



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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Case Number: CPF-08-508759

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ORDER

IOLOGICAL DIVERSITY, A NON-PROFIT VS. CALIFORNIA FISH AND GAME COMMISSIC

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FILED
Superior Court of California
County of San Francisco

MAY 11 2009

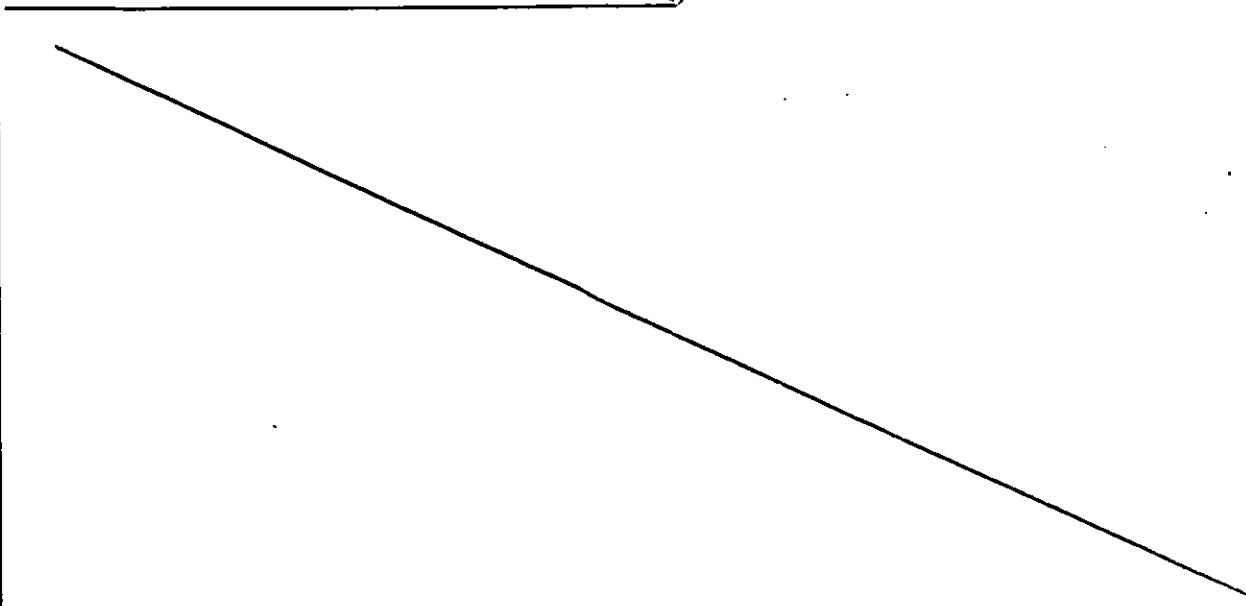
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8 IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN FRANCISCO

10 CENTER FOR BIOLOGICAL DIVERSITY,
11 Petitioner,
12 vs.
13 CALIFORNIA FISH AND GAME COMMISSION,
14 Respondent,
15 and
16 CALIFORNIA DEPARTMENT OF FISH AND
17 GAME,
18 Intervenor-Respondent.

) Case No.: CPF-08-508759

) ~~PROPOSED~~ ORDER/JUDGMENT *(ah)*
) GRANTING PEREMPTORY WRIT OF
) MANDAMUS



(ah)

ORIGINAL

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

vs.

CALIFORNIA FISH AND GAME COMMISSION,

Respondent,

and

CALIFORNIA DEPARTMENT OF FISH AND
GAME,

Intervenor-Respondent.

Case No.: CPF-08-508759

~~PROPOSED~~ ORDER/JUDGMENT ⁽²⁰⁾
GRANTING PEREMPTORY WRIT OF
MANDAMUS

REC'D APR 27 2009

The Petition for Writ of Mandate by Center for Biological Diversity (Petitioner) against the California Fish and Game Commission (Respondent) came on regularly for hearing in Department 301 of the above court on April 16, 2009, the Honorable Peter J. Busch presiding. The record of the administrative proceedings having been received into evidence and examined by the Court, and the Court having considered the parties' briefs opposing and supporting the petition, and the oral argument of counsel for all parties,

IT IS ORDERED, ADJUDGED and DECREED:

1. The Petition for Writ of Mandate is hereby GRANTED for the following reasons:
 - a. The Petition for Writ of Mandate challenged Respondent's decision to reject Petitioner's petition, submitted on August 21, 2007, to list the American pika as threatened, or, in the alternative, five subspecies of the American pika as either endangered or threatened, under the California Endangered Species Act (CESA; Fish & G. Code, § 2050 et seq.). Respondent rejected the petition pursuant to Fish and Game Code section 2074.2.
 - b. The Court reviews Respondent's decision under section 1094.5 of the Code of Civil Procedure. (Fish & G. Code, § 2076.) This Court's task is to review Respondent's

1 findings in support of its decision to determine “whether there was any prejudicial
2 abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b).) Abuse of discretion is
3 established if the Commission “has not proceeded in the manner required by law, the
4 order or decision is not supported by the findings, or the findings are not supported by
5 the evidence.” (*Ibid.*) An agency’s use of an erroneous legal standard constitutes a
6 failure to proceed in a manner required by law.” (*City of Marina v. Board of Trustees*
7 *of the Cal. State Univ.* (2006) 39 Cal. 4th 341, 355, quoting *No Oil, Inc. v. City of Los*
8 *Angeles* (1974) 13 Cal. 3d 68, 88.)

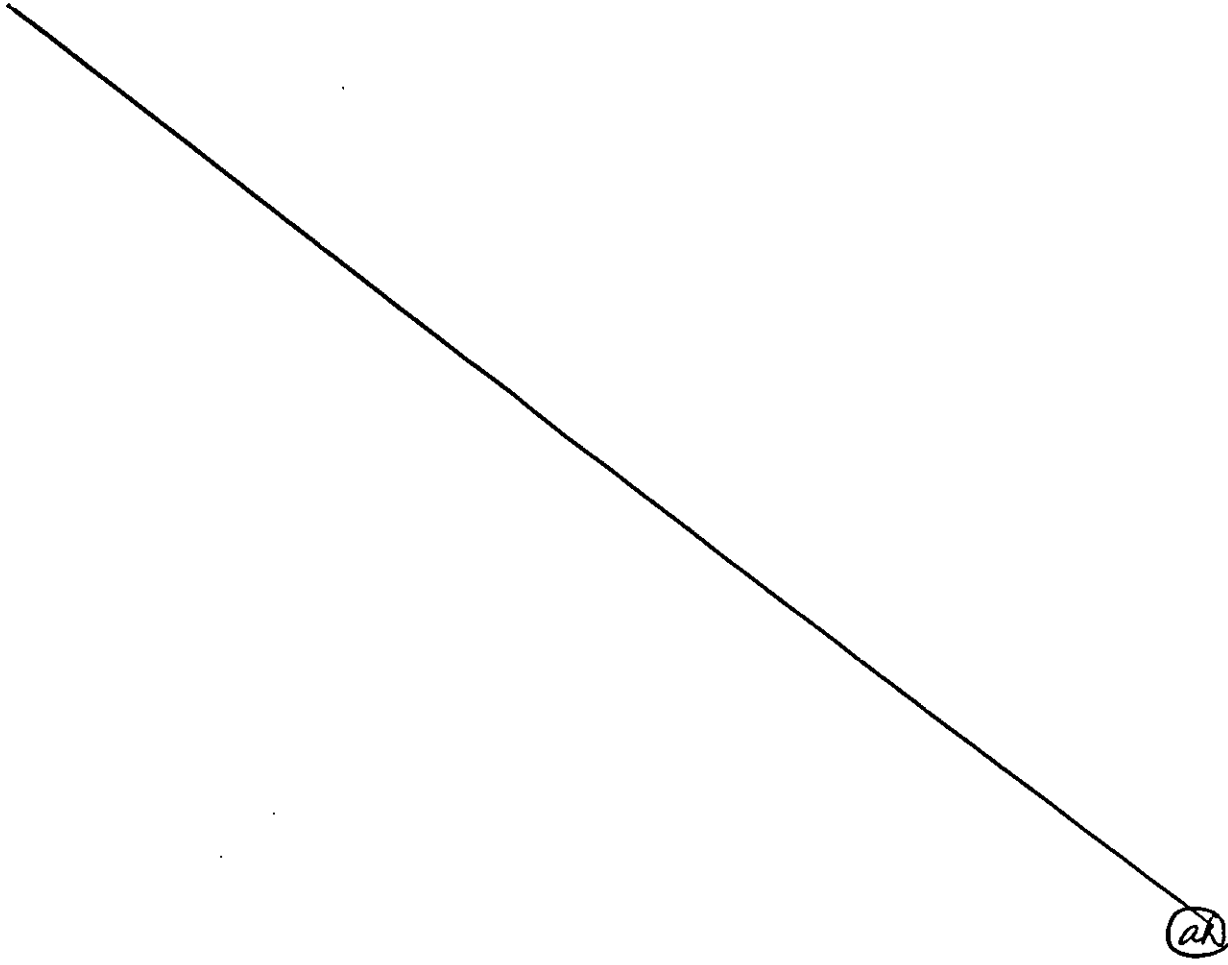
- 9 c. The legal standard the Commission must apply in determining whether to accept or
10 reject a petition to consider listing a species under CESA is whether “the petition
11 provides sufficient information to indicate that the petitioned action may be
12 warranted....” (Fish & G. Code, § 2074.2, subd. (a)(2).) This statutory language has
13 been interpreted to mean “that amount of information, when considered in light of the
14 Department’s written report and the comments received, that would lead a reasonable
15 person to conclude that there is a substantial possibility that the requested listing
16 could occur.” (*Natural Resources Defense Council v. Fish & Game Com’n* (1994) 28
17 Cal.App.4th 1104, 1125 (*NRDC*.)
- 18 d. In the second paragraph of Section III of Respondent’s Notice of Findings, entitled
19 “Reason for Finding,” it states: “In order to accept the petition, the Commission is
20 required to determine that it has information to persuade a reasonable person that
21 there is a substantial possibility that the American pika will be listed.” (Admin. Rec.,
22 Vol. II, at p. 329; see also *Id.* at 330 [“The Commission is not persuaded that the
23 decimation of some pika populations in the Great Basin constitutes sufficient
24 information to warrant listing pikas. . . .”].)
- 25 e. The above-quoted portions of the Notice of Findings do not correctly state the
26 applicable legal standard under *NRDC*. While the correct legal standard is set forth
27 elsewhere in the Notice of Findings, the court concludes that Respondent failed to
28 apply, at least in part, the correct legal standard in making its decision because the

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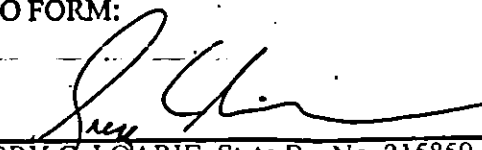
incorrect language quoted above is more closely connected to the analysis that Respondent conducted. As a result, the Court finds that Respondent did not proceed in the manner required by law. (Code Civ. Proc., § 1094.5, subd. (b).)

2. A peremptory writ of mandamus shall issue from this court, remanding the proceedings to Respondent and commanding Respondent to set aside its Notice of Findings, adopted on June 27, 2008. The writ shall further command Respondent to reconsider its action in the light of this Court's Judgment and to take any further action specially enjoined on it by law; but nothing in this judgment or in that writ shall limit or control in any way the discretion legally vested in Respondent.
3. Petitioner may submit a Memorandum of Costs and request for attorney's fees.

[CONTINUED ON PAGE 4]



1 APPROVED AS TO FORM:

2
3 Dated: 4/24/09 

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Commission and Respondent-Intervenor
California Department of Fish and Game

Diversity is granted. (AK)

Petition for writ of mandate by Center for Biological

IT IS SO ORDERED. Let judgment be entered accordingly.

23
24 Dated: MAY 11 2009, 2009


HON. PETER J. BUSCH
Judge of the Superior Court

25
26 * 508759
27 CTR. FOR BIOLOGICAL
28 DIVERSITY v. CALIF FISH & GAME