

RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSION MADE BY FRIENDS OF ANIMALS UNDER ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

I. Introduction

This memorandum responds to a request from the Secretariat of the Commission for Environmental Cooperation (“CEC”) that the Government of the United States of America respond to a submission by Friends of Animals (“Submitter”), made under Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”). Under Article 14, submissions by nongovernmental organizations or persons, asserting that Canada, Mexico, or the United States (“the Parties”) is failing to effectively enforce an environmental law, may be considered by the CEC. If, following review of any response from the Party concerned, the Secretariat considers that a submission warrants the development of a factual record, the Secretariat is required to inform the governing Council of the CEC pursuant to NAAEC Article 15 and provide reasons as to why, in its view, a factual record is warranted. Pursuant to NAAEC, Article 15.2, the Secretariat shall prepare a factual record if the Council, by at least a two-thirds vote, instructs it to do so.

The Submitter has filed a submission asserting that the United States is failing to effectively enforce the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712, “and its underlying Conventions” by allowing permitting authorities within the U.S. Fish and Wildlife Service (“FWS” or “Service”) to issue scientific collection permits that allow the lethal take of barred owls, primarily to study the effects of their absence on the northern spotted owl.

Article 14.3(a) of the NAAEC provides: “The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further.” Pursuant to Art. 14.3(a), the United States advises the Secretariat that the matter is the subject of pending judicial or administrative proceedings, see NAAEC Art. 14.3(a), as detailed below.¹

The Submitter and co-complainants have brought multiple lawsuits in U.S. courts challenging the scientific collection permits, and other agency actions related to those permits. In those lawsuits, the Submitter alleged violations of the MBTA, among other statutes.

¹ NAAEC Article 45(3)(a) defines “judicial or administrative proceeding,” for purposes of Article 14(3), to include “a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law.” See also SEM Guideline 9.6 (“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.”)

Specifically, the Submitter challenged the scientific collection permit in federal district court, arguing that the Service issued the relevant scientific collection permits for an experiment that does not advance the conservation of the targeted species, which the Submitter suggests is required under the MBTA and its underlying conventions. The case was dismissed for lack of standing. *Friends of Animals v. Jewell*, No. 13-CV-02034, 2014 WL 3837233, at *5-8 (E.D. Cal. Aug. 1, 2014).

The Submitter then filed a new challenge to the scientific collection permit in a different district court, raising both its MBTA claim and claims under the National Environmental Policy Act (“NEPA”). The district court dismissed all claims on summary judgment. Submitter appealed only the MBTA claim, and a federal appellate court affirmed the district court’s judgment, rejecting the Submitter’s challenge to the permits on the merits; the U.S. Supreme Court declined to review. *Friends of Animals v. U.S. Fish & Wildlife Serv.*, 879 F.3d 1000, 1001 (9th Cir.), *cert. denied sub nom. Friends of Animals v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 2628, 201 L. Ed. 2d 1029 (2018).

More recently, the Submitter has challenged a series of permits and Safe Harbor Agreements issued by the Service. The Submitter argued that the agreements, themselves, violated NEPA and the Endangered Species Act (“ESA”). Although the District Court of Oregon found that the Submitter did not have standing to bring these claims, 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). 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.

In addition, pursuant to NAAEC Article 14.3(b), the United States advises the Secretariat of the following other information.

First, FWS’s issuance of the barred owl scientific permits has been fully briefed and fleshed out previously in various domestic courts of the United States, and the Service’s Administrative Record for the scientific permits in those cases demonstrates that the barred owl removal permits would advance the overall conservation of migratory birds that are at risk of extinction. Thus, a factual record in the CEC forum shines no additional light on the issue and provides no additional information to the public, as details concerning the nature and issuance of this permit have already been made publicly available.

Second, with respect to the barred owl scientific permits, the United States has complied fully with requirements of the MBTA, as demonstrated in the domestic litigation. The United States’ compliance with the MBTA is also consistent with its compliance and enforcement of the ESA, NEPA, and FWS’ regulations.

II. Background

Migratory Bird Treaty Conventions, U.S. Statutes, and FWS Regulations

A. Migratory Bird Treaty Conventions, with a Focus on the Mexico Convention

The MBTA implements four bilateral treaties between the United States and Canada, Mexico, Japan, and Russia. *See* Convention between the United States and Great Britain for the protection of Migratory Birds, 39 Stat. 1702 (Aug. 16, 1916) (“Canada Convention”); Convention between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, 50 Stat. 1311 (Feb. 7, 1936) (“Mexico Convention”); Convention between the Government of the United States and the Government of Japan for the Protection of Migratory birds and Birds in Danger of Extinction, and their Environment, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972) (“Japan Convention”); Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and their Environment, T.I.A.S. No. 9073 (Nov. 19, 1976) (“Russia Convention”).

Of the four Conventions, only the Mexico Convention lists the Barred Owl and the Northern Spotted Owl as covered pursuant to the treaty.² The Mexico Convention provided for the protection of migratory birds by means that would also permit their rational utilization, as the respective Parties saw fit, for “sport, food, commerce and industry.” Mexico Convention, art I. The Parties also agreed, *inter alia*, to establish laws, rules, and regulations to this end, including the establishment of close seasons during which the taking of migratory birds would be prohibited, subject to certain exceptions. *Id.* at art. II. One such exception is for the take of protected species “when used for scientific purposes, for propagation or for museums.” Mexico Convention, art. II(A).³ The Mexico Convention was amended by a Protocol in 1997, which authorized indigenous inhabitants of Alaska to harvest wild ducks and their eggs for subsistence and other essential needs. Protocol between the Government of the United States of America and the Government of the United Mexican States Amending the Convention for Protection of Migratory Birds and Game Mammals, Sen. Treaty Doc. 105-26 (May 5, 1997).

B. Migratory Bird Treaty Act (MBTA)

The U.S. Congress passed the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–12, in 1918, to implement the United States’ obligations under the Canada Convention, the first of the four international Conventions to manage migratory birds. *See Missouri v. Holland*, 252 U.S. 416, 431 (1920). Congress has subsequently amended the Act to implement each of the three succeeding Conventions. *See* 49 Stat. 1555 (1936) (Mexico); PUB. L. NO. 93-300, 88 Stat. 190 (1974) (Japan); PUB. L. NO. 95-616, 92 Stat. 3110 (1978) (Russia). Congress delegated the responsibility to determine when such take may be permitted to the Secretary of the Interior.

² Each Convention lists the birds to which its terms apply. Canada Treaty, Art. I; Mexico Convention, Art. IV and Notes; Japan Convention, Annex; Russia Convention, App’x.

³ The other Conventions also authorize Parties to allow take of birds for scientific purposes. Canada Convention, Art. II, ¶ 3 (expressly providing that “the taking of migratory birds may be allowed at any time of the year for scientific, educational, propagative, or other specific purposes consistent with the conservation principles of this Convention”); Japan Convention, Art. III, ¶ 1(a) (authorizing take “[f]or scientific, educational, propagative or other specific purposes not inconsistent with the objectives of this Convention”); Russia Convention, Art. II, ¶ 1(a) (authorizing take “[f]or scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention”).

The Act authorizes and directs the Secretary of Interior (Secretary, Interior, FWS, or the Service), in relevant part, to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession . . .” of any migratory bird. 16 U.S.C. §§ 703(a), 704(a). The Act places no independent restriction on the Secretary’s exercise of that authority, other than to require that any permitted take be, in the Secretary’s discretion, “compatible” with the Conventions. 16 U.S.C. § 704(a). A violation of the MBTA that does not involve or contemplate the sale of migratory birds is a misdemeanor, and the violator is subject to a penalty of a fine of not more than \$15,000 or imprisonment for up to six months, or both. 16 U.S.C. § 707(a), 18 U.S.C. § 3571. Taking migratory birds for the purpose of selling them, or selling migratory birds in violation of the MBTA is a felony for which violators are subject to a fine of not more than \$500,000 and imprisonment for up to two years. 16 U.S.C. § 707 (b); 18 U.S.C. § 3571.

C. Endangered Species Act (ESA)

The Endangered Species Act, 16 U.S.C. §§ 1531–44, imposes obligations on individuals and federal agencies with regard to species listed as either “threatened” or “endangered.” A “threatened” species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20). An “endangered” species is one that is in danger of extinction throughout all or a significant portion of its range. *Id.* § 1532(6). As relevant to this matter, the ESA directs the FWS to craft plans “for the conservation and survival” of listed species, known as recovery plans. *Id.* § 1533(f).

D. National Environmental Policy Act (NEPA)

The National Environmental Policy Act requires federal agencies to give proper consideration to the environment prior to taking any “major federal action.” 42 U.S.C. § 4332(C). In developing a federal action, all federal agencies must prepare Environmental Assessments (EA) and/or Environmental Impact Statements (EIS) - detailed statements on potential environmental impacts and alternatives to the federal action. *See id.*; 40 C.F.R. §§ 1508.9, 1508.11. If the federal action is not “categorically excluded” from environmental analysis, an agency will prepare an EA to evaluate the action’s potential to cause significant environmental effects. *See* 40 C.F.R. §§ 1501.3, 1508.4. If there are no potential significant environmental effects, the agency will issue a Finding of No Significant Impact (FONSI) explaining its conclusion. *See id.* §§ 1501.4(e), 1508.13. If the agency finds that the proposed federal action will cause significant environmental effects, it must prepare an EIS. *See id.* § 1501.4; 42 U.S.C. § 4332(C).

The EIS is a more detailed statement with public notice and participation in the environmental analysis. *See* 40 C.F.R. Part 1502. The draft EIS is published in the Federal Register with a period for public review and comment for at least 45 days. *Id.* Part 1503, § 1506.10(c). After the agency incorporates all of the substantive comments, it publishes a final EIS. The agency may publish any necessary supplemental EIS when either it makes substantial changes to the proposed action or significant circumstances relevant to the environmental analysis occur. *See id.* § 1502.9(c). Next, the agency must wait at least 30 days before making a final decision on the proposed federal action. *Id.* § 1506.10(b). Once a decision is rendered, the agency must issue the

Record of Decision (ROD), which explains the agency's decision, the alternatives considered, and the agency's planned mitigation and monitoring. *See id.* § 1505.2.

E. The U.S. Fish and Wildlife Service's Regulations

The U.S. Fish and Wildlife Service implements the MBTA on behalf of the Secretary of the Interior. As directed by § 704 of the Act, the Service issues regulations regarding when take of migratory birds is permissible. *See* 50 C.F.R. Parts 20 & 21. Under the Service's regulations, persons who wish to take migratory birds must apply for a permit. *Id.* § 21.11. The Service issues different types of permits for different activities and purposes; it has set forth regulatory criteria and conditions for each. *See, e.g., id.* §§ 21.21 (import and export permits), 21.22 (banding or marking permits), 21.24 (taxidermist permits), 21.27 ("special purpose" permits). If the Service determines that an applicant has met the conditions and criteria for a particular permit type, it will issue a permit that exempts the level and type of take of migratory birds specified in that permit from prosecution under the Act. *See id.* § 21.11; *see also* 16 U.S.C. § 703(a).

The Service codified requirements for obtaining a scientific collecting permit ("permit" or "SCP") at 50 C.F.R. § 21.23. A scientific collecting permit is "required before any person may take, transport, or possess migratory birds, their parts, nests, or eggs for scientific research or educational purposes." *Id.* § 21.23(a). To obtain an SCP, applicants must disclose to the Service the species and number of migratory birds they propose to take, the location where take will occur, the "purpose and justification for granting such a permit, including an outline of any research project involved," and information about the institution to which collected specimens will ultimately be donated. *Id.* § 21.23(b). Applicants must also disclose whether they have received a state permit for the proposed take, if one is required by state law. *Id.* Based on this information, the Service decides whether to grant the permit.

If issued, a scientific collecting permit comes with certain conditions, including that the permittee donate and transfer any taken specimens within its possession to a public scientific or educational institution within a specified time. *Id.* § 21.23(c)(1). The permittee must also provide annual reports to the Service. *Id.* § 21.23(c)(4). The term of any SCP is limited to three years from the date of issuance. *Id.* § 21.23(d).

None of the regulatory requirements or conditions on SCPs place a restriction on what types of hypotheses or areas of inquiry a permit must further. In practice, the Service has issued SCPs for take intended to study an array of topics, including take of barn owls for research on hearing; take of hummingbirds for research on flight aerodynamics; take of northwestern crows for research on the connection between social behavior and intelligence; and take of barred owls for research on conserving northern spotted owls. Federal Appellee's Supplemental Excerpts of Records 1-27, 77-134, *Friends of Animals v. U.S. Fish & Wildlife Service*, Ninth Cir. No. 15-35639 (Feb. 16, 2016).

The Barred Owl Scientific Collecting Permit

The SCP issued by the Service under 50 C.F.R. § 21.23 authorizes the removal of barred owls by lethal means from specified areas to determine the effect that barred owl removal has on northern spotted owls in those areas.

The northern spotted owl belongs to a family of birds specifically covered under the Mexico Convention and protected by the MBTA. Mexico Convention, Notes; *see also* 50 C.F.R. § 10.13(c)(1) (listing spotted owl as a protected migratory bird). The northern spotted owl occurs in a relatively narrow range extending from southwestern British Columbia through western Washington, western Oregon, and the coastal range area of northwestern California south to San Francisco Bay. Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls, Final Environmental Impact Statement, 4 (U.S. Fish & Wildlife Service July 2013) (“Barred Owl Final EIS”). The majority of the population is found in the Cascades of Oregon and the Klamath Mountains in southwestern Oregon and northwestern California. *Id.* These owls primarily rely on old-growth and mature forest habitats, but may be found in younger forests that possess the appropriate structural and vegetation attributes. The northern spotted owl has been listed as a threatened species under the ESA since 1990. *See* 55 Fed. Reg. 26,114 (June 26, 1990). At the time it listed the northern spotted owl, the Service deemed loss of habitat due to timber harvesting the primary threat to the owl. *See id.* at 26,175–86. But it also noted that, in the two decades prior to the listing decision, more aggressive barred owls had invaded the northern spotted owl’s traditional range. *See id.* at 26,190–91. The Service expressed considerable concern about the invasion and called for continued examination of the role and impact of the barred owl “as a congeneric intruder in historical spotted owl range.” *Id.* at 26,191.

Like the northern spotted owl, the barred owl is protected by the Mexico Convention. Mexico Convention, Notes; *see also* 50 C.F.R. § 10.13(c)(1) (listing barred owl as a protected migratory bird). Unlike the northern spotted owl, it has never been listed under the ESA. To the contrary, the barred owl’s range has greatly expanded over the past century, from its native eastern North America, across the continent, to the west coast. *See* Recovery Plan for the Northern Spotted Owl, Appx. B-10 (U.S. Fish and Wildlife Service 2011) (“Revised Recovery Plan”). The barred owl’s expansion has caused its range to encroach upon that of the northern spotted owl, such that the range of barred owls now completely overlaps that of the northern spotted owl. Experimental Removal of Barred Owls to Benefit Threatened Spotted Owls, Record of Decision, 1 (U.S. Fish and Wildlife Service, September 2013) (“Barred Owl ROD”); Barred Owl Final EIS at 2. Barred owls now outnumber spotted owls in much of the northern spotted owl’s range. Barred Owl ROD at 1.

Barred owls and northern spotted owls compete for the same habitat and food sources. Barred Owl Final EIS at 2. Recent studies in the Pacific Northwest indicate that barred owls use and prefer old-growth forest and older forest, similar to the northern spotted owl. Revised Recovery Plan at Appx. B-10. The two species’ dietary preferences are also similar, with barred owl and northern spotted owl diets overlapping by as much as 76% in the western Washington Cascades. *Id.* But compared to the northern spotted owl, barred owls are more adaptable and have a more aggressive nature. Barred Owl ROD at 1. They have been known to physically attack northern spotted owls. *Id.*

Scientific studies suggest that competition from barred owls has displaced northern spotted owls from high-quality habitat and has reduced the northern spotted owl's survival and reproduction rates. *Id.* Competition from barred owls may explain, in part, the recent, sharp population declines in northern spotted owls throughout the Pacific Northwest. *Id.* If left unchecked, competition from barred owls could lead to the extirpation of northern spotted owls from all or a substantial portion of their historical range. *Id.*

When the Service first listed the northern spotted owl as “threatened” under the ESA in 1990, it believed that the primary threat to the owl was habitat loss and degradation due to timber harvesting. *See* 55 Fed. Reg. 26,175–86. Since then, increasing information and increasing barred owl populations have led the Service to conclude that both habitat loss and competition from encroaching barred owls now threaten the northern spotted owl. *See* Barred Owl ROD at 1; Barred Owl Final EIS at 3; Revised Recovery Plan at I-8. Most experts now agree that ensuring sufficient habitat and managing the barred owl threat are both necessary steps if the northern spotted owl is to recover. Revised Recovery Plan at I-8.

Shortly after designating the Northern Spotted Owl as a threatened species under the ESA, the Service prepared a draft recovery plan for the owl in 1992 setting recovery objectives “to recover the spotted owl so that it can be removed from the list of threatened or endangered species. Draft Recovery Plan at VIII; *see generally* 16 U.S.C. § 1533(f). Around the same time, the Service designated 6.9 million acres as “critical habitat” “essential to the conservation of” the northern spotted owl under the ESA. 57 Fed. Reg. 1796 (Jan. 15, 1991). The 1992 Draft Plan also acknowledged that invasive barred owls were potentially a competitive threat to the northern spotted owl that was not yet fully understood. *See* Draft Recovery Plan, Appx. C.

The Service issued an updated final recovery plan in 2008, following a multiyear, multi-agency process involving expert scientific review and opportunity for public comment. Recovery Plan for the Northern Spotted Owl (U.S. Fish and Wildlife Service 2008). Based on “the best scientific information available,” the 2008 Recovery Plan concluded that “the barred owl constitutes a significantly greater threat to spotted owl recovery than was envisioned when the spotted owl was listed in 1990.” *Id.* at viii. The 2008 Recovery Plan accordingly recommended that “specific actions to address the barred owl threat begin immediately,” while continuing “to recognize the importance of maintaining habitat for the recovery and long-term survival of the spotted owl.” *Id.* The 2008 Recovery Plan recommended 34 recovery actions, 12 of which related to developing a strategy for managing the barred owl threat, and 16 of which related to ensuring sufficient habitat. *See id.*

Given “substantial information gaps” that remained “regarding ecological interactions between spotted owls and barred owls,” one of the 2008 Recovery Plan’s action items specifically called on the Service to “[d]esign and implement large-scale control experiments in key spotted owl areas to assess the effects of barred owl removal on spotted owl site occupancy, reproduction, and survival.” *Id.* at 30–32. The Service instructed that so-called Recovery Action 29 “be conducted as well-designed removal experiments that will have the potential to substantially expand our knowledge of the ecological interactions between spotted owls and barred owls.” *Id.* at 31–32. Recovery Action 29 anticipated that those experiments “may identify important cause-and-effect relationships between barred owls and the population declines of spotted owls, as well

as the densities at which negative effects from barred owls occur.” *Id.* at 32. “Given the rapidity and severity of the increasing threat from barred owls,” the 2008 Recovery Plan recommended, “barred owl control in key spotted owl areas should be done as soon as possible.” *Id.* at 31.

The Service revised the northern spotted owl’s recovery plan in 2011. *See* Revised Recovery Plan. The 2011 Revised Recovery Plan, like the 2008 Recovery Plan, identified competition from barred owls, along with habitat loss, as primary threats to the northern spotted owl that required immediate attention. *See id.* at I-8–9, III-62. The 2011 Revised Recovery Plan once again called for the design and implementation of “large-scale control experiments to assess the effects of barred owl removal on spotted owl site occupancy, reproduction, and survival.” *Id.* at III-65. Like the 2008 Recovery Plan, the 2011 Revised Recovery Plan anticipated that such experiments “will have the potential to substantially expand” understanding of the barred owl’s effect on the northern spotted owl. *Id.*

To design a removal experiment that would advance Recovery Action 29, the Service convened a stakeholder group and retained a professional ethicist. Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls, Draft Environmental Impact Statement, 7 (U.S. Fish and Wildlife Service March 2012) (“Barred Owl Draft EIS”). The Service held a series of educational meetings for stakeholders to explore possible alternatives. *Id.* On December 10, 2009, the Service published notice that it planned to analyze the possible effects of various experimental options by preparing an EIS investigating several alternatives under NEPA. *See* 74 Fed. Reg. 65,546-01 (Dec. 10, 2009).

The Service published a Draft EIS in March 2012, which proposed seven possible experimental designs to conduct research on the effects on spotted owls of the removal of barred owls, plus a no-action alternative. *See* 77 Fed. Reg. 14,036 (Mar. 8, 2012). The design alternatives all involved dividing a study area (or areas) into two comparable portions: a treatment area in which barred owls would be removed, and a control area in which they would remain undisturbed. *Id.* at 14,038. Both treatment and control areas would be surveyed for the presence of northern spotted owls, to determine whether removal of barred owls in a treatment area significantly affected the population of northern spotted owls in that area. *Id.*

The Draft EIS explained that to perform any of the proposed experiments, the Service would need to obtain a scientific collecting permit under the Migratory Bird Treaty Act, and that the Service’s NEPA analysis would inform the permitting decision. Barred Owl Draft EIS at xxi. The Draft EIS explained that while “strong and very persuasive” evidence suggested that barred owls threaten the northern spotted owl’s recovery, the available evidence was not yet sufficient for the Service to consider undertaking a wider removal effort. *Id.* at xxii. Gathering experimental data before proposing any long-term management plan would allow the Service to “develop a better understanding of the impacts barred owls are having on spotted owl populations,” to “determine [removal’s] ability to reduce barred owl populations at a landscape level,” and to “estimate the cost of barred owl removal.” *Id.* The Service took public comment on the Draft EIS through June 6, 2012 and also conducted meetings with several federal and state agencies and the Hoopa Valley Tribe and reached out to researchers. Barred Owl Final EIS at 8.

The Service issued the Final EIS in July 2013. 78 Fed. Reg. 44,588 (July 24, 2013). The Final EIS described and evaluated nine alternatives, including eight removal experiments and one no action alternative. *Id.* The Final EIS identified a preferred alternative, which would involve establishing four study areas, spread throughout the northern spotted owl's range: one in Washington, one in northern Oregon, one in southern Oregon, and one in California. *Id.* at 44,589. The Final EIS found that performing a removal experiment on each of these areas would likely yield statistically significant results after four years of barred owl removal. 78 Fed. Reg. 57,171, 57,173 (Sep. 17, 2013). Conducting the experiments is estimated to require removing approximately 3,600 barred owls over those four years. Barred Owl Final EIS at xxxiii. For comparison, the number of barred owls estimated to be removed under all the other Final EIS's experimental designs ranged from over 300 to nearly 9,000. *Id.* at xxxiv.

Under the preferred alternative, removal can be accomplished by lethal or nonlethal means. *Id.* at 124. However, because of the dearth of institutions equipped and willing to humanely keep a live-captured barred owl, the vast majority of barred owls will be removed by lethal means: a preliminary investigation identified potential placements for only five captured owls. *Id.* at 21–22.

To assess the effect of the removal study on the barred owl population, the Service assessed the size of each removal area as a percentage of the barred owl's entire North American range. *Id.* at xxxiii. The Service found that, under the preferred alternative, barred owls would be removed from only 0.05% of their range in North America and only 1.72% percent of suitable habitat within that range. *Id.* at xxxiv. The Service estimated that, once experimental removal ends, the barred owl population will bounce back to its pre-experiment level within three to five years. *Id.* at 149, 240.

The Service issued a Record of Decision announcing its intention to implement the preferred alternative described in the Final EIS in September 2013. 78 Fed. Reg. 57,171. The Service explained that it “took into account all practicable measures to avoid or minimize environmental impacts” from the experiment, including developing “a detailed and specific removal protocol to ensure reasonable, feasible, and humane removal of barred owls”; reducing the size of study areas considered in the Draft EIS to reduce the number of barred owls taken; and allowing for both lethal and nonlethal removal of barred owls. Barred Owl ROD at 6. The Service concluded that the experiment would have a “negligible” effect on the total barred owl population. *Id.*

As stated in the Record of Decision, the Service announced that it would issue a scientific collecting permit under 50 C.F.R. § 21.23 for the removal of barred owls. *Id.* The Service submitted an application providing a detailed explanation of the study design, including the removal methodology. *See* Friends of Animals v. U.S. Fish & Wildlife Serv., 2015 WL 4429147, *3 (D. Or. 2015). On October 21, 2013, the Service issued a permit authorizing take of up to 2,500 barred owls for the first three years of study. *See id.*

On August 11, 2014, the Service sought an amendment to the 2013 permit because, due to a delay in initiating removal efforts, it would take substantially fewer barred owls than originally planned. *See id.* The Service issued an amended permit authorizing take of 1,600 barred owls on August 29, 2014 in four separate control areas in California, Oregon, and Washington. *See id.*

When the Service issued the amended permit, it expressly noted in the accompanying findings document that “[s]cientific collecting permits authorize take for scientific research or educational purposes” and that the “take requested in the application is for bona fide scientific research or educational purposes,” which can include “(1) research to advance science of the species taken, (2) research to advance science of other species (including humans) through the study of the species taken, and/or (3) take for museum collection purposes.” Appellants’ Excerpts of Record 729, *Friends of Animals v. U.S. Fish & Wildlife Service*, Ninth Cir. No. 15-35639 (Dec. 16, 2015). The Service noted the authorized take “is for bona fide scientific research to obtain information on the effect of the take of Barred Owls on Spotted Owl populations” and that the permit “will authorize research that advances the scientific understanding of both species.” *Id.*

A total of about 500 barred owls were taken under the 2013 permit. On April 1, 2016, the Service issued a new 3-year permit authorizing take of 1520 barred owls in the same four control areas, essentially renewing the experiment as set forth in the original permit for a further three years. About 1500 barred owls were taken under the renewed permit. That permit expired on March 31, 2019 and was renewed again for three years on May 20, 2019. The Service has donated barred owls killed under the permits to a variety of institutions for scientific and exhibition purposes and to tribal feather repositories for distribution to federally recognized tribal members for religious and cultural purposes.

Past and Current U.S. Domestic Litigation

The Submitter has repeatedly challenged — unsuccessfully — the Barred Owl Removal Experiment in the U.S. judicial system. In 2014, the Submitter alleged that the Service had violated multiple environmental statutes when it issued a scientific collecting permit under the MBTA to allow for the lethal taking of barred owls. The District Court held that the Submitter did not have standing for its allegations against the Service. The Submitter then challenged an amended version of the permit. Another District Court rejected that challenge on the merits; the federal Appellate Court agreed; and the U.S. Supreme Court declined to review the Submitter’s claims. Subsequently, the Submitter challenged the legality of agreements that the Service entered into with landholders to aid in effectuating the scientific collecting permit. Again, the District Court dismissed the Submitter’s case for lack of standing. The Appellate Court found that the Submitter had standing to challenge a subset of the agreements challenged. The case has been remanded back to the District Court for further proceedings.

A. Submitter’s Challenge to the Scientific Collecting Permit

In its merits challenge to the scientific collecting permit, the Submitter argued that the Service unlawfully authorized this experiment because the Service did not explain how the experiment would directly advance the conservation of any migratory bird species, which Submitter asserted is contrary to the mandate under the four migratory bird Conventions (including the Mexico Convention). The Submitter specifically alleged that the Conventions and MBTA impose a unique restriction on scientific research: the taking of a protected bird species must advance the conservation of that particular species. According to the Submitter, MBTA requires that FWS’s authorizations be “consistent” with the sole “purpose” of the Conventions, the conservation of migratory birds.

The Service rebutted the Submitter's misinterpretation of the MBTA and the relevant Conventions, noting that the MBTA explicitly grants the Service discretion to promulgate regulations "compatible with the terms of the conventions to allow hunting, taking, capture, killing" etc. 16 U.S.C. § 704(a). The Conventions, in turn, explicitly authorize take for scientific purposes. Neither the Conventions, the MBTA, nor the Service's regulations place the limit on what constitutes scientific take that the Submitter advanced.⁴

The Service also emphasized that its Administrative Record demonstrated that this experiment would advance the overall conservation of migratory birds that are at risk of extinction, consistent with the stated purpose of the Conventions and MBTA. The ESA mandates the Service to develop recovery plans for listed species like the northern spotted owl. Scientific study of ways to manage the threat posed by the barred owl is a priority on the northern spotted owl's current recovery plan. The Service determined that the 3,600 barred owls to be taken from spotted owls' geographical ranges would both provide essential data on how to handle this threat. The removal of those barred owls, moreover, would have only a negligible impact to the barred owl, which is an abundant species whose range stretches across the continent. And it would also advance further scientific understanding of barred owls by collection and donation of specimens. Examples so far include liver samples taken to study the effects of rodenticide on top predators and a study of stomach contents to better understand the species' diet, along with birds stored at various museums as voucher specimens for future use. Therefore, the experiment does advance the conservation of a threatened migratory bird species pursuant to both MBTA and the relevant Conventions, without jeopardizing any other species protected by the MBTA and Conventions.

Although not relevant to this submission, the Service also argued that it acted in compliance with NEPA when it completed an EIS for the barred owl removal experiment. During the EIS drafting process, the Service incorporated public comments and inter-agency discussions, as required under NEPA. The final EIS compared nine alternatives for the experiment. The Administrative Record thoroughly explained the Service's decision-making analysis for selecting Recovery Action 29, the barred owl removal experiment. Established case law provides that the recovery plan (the scientific basis for these permits) may be considered as guidance, and thus, there are no legal obligations to consider the listed alternative actions. Regardless, as an additional measure, the Service examined the alternatives listed in the EIS. Since the Service never made a formal proposal for future management plans for the barred owl, it was not obligated to consider any future management plans for the barred owls. Thus, the Service noted that it satisfied its requirements under NEPA.

⁴ At no point has the Submitter challenged the regulatory criteria the Service developed to carry out its statutory mandates; it has only challenged the permit granted under these criteria. The Administrative Record explained how the Service "faithfully applied the regulatory criteria when processing the permit application and issued the permit in accordance with its regulation." 50 C.F.R. § 21.23; Reply in Support of Federal Defendant's Cross Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 9, *Friends of Animals v. U.S. Fish & Wildlife Service*, No. 6:14-cv-01449-AA (2015).

B. Submitter's Ongoing Challenge to Landholder Agreements Related to the Scientific Collecting Permits

As authorized by the ESA, the Service has entered into “safe harbor agreements” with landholders in the study areas, which provide the Service access to non-federal lands in order to carry out the activities authorized by the scientific collecting permits. The Submitter challenged the landholder agreements, claiming that they violated both the ESA and NEPA. The Service argued that the Submitter did not have standing to raise these claims because they failed to demonstrate a “concrete and particularized injury” resulting from the issuance of the landholder agreements sufficient to meet the standard set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The Appellate Court, however, found that the plaintiffs had demonstrated the requisite injury with regard to a subset of the challenged agreements. The Appellate Court remanded to the District Court to consider the merits of plaintiffs’ ESA and NEPA challenges to those agreements. As relevant here, one of the Submitter’s claims in this lawsuit alleges that the Service failed to supplement the EIS evaluating the Barred Owl Experiment and scientific collecting permit in light of its decision to enter into the landholder agreements. The Submitter did not challenge the NEPA documents specifically evaluating the landholder agreements.

III. The United States’ Response to the Submission

A. The Matter is the Subject of a Pending Judicial Proceeding

Article 14.3 of the NAAEC provides, in pertinent part: “The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request: (a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further; . . .” Article 45.3 defines “judicial or administrative proceeding” for the purposes of Article 14.3 to include: “a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law.” Such actions include, among other things, “seeking sanctions or remedies in an administrative or judicial forum . . .”

The Service’s implementation of the barred owl removal experiment remains subject to pending domestic litigation. As discussed above, the scientific collection permit itself is no longer under review in federal courts, but the Service has entered into related “safe harbor agreements” with landholders in the study areas, which provide the Service access to non-federal lands in order to carry out the activities authorized by the scientific collection permits. Those related agency actions are the subject of ongoing judicial proceedings. The case at issue has been remanded to the District Court of Oregon for deliberation of the merits of the Submitter’s NEPA and ESA claims. One of those claims alleges that the Service failed to supplement the EIS for the Barred Owl Experiment and scientific collection permit. The NEPA claim does not appear to challenge landowner agreements for the Oregon Coast Range Study. More broadly, the remaining domestic

litigation is aimed at the same overall goal as that articulated in the Submission: to challenge the FWS's actions concerning the barred owl.⁵

B. The Barred Owl Removal Experiment was Designed with Extensive Public Participation and Has Been Fully Briefed in U.S. Courts

According to the Introduction to the SEM guidelines, “[t]he purpose of a factual record is to provide an objective presentation of the facts relevant to the assertion set forth in a submission and to allow the readers of the factual record to draw their own conclusions regarding a Party’s environmental law enforcement.” In determining whether to recommend the preparation of a factual record, “the Secretariat is to consider whether central questions of fact related to the assertion(s) in the submission remain open that could be addressed in a factual record” (Guideline 9.7). The Introduction to the Guidelines further provides: “Although a factual record is not to contain conclusions or recommendations, it is expected to generally outline the history of the environmental enforcement issue raised in the submission, the relevant legal obligations of the Party, and the actions of the Party in fulfilling those obligations; therefore, it can be another valuable outcome of this information sharing process.”

Given the lengthy litigation brought by the Submitter in U.S. courts, there is no need to provide an additional presentation of the facts underpinning the Service’s issuance of its scientific collecting permits for the barred owl; the history of the scientific collecting permit; the legal obligations of the U.S.; and the actions of FWS in fulfilling these obligations. While domestic litigation related to barred owl removal continues in U.S. courts, this issue has been fully hashed out over a period of years; first through the compilation of FWS’s Administrative Record in multiple district court cases and which have been produced for the Submitter, and subsequently through litigation at all levels of the federal judicial system. As such, there do not remain any central questions of fact related to the core assertions in the submission. The U.S. government has responded to the Submitter’s assertions in various fora on multiple occasions, and the facts have been examined by the U.S. courts.

The steps FWS took to comply with NEPA in its decision-making process, explained in Part II above, further illustrate the degree to which the public (and Submitter) has had an opportunity to participate in this matter. At the outset, the Service convened a stakeholder group and held a series of educational meetings for stakeholders to explore possible alternatives to the scientific collecting permit. The Service then prepared a draft EIS investigating several alternatives under NEPA. The Service took public comment on the Draft EIS, conducted meetings with several federal and state agencies and the Hoopa Valley Tribe, and reached out to researchers. The final EIS issued by the Service described and evaluated nine alternatives, including eight removal experiments and one no-action alternative. FWS also conducted NEPA review for each subsequent landowner agreement. In light of the extensive public participation and information-sharing opportunities provided to the public under NEPA, a factual record prepared under the SEM process would not shed any additional light on this issue.

⁵ See Submission at 1 (“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.”).

C. The United States Has Not Failed to Enforce its Environmental Laws

As a preliminary matter, the Submitter's claims that the United States is failing to enforce the Mexico Convention are not properly before the Commission. Despite the Submitter's contention that "the Mexico Convention is also an environmental law under the NAAEC" (Submission, p. 6), the NAAEC itself is clear that an "environmental law" does not include treaties. *See* NAAEC, Art. 45(2), defining environmental law as "any *statute or regulation* of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health" (emphasis added).⁶

Although the purpose of a factual record is to determine whether a country has failed to enforce its environmental law, in this case multiple U.S. courts have already found that the U.S. has not failed to enforce the MBTA and that FWS's issuance of the scientific collecting permits is consistent with the MBTA and its regulations. As noted above, the U.S. has complied fully with the requirements of the MBTA, consistent with its compliance and enforcement of the ESA, NEPA, and FWS Regulations (although these latter instruments are not the subject of this submission).

The FWS's Administrative Records demonstrate that the barred owl removal permits would advance the overall conservation of migratory birds. Nothing in the MBTA or FWS Regulations requires that take of a species under the MBTA for scientific purposes must be for the benefit of that same species and, in any case, there is a benefit to the species being taken here.

In brief, the MBTA authorizes the Service, acting for the Secretary of the Interior, to permit whatever take the Service determines is "compatible" with the Conventions. 16 U.S.C. § 704(a). The Mexico Convention, which is the only convention that covers the species here at issue, allows the taking of migratory birds "when used for scientific purposes." Mexico Convention, Art. II(A). The take authorized by the SCP is plainly compatible with that standard, because all barred owls taken under the permit will be used for scientific purposes. Specifically, each taken owl will be removed from and kept out of its environment, so that the Service can measure the effect of that absence on northern spotted owls. Moreover, the permit also requires that all barred owls taken and retrieved be donated to public educational and research institutions, where their remains may be the subject of additional scientific research.

The Submitter nevertheless argues that the only 'scientific purposes' that satisfy the Mexico Convention are scientific studies designed to benefit the particular species taken—not, as here, studies designed to aid other protected species. But such a restriction appears nowhere in the Convention, as courts in the United States have already held. *See Friends of Animals v. United States Fish & Wildlife Serv.*, 879 F.3d 1000, 1001 (9th Cir.), *cert. denied sub nom. Friends of*

⁶ To the extent Submitters rely on the Mexico Convention to support their interpretation of the MBTA, these arguments also fail. As discussed *supra*, the scientific collection permits issued by the Service serve a critical purpose—specifically, to assess the effects of take of the Barred Owl on the conservation and recovery of the Northern Spotted Owl. Such permits allow take for scientific purposes pursuant to the Mexico Convention.

Animals v. Fish & Wildlife Serv., 138 S. Ct. 2628, 201 L. Ed. 2d 1029 (2018). Nor is inserting such language into the Convention necessary to avoid harm to the abundant barred owl, as Submitter has argued. To the contrary, and as explained above, before it issued the challenged SCP, FWS found that the SCP would have a negligible effect on barred owls, while contributing significantly to the recovery of another, more vulnerable species also protected by the MBTA. For these reasons, Submitter's novel interpretation of the MBTA has no merit. Nothing in FWS Regulations interpreting the MBTA suggests otherwise.

IV. Conclusion

As the Response notes, the matter is the subject of a pending judicial proceeding and the Secretariat shall proceed no further. Additionally, as discussed in this Response, there are no grounds for the Secretariat to recommend the preparation of a factual record for this submission. The information that would comprise a factual record is fully and publicly available in the Service's Administrative Records, and in court filings for the three lawsuits Friends of Animals has litigated. Finally, the United States has fully complied with the MBTA as well as with the ESA, NEPA, and Fish and Wildlife Service's Regulations.