

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,
et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Defendants.

Case No. [11-cv-00293-JCS](#)

**ORDER GRANTING MOTION TO
INTERVENE; GRANTING MOTIONS
TO DISMISS AND DISMISSING
COMPLAINT WITH LEAVE TO
AMEND.**

Dkt. Nos. 135, 137, 139.

I. INTRODUCTION

Plaintiffs Center for Biological Diversity and Pesticide Action Network North America (hereafter “Plaintiffs”) filed this action against the Environmental Protection Agency (hereafter “EPA”), alleging the EPA violated the Endangered Species Act by failing to undertake required consultations regarding the effects of 382 registered pesticides on endangered and threatened species. Representatives of the producers of the pesticides—CropLife America, Responsible Industry for a Sound Environment, Southern Crop Production Association, Western Plant Health Association, Mid America CropLife Association, American Chemistry Council, and Reckitt Benckiser LLC—filed a Motion to Intervene as defendants under Rule 24 of the Federal Rules of Civil Procedure. The Court previously granted intervention in the remedial phase of the case, and now GRANTS the Motion to Intervene in the liability phase.

On November 16, 2012, both the EPA and Intervenor-Defendants filed a Motion to Dismiss, contending the Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim under the Endangered Species Act upon which relief may be granted. Defendants also argue that Plaintiffs’ Endangered Species Act claim is, in substance, an attack on the EPA’s pesticide registrations which are governed by the Federal Insecticide, Fungicide and Rodenticide Act, and

1 therefore, the case should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.
 2 The EPA additionally contends that Plaintiffs have not adequately pled a factual basis to support
 3 standing. For the reasons explained below, the Motions to Dismiss are GRANTED and the
 4 Complaint is DISMISSED WITH LEAVE TO AMEND.¹

5 **II. BACKGROUND**

6 **A. Statutory Background**

7 **1. The Endangered Species Act (“ESA”)**

8 The ESA requires federal agencies such as the EPA to “insure that any action authorized,
 9 funded, or carried out by such agency (hereinafter ... referred to as an ‘agency action’) is not
 10 likely to jeopardize the continued existence of any endangered species or threatened species or
 11 result in the destruction or adverse modification of habitat of such species which is determined by
 12 the Secretary ... to be critical.” 16 U.S.C. § 1536(a)(2). Section 7(a)(2) of ESA requires agencies
 13 to consult with either the United States Fish and Wildlife Service or the National Marine Fisheries
 14 Service (hereafter “Services” or “Service”) whenever an agency takes action that “may affect”
 15 listed species or their habitats. 16 U.S.C. § 1536(a)(2); *see also* 50 C.F.R. § 402.14(a).

16 The regulations promulgated under the ESA define “agency action” as:

17 Action means all activities or programs of any kind authorized,
 18 funded, or carried out, in whole or in part, by Federal agencies in the
 19 United States or upon the high seas. Examples include, but are not
 20 limited to: (a) actions intended to conserve listed species or their
 21 habitat; (b) the promulgation of regulations; (c) the granting of
 licenses, contracts, leases, easements, rights-of-way, permits, or
 grants-in-aid; or (d) actions directly or indirectly causing
 modifications to the land, water, or air.

22 50 C.F.R. § 402.02 (emphasis added). The Ninth Circuit has also clarified that determining
 23 whether there has been an “agency action” requires a two-part test:

24 First, we ask whether a federal agency affirmatively authorized,
 25 funded, or carried out the underlying activity. Second, we determine
 whether the agency had some discretion to influence or change the
 activity for the benefit of a protected species.

26 *Karuk Tribe*, 681 F.3d 1006, 1021 (9th Cir. 2012) (*en banc*) (“*Karuk Tribe*”). The second prong
 27

28 ¹ The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

1 of this test—determining whether the agency had discretion—derives from ESA’s implementing
 2 regulations which limit the application of ESA § 7 to “all actions in which there is discretionary
 3 Federal involvement or control.” 50 C.F.R. § 402.03.

4 If the agency determines that its action “may affect” endangered or threatened species or
 5 critical habitat, the agency must pursue either informal or formal consultation with one of the
 6 Services. *See* 50 C.F.R. §§ 402.13-402.14. Formal consultation is required unless the agency
 7 determines, as a result of informal consultation with the Service, “that the proposed action is not
 8 likely to adversely affect any listed species or critical habitat.” *Id.* § 402.13(a). If the agency
 9 action “may affect listed species or critical habitat,” formal consultation is required. *Id.* §
 10 402.14(a). If formal consultation is required, the Service prepares a Biological Opinion stating
 11 whether the proposed action is likely to “jeopardize the continued existence of listed species or
 12 result in the destruction or adverse modification of critical habitat.” *Id.* § 402.14(g). Thereafter,
 13 the agency must determine how to proceed with its action in light of the Service’s Biological
 14 Opinion. *Id.* § 402.15.

15 An agency is required to *reinitiate* formal consultation if the agency retains discretionary
 16 involvement or control over the action and one of the following four triggers occurs:

17 (a) If the amount or extent of taking specified in the incidental take
 18 statement is exceeded;

19 (b) If new information reveals effects of the action that may affect
 20 listed species or critical habitat in a manner or to an extent not
 21 previously considered;

22 (c) If the identified action is subsequently modified in a manner that
 23 causes an effect to the listed species or critical habitat that was not
 24 considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may
 be affected by the identified action.

25 50 C.F.R. § 402.16.

26 The ESA’s citizen suit provision authorizes any person to “commence a civil suit on his
 27 own behalf ... to enjoin any person, including the United States and any other governmental
 28 instrumentality or agency ... who is alleged to be in violation of any provision of this chapter or
 regulation issued under the authority thereof.” 16 U.S.C. § 1540(g)(1)(A). The citizen suit

1 provision also provides that “*district courts* shall have jurisdiction ... to enforce any such provision
2 or regulation.” *Id.* § 1540(g) (emphasis added).

3 **2. The Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”)**

4 FIFRA establishes a regulatory scheme for the distribution, sale and use of pesticides.
5 7 U.S.C. §§ 136 *et seq.* Under FIFRA, a pesticide may not be distributed or sold in the United
6 States unless it has been registered by the EPA. 7 U.S.C. § 136a(a). The EPA registers a pesticide
7 upon determining, *inter alia*, that “when used in accordance with widespread and commonly
8 recognized practice it will not generally cause unreasonable adverse effects on the environment.”
9 *Id.* § 136a(c)(5). FIFRA defines “unreasonable adverse effects on the environment” as “(1) any
10 unreasonable risk to man or the environment, taking into account the economic, social, and
11 environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from
12 residues that result from a use of a pesticide.” *Id.* § 136(z)(bb).

13 The EPA undertakes a variety of registration actions under FIFRA. For instance, the EPA
14 may approve an application for a new chemical or active ingredient which is not contained in any
15 other registered pesticide product, or approve a new use application for a previously registered
16 pesticide. *See* 7 U.S.C. § 136a(c)(5), (7). The EPA is also required to review each pesticide
17 registration every fifteen years “to ensure that each pesticide registration continues to satisfy the
18 FIFRA standard for registration.” 40 C.F.R. § 155.40(a). In 1988, Congress amended FIFRA to
19 require the EPA to reregister pesticides containing any active ingredients in a pesticide registered
20 before November 1, 1984. *See* 7 U.S.C. § 136a-1(a). The five-phase reregistration process
21 culminates in the issuance of a Reregistration Eligibility Determination (“RED”) after the agency
22 determines whether the pesticide meets the registration standard. *Id.* § 135a-1(g)(2)(C).

23 The regulations issued under FIFRA provide that the EPA “may evaluate a pesticide use”
24 at its “own initiative, or at the suggestion of any interested person.” 40 C.F.R. § 154.10. The EPA
25 “may conduct a Special Review of a pesticide use if he determines, based on a validated test or
26 other significant evidence, that the use of the pesticide ... [m]ay pose a risk to the continued
27 existence of any endangered or threatened species, ... [m]ay result in the destruction or other
28 adverse modification of any [critical] habitat,” or “[m]ay otherwise pose a risk to humans or to the

1 environment which is of sufficient magnitude to merit a determination whether the use of the
 2 pesticide product offers offsetting social, economic, and environmental benefits that justify initial
 3 or continued registration.” 40 C.F.R. § 154.7

4 Judicial review over the EPA’s registration actions are governed by FIFRA § 16. *See* 7
 5 U.S.C. § 136n (a)-(b). Section 16 divides jurisdiction over the appeals of the EPA’s registration
 6 actions among district courts and the court of appeals. *Id.* To determine which court has
 7 jurisdiction over the appeal, one must determine whether the agency took action following a
 8 public hearing. *Id.* Under FIFRA § 16(a), the district court has jurisdiction to review certain
 9 agency actions *not following* a hearing:

10 Except as otherwise provided in this subchapter, the refusal of the
 11 Administrator to cancel or suspend a registration or to change a
 12 classification *not following a hearing* and other final actions of the
 13 Administrator not committed to the discretion of the Administrator
 by law are judicially reviewable by the district courts of the United
 States.

14 7 U.S.C. § 136n (a) (emphasis added). Under FIFRA § 16(b), the court of appeals has jurisdiction
 15 to review orders of the EPA *following* a public hearing:

16 In the case of actual controversy as to the validity of any order
 17 issued by the Administrator *following a public hearing*, any person
 18 who will be adversely affected by such order and who had been a
 19 party to the proceedings may obtain judicial review by filing in the
 20 United States court of appeals, within 60 days after the entry of
 21 such order, a petition praying that the order be set aside in whole or
 in part.... Upon the filing of such petition the court shall have
 exclusive jurisdiction to affirm or set aside the order complained of
 in whole or in part.

22 7 U.S.C. 136n (b) (emphasis added). The Ninth Circuit has held that the EPA makes a decision
 23 following a “public hearing,” and therefore within the scope of FIFRA § 16(b), when it provides
 24 notice in the Federal Register and an opportunity for public comment. *See United Farm Workers*
 25 *v. Environmental Protection Agency*, 592 F.3d 1080 (9th Cir. 2010).

26 **B. Factual Allegations**

27 Plaintiffs filed the instant Complaint asserting a single ESA claim against the EPA for its
 28 alleged failure to initiate or reinstate consultation with the Services regarding 382 currently

1 registered active pesticide ingredients. Complaint (“Compl.”) ¶¶ 139-44. Plaintiffs have not
2 asserted any FIFRA claims in their complaint. *See id.* ¶ 14 (“Here, Plaintiffs bring claims only
3 under the ESA.”). Instead, Plaintiffs contend that “EPA retains ongoing discretionary control and
4 involvement over all of these pesticides, which constitutes ‘agency action’ subject to consultation
5 under Section 7(a)(2) of the ESA.” *Id.* ¶ 141. Plaintiffs identify 382 active pesticide ingredients
6 “currently registered for use by EPA” that “may affect” listed species and critical habitat. *Id.* ¶¶
7 140, 142. Plaintiffs attach a table to the Complaint identifying the threatened or endangered
8 species affected by each pesticide. *Id.* ¶ 93 and Ex. A. Plaintiffs allege that because the EPA’s
9 “ongoing agency actions related to the pesticides ... may affect listed species and critical habitat,
10 and because the standards for reinitiating consultation exist, EPA is required to initiate and
11 reinitiate consultation with the Service.” *Id.* ¶ 142.

12 Plaintiffs also allege that the EPA has “failed to reinitiate consultation for species and
13 pesticides addressed in consultations from 1989 to 1993,” and that for those species covered in the
14 1989 and 1993 Biological Opinions, the EPA is not meeting its Section 7 “no jeopardy”
15 obligations because the EPA is not properly implementing the terms and conditions of the
16 Biological Opinions. Compl. ¶ 133. Plaintiffs allege that the EPA was required to reinitiate
17 consultation with regard to the species addressed in the 1989 and 1993 Biological Opinions
18 because it has discretionary control and involvement over the registered pesticides, and triggering
19 factors discussed in the regulations have occurred. *Id.* ¶ 134; *see also* 50 C.F.R. § 402.16. For
20 instance, Plaintiffs allege: (1) that the EPA has failed to ensure the implementation of the
21 measures in the 1989 and 1993 Biological Opinions and therefore cannot determine whether “the
22 amount or extent of taking specified in the incidental take statement is exceeded,” § 402.16(a),
23 Compl. ¶ 136; (2) that “new information exists regarding the impacts of pesticides on wildlife and
24 plants” that is contained in the “EPA’s own documents,” Compl. ¶ 135, *see* § 402.16(b); and, (3)
25 that “because of EPA’s failure to implement the terms and conditions of the 1989 and 1993
26 Biological Opinions, ‘the identified action [has been] modified in a manner that causes an effect to
27 the listed species or critical habitat that was not considered in the biological opinion,” Compl. ¶
28 136 (quoting § 402.16(c)). Finally, Plaintiffs allege that “because the terms and conditions of the

1 1989 and 1993 Biological Opinions are not being enforced, or even monitored, EPA is failing to
 2 ensure that its authorizations of pesticide use are not jeopardizing ESA listed species.” Compl. ¶
 3 138.

4 **C. Procedural History**

5 On March 15, 2011, the Court entered a stay of this litigation pursuant to a joint stipulation
 6 filed by the EPA and Plaintiffs. Since then, various producers of the pesticides filed several
 7 motions to intervene in the litigation. *See* Dkt. Nos. 16, 40, 53, 58. On June 3, 2011, the Court
 8 granted the motions to intervene as to the remedial phase of the case, and denied without prejudice
 9 the motions to intervene as to the liability phase of the case.² *See* Dkt. No. 81. The producers of
 10 the pesticides subsequently filed a motion to dismiss, a motion to intervene (in the liability phase
 11 of the litigation), and a motion to lift the stay. *See* Dkt. Nos. 94-95, 98. While the motions to
 12 dismiss and intervene were denied without prejudice, *see* Docket Number 133, the motion to lift
 13 stay was granted in part on November 1, 2012.

14 On November 16, 2012, the applicants for intervention filed a renewed Motion to
 15 Intervene in the liability phase of this case. Dkt. No. 135. The EPA and the applicants each filed
 16 a Motion to Dismiss. Dkt. Nos. 137, 139. The pending Motion to Intervene and the Motions to
 17 Dismiss will be address separately.

18 **III. MOTION TO INTERVENE**

19 **A. Legal Standard**

20 Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, an applicant may intervene in
 21 a court proceeding as of right if the applicant “claims an interest relating to the property or
 22 transaction that is the subject of the action, and is so situated that disposing of the action may as a
 23 practical matter impair or impede the movant’s ability to protect its interest.” Fed.R.Civ.P. 24(a).
 24 There is no right to intervene, however, if “existing parties adequately represent that interest.” *Id.*

25
 26 ² The Court denied the motion to intervene without prejudice as to the liability portion for
 27 the motions filed by Crop Life (including Mid America CropLife Association), Reckitt Benckiser
 28 and the American Chemistry Council to the extent they represent pesticide registrants. *See* Dkt.
 No. 81. The Court denied the motions to intervene filed by the American Farm Bureau and the
 American Chemistry Council to the extent those parties represent members which are not pesticide
 registrants. *See id.*

1 The Ninth Circuit applies a four-part test to determine whether a party may intervene as of right:

2 (1) the motion must be timely;

3 (2) the applicant must claim a “significantly protectable” interest
relating to the property or transaction which is the subject of the
4 action;

5 (3) the applicant must be so situated that the disposition of the action
may as a practical matter impair or impede its ability to protect that
6 interest; and

7 (4) the applicant’s interest must be inadequately represented by the
parties to the action.

8 *Wilderness Society v. United States Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011) (*en banc*).

9 “While an applicant seeking to intervene has the burden to show that these four elements are met,
10 the requirements are broadly interpreted in favor of the intervenor.” *Citizens for Balanced Use v.*
11 *Montana Wilderness*, 647 F.3d 893, 897 (9th Cir. 2011).

12 Even if there is no intervention as of right, a court may, in its discretion, grant permissive
13 intervention under Rule 24(b)(1)(B) if “the applicant for intervention shows (1) independent
14 grounds for jurisdiction; (2) the motion is timely; and (3) the applicant’s claim or defense, and the
15 main action, have a question of law or a question of fact in common.” *United States v. City of Los*
16 *Angeles, Cal.*, 288 F.3d 391, 403 (9th Cir. 2002) (citation omitted).

17 **B. Discussion**

18 Plaintiffs do not contest that the applicants for intervention have submitted their motions
19 timely. Rather, Plaintiffs challenge the applicants’ assertion that they have protectable interests in
20 the liability phase of this action, that disposition of this action will impair those interests, and that
21 they are not adequately represented through the EPA’s defense of this action. The applicants are
22 owners of the pesticide registrations, and thus have property and financial interests in the
23 registrations. “It is generally enough that the interest is protectable under some law, and that there
24 is a relationship between the legally protected interest and the claims at issue.” *Sierra Club v.*
25 *EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993). Plaintiffs allege that the EPA failed to undergo
26 required consultations before issuing the pesticide registrations. Because Plaintiffs’ claim against
27 the EPA may affect the pesticide registrations, the Court finds that the applicants have a
28 protectable interest in the subject of this action, which may, as a practical matter, be impaired by

1 this litigation.

2 Whether the applicants' interests are adequately represented by the EPA presents a closer
3 question. "The burden of showing inadequacy of representation is 'minimal' and satisfied if he
4 applicant can demonstrate that representation of its interests 'may be' inadequate." *Citizens for*
5 *Balanced Use*, 647 F.3d at 898 (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).
6 "The 'most important factor' to determine whether a proposed intervenor is adequately
7 represented by a present party to the action is 'how the [intervenor's] interest compares with the
8 interests of existing parties." *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th
9 Cir. 2009) (citing *Arakaki*, 324 F.3d at 1086). "Where the party and the proposed intervenor share
10 the same 'ultimate objective,' a presumption of adequacy of representation applies, and the
11 intervenor can rebut that presumption only with a 'compelling showing' to the contrary." *Perry*,
12 587 F.3d at 951 (citing *Arakaki*, 324 F.3d at 1086); *see also League of United Latin Am. Citizens*
13 *v. Wilson*, 131 F.3d 1297 (9th Cir. 1997) (presumption of adequacy arose because a public interest
14 group and defendant had the same ultimate objective to defend the constitutionality of a state law).
15 In evaluating the adequacy of representation, courts in the Ninth Circuit consider three factors:
16 "(1) whether the interest of a present party is such that it will undoubtedly make all of a proposed
17 intervenor's arguments; (2) whether the present party is capable and willing to make such
18 arguments; and (3) whether a proposed intervenor would offer any necessary elements to the
19 proceeding that other parties would neglect." *Citizens for Balanced Use*, 647 F.3d at 898 (citing
20 *Arakaki*, 324 F.3d at 1086).

21 The applicants argue that they do not share the same ultimate objective as the EPA. They
22 contend that while the EPA is concerned with defending itself from liability, the applicants'
23 "objective is to ensure that their licenses are final and not subject to further process, regardless of
24 the EPA's liability." Reply at 8:22-23. The applicants also argue that their interests "necessarily
25 differ" from those of the EPA. They contend that the EPA has broader, regulatory interests in the
26 FIFRA process, while the applicants—the *regulated*—have specific property interests in maintaining
27 the validity of their pesticide registrations. They note as an example the fact that the EPA engaged
28 in settlement negotiations with the Plaintiffs, which the applicants would never have agreed to.

1 They argue these differences demonstrate that the EPA’s representation of the applicants’ interests
2 “may be” inadequate. *Citizens for Balanced Use*, 647 F.3d at 898.

3 The applicants have distinct property and financial interests in the pesticide registrations
4 which are not shared by the EPA. “Inadequate representation is most likely to be found when the
5 applicant asserts a personal interest that does not belong to the general public.” *Forest*
6 *Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated by*
7 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011) (quoting 3B Moore’s Federal
8 Practice, ¶ 24.07[4] at 24-78 (2d ed. 1995)). In this case, however, the Court knows how the
9 applicants will represent their property interests. Notably, the applicants’ Motion to Dismiss does
10 not contain any legal argument that the EPA’s Motion fails to include. Indeed, the applicants have
11 identified no argument that the EPA has been unwilling to assert in defense of this matter—which
12 the applicants would assert. In the liability phase of these proceedings, the applicants and the EPA
13 share the same ultimate objective—to uphold the validity of the pesticide registrations as a matter
14 of law. By failing to identify one argument which the EPA will not make, the applicants have
15 failed to rebut the presumption of adequate representation. *Perry*, 587 F.3d at 951 (addressing the
16 three *Arakaki* factors in terms of rebutting the presumption of adequate representation).

17 Nevertheless, the Court will grant permissive intervention under Rule 24(b)(1)(B). The
18 applicants meet the necessary requirements: (1) there is no jurisdictional bar to their defense; (2)
19 the motions to intervene were timely when initially filed; and (3) there is a common question of
20 law and fact regarding the pesticide registrations which form the basis of Plaintiffs’ ESA claim
21 and the intervenors’ arguments in defense to the EPA’s liability as owners of these pesticide
22 registrations. *See* Fed.R.Civ.P. 24(b)(1)(B). Other courts in this district have allowed intervention
23 in analogous circumstances.³ The Motion to Intervene is therefore GRANTED.

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27 ³ *See* Declaration of William K. Rawson in Support of Renewed Motion of CropLife
28 America, et al. to Intervene as Defendants, Exhs. A (Judge White’s Order Granting Motion to Intervene in *Center for Biological Diversity v. U.S. Fish & Wildlife*, Case No. 11-cv-5108, Dkt. No. 27), B (Judge Patel’s Order Granting Motions to Intervene in *Pesticide Action Network North America v. U.S. Environmental Protection Agency*, Case No. 08-cv-1814, Dkt. No. 43).

1 **IV. MOTIONS TO DISMISS**

2 **A. Legal Standard**

3 **1. Rule 12(b)(6)**

4 A complaint may be dismissed for failure to state a claim for which relief can be granted
5 under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The
6 purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the
7 complaint.” *N. Star. Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). In ruling on
8 a motion to dismiss under Rule 12(b)(6), the Court takes “all allegations of material fact as true
9 and construe(s) them in the lights most favorable to the non-moving party.” *Parks Sch. of Bus. v.*
10 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1990).

11 Generally, the plaintiff’s burden at the pleading stage is relatively light. Rule 8(a) requires
12 a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.
13 Civ. P. 8(a)(2). The complaint need not contain “detailed factual allegations,” but must allege
14 facts sufficient to “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
15 662, 663 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). The factual
16 allegations must be definite enough to “raise a right to relief above the speculative level on the
17 assumption that all of the complaint’s allegations are true.” *Twombly*, 550 U.S. at 545. “[T]he
18 tenet that a court must accept a complaint’s allegations as true is inapplicable to threadbare recitals
19 of a cause of action’s elements, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at
20 663.

21 **2. Rule 12(b)(1)**

22 A motion to dismiss for lack of jurisdiction is brought under Rule 12(b)(1) of the Federal
23 Rules of Civil Procedure. A claim may be challenged under Rule 12(b)(1) both facially and
24 factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Where, as here, a
25 facial challenge is brought, “the challenger asserts that the allegations contained in a complaint are
26 insufficient on their face to invoke federal jurisdiction.” *Id.* “Whether subject matter jurisdiction
27 exists therefore does not depend on resolution of a factual dispute, but rather on the allegations in
28 [the] complaint.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). When reviewing a Rule

1 12(b)(1) motion to dismiss for lack of jurisdiction, all allegations are assumed to be true and all
 2 reasonable inferences are drawn in plaintiff's favor. *Id.* The plaintiff bears the burden of
 3 establishing jurisdiction by preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504
 4 U.S. 555, 561 (1992).

5 **B. Discussion**

6 **1. Failure to Consult – Agency Action**

7 Defendants challenge the adequacy of the ESA claim on the basis that Plaintiffs have failed
 8 to allege the EPA took any “agency action” to trigger Section 7’s consultation requirement.

9 Section 7 of the ESA defines agency action as “any action authorized, funded, or carried out by [a
 10 federal] agency.” 16 U.S.C. § 1536(a)(2). The ESA regulations provide that “action means all
 11 activities or programs of any kind ... by the Federal agencies in the United States,” including the
 12 “granting of licenses” or “actions directly or indirectly causing modifications to the land, water, or
 13 air.” 50 C.F.R. § 402.02. The Ninth Circuit has stated that agency action has a “broad definition”
 14 in the ESA “in conformance with Congress’s clear intent.” *Karuk Tribe*, 681 F.3d at 1020
 15 (quoting *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 2004) (“*Pacific*
 16 *Rivers*”)).

17 In *Karuk Tribe*, the Ninth Circuit, sitting *en banc*, clarified that determining whether there
 18 has been an “agency action” requires a two-part test:

19 Our “agency action” inquiry is two-fold. First, we ask whether a
 20 federal agency affirmatively authorized, funded, or carried out the
 21 underlying activity. Second, we determine whether the agency had
 some discretion to influence or change the activity for the benefit of
 a protected species.

22 *Karuk Tribe*, 681 F.3d at 1021. The second prong of this test—determining whether the agency
 23 had discretion—derives from ESA’s implementing regulations which limit the application of ESA
 24 § 7 to “all actions in which there is discretionary Federal involvement or control.” 50 C.F.R. §
 25 402.03. “The Supreme Court explained that this limitation harmonizes the ESA consultation
 26 requirement with other statutory mandates that leave an agency no discretion to consider the
 27 protection of listed species.” *Karuk Tribe*, 681 F.3d at 1020-21 (citing *Nat’l Ass’n of Home*
 28 *Builders v. Defenders of Wildlife*, 551 U.S. 644, 665-55 (2007)).

1 In the Complaint, Plaintiffs provide a list of pesticides “currently registered for use by
2 EPA.” Compl. ¶ 130; *see also* Exh. A (listing chemical groups subject to this case and species that
3 may be affected by each chemical group). Notably, Plaintiffs do not allege that the EPA’s act of
4 registering the pesticides constitutes agency action. Rather, Plaintiffs allege that “EPA retains
5 discretionary control and involvement over all ... pesticides, which constitutes ‘agency actions’
6 subject to consultation under Section 7(a)(2) of the ESA.” Compl. ¶¶ 131, 141. Plaintiffs explain:

7 For example, EPA *may* change the use classification of any pesticide
8 when necessary to prevent unreasonable adverse effects on the
9 environment. 7 U.S.C. § 136a(d)(2). Also, EPA *may* determine that
10 additional data is required to maintain an existing pesticide
11 registration. 7 U.S.C. § 136a(c)(2)(B)(i). Moreover, FIFRA grants
12 EPA *authority to* change, cancel, restrict, or immediately suspend
13 registered pesticide labeling, or particular uses. 7 U.S.C. § 136d.

14 Compl. ¶ 132 (emphasis added). Allegations that the EPA “may” undertake a variety of actions
15 with regard to the pesticide registrations and has “authority” to do so are allegations that the EPA
16 has “discretionary Federal involvement or control” over pesticide registrations. *Id.*; 50 C.F.R. §
17 402.03. However, such allegations do not establish that the EPA ever “*affirmatively* authorized,
18 funded, or carried out the underlying activity”—the first prong of the ‘agency action’ test. *Karuk*
19 *Tribe*, 681 F.3d at 1021 (emphasis added). Plaintiffs do not mention any “affirmative act”—such
20 act of registering the pesticides; changing the classification; requiring additional data; or
21 cancelling, restricting or suspending pesticide labeling or uses—at any point in the Complaint.

22 Instead, Plaintiffs argue that they have sufficiently pled “agency action” because EPA
23 oversight of pesticide registrations constitutes “ongoing” agency action. Specifically, Plaintiffs
24 argue that the “EPA has affirmatively authorized, funded and carried out the registration of 382
25 pesticides identified in the Complaint, and EPA has discretion to influence or change the use of
26 these registered pesticides for the benefit of the protected species identified in the Complaint.”
27 *Opp.* at 10:9-11. Plaintiffs cite a number of Ninth Circuit cases which recognize “ongoing”
28 agency action as a sufficient basis to trigger Section 7’s consultation requirement. For instance, in
Pacific Rivers, the Ninth Circuit held that the Forest Service’s Land Resource Management Plans
 (“LRMPs”)—documents which established standards and guidelines governing projects in certain
 forest areas for a period of fifteen years—“constitute continuing agency action requiring

1 consultation under § 7(a)(2) of the ESA.” *Pacific Rivers*, 30 F.3d at 1051-52. The court rejected
 2 the Forest Service’s argument that the LRMPs did not constitute ongoing agency action
 3 “throughout their duration, but only when they were adopted in 1990 or if they are revised or
 4 amended in the future.” *Id.* at 1053. Instead, the court found that because the LRMPs have
 5 “ongoing and long-lasting effect even after adoption, ... the LRMPs represent ongoing agency
 6 action.” *Id.* Similarly, in *Washington Toxics*, a case substantially similar to the case at bar, the
 7 Ninth Circuit reaffirmed the applicability of “ongoing” agency action when it stated that
 8 “[b]ecause EPA has continuing authority over pesticide regulation, it has a continuing obligation
 9 to follow the requirements of the ESA.” *Washington Toxics Coalition v. Environmental*
 10 *Protection Agency*, 413 F.3d 1024, 1033 (9th Cir. 2005) (“*Washington Toxics*”) (affirming
 11 summary judgment in favor of environmental groups that challenged the EPA’s failure to consult
 12 with regard to several pesticide registrations).

13 Although *Pacific Rivers*, *Washington Toxics* and other Ninth Circuit cases⁴ discuss
 14 “ongoing” agency action, the Ninth Circuit altered the “agency action” analysis while sitting *en*
 15 *banc*.⁵ In *Karuk Tribe*, the court held that “[a]n agency must consult under Section 7 *only* when it
 16 makes an ‘affirmative’ act or authorization.” *Karuk Tribe*, 681 F.3d at 1021 (emphasis added).
 17 The court provided examples of affirmative agency actions such as the “renewal” of existing
 18 contracts, the “creation” of management strategies, and the “issuance” of permits. *Id.* Thus, to the
 19 extent “ongoing” agency action is based upon regulatory authority or discretionary control, such
 20 ongoing agency action does not trigger Section 7’s consultation requirement. This is not to say,
 21

22 ⁴ See *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d
 23 1071, 1083 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1508-09 (9th Cir. 1995); *Turtle*
 24 *Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 977 (9th Cir. 2003);
 25 *Western Watersheds Project v. Matejo*, 468 F.3d 1099, 1109 (9th Cir. 2006); *Wild Fish*
 26 *Conservancy v. Salazar*, 628 F.3d 513, 518 (9th Cir. 2010).

27 ⁵ The court’s decision in *Karuk Tribe* was preceded by two previous Ninth Circuit cases
 28 which also held that an agency must “affirmatively” act to trigger Section 7’s consultation
 requirement. See *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1102 (9th Cir. 2006)
 (“We conclude that the duty to consult is triggered by affirmative actions; because there was no
 such ‘action’ here, there was no corresponding duty to consult.”); *California Sportfishing*
Protection Alliance v. FERC, 472 F.3d 593 (9th Cir. 2006) (“The ESA and the applicable
 regulations, however, mandate consultation with NMFS only before an agency takes some
 affirmative agency action, such as issuing a license.”).

1 however, that an “affirmative” agency act cannot be ongoing. The “ongoing construction and
2 operation of a dam,” for example, is sufficient to trigger consulting obligations because the
3 operation of a dam is an affirmative act. *Id.* (citing *Tennessee Valley Authority v. Hill*, 437 U.S.
4 153, 173-74 (1978)).

5 Plaintiffs argue that *Karuk Tribe* does not address whether an agency’s continuing
6 regulatory authority constitutes ongoing agency action. To the contrary, the court clearly stated
7 that “[w]here private activity is proceeding pursuant to a vested right or to a previously issued
8 license, an agency has no duty to consult under Section 7 if it takes no further affirmative action
9 regarding the activity.” *Id.*; *see also California Sportfishing*, 472 F.3d at 595, 599 (the agency’s
10 grant of a license constituted an agency action, but the agency’s continuing discretion to “modify
11 the license to reflect changing environmental concerns” did not). Moreover, although *Karuk Tribe*
12 cites *Pacific Rivers* and *Washington Toxics* with approval, these cases were not cited for the
13 proposition which Plaintiffs seek to establish here.⁶ Thus, to the extent prior cases held that
14 ongoing control over a previous agency action is sufficient to trigger Section 7’s consultation
15 requirement without any further affirmative act, those holdings have been implicitly overruled in
16 *Karuk Tribe*.

17 In the Complaint, Plaintiffs assert one ESA claim which encompasses the EPA’s failure to
18 initiate consultation with the Services regarding the registration of 382 pesticides. However,
19 Plaintiffs have not alleged, nor can they allege, any single affirmative act which corresponds to the
20 registration of all 382 pesticides. Registration or re-registration of each of the 382 pesticides—or
21 some other affirmative act by the EPA—triggers the EPA’s requirement to consult with the
22 Services regarding each individual pesticide. Mere discretionary control and involvement will not
23 suffice. Plaintiffs must allege a separate ESA claim corresponding to an affirmative act with
24 respect to each of the 382 pesticides, and will be given an opportunity to do so. As discussed
25 below, this requirement has far-reaching implications with regard to Plaintiffs’ allegations of

26 _____
27 ⁶ *Karuk Tribe* cites *Pacific Rivers* for the proposition that “agency action” should be
28 construed broadly, and *Washington Toxics* for the proposition that “federal agencies’ authorization
of private activities, such as the approval and registration of pesticides” may constitute agency
action. *Karuk Tribe*, 681 F.3d at 1020-21.

1 standing and subject matter jurisdiction.

2 **2. Failure to Reinitiate Consultation**

3 The Court must separately address Plaintiffs' allegation that the EPA failed to *reinitiate*
4 consultation with the Service regarding the species and pesticides addressed in the EPA's 1989
5 and 1993 Biological Opinions. An agency is required to reinitiate formal consultation if the
6 agency retains discretionary involvement or control over an agency action and one of the
7 following four triggers occurs:

8 (a) If the amount or extent of taking specified in the incidental take
9 statement is exceeded;

10 (b) If new information reveals effects of the action that may affect
11 listed species or critical habitat in a manner or to an extent not
12 previously considered;

13 (c) If the identified action is subsequently modified in a manner that
14 causes an effect to the listed species or critical habitat that was not
15 considered in the biological opinion; or

16 (d) If a new species is listed or critical habitat designated that may
17 be affected by the identified action.

18 50 C.F.R. § 402.16.

19 The first flaw in Plaintiffs' pleadings relating to the EPA's failure to reinitiate consultation
20 is that they are too general. To state a claim for failure to reinitiate, Plaintiffs must plead, for a
21 specific pesticide, that the agency had prior consultation, and facts showing that one or more of the
22 triggering events occurred. Plaintiffs simply recite the language in 50 C.F.R. § 402.16 by
23 alleging: (1) that the EPA has failed to ensure the implementation of the measures in the 1989 and
24 1993 Biological Opinions and therefore cannot determine whether "the amount or extent of taking
25 specified in the incidental take statement is exceeded," § 402.16(a), Compl. ¶ 136; (2) that "new
26 information exists regarding the impacts of pesticides on wildlife and plants" that is contained in
27 the "EPA's own documents," Compl. ¶ 135, *see* § 402.16(b); and, (3) that "because of EPA's
28 failure to implement the terms and conditions of the 1989 and 1993 Biological Opinions, 'the
identified action [has been] modified in a manner that causes an effect to the listed species or
critical habitat that was not considered in the biological opinion,'" Compl. ¶ 136 (quoting §

1 402.16(c)). Such conclusory allegations are insufficient under the federal pleading standards
2 described in *Iqbal* and *Twombly*.

3 Moreover, Plaintiffs misinterpret how the § 402.16 factors would require the EPA to
4 reinitiate consultation. For instance, Plaintiffs allege that because the EPA failed to implement the
5 required measures, the EPA cannot know whether the amount of take identified in the incidental
6 take statement has been exceeded. Compl. ¶ 136. Plaintiffs do not allege, however, that the
7 amount of take specified in the incidental take statement has in fact been exceeded, which is
8 required under § 402.16(a). Similarly, Plaintiffs' allegation that the "EPA is failing to ensure that
9 its authorization of pesticide use are not jeopardizing ESA listed species," Compl. ¶ 138, is not an
10 allegation that "a new species is listed or critical habitat designated that may be affected by the
11 identified action," *id.* § 402.16(d). If Plaintiffs file an amended complaint, they must allege with
12 greater specificity the facts giving rise to the EPA's duty to reinitiate consultation regarding each
13 of the pesticides and species addressed in the 1989 and 1993 Biological Opinions, and must
14 address the factors as written in 50 C.F.R. § 402.16.

15 3. Standing

16 The EPA challenges Plaintiffs' constitutional standing to assert their ESA claim. Derived
17 from Article III's cases-or-controversy requirement, the Supreme Court has long held that a
18 plaintiff in federal court must affirmatively demonstrate an "irreducible constitutional minimum"
19 of (1) an injury in fact, (2) a causal connection between that injury and the challenged conduct,
20 and (2) that the injury will be redressed with a favorable decision. *Lujan*, 504 U.S. at 560. In
21 addition, a "plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each
22 form of relief sought.'" *Oregon v. Legal Services Corp.*, 552 F.3d 965, 969 (9th Cir. 2009)
23 (quoting *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (holding that the exercise of
24 supplemental jurisdiction over a state law claim does not relieve the plaintiff of the burden of
25 demonstrating constitutional standing for that state law claim)).

26 Defendants challenge Plaintiffs' failure to allege facts supporting standing for each
27 individual pesticide at issue in this case. Plaintiffs do not respond to this argument. Rather,
28 Plaintiffs contend they plead sufficient facts to establish each element of standing. In the

1 Complaint, Plaintiffs allege that their members' interests in living, working, visiting, recreating
2 and otherwise enjoying "areas across the nation" are injured "by EPA's registration, authorization
3 and oversight of pesticides known to be harmful to endangered and threatened species and their
4 habitats." Compl. ¶¶ 11-12. Plaintiffs allege a causal connection between the "EPA's failure to
5 ensure that its actions regarding pesticides do not impact endangered species and their habitats"
6 and the harm to "Plaintiffs' members' interests in the species." *See id.* ¶ 12. Plaintiffs further
7 allege that resolution of this case in their favor would redress their injuries because the EPA would
8 be required to comply with ESA's Section 7 consultation requirement. *Id.* ¶ 13. Plaintiffs do not,
9 however, allege any facts in connection to Plaintiffs' or the members' injury with regard to their
10 interests in any particular species or geographical area affected by any particular pesticide.

11 Plaintiffs must bring a separate ESA claim in connection with the EPA's affirmative act
12 with regard to each individual pesticide in order to invoke Section 7's consultation requirement. It
13 follows that Plaintiffs must also allege facts supporting standing for each individual claim.

14 *Oregon v. Legal Services Corp.*, 552 F.3d at 969 ("A plaintiff must demonstrate standing for each
15 claim he seeks to press and for each form of relief sought.") (internal quotations omitted); *Allen v.*
16 *Wright*, 468 U.S. 737, 752 (1984) ("the standing inquiry requires careful judicial examination of a
17 complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of
18 the *particular claims* asserted") (emphasis added). Plaintiffs have failed to do so.

19 The Supreme Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), illustrates the point.
20 In *Lewis*, the district court found that the Arizona Department of Corrections ("ADOC") failed to
21 meet the constitutional minimum of providing prisoners access to the courts through use of a law
22 library, and therefore ordered a system-wide injunction mandating detailed, system-wide changes.
23 *Id.* at 347-48. This was a class action brought by twenty-two representative class plaintiffs who
24 were inmates of various prisons operated by ADOC. *Id.* at 346. The Ninth Circuit affirmed, but
25 the Supreme Court reversed because the district court failed to support the broad injunction with
26 minimal factual findings of standing. The district court found only one actual injury on part of
27 one named plaintiff who was illiterate and whose case was dismissed due to the prison's lack of
28 special assistance for his illiteracy. *Id.* at 358. The Supreme Court held that this one injury did

1 not support the broad injunction ordered by the district court, which included several mandates
2 beyond the scope of assisting illiterate inmates. *Id.* at 357. The Court explained:

3 [S]tanding is not dispensed in gross. If the right to complain of one
4 administrative deficiency automatically conferred the right to complain
5 of all administrative deficiencies, any citizen aggrieved in one respect
6 could bring the whole structure of state administration before the courts
7 for review.

8 *Id.* at 358 n. 6. “The remedy must of course be limited to the inadequacy that produced the injury
9 in fact that the plaintiff has established.” *Id.* at 358.

10 Here, Plaintiffs seek a broad remedy—an injunction mandating the EPA to consult with the
11 Services regarding the registration and oversight of 382 pesticides. However, if properly pleaded,
12 each pesticide corresponds to an individual agency affirmative act which triggers the EPA’s duty
13 to consult with the Services. If the EPA failed to consult with the Services regarding the effects of
14 Pesticide X on the environment, and that failure-to-consult confers standing on a plaintiff to bring
15 an ESA claim arising under Section 7, the plaintiff’s standing in connection with Pesticide X does
16 not confer standing on the plaintiff to also bring a separate claim regarding Pesticide Y. If that
17 were the case, the remedy would not be “limited to the inadequacy that produced the injury in fact
18 that the plaintiff has established.” *Lewis*, 518 U.S. at 358. It is certainly possible that some of the
19 facts giving rise to the plaintiff’s standing in connection with Pesticide X will overlap with the
20 facts giving rise to the plaintiff’s standing in connection with Pesticide Y, but such facts must be
21 expressly alleged. “A plaintiff must demonstrate standing for each claim he seeks to press.”
22 *DaimlerChrysler*, 547 U.S. at 352.

23 Plaintiffs argue they have pled sufficient facts because “[a]t the pleading stage, general
24 factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to
25 dismiss [courts] presume that general allegations embrace those specific facts that are necessary to
26 support the claim.” *Lujan*, 504 U.S. at 561. However, Plaintiffs have not even pled the “general
27 factual allegations” giving rise to each individual ESA claim, nor have they asserted individual
28 ESA claims. The district court’s decision in *Washington Toxics* also supports this reasoning. *See*
Washington Toxic, No. 01-132C, 2002 WL 34213031, *6-8 (W.D. Wash. July 2, 2002). There,
the court granted summary judgment in favor of the defendant as to the majority of the 898

1 challenged active pesticide ingredients for which the plaintiffs submitted no evidence on the
2 causation element of standing, and allowed the plaintiffs' claims to proceed only with respect to
3 55 pesticide active ingredients. *Id.* at *8. Although the standing issue in this case first arises on a
4 Rule 12(b)(6) motion and not on summary judgment as it did in *Washington Toxics*, the Court
5 agrees that "plaintiffs must demonstrate standing separately for each section 7(a)(2) claim." *Id.* at
6 *7. Plaintiff will be given an opportunity to plead standing for each pesticide.

7 **4. Subject Matter Jurisdiction**

8 The parties also dispute whether this Court has jurisdiction over Plaintiffs' ESA claims.
9 Plaintiffs argue that jurisdiction is proper under the ESA's citizen suit provision, which states that
10 "district courts shall have jurisdiction ... to enforce any such provision or regulation." 16 U.S.C.
11 § 1540(g)(1)(A). In support of this position, Plaintiffs cite *Washington Toxics*, where the Ninth
12 Circuit affirmed summary judgment in favor of environmental groups who challenged the EPA's
13 failure to consult with regard to certain pesticide registrations. *See Washington Toxics*, 413 F.3d
14 at 1033.

15 Defendants argue, however, that because Plaintiffs' allegations attack the substance of the
16 EPA's pesticide registrations, and because FIFRA § 16(b) vests exclusive jurisdiction in the court
17 of appeals over the EPA's actions following a public hearing, Plaintiffs have not established this
18 Court's jurisdiction over a majority of the claims. In support of their position, Defendants cite
19 *American Bird Conservancy v. Federal Communications Commission*, 545 F.3d 1190 (9th Cir.
20 2008) ("*American Bird*"), and other Ninth Circuit cases cited therein, for the proposition that
21 district courts lack jurisdiction over ESA claims when the substance of those claims attacks a
22 regulatory statute that vests exclusive jurisdiction in the court of appeals.

23 The jurisdictional question turns on whether Plaintiffs' ESA claim confers an independent
24 basis for jurisdiction in district court by virtue of the ESA's citizen suit provision, or whether
25 Plaintiffs' ESA claims are subsumed by FIFRA's jurisdictional provisions because Plaintiffs are
26 essentially challenging an act which is governed by FIFRA's administrative scheme. Before the
27 Court may adequately address this question, however, the Ninth Circuit's previous decisions in
28 this area of law must be examined.

1 **i. United Farm Workers**

2 The Ninth Circuit's decision in *United Farm Workers* has implications on the scope of the
3 jurisdictional issue in this case. FIFRA § 16 divides the universe of appeals over the EPA's
4 actions with regard to pesticide registrations between district courts and the court of appeals. On
5 the one hand, FIFRA § 16(a) provides that district courts have jurisdiction over the EPA's
6 registration actions "not following a hearing." 7 U.S.C. § 136n(a). On the other hand, FIFRA §
7 16(b) provides that the court of appeals has "exclusive jurisdiction" over a "case of actual
8 controversy as to the validity of any order issued by the Administrator following a public
9 hearing." *Id.* § 136n(b). In *United Farm Workers*, the plaintiffs sought review of the EPA's
10 Registration Eligibility Determination ("RED") for the use of the pesticide Azinphos-Methyl
11 ("AZM") in district court under the belief that the appeal fell within the scope of FIFRA § 16(a)
12 because there was no public hearing before the EPA's issuance of the RED. *United Farm*
13 *Workers*, 592 F.3d at 1082. However, the Ninth Circuit held the court of appeals had exclusive
14 jurisdiction under FIFRA § 16(b) because the EPA had provided notice in the Federal Register and
15 an opportunity for public comment before issuing the RED, which constituted a "public hearing"
16 for purposes of FIFRA § 16. *Id.* at 1083.

17 Assuming *arguendo* that Plaintiffs' ESA claims may not be asserted except or provided by
18 FIFRA § 16, this Court may still have jurisdiction over claims arising under FIFRA § 16(a), that
19 is, review of EPA registration actions which did not, at a minimum, provide notice in the Federal
20 Register and an opportunity for public comment. However, if the registration actions follow a
21 public hearing as interpreted by the Ninth Circuit in *United Farm Workers*, the court of appeals
22 has exclusive jurisdiction under FIFRA § 16(b). The EPA does not suggest "that every FIFRA
23 action ever taken with respect to all 382 active pesticide ingredients catalogued in the Complaint
24 constitutes an 'order ... following a public hearing' under FIFRA Section 16(b) and [*United Farm*
25 *Workers*]." Motion at 14:24-26. Nevertheless, the EPA contends that the EPA is required to
26 publish notice and provide an opportunity to comment with regard to most registration actions.
27 *See, e.g.*, 7 U.S.C. § 136a(c)(4) (requiring notice and comment for each pesticide application that
28 contains any new active ingredient or a changed use pattern); 40 C.F.R. § 155.50(b) (requiring

1 notice for a registration review). Plaintiffs bear the burden of showing the basis for subject matter
 2 jurisdiction. *Lujan*, 504 U.S. at 561. Thus, if the jurisdictional provisions in FIFRA § 16 apply to
 3 Plaintiffs' ESA claims, Plaintiffs must show why each particular claim is governed by FIFRA §
 4 16(a) rather than § 16(b) to establish this Court's jurisdiction.

5 **ii. *Washington Toxics***

6 The only Ninth Circuit decision to explicitly address the interaction of the ESA and FIFRA
 7 is *Washington Toxics*. In that case, the EPA argued that because it complied with the
 8 requirements of FIFRA when registering the pesticides, it was not bound by the ESA's
 9 consultation requirements. *Washington Toxics*, 413 F.3d at 1028. The Ninth Circuit rejected this
 10 argument:

11 The statutes at issue in this case ... have different but
 12 complementary purposes. FIFRA utilizes a cost-benefit analysis to
 13 ensure that there is no unreasonable risk created for people or the
 14 environment from a pesticide, taking into account the economic,
 15 social, and environmental costs and benefits of a pesticide's use....

16 In contrast, the ESA affords endangered species the "highest of
 17 priorities" in assessing risks and benefits. *Tennessee Valley Auth. v.*
 18 *Hill*, 437 U.S. 153, 174, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The
 reasoning of our case law therefore leads us to conclude that an
 agency cannot escape its obligation to comply with the ESA merely
 because it is bound to comply with another statute that has
 consistent, complementary objectives.

19 *Id.* at 1032. The court also rejected the EPA's arguments that the doctrines of administrative
 20 exhaustion and primary jurisdiction precluded the plaintiff's claims, stating that "the mere fact that
 21 FIFRA recognizes EPA authority to suspend registered pesticides to protect listed species does not
 22 mean that FIFRA remedies trump those Congress expressly made available under ESA, or that
 23 FIFRA provides an exclusive or primary remedy." *Id.* at 1033-34.

24 Plaintiffs contend that this Court need look no further than *Washington Toxics* to find
 25 subject matter jurisdiction over ESA § 7 claims alleging the EPA's failure to consult. However,
 26 *Washington Toxics* did not "opine on the jurisdictional question" presented in this case. *Pesticide*
 27 *Action Network North America v. U.S. Environmental Protection Agency*, No. 08-1814-MHP,
 28 2008 WL 5130405, *8 (N.D. Cal. Dec. 5, 2008) ("*PANNA*") (quoting *American Bird Conservancy*

1 v. *F.C.C.*, 408 F.Supp.2d 987, 995 (D. Hawaii 2006)). Although the court considered the
2 doctrines of primary jurisdiction and exhaustion of administrative remedies, these are distinct
3 doctrines and did not concern the jurisdictional provision of FIFRA § 16 with which the Court is
4 presented here. A review of the district court’s docket in *Washington Toxics* reveals that FIFRA §
5 16(b), 7 U.S.C. § 136n(b), was never explicitly cited, and thus, never considered. The sole
6 reference to FIFRA § 16 was in connection with the intervenors’ argument that the Administrative
7 Procedure Act (“APA”), and its limited provision for judicial review of final agency action,
8 governed the claims. *See Washington Toxics*, No. 01-132C, 2002 WL 34213031 (W.D. Wash.
9 July 2, 2002), Dkt. No. 62 (Intervenors’ Cross-Motion for Summary Judgment) at 11:11; Dkt. No.
10 67 (Intervenors’ Reply in Support of Cross-Motion for Summary Judgment) at n. 3.

11 At the hearing on Defendants’ Motions to Dismiss, Plaintiffs argued that in *Washington*
12 *Toxics*, the Ninth Circuit held that jurisdiction over the ESA claim was proper in district court
13 when it rejected the argument that the APA applied. The APA provides judicial review for “final
14 agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. The court
15 held that because the ESA’s citizen suit provision provided an adequate remedy, the APA did not
16 apply. *Washington Toxics*, 413 F.3d at 1034. However, the court did not consider whether FIFRA
17 § 16 itself barred the suit in district court. When a superior court “does not address a jurisdictional
18 issue directly, any *sub silentio* assumption of jurisdiction in a case does not constitute binding
19 authority on the jurisdictional question.” *Thompson v. Frank*, 599 F.3d 1088, 1090 n. 1 (9th Cir.
20 2010) (internal quotations omitted). Thus, this Court must look beyond *Washington Toxics* to
21 resolve the jurisdictional issue in this case.

22 **iii. *American Bird***

23 The most relevant Ninth Circuit decision to the jurisdictional question at issue in this case
24 is *American Bird*, a case decided after *Washington Toxics*. In *American Bird*, environmental
25 organizations challenged the decision by the Federal Communications Commission (“FCC”) to
26 issue licenses for seven communications towers before consulting with the Services as required
27 under ESA § 7. *American Bird*, 545 F.3d at 1192. Although the complaint only contained an
28 ESA claim against the FCC for its failure to consult, the FCC argued that the plaintiff’s “core

1 objections” were to the FCC’s order issuing the tower licenses, and therefore, the district court
 2 lacked jurisdiction because the Communications Act limits jurisdiction over appeals of FCC
 3 orders exclusively to the court of appeals.⁷ *Id.* at 1193. Although the plaintiffs “disclaimed any
 4 intent to challenge the tower registrations themselves,” the court looked beyond the allegations of
 5 the complaint and considered the nature of the lawsuit and the relief sought. *Id.* The Ninth Circuit
 6 agreed with the FCC that the district court lacked jurisdiction:

7 American Bird does not object to the agency’s failure to consult in
 8 the abstract; rather, it identifies seven discrete tower registrations
 9 that it alleges were not supported by adequate environmental
 investigation. The tower registrations are therefore inextricably
 intertwined with the FCC’s obligation to consult with the Secretary.

10 *Id.* The court further stated that “American Bird cannot elude the Communication Act’s exclusive
 11 review provision by disguising its true objection to the tower registrations as a ‘failure to act’
 12 claim.” *Id.*

13 The Ninth Circuit found support from previous cases where the court similarly found “that
 14 a plaintiff may not escape an exclusive avenue of judicial review through artful pleading.”
 15 *American Bird*, 545 F.3d at 1194. The court’s decision in *California Save Our Streams Council*,
 16 *Inc. v. Yeutter*, 887 F.3d 908 (9th Cir. 1989) (“*Yeutter*”), is one such case. In *Yeutter*,
 17 environmental groups challenged the conditions of a license granted by the Federal Energy
 18 Regulatory Commission (“FERC”) acting under the Federal Power Act to construct a
 19 hydroelectric power facility. *Yeutter*, 887 F.2d at 909. Although the Federal Power Act provides
 20 for exclusive jurisdiction in the court of appeals for any claim based upon “an order issued by the
 21 Commission,” 16 U.S.C. § 8251 (b), the plaintiffs brought suit in district court on the basis of
 22 federal question jurisdiction over the FERC’s alleged violations of the National Environmental
 23 Policy Act (“NEPA”), 42 U.S.C. §§ 4321-47, and the American Indian Religious Freedom Act
 24 (AIRFA), 42 U.S.C. §§ 1996 *et seq.* *Id.* at 910. Like the later plaintiffs in *American Bird*, the

25
 26
 27 ⁷ The FCC is charged with the authority to issue licenses for communication towers under
 28 the Communications Act, 47 U.S.C. § 402. The Communications Act incorporates the Hobbs Act,
 which vests the court of appeals with “‘exclusive jurisdiction’ to review ‘all final orders of the
 Federal Communications Commission.’” *American Bird*, 545 F.3d at 1193 (quoting 28 U.S.C. §
 2342).

1 environmental groups argued that there was an independent statutory basis for jurisdiction because
2 they brought claims under NEPA and AIRFRA, and not under the Federal Power Act. *Id.* at 911.
3 Nevertheless, the court rejected the plaintiffs’ “attempt to style this as an independent claim
4 against the Forest Service” because “the practical effect of the action in district court is an assault
5 on an important ingredient of the FERC license.” *Id.* at 912.

6 The *American Bird* court also cited *Turtle Island Restoration Network v. United States*
7 *Department of Commerce*, 438 F.3d 937 (9th Cir. 2006) (“*Turtle Island*”). In *Turtle Island*, the
8 National Marine Fishery Service issued regulations reopening the part of the Hawaii-based long-
9 line fishery that targets swordfish. The regulations were issued under the Magnuson-Stevens
10 Fishery Conservation and Management Act of 1976 (“Magnuson Act”), 16 U.S.C. §§ 1801 *et seq.*,
11 which provides jurisdiction over challenges to “regulations which implement a fishery
12 management plan,” 16 U.S.C. § 1855(f)(2), but only if the petition for review is filed within 30
13 days. *Turtle Island*, 438 F.3d at 940. Five months after the regulations were issued,
14 environmental groups filed suit against the Service alleging violations of the Migratory Bird Act,
15 16 U.S.C. §§ 703-12, the NEPA, and the ESA (under a different section than what Plaintiffs assert
16 in this case). *Turtle Island*, 438 F.3d at 939. The plaintiffs did not reference the Magnuson Act
17 and its 30-day statute of limitations in the Complaint. Nevertheless, the Ninth Circuit found that
18 “the claims are appropriately characterized as an attack on the regulations reopening the fishery,
19 the Magnuson Act’s statute of limitations applies, and *Turtle Island*’s petition [was] barred
20 because it was filed beyond the thirty-day time limitation.” *Id.*

21 At least two other district courts have applied the reasoning in *American Bird* and the
22 cases cited therein to hold that they lack (or likely lack) jurisdiction over ESA claims asserted
23 against the EPA in connection with its pesticide registrations. *See PANNA*, 2008 WL 5130405;
24 *Council for Endangered Species Act Reliability v. Jackson*, No. 10-8254, 2011 WL 5882192 (D.
25 Ariz. Nov. 23, 2011) (“*CESAR*”). In *PANNA*, the plaintiffs asserted both FIFRA and ESA claims
26 against the EPA in connection with its reregistration of four pesticides. *PANNA*, 2008 WL
27 5130405, at *4. While awaiting the Ninth Circuit’s decision in *United Farm Workers*, the court
28 imposed a stay on both the FIFRA and ESA claims upon finding that the ESA claims “would

1 likely be subsumed” by FIFRA’s jurisdictional provisions. *Id.* at *6. Similarly, in *CESAR*, the
2 plaintiffs alleged that the EPA violated the ESA by failing to consult with the Service before
3 approving the use of the pesticide rotenone. *CESAR*, 2011 WL 5882192, at *2. Applying
4 *American Bird*, the district court found that “failure to consult claim is best construed as a
5 collateral attack on an agency registration triggering the jurisdictional provisions of [FIFRA].” *Id.*
6 at *5. The Court is unaware of any district court case which has found jurisdiction over an ESA
7 claim with regard to pesticide registrations after the Ninth Circuit’s decision in *American Bird*.

8 * * *

9 The Court finds that *American Bird* controls the jurisdictional question in this case.
10 Although Plaintiffs only challenge the EPA’s failure to consult under ESA § 7, Plaintiffs’ “core
11 objections” are to the pesticide registrations themselves, which are governed under FIFRA’s
12 administrative framework. *American Bird*, 545 F.3d at 1193. Like in *American Bird*, this Court is
13 presented with two conflicting jurisdictional statutes—FIFRA § 16 and the ESA’s citizen suit
14 provision. While ESA’s citizen suit provision provides for jurisdiction in district court, FIFRA §
15 16 establishes a comprehensive framework for all appeals over the EPA’s actions with regard to
16 pesticide registrations. FIFRA § 16 divides the universe of appeals between the district courts and
17 the court of appeals, where the place of jurisdiction turns on whether the EPA’s action follows a
18 public hearing. *See United Farm Workers*, 592 F.3d at 1083. “[W]hen two jurisdictional statutes
19 draw different routes of appeal, the well-established rule is to apply only the more specific
20 legislation.” *American Bird*, 545 F.3d at 1194 (quoting *Yeutter*, 887 F.3d at 911). If Plaintiffs’
21 ESA claim is based upon an EPA action which follows a public hearing, and thereby invokes
22 application of FIFRA § 16(b), this Court lacks jurisdiction over that particular claim.

23 The Ninth Circuit’s decision in *Karuk Tribe* further supports the Court’s conclusion. In
24 *Washington Toxics*, the court reasoned that the EPA’s “ongoing” regulatory control over pesticide
25 registrations was sufficient to trigger consultation obligations. However, *Karuk Tribe* now
26 explicitly requires Plaintiffs to identify an affirmative agency act to invoke Section 7’s
27 consultation requirement. These affirmative acts, such as registering a pesticide, cancelling a
28 registration, and many other acts of the EPA in connection with pesticides are also acts which are

1 governed by the jurisdictional provisions of FIFRA § 16. Thus, the EPA’s actions with regard to
2 pesticide registrations are “inextricably intertwined” with the EPA’s affirmative act which triggers
3 the obligation to consult under Section 7. *American Bird*, 545 F.3d at 1193.

4 Plaintiffs argue that *American Bird* should not control the jurisdiction question in the
5 pesticide context because *American Bird* interpreted a different statute, and determining whether a
6 regulatory statute’s jurisdictional provision applies to ESA claims requires a statute-specific
7 analysis. *See Turtle Island*, 438 F.3d at 947 (“it is the language of the specific jurisdictional
8 statute ... that controls”). Plaintiffs contend that applying FIFRA’s jurisdictional provision to
9 Plaintiffs’ ESA claims would be inconsistent with the plain language of FIFRA.

10 First, Plaintiffs argue that FIFRA § 16(b) cannot apply because they are not challenging
11 “the validity of any order,” 7 U.S.C. § 136n(b), as the statute requires, but rather EPA’s “ongoing
12 agency action” by virtue of its “ongoing discretionary control” over the 382 pesticides named in
13 the Complaint. Nevertheless, as explained above, this argument was implicitly rejected in *Karuk*
14 *Tribe*. “Ongoing discretionary control” is insufficient to invoke application of ESA § 7’s
15 consultation requirement; Plaintiffs must identify an affirmative agency act. *Karuk Tribe*, 681
16 F.3d at 1021. In *United Farm Workers*, the Ninth Circuit held that the EPA’s issuance of a RED
17 is an “order” for purposes of FIFRA § 16(b). *United Farm Workers*, 592 F.3d at 1081-82. It is
18 likely that many actions taken by the EPA with regard to pesticide registrations are “orders”
19 within the meaning of FIFRA § 16(b). If the challenged action is *not* an “order,” then it may fall
20 within the scope of FIFRA § 16(a).

21 Second, Plaintiffs argue that FIFRA § 16(b) is not triggered unless a petition is actually
22 filed in the court of appeals. Plaintiffs find support for this argument in the language of § 16(b),
23 which states that “[u]pon the filing of such petition the court shall have exclusive jurisdiction to
24 affirm or set aside the order complained of in whole or in part.” 7 U.S.C. § 136n(b) (emphasis
25 added); *see also PANNA*, 2008 WL 5130405, *5 (contemplating the possibility that § 16(b) is only
26 triggered once a petition for judicial review is submitted). Although the language of the statute is
27 ambiguous, the Ninth Circuit implicitly rejected this argument in *United Farm Workers*. The
28 plaintiffs in that case never filed a petition for judicial review in the court of appeals, but rather

1 only sought review in district court. Nevertheless, the Ninth Circuit held that FIFRA § 16(b)
 2 governed their claim. *See United Farm Workers*, 592 F.3d at 1082. Therefore, one need not
 3 actually file a petition in the court of appeals to invoke the exclusive jurisdictional provisions of
 4 FIFRA § 16(b).

5 Third, Plaintiffs contend that FIFRA § 16(b) only applies to a person who was “party to the
 6 proceedings,” and that because the court in *Washington Toxics* held that a plaintiff is not required
 7 to exhaust administrative remedies, the judicial review provision in FIFRA § 16(b) must not
 8 apply. This is essentially a repetition of Plaintiffs’ argument that *Washington Toxics* establishes
 9 this Court’s jurisdiction over the ESA claims. However, jurisdiction is a separate question than
 10 the exhaustion of administrative remedies, and is governed by a separate line of cases. The fact
 11 FIFRA § 16 governs jurisdiction over ESA claims does not require exhaustion of the
 12 administrative remedies contemplated in *Washington Toxics*.⁸ In deciding *Washington Toxics*, the
 13 Ninth Circuit did not address the jurisdictional question raised here with regard to FIFRA § 16.
 14 *Washington Toxics*, 413 F.3d at 1033. When a superior court “does not address a jurisdictional
 15 issue directly, any *sub silentio* assumption of jurisdiction in a case does not constitute binding
 16 authority on the jurisdictional question.” *Thompson*, 599 F.3d at 1090 n. 1 (internal quotations
 17 omitted); *see also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952). Thus,
 18 *Washington Toxic*’s holding that administrative remedies need not be exhausted does not preclude

19
 20 ⁸ In holding that administrative remedies need not be exhausted prior to invoking ESA § 7,
 21 the *Washington Toxics* court cited section 136d(c) as the “limited administrative remedy”
 22 available. *Washington Toxics*, 413 F.3d at 1033. Section 136d(c) provides that the EPA may
 23 suspend the registration of a pesticide—either in the case of an emergency or after the EPA issues a
 24 notice of intent to cancel the registration or change the classification—if the EPA “determines that
 25 action is necessary to prevent an *imminent hazard* during the time required for cancellation or
 26 change in classification proceedings.” 7 U.S.C. § 136d(c)(1) (emphasis added). An “imminent
 27 hazard” includes within its definition the “unreasonable hazard to survival of a species endangered
 28 or threatened by the Secretary pursuant to the Endangered Species Act of 1973.” *Id.* § 136(l).

As the Ninth Circuit recognized in *Washington Toxics*, “[n]either FIFRA nor the ESA ...
 suggest any legislative intent to require exhaustion of the FIFRA remedy before seeking relief
 under the ESA.” *Washington Toxics*, 413 F.3d at 1033. Although regulations promulgated under
 Section 136d permit “any interested person” to petition the EPA to determine, *inter alia*, whether
 use of a pesticide “may pose a risk to the continued existence of any endangered or threatened
 species,” or “may result in the destruction or other adverse modification of any [critical] habitat ...
 for any endangered or threatened species,” *see* 40 C.F.R. §§ 154.10, 154.7, one may *also*
 challenge the EPA’s alleged failure to consult with the Services through normal review procedures
 governed by FIFRA § 16, 7 U.S.C. 136n.

1 this Court’s decision that FIFRA § 16 governs jurisdiction over appeals arising from EPA actions
2 regulated under FIFRA.

3 The Court has also considered whether Plaintiffs would have been able to assert their ESA
4 claim under FIFRA § 16(b), which expressly limits review in the court of appeals to those who
5 “had been a party to the proceedings.” 7 U.S.C. § 136n(b). If only the person or entity that
6 submits the application for a pesticide registration or registration action may be considered a
7 “party to the proceeding,” then FIFRA § 16(b) does not contemplate a viable forum for Plaintiffs
8 to assert their ESA claims. However, the regulations promulgated under FIFRA and the
9 legislative history of FIFRA § 16(b) indicate this is not the case. The regulations governing
10 FIFRA hearings define a “Party” as “any person, group, organization, or Federal agency or
11 department that participates in a hearing,” which is broader than the definition of an “Applicant,”
12 which is “any person who has made application to have a pesticide registered or classified
13 pursuant to the provisions of the Act.” 40 C.F.R. § 164.2 (e), (m). Moreover, the legislative
14 history of FIFRA § 16(b) shows that conference committee members intended “that anyone who
15 intervenes in a public hearing under [FIFRA] shall be considered a party for purposes of [FIFRA §
16 16(b)].” Conf. Rep. No. 92-1540, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad.
17 News 4133.

18 The question still remains, however, what it means to intervene and participate in a
19 hearing. In *United Farm Workers*, the Ninth Circuit held that when the EPA provides notice in the
20 Federal Register and an opportunity for public comment, that constitutes a “public hearing” which
21 invokes the applicability of FIFRA § 16(b). While not entirely clear, it does appear that anyone
22 who submits a comment to the EPA during the allotted time intervenes and participates, and
23 therefore, is a “party to the proceeding” who may seek review of an adverse decision by the EPA
24 in the court of appeals under FIFRA § 16(b). Another FIFRA regulation supports this conclusion,
25 as it provides that “[a]ny person wishing to participate in a proceeding” can submit their position
26 in writing, and separately requires additional information if that person “is a registrant or an
27 applicant for registration.” 40 C.F.R. § 164.24. This language suggest that environmental groups,
28 such as Plaintiffs in this case, have the ability to intervene and participate in an administrative

1 hearing under FIFRA, and therefore may appeal under FIFRA § 16(b) as a “party to the
2 proceeding.”⁹

3 Plaintiffs also attempt to distinguish *American Bird* on its facts. Before the plaintiffs in
4 *American Bird* filed suit in district court under the ESA’s citizen suit provision, they pursued
5 administrative remedies. Specifically, the plaintiffs filed a “Petition for National Environmental
6 Policy Act Compliance” with the FCC, and simultaneously filed a “Notice of Violations Under the
7 Endangered Species Act” with the Secretary of the Interior, in which they “threatened to file a
8 citizen suit ... if the FCC’s administrative process produced an unsatisfactory result.” *American*
9 *Bird*, 545 F.3d at 1192. The plaintiffs then filed suit in district court while the administrative
10 process was still pending. *Id.* The plaintiffs in *Yeutter* and *Turtle Island* were similarly more
11 involved with the administrative processes prior to filing suit in district court.¹⁰

12 Plaintiffs argue that the Ninth Circuit’s reasoning in *American Bird*—and presumably in
13 *Yeutter* and *Turtle Island* as well—relied heavily on the fact that the plaintiffs had participated in
14 the administrative proceedings and only filed an ESA claim in district court when such
15 proceedings became unsatisfactory. To some extent, Plaintiffs are correct. In *American Bird*, the
16 court rejected the plaintiff’s attempt to “elude the Communications Act’s exclusive review
17 provision by *disguising* its true objection to the tower registrations as a ‘failure to act’ claim.”
18 *American Bird*, F.3d at 1193 (emphasis added); *see also Turtle Island*, 438 F.3d at 945 (“Turtle
19 Island’s challenge cannot *credibly* be viewed as anything other than an attack on the regulations”)

20 _____
21 ⁹ The regulatory jurisdictional provision in *Yeutter*—the Federal Power Act—similarly
22 limited review to “any party to the proceeding.” *Yeutter*, 887 F.2d at 910-11 (quoting 16 U.S.C. §
23 825I). Because the plaintiffs’ request for late intervention in the administrative proceedings was
24 denied, it seems the plaintiffs were not “party to the proceeding.” *See id.* at 910. Nevertheless,
25 the court held that the exclusive jurisdictional provision of the Federal Power Act applied, likely
26 because the plaintiffs *could have been* a party to the proceeding. By contrast, the regulatory
27 jurisdictional provisions at issue in both *American Bird* and *Turtle Island* allowed any person who
28 was adversely affected by an administrative decision to appeal that decision in the court of
29 appeals.

¹⁰ Before the plaintiffs in *Yeutter* filed claims in district court based on violations of
NEPA and AIRFRA, they sought to intervene in the FERC proceedings and filed for
administrative review of the conditions imposed by the Forest Service on the FERC license.
Yeutter, 887 F.3d at 910. Similarly, in *Turtle Island*, the plaintiffs participated in the formal
rulemaking process before the disputed regulations were issued and contested by the plaintiffs in
federal court. *Turtle Island*, 438 F.3d at 939.

1 (emphasis added). Nevertheless, the Ninth Circuit’s holdings in these cases were not based on the
2 plaintiffs’ credibility. Rather, the court looked to the nature of the claims and relief sought, and
3 found that the agencies’ failure to consult was “inextricably intertwined” with agency actions
4 governed by a regulatory framework. *American Bird*, 545 F.3d at 1193. There are no facts in this
5 case which distinguish it from this binding precedent.

6 There are sound policy reasons to apply the jurisdictional provisions established by FIFRA
7 § 16. It makes little sense to allow Plaintiffs to assert an ESA claim in district court, when
8 simultaneously, the same act triggering Section 7’s consultation requirement may be appealed
9 under FIFRA’s review procedures. As the court explained in *Yeutter*, “[t]he point of creating a
10 special review procedure in the first place is to avoid duplication and inconsistency. It provides a
11 single and expeditious procedure for resolving licensing disputes.” *Yeutter*, 887 F.2d at 912. The
12 possibility of two simultaneous lawsuits—one in the district court and one in the court of
13 appeals—does not align with Congress’ intent for efficient and safe resolution for pesticide
14 registrations. *See id.* Moreover, other administrative means exist for “any interested person” to
15 petition the EPA to conduct a “special review” if use of a pesticide “[m]ay pose a risk to the
16 continued existence of any endangered or threatened species or “[m]ay result in the destruction or
17 other adverse modification of any [critical] habitat.” 40 C.F.R. §§ 154.10, 154.7. Although
18 Plaintiffs are not required to exhaust, *see Washington Toxics*, 413 F.3d at 1033, or even invoke
19 these “special review” procedures, their existence shows that endangered and threatened species
20 may be protected by means other than filing a lawsuit in district court based on noncompliance
21 with Section 7.

22 This analysis is necessarily general given that Plaintiffs have not alleged specific
23 affirmative acts for each pesticide triggering § 7 consultation. It is possible that a specific
24 affirmative act may fall outside of FIFRA § 16, although the Court finds it hard to conceive of
25 such an act. It is also possible that a specific affirmative act may fall under FIFRA § 16(a) rather
26 than § 16(b). This potential issue will be addressed based on the allegations of the specific
27 affirmative acts in any amended complaint.
28

1 The Court also addresses the intersection of FIFRA § 16 and Plaintiffs’ allegation that the
2 EPA failed to *reinitiate* consultation with regard to pesticides listed in the 1989 and 1993
3 Biological Opinions. It appears that the majority of the events listed in 50 C.F.R. § 402.16, which
4 trigger the duty to reinitiate consultation, do not arise from any act undertaken by the EPA. When
5 a triggering event is not governed by FIFRA, then FIFRA’s jurisdictional provision does not
6 apply. However, subsection (c) requires the EPA to reinitiate consultation when an “identified
7 action is subsequently modified in a manner that causes an effect to the listed species or critical
8 habitat that was not considered in the biological opinion.” 50 C.F.R. § 402.16(c). If the
9 modification of the identified action arises from an EPA action regulated by FIFRA, then
10 jurisdiction over the appeal of such modification is governed by FIFRA § 16. As discussed above,
11 Plaintiffs have not pled sufficient facts to show that the EPA was required to reinitiate
12 consultation. In an amended complaint, Plaintiffs must also address the jurisdictional issue for a
13 claim based on failure to reinitiate consultation if the triggering event is regulated under FIFRA.

14 In sum, the provision of FIFRA § 16 appears to confer jurisdiction in this case. As
15 described above, in their amended complaint, Plaintiffs must plead facts showing the specific
16 affirmative acts or orders of the EPA that they allege with respect to each pesticide. They must
17 also plead facts showing standing with respect to each pesticide. And finally, they must plead
18 facts showing how this Court has jurisdiction under FIFRA § 16(a) for the affirmative actions
19 alleged—or that the specific affirmative acts fall outside the ambit of FIFRA § 16.

20 5. Statute of Limitations

21 Having determined that Plaintiffs must assert a separate ESA claim with regard to each
22 individual “agency action,” and must also establish the basis for standing and jurisdiction for each
23 of these claims, the Court must now address the statute of limitations as applied to Plaintiffs’
24 Complaint. Plaintiffs argue that no statute of limitations applies because they are challenging
25 “ongoing agency action.” However, as the Court explained above, in light of the Ninth Circuit’s
26 decision in *Karuk Tribe*, Plaintiffs cannot merely identify an “ongoing agency action” based on
27 discretionary control or authority. Rather, Plaintiffs must identify an affirmative act. *Karuk*
28 *Tribe*, 681 F.3d at 1021. The statute of limitations will apply in relation to the affirmative act

1 alleged with regard to each pesticide.

2 The ESA does not contain its own statute of limitations. Thus, the six-year statute of
3 limitations in 28 U.S.C. § 2401(a) applies. See *Wind River Mining Corp. v. United States*, 946
4 F.2d 710, 713 (9th Cir. 1991); *Coos Cnty. Bd. of Cnty. Comm'rs v. Kempthorne*, 531 F.3d 792,
5 812 n. 16 (9th Cir. 2008). Section 2401(a) provides that “every civil action commenced against
6 the United States shall be barred unless the complaint is filed within six years after the right of
7 action first accrues.” 28 U.S.C. § 2401(a). Plaintiffs’ Complaint was filed on January 20, 2011.
8 To the extent the Complaint implies a challenge to the EPA’s affirmative acts on registrations
9 actions occurring prior to January 20, 2005, such claims are barred by the statute of limitations. In
10 the amended complaint, Plaintiffs will have to plead the specific affirmative act for each pesticide,
11 and that will inform the Court’s application of the statute of limitations.

12 **V. CONCLUSION**

13 For the foregoing reasons, the Motion to Intervene is GRANTED. The EPA’s and the
14 Intervenors’ Motions to Dismiss are GRANTED and Plaintiffs’ Complaint is DISMISSED WITH
15 LEAVE TO AMEND. If Plaintiffs choose to file an amended complaint, that complaint shall be
16 filed within thirty (30) days of the issuance of this order. If Plaintiffs do not file an amended
17 complaint, the clerk is directed to close the file.

18 IT IS SO ORDERED.

19 Dated: April 22, 2013

20
21 
22 Joseph C. Spero
23 United States Magistrate Judge
24
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26
27
28