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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 CENTER FOR BIOLOGICAL DIVERSITY,)
13 SIERRA NEVADA FOREST PROTECTION)
14 CAMPAIGN, SIERRA CLUB, JOHN MUIR)
15 PROJECT, a project of Earth Island Institute,)
16 NATURAL RESOURCES DEFENSE COUNCIL,)
17 and DEFENDERS OF WILDLIFE,)

18 Plaintiffs,)

19 v.)

20 GALE A. NORTON, in her official capacity as)
21 Secretary of the Interior, and STEVEN A.)
22 WILLIAMS, in his official capacity as Director,)
23 U.S. Fish & Wildlife Service,)

24 Defendants.)
25)
26)
27)
28)

Case No:

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 **INTRODUCTION**

2 1. Plaintiffs bring this action under the Endangered Species Act (“ESA”), 16 U.S.C.
3 § 1531 *et seq.*, to compel the United States Fish & Wildlife Service (“Service”) to add the California
4 spotted owl to the list of endangered and threatened species and to designate its critical habitat.
5 Despite evidence that the owl is declining markedly across its historic range due to logging,
6 catastrophic fire caused by fire suppression, competition with non-native species and other factors,
7 and notwithstanding the United States Forest Service’s decision to significantly weaken important
8 protections for the owl on National Forests throughout the Sierra Nevada, the Service found that
9 listing the owl is not warranted. 68 Fed. Reg. 7580 (Feb. 14, 2003). In reaching this conclusion, the
10 Service committed numerous violations of both the ESA and the Administrative Procedure Act
11 (“APA”), 5 U.S.C. § 701, *et seq.*, described below. Accordingly, plaintiffs ask this Court to order
12 the Service to withdraw its finding for the owl and publish forthwith a proposed rule listing the owl
13 as endangered or threatened and designating its critical habitat.

14 **JURISDICTION, VENUE & INTRADISTRICT ASSIGNMENT**

15 2. This Court has jurisdiction over this action pursuant to sections 11(c) and (g) of the
16 ESA, 16 U.S.C. § 1540(c), (g). As required by 16 U.S.C. § 1540(g)(2), plaintiffs provided the
17 Service with written notice of the violations alleged herein more than sixty days before commencing
18 this action. *See* letter dated September 3, 2003 to Gale Norton, *et al.* from Gregory C. Loarie,
19 attached hereto as Exhibit A. Alternatively, this Court has jurisdiction over this action pursuant to
20 28 U.S.C. § 1331 to determine under the APA, 5 U.S.C. § 706, whether the Service acted arbitrarily,
21 capriciously or otherwise in violation of the law in failing to list the California spotted owl as
22 endangered or threatened under the ESA.

23 3. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(e) and 16 U.S.C.
24 § 1540(g)(3)(A), because plaintiffs Sierra Club and John Muir Project are incorporated in this
25 District and because California spotted owls inhabit Monterey County.

26 4. Assignment to the San Francisco Division of this judicial district is proper because
27 plaintiffs Sierra Club and John Muir Project are incorporated in San Francisco County. Civil L. R.
28 3-2(c), (d).

1 **PARTIES**

2 5. The plaintiffs in this action are:

3 a. CENTER FOR BIOLOGICAL DIVERSITY (“Center”). The Center is a non-
4 profit corporation based in Tucson, Arizona, with California offices in Oakland, Idyllwild and San
5 Diego. By combining conservation biology with litigation, policy advocacy and an innovative
6 strategic vision, the Center works to secure a future for animals and plants hovering on the brink of
7 extinction. Since its founding over ten years ago, the Center has fulfilled its mission by preparing
8 and publishing scientific articles, participating in state and federal administrative proceedings,
9 disseminating educational information through newsletters, alerts, the world-wide web and media
10 releases and petitioning and litigating both to list numerous species as threatened or endangered and
11 to designate their critical habitat under the ESA.

12 b. SIERRA NEVADA FOREST PROTECTION CAMPAIGN (“Campaign”).
13 The Campaign is a Sacramento-based coalition of over eighty local, regional and national
14 environmental organizations dedicated to protecting and restoring the Sierra Nevada’s national
15 forests. The Campaign was formed in 1996 to coordinate and focus the efforts of its member groups
16 and maximize their effectiveness. The Campaign works to protect and restore the ancient forests,
17 wildlands, wildlife and watersheds of the Sierra Nevada through scientific and legal advocacy,
18 public education and outreach, and grassroots forest protection efforts. Among other things, the
19 Campaign has sought to achieve greater protections for the California spotted owl, Pacific fisher,
20 American marten and other old forest dependent species.

21 c. SIERRA CLUB. The Sierra Club is a nationwide non-profit conservation
22 organization formed in 1892, with over 600,000 members, approximately 185,000 of whom reside in
23 California. The Sierra Club’s purposes are to explore, enjoy and protect the wild places of the Earth,
24 to practice and promote responsible uses of the Earth’s ecosystems and resources, to educate and
25 enlist humanity in the protection and restoration of the quality of the natural and human environment
26 and to use all lawful means to carry out those objectives. For many years the Sierra Club and its
27 members have advocated for the protection of forest ecosystems throughout California. These
28 advocacy efforts have included forest mapping and identification of remaining ancient forest areas,

1 lobbying for and achieving funding for numerous forest conservation efforts and urging protection
2 for imperiled species including the California spotted owl.

3 d. JOHN MUIR PROJECT. The John Muir Project is a project of the San
4 Francisco-based Earth Island Institute. Earth Island Institute was founded in 1982 with the mission
5 of developing and supporting Projects that counteract threats to the biological and cultural diversity
6 that sustains the environment. These Projects form a consortium of grassroots campaigns that
7 operate independently from one another, yet benefit from collective experience and ideas. Earth
8 Island provides these Projects with administrative support and operates as their fiscal sponsor. The
9 John Muir Project became part of the Earth Island consortium in 1997. It is dedicated to protecting
10 the ecological integrity of national forest ecosystems from destructive logging operations. On behalf
11 of Earth Island Institute’s many thousands of members, the John Muir Project has sought increased
12 protections for the California spotted owl and other forest species through administrative appeals of
13 Forest Service timber sales, litigation and other measures.

14 e. NATURAL RESOURCES DEFENSE COUNCIL (“NRDC”). NRDC is a
15 non-profit environmental organization with approximately 400,000 members nationwide, including
16 approximately 84,000 members in California. NRDC’s purpose is to safeguard the Earth: its
17 people, its plants and animals and the natural systems on which all life depends. The organization
18 works to restore the integrity of the elements that sustain life – air, land and water – and to defend
19 endangered natural places. NRDC seeks to establish sustainability and good stewardship of the
20 Earth as central ethical imperatives of human society and strives to protect nature in ways that
21 advance the long-term welfare of present and future generations. For more than a decade, NRDC
22 has advocated extensively for the protection of the nation’s forest resources and wildlife, including
23 the California spotted owl.

24 f. DEFENDERS OF WILDLIFE (“Defenders”). Defenders is a nonprofit
25 corporation with members and supporters across the nation, including many in California.
26 Defenders is dedicated to the protection of all native wild animals and plants in their natural
27 communities. The organization focuses its programs on what scientists consider two of the most
28 serious environmental threats to the planet: the accelerating rate of extinction of species and the

1 associated loss of biological diversity, and habitat alteration and destruction. These programs
2 encourage protection of entire ecosystems and interconnected habitats while protecting predators
3 that serve as indicator species for ecosystem health. Through education, outreach, advocacy,
4 litigation and other efforts, Defenders has worked to protect imperiled species such as the California
5 spotted owl and the habitats upon which these species depend.

6 6. The plaintiff organizations described above and their respective members have been
7 and will continue to be actively involved in efforts to protect and restore California spotted owl
8 populations throughout the State. Among other things, they have written to numerous federal, state
9 and local agencies and officials to urge increased protection for the owl and its habitat. Additionally,
10 on March 1, 2000, plaintiffs petitioned the Service to list the California spotted owl as endangered
11 and to designate its critical habitat under the ESA.

12 7. Each of the plaintiff organizations described above has members who live and/or
13 work in communities located near or adjacent to California spotted owl forest habitat in the Sierra
14 Nevada, central coast and southern California. In addition, members of each plaintiff organization
15 visit the owl's habitat on a regular basis. Plaintiffs' members use that habitat for a variety of
16 purposes, including, but not limited to, hiking, backpacking, photography, scientific study, wildlife
17 observation, hunting and fishing. They intend to continue to do so on an ongoing basis in the future.
18 Plaintiffs' members derive recreational, spiritual, professional, aesthetic, educational and other
19 benefits and enjoyment from the existence of California spotted owls in their natural habitat
20 throughout the State.

21 8. Plaintiffs and their members believe that California spotted owl populations will
22 continue to decline and may soon become extinct unless the Service immediately affords the species
23 the full protections of the ESA by listing it as endangered or threatened and designating its critical
24 habitat. Plaintiffs and their members also believe that spotted owls are an indicator of the overall
25 health of the forest ecosystems in which they live. Therefore, while the extirpation of California
26 spotted owls from any significant portion of its range would constitute an incalculable environmental
27 loss in and of itself, it would also indicate more generally that the health and diversity of the owl's
28 forest habitat had been severely degraded. These events would deprive plaintiffs and their members

1 of the recreational, spiritual, professional, aesthetic, educational and other benefits they presently
2 derive from these forest ecosystems.

3 9. Consequently, plaintiffs and their members have been, are being, and will continue to
4 be adversely affected and irreparably injured by the Service's continued failure to list the California
5 spotted owl as endangered or threatened and to designate the species' critical habitat. The Service's
6 ongoing failure to list the owl also denies plaintiffs' members their right to have the laws of the land
7 implemented and enforced and the satisfaction and peace of mind associated with witnessing the
8 enforcement of this nation's environmental laws and regulations. These injuries are actual and
9 concrete and would be redressed by the relief sought herein. Plaintiffs have no adequate remedy at
10 law.

11 10. The defendants in this action are:

12 a. GALE A. NORTON. Ms. Norton is sued in her official capacity as Secretary
13 of the Interior. She is ultimately responsible for implementing the ESA with respect to non-marine
14 species, including the responsibility for determining whether the California spotted owl warrants
15 listing as endangered or threatened.

16 b. STEVEN A. WILLIAMS. Mr. Williams is sued in his official capacity as
17 Director of the Service. He has been delegated the responsibilities of the Secretary of Interior
18 described in the preceding paragraph.

19 **THE ENDANGERED SPECIES ACT**

20 11. Congress enacted the ESA "to provide a program for the conservation of . . .
21 endangered species and threatened species" and "to provide a means whereby the ecosystems upon
22 which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).
23 A species is considered "endangered" if it is "in danger of extinction throughout all or a significant
24 portion of its range" and "threatened" if it is "likely to become an endangered species within the
25 foreseeable future." 16 U.S.C. § 1532(6), (20).

26 12. The ESA contains an array of strict procedural and substantive safeguards to prevent
27 activities that would jeopardize the continued existence of endangered and threatened species, result
28 in the destruction or adverse modification of their designated critical habitat, or harm individual

1 members of such species. 16 U.S.C. § 1536, 1538. In addition, the statute requires the Secretaries
2 of Interior and Commerce to develop and implement plans that provide for the recovery of
3 endangered and threatened species. 16 U.S.C. § 1533(f). However, none of these protections apply
4 until a species is first formally listed as either endangered or threatened.

5 13. Section 4 of the ESA, 16 U.S.C. § 1533, establishes a process by which citizens may
6 petition the Secretary of Interior to list any non-marine species as endangered or threatened. To the
7 maximum extent practicable, within 90 days after receiving a listing petition, the Secretary must
8 determine whether the petition presents substantial scientific or commercial information indicating
9 that the listing may be warranted. 16 U.S.C. § 1533(b)(3)(A). If the Secretary finds that the petition
10 presents such information, then she must determine whether listing is in fact warranted within 12
11 months of receiving the petition. 16 U.S.C. § 1533(b)(3)(B).

12 14. In making her 12-month finding under Section 4(b)(3)(B), 16 U.S.C. § 1533(b)(3)(B),
13 the Secretary must determine “whether the species is an endangered species or a threatened species
14 because of any of the following factors:

- 15 (A) the present or threatened destruction, modification, or curtailment of its habitat or
16 range;
- 17 (B) overutilization for commercial, recreational, scientific, or educational purposes;
- 18 (C) disease or predation;
- 19 (D) the inadequacy of existing regulatory mechanisms; or
- 20 (E) other natural or manmade factors affecting its continued existence.”

21 16 U.S.C. § 1533(a)(1). The Secretary must make this determination “solely on the basis of the best
22 scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

23 15. If the Secretary finds that a species warrants listing as either endangered or threatened
24 due to any of the five factors described above, she must promptly publish a proposed rule listing the
25 species as such in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(ii). A final listing rule must
26 follow within one year. 16 U.S.C. § 1533(b)(6)(A). Concurrently with publication of the final
27 listing rule, the Secretary must, with certain exceptions, also publish a final rule designating the
28 species’ critical habitat. 16 U.S.C. § 1533(b)(6)(C).

16. The Secretary of Interior has delegated the foregoing duties under Section 4 of the
ESA, 16 U.S.C. § 1533, to the Fish & Wildlife Service. 50 C.F.R. § 402.01(b).

1 **BACKGROUND**

2 **I. The California Spotted Owl and Its Habitat**

3 17. The California spotted owl (*Stix occidentalis occidentalis*) is a medium-sized raptor
4 with large dark eyes and mottled brown and white coloring. The species has a pale brown face
5 surrounded by a darker ring, and light “eyebrows” and “whiskers” that form a distinctive X between
6 the eyes. Unlike its cousins, the northern (*S. o. caurina*) and Mexican (*S. o. lucida*) spotted owls,
7 California spotted owls are not listed under the ESA and therefore receive no protection under that
8 Act.

9 18. California spotted owls inhabit the Sierra Nevada mountain range from the Pit River
10 in Shasta County south to the Tehachapi pass in Kern County, as well as isolated mountainous areas
11 in central and southern California and northern Baja. The owl’s range in central and southern
12 California is separated from its range in the Sierra Nevada as a result of natural topographic and
13 manmade obstacles.

14 19. Like all spotted owls, California spotted owls are habitat specialists that require old
15 growth forests with large trees, multi-storied canopies, dense canopy closure, snags, and downed
16 logs and woody debris for nesting, roosting and foraging. Studies have shown that California
17 spotted owls select remnants of old growth forests that are 200 to 400 years old. According to the
18 Service, the best scientific information available indicates that high survival of spotted owls is
19 achieved by maintaining large, unfragmented areas of old growth habitat.

20 20. Over the last century and a half, human activities including logging, livestock
21 grazing, urbanization and fire suppression have severely impacted California’s forests. As a result,
22 there currently remains substantially less of the old growth forest habitat required by California
23 spotted owls than in pre-historic times. The United States Forest Service estimates old growth
24 habitat in the Sierra Nevada has been reduced by up to 90 percent as a result of human activities.
25 Important old growth components – especially large trees, snags and downed logs – are in
26 particularly short supply across the owl’s range, and the average diameter of remaining trees in the
27 Sierra Nevada is significantly smaller than the diameter of trees typically selected by owls for
28 nesting.

1 21. The widespread degradation of habitat has caused California spotted owl populations
2 to decline throughout the State. Demographic data from the Sierra Nevada and southern California
3 demonstrate that owl populations have declined by 7 to 11 percent annually for the past 11 to 15
4 years. A team of owl biologists assembled by the United States Forest Service recently re-analyzed
5 these data and concluded that the degree of the owl's decline is not statistically certain; however, the
6 biologists identified several reasons for concern about the owls' status. For example, adult survival
7 for California spotted owls – a critical demographic parameter that largely determines population
8 stability – is lower than adult survival for northern spotted owls, which are declining and listed as
9 threatened under the ESA. Moreover, adult survival for individual California spotted owls living in
10 Sequoia Kings Canyon National Park, which is protected from logging, is higher than adult survival
11 for individuals living in the National Forests, where extensive logging is permitted.

12 **II. The Sierra Framework and the California Spotted Owl**

13 22. Since 1991, the Forest Service has initiated several significant planning efforts to
14 maintain viable populations of California spotted owls and other old growth-dependant species on
15 National Forests in the Sierra Nevada. These efforts culminated on January 12, 2001 with the Forest
16 Service's adoption of the Sierra Nevada Forest Plan Amendment – also known as the Sierra
17 Framework. The original Sierra Framework contained many standards and guidelines that regulated
18 activities such as logging, wildfire prevention and grazing on the eleven national forests in the Sierra
19 Nevada. The original Sierra Framework also explicitly provided that the Herger-Feinstein Quincy
20 Library Group pilot project – an intensive logging regime planned for Plumas and Lassen national
21 forests and the Sierraville Ranger District of the Tahoe national forest– would be conducted in
22 accordance with the Sierra Framework's strict standards and guidelines. Many of the original Sierra
23 Framework's standards and guidelines were included specifically to protect the California spotted
24 owl and its habitat.

25 23. On December 31, 2001, less than a year after its approval, the Forest Service
26 announced its intention to initiate a broad review of the Sierra Framework. The stated purpose of the
27 review was to identify and propose changes to the management plan that would permit, among other
28 things, more aggressive logging and greater implementation of the Quincy Library Group pilot

1 project. Over the next year, the Forest Service met with interested parties, including the Fish &
2 Wildlife Service, to discuss and develop these and other changes.

3 24. In March 2003, the Sierra Framework review team released a final report in which it
4 recommended relaxing or eliminating many of the Sierra Framework's standards and guidelines. On
5 April 7, 2003, the Forest Service published a notice of intent to prepare a supplemental
6 environmental impact statement analyzing the review team's proposals. 68 Fed. Reg. 16758. In
7 June 2003, the Forest Service published a draft supplemental environmental impact statement in
8 which the review team's proposals were reflected in the preferred alternative. During the status
9 review conducted to determine whether listing the California spotted owl was warranted, the Fish &
10 Wildlife Service was aware that the Forest Service was in the process of revising the Sierra
11 Framework and that it had proposed changes that, in the service's view, "could have more
12 widespread impacts on California spotted owl habitat." 68 Fed. Reg. at 7596.

13 25. On January 22, 2004, the Forest Service published a final supplemental
14 environmental impact statement and record of decision in which it essentially adopted the review
15 team's proposals. The revised Sierra Framework replaces the standards and guidelines included in
16 the original decision with different standards and guidelines that are significantly less restrictive of
17 activities that harm spotted owls. Among other things, the revised Sierra Framework allows three
18 times more logging than the original plan and allows for considerable increases in grazing, off-road
19 vehicle use and other destructive activities throughout the Sierra Nevada. In addition, the revised
20 Sierra Framework places absolutely no restrictions on implementation of the Quincy Library Group
21 pilot project. The revised Sierra Framework went into effect in March 2004.

22 **III. Plaintiffs' Petition to List the California Spotted Owl under the ESA**

23 26. On March 1, 2000, plaintiffs petitioned the Service to list the California spotted owl
24 as endangered or threatened under the ESA and to designate its critical habitat. On October 12,
25 2000, the Service found that plaintiffs' petition presented substantial information indicating that
26 listing may be warranted, and it initiated a formal status review. 65 Fed. Reg. 60605.

27 27. On July 31, 2001, the Center, Campaign, and NRDC, plaintiffs herein, filed suit in the
28 United States District Court for the Northern District of California challenging the Service's failure

1 to follow its initial finding that listing the owl may be warranted with a timely finding as to whether
2 listing was in fact warranted, as required by section 4(b)(3)(B) of the ESA, 16 U.S.C.
3 § 1533(b)(3)(B).

4 28. On March 5, 2002, that Court ordered the Service to determine whether the owl
5 warrants listing as endangered or threatened by February 10, 2003. *See Center for Biological*
6 *Diversity v. Norton*, 208 F. Supp. 2d 1044 (N.D. Cal. 2002).

7 29. On February 10, 2003, the Service announced that listing the California spotted owl
8 as endangered or threatened under the ESA is not warranted. The Service published notice of this
9 “12-month” finding for the owl in the Federal Register shortly thereafter. 68 Fed. Reg. 7580 (Feb.
10 14, 2003).

11 CAUSES OF ACTION

12 First Cause of Action

13 (ESA Section 4(a)(1)(A): Illegal analysis of the present and threatened
14 destruction, modification, and curtailment of the owl’s habitat and range)

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

17 31. Section 4(a)(1)(A) of the of the ESA requires the Service to determine whether any
18 species is endangered or threatened because of “the present or threatened destruction, modification,
19 or curtailment of its habitat or range.” 16 U.S.C. § 1533(a)(1)(A).

20 32. The Service must make its determination under Section 4(a)(1) “solely on the basis of
21 the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

22 33. In reaching the conclusion that the owl is neither endangered nor threatened due to
23 the present or threatened destruction, modification, or curtailment of its habitat or range, the Service
24 violated its duty under Section 4(a)(1)(A) in the following ways:

25 A. First, the Service improperly relied on its assessment that owl “population
26 declines are not conclusively demonstrable.” 68 Fed. Reg. at 7596. Even assuming that the
27 Service’s assessment of the owl’s population status is accurate, “conclusively demonstrable”
28 population declines are not a prerequisite to listing a species as endangered or threatened

1 under the ESA. Rather, if the *best* data available demonstrates that listing is warranted, the
2 Service must list the species regardless of whether such data is *conclusive*.

3 B. Second, the Service improperly considered only those threats that would be
4 reasonably foreseeable if the National Forests in the Sierra Nevada were managed in
5 accordance with the original Sierra Framework. 68 Fed. Reg. at 7596. As a result, the
6 Service explicitly refused to consider available evidence that the Forest Service was in the
7 process of revising the original Sierra Framework in a manner that would have more
8 widespread impacts on owl habitat. The Service may not consider only “reasonably
9 foreseeable outcomes of established management direction,” *id.*, and thereby exclude
10 available data from its evaluation of threats to the owl’s habitat and range. Rather, the
11 Service must base its listing determination on the best data available.

12 C. Third, the Service improperly found that timber harvest on National Forests in
13 Southern California “will be conducted with California spotted owl protection measures.” 68
14 Fed. Reg. at 7597. The Service failed to provide any rational basis for this conclusory
15 statement, which is contrary to the best scientific and commercial data available. Moreover,
16 the Service failed to consider numerous significant threats to the owl’s habitat and range in
17 central and southern California, including catastrophic fire, fuels reduction activities, insect-
18 related tree mortality and urbanization.

19 D. Fourth, the Service improperly concluded that implementation of Sierra
20 Pacific Industries’ (“SPI”) Maximum Sustainable Production plans would provide an
21 increase in the amount of owl habitat on private lands in the Sierra Nevada. 68 Fed. Reg. at
22 7597. The Service failed to provide any rational basis for this conclusion, which is contrary
23 to the best scientific and commercial data available. Moreover, SPI’s Maximum Sustainable
24 Production plans are voluntary and unenforceable measures upon which the Service may not
25 properly rely.

26 34. For these reasons, the Service’s finding for the owl is arbitrary, capricious, an abuse
27 of discretion, otherwise not in accordance with the law, and contrary to the best scientific and
28 commercial data available, all in violation of the ESA and APA.

1 **Second Cause of Action**

2 (ESA Section 4(a)(1)(D): Illegal analysis of the
3 inadequacy of existing regulatory mechanisms)

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

6 36. Section 4(a)(1)(D) of the ESA requires the Service to determine whether any species
7 is endangered or threatened because of the “inadequacy of existing regulatory mechanisms.”
8 16 U.S.C. § 1533(a)(1)(D).

9 37. The Service must make its determination under Section 4(a)(1)(D) “solely on the
10 basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

11 38. In reaching the conclusion that the owl is neither endangered nor threatened due to
12 the inadequacy of existing regulatory mechanisms, the Service violated its duty under Section
13 4(a)(1)(D) in the following ways:

14 A. First, the Service again improperly refused to consider available evidence that
15 the Sierra Framework was in the process of being revised by the Forest Service and would
16 therefore be inadequate to protect the owl in the foreseeable future. 68 Fed. Reg. at 7604.

17 B. Second, the Service again improperly found, without any rational basis and
18 contrary to the best data available, that “[s]potted owls in southern California are protected
19 by measures developed by each forest.” 68 Fed. Reg. at 7604.

20 C. Third, the Service again improperly found that SPI’s Maximum Sustainable
21 Production plans would result in benefits to the owl on private lands. 68 Fed. Reg. at 7606.
22 The Service again failed to provide any rational basis for this conclusion, which is contrary to
23 the best scientific and commercial data available. Moreover, SPI’s Maximum Sustainable
24 Production plans are voluntary and unenforceable measures upon which the Service may not
25 properly rely.

26 39. For these reasons, the Service’s finding for the owl is arbitrary, capricious, an abuse
27 of discretion, otherwise not in accordance with the law, and contrary to the best scientific and
28 commercial data available, all in violation of the ESA and APA.

1 **Third Cause of Action**

2 (ESA Section 4(A)(1)(E): Illegal analysis of other natural or
3 manmade factors affecting the owl’s continued existence)

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

6 41. Section 4(a)(1)(E) of the ESA requires the Service to determine whether any species
7 is endangered or threatened because of “other natural or manmade factors affecting its continued
8 existence.” 16 U.S.C. § 1533(a)(1)(E).

9 42. The Service must make its determination under Section 4(a)(1) “solely on the basis of
10 the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A).

11 43. In reaching the conclusion that the owl is neither endangered nor threatened due to
12 other natural manmade factors affecting its continued existence, the Service improperly concluded:

13 Although barred owls may pose a substantial threat to California spotted owls at some
14 point in the future, by themselves, or in combination with other factors, they do not
15 nor do other factors seem to pose now or in the foreseeable future a significant threat
16 to the continued existence of the California spotted owl such that it warrants listing.

16 68 Fed. Reg. at 7608.

17 44. The Service failed to provide any rational basis for this conclusion, which is contrary
18 to the best scientific and commercial data available.

19 45. The Service’s finding for the owl is therefore arbitrary, capricious, an abuse of
20 discretion, otherwise not in accordance with the law, and contrary to the best scientific and
21 commercial data available, all in violation of the ESA and APA.

22 **REQUEST FOR RELIEF**

23 WHEREFORE, plaintiffs respectfully request that the Court:

24 A. Adjudge and declare that the Service’s finding that the California spotted owl is not
25 endangered or threatened and that listing the owl is not warranted violated section 4 of the ESA,
26 16 U.S.C. § 1533, and the APA, 5 U.S.C. § 706;

27 B. Order the Service to comply with the law forthwith by finding that listing the owl as
28 endangered or threatened is warranted, and publishing a final regulation implementing that finding
by listing the owl and designating its critical habitat;

1 C. Retain jurisdiction over this matter until such time as the Service has fully complied
2 with the Court's order;

3 D. Award plaintiffs their costs of litigation, including reasonable attorneys' fees and
4 costs; and,

5 E. Grant plaintiffs such additional relief as the Court may deem just and proper.

6 Respectfully submitted,

7
8 Dated: May ____, 2004

9 _____
10 Gregory C. Loarie
11 Attorney for Plaintiffs
12
13

14 **CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

15 Pursuant to Civil Local Rule 3-16, the undersigned certifies that, as of this date, plaintiffs are
16 unaware of any entity or person other than the named parties with an interest that could be
17 substantially affected by the outcome of this proceeding.
18
19

20 Dated: May ____, 2004

21 _____
22 Gregory C. Loarie
23 Attorney for Plaintiffs
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