

Center for Biological Diversity



March 28, 2001

Ms. Gale Norton
Secretary of the Interior
U.S. Department of the Interior
18th & C Street, N.W.
Washington, D.C. 20240

Director, U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

RE: Notice of Intent to Sue for Violation of the Endangered Species Act

Dear Secretary Norton and FWS Director:

This is a notice of intent to sue under the Endangered Species Act (ESA), 16 U.S.C. § 1540(g)(2). By this letter, the Center for Biological Diversity (CBD), Southern Utah Wilderness Alliance, Diné Care, Center for Native Ecosystems, and Colorado Wild provide notice that the U.S. Fish and Wildlife Service (FWS) is in violation of the ESA, section 4(b)(2), with respect to its final rule designating critical habitat for the Mexican spotted owl. The rule, dated January 18, 2001, designates 4.6 million acres of critical habitat for the owl on federal lands in four southwestern states. The rule was officially published in the Federal Register on February 1, 2001. It includes 830,000 acres in Arizona, 525,000 acres in Colorado, 54,000 acres in New Mexico, and 3.2 million acres in Utah. No private, state, or tribal lands are included in the designation. CBD has previously submitted a 60 day notice of intent to sue for violation of the Endangered Species Act with respect to this rule on January 18, 2001. This second notice is being submitted because the final rule had not yet been published in the Federal Register on January 18 and because several other organizations have joined CBD on the notice.

The final rule designating critical habitat vastly differs in size and scope from the proposed rule, dated July 21, 2000, which identified 13.5 million acres in the four states. The discrepancy in acreage is largely due to FWS's elimination of proposed critical habitat within National Forest administered lands in Arizona in New Mexico. The proposed rule contained designations of approximately 3.3

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million acres of National Forest land in Arizona, and 4.2 million acres of National Forest land in New Mexico. In contrast, the final rule contains zero acres of National Forest land in either Arizona or New Mexico. Additionally, over 1.2 million acres of proposed critical habitat on Tribal lands have been eliminated from the final rule. CBD believes the final rule is a flagrant violation of the ESA's substantive provisions relating to the designation of critical habitat. This letter is a notice of intent to sue pursuant to 16 U.S.C. § 1540(g).

A. Inadequate Designation of Critical Habitat

The Endangered Species Act, section 4(b)(2), requires that critical habitat be designated for all species listed as Threatened or Endangered under the Act. Designations are to be based on “the best scientific data available.” The economic effects of the designation must be taken into account. Section 3 of the ESA defines “critical habitat” as:

“the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and the specific areas outside the geographical area occupied by the species . . . [which] are essential for the conservation of the species.”

Conservation is, in turn, defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”

The size and scope of FWS's critical habitat designation on National Forest, Bureau of Land Management, National Park Service, private, state, and tribal lands fails to meet this statutory direction by not designating areas essential to the conservation of the Mexican spotted owl and by not utilizing the best scientific data available. For example, FWS has not adequately designated habitat within Utah and Colorado National Forests. More egregiously, FWS has completely omitted Forest Service administered lands within Arizona and New Mexico. According to the Recovery Plan for the owl, over 90% of the remaining Mexican spotted owls exist on National Forest lands, with the vast majority occurring on National Forest lands within Arizona and New Mexico. It is simply beyond explanation that FWS has chosen to forgo critical habitat designation for most of the owl's occupied habitat, which is obviously essential to the continued survival and recovery of this imperiled species.

Additionally, these undesignated lands unarguably require “special management considerations or protection.” For example, the Mexican spotted owl, like the California and Northern spotted owl

subspecies, is imperiled largely due to logging and grazing practices conducted on Forest Service lands. Constant FWS vigilance over the Forest Service and full implementation of its duties under the ESA, including proper designation of critical habitat, are absolutely essential to ensure the spotted owl's continued survival and recovery.

FWS apparently believes that existing management plans and the Mexican spotted owl Recovery Plan obviate the need for special management consideration or protection within Arizona and New Mexico National Forests. However, the partial adoption of the Recovery Plan into Southwestern Region Forest Plans illustrates well the inadequacy of management plans compared to the critical habitat designations demanded by the ESA. These inadequacies include:

- * Incomplete and inadequate adoption of the Recovery Plan: The Forest Service has failed to “develop and implement” a “long-term, range wide management plan” per the Recovery Plan. Many other facets of the Recovery Plan were not fully adopted into the Forest Plans, including provisions related to logging and domestic livestock grazing.
- * Violations of the Recovery Plan: The Forest Service has systematically failed to abide by Recovery Plan monitoring provisions. Additionally, the Forest Service has repeatedly attempted to log in Protected Activity Center (PACs) and log trees larger than 24 inches in mixed conifer habitat, in direct contravention of the Recovery Plan.
- * The Recovery Plan was adopted in 1995, and will expire in 2005. Critical habitat designations, in contrast, are intended to apply until species recovery and de-listing are achieved.
- * All of the Forest Service Plans which have partially adopted the Recovery Plan are overdue for revision under the National Forest Management Act. There is no guarantee these plans will continue to partially adopt the Recovery Plan, especially under an environmentally unfriendly Presidential administration.

B. Conclusion

The U.S. Fish and Wildlife Service has issued a patently inadequate final rule designating critical habitat for the Mexican spotted owl. Unfortunately, this decision is merely the latest example of a complete abrogation of, and resistance to, its statutory duties with respect to the owl under the ESA. If you do not take immediate action within the next 60 days to withdraw this final rule and issue a new final rule which properly and lawfully designates critical habitat, we will pursue all injunctive,

declaratory and other relief that is available under the law and seek the protection to which the Mexican spotted owl is entitled.

The name, address, and phone numbers of the parties giving notice are:

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Please call me at (520) 623-5252 if you would like to discuss this matter.

Sincerely,

Brian Segee

Secretary Babbitt and Director Clark
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cc: Ms. Nancy Kaufman, Director, FWS Southwestern Region