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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 CENTER FOR BIOLOGICAL DIVERSITY and ) Case No:  
12 PACIFIC RIVERS COUNCIL, )  
13 Plaintiffs, )  
14 v. ) COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF  
15 GALE NORTON, in her official capacity as )  
Secretary of the Interior, and STEVEN A. )  
16 WILLIAMS, in his official capacity as Director, )  
United States Fish & Wildlife Service, )  
17 Defendants )  
18

19 INTRODUCTION

20 1. Over three years ago, Plaintiffs Center for Biological Diversity and Pacific Rivers  
21 Council (“Plaintiffs”) petitioned the Secretary of Interior and the Director of the U.S. Fish and  
22 Wildlife Service (collectively, the “Service”) to list the Sierra Nevada mountain yellow-legged frog  
23 (“frog”) as endangered under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* Since  
24 then, Plaintiffs have had to struggle continually to keep the listing process on track. This lawsuit  
25 marks the beginning of what Plaintiffs hope will be the final chapter in that struggle.

26 2. In December 2001, in response to an earlier lawsuit brought by Plaintiffs, this Court  
27 ruled that the Service had violated the ESA by failing to timely determine whether listing the frog  
28 was warranted. *See Center for Biological Diversity v. Norton*, 2001 U.S. Dist. LEXIS 20861, 2001

1 WL 1602696 (N.D. Cal., Dec. 12, 2001). Under Court order, the Service began its scientific review  
2 and the listing process resumed. That review is now complete, and the results have been published  
3 in the Federal Register. 68 Fed. Reg. 2303 (Jan. 16, 2003). In short, the Service has concluded that  
4 the frog is headed towards extinction and warrants listing under the ESA.

5 3. Yet the Service has decided not to list the frog at this time. Instead, the Service has  
6 determined that listing, though warranted, is currently precluded by “higher priority actions.” As a  
7 result, the listing process has once again ground to an indefinite halt. In the meantime, the frog  
8 remains completely unprotected by the ESA.

9 4. Fortunately for imperiled species like the frog, the listing process is not so easily  
10 sidestepped. The ESA is clear that the Service may make a “warranted but precluded” finding only  
11 if it demonstrates both that the timely promulgation of a regulation listing the species is precluded by  
12 other pending listing proposals *and* that expeditious progress is being made on those pending  
13 proposals. The Service has made no such demonstration with respect to the frog, nor is there any  
14 evidence that would support such a finding.

15 5. Consequently, Plaintiffs now return to this Court and respectfully request that the  
16 Court declare that the Service’s warranted but precluded finding for the frog violates both the ESA  
17 and the Administrative Procedure Act (“APA”) and order the Service to withdraw its finding and  
18 publish forthwith a proposed rule listing the frog as endangered.

### 19 **JURISDICTION AND VENUE**

20 6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal  
21 question jurisdiction), 16 U.S.C. § 1540(c) (actions arising under the ESA), and 16 U.S.C. § 1540(g)  
22 (citizen suit provision of the ESA).

23 7. Venue lies in this District pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.  
24 § 1540(g)(3)(A), because plaintiff Center for Biological Diversity maintains an office responsible for  
25 issues related to the Sierra Nevada here, and because many members of both plaintiff organizations  
26 reside in this District.

27 8. Plaintiffs provided the Service with written notice of the violation herein more than  
28 sixty days before commencing this action, as required by 16 U.S.C. § 1540 (g)(2)(C). *See* January

1 16, 2003 letter to Gale Norton, Secretary of the Interior, Steven A. Williams, Director, U.S. Fish &  
2 Wildlife Service, from Gregory C. Loarie. A true and correct copy of this letter is attached hereto as  
3 Exhibit A.

#### 4 **INTRADISTRICT ASSIGNMENT**

5 9. Assignment to the San Francisco Division of this Court is proper because a  
6 substantial part of the events or omissions giving rise to the claims in this case occurred in counties  
7 covered by this division. Civil Local Rule 3-2(c), (d).

#### 8 **PARTIES**

9 10. Plaintiff Center for Biological Diversity (“Center”) is a non-profit corporation based  
10 in Tucson, Arizona, with California offices in Oakland, Idyllwild and San Diego. The Center is  
11 dedicated to protecting endangered species and their habitat in western North America, including the  
12 Sierra Nevada, through science, policy, education, and environmental law. Since its founding over  
13 ten years ago, the Center has fulfilled its mission by preparing and publishing scientific articles,  
14 participating in state and federal administrative proceedings, disseminating educational information  
15 through newsletters, alerts, the world-wide web, and media releases, and petitioning and litigating to  
16 list numerous birds, fish, amphibians, plants, and insects as threatened or endangered species under  
17 the ESA. Many of the Center’s more than seven thousand members reside in or within several hours  
18 drive of the Sierra Nevada and regularly enjoy the Sierra Nevada’s native fauna and flora for  
19 educational, scientific research, moral, aesthetic or spiritual purposes.

20 11. Plaintiff Pacific Rivers Council (“Council”) is a non-profit corporation based in  
21 Eugene, Oregon dedicated to protecting and restoring the nation’s rivers, watersheds, and native  
22 aquatic species. The Council has over one thousand members, nearly two hundred of whom reside  
23 in California. The Council’s goal is to develop scientific tools, legislative policies, and other  
24 strategies to restore the ecological integrity and sustainable human use of America’s aquatic  
25 ecosystems and watersheds. The Council has an active Sierra Nevada Program, which is focused on  
26 achieving watershed level protection for aquatic species and their habitat.

27 12. On March 2, 2000, Plaintiffs submitted a petition to the Service to list the Sierra  
28 Nevada mountain yellow-legged frog as endangered and to designate its critical habitat under the

1 ESA. The petition extensively documents the frog's steep population decline and identifies the  
2 likely causes for this decline. Plaintiffs and their members continue to be actively involved in efforts  
3 to protect and restore the frog and its habitat.

4 13. Plaintiffs and their members derive recreational, scientific, aesthetic, educational,  
5 moral, spiritual, and conservation benefit and enjoyment from the existence of the frog. Plaintiffs  
6 believe that the species will continue to decline and will become extinct unless it is immediately  
7 listed as endangered and receives the full protections of the ESA.

8 14. Plaintiffs' members live and/or work in communities in or near the Sierra Nevada.  
9 They use, on a continuing and ongoing basis, the habitat of the frog for recreational, scientific,  
10 aesthetic, educational, moral, spiritual, and conservation purposes, including, but not limited to,  
11 nature study, wildlife observations, swimming, recreational fishing, hiking and backpacking, skiing,  
12 and aesthetic enjoyment. They intend to continue to do so on an ongoing basis in the future.

13 15. The health the frog is representative of the overall health of the Sierra Nevada  
14 ecosystem, and the alarming decline of this species signals the decline of many other species  
15 dependent upon this ecosystem as well. Extirpation of the frog would constitute an enormous  
16 environmental loss in itself and would indicate more generally that the health and diversity of the  
17 Sierra Nevada's aquatic ecosystems had declined severely. These events would deprive Plaintiffs  
18 and their members of the recreational, scientific, aesthetic, educational, moral, spiritual, and  
19 conservation benefit they presently derive from the native flora and fauna in the Sierra Nevada.

20 16. The above-described recreational, scientific, aesthetic, educational, moral, spiritual,  
21 and conservation interests of Plaintiffs and their members have been, are being, and, unless the relief  
22 prayed for herein is granted, will continue to be adversely affected and irreparably injured by the  
23 Service's continuing failure to list the frog.

24 17. The injuries described above are actual, concrete injuries suffered by Plaintiffs and  
25 their members. These injuries are caused by the Service's decision not to list the frog as endangered  
26 at this time. These injuries would be redressed by the relief sought herein. Plaintiffs have no  
27 adequate remedy at law.  
28

1 18. Defendant Gale Norton is sued in her official capacity as the Secretary of the Interior.  
2 She is ultimately responsible for implementing the ESA, including making findings and  
3 determinations in response to Plaintiffs' petition to list the frog as endangered.

4 19. Defendant Steven A. Williams is sued in his official capacity as Director of the U.S.  
5 Fish and Wildlife Service. He is responsible for administering the ESA, including reviewing and  
6 approving the findings and determinations in response to Plaintiffs' petition described above.

### 7 THE ENDANGERED SPECIES ACT LISTING PROCESS

8 20. A species receives protection under the ESA if and only if it is listed as endangered or  
9 threatened. To this end, Section 4(b) of the ESA, 16 U.S.C. § 1533(b), sets forth a three-step listing  
10 process that is triggered when the Service receives a listing petition such as that submitted by  
11 Plaintiffs in this case. First, within 90 days of receiving the petition, the Service must make a  
12 preliminary determination as to whether the petition presents substantial scientific or commercial  
13 information indicating that listing the species may be warranted. 16 U.S.C. § 1533(b)(3)(A).  
14 Second, if the Service makes a finding that the petition presents substantial information that a listing  
15 may be warranted, it must then complete a formal species status review and determine within 12  
16 months of receiving the petition whether listing the species as endangered or threatened is warranted,  
17 not warranted, or warranted but precluded by higher priority listing actions. 16 U.S.C.  
18 § 1533(b)(3)(B). Third, if the Service determines that listing is warranted and not precluded, the  
19 agency must promptly publish a proposed rule listing the species and then publish a final rule listing  
20 the species one year later. 16 U.S.C. § 1533(b)(6).

21 21. Section 4(b)(3)(B)(iii) of the ESA provides that the Service may make a "warranted  
22 but precluded" finding only if:

- 23 (I) the immediate proposal and timely promulgation of a final regulation  
24 implementing the petitioned action . . . is precluded by pending proposals to  
25 determine whether any species is an endangered species or a threatened species, *and*
- 26 (II) expeditious progress is being made to add qualified species to either [the  
27 endangered or the threatened species list] and to remove from such lists species for  
28 which the protections of this chapter are no longer necessary.

16 U.S.C. § 1533(b)(3)(B)(iii) (emphasis added).

1           22.     In addition, if the Service determines that listing is warranted but precluded, it must  
2 promptly publish the finding in the Federal Register “together with a description and evaluation of  
3 the reasons and data on which the finding is based.” 16 U.S.C. § 1533(b)(3)(B).

4           23.     The ESA treats a listing petition that receives a warranted but precluded finding under  
5 Section 4(b)(3)(B)(iii) as a petition that is resubmitted on the day that such finding is made and  
6 found to contain substantial information indicating that listing may be warranted. 16 U.S.C.  
7 § 4(b)(3)(C)(i). In other words, the petition remains in step two of the listing process for another  
8 year, after which time the Service must decide again whether listing is warranted, not warranted, or  
9 warranted but still precluded by higher priority listing actions. During this regulatory limbo, the  
10 species is monitored but receives no substantive protection whatsoever under the ESA. *See* 16  
11 U.S.C. § 4(b)(3)(C)(iii).

#### 12                   **THE SIERRA NEVADA MOUNTAIN YELLOW-LEGGED FROG**

13           24.     Mountain yellow-legged frogs (*Rana muscosa*) live only in two separate regions of  
14 California: the Sierra Nevada mountain range in eastern California and the San Gabriel, San  
15 Bernadino, and San Jacinto mountain ranges of southern California. Frogs in these two regions have  
16 evolved their own unique genetic, physical and behavioral characteristics, and the Service therefore  
17 considers these “distinct population segments” independently of one another for listing purposes  
18 under the ESA.

19           25.     This case involves the Sierra Nevada distinct population segment, referred to herein  
20 as the “Sierra Nevada mountain yellow-legged frog” or simply “the frog.” The Service listed the  
21 Southern California distinct population segment as endangered last year in keeping with the terms of  
22 a settlement agreement in another lawsuit reached with the Center, among other organizations.  
23 67 Fed. Reg. 44382 (July 2, 2002).

24           26.     The Sierra Nevada mountain yellow-legged frog is a moderately sized amphibian  
25 ranging from 1.5 to 3.25 inches in length. Individuals vary in color, but are typically mottled brown  
26 except for the belly and undersurfaces of the hind limbs, which, as the name suggests, are yellow.  
27 Mountain yellow-legged frogs are more closely tied to water bodies for breeding and foraging than  
28 many other species of frogs or toads. At lower elevations, the frog is generally associated with

1 rocky streambeds and wet meadows surrounded by coniferous forest. At higher elevations, the  
2 species occupies lakes, ponds, tarns and streams. Both adults and tadpoles must over-winter for up  
3 to nine months in the bottoms of lakes that are at least 5.6 feet deep.

4 27. Historically, the mountain yellow-legged frog was the most abundant frog in the  
5 Sierra Nevada. The frog's distribution was once more or less continuous from the vicinity of La  
6 Porte in southern Plumas County southward to Taylor and French Joe meadows in southern Tulare  
7 County at elevations of between 4,500 and 12,000 feet. Today, the frog's distribution in the Sierra  
8 Nevada is restricted primarily to publicly managed lands at high elevations. The frog has suffered a  
9 50 to 80 percent reduction in population size in the Sierra, and, if present trends continue, the  
10 Service estimates that the species will become extinct within a few decades.

11 28. Numerous factors have contributed to the frog's collapse, including the continued  
12 stocking of Sierra Nevada lakes with non-native fish that prey on the frog, pesticide drift from the  
13 Central Valley, livestock grazing, increased ultraviolet radiation due to depletion of the ozone layer,  
14 acid deposition, and drought.

15 29. On March 2, 2000, the Secretary received Plaintiffs' petition to list the Sierra Nevada  
16 mountain yellow-legged frog as endangered under the ESA and to designate critical habitat for this  
17 species. On October 5, 2000, the Service announced a preliminary 90-day finding that the petition  
18 presented substantial information indicating that listing the Sierra Nevada mountain yellow-legged  
19 frog may be warranted. 65 Fed. Reg. 60603 (Oct. 12, 2000). On January 16, 2003, the Service  
20 announced that listing the frog is warranted, but currently precluded by higher priority actions.  
21 68 Fed. Reg. 2303 (Jan. 16, 2003).

22 30. The Service characterizes the overall magnitude of the threats to the frog as "high"  
23 and the immediacy of these threats as "imminent." On that basis, the Service has assigned the frog a  
24 listing priority number of 3, just behind court ordered deadlines and emergency listing actions.

### 25 **FIRST CAUSE OF ACTION**

26 (Violation of the Endangered Species Act)

27 31. Plaintiffs reallege, as if fully set forth herein, each and every allegation contained in  
28 the preceding paragraphs.





1 **REQUEST FOR RELIEF**

2 WHEREFORE, Plaintiffs respectfully request that the Court:

3 A. Find and declare that the Service’s warranted but precluded finding for the Sierra  
4 Nevada mountain yellow-legged frog violates the ESA and APA;

5 B. Order the Service to withdraw its warranted but precluded finding for the frog and  
6 publish forthwith a proposed rule listing the frog as endangered and designating its critical habitat;

7 C. Retain jurisdiction over this matter until such time as the Service has published a final  
8 rule listing the frog as endangered and designating critical habitat;

9 D. Award Plaintiffs their costs of litigation, including reasonable attorney and expert  
10 witness fees; and

11 E. Grant Plaintiffs such further and additional relief as the Court may deem just and  
12 proper.

13  
14 Dated: April \_\_\_\_, 2003

Respectfully submitted,

15  
16  
17 \_\_\_\_\_  
18 Gregory C. Loarie  
19 Attorney for Plaintiffs

20 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

21 Pursuant to Civil Local Rule 3-16, the undersigned certifies that, as of this date, Plaintiffs are  
22 unaware of any entity or person other than the named parties with an interest that could be  
23 substantially affected by the outcome of this proceeding.  
24

25  
26 Dated: April \_\_\_\_, 2003

27 \_\_\_\_\_  
28 Gregory C. Loarie  
Attorney for Plaintiffs