

1 JUSTIN AUGUSTINE, State Bar No. 235561
CENTER FOR BIOLOGICAL DIVERSITY
2 351 California Street, Suite 600
San Francisco, CA 94104
3 T: (415) 436-9682
F: (415) 436-9683
4 E: jaugustine@biologicaldiversity.org

5 CHATTEN-BROWN & CARSTENS LLP
Jan Chatten-Brown, SBN 050275
6 Josh Chatten-Brown, SBN 243605
2200 Pacific Coast Highway, Suite 318
7 Hermosa Beach, CA 90254
T: (310) 798-2400
8 F: (310) 798-2402
E: jrbc@cbcearthlaw.com

9 *Counsel for Petitioners*

10
11 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF FRESNO

13 CENTER FOR BIOLOGICAL DIVERSITY,) Case No.:
14 and THE EARTH ISLAND INSTITUTE, non-)
profit organizations,)
15 Petitioners,) VERIFIED PETITION FOR
WRIT OF MANDATE
16 vs.)
17 CALIFORNIA FISH AND GAME COMMISSION,))
18 Respondent.)
19)

20
21 **INTRODUCTION**

22 1. Petitioners Center for Biological Diversity (“the Center”) and The Earth Island
23 Institute challenge the decision by the California Fish and Game Commission (“Commission”) to
24 deny listing the black-backed woodpecker as threatened or endangered under California’s
25 Endangered Species Act (“CESA”). (Fish & G. Code §§ 2050-2115.5.)

26 2. Black-backed woodpeckers are one of the most unique and important species in the
27 Sierra Nevada ecosystem. They are among the very first species to populate what is known as “snag
28 forest” – areas of dense, mature forest that have experienced high-intensity fire that kills most of the

1 trees. Black-backed woodpeckers depend upon the burned, but standing, dead trees for food, nest,
2 and roost sites. Moreover, after the woodpeckers leave their nests, the abandoned nests provide
3 habitat for other species that are not capable of drilling such holes into the trees. For this reason,
4 black-backed woodpeckers are considered a keystone species in the Sierras.

5 3. Unfortunately, black-backed woodpecker habitat is the target of intense logging after
6 fires. The very areas that the woodpeckers rely on – the most intensely burned forest – are the areas
7 most desired by logging actions. This direst loss of habitat is one of the reasons there are so few
8 black-backed woodpeckers left in California.

9 4. Despite the woodpecker’s extremely small population size, and despite the many
10 threats facing the species, the California Fish and Game Commission rejected listing the species as
11 threatened or endangered. The Commission, however, applied the wrong legal standard and failed to
12 base its decision on the best scientific information available.

13 5. To remedy the violations of law, the Center and The Earth Island Institute ask this
14 Court to issue a writ of mandate setting aside the Commission’s decision, and remanding the petition
15 to the Commission to reconsider whether listing the black-backed woodpecker as threatened or
16 endangered under CESA is warranted.

17 **JURISDICTION AND VENUE**

18 6. The Commission’s decision to reject the listing of the black-backed woodpecker is
19 subject to judicial review under Section 1094.5 of the Code of Civil Procedure. (Fish & G. Code §
20 2076.)

21 7. Venue is proper in the Superior Court for the County of Fresno because the species in
22 controversy lives in the Sierra Mountains, the Commission is a state commission based in
23 Sacramento County, but its staff, the California Department of Fish and Wildlife has offices in
24 Fresno, as does the California Attorney General. (Code Civ. Proc. §401(1)).

25 **PARTIES**

26 8. Petitioner Center for Biological Diversity is a non-profit 501(c)(3) corporation with
27 offices in San Francisco, California, as well as Alaska, Arizona, Florida, Minnesota, Nevada, New
28 York, Oregon, Vermont, Washington, and Washington, D.C. The Center has over 50,000 members

1 throughout the United States and the world and works through science, law, and policy to secure a
2 future for all species hovering on the brink of extinction. The Center is actively involved in species
3 and habitat protection throughout the United States. The Center brings this action on its own behalf
4 and on behalf of its adversely affected members and staff.

5 9. Petitioner Earth Island Institute (“Earth Island”) is a non-profit corporation located in
6 Berkeley, California. Earth Island Institute is a membership organization with over 15,000
7 members. Earth Island’s mission is to develop and support projects that counteract threats to the
8 biological and cultural diversity that sustains the environment. Through education and activism,
9 these projects promote the conservation, preservation and restoration of the Earth. One of these
10 projects is the John Muir Project—whose mission is to protect all federal public forestlands from
11 commercial exploitation that undermines and compromises science-based ecological management.
12 John Muir Project offices are in San Bernardino County, California.

13 10. Petitioners’ members and staff include individuals with a wide variety of interests in
14 black-backed woodpeckers and their forest habitat, ranging from scientific, professional and
15 educational to recreational, aesthetic, moral and spiritual interests. Petitioners authored and
16 submitted the petition to protect black-backed woodpeckers under CESA, and its members and
17 constituents are adversely affected and aggrieved by the Commission’s refusal to list black-backed
18 woodpeckers as threatened or endangered under CESA. Without the substantial protections of
19 CESA, the small population of black-backed woodpeckers is more likely to decline and become
20 extinct. Petitioners and their members are therefore injured because their enjoyment of black-backed
21 woodpeckers is threatened by the species’ continued habitat destruction and possible extinction.
22 These are actual, concrete injuries to Petitioners caused by the Commission’s failure to comply with
23 the CESA. The relief requested will fully redress those injuries.

24 11. Respondent California Fish and Game Commission is a five member State board,
25 appointed by the Governor, with broad responsibilities for fish and wildlife management in
26 California. The Commission is a state administrative body entrusted with specific regulatory and
27 adjudicatory duties relating to the protection of wildlife. As stated in Fish and Game Code section
28 1801, the Commission's primary responsibilities include: “encouraging the conservation and

1 maintenance of wildlife resources, maintaining sufficient populations for the beneficial use and
2 enjoyment of wildlife by all citizens of the State, perpetuating all species of wildlife for their
3 intrinsic and ecological values and for their direct benefit to man, and contributing to the economic
4 welfare of state citizens through the recognition that wildlife is a productive, renewable resource, if
5 managed in a manner consistent with the maintenance of healthy and thriving wildlife resources and
6 the public ownership status of wildlife resources.”

7 12. Respondent Commission is the administrative body charged with final decision-
8 making authority for the designation of candidate, threatened, and endangered species under the
9 California Endangered Species Act. The Commission is guided in its decisions by the Department
10 of Fish and Game.

11 **STATUTORY BACKGROUND**

12 13. In 1970, California became one of the first states in the Union to enact a statutory
13 scheme to protect endangered and rare animals. Fourteen years later, this original scheme was
14 replaced with a new one modeled after the federal Endangered Species Act and known as the
15 California Endangered Species Act (“CESA”).

16 14. Recognizing that certain species of plants and animals have gone extinct “as a
17 consequence of man’s activities, untempered by adequate concern for conservation,” that other
18 species are in danger of extinction, and that “[t]hese species of fish, wildlife, and plants are of
19 ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people
20 of this state, and the conservation, protection, and enhancement of these species and their habitat is
21 of statewide concern,” the California Legislature enacted the California Endangered Species Act.
22 (Fish & G. Code § 2051 (a),(c); 2050-2100.)

23 15. CESA contains a number of procedural and substantive provisions that are designed
24 to protect imperiled species and prevent further extinctions. (Fish & G. Code § 2052.)

25 16. CESA defines a species as “endangered” if it is “in serious danger of becoming
26 extinct throughout all, or a significant portion, of its range due to one or more causes, including loss
27 of habitat, change in habitat, overexploitation, predation, competition, or disease.” (Fish & G. Code
28 § 2062.) A species is defined as “threatened” if it is not presently threatened with extinction but “is

1 likely to become an endangered species in the foreseeable future” in the absence of special
2 protection and management efforts. (Fish & G. Code § 2067.) Regulations implementing CESA
3 provide that a species “shall be listed as endangered or threatened” if the Commission determines
4 that the species’ continued existence is “in serious danger or is threatened by *any one of or any*
5 *combination* of the following factors:” (1) present or threatened destruction of habitat, (2)
6 overexploitation, (3) predation, (4) competition, (5) disease, or (5) “other natural occurrences or
7 human-related activities.” (Cal. Code Regs, tit. 14, § 670.1, subd. (i)(A), emphasis added.)

8 17. Pursuant to CESA, an interested person may petition the Commission to list a species
9 as threatened or endangered. (Fish & G. Code § 2071).

10 18. If the Commission finds that listing may be warranted, it must accept the petition and
11 designate the species as a “candidate” for listing. (Fish & G. Code § 2074.2(a)(2).)

12 19. After a species becomes a candidate for listing, the Department of Fish and Wildlife
13 has 12 months to complete a thorough evaluation of the species’ status and recommend to the
14 Commission whether listing is warranted. (Fish & G. Code § 2074.6.)

15 20. During this time, “interested parties” are also permitted “to submit a detailed written
16 scientific report to the commission on the petitioned action.” (Cal. Code Regs., tit. 14, § 670.1(h).)

17 21. Status reports, to comply with the Fish and Game Code, section 2074.6, must be
18 “based upon the best scientific information available.”

19 22. Following receipt of the Department’s status review and any reports from interested
20 parties, the Commission holds a public hearing and determines whether to list the species as
21 threatened or endangered. (Fish & G. Code § 2075.5.)

22 23. Once a species is listed as threatened or endangered, state agencies may not approve
23 projects that would jeopardize the species’ continued existence or result in the destruction or adverse
24 modification of its essential habitat. (Fish & G. Code § 2053.) In addition, CESA directs all state
25 agencies, boards and commissions to exercise their respective authorities to “conserve” threatened
26 and endangered species. (Fish & G. Code § 2055.) The term “conserve” is defined broadly to
27 include all actions that are necessary to bring the species to the point at which protection under
28 CESA is no longer necessary. (Fish & G. Code § 2061.)

1 **PROCEDURAL BACKGROUND**

2 24. On October 1, 2010, Petitioners Center for Biological Diversity and the John Muir
3 Project of Earth Island Institute filed a petition to list the black-backed woodpecker as a threatened
4 or endangered species under CESA. The Commission published formal notice of receipt of the
5 petition on October 29, 2010. (Cal. Reg. Notice Register Z2010-1019-11).

6 25. On December 15, 2011, the Commission considered the woodpecker petition at the
7 first stage in the listing process, known as the “candidacy” finding. The Commission was charged
8 with deciding whether the administrative petition, together with other submissions, contains
9 sufficient information indicating that listing “may be warranted.” (Fish & G. Code § 2073.5.)

10 26. Finding that the petition provided sufficient information to indicate that the petitioned
11 action may be warranted, on December 15, 2011 the Commission accepted for consideration the
12 petition submitted to list the black-backed woodpecker as threatened or endangered. (Title 14,
13 California Code of Regulations Sections 670.1, 670.5.)

14 27. Consistent with CESA and CESA regulations, a 12-month status review of black-
15 backed woodpeckers was commenced following published notice of its designation as a candidate
16 species. In addition, an independent “scientific report to the commission on the petitioned action”
17 was conducted by Petitioners.

18 28. Compelling evidence received during the status review overwhelmingly demonstrates
19 that black-backed woodpeckers in California warrant CESA listing. This includes:

- 20 a) The best available science shows that Black-backed Woodpecker numbers in
21 California are likely very low – at a level that has a high probability of
22 extinction and is not sustainable;
- 23 b) In addition to its small population size, black-backed woodpeckers in
24 California may be isolated from woodpeckers elsewhere, further exacerbating
25 its small population size.
- 26 c) The best available science shows that Black-backed Woodpeckers rely
27 primarily on “snag forest habitat,” which is created by large patches of
28 moderate/high-severity fire that has occurred in dense, mature/old, higher-

1 elevation conifer forest. This habitat type is only sufficient for Black-backed
2 Woodpeckers shortly after the fire occurs (i.e., for approximately seven or
3 eight years, typically). Furthermore, not only is snag forest habitat ephemeral,
4 it is very rare on the landscape to begin with due to three overarching reasons:
5 1) fire suppression (which, when fires do occur, prevents snag forest habitat
6 from being created in greater amounts), 2) fire prevention (meaning the
7 mechanical thinning and other efforts taken to prevent high-severity fire, and
8 hence, snag forest habitat, from occurring at all), and 3) intensive logging
9 (which eliminates snag forest habitat when it does occur). Consequently, only
10 in those rare instances where the above three factors do not play out does new
11 snag forest habitat occur.

12 29. Notwithstanding this, and the overwhelming evidence before the Commission that
13 black-backed woodpeckers warrant listing as threatened, on August 17, 2013, the Commission voted
14 to reject listing the black-backed woodpecker as threatened or endangered. (Fish & G. Code, §
15 2075.5, subd. (1); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).)

16 30. On November 22, 2014, the Commission published its findings in the Register.

17 **FIRST CAUSE OF ACTION**

18 **(Violations of CESA)**

19 31. The Center re-alleges, as if fully set forth herein, each and every allegation contained
20 in the preceding paragraphs.

21 32. The Commission's decision to deny the Center's petition to list the black-backed
22 woodpecker under CESA constitutes a prejudicial abuse of discretion. The Commission failed to
23 proceed in the manner required by law, the Commission's decision is not supported by the written
24 findings, and the Commission's decision and findings are not supported by substantial evidence in
25 the record.

26 **The Commission applied the wrong legal standard.**

27 33. In evaluating whether a species is "endangered" or "threatened" under CESA, the
28 Commission must consider whether the species is in serious danger of extinction, or is *likely to*

1 *become in serious danger of extinction*, “throughout all, or a significant portion, of its range . . .”
2 (Fish & G. Code §§ 2062, 2067, *emphasis added*.) The findings issued by the Commission on
3 November 2, 2013 show that the Commission demanded conclusive evidence that the black-backed
4 woodpecker would become extinct if not protected.

5 34. For example, when Petitioners presented the Commission with a study showing that
6 black-backed woodpeckers declined a four year study period in forests with mountain pine beetle
7 infestations or forests burned by prescribed fires, the Commission stated, “However, what is
8 unanswered is if the declining population would reach a minimum but stable floor as the food source
9 declines or if the population is expected to reduce to zero over time.” The only way to conclusively
10 answer the Commission’s question would be to wait and see if the black-backed woodpecker
11 population is entirely eliminated and the population is reduced to zero. Only then would this issue
12 be conclusively resolved.

13 35. Further, the Commission’s findings acknowledge that the scientific literature predicts
14 a huge net loss of the forest types inhabited by black-backed woodpeckers by the end of the century,
15 and does not note any studies that contradict this prediction (in fact, all studies predict future black-
16 backed woodpecker range contraction, due to climate change). However, the Commission then
17 attempts to dismiss this concern too, suggesting that there are some “uncertainties.” This is a telling
18 remark—one that goes to the heart of the improper standard that the Commission employed in the
19 evaluation of the black-backed woodpecker. It is not incumbent upon Petitioners to establish
20 absolute certainty of the black-backed woodpeckers’ status—far from it—and the Commission is not
21 authorized to set the bar so impossibly high (near certainty) in order to list a species under CESA,
22 and setting such a standard thwarts the very purpose of CESA.

23 36. This improper standard that wrongly places too high a burden of proof on proponents
24 of protection of the species is further illustrated in the Commission’s discussion of unburned forest
25 habitat. There is no basis to put the burden of risk on the species, and to do so is contrary to CESA’s
26 conservation purposes.

27 37. Since the evidence must only demonstrate that the black-backed woodpecker is
28 “likely to become in serious danger of extinction throughout a significant portion of its range” (Fish

1 & G. Code §§ 2062, 2067), the Commission’s requirement of conclusive proof of the black-backed
2 woodpeckers’ future extinction violates CESA.

3 **The Commission failed to issue a decision based on the “best scientific information**
4 **available.”**

5 38. CESA provides that the Commission shall add species to the list of endangered and
6 threatened species “if it finds, upon the receipt of sufficient scientific information pursuant to
7 [CESA], that the action is warranted.” (Fish & G. Code § 2070.) CESA further provides that the
8 Commission’s decisions to list, or not list must be based “upon the best scientific information
9 available . . .” (Fish & G. Code § 2074.6.) The Commission’s decision is not based on the best
10 scientific information available. For example, the best available evidence shows that black-backed
11 woodpeckers in the Sierra region likely have been reduced to an extremely small, and potentially
12 isolated, population; that current logging practices have eliminated large swathes of black-backed
13 woodpecker habitat, and that current management direction at the state and federal level not only
14 fails to protect the species’ burned forest habitat *at all*, it seeks to prevent that habitat from occurring
15 in the first instance via logging practices and regulations that are designed to avoid the creation of
16 the snag densities that black-backed woodpeckers use.

17 **The Commission’s decision is not supported by the findings.**

18 39. Under CESA, the Commission must make a finding that listing a species as
19 threatened or endangered is not warranted at a public meeting and “the finding shall be entered in the
20 public records of the commission . . .” (Fish & G. Code §§ 2075, 2075.5, subd. (1).) The findings
21 adopted by the Commission fail to bridge the analytic gap between the evidence before the
22 Commission and the Commission’s decision to reject listing the black-backed woodpecker as
23 threatened or endangered. For example, while the findings acknowledge that the “black-backed
24 woodpecker’s population is likely to be small,” the findings dismiss this with the assertion that
25 “there is no specific evidence in the record indicating the mere fact of the black-backed
26 woodpecker’s small population size, by itself or in combination with other factors, causes the bird’s
27 continued existence to be in serious danger or threatened.” CESA does not demand such specificity
28 or certainty, however. Rather, CESA requires the Commission to rely on the best available science,

1 which here (e.g., Trail et al. 2007, 2010) demonstrates that the current black-backed woodpecker
2 population is well below the extinction-risk threshold for birds. Indeed, the Commission offers
3 nothing to show otherwise. The Commission’s analytical pathway is therefore fundamentally flawed
4 in that contradicts the best available science and demands a level of evidence that CESA does not
5 require.

6 **The Commission’s decision is not supported by substantial evidence in the record.**

7 40. The Commission’s adopted findings rejecting listing the black-backed woodpecker as
8 threatened or endangered are not supported by substantial evidence in the record. For example, the
9 Commission’s assertion in its findings that “there is little information concerning the extent to which
10 the presence of burnt forest is a requisite for the bird’s continued existence” is false. The findings do
11 not discuss any scientific studies to support this statement, including numerous studies that
12 specifically conclude: a) the evidence indicates that the black-backed woodpecker requires recent
13 higher-intensity post-fire habitat to maintain viable populations, and that continued fire suppression,
14 thinning, and post-fire logging at current rates will seriously threatened this species with extinction
15 in the next 27 years without substantial protections (Odion and Hanson 2013); b) black-backed
16 woodpeckers are vastly rarer in unburned forest than in burned forest—and they are quite rare in
17 burned forest (Hanson and North 2008, Hutto 2008, Burnett et al. 2010, 2012); c) the black-backed
18 woodpecker is not adapted to feed upon the small prey (bark beetle larvae) found mostly in unburned
19 forest but, rather, are narrowly adapted to feed on large wood-boring beetle larvae, which are found
20 mostly in forests recently burned at higher intensities (Rota 2013, Siegel et al. 2013); d) in unburned
21 forest, black-backed woodpeckers travel much farther, and expend far more energy, to get lesser and
22 poorer food than in burned forest (Siegel et al. 2013); e) in unburned forest, black-backed
23 woodpeckers have home ranges that are several times larger than black-backed woodpecker home
24 ranges in burned forest, indicating low territory fitness and sink populations (Siegel et al. 2013); and
25 f) black-backed woodpeckers only maintain stable or increasing populations in recent higher-
26 intensity burned forest, and have steeply declining populations in unburned forest (Rota 2013).

27 41. Likewise, the assertion in the Commission’s findings that “there has been no
28 detected decrease in the black-backed woodpecker’s range nor any detected decrease in the bird’s

1 population” is misleading and contrary to the literature. Published, peer-reviewed scientific findings
2 conclude the opposite—for example, that the black-backed woodpecker’s suitable habitat (recent
3 higher-intensity burned areas in mature forest) has declined by about fivefold since the early 20th
4 century (Odion and Hanson 2013).

5 42. The claim that “since the 1980s there has been an increase in forest fire frequency,
6 burned area, and extent of high severity fire” is also false. The most comprehensive analysis of this
7 question was recently published in a scientific journal – and the publication provided to the
8 Commission – concluding that there has been no increase in high-intensity fire since the 1980s in the
9 Sierra Nevada management region (Hanson and Odion 2013). Hanson and Odion (2013) also
10 established, statistically, that the two previous studies, upon which the Commission relied to suggest
11 that fire intensity was increasing (Miller et al. 2009, Miller and Safford 2012), contained
12 demonstrable methodological errors which resulted in these studies reporting an erroneous upward
13 trend in fire intensity in the Sierra Nevada management region. Moreover, the findings erroneously
14 refer to Hanson and Odion (2013) as “an unpublished study”. Hanson and Odion (2013) was
15 published in a peer-reviewed scientific journal, *The International Journal of Wildland Fire*, on
16 September 10, 2013, and the findings even acknowledge that the publication was provided to the
17 Commission.

18 43. The Commission’s findings further claim that there is a “nearly universal recognition
19 of an increasing trend in western North American forest fire frequency and size in the published
20 literature”, but cite only one study for this proposition: Westerling et al. (2006). However, this is
21 misleading. Westerling et al. (2006) found an increase in fire overall (not high-intensity fire) from
22 1970 through the mid-1980s, but the data presented by Westerling et al. (2006) clearly show no
23 increase since the mid-1980s; thus, the assumption of a progressive and ongoing current increase in
24 fire is unfounded.

25 44. The Commission’s findings acknowledge that post-fire logging adversely affects
26 black-backed woodpeckers, but dismisses this threat by claiming that “there is no information
27 directly linking the effects of such modifications to the black-backed woodpecker’s continued
28 existence in California.” This is wrong as Odion and Hanson (2013) directly made this linkage and

1 concluded that continued post-fire logging at current levels will seriously threaten black-backed
2 woodpecker populations with extinction in the near future.

3 45. Finally, the Commission's findings almost entirely ignore the Status Review that was
4 submitted by Petitioners and which painstakingly explained the population status of the black-
5 backed woodpecker. The Commission failed to acknowledge the best available science that was
6 presented in this Status Review, as well as the five peer reviews that agreed with the Status Review.

7 46. For the reasons stated above, and examples provided above, the Commission's
8 decision to deny listing the black-backed woodpecker under CESA as threatened or endangered
9 constitutes a prejudicial abuse of discretion.

10 **SECOND CAUSE OF ACTION**

11 **(Declaratory Relief)**

12 47. Petitioners re-allege, as if fully set forth herein, each and every allegation contained
13 in the preceding paragraphs.

14 48. Petitioners contend that the Commission's decision that listing the black-backed
15 woodpecker is not warranted and its failure to prepare adequate written findings constitute a
16 prejudicial abuse of discretion under CESA.

17 49. The Commission contends that its actions and findings with respect to the black-
18 backed woodpecker under CESA were and are lawful.

19 50. An actual controversy has arisen and now exists between the Petitioners and the
20 Commission regarding their respective rights and duties under CESA.

21 51. The Petitioners desire a judicial determination and declaration of the parties'
22 respective rights and duties, including a declaration of whether the decisions, actions, and findings of
23 the Commission and Department with respect to the Center's petition to list the black-backed
24 woodpecker comport with CESA and other legal requirements. Such a declaration is necessary and
25 appropriate at this juncture.

26 **REQUEST FOR RELIEF**

27 Wherefore, Petitioners respectfully request relief:
28

1 **VERIFICATION**

2 I, Justin Augustine, hereby declare:

3 I am a staff attorney at the Center for Biological Diversity. The facts alleged in the above
4 petition are true to my personal knowledge.

5 I declare under penalty of perjury under the laws of the State of California that the above is
6 true and correct and that this verification is executed on this ___ day of ___ at San Francisco,
7 California.

8
9 _____
10 Justin Augustine
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28