

**CITIZEN PETITION SUBMITTED TO THE COMMISSION FOR ENVIRONMENTAL
COOPERATION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT
ON ENVIRONMENTAL COOPERATION**



Photo: W. Scott Young, Macaulay Library, Maryland (January 8, 2017)

Submitted by:

Friends of Animals

Wildlife Law Program

7500 E. Arapahoe Rd. Ste. 385

Centennial, CO 80112

September 24, 2019

TABLE OF CONTENTS

SUMMARY OF THE SUBMISSION	1
STATEMENT OF FACTS AND LAW	2
A. The Northern Spotted Owl.....	2
B. The Barred Owl	2
C. The Barred Owl Removal Experiment.....	3
D. Migratory Bird Treaty Act and Mexico Convention	4
THE UNITED STATES' FAILURE TO ENFORCE THE MBTA	5
A. FWS's Interpretation of the Mexico Convention Exception Is Not in Line with the Purpose of the MBTA or Mexico Convention.....	7
B. FWS Fails to Comply with the Plain Text Meaning and Common-Sense Reading of the Mexico Convention Exception Implemented by the MBTA.....	8
1. Dictionary Definitions of the Mexico Convention Exception Require that the Bird Taken be Used for a Scientific Purpose.	8
2. A Holistic Reading of the Mexico Convention Exception Requires that the Bird Taken Be Used for a Scientific Purpose.....	9
C. FWS's Experiment Results in Dangerous Precedent for Future Species Management and Treaty Interpretation.	10
3. FWS's BORE Sets Precedent that Will Likely Negatively Affect Domestic and International Relations.....	11
4. FWS's BORE Is Not a Feasible Long-Term Solution to NSO Population Recovery.....	11
5. FWS's BORE Sets Precedent that Endangers Countless Animals as Climate Change Shifts Species.....	12
THIS SUBMISSION MERITS THE PREPARATION OF A FULL FACTUAL RECORD.....	13
A. This submission meets the requirements of Article 14.1.	13
1. 14.1(a).....	13
2. 14.1(b).	13
3. 14.1(c).....	13
4. 14.1(d).	13
5. 14.1(e).....	14
6. 14.1(f).....	14

B. The issues raised in this submission merit a response from the government of the United States.....	14
1. 14.2(a).....	14
2. 14.2(b).	14
3. 14.2(c).....	15
4. 14.2(d).	15
CONCLUSION	15

SUMMARY OF THE SUBMISSION

Pursuant to Articles 5(1), 14, and 15 of the North American Agreement on Environmental Cooperation (NAAEC), Friends of Animals (hereinafter, “FoA”) submits the following petition to the Secretariat of the Commission for Environmental Cooperation, presenting evidence that the United States is failing to effectively enforce the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703-712, by allowing the United States Fish and Wildlife Service (FWS) to issue itself scientific collection permits that allow the lethal take of barred owls to study the effects of their absence on the northern spotted owl (hereinafter, “NSO”).¹

The MBTA implements four international conventions, including agreements with Mexico and Canada, aimed at protecting migratory birds. The MBTA enforces these agreements by prohibiting the killing or “take” of protected migratory birds in the United States, unless take is permissible under one of several narrow exceptions listed in the MBTA or related Conventions, and FWS accordingly issues a permit.² The MBTA protects both barred owls and NSOs, with barred owls specifically protected under the Convention between the United States of America and the United Mexican States for the Protection of Migratory Birds and Game Mammals (hereinafter, “Mexico Convention”).³ Under Article II of the Mexico Convention, the only convention that lists barred owls, take is only permissible when the bird taken is itself “used for scientific purposes, for propagation or for museums.”⁴ This exception does not apply to FWS because FWS is not studying or using the barred owls that it takes in order to benefit barred owl as a species. FWS’s issuance of scientific collection permits to study a species other than the one taken is in direct conflict with the MBTA and underlying Mexico Convention. FoA requests that the Secretariat of the Commission for Environmental Cooperation direct the development of a factual record to investigate and document the United States’ failure to comply with the MBTA.

This petition describes the history and current state of the barred owl and NSO, as well as the statutory and regulatory scheme of the MBTA. It outlines the failure of FWS to adhere to the requirements of the MBTA and its underlying Conventions by evading the purpose and common sense meaning of both documents. Finally, it details the implications of upholding FWS’s fatal error in treaty interpretation and species management. A pressing need for action exists because FWS has killed hundreds of barred owls and is targeting even more. Further, FoA has no remaining domestic remedies available.

FoA files this petition under the Citizen Submission on Enforcement Matters process of the NAAEC. When a country that is a party to the North American Trade Agreement fails to enforce one of its own environmental laws, a party may petition the Secretariat to develop a factual record on the matter. Under the MBTA, it is illegal to take, transport, or carry any migratory bird, dead or alive, or any part of a migratory bird, nest or egg, unless permitted by valid regulations.⁵ This petition details the failure of the United States to properly and effectively enforce the MBTA by allowing the lethal take of protected barred owls for scientific research without the actual study or use of the taken specimens or species.

STATEMENT OF FACTS AND LAW

A. The Northern Spotted Owl

The northern spotted owl (hereinafter, “NSO”) has served as a symbol of environmentalism in the Pacific Northwest for decades.⁶ NSOs require old growth forest habitat to thrive and due to this specificity, have been an ongoing point of contention between conservationists and the logging industry.⁷ These icons are medium-sized owls with chestnut brown coloring, white spots on the head and neck, and white mottling along the body.⁸ NSOs inhabit a range from southwestern British Columbia through western Washington, western Oregon, and coastal northwestern California, south to San Francisco Bay. Most of the current NSO population is concentrated in the Cascades of Oregon and the Klamath Mountains in southwestern Oregon and northwestern California.⁹ NSOs have adapted to fill a niche in old-growth and mature forest, thriving in multi-layered habitat and on food sources specific to these types of forests.¹⁰ Typically, a forest does not gain old-growth characteristics until it is at least 150-200 years old, making these habitats crucial to protect and very difficult to replace.¹¹

Logging companies’ economic interest in old-growth forests has historically been, and still is, NSOs’ greatest threat to survival. Timber harvesting and land conversions have caused huge losses in NSOs’ original habitat.¹² Specifically, habitat loss, fragmentation due to clear cutting, and poor forest management threatens the NSO.¹³ In addition, climate change, urban and suburban expansion, and agricultural development constitute growing threats.¹⁴ FWS estimates that sixty percent of NSO old-growth habitat has been extinguished over the past two centuries.¹⁵ Further, FWS predicts that unprotected old-growth habitat will disappear in ten to thirty years if current trends continue.¹⁶ The rapid disappearance of habitat is due, in large part, to economic and political influence, which has consistently delayed or derailed conservation efforts.¹⁷

Due to the mounting pressures and resulting decline in population, FWS listed the NSO as threatened under the Endangered Species Act in 1990. NSOs were listed as threatened “due to loss and adverse modification of spotted owl habitat as a result of timber harvesting.”¹⁸ Specific threats in 1990 included, limited and declining habitat, lack of coordinated conservation efforts, inadequacy of regulatory mechanisms, and vulnerability to natural disturbances.¹⁹ When FWS listed the NSO, barred owls were not a recognized threat to NSOs.²⁰ Since NSOs’ listing, FWS has attempted to preserve old growth habitats, but many attempts have been thwarted by economic interest or political interference, undermining NSOs’ threatened status and leading to further declines in population.²¹ FWS’s attempts at habitat conservation have been insufficient because NSO populations continue to decline across the Pacific Northwest.²²

B. The Barred Owl

Barred owls are protected under the Mexico Convention and are therefore protected by the MBTA.²³ Like NSOs, barred owls are native to North America.²⁴ The two species are

closely related—so much that in rare cases the two will mate.²⁵ Historically, barred owls resided only in eastern North America, but their range has expanded over the past century to overlap with the majority of NSO's traditional territory.²⁶ Barred owls likely migrated due to human-made changes in landscape.²⁷ The arrival of Europeans in North America several hundred years ago brought an end to Native American burning practices that historically kept vast swaths of central America free of trees and further paved the way for new cities to flourish. This allowed trees to grow where historically absent, essentially creating bridges of habitable space for forest-dwelling animals that, over time, allowed for westward migration.²⁸ Barred owls were observed living in close proximity to NSOs as early as 1959 in western Canada and in 1973 in Washington.²⁹ Since these early sightings, barred owl numbers have increased steadily and now outnumber NSOs in portions of their range.³⁰

FWS believes that barred owls' relatively new inhabitation of the Pacific Northwest hinders the survival of NSOs.³¹ This is plausible, as the two owl species are very similar, and therefore compete for habitat, roosting sites, and food in regions of overlap.³² For example, in the Western Cascades, the diets of both species can overlap by as much as seventy-six percent.³³ Additionally, barred owls' slightly larger size, more aggressive nature, and varied diet make them less susceptible to changes in their environment, which could create an advantage over highly-specialized NSOs.³⁴ However, any perceived competitive advantage of the barred owl is largely due to NSOs' static dependence on old-growth forests.³⁵ NSOs are particularly vulnerable to habitat destruction because they are old-growth forest mavens.³⁶ The future of NSOs is directly tied to the protection of old-growth forest, as NSOs have evolved to thrive in very specific habitats. The presence of barred owls in habitat historically dominated by NSOs only intensifies the need for immediate increase in old-growth forest preservation to provide adequate resources to accommodate both species.³⁷

C. The Barred Owl Removal Experiment

The idea to lethally remove barred owls to lessen competition is a fairly new phenomenon in the ongoing effort to protect NSOs. In 2007, FWS issued a draft recovery plan for the NSO, which it finalized in 2008. In these recovery plans, FWS included, for the first time, a statement suggesting that barred owls created a significantly greater threat to NSO recovery than FWS initially envisioned when it listed the NSO as threatened in 1990.³⁸ Several years later, FWS released a Draft Revised Recovery Plan aimed at protecting and increasing NSO populations (hereinafter, "2011 Recovery Plan"),³⁹ which continued to identify barred owls as threats to NSOs along with habitat destruction and fragmentation.⁴⁰

The 2011 Recovery Plan included four steps: 1) to complete a habitat modeling tool; 2) to conserve habitat and restore forests; 3) to manage barred owls; and 4) to research and monitor.⁴¹ Of the thirty-three action items listed in the 2011 Recovery Plan, less than ten focused solely on habitat recovery or conservation, despite overwhelming evidence that habitat loss is the NSOs greatest threat.⁴² In contrast, a full ten action items were aimed at

the management of the perceived barred owl threat.⁴³ Recovery Action 29 directed FWS to: “[d]esign and implement large-scale control experiments to assess the effects of barred owl removal on spotted owl site occupancy, reproduction, and survival.”⁴⁴ In response to this action item, FWS initiated the “barred owl removal experiment” (hereinafter, “BORE”).⁴⁵

FWS approved the BORE on September 17, 2013.⁴⁶ In doing this, FWS authorized the experimental removal, through primarily lethal means, of approximately 3,603 barred owls over four years in three states—California, Oregon, and Washington.⁴⁷ Under the BORE, to lethally remove a barred owl, researchers employ a recorded owl call.⁴⁸ As the owl responds to the call and approaches the researcher, the barred owls are shot and killed.⁴⁹ FWS requires only a “reasonable” effort to retrieve the barred owl carcasses.⁵⁰ Under the BORE, the vast majority of removal is achieved through lethal means. Non-lethal removal can only occur where an identified, interested organization exists with adequate resources to provide a high quality of life for the captured owl.⁵¹ Under the non-lethal removal method, researchers attract the owl with a recorded call and decoy, capture it in a mist net, and transport the barred owl outside of the study area.⁵² Then, the researchers move the barred owl to a holding facility, examine and stabilize it, and later transport the owl to a permanent facility.⁵³ Because there are very few openings in facilities with the capabilities to care for a barred owl long term, the vast majority of removal by FWS is lethal.⁵⁴

FWS granted itself legal authority to carry out the BORE based on its ability to “issue a scientific collecting permit” pursuant to the MBTA regulations.⁵⁵ FWS issued itself permits for the lethal and non-lethal take as required under the Migratory Bird Treaty Act.⁵⁶ After FoA filed suit challenging the BORE in 2014, FWS issued itself a modified permit for the take of 1,600 barred owls.⁵⁷ Along with the modified permit, FWS included an additional memorandum certifying that “[t]he take of Barred Owls requested in this application is for bona fide scientific research” that “advances the scientific understanding of both species” of owls.⁵⁸ FWS’s memorandum may have been its attempt to qualify the BORE within the exemptions of the MBTA or Mexico Convention, but the memorandum does not offer any analysis and fails to justify how FWS’s BORE falls within an exception.

D. Migratory Bird Treaty Act and Mexico Convention

Congress passed the MBTA in 1918 to implement the United States’ commitment to four bilateral international conventions that focus on the protection of migratory birds, including agreements with Great Britain (for Canada), Mexico, Japan, and Russia.⁵⁹ Notably, in 1936, the United States signed a convention with Mexico to prevent the extinction of migratory bird species.⁶⁰ The MBTA aims to recognize the ecological and economic value of all migratory bird species, not only those that are endangered. Since its inception, the United States has repeatedly recognized the importance of passing and enforcing the MBTA. The United States Supreme Court highlighted the gravity of the MBTA’s provisions in stating, “[b]ut for the treaty and the statute there soon might be no birds for any power to deal with.”⁶¹ Viewed together, the MBTA and underlying Conventions constitute “conservation measures of prime importance.”⁶²

Under the MBTA, “it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill . . . any migratory bird . . . included in the terms of the conventions,” unless FWS issues a valid permit, as FWS is responsible for administering and enforcing the MBTA.⁶³ The regulations authorize FWS to issue scientific collection permits.⁶⁴ Each of the four underlying conventions has its own explicit limitations regarding when it is acceptable for FWS to issue take permits.

The Mexico Convention is the only convention that includes barred owls on its list of protected species, making it the controlling Convention in regard to the implementation of the BORE.⁶⁵ Article I of the Mexico Convention states that the Convention’s intent is to prevent the extermination of listed migratory species, and, where applicable, provide means for sustainably managing these protected species for “sport, food, commerce and industry.”⁶⁶ Article II of the Mexico Convention establishes substantive protections for listed birds while outlining specific, narrow exemptions from its general prohibition on take. In relevant part, Article II reads:

The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in [Article I], including: A) The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds . . . except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.⁶⁷

The MBTA allows the Secretary of the Interior to determine when take is tolerable, “subject to the provisions and in order to carry out the purposes of the conventions.”⁶⁸ The regulations then require a “special purpose” permit for take of MBTA-protected species.⁶⁹ Because barred owls are listed under the Mexico Convention, the determination and permitting depends on the provisions provided therein. The Mexico Convention allows take when the bird is “used for scientific purposes, for propagation or for museums.”⁷⁰ Although the Mexico Convention and MBTA do not provide a definition for this exemption phrase, the language and context of the MBTA and Mexico Convention clearly require that when a protected migratory bird is properly taken under the Mexico Convention exemption, the taken specimen must itself be used for the exempted purpose, regardless of whether the intended purpose is scientific, for propagation, or for museums.

THE UNITED STATES’ FAILURE TO ENFORCE THE MBTA

The United States is violating and failing to effectively enforce the MBTA and its underlying international Conventions by allowing FWS to issue itself scientific collecting permits that authorize the lethal and non-lethal take of up to 1,600 protected barred owls over a four-year period to assess the effects of barred owl removal on NSO occupancy, reproductive, and/or survival where such take will yield no conservation benefit to, or scientific understanding of, barred owls as a species or population. The MBTA creates a moratorium on the take of protected migratory birds with several narrow exemptions, none of which allow for FWS’s scientific take permits. Therefore, FWS’s issuance of these

permits is illegal. The United States' continued tolerance of FWS's issuance of the scientific take permits fails to effectively enforce the MBTA because the purpose of the MBTA is to conserve and protect migratory bird species. The United States' failure to properly enforce the MBTA is ongoing, as FWS continues to kill protected barred owls in a lasting attempt to study the effects of their removal on local populations of NSOs. FWS even confirms that they "are currently conducting an experimental removal of barred owls from spotted owl habitat to assess the effect on spotted owls."⁷¹

Under the MBTA, it is illegal to take, transport, or carry any migratory bird, dead or alive, or any part of a migratory bird, nest or egg, unless permitted by valid regulation.⁷² A permit to take a protected migratory bird may be issued by FWS in accordance with the MBTA.⁷³ The MBTA requires the United States to uphold the Mexico Convention, under which barred owls are listed as protected. In the Mexico Convention's exemption to a general prohibition on take, it specifically states that a taken bird must be used for a scientific purpose, propagation, or for museums.⁷⁴ FWS's BORE does not require that the taken barred owls be used or studied in any capacity. Allowing FWS to read the Mexico Convention exemption to permit virtually unlimited take for any scientific purpose at all is a clear violation of the Mexico Convention's requirement to use the taken bird for a scientific purpose and thus, a failure to effectively enforce the MBTA. As interpreted, there is no articulated or logical limit on scientific take or the species that may be benefited by experimentation. Take of protected migratory birds could foreseeably be allowed to study human economic gain, defeating the purpose of the MBTA and its underlying Conventions.

The MBTA is an environmental law under the definition set forth by the NAAEC because its' express purpose is to protect wild fauna, specifically migratory birds.⁷⁵ The Mexico Convention is also an environmental law under the NAAEC for the same reason.⁷⁶ Moreover, the parties to the NAAEC have already granted the creation of a factual record in response to a prior submission that evidenced the United States' noncompliance with the MBTA, further establishing that the MBTA is an environmental law under the definition provided in Article 45.⁷⁷

Under Article 45(1) of the NAAEC, the United States has violated and failed to effectively enforce the MBTA. Article 45 states:

A party has not failed to "**effectively enforce its environmental law**" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party: 1. reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or 2. results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.⁷⁸

Here, FWS's decision to issue itself scientific take permits under the MBTA was in no way a "reasonable" exercise of discretion. FWS's permit issuance went against public outcry in its notice-and-comment portion of decision⁷⁹ and was an abuse of power that

neglected the intent of the MBTA and resulted in dangerous precedent for both international treaty interpretation and species management. FWS offered no analysis of the legality of its self-issued scientific permit. FWS only offered an explanation after litigation had commenced and that explanation still failed to offer any form of analysis. This lack of explanation is an abrupt turn from FWS's requirement of "a sufficient showing of benefit to the migratory bird resource, important research reasons, reasons of human concern for individual birds, or other compelling justifications."⁸⁰ Further, although FWS has deemed the NSO to be of higher importance, both species are protected equally under the MBTA and Mexico Convention. The decision to prioritize NSOs over barred owls was not "*bona fide*," as FWS never acknowledged the protected status of the barred owl and offered no analysis as to how the BORE fit within the exceptions to that protection.

A. FWS's Interpretation of the Mexico Convention Exception Is Not in Line with the Purpose of the MBTA or Mexico Convention.

The MBTA and Mexico Convention have comparable structures, each beginning with a general prohibition on take and later outlining specific exceptions to the stated prohibition.⁸¹ The main purpose of each is the conservation of migratory bird species, with specific circumstances in which take is allowed under each document. Article I of the Mexico Convention confirms the purpose of the document by stating, "[i]n order that the species may not be exterminated, the high contracting parties declare that it is right and proper to protect the said migratory birds, whatever may be their origin."⁸² Allowing the take of protected migratory birds under the guise of a scientific experiment that will neither further the knowledge of the species taken nor use the birds themselves for scientific study is clearly not in accordance with the principles or intent of the Mexico Convention when read and understood holistically. Following the conservation-themed language in Article I of the Mexico Convention, Article II outlines circumstances in which take of protected migratory birds are tolerable in stating:

The contracting parties agree to establish laws, regulation and provisions to satisfy the need set forth in the preceding Article [I], including: A) the establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums."⁸³

A broad interpretation of this clause, like FWS's experiment to study a species other than the one taken, vastly diminishes established protections and is contrary to the goal of Article I, which calls for conservation of migratory species for "the utilization of said birds rationally for purposes of sport, food, commerce, and industry."⁸⁴ To comply with Article I, the bird must itself be used for the exempted purpose or further the conservation efforts of the specimen or species. This reading is supported by the plain text of the MBTA and Mexico Convention in multiple ways discussed below.

In examining statutory interpretation norms of other member countries of the NAAEC, the context of the Mexico Convention exception is critical in modern Canadian statutory interpretation. Driedger's Modern Principle, the leading strategy used in Canadian statutory interpretation, reads: "the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."⁸⁵ This method confirms the importance of considering the context and intent of the statute as a whole, which FWS failed to do. In looking to Mexico, because the country follows the civil law tradition, there is no true equivalent form of interpretation. However, most Mexican jurisprudence is based on a direct understanding of the United States system, and it can be inferred that Mexico would follow similar interpretation methods as the United States and Canada.⁸⁶ Mexico has also relied on foreign precedent in their decision making, making it even more important that the United States' failure to effectively enforce the MBTA be recognized.⁸⁷

B. FWS Fails to Comply with the Plain Text Meaning and Common-Sense Reading of the Mexico Convention Exception Implemented by the MBTA.

1. Dictionary Definitions of the Mexico Convention Exception Require that the Bird Taken be Used for a Scientific Purpose.

"When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."⁸⁸ At issue is the phrase "used for scientific purposes," from the Mexico Convention exception.⁸⁹ A series of United States case law details how to determine the natural meaning of statutory language. To start, one should look to any given definitions. If Congress has provided a definition, that definition should rule.⁹⁰ However, if there is no provided definition, as in this case, the ordinary usage of terms should rule.⁹¹ Without guidance from Congress, the ordinary usage of terms is typically the dictionary definition of a word.⁹² In challenging a dictionary definition, a dictionary from the era the statute was passed should be used.⁹³ However, idiosyncratic definitions should not be considered.⁹⁴ As noted above, Canadian law follows a similar ordinary sense interpretation method.⁹⁵ Here, the lack of express definition in the MBTA or Mexico Convention confines the language used in the Mexico Convention exception to its dictionary definition from the era Congress passed the MBTA.

The Mexico Convention exception prohibits take, "except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums."⁹⁶ The Senate Resolution for a Migratory Bird Treaty was proposed in 1913 and Congress passed the MBTA in 1918.⁹⁷ In 1913, the same era that Congress passed the MBTA, Webster's Dictionary defined "use" as: "[t]o make use of; to convert to one's service; to avail one's self of; to employ; to put a purpose; as, to use a plow; to use a chair; to use time; to use flour for food; to use water for irrigation."⁹⁸ This definition suggests that to "use" something means to put a particular thing to use for a particular purpose.

The definition of “use” in context of the Mexico Convention exception requires that FWS use the bird that it takes for the exempted purposes. FWS has failed to meet this requirement because FWS does not use slain barred owls for any particular purpose; FWS’s only purpose for killing barred owls is to study their absence on the NSO. FWS’s interpretation of the word “use” in this context warps its ordinary meaning. The drafters of the Mexico Convention specifically chose the word “use” in the exemption clause rather than a word such as “take,” which may have allowed FWS’s experiment. This is evidenced by the prior use of the word “take” in the Mexico Convention, making it clear that the drafters did not just overlook the availability of different words, but specifically chose to input the word “use” in the exception clause.⁹⁹ FWS’s failure to adhere to the independent and narrow meaning of the word “use” additionally violates canons of statutory interpretation that mandate interpreting traditional statutory exemptions narrowly.¹⁰⁰

Additionally, FWS failed to adequately define “scientific purposes.” In previous litigation, FWS pointed to 50 C.F.R. § 21.23 to provide a definition for the phrase, however the regulations do not contain any remote definition as to what a scientific purpose is under the MBTA or Mexico Convention in order to resolve the ambiguity.¹⁰¹ Rather, the regulations contains only procedural information regarding the issuance of a scientific collecting permit.¹⁰² Because FWS does not identify any established definition, there is no meaning to be deferred to and the same analysis of the ordinary usage and dictionary definition of the phrase should be followed.

In 1913, Webster’s Dictionary defined “scientific” as, “[o]f or pertaining to science; used in science; as, *scientific* principles; *scientific* apparatus; *scientific* observations.”¹⁰³ Further, in 1913, Webster’s Dictionary defined “science” as, “[k]nowledge; knowledge of principles and causes; ascertained truth of facts.”¹⁰⁴ “Purpose” is defined as, “[t]hat which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure, or exertion; view; aim; design; intention; plan.”¹⁰⁵ These definitions, in conjunction with the definition of “use” above, indicate that the aim of the knowledge gathered should be on the specimen being used or taken, in this case, the barred owl. Little ambiguity exists in these definitions, and therefore, FWS’s experiment clearly does not comply with the language of the Mexico Convention.

2. A Holistic Reading of the Mexico Convention Exception Requires that the Bird Taken Be Used for a Scientific Purpose.

In examining word choice and definition, word placement should also be considered. *Noscitur a sociis*, the common-sense canon, provides that a word is given more precise content by the words that it is associated with.¹⁰⁶ This canon, again, mirrors principles used in Canadian statutory interpretation.¹⁰⁷ Under this canon, the Mexico Convention scientific exception should be read in conjunction with the other listed exempted actions. In relevant part, the exception in Article II of the Mexico Convention reads, “when used for scientific purpose, for propagation or for museums.”¹⁰⁸ Read together, each of the three listed exceptions allow FWS to take the bird only to use for the listed exempted purposes. The

exempted actions immediately following the scientific exception, for propagation or for museums, indicate that the specimen taken is to be used directly for either propagation or in a museum. In context, the three exceptions dictate the requirement that use of the specimen taken must go directly toward the exempted use. FWS fails to meet this requirement because the barred owls taken are not themselves studied or used in any capacity and cannot themselves be said to be used for a scientific purpose.

The phrase “when used for scientific purposes” is not freestanding and does not stand in isolation from the two other listed exemptions. Rather, “a word is given more precise content by the neighboring words with which it is associated.”¹⁰⁹ The two exemptions, propagation and museum use, cannot be performed without the specimen taken being used for that particular purpose. There is no possible way to “use” an animal for propagation if that animal is absent or has been killed. Similarly, a bird cannot be “used” in a museum without the specimen taken being physically inside said museum. There is nothing that makes the “scientific purpose” exemption distinct from the other listed exemptions, as use for propagation and museums is no more similar than would be use for scientific purposes and propagation.

Further, the *noscitur a sociis* canon urges that “when a statute contains a list, each word in that list presumptively has a ‘similar’ meaning.”¹¹⁰ If the scientific purpose portion of the exemption clause is read with the other two exemptions, the specimen taken must be used for scientific purposes. The similar meaning here is not the actions exempted, as they are all equally distinct, but the way in which the exempted actions are carried out. The proper reading requires use of the taken bird for the exempted purpose. It is possible that the absence of a specimen may further scientific knowledge; however, this unchecked experimentation could quickly result in the extinction of migratory species, which is the exact opposite of the intent of the MBTA. Therefore, the correct reading that acknowledges the intent of the MBTA and traditional statutory interpretation cannon *noscitur a sociis* is that the specimen taken must itself be used for any of the listed exemptions.

C. FWS’s Experiment Results in Dangerous Precedent for Future Species Management and Treaty Interpretation.

FWS’s sweeping interpretation of the Mexico Convention exception will set precedent not only for how the MBTA is interpreted, but it may also influence the interpretation of other international treaties. Further, the use of the Mexico Convention exemption for such a broad scientific experiment is not only out of accordance with the MBTA and its Conventions, but the experiment itself is not a viable solution to the problem FWS is attempting to solve. FWS’s short sightedness in its experiment could cost thousands of animals their lives as climate change continues to press species from their natural range.

3. FWS's BORE Sets Precedent that Will Likely Negatively Affect Domestic and International Relations.

FWS's interpretation of the Mexico Convention exemption has hindered the public's trust in the United States government to protect land and animals. In the notice-and-comment phase of FWS's BORE decision, the public flooded FWS with negative responses to its proposal to shoot and kill hundreds to thousands of barred owls.¹¹¹ FWS carried out with the BORE, despite pleas from the public to pursue a "no action" alternative.¹¹² Further, FWS's BORE is contrary to the agency's purpose. FWS states, "[o]ur mission is to [w]ork with others to conserve, protect and enhance fish, wildlife and plants and their habitats for the continuing benefit of the American people."¹¹³ The contrast between FWS's actions and FWS's purpose erodes wavering public trust, providing no sense of continuity for the American public.

As it stands, FWS's interpretation applies only to the MBTA and Mexico Convention. However, the precedent of allowing any kind of scientific experiment, could easily carry to the three other Conventions incorporated by the MBTA. If the United States continues to interpret international treaties in a way that ignores the intent of Congress and other countries involved and allows the contortion of language to reach any sought-after result, it could dangerously strain international relations and cooperation.

For example, FWS's illegal issuance of a scientific permit mirrors Japan's "scientific" whaling efforts. In 1982, the International Whaling Commission imposed a moratorium on commercial whaling with a built in "scientific" exception, very much like the MBTA moratorium on migratory bird take with the exception of several narrow purposes, among them scientific purposes.¹¹⁴ In 2014, the International Council of Justice ruled that Japan's "scientific" whaling program in the Antarctic violated international law.¹¹⁵ Japan's whaling practices have caused immense strife in the international community and have been exposed as illegal on a global stage. Here, FWS is not in compliance with the MBTA, which implements a international treaty. If the United States continues to allow activity that frustrates the purpose of the MBTA and is not in accordance with the plain meaning and holistic reading of the MBTA, it could cause ongoing discord in the international community. Therefore, FoA requests that the NAAEC Secretariat assist in addressing this issue that affects not only the United States, but all countries with which the United States has formed treaties.

4. FWS's BORE Is Not a Feasible Long-Term Solution to NSO Population Recovery.

Even if FWS's BORE adhered to the requirements of the MBTA, it is not a viable solution to the long-term problem of dwindling NSO populations. Biologists actively involved in the removal of barred owls understand that the BORE only exists as an experiment, not as practical long-term NSO recovery option. Eric Forsman, a now-retired Forest Service spotted owl biologist admits, "[w]e would have to do it forever and on fairly large areas to actually have an effect. . . [a]nd that's just not going to happen."¹¹⁶ BORE co-leader, Robin

Bown, continues, “[i]n the end, we may choose not to do anything. But this way, we’ll know how effective removal is. And how costly.”¹¹⁷ Even if FWS found that lethal removal of barred owls does in fact bolster NSO survival, there is no room under the MBTA for the continued shooting of untold numbers of owls as a management plan.¹¹⁸ Here, FWS contends that they fall within the scientific exceptions of the Mexico Convention; however, there is no similar exception for a management plan in either the MBTA or the Mexico Convention. The continuation of this sort of massacre would, in effect, rewrite the MBTA.

Even amid lethal experimentation, United States government agencies acknowledge the most crucial factor for NSO survival: habitat conservation. USGS biologist Katie Dugger, a leader in the federal plan to remove barred owls, admonishes, “[s]potted owls cannot exist without old-growth forest. And now we’re talking about two species trying to use the same space, so in fact we need more of it.”¹¹⁹ Fellow USGS biologist, David Wiens, leader of a team that has killed approximately 1,700 owls, confirms, “[t]he long-term issue continues to be habitat loss. The more loss there is, the greater the competitive pressure becomes.”¹²⁰ Rather than focusing on the far more pressing danger of habitat loss, FWS is wasting precious time and resources fighting a perceived threat that has already become a well-established presence in Pacific Northwest forests.

5. FWS’s BORE Sets Precedent that Endangers Countless Animals as Climate Change Shifts Species.

FWS’s management decision could have an enormous negative impact on the future of species management as a whole, especially in the wake of climate change. FWS and other groups can currently point to the BORE and its supposed legality as evidence that the killing of one protected species can and/or should be undertaken to benefit another. Scientists agree that climate change is altering habitat and will continue to do so, leading to increased vulnerability of native species.¹²¹ The habitat ranges of many North American species are moving northward in latitude and upward in elevation.¹²² Thus, it can be expected that competition amongst native and newcomer species will only rise, increasing conflicts between native species and those who have been pushed from their native range.¹²³

Shifts in habitat increases competition between native flora and fauna. Already, climate change has moved the ranges of many species, resulting in different timing of migratory movements and transforming inter-species interactions, as exhibited by the relatively new interactions between the barred owl and NSO.¹²⁴ A study of over 1,700 species of plants and animals showed that since 1950, species have moved on average either 3.8 miles towards the poles or 20 feet upwards in elevation to escape rising temperatures.¹²⁵ New estimates reveal that shifts may be happening three times faster than initially projected.¹²⁶ If FWS’s precedent is the preferred means of species management, vast amounts of time, money, and resources will have to be dedicated to the attempted eradication of moving species.

Birds are especially susceptible to changes in environment. A study of 99 bird species in the Sierra Nevada Mountain range showed that rising temperatures push some birds higher in elevation while increased precipitation shifts some birds lower, showing the varied effects of climate change on habitation and species interactions.¹²⁷ Another study found that, out of 588 North American bird species evaluated, 314 of those species will lose more than fifty percent of their current range by 2080.¹²⁸

Although barred owls' range did not likely expand as a product of climate change, it did likely move due to human activity. Human-induced non-climate impacts such as hunting, habitat destruction, and the introduction of invasive species created dramatic changes in available habitat.¹²⁹ FWS's experiment has the potential to become the norm for non-native species, no matter how they arrived in their new homes, in an area of law that is not entirely defined. FWS is penalizing the barred owls for their adaptability, which is a dangerous precedent that could affect many other species if FWS's method becomes the norm.

THIS SUBMISSION MERITS THE PREPARATION OF A FULL FACTUAL RECORD

A. This submission meets the requirements of Article 14.1.

Under Article 14 of the NAAEC, "the Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law." FoA meets all submission requirements.

1. 14.1(a).

This submission is written in English, a language permitted by the NAAEC.

2. 14.1(b).

This submission clearly identifies Friends of Animals as the petitioner. FoA meets the definition of a "non-governmental organization" in Article 45 of the NAAEC because FoA is a non-profit international advocacy organization with nearly 200,000 members.

3. 14.1(c).

FoA believes that this submission and the attached appendix provide sufficient information to allow the Secretariat to determine whether a factual record should be developed. Evidence to support FoA's allegations is drawn primarily from government records, published scientific studies, and United States court precedent. If the Secretariat would like additional information, FoA can provide further information upon request.

4. 14.1(d).

The goal of this submission is to promote the enforcement and proper interpretation of the MBTA. This submission does not intend to harass industry, it only intends to uphold international treaty vital to the survival and longevity of migratory bird species.

5. 14.1(e).

FoA has communicated this matter in writing to the relevant authorities of the United States. FoA has filed various legal actions regarding the agencies failure to enforce environmental laws when issuing the permit. FoA brought litigation challenging FWS's issuance of the permits in the Eastern District of California, the District of Oregon, the Ninth Circuit, and petitioned the Supreme Court.¹³⁰ Through this extensive litigation, FoA has communicated its' concerns to FWS by explaining how FWS is failing to effectively enforce the MBTA by allowing the issuance of scientific take permits of a MBTA-protected species, without studying or using the birds taken. In addition, on September 12, 2019, FoA notified FWS via email that it intends to submit this petition and FoA attached a copy of the petition to the email.¹³¹ FWS did not respond.

6. 14.1(f).

FoA, is an organization residing in the territory of a Party. FoA is a United States non-profit advocacy organization incorporated in the state of New York since 1957 and has offices in Connecticut and Colorado. FoA's Wildlife Law Program, which is filing this petition, was established in 2013. The Wildlife Law Program is located at 7500 E. Arapahoe Road, Suite 385, Centennial, Colorado.

B. The issues raised in this submission merit a response from the government of the United States.

1. 14.2(a).

FoA and its members are suffering harm from the United States' failure to enforce the MBTA by allowing FWS to issue scientific take permits that authorize killing barred owls. FoA is a United States non-profit international advocacy organization whose mission is to ensure the right of all wildlife to live in an ecosystem free from human manipulation, exploitation, or abuse. FoA has approximately 200,000 members residing in the United States and Canada.

FoA has a long-standing interest in barred owl protection. FoA seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Further, FoA members have spiritual, educational, and recreational interests in the barred owl. FoA's members regularly visit the sites where barred owl management is taking place. FoA's members are disturbed by the governments' actions and thus not able to fully enjoy outdoor experiences.

2. 14.2(b).

Investigating the United States' failure to effectively and properly enforce the MBTA and its Conventions would advance the goals of the NAAEC. For example, further investigation would increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna because the MBTA enforces

international treaties with both Mexico and Canada and specifically seeks to protect migratory birds. Investigating the United States' failure to properly enforce the MBTA would also advance the NAAEC's goals by strengthening cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices because honoring international treaties will promote trust and lead to improved working relationships. In addition, investigation will enhance compliance with, and enforcement of, environmental laws and regulations because the United States is currently failing to comply with and enforce the MBTA and its' underlying Conventions. Further, investigation will promote transparency and public participation in the development of environmental laws, regulations, and policies because proper enforcement would honor the citizens' opinions who spoke against this plan in the notice-and-comment portion of the proposal.¹³² Finally, investigation would also advance the goals of the NAAEC by promoting economically efficient and effective environmental measures because the BORE is not a feasible ongoing management plan.

3. 14.2(c).

FoA has taken extensive actions to pursue remedies with respect to the United States' failure to enforce the MBTA regarding the barred owl. FoA has filed litigation in the District Court of California, the District Court of Oregon, the Ninth Circuit, and petitioned the Supreme Court. On June 8, 2018, the United States Supreme Court denied hearing FoA's appeal, terminating FoA's extended litigation process.¹³³ FoA has completely exhausted all available private, domestic remedies. Further, private tort actions are unavailable under the MBTA, criminal enforcement by FWS is unavailable, and judicial review of FWS's decision proved unsuccessful to provide remedy.¹³⁴ The MBTA is a criminal statute and citizens do not have authority to bring private criminal enforcement actions. Only FWS has the authority to enforce the MBTA against private individuals on non-private lands. Thus, FoA has pursued and exhausted all available remedies.

4. 14.2(d).

Evidence to support this submission is drawn primarily from government records, published scientific studies, and United States court precedent, with additional insight from United States' government employees. If the Secretariat would like additional information, FoA can provide further information upon request.

CONCLUSION

The United States is failing to properly and effectively enforce the MBTA by allowing the issuance of an illegal scientific take permit that allows for the slaughter of hundreds to thousands of protected migratory owls. For all of the reasons set forth above, FoA respectfully requests that the Secretariat finds that this submission satisfies the requirements of Article 14 of the NAAEC and that this submission warrants developing a factual record under Article 15.

Appendix A: Endnotes

¹ 16 U.S.C §§ 703-712.

² *Id.*

³ Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, U.S.-Mex., Feb. 7, 1936, 50 Stat. 1311 [hereinafter *Mexico Convention*].

⁴ Mexico Convention, art II.

⁵ 16 U.S.C. § 703.

⁶ National Geographic, *Northern Spotted Owl*, (Feb. 24, 2012), <https://www.nationalgeographic.org/media/northern-spotted-owl/> (last visited June 20, 2019); Susan Schalbe, *Spotted Owl Overview*, CORNELL LAB OF ORNITHOLOGY: ALL ABOUT BIRDS MAG. (2017), https://www.allaboutbirds.org/guide/Spotted_Owl/overview.

⁷ Kenn Kaufman, *Spotted Owl*, NATIONAL AUDUBON SOCIETY: GUIDE TO NORTH AMERICAN BIRDS, <https://www.audubon.org/field-guide/bird/spotted-owl>.

⁸ Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, 26,114 (June 26, 1990).

⁹ *Id.* at 26115.

¹⁰ *Id.* at 26139.

¹¹ Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, *Conservation Strategy for the Northern Spotted Owl*, 19 (May 1990), https://www.fws.gov/arcata/es/birds/NSO/documents/ConservationStrategyForTheNorthernSpottedOw_May1990.pdf.

¹² *Id.*; see App. C.

¹³ S. P. Courtney et al., *5-Year Status Review 2004: Scientific evaluation of the status of the Northern Spotted Owl*, SUSTAINABLE ECOSYSTEMS INSTITUTE, 6-4 (Sept. 2004), <https://www.fws.gov/wafwo/species/Fact%20sheets/NSO%20SEI%20Scientific%20Status%20Review%202004.pdf>.

¹⁴ U.S. Fish and Wildlife Service, *Comments received by the US Fish and Wildlife Service on Draft Environmental Impact Statement on the Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls* (June 20, 2012), <https://www.fws.gov/oregonfwo/species/data/northernspottedowl/BarredOwl/Documents/DEIS%20Comments.pdf>.

¹⁵ Oregon Fish and Wildlife Office, *Northern Spotted Owl*, <https://www.fws.gov/oregonfwo/articles.cfm?id=149489595> (last visited June 20, 2019).

¹⁶ *Id.*

¹⁷ See *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 134 (D.D.C. 2010); Presidential Memorandum of February 28, 2012, Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens Memorandum for the Secretary of the Interior, 77 Fed. Reg. 12,985 (March 5, 2012).

¹⁸ U.S. Fish and Wildlife Service, *5-Year Review Short Form Summary, Northern Spotted Owl* (2011), https://www.fws.gov/oregonfwo/species/data/northernspottedowl/Documents/2011_5yrReview.pdf (citing Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114, (June 26, 1990)).

¹⁹ *Id.*

²⁰ Katie M. Dugger, et al., *Transient dynamics of invasive competition: Barred Owls, Spotted Owls, habitat, and the demons of competition present*, 7 ECOLOGICAL APPL. 2459, 2459 (2011); Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114.

²¹ *See Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 134 (D.D.C. 2010); Presidential Memorandum of February 28, 2012, Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens Memorandum for the Secretary of the Interior, 77 Fed. Reg. 12,985 (March 5, 2012).

²² *See App. D.*

²³ 50 C.F.R. § 10.13.

²⁴ U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)*, B-10 (June 28, 2011).

²⁵ Susan Schalbe, *Spotted Owl Overview*, CORNELL LAB OF ORNITHOLOGY: ALL ABOUT BIRDS MAG. (2017), https://www.allaboutbirds.org/guide/Spotted_Owl/lifehistory.

²⁶ U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)*, B-10 (June 28, 2011).

²⁷ National Park Service, *Spotted Owl and Barred Owl*, (Nov. 24, 2017), <https://www.nps.gov/redw/learn/nature/spotted-owl-and-barred-owl.htm> (last visited June 20, 2019).

²⁸ *Id.*

²⁹ Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, *Experimental Removal of Barred Owls to Benefit Threatened Spotted Owls: Record of Decision*, 1 (Sept. 2013).

³⁰ U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)*, B-10 (June 28, 2011); Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, *Experimental Removal of Barred Owls to Benefit Threatened Spotted Owls: Record of Decision*, 1 (Sept. 2013).

³¹ *See* U.S. Fish and Wildlife Services, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)*, B-12 (June 28, 2011).

³² *Id.*

³³ *Id.* at B-10.

³⁴ S. P. Courtney et al., *5-Year Status Review 2004: Scientific evaluation of the status of the Northern Spotted Owl*, SUSTAINABLE ECOSYSTEMS INSTITUTE, 6-4 (Sept. 2004), <https://www.fws.gov/wafwo/species/Fact%20sheets/NSO%20SEI%20Scientific%20Status%20Review%202004.pdf>.

³⁵ E-mail from Regional Director of National Park Service, Pacific West Region, to State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (June 6, 2012) (on file with author).

³⁶ *Id.*

³⁷ U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)*, I-8 (June 28, 2011).

³⁸ U.S. Fish and Wildlife Service, *Draft Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)* (Apr. 2007); U.S. Fish and Wildlife Service, *Final Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)* (May 13, 2008).

³⁹ See U.S. Fish and Wildlife Service, *Revised Recovery Plan for the Northern Spotted Owl (Strix occidentalis caurina)* (June 28, 2011).

⁴⁰ *Id.* at vi.

⁴¹ *Id.* at vii.

⁴² See *id.* at III-4-III-65.

⁴³ See *id.* at III-63-III-68.

⁴⁴ *Id.* at III-65.

⁴⁵ See Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls; Record of Decision for Final Environmental Impact Statement, 78 Fed. Reg. 57,171, 57,172 (Sept. 17, 2013).

⁴⁶ *Id.*

⁴⁷ Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, *Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls Final Environmental Impact Statement*, xxxiii (July 2013).

⁴⁸ *Id.* at 364-65.

⁴⁹ *Id.*

⁵⁰ Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, *Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls Final Environmental Impact Statement*, 365 (July 2013).

⁵¹ *Id.* at 367-69

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 29.

⁵⁵ 50 C.F.R. § 21.23.

⁵⁶ U.S. FISH AND WILDLIFE SERVICE, Federal Fish and Wildlife Scientific Collecting Permit issued to Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service (Sept. 23, 2013); U.S. FISH AND WILDLIFE SERVICE, Amended Federal Fish and Wildlife Scientific Collecting

Permit issued to Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service (Oct. 18, 2013).

⁵⁷ Memorandum from Migratory Bird Permit Office to Nanette Seto, *Findings Document for USFWS- Oregon State Office Migratory Bird Scientific Collecting Permit, amendment* (Aug. 29, 2014).

⁵⁸ *Id.*

⁵⁹ 16 U.S.C. §§ 703-712.

⁶⁰ Mexico Convention.

⁶¹ *Missouri v. Holland*, 252 U.S. 416, 435 (1920).

⁶² H. R. Rep. No. 65-243, at 7359 (reprinted letter from Robert Lansing, Secretary of State, to President Woodrow Wilson, Aug. 17, 1916).

⁶³ 16 U.S.C. § 703(a); 16 U.S.C. § 706; 50 C.F.R. § 10.12.

⁶⁴ 50 C.F.R. § 21.23

⁶⁵ *See* Mexico Convention.

⁶⁶ Mexico Convention, art. I.

⁶⁷ Mexico Convention, art. II.

⁶⁸ 16 U.S.C. § 704(a).

⁶⁹ 50 C.F.R. § 21.27

⁷⁰ Mexico Convention, art. II.

⁷¹ Oregon Fish and Wildlife Office, *Northern Spotted Owl*, <https://www.fws.gov/oregonfwo/articles.cfm?id=149489595> (last visited June 20, 2019).

⁷² 16 U.S.C. § 703.

⁷³ *See* 50 C.F.R. § 21.27.

⁷⁴ Mexico Convention, art II.

⁷⁵ North American Agreement on Environmental Cooperation, art. 45(2)(a)(iii): Definitions (1993); *See* Chris Wold & David Downes, Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, at 10 (Nov. 17, 1999), <http://www.lclark.edu/live/files/146> (last visited June 20, 2019).

⁷⁶ *See Id.*

⁷⁷ *See id.*

⁷⁸ North American Agreement on Environmental Cooperation, art. 45: Definitions (1993).

⁷⁹ U.S. Fish and Wildlife Service, *Comments on Draft Environmental Impact Statement on the Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls* (June 20, 2012),

<https://www.fws.gov/oregonfwo/species/data/northernspottedowl/BarredOwl/Documents/DEIS%20Comments.pdf>.

⁸⁰ 50 C.F.R. § 21.27.

⁸¹ 16 U.S.C. §§ 703-704; Mexico Convention, art. II.

⁸² Mexico Convention, art I.

⁸³ Mexico Convention, art II.

⁸⁴ Mexico Convention, art I.

⁸⁵ ELMER A. DRIEDGER, *THE CONSTRUCTION OF STATUTES* 87 (2d ed. 1983).

⁸⁶ See M C. Mirow, *Marbury in Mexico: Judicial Review's Precocious Southern Migration*, 35 *Hastings Const. L.Q.* 41 (2007), http://ecollections.law.fiu.edu/faculty_publications/115.

⁸⁷ Eduardo Ferrer Mac-Gregor & Ruben Sanchez Gil, *Foreign Precedents in Mexican Constitutional Adjudication*, *MEX. LAW REV.* vol. 4, no. 2, ISSN 1870-0578 (June 2012).

⁸⁸ See *Smith v. United States*, 508 U.S. 223, 228 (1993).

⁸⁹ Mexico Convention, art. II.

⁹⁰ *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989).

⁹¹ *Id.*

⁹² *Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988).

⁹³ See *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987).

⁹⁴ See *MCI Telecommunications Corp. v. AT&T Co.*, 114 S. Ct. 2223, 2229-30 (1994).

⁹⁵ ELMER A. DRIEDGER, *THE CONSTRUCTION OF STATUTES* 87 (2d ed. 1983).

⁹⁶ Mexico Convention, art. II.

⁹⁷ See 51 Cong. Rec. 8349 (1914).

⁹⁸ Webster's Unabridged Dictionary (1913) "use."

⁹⁹ See Mexico Convention, art. II.

¹⁰⁰ See *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 524-25 (1993); *U.S. Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2014 (1993); *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 33-35 (1987).

¹⁰¹ 50 C.F.R. § 21.23.

¹⁰² 50 C.F.R. § 21.23.

¹⁰³ Webster's Unabridged Dictionary (1913) (emphasis added) "scientific."

¹⁰⁴ *Id.* at "science."

¹⁰⁵ *Id.* at "purpose."

¹⁰⁶ *United States v. Williams*, 553 U.S. 285, 294 (2008); *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 633-35 (2012); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); *McDonnell v.*

United States, 136 S. Ct. 2355, 2368-89 (2016); *Schreiber v. Burlington Northern Inc.*, 472 U.S. 1, 5-8 (1985).

¹⁰⁷ ELMER A. DRIEDGER, *THE CONSTRUCTION OF STATUTES* 87 (2d ed. 1983).

¹⁰⁸ Mexico Convention, art. II.

¹⁰⁹ *United States v. Williams*, 553 U.S. 285, 294 (2008).

¹¹⁰ *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015) (Justice Alito concurring) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 576 (1995)).

¹¹¹ See U.S. Fish and Wildlife Service, *Comments on Draft Environmental Impact Statement on the Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls* (June 20, 2012)

<https://www.fws.gov/oregonfwo/species/data/northernspottedowl/BarredOwl/Documents/DEIS%20Comments.pdf>.

¹¹² See *id.*

¹¹³ U.S. Fish and Wildlife Service, *About the U.S. Fish and Wildlife Service* (Oct. 16, 2018), https://www.fws.gov/help/about_us.html (last visited June 20, 2019).

¹¹⁴ Rachel Nussbaum Wichert & Martha C. Nussbaum, *Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission*, SYMPOSIUM – THE CAPABILITIES OF DIFFERENT BEINGS, 356-69. (Oct. 5, 2017). See Mexico Convention; 16 U.S.C §§ 703-712.

¹¹⁵ Rachel Nussbaum Wichert & Martha C. Nussbaum, *Scientific Whaling? The Scientific Research Exception and the Future of the International Whaling Commission*, SYMPOSIUM – THE CAPABILITIES OF DIFFERENT BEINGS, 356-69. (Oct. 5, 2017).

¹¹⁶ Sarah Gilman, *Evidence of Absence: Northern Spotted Owls Are Still Vanishing from the Northwest*, LIVING BIRD MAG., Spring 2016, April 12, 2016, <https://www.allaboutbirds.org/evidence-of-absence-northern-spotted-owls-are-still-vanishing-from-the-northwest/> (last visited June 20, 2019).

¹¹⁷ *Id.*

¹¹⁸ Mexico Convention, art. II.

¹¹⁹ Sarah Gilman, *Evidence of Absence: Northern Spotted Owls Are Still Vanishing from the Northwest*, LIVING BIRD MAG., Spring 2016, April 12, 2016, <https://www.allaboutbirds.org/evidence-of-absence-northern-spotted-owls-are-still-vanishing-from-the-northwest/> (last visited June 20, 2019).

¹²⁰ *Id.*

¹²¹ See e.g., Jeffery S. Dukes, *Does global change increase the success of biological invaders?*, 4 TRENDS IN ECOLOGY & EVOLUTION, 135-39 (1999).

¹²² See John J. Wiens, *Climate-Related Local Extinctions Are Already Widespread among Plant and Animal Species*, PLoS Biol 14(12), 1-18, 3 (2016).

¹²³ See *id.*

¹²⁴ Matthew Schwartz, *Ecosystem Shift: How Global Climate Change is Reshaping the Biosphere*, HARVARD UNIVERSITY: GRADUATE SCHOOL OF ARTS AND SCIENCES BLOG, SPECIAL EDITION ON CLIMATE CHANGE (June 30, 2014), <http://sitn.hms.harvard.edu/flash/2014/ecosystem-shift-how-global-climate-change-is-reshaping-the-biosphere/> (last visited June 20, 2019).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ See Gary Langham et al., *Audubon's Birds and Climate Change Report: A Primer for Practitioners*, NATIONAL AUDUBON SOCIETY: CONSERVATION SCIENCE (2015).

¹²⁹ Matthew Schwartz, *Ecosystem Shift: How Global Climate Change is Reshaping the Biosphere*, HARVARD UNIVERSITY: GRADUATE SCHOOL OF ARTS AND SCIENCES BLOG, SPECIAL EDITION ON CLIMATE CHANGE (June 30, 2014), <http://sitn.hms.harvard.edu/flash/2014/ecosystem-shift-how-global-climate-change-is-reshaping-the-biosphere/> (last visited June 20, 2019).

¹³⁰ See *Friends of Animals v. Jewell*, No. 13-cv-02034 JAM-CKD, 2014 U.S. Dist. LEXIS 106030 (E.D. Cal. July 31, 2014); *Friends of Animals v. U.S. Fish and Wildlife Serv.*, No. 6:14-cv-01449-AA, 2015 U.S. Dist. LEXIS 93734 (D. Or. July 16, 2015), *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2628 (Mem), 2018 U.S. LEXIS 3607 (2018) (No. 17-1426).

¹³¹ See App. E.

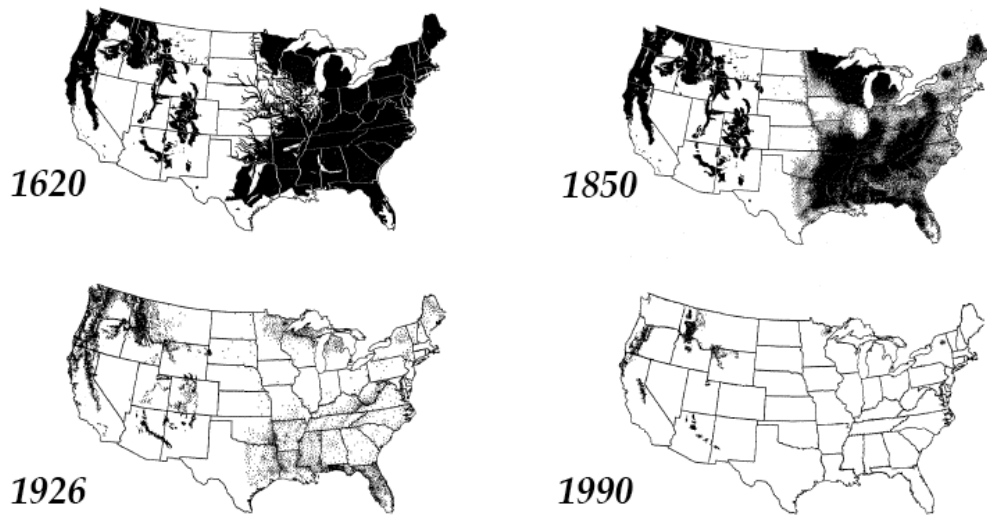
¹³² U.S. Fish and Wildlife Service, *Comments on Draft Environmental Impact Statement on the Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls* (June 20, 2012), <https://www.fws.gov/oregonfwo/species/data/northernspottedowl/BarredOwl/Documents/DEIS%20Comments.pdf>.

¹³³ *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2628, 2018 U.S. LEXIS 3607 (2018) (No. 17-1426).

¹³⁴ See *Friends of Animals v. Jewell*, No. 13-cv-02034 JAM-CKD, 2014 U.S. Dist. LEXIS 106030 (E.D. Cal. July 31, 2014); *Friends of Animals v. U.S. Fish and Wildlife Serv.*, No. 6:14-cv-01449-AA, 2015 U.S. Dist. LEXIS 93734 (D. Or. July 16, 2015), *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2628 (Mem), 2018 U.S. LEXIS 3607 (2018) (No. 17-1426).

Appendix B: All Referenced Materials (See Flash Drive)

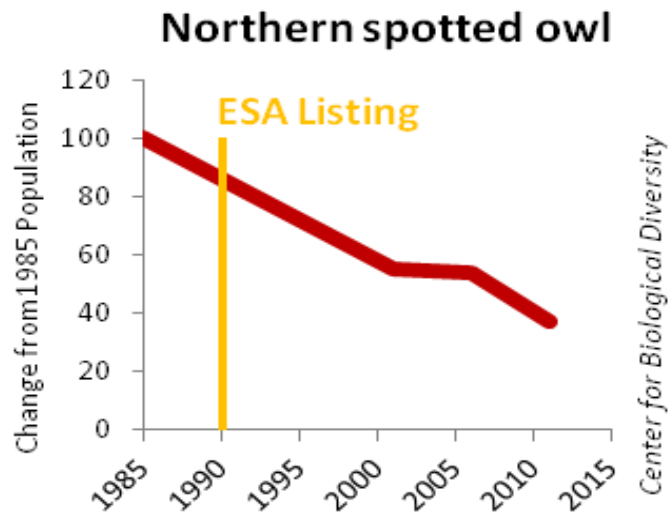
Appendix C: Map of Old Growth Forest



Map evidencing the loss of old growth forest across the United States from 1620 to 1990. Shaded areas show the remaining old growth forest. Old growth forests contain a variety of trees of differing ages. Northern spotted owls rely exclusively on old growth forest for habitat and foraging.

Findley et al., *"Will We Save Our Own?"* 178 NATIONAL GEOGRAPHIC 3, 120 (Sept. 1990), available at <http://dew.globalsystemsscience.org/activities/investigations/what-is-a-digital-image/investigation-measuring-old-growth-forest-loss>.

Appendix D: Northern spotted owl population trends



This graph shows the population trends of the northern spotted owl, with the yellow line indicating when the owl was listed under the Endangered Species Act. Since being listed, populations have declined by 3.8% annually. In 2011, the total population at 11 researched sites was 37% what it had been in 1985. Listed threats include destruction and fragmentation of foraging, nesting, and roosting habitat by logging, fire, and other natural disturbances, as well as competition from barred owls.

Endangered Bird Trends: ESA Population Trend Determined, *available at* https://www.esasuccess.org/2016/western_forest.shtml.

Appendix E: Written Correspondence with FWS

Reply Reply All Forward

Thu 9/12/2019 3:11 PM

AM
Andreia Marcuccio

Petition to the Commission for Environmental Cooperation

To exsec@ios.doi.gov; margaret_everson@FWS.gov

PDF NAAEC (NAFTA) Petition_Barred Owl III_v9.pdf
403 KB

Dear Secretary Bernhardt and Deputy Director Everson,

Please see the attached petition to the Commission for Environmental Cooperation presenting evidence that the United States is failing to effectively enforce the Migratory Bird Treaty Act by allowing the United States Fish and Wildlife Service to issue itself scientific collection permits that allow the lethal take off barred owls to study the effects of their absence on the northern spotted owl. Friends of Animals intends to submit this petition on or after September 20, 2019.

Friends of Animals has brought litigation challenging FWS's issuance of the permits in the Eastern District of California, the District of Oregon, the Ninth Circuit, and petitioned the Supreme Court. *See Friends of Animals v. Jewell*, No. 13-cv-02034 JAM-CKD, 2014 U.S. Dist. LEXIS 106030 (E.D. Cal. July 31, 2014); *Friends of Animals v. U.S. Fish and Wildlife Serv.*, No. 6:14-cv-01449-AA, 2015 U.S. Dist. LEXIS 93734 (D. Or. July 16, 2015), *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2628 (Mem), 2018 U.S. LEXIS 3607 (2018) (No. 17-1426). Please feel free to contact me if you have any questions.

Andreia Marcuccio

Andreia Marcuccio
Animal Law Fellow
Wildlife Law Program
Friends of Animals
7500 E. Arapahoe Road, Suite 385
Centennial, Colorado 80112
andreia@friendsofanimals.org
720-949-7791