

PATTI GOLDMAN (DCB# 398565)
KRISTEN L. BOYLES (WSB #23806)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
pgoldman@earthjustice.org
kboyles@earthjustice.org

PAUL A. KAMPMEIER (WSB #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, WA 98104-2245
(206) 223-4088
(206) 223-4280 [FAX]
pkampmeier@wflc.org

Attorneys for Plaintiff-Intervenor-Applicants

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CARPENTERS INDUSTRIAL COUNCIL, AMERICAN) Case No. 1:08-cv-01409-EGS
FOREST RESOURCE COUNCIL, SWANSON GROUP,)
INC., ROUGH & READY LUMBER CO., and)
PERPETUA FORESTS COMPANY,)
)
Plaintiffs,)
)
and)
)
SEATTLE AUDUBON SOCIETY, NATIONAL)
CENTER FOR CONSERVATION SCIENCE AND)
POLICY, OREGON WILD, KLAMATH-SISKIYOU)
WILDLANDS CENTER, THE WILDERNESS)
SOCIETY, SIERRA CLUB, CENTER FOR)
BIOLOGICAL DIVERSITY, ENVIRONMENTAL)
PROTECTION INFORMATION CENTER,)
CONSERVATION NW, AUDUBON SOCIETY OF)
PORTLAND, NATIONAL AUDUBON SOCIETY,)
CASCADIA WILDLANDS PROJECT, AMERICAN)
LANDS ALLIANCE, KLAMATH FOREST ALLIANCE,)

CONSERVATION CONGRESS, AMERICAN BIRD)
 CONSERVANCY, UMPQUA WATERSHEDS, and)
 GIFFORD-PINCHOT TASK FORCE,)
)
 Plaintiff-Intervenor-Applicants,)
)
 vs.)
)
 DIRK KEMPTHORNE, Secretary of Interior, and U.S.)
 FISH AND WILDLIFE SERVICE,)
)
 Defendants.)
 _____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action for declaratory and injunctive relief under the Administrative Procedure Act (“APA), 5 U.S.C. § 551 et seq. Plaintiffs Seattle Audubon Society et al. challenge two closely related final U.S. Fish and Wildlife Service (“FWS” or “Service”) actions: the issuance of the Final Recovery Plan for the Northern Spotted Owl (*Strix occidentalis caurina*) (May 13, 2008) and the decision to eliminate over 1.5 million acres of protected critical habitat for the northern spotted owl. Revised Designation of Critical Habitat for the Northern Spotted Owl, 73 Fed. Reg. 47,326 (Aug. 13, 2008). FWS took both actions under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-44, because the northern spotted owl has been listed as a threatened species since June 26, 1990. 55 Fed. Reg. 26,114 (June 26, 1990).

2. The 1990 northern spotted owl listing triggered FWS’s duties to develop a plan that will recover the species—one that will bring the owl to the point where the protections of the ESA are no longer necessary. Years overdue, the final recovery plan fails to meet the requirements of the Act or the recovery needs of the northern spotted owl. The final recovery plan literally falls short: FWS describes its plan as having a “useful life” of ten years even as it acknowledges that northern spotted owl recovery will take thirty years at a minimum.

Additionally, although the final recovery plan recognizes habitat destruction through logging as a threat to the species, it fails to utilize the best scientific data that require protecting more spotted owl habitat at a time when the species is in rapid decline and is facing increased threats. For these and other reasons, the final recovery plan is arbitrary, capricious, and otherwise not in accordance with law.

3. The revised designation of critical habitat is similarly flawed, not least because it is based on the flawed final owl recovery plan and the now-repudiated draft owl recovery plan. FWS also considered only federal lands in its critical habitat revision, eliminating owl habitat on non-federal lands in violation of the ESA's statutory mandate. Nor did FWS analyze how much habitat is needed for the owl to recover. For these and other reasons, the Revised Critical Habitat Designation is arbitrary, capricious, and otherwise not in accordance with law.

4. Plaintiffs seek a judgment declaring that FWS has violated the APA by issuing a final recovery plan and revised critical habitat rule for the owl that do not comply with the statutory mandates of the ESA, are not based on the best available science, and will in fact further harm this imperiled species. Plaintiffs also seek an order directing FWS to promulgate a new legally and scientifically adequate recovery plan and reinstating the original 1992 critical habitat designation.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 2202 (injunctive relief).

6. Although plaintiffs' claims do not arise under the ESA, plaintiffs have also notified FWS of its violations pursuant to ESA § 11, 16 U.S.C. §§ 1540(g), by letter dated November 21, 2008.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) as defendant resides in this district.

PARTIES

8. The plaintiffs in this action are:

A. SEATTLE AUDUBON SOCIETY (“Seattle Audubon”), founded in 1916, a non-profit corporation organized and existing under the laws of the State of Washington with its principal place of business in King County, Washington. Seattle Audubon cultivates and leads a community that values and protects birds and the natural environment. Seattle Audubon pursues that mission by involving volunteers and the community in education, advocacy, preservation, science, and enjoyment. Many of Seattle Audubon’s members live, work, and/or recreate in or near federal and state forest lands in Washington State and have an interest in the health and welfare of those forests and northern spotted owls. Seattle Audubon has roughly 5,400 members and over 700 active volunteers working in education, conservation, and science programs. It was one of the petitioners to have the owl listed under the ESA, and also a plaintiff in the lawsuit that compelled FWS to list the owl and designate critical habitat. Additionally, Seattle Audubon was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. Seattle Audubon commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

B. NATIONAL CENTER FOR CONSERVATION SCIENCE AND POLICY (“NCCSP”), a non-profit organization with approximately 5,545 active members that is committed to bridging the gap between sound conservation science and natural resource policy, with its principal place of business in Ashland, Oregon. NCCSP’s mission is to create science-based solutions to protect and restore the life processes and ecological vitality that sustain all

lands, waters, and communities. Protection of forest ecosystems in the Pacific Northwest is a primary goal, with a focus on preserving the sound science mandates of the Northwest Forest Plan. NCCSP's executive director, Dr. Dominick DellaSala, served on FWS's multi-stakeholder recovery team tasked with completing a spotted owl recovery plan. NCCSP commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

C. OREGON WILD, a non-profit corporation organized under the laws of the State of Oregon. Oregon Wild is headquartered in Portland, Oregon, with field offices in Eugene and Bend. Oregon Wild's mission is to protect and restore Oregon's wild lands, wildlife, and water as an enduring legacy. Oregon Wild has approximately 4,500 individual and organizational members. Oregon Wild (then known as Oregon Natural Resources Council) was a party to actions that permanently enjoined the Forest Service and the Bureau of Land Management from conducting timber sales in spotted owl habitat until they adopted plans to protect the owl under the National Forest Management Act and the National Environmental Policy Act. Additionally, Oregon Wild (then known as Oregon Natural Resources Council) was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. Oregon Wild commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

D. KLAMATH-SISKIYOU WILDLANDS CENTER ("KS Wild"), a non-profit organization incorporated in Oregon with offices in Ashland and Williams, Oregon. KS Wild has 1,800 members in over 10 states, with most members concentrated in southern Oregon and northern California. KS Wild advocates for the forests, wildlife, and waters of the Rogue and

Klamath Basins. KS Wild works to protect and restore the extraordinary biological diversity of the Klamath-Siskiyou region of southwest Oregon and northwest California. KS Wild commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

E. THE WILDERNESS SOCIETY (“TWS”), a non-profit national membership organization that works to protect wilderness and to inspire Americans to care for their wild places. Founded in 1935, TWS is headquartered in Washington, D.C. with over 300,000 members nationwide. TWS uses public education, scientific analysis, and advocacy to work towards its mission. Approximately 43,000 of its 300,000 members reside in Oregon, California, and Washington. In the 1980’s, TWS conducted a series of studies evaluating the amount of old-growth forest habitat in the Douglas-fir region of the Pacific Northwest. The Forest Service used those studies in its review of the status of the northern spotted owl. TWS was also one of the petitioners seeking listing of the northern spotted owl as a threatened species, and also a participant in litigation to compel listing and designation of critical habitat for the species. Since then, TWS has undertaken numerous petitions and campaigns to protect the northern spotted owl and its habitat in California and the Pacific Northwest. Additionally, TWS was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. TWS commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

F. SIERRA CLUB, the nation’s oldest grass-roots environmental organization founded in 1892. The Sierra Club is incorporated in California, and has its headquarters in San Francisco, California. It has approximately 1.3 million members and supporters nationwide,

with roughly 240,000 residing in Washington, Oregon, and California.. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including our national forests. The Sierra Club has been a key participant in decisions regarding the northern spotted owl and its habitat at the national and state levels. The Sierra Club was an active participant in the Forest Conference convened and chaired by President Clinton in April 1993 to discuss issues of old growth forest protection, and it has consistently promoted legislation to provide greater protection for remaining old growth forests that provide habitat for the spotted owl. It has also participated in numerous lawsuits to save the spotted owl and its habitat, including the original lawsuit that forced FWS to list the spotted owl and designate critical habitat, as well as actions challenging forest management plans on federal and state lands, actions challenging specific timber sales, and actions challenging the issuance of permits allowing for the incidental take of the spotted owl. Additionally, the Sierra Club was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. Sierra Club commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

G. CENTER FOR BIOLOGICAL DIVERSITY (“The Center”), a non-profit conservation group with over 40,000 members, many of whom reside in Washington, Oregon, and California. Its principal place of business is in Tucson, Arizona with offices in Portland, Oregon; Washington, D.C.; San Francisco, California; and elsewhere. The Center’s mission is to protect endangered species and wild places through science, policy, education, and law. The Center believes that the health of human societies depends upon the integrity of the natural

environment. The Center submitted comments on the revisions to designated critical habitat for the northern spotted owl.

H. ENVIRONMENTAL PROTECTION INFORMATION CENTER (“EPIC”), a community based non-profit organization that works to protect and restore forests, watersheds, coastal estuaries, and native species in northwest California. It seeks to achieve its conservation goals through public education, administrative advocacy, and strategic litigation. EPIC maintains offices in Humboldt County, California. EPIC has worked on many fronts to protect the northern spotted owl over the past 15 years, and it has initiated and been party to at least 20 legal actions to protect the species. The majority of EPIC’s 2,000 members reside in northern California near the state’s remaining northern spotted owl habitat, including state and national forests, state and federal parks, and privately held timberlands. EPIC was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. EPIC commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

I. CONSERVATION NW, a non-profit corporation organized under the laws of Washington state, with its principal place of business in Bellingham, Washington, and offices in Seattle, Spokane, and Republic. Conservation NW and its members are dedicated to protecting and restoring wildlands in Washington and southern British Columbia. Conservation NW carries out research and advocacy, and works with scientists, environmental activists, policymakers, and the general public to protect biological diversity and ecological integrity on public lands. It monitors national forest timber sales in Western Washington, and uses formal administrative procedures and various other means to encourage the Forest Service to modify or drop sales that

would harm mature and old-growth forests and critical habitat for the northern spotted owl. Additionally, Conservation NW (then known as Northwest Ecosystem Alliance) was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. Conservation NW commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

J. AUDUBON SOCIETY OF PORTLAND (“Audubon Portland”), founded in 1902 and organized under the laws of Oregon as a non-profit organization. It has approximately 10,000 members, a paid staff of 23, and about 800 active volunteers. Audubon Portland’s mission is to promote the enjoyment, understanding and protection of native birds, other animals, and their habitats, with particular focus on the Portland community and the Pacific Northwest. It was one of the petitioners to have the northern spotted owl listed under the ESA in 1987. It was also a plaintiff in the litigation that eventually forced the FWS to list the owl and designate its critical habitat. Additionally, Audubon Portland was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat. Audubon Portland commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

K. NATIONAL AUDUBON SOCIETY (“National Audubon”), a non-profit corporation organized under the laws of the State of New York, where its principal office is located. National Audubon has more than one million members and supporters, offices in 23 states, and a presence in all 50 states through more than 450 certified chapters and through its nature centers, sanctuaries, and education and science programs. National Audubon’s mission is

to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. It carries out that mission nationally through a variety of activities including education, habitat conservation, and public policy advocacy. Audubon Washington, the official state office of National Audubon, works on behalf of Audubon's 20,000 members and supporters in the State, who engage in a variety of wildlife observation and conservation activities, including bird watching and working to protect avian species and their habitats, including the northern spotted owl. A National Audubon staff member, Tim Cullinan, served on the FWS's multi-stakeholder recovery team tasked with completing a spotted owl recovery plan. National Audubon, through Audubon Washington, commented on the northern spotted owl recovery plan.

L. CASCADIA WILDLANDS PROJECT, ("CWP"), an Oregon non-profit organization based in Eugene, Oregon. CWP's mission is to defend the forests, waters, and wildlife of the Cascadia bioregion, including western Oregon, by monitoring environmentally destructive projects and educating, organizing, and advocating for a more compassionate and responsible relationship with the ecosystems we live in. Cascadia Wildlands commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

M. AMERICAN LANDS ALLIANCE ("American Lands"), founded in 1992, an Oregon non-profit corporation. American Lands' mission is to protect and restore America's forest ecosystems by providing national leadership, coordination, and capacity building for the forest conservation movement. American Lands mobilizes citizens to oppose damaging policies and promote ecologically sound forest practices. American Lands uses public education, advocacy, scientific analysis, and advocacy to work towards its mission. American Lands

represents approximately 2,000 local and regional forest conservation organizations and individuals many of whom live, work, or recreate in public forests in the Pacific Northwest and have an interest in the health and welfare of endangered species including the northern spotted owl and the forest habitat upon which it needs to survive. American Lands commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

N. KLAMATH FOREST ALLIANCE (“The Alliance”), a non-profit organization formed in 1989 under the laws of the State of California with its principal place of business in Etna, California. The Alliance’s mission is to protect and promote sustainable ecosystems and communities throughout northern California and southern Oregon. In pursuit of this mission, the Alliance participates in public and private forest management decisions, water quality and water allocation reform, ecosystem and watershed rehabilitation, economic and social redevelopment and related outreach, and education and training programs. The Alliance has approximately 500 members. The Alliance submitted comments on the northern spotted owl recovery plan.

O. CONSERVATION CONGRESS, a non-profit incorporated in the state of California that works to protect and preserve National Forests, roadless areas, native wildlife species and their habitat primarily in northern California, as well as the Rocky Mountain region. Conservation Congress is a membership organization representing over 300 conservationists, including hikers, campers, bird watchers, hunters, fishermen, and those with other recreational interests. Conservation Congress commented on the northern spotted owl recovery plan.

P. AMERICAN BIRD CONSERVANCY (“ABC”), an organization that works to conserve birds and their habitats throughout the Americas. ABC acts to safeguard the rarest bird species, conserve and restore habitats, and reduce threats, while building capacity in the

conservation movement. The organization is very concerned about the declining population of the northern spotted owl, which is included on the U.S. WatchList, a list of birds of highest conservation concern developed by scientists at ABC and National Audubon Society. ABC has its headquarters in The Plains, Virginia, is a 501(c)(3) membership organization with 7,700 members, and is consistently awarded a top, four-star rating by the independent group, Charity Navigator. ABC commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

Q. UMPQUA WATERSHEDS, a non-profit conservation group located in Roseburg, Oregon, whose mission is the protection and restoration of the ecosystems in the Umpqua watershed and beyond. Umpqua Watersheds monitors public land projects, and advocates for the forests and wildlife in the Umpqua, Coos, and Coquille watershed. Umpqua Watersheds has over 1,000 members and commented on both the northern spotted owl recovery plan and the revisions to designated critical habitat for the northern spotted owl.

R. GIFFORD-PINCHOT TASK FORCE, a non-profit conservation group located in Portland, Oregon. Gifford-Pinchot Task Force works to protect and restore the ecosystems and communities of the Central Cascades with a particular focus on the Gifford Pinchot National Forest. Gifford-Pinchot Task Force has over 3,500 members that actively support its mission and programs. Gifford-Pinchot Task Force commented on the revisions to designated critical habitat for the northern spotted owl. Additionally, Gifford-Pinchot Task Force was a defendant-intervenor in Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.), the timber industry lawsuit whose settlement agreement started the process to revise critical habitat.

9. Plaintiffs and their members use and enjoy the “spotted owl forests” in Washington, Oregon, and California that provide habitat for the owl for recreational, scientific, aesthetic, and conservational purposes. Plaintiffs have members who reside near, visit, or otherwise use and enjoy areas that are home to spotted owls in a variety of ways, including recreation, subsistence and sport hunting and fishing, wildlife viewing and education, and aesthetic and spiritual enjoyment. The plaintiffs and their members derive scientific, recreational, aesthetic, and conservation benefits of and enjoyment from the existence of northern spotted owls in the wild. Given their interests in northern spotted owls, plaintiffs have an interest in the full and proper implementation of the Endangered Species Act, including those provisions that relate to recovery planning and the designation of critical habitat.

10. Plaintiffs and their members have actively participated in efforts to protect and preserve the northern spotted owl and its habitat for almost 20 years.

11. The above-described aesthetic, conservation, recreational, and scientific interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by FWS’s disregard for its statutory duties and by the unlawful harm imposed on the northern spotted owl and its habitat by its actions. FWS’s failure to develop an adequate recovery plan for the northern spotted owl leaves the owl insufficiently protected and fails to assure its recovery. FWS’s revisions to designated critical habitat harm the owl by protecting less habitat than necessary for the owls’ survival and recovery. Plaintiffs have no adequate remedy at law.

12. The defendant in this action is the U.S. FISH AND WILDLIFE SERVICE, the agency within the Department of the Interior responsible for implementing and ensuring compliance with the ESA.

STATUTORY REQUIREMENTS

13. Congress enacted the ESA “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).

14. Before a species receives any protection under the ESA, the U.S. Fish and Wildlife Service or National Marine Fisheries Service (“NMFS”) must list the species as “threatened” or “endangered.” 16 U.S.C. §§ 1533(a) and (c). An “endangered species” is one that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A “threatened species” is one that is “likely to become an endangered species within the foreseeable future through all or a significant portion of its range.” 16 U.S.C. § 1532(20).

A. Recovery Plans Under the ESA

15. The Service must develop and implement a “recovery plan” for a listed species within its jurisdiction, unless the Service finds that such a plan would not promote the conservation of that species. 16 U.S.C. § 1533(f)(1).

16. When developing recovery plans FWS must, to the maximum extent practicable, give priority to species that are most likely to benefit from recovery plans, particularly those species like the northern spotted owl that are in conflict with economic activity. 16 U.S.C. § 1533(f)(1)(A). The FWS and NMFS have published a joint policy committing the agencies to develop final recovery plans within two and a half years of a species’ listing. 59 Fed. Reg. 34272, 34273 (July 1, 1994).

17. Recovery plans must be based on the best scientific and commercial data currently available.

18. Recovery plans must ensure the “conservation and survival” of listed species. The ESA defines “conservation” as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3). Recovery plans must be written so that implementation of the plan will bring the listed species to the point where listing under the Act is no longer necessary. Id.; 16 U.S.C. § 1533(f)(1)(B)(ii).

19. Additionally, recovery plans must include, to the maximum extent practicable: 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).

20. Before issuing a final recovery plan, FWS must provide the public with an opportunity to review and comment on a draft recovery plan. 16 U.S.C. § 1533(f)(4). In developing the final plan, FWS must consider all information presented during the public comment period. Id.

B. Designated Critical Habitat

21. In enacting the ESA, Congress recognized that habitat loss is “the major cause for the extinction of species worldwide.” H.R. Rep. No. 1625, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S.C.C.A.N. 9453, 9455.

22. Section 4 of the ESA, and its corresponding regulations, require the Service to designate, at the time of listing, “critical habitat” for threatened and endangered species to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3)(A)(i); 50 C.F.R.

§ 424.12(a). “Species” includes any subspecies of wildlife, such as the owl. 16 U.S.C.

§ 1532(16).

23. The ESA defines critical habitat as specific areas: (1) within the geographic area occupied by the species at the time it is listed, on which are found those physical or biological features that are “essential to the conservation of the species” and which may require special management consideration or protection, and (2) outside the geographic area occupied by the species at the time it is listed that are “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(i), (ii). The Ninth Circuit has emphasized that “the purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” Gifford Pinchot Task Force v. United States Fish & Wildlife Serv., 378 F.3d 1059, 1070 (9th Cir. 2004).

24. Critical habitat must include “[h]abitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.” 50 C.F.R. § 424.12(b)(5).

25. The Service must make critical habitat determinations “on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2); 40 C.F.R. § 424.12(a). It is the Service’s policy that the best available science includes sources such as a species’ recovery plan, articles in peer-reviewed journals, conservation plans for the species, scientific status surveys and studies, biological assessments, or other expert opinion.

26. The Secretary may exclude an area from critical habitat only if he or she “determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2).

27. Once the Service designates critical habitat, the ESA protects that habitat from harm caused by actions by federal agencies. Section 7(a)(2) of the ESA requires each federal agency to “insure” that its actions will not “result in the destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2).

FACTUAL BACKGROUND

A. Northern Spotted Owls and Their Habitat Needs

28. Northern spotted owls are dark to chestnut brown with round or oval white spots and dark eyes. The average adult owl is about 18 inches tall, with a wing span of approximately 48 inches. They can live up to 10 years in the wild.

29. Northern spotted owls are typically associated with old-growth forests of northern California, the Pacific Northwest, and southern British Columbia. Northern spotted owls prefer forests, like old-growth forests, that contain multi-layered canopies of trees that are high and open enough for the owls to fly between and underneath. Old-growth forests also typically contain large trees with broken tops, deformed limbs, and large cavities, which are capable of supporting northern spotted owls’ nests. It is estimated that logging has eliminated 80-85% of the old-growth forests in the Pacific Northwest.

30. Northern spotted owls are site tenacious and generally live their entire adult lives in a home range territory. Within an owls’ home range, large amounts of forest habitat are necessary to support an owl’s life needs. Northern spotted owls are generally intolerant of habitat disturbances.

31. Loss of habitat has been a primary cause of the decline in northern spotted owl populations. In its final listing rule, the Service noted that the northern spotted owl is threatened throughout its range "...by the loss and adverse modification of suitable habitat as the result of timber harvesting and exacerbated by catastrophic events such as fire, volcanic eruptions, and wind storms." 55 Fed. Reg. at 26,151.

32. The destruction of owl habitat injures individual territorial owls by eliminating areas where they can nest, roost, forage, and raise their young. Additionally, foraging spotted owls that have to travel over large expanses of unsuitable habitat are at a significantly higher risk of predation and starvation. The destruction of owl habitat also makes it more difficult for dispersing owls to establish new territories. As owl habitat becomes increasingly scarce, competition for the remaining habitat increases. Spatial separation between blocks of owl habitat also makes it more difficult for dispersing owls to find habitat in which they can establish a home range. Large-scale destruction of owl habitat disconnects spotted owl subpopulations and can cause genetic bottlenecks that increase the likelihood that isolated subpopulations will be extirpated. Large-scale habitat loss also exacerbates harm to northern spotted owls from other threats.

33. Managing sufficient habitat for northern spotted owls now and into the future is essential for its recovery. The continued destruction of suitable spotted owl habitat decreases the likelihood that the species will recover in the wild.

B. Initial Recovery Planning Efforts, Designation of Critical Habitat, and the Northwest Forest Plan

34. Due to concerns over the widespread loss and modification of its habitat, on June 26, 1990, the FWS listed the northern spotted owl as a threatened species under the ESA,

16 U.S.C. § 1533(a). Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. § 17.11(h)).

35. The Service first completed a draft northern spotted owl recovery plan in 1992. To address threats to northern spotted owls from timber harvest and other causes of habitat loss, the 1992 draft plan identified fixed habitat reserves on both sides of the Cascade Range. To address the inadequacy of existing regulatory mechanisms, the 1992 draft plan detailed province-specific contributions to recovery that were expected from non-federal lands.

36. The Service never finalized or implemented the 1992 draft recovery plan.

37. FWS designated critical habitat for the owl in 1992, protecting owl habitat on 6,887,000 acres of federal land in California, Oregon, and Washington. Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1,796 (Jan. 15, 1992) (codified at 50 C.F.R. § 17.11(h); § 17.95(b)). No non-federal land or unoccupied habitat was designated. FWS “recognized that critical habitat would be a valuable tool in the conservation of the owl.” Id.

38. On April 13, 1994, the Secretary of Agriculture and the Secretary of the Interior jointly amended the land management planning documents of 19 National Forests and 7 Bureau of Land Management Districts in the Pacific Northwest. The Secretaries issued a Record of Decision for these amendments, referred to as “The Northwest Forest Plan.”

39. The Northwest Forest Plan established an ecosystem approach to resource management on federal lands within the range of the northern spotted owl. Although the Northwest Forest Plan does not meet ESA criteria for a recovery plan, FWS nevertheless suspended the northern spotted owl recovery plan preparation process after determining the Northwest Forest Plan provided a sound framework for recovery of northern spotted owls. The

Northwest Forest Plan established fixed northern spotted owl habitat reserves on both sides of the Cascade Range. A federal district court found the Northwest Forest Plan's habitat protections to be the bare minimum likely to comply with the nation's environmental laws.

40. The Northwest Forest Plan established seven categories of land allocation. One of these categories, Late Successional Reserves ("LSRs"), represents 30 percent of the federal land within the range of the northern spotted owl. The LSRs were designed "to serve as habitat for late-successional and old-growth related species including the northern spotted owl."

41. The LSRs established by the Northwest Forest Plan receive different protections than afforded designated critical habitat; designating LSRs as critical habitat ensures LSR will function to support recovery of northern spotted owls. In 1996, FWS asserted that the old-growth reserves of the Northwest Forest Plan "are plan-level designations with less assurance of long-term persistence than areas designated by Congress. Designation of LSRs as critical habitat compliments and supports the Northwest Forest Plan and helps to ensure persistence of the management directive over time." 61 Fed. Reg. 26,256, 26,265 (May 24, 1996) (designation of critical habitat for marbled murrelet).

C. Owl Populations Continue to Decline

42. Northern spotted owls have continued to decline since being listed as threatened under the ESA in 1990. Demographic projections in the Northwest Forest Plan estimated that northern spotted owl populations would continue to decline for fifty years following adoption of the plan. However, the real rates of population decline have been far greater than the worst-case scenario presented in the Environmental Impact Statement for the Northwest Forest Plan. Between 1992 and 2005, northern spotted owl populations declined 50-60 percent in some Washington study areas. More recent reports from demographic study areas in Washington, Oregon, and California point to the continuation and possible acceleration of a range-wide

decline in owls. Notwithstanding these population declines, in 2000 the Service proposed finding that a northern spotted owl recovery plan would not promote the conservation of the species.

43. The Service's 1994, 1996, 2002, and 2005-2006 Recovery Reports to Congress confirm the northern spotted owl's status as "declining." Like the previous reports, the 2005-2006 Recovery Report to Congress defined "declining" as a "species known to be decreasing in population numbers and/or whose threats to their continued existence are increasing in the wild."

44. The Northwest Forest Plan did not plan for spotted owl conservation on non-federal lands. In 2006, Anthony *et al.* demonstrated that northern spotted owls were reproducing and surviving better on federal land managed under the Northwest Forest Plan than on non-federal lands within the study areas. On non-federal lands, the annual rate of northern spotted owl population declines is more than twice that on federal lands. State logging rules developed in the absence of a northern spotted owl recovery plan have proven inadequate to protect spotted owls or their habitat. For example, in the *Final Draft Briefing Report to the Washington State Forest Practices Board Regarding Spotted Owl Status and Forest Practices Rules* (Buchanan and Swedeen 2005), the State of Washington concluded that logging rules designed to protect spotted owls were in fact not providing for the viability of the species in Washington State. Nonetheless, the final recovery plan (described below) designated many areas subject to Washington's logging rules as "Conservation Support Areas" that ostensibly "are expected to increase the likelihood that spotted owl recovery is achieved, shorten the time needed to achieve recovery, and/or reduce management risks associated with the Recovery Strategy and Actions."

D. The 2007 Draft Recovery Plan and Political Interference in the Planning Process

45. In May 2006 – nearly sixteen years after the northern spotted owl was listed as a threatened species – the Service assembled a Recovery Team and began the recovery planning

process for the northern spotted owl. Recovery plans are typically developed by recognized experts in the ecology and management of the subject species. The Service appointed stakeholders to the Recovery Team, including representatives of National Audubon and the National Center for Conservation Science and Policy. The Service did not appoint any of the leading northern spotted owl biologists to the Recovery Team.

46. The Recovery Team developed a draft recovery strategy anchored by the existing network of fixed habitat reserves identified by the Northwest Forest Plan. The Recovery Team reached consensus that a fixed-reserve approach rooted in the Northwest Forest Plan was the most scientifically credible way to recover northern spotted owls. The best scientific and commercial data available confirms that the conservation of northern spotted owls requires fixed habitat reserves.

47. In September 2006, the Recovery Team forwarded its draft recovery plan to the Service's Washington, D.C., headquarters for review. Officials from the U.S. Department of Agriculture, the U.S. Forest Service, the Bureau of Land Management, and the Department of the Interior reviewed the Recovery Team's draft recovery plan. The Service referred to these officials as the "Washington Oversight Committee." Former Deputy Assistant Secretary Julie MacDonald was a member of the Washington Oversight Committee through January 2007.

48. In October 2006, the Recovery Team was told that the Washington Oversight Committee had concerns that the draft recovery plan was based on the Northwest Forest Plan's network of fixed habitat reserves. The Recovery Team was advised to put less focus on habitat preservation and to de-link the recovery plan from the Northwest Forest Plan. The Recovery Team was advised to revise the draft recovery plan to include a second alternative that did not

rely on fixed habitat reserves. The Recovery Team was also advised to minimize the threat to northern spotted owls from the loss of habitat and to emphasize the threat from barred owls.

49. A documented history exists within the Interior Department of interference by political appointees with scientific decision-making in the Endangered Species Program. Such interference has compromised the scientific integrity of the Service's endangered and threatened species decisions, including the final recovery plan for the owl.

50. On April 11, 2006, a FWS employee filed a complaint with the Interior Department's Inspector General that former Deputy Assistant Secretary MacDonald had "bullied, harassed, and insulted" professional staff of the Service to coerce staff to ignore scientific information and change scientific documents related to the Service's Endangered Species Program. The Inspector General initiated an investigation of Ms. MacDonald's inappropriate involvement in species listing and critical habitat decisions.

51. The scientific integrity of numerous species decisions has been called into doubt by former Deputy Assistant Secretary MacDonald's aggressive involvement in reshaping endangered species decisions. Examples of this behavior are reflected in the Inspector General's final report of its investigation of Ms. MacDonald, which it published in March 2007.

52. On April 26, 2007, the Service released and sought public comment on the Draft Recovery Plan for the Northern Spotted Owl. 72 Fed. Reg. 20,865 (Apr. 26, 2007). The April 26, 2007 federal register notice listed competition with barred owls, the loss of habitat from past activities, and the ongoing and projected loss of habitat from fire, logging, and conversion as the most important threats to the species. 72 Fed. Reg. at 20,866.

53. On May 9, 2007, the U.S. House of Representatives' Committee on Natural Resources held a hearing to gather information about political interference with agency ESA

decisions. Dr. Dominick DellaSala, Executive Director of plaintiff National Center for Conservation Science and Policy, testified about the Washington Oversight Committee and the political influences that caused the Draft Recovery Plan to depart from the best scientific data available.

54. The Draft Recovery Plan proposed two options, both of which relied on federal lands to provide the primary contributions for northern spotted owl recovery. Option 1 was based on fixed habitat reserves, but it failed to require adequate old growth habitat to be managed inside the reserve network over time. Option 2 did not designate specific conservation area boundaries but instead provided a rule set to guide the federal agencies when taking actions that might impact northern spotted owls. Option 2 reflected the second alternative directed by the Washington Oversight Committee.

55. The Service sought peer review of the Draft Recovery Plan. The peer review sought by the Service noted that the Draft Recovery Plan was not based on the best scientific data available. That peer review also expressed concern that both Option 1 and Option 2 decreased habitat protections from those in the Northwest Forest Plan. A separate review of the Draft Recovery Plan, by Dr. Carlos Carroll and dated August 21, 2007, concluded that “proposed changes to the current reserve network would reduce the proportion of the owl population protected by one-fifth to one-third.” On page one of its August 9, 2007 review of the Draft Recovery Plan, The Wildlife Society concluded that “neither option presented in the 2007 Plan will lead to recovery of this species.”

56. By letter dated October 5, 2007, the State of Washington submitted comments to the Service on the Draft Recovery Plan. The State of Washington emphasized the importance of retaining the Northwest Forest Plan in Washington. Also, on page two of its comments, the State

of Washington stated: “We believe that an approach which does not designate specific habitat conservation areas does not ensure that habitat recovery goals will be met.”

57. After the comment period on the draft recovery plan closed, FWS contracted with a private consulting firm (Sustainable Ecosystems Institute or SEI) to review both the science and the peer review comments. SEI review held several panel workshops on barred owls, habitat, and fire. In its final report, SEI agreed with peer reviewers that the draft didn’t emphasize habitat protection enough and that a fixed reserve based approach was still needed.

E. The Final Recovery Plan.

58. The Service issued the Final Recovery Plan for the Northern Spotted Owl on May 13, 2008. The final recovery plan did not adopt Option 2 from the draft recovery plan. The final recovery plan relies on federal lands to provide the major contributions for northern spotted owl recovery, based on a network of Managed Owl Conservation Areas or MOCAs. The final recovery plan also identifies Conservation Support Areas, locations where the Service contends state and private timber lands will contribute to the recovery of northern spotted owls. On federal lands, the final recovery plan delineates fixed habitat reserves west of the Cascade crest but does not delineate fixed habitat reserves east of the Cascade crest. Instead, the final recovery plan recommends extensive timber harvest in eastside forests to deal with the threat of fire.

59. The final recovery plan does not plan for the recovery of northern spotted owls. For example, the final recovery plan estimates that the recovery of northern spotted owls will take thirty years or longer, but states that “the useful life of this plan is approximately 10 years.” Additionally, the final recovery plan limits all recovery actions to 10 years. The final recovery plan is an interim plan that, even if implemented, will not recover northern spotted owls.

60. The final recovery plan does not protect enough northern spotted owl habitat from timber harvest. For example, the final recovery plan decreases the amount of spotted owl habitat

protected from timber harvest by the Northwest Forest Plan; the fixed habitat reserves identified in the final recovery plan are smaller than those in the Northwest Forest Plan and are insufficient to recover northern spotted owls.

61. The final recovery plan does not address the threat to northern spotted owls from inadequate regulatory mechanisms. For example, timber harvest on non-federal lands remains a threat to northern spotted owls. Within the range of the northern spotted owl, the annual rate of timber harvest on federal lands has decreased, and the annual rate of timber harvest on non-federal lands has increased since adoption of the Northwest Forest Plan. The final recovery plan does not address this threat because it fails to identify sufficient provisions for altering rates of timber harvest on non-federal lands.

62. The final recovery plan is not based on the best scientific and commercial data available. By letter dated June 27, 2008, The Society for Conservation Biology and The American Ornithologists' Union submitted to the Service their comments on the final recovery plan. According to those comments, the review of the final recovery plan was conducted by "four leaders in the field of avian management and conservation biology, all of whom are familiar with management and conservation of the Northern Spotted Owl." On page one of their June 27, 2008, comments, the Society for Conservation Biology and The American Ornithologists' Union state that "the Final Plan is still inadequate as a conservation strategy," primarily because "it represents a reduction in the total area of federal lands dedicate [sic] to the species recovery."

63. The Society for Conservation Biology also stated in its June 27, 2008 comments: "Given that the northern spotted owl has been experiencing about a 4% annual rate of population decline for the last 15 years, any reductions from current levels of habitat protection cannot be

justified. In contrast, a sufficient conservation strategy would continue to protect all lands currently designated for spotted owl recovery under the NWFP and consider expansion in the size or number of habitat reserves.”

64. By letter dated July 31, 2008, The Wildlife Society submitted to the Service its comments on the final recovery plan. On page one of those comments, The Wildlife Society notes that it “asked experts in population dynamics, spotted owl ecology, forest ecology and management, and fire ecology to review the 2008 Final Northern Spotted Owl Recovery Plan.” On page two of those comments, The Wildlife Society described the final recovery plan as “seriously flawed” and concluded that “the 2008 Plan will not lead to recovery of this species. Indeed, the plan would reverse much of the progress made over the past 20 years to protect this species and the habitat upon which it depends.” At the conclusion of its comments, The Wildlife Society states: “There is simply no scientific justification for this plan, and in fact the plan’s authors offer none. We believe that the 2008 Plan will not achieve recovery of northern spotted owls and will likely exacerbate their precarious status.”

F. 2007 Proposed Revisions to Designated Critical Habitat

65. In April 2002, timber industry groups filed a lawsuit seeking, among other things, to force FWS to revise the 1992 designation of critical habitat. Western Council of Industrial Workers v. Secretary of Interior, No. 02-6100-AA (D. Or.). Over the objections of many of the plaintiffs here, who were defendant-intervenors in that case, FWS entered into a settlement agreement that committed the Service to (1) undertake a status review for the owl, and (2) consider revising critical habitat for the northern spotted owl.

66. The status review was completed in 2004. SEI, Scientific Evaluation of the Status of the Northern Spotted Owl (2004). The 2004 status review found that the owl population was still declining and faced an uncertain future. The status review described northern spotted owl

populations as being in steep decline in Washington and British Columbia, with a less rapid decline in southwest Oregon and northwest California. The status review also found threats to the owl that could be more severe in the southern part of the species' range. The status review advised that protection for all suitable owl habitat could be critical to owl survival and recovery, and it found that the Northwest Forest Plan reserves were integral to spotted owl survival and recovery.

67. In 2007, FWS published its proposed revision of northern spotted owl critical habitat. Proposed Revised Designation of Critical Habitat for the Northern Spotted Owl, 72 Fed. Reg. 32,450 (June 12, 2007). The proposal decreased designated critical habitat for the owl by approximately 1,549,161 acres, based entirely on the 2007 draft northern spotted owl recovery plan. For National Forest lands, the proposed critical habitat revision relied on Option 1 in the draft recovery plan. For federal forests managed by BLM in Oregon, the proposed critical habitat revision relied on the methodology outlined in Option 2 of the 2007 draft recovery plan.

G. 2008 Final Revisions to Designated Critical Habitat

68. FWS issued its final Revised Designation of Critical Habitat for the Northern Spotted Owl on August 13, 2008. 73 Fed. Reg. 47,326 (Aug. 13, 2008). The final rule reduces designated northern spotted owl critical habitat by 1,574,700 acres. For habitat on the west side of the Cascade Mountain Range, the revisions to critical habitat are based on the Final Northern Spotted Owl Recovery Plan. The habitat revisions for lands on the east side of the Cascades, however, are based on Option 1 of the 2007 draft recovery plan.

69. FWS solicited and received peer reviews on its proposed revisions from six “knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and/or conservation biology principles.” 73 Fed. Reg. at 47,328. The peer review comments were almost uniformly critical, with

commenters asking “whether the reduction of more than 1.5 million acres was consistent with the best scientific understanding of the species’ conservation needs, and ask[ing] how we can justify dropping critical habitat from the current designation when the species is continuing to decline. One reviewer pointed to the work of Carroll and Johnson (in press), which indicates the current proposal will result in reduced habitat as well as reduced abundance of owls.” Id.

70. Other peer reviewers stated that managing for clusters of 20 pairs of owls was not sufficient for long-term population stability, that there was no scientifically valid justification for relying only on federal lands for owl recovery, and questioned the conclusion that reducing the amount of critical habitat while northern spotted owl populations are declining could ever lead to recovery. Id. at 47,329-34. FWS’s consistent response to these criticisms is that “the revised critical habitat is based on the 2008 final recovery plan....” Id. at 47,329.

71. Despite scientific criticisms, FWS based the final revised critical habitat decision on both the 2007 draft and 2008 final owl recovery plans, not the Northwest Forest Plan or the 2004 status review. Nor did FWS undertake the crucial first steps in critical habitat designation: it did not begin by identifying the geographical areas that contained the owl’s primary constituent elements or determining how much habitat is needed for the owls to reach recovery. Impacts to owl habitat from global warming were not adequately addressed, and FWS failed to consider, designate, or provide a rational basis for excluding non-federal lands in this revision.

72. Indeed, despite the fact that the final owl recovery plan Recovery Action 32 requires that agencies “[m]aintain substantially all of the older and more structurally complex multi-layered conifer forests on Federal lands outside of MOCAs...,” states that owl conservation requires “significant populations of intermediate-sized and large trees throughout. Mature and old trees will provide the framework for replacement spotted owl habitat....” and

finds that “[l]arge and old trees, either living or dead, are important wherever they occur...” the final revised critical habitat reduces protection of owl habitat.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: The Final Owl Recovery Plan Is Not a Recovery Plan.

73. FWS’s adoption of the final owl recovery plan is a final agency action subject to judicial review under the APA.

74. Recovery plans must ensure the “conservation and survival” of listed species. The ESA defines “conservation” as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3). Recovery plans must be written so that implementation of the plan will bring the listed species to the point where listing under the Act is no longer necessary. *Id.*; 16 U.S.C. § 1533(f)(1)(B)(ii).

75. By its own terms, the final recovery plan for the northern spotted owl does not plan for the recovery of the owl. For example, the final recovery plan estimates that the recovery of northern spotted owls will take thirty years or longer, but states that “the useful life of this plan is approximately 10 years.” The recovery actions in the plan likewise are limited to 10 years. As another example, the MOCA strategy described in Appendix C of the final recovery plan demonstrates that that strategy will not recover northern spotted owls. The final recovery plan is an interim plan that, even if implemented, will not recover northern spotted owls.

76. The Service’s promulgation of a “Recovery Plan” that does not plan for the recovery of the owl is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and in excess of statutory authority, in violation of the APA, 5 U.S.C. § 706(2).

SECOND CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: The Final Owl Recovery Plan Does Not Incorporate the Statutory Factors to the Maximum Extent Practicable

77. Section 4(f)(1)(B) of the ESA requires that FWS shall to the maximum extent practicable, incorporate in each plan:

- (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
- (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
- (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

16 U.S.C. § 1533(f).

78. The Service could have developed a longer-term document that planned for the full recovery of northern spotted owls – it was practicable to do so. Because the final recovery plan for the Northern Spotted Owl is only a 10-year plan, despite its internal assessment that 30 years is needed for recovery, it does not (and cannot by definition) include descriptions of site-specific actions necessary to achieve the recovery and delisting of the owl or objective, measurable criteria which, when met, would result in recovery and delisting of the owl. While the Recovery Plan does include an estimate of the total time and total cost needed to implement its recovery actions, again, as the Recovery Plan is only a 10-year interim plan, these time and cost estimates are incomplete and legally deficient. Moreover, the Recovery Plan's 30-year recovery estimate is flawed and further undermines the ability of its actions and criteria to meet the goal of species' recovery. Because a full, long-term plan for recovery of northern spotted owls could have been developed, but was not, the Service has failed to comply with its duties to incorporate into each plan the Section 4(f)(1)(B) criteria to the maximum extent practicable.

79. The Service's failure to incorporate in the Recovery Plan the factors required by § 4 of the ESA is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, in excess of statutory authority, and without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706(2).

THIRD CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: The Final Owl Recovery Plan Does Not Rely on the Best Scientific and Commercial Data Available

80. Section 4(b)(1)(A) requires FWS to make listing determinations "solely on the basis of the best scientific and commercial data available," 16 U.S.C. §1533(b)(1)(A), and because a recovery plan must conserve a species (i.e., return it to the point at which the protections of the ESA are no longer needed and the species can be de-listed), recovery plans must be based on the best scientific and commercial data available.

81. The final recovery plan for the northern spotted owl is not based on the best available science in numerous ways, including, but not limited to, its failure to rely on the Northwest Forest Plan and the 2004 SEI Status Review, its failure to adequately protect dispersal habitat, its failure to protect links between blocks of habitat, its failure to consider threats to the owl on non-federal land, and its failure to protect sufficient pairs of owl to conserve the species.

82. The Service's failure in the final recovery plan to make its determination on the basis of the best scientific data available is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, and in excess of statutory authority, in violation of the APA, 5 U.S.C. § 706(2).

FOURTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: The Final Owl Recovery Plan Does Not Articulate a Rational Basis Between the Facts Found and the Choice Made.

83. When promulgating a rule, an agency must “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) (internal citations omitted).

84. The facts found by the Service in the final recovery plan do not support the conclusion that the Recovery Plan will lead to the recovery of the owl. To the contrary, the facts found in the Recovery Plan demonstrate that the owl will continue to decline under the measures outlined in the Recovery Plan. For example, Appendix C of the final recovery plan does not demonstrate a basis for concluding that the final recovery plan and its MOCA strategy will recover the species; to the contrary, it affirmatively demonstrates that implementation of the final recovery plan will hasten the demise of northern spotted owls. As another example, there is no basis for the Service’s conclusion that recovery of the northern spotted owl will take 30 years.

85. The Service’s failure in the final recovery plan to articulate a rational connection between the facts found and the conclusions reached is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, in violation of the APA, 5 U.S.C. § 706(2).

FIFTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Revisions to Owl Critical Habitat Ignore the Statutory Baseline and Statutory Exclusion Analysis

86. FWS’s adoption of a final revised critical habitat rule is a final agency action subject to judicial review under the APA.

87. Section 4(a)(3) of the ESA imposes a duty on the Service to designate as critical habitat for the northern spotted owl all areas that are essential to the survival, recovery, and conservation of the owl. 16 U.S.C. § 1533(a)(3). Section 3(5) of the ESA defines critical habitat as “(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.” Id. § 1532(5).

88. Section 4(b)(2) of the ESA imposes a duty on the Service to designate critical habitat for all listed species, including the northern spotted owl, after taking into consideration the economic impact and “any other relevant impact” of specifying a particular area as critical habitat. 16 U.S.C. § 1533(b)(2). The Secretary may exclude an area from critical habitat only if he or she “determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2).

89. Rather than starting with the geographical areas on which are found those features essential to the conservation of the owl as the baseline critical habitat area, and then determining whether the benefits of potentially excluding portions of that area outweigh the benefits of inclusion, as required by sections 3(5) and 4(a)(2), the Service used the existing MOCA network as the baseline for the owl’s critical habitat. By substituting the MOCA network for the statutory baseline, which necessarily excluded lands that contained northern spotted owl primary constituent elements, the Service excluded lands, including federal lands on the east side of the

Cascade Range and all non-federal lands, from critical habitat without first considering whether the benefits of including those lands were outweighed by the benefits of excluding them, and without considering whether their exclusion would result in the extinction of the owl.

90. The Service's failure in the final critical habitat rule to designate as critical habitat all geographical areas on which are found those features essential to the conservation of the owl and its exclusion of habitat without going through the analysis required by section 4(b)(2) are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with the law, in excess of statutory authority, and without observance of procedure required by law, in violation of the APA, 5 U.S.C. § 706(2).

SIXTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Revisions to Owl Critical Habitat Are Not Based on the Best Scientific Data Available

91. Section 4(b)(2) of the ESA imposes a duty on the Service to designate critical habitat for all listed species and subspecies, including the northern spotted owl, "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2).

92. The final critical habitat rule is based in part on the draft recovery plan and in part on the final recovery plan. The draft recovery plan includes options and conclusions that were rejected in the final recovery plan and so cannot constitute the best available science.

93. The final critical habitat rule does not consider and is not based on the 2004 status review, the Northwest Forest Plan, and the old critical habitat rule, all of which constitute the best available science.

94. The final critical habitat rule ignores science demonstrating that protection of unoccupied land as critical habitat is essential to the survival and conservation of the owl and

that the total amount of habitat protected is inadequate to ensure the survival and conservation of the owl.

95. The Service's failure in the final critical habitat rule to make its determination of the owl's critical habitat on the basis of the best scientific data available is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, in violation of the APA, 5 U.S.C. § 706(2). The Service improperly failed to articulate a rational basis for its departure from the conservation strategies in the Northwest Forest Plan.

SEVENTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Revisions to Owl Critical Habitat Are Based on the Invalid Final Recovery Plan

96. The final critical habitat rule is based on the final recovery plan and relies extensively on the findings of the recovery plan to justify its conclusions.

97. The final recovery plan is invalid because it is arbitrary, capricious, and not in accordance with law, for the reasons discussed supra.

98. Because the final critical habitat rule relies on the invalid recovery plan, it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, in violation of the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Adjudge and declare that FWS violated the APA when it issued the May 13, 2008 Final Recovery Plan for the Northern Spotted Owl;
- B. Order the Final Owl Recovery Plan set aside;
- C. Order FWS to initiate a new rulemaking procedure immediately to develop a northern spotted owl recovery plan that fully complies with the Endangered Species Act;

D. Adjudge and declare that FWS violated the APA in revising critical habitat for the northern spotted owl;

E. Vacate the 2008 Revised Critical Habitat Decision and reinstate the prior 1992 critical habitat designation;

F. Grant such restraining orders and/or preliminary and permanent injunctive relief as plaintiffs may from time to time request to ensure that northern spotted owls and their habitat do not suffer irreparable harm pending resolution of the merits of this action;

G. Award plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412; and

H. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 24th day of November, 2008.

PATTI GOLDMAN (DCB# 398565)
KRISTEN L. BOYLES (WSB #23806)
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 [FAX]
pgoldman@earthjustice.org
kboyles@earthjustice.org

PAUL A. KAMPMEIER (WSB #31560)
Washington Forest Law Center
615 Second Avenue, Suite 360
Seattle, WA 98104-2245
(206) 223-4088
(206) 223-4280 [FAX]
pkampmeier@wflc.org

Attorneys for Plaintiff-Intervenor-Applicants Seattle Audubon Society, National Center for Conservation Science and Policy, Oregon Wild, Klamath-Siskiyou Wildlands Center, The Wilderness Society, Sierra Club, Center for Biological Diversity, Environmental Protection Information Center, Conservation NW, Audubon Society of Portland, National Audubon Society, Cascadia Wildlands Project, American Lands Alliance, Klamath Forest Alliance, Conservation Congress, American Bird Conservancy, Umpqua Watersheds, and Gifford-Pinchot Task Force