

1 ERIN M. TOBIN (State Bar No. 234943)
etobin@earthjustice.org
2 MICHAEL R. SHERWOOD (State Bar No. 63702)
msherwood@earthjustice.org
3 Earthjustice
426 17th Street
4 Oakland, CA 94612
(510) 550-6725
5 (510) 550-6749 fax

6 Attorneys for Plaintiff

7
8 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
9 SAN FRANCISCO DIVISION
10

11 CENTER FOR BIOLOGICAL DIVERSITY,) Civ. No.
12 Plaintiff,)
13 v.) COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
14 DIRK KEMPTHORNE, in his official capacity)
as Secretary of the Interior; H. DALE HALL, in)
15 his official capacity as Director, United States)
Fish and Wildlife Service; and UNITED)
16 STATES FISH AND WILDLIFE SERVICE, an)
agency of the United States Department of the)
17 Interior,)
18 Defendants.)
19)

20 **INTRODUCTION**

21 1. This is an action for declaratory and injunctive relief under the Endangered Species
22 Act (“ESA”), 16 U.S.C. §§ 1531- 44, and the Administrative Procedure Act (“APA”), 5 U.S.C. §
23 551, et seq. Plaintiff Center for Biological Diversity challenges the decision of defendants Dirk
24 Kempthorne, Secretary of the Interior, H. Dale Hall, Director, U.S. Fish and Wildlife Service, and
25 the U.S. Fish and Wildlife Service (collectively “the Service”) to eliminate nearly 3.5 million acres
26 of proposed critical habitat for the threatened California red-legged frog (*Rana aurora draytonii*)
27 (“the Frog”), an imperiled subspecies whose geographic range has been drastically curtailed by over
28 seventy percent because of habitat destruction caused by human activities.

PARTIES

1
2 7. Plaintiff Center for Biological Diversity (“Center”) is a non-profit membership
3 organization based in Tucson, Arizona, with California offices in San Francisco and San Diego. The
4 Center is dedicated to protecting endangered and threatened species and their habitat in North
5 America through science, policy, education, and environmental law. The Center pursues its mission
6 by preparing and publishing scientific articles, participating in state and federal administrative
7 proceedings, disseminating educational information through newsletters, alerts, the world-wide web,
8 and media releases, and petitioning and litigating to list numerous birds, fish, amphibians, plants,
9 and insects as threatened or endangered species under the ESA and to designate critical habitat for
10 those species. The Center’s more than 7,000 members and staff include residents who live and work
11 in or near California red-legged frog habitat and who possess educational, scientific, moral, spiritual,
12 and recreational interests in preserving that habitat.

13 8. Plaintiff and its members use and enjoy, on an ongoing basis, aquatic ecosystems of
14 the State of California that provide habitat for the Frog, for recreational, scientific, conservational,
15 and aesthetic purposes. Plaintiff and its members derive or, but for the threatened status of the Frog,
16 would derive recreational, scientific, aesthetic, and conservational benefits from the existence in the
17 wild of California red-legged frogs through wildlife observation, study, photography, and other
18 activities. The past, present, and future enjoyment of these benefits by plaintiff and its members has
19 been, is being, and will continue to be irreparably harmed by the defendants’ failure to designate
20 legally adequate critical habitat for the Frog.

21 9. The recreational, scientific, conservational, and aesthetic interests of the Center and
22 its members are actual, concrete injuries suffered by the Center and its members. They would be
23 redressed by the relief sought herein. Plaintiff has no adequate remedy at law.

24 10. The defendants in this action are:

25 A. Dirk Kempthorne, Secretary of the Interior. As Secretary of the Interior, he
26 has the ultimate responsibility to enforce and implement the provisions of the ESA. Defendant
27 Kempthorne is sued in his official capacity.
28

1 B. H. Dale Hall, Director of the U.S. Fish and Wildlife Service. As the Director,
2 he is the federal official with delegated responsibility for properly enforcing the ESA and the Act's
3 implementing regulations with respect to terrestrial species such as the Frog. Defendant Hall is sued
4 in his official capacity.

5 C. The United States Fish and Wildlife Service. As an agency within the
6 Department of the Interior, the Service is charged with implementing and ensuring compliance with
7 the ESA.

8 **STATUTORY BACKGROUND**

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

14 12. Section 4 of the ESA, and its corresponding regulations, require designation of
15 “critical habitat” for threatened and endangered species at the time of listing, to the maximum extent
16 prudent and determinable. 16 U.S.C. § 1533(a)(3)(A)(i); 50 C.F.R. § 424.12(a). “Species” includes
17 any subspecies of wildlife, such as the Frog. 16 U.S.C. § 1532(16).

18 13. The ESA defines critical habitat as specific areas: (1) within the geographic area
19 occupied by the species at the time it is listed, on which are found those physical or biological
20 features that are “essential to the conservation of the species” and which may require special
21 management consideration or protections, and (2) outside the geographic area occupied by the
22 species at the time it is listed that are “essential for the conservation of the species.” 16 U.S.C. §
23 1532(5)(A)(i), (ii).

24 14. The ESA defines “conservation” to mean “the use of all methods . . . that are
25 necessary to bring any . . . threatened species . . . to the point at which the measures provided
26 pursuant to [the Act] are no longer necessary,” 16 U.S.C. § 1532(3), *i.e.*, the point at which the
27 species is recovered. The Ninth Circuit has emphasized that “the purpose of establishing ‘critical
28 habitat’ is for the government to carve out territory that is not only necessary for the species’

1 survival but also essential for the species' recovery." *Gifford Pinchot Task Force v. United States*
2 *Fish & Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004).

3 15. Critical habitat must include "[h]abitats that are protected from disturbance or are
4 representative of the historic geographical and ecological distributions of a species." 50 C.F.R. §
5 424.12(b)(5).

6 16. The Service must make critical habitat determinations "on the basis of the best
7 scientific data available and after taking into consideration the economic impact . . . and any other
8 relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2); 40
9 C.F.R. § 424.12(a). It is the Service's policy that the best available science upon which critical
10 habitat decisions must be based includes sources such as a species' recovery plan, articles in peer-
11 reviewed journals, conservation plans for the species, scientific status surveys and studies, biological
12 assessments, or other expert opinion.

13 17. Once the Service designates critical habitat, the ESA protects that habitat from harm
14 caused by actions by federal agencies. Section 7(a)(2) of the ESA requires that each federal agency
15 "insure" that federal actions will not "result in the destruction or adverse modification" of critical
16 habitat. 16 U.S.C. § 1536(a)(2).

17 **FACTUAL BACKGROUND**

18 **The California Red-Legged Frog**

19 18. The California red-legged frog is the largest frog native to the western United States
20 and is characterized by the red or salmon pink coloring of the abdomen and hind legs of adults.

21 19. The Frog is a subspecies of the red-legged frog species and is found mainly in
22 California. The habitat range of the Frog historically extended along the California coast from
23 Marin County to northwestern Baja, Mexico, throughout the Central Valley, and within the foothills
24 of the Sierra Nevada. It is typically found from sea level to elevations of approximately 5,000 feet.

25 20. The Frog has lost more than seventy percent of its historic range. It has disappeared
26 from 99 percent of its historic range in the Sierra Nevada, and was eliminated from the Central
27 Valley before 1960. Most remaining populations of the Frog are found along the Pacific coast, and
28 there are some pockets of smaller, isolated populations in the Sierra Nevada.

1 21. Agriculture, urbanization, water development, placer mining, livestock grazing,
2 logging, road construction, pesticide and chemical use, and the introduction of a variety of non-
3 native predators and competitors have all contributed to widespread habitat alteration that has
4 jeopardized the survival of the Frog. The fragmentation of existing habitats may represent the most
5 significant current threat to California red-legged frogs.

6 22. The Frog is adapted to survive in a Mediterranean climate with variable habitat
7 quality that can influence Frog population sizes. The Frog is found in ponds, marshes, and creeks
8 with still water, and the subspecies requires riparian areas with dense or shrubby vegetation that
9 contain open areas for basking. During periods of extended drought, Frogs may temporarily
10 disappear from an area. This makes it important for the survival and recovery of the subspecies to
11 protect unoccupied sites that can be recolonized by nearby subpopulations.

12 23. To reproduce, female adult frogs attach their egg masses to emergent vegetation
13 where the eggs float on the water surface until they hatch. Because the eggs are exposed and
14 vulnerable, and because the larvae need five to seven months to metamorphose, the survival rate of
15 larvae has been estimated as less than one percent. It is critical to the Frog's survival, development,
16 and recovery that riparian vegetation is undisturbed.

17 24. California red-legged frogs may move from breeding sites at any time of year. Frogs
18 are capable of dispersing at distances exceeding 1.8 miles from a breeding site and farther than 328
19 feet from water in adjacent dense riparian vegetation. There is some evidence that juvenile frogs
20 disperse at least .6 miles away from breeding habitat.

21 25. The healthiest California red-legged frog populations persist as a collection of
22 subpopulations that exchange genetic information through individual dispersal events. These
23 populations persist and grow when there is suitable breeding and nonbreeding habitats interspersed
24 throughout the landscape that are interconnected by unfragmented dispersal habitat.

25 26. The survival and recovery of the Frog is dependent upon the protection of existing
26 breeding habitat, the movements of individual frogs between aquatic habitat, and the ability of
27 individual frogs to recolonize unoccupied habitat. Recolonization of historically occupied but
28 currently unoccupied areas is essential to the recovery of the Frog.

1 **Administrative and Procedural History**

2 27. In 1996, the Service listed the Frog as threatened under the ESA. 61 Fed. Reg. 25813
3 (May 23, 1996). In the final rule, the Service noted that urbanization, agriculture, and many other
4 land-disturbing activities have caused substantial changes in the Frog’s habitat in California. The
5 Service acknowledged that preservation and proper management of open space in riparian areas is a
6 “fundamental requirement in the survival and recovery of the California red-legged frog.” *Id.* at
7 25819. However, the Service did not designate critical habitat for the subspecies because the
8 Service found that designating critical habitat was “not prudent.” *Id.* at 25822.

9 28. On March 24, 1999, a coalition of conservation organizations including the Center
10 filed a lawsuit in the Northern District of California challenging the Service’s failure to designate
11 critical habitat for the Frog.

12 29. On December 15, 1999, as clarified by a subsequent order, the district court ordered
13 the Service to issue a final critical habitat rule for the Frog by December 29, 2000.

14 30. On September 11, 2000, the Service issued a proposed rule that would designate
15 approximately 5,373,650 acres as critical habitat for the Frog. 65 Fed. Reg. 54892 (September 11,
16 2000). On March 13, 2001, the Service published a final rule designating approximately 4.1 million
17 acres of critical habitat for the Frog. 66 Fed. Reg. 14626 (March 13, 2001).

18 31. On May 28, 2002, the Service adopted a Recovery Plan for the Frog with the
19 objective of reducing the threats to and improving the population status of the Frog sufficient to
20 delist the subspecies. According to the Recovery Plan, delisting of the Frog requires protection of
21 existing populations, connectivity between subpopulations, and reestablishment of new populations
22 in certain “core areas” in the Frog’s historic range. The purpose of the core areas is to allow for the
23 long-term viability of existing populations and reestablishment of new populations in the Frog’s
24 historic range.

25 32. On June 8, 2001, the Home Builders Association of Northern California and other
26 industry groups filed a lawsuit in the U.S. District Court for the District of Columbia challenging the
27 Service’s designation of critical habitat for the Frog. A coalition of conservation organizations
28 including the Center intervened in that lawsuit to defend the critical habitat rule. However, the

1 Service reached a closed-door settlement with the industry groups and agreed to vacate the critical
2 habitat designation and remand it to the Service to do over with a new economic analysis. The
3 settlement allowed two areas (that were not occupied by the Frog) to retain their status as critical
4 habitat, in Tuolumne, Mariposa and Los Angeles Counties. The settlement was adopted by the court
5 over the objections of the Center as a consent decree on November 6, 2002.

6 33. On April 13, 2004, the Service published a proposed revised critical habitat rule
7 designating approximately 4.1 million acres as critical habitat for the Frog. 69 Fed. Reg. 19620
8 (April, 13, 2004) (“proposed rule”). The proposed rule proposed designating as critical habitat areas
9 essential to the Frog’s conservation, including essential aquatic habitat for feeding and breeding,
10 associated uplands, and dispersal habitat to allow frogs to move between and among essential
11 aquatic habitat. The proposed rule would have designated both areas that were occupied by the Frog
12 and areas not occupied by the Frog. The Service concluded that the unoccupied areas proposed for
13 designation as critical habitat are essential to the Frog’s conservation because they are within the
14 “core areas” identified in the Frog’s Recovery Plan, represent the Frog’s historic range, and have
15 “unique ecological significance” for the subspecies.

16 34. On November 3, 2005, the Service published a revised proposed revised critical
17 habitat rule. 70 Fed. Reg. 66906 (Nov. 3, 2005) (“revised proposed rule”). The revised proposed
18 rule proposed to designate approximately 737,912 acres of critical habitat. As compared to the pre-
19 existing rule and the April 2004 proposed rule, each of which would designate approximately 4.1
20 million acres of critical habitat, this represented a substantial reduction in critical habitat for the
21 Frog. The revised proposed rule eliminated all areas that were not currently occupied by the Frog,
22 even though the Service had determined in the proposed rule that at least two such unoccupied areas
23 are “essential” to the conservation of the Frog.

24 35. On April 13, 2006, the Service published a final revised rule designating critical
25 habitat for the Frog that reduced the Frog’s critical habitat even further, to approximately 450,288
26 acres. 71 Fed. Reg. 19244 (April 13, 2006) (“final critical habitat rule” or “final rule”). This was
27 nearly a ninety percent reduction in overall critical habitat for the Frog as compared to the pre-
28 existing rule and the April 2004 proposed rule.

1 36. The final critical habitat rule does not designate as critical habitat any areas that are
2 not currently occupied by the Frog, even though the Frog’s geographic range has dwindled to less
3 than a third of the subspecies’ historic range. The final rule does not explain why the Service
4 decided it would not designate historically occupied but currently unoccupied areas as critical
5 habitat when both the Service’s April 2004 proposed rule and the Recovery Plan determine that
6 some unoccupied areas are essential to the Frog’s conservation.

7 37. The final rule excludes from the Frog’s critical habitat federal lands within Sierra
8 Nevada national forests, and areas covered by habitat conservation plans and other management
9 plans, by consistently overstating the costs and failing to recognize the conservation, societal, and
10 economic benefits of designating Frog critical habitat.

11 38. The final critical habitat rule excludes over 200,000 acres based on an economic
12 analysis that does not meaningfully consider nor analyze all of the likely benefits of designating
13 such areas as critical habitat for the Frog.

14 39. Benefits of designating critical habitat ignored by the Service in the final rule include,
15 but are not limited to, protection of ecosystem functions such as water filtration, erosion control, and
16 climate and air quality control. Although members of the public repeatedly informed the Service of
17 this error in public comments on the proposed rule, the Service did not consider many such benefits
18 because the Service found that it was too “difficult” to estimate their value. The Service also did not
19 evaluate broader social values of designating critical habitat such as the value of preserving the
20 genetic and scientific resources of plants and animals protected by critical habitat, or the aesthetic,
21 cultural, and historic values of preserving critical habitat.

22 **Political Interference In The Rule-Making Process**

23 40. The Service’s determination in the final critical habitat rule that over 3.5 million acres
24 is not Frog “critical habitat” is a direct result of pressure by the Interior Department, in particular by
25 former Deputy Assistant Secretary Julie MacDonald, to reduce protections for the Frog for the
26 benefit of private landowners, the livestock industry, and other special-interest groups, at the
27 expense of the scientific integrity of the final rule.

1 41. After publication of the proposed critical habitat rule in April 2004, Service field
2 offices were informed that officials in the Interior Department in Washington, D.C. wanted the
3 Service to re-propose the Frog’s critical habitat rule in order to reduce the potential economic effect
4 of the rule on industry groups. Instructions came directly from former Deputy Assistant Secretary
5 for Fish, Wildlife, and Parks, Julie MacDonald, a non-biologist and political appointee, that it was
6 necessary to designate the smallest possible critical habitat for the Frog. Field offices were told that
7 designating as critical habitat areas that were not currently occupied by the Frog would be “very
8 difficult,” and that Service biologists could not rely on the Frog’s Recovery Plan to determine that
9 unoccupied areas were essential to the conservation of the Frog and, hence, critical habitat.

10 42. Former Deputy Assistant Secretary MacDonald is not a trained biologist. Ms.
11 MacDonald nevertheless had numerous briefings with professional staff in the Service’s California-
12 Nevada Operations Office and California field offices who were handling the critical habitat rule. In
13 some of these briefings, Ms. MacDonald gave staff direction as to how to map habitat of the Frog.
14 Ms. MacDonald also made clear her concern that staff were proposing to designate too much
15 unoccupied habitat as critical habitat for the Frog. Ms. MacDonald also reviewed, commented, and
16 edited in detail drafts of the critical habitat rule, and repeatedly questioned scientific judgments and
17 interpretation of scientific literature that would increase protections for the Frog and potentially
18 adversely impact industry groups.

19 43. A documented history exists within the Interior Department of interference by
20 political appointees with scientific decision-making in the Endangered Species Program. Such
21 interference has compromised the scientific integrity of the Service’s endangered and threatened
22 species listing and critical habitat decisions, including the final critical habitat rule for the Frog.

23 44. On April 11, 2006, an employee of the Service filed a complaint with the Interior
24 Department’s Inspector General that former Deputy Assistant Secretary MacDonald had “bullied,
25 harassed, and insulted” professional staff of the Service to coerce staff to ignore scientific
26 information and change scientific documents related to the Service’s Endangered Species Program.
27 The Inspector General initiated an investigation of Ms. MacDonald’s inappropriate involvement in
28 species listing and critical habitat decisions.

1 45. The scientific integrity of numerous species decisions has been called into doubt as a
2 result of former Deputy Assistant Secretary MacDonald's unmatched and aggressive involvement in
3 reshaping endangered species scientific reports at the field level. Ms. MacDonald has interfered
4 with critical habitat fieldwork, ordered that staff change scientific documents, and insisted that field
5 scientists revise their scientific findings to be consistent with Ms. MacDonald's inexpert
6 interpretations of the scientific literature. Examples of this behavior are reflected in the Inspector
7 General's final report of its investigation of Ms. MacDonald, which it published in March 2007.

8 46. On or around May 1, 2007, Ms. MacDonald resigned as Deputy Assistant Secretary
9 of the Interior for Fish, Wildlife, and Parks.

10 47. On or around June 29, 2007, the Manager of the Service's California-Nevada
11 Operations Office informed the Director of the Service that on "multiple occasions" former Deputy
12 Assistant Secretary MacDonald "did actively attempt to influence [the] scientific rationale and
13 conclusions" for species decisions. The California-Nevada Operations Office further recommended
14 that the Service revise the Frog's critical habitat because MacDonald "influenced the application of
15 science" in the final rule. *See* June 29, 2007 letter from Manager Steve Thompson to Director H.
16 Dale Hall, attached hereto as Exhibit B.

17 48. On or around July 20, 2007, Director H. Dale Hall ordered a review of the listing and
18 critical habitat decisions for eight species, including the Frog's critical habitat rule, because the
19 decisions may have been inappropriately influenced by former Deputy Assistant Secretary
20 MacDonald.

21 49. On or around November 23, 2007, the Service determined that the Frog's critical
22 habitat rule "should be revised" because of valid questions concerning the scientific integrity of the
23 final rule and whether the rule applied the appropriate legal standards. *See* November 23, 2007 letter
24 from Acting Director Kenneth Stansell to Representative Nick J. Rahall, II, attached hereto as
25 Exhibit C. However, the Service stated that it would only proceed with this revision "as funding is
26 made available." *Id.*

1 **CLAIMS FOR RELIEF**

2 **FIRST CLAIM FOR RELIEF**

3 **(Violation of the Endangered Species Act)**

4 50. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in
5 the preceding paragraphs.

6 51. Section 4(b)(2) of the ESA imposes a non-discretionary duty on the Service to
7 designate critical habitat for all listed species and subspecies, including the Frog, “on the basis of the
8 best scientific data available.” 16 U.S.C. § 1533(b)(2).

9 52. Because the Interior Department improperly interfered with scientific determinations
10 forming the basis of the Frog’s critical habitat designation, and for the reasons set forth above, the
11 final critical habitat rule is not based on the “best scientific data available,” in violation of Section
12 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2).

13 53. This violation of a non-discretionary duty is subject to judicial review under the ESA,
14 16 U.S.C. § 1540(g).

15 **SECOND CLAIM FOR RELIEF**

16 **(Violation of the Endangered Species Act)**

17 54. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in
18 the preceding paragraphs.

19 55. Section 4(b)(2) of the ESA imposes a non-discretionary duty on the Service to
20 designate critical habitat for all listed species, including the Frog, after taking into consideration the
21 economic impact and “any other relevant impact” of specifying a particular area as critical habitat.
22 16 U.S.C. § 1533(b)(2). The Secretary may exclude an area from critical habitat only if he or she
23 “determines that the benefits of such exclusion outweigh the benefits of specifying such area as part
24 of the critical habitat.” 16 U.S.C. § 1533(b)(2).

25 56. The final critical habitat rule excludes from the Frog’s critical habitat areas within
26 Sierra Nevada national forests, areas covered by habitat conservation plans and State and local
27 management plans, and other areas, based on the Service’s arbitrary assessment of the benefits and
28 costs of designating these areas as critical habitat, the agency’s failure to recognize the conservation

1 and societal benefits of critical habitat, and a faulty economic analysis that inflates the overall costs
2 and fails to recognize the economic benefits of designating critical habitat for the Frog, in violation
3 of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2).

4 57. This violation of a non-discretionary duty is subject to judicial review under the ESA,
5 16 U.S.C. § 1540(g).

6 **THIRD CLAIM FOR RELIEF**

7 **(Violation of the Endangered Species Act)**

8 58. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in
9 the preceding paragraphs.

10 59. Section 4(a)(3) of the ESA imposes a non-discretionary duty on the Service to
11 designate as critical habitat for the Frog all areas that are essential to the survival, recovery, and
12 conservation of the Frog. 16 U.S.C. § 1533(a)(3); 16 U.S.C. § 1532(5)(A)(i), (ii).

13 60. For the reasons set forth above, the Service failed to include in the final critical
14 habitat rule areas that are essential to the survival, recovery, and conservation of the Frog, in
15 violation of Section 4(a)(3) of the ESA, 16 U.S.C. § 1533(a)(3).

16 61. This violation of a non-discretionary duty is subject to judicial review under the ESA,
17 16 U.S.C. § 1540(g).

18 **FOURTH CLAIM FOR RELIEF**

19 **(Violations of the Administrative Procedure Act)**

20 62. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in
21 the preceding paragraphs.

22 63. The Service's adoption of the final critical habitat rule is a final agency action subject
23 to judicial review under the APA.

24 64. The Service's failure in the final critical habitat rule to make its determination of the
25 Frog's critical habitat on the basis of the best scientific data available, its failure to designate as
26 critical habitat all areas that are essential to the conservation of the Frog, and its exclusion of areas
27 under Section 4(b)(2) and in reliance on a faulty economic analysis, are each and all arbitrary,
28 capricious, an abuse of discretion, otherwise not in accordance with the law, in excess of statutory

1 authority, and without observance of procedure required by law, in violation of the APA, 5 U.S.C. §
2 706(2).

3 **PRAYER FOR RELIEF**

4 WHEREFORE, plaintiff respectfully requests that the Court:

5 A. Find and declare that the Service violated the ESA, its implementing regulations, and
6 the APA in designating critical habitat for the Frog;

7 B. Order the Service to designate critical habitat for the Frog that includes all habitat
8 that, on the basis of the best available scientific data, is essential to the survival and recovery of the
9 Frog, properly considers the benefits and costs of critical habitat designation, and is otherwise in
10 compliance with the ESA and its implementing regulations;

11 C. Order the Service to initiate a new rulemaking procedure immediately, and to publish
12 a proposed revised designation of critical habitat for the Frog within ninety days after the Order of
13 this Court, and to publish a final rule designating legally adequate critical habitat for the Frog within
14 nine months thereafter;

15 D. Retain jurisdiction over this matter until such time as the Service has published a final
16 rule designating legally adequate critical habitat for the Frog;

17 D. Award plaintiff its reasonable fees, costs, expenses, and disbursements, including
18 attorneys fees, associated with this litigation.

19 E. Grant plaintiff such additional and further relief as the Court may deem just and
20 appropriate.

21 DATED: December ____, 2007.

Respectfully submitted,

22
23 ERIN M. TOBIN (State Bar No. 234943)
24 MICHAEL R. SHERWOOD (State Bar No. 63702)
25 Earthjustice
26 426 17th Street
27 Oakland, CA 94612
28 (510) 550-6725
(510) 550-6749 fax

Attorneys for Plaintiff