



November 2, 2011

Hon. Ken Salazar
Secretary of Interior
United States Department of Interior
1849 C St. N.W.
Washington, D.C. 20240

Hon. Dan Ashe, Director
U.S. Fish and Wildlife Service
1849 C St. N.W.
Washington, D.C. 20240

Re: Notice of Intent to Sue to Remedy Violations of the Endangered Species Act Concerning
the Marbled Murrelet in Washington, Oregon and California

Dear Secretary Salazar and Director Ashe:

American Forest Resource Council (AFRC) and its members¹ give notice pursuant to Section 11(g)(1)(C) of the Endangered Species Act (ESA or Act), 16 U.S.C. § 1540(g)(1)(C), of their intent to file a civil suit to remedy violations of the Act by the U.S. Fish and Wildlife Service (Service) resulting from Service decisions relating to the population of marbled murrelets in Washington, Oregon and California that is listed as a threatened species under the ESA.

I. 2010 Denial of Delisting Petition. On January 21, 2010 the Service published in the Federal Register a notice denying AFRC's petition to delist the listed population of murrelets. The Service based the denial on its determination that the listed population is a distinct population segment (DPS) that is listable under the ESA and meets the legal definition of a threatened species. In making the DPS determination, the Service relied on the Joint Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy). 61 Fed. Reg. 4722 (February 7, 1996).

This decision to deny the delisting petition constitutes the failure of the Secretary to perform an act or duty which is not discretionary with the Secretary. The Secretary has no discretion to list a population of organisms that is not a species or subspecies of fish and wildlife or a distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. The listed three-state murrelet population is not any of these groupings, and the

¹ AFRC's current membership list is available at <http://www.amforest.org/about>.

Secretary had a non-discretionary duty to initiate proceedings to remove the population from the list of threatened species. The Secretary failed to perform this non-discretionary duty.

The Secretary impermissibly applied a non-scientific factor to justify the denial of the delisting petition: the existence of an international boundary between the United States and Canada. The Secretary must make all listing determinations “solely on the basis of the best scientific and commercial data available to him.” The Secretary lacks discretion to consider an international boundary in determining the existence of a listable distinct population segment. To the extent the Joint Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act purports to allow the Secretary to consider a non-scientific factor in making a DPS determination, the joint policy is contrary to law, has no binding effect and carries no weight.

The Secretary’s DPS determination under the Joint Policy is also contrary to law. The Joint Policy allows the Service to designate a DPS based on either biological factors or “international boundaries within which significant differences in control of exploitation, habitat management, conservation status, or regulatory mechanisms exist in light of section 4(a)(1)(D) of the ESA.” The Service found “[t]here is no evidence of marked genetic or morphological discontinuity between murrelet populations at the United States-Canada border.” The Service based the DPS determination solely on the existence of an international boundary without ever explaining what differences in habitat management, conservation status or regulatory mechanisms between the U.S. and Canada are “significant ... in light of section 4(a)(1)(D) of the ESA.”

II. 2008 Decision to Maintain Critical Habitat. The Service designated critical habitat for the listed marbled murrelet population on May 24, 1996. 61 Fed. Reg. 26256. In response to a lawsuit filed by AFRC and in compliance with a settlement agreement to resolve that case, on September 12, 2006, the Service published a proposed revision to critical habitat for the listed marbled murrelet population based on the best available science at that time. 71 Fed. Reg. 53838. On March 6, 2008, the Service published a notice in the Federal Register, 73 Fed. Reg. 12067, stating that “it is not appropriate to revise the designation of critical habitat for the marbled murrelet at this time.” The Service identified as the sole reason for that decision uncertainty regarding future Bureau of Land Management (BLM) planning decisions.

The March 6, 2008 decision to maintain the designation of all critical habitat designated in 1996 was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law and in excess of statutory jurisdiction, authority or limitations. 5 U.S.C. §706(2)(A), (C). There is no rational relationship between the reason given for the “not appropriate” decision and the decision itself. The settlement agreement required the Service to prepare a new economic analysis of the critical habitat designation, which the Service did, but the Service refused to consider the new economic analysis although the availability of that new analysis has nothing to do with future BLM planning decisions. Nor did the Service consider any of the other legal objections AFRC raised to the existing designation.

An area currently occupied by the species but which was not known to be occupied at the time of listing will likely, but not always, be essential to the conservation of the species and, therefore, typically included in the critical habitat designation.

71 Fed. Reg. 53842.

At the time of listing, only 16 marbled murrelet tree nests had been located in the three Pacific Coast states, “five in Washington, seven in Oregon, four in California,” 57 FR 45329 (October 1, 1992), and the Service applied a methodology to determine occupancy where no tree nest was found: “Active nests, egg shell fragments or young found on the forest floor, birds seen flying through the forest beneath the canopy, birds seen landing, or birds heard tailing from a stationary perch are all strong indicators of occupied habitat.” *Ibid.*

In the Service’s Final Biological Opinion for Preferred Alternative (Alternative 9) of the Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Species Within the Range of the Northern Spotted Owl (February 10, 1994), the Service indicated that it had identified all “known occupied sites” for the marbled murrelet as of that time. It stated that “approximately 87 percent of the known marbled murrelet occupied sites on Federal lands are contained in areas designated for protection within large reserve areas.” Page 26. These specific “known marbled murrelet occupied sites” catalogued by the Service in 1994 are (if they were also occupied in 1992) the only areas that can legally be designated as critical habitat under subsection 3(5)(A)(i).

The Service has no valid scientific basis to conclude that current occupancy establishes occupancy in 1992, especially in the large blocks of habitat the Service designated as critical habitat in 1996. The Final Science Review for the 5-Year Status Review of the Marbled Murrelet (McShane et al. 2004) reports (on page 2-14):

Little data are available regarding nest site fidelity by marbled murrelets because of the low number of observed nest sites and difficulty of observing bands on birds attending nest site. There are 15 records of murrelets using nest sites in the same or adjacent trees in successive years, but it is not clear if they were used by the same birds ...

The Service has no information that would support a conclusion that all of the LSRs were occupied at the time of listing. The unsupported belief that later occupancy establishes occupancy at the time of listing is also unlawful. *Otay Mesa Property, L.P. v. U.S. Dept. of Interior*, 646 F.3d 914 (D.C. Cir. 2011). The absence of any evidence that the designated areas were occupied at the time of listing is further shown in the September 12, 2006 proposal, which states:

Suitable marbled murrelet habitat, in Late-Successional Reserves (LSRs) in National Forests in Oregon and Washington and in areas covered by Bureau of Land Management (BLM) Western Oregon Land Use Plans, is managed by

the Forest Service and the BLM as occupied and therefore we have included the LSRs as occupied habitat.

71 FR 53845.

This methodology for identifying occupied habitat is unlawful for five reasons:

1. Basing an occupancy determination on the manner in which a land management agency “manages” an area is arbitrary and irrational. The Forest Service and BLM have never claimed that all, or any, of the unsurveyed suitable murrelet habitat in LSRs is in fact occupied by marbled murrelets – either currently or in 1992 when the murrelet was listed.

To the contrary, for example, McShane et al (2004) (page 4-5) reported that the BLM believes that in its Salem District only 21% of suitable murrelet habitat is likely to be occupied. The Forest Service believes that only 3% of suitable murrelet habitat on the Six Rivers National Forest is likely to be occupied. Out of five national forests and five BLM district submitting estimates of likely percentages of occupied murrelet habitat, only one unit reported that all suitable habitat is in fact occupied. Each of the other nine units estimates that some or most suitable habitat is not occupied. The Olympic and Mt. Rainier national parks reach the same conclusion.

2. The Service is required to use the best scientific and commercial data available for its critical habitat designations. There is no scientific basis for the Service to treat this alleged “managed as occupied” determination by the Forest Service or BLM for unsurveyed habitat in LSRs (even if there had been one) as an actual determination of occupancy, when many Forest Service or BLM units have recently reported that this is not true.

3. There is no “managed as occupied” practice by the Forest Service and BLM. The Forest Service and the BLM manage their LSRs, including areas of unsurveyed suitable murrelet habitat, based on direction in the Northwest Forest Plan (as interpreted, for the BLM, by district Resource Management Plans). The Forest Service and BLM have never made any independent determination that all unsurveyed habitat in LSRs should be managed as if occupied by murrelets, or as if suitable for murrelets. They simply follow the Northwest Forest Plan.

4. The Final Science Review for the 5-Year Status Review of the Marbled Murrelet (McShane et al. 2004) reports (on page 4-5) that local land managers believe there are only 820,768 acres of suitable murrelet habitat throughout the three Pacific Coast States that are “likely to be occupied.” This compilation of available data contradicts any claim that all 3.5+ million acres of proposed critical habitat are “likely to be occupied.”

5. The Service may not lawfully determine that millions of acres of forests are “occupied” by marbled murrelets under subsection 3(5)(A)(i) because a small number of localized murrelet observances (usually auditory) have occurred in individual trees or small stands consisting of a few acres of trees in various spots within that vast area. The Service’s decision to designate these vast areas as critical habitat without any specific evidence of

occupancy for each individual area at the time of listing is unlawful. *Otay Mesa Property, L.P.*, 646 F.3d 914 (requiring evidence of occupancy at the time of listing on a 143 acre parcel of land to support the designation of that parcel as critical habitat).

B. Does not currently contain physical or biological features essential to the conservation of the species. Over three million acres of the designated habitat was selected because it was included within Late-Successional Reserves (LSR), as described in the Northwest Forest Plan, on Federal lands within the range of the marbled murrelet in Washington, Oregon and California. Yet, when the Northwest Forest Plan was adopted in 1994, the LSRs were estimated to contain only 1,295,800 acres of suitable marbled murrelet habitat. (Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Species Within the Range of the Northern Spotted Owl (USDA & USDI February 1994), Table 3&4-38, page 3&4-222.

The Final Science Review for 5-Year Status Review of the Marbled Murrelet (McShane et al. 2004) reports (on page 4-5) that local land managers believe there are only 2,068,210 acres of suitable murrelet habitat on all lands throughout the three Pacific Coast states, with only about 1.4 million acres on Forest Service and BLM land within all land allocations. In 2006 Martin Raphael estimated that there are only 790,000 acres of suitable murrelet habitat on federal land, with only 680,000 acres in reserved allocations (including LSRs). M. G. Raphael, *Conservation of the Marbled Murrelet under the Northwest Forest Plan*, 20 Conservation Biology 297, 299. The 2009 Status Review did not dispute these figures.

Consistent with these suitable habitat estimates, in 2006 the Rogue River/Siskiyou National Forests and Medford BLM district reported that out of 421,000 acres designated as marbled murrelet critical habitat in 1996, only 150,000 acres are suitable marbled murrelet habitat. Rogue River/Siskiyou NFS, Medford BLM – FY 06-08 Biological Assessment, revised August 2, 2006, page BA-35. Thus, 270,000 acres of critical habitat in that area do not currently contain features that are “essential to the conservation of the” marbled murrelet, are not may not legally be designated as critical habitat.

The Service designated currently unsuitable areas within LSRs simply because it believes those areas “should develop into large blocks of suitable murrelet nesting habitat given sufficient time,” which may be measured in “decades or centuries.” Under subsection 3(5)(A)(i), the Service cannot designate areas that are not currently suitable and do not contain PCEs. “The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation.” *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F.Supp.2d 108, 122 (D.D.C. 2004).

The 2008 rule relies on the May 24, 1996 designation to describe the physical or biological features (primary constituent elements) of marbled murrelet habitat:

The Service has determined that the physical and biological habitat features (referred to as the primary constituent elements) associated with the terrestrial environment that support nesting, roosting, and other normal behaviors are essential to the conservation of the marbled murrelet and require special management considerations.

Within areas essential for successful marbled murrelet nesting, the Service has focused on the following primary constituent elements: (1) individual trees with potential nesting platforms, and (2) forested areas within 0.8 kilometers (0.5 miles) of individual trees with potential nesting platforms, and with a canopy height of at least one-half the site-potential tree height. This includes all such forest, regardless of contiguity. These primary constituent elements are essential to provide and support suitable nesting habitat for successful reproduction of the marbled murrelet.

Individual nest trees include large trees, generally more than 81centimeters (32 inches) dbh with the presence of potential nest platforms or deformities such as large or forked limbs, broken tops, dwarf mistletoe infections, witches' brooms, or other formations providing platforms of sufficient size to support adult murrelets. 61 Fed. Reg. 26264.

Both PCEs identified by the Service require the presence of at least one individual potential nest tree with the appropriate diameter, height and platform. (The "surrounding forested areas" PCE can only be defined by reference to an individual potential nest tree.)

Courts have ruled that PCEs must currently be found in all areas designated as critical habitat under subsection 3(5)(A)(i):

PCEs must be "found" on occupied land before that land can be eligible for critical habitat designation.

[T]he Service admits in the final rule that some designated areas do not contain PCEs. ... In the administrative record, the Service offers these excuses: sufficient data was not available, the time and expense required to check each area was prohibitive, and that this flexible approach was needed given the dynamic nature of the coastal areas. ... These excuses have no basis in the statute or in cases; rather, the Service has previously been critiqued for not mounting the proper effort to ensure that PCEs do exist on designated lands. ... The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation.

That PCEs must be "found" on an area is a prerequisite to designation of that area as critical habitat. The Service's argued-for interpretation, essentially that designation is proper merely if PCEs will likely be found in the future, is simply beyond the pale of the statute.

On remand, the Service must show that PCEs are found on the areas it designates as critical habitat.

Cape Hatteras Access Preservation Alliance, 344 F.Supp.2d at 122-23.

[T]he court finds that ... the Service ... included within the critical habitat boundary areas that are "likely to develop" essential habitat components, but do not contain them now. Yet, the ESA defines critical habitat for the area occupied by the species as the specific areas on which are found the features essential to the conservation of the species.

[T]he express language of the ESA [is] that critical habitat comprises "specific areas" where "physical or biological features" "essential to the conservation of the species" "are found." 16 U.S.C. § 1532(5)(A)(i)(emphasis added). Further, the Service is required to "designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(emphasis added). Although Defendants argue that Plaintiffs demand an unreasonable level of certainty in designating the critical habitat and that the court should defer to the Service's judgment, the court cannot do so when the Service has acted in direct violation of the statute.

Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service, 268 F.Supp.2d 1197, 1215, 1216 (E.D. Cal. 2003).

As shown above, millions of acres of designated critical habitat do not contain the PCEs required for critical habitat designation. The May 24, 1996 designation recognized this fact:

Within the boundaries of designated critical habitat, only those areas that contain one or more of primary constituent element are, by definition, critical habitat. Areas without any primary constituent elements are excluded by definition.

61 Fed. Reg. 26265.

III. 2011 Decision to Maintain Unlawful Critical Habitat and Reverse Longstanding Agency Interpretation of Critical Habitat. On October 5, 2011 the Service published a notice in the Federal Register revising the marbled murrelet critical habitat designation by removing some 189,000 acres and continuing the designation for the remainder of the currently designated habitat. The Service refused to consider AFRC's objections to the legality of the currently designated habitat ("Claims of inconsistency with statutory requirements (e.g., occupancy at the time of listing, definition of occupied habitat, reliance on 1996 primary constituent elements (PCEs))" on the ground that the legality of the designation was "outside the scope of the proposed rule." The Service therefore once again unlawfully continued to designate millions of acres of habitat that does not meet the legal definition of critical habitat for all the reasons stated above.

The October 5, 2011 rule also announced a reversal of the agency's longstanding interpretation of the designated critical habitat which constitutes a major expansion of the designated area. As noted above, the 1996 designation had stated that "[a]reas without any primary constituent elements are excluded by definition." The Service repeated this

interpretation of the 1996 rule when it proposed to revise the critical habitat in 2006. 71 Fed. Reg. 53851. The October 5, 2011 rule reverses that consistent 15 year interpretation:

The preamble to the 1996 final critical habitat rule (61 FR 26265; May 24, 1996), states that “within the boundaries of designated critical habitat, only those areas that contain one or more primary constituent elements are, by definition, critical habitat. Areas without any primary constituent elements are excluded by definition.” However, this language is not in the final critical habitat rule itself and is no longer accurate. The potential effects of Federal actions that may affect any area within the boundaries of designated critical habitat will need to be evaluated on a project-specific basis during the section 7(a)(2) consultation process.

The Service’s decision to reverse its interpretation of this key element of the 1996/2008 designation, and to add as much as two million additional acres to the designated critical habitat – areas that by definition do not contain any of the PCEs required for critical habitat – that now must undergo lengthy, burdensome and expensive consultation under section 7 of the ESA, was made without any notice to the public, without any opportunity to comment and without any of the other procedures required by law under the ESA for the adoption or amendment of a critical habitat designation. That decision is both substantively and procedurally unlawful. *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191 (D.C. Cir. 1996).

Unless these illegal actions are withdrawn and remedied within 60 days from your receipt of this letter, AFRC will initiate legal action to accomplish that objective.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tom Partin", with a large, stylized flourish extending to the right.

Tom Partin
President, AFRC