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15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 FOR THE CENTRAL DISTRICT OF CALIFORNIA

18 **EDCV09-0090**

19 **SQL (FTM)**

20 CENTER FOR BIOLOGICAL)
21 DIVERSITY, SAN BERNARDINO)
22 VALLEY AUDUBON SOCIETY, and)
23 FRIENDS OF THE NORTHERN SAN)
24 JACINTO VALLEY)

Case No.:

25 **COMPLAINT FOR DECLARATORY**
26 **AND INJUNCTIVE RELIEF**

27 Plaintiffs,)

28 vs.)

29 U.S. FISH & WILDLIFE SERVICE,)
30 and DIRK KEMPTHORNE, Secretary)
31 of the Interior,)

32 Defendants.)

BY FAX

33 Complaint for Declaratory and Injunctive Relief

BY: [Signature]
CLERK OF DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
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I. INTRODUCTION

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2 1. This is an action for declaratory and injunctive relief brought by
3 Plaintiffs the Center for Biological Diversity (“the Center”), San Bernardino
4 Valley Audubon Society, and Friends of the Northern San Jacinto Valley in
5 connection with the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”).
6 The Secretary of the Interior (“Secretary”) and the United States Fish and Wildlife
7 Service (“Service” or “FWS”) have violated the ESA by failing to designate
8 adequate critical habitat for the San Bernardino kangaroo rat to ensure the
9 conservation and recovery of the species. 16 U.S.C. § 1533(a)(3). The San
10 Bernardino kangaroo rat (*Dipodomys merriami parvus*) (“SBKR”) is a small
11 mammal found primarily on the gentle slopes of alluvial fans, in flood plains,
12 along washes, and on adjacent upland areas with soils containing sand, loam, and
13 gravel deposited by rivers and streams. The SBKR was once a common resident of
14 the San Bernardino Valley in San Bernardino County and in the San Jacinto River
15 valley in Riverside County. In 1998, the Service listed the SBKR as an endangered
16 species and at the time of listing, estimated that the SBKR’s historic range had
17 been reduced by 95%. Unfortunately, threats to the SBKR include continued loss,
18 degradation, and fragmentation of habitat due to sand and gravel mining, flood
19 control projects, and development. In 2002 and again in 2008, the Service
20 designated critical habitat for the SBKR. The 2008 designation challenged herein
21 includes only 7,779 acres; a reduction of over 76% from the 2002 designation.
22 This action seeks an order declaring that the Secretary and the Service failed to
23 designate sufficient critical habitat in 2008 to provide for the conservation of the
24 SBKR, and compelling the Secretary and the Service to revise the critical habitat
25 designation in a manner necessary to conserve the species. This action arises under
26 and alleges violations under the ESA, 16 U.S.C. §§ 1531-1544, and the
27 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551 et seq.

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II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question); and 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision).

3. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) because the species is found in this District and 28 U.S.C. § 1391(e) because Plaintiffs San Bernardino Valley Audubon Society and Friends of the Northern San Jacinto Valley are both incorporated in this District and Plaintiff Center for Biological Diversity has a place of business within this District.

4. Plaintiffs provided 60 days notice of intent to file this suit pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to each Defendant dated and sent by certified mail and facsimile on November 12, 2008. Neither Defendant responded to the notice of intent to sue nor have the Defendants remedied the alleged violations. Therefore, an actual controversy exists between the parties within the meaning on 28 U.S.C. § 2201. For all claims, Plaintiffs have exhausted all of the administrative remedies available.

III. PARTIES

5. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“Center”), formerly known as the Southwest Center for Biological Diversity, is a non-profit corporation with offices in California, Arizona, New Mexico, Oregon, and Washington, D.C. The Center is actively involved in species and habitat protection issues throughout North American and the Pacific. The Center has nearly 60,000 members throughout the United States, including many members who reside in Southern California and live, visit, or recreate in and near areas that serve as habitat for the San Bernardino kangaroo rat (“SBKR”). The Center’s members and staff have educational, scientific, biological, aesthetic, and spiritual interests in the SBKR. The Center, its members, and staff have participated in

1 efforts to protect and preserve the habitat essential to the continued survival of the
2 SBKR and use the alluvial fan scrub habitat in this desert region where the species
3 is present and which Plaintiffs alleges were improperly excluded from the
4 designated critical habitat.

5 6. SAN BERNARDINO VALLEY AUDUBON SOCIETY is a
6 California non-profit public benefit corporation dedicated to the preservation and
7 conservation of the environment in the San Bernardino Valley and surrounding
8 areas. The purpose of the San Bernardino Valley Audubon Society is to educate the
9 public about the environment, about planning/infrastructure issues, and to take
10 action to protect the County's natural heritage areas when necessary. As part of
11 those efforts, San Bernardino Valley Audubon Society is actively engaged in
12 public education and conservation activities including sponsoring bird walks and
13 field trips and submitting oral or written comment on projects that may affect the
14 environment in the area. The San Bernardino Valley Audubon Society has 2000
15 members many of whom live, visit, work, and/or recreate in and near essential
16 habitat for the San Bernardino kangaroo rat, and are interested in the conservation
17 and recovery of the San Bernardino kangaroo rat in the wild and protection of its
18 essential habitat.

19 7. FRIENDS OF THE NORTHERN SAN JACINTO VALLEY is a
20 501(c)(3) non-profit organization dedicated to the protection, preservation,
21 restoration and enjoyment of the northern San Jacinto Valley's biological,
22 geological, anthropological, historical and cultural resources including the San
23 Bernardino kangaroo rat and its habitat which is found in this area. To that end the
24 Friends of the Northern San Jacinto Valley: sponsor monthly nature walks at the
25 San Jacinto Wildlife Area from September through June to introduce local
26 residents to the San Jacinto Wildlife Area; attend community events to share
27 information about the wildlife area and its wildlife and educational values; conduct
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1 tours of the area for school groups and other interested parties; sponsor tree
2 planting projects and purchase trees and other plants for habitat restoration
3 projects; submit written and oral comments on a wide variety of land use and
4 transportation issues which affect the area; and work to maintain the integrity and
5 wildlife values of the San Jacinto Wildlife Area and the northern San Jacinto
6 Valley.

7 8. The above-described aesthetic, conservation, recreational, scientific,
8 educational, and other interests of Plaintiffs' staff, board, and members have been,
9 are being, and, unless the relief prayed for herein is granted, will continue to be
10 adversely affected and irreparably injured by the failure of Defendants to designate
11 sufficient critical habitat for the SBKR.

12 9. The injuries described above are actual, concrete injuries suffered by
13 Plaintiffs' staff, boards, and members. These injuries are caused by Defendants'
14 failure to designate adequate critical habitat for the SBKR to provide for the
15 recovery of the species. The relief sought herein would redress Plaintiffs' injuries.
16 Plaintiffs have no other adequate remedy at law.

17 10. Defendant DIRK KEMPTHORNE is the Secretary of the Interior and
18 is the federal official in whom the ESA vests final responsibility for making
19 decisions and promulgating regulations required by and in accordance with the
20 ESA, including proposed and final critical habitat decisions. He is sued in his
21 official capacity.

22 11. Defendant the UNITED STATES FISH AND WILDLIFE SERVICE
23 ("FWS" or "Service"), an agency within the Department of the Interior has been
24 delegated the responsibility of the Secretary of the Interior to propose and
25 designate critical habitat.

IV. FACTS

Legal Background.

12. Among the purposes of the ESA are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . .” 16 U.S.C. § 1531(b). To this end, the ESA section 4, requires that the Secretary protect such species by listing them as either “threatened” or “endangered,” and by designating “critical habitat” for each listed threatened or endangered species at the time the species is listed. 16 U.S.C. § 1533.

13. “Conserve” and “conservation,” as defined in the ESA, “mean to use and the use of all methods and procedures necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” ESA § 3(3), 16 U.S.C. § 1532(3).

14. The ESA requires that the Secretary designate areas of critical habitat for endangered species necessary for the conservation of the species in order to provide the habitat necessary to promote recovery of the species such that the protections of the ESA are no longer needed. ESA §§ 4(a)(3)(A), 3(5)(A) and (3), 16 U.S.C. §§ 1533(a)(3)(A), 1532(5)(A) and (3).

15. “Critical habitat” means

(i) the specific areas within the geographical area occupied by the species at the time it was listed in accordance with the provisions of section 1533 of this title, on

which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

1 (ii) specific areas outside the geographical area occupied by the
2 species at the time it is listed in accordance with the provisions of section
3 1533 of this title, upon a determination by the Secretary that such areas are
4 essential for the conservation of the species.

5 ESA § 3(5)(A), 16 U.S.C. § 1532(5)(A).

6 16. Section 4(b)(2) of the ESA provides that some areas may be excluded
7 from designation as critical habitat based on economic considerations, however,
8 habitat may not be excluded from designation as critical habitat if the “failure to
9 designate such area as critical habitat will result in the extinction of the species
10 concerned.” ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2). The Secretary has delegated
11 the authority to designate critical habitat and develop and implement recovery
12 plans to the Director and the Service.

13 17. Designated critical habitat is protected from adverse modification
14 pursuant to Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

15 18. Section 4(f) of the ESA requires Secretary to develop and implement
16 recovery plans for the conservation and recovery of endangered and threatened
17 species. ESA § 4(f), 16 U.S.C. § 1533(f). To date, the Secretary has failed to
18 provide a recovery plan for the San Bernardino kangaroo rat in violation of the
19 ESA.

20 **The Species and Its Habitat; ESA Listing**

21 19. The San Bernardino kangaroo rat (*Dipodomys merriami parvus*)
22 (“SBKR”) is a small mammal and, like all kangaroo rats, they have large hind feet
23 on which they hop around, which also give them their name. The SBKR are found
24 on the gentle slopes of alluvial fans, on flood plains, along washes, and on adjacent
25 upland areas with soils containing sand, loam, and gravel deposited by rivers and
26 streams. They also occupy areas where sandy soils are wind deposited. These soft
27 soils allow SBKR to dig shallow burrows and the soils support alluvial sage scrub,
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1 coastal sage scrub, and chaparral vegetation. The SBKR was once a common
2 resident of the San Bernardino Valley in San Bernardino County and in the San
3 Jacinto River valley in Riverside County. The species' range historic range
4 encompassed approximately 326,000 acres of alluvial scrub habitat in these areas.

5 20. In January, 1998, the Service emergency listed the SBKR (63 Fed.
6 Reg. 3835-3843), and then in September, 1998, issued a final rule listing the SBKR
7 as an endangered species. Endangered and Threatened Wildlife and Plants; Final
8 Rule To List the San Bernardino Kangaroo Rat as Endangered, 63 Fed. Reg.
9 51005-17 (September 24, 1998). Threats to the SBKR include continued loss,
10 degradation, and fragmentation of habitat due to sand and gravel mining, flood
11 control projects, and development. At the time of listing, FWS estimated that the
12 SBKR's historic range had already been reduced by 95%.

13 **2002 Critical Habitat Designation**

14 21. Although required to designate "critical habitat" for the species
15 concurrently with listing, 16 U.S.C. § 1533(b)(2), FWS failed to do so for the
16 SBKR. In 1999, the Southwest Center for Biological Diversity filed suit to compel
17 a decision for this and other similarly situated species. Pursuant to a settlement
18 agreement the Service was to re-evaluate the prudence of designating critical
19 habitat and if prudent, publish a proposed rule critical habitat designation by
20 December 1, 2000, and a final designation by December 1, 2001. The Service
21 published the proposed rule on December 8, 2000 and sought an extension for
22 publication of the final rule.

23 22. The 2000 proposed rule proposed to designate 55,408 acres of critical
24 habitat for the SBKR. Endangered and Threatened Wildlife and Plants; Proposed
25 Designation of Critical Habitat for the San Bernardino Kangaroo Rat; Proposed
26 Rule, 65 Fed. Reg. 77178-208 (December 8, 2000). The Service identified the
27 primary constituent elements needed for critical habitat and based the 2000
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1 proposed designation on the remaining areas of occupied and unoccupied habitat
2 containing those important habitat elements remaining within the historic habitat
3 for the SBKR.

4 23. In 2002, FWS designated 33,295 acres of critical habitat for the SBKR
5 in San Bernardino County and Riverside County. Endangered and Threatened
6 Wildlife and Plants; Final Designation of Critical Habitat for the San Bernardino
7 Kangaroo Rat; Final Rule, 67 Fed. Reg. 19812-19845 (April 23, 2002)

8 24. In settlement of a lawsuit, the Service agreed to reevaluate the critical
9 habitat designation and issue a new proposed rule by June, 2007.

10 **2008 Critical Habitat Designation.**

11 25. Although the species had not yet recovered and continued to decline,
12 in 2007, the FWS proposed a revised critical habitat designation of only 9,079
13 acres. Endangered and Threatened Wildlife and Plants; Revised Critical Habitat
14 for the San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*); Proposed
15 Rule, 72 Fed. Reg. 33808-33842 (June 19, 2007). In 2008, the FWS reduced the
16 designated critical habitat for the endangered SBKR to only 7,779 acres; a
17 reduction of over 76% from the 33,295 acres of critical habitat designated in 2002.
18 Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat
19 for the San Bernardino Kangaroo Rat (*Dipodomys merriami parvus*); Final Rule,
20 73 Fed. Reg. 61936-62002 (October 17, 2008).

21 **V. VIOLATIONS OF LAW**

22 26. The ESA requires the Secretary to designate sufficient critical habitat
23 to conserve the species and promote its recovery. ESA §§ 4(a)(3)(A), 3(5)(A) and
24 (3), 16 U.S.C. §§ 1533(a)(3)(A), 1532(5)(A) and (3). The 2008 Final Rule fails to
25 designate sufficient critical habitat for the SBKR to ensure conservation and
26 protection of the species. Because Defendants failed to designate sufficient critical
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1 habitat to conserve the species, Defendants violated Section 4(a)(3) of the ESA. 16
2 U.S.C. § 1533(a)(3).

3 27. In the 2008 Final Rule, the Service improperly excluded habitat that it
4 concluded was essential to the conservation of the SBKR and which required
5 special management—that is, habitat which met the statutory definition of critical
6 habitat, ESA §3(5)(A), 16 U.S.C. § 1532(5)(A), from designation as critical habitat
7 for economic reasons under Section 4(b)(2) of the ESA. Of the over 55,000 acres
8 of habitat that the Service identified as being essential to the species, less than
9 8,000 was designated as critical habitat in 2008. Large areas of occupied essential
10 SBKR habitat is on land managed under various conservation plans and those areas
11 are require special management and thus meet the definition of critical habitat. In
12 addition, both the 2007 proposal and 2008 final critical habitat designation failed to
13 identify or designate any unoccupied suitable habitat. These omissions from the
14 2007 proposal and the 2008 final designation undermine the very purpose of
15 critical habitat designation—to provide for the conservation and recovery of the
16 species.

17 28. The FWS also violated the ESA by issuing the 2008 final critical
18 habitat designation because it failed to rely on the best available scientific data and
19 information in making its determination.

20 29. For the exclusions pursuant to Section 4(b)(2), the Service asserted
21 that the benefits of excluding the habitat outweighed the benefits of including the
22 areas as designated critical habitat for the SBKR. In making this determination,
23 however, the Service failed to properly balance the benefits of exclusion versus the
24 benefits of designation as required by Section 4(b)(2) of the ESA, 16 U.S.C. §
25 15533(b)(2).

26 30. In assessing the costs of designating critical habitat, the Service did
27 not properly consider and weigh the benefits and costs associated with designating
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1 critical habitat. The 2008 final critical habitat rule undervalues the benefits to the
2 species associated with designating critical habitat and also fails to identify or
3 analyze many other benefits of critical habitat designation. FWS also grossly
4 overestimates the costs associated with designation of critical habitat. By both
5 inflating the costs attributed to critical habitat designation and underestimating or
6 ignoring the benefits of designated critical habitat, FWS violated ESA § 4(b)(2) in
7 adopting the 2008 Final Designation.

8 31. Under Section 4(b)(2) of the ESA, the Secretary “may exclude any
9 area from critical habitat if he determines that the benefits of such exclusion
10 outweigh the benefits of specifying such area as part of the critical habitat, unless
11 he determines, based on the best scientific and commercial data available, that the
12 failure to designate such area as critical habitat will result in the extinction of the
13 species concerned.” 16 U.S.C. § 1533(b)(2). Because the failure to designate
14 sufficient critical habitat for the SBKR may result in extinction of the species,
15 Defendants violated the Act by excluding habitat necessary to the survival of the
16 species from the 2008 Final Rule pursuant to Section 4(b)(2) of the ESA. 16 U.S.C.
17 § 1533(b)(2).

18 32. The 2008 Final Rule improperly excluded habitat necessary to the
19 survival of the species. The Service found more than 55,000 acres of habitat
20 remained that was essential for the survival of the SBKR in its 2002 proposed rule
21 and designated over 33,000 acres of critical habitat in the 2002 Final Rule because
22 it was necessary to ensure the survival and recovery of the species. Because all of
23 the identified essential habitat contains the primary constituent elements of critical
24 habitat, the areas identified in the 2000 proposed rule (including the habitat
25 designated in the 2002 rule) meet the definition of critical habitat in ESA section
26 3(5)(A), 16 U.S.C. § 1532(5)(A).

1 33. The regulatory definition of “destruction or adverse modification” of
2 critical habitat in 50 C.F.R. § 402.02, has been repeatedly declared invalid. *See,*
3 *e.g., Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059,
4 1069-70 (9th Cir. 2004) (finding that the regulation improperly eliminated the
5 recovery goal and benefit from critical habitat designation). The Service claimed
6 that it did not rely on that definition in designating critical habitat for the SBKR,
7 however, the Service has, to date, failed to revise the regulation. Plaintiffs aver that
8 in making the critical habitat designation for the SBKR, the Service improperly
9 evaluated the recovery goal and benefit of critical habitat designation and as a
10 result failed to fairly evaluate the benefits of critical habitat designation as required
11 by the ESA. As a result, Defendants relied on invalid criteria to assess the benefits
12 of critical habitat designation. Defendants failed to properly identify and analyze
13 the benefits of designating critical habitat before weighing the costs and benefits
14 necessary to justify the exclusion of habitat from critical habitat designation
15 pursuant to Section 4(b)(2) of the ESA. 16 U.S.C. § 1533(b)(2). Therefore,
16 Defendants acted in violation of Section 4(b)(2) of the ESA. 16 U.S.C. §
17 1533(b)(2).

18 34. The Service ignored potential benefits to the species that result from
19 designation of critical habitat that are not provided by listing alone. In addition,
20 the Service did not evaluate benefits to other species, ecosystems, and the human
21 environment provided by essential habitat areas that would be enhanced by critical
22 habitat designation, such as protecting other rare and imperiled species found in
23 this same habitat, protecting water quality, and flood protection. The failure to
24 designate sufficient critical habitat could thus also have a drastic effect on the
25 ecosystem in which the SBKR is found, and could lead to the extirpation and
26 degradation of various other species. Because the Service did not take into account
27 benefits of designation to the species for its own survival and recovery, for other
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1 plant and animal species, and ecosystem at large, Defendants violated Section
2 4(b)(2) of the ESA in excluding large areas of essential habitat from the critical
3 habitat designation for the SBKR. 16 U.S.C. § 1533(b)(2).

4 35. A recovery plan has never been developed for the SBKR. The ESA
5 requires the Secretary of Interior to develop and implement recovery plans for all
6 listed species “unless he [or she] finds that such a plan will not promote the
7 conservation of the species.” ESA § 4(f), 16 U.S.C. § 1533(f). The failure to
8 adopt a recovery plan is an ongoing violation of the ESA. The continued lack of a
9 recovery plan and implementation strategy makes it difficult for federal agencies
10 and others to rationally prioritize and coordinate efforts to conserve and recover the
11 SBKR.

12 **VI. CLAIM FOR RELIEF**

13 (Violation of the Endangered Species Act)

14 36. Each and every allegation set forth in the preceding paragraphs is
15 incorporated herein by reference.

16 37. Defendants failed to issue a legally sufficient critical habitat
17 designation for the San Bernardino kangaroo rat, in violation of Section 3 and
18 Section 4 of the ESA. 16 U.S.C. §§ 1532(5)(A) and 1533(a)(3)(A). Defendants’
19 assertion that the economic benefits of designating critical habitat of a listed
20 species are insubstantial is not based on the best scientific and commercial data
21 available and is contrary to law. Defendants violations include, but are not limited
22 to: failing to designate sufficient critical habitat to ensure the survival of the
23 species; failing to quantify and analyze the economic and other benefits of
24 designating critical habitat for the San Bernardino kangaroo rat; improperly
25 including speculative costs; and failing to consider the likelihood of the extinction
26 of the San Bernardino kangaroo rat. 16 U.S.C. § 1533(b)(2).

1 38. Defendants have also violated Section 4(f) of the ESA by failing to
2 develop and implement a recovery plan for the conservation and recovery of the
3 San Bernardino kangaroo rat. ESA § 4(f), 16 U.S.C. § 1533(f).

4 39. For each of the above reasons, and others, Defendants failed perform
5 their non-discretionary duties as required by the ESA, and have acted in a manner
6 that is arbitrary, capricious, and not in accordance with law. ESA § 11(g), 16
7 U.S.C. § 1540(g); 5 U.S.C. § 706(2)(A).

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiffs respectfully request that this Court enter
10 judgment providing the following relief:

11 (1) Declare that Defendants the United States Fish and Wildlife Service
12 and Dirk Kempthorne, Secretary of the Interior, violated the ESA by issuing an
13 inadequate designation of critical habitat for the San Bernardino kangaroo rat on
14 October 17, 2008, that fails to provide sufficient critical habitat necessary for
15 conservation of the species;

16 (2) Direct by injunction that the Secretary and the Fish and Wildlife
17 Service issue a revised critical habitat designation for the San Bernardino kangaroo
18 rat which corrects these errors, and which otherwise provides for the conservation
19 of the species, by a date certain;

20 (3) In order to protect the species pending the completion of an adequate
21 critical habitat designation for the San Bernardino kangaroo rat, enjoin the
22 Secretary of the Interior and the United States Fish and Wildlife Service from
23 issuing any approval, biological opinion, or concurrence pursuant to Section 7 of
24 the ESA, for any actions that may harm the San Bernardino kangaroo rat or cause
25 destruction or adverse modification to San Bernardino kangaroo rat habitat within
26 areas of former critical habitat designated in 2002 that were excluded from the
27 2008 designation as critical habitat, and reinstate the 2000 proposed critical habitat
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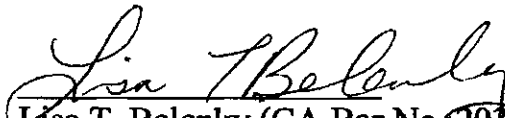
1 during the time the Secretary and the Service are preparing a revision of the critical
2 habitat designation for the San Bernardino kangaroo rat;

3 (4) Grant Plaintiff its fees, costs, expenses and disbursements, including
4 reasonable attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or
5 the Equal Access to Justice Act, 28 U.S.C. § 2412; and

6 (6) Grant Plaintiff such additional and further relief as the Court deems
7 just and proper.

8 Respectfully submitted,

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10 January 14, 2009


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