

1 Catherine Kilduff (CA Bar No. 256331)
2 David Derrick (CA Bar No. 316745)
3 Julie Teel Simmonds (CA Bar No. 208282)
4 CENTER FOR BIOLOGICAL DIVERSITY
5 1212 Broadway, St. #800
6 Oakland, CA 94612
7 Phone: (510) 844-7100
8 Facsimile: (510) 844-7150
9 ckilduff@biologicaldiversity.org
10 dderrick@biologicaldiversity.org
11 jteelsimmonds@biologicaldiversity.org

12 *Attorneys for Plaintiffs Center for Biological Diversity
13 and Turtle Island Restoration Network*

14 **UNITED STATES DISTRICT COURT FOR THE**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 CENTER FOR BIOLOGICAL DIVERSITY
17 and TURTLE ISLAND RESTORATION
18 NETWORK, non-profit organizations,

19 Plaintiffs,

20 v.

21 GINA RAIMONDO, U.S. Secretary of
22 Commerce, and NATIONAL MARINE
23 FISHERIES SERVICE,

24 Defendants.

Case No. 23-

**COMPLAINT FOR DECLARATORY
AND OTHER RELIEF**

INTRODUCTION

1
2 1. In this action, Plaintiffs Center for Biological Diversity and Turtle Island
3 Restoration Network challenge a rule issued by Defendants Secretary of Commerce Gina
4 Raimondo and the National Marine Fisheries Service’s (collectively, “the Fisheries Service”) under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–
5 1891d, to open almost 2,000 square miles of leatherback sea turtle critical habitat to sablefish pot
6 fishing. 88 Fed. Reg. 83,830–61 (Dec. 1, 2023) (“Reopening Rule”). By refusing to reinitiate
7 consultation under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), on the impacts of the
8 Reopening Rule, the Fisheries Service is failing to ensure that the Washington/Oregon/California
9 sablefish pot/trap fishery (“Pot Fishery”) does not jeopardize the continued existence of
10 leatherback sea turtles or destroy or adversely modify their designated critical habitat.
11

12 2. If current population trends continue, the West Pacific leatherback may be
13 effectively extinct within 20 years. In waters off the U.S. West Coast, leatherback sea turtles face
14 numerous, ongoing threats including getting tangled up and killed in commercial pot gear.
15 Sablefish pots sit on the bottom of the ocean and are connected to each other in approximately
16 two-mile-long strings of 15 to 50 pots. The end of each of the strings is connected by a vertical
17 line to a surface buoy.

18 3. The Pot Fishery entangles leatherback sea turtles in the vertical lines connecting
19 the pots to a surface buoy. When a leatherback sea turtle gets tangled in sablefish pot lines, it can
20 no longer move, may be unable to reach the surface to breathe, and can drown while anchored in
21 place by the fishing gear.

22 4. The Fisheries Service is violating the law in several ways by continuing to
23 authorize this Pot Fishery without reinitiating and completing consultation under the Endangered
24 Species Act on its impacts to leatherbacks. The agency continues to rely on an inadequate and
25 outdated biological opinion it issued in 2012 on continuing operations of the Pacific Coast
26 Groundfish Fishery (“2012 Biological Opinion”). Reinitiation of consultation is required for
27 three reasons.

28 5. First, the Rule increases the risks of leatherback entanglements by allowing

1 dangerous vertical lines in nearly 2,000 square miles of leatherback critical habitat—areas the
2 Fisheries Service has determined are essential for the species’ survival—for the very first time.
3 Some of these areas are in the leatherbacks’ primary feeding habitat, including parts of the
4 Cordell Bank, Greater Farallones, and Monterey Bay national marine sanctuaries. The decade-
5 old biological opinion does not consider how the Pot Fishery’s operation in the newly opened
6 areas could adversely affect the species or its critical habitat.

7 6. Second, the number of leatherbacks killed or injured in fishing gear has exceeded
8 the level permitted in the incidental take statement in the existing biological opinion. Scientists
9 have indicated that protection of every reproductive leatherback is critical to its continued
10 existence.

11 7. Third, new information on leatherback’s declining abundance at nesting beaches
12 and in California’s waters indicates an increasing extinction risk and reveals that the Pot Fishery
13 may be affecting leatherbacks in a manner and to an extent not previously considered.

14 8. In sum, the Fisheries Service’s ongoing failure to reinstate consultation in the
15 face of this information is unlawful, and puts leatherbacks at further risk of extinction.

16 9. The Fisheries Service’s continued reliance on the fundamentally flawed 2012
17 Biological Opinion violates the procedural requirement to reinstate consultation and the
18 agency’s substantive duty to ensure its actions are not likely to jeopardize the continued
19 existence of leatherback sea turtles. 16 U.S.C. § 1536(a)(2).

20 10. The Fisheries Service violated the Magnuson-Stevens Fishery Conservation and
21 Management Act and the Administrative Procedure Act by issuing the Reopening Rule in
22 violation of the Endangered Species Act.

23 11. Accordingly, Plaintiffs seek a declaration that the Fisheries Service’s refusal to
24 reinstate and complete consultation on the impacts of the Pot Fishery violates the Endangered
25 Species Act, the Magnuson-Stevens Fishery Conservation and Management Act, and the
26 Administrative Procedure Act. Plaintiffs also seek an order requiring the Fisheries Service to
27 complete consultation under the Endangered Species Act by a date certain and to issue interim
28

1 measures until consultation is complete to protect leatherback sea turtles from further unlawful
2 death, injury, and other harm due to the Fisheries Service’s illegal actions and omissions.

3 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

4 12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal
5 question); 28 U.S.C. § 1346 (action against the United States); 28 U.S.C. § 1361 (action to
6 compel an officer of the United States to perform his or her duty); 28 U.S.C. §§ 2201–02 (power
7 to issue declaratory judgments and grant relief in cases of actual controversy); 16 U.S.C.
8 § 1540(g) (Endangered Species Act citizen suit provision); 16 U.S.C. § 1855(f) (review of
9 regulations promulgated under the Magnuson-Stevens Fishery Conservation and Management
10 Act); and 5 U.S.C. § 702 (Administrative Procedure Act).

11 13. The requested relief is proper under 16 U.S.C. § 1540(g)(1); 16 U.S.C.
12 § 1855(f)(1); 28 U.S.C. §§ 2201, 2202, 1361; and 5 U.S.C. §§ 704, 706.

13 14. Venue is proper in the Northern District of California pursuant to 16 U.S.C.
14 § 1540(g)(3)(A) because the violations are occurring in this district. Venue is also proper in this
15 district pursuant to 28 U.S.C. § 1391(e), as one or more Plaintiffs reside in this judicial district
16 and a substantial part of the events giving rise to the claims occurred here.

17 15. Pursuant to Civil Local Rule 3-2(c) and 3-2(d), the appropriate intradistrict
18 assignment of this case is either the San Francisco or Oakland division.

19 **PARTIES**

20 **Plaintiffs**

21 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the “Center”) is a national
22 nonprofit conservation organization that works through science, law, and policy to secure a
23 future for all species, great or small, hovering on the brink of extinction. The Center is dedicated
24 to the preservation, protection, and restoration of biodiversity and ecosystems throughout the
25 world. The Center has more than 84,000 members. The Center brings this action on behalf of its
26 members.

27 17. The Center’s Oceans Program focuses specifically on conserving marine
28 ecosystems and seeks to ensure that imperiled species are properly protected from destructive

1 practices in our oceans. In pursuit of this mission, the Center has been actively involved in
2 securing Endangered Species Act protections for imperiled sea turtles and protecting wildlife
3 from deadly and harmful entanglements in commercial fishing gear.

4 18. Center members live in and regularly visit ocean waters, bays, beaches, and other
5 coastal areas to observe, photograph, study and otherwise enjoy leatherback sea turtles and their
6 habitat. Center members have an interest in sea turtles and other wildlife and their Pacific Ocean
7 habitat, including waters off California, Oregon, and Washington. For example, Center members
8 frequently sail, kayak, and go on whale-watching tours in Gulf of the Farallones, Half Moon
9 Bay, Monterey Bay, and the Santa Barbara Channel to look for and photograph whales, sea
10 turtles, and other wildlife. Center members derive recreational, spiritual, professional, scientific,
11 educational, and aesthetic benefit from the presence of leatherback sea turtles and protection of
12 their habitat. One Center member has gone on numerous whale-watching trips leaving from San
13 Francisco, Monterey Bay and Long Beach hoping to see sea turtles, marine mammals, and
14 seabirds. He went whale watching in Monterey Bay in early October 2023 and searched for
15 leatherback sea turtles. He saw many humpback whales, killer whales, and birds. He enjoyed that
16 trip but felt greatly troubled that leatherback sea turtles are threatened with extinction and rarely
17 seen. He fears he may not have the chance of seeing them in the future. He and other Center
18 members intend to continue to look for Pacific leatherback sea turtles and enjoy their habitat on
19 an ongoing basis.

20 19. Entanglements of leatherback sea turtles in the Pot Fishery kill animals that
21 Center members enjoy viewing. The Fisheries Service's failure to comply with the Endangered
22 Species Act makes it less likely that Center members will be able to observe, study, and enjoy
23 these animals. Additionally, Center members reasonably fear that they will see a leatherback sea
24 turtle entangled in fishing gear when recreating and visiting beaches and ocean waters of
25 California, Oregon, and Washington.

26 20. Plaintiff TURTLE ISLAND RESTORATION NETWORK ("Turtle Island") is a
27 nonprofit 501(c)(3) corporation with its principal place of business in Olema, California. Turtle
28 Island works through scientific research; legal and policy advocacy; education; and restoration

1 efforts to protect marine and riparian wildlife globally. Turtle Island is dedicated to the
2 preservation, protection, and restoration of marine biodiversity, native species, and ecosystems.
3 Turtle Island’s approximately 160,000 supporters and members throughout the United States and
4 the world share a commitment to the study, protection, enhancement, conservation, and
5 preservation of the world’s marine and terrestrial ecosystems, including protection of sea turtles
6 and marine mammals.

7 21. Turtle Island has devoted considerable resources to studying and communicating
8 the threats to a wide range of threatened and endangered marine species. For example, Turtle
9 Island has actively advocated on all levels to protect leatherback and loggerhead sea turtles and
10 other species from both the use of harmful fishing gear and attempts to ramp up fishery efforts.
11 Turtle Island played a crucial role in having the Pacific Leatherback as California’s declared
12 California’s official “State Marine Reptile.” Turtle Island provides grant funding and support for
13 protection of nesting beaches in Papua New Guinea and Costa Rica.

14 22. Turtle Island’s members have researched, studied, observed, and sought
15 protection for many federally listed threatened and endangered species, including leatherback
16 and loggerhead sea turtles. Turtle Island’s members regularly use, and plan to continue to use,
17 waters of the Pacific Ocean and its wildlife for observation, research, aesthetic enjoyment, and
18 other recreational, scientific, and educational activities. Turtle Island’s members derive
19 educational, scientific, recreational, conservation, spiritual, commercial, and aesthetic benefits
20 from observing, photographing, producing film documentaries, and providing naturalist-led
21 interpretive activities to view leatherback sea turtles, marine mammals, and other marine species
22 in the wild. Turtle Island brings this action on behalf of its members.

23 23. An integral aspect of the Plaintiffs’ members’ use and enjoyment of leatherback
24 sea turtles is the expectation and knowledge that the species are in their native habitat. For this
25 reason, Plaintiffs’ use and enjoyment of sea turtles is entirely dependent on the continued
26 existence of healthy, sustainable populations in the habitat off the Pacific Coast. The Fisheries
27 Service’s failure to comply with applicable environmental laws deprives sea turtles of statutory
28 protections that are vitally important to the species’ survival and eventual recovery. The

1 Fisheries Service's failure to reinitiate consultation under the Endangered Species Act and
2 complete an adequate biological opinion diminishes the aesthetic, recreational, spiritual,
3 scientific, and other interests of Plaintiffs and their members because leatherback sea turtles are
4 more vulnerable to harm and less likely recover. Plaintiffs are therefore injured because
5 Plaintiffs' use and enjoyment of the sea turtles, and those areas inhabited by them, are threatened
6 by the Fisheries Service's issuance of the Reopening Rule without compliance with those
7 environmental laws.

8 24. The above-described cultural, spiritual, aesthetic, recreational, scientific,
9 educational, and other interests of Plaintiffs have been, are being, and, unless the relief prayed
10 herein is granted, will continue to be adversely affected and irreparably injured by the Fisheries
11 Service's continued refusal to comply with obligations under the Endangered Species Act, the
12 Magnuson-Stevens Fishery Conservation and Management Act, and other laws. The relief sought
13 in this case will redress these injuries.

14 25. In addition, Plaintiffs' members regularly comment on agency actions that affect
15 wildlife off the West Coast, including leatherback sea turtles, and regularly comment on and
16 participate in the Fisheries Service's decisions affecting threatened and endangered species.
17 Rules regarding fishing, the routing of ship traffic, the management of national marine
18 sanctuaries, and offshore energy development all have the potential to impact leatherback sea
19 turtles. The Fisheries Service's failure to comply with the Endangered Species Act and
20 Magnuson-Stevens Fishery Conservation and Management Act, specifically by failing to ensure
21 against jeopardy and adverse modification and by failing to adequately assess the impact of the
22 Pot Fishery, deprives Plaintiffs' members of these rights to understand and comment on the
23 impacts of agency activities on leatherback sea turtles, and causes them informational injuries
24 that would be redressed by a favorable decision.

25 **Defendants**

26 26. Defendant GINA RAIMONDO, U.S. Secretary of Commerce, is the highest-
27 ranking official within the Department of Commerce and, in that capacity, has responsibility for
28 its administration and implementation of the Endangered Species Act and the Magnuson-Stevens

1 Fishery Conservation and Management Act, and for compliance with all other federal laws
2 applicable to the Department of Commerce. She is sued in her official capacity.

3 27. Defendant NATIONAL MARINE FISHERIES SERVICE is an agency within the
4 Department of Commerce. The National Marine Fisheries Service is the agency that implements
5 the Endangered Species Act and the Magnuson-Stevens Fishery Conservation and Management
6 Act.

7 **LEGAL BACKGROUND**

8 **Endangered Species Act**

9 28. With the Endangered Species Act, Congress intended endangered species to be
10 afforded the highest of priorities. The Endangered Species Act's purpose is "to provide a means
11 whereby the ecosystems upon which endangered species and threatened species depend may be
12 conserved, [and] to provide a program for the conservation of such endangered species and
13 threatened species." 16 U.S.C. § 1531(b).

14 29. Under the Endangered Species Act, conservation means "to use and the use of all
15 methods and procedures which are necessary to bring any endangered species or threatened
16 species to the point at which the measures provided pursuant to this Act are no longer
17 necessary." *Id.* § 1532(3).

18 30. To receive the full protections of the Endangered Species Act, a species must first
19 be listed by the Secretary of the Commerce, through the Fisheries Service, as "endangered" or
20 "threatened." *Id.* at § 1533. The Endangered Species Act defines an "endangered species" as
21 "any species which is in danger of extinction throughout all or a significant portion of its range."
22 *Id.* § 1532(6). A "threatened" species is "any species which is likely to become an endangered
23 species within the foreseeable future throughout all or a significant portion of its range." *Id.*
24 § 1532(20).

25 31. Recognizing the importance of timely habitat protections to the conservation and
26 recovery of endangered species, the Endangered Species Act requires the designation of critical
27 habitat concurrently with listing a species. *Id.* § 1533(a)(3)(A)(i); *see also id.* § 1533(b)(6)(C).
28 Habitat designated as critical habitat is essential to the species' survival and recovery. *Id.*

1 § 1532(5).

2 32. The Endangered Species Act generally prohibits any person, including both
3 private persons and federal agencies, from “taking” any endangered species. 16 U.S.C.
4 § 1538(a)(1). The Endangered Species Act defines “take” to mean “harass, harm, pursue, hunt,
5 shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.*
6 § 1532(19).

7 33. Once a species is listed and critical habitat is designated, Section 7(a)(2) of the
8 Endangered Species Act, 16 U.S.C. § 1536(a)(2), establishes a critical component of the
9 statutory scheme to conserve endangered and threatened species. It requires that every federal
10 agency determine whether its actions “may affect” any endangered or threatened species. If so,
11 the action agency must typically formally consult with the Fisheries Service as part of its duty to
12 “insure that [its] action is . . . not likely to jeopardize the continued existence of any endangered
13 species or threatened species or result in the destruction or adverse modification of” habitat that
14 has been designated as critical for such species. *Id.* § 1536(a)(1), (2); 50 C.F.R. § 402.14 (2019).

15 34. The term “jeopardize” is defined as an action that “reasonably would be expected,
16 directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a
17 listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”
18 50 C.F.R. § 402.02 (2019). Recovery is defined as “improvement in the status of listed species
19 to the point at which listing is no longer appropriate.” *Id.*

20 35. “Destruction or adverse modification means a direct or indirect alteration that
21 appreciably diminishes the value of critical habitat as a whole for the conservation of a listed
22 species.” *Id.*

23 36. At the completion of formal consultation, the Fisheries Service issues a biological
24 opinion that determines if the agency action is likely to jeopardize the species or adversely
25 modify its critical habitat. 16 U.S.C. § 1536(b)(3)–(4); 50 C.F.R. § 402.14(h) (2019).

26 37. In forming its biological opinion, the Fisheries Service must consider the “current
27 status . . . of the listed species or critical habitat;” the “effects of the action;” and the “cumulative
28 effects.” 50 C.F.R. § 402.14(g)(2)–(4) (2019). In doing so, it may only use “the best scientific

1 and commercial data available.” 16 U.S.C. § 1536(a)(2).

2 38. “Effects of the action” include “all consequences to listed species or critical
3 habitat” from a proposed action. 50 C.F.R. § 402.02 (2019). The “environmental baseline”
4 includes “the past and present impacts of all Federal, State, or private actions and other human
5 activities in the action area, the anticipated impacts of all proposed Federal projects in the action
6 area that have already undergone formal or early section 7 consultation, and the impact of State
7 or private actions which are contemporaneous with the consultation in process.” *Id.* “Cumulative
8 effects” include “future State or private activities, not involving Federal activities, that are
9 reasonably certain to occur within the action area.” *Id.*

10 39. Thus, in issuing a biological opinion, the Fisheries Service must consider not just
11 its isolated share of responsibility for impacts to the species traceable to the activity that is the
12 subject of the biological opinion, but also the effects of that action when added to all other
13 activities and influences affecting that species.

14 40. After the Fisheries Service has added the direct and indirect effects of the action
15 to the environmental baseline and cumulative effects, it must make its determination of whether
16 the action is likely to jeopardize the continued existence of a listed species or result in the
17 destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3), (b)(4); 50 C.F.R.
18 § 402.14(h) (2019).

19 41. A biological opinion that concludes an agency action is not likely to jeopardize
20 the continued existence of a listed species but is reasonably certain to result in take incidental to
21 the agency action must include an incidental take statement. 16 U.S.C. § 1536(b)(4).

22 42. The take of a listed species in compliance with the terms of a valid incidental take
23 statement is not prohibited under section 9 of the Endangered Species Act. *Id.* § 1536(o)(2); 50
24 C.F.R. § 402.14(i)(5) (2019).

25 43. The incidental take statement must specify the amount or extent of incidental
26 taking on such listed species, “reasonable and prudent measures” that the Fisheries Service
27 considers necessary or appropriate to minimize such impact and set forth “terms and conditions”
28 that must be complied with by the action agency to implement the reasonable and prudent

1 measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i) (2019).

2 44. If the Fisheries Service determines in its biological opinion that the action is likely
3 to jeopardize the continued existence of a listed species, the biological opinion must include
4 “reasonable and prudent alternatives” to the action that will avoid jeopardy. 16 U.S.C.
5 § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(2) (2019).

6 45. Regardless of the conclusion reached in the biological opinion, the agency
7 undertaking the federal action has an independent duty to ensure that its actions are not likely to
8 jeopardize the continued existence of listed species or adversely modify their designated critical
9 habitat. 16 U.S.C. § 1536(a)(2). An agency’s reliance on a legally flawed biological opinion to
10 authorize an action does not satisfy its substantive duty to prevent jeopardy.

11 46. The Endangered Species Act specifies that Section 7 consultations must typically
12 be completed within ninety days after initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e)
13 (2019). The substantive duty to ensure against jeopardy of listed species and adverse
14 modification of critical habitat remains in effect regardless of the status of the consultation.

15 **Magnuson-Stevens Fishery Conservation and Management Act**

16 47. The Magnuson-Stevens Act governs fishing by U.S. vessels. 16 U.S.C. § 1801.

17 48. The Magnuson-Stevens Act accomplishes this, in part, through Regional Fishery
18 Management Councils, which propose Fishery Management Plans (“Plans”) and Plan
19 amendments to regulate fishing within their region. 16 U.S.C. § 1852(h)(1). The Fisheries
20 Service must approve each Plan or Plan amendment before it takes effect. *See id.* § 1854(a). The
21 Fisheries Service may approve a Plan or Plan amendment only if it is consistent with applicable
22 laws, including the Endangered Species Act. *Id.* §§ 1853(a)(1)(C), 1854(a)(1)(A), (3).

23 49. The Magnuson-Stevens Act provides for judicial review of the Fisheries Service’s
24 actions implementing a fishery management plan. 16 U.S.C. § 1855(f).

25 **Administrative Procedure Act**

26 50. The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 551–706, provides for
27 judicial review of final agency action. Under the APA, a person may seek judicial review to
28 “compel agency action unlawfully withheld or unreasonably delayed.” *Id.* § 706(1). Additionally,

1 the APA requires that a reviewing court “hold unlawful and set aside agency action, findings,
2 and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in
3 accordance with law.” *Id.* § 706(2)(A).

4 **FACTUAL AND PROCEDURAL BACKGROUND**

5 **Imperiled Leatherback Sea Turtles**



15 Credit: National Marine Fisheries Service

16 51. The Fisheries Service listed the leatherback sea turtle as endangered throughout
17 its range in 1970. 50 C.F.R. § 224.101(h) (1970). The agency designated its critical habitat on
18 September 26, 1978 (43 Fed. Reg. 43,688), revised that designation on March 23, 1979 (44 Fed.
19 Reg. 17,710), and expanded the designation in 2012 to add waters off the U.S. West Coast. 50
20 C.F.R. § 226.207 (2012).

21 52. The Fisheries Service completed a comprehensive status review of leatherback
22 sea turtles in 2020. 85 Fed. Reg. 48,332 (Aug. 10, 2020). The Fisheries Service did not propose
23 changes to the existing global listing of leatherback sea turtles as endangered. *Id.* However, it
24 found that seven populations would meet the discreteness and significance criteria for
25 recognition as distinct population segments under the Endangered Species Act. *Id.*

26 53. One of those populations, the West Pacific leatherback sea turtle, includes
27 individuals that migrate from nesting beaches in Indonesia, Papua New Guinea, and the Solomon
28 Islands to forage in the eastern Pacific Ocean, including in waters off the U.S. West Coast.

1 Approximately 38 to 57 percent of West Pacific leatherback sea turtles migrate to West Coast
2 foraging grounds, including Central California waters.

3 54. Juvenile West Pacific leatherback sea turtles may swim thousands of miles
4 searching for abundant food sources, such as those in the central California ecoregion. The West
5 Pacific leatherback sea turtles that migrate to the eastern Pacific may forage there seasonally for
6 a few years before returning to nest.

7 55. As of 2017, the nesting female abundance of the West Pacific leatherbacks was
8 just 1,053 nesting females (or 1,442 adults based on a 73 percent female-biased sex ratio). This
9 places these leatherbacks “at risk for environmental variation, genetic complications,
10 demographic stochasticity, negative ecological feedback, and catastrophes.” 85 Fed. Reg. at
11 48,389 (status review). The West Pacific leatherback’s small population size is a major factor in
12 its extinction risk. *Id.*

13 56. From 1984 to 2011, West Pacific leatherback sea turtle’s population declined by
14 as much as 78.3 percent. *Id.* at 48,390. West Pacific leatherbacks’ abundance has been declining
15 about six percent annually through 2017. *Id.*

16 57. Assuming the decline of six percent per year continues, the Fisheries Service’s
17 2020 population trend model predicts that West Pacific leatherbacks will decline to 50 percent of
18 their 2017 abundance in about 10 years (starting in 2021) and to 25 percent in about 20 years. In
19 other words, the West Pacific leatherback sea turtle population will decline by 75 percent
20 between the years 2021 and 2041, or 263 nesting females (or 334 adults based on a 73 percent
21 female-biased sex ratio). At that point it will be difficult if not impossible for the leatherback to
22 avoid extinction. The 2020 model’s projected decline is the best available data.

23 58. Fisheries Service scientists have estimated that mortality of leatherbacks off the
24 U.S. West Coast must be kept to fewer than one death every six years to avoid delaying the
25 population’s recovery.

26 59. Consistent with this declining trend, leatherback abundance off central California
27 declined 5.6 percent annually over 28 years, which corresponds to an overall decline of 80
28 percent. *Id.* at 48,390. From 1990 to 2003, the average estimate of leatherbacks foraging off

1 central California was 128. From 2004 to 2017, the average number dropped to 55. Leatherbacks
2 foraging off central California are adults or sub-adults.

3 60. The primary threat to leatherback sea turtles globally is legal and illegal harvest of
4 turtles and eggs. *Id.* at 48,392. Abundance and productivity are further reduced by coastal and
5 open-ocean fisheries, internationally and in the United States. Other threats include vessel
6 strikes, pollution, and natural disasters. Climate change is an increasing threat.

7 61. Loss of West Pacific leatherback sea turtles would result in a significant gap in
8 the range of leatherback sea turtles as a species. The potential for its imminent extinction
9 warrants extreme caution in assessing impacts of fisheries entanglements and authorizing fishing
10 activities.

11 62. The Fisheries Service identified prey—specifically jellyfish and other gelatinous
12 animals—of “sufficient condition, distribution, diversity, abundance and density necessary to
13 support individual as well as population growth, reproduction, and development of leatherbacks”
14 as the primary constituent element of critical habitat. 50 C.F.R. § 226.207(b)(4) (2012). The
15 designated critical habitat included three specific geographic areas that met the definition of
16 critical habitat and had conservation benefits to the species that outweighed the benefits of
17 excluding those areas.

18 63. The three specific geographic areas designated are used regularly for foraging and
19 are identified in order of higher to lower conservation value:

20 Area 1: The waters south of Point Arena to Point Sur, California, extending offshore to
21 the 200-meter depth contour. This area is a principal California foraging area
22 characterized by high densities of primary prey species.

23 Area 2: The waters between Cape Flattery, Washington, and Cape Blanco, Oregon,
24 extending offshore to the 2000-meter isobath. This area is the principal

25 Oregon/Washington foraging area and includes important habitat associated with the
26 Columbia River Plume, and Heceta Bank, Oregon.

27 Area 7: The waters offshore from Point Arena to Point Sur, California (i.e., between the
28 200–3000 meter depth contours), and waters between the coastline and the 3000 meter

1 depth contour from Point Sur to Point Arguello, California. Leatherbacks commonly
2 utilize these offshore waters when jellyfish availability in Area 1 is poor and as a region
3 of passage to and from Area 1. The southern portion of the region includes Morro and
4 Avila bays, where large densities of brown sea nettles have been observed seasonally.
5 77 Fed. Reg. 4170, 4,189–90 (Jan. 26, 2012).

6 64. While all three of these areas scored a high conservation value—consistent with
7 scientific literature and observations of a high level of leatherback foraging in these areas—Area
8 1 was the only area given the highest score for prey density and prey aggregating mechanism and
9 thus scored higher than the other two areas. 77 Fed. Reg. at 4,193. Area 1 is also the smallest of
10 the three areas, encompassing 3,807 square miles. *Id.* at 4,192 (Table 1).

11 65. The Fisheries Service chose Pacific leatherback sea turtles as one of just ten
12 “Species in the Spotlight,” which are among the most at-risk of extinction.

13 **The Pot Fishery**

14 66. The Fisheries Service implements the Pacific Coast Groundfish Fishery
15 Management Plan, 50 C.F.R. § 660.10 (2010), which uses measures like quotas, area restrictions,
16 and gear specifications to manage over 100 different species that primarily live on or near the
17 ocean bottom. Sablefish are one of six species of “groundfish” covered in the Plan.

18 67. The Washington/Oregon/California Pot Fishery uses pots (or traps), heavy-duty
19 fishing line, and buoys. The gear is configured so that multiple heavy pots are linked along the
20 seafloor, with ends marked at the surface by one or more buoys attached to a line that runs
21 through the water column. The pots can weigh hundreds of pounds.

22 68. Approximately 155 vessels fish in the Pot Fishery off Washington, Oregon, and
23 California. From 2015 to 2019, those vessels fished an annual average of approximately 75,000
24 pots.

25 69. Landings indicate that concentrated fishing areas exist off Astoria, Oregon;
26 Newport, Oregon; Fort Bragg, California, and San Francisco, California. While fishing occurs
27 year-round, landings of groundfish in the Pot Fishery are highest from May through December.
28 This overlaps with West Pacific leatherback’s seasonal migration to feed off the West Coast

1 because the leatherbacks arrive in spring. Central California is the principal foraging grounds for
2 West Pacific leatherback sea turtles, so fishing in this area at this time increases the Pot Fishery's
3 risk of entanglements.

4 70. Various threats exist where the Pot Fishery operates. Leatherbacks have been
5 entangled in coastal pot/trap fisheries and the California drift gillnet fishery, killed by vessel
6 strikes, entrained in power plants, and taken through scientific research. The most recent
7 documented mortality occurred on November 24, 2023, when a leatherback sea turtle was found
8 dead, entangled in a lost or abandoned commercial California Dungeness crab pot.

9 71. In 2020, the Fisheries Service said the California Dungeness crab pot fishery may
10 be a newly emerging threat to leatherback sea turtles. 85 Fed. Reg. at 48,397. Leatherback
11 entanglements in the California Dungeness crab pot fishery were documented in 2015, 2016, and
12 2023. One dead leatherback was found in 2018 floating in pot fishing gear for rock crabs.

13 72. Some vessels fish in both the Dungeness crab pot fishery and the sablefish Pot
14 Fishery. For example, some of the same vessels fished in both the Pot Fishery and the Dungeness
15 crab pot fishery in 2015 and 2016, the years when leatherback sea turtles were entangled in
16 Dungeness crab gear. The Dungeness crab fishery closure in 2016, due to naturally occurring
17 toxins, caused additional vessels from the Dungeness crab fishery to switch to the Pot Fishery for
18 that season.

19 73. Entanglement reports are opportunistic and are likely biased towards areas of
20 higher human populations and areas where leatherback sea turtles are closer to shore. Most pot
21 fishing vessels, like those used in the California Dungeness crab pot fishery, do not have wildlife
22 observers onboard. Others, including the Pot Fishery, have observers on a very low percentage of
23 the vessels. The Fisheries Service has not required gear marking to identify the Pot Fishery's
24 gear if it is lost or abandoned.

25 *The Pot Fishery's Leatherback Sea Turtle Entanglements*

26 74. The 2012 Biological Opinion assesses the effects of the Pot Fishery on
27 endangered leatherback sea turtles and their critical habitat as well as on other endangered and
28 threatened species. The 2012 Biological Opinion defines the agency action as the Fisheries

1 Service's continuing implementation of the Pacific Coast Groundfish Fishery Management Plan.

2 75. The 2012 Biological Opinion found that the Pot Fishery's take of leatherback sea
3 turtles would be ongoing due to its continued operation. It anticipated the Pot Fishery would
4 injure or kill 1.9 leatherback sea turtles over five years (or 0.38 leatherback sea turtles annually).

5 76. The 2012 Biological Opinion calculated this estimated take of leatherback sea
6 turtles by including in its calculations the interactions observed in the Pot Fishery and those
7 attributable to unidentifiable fishing gear. The Fisheries Service wrote that there "is uncertainty
8 about the number of past entanglements attributed to the [Pot Fishery], because most of the
9 fishing effort identified as an entanglement risk was not observed . . . [and] entanglements
10 reported through stranding networks could not be attributed to specific fisheries." 2012
11 Biological Opinion at 104. The Fisheries Service's analysis included one leatherback mortality
12 observed in 2008 from the Pot Fishery and two leatherback sea turtles entangled in gear that
13 could not be attributed to a specific fishery, resulting in an annual average of 0.38 leatherback
14 takes between 2002 and 2010.

15 77. Consistent with this method, the 2012 Biological Opinion's incidental take
16 statement specifies that "unidentified gear entanglements reported to stranding networks would
17 be counted against these take limits in addition to known leatherback sea turtle entanglements in
18 gear of" the Pot Fishery, until minimum observer coverage levels are achieved. *Id.* at 123. The
19 2012 Biological Opinion does not identify minimum observer coverage levels.

20 78. The Fisheries Service has said that it plans to maintain historical wildlife observer
21 rates in the Pot Fishery, which is 3–12 percent of all the landings. It also said that due to this low
22 observer coverage, conclusive statements about leatherback turtle bycatch cannot be made
23 without more data on the overlap between the Pot Fishery and leatherback sea turtles.

24 79. During the period 2015 to 2019, the Pot Fishery exceeded the 2012 Biological
25 Opinion's incidental take statement's limit of 0.38 leatherback sea turtles per year. The Fisheries
26 Service reported leatherback sea turtle strandings in 2015 and 2019 that had evidence of fishery
27 interactions. These two incidents result in an annual average take of 0.40 leatherback sea turtles
28 over five years. Three more strandings were attributed to crab pot fisheries in this period. In

1 contrast, the 2012 Biological Opinion reported three leatherback sea turtles in pot gear in
2 California reported from 2001 to 2008, a nine-year period.

3 80. More entanglements in pot fishing gear combined with a declining West Pacific
4 leatherback abundance means the impact of pot fishing gear on the leatherback's extinction risk
5 is higher than the Fisheries Service analyzed in its 2012 Biological Opinion.

6 **The Reopening Rule Increases Entanglement Risk and Adversely Modifies Critical Habitat**

7 81. On December 1, 2023, the Fisheries Service published a final rule implementing
8 regulations for Amendment 32 to the Pacific Coast Groundfish Fishery Management Plan
9 ("Reopening Rule") that will open almost 2,000 square miles of leatherback sea turtle critical
10 habitat to the Pot Fishery. 88 Fed. Reg. at 83,830. The Reopening Rule specifically allows non-
11 trawl fishing gear—including sablefish pot gear—into parts of the Non-Trawl Rockfish
12 Conservation Area ("Conservation Area") that have been closed since the early 2000s to protect
13 overfished rockfish, which are a type of groundfish. The Reopening Rule created smaller areas
14 that will remain closed to continue protecting vulnerable fish species, as well as to protect critical
15 groundfish habitats like rocky reefs, corals, and sponges.

16 82. The Reopening Rule generally allows fishing closer to shore, specifically
17 allowing fishing to a boundary that approximates a depth contour of 137 meters (75 fathoms).
18 The previous boundary followed either the 183-meter contour off Oregon, or the 183-meter or
19 229-meter contour off California, depending on the latitude. No change in the Conservation
20 Areas' boundaries was made in waters off Washington or in the Southern California Bight, an
21 area spanning from Point Conception in Santa Barbara County to just south of San Diego.

22 83. The Reopening Rule opens to the Pot Fishery approximately 2,414 square miles
23 of waters off California and Oregon, 1,942 square miles of which overlap with leatherback
24 critical habitat. The Pot Fishery's operation over a larger area of leatherback critical habitat
25 increases the risk of leatherback entanglement and adversely modifies the critical habitat by
26 lowering its conservation value.

27 84. The Pot Fishery can obstruct the leatherback sea turtles' movement and thereby
28 prevent or impede prey consumption. The Fisheries Service designated critical habitat for

1 leatherbacks in this area because of the availability of prey and the likelihood that leatherback
2 sea turtles would be foraging in this area. Opening this habitat to the Pot Fishery increases the
3 risk of leatherback entanglements.

4 85. It also destroys and adversely modifies the designated critical habitat itself and
5 diminishes its value for leatherback conservation. The occurrence of prey items of sufficient
6 quality necessary to support “growth, reproduction, and development of leatherbacks” is the
7 primary constituent element of critical habitat. 50 C.F.R. § 206.227(b)(4). If those prey items are
8 less accessible or inaccessible because of fishing gear, it diminishes the value of the critical
9 habitat. The distribution, diversity, abundance, and density of the prey items may not be
10 sufficient to support leatherback growth, reproduction, and development if the Pot Fishery is
11 coextensive with designated critical habitat.

12 86. In the *Federal Register* notice for the Reopening Rule, the Fisheries Service
13 determined there are no anticipated impacts on endangered leatherback sea turtles beyond those
14 already considered in the 2012 Biological Opinion and therefore re-initiation is not warranted. 88
15 Fed. Reg. at 83,837. The Fisheries Service further said that it is not aware of any information that
16 allowing the Pot Fishery in coastal waters “would create more potential for sea turtle interactions
17 compared to fishing in” deeper waters, or in other words, than fishing beyond the previous
18 Conservation Areas’ 183- or 229- meter boundary. *Id.*

19 87. Yet the Fisheries Service explicitly designated California’s leatherback critical
20 habitat into two areas on either side of the 200-meter-depth contour. *See* 50 C.F.R.
21 § 226.207(b)(1). This indicates that the 200-meter-depth contour is an important line for
22 leatherback sea turtles. The coastal, nearshore waters of Area 1 are “the principal foraging area
23 off the coast of California.” 77 Fed. Reg. at 4,189. The offshore waters, while essential to the
24 conservation of the species, have a lower conservation value compared to the coastal waters. *Id.*
25 at 4,193 (Table 2 (comparing Area 1 to Area 7)).

26 88. The Reopening Rule’s boundary change in California’s leatherback critical habitat
27 allows the Pot Fishery to set pots in 407 square miles of the leatherback’s principal feeding area.
28 *See* Figure 1 below. This increases the risk of leatherback entanglement, injury, and death and

adversely modifies its critical habitat.

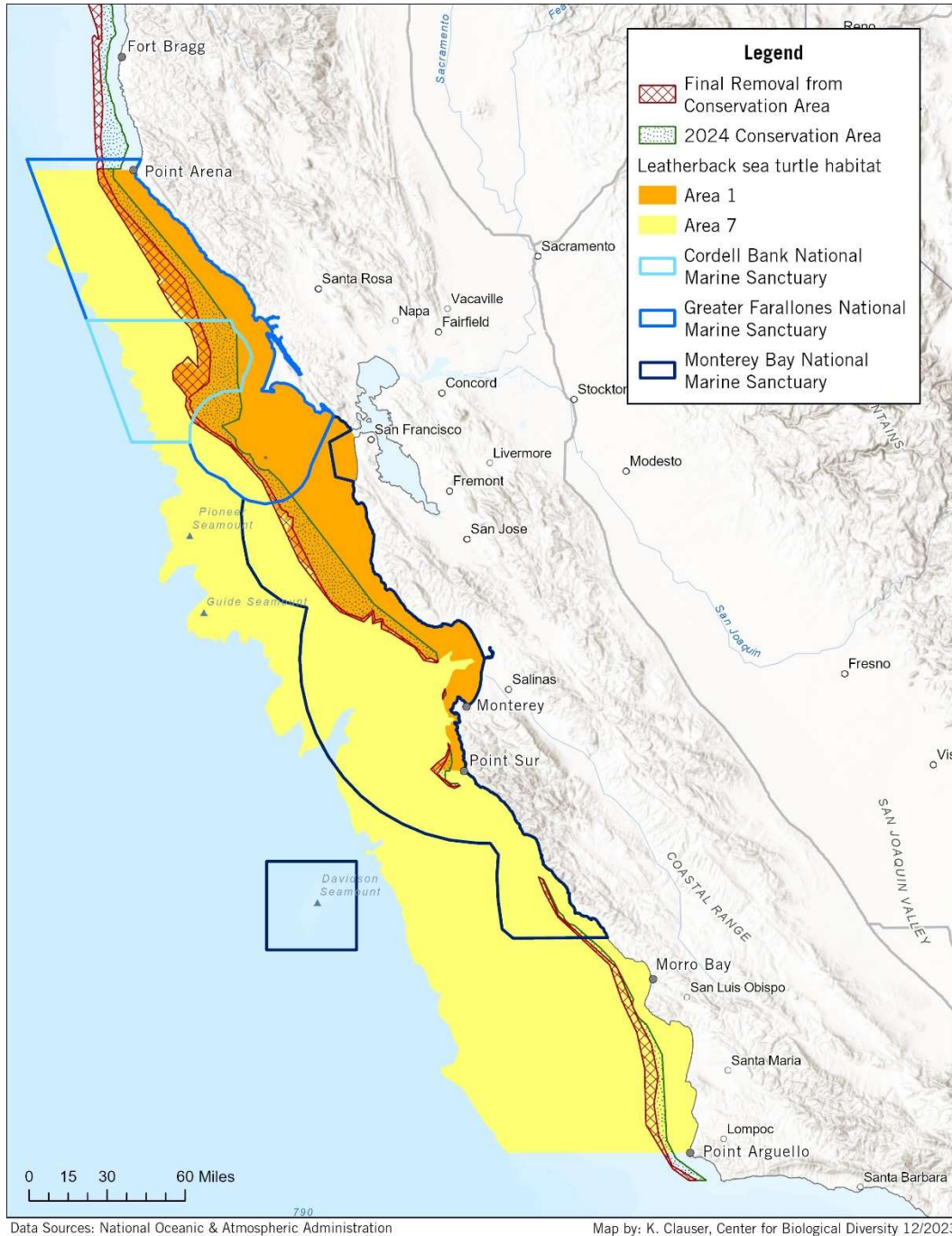


Figure 1. Leatherback sea turtle critical habitat in California consists of Area 1 in orange, the principal feeding area, and Area 7 in yellow, the secondary feeding area. The cross-hatch indicates Conservation Areas the Fisheries Service reopened to sablefish pot fishing.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

**Violation of the Endangered Species Act
(Failure to reinitiate and complete consultation)**

89. Paragraphs 1 through 88 are hereby realleged as though set out in full.

90. The Fisheries Service retains ongoing discretionary control and involvement over the Pot Fishery. The Fisheries Service’s authorization, permitting, oversight, and management of the Pot Fishery, including issuing the Reopening Rule, constitute agency “action” that trigger consultation under Section 7 of the Endangered Species Act. 16 U.S.C. § 1536; 50 C.F.R. §§ 402.02 (2019), 402.03 (2009).

91. The Fisheries Service’s 2012 Biological Opinion and incidental take statement for leatherback sea turtles are no longer valid the reasons explained herein, including:

- that the Reopening Rule increases the risk of leatherback entanglements and destroys or adversely modifies leatherback critical habitat in a way that was not considered in the 2012 Biological Opinion. 50 C.F.R. § 402.16 (2019);
- that from 2015 to 2019 the amount of leatherback sea turtles entangled exceeded the incidental take statement’s limit; and
- new information—including that the leatherback abundance off the West Coast has declined almost six percent annually from 1990 to 2017—shows the effects of the action may affect leatherback sea turtles and their critical habitat in a manner or to an extent not previously considered.

92. The Fisheries Service has failed to reinitiate and complete consultation on the impacts of the Pot Fishery and the Reopening Rule on Pacific leatherback sea turtles and their designated critical habitat. This violates Section 7(a)(2) of the Endangered Species Act and its implementing regulations. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14 (2019), 402.16 (2019).

93. The Fisheries Service’s refusal to reinitiate and complete consultation on the impacts of the Pot Fishery and Reopening Rule on Pacific leatherback sea turtles and their critical habitat constitutes arbitrary and capricious agency action, agency action “unlawfully

1 withheld or unreasonably delayed,” and agency action made “without observance of procedure
2 required by law” under the Administrative Procedure Act. 5 U.S.C. § 706(1), (2)(A), (2)(D).

3 **SECOND CLAIM FOR RELIEF**

4 **Violation of the Endangered Species Act and Administrative Procedure Act**
5 **(Unlawful Reliance on 2012 Biological Opinion)**

6 94. Paragraphs 1 through 88 are hereby realleged as though set out in full.

7 95. The Fisheries Service has a duty as the action agency authorizing and managing
8 the Pot Fishery to ensure that its actions are not likely to jeopardize the continued existence of
9 any listed species, including endangered leatherback sea turtles, or result in the destruction or
10 adverse modification of the critical habitat of such species. 16 U.S.C. §1536(a)(2).

11 96. The Fisheries Service cannot rely on the outdated 2012 Biological Opinion to
12 meet its duty to ensure that its authorization and management of the Pot Fishery, including
13 issuance of the Reopening Rule, will not jeopardize the continued existence of leatherback sea
14 turtles or result in the destruction or adverse modification of their critical habitat.

15 97. The Fisheries Service’s continued authorization and management of the Pot
16 Fishery based on the 2012 Biological Opinion violates Section 7(a)(2) of the Endangered Species
17 Act, 16 U.S.C. § 1536(a)(2), and reliance on the 2012 Biological Opinion is arbitrary, capricious,
18 an abuse of discretion, and not in accordance with law, contrary to the Administrative Procedure
19 Act, 5 U.S.C. § 706(2).

20 **THIRD CLAIM FOR RELIEF**

21 **Violations of the Magnuson-Stevens Fishery Conservation and**
22 **Management Act and Administrative Procedure Act**
23 **(Unlawful Issuance of the Reopening Rule)**

24 98. Paragraphs 1 through 88 are hereby realleged as though set out in full.

25 99. The Reopening Rule opening approximately 2,411 square miles to the Pot Fishery
26 is a final agency action within the meaning of the Administrative Procedure Act.

27 100. For the reasons set forth above, the Reopening Rule is not consistent with
28 applicable law. The Fisheries Service’s decision to finalize and promulgate the Reopening Rule
despite its inconsistency with applicable law exceeds its authority under the Magnuson-Stevens

1 Fishery Conservation and Management Act and is arbitrary, capricious, an abuse of discretion,
2 not in accordance with law, and/or without observance of procedure required by law within the
3 meaning of the APA, 5 U.S.C. § 706(2).

4 **REQUEST FOR RELIEF**

5 For the reasons stated above, Plaintiffs respectfully request that the Court:

6 1. Declare that the Fisheries Service has violated and is violating the Endangered
7 Species Act, its implementing regulations, and the Administrative Procedure Act by failing to
8 reinitiate and complete consultation on the Pot Fishery's Reopening Rule;

9 2. Declare that the Fisheries Service is in violation of its Endangered Species Act
10 Section 7(a)(2), 16 U.S.C. § 1536(a)(2), duty to ensure that the agency's continued authorization
11 and management of the Pot Fishery is not likely to jeopardize the continued existence of
12 leatherback sea turtles or destroy or adversely modify their critical habitat;

13 3. Declare that the Fisheries Service has violated and is violating the Magnuson-
14 Stevens Fishery Conservation and Management Act and the Administrative Procedure Act by
15 issuing the Reopening Rule;

16 4. Vacate and set aside the Reopening Rule's provisions that open approximately
17 2,411 square miles to the Pot Fishery under the Magnuson-Stevenson Fishery Conservation and
18 Management Act;

19 5. Order Defendants to complete an Endangered Species Act consultation and issue
20 a new, legally valid biological opinion for leatherback sea turtles within 90 days;

21 6. Issue any appropriate injunctive relief, including ordering Defendants to
22 implement mitigation measures to reduce the Pot Fishery's impacts to leatherback sea turtles and
23 their critical habitat pending completion of consultation;

24 7. Award Plaintiffs their litigation costs, including reasonable attorneys' fees; and

25 8. Provide such other relief as the Court deems just and proper.
26
27
28

1 DATE: December 28, 2023

Respectfully Submitted,

2 /s/ Catherine Kilduff

3 Catherine W. Kilduff (CA Bar No. 256331)

4 David Derrick (CA Bar No. 316745)

5 Julie Teel Simmonds (CA Bar No. 208282)

CENTER FOR BIOLOGICAL DIVERSITY

1212 Broadway, Ste. #800

6 Oakland, CA 94612

Phone: (510) 844-7100

7 Facsimile: (510) 844-7150

ckilduff@biologicaldiversity.org

8 dderrick@biologicaldiversity.org

9 jteelsimmonds@biologicaldiversity.org

10 *Attorneys for Plaintiffs Center for Biological*
11 *Diversity and Turtle Island Restoration Network*