



Conservation  
Congress

RECEIVED

2013 JUN -5 AM 10: 30

OFFICE OF THE  
EXECUTIVE SECRETARIAT

May 28, 2013

Ms. Sally Jewell, Secretary of Interior  
U.S. Department of the Interior  
1849 C Street NW  
Washington, DC 20240

Mr. M. Earl Stewart, Forest Supervisor  
Coconino National Forest  
1824 S. Thompson Street  
Flagstaff, AZ86001

Dear Secretary Salazar and Forest Supervisor Stewart:

**Re: Sixty-Day Notice of Intent to Sue Over Violations of the Endangered Species Act In Connection With the Mexican Spotted Owl for the Wing Mountain Project on the Coconino National Forest in northern Arizona.**

On behalf of Conservation Congress and WildEarth Guardians we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), that the U.S. Forest Service ("USFS") and U.S. Fish & Wildlife Service ("USFWS") have violated and are continuing to contravene various provisions of the ESA, 16 U.S.C. § 1531 *et seq.*, by authorizing discrete but interrelated violations of the ESA in the Coconino National Forest ("National Forest"). Their actions are resulting in an ongoing pattern of activity that is harming the Mexican Spotted Owl (*Strix occidentalis caurina*) and impairing its survival and recovery.

The Mexican Spotted Owl is listed as a threatened species under the ESA. Determination of Threatened Status for the Mexican Spotted Owl, 58 Fed. Reg. 14248 (March 16, 26, 1993). Under Section 7(a)(1) of the ESA, each federal agency must "utilize [its] authorities in furtherance of the purposes" of the ESA, 16 U.S.C. § 1536(a)(1), and under Section 7(a)(2), "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* § 1536(a)(2).

As explained in detail below, we believe that the USFS and USFWS have contravened the requirements of the ESA by failing to complete formal consultation; by failing to re-initiate consultation based on significant new information; by failing to ensure against adverse modification or destruction of the Owl's critical habitat as required by the ESA; and by otherwise failing to carry out their statutory responsibilities under the ESA to conserve and recover the Owl.

On August 21, 2012 Conservation Congress submitted official comments on the Wing Mtn. EA; and appealed the Decision Notice/FONSI on April 4, 2013. We have clearly and repeatedly demonstrated violations of the ESA in our comments on the Wing Mtn. project which have been ignored by the USFS. We incorporate by reference in their entirety our comments on the EA and our administrative appeal.

Documents (Letter of Concurrence, Environmental Assessment, Biological Assessment) show that consultations between the Fish and Wildlife Service and the Forest Service failed to take into account past authorized takes and habitat destruction, thereby preventing an accurate evaluation of whether a proposed action is likely to adversely affect the species or critical habitat. Similarly, nowhere do the documents associated with this project reflect any attempt to quantify or to estimate how much take the species can withstand without jeopardizing its survival or rendering its recovery impossible.

Specific to this Notice, it is our judgment that the Coconino National Forest has been and continues to violate the ESA regarding its duties to conserve and recover the Mexican spotted owl. Specifically the Wing Mtn. Project proposed action would allow 417 acres of logging of trees in protected activity centers (PACs) (EA at 72<sup>1</sup>), and the use of mechanical equipment would be allowed. EA at 14.

According to the Letter of Concurrence dated 9/19/12 signed by Steven Spangle, Field Supervisor of the AZ Ecological Services Office, the Wing Mtn. project area includes 850 acres of designated critical habitat in Critical Habitat Unit 14 (CHU-14), including protected habitat, restricted habitat, and target habitat. Of this 221 acres (26%) of restricted habitat will also be thinned and burned and 82 acres of target habitat will be thinned and burned. The 1995 Recovery Plan is cited (LOC pg. 2). There is virtually no analysis in the LOC of past or present activities in CHU-14. In fact, the LOC does not include any analysis at all. It is simply a description of the project, minus the protected habitat mentioned in the FS EA, and a statement the FWS agrees with the FS determination. The LOC only cites to the 1995 Recovery Plan when the 2012 Recovery Plan was in effect and was available to both agencies *prior* to a final decision on Wing Mtn.

Conservation Congress suggested that another way to provide some fire hazard reduction would

---

<sup>1</sup> According to EA p. 14, 392 acres of MSO PACs would be treated. This discrepancy is not explained.

be to cut on lands near MSO habitat but leave the owl habitat alone. Note that this is specifically suggested in the Draft Revised Recovery Plan:

In many cases, strategic treatments on surrounding and/or adjoining lands will reduce fire risk sufficiently so that, in the short term, treatments are not needed within PACs...

FWS, 2011, at 252.

Note further that:

Existing forested habitat used by Mexican spotted owls for nesting/roosting generally has not been developed through planned silvicultural treatments. That is, although owls may be found in managed stands, these stands were not treated specifically to enhance spotted owl habitat.

FWS, 2011, at 250.

Any kind of treatment certainly would not create the large trees needed by owls for nesting and roosting. Also, any logging is likely to simplify the complex structure desired by owls and their prey.

Even if treatment inside MSO PACs is justified, the proposed action would approve a far larger treatment area than is recommended under the Draft Revised Recovery Plan. The proposed action would allow 392 acres in PACs to be treated (EA at 14), in the two PACs within the project area. EA at 70. The Draft Revised Recovery Plan would allow a maximum of 20 percent of each PAC to receive treatment. FWS, 2011, at 255. PACs are generally 600 acres, but can be larger. Id. at 33. Thus unless the PACs in the project area are unusually large, more than 20 percent of at least one of them would be cut under the proposed action.<sup>2</sup> It is even possible that treatment in the core area of one or both PACs could occur. Except for removal of hazard trees, logging is not listed as one of the activities permitted in core areas. (Low intensity fire is permitted.) Id. at 255-256.

If MSO is to recover so that it can be ESA-delisted, it will have to expand into areas not currently occupied. Caution should be taken in any project that involves manipulation of MSO designated critical habitat. The 2012 Recovery Plan notes that juvenile dispersal of up to 92 km has been detected. Id. at 26. Past, present, and reasonably foreseeable activities outside the project area, combined with the effects of the Wing Mountain Project, could affect the ability of MSO to use new or historically used (but currently unoccupied) habitat. The ESA requires that unoccupied habitat for threatened species is to be protected for future occupancy. Thus the impacts of

---

<sup>2</sup> The EA states (p. 70) that the acreages of the PACs in the project area are 468 and 53 acres, but it does not state the overall size of the PACs. However, it would appear both PACS are under minimum habitat thresholds.

such activities outside of the Wing Mountain Project area and within CHU-14 must be analyzed in conjunction with the impacts of the latter project.

For example, Conservation Congress and WildEarth Guardians recently submitted comments on the 4FRI draft EIS that will cover 600,000 acres, and will "treat" literally every acre of MSO designated critical habitat on the Forest. This project was being developed at the same time as Wing Mountain as well as others mentioned in the Wing Mtn. EA (Hart Prairie, Eastside, Ft. Valley Restoration, A-1 Multi-Product, Mars Hill, Ritter, Sinks, Mormon Lake Basin, Woody Ridge, Kachina Village, Lake Mary, Mountaineer, Elk Park, Jack Smith Schultz, Marshall and Skunk Fuel Reduction and Forest Health Projects). EA at 45. MSO habitat is being submitted to "a death by a thousand cuts" without any substantial cumulative effects analysis.

Despite the lack of analysis the FWS determined a "May Affect, Not Likely to Adversely Affect".

This determination was made despite the fact that:

- The Forest Service (FS) and FWS relied on the outdated 1995 Recovery Plan<sup>3</sup>;
- The FWS failed to establish an Environmental Baseline for the MSO;
- The FS and FWS failed to include a cumulative effects analysis of past and present projects despite the FS listing the many projects involving owl habitat;
- The FWS failed to include an analysis of CHU 14 including past actions and current condition of habitat;
- The FS failed to survey for MSO using the 2012 survey protocol;
- The FS and FWS have not guaranteed that adverse modification of critical habitat will not occur through the Wing Mtn. project;
- Had the FS originally requested formal consultation for the Wing Mtn. project relying on the draft Recovery Plan available in 2011 and re-initiated consultation once the 2012 Recovery Plan became viable, the Coconino NF and FWS could have considered new significant information including: 1) new information regarding the habitat needs of owls in N AZ; 2) the current status of the Mexican spotted owl range-wide that continues to decline; and 3) assess how CHU-14 is currently functioning or being used by owls; and 4) informed its decisions using the 2012 Recovery Plan.

Both agencies could have also considered managing currently degraded habitat in PACS that appears to already be below minimum thresholds and taking actions that would work towards recovery of the species and the conservation value of its critical habitat.

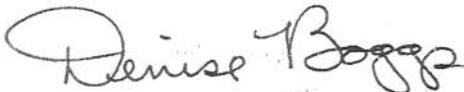
---

<sup>3</sup> LOC -2

The Agencies' consultation and environmental analysis for this project did not apply the best available science regarding the Mexican Spotted Owl and/or was arbitrary and capricious, and thus inadequate under Section 7 of the ESA. The Project may also result in unauthorized take under Section 9 of the ESA due to the absence of analysis in CHU-14 and the failure to conduct owl surveys according to the 2012 survey protocol. Therefore, the agencies have violated their duties under the ESA, 16 U.S.C. Section 1531 *et seq.*, to ensure that their actions do not jeopardize threatened and endangered species, that their actions do not result in unauthorized take of these species of wildlife, and that their actions promote recovery of these species. The Agencies' actions in this matter represent an unlawful departure from the legally binding mandate to protect and recover imperiled species and their habitats.

The decision to implement this project will violate the ESA, and the 2012 Recovery Plan (50 CFR 402.16) for failing to re-initiate consultation.

Sincerely,



Denise Boggs, Executive Director  
On behalf of Conservation Congress & WildEarth Guardians,

Cc: Jay Tutchton, Attorney at Law  
Steve Sugarman, Attorney at Law

WEG Caveat:

WildEarth Guardians (WEG) believes that the 2012 Recovery Plan for the Mexican spotted owl is inadequate in many ways to assure the conservation and recovery of the owl. WildEarth Guardians' concerns regarding the substance of the 2012 Recovery Plan were set out in its August 23, 2011 comments on the draft of that Plan, which comments were submitted to the Fish and Wildlife Service during the period of plan development. WildEarth Guardians' comments on the Four-Forests Restoration Initiative – and the various ways in which the Initiative fail to adhere to the framework set out in the 2012 Recovery Plan – do not constitute any waiver of WildEarth Guardians' to challenge the substance of that Plan in the future and do not constitute any sort of tacit endorsement of the provisions of that Plan.