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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
11 AT SEATTLE

12 SEATTLE AUDUBON SOCIETY and)
13 KITTITAS AUDUBON SOCIETY, non-)
14 profit corporations,)

15 Plaintiffs,)

16 v.)

17 GALE NORTON, Secretary of the Interior,)
18 and H. DALE HALL, Director of the U.S.)
19 Fish & Wildlife Service,)

20 Defendants.)
21

Case No. C05-1835 JLR

FIRST AMENDED COMPLAINT

22 **I. INTRODUCTION**

23 1. Plaintiffs Seattle Audubon Society and Kittitas Audubon Society challenge the
24 failure of the federal Defendants to develop and implement a recovery plan for the Northern
25 Spotted Owl (*Strix occidentalis caurina*). Under the Endangered Species Act (“ESA” or “Act”),
26 16 U.S.C. §§1531 *et seq.*, the listing of the Northern Spotted Owl as “threatened” in 1990
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1 triggered Defendants' non-discretionary duties to develop and implement a Northern Spotted
2 Owl recovery plan. Although fifteen years have passed since the listing, Defendants have failed
3 to perform these duties, in violation of the law. Plaintiffs seek declaratory, injunctive, and other
4 relief for Defendants' violations.

6 II. JURISDICTION AND VENUE

7 2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal
8 question); 5 U.S.C. §§701-706 (APA); and 16 U.S.C. §§1540(c) & (g) (action arising under the
9 ESA and ESA citizen suit provision).

10 3. This Court has the authority to grant the relief requested pursuant to 16 U.S.C.
11 §1540(g) (ESA); 5 U.S.C. §§701-06 (APA); and 28 U.S.C. §2412 (Equal Access to Justice Act).

12 4. Plaintiffs have satisfied the jurisdictional requirements for bringing this suit.
13 Under Section 11 of the ESA, 16 U.S.C. §§1540(g)(2)(A) & (C), by letter dated and postmarked
14 August 4, 2005, Plaintiffs notified Defendant Norton of her violations of the ESA; of Plaintiffs'
15 intent to sue for those violations; and of Plaintiffs' willingness to discuss settlement terms
16 (hereafter "Notice Letter"). Although not required to, on August 4, 2005, Plaintiffs sent a copy
17 of the Notice Letter to Mr. Matthew Hogan, then Acting Director of the U.S. Fish & Wildlife
18 Service, and to Mr. Dave Allen, Director of Region 1 of the U.S. Fish & Wildlife Service.
19 Defendant Norton and Mr. Hogan, and/or their authorized agents, received a copy of the Notice
20 Letter on August 12, 2005. Mr. Allen and/or his authorized agent received a copy of the Notice
21 Letter on August 8, 2005. After Plaintiffs mailed Mr. Hogan a copy of the Notice Letter, Mr. H.
22 Dale Hall became Director of the U.S. Fish & Wildlife Service. A copy of the Notice Letter is
23 attached hereto as Exhibit 1.

1 and conservation, with a focus on birds. Kittitas Audubon Society is a membership organization
2 and has at least one member who is injured by Defendants' violations. Many of Kittitas
3 Audubon Society's members live, work, and/or recreate in or near forest lands in Washington
4 State and have an interest in the health and welfare of the forests and Northern Spotted Owls.
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6 9. Plaintiffs have standing to bring this case. The recreational, economic, aesthetic,
7 health, and/or other interests of Plaintiffs and their members have been, are being, and will be
8 injured and adversely affected by Defendants' violations of the ESA and the APA. Plaintiffs and
9 Plaintiffs' members generally derive aesthetic, recreational, spiritual, educational, and other
10 benefits from Washington's forest and wildlife resources, which benefits are reduced by
11 Defendants' violations. Plaintiffs' members and staff have educational, scientific, moral,
12 spiritual, recreational, and other interests in the threatened Northern Spotted Owl. Plaintiffs and
13 Plaintiffs' members have actively participated in efforts to protect and preserve the Northern
14 Spotted Owl and Defendants' violations have hindered that effort to the injury of Plaintiffs.
15 Plaintiffs and Plaintiffs' members and staff use and enjoy, and intend to continue to use and
16 enjoy, regions in Washington State that are home to the Northern Spotted Owl, thereby deriving
17 benefits from the existence and health of the species. Plaintiffs have suffered legal wrong and/or
18 are adversely affected or aggrieved by Defendants violations of law. The relief sought in this
19 lawsuit can redress the injuries to these interests.
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23 10. Defendant GALE NORTON is sued in her official capacity as the Secretary of the
24 Interior. Defendant Norton is the federal official charged with administering the ESA as it
25 pertains to Northern Spotted Owls and has non-discretionary duties to prioritize, develop, and
26 implement recovery plans for species listed under the Act. 16 U.S.C. §§1532(15) & 1533(f).
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1 Although Defendant Norton has delegated responsibility for administering the ESA to the U.S.
2 Fish & Wildlife Service (hereafter “Service”), Defendant Norton ultimately remains responsible
3 for complying with the recovery planning mandates of the ESA.

4 11. Defendant H. DALE HALL is sued in his official capacity as the Director of the
5 U.S. Fish & Wildlife Service. Defendant Hall is responsible for implementing the ESA for
6 species within the jurisdiction of the Department of the Interior.
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8 **IV. FACTS**

9 **A. The Northern Spotted Owl.**

10 12. Northern Spotted Owls are typically associated with old growth forests of
11 northern California, the Pacific Northwest, and southern British Columbia. It has recently been
12 estimated that there are fewer than 100 pairs of Northern Spotted Owls in British Columbia;
13 1,200 pairs in Oregon; 560 pairs in northern California; and 500 pairs in Washington.
14

15 13. Northern Spotted Owls are dark to chestnut brown with round or oval white spots
16 and dark eyes. The average adult size is about 18 inches tall, with a wing span of approximately
17 48 inches. They can live up to 10 years in the wild and up to 15-20 years in captivity.
18

19 14. Suitable spotted owl habitat includes forests with multi-layered canopies of trees
20 that are high and open enough for the owls to fly between and underneath. These forest
21 characteristics are typically found in old growth forests, but may be found in other forest types.
22 Spotted owls prefer areas with large trees with broken tops, deformed limbs, and large cavities,
23 which are capable of supporting Northern Spotted Owls’ nests. Spotted owls are very territorial
24 and generally intolerant of habitat disturbances.
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1 B. The ESA & Its Recovery Planning Mandates.

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

8
9 16. On June 26, 1990, the U.S. Fish & Wildlife Service recognized the serious threats
10 facing Northern Spotted Owls and listed the species as “threatened”. 55 Fed. Reg. 26,114 (June
11 26, 1990). In its final listing rule, the Service noted that the Northern Spotted Owl is threatened
12 throughout its range “...by the loss and adverse modification of suitable habitat as the result of
13 timber harvesting and exacerbated by catastrophic events such as fire, volcanic eruptions, and
14 wind storms.” 55 Fed. Reg. 26114, 26151.

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16 17. Listing the Northern Spotted Owl under the ESA triggered Defendants’ duties to
17 develop and implement a recovery plan for Northern Spotted Owls or, in the alternative, to find
18 that such a plan would not promote the conservation of the species. 16 U.S.C. §1533(f). The
19 duties to develop and implement a recovery plan are non-discretionary duties for purposes of
20 ESA Section 11, 16 U.S.C. §1540(g)(1)(C).

21
22 18. The U.S. Fish & Wildlife Service and NOAA Fisheries have published a joint
23 policy committing the agencies to develop final recovery plans within two and a half years of a
24 species’ listing. 59 Fed. Reg. 34272, 34273 (July 1, 1994).

1 19. When developing recovery plans Defendants must, to the maximum extent
2 practicable, give priority to threatened or endangered species that are most likely to benefit from
3 recovery plans, particularly those species like the Northern Spotted Owl that are or may be in
4 conflict with economic activity. 16 U.S.C. §1533(f)(1)(A). The timely development of recovery
5 plans is essential to planning and coordinating recovery actions and ensuring cooperation
6 between those entities most able to afford protection to listed species. The duty to prioritize
7 recovery planning for certain species is a non-discretionary duty for purposes of ESA Section 11,
8 16 U.S.C. §1540(g)(1)(C).
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11 20. The Service has given the Northern Spotted Owl a recovery priority number of
12 “3”—1 being the highest priority and 18 being the lowest priority—meaning both the degree of
13 threat and the potential for recovery are “high”.
14

15 21. The Service’s 1994, 1996, and 2002 Recovery Reports to Congress recognize the
16 Northern Spotted Owl’s status as “declining”, which the reports define as a “species known to be
17 decreasing in numbers and/or whose threats to their continued existence are increasing in the
18 wild.”
19

20 22. To ensure that recovery plans provide for the long-term survival and recovery of
21 protected species, recovery plans must include: 1) a description of site-specific management
22 actions necessary to achieve the plan’s goal for the conservation and survival of the species; 2)
23 objective, measurable criteria which, when met, will result in a determination that the species
24 should be removed from the list of species protected by the Act; and 3) an estimate of the time
25 required and the cost necessary to carry out the measures needed to achieve the plan’s goals. 16
26 U.S.C. §1533(f)(1)(B).
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1 23. Before final approval of a new or revised recovery plan, Defendants must provide
2 public notice and an opportunity for public review and comment upon the draft recovery plan.
3 16 U.S.C. §1533(f)(4). In developing the final plan, Defendants must consider all information
4 presented during the public comment period. Id.

5
6 24. The Service performs its duty to “develop” a recovery plan by finalizing and
7 approving the final plan. A recovery plan is considered “approved” only after the Service’s lead
8 Regional Director or Director signs the final recovery plan. Until a final recovery plan is signed
9 by the proper personnel and officially approved, Defendants have not performed their non-
10 discretionary duty to “develop” a recovery plan.

11
12 C. Defendants’ Failures to Perform Their Recovery Planning Duties.

13 25. Defendants have not developed or implemented a final Northern Spotted Owl
14 recovery plan even though Defendants completed a draft recovery plan for the species thirteen
15 years ago, in 1992. Defendants suspended the Northern Spotted Owl recovery plan preparation
16 process sometime in the early 1990s—around the time the Northwest Forest Plan was adopted—
17 and have never finalized or approved a final Northern Spotted Owl recovery plan.

18
19 26. Defendants have not made a finding that a recovery plan will not promote the
20 conservation of the Northern Spotted Owl. On the contrary, the Service’s preparation of a draft
21 recovery plan in the early 1990s illustrates Defendants’ recognition that a recovery plan would
22 promote the conservation of the spotted owl.

23
24 27. Defendants have failed to properly prioritize recovery planning for the Northern
25 Spotted Owl. Instead of completing a recovery plan for the high priority Northern Spotted Owl,
26 the Service completed plans for species with lower priority numbers that were listed after the
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1 Northern Spotted Owl. In 1998 the Service completed a recovery plan for the Point Arena
2 Mountain Beaver, which was listed in 1991 and has a recovery priority number of 9c. In 1999
3 the Service completed the Arroyo Toad recovery plan; the Arroyo Toad was listed in 1994 and
4 has a recovery priority number of 8. In 1997, the Service completed the Marbled Murrelet
5 recovery plan; the Marbled Murrelet has the same recovery priority number as the Northern
6 Spotted Owl and was listed in 1992, two years after the Northern Spotted Owl was listed.
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8 D. Current Status of the Northern Spotted Owl.

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10 28. Since 1992—during the time that Defendants have failed to develop and
11 implement a final spotted owl recovery plan—Northern Spotted Owl populations have declined
12 50-60 percent in some Washington study areas. In Washington, spotted owl populations are
13 declining at rates greater than the worst-case scenario presented in the Environmental Impact
14 Statement for the Northwest Forest Plan. Other indicators of population health such as survival
15 rates and the number of fledged young are also declining.
16

17 29. Two major studies by the State of Washington’s Department of Fish and Wildlife
18 recently confirmed that a very significant amount of suitable Northern Spotted Owl habitat on
19 state and private forestland in Washington has been logged since 1996. In *An Assessment of the*
20 *Status of Spotted Owl Habitat on Non-federal Lands in Washington between 1996 and 2004*
21 (August 8, 2005), Pierce, et al., estimate that between 1996 and 2004 at least 59,000 acres of
22 suitable spotted owl habitat was logged from within areas specifically managed (by Washington
23 State) for Northern Spotted Owl conservation or from areas associated with known Northern
24 Spotted Owl nest sites.
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1 30. Additionally, in their *Final Draft Briefing Report to the Washington State Forest*
2 *Practices Board Regarding Spotted Owl Status and Forest Practices Rules* (January 2005),
3 Buchanan and Swedeen conclude that logging rules in Washington, which are supposed to
4 protect Northern Spotted Owls, are not providing for the viability of spotted owls in Washington
5 State. The availability of suitable habitat on state and private land, particularly land adjacent to
6 federal reserves, is deemed essential to the protection and recovery of the Northern Spotted Owl.
7

8 31. The Washington State Forest Practices Board is reviewing its rulemaking options
9 for the Northern Spotted Owl. Members of the Board and its staff have at times justified inaction
10 by citing the lack of a Northern Spotted Owl recovery plan.
11

12 32. Since 1992—during the time that Defendants have failed to develop and
13 implement a spotted owl recovery plan—the Service issued at least fifteen permits throughout
14 Washington, Oregon, and California allowing the incidental “taking” of Northern Spotted Owls.
15 *See* 16 U.S.C. §§1539(a)(1)(B) & (a)(2). Additionally, the Service is now considering the State
16 of Washington’s Forest Practices Habitat Conservation Plan, approval of which would authorize
17 logging across approximately 9.1 million acres of land, allow the “incidental taking” of ESA-
18 listed aquatic species, and likely impact Northern Spotted Owls.
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21 33. Federal and state actions affecting the Northern Spotted Owl have occurred in an
22 unplanned, uncoordinated fashion in part because of Defendants’ failures to prioritize, develop,
23 and implement a Northern Spotted Owl recovery plan.
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25 34. In late 2004, in response to an industry lawsuit, the Service completed a five-year
26 status review of the Northern Spotted Owl, which concluded:
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1 ...it is our firm and unanimous conclusion that the risks currently faced by
2 Northern Spotted Owls are significant; our qualitative evaluation is that these
3 risks are comparable in magnitude to those faced by the species in 1990. Based
4 on the best scientific information, as shown throughout this report, we believe that
there are significant threats to the species at this time, and that these threats have
the potential to increase.

5 Courtney, et al., *Scientific Evaluation of the Status of the Northern Spotted Owl*, at 11-14
6 (2004).

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8 35. Based on the current threats to the continued survival of the species, particularly
9 timber harvest and other forms of economic activity, Northern Spotted Owls will benefit, and
10 would have benefited, from the development and implementation of a recovery plan.

11 V. CAUSES OF ACTION

12 **First Claim for Relief—Endangered Species Act Claim**

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14 36. Plaintiffs hereby allege and incorporate by reference all of the preceding
15 paragraphs.

16
17 37. Defendant Norton has not complied with her ESA recovery planning duties as
18 they pertain to the Northern Spotted Owl. 16 U.S.C. §1533(f).

19
20 38. Defendant Norton's failures to prioritize, develop, and implement a recovery plan
21 for the Northern Spotted Owl violate the ESA and constitute failures to perform non-
22 discretionary duties imposed by ESA Section 4.

23
24 39. Defendant Norton's failures to perform her ESA recovery planning duties are
25 subject to citizen suit enforcement under ESA Section 11, 16 U.S.C. §§1540(g)(1)(A) & (C).

1 D. Award Plaintiffs their costs of litigation, including reasonable attorneys' and
2 experts' fees, as provided by the ESA, 16 U.S.C. §1540(g)(4), and/or the Equal Access to Justice
3 Act, 28 U.S.C. §2412; and

4 E. Award such other relief as allowed by the ESA, the APA, the EAJA, or as this
5 Court deems just and proper.
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7 DATED this ____ day of November, 2005.
8

9
10 WASHINGTON FOREST LAW CENTER

11 By: _____
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