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By Email and Certified Mail, Return Receipt Requested

Subject: Notice of Intent to Sue BLM and FWS For Violations of the Endangered Species Act

Dear Secretary Burgum, Msrs. Groffy, Beaucage, Nesvik, and Asch, and Mses. Prill, Lenhartzen, Fahey, and Lee:

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity of our intent to sue the Bureau of Land Management (“BLM”) for violating Endangered Species Act (“ESA”) section 7(a)(2) by failing to ensure the Big Weekly Elk Forest Management Project (hereafter, “Big Weekly Elk” or the “Project”) and its associated timber sales are not likely to jeopardize the threatened marbled murrelet or adversely destroy or modify the species’ critical habitat. In approving this Project and associated sales, BLM relied on a reinterpretation of the Marbled Murrelet Management Direction in its 2016 Northwestern and Coastal Oregon Resource

Management Plan (“RMP”)—as compared to what FWS consulted on in 2016—that sharply reduced protections for murrelets. This reinterpretation was nominally sanctioned in 2019 by the U.S. Fish and Wildlife Service (“FWS”) in a cursory and incomplete Letter of Concurrence (hereafter, “2019 LOC”). Accordingly, pursuant to APA section 706(2)(A), the Center also intends to challenge FWS’s 2019 LOC as arbitrary, capricious, and contrary to the ESA. Finally, the Center intends to challenge, pursuant to APA section 706(2)(A), FWS’s biological opinion (“BiOp”) for Big Weekly Elk as arbitrary, capricious, and contrary to the ESA, due to its reliance on the 2019 LOC.¹

Protected as a threatened species under the ESA in 1992, the murrelet has suffered severe population declines in large part due to the liquidation of its nesting habitat—mature and old-growth forests within roughly 50 miles of the coasts of Oregon, Washington, and California—more than a century of logging. In 1994, BLM, along with the Forest Service, protected much of the murrelet’s remaining habitat on Public Lands through the adoption of the Northwest Forest Plan (“NWFP”). Under political pressure to produce more timber volume, BLM opted out of the NWFP in 2016, adopting RMPs for western Oregon that purported to provide stronger protections for murrelets while at the same time allowing more logging. In 2018, BLM backed away from critical murrelet protections provided by the RMPs’ Murrelet Management Direction, reinterpreting that Direction in a manner that effectively opens thousands of acres of nesting habitat to fragmentation and destruction, severely undermining the conservation and recovery of these unique forest-nesting seabirds.

FWS has not fully or adequately consulted on BLM’s reinterpretation of the RMPs’ Murrelet Management Direction. Nonetheless, BLM is implementing its version of the Murrelet Management Direction in Big Weekly Elk to the detriment of murrelets and their critical habitat.² FWS’s BiOp for Big Weekly Elk, which relies upon its arbitrary, capricious, and illegal 2019 LOC, is thus likewise arbitrary, capricious, and contrary to the ESA. And BLM, by relying on that flawed BiOp to approve Big Weekly Elk, is failing to ensure against jeopardy to murrelets and destruction or adverse modification of their critical habitat. If BLM and FWS do not remedy their ESA violations, as documented below, within 60 days of the date of this notice letter, the Center intends to file suit in federal court.

LEGAL FRAMEWORK

Congress enacted the ESA “to halt and reverse the trend toward species extinction,

¹ This notice is provided pursuant to ESA section 11(g)(1)(A), 16 U.S.C. § 1540(g)(1)(A). As addressed at the end of this letter, the Center is also providing notice of BLM’s and FWS’s failure to reinstate ESA consultation as required by ESA section 7(a)(2) and the ESA’s implementation regulations. Although two of the section 7 violations against FWS arise under the APA and thus do not require notice, the Center is doing so as a matter of courtesy and to provide both agencies with the opportunity to remedy their legal violations before the Center files suit.

² In September 2023, two environmental groups challenged Big Weekly Elk in federal court, raising claims under the National Environmental Policy Act and the Federal Land Policy and Management Act. In August 2025, the Ninth Circuit Court of Appeals affirmed the district court’s decision granting of summary judgment to BLM. *See generally, Cascadia Wildlands v. BLM*, 153 F.4th 869 (9th Cir. 2025); *see also Cascadia Wildlands v. BLM*, 2024 U.S. Dist. LEXIS 117974 (D. Or. June 28, 2024). That case did not include ESA claims, and the courts did not consider whether BLM and FWS have met their ESA obligations with regard to BLM’s reinterpretation of the Murrelet Management Direction. They clearly have not.

whatever the cost.”³ The ESA’s stated purpose is “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 . . . species.”⁴ One of the Act’s stated policies is “that all Federal . . . agencies shall seek to conserve [ESA-listed] species.”⁵ The Supreme Court described the ESA as “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.”⁶

To achieve its goals, ESA section 7(a)(1) requires federal agencies to use the programs they administer to further the ESA’s conservation purposes.⁷ This is an affirmative duty on all federal agencies.⁸ The ESA defines “conservation” to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”⁹

The ESA also requires each federal agency to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.”¹⁰ “Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”¹¹ “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.”¹²

The substantive duty to ensure against jeopardy or the destruction or adverse modification of critical habitat is accomplished through “consultation,” where an “action agency” (here, BLM) consults with the “expert agency” (here, FWS¹³) to determine a proposed action’s impact on listed species and their critical habitat. This consultation must be based on the “best scientific and commercial data available,”¹⁴ and can be formal or informal. Formal consultation is required if an action “may affect” listed species or critical habitat.¹⁵ FWS and the action agency must engage in a back-and-forth, iterative consultation, wherein the agencies discuss the information provided by the action agency, the current status and baseline of the listed species and critical habitat, and the effects of the action and its cumulative effects on the

³ *TVA v. Hill*, 437 U.S. 153, 184 (1978).

⁴ 16 U.S.C. § 1531(b).

⁵ *Id.* § 1531(c)(1).

⁶ *Hill*, 437 U.S. at 185.

⁷ 16 U.S.C. § 1536(a)(1); see also *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 261 (9th Cir. 1984) (addressing section 7(a)(1) claim against the Secretary of the Interior).

⁸ *Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of Navy*, 898 F.2d 1410, 1416 (9th Cir. 1990).

⁹ 16 U.S.C. § 1532(3).

¹⁰ *Id.* § 1536(a)(2).

¹¹ 50 C.F.R. § 402.02.

¹² *Id.* § 402.02.

¹³ *Id.* § 402.01(b).

¹⁴ 16 U.S.C. § 1536(a)(2).

¹⁵ 50 C.F.R. § 402.14.

species and their critical habitat.¹⁶ The process concludes with FWS’s issuance of a BiOp,¹⁷ which “detail[s] how the agency action affects the species”¹⁸ and sets forth FWS’s opinion as to whether the action is likely to jeopardize the listed species (by appreciably reducing the likelihood of its survival and recovery) or destroy or adversely modify critical habitat.¹⁹

Prior to formal consultation, the ESA’s implementing regulations allow an action agency to enter into informal consultation with FWS to determine whether the action is likely to adversely affect ESA-listed species or their critical habitats.²⁰ Usually this is done by completing a biological assessment and submitting it to FWS for concurrence.²¹ If the action agency determines its proposed action is “not likely to adversely affect” a listed species or their habitat and FWS issues a letter of concurrence, no further consultation is necessary.²²

The APA requires agencies to engage in “reasoned decisionmaking,”²³ and directs that reviewing courts “shall . . . hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁴ An agency’s decision is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁵

FACTUAL BACKGROUND

I. Marbled murrelets and their critical habitat

The marbled murrelet is a small, diving seabird that forages in near-shore, coastal waters and breeds in mature and old-growth forests of northern California, Oregon, and Washington. During the breeding season, murrelets fly up to 55 miles inland to nest in small depressions or cups made of moss or other debris on large branches or suitable platforms high in large trees.²⁶ Murrelets reneest in the same forest stands and trees from year to year²⁷ and, while most nests are

¹⁶ See generally, *id.*

¹⁷ *Id.* §§ 402.02, 402.14(c)(1).

¹⁸ 16 U.S.C. § 1536(b)(3)(A).

¹⁹ 50 C.F.R. § 402.14(h)(1)–(3).

²⁰ See *id.* § 402.13.

²¹ *Id.* § 402.12(j), (k).

²² *Id.* §§ 402.13, 402.14(b).

²³ *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

²⁴ 5 U.S.C. § 706(2)(A).

²⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); see also *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067–68 (9th Cir. 2018) (an agency must “consider[] the relevant factors and articulate[] a rational connection between the facts found and the choices made”).

²⁶ See e.g., Martin G. Raphael et al. (2018), Chapter 5: Marbled Murrelet, at 301–02, in T.A. Spies, et al. (2018), Synthesis of science to inform land management within the Northwest Forest Plan area, Gen. Tech. Rep. PNW-GTR-966; FWS (1997), Recovery Plan for the Threatened Marbled Murrelet (*Brachyramphus marmoratus*) in Washington, Oregon, and California, at 21.

²⁷ Miller et al. (2012), Recent Population Decline of the Marbled Murrelet in the Pacific Northwest, *The Condor* 114(4): 771–781, at 777; see also Murrelet Recovery Plan at 20 (noting murrelets’ nest site fidelity, and further commenting that “forest sites that are occupied by marbled murrelets may attract other marbled murrelets to those

solitary, they may be in the vicinity of a few other nests.²⁸



Juvenile Marbled Murrelet, USGS/R. Macintosh, Public Domain

More than a century of logging has decimated the murrelet’s nesting habitat. By the 1990s, Oregon’s old-growth coastal forests had been reduced by about 82 percent compared to pre-logging levels,²⁹ and the remaining forest exists in mostly small, fragmented patches or in forest parks and reserves.³⁰ Due largely to this drastic decline in habitat, FWS listed the marbled murrelet as threatened under the Endangered Species Act in 1992.³¹ In 1996, FWS designated critical habitat for the murrelet.³² Loss of suitable nesting habitat has slowed in recent decades but nonetheless, there was an estimated loss of nearly 307,957 acres of higher suitability nesting habitat (12 percent) across all lands between 1993 and 2012, with the highest rate of decline on private land.³³ Logging remains the leading attributable cause of this loss.³⁴ As of 2017, “only about 7 percent” of forests in the range of the murrelet currently support nesting habitat.³⁵ Loss and modification of the murrelet’s old forest habitat is the “principal factor” and “main cause” of the species’ decline.³⁶

In 1997, FWS issued a recovery plan for the marbled murrelet.³⁷ In the recovery plan, FWS recognized that certain factors—including the species’ specific nesting habitat requirements, life history strategy, low reproductive rate, and low current breeding success and recruitment rate—were likely to lead to a decreasing population that could not easily recover from further catastrophic events.³⁸ Because it can take nesting habitat at least 100 to 200 years to develop, the recovery plan set forth several “critical” recommendations to help stabilize the

stands or adjacent, unoccupied forest stands, a behavior that may be important for recovering the species”).

²⁸ Murrelet Recovery Plan at 19.

²⁹ *Id.* at 4.

³⁰ Miller et al, *supra* n. 27, at 772.

³¹ See 57 Fed. Reg. 45328, 45330 (Oct. 1, 1992).

³² See 61 Fed. Reg. 26256 (May 24, 1996).

³³ Raphael et al. (2018), *supra* n. 26, at 315 (discussing Raphael et al. (2016)).

³⁴ *Id.* (for loss of higher suitability nesting habitat between 1993 and 2012, 23 percent of loss on federal lands and 98 percent on nonfederal lands were attributable to logging).

³⁵ Teresa J. Lorenz et al. (Sept. 2021), Status and Trend of Nesting Habitat for the Marbled Murrelet Under the Northwest Forest Plan, 1993 to 2017, General Technical Report PNW-GTR-998, at 25, Figure 12.

³⁶ 57 Fed. Reg. 45328, 45330 (Oct. 1, 1992).

³⁷ See generally, Murrelet Recovery Plan.

³⁸ *Id.* at v.

murrelet populations in the short term, including maintaining occupied habitat, maintaining large blocks of suitable habitat, and maintaining and enhancing buffer habitat.³⁹ Long-term actions included increasing the amount, quality, and distribution of suitable murrelet nesting habitat.⁴⁰

II. The Northwest Forest Plan, BLM's 2016 RMPs, and the Marbled Murrelet Management Direction

For much of the 20th century, logging in federal forests in the Pacific Northwest ignored the needs of species, including northern spotted owls and marbled murrelets, that are dependent on interconnected mature and old-growth forests. The Forest Service's and BLM's detrimental logging practices led to a series of court decisions in the early 1990s that enjoined much of this logging due to its impacts to species and ecosystems.⁴¹ This logging drove several species towards imperilment, and resulted in FWS listing first the northern spotted owl (in 1990) and then the marbled murrelet (in 1992) under the ESA.

In 1994, the Clinton Administration convened a team of dozens of scientists to develop an ecosystem approach to management of Northwest Forests, including protecting much of the remaining mature and old-growth forests on Public lands for the conservation of the marbled murrelet, northern spotted owl, Pacific salmon, and hundreds of other old-forest associated species. Following this assessment, the Forest Service and BLM adopted the Northwest Forest Plan ("NWFP"), amending existing National Forest and Resource Management Plans to adopt a system of late-successional reserves ("LSR") and riparian reserves across Forest Service and BLM lands in Oregon, Washington, and northwestern California, where logging was, for the most part, prohibited. The NWFP protects portions of murrelet habitat along the length of the species' U.S. distribution. Since the adoption of the NWFP, loss of murrelet habitat to logging has been concentrated on non-federal lands.⁴²

Because it can take a century or more for old-growth forests to re-grow, murrelet populations were not expected to rebound quickly under the NWFP.⁴³ Thus, when FWS finalized the Marbled Murrelet Recovery Plan in 1997, it recognized the critical importance of surveying for murrelets and protecting occupied habitat to the overall recovery of the species while nesting habitat grew and developed over the long-term, as well as the overall importance of the NWFP and its reserve system to the recovery of the species.⁴⁴

³⁹ *Id.* at v, 121, 138.

⁴⁰ *Id.* at 121 ("Increasing the stand size of suitable habitat to provide more interior forest conditions and increasing the number of stands of suitable nesting habitat are considered key to long-term recovery. Within secured habitat areas, this means protecting currently unsuitable habitat to allow it to become suitable, reducing fragmentation, providing replacement habitat for current suitable nesting habitat lost to disturbance events and habitat lost to both timber harvest and disturbance events in the past.").

⁴¹ *See, e.g., Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991) (enjoining Forest Service timber sales); *Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) (affirming district court injunction against BLM logging operations); *Lane County Audubon v. Jamison*, 958 F.2d 290 (9th Cir. 1992) (enjoining BLM from pursuing logging strategy pending ESA consultation).

⁴² Raphael et al. (2018), *supra* n. 26, at 315.

⁴³ Miller et al, *supra* n. 27, at 776.

⁴⁴ Murrelet Recovery Plan at 151 ("Recovery of the species depends on preventing its extinction during the next 50 to 100 years, before additional suitable nesting habitat will be developed in many secured areas. This can only be done if the locations of most, if not all, occupied nesting habitat is known."); *id.* at 119 (stating that the NWFP

While by no means perfect, the NWFP established a series of important protections for murrelets. This included not just the LSRs and riparian reserves, where ecosystem values needed by the seabird are required to be maintained, but also a requirement for the Forest Service and BLM to conduct pre-project surveys of murrelet habitat for all timber sales and, if behavior indicating murrelet occupancy was detected, to protect all contiguous existing and recruitment habitat (i.e., stands that could develop into murrelet habitat within 25 years).⁴⁵ If murrelets were found using habitat outside of the LSR, then that habitat was designated as new LSR.⁴⁶

In 2016, BLM withdrew from the NWFP and adopted new RMPs for western Oregon, with a stated goal of increasing logging while maintaining protections for murrelets and other old forest species. Together, the Northwestern and Coastal Oregon and Southwestern Oregon RMPs provide management direction for nearly 2.5 million acres of BLM lands in Oregon. The 2016 RMPs purported to increase protections for murrelets in part by protecting an additional 48,182 acres of murrelet nesting habitat in the reserve system.⁴⁷ Similar to the NWFP, BLM designated all known occupied murrelet sites as LSR, and any future sites discovered outside of the LSR within 35 miles of the coast or in the riparian reserves between 35 and 50 miles would become LSR.⁴⁸

Further, the RMPs contained a “Marbled Murrelet Management Direction” intended to protect murrelets by prohibiting, with limited exceptions, logging activities that disrupt murrelets or modify occupied nesting habitat. The Direction provides that “[b]efore modifying nesting habitat or removing nesting structure” in all BLM lands within 35 miles of the Pacific Ocean, BLM must “assess the analysis area for marbled murrelet nesting structure.”⁴⁹ If the analysis area contains no nesting structure, no further consideration of marbled murrelet habitat is required.⁵⁰ If the area contains nesting structure, then “[b]efore modifying forest stands in any 5-acre portion (using a 5-acre moving circle) of the analysis area that contains at least 6 trees with nesting structure,” BLM must implement one of three options. Option 1, the option most relevant here, requires surveying for murrelets. If occupancy is determined, no activities may be conducted within the occupied stand or within 300 feet of the stand.⁵¹ “Occupied stand” is defined as “all forest stands, regardless of age or structure, within 1/4 mile (1,320 feet) of the location of marbled murrelet behavior indicating occupancy and not separated from the location of marbled murrelet behavior indicating occupancy by more than 328 feet of non-forest.”⁵²

“provides a substantial contribution towards protecting nesting habitat on federal lands, especially habitat that is currently occupied by marbled murrelets, and represents the backbone of this Recovery Plan strategy”).

⁴⁵ Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl, Attachment A to the Record of Decision for the NWFP, at C-10; FWS, Biological Opinion on BLM’s Approval of the Proposed Resource Management Plan for Western Oregon, FWS Ref. No. 01EOFW00-2015-F-0279 (July 20, 2016) (hereafter, “RMP BiOp”), at 227 (summarizing NWFP protections).

⁴⁶ *Id.* at 227–28.

⁴⁷ *Id.* at 307.

⁴⁸ RMP BiOp at 284.

⁴⁹ BLM, Northwestern & Coastal Oregon Record of Decision and Resource Management Plan (Aug. 2016), at 98 (hereafter, “RMP”). For simplicity, this NOI only cites to the Northwestern and Coastal Oregon RMP, which governs Big Weekly Elk.

⁵⁰ *Id.*

⁵¹ *Id.* at 98–99.

⁵² *Id.* at 98, n.38.

As discussed further below, BLM’s 2018 reinterpretation, as utilized in the Big Weekly Elk Project, backtracked on some of these critical protections and will allow for further loss of nesting habitat beyond that considered in the 2016 biological opinion on the RMPs.

III. FWS’s conclusion that the 2016 RMPs would not jeopardize marbled murrelets was based largely on the Marbled Murrelet Management Direction.

Pursuant to the ESA, BLM and FWS engaged in the legally-required consultation regarding BLM’s RMPs. As a result of these discussions, FWS prepared a BiOp assessing the expected effects of the RMPs on ESA-listed species and their critical habitat, including marbled murrelets, over a 50-year time frame.⁵³ Based on BLM modeling, the agencies concluded that the RMPs covered 493,434 acres of murrelet nesting habitat.⁵⁴ FWS then used habitat as a surrogate to analyze how the RMP would affect murrelets.⁵⁵ Its analysis and conclusions were based largely on FWS’s understanding of how BLM would be applying the “overarching protection” of the Murrelet Management Direction.⁵⁶ As explained by FWS,

To determine if protective measures apply, BLM will conduct an analysis of all activities that modify nesting habitat or remove nesting structure. Modify nesting habitat includes affecting adjacent stands that would modify the nesting structures wind firmness, microclimate and/or predation risks. In addition to identifying nesting structure outside the treatment unit that may be affected by the treatment, this analysis will also be used to determine which of four protective measures apply. Although impacts from treating adjacent stands without nesting structure (referred to as buffer habitat) is expected within 300 to 600 feet from nesting structure, the analysis of habitat goes out 726 feet from the treatment boundary to properly identify low density nesting structure in younger stands, as option 4 can only be selected as an option in these situations.⁵⁷

In other words, the Direction would be triggered by activities that modify or remove nesting habitat, as well as activities in stands adjacent to nesting habitat (the buffer habitat) that impact nesting structure through edge effects. Moreover, FWS believed the Murrelet Management Direction’s 300-foot buffer would apply to all occupied murrelet habitat as well as habitat with unknown occupancy status and certain unoccupied potential habitat.⁵⁸

Based on its consultation with BLM, FWS concluded that the Murrelet Management

⁵³ RMP BiOp at 330; *see also id.* at 2 (stating that FWS applied a 50-year analytical timeframe for purposes of the ESA consultation).

⁵⁴ *Id.* at 243.

⁵⁵ *Id.* at 330.

⁵⁶ *Id.* at 285.

⁵⁷ *Id.* at 286 (internal citation excluded; emphasis in original).

⁵⁸ *See* FWS, Comments on Draft RMP/EIS for Western Oregon (Aug. 20, 2025), at 33 (commenting that a 300 foot buffer should be applied to stands adjacent to occupied habitat, surveyed potential habitat and unoccupied potential habitat within the reserve system or murrelet critical habitat and recommending protection measures to minimize edge effects within 300 feet of “all” such habitat); BLM, Biological Assessment of the Proposed Resource Management Plan for Western Oregon (Feb. 1, 2016), at 16 (stating that BLM implemented the Service’s recommendation to “expand its protection of occupied forest stands to include all forest habitat within 300 feet of occupied stands.”).

Direction would prevent almost all adverse effects to individual murrelets.⁵⁹

Notably, the BiOp evinces a mutual understanding between FWS and BLM that the RMPs would be more protective of murrelets than the NWFP. FWS was persuaded by the fact that BLM would be immediately adding 79,500 acres to the reserve system (including 48,182 acres of murrelet nesting habitat), as well as by the fact that the RMPs would “significantly minimize” habitat modification and nest disturbance, lead to an increase in the murrelet population, and “improve the amount, quality, and distribution of murrelet nesting habitat” over fifty years.⁶⁰ FWS also believed that the RMP’s protections around occupied sites (including the younger stands and the buffer habitat) would eventually result in larger protected occupied murrelet sites than the NWFP, helping to reduce fragmentation of habitat.⁶¹

IV. BLM has significantly modified the Murrelet Management Direction that BLM and FWS consulted on, and FWS has acquiesced to BLM’s changes.

After issuing the RMP BiOp, FWS learned that BLM was interpreting the Murrelet Management Direction in a significantly different manner than what the agencies consulted on.⁶² BLM was not requiring 300-foot buffers around all occupied murrelet sites, as FWS expected. Instead, BLM was drawing a line between occupied sites discovered before BLM withdrew from the NWFP and sites discovered after the 2016 RMPs became effective, and not buffering activities adjacent to the NWFP-occupied sites. Further, as BLM explained in an internal document, it was applying a different definition of “modifying nesting habitat”:

In this management direction, “modifying nesting habitat” refers to direct alteration of nesting habitat; that is, habitat-altering activities occurring within a polygon that BLM identifies as marbled murrelet habitat. The BLM’s delineation of nesting habitat may contain an entire stand, multiple stands, or a portion of a stand, and is based on a site-specific evaluation of forest conditions The requirement to “assess the analysis area for marbled murrelet nesting structure” is not triggered by actions outside of nesting habitat unless the action would remove nesting structure. The U.S. Fish and Wildlife Service’s Biological Opinion on the RMP mischaracterized the BLM’s action when it stated, “Modify nesting habitat includes affecting adjacent stands that would modify the nesting structures wind firmness,

⁵⁹ See e.g., RMP BiOp at 292 (internal citations omitted) (“[I]mpacts from timber harvest to individual murrelets are only expected in the [HLB] when occurring [between 35 and 50 miles of the Pacific Coast]. The remaining acres will be subject to protection of occupied habitat under the [Murrelet Management Direction] and will only be harvested if no adverse effects are anticipated to occupied murrelet habitat either within or adjacent to the harvest unit except when taking actions that are necessary to treat or protect stands from sudden oak death.”).

⁶⁰ *Id.* at 284; see also *id.* at 308 (describing the RMP reserve system as “a net benefit” over the NWFP); *id.* at 317 (concluding that the RMPs were consistent with the murrelet recovery plan “[d]ue to the greater amount and protection of nesting habitat for murrelets than in the NWFP as referenced in the recovery plan”).

⁶¹ *Id.* at 320 (“[A]ll younger stands within the ¼ mile occupied site plus the 300 foot buffer will be managed to protect nesting habitat reducing local fragmentation and allowing more potential for ingrowth over the long term (current average occupied site protection is 148 acres versus the PRMP 189.27 acres).”).

⁶² In finding BLM entitled to deference on its interpretation of the Murrelet Management Direction, the Ninth Circuit reasoned that BLM had not altered its position on the Direction’s meaning. *Cascadia Wildlands*, 153 F.4th at 900. However, there is no doubt that BLM’s position is a reinterpretation of the Direction as compared to what FWS consulted on in 2016 BiOp.

microclimate and/or predation risks.” (RMP BO, p. 286).⁶³

In other words, BLM did not consider the Direction triggered by activities that occurred adjacent to nesting habitat—only activities that directly alter nesting habitat. And BLM was applying a vague definition of what qualified as “nesting habitat” for purposes of triggering the Direction, stating that it could determine “nesting habitat” on a site-specific basis.⁶⁴ These changes open significant amounts of murrelet habitat and adjacent forest to logging that FWS considered protected in its 2016 BiOp.

On September 23, 2019, FWS sent BLM a letter of concurrence “clarif[ying]” its recommendation for how BLM should implement the Management Direction.⁶⁵ This recommendation was limited to the 300-foot buffer issue, and FWS recommended that BLM apply the Management Direction as FWS had analyzed in the BiOp: that BLM provide a 300-foot buffer for all occupied murrelet sites within 35 miles of the Pacific Ocean, regardless of whether the occupied sites were discovered before or after the 2016 RMPs.⁶⁶

However, in the LOC, FWS immediately undercut its recommendation by providing an analysis of the impacts to murrelets if BLM ignored FWS’s recommendation and chose to continue not applying the 300-foot buffer around the NWFP-delineated occupied sites.⁶⁷ FWS, after summarizing the potential effects to murrelets from harvesting buffer habitat, summarily concluded, with hardly any discussion or analysis, that not buffering the NWFP-delineated occupied murrelet sites would not alter the RMP BiOp’s no-jeopardy conclusion.⁶⁸ This was a sharp reversal from the position FWS had taken just a few years earlier on the importance of buffer habitat to protecting and recovering murrelets and restoring their highly-fragmented habitat.⁶⁹ FWS’s LOC provides no valid rationale for this about-face, nor does it attempt to justify the line-drawing between NWFP-delineated occupied sites and murrelet sites discovered under the 2016 RMPs.

Further, FWS’s cursory analysis was limited to the 300-foot buffer issue.⁷⁰ FWS’s LOC did not address the other aspects of BLM’s reinterpretation of the Direction, including the implications of BLM applying a narrower definition of “modifying nesting habitat” to murrelets

⁶³ See Bruce Hollen and the RMP Team, Modification and Clarification from the State Office (June 19, 2018), at 1.

⁶⁴ BLM’s suggestion that FWS “mischaracterized” BLM’s action is misleading, as it ignores the fact the BLM was seemingly, and as legally required, an active participant in the ESA consultation process and as such should have recognized such a significant “mischaracterization” and taken steps to correct it prior to BiOp’s finalization.

⁶⁵ See State Supervisor, Oregon Fish and Wildlife Office, FWS, Memorandum re: Interpretation of the Bureau of Land Management’s (BLM) management direction for marbled murrelet (Sept. 23, 2019) (hereafter, “FWS 2019 LOC”), at 1. FWS did not refer to this document as a letter of concurrence, instead labeling it a “memorandum” that included an attached “Effects Analysis” and “7(a)(2) Analysis.” Regardless of what FWS titled this document, it is clear from its face that it is a letter of concurrence.

⁶⁶ *Id.* at 3.

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See e.g.*, FWS comments on RMP DEIS, *supra* n. 58.

⁷⁰ *See* FWS 2019 LOC at 1 (internal cites omitted) (“The issue is whether the marbled murrelet biological conclusion in the FWS’s RMP Biological Opinion would be the same if the BLM conducts harvest activities (thinning and regeneration harvest) directly adjacent to stands mapped as occupied under the Northwest Forest Plan as implemented under the BLM’s 1994 RMP (i.e. prior to March 26, 2015).”).

and their nesting habitat. FWS, for example, did not consider the clear implication that, under this narrower definition, BLM will have to conduct far fewer surveys for murrelets, likely leading to occupied murrelet habitat being logged. This oversight is particularly troubling given the importance of discovering and protecting occupied sites to murrelet recovery. FWS also did not give serious consideration to the impact of increased logging in stands contiguous with murrelet nesting habitat on the expectation in the 2016 BiOp that the RMPs would contribute to increased nest-patch sizes, reduced fragmentation, and more ingrowth despite the clear implication that BLM's logging will have the opposite impact.⁷¹ Finally, FWS did not consider the degree to which BLM's reinterpretation would result in take of murrelets through destruction of their nesting habitat and disruption of nesting murrelets, nor did FWS address impacts of the reinterpretation on murrelet critical habitat.⁷²

In short, FWS's 2019 LOC failed to address all the potential effects of BLM's reinterpretation on murrelets and their critical habitat. FWS's failure, at this juncture, to hold BLM accountable for its significant change to the Murrelet Management Direction was, and remains, an abdication of its responsibilities under the ESA to protect, conserve, and recover murrelets and their critical habitat.

V. BLM is implementing its reinterpreted version of the Murrelet Management Direction in Big Weekly Elk even though FWS has not fully or adequately consulted on its effects to murrelets or their critical habitat.

Big Weekly Elk is a BLM forest management project governed by BLM's 2016 Northwestern and Coastal Oregon RMP. The Project authorizes 3,623 acres of harvest across all land use allocations, including 1,827 acres of timber harvest in the LSR (1,562 acres of which are for commercial thinning) as well as associated road construction and yarding corridors, to be implemented through multiple timber sales.⁷³ The entire Project lies within 18 to 28 miles of the Pacific Ocean and, as such, activities under all land use allocations are subject to the Murrelet Management Direction.⁷⁴ The Project is interwoven with a significant amount of suitable murrelet habitat, and there are 225 acres of designated murrelet critical habitat within the

⁷¹ See RMP BiOp at 320 (“[A]ll younger stands within the 1/4 mile occupied site plus the 300 foot buffer will be managed to protect nesting habitat reducing local fragmentation and allowing more potential for ingrowth over the long term (current average occupied site protection is 148 acres versus the PRMP 189.27 acres); *id.* at 288 (noting that the 300-foot buffer provides an additional 63.6 acres to the 125.66 acre (1/4 mile) circle of protection around occupied sites).

⁷² *But see e.g.*, RMP BiOp at 340–41 (“Removal of buffer habitat to an extent that it affects its function to support [a tree with nesting structure] is an adverse effect to murrelet critical habitat.”).

⁷³ See USFWS, Big Weekly Elk Biological Opinion (TAILS #01EOFW00-2020-F-553) (Dec. 22, 2020), at 11 (hereafter, “BWE BiOp”); BLM, Big Weekly Elk Forest Management Project Environmental Assessment (Oct. 2021) (DOI-BLM-ORWA-C040-2019-0006-EA) (hereafter, “BWE EA”), at 19–20, Table 7 (identifying proposed timber sales in the HLB in the BWE Project area). Since finalizing the Project, BLM has authorized seven timber sales under the Project. See BLM National NEPA Register, Project Name: Big Weekly Elk Forest Management Project (NEPA Number: DOI-BLM-ORWA-C040-2019-0006-EA), available at <https://eplanning.blm.gov/Project-Home/?id=155facb0-a7f2-f011-8407-001dd80db62a> (last visited Mar. 27, 2026); BLM National NEPA Register, Project Name: New Yankee TS DNA (NEPA Number: DOI-BLM-ORWA-C040-2024-0002-DNA, available at <https://eplanning.blm.gov/Project-Home/?id=b5ec57d9-a7f2-f011-8406-001dd80ef717> (last visited Mar. 27, 2026).

⁷⁴ See RMP at 98.

Project’s action area, including 192 acres of suitable murrelet habitat.⁷⁵

BLM is applying its reinterpreted Murrelet Management Direction to Big Weekly Elk,⁷⁶ and is permitting logging directly adjacent to murrelet nesting habitat, including occupied habitat.⁷⁷ BLM is using its narrower definition of “modifying habitat,” splitting the modifications into those that cause direct effects (i.e., removing nesting structure) versus indirect effects (i.e., edge effects to nesting habitat from logging in areas adjacent to that habitat).⁷⁸ BLM is using this new definition to limit when the Murrelet Management Direction is triggered, adding in the requirement—not included in the RMP—that only direct modification to nesting habitat or structure triggers the Direction.⁷⁹ This is allowing BLM to avoid implementing the Direction and its ensuing protections, which has serious ramifications for murrelets and their habitat.⁸⁰ For example, because according to BLM only direct effects modify nesting habitat, BLM is imposing a small, 150-foot buffer around occupied or unsurveyed nesting structure in the LSR for logging in forests 60 years or younger, and a 150-foot buffer around occupied habitat for logging in forests greater than 70 years old, to avoid triggering murrelet surveys.⁸¹ However, such protection is far smaller than what FWS believed required by the RMP’s Murrelet Management Direction, and is not sufficient to protect murrelets from the effects of logging (such as impacting the nesting structure’s wind firmness and microclimate and increasing predation risks) or contribute to increased nest patch sizes and decreased habitat fragmentation.

Further, BLM is not applying the 300-foot buffer to NWFP-delineated occupied murrelet sites,⁸² which is particularly troubling because Big Weekly Elk overlaps with 55 of the 351 NWFP-delineated occupied murrelet sites on all BLM land in Oregon.⁸³ After discussions with

⁷⁵ BWE BiOp at 64–65 & Table 9, 67.

⁷⁶ *Id.* at 109 (“The basis for some assumptions and terminology incorporated in the Service’s murrelet analysis of the RMP are applied differently within the Big Weekly Elk Project.”);

⁷⁷ *See e.g., id.* at 118 (stating that BLM estimated 350 acres of occupied suitable habitat occurs within 150 feet of proposed thinning); *id.* at 116 (“40 occupied sites could be indirectly affected by thinning and/or directly affected by new road construction or heavy road renovation”).

⁷⁸ *See* Coos Bay BLM, Biological Assessment for Big Weekly Elk (Dec. 1, 2020), at 20 (hereafter, “BWE BA”).

⁷⁹ *Compare id.* at 79 (emphasis added) (describing Murrelet Management Direction as being triggered “prior to any activity that would potentially *directly* modify murrelet nesting habitat or remove nesting structure,” and further stating that it would “only considered habitat modified if the activity would occur within nesting habitat”) *with* RMP at 98 (“Before modifying nesting habitat or removing nesting structure . . .”).

⁸⁰ *See* BWE BA at 79 (discussing how BLM used its “direct modification” interpretation of the Direction to avoid triggering the survey requirement). The serious ramifications include both the impacts to murrelets and their habitat, including critical habitat, addressed by FWS in the Big Weekly Elk BiOp, *see generally* BWE BiOp at 108–128, as well as the loss of the protections that FWS believed the Murrelet Management Direction would provide.

⁸¹ *Compare* BWE BiOp at 14 (standards for HLB activities, including murrelet surveys) *with id.* at 14–16 (imposing 150-foot buffer standard in LSR and no standard requiring murrelet surveys); BWE EA at 108 (noting that commercial thinning would occur on approximately 56 acres of unsurveyed suitable murrelet habitat in the LSR and addressing how logging activities in LSR stands with individual murrelet trees or pockets of murrelet trees would avoid affecting existing occupied habitat by buffering trees with murrelet structure); *see also* BWE BA at 89 (explaining that “to avoid direct modification of adjacent habitat” within the HLB, “[i]n units adjacent to unsurveyed nesting habitat, the BLM will implement a 150 ft buffer for trees with murrelet structure that are within suitable habitat for HLB commercial thinning or 300 feet for regeneration harvest.”).

⁸² *See id.* at 64–65; *Cf.* RMP BiOp at 317 (“Protection for occupied nest trees includes a 300-foot buffer habitat; therefore, the following discussion on protection of occupied sites includes protection for buffer habitat.”).

⁸³ *See* BWE BiOp at 64; RMP BiOp at 245.

FWS, BLM agreed to apply 150-foot buffers in the LSR,⁸⁴ but these buffers are far smaller than the buffers BLM would have had to apply if it implemented the Management Direction as the agencies consulted on in 2016. Indeed, in the RMP BiOp, FWS concluded that, because of the Murrelet Management Direction, there would be no impacts to individual murrelets within 35 miles of the coast, but in Big Weekly Elk, FWS concluded that, due to the lack of the 300-foot buffer, the Project could result in the incidental take of murrelet young at up to four sites.⁸⁵

LEGAL VIOLATIONS

I. The Big Weekly Elk BiOp is arbitrary, capricious, and contrary to the ESA.

BLM is implementing its reinterpreted Marbled Murrelet Management Direction in Big Weekly Elk even though FWS has not fully or adequately consulted on the effects of BLM's reinterpretation to murrelets or their critical habitat. In its Big Weekly Elk BiOp, FWS concluded that the Project may affect, and is likely to adversely affect, marbled murrelets and their designated critical habitat, but that these effects were not likely to jeopardize murrelets or destroy or adversely modify their critical habitat.⁸⁶ BLM reached this conclusion by comparing the effects of Big Weekly Elk to assumptions and projected impacts described in the 2016 RMP BiOp and the 2019 LOC.⁸⁷ But the assumptions and projected impacts from the 2016 RMPs, and their underlying analyses, are inapplicable given BLM's reinterpretation, and FWS's 2019 LOC only considered one aspect of BLM's reinterpretation to murrelets and their critical habitat. For the aspect that the 2019 LOC did consider—the 300-foot buffer issue—FWS's analysis was arbitrary, capricious, and contrary to the ESA. Because BLM relied on these inapplicable, incomplete, and inadequate earlier assessments in Big Weekly Elk BiOp, that BiOp was arbitrary, capricious, and contrary to the ESA.⁸⁸

II. BLM is failing to ensure against jeopardy to murrelets and destruction or adverse modification of their critical habitat, in violation of the ESA.

An agency violates ESA section 7's obligation to ensure that its action does not jeopardize a listed species or destroy or adversely modify critical habitat when it relies on a flawed BiOp in making that decision.⁸⁹ Here, as discussed above, the BWE BiOp was arbitrary, capricious, and contrary to the ESA. By relying on the flawed BiOp to support its decision to approve Big Weekly Elk and its associated timber sales, BLM has violated its substantive duty under the ESA to ensure that its authorization of the Project will not jeopardize marbled

⁸⁴ BWE BiOp at 109.

⁸⁵ Compare RMP BiOp at 292 with BWE BiOp at 116–17, 135.

⁸⁶ *Id.* at 128.

⁸⁷ *Id.* at 125–28 (addressing BWE effects to murrelets in relation to the RMP's assumptions and projections and summarizing effects to murrelets, and stating that “[i]n summary, consulted on impacts to murrelets remain below projected impacts described in the RMP and the 2019 analysis with two exceptions (annual pair impacts and removal of habitat in OR-06c”); *id.* at 128 (“This action and its associated effects appear consistent with those evaluated in the RMP and are not likely to resonate [*sic*] at the rangewide scale.”); BWE BA at 89 (stating that BA tiers to FWS's 2019 LOC).

⁸⁸ See 5 U.S.C. § 706(2)(A).

⁸⁹ See *Pyramid Lake*, 898 F.2d at 1415 (“A federal agency cannot abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a FWS biological opinion must not have been arbitrary or capricious.”).

murrelets and or destroy or adversely modify their critical habitat.⁹⁰

III. FWS's 2019 LOC is arbitrary, capricious, and contrary to the ESA.

FWS's 2019 LOC is arbitrary, capricious, and contrary to the ESA for at least the following reasons.⁹¹ First, FWS's 2019 LOC did not evaluate the full scope of the potential effects to murrelets and their critical habitat from BLM's reinterpretation of the Management Direction. The analysis was limited to the potential effects on murrelets from harvesting in the 300-foot buffer habitat around NWFP-occupied stands. The analysis did not evaluate any other effects to murrelets or their critical habitat from BLM's reinterpreted Management Direction, including effects based on the Management Direction being triggered less frequently.

This is not a minor oversight, as the aspects of BLM's reinterpretation that FWS has not consulted on may have significant impacts for murrelets and their critical habitat. For example, the Murrelet Recovery Plan identifies locating "most, if not all, occupied nesting habitat" as critical to the recovery of the species, and notes that "[c]onsiderable effort is, therefore, justified to identify the location of sites currently used by marbled murrelets, regardless of their distance inland."⁹² Yet, as a result of BLM's reinterpretation, the Direction is likely to be triggered less frequently, fewer surveys will occur, fewer occupied sites will be discovered, and thus, murrelets at undiscovered sites are likely to be impacted by logging activities that would otherwise be prohibited or restricted.⁹³ Further, the RMP BiOp's conclusion regarding the impacts the Direction's protections would have on creating larger protected sites and reducing habitat fragmentation is significantly undermined.

Second, FWS's conclusion that allowing logging within 300 feet of NWFP-occupied stands would not jeopardize murrelets was unreasonable and ignored best available science regarding the importance of buffering logging activities to protecting occupied murrelet sites and contributing to the recovery of the species by, among other things, protecting against edge effects and helping reduce fragmentation of their decimated forest habitat. After discussing how "[r]emoving or modifying buffer habitat may adversely affect murrelets,"⁹⁴ FWS concluded, in a highly cursory fashion, with hardly any explanation, that these effects did not change the RMP BiOp's no jeopardy conclusion.⁹⁵ This falls far short of the adequate, well-reasoned explanation required by the ESA and APA, does not respond to best available science demonstrating the importance of buffering occupied murrelet habitat,⁹⁶ and does not represent a rationale

⁹⁰ See 16 U.S.C. § 1536(a)(2); see also *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (finding that agency's reliance on a legally-flawed BiOp was arbitrary and capricious, and therefore that agency had violated its substantive duty under ESA section 7 to ensure against jeopardy to listed species).

⁹¹ See 5 U.S.C. § 706(2)(A).

⁹² Murrelet Recovery Plan at 151; see also BLM, Resource Management Plans for Western Oregon: Planning Criteria (Feb. 2014), at 188 ("If pre-disturbance surveys are not conducted, marbled murrelet sites will not be found. If undetected marbled murrelet sites are located within the harvest land base, they will be lost.").

⁹³ Notably, the BiOp predicted that under the RMP, BLM would discover and protect 97 occupied murrelet sites by the end of 2023, but in March 2022, BLM reported it had thus far only discovered 38 new occupied sites. Compare RMP BiOp at 318 with BLM, Resource Management Plan Evaluation Report, Northwestern and Coastal Oregon and Southwestern Oregon RMPs (Mar. 2022), at 33.

⁹⁴ FWS 2019 LOC at 4–6.

⁹⁵ *Id.* at 6–7.

⁹⁶ See e.g., *id.*; see also Murrelet Recovery Plan at 140 (identifying 300-600 foot buffers around occupied habitat as

justification for FWS's backsliding from its position from just a few years earlier regarding the importance of the buffer habitat. Further, FWS failed to adequately explain why affecting an additional 212.4 murrelet pairs over a 50-year period was not significant,⁹⁷ especially given the low reproductive potential of the species and the fact that protecting murrelets and their occupied nesting habitat in the short-term while their nesting habitat re-grows over, at a minimum, 100 to 200 years, is critical to recovery of the species.⁹⁸

Third, the LOC was procedurally improper. FWS acknowledged that “[r]emoving or modifying buffer habitat may adversely affect murrelets,”⁹⁹ but then concluded, in a highly cursory analysis not based on any biological assessment, that BLM's interpretation would not change its conclusion in the BiOp.¹⁰⁰ Updating BiOps in this manner is improper and renders the ESA's consultation process meaningless.¹⁰¹ The ESA requires more.

IV. BLM and FWS have failed to reinitiate consultation on the 2016 RMP's Murrelet Management Direction, in violation of the ESA.

A federal agency's obligation to consult with FWS and ensure against jeopardy is ongoing. Under the ESA's implementing regulations,

Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . [i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence.¹⁰²

Here, BLM has, through its reinterpretation of the Murrelet Management Direction, subsequently modified the 2016 RMPs in a manner that has caused, and will continue to cause, effects to murrelets and their critical habitat that were not considered in FWS's 2016 RMP BiOp. As discussed above, FWS's 2019 memo was an arbitrary, capricious, and illegal letter of concurrence. However, to the extent that FWS and BLM argue this memo was not a letter of concurrence, then BLM has not reinitiated consultation on the 2016 RMPs despite its significant modification to the Direction, and its failure to do so is a violation of ESA section 7(a)(2) and the ESA's implementing regulations. Likewise, FWS has not requested that BLM reinitiate consultation on the 2016 RMPs despite BLM's significant modification to the Direction. FWS's failure to do so is also a violation of ESA section 7(a)(2) and its implementing regulations.

a necessary short-term action to stabilize and increase the murrelet population and provide for recovery).

⁹⁷ FWS 2019 LOC at 14, Table 10.

⁹⁸ See Murrelet Recovery Plan at 121, 138–39.

⁹⁹ FWS 2019 LOC at 4.

¹⁰⁰ *Id.* at 6–7.

¹⁰¹ See *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059, 1077 (9th Cir. 2004) (rejecting FWS argument that BiOp updates were proper and commenting that such “‘updates’ are prohibited because they would render the consultation process ‘meaningless’ and would allow the FWS to issue ‘unsupported Biological Opinions knowing that it would search for evidentiary support if the opinion was later challenged’”) (quoting *Ariz. Cattle Growers’ Ass’n v. USFWS*, 273 F.3d 1229, 245 (9th Cir. 2001)).

¹⁰² 50 C.F.R. § 402.16(a)(3) (2023).

CONCLUSION

BLM's authorization of Big Weekly Elk and its associated timber sales violates the ESA, and FWS's BiOp for Big Weekly Elk and its 2019 letter of concurrence are arbitrary, capricious, and contrary to the ESA. BLM must immediately halt implementation of Big Weekly Elk, including any ongoing or future timber sales associated with the Project.¹⁰³ If BLM does not do so within 60 days of this letter, we intend to file suit.

Please reach out to us at the contact information below if you would like to discuss this matter during the notice period.

Regards,



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¹⁰³ See 16 U.S.C. § 1536(d).