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[Northern Spotted Owl Preservation - Conflicts]

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Weyerhaeuser

2001 L Street N.W.
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Washington, D.C. 20036
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May 28, 1993

David Cottingham, Director
NOAA Ecology & Conservation Office
U. S. Department of Commerce
Room 6222
14th & Constitution Avenue, NW
Washington, DC 20230

Dear Dave:

During our meeting last week we discussed the history of the protective owl circles on private lands. Described below are the events leading to the current situation; one that is having a serious impact on the ability of private landowners to harvest their lands.

The situation began with the issuance by the Fish and Wildlife Service (FWS) of "guidelines" that restrict harvesting operations on non-federal lands of up to 3960 acres in circles around each owl site. (Tab A)

These guidelines were issued, with no opportunity for public comment, by the FWS July, 1990. Ostensibly to provide assistance to private landowners in making harvest decisions, these guidelines quickly became the basis for enforcement threats in the field and for applying pressure on state agencies. The intent of the Service was clear: to implement overly stringent protection for the spotted owl without subjecting the de-facto rules to the required public scrutiny.

The language of the guidelines implied strongly that they were mandatory. State officials were threatened with legal action if the states did not "enforce" them through state forest practices regulations. That threat became explicit in November, 1990 when John Kerbow, FWS Acting Field Supervisor, sent a letter to Arden Olson of the Washington State Department of Natural Resources (DNR) in which the FWS threatened criminal prosecution using the guidelines as the basis for enforcement. (TAB B) The message of this letter was that if the DNR approved a harvesting permit inside these circles, they would be subject to a "possible take violation".

In August of 1991, a group of community organizations, landowners and businesses challenged the guidelines in a Federal court lawsuit (commonly known as Sweet Home II) based upon FWS's failure to follow the Administrative Procedure Act, among other things. Subsequently, FWS rescinded the guidelines publicly, but retained them for internal use in evaluating potential enforcement actions. On February 21, 1992, Dale Hall, FWS Region 1 Assistant Director for Fish and Wildlife Enhancement, submitted a declaration assuring the court that the guidelines were never intended to be binding, and that in any event they were rescinded. (Tab C)

The lawsuit was then declared moot based upon the FWS assertion that non-federal lands were no longer affected by the guidelines. Following dismissal of the lawsuit, however, FWS Region 1 officials wrote to the Seneca Sawmill Corporation on March 30, 1992, that its "law enforcement office" had determined that a proposed Seneca road building project would be a "take" of spotted owls based on the same standards as the rescinded guidelines. (Tab D)

During testimony before the House Interior Appropriations Subcommittee on April 29, 1992, FWS official Dale Hall (the same official who testified that the guidelines no longer affected non-federal landowners) stated in response to a question about the status of the guidelines posed by Congressman Norm Dicks, "...that all we withdrew was the appearance, because some folks thought it was a rule, the appearance of a rule; that we still stand behind the biology that built those guidelines and we want people to understand that, if we have to do a law enforcement investigation, those same biological parameters would be used in evaluating the 'take' case". (Tab E)

On May 14, 1992, the Draft Spotted Owl Recovery Plan was distributed and included language indicating that the original guidelines would be made a part of that plan. (Tab F)

After months of discussion within the Department of the Interior, a temporary order reducing these circles to 500 acres was issued on August 24, 1992. (Tab G)

The uncertainty created by these events remains. The State of Washington attempted to reduce the circles to 500 acres, but that action was challenged in court. Weyerhaeuser, in order to avoid difficulties in either state, is honoring the larger circles until a resolution is reached.

This situation must be resolved. If it is not, millions of board feet of timber that could help replace the reduced federal sales volumes will remain unavailable.

Please note the attached letter on this subject that we sent to Secretary Babbitt.

Please let me know if I can provide any additional information.

Best regards,

Fred

Frederick S. Benson, III
Vice President

Enclosure

Weyerhaeuser

Corporate Headquarters
Tacoma, Washington 98477
Tel (206) 924 2345

May 14, 1993

The Honorable Bruce Babbitt
Secretary of Interior
1849 C Street
Washington D.C.

Dear Secretary Babbitt,

As we discussed during our meeting on May 3, 1993, Weyerhaeuser Company is heavily affected by restrictive circles imposed to protect northern spotted owls on private lands. All or part of 370 owl circles fall on our lands, affecting our ability to manage 390,000 acres of our forest lands in the Douglas fir region of Washington and Oregon. Approximately 4 billion board feet of Weyerhaeuser timber is contained within these circles.

Many other private landowners, as well as state lands, are similarly affected by owl circles.

These circles must be eliminated from private lands as part of the overall resolution of forest related issues in the northwest. Continued imposition of the circles will exacerbate the overall timber supply problems in the region by constraining the ability of private landowners to harvest timber.

The owl circles are neither equitable nor biologically sound. As we discussed in our meeting, the data from our years of research and monitoring of owls in second growth forests suggests that the circles do not correspond to actual owl behavior patterns and do not fit the landscape. They are differentially enforced across the three affected states, and bear no relationship to the conservation measures taken on federal lands.

We have committed to proceed with the development of a comprehensive habitat management plan that would be a model for industrial forest lands in Oregon and Washington. Our vision is a plan that addresses all species, including those currently listed under the Endangered Species Act and those that could be listed in the future. In other words, we envision a plan that transcends the current species-by-species approach and defines the role of industrial forest lands in an overall landscape context. The cornerstone of this approach will be riparian conservation and enhancement to benefit fish populations and other aquatic species.

The owl circles force us to unnecessarily maintain the current species-by-species approach. Their mere presence hinders the development of a more thoughtful and collaborative landscape plan for our lands.

Until there is a resolution of this issue, we will continue our historic commitment to protect spotted owls using our best science.

We urge you to eliminate the owl circles as part of the resolution to the northwest forest issues. Doing so will immediately help the overall timber supply situation and will be an important first step in the development of a model habitat management plan for industrial forest lands in Oregon and Washington.

Sincerely,

Charles W. Bingham

Charles W. Bingham
Executive Vice President

Clinton Presidential Records
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Divider Title: **A**

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

- o Formal Section 7 Consultation Guidance
- o Interim Recovery Strategy
- o Conservation Planning for Non-Federal Actions
- o Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

This document was prepared by the U.S. Fish and Wildlife Service in Region 1, Portland, Oregon. For further information, please contact the following offices:

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.

2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.

3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

- SECTION 7 OF THE ESA -- FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondiscretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within suitable owl habitat, as well as any harvest activities within a 1/2 mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the Service to the action agency. The opinion always makes a "likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environmental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in the most subtle types of incidental take, the Service convened a group of its biologists and developed incidental take guidelines which consider the biology of the owl throughout its range. Such guidelines are described later in this document.

o SECTIONS 9 AND 10 OF THE ESA -- TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures necessary for a private party to submit a properly prepared permit application for processing.

o SECTION 4 OF THE ESA -- RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

o FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within 1/2 mile of any known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multilayered, multispecies canopy dominated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests that support breeding owls, the nest and major roost sites are usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Areas as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;
2. a description of the specific area that may be affected by the action;
3. a description of any listed species or critical habitat that may be affected by the action;
4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. relevant reports, including any environmental impact statement or environmental assessment; and
6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent activities, and cumulative effects of reasonably certain State or private activities in the action area;
2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);
3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and
4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;
2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and
3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to complete the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the time of this writing, there are no other conservation strategies developed and presented for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued) Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a 1/2 mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny.
		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.	Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued) Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs.
		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.	Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

o INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and Sec. 10(a)(1)(B) of the ESA).

The Service offers the following general guidance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the need for incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest entity can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid or reduce the risk of incidental take:

1. Conduct spotted owl surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best available suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than a 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site and/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based upon Home Range Size by Physiographic Province[1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

1. The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Servcie, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

o HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;
2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;
3. alternative actions to such taking that were considered;
4. why these alternatives were not employed;
5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and
6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;
2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;
3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;
4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;
5. the applicant will ensure that other measures required by the Service will be provided; and

6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA. The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

o RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species. Recovery actions are meant to arrest or reverse the species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in Appendix 4. Specific guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted owl. Given this, the Service is reviewing this document for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

The process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation strategy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon, and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Service believes that these processes allow for an open and appropriate forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

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Divider Title: **B**

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Fish and Wildlife Enhancement
2625 Parkmont Lane SW, Bldg B
Olympia, Washington 98502
206/753-9440 FTS 434-9440

November 20, 1990

Ardon Olson, Division Manager
Forest Regulation and Assistance Division
Washington Department of Natural Resources
1007 So. Washington EL-03
Olympia, Washington 98504

Dear Mr. Olson:

I am in receipt of a copy of the November 13, 1990, letter from John Pierce (Washington Department of Wildlife) to Tom Robinson of your staff, pertaining to Forest Practice Applications (FPAs) within the Cabin Creek spotted owl territory. The Fish and Wildlife Service is concerned that your agency considers this territory as a non-pair site, and that the Department of Natural Resources has not classified this site as a Class IV special, as is required under WAC 222-16-050 (1)(b)(i).

The Fish and Wildlife Service concurs with Washington Department of Wildlife's conclusion that the occupancy of the Cabin Creek site by a pair of owls in 1989 and the successful breeding by the pair in 1988 qualifies this as an owl territory subject to the provisions of the Fish and Wildlife Service's take guidelines.

It should be further noted that while the Cabin Creek female was not located during 1990 survey efforts, the male of this pair (which was tagged with a radio-telemeter in 1988) has demonstrated strong site fidelity, indicating territory maintenance. This point alone would subject this individual owl to the provision of take under Section 9 of the Endangered Species Act. As you are aware, take under the Act pertains to individuals, not just pairs or populations of species, that are listed as threatened or endangered.

The issue of protecting single owls that have established territories is not new. This issue and the protocols for determining whether or not a single should be considered a resident/territorial owl were addressed in the Washington Department of Wildlife's *Draft Recommendations for Interim Procedures to Process FPAs for Compliance with Fish and Wildlife Service's Take Guidelines* (August 20, 1990). Members of your staff and individuals from the Olympia Field office assisted the Department of Wildlife in the preparation of these interim procedures that were provided to the Department of Natural Resources. Not only did the Service assist with the development of the procedures, we verbally conveyed the need for the Department of Natural Resources to consider territorial singles as they apply to the take guidelines when processing FPAs.

The Fish and Wildlife Service is soon to release survey protocols for the spotted owl, including the treatment of single owls under the Service's take guidelines. Until these protocols are released, we recommend that your agency adhere to the Washington Department of Wildlife's Interim Procedures. Please be advised that it is the opinion of the Fish and Wildlife Service that territorial/residential single owls would be subject to the take guidelines and that the Department of Natural Resources should assess impacts to individual owls accordingly when reviewing FPAs.

By way of this letter, the Service is not only notifying the Department of Natural Resources of the possible conflicts with the Service's take guidelines if any FPA is permitted within the 1.8-mile median territory of the Cabin Creek spotted owl site; we are also alerting our Division of Law Enforcement of a possible take violation.

Please notify this office of any decision made by your agency on FPAs located within the Cabin Creek Area.

Sincerely,

John R. Kerbow

John R. Kerbow
Acting Field Supervisor

jlm/gb

c: DNR, (Robertson)
FWS, Bellevue (Law Enforcement Div.)
FWS, Moses Lake Office
FWS, Portland (Region 1, ARD-FWE)
FWS, Portland (PFO)
FWS, Sacramento (SFO)
Governor's Timber Task Force (Elliot)
WDW, Olympia (Smitch)
WDW, (Pierce)
WDW, (Hays)
WDW, Olympia (Nongame)

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Divider Title: C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREATER OREGON, et al. Plaintiffs, v. MANUAL LUJAN, JR. Secretary of the Interior, and JOHN F. TURNER, Director U.S. Fish and Wildlife Service Defendants.	Civil Action No. 91-2218 (NHJ)

DECLARATION OF H. DALE HALL

I, H. Dale Hall, declare and state as follows:

1. I am the Assistant Regional Director for Fish and Wildlife Enhancement in Region 1 of the Fish and Wildlife Service (Service), which is headquartered in Portland, Oregon. In that position, I am responsible for most activities of the Service under the Endangered Species Act (ESA), including activities relating to consultation with Federal agencies under section 7(a)(2) of the ESA.

2. In July 1990, after the northern spotted owl was listed as a threatened species under the ESA, the Service issued the document at issue in this litigation, which is entitled, "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl." This document was sometimes

referred to as the "Incidental Take Guidelines." Although one section of the document presented guidelines with respect to incidental take, the document covered several other issues as well. I will refer to the document as the "Guidelines" in the remainder of this declaration.

3. The Guidelines were drafted and issued in response to requests from the timber industry, state and local governments, and the general public for guidance as to how these entities might ensure compliance with the various provisions of the ESA that apply to the northern spotted owl. The Guidelines were never intended by the Service to be viewed or to operate as binding. They were intended and have been used by the Service as guidelines to assist the public and the Service in determining how to implement the ESA with respect to the owl. In particular, they were intended to provide the public with a means of assessing risks with respect to the take prohibition.

4. On October 2, 1991, I issued a memorandum rescinding the Guidelines. I did this in part based upon advice of attorneys in the Department of the Interior's Office of the Solicitor, the contents of which I decline to reveal. In addition, it appeared that many persons in the timber industry, state and local government, and the general public had mistakenly come to view the Guidelines to be mandatory in nature. For instance, it appeared that many persons believed that any action inconsistent with the incidental take guideline portion of the Guidelines was automatically a violation of the prohibition in the ESA against take of a listed species. This was not correct, because they were never intended to be viewed or used as binding or mandatory standards. Rather, they were intended to be used as a guide to be applied on a case-by-case basis.

5. In rescinding the Guidelines, the Service withdrew the Guidelines from the timber industry, state and local governments, and the general public so that they would no longer use and rely on the Guidelines. However, the Service has always believed that the Guidelines are based upon sound biological principles and therefore has continued to use the Guidelines internally even though the Guidelines have been rescinded for external use.

6. The Service uses the Guidelines to assist in the implementation of the Service's responsibilities under section 7 of the ESA to consult with Federal agencies on actions that may affect the owl. For instance, the Service has continued to rely on the principles in the Guidelines in determining on a case-by-case basis under section 7 whether and to what extent proposed Federal actions may result in incidental take of the owl.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Portland, Oregon, on this 21st day of February, 1992.

H Dale Hall

H. Dale Hall

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
Portland Field Station
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266

March 30, 1992

Mr. Aaron Jones
Seneca Sawmill Corporation
P.O. Box 851
Eugene, Oregon 97440

Dear Mr. Jones:

At the request of the U.S. Fish and Wildlife Service's (Service) Law Enforcement Office, Robin Bown, a fish and wildlife biologist with the Service's Portland Field Office, visited the area of proposed harvest in Township 30 South, Range 6 West, Sections 27 and 34. Based on the field visit, Ms. Bown confirmed that constuction had begun on the road designed to access parts of section 34. In addition, she determined that the forest stands in the vicinity of the new road contain suitable spotted owl habitat. This habitat lies within the median provincial home range radius (1.5 miles) of the Hefty Creek spotted owl site.

This site has approximately 449 acres of spotted owl habitat within 0.7 miles of the nest site and 1,285 acres of suitable habitat within the provincial home range radius distance of the core area. Based on data from field research (Attachment 1), it is our professional judgement that harvest of the forest adjacent to the new road would result in take of the Hefty Creek spotted owl pair by reducing the amount of suitable habitat to below levels that would maintain the reproductive success of this pair. These low levels of habitat would result in reduced survival or reproductive success of this pair.

If Seneca Sawmill Corporation plans to harvest in Section 34 of Township 30 South, Range 6 West, we recommend that you apply for and obtain an incidental take permit under section 10 of the Endangered Species Act before proceeding. If you have any further questions, please feel free to contact Pete Nylander of the Service's Law Enforcement Office at (503) 682-6131 or Robin Bown or me at (503) 231-6179.

Sincerely,

Russell D. Peterson

Russell D. Peterson
Field Supervisor

CC: Peter Nylander, U.S. Fish and Wildlife Service, Law Enforcement Office

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go through all kinds of procedures and processes in order to have his bill submitted or his options submitted, but he said if we requested it, then he could cut through all that. Well, we asked for it; we still hope we're going to get it.

Does this not set up a conflict, however, between the Endangered Species Act and the National Forest Management Act regarding this particular issue? I mean, in other words, if you're going to have a plan that doesn't satisfy the legal requirements, and so, therefore, Congress would have to enact it basically; isn't that what we're talking about here?

Mr. HAYDEN. That is what we're talking about, Mr. Chairman. It would require an action by the Congress, because currently there is no authorization for such a plan.

Mr. DICKS. Mr. Turner, I understand that the Fish and Wildlife Service is on the verge of releasing new guidelines for private landowners regarding the northern spotted owl. When will the Service advertise these guidelines in The Federal Register?

Mr. TURNER. Mr. Chairman, I'm going to ask Dr. Morgenwe to respond to that.

Mr. MORGENWECK. There are two aspects of that that we'r working on. First is reflecting back to the old guidelines that we had back in 1990 which provide guidance as to how to avoid the taking of species. We are working on a regulation now, and we are hoping that we can propose that regulation sometime in May of this year, and that would go out for public comment.

Mr. DICKS. Now have you followed the process this time? Have you had public hearings on these?

Mr. MORGENWECK. When the proposal comes out, then we'd have an opportunity to have public meetings, public hearings, receive public input, and then make a final decision and publish the final regulations.

Mr. DICKS. Will the Service follow the Administrative Procedure Act which ensures public notice and comment in issuing these guidelines?

Mr. MORGENWECK. Oh, yes.

Mr. DICKS. Well, you didn't do it last time.

Mr. MORGENWECK. No, that's correct; we did not, and they were meant to be informal guidelines. As you know, we were sued on that question; we withdrew them, but we will follow the necessary procedures.

Mr. DICKS. In promulgating new guidelines, did the Fish and Wildlife Service clearly delineate the agency's role and the responsibility that States have with regard to takings on private lands?

Mr. MORGENWECK. That really gets, in part, to the second issue, which is: can we do a special regulation dealing with particularly take on private lands? It's our intention, using the draft recovery plan, to develop that special regulation for the spotted owl, in addition to the definition of what is ''take.'' So between the two of them, we should be able to much more clearly define what the private landowner can and cannot do on his land and I think clarify a whole lot of the problem for private landowners that they have had since the spotted owl was listed.

Mr. DICKS. What guidelines does the Service use to determine whether habitat modification is significant enough to warrant a taking enforcement under section 9 of the Endangered Species Act?

Mr. MORGENWECK. I think that we would all admit that there's a gray area as it relates to what is ''take'' of any species. It's very clear on one end of the spectrum where there is a dead animal that's been shot or trapped, or something like that, much less clear in terms of the habitat implications. That's what we're trying to wrestle with in terms of the guidelines that I mentioned earlier, the regulation trying to identify and clarify that gray area.

Mr. DICKS. Well, you know what they tell me out in the State of Washington. They say you withdrew the guidelines, but the word on the street was, if you don't follow the guidelines that were there, there will be an enforcement action taken against you. So you all sit back here in Washington, D.C., inside the beltway, but out there on the street the same guidelines are in effect today in the real world that were withdrawn by the agency. So I hope you will get this thing resolved.

I wrote you a letter back in November and I didn't get a response to it until April 28th. I understand that there may have been some problems with that, and I will look into that. But this has become a very contentious issue out there affecting a lot of people, a lot of jobs, and it's certainly one that could have been taken care of more expeditiously and following the process, which apparently wasn't followed.

Mr. TURNER. Mr. Chairman, I apologize for the delinquen in the response to your correspondence.

Mr. DICKS. We had meetings about this, discussed it. I can't believe we lost the letter about which we had had various discussions.

Mr. TURNER. The ''take'' issue, as Dr. Morgenweck has talked, has been very fuzzy and usually settled in the courts. What I tried to do when we listed the species was, reacting to a response from the industry and the Congress, was to provide some guidelines for ''take.'' We did that as a favor. They were not rules and regulations. So we did that as a response to what we heard on the Hill here and out in the industry to provide some guidelines. So I think the initial was in good faith by the Fish and Wildlife Service to tackle a very difficult area.

Maybe Dale Hall would have a comment on that.

Mr. HALL. Yes, sir. It's important to us that this committee understand, when the Service put out the guidelines early on, it was at the request of the industry and the States and the private sector to try to determine if they want to comply with the law, how could they, or what are the things that we will look at in the evaluation of a ''take?'' The Service normally wouldn't do that because of the legal ramifications in a law enforcement case, unless we did do regulations. But we clearly identified in those guidelines that they were advice. They were basically a risk analysis effort that private landowners and the State could use.

The Forest Products Association sued us, saying that the were basically being used a rule even though we hadn't ever said that they should be. I withdrew those guidelines upon advice of counsel, and with your direction from the Appropriations Committee last year we're formulating rules. These rules, then, will go out and actually have the public input, and they'll help us to understand if our biology is correct or incorrect.

But in address to your question about on the street they still are using them, we have tried very, very desperately to have people understand that all we withdrew in that was the appearance, because some folks thought it was a rule, the appearance of a rule; that we still stand behind the biology that built those guidelines and we want people to understand that, if we have to do a law enforcement investigation, those same biological parameters would be used in evaluating the ''take'' case.

Mr. DICKS. So you had the same rules in effect; you jus withdrew them to get out of the legal problems. I understand that. But I wish we had done it right in the first place. Then we wouldn't have had to go through all this.

That's what I'm saying, Mr. Director. Let's get this thing out. Let's get it on the street. Let's do it right, get through the Administrative Procedure Act, and let people have their input. Then we'll get to the bottom of it. //

Please update for me the current situation involving the Fish and Wildlife Service relationship with the Bureau of Land Management. I realize that the BLM in Oregon currently faces an enjoined timber program. However, isn't it a possibility that if somehow the GODD committee process were to provide relief for the BLM and its timber program, later that there would be a price paid on the Forest Service land based on two different management strategies being carried out by two Federal agencies to manage contiguous land bases? I think that's been stated. Your witnesses have testified

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3. *Activities that may result in destruction or adverse modification of critical habitat.*

The recovery plan establishes guidelines for the management of DCAs and the preparation of DCA management plans. The Recovery Team recommends that the FWS use these guidelines in determining whether proposals for actions within DCAs, or for adoption of DCA management plans, would result in the destruction or adverse modification of critical habitat. The recovery plan recommends that critical habitat be revised to conform with DCA boundaries, and recommends, in the interim, that the FWS utilize the matrix management prescriptions (section III.C.2.) in analyzing the impact of actions in critical habitat outside of DCAs.

4. *Relationship between agency actions.*

The Recovery Team considered the potential relationship between the actions of different agencies. Clearly, recovery will be achieved more rapidly and effectively if all agencies comply with the recovery plan in a timely manner. Substantial lack of compliance could delay or preclude recovery. Agency actions that do not comply with the recovery plan will be required to individually satisfy the mandate of section 7 consultation in terms of adverse modification of critical habitat or jeopardy to the species. However, the accumulated impacts of actions not consistent with the recovery plan could eventually necessitate redesign of the recovery plan in a particular area. This may result in greater restrictions on timber harvest activities, including those of agencies that have complied with the recovery plan.

Past and current actions of each agency affect other agencies through impacts on the rangewide habitat condition and spotted owl populations. Impacts of actions that may affect spotted owls are evaluated in light of this baseline condition. However, due to location and ownership patterns, the recovery plan envisions little opportunity to substitute greater contributions from one agency for lesser contributions from another. This is particularly true in the case of DCAs, but also applies to the matrix. Consequently, the recovery plan generally anticipates that, during the next few years, actions proposed by one agency are unlikely to significantly affect the outcome of consultations on actions proposed by other agencies.

Nonfederal lands

The explicit federal duties described in the Endangered Species Act, combined with the concentration of northern spotted owls on lands administered by the Forest Service and BLM, give the federal government a dominant role in providing for recovery of the species. Nonfederal lands, however, comprise important portions of the spotted owl's range where federal contributions alone are not sufficient to meet recovery goals. Recovery goals for each province contain objectives for nonfederal lands, although the amount and type of contribution vary (see section III.C.4.).

Current protection afforded spotted owls on nonfederal lands derives from the Endangered Species Act's prohibition against the taking of listed species. The FWS developed biological guidance in July 1990 for reducing the risk of violating the take prohibition. The guidance recommends that landowners survey for spotted owls prior to timber harvest and avoid reducing habitat below prescribed amounts within circles around nests or activity centers (Section II.C.). This protection applies unless effective alternate measures are implemented through habitat conservation planning (under section 10 of the

Endangered Species Act) or through regulations adopted in compliance with section 4(d) of the act.

Several measures are available to achieve recovery through alternatives that would be more effective than maintenance of the current take circles (see tools for implementing recovery on nonfederal lands in this section). Recovery goal implementation likely will differ by state due to the variations in the degree of federal ownership by province, states' authorities, and availability of information about the owls. Protective management, which encourages creative approaches to recovery goal implementation, is a likely alternative to maintenance of take circles. States, landowners, the FWS would negotiate with state wildlife agencies and other interested parties to develop a plan to improve species protection and landowners' ability to manage their land. The Endangered Species Act allows protective management to serve as the basis for either conservation plans (section 10 of the Endangered Species Act) or special rules (section 4(d)).

Incentives to Participate in Protective Management.

Biologists, landowners, communities, and government agencies share several incentives to participate in protective management:

1. *Management flexibility for owl protection and timber harvest planning.*

   A plan could tailor protection to fit the owl population's long-term habitat requirements, with less emphasis on short-term protection of individuals and pairs. Long-term protection could be adjusted across the landscape to improve the configuration of owl habitat blocks and to complement reserves on federal lands more effectively. The FWS could authorize an increased level of take if assurances were provided by landowners that long-term, effective mitigation efforts would be implemented providing the needed level of support for recovery. Measures such as designating certain areas to be protected or instituting FWS-approved habitat management plans might be more attractive to landowners than continuing take circles and annual surveys.

2. *Certainty of owl protection and timber harvest planning.*

   Landowners would manage for long-term owl habitat needs, providing a better guarantee of habitat than the transient and potentially vulnerable circles (see section II.C.). Landowners then could plan timber harvest based on the certainty of knowing which areas would be affected by owl protection.

3. *Cost reduction of owl protection.*

   Perhaps the most compelling incentive for landowners to participate in an alternative conservation program is a significant reduction of the costs of owl protection they now incur including: a) maintenance of habitat within current take circles; b) conducting annual owl surveys; and c) administrative costs associated with compliance with state forest practices regulations protecting listed species (see section II.C. for description of each state's regulations).

4. *Authorizing incidental take in exchange for implementing conservation measures identified in the recovery plan.*

   Consistent with the Endangered Species Act, landowners could be authorized a level of incidental take through the HCP or 4(d) process if they are found to exceed protection called for in the conservation objectives, allowing them to plan future timber harvests (see section II.C.).

5. *Relaxation of owl conservation requirements on federal lands in response to increased efforts on nonfederal lands.*

   Some nonfederal landowners are more willing to contribute to owl recovery if they see that their efforts can lead to a reduction of conservation required on federal lands.

Guidelines for protective management.

1. Protective management should provide for the identified recovery objectives for nonfederal lands while placing the minimum burden on landowners necessary to achieve those conservation objectives.

2. Explicit goals for nonfederal lands should describe when recovery would be reached and how a landowner's efforts would contribute to overall recovery. Protective management should be based on the recovery plan's identification of the amount, spatial and temporal configuration, and function of the necessary habitat; and the target number of individuals and population trends required to meet delisting goals. The protective management plan should describe the specific implementation actions needed to implement the recovery plan's provincial goals.

3. Incentives, rather than disincentives, should be provided for finding owls, when consistent with the Endangered Species Act. Possible incentives include: a) landowner flexibility in where they protect habitat, b) reduction of total area required for protection, c) off-site mitigation for owl protection, or d) relaxation of restrictions on adjacent federal lands. Based on the recovery plan's description of contribution from nonfederal lands, landowners could be authorized some amount of incidental take where conservation measures had been implemented.

4. A protective management plan should explain the variation in owl protection requirements based on biological and physiographic distinctions and the degree of federal conservation by province, so that the public will understand the basis for differences in federal and state owl protection regulations.

5. Protective management plans should start with the recovery plan's assessment of the take prohibition.

   The protective management plan should be based on the recovery plan's general assessment of the amount and rate of incidental take that can be allowed on nonfederal lands where conservation mechanisms are being put into place to accomplish recovery goals for a province. The protective management plan should identify where implementation of province recovery objectives cannot allow incidental take. Where possible, the allowable amount and rate should be identified. The form and pattern of landowner contribution to recovery can be negotiated. If areas are identified where protection of individual owls is not essential for conservation, incidental take could be permitted with minimal mitigation required. The protection of owls beyond the level needed could be considered as mitigation for impacts on owls in other nearby areas.

   Land purchase and exchange should be considered for nonfederal areas essential to recovery that do not have take prohibitions to serve as an incentive to negotiate conservation with landowners.

6. Costs to landowners should be reduced.

The protective management plan should identify and analyze the cost of conservation options, and encourage selection of the lowest cost option.

The protective management plan should minimize the cost of owl protection for small acreage landowners who are less able than their neighbors with larger acreages to negotiate owl protection. Take circles may cover a substantial portion of their land, often for owls on adjacent ownerships, disproportionately restricting access to their small holdings. The conservation plan could recommend that these landowners contribute to conservation in an alternative manner.

The cost of protective management itself should be paid in such a way that landowners' incentive of cost reduction is not eliminated. If landowners are required to bear the full cost of protective management, they may find that the planning costs outweigh savings from changes in take prohibitions. For instance, state wildlife agencies could be funded to help landowners write the plans.

7. The protective management plan should recognize the role of state regulators. The plan should acknowledge the extent to which states have the authority to: a) enforce an agreement between the FWS and landowners; and b) conform state regulatory measures to the requirements of the plan. States also may have requirements independent of take prohibitions that should be assessed in the plan.

8. The feasibility and timing of implementation, such as the development of new state rules, legislative actions, board/commission approval of rules, and availability of funding, should be assessed.

Habitat Conservation Plans. Habitat conservation plans (HCPs) (see Section II.C.4.) provide an excellent opportunity for nonfederal landowners to participate in the development of protective management plans. California has been developing HCPs for northern spotted owls during the past few years. A few companies have developed HCPs and signficiant progress has been made on developing a statewide HCP. These efforts should be assisted and encouraged by the Recovery Team.

Regulations under section 4(d) of the Endangered Species Act.

For endangered animals, section 9 of the act directly prescribes prohibitions against taking. Take is defined broadly under the act as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." For threatened animals, section 4(d) of the act directs the Secretary to adopt "such regulations as he deems necessary and advisable to provide for the conservation of such species." The regulations applied for a threatened species may adopt any or all of the prohibitions applied by section 9 for endangered species. Since 1975, general regulations (50 CFR 17.31) have applied the full range of taking prohibitions for threatened animal species, but also have provided for the alternative of adopting special rules for particular species as necessary and advisable. The FWS has adopted special rules for more than 30 species.

Potentially, the special rule mechanism could provide great flexibility to apply taking prohibitions for the owl in those ways most likely to promote its conservation. A well-crafted special rule framework could incorporate many of the characteristics of a habitat conservation plan. Any set of rules adopted would have to pass the test of being necessary and advisable to promote the owl's conservation and would be subjected to public review in a rulemaking process.

These requirements would tend to ensure that special rules would permit take only when a more effective program (that provided long-term assurance that recovery would occur) had been implemented.

As envisioned by the Recovery Team, one possible role for federal special rules would be to ratify owl protection measures implemented under state authorities. For example, a state would adopt regulations governing the harvest of owl habitat on nonfederal lands including measures aimed at maintaining currently unoccupied habitat in some areas and possibly other measures aimed at developing owl habitat in areas where it does not now exist or is in short supply. In areas where nonfederal contributions to recovery do not require absolute prohibition of taking, restrictions on harvest might be substantially less than those that now apply under federal regulations. Federal rules might then prohibit deliberate, nonincidental taking and taking in violation of state regulation. The owl would gain benefits not available under the general taking prohibition in areas that now have no owls, and landowners would be relieved of some of the current taking restrictions within occupied owl habitat.

Another possible arrangement can be imagined that, for instance, would place more of the substantial restrictions within the federal rules or would allow various means of off-site mitigation for harvest under state regulations. Close cooperation between the FWS and the states would be necessary in the planning of any such arrangement to ensure that state regulatory authorities were adequate for implementation and that any regulation adopted would satisfy the standards of the Endangered Species Act. The adoption of federal regulations also would be subject to review under NEPA and Executive Order 12291, which requires assessments of the impacts of federal rules.

Building a climate for negotiating protective management.

Landowners are not required by the Endangered Species Act to contribute any spotted owl protection beyond their obligation to refrain from taking owls. If spotted owl recovery depends in part on conservation efforts on nonfederal lands, a climate for negotiation between landowners, the states, and the FWS must be created.

Although spotted owl recovery would be enhanced by replacing the short-term protection of individual owls with long-term conservation efforts consistent with recovery objectives, such protection efforts will not be initiated unless landowners see that it is to their benefit to participate in protective management.

Section 10 of the Endangered Species Act allows nonfederal landowners to develop habitat conservation plans (HCPs) as a condition for issuance of incidental taking permit. ection 4(d) of the act is an alternative conservation tool, which allows the FWS to promulgate "special rules" for the protection of threatened species. The FWS has indicated it will consider writing such rules if the states or landowners develop conservation or protective management plans. Rules also could provide interim management direction while an HCP is being developed.

In California, several landowners, forestry associations, environmental interests, and scientists currently participate in habitat protective management efforts with the state, FWS, Forest Service, and BLM. A few California companies are working directly with the FWS to develop their own habitat conservation plans that are expected to be consistent with the statewide plan. The statewide HCP is expected to be completed by 1993, at the earliest, underscoring the need to establish and maintain a positive climate for negotiation (see section II.C.).

The real or perceived disincentives to protective management cause delay in implementation of improved protection for the species. With each year of protective management delay, habitat is cut outside take circles, reducing options for recovery. After several years of take circle management, habitat on nonfederal lands may be found only inside those circles

Expediency of plan development, approval, and implementation may be the most important criterion for successful protective management. Some HCPs have been completed in 6 to 12 months but others have taken substantially longer to complete. Available mechanisms to achieve recovery objectives on nonfederal lands should be streamlined to achieve the same conservation goal in a more efficient and less costly manner.

A process for incorporating implementation tools into protective management.

The following scenario presumes that the FWS finds that the approach identified for nonfederal lands is consistent with the intent of sections 4, 9, and 10 of the Endangered Species Act (i.e., consistent with the conservation of the owl), and that the states indicate their willingness to support the recovery plan and the approach for compliance under the Endangered Species Act on nonfederal lands through appropriate state laws.

1. States and the FWS would develop a detailed implementation strategy for the use of nonregulatory mechanisms, such as land acquisition, to contribute to recovery goals. (see Tools for implementing recovery on nonfederal lands in this section.)

2. The FWS, states, and landowners agree on a regulatory program as follows:

   a. Specific landowner contributions that would allow specified levels of incidental take to occur would be identified and agreements made to implement them.

   b. Means for ensuring and monitoring implementation of the agreements are identified and put in place.

   c. State and/or landowners incorporate 1 and 2 (above) into protective management plans, forming the basis of either a section 10 permit or a section 4(d) rule.

   d. The FWS pursues the appropriate action, including public review, which authorizes incidental take and ensures implementation of the alternative protective management plan. The states may require additional measures above those identified in the recovery plan or under the FWS's take guidelines.

Tools for implementing recovery on nonfederal lands.

The Recovery Team evaluated the availability and effectiveness of several mechanisms for implementation of the recovery objectives for nonfederal land, identified in section III.C.4. These mechanisms are elements of a comprehensive approach to owl conservation. Any one or a combination of these may be acceptable. This list may not be all inclusive; other equally valid ideas may exist. Anticipated implementation of the biological objectives varies by province owing to differences in the proportion of federal ownership, state authorities, and availability of information about spotted owls.

Implementation tools are defined as:

1. *Existing reserves*. State, county, or local parks, known conservation easements, or other areas that have binding, enforceable restrictions on the level of timber harvest and other forest management activities that are likely to alter the amount of suitable owl habitat. Existing reserves must be evaluated on 1) the level of current habitat within them, 2) size, 3) number, 4) spacing, and 5) timing of future habitat achieving owl suitability characteristics.

2. *Private voluntary actions*. Actions that are not required by statute or regulation, but that landowners voluntarily undertake. Actions can include, for example, long-term management plans, commitments to long rotations per uneven-aged management, or easements. Such actions must be evaluated on 1) how binding the actions are over time, 2) effectiveness in providing the conservation measures (number of owls, amount and configuration of habitat) stated in the recovery objective, 3) timing of the contribution of suitable habitat, and 4) how attractive they are to landowners to undertake.

3. *Forest practices statute and regulations*. Statutes and rules enforced by state or local government that require certain practices be used or certain habitat conditions be maintained. Depending on the definition of different types of owl habitat, these requirements can contribute to certain habitat objectives. Statutes and regulations must be evaluated on 1) current requirements for the provision of conservation measures detailed in the recovery objective, 2) whether current state statutes authorize promulgation and enforcement of additional regulations, and 3) ability, ease, and timing requirements of passing new state legislation.

4. *Prohibition on taking*. Refers to the Endangered Species Act prohibition of take of individuals, as implemented and enforced by the FWS. The relative ease of implementing an option will be increased to the extent that protection of individuals (on a case-by-case approach) implements the conservation measures in a recovery objective. The current take prohibition does not provide a long-term contribution to recovery. The success of the prohibition in contributing to recovery is variable, and dependent upon the province and existing conditions within owl home ranges. Application of take prohibition guidelines must be evaluated for consistency of results, fairness, uniformity of enforcement, and adequacy of protection.

5. *Landscape management as a basis for modifying the take prohibition*. Refers to providing suitable habitat adequate to meet the conservation objective, without necessarily focusing on the location of individuals or pairs. Landscape management may provide a basis for allowing an increased level of take. The potential role of landscape management must be assessed relative to the current number of known owl sites contributing to recovery objectives and the current burden of surveys (see Protective Management Guidelines, point #5). The Endangered Species Act provides mechanisms for landscape habitat management, including the habitat conservation plan (HCP) or section 4(d) rules.

6. *Critical habitat*. See description under Federal Implementation in section III.C.

7. *Land exchange*. Exchanging public land (fee title) for state and private lands to secure a particular location and/or management. This tool must be evaluated on 1) the availability of public land of equal value for exchange, 2) the ownership of the public land (federal, state, county), 3) the

authority of the public body to enter into land exchanges, 4) the change in public timber supply as a result of the exchange, 5) effect on local tax base, 6) the willingness of nonfederal landowners to enter into exchanges, and 7) the timing of the exchange.

8. *Purchase.* Purchase of fee title of private or state lands for reasons similar to land exchange. Purchase must be evaluated on: 1) the authority of the public sector to purchase private or state land, 2) the availability of resources for public purchase, 3) the willingness of the nonfederal parties to sell, 4) the change in public timber supply as a result of the purchase, 5) effect on local tax base, 6) the timing of the purchase, 7) whether purchase is of both land or timber or whether some harvest rights are retained by seller.

9. *Timber rights trade.* Rather than purchasing or exchanging land, federal and nonfederal parties exchange timber cutting rights without altering land ownership. This should be evaluated in the same way as land purchase or exchange. Legai technicalities may need to be addressed.

10. *Conservation easements, mitigation banks, purchase or transfer of development or harvest rights.* A number of "market-oriented" tools are available for protective management. These tools are characterized by being voluntary, rather than mandatory, and allow all parties involved to base their decisions on the likely costs and benefits they will incur. The availability of these tools increases the options for efficiently meeting conservation goals.

    A conservation easement is dedicated for conservation purposes, such as open space or wildlife habitat. The landowner is compensated for placing land in an easement, often through preferential property tax treatment.

    The feasibility of conservation easements must be evaluated in terms of 1) the availability of suitable areas for easements, 2) the ability to administer the easements, such as the existence of land trusts, and 3) the relative benefits that a landowner could expect from entering into a conservation easement.

    Mitigation banking is an offsite mitigation tool intended to compensate for habitat losses associated with future timber harvesting or other activities. Credits must be established (e.g., acres of owl habitat) prior to timber harvesting. The intent of mitigation banking is to develop a surplus of secured habitat before timber harvesting proceeds in existing suitable habitat to minimize the lag time between losses from timber harvesting and replacement from mitigation. Mitigation banking can consolidate mitigation measures from numerous small habitat losses and provide a larger off-site mitigation area.

    The feasibility of mitigation banks must be evaluated based on 1) the availability of suitable sites for mitigation banks that would not have been protected otherwise, 2) the ability to establish appropriate measure of credits, 3) the institutional ability to administer the banks and monitor their effectiveness.

    Transfer of development or harvest rights is another mechanism to allow higher levels of activity, such as timber harvesting, on location (destination or sink) by transferring unused rights from another location (source), thereby reducing the potential level of activities in the source location. Purchase of such rights can be used to lower the overall potential level of timber harvesting in an area by not transferring them to another location.

The feasibility of transfer or purchase of rights must be evaluated against 1) biological constraints regarding habitat quality, quantity, and location, 2) availability of institutional means to evaluate, monitor, and keep account of the trades, and 3) transactions costs to landowners and administering agencies. Any trades would have to be carefully and conservatively structured owing to the uncertainty about their biological and social and economic effects.

Implementation Scenario

In section III.C.3., the recovery plan assumes that federal agency implementation will occur in phases during the next 5 years. An approach to recovery plan implementation that is feasible and prompt might occur in three broad phases. The first phase, which should take less than 1 year, involves completion of a federal and nonfederal review of its recommendations to determine organization-specific actions needed to achieve consistency; e.g., forest and resource management plan revisions, and to carry out interim management which serves as an appropriate "bridge" to full implementation. The second phase, which likely will require up to 2 years, involves completing these general resource management planning activities, preparing the more specific DCA management plans recommended in the recovery plan, and adopting research and monitoring strategies, and initiating related on-the-ground management actions. The third phase includes further refinements of management activities, including monitoring and research, that characterize full-scale implementation, and the development of information for use in reviewing and, as necessary, revising the recovery plan.

The following outline briefly describes this phased implementation strategy. It lists anticipated activities in each phase of federal action agency (Forest Service, BLM, National Park Service), nonfederal entities, and the FWS. Some of the actions specified in each phase are interdependent, and it is assumed that they may proceed either concurrently or sequentially, as necessary.

Phase 1 (May 1992 - May 1993)

1. Federal action agencies:

   - Review the recovery plan to determine management requirements needed to achieve consistency with recovery plan recommendations and take prohibitions as required by FLPMA, NFMA, NEPA, and any other applicable mandates (e.g., forest plan and regional guide revision or amendment).

   - By January 1993, adopt the recovery plan and implement interim management to assure maximum consistency with recovery plan recommendations pending completion of the above management requirements.

2. States:

   - Review the recovery plan to determine how to implement its recommendations under current authorities and initiate necessary actions (e.g., HCP development), in cooperation with private landowners as appropriate.

   - Assess the feasibility of other actions to promote recovery plan implementation.

3. U.S. Fish and Wildlife Service:

   - Promulgate a critical habitat rule to reflect recovery plan recommendations, and use it in conjunction with the DCA management guidelines as the basis for adverse modification determinations.

- Use the recovery plan's recommendations for the federal matrix lands as the basis for section 7 consultation and consider issuing programmatic "no jeopardy" biological opinions (including incidental take statements) for agency plans that are consistent with those recommendations.

- Establish the coordinating group recommended in the recovery plan to provide implementation advice and assistance.

- Issue guidance to states and private landowners to help them in preparing HCPs.

- Assess the desirability of promulgating a special rule under section 4(d) of the Endangered Species Act.

Phase 2 (May 1993 - May 1995)

1. Federal action agencies:

   - Complete actions needed to assure full adoption of recovery plan recommendations in accordance with their legal mandates.

   - Adopt monitoring and research strategies.

   - Prepare DCA management plans, consult with the FWS, and implement required actions including silvicultural treatments to enhance owl habitat.

2. States:

   - Continue efforts to implement recovery plan recommendations for nonfederal lands, including HCP development.

   - Coordinate with federal agencies and the private sector on monitoring and research efforts.

3. U.S. Fish and Wildlife Service:

   - Consult on DCA plans submitted by action agencies and consider issuing programmatic "no adverse modification" biological opinions to cover future actions carried out consistent with those plans.

   - Provide advice and assistance on all aspects of recovery plan implementation as required, in conjunction with the coordinating group.

   - Assess progress toward recovery plan implementation and provide appropriate recommendations.

   - Complete promulgation of a special rule.

Phase 3 (May 1995 - May 1997)

1. Federal action agencies:

   - Complete planning requirements and be in "full implementation" regarding program operations, as well as monitoring and research.

   - Report on the results of recovery plan implementation during the first 5 years.

2. States:

• Continue to implement the recovery plan's recommendations, especially those designed to provide further incentives for owl and habitat conservation.

3. Fish and Wildlife Service:

• Devote primary efforts to providing advice and assistance on owl recovery, as opposed to regulatory operations, if federal agencies are in the "full implementation" phase.

• With assistance from the coordinating group, provide guidance to federal action agencies, states, and private landowners on the process and information requirements for recovery plan review after its initial implementation phase, so that review can begin promptly in May 1997, and revision completed in a time frame that enables it to serve as a basis for agency decadal planning.

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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

August 24, 1992

Memorandum

To: Director, Fish and Wildlife Service

From: Assistant Secretary - Fish and Wildlife and Parks

Subject: Interim Policy Regarding Enforcement of Prohibition Against Taking for the Northern Spotted Owl

There continues to be concern over how the Fish and Wildlife Service will enforce taking restrictions with respect to the northern spotted owl (Strix occidentalis caurina) on non-Federal lands within its range. This concern has centered in part on uncertainty regarding the extent to which habitat alterations would be considered take prohibited under Section 9 of the Endangered Species Act (ESA). The Office of the Solicitor has considered the Federal Government's ability to successfully prosecute habitat alteration cases. Additionally, the Fish and Wildlife Service must consider the most effective use of enforcement resources.

In order to concentrate enforcement of the taking prohibition for the owl on areas that are most likely to produce positive results for the species and to deter serious violations of the Endangered Species Act, you should focus attention on suspected violations that:

1. show evidence of deliberate intent to cause harm or harassment of spotted owls, or

2. produce physical evidence that a direct taking of owls or their parts has occurred, or

3. involve destruction of habitat in the immediate vicinity of a known activity center (less than a 500 acre circle centered at the activity center).

In implementing this Interim Policy, please be reminded that by memorandum dated October 2, 1991, the Fish and Wildlife Region 1 Office withdrew the document referred to as "Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl," (FWS July 1990). By written brief filed by the Department of Justice on behalf of the Department and the Service in Sweet Home Chapter of Communities for a Great Oregon v. Turner, the District Court was advised that those Procedures (referred to as "the

Incidental Take Guidelines") were rescinded for external use. The standards from that guidance document may no longer be used in a manner inconsistent with these directions. In this regard, you should continue to assess possibilities for instituting conservation mechanisms for this species through Habitat Conservation Plans or special rules that ~~might be~~ more effective than the prohibition against taking. This Interim Policy will remain in effect until such measures are put in place.