

descriptions of surveys). However, existing data sets do constitute the best available scientific information for the species.

While our conservative approach to analyzing that information is more likely to produce results indicating that significant declining splittail population trends exist, we believe that using this "worst case" scenario in analyzing the impacts reported in the section entitled Summary of Factors Affecting the Species is most likely to result in a listing finding that is robust.

Because we have chosen to adopt the CDFG/USBR MLR Model jointly submitted by CDFG and USBR (as our primary basis for abundance analyses), and are no longer using our analysis in our August 17, 2001 notice (66 FR 43145), specific comments on our analysis in our August 17, 2001 notice (66 FR 43145) will not be addressed in the section entitled Summary of Comments and Recommendations.

#### *Previous Federal Action*

On February 8, 1999, we published a final rule listing the splittail as threatened under the Act (64 FR 5963). Please refer to the final rule for a discussion of Federal actions prior to the publication of the final rule. At the time of our final determination of threatened status for the splittail, the splittail population had declined in both numbers and range and was primarily threatened by changes in water flow and water quality resulting from the export of water from the Sacramento and San Joaquin Rivers, periodic prolonged drought, loss of shallow water habitat, introduced aquatic species, and agricultural and industrial pollutants.

Subsequent to the publication of the final rule, plaintiffs in the cases *San Luis & Delta-Mendota Water Authority v. Anne Badgley, et al.* and *State Water Contractors, et al. v. Michael Spear, et al.* commenced action in the Federal Eastern District Court of California, challenging the listing of the splittail as threatened, alleging various violations of the Act and of the Administrative Procedure Act (5 U.S.C 551 *et seq.*), specifically that we: (1) Failed to use the best scientific and commercial data available; (2) ignored all pre-1980 and post-1992 data available and that we used only selected data from the 1980 to 1992 period; (3) did not publish a summary of the available data, which data we considered, and the relationship between the data and our decision on the final rule; and (4) promulgated the final rule in a manner that was arbitrary, capricious, and not in accordance with law, in that the splittail

did not meet the definition of a threatened species as set forth in the Act.

On June 23, 2000, the Court rendered summary judgment in the two cases in favor of the plaintiffs, finding that our promulgation of the final rule listing the splittail as threatened was unlawful. On September 22, 2000, the court remanded the determination of whether or not the splittail is a threatened or endangered species to us. The court ordered us to re-evaluate our final determination and publish a new finding within 6 months of the date of the remand order, and kept the rule in effect during that period. The court used its equitable powers to retain the protections of the Act for the species during the remand of the rule to the Service.

On January 12, 2001, we reopened the comment period for 30 days to seek information regarding the splittail's status, abundance and distribution, as well as information regarding issues identified by the District Court in its June 23, 2000, judgment (66 FR 2828). At that time, we were subject to a court-ordered deadline of March 22, 2001. On March 16, 2001, we received an extension from the District Court until June 22, 2001, so that we could reopen the comment period. Subsequent to that extension, we reopened the comment period for the second time since the remand, from May 8, 2001 to June 7, 2001 (66 FR 23181). On June 28, 2001, we received an additional extension from the court so that the comment period could be reopened and we could have additional time to obtain reviews of the revised statistical analyses which we employed in response to prior comments. The comment period was then opened on August 17, 2001 (66 FR 43145); while the court ordered decision date was established as January 31, 2002. We later received an additional extension from the court until October 15, 2002, so that we could seek comments on the MLR Model submitted by CDFG and USBR during the August 17, 2001, comment period. On March 21, 2002, we reopened the comment period for the fourth time since the remand (67 FR 13095) and on April 1, 2002, we corrected the duration of the comment period to reflect 60 days (67 FR 15337). On October 31, 2002, we received an additional extension from the court so that the comment period could be reopened for a fifth time since the remand (67 FR 66344) to solicit comments on the revised statistical analysis we had done, as described in our March 21, 2002 document (67 FR 13095). Finally, on February 28, 2003, the court approved a joint stipulation requiring us to submit our final

determination to the **Federal Register** for publication on or before September 15, 2003. This final determination is in compliance with that joint stipulation agreement.

#### **Summary of Comments and Recommendations**

During the five comment periods following the remand, we contacted all appropriate State and Federal agencies, Tribes, county governments, elected officials, and other interested parties and invited them to comment. We have requested that all interested parties submit factual reports or information that might contribute to the development of a final determination. In addition, we have invited public comment through the publication of notices in various newspapers. We published notice of the January 12, 2001, reopening of the comment period in the *Sacramento Bee*, *Fresno Bee* and *Contra Costa Times* newspapers. For the May 8, 2001, notice, we invited public comment through publication of notices in the *Antioch Ledger-Dispatch*, the *Marysville Appeal-Democrat*, the *Fresno Bee*, and the *Sacramento Bee*. For the August 17, 2001, reopening notice we invited public comment through publication of notices in the *Marysville Appeal-Democrat*, the *Fresno Bee*, and the *Sacramento Bee*. An electronic mail address for submission of comments was provided in the May 8, 2001, and August 17, 2001, notices and was posted on the Sacramento Fish and Wildlife Office's official web site. For the March 21, 2002 reopening notice, we invited public comment through publication of notices on March 27, 2002, in the *Marysville Appeal-Democrat*, the *Sacramento Bee*, and the *Fresno Bee*. An electronic mail address was not provided for the March 21, 2002, reopening due to uncertainties regarding our internet access. An electronic mail address was, however, provided with our April 1, 2002, correction, and with our October 31, 2002, reopening. We also sent out notices of each reopening of the comment period to all parties on a mailing list for Sacramento splittail information.

During the five comment periods opened since the remand, we received a total of 33 written comment letters representing 1 Federal agency, 2 State agencies, 2 local governments, and 13 private individuals or organizations. We reviewed all comments received for substantive issues and new information regarding the status of the Sacramento splittail. Of the comments we received, only 3 supported listing. Information contained in these comments was reviewed to determine if it raised any