

1 T. GERALD CHILTON, JR., State Bar No. 002481
2 Jerry@chiltonlaw.com
3 CHILTON LAW OFFICES
4 110 S. Mesa Drive, Suite 1
5 Mesa, Arizona 85210
6 Telephone: (480) 969-0500
7 Facsimile: (480) 969-7056

8 BRENDA W. DAVIS, (pro hac vice pending)
9 bdavis@bwdlawgroup.com
10 LESLIE R. WAGLEY, (pro hac vice pending)
11 lwagley@bwdlawgroup.com
12 THE BRENDA DAVIS LAW GROUP
13 1990 3rd Street, Suite 400
14 Sacramento, CA. 95811
15 Telephone: (916) 341-7400
16 Facsimile: (916) 341-7410

17 Attorneys for Plaintiffs
18 COUNCIL FOR ENDANGERED SPECIES ACT RELIABILITY,
19 and GEORGE YARD

20 **THE UNITED STATES DISTRICT COURT**
21 **DISTRICT OF ARIZONA**

22 COUNCIL FOR ENDANGERED SPECIES
23 ACT RELIABILITY, a nonprofit organization;
24 and DR. GEORGE YARD

25 Plaintiffs,

26 v.

27 LISA P. JACKSON, as Administrator of the
28 United States Department of the Interior;
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY; and LAURA
YOSHII, as Region 9 Administrator of the
United States Environmental Protection Agency,

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

I. INTRODUCTION

1
2 1. This is an action for declaratory judgment and injunctive relief which arises under and
3 asserts violations of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§
4 136-136y, and the Endangered Species Act (“ESA”) 16 U.S.C. §§ 1531-1544.

5 2. Plaintiffs COUNCIL FOR ENDANGERED SPECIES ACT RELIABILITY
6 (“CESAR”) and DR. GEORGE YARD challenge the failure of Defendants UNITED STATES
7 ENVIRONMENTAL PROTECTION AGENCY (“EPA”); LISA P. JACKSON, as Administrator of
8 the EPA; and LAURA YOSHII, as Regional 9 Administrator of the EPA, to comply with the FIFRA
9 and the ESA in re-registering the pesticide rotenone for aquatic use and in approving of its
10 applications to Arizona’s rivers, streams, lakes and stock ponds as a piscicide. Defendants’ failure to
11 comply with the ESA is jeopardizing the continued existence of Chiricahua leopard frogs (*Rana*
12 *chiricahuensis*)¹, Spikedace (*Meda fulgida*)², Loach minnows (*Tiaroga cobitis*)³, bonytail chubs
13 (*Gila elegans*)⁴, razorback suckers (*Xyrauchen texanus*)⁵, Gila topminnows (*Poeciliopsis*
14 *occidentalis*)⁶, Gila chubs (*Gila intermedia*)⁷, Sonora tiger salamanders (*Ambystoma tigrinum*
15 *stebbinsi*)⁸, Southwestern willow flycatchers (*Empidonax trailli extimus*)⁹, and Jaguars (*Panthera*

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17
18 _____
19 ¹ Listed as threatened June 13, 2002, 67 Fed. Reg. 40789-40811

20 ² Listed as threatened July 1, 1986, 51 Fed. Reg. 23769-23781

21 ³ Listed as threatened October 28, 1986, 51 Fed. Reg.39468-39478

22 ⁴ Listed as endangered with critical habitat, November 2, 2005, 70 Fed. Reg. 66663-66721

23 ⁵ Listed as endangered October 23, 1991, 56 Fed. Reg. 54957-54967; critical habitat designated March 21, 1994, 59
24 Fed. Reg. 13374-13400

25 ⁶ Listed as endangered March 11, 1967, 32 Fed. Reg. 4001

26 ⁷ Listed as endangered with critical habitat, 70 Fed. Reg. 66663-66721

27 ⁸ Listed as endangered January 6, 1997, 62 Fed. Reg. 665-689

28 ⁹ Listed as endangered February 27, 1995, 60 Fed. Reg. 10693-10715; critical habitat designated, October 19, 2005, 70
Fed. Reg. 60886-61009

1 *onca*)¹⁰ (collectively the "affected endangered and threatened species"), federally listed endangered
2 and threatened species, and adversely modifying many of these species' critical habitat.

3 3. The Defendants' actions are in violation of the ESA by failing to undergo consultation
4 with the FWS regarding the effects of the re-registration of rotenone on these endangered and
5 threatened species, in violation of §7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

6 4. These violations continue despite the availability of considerable scientific research
7 showing that aquatic use of rotenone for piscicidal (fish-killing) purpose can adversely affect the
8 health and survival of the affected endangered and threatened species and the habitat on which they
9 depend.

10 5. Plaintiffs seek a judgment declaring that EPA has violated the ESA by re-registering
11 and allowing continued use of rotenone without completing consultations with the FWS and without
12 ensuring that the pesticide re-registration will not jeopardize listed species' existence and will not
13 destroy and/or adversely modify their designated critical habitat. Plaintiffs seek an order (1)
14 compelling EPA to initiate consultations with the FWS regarding the effects of rotenone, and any
15 organic and/or synthetic formulations thereof, on the affected threatened and endangered species that
16 may be affected by the aquatic use of this pesticide; and (2) granting interim protective measures to
17 prevent harm to listed species and their designated critical habitat until the consultation process is
18 complete and the EPA brings the re-registration for rotenone into compliance with the ESA.

19 6. Plaintiffs also seek an order declaring that the EPA has violated Section 7(d) of the
20 ESA by making irreversible and irretrievable commitments of resources prior to the conclusion of the
21 consultation process.

22 7. Plaintiffs also seek a judgment declaring that EPA acted arbitrarily, capriciously, and
23 in violation of FIFRA in re-registering rotenone for aquatic use.

24 **II. JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

25 8. This action is brought pursuant to section 16(a) of FIFRA, 7 U.S.C. § 136n(a), and
26 section 11(g)(1) of the ESA, 16 U.S.C. § 1540(g)(1). This Court has jurisdiction pursuant to 7 U.S.C.

27 _____
28 ¹⁰ Listed as endangered in United States July 22, 1997, 62 Fed. Reg. 39147-39157

1 § 136n(a), 16 U.S.C. § 1540(g)(1), and 28 U.S.C. § 1331. Further, the Court may grant declaratory
2 and injunctive relief. 28 U.S.C. §§ 2201, 2202.

3 9. As required by the ESA citizen suit provision, plaintiff Dr. George Yard provided 60
4 days' notice of intent to sue on November 17, 2009, to defendants via certified mail and facsimile. A
5 copy of the notice is appended as Exhibit A. To date, Defendants have not remedied the violations set
6 forth in the 60-day notice.

7 10. Venue is proper in the District Court for the District of Arizona pursuant to 28 U.S.C.
8 § 1391(e).

9 11. The federal government waived sovereign immunity in this action. 16 U.S.C. §
10 1540(g); 5 U.S.C. § 702.

11 **III. PARTIES**

12 12. Plaintiff CESAR is a California nonprofit, public interest organization whose mission
13 is to bring scientific rigor to regulatory decisions undertaken pursuant to environmental statutes, to
14 ensure consistent application of these statutes throughout all industries and all sectors, and to fulfill
15 the educational goals of its members and provide educational information on the ESA and its
16 application to the general public in the process. See <http://bestscience.org/>. CESAR fulfills its
17 mission by holding educational seminars, disseminating educational materials to its members,
18 participating in administrative proceedings, and commenting on and initiating litigation about species
19 listings under the ESA. CESAR brings this action on its own behalf and on behalf of its adversely
20 affected members.

21 13. Plaintiff Dr. George Yard owns ranch land, lives on and has cattle on land threatened
22 by the re-registration, approval and subsequent use of rotenone by Defendants and has been and will
23 be adversely affected by Defendants' failure to comply with the ESA. This is because rotenone has
24 already been applied to the upper Verde River upstream from Dr. Yard's ranch (in 2009), will likely
25 be applied there again in 2010, and because at least two more Arizona streams (West Fork of Oak
26 Creek, upstream of Sedona, Arizona, and Redrock Canyon, upstream of Patagonia, Arizona) are
27 currently proposed for rotenone poisoning in 2010. Unless the relief requested is granted, Dr.
28 Yard's educational, moral, spiritual, scientific, recreational, biological, property, personal health, and

1 aesthetic interests will continue to be adversely affected and injured by the Defendants' failure to
2 consult with the FWS under the ESA and their additional failure to comply with the FIFRA.

3 14. Defendant UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
4 (“EPA”), an agency of the United States charged with registering and re-registering pesticides under
5 FIFRA and with ensuring that the authorized pesticide uses will not cause unreasonable adverse
6 effects on the environment. The EPA is also charged with ensuring that, through consultation with the
7 FWS, its pesticide registrations will not jeopardize the survival and recovery of listed species or
8 destroy or adversely modify their designated critical habitat.

9 15. Defendant LISA P. JACKSON is the Administrator of the EPA and is named in her
10 official capacity.

11 16. Defendant LAURA YOSHII is the Region 9 Administrator of the EPA and is named in
12 her official capacity.

13 **IV. LEGAL BACKGROUND**

14 **A. ESA Framework**

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

21 18. Section 7(a)(2) of the ESA requires the following: “each federal agency shall, in
22 consultation with and with the assistance of the Secretary, insure that any action authorized, funded,
23 or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely
24 to jeopardize the continued existence of any endangered species or threatened species or result in the
25 destruction or adverse modification of habitat of such species which is determined by the Secretary ...
26 to be critical.” 16 U.S.C. § 1536(a)(2).

27 19. The ESA establishes an interagency consultation process to assist federal agencies in
28 complying with their substantive Section 7(a)(2) duty to guard against jeopardy to listed species or

1 destruction or adverse modification of critical habitat. Under Section 7(a)(2), federal agencies must
2 consult with the appropriate expert fish and wildlife agency to determine whether their actions will
3 jeopardize listed species' survival or adversely modify designated critical habitat, and if so, to identify
4 ways to modify the action to avoid that result. 50 C.F.R. § 402.14.

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

11 21. Regulations implementing Section 7 broadly define the scope of agency actions
12 subject to consultation to encompass "all activities or programs of any kind authorized, funded, or
13 carried out, in whole or in part, by Federal agencies," including the promulgation of regulations and
14 the granting of licenses. 50 C.F.R. § 402.02 (definition of "action").

15 22. Agencies must consult on ongoing agency actions over which the federal agency
16 retains, or is authorized to exercise, discretionary involvement or control. See, e.g., 50 C.F.R. §
17 402.16 (re-initiation of consultation). Agencies must also consult on ongoing agency actions "if a new
18 species is listed . . . that may be affected by the identified action." *Id.*

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

28

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

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

21 **B. FIFRA**

22 26. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") charges the EPA
23 with registering, reviewing, amending, and re-registering chemicals and chemical formulations for
24 use as insecticides, fungicides, and pesticides in the United States. 7 U.S.C. §§136-136y. Under
25 FIFRA, a pesticide generally may not be sold or used in the United States unless it has an EPA
26 registration for that particular use. 7 U.S.C. § 136a(a). EPA may register a pesticide if it makes the
27 following determinations: (1) the labeling complies with FIFRA's requirements; (2) the composition
28 claims are warranted; (3) the pesticide will perform its intended function; and (4) the pesticide will

1 not cause unreasonable adverse effects on the environment. 7 U.S.C. § 136a(c)(5). The culmination of
2 the registration process is EPA's approval of a label for the particular pesticide. FIFRA makes it
3 unlawful to use a pesticide in a manner inconsistent with the label. Id. at §136j(2)(G), or to make any
4 claims that differ substantially from the label. Id. at § 136j(1)(B).

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

13 28. EPA is in a process of re-registering pesticides that have been on the market for years
14 and often decades prior to enactment of the environmental registration requirements currently in
15 place. 7 U.S.C. § 136a-1. EPA generally eliminates or imposes restrictions on harmful uses of the
16 pesticides, including those uses that cause harm to threatened or endangered species, as part of the re-
17 registration determination.

18 29. The EPA Administrator has the authority to cancel pesticide registrations whenever "a
19 pesticide or its labeling or other material required to be submitted does not comply with the
20 provisions of this Act or, when used in accordance with widespread and commonly recognized
21 practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. §136d(b). The
22 Administrator may immediately suspend a pesticide registration to prevent an imminent hazard. Id. §
23 136d(c). An announcement by the Administrator of an intent to cancel a pesticide use often results in
24 the registrant's voluntary cancellation of, or agreement to further constraints upon that use.

25 **C. Rotenone Use and the Affected Endangered Species**

26 30. The EPA classifies rotenone as highly toxic or slightly toxic depending on
27 concentration. The World Health Organization classifies it as moderately hazardous. (IPCS,
28 International Programme on Chemical Safety; United Nations Environment Programme; International

1 Labour Organization; World Health Organization. (2007). The WHO Recommended Classification of
2 Pesticides by Hazard. WHO (www.who.int/ipcs/publications/pesticides_hazard/en/.) Rotenone is
3 classified by the United States Department of Agriculture National Organic Program as a
4 nonsynthetic and was allowed to be used to grow "organic" produce until 2005 when it was removed
5 from the list of approved substances due to concerns about its safety. (Rotenone. Resource Guide for
6 Organic and Disease Management. Cornell University.) Potential problems in mammals include
7 dermatitis, allergies and possible Parkinson's like symptoms (Caboni P, Sherer T, Zhang N, Taylor G,
8 Na H, Greenamyre J, Casida J (2004). "Rotenone, deguelin, their metabolites, and the rat model of
9 Parkinson's disease". *Chem Res Toxicol* 17 (11): 1540–8. doi:10.1021/tx049867r. PMID 15540952.).
10 Additionally, a recent scientific study published in the *Journal of Agromedicine* shows a correlation
11 between 100 Parkinson's disease patients and the use of the pesticide rotenone (Dhillon, AS,
12 Tarbutton, GL, Levin, JL, Plotkin, GM, Lowry, LK, Nalbhone, JT and S Shepard (2008).
13 "Pesticide/environmental exposures and Parkinson's disease in East Texas." *J Agromedicine*. 2008;
14 13(1): 37-48.).

15 31. The approved use of rotenone as an aquatic pesticide introduces many toxins into the
16 affected endangered and threatened species' habitat. Three ingredients in current rotenone
17 formulations are on the Proposition 65 list of chemicals known to the State of California to cause
18 cancer or reproductive toxicity. Moreover, exposure to rotenone has recently been directly linked
19 with Parkinson's disease in humans. Further, rotenone, when used as an aquatic pesticide, interferes
20 with oxygen use and is especially toxic to organisms that obtain oxygen from water, such as fish,
21 amphibians and aquatic invertebrates. Certain species of aquatic invertebrates and native fishes are
22 particularly susceptible to long-term or permanent extirpation from streams poisoned by rotenone.
23 (Mangum and Madrigal (1999); Maslin (1996)).

24 32. Rotenone also has indirect lethal and sublethal effects as amphibians, birds and other
25 species will likely suffer from depleted food sources because rotenone will substantially decrease
26 insect populations and other macro-invertebrate populations and will eliminate fish populations
27 depended on as food sources.

28

1 33. Despite this readily available information regarding these detrimental effects of
2 rotenone, the EPA neither initiated the requisite ESA consultation nor complied with the FIFRA prior
3 to issuing its re-registration decision on rotenone and approving its use as an aquatic pesticide.

4 **V. FIRST CLAIM FOR RELIEF**

5 **(Violation of FIFRA in Re-registering Rotenone)**

6 34. Each and every allegation set forth above in Paragraphs 1 through 33 is hereby re-
7 alleged and is incorporated herein by reference.

8 35. In order to register or re-register a pesticide use, EPA must determine that the use “will
9 not generally cause unreasonable adverse effects on the environment.” 7 U.S.C. §§ 136a(c)(5), 136a-
10 1(a)(2). FIFRA defines “unreasonable adverse effects on the environment” to mean “any
11 unreasonable risk to man or the environment, taking into account the economic, social, and
12 environmental costs and benefits of the use of any pesticide” Id. at § 136(bb). In order to satisfy
13 this standard, EPA must consider all relevant health, environmental, economic, and social risks and
14 benefits of the pesticide use and determine that the benefits outweigh the risks.

15 36. The registrant bears the burden of proving that the benefits of a pesticide use outweigh
16 the risks. The registrant bears this burden at all times. EPA cannot re-register a pesticide use unless
17 the registrant has met its burden with respect to that use.

18 37. In determining whether rotenone was eligible for re-registration, EPA inadequately
19 investigated and failed to fully consider the risks posed to the human and natural environments from
20 rotenone uses.

21 38. Under FIFRA, EPA cannot register or re-register a pesticide use that poses risks of
22 concern to workers or the environment unless the registrant has proved that the benefits of the use
23 outweigh all of the health, environmental, economic, and social risks posed by that use. Here, the
24 EPA failed to place the burden of proof on the registrant to prove that rotenone was eligible for re-
25 registration under FIFRA. EPA also conducted an inadequate investigation into the risks and benefits
26 of rotenone and failed to consider important factors relating to the re-registration eligibility of
27 rotenone. In addition, EPA never aggregated the total risks posed by the rotenone uses to the
28 environment. In the absence of a full assessment of the risks and benefits of rotenone, EPA lacked a

1 sufficient basis to determine that the benefits of each rotenone use outweighed the risks and would
2 therefore not have unreasonable adverse effects on human health and the environment. By re-
3 registering rotenone uses that pose substantial risks of concern to human health and the environment
4 without requiring the registrant to prove that rotenone was eligible for re-registration, and without an
5 adequate basis to make the FIFRA-mandated risk-benefit findings, EPA acted arbitrarily,
6 capriciously, and contrary to FIFRA.

7 **VI. SECOND CLAIM FOR RELIEF**

8 **(Violations of The Endangered Species Act [16 U.S.C. §1536(a)(2) and (d)])**

9 39. Each and every allegation set forth above in Paragraphs 1 through 38 is hereby re-
10 alleged and is incorporated herein by reference.

11 40. Section 7(a)(2) of the ESA states the following: Each Federal agency shall, in
12 consultation with and with the assistance of the Secretary [of the Interior or Commerce], insure that
13 any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the
14 continued existence of any endangered species or threatened species or result in the destruction or
15 adverse modification of[critical] habitat . . .16 U.S.C. § 1536(a)(2). “Its very words affirmatively
16 command all federal agencies to insure that actions authorized, funded, or carried out by them do not
17 jeopardize the continued existence of an endangered species.” *TVA v. Hill*, 437 U.S. 153, 173(1978).
18 The EPA and FWS must review their actions through the consultation process at the earliest possible
19 time to determine whether any action may affect listed species or critical habitat. 50 CFR § 402.14(a).
20 Re-initiation of consultation is required and must be requested by the EPA or the FWS where
21 discretionary federal involvement or control over the action has been retained or is authorized by law
22 and a new species is listed or critical habitat designated that may be affected by the identified action.
23 50 CFR § 402.16(d).

24 41. Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires federal agencies to ensure
25 that their actions will not jeopardize the survival and recovery of listed species and will not adversely
26 modify designated critical habitat. To comply with this duty, federal agencies, like EPA, must consult
27 with the FWS and/or NMFS whenever the agency takes an action that “may affect” a listed species or
28

1 the species' critical habitat. Id.; see also 50 C.F.R. § 402.14(a). The federal agency must determine
2 whether its actions "may affect" listed species at the earliest possible time.

3 42. On its face and under ESA implementing regulations, section 7(a)(2) of the ESA
4 applies to licenses such as EPA's registration and re-registration of pesticides. 50 C.F.R. § 402.02.
5 EPA's findings of risks of concern for threatened and endangered species equates with a "may affect"
6 finding that triggers ESA's consultation mandates.

7 43. Under the ESA, the EPA has a duty to undergo consultation to "insure that any action
8 authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued
9 existence of an endangered or threatened species." 16 U.S.C. § 1536(a)(2).

10 44. In its ecological risk assessments for rotenone, EPA states that "the ecological
11 assessment that EPA conducted for this RED does not, in itself, constitute a determination as to
12 whether specific species or critical habitat may be harmed by the pesticide. Rather, this assessment
13 serves as a screen to determine the need for any species specific assessment that will evaluate whether
14 exposure may be at levels that could cause harm to specific listed species and their critical habitat."
15 This statement is insufficient to meet the EPA's requirements under the ESA. Over 47 threatened and
16 endangered species live in counties where such uses are authorized to occur. For example, Sonora
17 Tiger salamanders, Gila Topminnows, Spikedace, Loach minnows, Chiricahua leopard frogs and
18 Southwestern willow flycatchers live at rotenone application sites and/or sites of proposed application
19 of rotenone and may be severely adversely affected by use of rotenone as an aquatic pesticide.

20 45. EPA is in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by re-
21 registering rotenone without completing the ESA-mandated consultations and without ensuring that
22 the re-registered pesticide uses will not jeopardize the survival and recovery of threatened and
23 endangered species and will not destroy and/or adversely modify their critical habitat.

24 46. Separately, section 7(d) of the ESA, 16 U.S.C. § 1536(d), prohibits federal agencies,
25 after the initiation of consultation under section 7(a)(2), from making any irreversible or irretrievable
26 commitment of resources if doing so would foreclose the implementation of reasonable and prudent
27 alternatives. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. The purpose of this section is to insure that
28 the existing environmental status quo is maintained during the consultation process so as not to

1 foreclose consideration and adoption of alternatives to the proposed federal agency action. *Connor v.*
2 *Burford*, 848 F.2d 1441, 1445 n. 34 (9th Cir. 1988). This prohibition on irreversible and irretrievable
3 commitment of resources applies throughout consultation and continues until the requirements of
4 section 7 are completed. Because the registration program is an “agency action” triggering the
5 consultation process, the EPA is subject to the prohibition on making irreversible and irretrievable
6 commitments of resources pending final resolution of the consultation process.

7 47. As EPA continues to allow uses of rotenone prior to completion of an ESA
8 consultation, it makes irreversible and irretrievable commitments of resources that will foreclose the
9 implementation of reasonable and prudent alternatives that may result from the consultation and,
10 therefore, is in violation of section 7(d) of the ESA.

11 **VII. PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiffs respectfully request that the Court enter judgment providing the
13 following relief:

14 1. Declare that EPA violated sections 7(a)(2) and 7(d) of the ESA by failing to complete
15 ESA consultations before re-registering rotenone use and for failing to ensure that the re-registered
16 uses will avoid jeopardizing the survival and recovery of threatened and endangered species and
17 destroying and/or adversely modifying their designated critical habitat;

18 2. Declare that EPA acted arbitrarily, capriciously, and contrary to FIFRA in re-
19 registering uses of rotenone;

20 3. Order EPA to consult with the FWS pursuant to section 7(a)(2) of the ESA on the re-
21 registered uses of rotenone that “may affect” threatened and endangered species and/or their
22 designated critical habitat, and direct EPA to ensure that it conducts the consultations in a manner that
23 addresses the most significant threats posed to listed species by pesticide use in an expeditious
24 fashion;

25 4. Order EPA to make new re-registration eligibility decision for rotenone use on an
26 expeditious basis in which EPA re-registers a use of a pesticide only when the pesticide registrants
27 have proved that the health, environmental, economic, and social benefits outweigh the risks; and
28 ensures, based on completed section 7(a)(2) consultations, that the re-registered pesticide uses will

1 avoid jeopardizing the survival and recovery of threatened and endangered species and destroying
2 and/or adversely modifying their critical habitat;

3 5. Order the EPA to prohibit uses of rotenone affecting the threatened and endangered
4 species identified herein, and their critical habitat, until the consultation process has been completed
5 and the EPA has brought its pesticide registration program into compliance with ESA § 7(a)(2) and
6 the FIFRA;

7 6. Award Plaintiffs' costs, including reasonable attorneys' fees; and

8 7. Provide such other relief as the court deems just and proper.

9 DATED THIS 16th day of March, 2010.

10 CHILTON LAW OFFICES

11
12 /s/ T. Gerald Chilton, Jr.
13 T. Gerald Chilton, Jr.

14 THE BRENDA DAVIS LAW GROUP

15
16 /s/ Brenda W. Davis
17 Brenda W. Davis

18 Attorneys for Plaintiffs
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