

August 4, 2005

Via Certified Mail—Return Receipt Requested—No. 7004 1350 0003 6052 1270

Ms. Gale Norton, Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

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

Dear Secretary Norton:

We represent the Seattle Audubon Society, 8050 35th Avenue NE, Seattle, Washington 98115, (206) 523-4483, and the Kittitas Audubon Society, P.O. Box 1443, Ellensburg, Washington 98926, (509) 674-1855 (collectively “the Audubons”). Any response or correspondence related to this matter should be directed to us at the letterhead address.

This letter provides you and the Department of the Interior with sixty days notice of the Audubons’ intent to file a citizen suit against you under Section 11 of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. §1540, for failing to develop, publish, and implement a recovery plan for the Northern Spotted Owl (*Strix occidentalis caurina*) and/or for failing to make a finding that a recovery plan would not promote the conservation of the species. Your failure to perform, and/or your unreasonable delay in performing, the nondiscretionary duties imposed by ESA Section 4(f) violates the Act and is subject to citizen suit enforcement under ESA Section 11(g). Since you have delegated responsibility for administering the Act to the U.S. Fish and Wildlife Service, you, the Department of the Interior, and the United States Fish & Wildlife Service will be collectively referred to herein as “the Secretary” or “the Service”.

I. The ESA requires the Secretary to plan for the recovery of listed species.

As you are aware, the central purpose of the ESA is to conserve threatened and endangered species and the ecosystems upon which they depend. 16 U.S.C. §1531(b). The Act states unequivocally that it is the policy of Congress that all federal departments and agencies shall conserve threatened and endangered species and shall utilize their authorities in furtherance of the purposes of the Act. 16 U.S.C. §1531(b); 16 U.S.C. §1536(a)(1). The ultimate goal of these conservation efforts is the recovery of listed species so that they no longer need the Act’s protective measures.

The United States Supreme Court observed that the ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). Beyond any doubt, “Congress intended endangered species to be afforded the highest of priorities”—the ESA reflects “an explicit Congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species” and “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” *Id.*, at 174, 185. “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.*, at 184.

One way the Act provides for species recovery is through Section 4 recovery plans. Thus, ESA Section 4(f) requires development and implementation of a recovery plan for Northern Spotted Owls unless the Secretary makes a finding that such a plan will not promote the conservation of the species. 16 U.S.C. §1533(f)(1). The ESA further requires the Secretary, to the maximum extent practicable, to give priority to threatened or endangered species that are most likely to benefit from recovery plans, particularly those species like the Northern Spotted Owl that are or may be in conflict with economic activity. 16 U.S.C. §1533(f)(1)(A).

The timely development of recovery plans is essential to planning and coordinating recovery actions and ensuring cooperation between those entities most able to afford protection to listed species. To ensure that recovery plans provide for the long-term survival and recovery of protected species, the Act requires plans to include: 1) a description of site-specific management actions necessary to achieve the plan’s goal for the conservation and survival of the species; 2) objective, measurable criteria which, when met, will result in a determination that the species should be removed from the list of species protected by the Act; and 3) an estimate of the time required and the cost necessary to carry out the measures needed to achieve the plan’s goals. 16 U.S.C. §1533(f)(1)(B). Recovery plans are an essential tool for meeting the recovery mandate of the ESA.

II. The Service has failed to develop and implement a recovery plan for Northern Spotted Owls, which have continued to decline since being listed.

The Northern Spotted Owl was listed as “threatened” on June 26, 1990. 55 Fed. Reg. 26114. The listing was prompted by the past and continued loss of suitable habitat throughout the Owl’s range, caused primarily by timber harvesting. 55 Fed. Reg. 26114, 26151. The federal government is not alone in recognizing the threats to the Northern Spotted Owl; as early as 1988, the State of Washington chose to list the species as endangered because it was seriously threatened with extinction throughout all or a significant portion of its range within the state. RCW 77.12.020; Wash. Admin. Code §232-12-014.

Listing the Northern Spotted Owl under the ESA triggered the Secretary’s duties to develop and implement a recovery plan for the species. 16 U.S.C. §§1533(a)(3) & (f). Unfortunately, no recovery plan has been developed or implemented even though the Service recognizes the species’ population status as “declining”; the species has a high recovery priority

number (3); and the Secretary circulated a draft recovery plan thirteen years ago. See USFWS' *Recovery Report to Congress, Fiscal Years 2001-2002*. The Secretary has quite simply failed to develop and implement a recovery plan for Northern Spotted Owls, in violation of the ESA.

It should come as no surprise, then, that the Northern Spotted Owl has continued to decline at an average annual rate of 3.7% since demographic studies began in 1985. In Washington, populations have been declining at about 7.3% per year, which is greater than the worst-case scenario presented in the Environmental Impact Statement for the Northwest Forest Plan—in some areas the population has even declined by up to 60% since 1992. Other indicators of population health such as survival rates and the number of fledged young are also currently declining at many surveyed sites. Anthony et al., *Status and Trends in the Demography of Northern Spotted Owls 1985- 2003* (2005).

Although the Northwest Forest Plan did envision some continued decline during the initial stages of its implementation, a central premise of the Northwest Forest Plan is that the recovery of late successional and old growth forests will provide habitat for future, expanding populations of Northern Spotted Owls. However, as discussed at a recent two-day conference in Arcata, California, Barred Owls are increasingly encroaching into Northern Spotted Owl territory. Like so many other threats, Barred Owl encroachment underscores the need for a comprehensive recovery plan that can address dynamic threats to the Spotted Owl; a recovery plan would likely help the Service and concerned citizens craft an appropriate and constructive solution to any Barred Owl problem.

A recovery plan could also help manage the substantial adverse impacts to Spotted Owls caused by past and present timber harvest. Two major studies by the State of Washington recently confirmed the dire situation facing Spotted Owls and the failure of current state and federal regulations to protect habitat and recover the species. In their *Final Draft Briefing Report to the Washington State Forest Practices Board Regarding Spotted Owl Status and Forest Practices Rules* (January 2005), Buchanan and Swedeen conclude that Washington's Spotted Owl rules are not providing for the viability of the owls in Washington State and that owl protections have been routinely and systematically degraded through political interference. Buchanan and Swedeen 2005. Similarly, in *An Assessment of the Status of Spotted Owl Habitat on Non-federal Lands in Washington between 1996 and 2004*, Pierce et al confirm that Washington's forest practices rules do not adequately protect Spotted Owls or their habitat, estimating that approximately 53,000 acres of suitable habitat have been logged near nest sites since 1996. Pierce et al 2005. Indeed, despite the dire condition of owl habitat on state and private lands at the time of listing, Pierce et al report that 73,000 acres of suitable owl habitat on non-federal lands in Washington were logged between 1996 and 2004. Pierce et al 2005. Although studies have not been conducted on habitat loss in Oregon, state logging rules in Oregon are generally less protective of the Northern Spotted Owl than in Washington.

Concurrent with this habitat destruction, since 1992 the Service issued at least fifteen permits throughout Washington, Oregon, and California that allow for the incidental taking of Northern Spotted Owls. Additionally, the Service is now considering the State of Washington's Forest Practices Habitat Conservation Plan, which would cover listed aquatic species on approximately 9.1 million acres of land. Clearly, the issuance of incidental take permits based on Washington's Forest Practices Habitat Conservation Plan would bless fifty years of forest practices and impact Northern Spotted Owls. Yet the Service has been issuing these permits—and has also designated Northern Spotted Owl critical habitat and participated in extensive federal lands management—without having a plan to guide and ensure consistent action that contributes to the recovery of the species.

Instead, the Service has prioritized other, lower priority recovery plans and unreasonably delayed completion of the plan for Northern Spotted Owls. For example, in 1998 the Service completed a recovery plan for the Point Arena Mountain Beaver, which was listed in 1991 and has a recovery priority number of 9c. Similarly, the Service completed the Arroyo Toad recovery plan in 1999; the Arroyo Toad was listed in 1994 and has a recovery priority number of 8. The Service even completed the Marbled Murrelet recovery plan in 1997—nearly seven years ago—even though the Marbled Murrelet has the same recovery priority number as the Northern Spotted Owl and was listed in 1992, two years after the Northern Spotted Owl was listed.

In late 2004, the Service completed a five-year status review of the species, in which it summarized the diverse threats to the Spotted Owl and new information regarding the Owl's habitat preferences. The authors of the status review concluded emphatically:

...it is our firm and unanimous conclusion that the risks currently faced by Northern Spotted Owls are significant; our qualitative evaluation is that these risks are comparable in magnitude to those faced by the species in 1990. Based on the best scientific information, as shown throughout this report, we believe that there are significant threats to the species at this time, and that these threats have the potential to increase.

Courtney et al., *Scientific Evaluation of the Status of the Northern Spotted Owl*, at 11-14 (2004) (emphasis added). After the status review the Service correctly chose not to de-list the Spotted Owl. However, given the quantity and quality of threats to the species, the Service must do more than simply express renewed interest in planning for the recovery of Northern Spotted Owls.

III. The Service's failure to develop and implement a Northern Spotted Owl recovery plan violates the Endangered Species Act.

Consequently, the Audubons hereby provide sixty days notice of their intent to file suit against the Secretary of the Interior for the violations described herein. The Service's failure to develop and implement a Northern Spotted Owl recovery plan violates the spirit and letter of the Act and constitutes a failure to perform the nondiscretionary duties imposed by ESA Section 4(f). Additionally, the Service's delay in developing, promulgating, and implementing a

Northern Spotted Owl recovery plan is unreasonable and constitutes action unlawfully withheld and/or unreasonably delayed.

These failures and delays are subject to the Act's citizen suit provisions. Therefore, under Section 11(g) of the Act, 16 U.S.C. §1540(g), the Audubons intend to seek injunctive relief to ensure prompt completion and implementation of a Northern Spotted Owl recovery plan, as well as such other relief permitted by law. Additionally, should the Audubons prevail in any action related to this notice letter, they will seek to recover the costs of litigation, including attorneys' and expert witness fees. *See, e.g.*, 16 U.S.C. §1540(g)(4).

During this sixty day notice period the Audubons will be willing to discuss settlement terms and effective remedies for the violations described in this letter. Among other things, the Audubons will want the Service to commit to an enforceable timeline and process for completing the recovery plan. If you wish to pursue settlement discussions in the absence of litigation, we suggest you initiate those discussions within ten days of receiving this notice so that a meeting can be arranged and negotiations completed before the end of the notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends. If you have any questions about this notice letter or wish to discuss this matter further, I can be reached at (206) 223-4088.

Very truly yours,

WASHINGTON FOREST LAW CENTER

Paul A. Kampmeier
Attorney at Law

cc: Mr. Matthew J. Hogan, Director, USFWS
Mr. Dave Allen, Director, USFWS Region 1