

Petition to Delist California/Oregon/Washington
Distinct Population Segment of Marbled Murrelet (*Brachyramphus marmoratus*)
Date of Petition: May 28, 2008



American Forest Resource Council (AFRC), the Carpenters Industrial Council (CIC), Douglas County, Oregon and Ron Stunzner petition the Secretary of Interior, through the Director of the U.S. Fish and Wildlife Service, under 50 C.F.R. §424.14 to delist the California/Oregon/Washington distinct population segment (DPS) of Marbled Murrelet (*Brachyramphus marmoratus*) (Three-State Murrelet DPS) that was listed as a threatened species under the Endangered Species Act (ESA) on October 1, 1992. 57 Fed. Reg. 45328; 50 C.F.R. §17.11.

Identification of Petitioners

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 90 forest product manufacturing companies and landowners throughout Oregon, Washington, California and nine other states in the midwestern and western United States. AFRC is submitting this petition on behalf of itself and its members.

Many of AFRC's members purchase or seek to purchase timber sales sold by the U.S.D.A. Forest Service and U.S.D.I. Bureau of Land Management (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 listing of the Three-State Murrelet Population as a threatened species on October 1, 1992 and the subsequent designation of critical habitat for the population in 1996.

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 are intermingled with or adjacent to the federal lands used, potentially used or designated as critical habitat for the marbled murrelet. 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 the listing of the murrelet DPS.

The CIC, located in Portland, Oregon, is a labor organization that represents some 10,000 forest products workers in Oregon, Washington and northern California, and 120,000 members nationwide. CIC is an affiliate of the United Brotherhood of Carpenters & Joiners, headquartered in Washington, D.C. CIC's members are directly and adversely affected by limits on timber harvesting resulting from the listing of the marbled murrelet as a threatened species. Most CIC workers on the Pacific Coast live in remote rural communities that are heavily dependent on timber. If these workers lose their jobs, they have few if any opportunities to obtain comparable employment elsewhere in their home towns.

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% 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% of the land area of the County is owned by the Federal Government and managed by the U.S. Forest Service and the Bureau of Land Management. Douglas County owns and manages its own forest lands that are used or potentially used by the marbled murrelet, and the County directly and adversely affected by limits on timber harvesting resulting from the listing of the marbled murrelet as a threatened species.

Ron Stuntzner is the Founder of Stuntzner Engineering & Forestry, a consulting business with 35 employees; engineers, surveyor and foresters. He has been in business for about 40 years, providing timberland management, timber cruising and appraisal, engineering and land surveying service to the public. He is a Registered Forest Engineer in Washington and Oregon, a Land Surveyor in Oregon and a Registered Professional Forester in California. Mr. Stuntzner's family owns about 200 acres of timber and timberland in two-100 acre parcels, one about 10 miles north of Coos Bay and one about 10 miles south of Coos Bay. The tract north of Coos Bay could currently contain possible murrelet habitat, and both parcels may develop possible murrelet habitat in the future.

Basis for Petition

In the 1992 murrelet listing decision FWS expressed uncertainty whether the three-state murrelet population constitutes a DPS eligible for listing as a "species" under the ESA:

At the time of proposing to list the marbled murrelet in Washington, Oregon, and California, the Service considered the murrelets in these States to constitute a distinct population segment comprising a significant portion of the east Pacific subspecies of the marbled murrelet. While the Service continues to believe that existing legal protection is not adequate to ensure survival of murrelets in the three-state region, some question remains whether the population listed in this rule qualifies for protection under the Act's definition of "species."

57 Fed. Reg. 45330.

FWS promised to reexamine the DPS 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. Nor at any time in the next decade did FWS conduct a five-year status review of the Three-State Murrelet Population as required by §4(c)(2) of the ESA.

As the term “distinct population segment” is not defined in the ESA or in common scientific parlance, in 1996 FWS and the National Oceanic and Atmospheric Administration (NOAA), which administers the ESA for some species, issued a joint Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy). 61 Fed. Reg. 4722 (February 7, 1996). 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 is met by either of two alternative tests:

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.

61 Fed. Reg. at 4725. The Services acknowledged that “the use of international boundaries as a measure of discreteness may introduce an artificial and non-biological element into the recognition of DPS’s.” 61 Fed. Reg. 4722. There is no express statutory authority in the ESA to use an international boundary to define a DPS.

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 seeking, inter alia, to compel FWS to conduct a five-year status review of the Three-State Murrelet Population. *Am. Forest Resource Council v. Dep’t of Interior*, Civil No.02-6087-AA (D. Or.). On January 13, 2003 AFRC and the Department of Interior entered into a Settlement Agreement of that case in which, inter alia, the FWS agreed that “[b]y December 31, 2003, the Service will complete the Status Review and will, based upon the best available scientific and commercial data, determine whether a change in listing status is warranted as provided by ESA Section 4(c)(2).” The Settlement Agreement was approved by the United States District Court for the District of Oregon on April 24, 2003. The parties to the Settlement Agreement twice agreed to extend the deadline first to April 30, 2004, and then to August 31, 2004. On that date FWS announced that it had completed the five-year Status Review.

The Status Review concluded that the Three-State Murrelet DPS is not a listable DPS because "the currently listed murrelet population is not discrete according to the 1996 DPS Policy":

13. New Information: Application of the DPS policy

13. A. Is there relevant new information with respect to the appropriate application of the DPS policy to the listed entity under review?

Yes, see Section 13.B. Of particular importance is the recent entry into force of Canada's Species At Risk Act.

13. B. Given the updated information, is the listed entity consistent with the DPS policy with regards to the Discreteness and Significance elements?

1) *Is the currently listed murrelet population discrete according to the 1996 DPS Policy?*

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. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.

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.

The currently listed murrelet population is not discrete according to the 1996 DPS Policy.

(a) **Biological Issues:** There is no marked separation of physical, physiological, ecological or behavioral differences at the border (Note: This is a wide ranging species and there are some north to south physical and ecological differences across its range. For example, there are some north to south differences in topography, terrestrial forest habitat, and marine conditions. There is no significant evidence of genetic or morphological discontinuity between populations at the U.S.-Canadian border.)

(b) **International Border Issues:** There 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.

(b)(1) *Control of exploitation.* There is no difference across the international border in control of exploitation that is significant in light of section 4(a)(1)(D) of the Act. That is to say that if there exist any differences in control of exploitation, those differences are not the result of inadequate existing regulatory mechanisms so as to place the species at risk of being listed as threatened or endangered. In fact, there are virtually no differences in control of exploitation. On both sides of the international border, the murrelet is protected against illegal exploitation. Under the ESA, prohibitions are enforced against illegal take, harassment, hunting, and commercial trafficking. Penalties include fines of up to \$50,000 and one year in prison. Canada's Species At Risk Act (SARA) recently entered into force. Under

this statute, the marbled murrelet is classified as a "threatened" species. SARA defines a threatened species as "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction." It is illegal to kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or to possess, collect, buy, sell or trade an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such an individual. Violations are punishable by fine of not more than \$250,000 or to imprisonment for a term of not more than five years, or both. In both the U.S. and Canada, exploitation is controlled under statutes implementing migratory bird treaties.

(b)(2) *Management of Habitat.* There is a difference in management of habitat for the marbled murrelet between the U.S. and Canada. In the U.S. Northwest, habitat is managed under the Northwest Forest Plan, habitat conservation plans, and state endangered species acts, forest practice rules and timber harvest plans. In Canada, murrelet habitat appears to be managed in accordance with the goals of the 2003 Canadian Marbled Murrelet Assessment (Canadian Marbled Murrelet Recovery Team 2003). British Columbia is currently in the process of revising its Identified Wildlife Management Strategy (IWMS), under which it is proposed approximately half of the murrelet range will be under a strategic land use planning process that establishes wildlife habitat areas (WHAs) for the murrelet. The differences in management of habitat are not significant in light of section 4(a) (1) (D) of the Act. That is to say that those differences do not reflect the inadequacy existing regulatory mechanisms so as to place the species at risk of being listed as threatened or endangered. For example, the scheme of habitat management on the U.S. side is quite sophisticated. The adoption of the Northwest Forest Plan has greatly reduced the annual rate of habitat loss since 1994. Nonetheless, estimated potential total loss of suitable murrelet habitat since listing of the species is about 10% of the current estimate of suitable habitat. The Canadian recovery plan, by comparison, states as a central recovery goal to down-list the species from Threatened to Special Concern, by creating conditions that will limit the decline of the BC population and its nesting habitat to less than 30% over three generations (30 years), roughly the same habitat loss in arithmetical terms as that experienced during the period 1992 to 2003 in the U.S. In any event, both the U.S. and Canadian schemes acknowledge and allow continued harvest of murrelet habitat.

(b)(3) *Conservation Status.* In the U.S., the marbled murrelet is classified as "threatened;" that is, a "species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." In Canada, under SARA, the species is classified as "threatened;" that is, "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction." These are roughly equivalent definitions.

There are differences in population numbers between Canada and Washington, Oregon, and California. The continental U.S. has a smaller population of murrelet (approximately 24,000; Huff et al. 2003, Peery pers. comm. 2003), than in Canada (approximately 66,000; Burger 2002). Further, estimates of loss of old-growth

forests in the U.S. Pacific Northwest since pre-industrial times (National Research Council 2000), as compared to the amount of forests within the range of the murrelet in British Columbia that have become unsuitable due to anthropogenic causes (e.g., industrial logging and urbanization) (Demarchi and Button 2001a, b as adapted by Burger 2002), show a higher percentage of murrelet habitat has been lost in Washington, Oregon, and California. However, 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.

(b)(4) *Regulatory Mechanisms*. The regulatory mechanisms existing on each side of the border have been described above. The differences in these mechanisms are hardly significant in the abstract. They are not significant at all in light of section 4(a) (1) (D) of the Act. That is, those differences do not reflect the inadequacy of any existing regulatory mechanisms so as to place the species at risk of being listed as threatened or endangered.

Status Review at 14-17.

Despite the conclusion that the murrelet DPS does not meet the discreteness element of the 1996 DPS Policy, the Service has taken no action to delist the DPS. In *Am. Forest Resource Council v. Hall*, 2008 WL 299052 (February 5, 2008), *motion for reconsideration pending*, the U.S. District Court for the District of Columbia determined that the five year Status Review was not reviewable final agency action, and that AFRC could obtain a reviewable agency decision by filing a petition to delist the murrelet DPS.

Accordingly, the above-named petitioners now petition the Secretary of Interior, through the Director of the U.S. Fish and Wildlife Service, under §4(b) of the ESA, to remove the California/Oregon/Washington distinct population segment of Marbled Murrelets (*Brachyramphus marmoratus*) from the list of threatened and endangered species.

The listed murrelet DPS does not legally qualify for listing under the Endangered Species Act because under the 1996 DPS Policy, it satisfies neither of the standards for discreteness: 1) that the population in question “is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors” or 2) that the population “is delimited by international governmental boundaries within with differences in control of exploitation, management of habitat, conservation status, or regulatory mechanism exist that are significant in light of section 4(a)(1)(D) of the Act.” The Service has already determined that neither of these conditions exists.

The Service found in the 2004 Status Review that “[t]here is no marked separation of physical, physiological, ecological or behavioral differences at the border [between British Columbia and Washington State].” Status Review at 15. There is no biological evidence since 2004 to call that conclusion into question. In agreement with the 2004 Status Review, the 2007 United States Geological Survey report found “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 page 138. The USGS Report actually found that the central California portion of the listed Three-State DPS is discrete from the rest of

the listed DPS: "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." USGS Report at page 138. The best scientific and commercial data available shows that the listed murrelet DPS is not discrete from other marbled murrelets under the first of the two alternative standards.

The Service also found in 2004 that the murrelet DPS does not meet the second "non-biological" standard based on "international governmental boundaries." After presenting a detailed comparison of the Canadian and American protective programs for marbled murrelets in the 2004 Status Review, the Service's conclusion to this "non-biological" question was that "those differences do not reflect the inadequacy of any existing regulatory mechanisms so as to place the species at risk of being listed as threatened or endangered." Status Review at 17.

Nothing has changed since 2004 to call this conclusion into question. Upon reviewing the laws and policies of Canada for control of exploitation, management of habitat, conservation status and regulatory mechanism, the Service should reaffirm its 2004 conclusion that with respect to the marbled murrelet there are no differences between the protective measures in SARA and those in the ESA that are significant in light of section 4(a)(1)(D) of the Act.

SARA creates a mechanism for listing species at risk as "extinct, extirpated, endangered, threatened or of special concern" (section 15), similar to section 4 of the ESA. The marbled murrelet is listed as threatened in Canada under SARA. As in section 9 of the ESA, SARA provides that "no person shall kill, harm, harass, capture or take an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species." (Section 32). SARA protects habitat of protected species comparably to the ESA, by protecting the "residence" of a protected species on federal land (section 33), and granting the federal government power to impose similar restrictions on non-federal land in a province or territory if it determines its local laws "do not effectively protect the species or the residences of its individuals." (Section 34-35). A recovery strategy is required for every threatened or endangered species, as in section 4 of the ESA. Section 37. In addition to SARA, Canada also uses the 1996 Accord for the Protection of Species at Risk, which has been endorsed by the provinces and territories, and the federal Habitat Stewardship Program for Species at Risk, introduced in 2000.

The 2007 USGS Report addressed the international boundary issue but failed to present any new information on the subject:

In 2004, when the FWS decided that the WOC population of Marbled Murrelet did not satisfy the criteria for designation as a DPS, Canada's Species at Risk Act (SARA) had only recently passed. Like the ESA, SARA may effectively control the illegal exploitation of Marbled Murrelets from various forms of direct take. From the perspective of conservation of nesting habitat, it is difficult to make direct comparisons of the benefits to Marbled Murrelets between the two laws. The details of how SARA will be applied to Marbled Murrelets have not yet been finalized. The Canadian Marbled Murrelet Recovery Team drafted a Recovery

Strategy, but this strategy is still under review by Federal and Provincial governments. At this time, only one of three Recovery Action Plans has been submitted for government review. The Recovery Strategy and its associated Recovery Action Plans will not likely be in place before 2008.

USGS Report at 139. USGS does not have statutory authority to implement or administer the ESA, and has no special knowledge of the Services' DPS policies. The USGS Report pointed to only one new piece of analytical information its authors considered relevant to the international boundary issue:

Unavailable at the time the FWS completed its 5-year review of the Marbled Murrelet in WOC was a report by the Forest Practices Board (FPB) in British Columbia that was critical of the province's implementation of the existing forest practices regime for conservation of forest nesting habitat of this species (Forest Practices Board 2004). ... The FPB concluded that conservation of Marbled Murrelet habitat under the Forest and Range Practices Act is limited and very slow. The FPB was particularly concerned that while the process of developing a conservation strategy for Marbled Murrelets is still ongoing, logging projects continue to be approved, thereby eliminating future options for murrelet habitat conservation, especially on the southern British Columbia coast where conservation is most needed. The FPB also was critical of British Columbia's implementation of the Identified Wildlife Management Strategy under the FRPA. Under this strategy, British Columbia arbitrarily restricted protection of forest habitat for all IWMS species to less than 1 percent of the mature timber land base (in which most murrelet nesting habitat occurs). In the FPB's view, this prevents conservation of the most important murrelet nesting habitat and deflects conservation to less suitable habitat.

USGS Report at 139.

This FRB Report was issued just three months after SARA took effect on June 1, 2004, and did not document any actual delay or failure under the newly-effective statute. In addition, the FRB's 2004 commentary does not shed any meaningful light on whether SARA and ESA have "differences in control of exploitation, management of habitat, conservation status, or regulatory mechanism exist that are significant in light of section 4(a)(1)(D) of the Act." To make such a comparison under the 1996 DPS Policy, there is little relevance to identification of instances where Canadian wildlife authorities have been slow to implement the protective measures for listed species, such as suggested by the 2004 FRB Report (whether or not this is correct).

Criticism of slow Canadian implementation of protective measures for the marbled murrelet does not serve to identify any "differences" between the two nations' administrative records because the Service has often received exactly the same criticism of its own administrative delays. The Service was successfully sued in 1992 to overturn delays in the murrelet listing decision, *Marbled Murrelet v. Lujan*, No 91-522BR (W.D. Wash.), and was again successfully sued in 1993 after it failed to designate critical habitat for the listed murrelet

DPS. See *Marbled Murrelet (Brachyramphus Marmoratus) v. Babbitt*, 918, 320 F.Supp. 318 (W.D.Wash. 1996) (recounting history).

There is far more criticism on the public and judicial record of the Service's failure to implement the protective measures of the ESA in a timely manner than any criticism Environment Canada and its governmental and non-governmental conservation partners may have received since SARA took effect in 2004. For example, in 2007 the 11th Circuit Court of Appeals found the Service "chronically fails" to designate critical habitat for listed species. *Alabama-Tombigbee Rivers Coalition v. Kempthorne* 477 F.3d 1250, 1269 (11th Cir. 2007) ("it is clear that the Service chronically fails to meet its statutory duty of designating critical habitat of endangered species within the time the Endangered Species Act requires."). Another court made a comparable finding for five year status reviews. *Florida Home Builders Ass'n v. Norton*, 496 F.Supp.2d 1330, 1336 (M.D.Fla. 2007) ("Defendants acknowledge that they have failed to comply with a mandatory, nondiscretionary, Congressional directive to undertake status reviews of threatened or endangered species within the five-year deadline established by statute."). Many similar criticisms of the Service's delays in ESA implementation can be found in the literally dozens of court decisions from the past 10 years. The Canadian record of timely compliance does not compare unfavorably to the Service's record.

Thus, noting that Canadian authorities have not implemented protective measures for marbled murrelets as fast as some critics think they should have does not differentiate Canada's species protection laws from those in the United States, and cannot serve as a basis for finding the Three-State Murrelets to be a DPS under the 1996 DPS Policy.

A group of fisheries scientists presented a detailed comparison of the two statutes in the December 2005 issue of Fisheries Magazine in the context of salmon protection (most of which applies generally to the two statutes), carefully noting the areas where each statute may be stronger or weaker than the other:

Comparison to the US Endangered Species Act (ESA)

... Multiple criteria are used by both SARA and ESA in scientific assessments of the biological risk of extinction. SARA mandates a non-governmental scientific group (COSEWIC) to conduct the biological assessments of risk, without considering the regulatory or socioeconomic impacts. By contrast, ESA relies on a government agency (NOAA for salmon) that must also later deal with the implications of the listing. The independent assessment and two-step process of SARA that clearly separates biology from socioeconomic consequences could conceivably result in more species being "considered" for Canadian listing. Canada has two lists—the COSEWIC biological status list and the SARA legal list that may also consider socioeconomic consequences of listing—and some species may not receive legal protection even though they are biologically at risk. By contrast, the single-step process of ESA provides protection for all listed species. SARA does not specify a timeline for the Minister's recommendation to Cabinet of species at risk so delays can occur; ESA prescribes a timeline for receiving petitions for listing and NOAA taking actions to make scientific

recommendations and final status decisions. In both SARA and ESA, socioeconomic impacts are considered in developing recovery plans. Both SARA and ESA provide for the protection of critical habitat, but in the United States, critical habitat designations must consider economic and other relevant impacts of such designations, and areas may be excluded from critical habitat if the costs outweigh the benefits of specifying such areas as part of the critical habitat. Recovery teams in both countries are having difficulty applying the critical habitat concept to salmon. For example, in the United States, habitats that had been identified as critical for 19 salmon and steelhead Evolutionarily Significant Units (ESUs) in Washington, Oregon, Idaho, and California were withdrawn in 2002 and a revised list was released by NOAA Fisheries in August 2005 (NOAA Fisheries 2005). In Canada, critical habitat has not yet been designated for any salmon, although draft recovery plans identify proposed critical habitat. In contrast to SARA, there is no mandated timetable for ESA recovery plans and developing these has sometimes dragged on for many years. Under SARA, there is no provision for public comment or review of the incidental harm permitting process, unlike ESA. Finally, both SARA and ESA allow protection of salmon at the population level, however, COSEWIC requires only that they are genetically or geographically distinct (the DU), while the ESA requires a demonstration that a population is both distinct and "evolutionarily significant" (the ESU). Thus, a population may qualify as a DU but not as an ESU because of the latter's emphasis on evolutionary heritage (Ford 2004).

James R. Irvine et al: *Canada's Species at Risk Act: An Opportunity to Protect Endangered Salmon*. The authors concluded: "It is too early in the history of SARA to know whether it will be a more effective tool than ESA in preventing species extinctions." Nothing in this article suggests any of the noted differences are "significant in light of section 4(a)(1)(D) of the ESA."

The head of the Canadian marbled murrelet recovery team offered the following description of SARA's key features as applied to the marbled murrelet in particular:

The Marbled Murrelet is listed by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) as "Threatened" due to nesting habitat loss and threats of mortality from oil and gill net fishing. In 2003, Canada passed the Species at Risk Act (SARA). The act identifies listed species as Extirpated, Endangered, Threatened or Special Concern, outlines prohibitions, and requires recovery strategies and action plans to be produced. The SARA focuses on the identification and conservation of "critical habitat" as the basis for recovery of listed species. The SARA places emphasis on land stewardship and delegates responsibility for conservation of species on non-federal lands to the provinces and territories of Canada. The SARA has a "safety net" which can be invoked if it can be demonstrated that a province or territory has failed to protect a listed species adequately.

Douglas F. Bertram and David Cunnington, *Management Of Marbled Murrelet Populations Under Canadian Law And Policy* (Abstracts Of Oral And Poster Presentations, Final List Of Presentations 32nd Annual Meeting Of The Pacific Seabird Group 27th Annual Meeting Of The Waterbird Society Portland, Oregon, 19–22 January 2005) (available on-line at: www.waterbirds.org/Day_FINAL%20ABSTRACTS%20FOR%20WEBPAGE.pdf).

The Service correctly determined in 2004 that the Canadian laws and policies for control of exploitation, management of habitat, conservation status, or regulatory mechanisms are not different from those in the United States in any way that is significant in light of section 4(a)(1)(D) of the Act. There is no basis for the Service to alter that conclusion. Accordingly, the international boundary between the United States and Canada does not provide a basis for finding the murrelet population in Washington, Oregon and California to be a DPS.

Since the Three-State Murrelet DPS may not properly be classified as a distinct population segment under the 1996 DPS Policy and is neither a species nor a subspecies, the Three-State Murrelet DPS may not lawfully be listed as a threatened or endangered species under the ESA. The Service should therefore promptly initiate and complete rulemaking to remove the Three-State Murrelet DPS from the list of threatened species.

This regulatory action is independent of any consideration the Service may choose to give in the future to listing the marbled murrelet species as threatened or endangered “in all or a significant portion of its range.” Regardless of such consideration if it ever occurs, the currently listed DPS is not a distinct population segment under the ESA, may not be listed as a distinct population segment under the ESA, and should be removed from the list of threatened or endangered species.

Please feel free to contact us if we may provide you with further explanation or information about this petition.



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