

NORTHERN SPOTTED OWL V. HODEL
716 F. Supp. 479 (W.D. Wash. 1988)

THOMAS S. ZILLY, UNITED STATES DISTRICT JUDGE

A number of environmental organizations bring this action against the United States Fish & Wildlife Service ("Service") and others, alleging that the Service's decision not to list the northern spotted owl as endangered or threatened under the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq. ("ESA" or "the Act"), was arbitrary and capricious or contrary to law.

Since the 1970s the northern spotted owl has received much scientific attention, beginning with comprehensive studies of its natural history by Dr. Eric Forsman, whose most significant discovery was the close association between spotted owls and old-growth forests. This discovery raised concerns because the majority of remaining old-growth owl habitat is on public land available for harvest.

In January 1987, plaintiff Greenworld, pursuant to Sec. 4(b)(3) of the ESA, 16 U.S.C. § 1533(b)(3), petitioned the Service to list the northern spotted owl as endangered. In August 1987, 29 conservation organizations filed a second petition to list the owl as endangered both in the Olympic Peninsula in Washington and in the Oregon Coast Range, and as threatened throughout the rest of its range.

The ESA directs the Secretary of the Interior to determine whether any species have become endangered or threatened n1 due to habitat destruction, overutilization, disease or predation, or other natural or manmade factors. 16 U.S.C. § 1533(a)(1). n2 The Act was amended in 1982 to ensure that the decision whether to list a species as endangered or threatened was based solely on an evaluation of the biological risks faced by the species, to the exclusion of all other factors. See Conf. Report 97-835, 97th Cong. 2d Sess. (Sept. 17, 1982) at 19, reprinted in 1982 U.S. Code Cong. & Admin. News 2860.

The Service's role in deciding whether to list the northern spotted owl as endangered or threatened is to assess the technical and scientific data in the administrative record against the relevant listing criteria in section 4(a)(1) and then to exercise its own expert discretion in reaching its decision. *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 131 (D.C. Cir. 1979).

In July 1987, the Service announced that it would initiate a status review of the spotted owl and requested public comment. 52 Fed. Reg. 34396 (Sept. 11, 1987). The Service assembled a group of Service biologists, including Dr. Mark Shaffer, its staff expert on population viability, to conduct the review. The Service charged Dr. Shaffer with analyzing current scientific information on the owl. Dr. Shaffer concluded that:

the most reasonable interpretation of current data and knowledge indicate continued old growth harvesting is likely to lead to the extinction of the subspecies in the foreseeable future which argues strongly for listing the subspecies as threatened or endangered at this time.

The Service invited a peer review of Dr. Shaffer's analysis by a number of U.S. experts on population viability, all of whom agreed with Dr. Shaffer's prognosis for the owl, although each had some criticisms of his work.

The Service's decision is contained in its 1987 Status Review of the owl ("Status Review") [Administrative Record at II.C] and summarized in its Finding on Greenworld's petition n4 ("Finding") [Administrative Record at I.D.1]. The Status Review was completed on December 14, 1987, and on December 17 the Service announced that listing the owl as endangered under the Act was not warranted at that time. n5 52 Fed. Reg. 48552, 48554 (Dec. 23, 1987).

This Court reviews the Service's action under the "arbitrary and capricious" standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 980-81 (9th Cir. 1985). This standard is narrow and presumes the agency action is valid, *Ethyl Corp. v. EPA*, 176 U.S. App. D.C. 373, 541 F.2d 1, 34 (D.C. Cir.), cert. denied, 426 U.S. 941, 49 L. Ed. 2d 394, 96 S. Ct. 2662, 96 S. Ct. 2663 (1976), but it does not shield agency action from a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). Courts must not "rubber-stamp the agency decision as correct." *Ethyl Corp. v. EPA*, supra at 34.

Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors. . . ." Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." This is particularly true in highly technical cases. . .

Id. at 34-35 (citations and footnotes omitted). Agency action is arbitrary and capricious where the agency has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (citations omitted).

The Status Review and the Finding to the listing petition offer little insight into how the Service found that the owl currently has a viable population. Although the Status Review cites extensive empirical data and lists various conclusions, it fails to provide any analysis. The Service asserts that it is entitled to make its own decision, yet it provides no explanation for its findings. An agency must set forth clearly the grounds on which it acted. *Atchison T. & S.F. Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807, 37 L. Ed. 2d 350, 93 S. Ct. 2367 (1973). Judicial deference to agency expertise is proper, but the Court will not do so blindly. The Court finds that the Service has not set forth the grounds for its decision against listing the owl.

The Service's documents also lack any expert analysis supporting its conclusion. Rather, the expert opinion is entirely to the contrary. ...

Numerous other experts on population viability contributed to or reviewed drafts of the Status Review, or otherwise assessed spotted owl viability. Some were employed by the Service; others were independent. None concluded that the northern spotted owl is not at risk of extinction. For example, as noted above, Dr. Shaffer evaluated the current data and knowledge and determined that continued logging of old growth likely would lead to the extinction of the owl in the foreseeable

future. This risk, he concluded, argued strongly for immediate listing of the subspecies as threatened or endangered. M. Shaffer, Final Assessment of Population Viability Projections for the Northern Spotted Owl, Memorandum to Jay Gore, U.S. Fish and Wildlife Service, Region 1, Endangered Species (November 11, 1987) [Administrative Record at III.A.1].

The Service invited a peer review of Dr. Shaffer's analysis. Drs. Michael Soule, Bruce Wilcox, and Daniel Goodman, three leading U.S. experts on population viability, reviewed and agreed completely with Dr. Shaffer's prognosis for the owl. ...

The Court will reject conclusory assertions of agency "expertise" where the agency spurns unrebutted expert opinions without itself offering a credible alternative explanation. See, e.g., *American Tunaboat Ass'n v. Baldrige*, 738 F.2d 1013, 1016 (9th Cir. 1984). Here, the Service disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions.

The Service has failed to provide its own or other expert analysis supporting its conclusions. Such analysis is necessary to establish a rational connection between the evidence presented and the Service's decision. Accordingly, the United States Fish and Wildlife Service's decision not to list at this time the northern spotted owl as endangered or threatened under the Endangered Species Act was arbitrary and capricious and contrary to law.

The Court further finds that it is not possible from the record to determine that the Service considered the related issue of whether the northern spotted owl is a threatened species. This failure of the Service to review and make an express finding on the issue of threatened status is also arbitrary and capricious and contrary to law.

In deference to the Service's expertise and its role under the Endangered Species Act, the Court remands this matter to the Service, which has 90 days from the date of this order to provide an analysis for its decision that listing the northern spotted owl as threatened or endangered is not currently warranted. Further, the Service is ordered to supplement its Status Review and petition Finding consistent with this Court's ruling.

IT IS SO ORDERED.

The clerk of this Court is directed to send uncertified copies of this order to all counsel of record.

DATED this 17th day of November, 1988.