

1 | Brent Plater (CA Bar # 209555)  
CENTER FOR BIOLOGICAL DIVERSITY  
2 | 2325 Carleton St. Ste. B  
Berkeley, CA 94704  
3 | Telephone: (510) 841-0812  
Facsimile: (510) 841-0187

4 |  
Brendan Cummings (CA Bar # 193952)  
5 | CENTER FOR BIOLOGICAL DIVERSITY  
P.O. Box 493  
6 | 54870 Pine Crest Ave.  
Idyllwild, CA 92549  
7 | Telephone: (909) 659-6053  
Facsimile: (909) 659-2484

8 |  
Thomas N. Lippe (CA Bar # 104640)  
9 | Michael W. Graf (CA Bar # 136172)  
LAW OFFICES OF THOMAS N. LIPPE  
10 | One Market Plaza, Steuart Tower  
Sixteenth Floor  
11 | San Francisco, California 94105  
Telephone: (415) 777-5600  
12 | Facsimile: (415) 777-9809

13 | Attorneys for Plaintiff

14 | **UNITED STATES DISTRICT COURT**

15 | **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 | CENTER FOR BIOLOGICAL )  
17 | DIVERSITY ) Case No. :  
Plaintiff, )  
18 | ) **COMPLAINT FOR DECLARATORY AND**  
vs. ) **INJUNCTIVE RELIEF**  
19 | )  
CHRISTIE WHITMAN, )  
20 | Administrator, Environmental )  
Protection Agency, and WAYNE )  
21 | NASTRI, Region 9 )  
Administrator, Environmental )  
22 | Protection Agency )  
Defendants. )  
23 | )  
24 | \_\_\_\_\_ )

INTRODUCTION

1  
2           1. This action challenges Defendants' CHRISTIE WHITMAN,  
3 Administrator, Environmental Protection Agency, and WAYNE  
4 NASTRI, Region 9 Administrator, Environmental Protection Agency,  
5 failure to comply with the federal Endangered Species Act, 16  
6 U.S.C. §§ 1531-1544 (1994) ("ESA" or the "Act"), in the  
7 implementation and administration of the pesticide review  
8 program and the registration and reregistration of pesticides  
9 and pesticide formulations pursuant to that program. The  
10 pesticide review program and the registration and reregistration  
11 of pesticides and pesticide formulations are jeopardizing the  
12 continued existence of the California red-legged frog, (*Rana*  
13 *aurora draytonii*), a federally listed threatened species, and  
14 adversely modifying the frog's critical habitat.

15           2. The Defendants' actions are in violation of four  
16 provisions of the ESA. First, the Environmental Protection  
17 Agency ("EPA") has failed to undergo consultation with the U.S.  
18 Fish and Wildlife Service ("FWS") regarding the impacts of the  
19 pesticide review program and the registration and reregistration  
20 of pesticides and pesticide formulations on the California red-  
21 legged frog, in violation of § 7(a)(2) of the ESA. 16 U.S.C. §  
22 1536(a)(2).

23           3. Second, the EPA has violated and is continuing to  
24 violate its duty to utilize its authority in furtherance of the  
25 conservation and recovery of California red-legged frogs in  
26 Complaint for Declaratory and 2  
Injunctive Relief

1 consultation with the FWS, in violation of § 7(a)(1) of the ESA.  
2 16 U.S.C. § 1536(a)(1).

3 4. Third, because the EPA continues to operate and  
4 administer the pesticide registration program without undergoing  
5 consultation regarding the impacts of the program on California  
6 red-legged frogs, they have and will continue to irreversibly  
7 and irretrievably commit resources in a manner that forecloses  
8 the EPA's ability to implement reasonable and prudent  
9 alternatives to protect California red-legged frogs and their  
10 critical habitat, in violation § 7(d) of the ESA. 16 U.S.C.  
11 §1536(d).

12 5. The fourth violation of the ESA stems from the EPA's  
13 registration and reregistration of pesticides and pesticide  
14 formulations that are known to cause deformities and deaths in  
15 California red-legged frogs. The continued registration and  
16 reregistration causes "take" of California red-legged frogs in  
17 violation of § 9 of the ESA. 16 U.S.C. § 1538.

18 6. All of these violations continue despite recent studies  
19 that suggest that chemical use affects the health and survival  
20 of the California red-legged frog. These studies link the  
21 decline of California red-legged frog populations with  
22 agricultural activities that uses pesticides upwind of the  
23 frog's habitat.

24 7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("CBD") seeks  
25 an order declaring that the Defendants have violated Sections  
26 Complaint for Declaratory and 3  
Injunctive Relief

1 7(a)(2) and 7(a)(1) of the ESA by failing to undergo  
2 consultation with FWS concerning pesticide use and its effect on  
3 California red-legged frogs and by failing to use their  
4 authority to carry out programs to preserve this declining  
5 species. Plaintiff CBD also seeks an order declaring that the  
6 EPA has violated Sections 7(d) and 9 of the ESA by making  
7 irreversible and irretrievable commitments of resources prior to  
8 the conclusion of the consultation process and by permitting  
9 lethal pesticide use, which constitutes a take of the red-legged  
10 frog.

11 8. CBD seeks an order compelling the EPA to begin the  
12 consultation process as required by Section 7(a)(2) of the ESA  
13 and to utilize their authority to promote conservation programs  
14 for the benefit of the threatened California red-legged frog as  
15 required by Section 7(a)(1) of the ESA. CBD also seeks an order  
16 prohibiting the EPA from registering and/or reregistering  
17 pesticides and pesticide formulations, and an order prohibiting  
18 pesticide use that may jeopardize the continued existence of the  
19 California red-legged frog or adversely modify its critical  
20 habitat, which constitutes both an irreversible and  
21 irretrievable commitment of resources under Section 7(d) of the  
22 ESA and a take under Section 9 of the ESA.

23 JURISDICTION AND VENUE

24 9. This court has jurisdiction over this action pursuant to  
25 16 U.S.C. §§ 1540(g) and 1540(c) (Endangered Species Act), 28  
26 Complaint for Declaratory and 4  
Injunctive Relief

1 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (United  
2 States as defendant), 28 U.S.C. § 2201 (declaratory relief), and  
3 28 U.S.C. § 2202 (injunctive relief).

4 10. To the extent required by the ESA, 16 U.S.C. §  
5 1540(g)(2)(A), the Center for Biological Diversity provided 60  
6 days notice of its intent to sue by letter sent to the  
7 Defendants on November 26, 2001. The Defendants have not  
8 remedied the violations set forth in the 60-day notice.

9 11. An actual controversy exists between the parties within  
10 the meaning of 28 U.S.C. § 2201 (declaratory judgments).

11 12. Venue is proper in the District Court for the Northern  
12 District of California pursuant to 28 U.S.C. § 1391(e).

13 PARTIES

14 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("CBD") is a  
15 non-profit corporation with offices in Berkeley, Idyllwild, and  
16 San Diego, California; Phoenix and Tucson, Arizona; and Pinos  
17 Altos, New Mexico. CBD is actively involved in species and  
18 habitat protection issues throughout the continental United  
19 States, northern Mexico, Alaska, and Hawaii. CBD has members  
20 throughout these regions, including in and near areas that serve  
21 as habitat for the California red-legged frog. CBD and its  
22 members and staff include local residents with educational,  
23 moral, spiritual, scientific, and recreational interests in the  
24 California red-legged frog. CBD and its members and staff also  
25 enjoy the biological, recreational, and aesthetic values of the

1 areas inhabited by the species. CBD and its members and staff  
2 have participated in efforts to protect and preserve the habitat  
3 essential to the continued survival of the California red-legged  
4 frog. The CBD was among the plaintiffs who won the designation  
5 of 4,138,064 acres of "critical habitat" for the threatened  
6 California red-legged frog on March 13, 2001. The designation  
7 includes 29 separate areas spanning 28 California counties and  
8 over 500 miles of streams and rivers. CBD and its members and  
9 staff also partake in the above interests by using many of the  
10 habitat areas where red-legged frogs are present and where  
11 critical habitat is designated. CBD is also involved in efforts  
12 to protect other amphibian species throughout the country. CBD  
13 brings this action on its own behalf and on behalf of its  
14 adversely affected members and staff.

15 14. The above-described educational, moral, spiritual,  
16 scientific, recreational, biological, and aesthetic interests of  
17 CBD and its members and staff have been adversely affected by  
18 Defendants' failure to comply with the ESA and continual  
19 registration and authorization of pesticides harmful to the  
20 species. Unless the relief requested is granted, Plaintiff's  
21 interests will continue to be adversely affected and injured by  
22 the failure to consult and the continual commitment of resources  
23 and take of the California red-legged frog.

24

25

1 15. Defendant CHRISTIE WHITMAN is sued in her official  
2 capacity as the Administrator of the Environmental Protection  
3 Agency.

4 16. Defendant WAYNE NASTRI is sued in his official capacity  
5 as Administrator for Region 9 of the Environmental Protection  
6 Agency.

7 THE ENDANGERED SPECIES ACT FRAMEWORK

8 17. When a species has been listed as threatened or  
9 endangered under the ESA, federal agencies have duties under the  
10 Act to assess and bring their programs and activities into  
11 compliance with the Act. These duties fall into two categories:  
12 (1) the duty to ensure that agency actions will not jeopardize  
13 the survival and recovery of listed species or adversely modify  
14 critical habitat for such species; and (2) the duty to utilize  
15 agency programs and authorities to conserve listed species. The  
16 Act prescribes the process to be followed to ensure compliance  
17 with each set of duties.

18 Section 7(A)(2) - Consultations to Avoid Jeopardy

19 18. Section 7(a)(2) of the ESA requires the following:

20 "each federal agency shall, in consultation with and with  
21 the assistance of the Secretary, insure that any action  
22 authorized, funded, or carried out by such agency  
23 (hereinafter in this section referred to as an 'agency  
24 action') is not likely to jeopardize the continued  
existence of any endangered species or threatened species  
or result in the destruction or adverse modification of  
habitat of such species which is determined by the  
Secretary . . . to be critical."

25 16 U.S.C. § 1536(a)(2).

1 19. The Act establishes an interagency consultation process  
2 to assist federal agencies in complying with their substantive  
3 Section 7(a)(2) duty to guard against jeopardy to listed species  
4 or destruction or adverse modification of critical habitat.  
5 Under Section 7(a)(2), federal agencies must consult with the  
6 appropriate expert fish and wildlife agency to determine whether  
7 their actions will jeopardize listed species' survival or  
8 adversely modify designated critical habitat, and if so, to  
9 identify ways to modify the action to avoid that result. 50  
10 C.F.R. § 402.14.

11 20. An agency must initiate consultation under Section 7  
12 whenever it undertakes an action that "may affect" a listed  
13 species or critical habitat. 50 C.F.R. § 402.14(a).  
14 Conversely, an agency is relieved of the obligation to consult  
15 on its actions only where the action will have "no effect" on  
16 listed species or designated critical habitat. Effects  
17 determinations are based on the direct, indirect, and cumulative  
18 effects of the action when added to the environmental baseline  
19 and other interrelated and interdependent actions. 50 C.F.R. §  
20 402.02 (definition of "effects of the action").

21 21. Regulations implementing Section 7 broadly define the  
22 scope of agency actions subject to consultation to encompass  
23 "all activities or programs of any kind authorized, funded, or  
24 carried out, in whole or in part, by Federal agencies,"  
25



1 including the promulgation of regulations and the granting of  
2 licenses. 50 C.F.R. § 402.02 (definition of "action").

3 22. Agencies must consult on ongoing agency actions over  
4 which the federal agency retains, or is authorized to exercise,  
5 discretionary involvement or control. See, e.g., 50 C.F.R. §  
6 402.16 (re-initiation of consultation). Agencies must also  
7 consult on ongoing agency actions "if a new species is listed .  
8 . . . that may be affected by the identified action." Id.

9 23. To initiate consultation, an agency must assess the  
10 impacts of the action on listed species and their habitat and  
11 provide all relevant information about such impacts to the  
12 expert fish and wildlife agency. 50 C.F.R. § 402.14(c). The  
13 ESA provides for formal consultations, culminating in FWS'  
14 issuance of a biological opinion. By regulation, FWS has  
15 provided that, if the action agency determines that an action  
16 "may affect," but is "not likely to adversely affect" the listed  
17 species or its critical habitat, the consultation may be  
18 resolved without preparation of a biological opinion if FWS  
19 concurs in writing in that determination. 50 C.F.R. § 402.13.  
20 If FWS does not concur, or if the action agency has determined  
21 that the action is "likely to adversely affect" the listed  
22 species, the agencies must conduct a formal consultation. Id.  
23 §§ 402.02, 402.14(a).

24 24. The end product of formal consultation is a biological  
25 opinion in which FWS determines whether the action will  
26  
Complaint for Declaratory and 9  
Injunctive Relief

1 | jeopardize the survival and recovery of listed species or will  
2 | adversely modify the species' critical habitat. 16 U.S.C. §  
3 | 1536(b). In order to make this determination, FWS must review  
4 | all relevant information and provide a detailed evaluation of  
5 | the action's effects, including the cumulative effects of  
6 | federal and nonfederal activities in the area, on the listed  
7 | species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).  
8 | FWS has a statutory duty to use the best available scientific  
9 | information in an ESA consultation. 16 U.S.C. § 1536(a)(2); 50  
10 | C.F.R. § 402.14(g)(8). If FWS determines that the action is  
11 | likely to jeopardize the species, the biological opinion must  
12 | specify reasonable and prudent alternatives that will avoid  
13 | jeopardy. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14(h)(3). FWS  
14 | must also formulate discretionary conservation recommendations  
15 | to reduce or minimize the action's impacts on listed species or  
16 | critical habitat. 50 C.F.R. § 402.14(g)(6).

17 | Section 7(A)(1) - Consultations to Utilize Programs and  
18 | Authorities to Conserve Listed Species

19 | 25. Under section 7(a)(1) of the Endangered Species Act,  
20 | federal agencies must "utilize their authorities in furtherance  
21 | of the purposes of this chapter by carrying out programs for the  
22 | conservation of endangered species and threatened species  
23 | listed" under the Act. 16 U.S.C. § 1536(a)(1). As defined  
24 | under ESA § 3, the term "conservation" means to use all  
25 | necessary methods and procedures to bring any endangered or  
26 | Complaint for Declaratory and 10  
Injunctive Relief

1 threatened species to the point at which the measures provided  
2 pursuant to the ESA are no longer necessary. 16 U.S.C. §  
3 1532(3).

4 26. Action agencies, like the EPA, must review the programs  
5 that they administer and consult with the expert fish and  
6 wildlife agencies to ensure that they utilize their programs and  
7 authorities to conserve listed species.

8 Section 7(d) - Limitation on Commitment of Resources

9 27. Section 7(d) of the ESA mandates against "irreversible  
10 and irretrievable commitment of resources" that would foreclose  
11 the agency's ability to implement reasonable and prudent  
12 alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The  
13 purpose of this section is to insure that the existing  
14 environmental status quo is maintained during the consultation  
15 process so as not to foreclose consideration and adoption of  
16 alternatives to the proposed federal agency action. Connor v.  
17 Burford, 848 F.2d 1441, 1445 n. 34 (9th Cir. 1988). This  
18 prohibition on irreversible and irretrievable commitment of  
19 resources applies throughout consultation and continues until  
20 the requirements of section 7 are completed.

21 Section 9 - Prohibition Against Take of an Endangered Species

22 28. Under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B), it is  
23 illegal for any person - whether a private or governmental  
24 entity - to "take" any endangered species of fish or wildlife  
25 listed under the ESA. "Take" is defined to mean harass, harm,

1 pursue, hunt, shoot, wound, kill, trap, capture, or collect, or  
2 attempt to engage in such conduct. Id. at § 1532(19). FWS has  
3 defined "harm" to include "significant habitat modification or  
4 degradation which actually kills or injures fish or wildlife by  
5 significantly impairing essential behavioral patterns, including  
6 breeding, spawning, rearing, migrating, feeding or sheltering."  
7 50 C.F.R. § 222.102. The FWS has promulgated regulations that  
8 prohibit the take of threatened species as well as prohibiting  
9 take of endangered species. 50 C.F.R. § 17.31(a).

10 22. As part of a consultation, FWS determines whether to  
11 authorize the incidental take of listed species through the  
12 issuance of an incidental take statement. An incidental take  
13 statement may be issued only if the action can proceed without  
14 causing jeopardy. 16 U.S.C. § 1536(b)(4). An incidental take  
15 statement must do the following: (1) specify the impact of the  
16 incidental take on the listed species; (2) specify reasonable  
17 and prudent measures the National Marine Fisheries Service  
18 ("NMFS") considers necessary to minimize that impact; and (3)  
19 set forth mandatory terms and conditions. Id.

20 29. An incidental take statement insulates the federal  
21 agency from liability for a take of a threatened or endangered  
22 species, provided the agency complies with the statement's terms  
23 and conditions. This insulation extends further to any entity  
24 receiving the federal permit, license, or funding subject to the  
25 statement. Thus, the Act provides the following:

1 [A]ny taking that is in compliance with the terms and  
2 conditions specified in a written statement provided under  
3 subsection (b)(4)(iv) of this section shall not be  
4 considered to be a prohibited taking of the species  
5 concerned.

6 16 U.S.C. § 1536(0)(2).

7 THE EPA'S DUTY UNDER FIFRA

8 30. The Federal Insecticide, Fungicide, and Rodenticide Act  
9 ("FIFRA") charges the EPA with registering, reviewing, amending,  
10 and reregistering chemicals and chemical formulations for use as  
11 insecticides, fungicides, and pesticides in the United States.

12 7 U.S.C. §§136-136y. Under FIFRA, a pesticide generally may not  
13 be sold or used in the United States unless it has an EPA  
14 registration for that particular use. 7 U.S.C. § 136a(a). EPA  
15 may register a pesticide if it makes the following  
16 determinations: (1) the labeling complies with FIFRA's  
17 requirements; (2) the composition claims are warranted; (3) the  
18 pesticide will perform its intended function; and (4) the  
19 pesticide will not cause unreasonable adverse effects on the  
20 environment. 7 U.S.C. § 136a(c)(5). The culmination of the  
21 registration process is EPA's approval of a label for the  
22 particular pesticide. FIFRA makes it unlawful to use a  
23 pesticide in a manner inconsistent with the label, Id. at §  
24 136j(2)(G), or to make any claims that differ substantially from  
25 the label. Id. at § 136j(1)(B).

26 31. EPA must classify pesticides as general or restricted  
use pesticides, depending on the risks posed to the environment.

1 | Where necessary to guard against unreasonable adverse  
2 | environmental effects, EPA must classify a pesticide as  
3 | restricted use. 7 U.S.C. § 136a(d)(1)(C). Restricted use  
4 | pesticides are subject to additional regulatory restrictions,  
5 | particularly concerning application of the pesticide. Id. EPA  
6 | must reclassify pesticides as restricted use pesticides where  
7 | necessary to prevent unreasonable adverse effects on the  
8 | environment. Id. at § 136a(d)(1)(C)(2).

9 |       32. After approving a pesticide registration, EPA retains  
10 | discretionary involvement and control over that registration.  
11 | EPA must periodically review pesticide registrations with a goal  
12 | of reviewing each pesticide registration every 15 years. Id. at  
13 | § 136a(g)(1). EPA has the authority to compel registrants to  
14 | submit data necessary for a reregistration review. Id. at §  
15 | 136a(g)(2). Even apart from such explicit data submission  
16 | requirements, registrants must submit to EPA any information  
17 | about registered pesticides' unreasonable adverse effects on the  
18 | environment. Id. at § 136d(a)(2). EPA takes such information  
19 | into account in reviewing and, where necessary, modifying the  
20 | pesticide registrations.

21 |       33. EPA is in a process of reregistering pesticides that  
22 | have been on the market for years and often decades prior to  
23 | enactment of the environmental registration requirements  
24 | currently in place. 7 U.S.C. § 136a-1. EPA generally  
25 | eliminates or imposes restrictions on harmful uses of the  
26 | Complaint for Declaratory and 14  
Injunctive Relief

1 pesticides, including those uses that cause harm to threatened  
2 or endangered species, as part of the re-registration  
3 determination.

4 34. The EPA Administrator has the authority to cancel  
5 pesticide registrations whenever "a pesticide or its labeling or  
6 other material required to be submitted does not comply with the  
7 provisions of this Act or, when used in accordance with  
8 widespread and commonly recognized practice, generally causes  
9 unreasonable adverse effects on the environment." 7 U.S.C. §  
10 136d(b). The Administrator may immediately suspend a pesticide  
11 registration to prevent an imminent hazard. Id. § 136d(c). An  
12 announcement by the Administrator of an intent to cancel a  
13 pesticide use often results in the registrant's voluntary  
14 cancellation of, or agreement to further constraints upon that  
15 use.

16 PESTICIDE USE AND THE CALIFORNIA RED-LEGGED FROG

17 35. The California red-legged frog (*Rana aurora draytonii*)  
18 was listed as a threatened species under the ESA on May 23,  
19 1996. Endangered and Threatened Wildlife and Plants;  
20 Determination of Threatened Status for the California Red-Legged  
21 Frog, 61 Fed. Reg. 25,813 (May 23, 1996). Critical habitat was  
22 designated for the species on March 13, 2001. Endangered and  
23 Threatened Wildlife and Plants; Final Determination of Critical  
24 Habitat for the California Red-Legged Frog, 66 Fed. Reg. 14,626  
25 (March 13, 2001). California red-legged frogs have disappeared

1 from more than 70 percent of their historic range in California.

2 Id.

3 36. The FWS Recovery Team for the California red-legged  
4 frog discussed the effects of "Contaminants and Agriculture" in  
5 its discussion of "Reasons for Decline and Threats to Survival"  
6 to the California red-legged frog. United States Fish and  
7 Wildlife Service, Draft Recovery Plan for the California Red-  
8 Legged Frog (Rana aurora draytonii) 26-27, 39-41 (January 2000)  
9 ("Draft Recovery Plan"). According to the Draft Recovery Plan,  
10 amphibians generally have complex life cycles, which afford them  
11 more opportunities for exposure to chemicals and more potential  
12 route of exposure than other vertebrates. Id. at 39.

13 37. Exposure to contaminants may cause deformities,  
14 abnormal immune system functions, diseases, injury, and death in  
15 California red-legged frogs. Id. at 28. A number of studies  
16 have addressed certain contaminants that disrupt biological  
17 processes by mimicking the effects of naturally produced  
18 hormones, such as the female hormone estrogen. 66 Fed. Reg.  
19 25818. This phenomenon has been implicated in the worldwide  
20 decline in amphibians. Id.

21 38. Agricultural practices, which typically use pesticides  
22 and herbicides, introduce many toxins into the California red-  
23 legged frog's range. Draft Recovery Plan at 39-40. In 1997,  
24 the California Department of Pesticide Regulation reported that  
25 there were approximately 150 pesticides or herbicides used



1 within approximately 2 square kilometers (1 square mile) of  
2 known California red-legged frog habitat. Id. at 40. The Draft  
3 Recovery Plan provided a list and description of chemicals of  
4 greatest concern that are used within the range of the frog.  
5 Id. This discussion of chemicals cited their prevalent use and  
6 potential deleterious impacts on California red-legged frogs,  
7 yet the EPA did not initiate consultation with the FWS.

8 39. Recent studies confirm that there is a strong  
9 association between declines in the California red-legged frog  
10 population and the amount of upwind agricultural pesticide use.  
11 See, e.g., Carlos Davidson et al., Declines of the California  
12 Red-Legged Frog: Climate, UV-B, Habitat, and Pesticide  
13 Hypotheses, 11 Ecological Applications 464, 474 (2001). These  
14 studies indicate that chemical use is impacting the population  
15 status and health of this threatened species. This suggests  
16 that wind-borne agrochemicals may be an important factor in  
17 declines of the California red-legged frog; Donald W. Sparling  
18 et al., Pesticides and Amphibian Declines in California, USA,  
19 20(7) Envtl. Toxicology & Chemistry 1591 (2001).

20 **FIRST CLAIM FOR RELIEF**

21 **Violation Of The Endangered Species Act**  
22 **[16 U.S.C. §1536(a)(2)]**  
23 **(The EPA's Failure To Consult On Pesticide Registrations That**  
24 **May Affect California Red-Legged Frogs And Their Critical**  
25 **Habitat)**

26 40. Each and every allegation set forth in this Complaint  
is incorporated herein by reference.  
Complaint for Declaratory and 17  
Injunctive Relief

1 41. Section 7(a)(2) of the ESA states the following:

2 Each Federal agency shall, in consultation with and with the  
3 assistance of the Secretary [of the Interior or Commerce],  
4 insure that any action authorized, funded or carried out by  
5 such agency . . . is not likely to jeopardize the continued  
6 existence<sup>1</sup> of any endangered species or threatened species or  
7 result in the destruction or adverse modification of  
8 [critical] habitat . . . .

9 16 U.S.C. § 1536(a)(2). "Its very words affirmatively command  
10 all federal agencies to insure that actions authorized, funded,  
11 or carried out by them do not jeopardize the continued existence  
12 of an endangered species." TVA v. Hill, 437 U.S. 153, 173  
13 (1978). The EPA and FWS must review their actions through the  
14 consultation process at the earliest possible time to determine  
15 whether any action may affect listed species or critical  
16 habitat. 50 CFR § 402.14(a). Re-initiation of consultation is  
17 required and must be requested by the EPA or the FWS where  
18 discretionary federal involvement or control over the action has  
19 been retained or is authorized by law and a new species is  
20 listed or critical habitat designated that may be affected by  
21 the identified action. 50 CFR § 402.16(d).

22 42. The EPA's implementation of the pesticide registration  
23 program through the registration, review, amendment, and re-  
24 registration of all pesticides and pesticide formulations

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25 <sup>1</sup> To "jeopardize the continued existence of" is defined as to  
26 "engage in an action that reasonably would be expected, directly  
or indirectly, to reduce appreciably the likelihood of both the  
survival and recovery of a listed species in the wild by

1 pursuant to 7 U.S.C. § 136a constitutes federal agency action.  
2 The EPA and FWS have never undergone consultation about this  
3 program's effect on the status of California red-legged frogs  
4 and their habitats. Evidence now exists indicating that  
5 chemicals are used in the proximity of California red-legged  
6 frogs and their habitats, See, e.g., 2 Richard A. Marovich &  
7 Steven Kishaba, An Index to Pesticides That Are Used in  
8 Proximity to Federally Listed, Proposed, and Candidate Species  
9 in California by Active Ingredient 45-49 (1997)(Incomplete list  
10 identifying over 200 active ingredients being used near  
11 California red-legged frogs). Additionally, evidence indicates  
12 that pesticide use is jeopardizing the species, Davidson et al.,  
13 supra at 474. By failing to consult and/or re-initiate  
14 consultation with respect to each of these federal agency  
15 actions, the EPA and FWS have violated their mandatory duties to  
16 insure no jeopardy to the continued existence of listed species  
17 and to insure no adverse modification or destruction of critical  
18 habitat. 16 U.S.C. § 1536(a)(2).

19 43. Under the ESA, the EPA has a duty to undergo  
20 consultation to "insure that any action authorized, funded or  
21 carried out by such agency . . . is not likely to jeopardize the  
22 continued existence of an endangered or threatened species." 16  
23 U.S.C. § 1536(a)(2). The EPA has not attempted to even initiate  
24

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25 reducing the reproduction, numbers or distribution of that  
26 species." 50 C.F.R. § 402.02.

1 the consultation process regarding the impact of the ESA's  
2 pesticide registration program on the California red-legged  
3 frog.

4 **SECOND CLAIM FOR RELIEF**

5 **Violation Of The Endangered Species Act**  
6 **[16 U.S.C. § 1536(a)(1)]**  
7 **(The EPA's Failure To Utilize Their Programs And Authorities To**  
8 **Conserve California Red-Legged Frogs)**

9 44. Each and every allegation set forth in this Complaint  
10 is incorporated herein by reference.

11 45. Section 7(a)(1) of the ESA states the following:

12 The Secretary shall review other programs administered by him  
13 and utilize such programs in furtherance of the purposes of  
14 this chapter. All other Federal agencies shall, in  
15 consultation with and with the assistance of the Secretary,  
16 utilize their authorities in furtherance of the purposes of  
17 this chapter by carrying out programs for the conservation of  
18 endangered species and threatened species listed pursuant to  
19 section 1533 of this title.

20 16 U.S.C. § 1536(a)(1). The ESA defines "conserve" as "to use  
21 and the use of all methods and procedures which are necessary to  
22 bring any endangered species or threatened species to the point  
23 at which the measures provided pursuant to this chapter are no  
24 longer necessary." 16 U.S.C. § 1532(3).

25 46. The EPA has violated and continues to violate its duty  
26 under this section to utilize its authorities in furtherance of  
the purposes of the ESA by carrying out programs for the  
conservation of the California red-legged frog in consultation

1 with the Secretary of the Interior. The agency has not carried  
2 out any program to conserve California red-legged frogs.

3 **THIRD CLAIM FOR RELIEF**

4 **Violation Of The Endangered Species Act**  
5 **[16 U.S.C. § 1536(d)]**

6 **(The EPA'S Irreversible And Irretrievable Commitment Of**  
7 **Resources Before Final Resolution Of The Consultation Process)**

8 47. Each and every allegation set forth in this Complaint  
9 is incorporated herein by reference.

10 48. Section 7(d) of the ESA mandates against "irreversible  
11 and irretrievable commitment of resources" that would foreclose  
12 the agency's ability to implement reasonable and prudent  
13 alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The  
14 purpose of this section is to insure that the existing  
15 environmental status quo is maintained during the consultation  
16 process so as not to foreclose consideration and adoption of  
17 alternatives to the proposed federal agency action. Connor v.  
18 Burford, 848 F.2d 1441, 1445 n. 34 (9th Cir. 1988). This  
19 prohibition on irreversible and irretrievable commitment of  
20 resources applies throughout consultation and continues until  
21 the requirements of section 7 are completed. Because the  
22 registration program is an "agency action" triggering the  
23 consultation process, the EPA is subject to the prohibition on  
24 making irreversible and irretrievable commitments of resources  
25 pending final resolution of the consultation process.

1 49. The EPA has continued to register pesticides and  
2 pesticide formulations under its current registration program  
3 notwithstanding recent studies linking pesticide use and the  
4 deterioration of the California red-legged frog. The EPA has  
5 thus violated Section 7(d) of the ESA, which forbids  
6 irreversible and irretrievable commitment of resources pending  
7 final resolution of the consultation process. 16 U.S.C. §  
8 1536(d). In the present case, the consultation process has not  
9 started yet.

10  
11 **FOURTH CLAIM FOR RELIEF**

12 **Violation Of The Endangered Species Act**  
13 **[16 U.S.C. §1538]**  
14 **(The EPA's Take of California Red-Legged Frogs)**

15 50. Each and every allegation set forth in this Complaint  
16 is incorporated herein by reference.

17 51. Under ESA Section 9, 16 U.S.C. § 1538(a)(1)(B), it is  
18 illegal for any person - whether a private or governmental  
19 entity - to "take" any endangered species of fish or wildlife  
20 listed under the ESA. "Take" is defined to mean harass, harm,  
21 pursue, hunt, shoot, wound, kill, trap, capture, or collect, or  
22 attempt to engage in such conduct. Id. at § 1532(19). FWS has  
23 defined "harm" to include "significant habitat modification or  
24 degradation which actually kills or injures fish or wildlife by  
25 significantly impairing essential behavioral patterns, including  
26 breeding, spawning, rearing, migrating, feeding or sheltering."

1 50 C.F.R. § 222.102. Threatened species are similarly protected  
2 from take pursuant to regulation. 50 C.F.R. § 17.31(a).

3 52. The EPA has failed to consult with respect to the  
4 effects of pesticides and fungicides on recently listed  
5 threatened and endangered species. This failure to consult as  
6 to how registration of pesticides and pesticide formulations  
7 would affect the species and their proposed and designated  
8 critical habitat is a violation of Section 7 of the ESA.  
9 Additionally, their failure to consult has resulted in take of  
10 California red-legged frogs in violation of Section 9 of the ESA  
11 because the EPA has registered and continues to register  
12 pesticides known to cause deformities and death of the  
13 California red-legged frogs.

14 PRAYER FOR RELIEF

15 WHEREFORE, Plaintiffs respectfully request that the Court  
16 enter judgment providing the following relief:

17 1. Declare that the EPA is violating ESA § 7(a)(2) by  
18 failing to undergo consultation concerning effects of EPA  
19 pesticide registrations on the threatened California red-legged  
20 frog and its critical habitat;

21 2. Declare that the EPA and FWS are violating ESA §  
22 7(a)(1) by failing to review its programs and consult with each  
23 other to determine how to utilize the EPA pesticide program and  
24 their authorities to conserve the threatened California red-  
25 legged frog;

1           3.       Declare that the EPA is violating ESA § 7(d) by making  
2 irreversible and irretrievable commitments of resources that  
3 foreclose the EPA's ability to implement reasonable and prudent  
4 alternatives in light of the recent studies linking pesticide  
5 use and the decline of the California red-legged frog;

6           4.       Declare that the EPA has violated ESA § 9 by  
7 registering pesticides known to cause deformities and death in  
8 the California red-legged frog, which amounts to a take;

9           5.       Order the EPA and FWS to begin consulting pursuant to  
10 ESA §7(a)(2) on the effects of EPA pesticide registrations on  
11 threatened California red-legged frogs and their critical  
12 habitat, and direct the Defendants to ensure that they conduct  
13 consultations in a manner that addresses the most significant  
14 threats posed to listed red-legged frogs by pesticide use in an  
15 expeditious fashion;

16           6.       Order the EPA to prohibit uses of pesticides affecting  
17 the critical habitat for California red-legged frogs until the  
18 consultation process has been completed and the EPA has brought  
19 its pesticide registration program into compliance with ESA §  
20 7(a)(2);

21           7.       Order the EPA review its programs and authorities and  
22 to consult with the FWS to determine how best to utilize its  
23 programs and authorities to promote the conservation of  
24 threatened California red-legged frogs in compliance with ESA §  
25 7(a)(1);



1 8. Order the EPA to prohibit and refrain from registering  
2 pesticides that may negatively affect the California red-legged  
3 frog so that no further irreversible and irretrievable  
4 commitment of resources may prevent the agency's ability to  
5 adopt alternatives during the consultation process in compliance  
6 with ESA § 7(d);

7 9. Order the EPA to prohibit and refrain from  
8 registering pesticides known to result in deformities and death  
9 of California red-legged frogs, which constitutes a take under  
10 ESA § 9;

11 10. Award Plaintiffs' costs, including reasonable  
12 attorney's fees and expert witness fees; and

13 11. Provide such other relief as the court deems just and  
14 proper.

15 Respectfully submitted,

16  
17 DATED: April 2, 2002

\_\_\_\_\_  
18 Brent Plater (CA Bar # 209555)  
19 CENTER FOR BIOLOGICAL DIVERSITY  
20 2325 Carleton St. Ste. B  
21 Berkeley, CA 94704  
22 Telephone: (510) 841-0812  
23 Facsimile: (510) 841-0187

24 Brendan Cummings (CA Bar # 193952)  
25 CENTER FOR BIOLOGICAL DIVERSITY  
26 P.O. Box 493  
54870 Pine Crest Ave.  
Idyllwild, CA 92549  
Telephone: (909) 659-6053  
Facsimile: (909) 659-2484

1 Thomas N. Lippe (CA Bar # 104640)  
Michael W. Graf (CA Bar # 136172)  
2 LAW OFFICES OF THOMAS N. LIPPE  
One Market Plaza, Steuart Tower  
3 Sixteenth Floor  
San Francisco, California 94105  
4 Telephone: (415) 777-5600  
Facsimile: (415) 777-9809  
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