



Keeping Northwest California wild since 1977

March 18, 2013

*Via Certified U.S. Post, Return Receipt Requested*

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**RE: Notice of Intent to Sue for Violations of the federal Endangered Species Act;  
Actions Threatening the Northern Spotted Owl and Marbled Murrelet  
Timber Harvest Plan 1-12-114HUM “Nacho Libre”**

Dear Responsible Parties,

The Environmental Protection Information Center (“EPIC”) hereby provides notice of intent to sue Green Diamond Resources Company (“GDRC”) and Sierra Pacific Industries, Inc. (“SPI”) for violations of the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 *et seq.*, threatening the Northern Spotted Owl (*Strix occidentalis caurina*), and the Marbled Murrelet (*Brachyramphus marmoratus*). The citizen-suit provision of the ESA requires that the alleged violators and the Secretary of Interior be given 60 days notice prior to filing a lawsuit in federal district court. 16 U.S.C. 1540(g)(2). This letters serves as the requisite legal notice.

The violations of the ESA arise from GDRC’s and SPI’s proposed actions, including logging other disturbance, detailed in **Timber Harvest Plan 1-12-114HUM “Nacho Libre”** (hereinafter “Nacho Libre THP”) in the Canon Creek drainage of the Mad River in northern California. The “Nacho Libre” THP will result in significant habitat modification or degradation that is likely to actually kill and injure the Northern Spotted Owl and Marbled Murrelet, species listed as “threatened” under the ESA. As described in more detail below, GDRC’s and SPI’s actions contemplated in the “Nacho Libre” THP will result in unlawful “take” of ESA-listed species by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering, in violation of Section 9(a) of the ESA, 16 U.S.C. § 1538(a).

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**Environmental Protection Information Center**

145 G Street, Suite A, Arcata, CA 95521 | (707) 822-7711

*www.wildcalifornia.org*

In this letter we summarize the status of the Northern Spotted Owl and Marbled Murrelet, and the relevant regulatory framework. Next, we describe how GDRC's and SPI's actions are likely to kill and injure Northern Spotted Owls and Marbled Murrelets by degrading and destroying their habitat, and explain why these actions constitute violations of Section 9 of the ESA. Finally, we set out the relief that EPIC will seek if this matter cannot be settled short of litigation. EPIC is willing to engage in negotiations with GDRC and SPI to find a mutually satisfactory settlement to this matter prior to litigation.

### **Identity of Organization Giving Notice**

The name, address, and phone number of the organization giving notice of intent to sue under the ESA is:

Environmental Protection Information Center, Inc.  
Attn: Andrew Orahoske, Conservation Director  
145 G Street, Suite A  
Arcata, California 95521  
Tel: (707) 822-7711

The Environmental Protection Information Center ("EPIC") is a California non-profit organization dedicated to the protection and restoration of forests, watersheds and biodiversity in northern California. EPIC's members and supporters have a direct interest in the protection of the Northern Spotted Owl and Marbled Murrelet as well as their habitat and recovery. EPIC's members and supporters live and recreate near areas and in the region where GDRC and SPI plan to destroy and degrade habitat and harms individual ESA-listed species. GDRC's and SPI's actions harming Northern Spotted Owl and Marbled Murrelet cause direct harm to the interests of EPIC's members and supporters.

### **Requirements of the Endangered Species Act**

The United States Supreme Court describes the ESA as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The ESA is designed to provide "a means whereby the ecosystems upon which endangered and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The U.S. Fish and Wildlife Service ("USFWS"), an agency of the Department of the Interior, administers the Act with respect to the Northern Spotted Owl. *See* 50 C.F.R. § 402.01(b). Species are listed as "endangered" or "threatened" by the USFWS under Section 4 of the Act, 16 U.S.C. § 1533. A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range . . ." 16 U.S.C. § 1532(6).

Under Section 9(a)(1)(B) of the ESA it is "unlawful for any person subject to the jurisdiction of the United States to . . . take any [endangered] species within the United States." 16 U.S.C. § 1538(a)(1)(B). Section 9(a)(1)(G) of the ESA makes it unlawful to violate any regulation pertaining to a threatened or endangered species. 16 U.S.C. § 1538(a)(1)(G). Under Section 4(d) of the Act, USFWS may promulgate regulations extending this prohibition to threatened species when "necessary and advisable to provide for the conservation of the species." 16 U.S.C. § 1533(d). The take prohibition has been extended by regulation to include the threatened Northern Spotted Owl. 50 C.F.R. § 17.31.

The legislative history of the ESA indicates that “[t]ake is defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 93-307 at 7 (1973). Section 3 of the ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

The statutory definition of the term “take” is further defined by regulations promulgated by the USFWS which define the terms “harm” and “harass,” as used in the Act’s definition of “take.” The USFWS regulations define “harm” to mean:

[a]n act that actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. § 17.3. The United States Supreme Court upheld this definition of “harm” in *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 527 U.S. 687 (1995). “Harass” is defined to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding or sheltering.” *Id.*

The destruction of habitat relied upon by ESA-listed species constitutes “take.” *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1069 (9th Cir. 1996) (activity could be enjoined before take occurs and “a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to ‘harm’ under the ESA”); *Marbled Murrelet v. Pacific Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995) (timber harvesting during breeding season could “harass” marbled murrelets by “annoying them to such an extent that it will significantly disrupt their normal behavior patterns”).

The primary mechanism for avoiding liability under Section 9 is to apply for and receive an incidental take permit (“ITP”). 16 U.S.C. § 1539(a)(1)(B). In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that conserves the species. *Id.* §§ 1539(a)(1)(B), (a)(2)(A); *see also Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“‘[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ speaks to the recovery of a threatened or endangered species” (emphasis added)). This plan is called a Habitat Conservation Plan (“HCP”) and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts . . . .” 16 U.S.C. § 1539(a)(2)(A).

### **Status of the Northern Spotted Owl**

The Northern Spotted Owl is associated with late-successional and old-growth forests from southern British Columbia to central coastal California. The USFWS listed the Northern Spotted Owl as a threatened species under the ESA in 1990 due to the extensive loss of suitable habitat from intensive logging of native forests. 55 Fed. Reg. 26114 (June 26, 1990). Since the ESA listing, population analyses have documented the continued range-wide declines that are attributed to the continued loss of habitat from logging, especially on private industrial

timberlands and from other factors, including the invasion of a non-native competitor, the Barred Owl. (Anthony et al 2006, Forsman et al. 2011). The fragmentation of older forests exacerbates the threat posed by Barred Owl invasion into forests once occupied by Northern Spotted Owl (Dugger et al 2011). Indeed, researchers have found a direct correlation between the likelihood of Barred Owl invasion of Spotted Owl territories and the lack of significant older forest. *Id.*

### **Status of the Marbled Murrelet**

The Marbled Murrelet was listed under the federal ESA in 1992 as threatened under the Endangered Species Act. 57 Fed. Reg. 45328 (October 1, 1992). Federal conservation efforts have not come close to reversing or even halting the decline of the Marbled Murrelet, a seabird that nests in old growth forests in the Pacific Northwest. According to a recent peer-reviewed study of the status of the Marbled Murrelet, which was prepared by scientists from the U.S. Forest Service, the U.S. Fish and Wildlife Service, the Washington Department of Fish and Wildlife and others, Marbled Murrelet numbers in five different study areas fell sharply between 2001 and 2010, from a total count of roughly 22,200 to a total count of roughly 16,700 (Miller et al 2012). In California, the extensive logging of old-growth redwood forests has also resulted in a listing as “endangered” under the state’s ESA.

### **Details of the “Nacho Libre” Timber Harvest Plan**

The “Nacho Libre” THP is proposed for forests on land owned by SPI, and GDRC has bought the timber rights. The THP is being submitted under the GDRC Habitat Conservation Plan (“HCP”) and Incidental Take Permit (“ITP”) for Northern Spotted Owl. The “Nacho Libre” THP covers 87.4 acres of proposed harvest within the Upper and Lower Cannon Creek State Planning Watersheds in Humboldt County, California. Both these watersheds drain into the Mad River. Logging methods include 58.8 acres of clearcutting, 18 acres of selection, one acre of road-right-of-way, and 9.6 acres of no-harvesting.

GDRC and SPI characterize forest stands proposed for logging in the “Nacho Libre” THP as averaging 60 years, but ranging as old as 130 years. However, as explained in more detail below, a pre-harvest inspection report prepared by the California Department of Forestry and Fire Protection (“CAL FIRE”) indicates that “Unit A” may qualify as “Late Successional Forest” per the California Forest Practice Rules (“CA FPRs”) definition. While GDRC and SPI acknowledge a “residual” older component to the forest stand, no admission of late successional forest is made by either company. According to pre-harvest inspection report of the “Nacho Libre” THP, the GDRC and SPI have substantially misrepresented the condition of the forest stands to be logged by clearcutting. Indeed, CAL FIRE consistently found tree diameters to be significantly higher than disclosed by GDRC and SPI. Furthermore, the CAL FIRE inspection report indicates that the forest stand threatened by clearcut logging likely qualifies as “late successional forest” under the CA FPRs. Designation as “late successional forest” under the CA FPR is significant as it triggers additional protections and emphasizes the importance of the forest stand to imperiled species like the Northern Spotted Owl and Marbled Murrelet. In addition, publically available aerial imagery indicates that there is no other old growth or late successional forest in the planning watershed. Lacking such analysis and disclosure, it would appear that GDRC and SPI are attempting to violate the CA FPRs as well as the federal ESA.

## **Admission of “Take” of Northern Spotted Owl**

GDRC and SPI acknowledge in the “Nacho Libre” THP of the existence of a Northern Spotted Owl activity center in Unit A of the plan (designated as activity center “HUM0301-Freeman”).

## **Violations of the Endangered Species Act**

SPI does not have an approved Incidental Take Permit (“ITP”) under a Habitat Conservation Plan (“HCP”) and therefore could not legally conduct logging activities that would “take” the Northern Spotted Owl activity center “HUM0301 – Freeman” Project-specific comments. As noted above the documentation for the “Nacho Libre” THP admits that logging activities will result in “take” of Northern Spotted Owls.

GDRC is attempting to apply the ITP and associated HCP that the company has been operating under since 1992 to SPI ownership. This failed HCP has resulted in precipitous declines of Northern Spotted Owls across GDRC’s ownership and adjacent lands. The operative language in GDRC’s permit to “take” Northern Spotted Owl is found in paragraph H. It reads:

H. The location where authorized activities may be conducted under the permit consists of commercial timberlands located in Del Norte, Humboldt, Mendocino, and Trinity Counties, California owned by Permittees at the time of permit issuance and commercial timberlands within these counties in which Permittees hold timber harvesting rights at the time of permit issuance and commercial timberlands acquired by Permittees after the effective date of the permit within Humboldt, Del Norte and Mendocino Counties and commercial timberlands within these counties in which Permittees acquire timber harvesting rights after the effective date of the permit.

See GDRC Incidental Take Permit for Northern Spotted Owl. The application of the ITP/HCP in the instance of the “Nacho Libre” THP is not proper under the ESA. This is because at the time the permit was issued, the associated environmental analysis under the ESA and the National Environmental Policy Act (“NEPA”) did not disclose and analyze the effect of “take” of Northern Spotted Owls outside of GDRC’s ownership. The analysis could not have foreseen and therefore never analyzed the environmental impacts of applying a blanket “take” permit outside of the analysis area more than 20 years after the permit was issued.

GDRC’s and SPI’s actions, including logging and other disturbance, proposed under the “Nacho Libre” THP will result in illegal “take” of Northern Spotted Owl and Marbled Murrelet by causing harm through significant habitat modification and degradation, resulting in death or injury to the Northern Spotted Owl and Marbled Murrelet by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. GDRC’s and SPI’s proposed actions will result in injury and death to known Northern Spotted Owls as a result of the destruction and degradation of suitable spotted owl habitat. Similarly, GDRC’s and SPI’s proposed actions will result in death or

injury to Marbled Murrelets that may be nesting in the forest stand at risk. Without adequate surveys for this species, and because suitable nesting habitat exists, the proposed “Nacho Libre” THP will result in illegal “take.” *See Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1069 (9th Cir. 1996).

### **Requested Relief**

First, EPIC requests that GDRC and SPI immediately cancel the “Nacho Libre” THP and cease and desist from any actions that impact Northern Spotted Owl and Marbled Murrelet habitat, including the suspension of all logging and other disturbance of suitable habitat. Second, EPIC requests that GDRC and SPI immediately cease and desist from any actions that may result in “take” of Northern Spotted Owl and Marbled Murrelet. Finally, EPIC requests that GDRC and SPI develop and implement new habitat conservation plans based on the best available science that will promote the recovery of imperiled species.

### **Conclusion**

EPIC has satisfied its obligation under the ESA for providing GDRC and SPI with notice of violations of the ESA as required by 16 U.S.C. § 1540(g). EPIC is willing to engage in discussions with GDRC and SPI to find a mutually satisfactory settlement to this matter prior to litigation. Please contact our office at (707) 822-7711 to arrange a time for a meeting.

Sincerely,



Andrew J. Orahoske, Conservation Director  
Environmental Protection Information Center

Cc:  
Secretary of the Interior, U.S. Department of the Interior  
United States Fish and Wildlife Service