

1 KRISTEN L. BOYLES (CSB #158450)
2 JAN E. HASSELMAN (Mass. SB #638030)
3 Earthjustice Legal Defense Fund
4 705 Second Ave., Suite 203
5 Seattle, WA 98104
6 (206) 343-7340

7 Attorneys for Plaintiffs
8 Appearing Pro Hac Vice (approval pending)

9 MICHAEL R. SHERWOOD (CSB #63702)
10 Earthjustice Legal Defense Fund
11 180 Montgomery St., Suite 1725
12 San Francisco, CA 94104
13 (415) 627-6725

14 Local Counsel for Plaintiffs

15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 JUMPING FROG RESEARCH) Civ. No.
19 INSTITUTE, CENTER FOR SIERRA)
20 NEVADA CONSERVATION, PACIFIC)
21 RIVERS COUNCIL, RESPOSIBLE)
22 CONSUMERS OF THE MONTEREY)
23 PENINSULA and SOUTHWEST CENTER)
24 FOR BIOLOGICAL DIVERSITY,)
25 Plaintiffs,) COMPLAINT FOR DECLARATORY AND
26 v.) INJUNCTIVE RELIEF
27)
28)
29 BRUCE BABBITT, in his official)
30 capacity as Secretary of the)
31 Interior; JAMIE CLARK, in her)
32 official capacity as Director,)
33 United States Fish and Wildlife)
34 Service; ANNE BADGLEY, in her)
35 official capacity as Regional)
36 Director, Pacific Region,)
37 United States Fish and Wildlife)
38 Service; and UNITED STATES FISH)
39 AND WILDLIFE SERVICE, an agency)
40 of the United States Department)
41 of the Interior,)
42 Defendants.)

Case: CIV 99-01461 WHA
Judge: William Alsup
Filed: 3/24/99
Won: 12/20/99
Order: Proposal must be published
by 8/31/00. Final rule by
12/29/00.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

Earthjustice Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

1 PRELIMINARY STATEMENT

2 1. This is an action for declaratory and injunctive
3 relief. Plaintiffs Jumping Frog Research Institute, Center for
4 Sierra Nevada Conservation, Pacific Rivers Council, and
5 Southwest Center for Biological Diversity (collectively "Jumping
6 Frog") challenge the failure of the defendants Bruce Babbitt,
7 Secretary of the Interior, Jamie Clark, Director, U.S. Fish and
8 Wildlife Service, Anne Badgley, Regional Director, Pacific
9 Region, U.S. Fish and Wildlife Service, and the U.S. Fish and
10 Wildlife Service (collectively "FWS") to designate critical
11 habitat for the threatened California red-legged frog (*Rana*
12 *aurora draytonii*) pursuant to § 4(b)(6)(C) of the Endangered
13 Species Act ("ESA"), 16 U.S.C. § 1533(b)(6)(C).

14 2. This action arises under and alleges violations of the
15 ESA, 16 U.S.C. § 1531-1544, and the Administrative Procedures
16 Act ("APA"), 5 U.S.C. § 551 et seq.

17 3. Plaintiffs seek a judgment declaring that FWS has
18 violated the ESA and the APA by failing to designate critical
19 habitat. Plaintiffs also seek an order directing FWS to
20 designate critical habitat for the California red-legged frog.

21 JURISDICTION AND VENUE

22 4. The court has jurisdiction over this action by virtue
23 of 28 U.S.C. § 1331 (federal question), § 2201 (declaratory
24

1 judgment), § 2202 (injunctive relief), and 16 U.S.C. § 1540(g)
2 (Endangered Species Act citizen suit).

3 5. As required by the ESA, 16 U.S.C. § 1540(g),
4 plaintiffs provided sixty days' notice of intent to sue on
5 August 2, September 3, and October 9, 1998. Copies of the
6 notices are attached as Exhibits A-C.

7 6. Venue is properly vested in this court pursuant to 16
8 U.S.C. § 1540(g)(3)(A), as all or part of the violations of the
9 ESA alleged occur in the Northern District of California, and 28
10 U.S.C. § 1391(e), as a substantial part of the events and
11 omissions giving rise to the claims occurred in this district.

12 INTRADISTRICT ASSIGNMENT

13 7. Assignment to the San Francisco Division is proper
14 because the California red-legged frog is found in counties
15 covered by this division, including Marin County, and a
16 substantial part of the events and omissions giving rise to the
17 claims occur in the counties covered by this division.

18 PARTIES

19 8. The plaintiffs in this action are:

20 A. Jumping Frog Research Institute("Jumping Frog"),
21 an environmental organization based in the central Sierra Nevada
22 of California, with its principal place of business in Angels
23 Camp, California. Jumping Frog's primary focus is to
24 reestablish viable populations of California red-legged frogs in

1 Calaveras County. Jumping Frog's overall mission includes
2 ensuring the long-term protection, survival, and expansion of
3 existing native amphibian populations in the central Sierra
4 Nevada using sound principles of conservation biology coupled
5 with public education and involvement.

6 B. The Center for Sierra Nevada Conservation
7 ("CSNC"), a non-profit corporation founded in 1986 and organized
8 under the laws of the State of California in 1988. CSNC has
9 approximately 400 members and supporters with a primary focus on
10 public education about natural resource issues. CSNC and its
11 members primarily work in El Dorado County, the Eldorado
12 National Forest, and the Sierra Nevada with a dedication to the
13 protection of ecosystem values and the long term sustainability
14 of natural resources for future generations. CSNC and its
15 members participate in a wide range of environmental issues
16 including, but not limited to, protection of fish and wildlife
17 habitat, riparian conservation, protection of aquatic diversity,
18 and the enhancement of water quality in the waters of the State
19 of California. CSNC and its members also work to foster truly
20 sustainable economies within rich, diverse, and healthy
21 ecosystems.

22 C. Pacific Rivers Council ("PRC"), a non-profit
23 conservation organization with its principal place of business
24 in Eugene, Oregon. PRC has offices across the country,

1 including Berkeley, California, and members throughout the West,
2 including approximately 200 in California. PRC is dedicated to
3 protecting and restoring the nation's rivers and aquatic
4 ecosystems. PRC, as an organization and on behalf of its
5 members, is greatly concerned with protecting and improving
6 aquatic ecosystems in California, and PRC and its members are
7 committed to the conservation and restoration of native aquatic
8 species, including California red-legged frogs.

9 D. Southwest Center for Biological Diversity
10 ("Southwest Center"), is a non-profit corporation with its
11 principal place of business in Tucson, Arizona. Southwest
12 Center has offices across the West, including Berkeley,
13 California. Southwest Center and its members are actively
14 involved in species and habitat protection issues throughout the
15 western United States, northern Mexico, and Alaska. Southwest
16 Center's members and staff include local residents with
17 educational, scientific research, moral, spiritual, and
18 recreational interests in preserving the habitat of native
19 species, including California red-legged frogs.

20 9. Plaintiffs and their members use and enjoy, on an
21 ongoing basis, the aquatic ecosystems of the State of California
22 for recreational, scientific, conservational, and aesthetic
23 purposes. Plaintiffs and their members derive or, but for the
24 threatened status of the California red-legged frog, would

1 derive recreational, scientific, aesthetic, and conservational
2 benefits from the existence in the wild of red-legged frogs
3 through wildlife observation, study, photography, and other
4 activities. The past, present, and future enjoyment of these
5 benefits by plaintiffs and their members has been, is being, and
6 will continue to be irreparably harmed by the defendants'
7 disregard of their statutory duties.

8 10. The above-described aesthetic, conservation,
9 recreational, and scientific interests of plaintiffs and their
10 respective members have been, are being, and, unless the relief
11 prayed for is granted, will continue to be adversely affected
12 and irreparably injured by the failure of defendants to comply
13 with the ESA. Plaintiffs have no adequate remedy at law.

14 11. The defendants in this action are:

15 A. Bruce Babbitt, Secretary of the Interior. As
16 Secretary of the Interior, he has the ultimate responsibility to
17 enforce and implement the provisions of the ESA. Defendant
18 Babbitt is sued in his official capacity.

19 B. Jamie Clark, Director of the U.S. Fish and
20 Wildlife Service. As the Director, she is the federal official
21 vested with responsibility for properly enforcing the ESA and
22 its joint regulations. Defendant Clark is sued in her official
23 capacity.

1 C. Anne Badgley, Regional Director of the Pacific
2 Region office of the U.S. Fish and Wildlife Service. The
3 Pacific Region of the FWS is the federal agency with
4 responsibility to designate critical habitat for threatened or
5 endangered species within California. Defendant Badgley is sued
6 in her official capacity.

7 D. The United States Fish and Wildlife Service, an
8 agency of the United States charged with implementing and
9 ensuring compliance with the Endangered Species Act through the
10 Administrative Procedure Act and federal law.

11 STATUTORY BACKGROUND

12 12. In enacting the ESA, Congress recognized that habitat
13 loss is "the major cause for the extinction of species
14 worldwide." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 5,
15 reprinted in 1978 U.S.C.C.A.N. 9453, 9455. A primary purpose of
16 the ESA is to "provide a means whereby the ecosystems upon which
17 endangered species and threatened species depend may be
18 conserved." 16 U.S.C. § 1531(b).

19 13. Section 4 of the ESA, and its corresponding
20 regulations, require designation of critical habitat for
21 threatened or endangered species at the time of listing, "to the
22 maximum extent prudent and determinable." 16 U.S.C. §
23 1533(a)(3)(A); 50 C.F.R. § 424.12(a).

1 14. The ESA defines critical habitat as specific areas,
2 either within or outside the geographical area occupied by the
3 species at the time it is listed, that are essential for the
4 conservation of the species. 16 U.S.C. § 1532(5)(A). Critical
5 habitat must include “[h]abitats that are protected from
6 disturbance or are representative of the historic geographical
7 and ecological distributions of a species.” 50 C.F.R. §
8 424.12(b)(5). See also 50 C.F.R. §§ 424.02(d)(2), 424.12(e).

9 15. Once critical habitat is designated, the ESA protects
10 that habitat from harm related to actions by federal agencies.
11 Section 7(a)(2) of the ESA requires each federal agency to
12 “insure” that any such action will not “result in the
13 destruction or adverse modification of habitat of such species
14 which is determined by the Secretary ... to be critical....” 16
15 U.S.C. § 1536(a)(2).

16 16. The ESA contains only two exceptions to the
17 requirement that critical habitat must be designated
18 concurrently with the final listing decision. Concurrent
19 designation is not required when it is essential that the
20 listing determination be promptly published or when critical
21 habitat for the species is not determinable. 16 U.S.C. §
22 1533(b)(6)(C).

1 17. However, both of the above exemptions simply allow
2 critical habitat designation to be postponed by not more than
3 one year. 16 U.S.C. § 1533(b)(6)(C).

4 18. In addition, the ESA mandates that the FWS designate
5 critical habitat for listed species "to the maximum extent
6 prudent and determinable." 16 U.S.C. § 1533(a)(3). The FWS has
7 construed this language to allow it to forego designation of
8 critical habitat upon a finding that such a designation would
9 not be prudent.

10 19. Critical habitat designation is not prudent when
11 "[t]he species is threatened by taking or other human activity,
12 and identification of critical habitat can be expected to
13 increase the degree of such threat" or "[s]uch designation of
14 critical habitat would not be beneficial to the species." 50
15 C.F.R. § 424.12(a)(1).

16 STATEMENT OF FACTS

17 20. The California red-legged frog is the largest native
18 frog in the western United States and is characterized by the
19 red coloring of the abdomen and hind legs of adults. The
20 California red-legged frog is found in ponds, marshes, and
21 creeks with still water, and the species requires riparian areas
22 with dense or shrubby vegetation that contain open areas for
23 basking.

1 21. The female adult frogs attach their egg masses to
2 emergent vegetation where the eggs float on the water surface
3 until they hatch. Because the eggs are exposed and vulnerable,
4 and because the larvae need 5-7 months to metamorphose, it is
5 critical that the riparian vegetation remains undisturbed.

6 22. Historically, the habitat range of the California red-
7 legged frog included areas on the California coast from Marin
8 County to Santa Barbara, throughout the Central Valley, and
9 within the Sierra Nevada. It was commonly found at elevations
10 of 1,000-3,000 feet.

11 23. The frog has sustained a 70 percent reduction in its
12 geographic range in California. It has disappeared from 99
13 percent of its historic range in the Sierra Nevada, and was
14 eliminated from the Central Valley before 1960. Remaining
15 substantial populations (over 350 individuals) of the California
16 red-legged frog are found along the Pacific coast, and there are
17 some pockets of smaller, fragmented populations in the Sierra
18 Nevada.

19 24. Agriculture, urbanization, water development, placer
20 mining, livestock grazing, logging, road construction, pesticide
21 and chemical use, and the introduction of a variety of non-
22 native predators and competitors have all contributed to this
23 widespread habitat alteration, which has jeopardized the
24 survival of the frog.

1 25. In 1996, the FWS listed the California red-legged frog
2 as threatened under the ESA. 61 Fed. Reg. 25813 (May 23, 1996).
3 In the final rule, FWS noted that urbanization, agriculture, and
4 many other land-disturbing factors have caused substantial
5 changes in wildlife habitat in California; the Service
6 acknowledged that preservation and proper management of open
7 space in riparian areas was a "fundamental requirement in the
8 survival and recovery of the California red-legged frog." Id.
9 at 25819.

10 26. Despite this recognition, FWS refused to designate
11 critical habitat for the species, instead finding the
12 designation of critical habitat "not prudent." Id. at 25830.

13 27. FWS cited two reasons in deciding not to designate
14 critical habitat. First, FWS claimed without explanation that
15 revealing precise locations of habitat would make the frog more
16 vulnerable to vandalism and other unauthorized takings. Id. In
17 addition, the FWS noted the alleged existence of a significant
18 market for frog meat in California. The California red-legged
19 frog, according to the FWS, could be taken accidentally due to
20 its similar appearance to the bullfrog, or intentionally, as
21 California red-legged frogs reputedly taste better than
22 bullfrogs. Id.

1 28. Second, FWS stated that designating critical habitat
2 would not necessarily provide additional protection. Id. at
3 25822.

4 29. The FWS failed to provide particularized analysis or
5 evidence supporting its conclusion that designation of critical
6 habitat would not be prudent for the California red-legged frog.
7 The FWS's claim of "increased threat" failed to balance the
8 advantages and disadvantages of designation, as expressly
9 required under section 4 of the ESA. 16 U.S.C. § 1533(b)(2).

10 30. To the contrary, designation of critical habitat for
11 the red-legged frog would affirmatively benefit the species.
12 Designation of critical habitat would prohibit federal agency
13 actions that are likely to destroy or adversely modify habitat
14 needed for the continued survival and recovery of the frog.

15 31. Critical habitat designation would also place all
16 landowners on notice that certain areas designated as critical
17 habitat are environmentally sensitive. Local, state, and
18 federal agencies would know this in advance of making financial
19 or contractual commitments, so that future potential conflicts
20 could be avoided.

21 32. Additionally, the FWS's decision on critical habitat
22 did not describe any specific instances of vandalism or
23 intentional taking which would lead to the determination that
24 identification of habitat would increase, rather than decrease,

1 the threat to the California red-legged frog. It is just as
2 logical to assume that critical habitat designation would fairly
3 warn frog collectors of areas to avoid for fear of harming a
4 protected species. Indeed, the existence and locations of the
5 populations of California red-legged frogs are already known or
6 can be easily determined.

7 CLAIM FOR RELIEF

8 Violation of the Endangered Species Act
9 and the Administrative Procedure Act

10 33. Plaintiffs incorporate by reference all preceding
11 paragraphs.

12 34. At the time the California red-legged frog was listed
13 as a threatened species, the FWS had a non-discretionary duty
14 under the ESA to concurrently designate critical habitat for the
15 frog. 16 U.S.C. §§ 1533(a)(3)(A) & 1533(b)(6)(C). The FWS
16 failed and refused, and continues to fail and refuse, to
17 designate critical habitat for the frog. This violation of a
18 non-discretionary duty is subject to judicial review under the
19 ESA, 16 U.S.C. § 1540(g).

20 35. The FWS's failure to designate critical habitat
21 unlawfully withholds and unreasonably delays an action required
22 by the ESA, in violation of the Administrative Procedure Act, 5
23 U.S.C. § 706(1), and is arbitrary, capricious, and not in
24

1 accordance with law, in violation of the Administrative
2 Procedure Act, 5 U.S.C. § 706(2).

3 PRAYER FOR RELIEF

4 WHEREFORE, plaintiffs respectfully request that the Court:

5 A. Adjudge and declare that FWS violated the ESA, its
6 implementing regulations, and the APA by failing to designate
7 critical habitat for the California red-legged frog.

8 B. Adjudge and declare that the continuing failure by FWS
9 to designate critical habitat for the California red-legged frog
10 constitutes an ongoing violation of the ESA, its implementing
11 regulations, and the APA.

12 C. Order FWS to designate critical habitat for the
13 California red-legged frog, as required by the ESA and as
14 defined in the joint regulations, 50 C.F.R. § 424.12.

15 D. Award plaintiffs their reasonable fees, costs,
16 expenses, and disbursements, including attorneys fees,
17 associated with this litigation.

1 E. Grant plaintiffs such additional and further relief as
2 the Court may deem just and appropriate.

3 DATED this 24th day of March, 1999.

4 Respectfully submitted,

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KRISTEN L. BOYLES (CSB #158450)
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