

1 **INTRODUCTION**

2 1. This lawsuit challenges the U.S. Fish and Wildlife Service’s unlawful determination
3 that the California spotted owl does not warrant protection under the Endangered Species Act, 84
4 Fed. Reg. 60371, 60372 (Nov. 8, 2019).

5 2. The California spotted owl (*Stix occidentalis occidentalis*) is a subspecies of spotted
6 owl found in the Sierra Nevada Mountains of California, southern and coastal California, and
7 potentially in the Sierra San Pedro Martir area of Mexico. Unlike members of the other two
8 subspecies of spotted owl—the northern and Mexican—California spotted owls are not listed as
9 either endangered or threatened under the Endangered Species Act and therefore receive no
10 protection under the Act. This is despite the fact that there are estimated to be less than half as many
11 California spotted owls as northern spotted owls, and California spotted owls have the most limited
12 genetic variability of all three subspecies, making them at higher risk for extinction. Conservation
13 groups have repeatedly petitioned the Service to afford California spotted owls the same well-
14 deserved protections as their cousins, including most recently petitioning the Service in 2015 to list
15 them under the Act as endangered or threatened. The Service has been steadfast in its refusal to do
16 so, despite overwhelming scientific evidence that protection under the Endangered Species Act is
17 warranted.

18 3. As a result of the Service’s intransigence, California spotted owls are on a path to
19 extinction. In evaluating the recent petition to protect the California spotted owl, the Service’s own
20 scientific experts analyzed the best available science and concluded that in the foreseeable future,
21 California spotted owls may be extirpated from large portions of their range. The Service also
22 confirmed that the serious threats facing the owl will continue unabated. Among other serious
23 threats, the Service’s scientists predicted there will be increasing threats from climate change and
24 associated increases in drought, tree mortality, and high-severity fire; that logging practices will
25 continue to degrade the owls’ habitat; and that the invading barred owl may eventually replace the
26 California spotted owl on the landscape. Nevertheless, the agency came to the inexplicable
27 conclusion that the owl is not in danger of extinction. In light of the dire predictions the Service
28 itself has made, its conclusion that the California spotted owl is not in danger of extinction either

1 now or in the foreseeable future, throughout all or any significant portion of its range, was arbitrary,
2 capricious, contrary to the best available science, and otherwise not in accordance with law.
3 Plaintiffs ask the Court to set aside the Service’s illegal determination and direct the Service to
4 prepare a new determination that comports with the law and the science.

5 **JURISDICTION AND VENUE**

6 4. This Court has jurisdiction over this action by virtue of 28 U.S.C. § 1331 (federal
7 question jurisdiction), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief),
8 16 U.S.C. § 1540(c) (actions arising under the Endangered Species Act (“ESA”)), and 16 U.S.C.
9 § 1540(g) (citizen suit provision of the ESA).

10 5. As required by the ESA, 16 U.S.C. § 1540(g), plaintiffs provided sixty days’ notice of
11 the violations alleged herein on April 15, 2020 and supplemented this notice on June 8, 2020. A
12 copy of plaintiffs’ notice letters are attached hereto as Exhibit A.

13 6. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.
14 § 1540(g)(3)(A), because plaintiff Sierra Forest Legacy is a project of the Tides Center, which is
15 incorporated in this District and has an office here; and because the California spotted owl’s range
16 includes Monterey County.

17 **INTRADISTRICT ASSIGNMENT**

18 7. Assignment to the San Jose Division of this Court is proper, because a substantial part
19 of the events and omissions giving rise to the claims herein occurred in Monterey County. Civil L.R.
20 3-2(c), 3-5(b).

21 **PARTIES**

22 8. Plaintiff Sierra Forest Legacy is a project of the San Francisco-based non-profit Tides
23 Center. Organized in 1996, Sierra Forest Legacy works to protect and restore the ancient forests,
24 wildlands, wildlife, and watersheds of the Sierra Nevada through scientific and legal advocacy,
25 public education and outreach, as well as grassroots forest protection efforts. Sierra Forest Legacy’s
26 staff and members have been involved in most major policy decisions and research initiatives
27 relating to Sierra Nevada national forest management and species conservation, including efforts to
28 study, protect, and recover the California spotted owl.

1 9. Plaintiff Defenders of Wildlife (“Defenders”) is a nonprofit corporation with
2 members and supporters across the nation, including many in California. Defenders is dedicated to
3 the protection of all native wild animals and plants in their natural communities. The organization
4 focuses its programs on what scientists consider two of the most serious environmental threats to the
5 planet: the accelerating rate of extinction of species and the associated loss of biological diversity,
6 and habitat alteration and destruction. These programs encourage protection of entire ecosystems
7 and interconnected habitats while protecting predators that serve as indicator species for ecosystem
8 health. Through education, outreach, advocacy, litigation and other efforts, Defenders has worked to
9 protect imperiled species such as the California spotted owl and the habitats upon which these
10 species depend.

11 10. Plaintiff Center for Biological Diversity (“the Center”) is a non-profit organization
12 incorporated in California with its headquarters in Oakland. The Center has over 67,000 members
13 throughout the United States and the world. The Center works through science, law, and policy to
14 secure a future for all species teetering on the brink of extinction. The Center has been involved for
15 decades in species and habitat protection throughout the western United States, including protection
16 of the California spotted owl. For two decades, the Center has worked to secure protection under
17 both state and federal laws for the California spotted owl and its old forest habitat in California. The
18 Center has also worked extensively to prevent destructive activities such as commercial logging of
19 large trees and overuse of toxic rodenticides that are harming the California spotted owl and its
20 habitat.

21 11. Plaintiffs’ members and staff live, work, and recreate in or near the current and
22 historic range of the California spotted owl. Plaintiffs members use and enjoy, on a continuing and
23 ongoing basis, the habitat of the California spotted owl and the larger ecosystem upon which it
24 depends. Plaintiffs’ members and staff derive aesthetic, recreational, scientific, inspirational,
25 educational, and other benefits from California spotted owls and their habitat, and they intend to do
26 so frequently in the future on a regular and continuing basis.

27 12. Plaintiffs’ members and staff have been for years, and remain today, engaged in
28 numerous efforts to protect and preserve the California spotted owl and its forest habitat. Among

1 other things, plaintiffs were among the organizations that petitioned the U.S. Fish and Wildlife
2 Service (“Service”) to protect the California spotted owl in 2000, 2004, and 2015, and they have
3 worked tirelessly since to ensure that California spotted owls are afforded legal protection under the
4 ESA.

5 13. The Service’s decision not to list the California spotted owl under the ESA has caused
6 plaintiffs and their members to suffer a concrete and particularized injury that is actual and
7 imminent. Plaintiffs and their members will continue to suffer injury unless the relief requested
8 herein is granted. Plaintiffs’ injuries would be redressed by the relief requested in this complaint.

9 14. Plaintiffs have exhausted all available administrative remedies and have no other
10 adequate remedy at law.

11 15. Defendant U.S. Fish and Wildlife Service is the administrative agency within the U.S.
12 Department of Interior responsible for implementing the ESA with respect to terrestrial mammals,
13 including the California spotted owl.

14 16. Defendant David Bernhardt is the Secretary of the Department of Interior and
15 ultimately responsible for properly carrying out the ESA with respect to terrestrial mammals such as
16 the California spotted owl. He is sued in his official capacity.

17 17. Defendant Aurelia Skipwith is the Director of the Service. She is sued in her official
18 capacity. She has been delegated the responsibilities of the Secretary of the Interior described in the
19 preceding paragraph. 50 C.F.R. § 402.01(b).

20 **LEGAL BACKGROUND**

21 18. Congress enacted the Endangered Species Act in 1973 to provide “a means whereby
22 the ecosystems upon which endangered species and threatened species depend may be conserved”
23 and “a program for the conservation of such endangered species and threatened species.” 16 U.S.C.
24 § 1531(b). The statute contains an array of provisions designed to afford imperiled species “the
25 highest of priorities,” so that they can recover to the point where federal protection is no longer
26 needed. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). To benefit from these provisions,
27 however, the Secretary of Interior, acting here through the Service, must first list the species as
28 either “threatened” or “endangered” pursuant to Section 4 of the ESA, 16 U.S.C. § 1533.

1 California, and potentially in the Sierra San Pedro Martir area of Mexico, where it has not been
2 confirmed but where the Service believes it likely exists. The owl's southern California ranges are
3 separated from its range in the Sierra Nevada as a result of natural topographic and manmade
4 obstacles. For assessment purposes, the Service has divided the California spotted owl population
5 into "regions" based on land management boundaries, designating eleven regions in the Sierra
6 Nevada, one region in coastal southern California, three regions in southern California, and one
7 region in the San Pedro Martir area of Mexico.

8 24. Like all spotted owls, California spotted owls are habitat specialists that require old
9 growth forests with large trees, multi-storied canopies, dense canopy closure with more than 70
10 percent canopy cover, snags, and downed logs and woody debris for nesting, roosting, and foraging.
11 Studies have shown that California spotted owls typically select remnants of old growth forests that
12 range from 200 to 350 years in age or greater.

13 25. Timber harvest from the 1800s through the 1980s in the Sierra Nevada selected for
14 the old growth trees on which the California spotted owl depends, resulting in the loss of much of
15 the owl's suitable habitat. The Forest Service has concluded that old forest conditions have declined
16 by as much as 90 percent from their historical conditions in the Sierra Nevada. The majority of
17 suitable habitat for the California spotted owl in the Sierra Nevada is currently on public land, with
18 75% managed by the U.S. Forest Service; 7% managed by the National Park Service; and 18%
19 privately owned or managed by other government agencies.

20 26. Since the early 1990s, the volume of commercial logging of mature trees on public
21 land in the Sierra Nevada has declined, but "fuel reduction" in the form of mechanical thinning and
22 salvage logging continue, both of which continue to degrade the owls' habitat.

23 27. Mechanical thinning is promoted under the Forest Service's current land and resource
24 management plans. Mechanical thinning involves the selective removal of trees in a row, strips, or in
25 intervals either for commercial harvest or to reduce fuel loads to decrease the likelihood of high-
26 severity fire. Mechanical thinning is a present threat to the California spotted owls' habitat, because
27 the Forest Service allows for canopy cover to be reduced to 40 percent throughout a significant
28

1 portion of California spotted owl territory, far below the minimum 70 percent the California spotted
2 owl requires.

3 28. Salvage logging is also promoted under the Forest Service’s land and resource
4 management plans. It is a practice whereby dead or dying trees are removed after wildfires, disease,
5 or insect infestation to recover their economic value. California spotted owls can inhabit areas that
6 have been burned by fire, and areas with large dead trees help recovering stands attain needed
7 features of owl habitat more quickly; therefore salvage logging also reduces the amount of habitat
8 for the California spotted owl.

9 29. Recent demographic studies have shown that the California spotted owl is currently
10 markedly declining in the Sierra Nevada, likely due to these ongoing logging practices. The only
11 potentially stable California spotted owl population is in the Sequoia-Kings Canyon National Park
12 region, where almost no tree removal is allowed.

13 **PROCEDURAL BACKGROUND**

14 30. Because the total population of California spotted owls is small and it faces continued
15 habitat destruction and other threats, conservation groups have been working for decades to protect it
16 under the Endangered Species Act. The Service has repeatedly declined to protect the subspecies,
17 however, on the basis that it did not have conclusive evidence of continued population declines.

18 31. Plaintiff Center for Biological Diversity and the Sierra Nevada Forest Protection
19 Campaign (now Sierra Forest Legacy) first submitted a petition to list the California spotted owl on
20 April 3, 2000. In 2003, the Service recognized that the California spotted owl faces threats from
21 habitat modification as well as potential future threats from climate change and drought. It
22 nevertheless refused to list the California spotted owl, finding that it was “uncertain” whether it was
23 declining. Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List
24 the California Spotted Owl (*Strix occidentalis occidentalis*), 68 Fed. Reg. 7,580, 7,608 (Feb. 14,
25 2003).

26 32. In 2006, the Service again refused to list the California spotted owl on the basis that it
27 found inconclusive evidence of population decline. Endangered and Threatened Wildlife and Plants;
28 12-Month Finding for a Petition to List the California Spotted Owl (*Strix occidentalis occidentalis*)

1 as Threatened or Endangered, 71 Fed. Reg. 29886, 29907 (May 24, 2006). While the Service
2 acknowledged mechanical thinning might “temporarily” degrade habitat, the Service asserted these
3 negative effects would be offset by protecting the owl from high-severity wildfire. *Id.* at 29,906.

4 33. Since 2006, studies have shown dramatic population declines. Plaintiffs Sierra Forest
5 Legacy and Defenders accordingly again submitted a petition in 2015 asking the Service to list the
6 California spotted owl. The petition highlighted the new demographic evidence of range-wide
7 decline, as well as evidence showing that current forestry management practices are resulting in
8 long-term degradation of habitat without ameliorating the threat of high-severity wildfire. The
9 petition also presented evidence the owl is at significant risk due to its small total population size
10 and impoverished gene pool, and that it faces increasing threats from exposure to anticoagulant
11 rodenticides and invasion of the barred owl—a closely related species that has similar habitat
12 requirements and is aggressively outcompeting and displacing spotted owls on the landscape.

13 34. On September 18, 2015, the Service issued a 90-day finding that the petition
14 presented substantial scientific information indicating that listing may be warranted. Endangered and
15 Threatened Wildlife and Plants; 90-Day Findings on 25 Petitions, 80 Fed. Reg. 56423, 56426 (Sept.
16 18, 2015).

17 35. When the Service failed to make a final determination on the petition by the 12-
18 month deadline to do so, 16 U.S.C. § 1533(b)(3)(B), Plaintiff Center for Biological Diversity
19 challenged the Service’s failure. *CBD v. Jewell, et al.*, No. 1:16-cv-00503-JDB (D.D.C.). That
20 litigation resulted in a settlement agreement whereby the Service committed to submit a 12-month
21 finding on the California spotted owl to the Federal Register by September 30, 2019. On May 2,
22 2019, the D.C. District Court extended the deadline until November 4, 2019.

23 36. The Service issued the final listing decision on November 8, 2019. Endangered and
24 Threatened Wildlife and Plants; 12-Month Finding for the California Spotted Owl, 84 Fed. Reg.
25 60371, 60372 (Nov. 8, 2019) (“Listing Decision”).

26 37. The Listing Decision purports to be supported by a June 2019 Species Status
27 Assessment Report for the California Spotted Owl (*Strix occidentalis occidentalis*) (“Species Status
28 Assessment”). According to the Service, the Species Status Assessment is “a scientific review of the

1 best available information, including scientific literature and discussions with experts, related to the
2 biology and conservation status of the [California spotted owl].” Species Status Assessment at 2.

3 38. The Species Status Assessment confirms dramatic population declines in four out of
4 the five population study areas for which there was robust data. These include a 44% population
5 decline in the Lassen region of the owl’s Sierra Nevada range (Species Status Assessment at 53); a
6 50% population decline in the Eldorado region of the owl’s Sierra Nevada range (*id.* at 55); a 31%
7 population decline in the Sierra region of the owl’s Sierra Nevada range (*id.* at 58); and a 9%
8 population decline in the San Bernardino region of the owl’s inland southern California range (*id.* at
9 62). The Species Status Assessment concluded that only one region was potentially stable—the
10 Sequoia Kings Canyon region in an area protected from logging. *Id.* at 59. Overall, the Species
11 Status Assessment concluded that 32% of California spotted owl regions are in decline, none are
12 increasing, and only 3% are stable. *See Id.* at 68, fig 20. The remaining 65% have an unknown
13 population trend. *Id.*

14 39. The Species Status Assessment concluded that these regions are likely to continue to
15 decline, and that the owl faces potential extirpation throughout major portions of its range. The
16 Species Status Assessment concluded that the California spotted owl may be extirpated from the
17 entire southern and coastal California portions of its range, and from the Lassen and Eldorado
18 regions of the Sierra Nevada portion of its range. *See, e.g.,* Species Status Assessment at 96; *see also*
19 *id.* at 95, fig 22 (reproduced below). It concluded that the majority of the remaining areas of the
20 California spotted owl’s range will be in low or low-moderate condition in the foreseeable future,
21 *id.*, which means they will “have low resiliency and may not be able to withstand stochastic events
22 because of significant declines in occupancy, survival, fecundity, or habitat quality.” *Id.* at 69.

California Spotted Owl Regional
Future Scenario 2 Condition

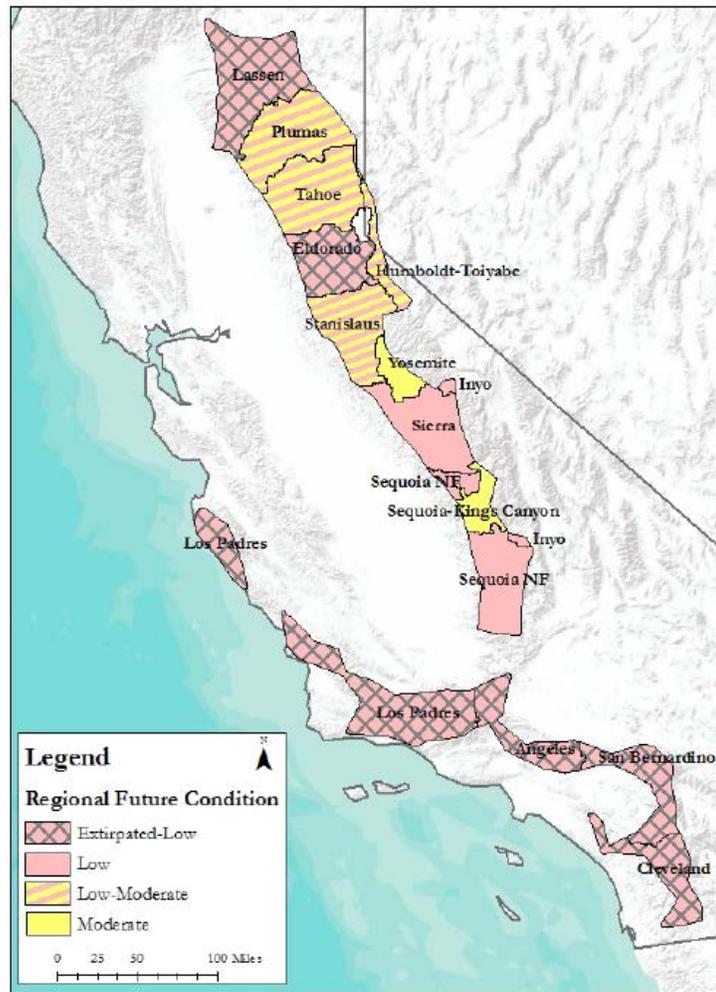


Figure 22: Map of CSO regions and the overall viability prediction under future scenario 2.

40. The Species Status Assessment also concluded that all threats to the owl will continue, with some threats increasing in severity. Species Status Assessment at iv, 95, 19–41. These threats include continued clearcutting and mechanical thinning and increased salvage logging in the California spotted owl’s habitat; increasing negative impacts due to climate change including increasing large-scale high severity fire, increasing tree mortality, increasing drought conditions, and direct physiological impacts on individual owls; and increasing invasion of the barred owl. The Species Status Assessment also acknowledged that the California spotted owl is likely currently

1 experiencing detrimental impacts from exposure to illegal rodenticides in its habitat. Species Status
2 Assessment at 38.

3 41. With regards to clearcutting, mechanical thinning, and salvage logging, the Species
4 Status Assessment acknowledged that logging in the California spotted owl’s habitat “pose[s] a risk
5 to future viability of the species.” Species Status Assessment at ii. The Species Status Assessment
6 concluded that clearcutting—a method of removing all trees in a stand—will remain at current
7 levels. *Id.* at iv. It acknowledged that “[h]istorical, current, and future clearcutting in the Sierra
8 Nevada portion of the range impacts the availability of large trees and multi-layered high canopy
9 cover for individuals, likely then resulting in negative impacts to occupancy and dispersal of the
10 population as a whole.” *Id.* at 33. The Species Status Assessment also concluded that mechanical
11 thinning will continue at current rates. *Id.* at iv. It found that “[m]echanical thinning can decrease
12 [California spotted owl] occupancy and is negatively correlated with reproduction” and that it “is a
13 threat to [the California spotted owl] when large trees or too much canopy cover is removed
14 resulting in negative impacts to occupancy and dispersal of populations.” Species Status Assessment
15 at 34. Finally, the Species Status Assessment concluded that salvage logging will “increase as large-
16 scale high-severity fires increase at the current trend.” *Id.* at iv. With regards to salvage logging, the
17 Species Status Assessment acknowledged that “salvage logging likely reduces the amount of habitat
18 available for [the California spotted owl]” and that “[t]here is some evidence that [California spotted
19 owl] occupancy decreases with salvage logging.” *Id.* at 34–35.

20 42. With regards to fire, the Species Status Assessment concluded that “[l]arge-scale
21 high-severity fires [will] continue to increase at the current trend on the landscape.” Species Status
22 Assessment at iv. “Large-scale high-severity fire is generally defined as over 10,000 ha (24,711 ac)
23 of area burned with 75–100 percent canopy mortality.” *Id.* at 20. The Species Status Assessment
24 found that “[l]arge-scale high-severity fires can degrade or destroy [California spotted owl] habitat”
25 *Id.* The Species Status Assessment acknowledged that “large-scale high-severity fires have a
26 detrimental effect on both [the California spotted owl] and its habitat.” *Id.* at 19–20. “The majority
27 of the [California spotted owl] range occurs within the ‘very high’ wildfire threat category. . . . Much
28 of the southern California range of [the California spotted owl] falls within the extreme fire risk.” *Id.*

1 at 21. The Species Status Assessment concluded that “[b]ased on fire activity and trends within the
2 next 75 years, the cumulative amount of nesting habitat burned at $\geq 50\%$ tree basal area mortality
3 will exceed the total existing habitat. . . . In other words, the loss of suitable [California spotted owl]
4 habitat would exceed the rate of new forest growing post-fire.” *Id.* at 21–22.

5 43. With regards to tree mortality, the Species Status Assessment concluded that tree
6 mortality will continue to increase due to climate change, and may further isolate California spotted
7 owl populations. Species Status Assessment at iv, 27. “Widespread increases in tree mortality have
8 been occurring in California due to drought, disease, and bark beetles.” *Id.* at 26. “The tree mortality
9 events are particularly severe in the southern Sierra Nevada area.” *Id.* The Species Assessment
10 acknowledges “this may increase the isolation between the [California spotted owl] populations in
11 the Sierra Nevada region and the [California spotted owl] populations in coastal and southern
12 California.” *Id.*

13 44. With regards to drought conditions, the Species Status Assessment concluded they
14 will “continue to increase” due to climate change. Species Status Assessment at iv. The Species
15 Status Assessment acknowledged that “[d]rought conditions alone can have impacts on [the
16 California spotted owl],” including by contributing to tree mortality, lowering reproductive success,
17 and negatively impacting prey species. *Id.* at 29. It noted that “[t]here are no regulatory mechanisms
18 or conservation measures in place to ameliorate the direct impacts of drought to [the California
19 spotted owl].” *Id.*

20 45. With regards to climate change, in addition to its broad impacts contributing to
21 drought, tree mortality, and fire, the Species Status Assessment concluded that the effects of climate
22 change will “impact both the habitat and physiology of California spotted owls.” Species Status
23 Assessment at iv. Above temperatures of 95° Fahrenheit, the California spotted owl experiences heat
24 stress. *Id.* at 30. The Species Status Assessment thus concluded that “[c]hanging climatic conditions
25 may have direct impacts on [California spotted owl] physiology, survival, reproduction, recruitment,
26 or population growth.” *Id.* It further concluded that “[i]t may also have indirect impacts including
27 changes in habitat and prey distribution, abundance, and quality.” *Id.* The Species Status Assessment
28 acknowledged that even under an optimistic prediction of climate change impacts, climate change is

1 likely to lead to a decrease in California spotted owl occupancy in comparison to current climate
2 conditions. *Id.* at 31.

3 46. The Species Status Assessment concluded that the barred owl will “continue to
4 slowly occupy the California spotted owl range.” Species Status Assessment at iv. It acknowledged
5 that the “main threat” that could limit the California spotted owl’s ability to withstand change from
6 climate change and large-scale high-severity fire is “an invasion of barred owls.” *Id.* at 96. “Barred
7 owls have similar habitat requirements as spotted owls and are aggressively outcompeting and
8 displacing spotted owls on the landscape.” *Id.* at 35. “Since the 1960s, the barred owl has been
9 extending its range westward, coming in contact with first northern spotted owls and now moving
10 into the California spotted owl range.” *Id.* The Species Status Assessment noted that “[c]urrently,
11 there are no management actions or plans in place to limit the barred owl invasion, so barred owls
12 will likely continue to increase in [California spotted owl] habitat, displacing and outcompeting [the
13 California spotted owl].” *Id.* at 84. It concluded that under a continuation of current conditions,
14 “[f]ecundity and occupancy would likely significantly decline due to barred owls displacing
15 [California spotted owl] and reducing the available habitat for spotted owls to occupy and reproduce.
16 With decreased conditions of survival, fecundity, and occupancy, population growth would likely
17 also decline due to barred owls[.]” *Id.* at 92. The Species Status Assessment concluded that “[i]f
18 control measures are not taken, barred owls will most likely replace [the California spotted owl] on
19 the landscape in the future, though the timescale of this replacement is uncertain.” *Id.* at 36.

20 47. Finally, the Species Status Assessment acknowledged the risk of anticoagulant
21 rodenticides to the California spotted owl. Species Status Assessment at 37–38. Anticoagulant
22 rodenticides are designed to kill small pest mammals. They act by thinning an animal’s blood, and
23 exposure is manifested by bleeding nose and gums, extensive bruises, anemia, fatigue, and difficulty
24 breathing. An animal exposed to anticoagulant rodenticides may live for several days after exposure,
25 but may become lethargic and more easily caught by predators. Large quantities of anticoagulant
26 rodenticides have increasingly been found at illegal marijuana cultivation sites within California
27 spotted owl habitat, where they are often used indiscriminately by growers to discourage mice and
28 other rodents from chewing marijuana plants and plastic irrigation lines. *Id.* at 38. In 2018, Mourad

1 W. Gabriel et al., published “Exposure to rodenticides in Northern Spotted and Barred Owls on
2 remote forest lands in northwestern California: evidence of food web contamination.” 13 *Avian*
3 *Conservation and Ecology*, June 2018: 1–9, <https://doi.org/10.5751/ACE-01134-130102>. This study
4 found that “a high percentage” of barred owls (40%) and northern spotted owls (70%) tested positive
5 for exposure to anticoagulant rodenticides. *Id.* at 5. The study found this was “of significant concern
6 because all of these owls were collected in remote forested lands with no nearby urban or peri-urban
7 settings,” and attributed the source of exposure to rodenticides used at illegal marijuana grow sites.
8 *Id.* at 5–6. The authors concluded that anticoagulant rodenticide contamination is likely widespread,
9 including in California spotted owl habitat, and that “[t]he occurrence of [anticoagulant rodenticides]
10 in both northern and California Spotted Owl habitats has been labeled as an ecological stressor and a
11 significant emerging threat to both species.” *Id.* at 6. The Species Status Assessment acknowledged
12 the risk of anticoagulant rodenticides to the California spotted owl, although it noted that no studies
13 have yet directly documented impacts to the California spotted owl. Species Status Assessment at
14 37–38. It acknowledged that there are “likely thousands” of illegal marijuana growing operations
15 within the California spotted owl range. *Id.* at 38. It acknowledged the 2018 Gabriel study on barred
16 and northern spotted owls and concluded that “it is likely that [California spotted owls] are
17 experiencing some detrimental impacts as well.” *Id.* It also concluded that “[a]lthough this threat
18 impacts the survival of individuals, since [the California spotted owl] is a long-lived species with
19 low reproductive rates, the loss of just a few individuals may reduce survival and the population
20 growth rate.” *Id.* at 37–38. The Species Status Assessment explained that “[t]his threat would be
21 particularly detrimental if a parent were exposed during breeding season because hatchlings and
22 juveniles rely on parental care to survive, so the loss of just one parent would likely result in the loss
23 of offspring as well.” *Id.*

24 48. The Species Status Assessment did not predict that any threat to the owl would abate.

25 49. Despite the Species Status Assessments’ dire conclusions, the Service determined that
26 listing the California spotted owl as threatened or endangered under the ESA was not warranted. The
27 Listing Decision concluded that the owl is likely to persist into the foreseeable future, and that
28 “[o]verall, the threats are not affecting the subspecies at such a level to cause it to be in danger of

1 extinction throughout all or a significant portion of its range or to become an endangered species in
2 the foreseeable future throughout all or a significant portion of its range.” Listing Decision, 84 Fed.
3 Reg. at 60372.

4 50. Because the Service refused to list the California spotted owl on the Endangered
5 Species Act list, it has not been afforded protections of the Act. It has no recovery plan, as would be
6 required under section 4(f) of the Act if it were a listed species. 16 U.S.C. § 1533(f)(1). It has no
7 critical habitat designated for protection, as would be required by section 4(b). 16 U.S.C.
8 § 1533(b)(2). Federal agencies like the Forest Service are not required to consult with the Service
9 before damaging its habitat, including when approving logging projects that science suggests would
10 be harmful to the species, as would be required by section 7. 16 U.S.C. § 1536(a)(4). And the
11 California spotted owl is not federally protected from “take,” meaning there is no general federal
12 prohibition from harassing, harming, hunting, or killing the owl, as would be prohibited by section 9.
13 16 U.S.C. § 1538(a)(1)(B).

14 **FIRST CAUSE OF ACTION**
15 **(Violation of the ESA: Illegal Finding that**
16 **California Spotted Owls Are Not Threatened or Endangered Throughout All of Their Range)**

17 51. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
18 the preceding paragraphs.

19 52. The Service’s Listing Decision is subject to judicial review in accordance with the
20 standard of review set forth in the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706. *See*
21 *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). Consistent with
22 the APA, courts must hold unlawful and set aside agency actions found to be “arbitrary, capricious,
23 an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

24 53. The U.S. Supreme Court has clarified that agency action is arbitrary and capricious
25 when “the agency has relied on factors which Congress has not intended it to consider, entirely
26 failed to consider an important aspect of the problem, offered an explanation for its decision that
27 runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
28 difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v.*
State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Stated differently, the Service “has an

1 obligation to state a rational connection between the facts found and the decision made.” *Tucson*
2 *Herpetological Soc’y v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009). The Service must also be
3 consistent; “an internally inconsistent analysis is arbitrary and capricious.” *Nat’l Parks Conservation*
4 *Ass’n v. E.P.A.*, 788 F.3d 1134, 1141 (9th Cir. 2015).

5 54. The ESA requires the Service to make its listing decisions “solely on the basis of the
6 best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

7 55. Based on the best scientific data available, the Service’s Species Status Assessment
8 shows that where population data exists, California spotted owls are declining in many portions of
9 their range. Species Status Assessment at 68. It concludes that under the most likely future scenario,
10 the owl may be extirpated from large portions of its current range in the foreseeable future and that
11 the remaining regions will be largely in low condition and thus unable to withstand stochastic events.
12 *See, e.g., id.* at 95. It also finds that all threats to the owl will continue, with some threats increasing
13 in severity. Species Status Assessment at 95, 19–41.

14 56. Contrary to the best available science, the Service’s Listing Decision concludes “the
15 California spotted owl will retain sufficient redundancy, resiliency and representation to allow it to
16 persist into the foreseeable future” and “[o]verall, the threats are not affecting the subspecies at such
17 a level to cause it to be in danger of extinction throughout all or a significant portion of its range or
18 to become an endangered species in the foreseeable future throughout all or a significant portion of
19 its range.” Listing Decision, 84 Fed. Reg. at 60372. These conclusions are counter to the conclusions
20 of the Service’s own Species Status Assessment and counter to the best available science.

21 57. Because the Service’s Listing Decision is contrary to the best available scientific
22 information, it is arbitrary, capricious, and contrary to law, in violation of the ESA.

23 **SECOND CAUSE OF ACTION**

24 **(Violation of the ESA: Illegal Finding that California Spotted Owls Are Not Threatened or 25 Endangered Throughout Any Significant Portion of Their Range)**

26 58. Plaintiffs re-allege, as if fully set forth herein, each and every allegation contained in
the preceding paragraphs.

27 59. The ESA defines an “endangered” species as one that is “in danger of extinction
28 throughout all *or a significant portion* of its range.” 16 U.S.C. § 1532(6) (emphasis added).

1 Similarly, a “threatened” species is “likely to become an endangered species within the foreseeable
2 future throughout all *or a significant portion* of its range.” *Id.* § 1532(20) (emphasis added).
3 Consistent with the plain language of these definitions, courts have made clear that the determination
4 of whether a species is endangered or threatened “throughout a significant portion of its range”
5 cannot be conflated with the question of whether it is endangered or threatened throughout its entire
6 range. *See, e.g., Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001); *Ctr. for Biological*
7 *Diversity v. Jewell*, 248 F.Supp.3d 946, 957 (D. Ariz. 2017), *amended in part*, No. CV-14-02506-
8 TUC-RM, 2017 WL 8788052 (D. Ariz. Oct. 25, 2017); *Desert Survivors v. U.S. Dep’t of Interior*,
9 321 F.Supp.3d 1011, 1072–73 (N.D. Cal. 2018). The Service must also provide ““some rational
10 explanation for why the lost and threatened portions of a species’ range are insignificant before
11 deciding not to designate the species for protection.”” *Ctr. for Biological Diversity v. Zinke*, 900 F.3d
12 1053, 1064 (9th Cir. 2018) (quoting *Tucson Herpetological Soc’y v. Salazar*, 566 F.3d 870, 876–77
13 (9th Cir. 2009); *see also Defs. of Wildlife*, 258 F.3d at 1145.

14 60. The California spotted owl has four general areas of range: throughout the Sierra
15 Nevada mountain range, in the mountain ranges of southern coastal California, in the inland
16 mountain ranges of southern California, and potentially in the Sierra San Pedro Martir area of
17 Mexico. The Species Status Assessment concluded that the owl may be extirpated from the entire
18 coastal and southern California portions of its range in the next 40–50 years. *See* Species Status
19 Assessment 95, fig. 22 (California Spotted Owl Regional Future Scenario 2 Condition). The Species
20 Status Assessment explained that these portions of range make up roughly 30 percent of the
21 California spotted owl’s available habitat, and that the populations are genetically distinct from the
22 Sierra Nevada populations, adapted to different environments, and contribute meaningfully to the
23 subspecies’ overall redundancy and representation. *See, e.g.,* Species Status Assessment at 18
24 (noting that that the coastal, southern, and Sierra populations “and the differences in the way the
25 populations interact within them provide redundancy for the species as a whole”); *id.* (“The genetic
26 differences that are found between areas, as well as the habitat and climate differences, may
27 represent a moderate degree of adaptation and thus moderate representation.”); *id.* at 19 (showing
28 that 31 percent of the California spotted owl’s range is in coastal and southern California). It also

1 concluded that the loss of these populations, along with the predicted deterioration of the owl's
2 remaining range in the Sierra Nevada, will mean that "[o]verall, the species would be less likely to
3 withstand catastrophic events[.]" Species Status Assessment at 96.

4 61. The Species Status Assessment also concluded the California spotted owl may be
5 extirpated from the Lassen and El Dorado regions of the Sierra Nevada in the foreseeable future. *See*
6 Species Status Assessment 95, fig. 22 (California Spotted Owl Regional Future Scenario 2
7 Condition). It further concluded that the Plumas, Tahoe, Stanislaus, Humboldt-Toiyabe, Inyo, Sierra,
8 and Sequoia National Forest regions will deteriorate in condition to low or low-moderate condition,
9 *id.*, which means that they will "have low resiliency and may not be able to withstand stochastic
10 events because of significant declines in occupancy, survival, fecundity, or habitat quality." *Id.* at 69.

11 62. Neither the Listing Decision itself, nor the underlying Species Status Assessment,
12 analyzed whether the California spotted owl is endangered or threatened *throughout a significant*
13 *portion of its range*, including in those portions of its range where the Service predicts the owl will
14 be extirpated or threatened.

15 63. Instead, the Service prepared a separate "Species Assessment Form" which purported
16 to analyze whether the California spotted owl is endangered or threatened throughout a significant
17 portion of its range. This analysis, which evaluated only whether the coastal and southern California
18 portions of the California spotted owl's range are significant, was insufficient for three reasons.

19 64. First, the Species Assessment Form improperly conflated the analysis of whether the
20 California spotted owl is endangered or threatened throughout a significant portion of its range with
21 the question of whether it is endangered or threatened throughout its entire range. *Defenders of*
22 *Wildlife*, 258 F.3d at 1145. It concluded that the coastal and southern California portions of the
23 California spotted owl's range are not "significant portion[s] of its range," 16 U.S.C. § 1532(6), (20),
24 because their loss will not threaten "*the overall ability of the species* to withstand catastrophic
25 events," Species Assessment Form at 58 (emphasis added). The conclusion of the Species
26 Assessment Form that the loss of the coastal and southern California portions of the California
27 spotted owl's range are not significant because they will not threaten the subspecies *overall*
28 improperly conflated analysis of whether the subspecies is threatened or endangered throughout

1 *significant portions* of its range with its analysis of whether the subspecies is threatened or
2 endangered throughout *all* its range, and was therefore arbitrary and capricious. *Defs. of Wildlife*,
3 258 F.3d at 1141–42 (“If . . . the effect of extinction throughout ‘a significant portion of its range’ is
4 the threat of extinction everywhere, then the threat of extinction throughout ‘a significant portion of
5 its range’ is equivalent to the threat of extinction throughout *all* its range. Because the statute already
6 defines ‘endangered species’ as those that are ‘in danger of extinction throughout all . . . of [their]
7 range,’ the Secretary’s interpretation of ‘a significant portion of its range’ has the effect of rendering
8 the phrase superfluous.”).

9 65. Second, the Species Assessment Form’s conclusion that the coastal and southern
10 California populations are not significant because they are “unlikely to contribute significantly to the
11 overall ability of the species to withstand catastrophic events,” Species Assessment Form at 58, is
12 arbitrary and capricious and contrary to the best available science contained in the Species Status
13 Assessment. The Species Status Assessment explains that these populations contribute significantly
14 the subspecies overall and that their loss will mean that “[o]verall, the species would be less likely to
15 withstand catastrophic events.” Species Status Assessment at 96.

16 66. Finally, the Service unlawfully failed to consider whether the Lassen, El Dorado,
17 Plumas, Tahoe, Stanislaus, Humboldt-Toiyabe, Inyo, Sierra, and Sequoia regions of the Sierra
18 Nevada, which the Service predicts will be lost or threatened in the foreseeable future, constitute a
19 significant portion of the owl’s range. *Ctr. for Biological Diversity*, 900 F.3d at 1064 (explaining
20 that the Service must provide “some rational explanation for why the lost and threatened portions of
21 a species’ range are insignificant before deciding not to designate the species for protection”).

22 67. The Service’s conclusion that the California spotted owl is not threatened or
23 endangered throughout any significant portion of its range is contrary to the best scientific and
24 commercial data available, and the Listing Decision fails to state a legally valid and rational
25 connection between the facts found and the decision made. The best scientific and commercial data
26 available demonstrates that the California spotted owl is threatened or endangered throughout one or
27 more significant portions of its range due to the stressors identified in the Service’s final Species
28 Status Assessment. The Listing Decision fails to articulate a legal, rational explanation for the

1 Service's conclusion to the contrary. The Listing Decision is therefore arbitrary, capricious, and not
2 in accordance with law, in violation of the ESA.

3 **REQUEST FOR RELIEF**

4 WHEREFORE, plaintiffs respectfully request that the Court:

5 A. Find and declare that the Service's Listing Decision is arbitrary, capricious, an abuse
6 of discretion, contrary to the best scientific and commercial data available, and otherwise not in
7 accordance with law;

8 B. Set aside the Service's Listing Decision and remand the matter to the Service with
9 instructions to issue a new decision in accordance with Section 4 of the ESA within six months as to
10 whether the California spotted owl is threatened or endangered throughout all or any significant
11 portion of its range;

12 C. Award plaintiffs their costs, including reasonable attorneys' fees and costs; and

13 D. Grant plaintiffs such other and further relief as this Court may deem just and proper.
14

15 Respectfully submitted,

16
17 Dated: August 18, 2020

/s/ Elizabeth B. Forsyth
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Exhibit A



April 15, 2020

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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June 8, 2020

Via Email and Certified Mail – Return Receipt Requested

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Re: Supplement to 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 supplement our April 15, 2020 notice of violation of Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533.

Our April 15, 2020 notice explained that the U.S. Fish and Wildlife Service (“Service”) violated the ESA in refusing to list California spotted owl under the ESA because “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.”

On June 1, 2020, the Service responded by letter, but has not ameliorated its violations of the ESA. Among other deficiencies, our letter pointed out that neither the Service’s November 8, 2019 Federal Register decision not to list the California spotted owl, 84 Fed. Reg. 60,371, 60,372 (Nov. 8, 2019) (“Listing Decision”), nor its underlying June 2019 Species Status Assessment Report for the California Spotted Owl (*Strix occidentalis occidentalis*) (“Species Status Assessment”), analyzed specifically whether the California spotted owl is endangered or threatened throughout a *significant portion* of its range, as required by 16 U.S.C. § 1533 and 16 U.S.C. § 1532(6), (20). It also explained that 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., Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001).

In its response letter, the Service has admitted that “the Federal Register notice does not include detail about this [significant portion of range] analysis.” Instead, the Service claims it included analysis of whether the California spotted owl is endangered or threatened throughout a significant portion of its range in a separate “Species Assessment Form.” The Species Assessment Form’s “significant portion of range” discussion, however, similarly does not comply with the ESA. Like the Listing Decision, it too improperly conflates the question of whether the subspecies is threatened or endangered “throughout a significant portion of its range” with the question of whether it is threatened or endangered throughout its entire range, effectively rendering the phrase “significant portion of its range” in 16 U.S.C. § 1532(6), (20) superfluous. *Def. of Wildlife*, 258 F.3d at 1141-45; *see also Ctr. for Biological Diversity v. Jewell*, 248 F. Supp. 3d 946, 957 (D. Ariz. 2017), *amended in part*, No. CV-14-02506-TUC-RM, 2017 WL 8788052 (D. Ariz. Oct. 25, 2017); *Desert Survivors v. U.S. Dep’t of Interior*, 321 F. Supp. 3d 1011, 1072-73 (N.D. Cal. 2018). The Species Assessment Form concludes that the coastal and southern California portions of the California spotted owl’s range, which the Service predicts will be extirpated in the foreseeable future, are not significant because their loss will not contribute “to the species as a whole” or “harm the overall ability of the species to withstand catastrophic events.” Species Assessment Form at 58 (emphasis added). But by evaluating only whether the loss of these populations will harm the species *overall* or *as a whole*, the Service has improperly conflated its analysis of whether subspecies is threatened or endangered throughout *significant portions* of its range with its analysis of whether the subspecies is threatened or endangered throughout *all* its range. *Def. of Wildlife*, 258 F.3d at 1141-42.

Moreover, even if the Service’s interpretation of “significant” was permissible—which it was not—the Species Assessment Form’s conclusion that the coastal and southern California portions of the California spotted owl’s population are not significant is arbitrary and capricious and contrary to the best available science. The Species Status Assessment explains that these portions of range make up 30 percent of the California spotted owl’s available habitat, and that the populations are genetically distinct from the Sierra Nevada populations, adapted to different environments, and contribute meaningfully to the subspecies’ overall redundancy and representation. *See, e.g.*, Species Status Assessment at 18 (noting that that the coastal, southern, and Sierra populations “and the differences in the way the populations interact within them provide redundancy for the species as a whole”); *id.* (“The genetic differences that are found between areas, as well as the habitat and climate differences, may represent a moderate degree of adaptation and thus moderate representation.”). It also predicts that the loss of these populations, along with the predicted deterioration of the owl’s remaining population areas in the Sierra Nevada, will mean that “[o]verall, the species would be less likely to withstand catastrophic events.” Species Status Assessment at 96. The Species Assessment Form’s contrary conclusions that the coastal California and southern California populations are not significant, and that they are “unlikely to contribute significantly to the overall ability of the species to withstand catastrophic events,” Species Assessment Form at 58, are arbitrary and capricious and contrary to the best available science contained in the Species Status Assessment.

Finally, the Service’s “significant portion of range” analysis contained in the Species Assessment Form is also arbitrary and capricious because it fails entirely to analyze whether other portions of the California spotted owl’s range are significant. As we explained in our April

15, 2020 notice, 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’y v. Salazar*, 566 F.3d 870, 876-77 (9th Cir. 2009); see also *Def. of Wildlife*, 258 F.3d at 1145. The Service predicts that along with the coastal and southern California portions of range, the Lassen and Eldorado regions of the Sierra Nevada may be extirpated in the foreseeable future. Species Status Assessment at 95. It further predicts that the Plumas, Tahoe, Stanislaus, Humboldt-Toiyabe, Inyo, Sierra, and Sequoia National Forest regions will deteriorate in condition to 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. The Service provides no explanation at all for why these areas are not significant portions of the California spotted owl’s range. *Ctr. for Biological Diversity*, 900 F.3d at 1064; *Def. of Wildlife*, 258 F.3d at 1145.

If the Service does not remedy the violations described in our April 15, 2020 notice and supplemented here, 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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