



September 3, 2003

**Via Certified Mail – Return Receipt Requested**

Anne Badgley, Regional Director  
U.S. Fish & Wildlife Service  
911 NE 11th Ave  
Portland, OR 97232-4181

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

Steve Williams, Director  
U.S. Fish & Wildlife Service  
1849 “C” Street, NW, M/S 3012  
Washington, D.C. 20240

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

Dear Ms. Badgley, Mr. Williams, and Ms. Norton:

We are writing on behalf of the Center for Biological Diversity, Sierra Nevada Forest Protection Campaign, Natural Resources Defense Council, Sierra Club, Defenders of Wildlife, Friends of the River, John Muir Project and The Wilderness Society 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. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, 16 U.S.C. § 1540(g). The reasons for this notice are set out in greater detail below.

**Background**

The California spotted owl (*Stix occidentalis occidentalis*) is one of three unique subspecies of spotted owl. Individuals are mottled brown with white barring, dark brown eyes, and a wingspan of 42 to 45 inches. 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 ESA and therefore receives no protection under the Act.

California spotted owls inhabit the Sierra Nevada range from Shasta County south to the Tehachapi pass as well as isolated mountainous areas in California’s central coast, southern California, and northern Baja. 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, grazing, fire suppression, and urbanization have profoundly altered the landscape throughout the California spotted owl’s historic range and drastically reduced the amount of suitable habitat available to the owl. Currently, only 15 percent of the coniferous

forests in the Sierra Nevada remain in the late-successional stages required by spotted owls. This loss of habitat has significantly reduced California spotted owl populations throughout the state.

Concerned that the California spotted owl's decline could lead to extinction if present trends continue, on April 3, 2000 the Center for Biological Diversity and other organizations petitioned the Service to list the California spotted owl as endangered or threatened and to designate its critical habitat. On October 12, 2000, the Service determined that the petition presented substantial information indicating that listing may be warranted. 65 Fed. Reg. 60605. When the Service subsequently failed to determine whether listing was in fact warranted within 12 months of receiving the petition as required by section 4(b)(3)(B) of the ESA, 16 U.S.C.

§ 1533(b)(3)(B), the Center for Biological Diversity and others filed suit in the United States District Court for the Northern District of California. That litigation concluded with the Court ordering the Service to complete the 12-month finding by February 10, 2003. *See Center for Biological Diversity v. Norton*, 208 F. Supp. 2d 1044 (N.D. Cal. 2002).

On February 14, 2003, the Service announced that listing the California spotted owl is not warranted. 68 Fed. Reg. 7580. The Service recognized both that owl populations may be declining throughout the state and that the species may face continued threats from logging and fire suppression. Nevertheless, the Service concluded that the California spotted owl does not require protection under the ESA.

#### **Violations of the Endangered Species Act**

Under Section 4 of ESA, within 12 months of receiving a listing petition that is found to present substantial information indicating that listing may be warranted, the Service must determine whether the species is endangered or threatened<sup>1</sup> 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). The ESA further provides that the Service must make such determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a

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<sup>1</sup> The ESA defines an endangered species as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A threatened species is defined as "any species which 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(20).

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review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation . . . to protect such species.” 16 U.S.C. § 1533(b)(1)(A).

In reaching the conclusion that listing the California spotted owl is not warranted, the Service violated section 4 of the ESA in numerous respects, including, but not limited to, the following:

- (1) the Service failed to base its determination solely on the best scientific information available;
- (2) the Service failed to evaluate properly the threatened destruction, modification, or curtailment of the spotted owl’s habitat or range and the inadequacy of existing regulatory mechanisms;
- (3) the Service failed to base its determination on the factors prescribed by the ESA;
- (4) the Service failed to consider whether the spotted owl is likely to become an endangered species within the foreseeable future and/or is in danger of extinction throughout all or a significant portion of its range; and,
- (5) the Service failed to conduct an adequate review of the status of the spotted owl.

The Service’s conclusion that listing the California spotted owl is not warranted is also arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and without observance of procedure required by law for reasons including but not limited to those described above, all in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 702, *et seq.*

### **Conclusion**

If the Service does not remedy the violations described herein within 60 days, the organizations named above intend to commence an appropriate 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 yours,



Gregory C. Loarie

Deborah S. Reames

Attorneys for Center for Biological Diversity, *et al.*