

Cascadia Wildlands

we like it wild.



June 3, 2014

Sent Via First Class Mail

Scott Timber Company
Via Paul Martin Daley, Registered Agent
Old Highway 99 S
Dillard, OR 97432

Seneca Sawmill Company
Via Thomas Herrmann
PO Box 851
Eugene, OR 97440

Re: Notice of Intent to Sue for Violations of the Endangered Species Act

Dear Sir or Madam:

We understand that you have purchased lands in the Elliott State Forest in Coos County, Oregon, including the Adams Ridge Parcels, the Benson Ridge Parcel, and/or the East Hakki Ridge Parcel. You are hereby provided notice, pursuant to 16 U.S.C. § 1540(g), that logging in occupied or suitable nesting habitat for marbled murrelets in any of these parcels violates the Endangered Species Act (“ESA”) and its implementing regulations, by killing, injuring, harming, harassing, and otherwise causing “take” of threatened marbled murrelets.

As you may be aware, on November 19, 2012, the Federal District Court for the District of Oregon issued an injunction against logging in occupied marbled murrelet habitat on the Elliott State Forest, including in any occupied sites on the parcels that are now for sale. As a result of that litigation, *Cascadia Wildlands v. Decker*, 3:12-cv-00961-AA (D. Or), the State of Oregon canceled all of its pending and future logging activities in occupied murrelet habitat on the Elliott State Forest. The State of Oregon sold these lands as a direct result of the litigation and because of the liability and encumbrances associated with the presence of marbled murrelets and other threatened and endangered species. Liability under the Endangered Species Act

applies just as forcefully to subsequent owners of this land, whether that owner is a state, an individual, a corporation, or any other entity.

Following your recent purchase of parcels within the Elliott State Forest, and as forewarned in our letter sent March 13, 2014, we intend to commence litigation to obtain an injunction - the very same injunction already obtained against the State of Oregon – to prevent you from logging in suitable or occupied marbled murrelet habitat or engaging in any other practices that result in harm to or take of threatened or endangered species.

BACKGROUND

A. The Endangered Species Act

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *TVA v. Hill*, 437 U.S. 153, 180 (1978). Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b).

To achieve these objectives, the ESA directs the United States Fish and Wildlife Service (FWS) to determine which species of plants and animals are “threatened” and “endangered” and place them on the endangered species list. 16 U.S.C. § 1533. An “endangered” species is one “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become endangered in the near future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20). Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but also its ultimate recovery. “Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities.” *Hill*, 437 U.S. at 155.

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of an endangered species. 16 U.S.C. § 1538(a). The term person is defined to include “an individual, corporation, partnership, trust, association, or any other private entity” 16 U.S.C. § 1532(13). This take prohibition also applies to threatened species such as the marbled murrelet. *Id.* § 1533(d); 50 C.F.R. § 17.31. The term “take” is defined broadly, and includes to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so. 16 U.S.C. § 1532(19). The FWS has further defined “harass” to include “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.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; see also *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. 16 U.S.C. § 1540(g). Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take. *National Wildlife Fed'n v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9th Cir. 1994). The ESA's citizen suit provision also provides for the award of costs of litigation, including reasonable attorneys' fees and expert witness fees. 16 U.S.C. § 1540(g)(4).

Courts in the Ninth Circuit have repeatedly held that logging in occupied habitat causes take of marbled murrelets. See *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. at 1365-67; *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68. In *Marbled Murrelet v. Pac. Lumber Co.*, Judge Bechtel held that logging in occupied habitat would "harm" marbled murrelets because it "will significantly impair the marbled murrelets' breeding behavior and decrease the chances of successful nesting," "will likely cause returning marbled murrelets to become disoriented and significantly decrease the likelihood that they will be able to successfully nest and raise their young to fledgling," and "will increase the likelihood of avian predation upon the remaining marbled murrelets who achieve nesting, their eggs, and their young." 880 F. Supp. at 1366. The court further held that logging occupied nesting habitat would "harass" marbled murrelets because it "creates the likelihood of injury to marbled murrelets by annoying them to such an extent that it will significantly disrupt their normal behavioral patterns." *Id.* at 1367.

The Ninth Circuit upheld this decision in *Marbled Murrelet v. Babbitt*, 83 F.3d at 1067-68. In a unanimous opinion authored by Judge Thompson, the Ninth Circuit reaffirmed that "habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to 'harm' under the ESA." *Id.* The court then held that plaintiffs had properly carried their burden of proof when they established that logging activities "would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as the young." *Id.* The Ninth Circuit also upheld the district court's issuance of an injunction, reaffirming that "a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA." *Id.* at 1066 (citing *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th Cir. 1995); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000)).

Most recently in *Cascadia Wildlands v. Decker*, 2012 U.S. Dist LEXIS 168459, 3:12-cv-00961-AA (D. Or. Nov. 19, 2012), Chief Judge Aiken issued a preliminary injunction against logging in marbled murrelet sites on the Elliott State Forest, finding that "plaintiffs have sufficiently established likelihood of success on the merits, a balance of equities in their favor, and that an injunction is in the public interest." After a year and a half of litigation, but prior to obtaining a final decision on the merits, the state defendants canceled all of their logging proposals in occupied marbled murrelet habitat on state forests, including twenty-six timber sales on the Elliott State Forest.

B. Marbled Murrelets

Marbled murrelets (*Brachyramphus marmoratus*) are small sea birds in the *Alcidae* family. 75 Fed. Reg. 3425. Murrelets are found only on the west coast of North America, from

Alaska to Santa Cruz, California. Murrelets spend most of their lives offshore, foraging for small fish and invertebrates, but fly inland to nest in mature and old-growth forests. 75 Fed. Reg. at 3425. Murrelets do not build nests, but instead rely on thick, flat tree branches with natural depressions and a blanket of moss on which to lay their eggs. *Id.* The presence of these naturally occurring platforms “is the most important characteristic of their nesting habitat.” *Id.* Marbled murrelets are thus “closely associated with old-growth and mature forests for nesting.”

Marbled murrelets do not always nest every year, 57 Fed. Reg. at 45,329, but when they do they have high “site fidelity,” meaning they return again and again to the same forest stand and even the same nest tree. Nesting occurs between mid-April and September, and nests can be as far as 80 kilometers (50 miles) from the ocean. 57 Fed. Reg. at 45,328-29. The female lays a single egg and the male and female incubate the egg switching shifts once a day while the other bird flies back and forth to the ocean to feed, typically at dawn or dusk. *Id.* at 45,329. The adults feed the chick at least once per day, carrying fish back from the ocean. *Id.*

In 1992, marbled murrelets in Oregon, Washington, and California were listed as a threatened species because of “the loss and modification of nesting habitat (older forests) primarily due to commercial timber harvesting.” 57 Fed. Reg. at 45,328. “The principal factor affecting the marbled murrelet in the three-state area, and the main cause of population decline has been the loss of older forests and associated nest sites.” *Id.* at 45,330. Extensive logging over the past 150 years has resulted in the loss of “at least 82 percent of the old-growth forests existing in western Washington and Oregon.” Murrelets are also significantly affected by forest fragmentation. 57 Fed. Reg. at 45,329 (“[s]tand size is also an important factor for marbled murrelets”). This is because murrelets depend on large blocks of interior forest habitat—*i.e.*, habitat that is far from forest edges—for protection from predators, changes in microclimate, and windthrow of nest trees. 76 Fed. Reg. 61,604 (Oct. 5, 2011); 75 Fed. Reg. at 3425 (nesting habitat is “positively associated with the presence and abundance of mature and old-growth forests, large core areas of old-growth, low amounts of edge habitat, reduced habitat fragmentation, proximity to the marine environment, and forests that are increasing in stand age and height”).

Fragmentation from logging reduces the “interior or core habitat” and “increases the amount of forest edge, isolates remaining habitat patches, and creates ‘sink’ habitats.” FWS, *Marbled Murrelet Five-Year Status Review* (2009), p. 30. Impacts from habitat fragmentation include “effects on population viability and size, local or regional extinctions, displacement, fewer nesting attempts, failure to breed, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.” *Id.* at 29. Predation and nest failure are substantial threats to marbled murrelets. *See* 75 Fed. Reg. at 3432 (“Nest failure rates of 68 to 100 percent due to predation in real nests, and 81 to 95 percent in artificial nests have been reported”). Murrelet predation “increases with the fragmentation of older-aged forests” and nest success “is lower in small forest fragments... .” 57 Fed. Reg. at 45,334 (internal citations omitted). Due to these risks, it is highly recommended that marbled murrelet habitat is maintained “in relatively large contiguous blocks.” USFWS, *Marbled Murrelet Recovery Plan* (1997), p.50.

NOTICE OF VIOLATION

The Elliott State Forest is one of the few places where marbled murrelets are reliably present, and surveys have consistently shown that suitable habitat in the area is occupied by murrelets close to one hundred percent of the time. For example, the State of Oregon planned sixteen timber sales on the Elliott State Forest in 2013. After surveying for marbled murrelets, fifteen of those sales – all but one – were canceled because of marbled murrelet occupancy.

The State of Oregon originally proposed to sell five parcels. Murrelet surveys have only been conducted so far in two of the five parcels being considered for sale, and significant murrelet occupancy was detected in both of those surveyed parcels. Following the discovery of marbled murrelets in the two surveyed parcels, the State of Oregon delayed the land sale of the two parcels.

We have evidence that the remaining three parcels are also occupied by murrelets. First, there is a significant amount of suitable marbled murrelet habitat in the three other parcels, including 298 acres of the East Hakki Ridge parcel, 219 acres in the Benson Ridge Parcel, and 235 acres in the Adams Ridge #1 parcel. Second, certified murrelet surveyors have recently found marbled murrelets exhibiting occupancy behavior in all three parcels. Thus, logging of any of the three parcels will violate the ESA because all three parcels are occupied murrelet habitat.

Logging in occupied murrelet habitat causes take of marbled murrelets. Logging in occupied habitat actually kills murrelets, and injures and annoys murrelets to such a degree as to disrupt and significantly impair essential behavioral patterns, including breeding, feeding, and sheltering. Logging in occupied murrelet habitat causes death, displacement, fewer nesting attempts, failure to breed, nest failure, reduced fecundity, reduced nest abundance, lower nest success, increased predation and parasitism rates, crowding in remaining patches, and reductions in adult survival.

Logging also causes take of marbled murrelets by fragmenting the landscape to such a degree as to cause death, injury, annoyance, and significant impairment and disruption of essential behavioral patterns. Fragmentation and logging in suitable habitat leads to edge effects, habitat loss, predation, and disturbance of nest sites. Several studies show a relationship between the distance from the forest edge and murrelet nest success. Authorizing logging adjacent to and within suitable habitat also increases the loss of existing habitat from windthrow. Fragmenting the forested landscape harms marbled murrelets by significantly disrupting and impairing essential behavioral patterns including breeding, feeding and sheltering.

Logging of the East Hakki Ridge, Benson Ridge, and Adams Ridge #1 parcels is reasonably likely to occur and this logging will result in take of murrelets. *National Wildlife Fed'n*, 23 F.3d at 1511; *Marbled Murrelet v. Babbitt*, 83 F.3d at 1066 (“a reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA.” (citing *Forest Conserv. Council v. Rosboro Lumber Co.*, 50 F.3d 781, 786 (9th Cir. 1995); *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000))). Your companies – Scott Timber and Seneca – are both logging companies. The land you own is for the purpose of creating timber and generating revenue. Kathy Jones, one of the co-owners of

Seneca, has publicly stated that Seneca will clearcut the East Hakki Ridge parcel.¹ Therefore, your acquisition of the three parcels makes the logging of these murrelet occupied areas reasonably certain to occur. As a result, we intend to seek immediate injunctive relief.

CONCLUSION

Following your recent purchase of the Adams Ridge Parcels, the Benson Ridge Parcel, and the East Hakki Ridge Parcel, you will assume full liability for failing to conform to the guidelines of the Endangered Species Act. Pursuant to the citizen suit provision of the ESA, 16 U.S.C. §§ 1540(g)(1)(A), (2)(A), we are providing you with notice of our intent to commence a civil action and to obtain an injunction to prevent you from logging in suitable or occupied marbled murrelet habitat or engaging in any other practices that result in harm to or take of marbled murrelets. We will further seek an award for any costs and fees associated with the litigation, including reasonable attorneys' fees and expert fees. If you have any questions about this notice, please do not hesitate to contact us.

Sincerely,



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-for-

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¹ <http://earthfix.opb.org/land/article/seneca-jones-bids-on-elliott-state-forest-land-a-c/>

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cc: Sally Jewell, Secretary, Department of Interior
Paul Henson, State Director, FWS Oregon Office
Eric Holder, U.S. Attorney General