

Secretariat of the Commission for Environmental Cooperation
Determination in accordance with Article 14(3) of the North American Agreement on
Environmental Cooperation

Submitter: Friends of Animals
Party: United States of America
Date of receipt: 30 September 2019
Date of determination: 20 March 2020
Submission no.: SEM-19-004 (*Barred Owl*)

I. INTRODUCTION

1. On 30 September 2019, Friends of Animals (the “Submitter”) filed an Article 14(1) submission with the CEC Secretariat under the North American Agreement for Environmental Cooperation (NAAEC).¹ The Submitter asserts that the United States Fish and Wildlife Service (USFWS) is failing to effectively enforce the *Migratory Bird Treaty Act* (MBTA) when it issued to itself scientific collection permits that allow the lethal take of barred owls. The MBTA implements four international conventions, including the US/Mexican agreement for the protection of migratory birds and game mammals (“Mexico Convention”), which specifically lists the barred owl as a protected species.
2. On 21 November 2019, the Secretariat determined that the submission meets the Article 14(1) and (2) requirements and requested a response from the Government of the United States.² The United States submitted its response to the Submission on 27 February 2020.³
3. Having reviewed the submission in light of this response, with reference to Article 14(3) and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat terminates the submission pursuant to Article 14(3) due to the existence of a pending judicial proceeding. In accordance with section 9.4 of the Guidelines, the Secretariat explains below its reasons.

II. SUMMARY OF THE SUBMISSION

4. For a complete summary of the Submission, the Secretariat refers to its Article 14(1) and Article 14(2) determination of 21 November 2019.⁴

¹ SEM-19-004 (*Barred Owl*), NAAEC Article 14(1) Submission (30 September 2019). Details of this submission are available at <<http://www.cec.org/sem-submissions/barred-owl>>.

² SEM-19-004 (*Barred Owl*), NAAEC Article 14(1) and 14(2) Determination (21 November 2019), available at: <http://www.cec.org/sites/default/files/submissions/2016_2020/19-004_det1412_en.pdf>.

³ SEM-19-004 (*Barred Owl*), United States Response (27 February 2020), available at: <http://www.cec.org/sites/default/files/submissions/2016_2020/31-us_response.pdf>.

⁴ See, footnote 2, supra.

5. The Submission seeks to challenge collection permits issued by the United States Fish and Wildlife Service (USFWS) which authorize it to take a certain number of barred owls to aid in the preservation of the northern spotted owl under a project began in 2013 called the barred owl removal experiment (BORE). The northern spotted owl is listed as a threatened species under the Endangered Species Act (ESA). The submitters contend that the issuance of these permits is prohibited by the MBTA, whose provisions include protections for migratory bird species, such as the barred owl, by making the taking, killing, and possessing of migratory birds unlawful, unless such is authorized under the law.
6. The submitter maintains that the scientific take permits the USFWS issued to its Oregon office are in contravention of this law because they are not scientifically related to the study of or benefit to the barred owl as a species. Specifically, the Submitter asserts that the USFWS permit does not require taken barred owls to be studied in any way and, furthermore, that this type of permit cannot be issued for the scientific benefit of another species, in this case, specifically the northern spotted owl.

III. SUMMARY OF THE RESPONSE

7. In its response, the United States advises the Secretariat that the Submission is subject to a pending judicial proceeding and requests the Secretariat to proceed no further, as provided under NAAEC Article 14(3).
8. Additionally, the United States asserts that it has fully complied with the requirements of the MBTA as well as other applicable United States laws, such as the National Environmental Policy Act (NEPA) and the ESA.

A. Pending judicial proceeding

9. Article 14(3)(a) provides that if “the matter is the subject of a pending judicial or administrative proceeding..., the Secretariat shall proceed no further.” SEM Guideline 9.6 further states:

If, in its response under Article 14(3), the Party informs the Secretariat and explains in writing that the matter raised in the submission is the subject of a pending judicial or administrative proceeding, as defined in Article 45(3) of the Agreement, the Secretariat will proceed no further with the submission and will promptly notify the Submitter and the Council, in writing, that the submission process is terminated without prejudice to the Submitter’s ability to file a new submission.”

10. NAAEC Article 45(3)(a) defines a judicial or administrative proceeding as:

a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;

11. The Secretariat has consistently found that ongoing enforcement and defensive litigation involving the same matter that is the subject of the submission meets the definition of

pending judicial or administrative proceeding. The Secretariat also considers such factors as whether the matter is being pursued by the Party in a timely fashion and in accordance with its law and if the proceeding invoked by the Party in its response has the potential to resolve the matter raised in the submission. The Secretariat has also found that the exclusion of proceedings within the scope of Article 45(3)(a) helps avoid duplication of effort and prevent interference with pending litigation.⁵

12. As the United States notes in its response, and the Secretariat noted in its prior determination, the collection permits have been subject to a series of litigation challenges brought by the submitter against the USFWS in United States federal courts since the fall of 2013.⁶
13. After the United States Supreme Court denied review of the submitter's claims in 2018,⁷ including its MBTA claims, the United States notes in its response that the submitter then began a challenge to "a series of permits and Safe Harbor Agreements⁸" issued by the USFWS, arguing these actions violated NEPA and the ESA. Specifically, the United States indicates:

Although the District Court of Oregon found that the Submitter did not have standing to bring these claims,⁹ the Appellate Court determined that the Submitter did have standing to raise certain of the claims and remanded the matter to the District Court in January 2020. *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 789 F. App'x 599 (9th Cir. 2020).¹⁰ The Appellate Court remanded the case to the District Court of Oregon for deliberation of the merits of the Submitter's NEPA and ESA claims.

14. The United States argues that, although the legal challenges to the collection permit are no longer under review by any federal court once the Supreme Court denied review in 2018, the implementation of the barred owl removal experiment continues to be subject to a pending judicial proceeding, as described in the foregoing paragraph.¹¹ The United States maintains that the pending litigation is aimed at the same goal that is articulated in the Submission, a challenge to the BORE.

⁵ SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001); SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

⁶ Response, at pp. 2, 10-12; Articles 14(1) and 14(2) Determination at pp. 8-9.

⁷ *Friends of Animals v. Fish and Wildlife Serv.* 2018 US LEXIS 3607, 138 S. Ct. 2628.

⁸ Safe Harbor Agreements are agreements with landholders in the study areas, which provide the USFWS with access to non-federal lands in order to carry out the activities authorized by the scientific collecting permits. Other permits issued by the USFWS appear to be coastal range permits. See, Response at 12.

⁹ The U.S. District Court of Oregon dismissed this case on 11 December 2018; See, <https://www.courthousenews.com/wp-content/uploads/2019/12/BarredOwlSpottedOwl-DISMISSAL.pdf> (viewed 5 March 2020). The press reported that the Submitters intended to appeal this decision to the 9th Circuit. See, https://www.capitalpress.com/ag_sectors/research/third-lawsuit-over-barred-owl-killings-dismissed/article_e83055aa-03b7-11e9-8f38-c37bbdd6ee5b.html, (viewed 5 March 2020).

¹⁰ Available at <http://cdn.ca9.uscourts.gov/datastore/memoranda/2020/01/07/19-35044.pdf>

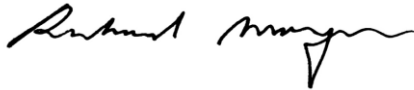
¹¹ Response, at 12.

15. The Secretariat notes that in its Submission, filed on 30 September 2019, the submitter asserts that it has “completely exhausted all available private, domestic remedies.”¹²
16. While there is no requirement under NAAEC Article 14(2)(c) to exhaust all remedies, the Secretariat agrees with the United States and finds that the matter which is the subject of the Submission, the barred owl removal experiment, is also the subject of a pending judicial action that has the potential to resolve the matter raised in the submission. As noted by the Secretariat, the purpose of Article 14(3) is to avoid a duplication of efforts and, under certain circumstances, prevent interference with pending litigation.¹³ If the Secretariat continued with the review of the Submission at this time, it could potentially interfere with this pending litigation.
17. The United States’ response also argues, for various reasons, that the Secretariat should not recommend the preparation of a factual record. Because of the Secretariat’s finding that a pending judicial proceeding is present, the Secretariat does not reach the question of whether a factual record would be warranted absent the pendency of the judicial action.

IV. DETERMINATION

18. Without opining on the merits of the concerns expressed by the Submitters, for the reasons stated herein, the Secretariat has determined it can proceed no further with its review of Submission SEM-19-004 (*Barred Owl*). In accordance with Section 9.4 of the *Guidelines*, the Submitters and the Council of the CEC are hereby notified that the process relating to this submission is now terminated, without prejudice to the Submitter’s ability to file a new submission once the pending proceeding is no longer present.

Secretariat of the Commission for Environmental Cooperation



per: Richard A. Morgan
Executive Director

cc: Chad McIntosh, Alternate Representative, United States
Rodolfo Godínez Rosales, Alternate Representative, Mexico
Catherine Stewart, Acting Alternate Representative, Canada
Submitter

¹² Submission, at 15.

¹³ The Secretariat has noted in the past the need to avoid unintended interference with a pending proceeding, in particular where the same subject matter coexists with an active submission. See for example: SEM-00-004 (*BC Logging*), Determination pursuant to Article 15(1) (27 July 2001, p. 17, and SEM-07-005 (*Drilling Waste in Cunduacán*), Determination pursuant to Article 14(3) (8 April 2009), §30. In both submissions, the Secretariat considered that, a submission can be terminated even if the environmental law in the submission is different from that in the pending proceeding. For example, in SEM-00-004 (*BC Logging*) cited above, the Secretariat terminated the process because a criminal investigation was ongoing and involved the same matter that is the subject of a submission.