

1 Jack Silver, Esquire SB# 160575
Law Office of Jack Silver
2 Jerry Bernhaut, Esquire SB# 206264
Post Office Box 5469
3 Santa Rosa, California 95402-5469
4 Telephone: (707) 528-8175
Facsimile: (707) 528-8675
5 Email: lhm28843@sbcglobal.net

6 Attorney for Plaintiff
7 CALIFORNIA RIVER WATCH

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA

10 CALIFORNIA RIVER WATCH, a
11 501(c)(3) non-profit, public benefit
Corporation,

12 Plaintiff,

13 v.

14 HUMBERTO CASTANEDA; MARIA
BERTHA CASTANEDA; DOES 1-10,
15 Inclusive,

16 Defendants.

CASE NO. 3:13-cv-01700 WHA

**FIRST AMENDED COMPLAINT FOR
DECLARATORY RELIEF, INJUNCTIVE
RELIEF AND REMEDIATION
[Endangered Species Act - 16 U.S.C. § 1531
et seq.]**

17
18 NOW COMES Plaintiff CALIFORNIA RIVER WATCH, a 501(c)(3) non-profit, public
19 benefit Corporation, (“PLAINTIFF”) by and through its attorneys, and for its First Amended
20 Complaint against Defendants HUMBERTO CASTANEDA, MARIA BERTHA CASTANEDA
21 and DOES 1-10, Inclusive, (“DEFENDANTS,”) states as follows:

22 **I. INTRODUCTION**

23 1. This is a civil action brought by PLAINTIFF under the federal Endangered Species
24 Act (“ESA,”) 16 U.S.C. § 1531 *et seq.*, to prevent DEFENDANTS from ongoing violations of
25 the ESA and violations of regulations pertaining to California Tiger Salamander listed as
26 endangered pursuant to ESA § 4. Said violations are detailed in the December 3, 2012 Notice
27 of Violations and Intent to File Suit, a true copy of which is attached hereto as **EXHIBIT A** and
28 fully incorporated into this First Amended Complaint.

1 endangered species under the ESA, including California Tiger Salamander. Said members have
2 spent, and plan to further spend, time in the habitat of the Sonoma CTS hoping to observe these
3 species. The interests of PLAINTIFF and its members are adversely affected by
4 DEFENDANTS' actions as set forth in this First Amended Complaint. Said interests have been,
5 are being, and unless the requested relief is granted, will continue to be, adversely affected by
6 DEFENDANTS' failure to comply with the ESA.

7 11. PLAINTIFF is informed and believes and thereupon alleges that DEFENDANTS
8 HUMBERTO CASTANEDA and MARIA BERTHA CASTANEDA are individuals residing
9 in the County of Sonoma who have an ownership interest in the property located at 2859 Fulton
10 Road in the area of Sonoma County designated as Fulton, assigned Sonoma County Assessor's
11 Parcel Numbers 059-060-042 and 059-060-043 (the "Property") where the violations alleged in
12 this First Amended Complaint took place.

13 12. The true names and capacities of DEFENDANT DOES 1-10, Inclusive, whether
14 individual, corporate, or otherwise, are presently unknown to PLAINTIFF, who therefore sues
15 DEFENDANTS by said fictitious name. PLAINTIFF is informed and believes and on such
16 information and belief alleges, that each of said fictitiously-named DEFENDANTS is
17 responsible in whole or in part for the acts alleged herein. PLAINTIFF will seek leave of the
18 Court to substitute the true names of said fictitiously-named DEFENDANTS when the same
19 have been ascertained.

20 13. PLAINTIFF alleges that at all relevant times herein, each DEFENDANT was the
21 agent, representative, employee, surrogate, partner, or joint venturer of each other DEFENDANT
22 and in doing the actions alleged herein, acted within the scope of his/her/its authority as such
23 agent, representative, employee, surrogate, partner, or joint venturer and acted with the
24 permission and consent of each of said DEFENDANTS.

25 **V. STATUTORY BACKGROUND**

26 14. The ESA is designed to "provide a means whereby the ecosystems upon which
27 endangered species and threatened species depend may be conserved, [and] to provide a program
28 for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

1 Principal among the ESA's system of species protection is the Section 9 prohibition rendering
2 it illegal for any "person" to "take" any species listed as endangered. *See* 16 U.S.C. §
3 1538(a)(1)(B). "Take is defined in the broadest possible manner to include every conceivable
4 way in which a person can 'take' or attempt to 'take' any fish or wildlife." *Defenders of Wildlife*
5 *v. Administrator*, EPA, 882 F.2d 1294, 1300 (8 Cir. 1989). The term "take" is defined as "to
6 harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage
7 in any such conduct." 16 U.S.C. § 1532(19). Harm includes significant habitat modification or
8 degradation. Harassment includes actions which significantly disrupt normal behavioral patterns
9 which include, but are not limited to, breeding, feeding, or sheltering.

10 15. Killing or injuring California Tiger Salamander is a TAKE under ESA § 9, 16
11 U.S.C. § 1538(a)(1)(B). There is a high likelihood that Sonoma CTS were present on the
12 Property due to the limited acres of their habitat remaining in the area as verified by studies
13 undertaken by regulatory agencies. Any Sonoma CTS present on the Property during the deep
14 ripping of the land and removal of vegetation by DEFENDANTS as alleged herein, were killed
15 or harmed by these activities.

16 16. Critical habitat consists of a habitat area essential to the conservation of a listed
17 species, though the area need not actually be occupied by the species at the time it is designated.
18 This is a specific term and designation within the ESA. To cause or contribute to the destruction
19 of critical habitat of California Tiger Salamander, or to otherwise degrade such critical habitat
20 is to "TAKE" that species regardless of whether the actions result in actual injury or death.
21 Modification of critical habitat such as the clearing and stripping of all vegetation from the land,
22 ripping up to six feet into the soil with tractors, and removing all root systems falls within the
23 ESA's "take" prohibition on harm by modifying critical habitat to the point where it will result
24 in injury; and harassment, by significantly disrupting normal behavioral patterns including
25 breeding, feeding and sheltering.

26 17. California Tiger Salamander burrow into the ground and use gopher, rabbit and
27 other animal dens for shelter. Plowing fields up to six feet below the ground level destroys these
28 burrows and therefore the shelter of California Tiger Salamander. "Take" includes direct as well

1 as indirect harm and need not be purposeful.” *Babbitt v. Sweet Home Chapter of Communities*
2 *for a Great Oregon*, 515 U.S. 687, 704 (1995). A TAKE may even be the result of an accident.
3 *See National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir.
4 1994). DEFENDANTS’ continued farming practices on the Property harass the Sonoma CTS
5 by rendering its habitat uninhabitable.

6 VI. STATEMENT OF FACTS

7 18. The Property, owned and controlled by DEFENDANTS, is located within the
8 designated critical habitat of Sonoma CTS. Portions of Sonoma County were designated critical
9 habitat during an emergency listing in 2002. [67 Fed. Reg. 47726 (July 22, 2002)]. A final rule
10 listed the critical habitat in 2005. [70 Fed. Reg. 74138]. A revised Designation of Critical
11 Habitat was completed in 2011. [76 Fed. Reg. 54372]. Critical habitat for Sonoma CTS was
12 designated based on credible records of Sonoma CTS breeding, as reported by biologists who
13 surveyed the area for FWS. Sonoma CTS are a Designated Population Segment, that is, a
14 population which is discrete from the rest of the population and is significant to the species. The
15 Sonoma County Designated Population Segment of California Tiger Salamander have declined
16 to a point where they now face extinction. California Tiger Salamander inhabit areas with vernal
17 pools, wetlands, and/or burrows which are essential to the feeding, breeding, and sheltering of
18 these animals. There are 47,383 acres of California Tiger Salamander critical habitat in Sonoma
19 County, California.

20 19. California Tiger Salamander live for approximately four to six years. They spawn
21 once a year. Large numbers of California Tiger Salamander larvae are killed by predation from
22 wading birds, garter snakes, non-native bullfrogs before reaching adulthood. The uninhabited
23 areas of Sonoma County have historically provided essential breeding, feeding, and sheltering
24 habitat for Sonoma CTS. Adults of the species migrate at night from upland habitats, such as
25 burrows, to aquatic breeding sites during the first major rain events of the autumn months;
26 walking up to a mile, which can take several days, to the nearest pond or wetland. Once
27 breeding is complete, Sonoma CTS return to the upland habitat. During the spring and summer
28 months they aestivate in burrows.

EXHIBIT A

Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402
Phone 707-528-8175 Fax 707-528-8675
lhm28843@sbcglobal.net



CORRECTED NOTICE

Via Certified Mail - Return Receipt Requested

December 3, 2012

Humberto and Maria Bertha Castaneda
2859 Fulton Road
Fulton, CA 95439

Ken Salazar, Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Re: Notice of Violations and Intent to File Suit under the Endangered Species Act

Dear Mr. and Mrs. Castaneda and Secretary Salazar:

The Endangered Species Act (“ESA”) Section 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator and the Secretary of Interior or Commerce.

This letter provides notice on behalf of Northern California River Watch (“River Watch”) to Humberto and Maria Bertha Castaneda, as landowners and vineyard developers of the land located along Fulton Road in northern Santa Rosa assigned Assessor’s Parcel Numbers 059-060-042 and 059-060-043 (“Developers”) of the alleged harm and unauthorized take of California tiger salamander in the Santa Rosa Plain Conservation Area, in violation of Section 7 and Section 9 of the ESA, 16 U.S.C. § 1538.

Notice is also provided to the Secretary of the Department of the Interior that after the expiration of the 60-day notice period, River Watch will be entitled to file suit in federal court to enforce the ESA, unless the Secretary has commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a); or, the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA alleged in this Notice.

STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B), it is unlawful for any person to TAKE an endangered species. Under ESA § 4(19), 16 U.S.C. § 1532(19), the term “TAKE” includes to harass, harm, wound, kill, trap, capture, or collect, or attempt to engage in any such

conduct. TAKE includes direct as well as indirect harm and need not be purposeful or intentional. Cumulative acts resulting in a TAKE are also actionable. Attempting to cause almost any level of injury to an endangered species is prohibited by law. A TAKE is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can TAKE or attempt to TAKE any fish or wildlife listed as endangered or threatened, pursuant to the ESA.

Regulations promulgated pursuant to ESA § 7 require all federal agencies to consult with the United States Fish and Wildlife Service (“FWS”) if an “action” is proposed that may affect listed freshwater fish and/or wildlife species or their designated habitat, 16 U.S.C. §1536 (a)(2); 50 CFR 402. The term “action” is defined broadly to include funding, permitting and other regulatory actions.

ESA §10 prohibits the TAKE of threatened and endangered species in the absence of an incidental take permit.

The ESA includes a broad citizen suit provision allowing any person to commence a civil suit on its own behalf to enjoin any entity alleged to be in violation of any provision of the ESA or a regulation issued under the authority thereof. A plaintiff can seek to enjoin both present activities which constitute an ongoing TAKE, and future activities reasonably likely to result in a TAKE, ESA §11(g), 16 U.S.C. §11(g).

BACKGROUND

California Tiger Salamander

The California tiger salamander (*Ambystoma Californiense*) is a rare species of amphibian protected under the ESA. It is a large, stocky, terrestrial salamander with a broad, rounded snout. The primary decline of the species is the loss and fragmentation of habitat both from human activities and from nonnative predators. California tiger salamanders survive in vernal pools and seasonal ponds, including many constructed stock ponds, in grassland and oak savannah plant communities, predominantly from sea level to 2,000 feet in central California.

The ESA provides for the listing of distinct populations segments (“DPSs”) of vertebrate species. *See* 61 Fed. Reg. 4725 (February 7, 1996) (“Policy Regarding the Recognition of Distinct Vertebrate Segments Under the Endangered Species Act”). Three populations of California tiger salamander are protected under the ESA: Santa Barbara, Sonoma, and Central California (not including Santa Barbara DPS and Sonoma DPS).

In 2002, the FWS made an emergency listing of the Sonoma population of the California tiger salamander as an endangered DPS. 67 Fed. Reg. 47726 (July 22, 2002); *see* 68 Fed. Reg. 13498 (March 19, 2003) (final ruling listing the DPS upon expiration of emergency rule; reaffirmed in 2005).

Highly vulnerable to urban development, road construction and use, and to intensive agricultural practices which eliminate vernal pools, wetlands, and burrows essential to the survival and recovery of the slow moving amphibian, it took approximately six (6) years for federal scientists to identify the acreage necessary to avoid the extinction of this species. Critical salamander habitat was determined to cover 74,223 acres, not all of which was contiguous. Due to backlash from builders and others, the acreage has now been reduced to only 47,383 (September 30, 2011). This small area is referred to as the Santa Rosa Plain Conservation Area.

Conversion of Habitat to Vineyard

Developers' land, located within the Santa Rosa Plain Conservation Area, is designated critical habitat of the California tiger salamander. Conversion of this land for the purpose of growing wine grapes requires clearing and stripping all vegetation from the land, ripping the soils with tractors and with digging tongs up to 6-feet in length, to remove all root systems. Harmful insecticides and pesticides are applied. The land is contoured, staked out with thousands of metal rods pounded into the ground, and tightly spaced wire racks are installed. Wildlife fencing often follows and water needs are identified and developed with water tanks filled by wells, municipal water, ponds, or other water diversions. These activities pose significant risks to the California tiger salamander through both physical harm and reduction of critical habitat.

In the Spring of 2012, as Developers began to clear land for a vineyard, they were advised by FWS that either a formal consultation under ESA § 7 or a habitat conservation plan would be required. Also, that land would need to be set aside for mitigation for the loss of critical habitat. Regardless, Developers installed a vineyard on the property without seeking the required ESA § 7 consultation or preparing a habitat conservation plan. Wetlands and vernal pools were plowed under, and the ripping of the soil destroyed the critical habitat of California tiger salamander.

Killing of Protected Species

The ESA intends that species on the verge of extinction shall not be killed. There are very few exceptions where this might be legal, none of which apply to Developers. River Watch alleges that endangered California tiger salamanders present during the deep ripping of the land and removal of vegetation for vineyard development were directly killed by these activities carried out and/or conducted under the direction of Developers. The high likelihood that tiger salamanders were present on Developers' land during the above-described activities is based on the small amount of tiger salamander habitat remaining in the area as verified by studies undertaken by regulatory agencies.

VIOLATIONS OF THE ESA

The ESA prohibits any person, agency, or entity from committing a TAKE by harming or harassing species listed as endangered or threatened, ESA § 9 (a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). As clarified by FWS in 1999, habitat modification or degradation may harm listed species and, therefore, constitutes a TAKE under the ESA.

River Watch alleges that Developers, as owners and operators of the property which is the subject of this Notice, and by reason of developing a vineyard on said property absent a formal consultation under ESA § 7 or a habitat conservation plan, are responsible for severely modifying and degrading, to the point of destroying, the critical habitat of California tiger salamander; and, are responsible for the actual physical killing of California tiger salamander. As a result, Developers are liable for a TAKE under both the definitions of “harm” and “harassment”. ESA §9 (a)(1)(B), 16 U.S.C. § 1538(a)(1)(B). This harm and harassment is continuing.

ESA § 7(d), 16 U.S.C. § 1538 (d) provides:

“ LIMITATION ON COMMITMENT OF RESOURCES. - After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2). ”

River Watch alleges that the initial contact by FWS with the Developers and notification to Developers by the FWS of the need for an ESA §7 consultation prior to vineyard development, constitutes the initiation of consultation for purposes of this subsection. The complete destruction of critical habitat in the course of vineyard development described above constitutes the irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures. River Watch alleges that Developers’ activities as described are therefore violations of ESA § 7(d)(2), 16 U.S.C. § 1538(d)(2).

ESA § 10 (a)(1)(B), 16 U.S.C. § 1539 (a)(1)(B), *et. seq.* authorizes any TAKE otherwise prohibited by 16 U.S.C. §1538 (a)(1)(B), under an incidental TAKE permit, upon submission by the applicant of a habitat conservation plan approved by the Secretary. River Watch alleges that no such habitat conservation plan was submitted or approved by Developers; and, that Developers failed to apply for an incidental take permit for the vineyard developed described in this Notice, in violation of ESA § 10 (a)(1)(B), 16 U.S.C. § 1539 (a)(1)(B).

IDENTIFICATION OF ENTITY BRINGING NOTICE

The entity providing this Notice is Northern California River Watch, a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams, wetlands, vernal pools, and groundwater in Northern California. Northern California River Watch is located in Sebastopol, California and can be contacted via Email at US@ncriverwatch.org or through its attorneys.

River Watch has retained legal counsel with respect to the issues addressed in this Notice. All communications regarding the same should be addressed as follows:

Jerry Bernhaut, Esquire
P.O. Box 5469
Santa Rosa, CA 95402-6459
Tel. 707-528-8175
Fax. 707-528-8675


CONCLUSION

The activities of Developers alleged herein violate the EPA. The harm and harassment to critical habitat of California tiger salamander significantly hinders the prospects for this species' recovery.

At the close of the 60-day notice period or shortly thereafter River Watch will pursue a citizens' suit against Developers for the violations of the ESA described herein. If prior to expiration of the 60-day notice period the Developers correct these violations and are legally enjoined from further violations of the ESA, River Watch will not proceed to suit.

River Watch is willing to discuss effective remedies for the violations described. However, if Developers wish to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the notice period.

Very truly yours,


Jerry Bernhaut

JB:lhbm

cc: Dan Ashe Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> ■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery 1-9-13</p>
<p>1. Article Addressed to:</p> <p>Humberto Castaneda Maria Bertha Castaneda 2659 Fulton Rd Fulton, CA 954139</p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>2. Article Number (Transfer from service label)</p>	<p>7009 2250 0003 0295 3735</p>
<p>PS Form 3811, February 2004</p>	<p>Domestic Return Receipt 102595-02-M-1540</p>