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Via Email and Certified Mail – Return Receipt Requested

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Re: Notice of Violations of the Endangered Species Act with Respect to the Decision that Listing the California Spotted Owl is Not Warranted

Dear Mr. Bernhardt and Ms. Skipwith,

We are writing on behalf of Sierra Forest Legacy, a project of the Tides Center; Center for Biological Diversity; and Defenders of Wildlife to notify you of violations of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533, by the U.S. Fish and Wildlife Service (“Service”) in determining that listing the California spotted owl under the ESA is not warranted. *See* 84 Fed. Reg. 60371 (Nov. 8, 2019). This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

As discussed below, California spotted owl populations are currently experiencing marked declines. The Service itself predicts that in the foreseeable future, the California spotted owl may be extirpated from large portions of its range, and that the serious threats facing the owl will continue unabated. Among other serious threats, the Service predicts that climate change will increasingly cause habitat loss due to drought, disease, and catastrophic fire; that logging practices will continue to degrade the subspecies’ habitat; and that the invading barred owl may eventually replace the California spotted owl on the landscape. In light of the dire predictions the Service itself has made, its conclusion that the California spotted owl is not in danger of extinction either now or in the foreseeable future, throughout all or any significant portion of their range, was arbitrary, capricious, contrary to the best available science, and otherwise not in accordance with law.

I. Background

The California spotted owl (*Stix occidentalis occidentalis*) is a subspecies of spotted owl occurring in the Sierra Nevada Mountains of California, southern and coastal California, and in the Sierra San Pedro Martir area of Mexico. Individuals are medium-sized (18.3-19 inches), and have a mottled appearance, a round face, and dark brown eyes. They are habitat specialists, relying on late-successional forests with large trees that form a substantial canopy cover for foraging and nesting. Human activities such as logging, fire suppression, and urbanization have profoundly altered the landscape throughout the California spotted owl's historical range and drastically reduced the amount of suitable habitat available to the owl. Unlike the other two subspecies of spotted owl—the northern (*S. o. caurina*) and Mexican (*S. o. lucida*)—the California spotted owl is not listed as either endangered or threatened under the Endangered Species Act and therefore receives no protection under the Act. California spotted owl populations have been estimated to be less than half the size of the northern spotted owl, and it has the most limited genetic variability of all three subspecies.

Conservation groups have been pushing for protection of the California spotted owl under the Endangered Species Act for decades. Center for Biological Diversity and others submitted a petition to list the California spotted owl on April 3, 2000. The Service found that listing was not warranted in 2003 on the basis that it did not believe the magnitude of threats to the owl rose to the level requiring protection under the ESA. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the California Spotted Owl (*Strix occidentalis occidentalis*), 68 FR 7580 (Feb. 14, 2003). On September 1, 2004, Center for Biological Diversity and others submitted an updated petition. The Service dismissed this petition in 2006, finding that spotted owl populations in the Sierra Nevada were for the most part not declining and that Forest Service fuels treatments mitigated the threat of high severity wildfire, which the Service had identified as a key threat. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the California Spotted Owl (*Strix occidentalis occidentalis*) as Threatened or Endangered, 71 FR 29886, 29900-01 (May 24, 2006).

On December 22, 2014, Wild Nature Institute and John Muir Project submitted a petition to list the California spotted owl. This listing petition was followed on August 19, 2015 by a listing petition from Sierra Forest Legacy and Defenders of Wildlife. The listing petitions highlighted that new demographic data showed conclusive evidence of range-wide decline, and presented evidence showing that current forestry management practices are resulting in long-term degradation of habitat. The petitions also presented evidence that the California spotted owl is at significant risk due to its small population size and impoverished gene pool, and that it faces increasing threats from invasion of the barred owl and from exposure to anticoagulant rodenticides.

On September 18, 2015, the Service issued a 90-Day Finding that the petitions presented substantial scientific information indicating that listing may be warranted. Endangered and Threatened Wildlife and Plants; 90-Day Findings on 25 Petitions, 80 Fed. Reg. 56423, 56426 (Sept. 18, 2015). On March 16, 2016, the Center for Biological Diversity challenged the Service's failure to timely issue 12-month findings in response to several listing petitions. *CBD v. Jewell, et al.*, No. 1:16-cv-00503-JDB (D.D.C.). The parties entered into a settlement

agreement whereby the Service committed to submit a 12-month finding on the California spotted owl to the Federal Register by September 30, 2019. On May 2, 2019, the court extended the deadline until November 4, 2019. The Service issued the final listing decision on November 8, 2019. Endangered and Threatened Wildlife and Plants; 12-Month Finding for the California Spotted Owl, 84 Fed. Reg. 60371, 60372 (Nov. 8, 2019) (“Listing Decision”).

The Listing Decision was supported by a June 2019 Species Status Assessment Report for the California Spotted Owl (*Strix occidentalis occidentalis*) (“Species Status Assessment”). According to the Service, the Species Status Assessment is “a scientific review of the best available information, including scientific literature and discussions with experts, related to the biology and conservation status of the [California spotted owl].” Species Status Assessment at 2.

The Species Status Assessment notes that where data exists on population trends, the majority of spotted owl populations are in decline, with only 3% of populations thought to be stable. *Id.* at 68. The Species Status Assessment predicts that under “the most likely future scenario for the species,” *id.* at 107, the California spotted owl may be extirpated in the foreseeable future from its entire southern and coastal California portions of its range, and from the Lassen and Eldorado areas of the Sierra Nevada portion of its range. *See, e.g., id.* at 95. It predicts that the majority of the remaining areas of the subspecies’ range will be in low or low-moderate condition, *id.*, which means that they will “have low resiliency and may not be able to withstand stochastic events because of significant declines in occupancy, survival, fecundity, or habitat quality.” *Id.* at 69. It predicts that the major threats to the California spotted owl will continue, with some threats increasing dramatically over time. The Service predicts that (1) high-severity fires will increase; (2) tree mortality will increase; (3) drought conditions will increase; (4) climate change will negatively impact the California spotted owl; (5) salvage logging will increase and will reduce available habitat; and (6) unless control measures are taken, barred owls will occupy the California spotted owl range and will most likely replace the California spotted owl on the landscape in the future. *Id.* at iv, 19-41. It also assumes that California spotted owls are “likely” currently experiencing detrimental impacts from exposure to anticoagulant rodenticides. *Id.* at 38.

Notwithstanding the Species Status Assessments’ predictions, the Service again concluded that listing the California spotted owl as an endangered species or threatened species under the ESA was not warranted. It concluded that the species is likely to persist into the foreseeable future, and that “[o]verall, the threats are not affecting the subspecies at such a level to cause it to be in danger of extinction throughout all or a significant portion of its range or to become an endangered species in the foreseeable future throughout all or a significant portion of its range.” Listing Decision, 84 Fed. Reg. at 60372.

II. The Endangered Species Act

Congress enacted the Endangered Species Act in 1973 with the goal of protecting and recovering imperiled species. In the words of the Act, its purpose is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” and “to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). In the seminal case on the purpose of the Endangered

Species Act, *Tennessee Valley Authority v. Hill*, the Supreme Court confirmed that it is “beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” 437 U.S. 153, 174 (1978).

Under Section 4 of the ESA, the Secretary of Interior, acting through the Service, is tasked with determining whether any terrestrial “species” warrants listing as “threatened” or “endangered.” 16 U.S.C. § 1533(a)(1). The term “species” is defined broadly by the statute to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). A species is considered “endangered” if it “is in danger of extinction throughout all or a significant portion of its range” and “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6), (20).

The ESA directs the Service to “determine whether any species is an endangered species or a threatened species because of any of the following factors:”

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. § 1533(a)(1). Notably, “[t]hese factors are listed in the disjunctive; any one or a combination can be sufficient for a finding that a particular species is endangered or threatened.” *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, at 1164 (N.D. Cal. 2000).

Section 4 further requires the Service to make its listing determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). The Service’s listing decisions are subject to judicial review in accordance with the standard of review set forth in the Administrative Procedure Act. *See Greater Yellowstone Coalition v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Specifically, the courts must hold unlawful and set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The Supreme Court has clarified that an agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The Service must also be consistent; “an internally inconsistent analysis is arbitrary and capricious.” *Nat’l Parks Conservation Ass’n v. E.P.A.*, 788 F.3d 1134, 1141 (9th Cir. 2015).

III. Violations of the Endangered Species Act

A. The Service's Listing Decision Was Arbitrary and Capricious, Contrary to the Best Available Science, and Violated the ESA.

As discussed above, an agency's decision is arbitrary and capricious if it has "offered an explanation for its decision that runs counter to the evidence before [it]." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The Service's Species Status Assessment shows that where population data exists, most California spotted owl populations are currently markedly declining. Species Status Assessment at 68. It predicts that under the most likely future scenario, the subspecies may be extirpated from large portions of its current range in the foreseeable future and that the remaining portions of its range will be largely in low condition and thus unable to withstand stochastic events. *See, e.g., id.* at 95. It also finds that all threats to the owl will continue, with some threats increasing in severity. Species Status Assessment at 95, 19-41. Some of the threats to the California spotted owl the Species Status Assessment notes may independently have calamitous implications for the subspecies. For example, with regards to the invasion of the barred owl, the Species Status Assessment explains that "[c]urrently, there are no management actions or plans in place to limit the barred owl invasion, so barred owls will likely continue to increase in [California spotted owl] habitat, displacing and outcompeting [the California spotted owl]." *Id.* at 84. It predicts that under a continuation of current conditions, "[f]ecundity and occupancy would likely significantly decline due to barred owls displacing [California spotted owl] reducing the available habitat for spotted owls to occupy and reproduce. With decreased conditions of survival, fecundity, and occupancy, population growth would likely also decline due to barred owls[.]" *Id.* at 92. The Species Status Assessment predicts that "[i]f control measures are not taken, barred owls will most likely replace [California spotted owl] on the landscape in the future, though the timescale of this replacement is uncertain." *Id.* at 35.

In its Listing Decision, the Service determined, in contrast, that "the California spotted owl will retain sufficient redundancy, resiliency and representation to allow it to persist into the foreseeable future" and "[o]verall, the threats are not affecting the subspecies at such a level to cause it to be in danger of extinction throughout all or a significant portion of its range or to become an endangered species in the foreseeable future throughout all or a significant portion of its range." Listing Decision, 84 Fed. Reg. at 60372. These conclusions were counter to the dire predictions of the Service's own Species Status Assessment. The Listing Decision was accordingly arbitrary and capricious, contrary to the best available science, and violated the ESA.

B. The Service Violated the ESA by Failing to Evaluate Whether the California Spotted Owl is Threatened or Endangered Throughout a Significant Portion of Its Range.

The ESA defines an "endangered" species as one that is "in danger of extinction throughout all *or a significant portion* of its range." 16 U.S.C. § 1532(6) (emphasis added). Similarly, a "threatened" species is defined as a species that is "likely to become an endangered species within the foreseeable future throughout all *or a significant portion* of its range." *Id.* § 1532(20) (emphasis added). Consistent with the plain language of these definitions, courts have made clear that the determination of whether a species is threatened or endangered

“throughout a significant portion of its range” cannot be conflated with the question of whether it is threatened or endangered throughout its entire range. *See, e.g., Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001). The Service has published a final policy that purports to interpret the phrase “significant portion of its range” for purposes of ESA listing decisions. *See* Final Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species”, 79 Fed. Reg. 37,578 (July 1, 2014). Although portions of that policy have now been vacated as insufficiently protective of species at risk in portions of their range, *see, e.g., Desert Survivors v. U.S. Dep’t of Interior*, 336 F. Supp. 3d 1131, 1133-37 (N.D. Cal. 2018), even that policy proscribes that “[i]f the species is neither endangered nor threatened throughout all of its range, [the Service] will determine whether the species is endangered or threatened throughout a significant portion of its range.” *Id.* at 37,585. According to the guidance, the Service should determine whether there is substantial information indicating that (1) portions of the range may be significant and (2) the species may be in danger of extinction or likely to become so in the foreseeable future in these portions. *See* 79 Fed. Reg. at 37,586.

The California spotted owl has four general areas of range: throughout the Sierra Nevada mountain range, in the mountain ranges of southern coastal California, in the inland mountain ranges of southern California, and potentially in the Sierra San Pedro Martir area of Mexico. The Species Status Assessment predicts that the subspecies may be extirpated from the entire southern California portions of its range, as well as from the Lassen and El Dorado regions of the Sierra Nevada, in the foreseeable future. *See* Species Status Assessment 95, fig. 23 (California Spotted Owl Regional Future Scenario 2 Condition). Nevertheless, the Service concluded that “the threats are not affecting the subspecies at such a level to cause it to be in danger of extinction throughout all or a significant portion of its range or to become an endangered species in the foreseeable future throughout all or a significant portion of its range.” Listing Decision, 84 Fed. Reg. at 60372.

But neither the Listing Decision itself, nor the underlying Species Status Assessment, analyzed specifically whether the California spotted owl is endangered or threatened *throughout a significant portion of its range*, including in those portions of its range where the Service predicts the subspecies may be extirpated. The Ninth Circuit has repeatedly explained that the Service “must ‘develop some rational explanation for why the lost and threatened portions of a species’ range are insignificant before deciding not to designate the species for protection.” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1064 (9th Cir. 2018) (quoting *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 877 (9th Cir. 2009); *see also Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001) (“where, as here, it is on the record apparent that the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a “significant portion of its range.”). The Service has thus violated the ESA by failing to determine whether the subspecies is endangered or threatened throughout a significant portion of its range, and by failing to include any rationalization for why the portions of the California spotted owl’s range it predicts are at risk of extirpation are not significant.

IV. Conclusion

If the Service does not remedy the violations described herein within 60 days, the organizations named above intend to pursue legal action in United States District Court. Should you believe any of the foregoing to be in error, have any questions, or wish to discuss this matter, please do not hesitate to contact us.

Sincerely,



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