

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**AMERICAN FOREST RESOURCE  
COUNCIL**, 5100 SW Macadam Ave., Ste.  
350, Portland, OR 97239; **CARPENTERS  
INDUSTRIAL COUNCIL**,  
12788 SE Stark Street, Portland, Oregon  
97233; and **DOUGLAS COUNTY,  
OREGON**, 1036 S.E. Douglas Street,  
Roseburg, Oregon 97470,

Plaintiffs,

v.

**DANIEL M. ASHE**, Director,  
U.S. Fish and Wildlife Service  
1849 C Street NW  
Washington, D.C. 20240; and  
**KEN SALAZAR**, Secretary of Interior,  
1849 C Street, NW  
Washington, D.C. 20240,

Defendants

Civil No. 12-111-JDB

Action for Declaratory and Injunctive  
Relief to Remedy Violations of the  
Endangered Species Act, 16 U.S.C.  
§§1531 *et seq.*, and the Administrative  
Procedure Act, 5 U.S.C. §§ 551-706

**COMPLAINT**

For their complaint herein, plaintiffs allege as follows:

**INTRODUCTION**

1. This is an action for declaratory and injunctive relief against Daniel M. Ashe, Director, United States Fish and Wildlife Service (FWS), and the Hon. Ken Salazar, Secretary of Interior, to remedy violations of the Endangered Species Act (ESA), 16 U.S.C. §§1531 *et seq.*, concerning the listing and designation of critical habitat for the marbled murrelet population in Washington, Oregon and California that was listed as a threatened species on October 1, 1992. 57 Fed. Reg. 45328.

## **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action under 16 U.S.C. §1540(c) and (g) and 28 U.S.C. § 1331 (federal question). Venue in this district is proper under 16 U.S.C. §1540(g) because the violations occurred in this district. Venue in this district is proper under 28 U.S.C. §1391(e) because the defendants reside in this district and a substantial part of the events or omissions giving rise to the claims occurred in this district.

## **PARTIES**

3. Plaintiff American Forest Resource Council (AFRC), a nonprofit corporation organized under the laws of the state of Oregon, is a forest products trade association located in Portland, Oregon which represents approximately 80 forest product manufacturing companies and landowners throughout Oregon, Washington, California and other states. AFRC's primary purpose is to advance its members' vital interest in preserving an adequate and reliable supply of timber for their processing facilities, both from federal lands managed by the U.S.D.A. Forest Service and Bureau of Land Management (BLM) in Washington, Oregon, California and elsewhere, and from their own privately-owned lands and other private lands. AFRC and its members actively participate in federal agency decisions that involve the protection, management, allocation and use of both federal and non-federal forest resources in California, Oregon and Washington, including wildlife, recreation and commodity production. AFRC and its predecessors have served as the representative for the western forest products industry on many such decisions since 1986.

4. Many of AFRC's members purchase or seek to purchase timber sales sold by the Forest

Service and BLM in the coastal portions of Oregon, California and Washington that contain forests used or potentially used by marbled murrelets. Many of AFRC's members have been unable to purchase timber sales as a result of restrictions on land management by the Forest Service and BLM stemming from the 1992 listing of the three-state murrelet population and the subsequent designation of critical habitat for the population. AFRC and its members utilize all the resources of lands managed by the Forest Service and BLM in Washington, Oregon, California and elsewhere, and have an interest in the environmentally-sound and sustainable management of those resources.

5. Many AFRC members own private timberland in the coastal region used or potentially used by marbled murrelets. Much of this land includes parcels of private land that is intermingled with or adjacent to the federal lands used, potentially used or designated as critical habitat for the marbled murrelet. Their management of these parcels of land has been and will be directly and adversely affected by the actions, failures and omissions challenged in this case. The risk of fire, disease or insect infestation starting on federal land and spreading to adjoining private land has increased, and will continue to increase, as a result of those actions, failures and omissions. These landowners may be forced to manage their lands in a different and less environmentally desirable manner in response to the actions, failures and omissions challenged in this case.

6. AFRC also collects information about the environmental, economic and social impacts of these major federal land management decisions, and disseminates this information to its members and participants, to public officials and to thousands of members of the public that are directly affected by these decisions.

7. Plaintiff Carpenters Industrial Council (CIC) is a labor organization that represents some 10,000 forest products workers in Oregon, Washington and northern California, and about 120,000 members nationwide. The CIC was chartered July 1, 2006, by the United Brotherhood of Carpenters and Joiners of America, which is headquartered in Washington, D.C. The CIC was formed after the merger of four Regional Industrial Councils – the Carpenters East Coast Industrial Council, the Midwestern Council of Industrial Workers, the Southern Council of Industrial Workers, and the Western Council of Industrial Workers (WCIW).

8. Many CIC members live in remote communities that are heavily dependent on timber, particularly federal timber sold by the Forest Service and the BLM. Several thousand of these workers have experienced, or continue to be threatened with, permanent job loss caused by the timber supply reductions resulting from land management restrictions and delays imposed for the protection of the marbled murrelet. There are few, if any, prospects to replace CIC members' jobs at a comparable wage in their home towns. Many CIC members use Forest Service and BLM forests for recreation, enjoyment, solitude and other purposes, and have a keen interest in maintaining the long-term health and stability of these forests, and in achieving the environmentally sound and sustainable management of all the resources of these forests.

9. Douglas County, Oregon is located in heavily-forested southwestern Oregon. The County extends from sea level at the Pacific Ocean to 9,182 foot Mt. Thielsen in the Cascade Mountains. It has the entire Umpqua River watershed within its boundaries, and it contains nearly 2.8 million acres of commercial forest lands. Approximately 25 percent of Douglas County's labor force is

employed in the forest products industry, which includes numerous sawmills and veneer plants, as well as one pulp and one particle board plant, and numerous shingle, shake, pole and other wood products plants. Over 50 percent of the land area of the County is owned by the Federal Government and managed by the Forest Service and the BLM. Douglas County owns and manages its own forest lands that may provide nesting habitat for marbled murrelets, and the County is directly and adversely affected by limits on timber harvesting resulting from the conservation measures arising from the listing of the marbled murrelet population as a threatened species.

10. Defendant Daniel M. Ashe, the Director of the U.S. Fish and Wildlife Service, is the official who is responsible for administration of the ESA with respect to terrestrial species including the marbled murrelet. Defendant Ken Salazar, Secretary of Interior, has supervisory responsibility over defendant Ashe, and has the statutory duty to implement the ESA. FWS shares ESA enforcement responsibility with the National Marine Fisheries Service (NMFS) within the Commerce Department, which has responsibility for certain predominantly marine species.

### **BACKGROUND ALLEGATIONS**

11. The marbled murrelet, recently reclassified by FWS as a full species, is a small, robin-sized sea bird that lives in both marine and inland environments along the North American Pacific coast. Marbled murrelets spend the majority of their life on the ocean, and travel inland to nest between April and September. Marbled murrelets nest both on the ground and in trees. The marbled murrelet is abundant throughout Alaska, which has over 90 percent of the species' population, which was most recently estimated at 944,000. The remaining population is found in British Columbia,

with 60,000-90,000 birds, and Washington, Oregon, and California, with 18,000-30,000 birds.

12. While the marbled murrelet population is “relatively continuous from the western Aleutian Islands to northern California,” Piatt, J.F., *et al.*, Status review of the Marbled Murrelet (*Brachyramphus marmoratus*) in Alaska and British Columbia (U.S. Geological Survey 2007) (hereafter USGS Report) at 138, “the one notable gap in its breeding distribution that we are aware of is the 450 km of coastline in California, between Humboldt County (northern California) and San Mateo County (central California).” *Id.* A population of marbled murrelets as large as 600 birds is found south of the 300 mile distribution gap.

13. The ESA protects fish, wildlife and plants through the process of “listing” a species of fish or wildlife or plants as threatened or endangered. 16 U.S.C. §1533(c)(1). The term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. §1532(16).

14. The ESA directs the Secretary in some circumstances to designate “critical habitat” for a listed species:

The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to maximum extent prudent and determinable –

(A) shall concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3).

15. Critical habitat is defined in 16 U.S.C. §1532(5)(A) of the ESA:

The term "critical habitat" for a threatened or endangered species means-

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5). FWS refers to the required "physical and biological features" as "primary constituent elements."

16. The Secretary may designate or revise critical habitat only "after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The Secretary has discretionary power to exclude areas from designation as critical habitat:

The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

*Id.*

17. On October 1, 1992 FWS published a Final Rule in the Federal Register "determin[ing] the Washington, Oregon and California population of the marbled murrelet ... to be a threatened species pursuant to the [ESA]." 57 Fed. Reg. 45328. In the listing decision, FWS expressed

uncertainty whether the murrelet population in the three-state area was a listable distinct population segment (DPS), and promised to reexamine that issue within 90 days of the listing decision:

Compliance with a court order required a final decision on listing to be made at this time. Based on the information now available to the Service, the only supportable decision that can be reached within the limit imposed by the court is to list the population as proposed. Nevertheless, the Service intends to reexamine the basis of recognizing this population of murrelets as a “species” under the Act. Within 90 days, the Service will announce the results of this examination and at that time may propose a regulatory change that would alter the listing of the murrelet as a threatened species.

57 Fed. Reg. 45330. However, the FWS never performed the promised 90-day reexamination of the DPS finding for the listed three-state population (hereafter Three-State DPS).

18. On February 7, 1996, FWS issued a Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (1996 DPS Policy). 61 Fed. Reg. 4722. The 1996 DPS Policy requires FWS to consider both the “discreteness” and the “significance” of a population segment to determine whether it is “distinct” for purposes of a proposed listing:

*Discreteness:* A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions:

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. ...
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

*Significance:* If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance will then be considered in light of Congressional guidance (see Senate

Report 151, 96th Congress, 1st Session) that the authority to list DPS's be used " \* \* \* sparingly" while encouraging the conservation of genetic diversity. In carrying out this examination, the Services will consider available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to, the following:

1. Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon,
2. Evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon,
3. Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range, or
4. Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Because precise circumstances are likely to vary considerably from case to case, it is not possible to describe prospectively all the classes of information that might bear on the biological and ecological importance of a discrete population segment.

61 Fed. Reg. at 4725.

19. On May 24, 1996, FWS designated 3,887,800 acres of critical habitat for the Three-State DPS. 61 Fed. Reg. 26256. All of the designated areas were determined to be "within the geographical area occupied by the species at the time it was listed under the Act." 76 Fed. Reg. 61604. FWS identified two primary constituent elements essential for the conservation of the marbled murrelet: "(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." 61 Fed. Reg. 26264. FWS acknowledged that some areas within the designated critical habitat do not contain either of the primary constituent elements, and that those areas are not considered to be critical habitat: "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.” 61 Fed. Reg. 26265. FWS affirmed this definitional limitation in its 2006 proposed critical habitat revision. 71 Fed. Reg. 53851.

20. On March 26, 2002 AFRC along with three of its members (Starfire Lumber Company, Herbert Lumber Company and C & D Lumber Co.) filed suit in the U. S. District Court for the District of Oregon to compel FWS to conduct a 5-year status review of the Three-State DPS and to challenge the 1996 critical habitat designation. *Am. Forest Res. Council v. Department of Interior*, Civil No.02-6087-AA (D. Or.). On January 13, 2003 the AFRC and the Department of Interior entered into a Settlement Agreement of that case in which FWS agreed to perform a 5-Year Review of the Three-State DPS and to "conduct a rulemaking to consider potential revisions to Murrelet critical habitat in accordance with ESA Section 4(b)(2) and 4(a)(3)(b)." The Settlement Agreement was approved by the United States District Court for the District of Oregon on April 24, 2003.

21. On August 31, 2004 FWS completed a 5-Year Review of the Three-State DPS, finding that "[t]he currently listed murrelet population is not discrete according to the 1996 DPS Policy" because "[t]here is no marked separation of physical, physiological, ecological or behavioral differences at the border" and "[t]here are no differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms across the international border that are significant in light of section 4(a)(1)(D) of the Act."

22. On September 12, 2006 FWS published in the Federal Register a proposed rule to

"revise currently designated critical habitat for the marbled murrelet (*Brachyramphus marmoratus marmoratus*) in Washington, Oregon, and California, under the [ESA]." 71 Fed. Reg. 83538. To identify areas that were likely to contain the identified primary constituent elements, FWS relied on "the current [*i.e.*, 1996] marbled murrelet critical habitat designation based on forest stand maps." 71 Fed. Reg. 53844. FWS invited broad public comment on the proposal:

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments particularly are sought concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether it is prudent to revise currently designated critical habitat and whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of marbled murrelet habitat, and what areas that were occupied at the time of listing that contain the features that are essential for the conservation of the species should be included in our revised designation, and why and what areas that were not occupied at the time of listing are essential to the conservation of the species;

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed revised critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed revised designation, and in particular, any impacts on small entities;

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns;

(6) Specific information from the public on marbled murrelet and its habitat, and which habitat or habitat components (*i.e.*, physical and biological features) are essential to the conservation of this species,

and why; and

(7) Specific information from the public regarding whether specific exclusions from this proposal may be appropriate for consideration.

71 Fed. Reg. 83538. AFRC and other members of the public submitted comments addressing the seven identified issues.

23. On March 6, 2008, the Service published a notice in the Federal Register, 73 Fed. Reg. 12067, determining not to revise the 1996 critical habitat:

Due to uncertainties regarding Bureau of Land Management (BLM) revisions to its District Resource Management Plans in western Oregon, we have determined that it is not appropriate to revise the designation of critical habitat for the marbled murrelet at this time, as discussed below. Therefore, ... we find that the proposed revision of critical habitat for the marbled murrelet should not be made. Accordingly, the May 24, 1996, final rule designating critical habitat for the marbled murrelet remains in effect (61 FR 26256).

73 Fed. Reg. 12067.

24. On July 31, 2008 FWS proposed to revise the 1996 critical habitat by deleting 254,070 currently designated acres. 73 Fed. Reg. 44678. FWS again requested comment from the public including "[s]pecific information on the amount and distribution of marbled murrelet habitat." Again, AFRC and other members of the public submitted comments addressing the identified issues.

25. On May 28, 2008 Plaintiffs submitted a petition to remove the Three-State DPS from the list of endangered and threatened species. On October 2, 2008 FWS published a finding that the petition "presents substantial information indicating that the petitioned action may be warranted." 73 FR 57314.

26. On June 12, 2009 FWS completed another 5-Year Review of the Three-State DPS,

determining that the Three-State DPS meets the legal definition of a species under the DPS Policy and should remain listed as a threatened species..

27. On January 21, 2010 FWS published a decision denying Plaintiffs' petition and "determin[ing] that removing the murrelet from the List is not warranted." 75 Fed. Reg. 3424 (hereafter Petition Denial Decision).

28. The best scientific information available to FWS at the time of the Petition Denial Decision was that the entire population of marbled murrelets is divided into three separate genetic units: "Marbled Murrelets between northern California and the eastern Aleutians, including those in Oregon, Washington, and British Columbia, do not appear to be genetically differentiated." USGS Report at 138. "Marbled Murrelets in the central and western Aleutian Islands and in central California have been found to be differentiated from each other and from Marbled Murrelets in the middle portion of their range, i.e., from northern California to the eastern Aleutian Islands." *Id.* The 300 mile distribution gap in California has resulted in genetic differentiation on both sides of the gap: "This gap in nesting distribution separates the genetically differentiated murrelet population in central California from the middle population that is distributed from northern California to the eastern Aleutians." *Id.* "The central California population is genetically distinct from northern populations." M. Zachariah Peery, *et al.*, Genetic Analyses of Historic and Modern Marbled Murrelets Suggest Decoupling of Migration and Gene Flow after Habitat Fragmentation. *Proc. R. Soc. B.* 2010 277, 697-706 (published online November 11, 2009). "Gene flow among these three regions occurs but is extremely low." *Id.*; Peery et al 2009 (only five central California birds

interbreed with the northern birds in each 10 year generation out of population of as many as 600 birds). In the Petition Denial Decision, FWS explicitly found that the marbled murrelets in central California constitute a different “genetic unit” than those north of the gap: "the currently listed population encompasses all of one genetic unit as mentioned above and a portion of another." 75 Fed. Reg. 3430.

29. On October 5, 2011 FWS published a final rule revising critical habitat for the Three-State DPS by deleting 189,671 acres of land from the designation. 76 Fed. Reg. 61599.

30. The actions, failures and omissions described above are causing current and threatened injury to plaintiffs, who have no remedy at law for these injuries.

### **Claims for Relief**

#### **FIRST COUNT**

(Unlawful denial of petition to delist Three-State DPS)

#### **FIRST CLAIM**

(Violation of ESA; unlawful listing of a group of organisms that do not interbreed when mature; failure to use best available science; agency action not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2))

31. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

32. The ESA does not permit the listing as a distinct population segment of any group of organisms that do not "interbreed[] when mature." 16 U.S.C. §1532(15). "The ESA requirement that a group of organisms must interbreed when mature to qualify as a DPS is a necessary ... condition [for a DPS listing]. Under the definition, ... all organisms that belong to a DPS must

interbreed when mature (at least on some time scale)." 71 Fed.Reg. at 838, quoted in *Modesto Irrigation District v. Gutierrez*, 619 F.3d 1024 (9th Cir. 2011). The Department of Justice has represented in judicial proceedings that "under NMFS's interpretation, the members of a DPS must interbreed when mature ...." Answering Brief of the Appellees, *Modesto Irrigation District v. Gutierrez*, No. 09-15214, at 28.

33. The best available scientific information shows that marbled murrelets in central California do not interbreed when mature with the marbled murrelets north of the 300 mile distribution gap. As a result, the central California birds cannot be listed in the same DPS as the northern California-Oregon-Washington birds. Although this scientific information was in the record at the time FWS issued its Petition Denial Decision, FWS failed to consider whether the Tri-State DPS meets the statutory "interbreed when mature" requirement, and never made a determination that the central California birds interbreed with the northern birds.

34. FWS has a non-discretionary duty to comply with the statutory limits on DPS listings, and has no legal authority to list a species as endangered or threatened except as permitted by the ESA. The FWS decision not to remove the Three-State DPS from the list of endangered and threatened species constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

## SECOND CLAIM

(Violation of ESA; arbitrary and capricious determination of "discreteness" for DPS listing; failure to consider and explain important factors; arbitrary and capricious agency action under 5 U.S.C. § 706(2))

35. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

36. FWS determined that the Three-State DPS meets the "discreteness" criterion under the 1996 Joint DPS Policy. 75 Fed. Reg. 3426. The agency found that the marbled murrelets in the Three-State grouping do not meet the biological test for a DPS defined by the U.S.-Canada boundary because the U.S. birds are not "markedly separated" from the birds in Canada by "physical, physiological, ecological, or behavioral factors." However, the agency found that the alternative non-biological discreteness test for defining a boundary-defined DPS under 1996 Policy was met because "there are significant differences in management of habitat, conservation status, and regulatory mechanisms between the countries." 75 Fed. Reg. 3426.

37. The FWS determination that absent ESA listing there would be significant differences in "conservation status" between the U.S. and Canada was contrary to the record, irrational, inconsistent with prior agency decisions, and ignored important factors:

a. The finding that there would be "significant difference in the conservation status of the murrelet across the United States and Canadian border from a legal standpoint," 75 Fed. Reg. 3426, irrationally compared the Canadian federal Species at Risk Act (SARA) only with state laws in Washington, Oregon and California, and improperly ignored the legal protection for marbled murrelets provided under federal law by the U.S. Migratory Bird Treaty Act (MBTA), 16 U.S.C.

§703(a), the National Forest Management Act, 16 U.S.C. §§ 1600 *et seq.*, and other U.S. federal laws and programs that protect marbled murrelets irrespective of ESA listing status. While FWS briefly noted the MBTA in assessing comparative regulatory mechanisms, 75 Fed. Reg. 3428, it never cited the MBTA or any other federal law in assessing comparative conservation status.

b. FWS observed four "significant differences in conservation status" between the Canadian murrelet population and the Three-State murrelets: the Canadian population is 66,000 while the Three-State population is 18,000; the "productivity" of murrelets in the Three-State population is considerably lower than in Canada; more old-growth forest has been lost in the Three-State region than in Canada; and there is probably less murrelet nesting habitat remaining in the Three-State region than in Canada. 75 Fed. Reg. 3426-27. However, even if these statistics are correct and relate to "conservation status," merely citing the statistics is insufficient under the DPS Policy because there must also be a finding that differences in conservation status are "significant in light of section 4(a)(1)(D) of the Act." Yet FWS made no such finding in the Petition Denial Decision, and gave no explanation for its conclusion. FWS determined in another recent discreteness decision that a difference in size of populations between two adjacent countries does not necessarily support a discreteness finding, 73 Fed. Reg. 77326 (December 18, 2008) (rejecting international boundary DPS for Humboldt penguins), and failed to explain why differing population sizes are "significant in light of section 4(a)(1)(D) of the Act" in this case but not for Humboldt penguins. Further, in the 2004 5-Year Status Review the Service reviewed the latest comparative population figures and determined that "there is no accepted protocol by which these statistics yield

a meaningful comparison of conservation status across the border for purposes of the DPS policy.” *Id.* at 16. In the Petition Denial Decision FWS did not present an “accepted protocol” to assessment the significance of differing population sizes, and did not explain the reversal from its 2004 position, which has nothing to do with shifting from a “with listing” to a “without listing” analysis.

38. FWS also justified its discreteness determination based on a difference in “management of habitat” and “regulatory mechanisms.” 75 Fed. Reg. 3427. This finding, based on the agency's interpretation of various Canadian and U.S. wildlife protection laws, exaggerated and misstated Canadian law, while ignoring and misdescribing the panoply of U.S. wildlife conservation laws that will continue to apply to marbled murrelets even if ESA protections are no longer in effect:

a. FWS proclaimed that SARA goes beyond the MBTA by prohibiting "harm" to a protected species in Canada (presumably encompassing some behavior not barred by the MBTA prohibitions on “pursue, hunt, take, capture, kill”) and by prohibiting destruction of the "residence" of a protected species, which is defined as “a ... nest ... that is occupied or habitually occupied by one or more individuals during all or part of their life cycles.” 75 Fed. Reg. 3427. Yet FWS failed to find or show that this difference is “significant.” The best scientific information available is that the marbled murrelet is elusive and secretive in its forested habitat and it is virtually impossible for human being to ever see a nesting marbled murrelet. USGS Report at 8 (“Marbled Murrelets [are] solitary nesters with secretive breeding habits and remote, often inaccessible nest sites ....”). “The marbled murrelet is one of the most mysterious seabirds to be found anywhere in the world.” <http://oceanlink.info/ONews/OceanNewsReader/ON3.pdf>. “Nests are cryptic and difficult to locate.”

A. Burger, Using Radar to Estimate Populations and Assess Habitat Associations of Marbled Murrelets, 65 Journal of Wildlife Management No. 4 (2001). “Marbled Murrelets are non-colonial, secretive alcids for which nesting biology has been notoriously difficult to study.” L. Tranquilla *et al.*, Replacement Laying in Marbled Murrelets, Marine Ornithology 31: 75-81 (2003). It has been difficult to locate and monitor their nests on the mossy platforms of old-growth trees ....” Since the very first marbled murrelet nest on record was discovered in 1974, no more than 180 marbled murrelet nests have ever been located in Canada. Silvergieter, M. P., and D. B. Lank. 2011, Patch scale nest-site selection by Marbled Murrelets (*Brachyramphus marmoratus*), Avian Conservation and Ecology 6(2): 6 (<http://dx.doi.org/10.5751/ACE-00483-060206>). Further, FWS reports that marbled murrelet “nests can be in trees up to 250 feet high,” <http://www.fws.gov/oregoncoast/wildlife/seabird.htm#9>, making human-murrelet encounters even more unlikely.

i. FWS failed to acknowledge the rarity of human-murrelet encounters, and never explained how an incremental prohibition in Canada on "harm[ing]" such an elusive species is a “significantly” more powerful regulatory tool than the MBTA’s prohibitions against “pursue, hunt, take, capture, kill” of a murrelet in America. FWS must consider the actual effect of the comparative regulatory mechanisms, not speculative or theoretical impacts. *Center for Biological Diversity v. Lubchenco*, 758 F.Supp.2d 945, 962 (N.D.Cal. 2010)(upholding NMFS determination that a boundary-defined DPS for the ribbon seal is not discrete because "even though quotas [in Russia] are high, the actual harvest is low, so there is no real threat to the seal."); 71 Fed. Reg.

56227-56256 (FWS declines to use U.S.-Mexico boundary to define DPS for Northern Mexican Gartersnake because “any conclusions that may be drawn with reference to differences in management across the United States-Mexico border are largely speculative due to the lack of information available as to the efficacy and protections of these regulations in practice.”). Since so few humans ever come in contact with a marbled murrelet, there is no realistic chance for a human to ever “harm” a murrelet, and no actual significance to the additional Canadian “harm” provision.

ii. FWS also did not explain why protecting the 180 known historic nest sites, less than ¼% of the current Canadian murrelet population of 66,000-90,000 birds, adds “significantly” to Canadian regulatory powers compared to those of the MBTA in the U.S. Nor did FWS address the best scientific information available showing that marbled murrelet nest sites are rarely re-used in more than one nesting season, so few of the 180 known nesting sites in fact meet the Canadian statutory definition of a protected “residence,” and protecting the few known historic nest sites is unlikely in actuality to protect any meaningful number of future nest sites.

b. FWS asserts that Canadian law regarding bycatch mortality of murrelets is superior to U.S. law in Washington state, erroneously asserting that “[w]ithout the ESA, murrelets in Washington do not appear to be protected from bycatch.” 75 Fed. Reg. 3429. In fact, regardless of Washington State law, the MBTA making any killing or taking of a murrelet unlawful, including bycatch by fishermen.

c. FWS observed that fines and prison terms for SARA violations in Canada are greater than those under the MBTA in the U.S. 75 Fed. Reg. 3428. Yet FWS never concluded, and

pointed to no information showing, that Americans are "significantly" more likely to kill a marbled murrelet than Canadians because they face "only" a \$15,000 fine and six months in prison. Absent some evidence-based finding that the difference in punishments is "significant" from a regulatory perspective, no such inference can be upheld.

d. FWS failed to consider the conservation value of the National Forest Management Act (NFMA), 16 U.S.C. §§1600 *et seq.*, although in another recent decision on a Pacific Northwest species, the fisher, FWS relied on the NFMA and found that because Canada has no comparable federal land management law, "[i]f anything, fishers would have more protection in the United States due to the NFMA." 75 Fed. Reg. 19929 (April 16, 2010). FWS discounted the regulatory importance of the Northwest Forest Plan applicable to national forests in the U.S. under the NFMA because "[i]f the murrelet were delisted, the NWFP could be amended to reduce protection for the species." 75 Fed. Reg. 3429. FWS's reliance on speculative future regulatory steps contradicts the NMFS approach that was upheld in *Lubchenco*, 758 F.Supp.2d 945 (upholding NMFS determination that "any threats to the ribbon seal are only potential, whereas the DPS policy focuses on actual threats.").

e. FWS failed to consider the conservation measures of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*, applicable to BLM public domain lands, although FWS found in its recent decision on the flat-tailed horned lizard that the boundary between the U.S. and Mexico did not define a DPS even though the lizard is listed as a threatened species in Mexico because "FLPMA is an adequate regulatory mechanism within the confines of its applicability" and

therefore there were no significant regulatory differences between the two countries. 76 Fed. Reg. 14234 (March 15, 2011).

f. FWS failed to consider the incidental conservation benefits resulting from ESA listing of other species that occupy U.S. murrelet habitat, most notably the northern spotted owl, although in its recent flat-tailed horned lizard decision, FWS relied on such incidental conservation benefits to determine that the international boundary could not properly define a DPS. 76 Fed. Reg. 14233.

g. FWS asserted that "absent protection of the ESA, Federal agencies would have no duty under section 7 of the ESA to consult with the Service on the effects of their actions on the species, to avoid jeopardizing the species, or to avoid adversely modifying previously identified critical habitat." 75 Fed. Reg. 3428. Yet SARA has no consultation requirement and no jeopardy-avoidance duty, so the U.S. is not at a regulatory disadvantage if those ESA mechanisms no longer apply. There is no designated critical habitat for the murrelet in Canada, so SARA imposes no duty to avoid adversely modifying such habitat for the murrelet, leaving the two countries with equivalent regulation in these areas if ESA protection ends in the U.S.

h. In comparing the U.S. mechanisms to those in Canada, FWS ignored the fact that with very minor exceptions there are no mandatory or legally binding habitat management policies in Canada, and the country relies almost exclusively on voluntary habitat recommendations for federal, provincial and private land. FWS never explained why the panoply of binding U.S. habitat regulations under federal and state law are less effective than the voluntary measures available in

Canada. Improbably, FWS actually asserts that Canada's aspirational habitat protection goal is superior to the U.S.'s mandatory regulatory regime because Canada aspires to limit habitat loss to the level already achieved in the U.S., a contention that simply makes no sense. 75 Fed. Reg. 3429.

39. FWS has a non-discretionary duty to comply with the statutory limits on DPS listings, and has no legal authority to list a species as endangered or threatened except as permitted by the ESA. The FWS's arbitrary, irrational and unlawful discreteness determination constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

### **THIRD CLAIM**

(Violation of ESA; arbitrary and capricious determination of "significance" for DPS listing; failure to consider and explain important factors; arbitrary and capricious agency action under 5 U.S.C. § 706(2))

40. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

41. FWS determined that the Three-State DPS meets the "significance" criterion under the 1996 Joint DPS Policy because "the loss of this distinct population segment would result in a significant gap in the range of the taxon and the loss of unique genetic characteristics that are significant to the taxon." 75 Fed. Reg. 3430 (citation omitted).

42. FWS explained the "significant gap" finding by noting that "the Washington, Oregon, and California area accounts for roughly 18 percent of the total coastal distribution of the species, encompassing 17 degrees of latitude." 75 Fed. Reg. 3430. Yet FWS never explained why 18 percent

of the area of coastal distribution is significant. In determining that the cactus ferruginous pygmy-owl population in Arizona was not a DPS, FWS found that a 12 percent loss of historic habitat was not "significant" for that taxon under the DPS Policy. 71 Fed. Reg. 19457 (April 14, 2006). FWS never explained why an 18 percent loss of habitat at the southern end of the murrelet's range, containing no more than perhaps two percent of the species population, is significant to the marbled murrelet taxon under the DPS Policy.

43. FWS also justified its "significant gap" by asserting "[t]his DPS contains an ecologically distinct forest system, the coastal redwood zone." 75 Fed. Reg. 3430. FWS never found that murrelet behavior is different in the coastal redwood zone than anywhere else. Absent any finding that ecological distinction creates a behavioral difference for the species, an ecological distinction does not create a significant gap under the 1996 Policy. *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*, 475 F.3d 1136, 1147 (9<sup>th</sup> Cir. 2007) (upholding FWS "not significant" determination for a population of western gray squirrels in Washington based on a lack of a "significant gap" in the population where "the Service believed that any gap caused by the loss of the Washington population would not be significant because the population lacks biologically distinctive traits.>"). FWS failed to explain or justify why it used a different standard for determining significant gap in this case than in the western gray squirrel case.

44. FWS also justified the "significant gap" finding by arguing:

Moreover, peripheral and disjunct populations may play an important role in maintaining opportunities for speciation and future biodiversity. Recovery of species without the conservation of these peripheral populations may be impossible if these populations are

eliminated or severely damaged.

75 Fed. Reg.3430 (citations omitted). The “peripheral and disjunct population” to which FWS referred is the genetically distinct central California murrelet population that is not properly part of the Three-State DPS and should not have been considered in making the significance determination. The major portion of the Three-State DPS is neither peripheral nor disjunct, but rather is part of the main population of the entire species ranging from northern California through Alaska. Further, even if these generalized statements are valid in the abstract, FWS did not find or show that these statements are true for the Three-State DPS. If FWS is contending that the loss of any "peripheral and disjunct population" constitutes a "significant gap" for the DPS Policy, the agency is materially departing from its past interpretation of the Policy, and the FWS may not depart from its established policy without noting and explaining the change.

45. Finally, FWS justified the significance finding with the argument that "[s]ince the currently listed population encompasses all of one genetic unit as mentioned above and a portion of another, loss of the population could compromise the long-term viability of the species as a whole." 3430. Yet the concern for loss of a “genetic unit” only applies to the central California population which is not legally part of the Three-State DPS. In addition, the central California population consists of perhaps fewer than 600 birds out of nearly one million marbled murrelets, and FWS never explained why this small population would be "significant to the taxon as a whole." FWS did not contend that the loss of the genetically-indistinguishable birds in northern California, Oregon and Washington (roughly 2 percent of the main genetic unit) could have a genetic impact on the species.

46. FWS has a non-discretionary duty to comply with the statutory limits on DPS listings, and has no legal authority to list a species as endangered or threatened except as permitted by the ESA. The FWS's arbitrary, irrational and unlawful significance determination constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

**SECOND COUNT**  
(Unlawful designation of critical habitat)

**FOURTH CLAIM**  
(Violation of 16 U.S.C. §1533(a); unlawful designation of critical habitat that was not occupied at the time of listing; unlawful agency action under 5 U.S.C. § 706(2))

47. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

48. At the time of listing only 16 marbled murrelet nests had been discovered in Washington, Oregon or California. 57 Fed. Reg. 45334. Because "[m]arbled murrelet nests are difficult to locate," 61 Fed. Reg. 26258, FWS has defined "occupied sites" as "forest stands where marbled murrelets have been observed exhibiting behaviors associated with nesting." *Id.* "Indicators of occupied habitat include active nests; egg shell fragments; young found on the forest floor; marbled murrelets seen flying through the forest beneath the canopy, landing in trees, circling above the canopy, and calling from a stationary perch; or large numbers of murrelets heard calling from in and around a forest stand." *Id.* As of 1996, FWS knew of 807 occupied sites on federal land, and included 695 of those sites in the designated critical habitat. 61 Fed. Reg. 26270. In 1995

FWS had known of only 715 occupied sites on federal land, and 665 were included in its supplemental critical habitat proposal. 60 Fed. Reg. 40902 (August 10, 1995).

49. The two primary constituent elements used to identify critical habitat in 1996 (a tree with a potential nesting platform; forested areas within half a mile of the potential nest tree with larger trees at least half as tall as they are likely to grow in the future) can produce a maximum designated area of approximately 500 acres around an occupied site. Even if all 695 of the occupied sites on federal land included within the designation had been occupied in 1992, the maximum designatable area is no more than approximately 350,000 acres, less than 10 percent of the actual designated area. The remaining designated area was not occupied at the time of listing, and cannot be designated as critical habitat under 16 U.S.C. §1532 3(5)(A)(i).

50. The FWS's designation under 16 U.S.C. § 1532 3(5)(A)(i) of three million acres or more of critical habitat that was not occupied at the time of listing constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

#### **FIFTH CLAIM**

(Violation of 16 U.S.C. §1533(a) and (b)(2) ; failure to use best scientific and commercial information available to identify physical or biological features essential to the conservation of the species and to consider exclusions; unlawful agency action under 5 U.S.C. § 706(2))

51. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth

herein.

52. The 2006 proposed critical habitat determination found that “[b]ased on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species,” the “individual trees with potential nesting platforms” PCE identified in the 1996 critical habitat rule should be replaced by a narrower definition: “Forested stands containing largesized trees, generally more than 32 inches (81 centimeters) in diameter with potential nesting platforms at sufficient height, generally greater than or equal to 33 feet (10 meters) in height.” 71 Fed. Reg. 53843.

53. The 2008 decision that a revision to the 1996 critical habitat was not “appropriate” and that the 1996 designation should remain in effect did not repudiate or reject the 2006 assessment of the best available scientific information for essential nesting tree requirements, or explain why the FWS did not use what it had determined is the best available scientific information for essential nesting tree requirements.

54. One of the claims in *Am. Forest Res. Council v. Department of Interior* challenged the legal adequacy of the 1996 economic analysis used by FWS to support the 1996 critical habitat designation. The FWS settlement of the case required FWS to prepare an updated economic analysis of the marbled murrelet critical habitat designation for use by the Secretary in determining whether to exclude areas from critical habitat under the criteria set forth in 16 U.S.C. §1533 (b)(2). FWS prepared an updated economic analysis of the proposed critical habitat in 2008 in compliance with the Settlement Agreement. However, in making the 2008 decision not to revise the 1996 critical

habitat, FWS admitted it did not rely on the updated economic analysis, but instead maintained the 1996 designation based on the 12 year old 1996 economic analysis. 73 Fed. Reg. 12068. The FWS's failure to use the updated 2008 economic analysis constitutes the failure to use the best available scientific and commercial data in violation of 16 U.S.C. §1533(a).

55. The FWS's decision to ignore the best available scientific and commercial data and continue the 1996 designation that is not based on the best available scientific and commercial data constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

#### **SIXTH CLAIM**

(Violation of 16 U.S.C. §1533(a); unlawful designation of critical habitat that does not contain physical or biological features essential to the conservation of the species; unlawful agency action under 5 U.S.C. § 706(2))

56. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

57. "For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time of listing must contain the physical or biological features essential to the conservation of the species and which may require special management considerations or protection." 76 Fed. Reg. 61605. An area that does not contain any physical or biological features essential to the conservation of the species may not be designated as critical habitat under 16 U.S.C. §1532 (5)(A)(i). Under 16 U.S.C. §1532 (5)(A)(ii), specific areas outside

the geographical area occupied by the species at the time it is listed can also be designated only if the Secretary determines that the areas are essential for the conservation of the species. FWS has never determined in any critical habitat decision for the marbled murrelet that areas not occupied at the time of listing are essential for the conservation of the species and may be designated under 16 U.S.C. § 1532 (5)(A)(ii).

58. In 1996, 2008 and 2011 FWS designated millions of acres of marbled murrelet critical habitat that do not contain either of the essential physical and biological features for marbled murrelet critical habitat (using either the outdated 1996 definitions or the more up-to-date 2006 definitions). 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. FWS recognized in 1996 that the LSRs contain non-suitable habitat but designated them because "[t]hese areas, as managed under the Northwest Forest Plan, should develop into large blocks of suitable murrelet nesting habitat given sufficient time." 61 Fed. Reg. 26265.

59. The marbled murrelet critical habitat designations do not satisfy the legal standard courts have established requiring that identified physical and biological features must currently be

found in all areas designated as critical habitat under 16 U.S.C. § 1532 (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 108, 122-23 (D.D.C. 2004).

[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).

60. The FWS's designation under 16 U.S.C. §1532 3(5)(A)(i) of millions of acres of critical habitat that does not currently contain the physical or biological features essential to the conservation of the species constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. § 706(2).

#### **SEVENTH CLAIM**

(Violation of 16 U.S.C. §1533(a), 16 U.S.C. §1533(b)(4) and APA – failure to provide notice and opportunity for public comment on expansion of designated critical habitat to additional areas that do not contain physical or biological features essential to the conservation of the species; unlawful additional designation of critical habitat that does not contain physical or biological features essential to the conservation of the species; unlawful agency action under 5 U.S.C. § 706(2))

61. Plaintiffs repeat and reallege the allegations in paragraphs 1-30 as if fully set forth herein.

62. In response to FWS's July 31, 2008 proposal to revise murrelet critical habitat, the BLM submitted a request to FWS to clarify and enlarge the "definitional" limitation in the 1996 rule excluding areas in designated units that do not contain any primary constituent elements :

The BLM suggested (a) Adding language to the final rule that clearly articulates that the PCEs must be present on the lands within the mapped critical habitat units for the area to meet the statutory definition of critical habitat; (b) that the final rule clarify that activities proposed to occur on lands that do not contain PCEs within the mapped critical habitat units will not be subject to a destruction

or adverse modification determination because such lands, by definition, are not critical habitat ....

76 Fed. Reg. 61604. In the final rule, FWS rejected the BLM suggestions and announced that it was abandoning the 1996 "definitional" limitation as "no longer accurate":

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.

76 Fed. Reg. 61604 (underlining added).

63. This regulatory announcement has the effect of expanding designated critical habitat to additional areas that do not contain physical or biological features essential to the conservation of the species. The decision has a potentially profound impact on the Forest Service and the BLM timber management programs, and threatens serious and potentially irreparable harm to the plaintiffs. Under the "definitional" limitation, the Forest Service or BLM could forgo ESA consultation with FWS on a timber management project within the geographical boundary of a murrelet critical habitat unit if it determined the project would have "no effect" on designated murrelet critical habitat because the management area did not contain either of the required physical or biological features of critical habitat. Such a determination would allow the management agency to proceed with its projects faster and in greater numbers, benefitting both the plaintiffs and the ecological well-being of the forests. Under the latest FWS decision, the Forest Service and BLM must initiate an ESA

consultation with FWS on every timber management project within the geographical boundary of a murrelet critical habitat unit, increasing the delay, burden and cost of the management agencies' timber management programs.

64. The rulemaking provisions of the APA, 5 U.S.C. §553, apply to any designation of critical habitat under 16 U.S.C. §1533(a) except where the ESA prescribes other procedures to be followed. 16 U.S.C. §1533(b)(4). APA rulemaking procedures require FWS to give the public notice and an opportunity to comment on a proposed designation or revision of critical habitat.

65. The July 31, 2008 proposed rule did not inform the public that FWS was considering the abandonment of the "definitional" limitation in the 1996 rule or the expansion of designated critical habitat to additional areas that do not contain physical or biological features essential to the conservation of the species. Plaintiffs and the public were not aware of the FWS's intent to abandon the "definitional" limitation until publication of the Final Rule on October 5, 2011. The FWS did not provide the public the opportunity to comment on the abandonment of the "definitional" limitation in the 1996 rule.

66. FWS violated the non-discretionary rulemaking requirements of the ESA and the APA by failing to provide the public notice of its intention to abandon the "definitional" limitation in the 1996 rule, failing to provide the public the opportunity to comment on the abandonment of the "definitional" limitation, and failing to provide a rational explanation for its decision. This violation constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(b)(4) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance

with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. § 706(2).

67. The FWS decision to treat every acre within a designated critical habitat unit as if it contains the identified essential physical and biological features although FWS knows this is not true, and to require ESA consultation on any project within a designated critical habitat unit even if the project has no effect on the identified essential physical and biological features, is contrary to 16 U.S.C. §1532 (5)(A)(i) and 16 U.S.C. §1536, and constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs pray for judgment as follows:

1. On the first claim, a declaration that the FWS decision not to remove the Three-State DPS from the list of endangered and threatened species constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

2. On the second claim, a declaration that FWS's discreteness determination constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary,

entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

3. On the third claim, a declaration that the FWS's significance determination constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533 which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and was not in accordance with law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

4. An order vacating and remanding the FWS decision not to remove the Three-State DPS from the list of endangered and threatened species, and directing the FWS to submit to the Federal Register within 90 days a proposed rule to remove the Three-State DPS from the list of endangered and threatened species.

5. On the fourth claim, a declaration that the FWS's designation under 16 U.S.C. §1532(5)(A)(i) of three million acres or more of critical habitat that was not occupied at the time of listing constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

6. On the fifth claim, a declaration that the FWS's decision to ignore the best available scientific and commercial data for essential nesting tree requirements and economic effects, and to continue the 1996 designation that is not based on the best available science for essential nesting tree requirements and economic effects constitutes the failure of the Secretary to perform an act or duty

under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

7. On the sixth claim, a declaration that the FWS's designation under 16 U.S.C. §1532(5)(A)(i) of millions of acres of critical habitat that does not currently contain the physical or biological features which are essential to the conservation of the species constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(a) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. § 706(2).

8. On the seventh claim, a declaration that FWS violated the non-discretionary rulemaking requirements of the ESA and the APA by failing to provide the public notice of its intention to abandon the "definitional" limitation in the 1996 rule, failing to provide the public the opportunity to comment on the abandonment of the "definitional" limitation, and failing to provide a rational explanation for its decision, and that this violation constitutes the failure of the Secretary to perform an act or duty under 16 U.S.C. §1533(b)(4) which is not discretionary, entitling plaintiffs to relief under 16 U.S.C. §1540(g), and is not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. § 706(2); and a declaration that the FWS decision to treat every acre within a designated critical habitat unit as if it contains the identified essential physical and biological features although FWS knows this

