8 Region (collectively the “Secretary”) to comply with the non-discretionary listing  
9 provisions of the Endangered Species Act, as amended, 16 U.S.C. §§ 1531-1544 (the  
10 “ESA”). The Secretary failed to issue the 12-month finding for the delta smelt  
11 (*hypomesus transpacificus*), and CESAR requests an order that the Secretary comply  
12 with its mandatory, non-discretionary duty to do so. 16 U.S.C. § 1533(b)(3)(B).  
13 Compliance with the ESA’s mandatory deadlines is necessary to ensure the proper  
14 evaluation of measures necessary for the continued survival of the delta smelt in the  
15 wild.

16 2. The delta smelt is a small (50-80 mm in length for most adults), nearly  
17 translucent, steely-blue, osmerid fish endemic to the San Francisco Bay/Sacramento-  
18 San Joaquin Delta Estuary, in California. In recent years, the delta smelt population  
19 experienced significant declines due to several environmental and anthropogenic  
20 threats, including: reductions in freshwater inflow to the estuary; loss of larval,  
21 juvenile and adult fish at various unscreened water diversions; salt and ammonia  
22 discharges by Publicly Owned Treatment Works; direct and indirect impacts of non-  
23 native species on the delta smelt’s planktonic food supply and habitat; lethal and sub-  
24 lethal effects of toxic chemicals; and, as a result of their present low population size,  
25 potential loss of the species’ genetic integrity.

26 3. These threats continue to scourge the delta smelt population despite being  
27 classified, in 1993, as a “threatened” species under the ESA. Due in part to less  
28 stringent consultation requirements for “threatened” species, the FWS repeatedly

1 squandered opportunities to rigorously study the Delta and all potential causes of the  
2 delta smelt decline. Rather, the FWS favors the silver bullet approach: blaming the  
3 federal and state water export pumps and implementing measures that severely curtail  
4 the export of water supplies. The FWS persists even though the overwhelming  
5 statistical and empirical evidence shows that water cutbacks will not prevent the  
6 decline of the delta smelt. A more rigorous assessment and consultation required to  
7 classify the delta smelt as “endangered” is needed. Without it the FWS will continue  
8 to make decisions that are not based on the best available scientific data and ignore the  
9 actual causes of the declining delta smelt, inevitably leading to species extinction.

10 4. On March 8, 2006, several organizations submitted a joint petition  
11 seeking to reclassify the delta smelt from “threatened” to “endangered” status under  
12 the ESA (the “Petition”). The Petition triggered mandatory ESA deadlines for the  
13 Secretary to act.

14 5. Within 90 days of receiving a petition, the Secretary must determine  
15 whether it presents substantial scientific or commercial information indicating that the  
16 listing “may be warranted,” and, if so, initiate a status review of the species (the “90-  
17 day finding”). 16 U.S.C. § 1533(b)(3)(A). Not until July 10, 2008 did the Secretary  
18 finally issue its 90-day finding on the Petition. 73 Fed. Reg. 39639. It found that  
19 reclassification of the delta smelt from threatened to endangered may be warranted. *Id.*  
20 In response to the 90-day finding, CESAR submitted detailed substantive comments  
21 supporting the reclassification.

22 6. After making a positive 90-day finding, the Secretary has one year from  
23 when it received the petition (regardless of when the 90-day finding was made) to  
24 determine whether the requested action, here reclassifying the delta smelt as  
25 endangered, is “warranted”, and, if so, publish a notice and proposed regulation (the  
26 “12-month finding”). 16 U.S.C. § 1533(b)(3)(B). The deadline passed over two years  
27 ago without the issuance of a 12-month finding. Indeed, the finding is languishing in  
28 administrative purgatory all while the delta smelt continues its precipitous decline.

1           7.     On April 30, 2009, CESAR provided the Secretary and the FWS with a  
2 60-day notice to remedy its violation of the ESA or face legal action. Having failed to  
3 act, CESAR now brings this action to compel the Secretary and the FWS to make the  
4 long overdue 12-month finding on the Petition on a date certain.

5           **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

6           8.     The Court has jurisdiction over this action. District courts have  
7 jurisdiction over ESA citizen suits, such as this one, seeking an order that the Secretary  
8 perform its nondiscretionary, mandatory duties. 16 U.S.C. § 1540(c) (providing the  
9 district courts of the United States with jurisdiction over ESA actions); 16 U.S.C. §  
10 1540(g) (providing district courts with jurisdiction in citizen suits to “order the  
11 Secretary to perform such act or duty” under the ESA); 28 U.S.C. § 1331 (federal  
12 question); 28 U.S.C. § 1361 (mandamus). CESAR also seeks relief under the  
13 Administrative Procedure Act, which likewise provides this Court with jurisdiction. 5  
14 U.S.C. §§ 702, 706 (providing judicial review of agency action); 28 U.S.C. § 1331  
15 (federal question); 28 U.S.C. § 1361 (mandamus). Further, the Court may grant  
16 declaratory and injunctive relief. 28 U.S.C. §§ 2201, 2202.

17           9.     Venue is proper in the Eastern District of California pursuant to 28 U.S.C.  
18 § 1391(e) and 16 U.S.C. 1540(g)(3)(A) since a substantial part of the events or  
19 omissions giving rise to this action occurred there. Further, CESAR and REN  
20 LOHOEFENER reside in the Eastern District.

21           10.    Pursuant to Local Rule 3-120, assignment of this case to the Fresno  
22 Division is appropriate.

23           11.    An actual, justiciable controversy exists between the parties. CESAR is  
24 adversely affected or aggrieved by federal agency inaction and is entitled to judicial  
25 review of such inaction within the meaning of the ESA and the Administrative  
26 Procedure Act. The Secretary’s failure to comply with the ESA’s mandatory deadline  
27 prevents the completion of the listing process for the delta smelt, and thus the  
28 implementation of additional measures to protect the delta smelt. Without the

1 additional protections made available by listing the delta smelt as “endangered,” the  
2 species is more likely to continue its decline since the current evaluations being  
3 performed by the FWS are inadequate to ensure its survival.

4 12. By letter sent by certified mail and facsimile on April 30, 2009, CESAR  
5 provided notice to the Secretary and the FWS of their ESA violations, and 60-days for  
6 them to issue the 12-month finding. 16 U.S.C. § 1540(g)(2)(C). To date, no finding  
7 has been issued.

8 13. The federal government waived sovereign immunity in this action. 16  
9 U.S.C. § 1540(g); 5 U.S.C. § 702.

### 10 **III. PARTIES**

11 14. Plaintiff CESAR is a nonprofit, public interest organization whose  
12 mission is to ensure the efficient and effective enforcement of the ESA, fulfill the  
13 educational goals of its members and provide educational information on the ESA and  
14 its application to the general public in the process. In accordance with its mission, on  
15 September 8, 2008, CESAR submitted detailed substantive comments in response to  
16 the 90-day finding on the delta smelt Petition supporting its reclassification as an  
17 “endangered” species.

18 15. Defendant KEN SALAZAR, United States Secretary of the Interior, is the  
19 highest-ranking official within the Department of the Interior and, in that capacity, has  
20 ultimate responsibility for the administration and implementation of the ESA with  
21 regard to the delta smelt, and for compliance with all other federal laws applicable to  
22 the Department of the Interior. He is sued in his official capacity.

23 16. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR  
24 (“DOI”) is the federal executive department of the United States government  
25 responsible for the management and conservation of most federal land and the  
26 administration of programs relating to Native Americans, Alaska Natives, and Native  
27 Hawaiians, and to insular areas of the United States.

28

1 17. Defendant UNITED STATES FISH AND WILDLIFE SERVICE  
2 (“FWS”) is a federal agency within the DOI authorized and required by law to protect  
3 and manage the fish, wildlife and native plant resources of the United States, including  
4 enforcing the ESA. The Secretary of the Interior delegated authority to the FWS to  
5 implement the ESA, including responsibility for making decisions and promulgating  
6 regulations such as proposed and final listing and critical habitat decisions and the  
7 processing of petitions for such listings.

8 18. Defendant SAM HAMILTON is the Director of the United States Fish  
9 and Wildlife Service, and is named in his official capacity. He is responsible for the  
10 administration of the ESA on behalf of the Secretary of the Interior.

11 19. Defendant REN LOHOEFENER is the Regional Director of the FWS,  
12 Pacific Southwest Region, and is named in his official capacity. The Regional  
13 Director is responsible, in part, for the administration of the ESA on behalf of the  
14 Secretary of the Interior within the Pacific Southwest Region, which includes  
15 California.

16 20. Defendants KEN SALAZAR, UNITED STATES DEPARTMENT OF  
17 THE INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE, SAM  
18 HAMILTON, and REN LOHOEFENER are collectively referred to herein as  
19 “Secretary.”

20 **IV. SPECIES LISTING PROCEDURES UNDER THE ESA**

21 21. The ESA is a federal statute enacted to conserve endangered and  
22 threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b).  
23 The ESA is the “most comprehensive legislation for the preservation of endangered  
24 species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180  
25 (1978). In enacting the ESA, Congress expressly found that species of fish, wildlife  
26 and plants that are in danger of or threatened with extinction are of “esthetic,  
27 ecological, educational, historical, recreational, and scientific value to the Nation and  
28 its people.” 16 U.S.C. § 1531(a)(3). The ESA further declared the policy of Congress

1 was that “all Federal departments and agencies shall seek to conserve endangered  
2 species and threatened species and shall utilize their authorities in furtherance of the  
3 purposes of [the ESA].” 16 U.S.C. § 1531(c)(1). The Supreme Court’s review of the  
4 ESA’s “language, history, and structure” convinced the Court “beyond doubt that  
5 Congress intended endangered species to be afforded the highest of priorities.” *Tenn.*  
6 *Valley Auth.*, 437 U.S. at 174.

7 22. The ESA protects species listed as either “endangered” or “threatened” by  
8 the Secretary. A species is “endangered” if it is “in danger of extinction throughout all  
9 or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if  
10 it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C.  
11 § 1532(20). The Secretary is responsible for determining whether a species should be  
12 listed as endangered or threatened. The listing process includes mandatory, non-  
13 discretionary deadlines that the Secretary must meet so that species in need of  
14 protection do not languish in administrative purgatory.

15 23. Interested citizens may trigger the listing process by submitting a petition  
16 to the Secretary requesting that it list, reclassify or even remove a species from  
17 protection. 5 U.S.C. § 553(e); 16 U.S.C. § 1533(b)(3); 50 C.F.R. § 424.14. Once a  
18 petition is received, the Secretary has, to the maximum extent practicable, 90 days  
19 within which to make an initial determination on the petition. 16 U.S.C. §  
20 1533(b)(3)(A). If the 90-day finding is positive, the Secretary “shall” promptly  
21 commence a status review of the species and “[w]ithin 12 months after receiving a  
22 petition” the Secretary “shall” make a determination on it. 16 U.S.C. § 1533(b)(3)(A)-  
23 (B). A 12-month finding, published in the Federal Register, must indicate one of the  
24 following: (i) the petitioned action is not warranted; (ii) the petitioned action is  
25 warranted; (iii) the petitioned action is warranted, but precluded for certain specified  
26 reasons. 16 U.S.C. § 1533(b)(3)(B). If, in the 12-month finding, the Secretary  
27 determines the petitioned action is warranted, then it must publish a general notice and  
28 the text of the proposed regulation for public comment. 16 U.S.C. §§



1 1533(b)(3)(B)(ii), 1533(b)(5). The Secretary is allotted one-year to finalize the  
2 proposed regulation and publish a final listing determination. 16 U.S.C. §  
3 1533(b)(6)(A).

4 24. The ESA authorizes “any person” to bring suit against the Secretary for  
5 failing “to perform any act or duty under section 1533 . . . which is not discretionary  
6 with the Secretary,” 16 U.S.C. § 1540(g)(1)(C), and against any person, including the  
7 United States and any other governmental instrumentality or agency, for violating a  
8 provision of the ESA, 16 U.S.C. § 1540(g)(1)(A). Such suit can be brought 60 days  
9 after written notice of the violation is provided to the Secretary. 16 U.S.C. §  
10 1540(g)(2)(A), (C).

11 25. Given the importance of preventing the extinction of endangered species,  
12 Congress enacted an expedited listing process. If species are to be protected in a  
13 timely manner, it is paramount that the Secretary scrupulously follow the ESA’s listing  
14 procedures and deadlines.

15 **V. THE DELTA SMELT POPULATION IS DECLINING DESPITE ITS 16**  
16 **YEAR CLASSIFICATION AS A “THREATENED” SPECIES**

17 26. Delta smelt are endemic to the Sacramento-San Joaquin River Delta  
18 which is the crucial passage point for the water supply for San Joaquin Valley farms,  
19 the San Francisco Bay Area and Southern California cities.

20 27. Delta smelt distribution today is consistent with its historic distribution  
21 since 1959—extending from western San Pablo Bay and the Napa River upstream to  
22 Sacramento on the Sacramento River and Mossdale on the San Joaquin River. The  
23 fish are found in bays, river channels and sloughs, including in the Sacramento River,  
24 the Mokelumne River system, the Cache Slough region, the Delta, Montezuma Slough,  
25 Suisun Bay, Suisun Marsh, Carquinez Strait, the Napa River, and San Pablo Bay.

26 28. Delta smelt feed exclusively on zooplankton and most live only one year.  
27 Throughout most of their life span, they inhabit low salinity habitat at the interface of  
28 inflowing fresh water from the Sacramento and San Joaquin Rivers and salt water from



1 the Pacific Ocean. Although they are restricted to a relatively small geographic range,  
2 delta smelt use different parts of the estuary at different life history stages.

3 29. The ecology of the Delta is complex and continually evolving, as it has  
4 been since its discovery. There are a number of factors affecting the wildlife and  
5 fishery habitat and the quality of drinking water and other water supply needs for  
6 consumption by residential, farming and municipal and industrial users. These factors  
7 are broadly acknowledged and include both natural phenomena (e.g., organic carbon,  
8 saltwater intrusion, disease, and predation) and human activities (e.g., waste  
9 discharges, introduction of invasive species, unscreened diversions, overfishing of  
10 some species, fish barriers, and channel alterations, among other things).

11 30. The FWS was originally petitioned to list the delta smelt as endangered on  
12 June 26, 1990. The FWS proposed to list the species as threatened and proposed the  
13 designation of critical habitat on October 3, 1991. 56 Fed. Reg. 50075. The FWS  
14 finally listed the species as threatened on March 5, 1993 (58 Fed. Reg. 12854), and  
15 designated critical habitat on December 19, 1994 (59 Fed. Reg. 65256). The delta  
16 smelt was one of eight fish species addressed in the November 26, 1996 Recovery Plan  
17 for the Sacramento-San Joaquin Delta Native Fishes. The FWS completed a 5-year  
18 status review of the delta smelt on March 31, 2004.

19 31. Based on its listing, government agencies convened a number of fora and  
20 attempted, ineffectively, to address the deteriorating ecology of the Delta and the  
21 dwindling delta smelt population, among other species (e.g., the Salt Marsh Harvest  
22 Mouse, Valley Elderberry Longhorn Beetle, various salmonid species). Thus, the  
23 administrative record pertaining to species protection in the Delta is voluminous. It is  
24 derived from numerous court actions, biological opinions, biological assessments,  
25 agency actions, independent studies, and public comments on agency actions, among  
26 other things.

27 32. In preparing assessments and ESA Section 7 consultations involving the  
28 delta smelt, the FWS ignored a large part of the scientific data available on the causes

1 of fishery conditions in the Delta, and instead, inaccurately asserted that export  
2 pumping is the cause of the decline in abundance indices. These inaccurate assertions  
3 are attributable, in part, to the less stringent consultation requirements for species that  
4 are listed as “threatened” under the ESA and have led to the implementation of  
5 measures requiring severe curtailments in export water supplies in the face of  
6 overwhelming statistical and empirical evidence that such cutbacks will not solve the  
7 problems with the species. As these measures are not based upon the best available  
8 scientific data on the delta smelt and fail to address the actual causes of declining delta  
9 smelt abundance, the FWS is failing to adequately protect the “threatened” species and  
10 is furthering its decline.

11 **VI. THE SECRETARY’S FAILURE TO ACT ON THE PETITION TO**  
12 **RECLASSIFY THE DELTA SMELT AS “ENDANGERED”**

13 33. On March 9, 2006, the FWS received a petition dated March 8, 2006 from  
14 the Center for Biological Diversity, the Bay Institute, and the Natural Resources  
15 Defense Council to reclassify, on an emergency basis, the federal listing status of the  
16 delta smelt from threatened to endangered status. 73 Fed. Reg. 39639-39640. The  
17 Petition contained information on changes in the status and distribution of the species  
18 and on increased threats to the species. *Id.*

19 34. In response to the Petition, the FWS sent a letter to the petitioners, dated  
20 June 20, 2006, stating it would not address the Petition at that time because further  
21 action on it was precluded by court orders and settlement agreements for other listing  
22 actions the FWS claimed exhausted nearly all of its listing funds for fiscal year 2006.  
23 *Id.* The FWS also claimed it evaluated the immediacy of possible threats to the delta  
24 smelt, and an emergency reclassification was not warranted at that time. *Id.*

25 35. On July 10, 2008, the FWS released its 90-day finding. 73 Fed. Reg.  
26 39639-39643. In the long overdue 90-day finding, the FWS determined that the  
27 Petition “presents substantial information that reclassification of the delta smelt from  
28 threatened to endangered may be warranted” and that it would be “initiating a status

1 review to determine if reclassifying the species from threatened to endangered is  
2 warranted.” 73 Fed. Reg. 39643. The FWS further explained it would solicit  
3 “scientific and commercial data and other information” regarding the delta smelt “to  
4 ensure that the status review is comprehensive.” *Id.*

5 36. In response to the FWS’s solicitation, on September 8, 2008, CESAR  
6 submitted detailed comments, scientific data and information specifically supporting  
7 the reclassification of the delta smelt from threatened to endangered. On December 9,  
8 2008, the FWS indicated it was reopening the comment period to February 9, 2009. 73  
9 Fed. Reg. 74674.

10 37. The Secretary, however, has not issued the 12-month finding. Having  
11 found that the March 8, 2006 Petition presents substantial information that  
12 reclassification may be warranted, the Secretary must issue a 12-month finding. It  
13 should have done so over two years ago. CESAR advised the Secretary of the Interior  
14 and the FWS on April 30, 2009 of its intent to sue based on their failure to perform this  
15 mandatory, nondiscretionary duty. But the failure to issue the 12-month finding  
16 continues.

## 17 **VII. CLAIM FOR RELIEF**

### 18 **(Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3),**

### 19 **Failure to Make a 12-month Finding on the Delta Smelt Petition)**

20 38. CESAR re-alleges, and fully incorporates by reference, Paragraphs 1  
21 through 37 herein as though fully set forth below.

22 39. The Secretary’s failure to make a 12-month finding on the Petition to  
23 reclassify the delta smelt as endangered is a violation of the ESA and its implementing  
24 regulations. 16 U.S.C. §§ 1533(b)(3)(B), 1540(g); 50 C.F.R. § 424.14(b)(3).

25 40. Additionally, the Secretary’s failure to perform its mandatory, non-  
26 discretionary duty with respect to the delta smelt Petition constitutes agency action  
27 under the Administrative Procedure Act “unlawfully withheld or unreasonably  
28

1 delayed,” and/or is arbitrary and capricious, an abuse of discretion, not in accordance  
2 with law, and/or a failure to observe proper procedure. 5 U.S.C. § 706.

3 41. CESAR has no plain, speedy and adequate remedy in the course of law,  
4 and absent immediate judicial intervention, it will suffer irreparable injury. The  
5 Secretary’s failure to issue the 12-month finding results in informational and  
6 procedural injury to CESAR. The ESA affords CESAR procedural and informational  
7 rights, including the opportunity to comment on and otherwise participate in the  
8 statutorily-mandated listing process triggered by the filing of a petition. The  
9 Secretary’s failure to timely process the Petition and act on CESAR’s 90-day  
10 comments frustrates these rights. These are actual, concrete injuries to CESAR caused  
11 by the Secretary’s failure to comply with the ESA, the Administrative Procedure Act,  
12 and their implementing regulations. The issuance of declaratory and injunctive relief  
13 finding the Secretary violated its mandatory duty and compelling the Secretary to act is  
14 therefore proper. 16 U.S.C. 1540(g); 28 U.S.C. §§ 2201, 2202.

15 **VIII. PRAYER FOR RELIEF**

16 42. For the reasons stated above, CESAR respectfully requests that the Court  
17 grant the following relief:

18 43. Declare that the Secretary violated its mandatory, nondiscretionary duty  
19 under 16 U.S.C. § 1533(b)(3)(B) by failing to make a 12-month finding in response to  
20 the Petition to reclassify the delta smelt from threatened to endangered;

21 44. Issue permanent injunctive relief compelling the Secretary to make and  
22 publish in the Federal Register a 12-month finding under the ESA on the delta smelt  
23 Petition by a date certain;

24 45. Award CESAR its costs of litigation, including reasonable attorney and  
25 expert witness fees; and

26 / / /

27 / / /

28 / / /

1 46. Grant CESAR such other relief as the Court deems just and proper.

2 DATED: October 15, 2009

3 ALAN N. BICK  
4 THOMAS A. MANAKIDES  
5 GIBSON, DUNN & CRUTCHER LLP

6 By:           /s/ Alan N. Bick          

7 Alan N. Bick

8 Attorneys for Plaintiff  
9 COUNCIL FOR ENDANGERED SPECIES  
10 ACT RELIABILITY

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