



April 4, 2016

Dear Interested Parties:

We are passionate about the Elliott State Forest and are writing to inform you about the proposed sale of these unique state forest lands. As the plaintiffs to the two lawsuits that make up the subject of this letter, we find it necessary to inform those interested in the Oregon Department of State Lands' Elliott Opportunity of the legal implications of the sale of these state forest lands. For those unaware, the 93,000-acre Elliott State Forest contains high-quality salmon and wildlife habitat and anchors significant populations of federally listed endangered species, like the marbled murrelet, northern spotted owl and Oregon Coast coho salmon. The Elliott is also a highly valued public recreational area for Oregonians, offering prime hunting and fishing, mushroom foraging, hiking, birding, educational, and sightseeing opportunities.

Our interest in state forest lands and seeing the law complied with led us to bring two lawsuits. The first case was based on the federal Endangered Species Act (ESA) and the second on state law, ORS 530.450. Both have significant bearing on the outcome of Elliott Opportunity that you have expressed interest in.

Fueled by an unsustainable revenue expectation, state officials adopted a Forest Management Plan at the end of 2011 that increased clearcutting and nearly doubled the annual harvest rate within the Elliott State Forest. In 2012, the Oregon Department of Forestry (ODF) tried to implement the new plan, but was thwarted due to a federal district court injunction relating to the Endangered Species Act and a threatened seabird called the marbled murrelet. The Parties to the litigation ultimately agreed to dismiss the case after the State agreed to cancel 28 timber sales in marbled murrelet habitat, forgo any future logging in occupied murrelet habitat, and revise its marbled murrelet "take" guidelines.

Since this resolution, the State has annually "operated in the red," which compelled the Oregon State Land Board and Department of State Lands to initiate the Elliott Opportunity and the proposed disposal of certain parts of the forest.

In the aftermath of the ESA murrelet lawsuit on the Elliott, the State initiated the preliminary sale of three parcels of the Elliott, one of which is currently being challenged in state court. Plaintiffs do not believe the State has the authority to sell the majority of the Elliott State

Forest as outlined in ORS 530.450. Additionally, the purchasers of the parcels sold after the ESA murrelet lawsuit were made aware of the Endangered Species Act's "take" prohibition, as the federal statute applies equally to federal, state, and private land owners.

A further discussion of these issues is provided below.

Federal Endangered Species Act (ESA)

Under the Endangered Species Act (ESA), it is illegal to engage in any activity that "takes" an endangered or threatened species. 16 U.S.C. § 1538(a)(1)(B); *Cascadia Wildlands v. Kitzhaber*, 2012 WL 5914255 *2 (D Or, Nov 19, 2012) (3:12-cv-00961-AA, dkt # 71). The ESA applies equally to every "person," which includes every "individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State." 16 U.S.C. § 1532(13)

"Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Harm includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. Harass includes "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 which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. In other words, unlawful "takes" under the ESA include instances when a species' habitat is modified to the extent it causes death or injury.

The marbled murrelet is a threatened species. 57 Fed. Reg. 45,328. The Elliott State Forest is one of the very few places where marbled murrelets are in abundance. Several courts have already held that logging in an area occupied by marbled murrelets causes "take" of the birds by significantly impairing breeding, feeding, and sheltering, and increasing the likelihood of attack by predators on the adults and young. *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1365-67 (ND Cal 1995); *Marbled Murrelet v. Babbitt*, 83 F3d 1060, 1067-68 (9th Cir 1996).

In 2012, Cascadia Wildlands, Audubon Society of Portland and the Center for Biological diversity brought a lawsuit under the ESA, specifically challenging the state's logging program on the Elliott, Tillamook, and Clatsop State Forests because the logging being authorized was causing take of murrelets. *Cascadia Wildlands v. Kitzhaber*, 3:12-cv-00961-AA (D Or). Finding that the "take" arguments were likely to succeed on the merits of their case, the court granted a preliminary injunction, enjoining eleven different timber sales and "any further logging activities in known occupied marbled murrelet sites in the Tillamook, Clatsop, and Elliot State Forests." *Cascadia Wildlands v. Kitzhaber*, 2012 WL 5914255 *2 (D Or, Nov 19, 2012) (3:12-cv-00961-AA, dkt # 71).

In early 2014, the State's operational policies for marbled murrelets were revised to comply with the ESA. At the time, there were twenty-eight timber sales that had been planned

and approved, but not yet implemented, on the Elliott State Forest. To comply with the ESA, the State ultimately canceled twenty-seven (all but one) of these timber sales, because they were found to be occupied by marbled murrelets. Since 2014, logging has been strictly prohibited in any area occupied by marbled murrelets, which includes nearly all of the mature forests on the Elliott.

We have already informed entities that bid upon the Elliott State Forest parcels that attempts to log these areas would violate the Endangered Species Act due to the “take” of marbled murrelets such logging would cause.

State Law (ORS 530.450)

The majority (about 75%) of the Elliott State Forest cannot lawfully be sold. ORS 530.450 states, “Any lands in the national forests on February 25, 1913, selected by, and patented to, the State of Oregon, for the purpose of establishing a state forest, hereby are withdrawn from sale * * *. The state forest shall be known as the Elliott State Forest.” Courts have authority to invalidate any sale of the Elliott State Forest that violates ORS 530.450. *See* ORS 183.484(5)(b) (Courts “shall” remand an agency order if it finds the agency’s exercise of discretion to be “outside the range of discretion delegated to the agency by law” or if the order is “otherwise in violation of a constitutional or statutory provision”).

In 2014, Cascadia Wildlands, Audubon Society of Portland, and the Center for Biological Diversity filed a lawsuit against the state under ORS 530.450, challenging the sale of 750 acres of the Elliott State Forest. *Cascadia Wildlands v. Oregon Department of State Lands*, Lane County Case 62-14-07847. In that case, the state agreed and conceded that the sale of the Elliott violates ORS 530.450, but it argued (1) that the plaintiffs did not have standing, and (2) that ORS 530.450 was unconstitutional. The Lane County Circuit Court dismissed plaintiffs’ case without addressing the merits, finding only that the plaintiffs lacked standing. That case is currently on appeal, with oral argument scheduled for June 10, 2016. There will likely be a decision from the Court of Appeals in the next 18 to 24 months (Oregon Court of Appeals No. A159061). If the Court of Appeals rules in the plaintiffs’ favor, the sale of approximately 70,000 acres of the Elliott State Forest would be invalidated.

Marbled Murrelet

As mentioned above, the federal Endangered Species Act’s “take” prohibition strictly outlaws logging or other activity in the Elliott State Forest that would “take” marbled murrelets. Approximately half of the Elliott State Forest is considered murrelet habitat. The species is a small seabird that nests exclusively in older forest. Nesting habitat is comprised of large core areas of older forests that provide interior habitat, reduced habitat fragmentation, and close proximity to the ocean. The bird spends most of its time at sea feeding on fish, but flies inland to nest between mid-April and September. The murrelet does not nest every year, has high site fidelity (returning to the same tree or stand to nest), and once the female lays an egg the male and female take turns incubating while the other is out at sea feeding. The shift change takes place at dawn or dusk, with the birds being cautious to avoid nest predation. Extensive logging of the

murrelets' habitat has resulted in severe habitat fragmentation and increased risk of predation, displacement of birds, fewer nesting attempts, failure to breed, lower nest success, reduced fecundity, reduced abundance and reductions in adult survival.

The Oregon Department of Forestry and Oregon Department of State Lands can likely provide you a map of the known Marbled Murrelet Management Areas on the Elliott, as well as information about spotted owl sites. Additionally, citizen surveyors have provided extensive data to the state about known occupied sites on the Elliott that are not included in the state's inventory. We can help provide you with that information should you be interested.

We hope this letter helps illustrate the need to protect Oregon's unique mature forests in the Elliott. Please do not hesitate to contact any of us with further thoughts or questions.

Sincerely,



Nick Cady
Legal Director
Cascadia Wildlands
(541) 434-1463
nick@cascwild.org

Bob Sallinger
Conservation Director
Audubon Society of Portland
(503) 292-6855
bsallinger@audubonportland.org

Tanya Sanerib
Senior Attorney
Center for Biological Diversity
(971) 717-6407
tsanerib@biologicaldiversity.org