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DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

April 5, 1994

To: Lois Schiffer
Peter Coppelman

From: James R. Lyons
Assitant Secretary for Natural Resources & Environment

Subject: Viability Standard for ROD and Court Review

Jim Gilliland and I have serious reservations as to the current discussion of diversity and viability in the ROD. We believe the "substantial likelihood" standard expands judicial review to significantly diminish the Secretary's multiple use discretion regarding the use of the National Forests. Under the standard the burden of proof will shift to the government upon a minimum showing by the plaintiff. The standard exposes the government to broad area injunctions until the Forest Service has conducted state-of-the-art viability assessments to demonstrate to judicial satisfaction "substantial likelihood" for any species that someone puts in issue.

The proposal abandons successful arguments and court rulings holding that the NFMA diversity provision and viability regulation are goals--"Diversity is not the controlling principle in forest planning, although it is an important goal to be pursued in the context of overall multiple-use objectives. The Court concludes that the Plan [Wayne National Forest] provides diversity of plant and animal communities while balancing a mix of multiple uses." Sierra Club v. Robertson, S.D. Ohio, March 11, 1994.

The "substantial likelihood" test goes beyond Judge Dwyer's statement that the Forest Service must use common sense and apply its fish and wildlife expertise to prevent the adoption of an owl protection strategy that would extirpate other vertebrate species. See Seattle Audubon v. Moseley, 798 F. Supp. 1473, 1497 (W.D. Wash. 1992).

We have attached a ROD rewrite designed to preserve the discretion of the Secretary under the multiple use mandate in complying with the NFMA diversity provision and the viability regulation. Please provide as with your comment as soon as possible as we must brief the Secretary as to this issue and the ROD at 2:00 Wednesday.

Attachment

cc: Will Stelle
Jim Pipkin

April 5, 1994

a. Diversity Provision and Viability Provision
of Fish and Wildlife Resource Regulation

The National Forest Management Act requires the Secretary of Agriculture to promulgate regulations to guide Forest Service planning that "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." In accord with this requirement, the Secretary promulgated a regulation for the fish and wildlife resource, which provides in part: "Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area."

Translating the statutory directive to provide for diversity of plant and animal communities through regulatory policy has been, and continues to be, a formidable challenge, as the Committee of Scientists who provided scientific advice to the Forest Service on the crafting of NFMA regulations accurately predicted at the time of their promulgation. The Committee stated that "it is impossible to write specific regulations to 'provide for' diversity" and that "there remains a great deal of room for honest debate on the translation of policy into management planning requirements and into management programs" (44 Fed. Reg. 26,600-01 & 26,608). Thus, flexibility is needed in the manner by which the fish and wildlife resource regulation is implemented, and the use of different approaches is appropriate depending upon the particular context of its application.

advises The statute and implementing regulation establish a goal to provide habitat for the continued persistence of vertebrate species in the planning area. The bottom line is that the Forest Service may not adopt a plan that it knows or believes would through its actions extirpate a vertebrate species. In the context of this decision, we find based on the record before us that the decision will provide an amount and distribution of habitat to support the continued persistence of the vertebrate species in the planning area, in light of biological and other relevant factors, that compliance can be achieved through managing or providing for an amount and distribution of habitat that has a substantial likelihood, in light of biological and other relevant factors, of supporting the continued persistence of the vertebrate species that exist in the planning area.

Relevant factors include the life history of species, the current amount and distribution of habitat, the amount and distribution of species' ranges within the planning area, and other reasonably foreseeable protective measures. Our approach involves highly technical and complex projections as to which certainty is not possible. There is no way to avoid all risk to the continued persistence of species. Even absent any human-

induced effects, the likelihood that habitat will continue to support species' persistence can vary among species. For example, the continued persistence of local rare endemic species whose entire range may comprise only a few acres is intrinsically insecure. Thus, compliance with the fish and wildlife resource regulation is not subject to precise numerical interpretation and cannot be fixed at any one single threshold.

By its own terms, the regulation applies only to vertebrate species. Nevertheless, consistent with the statutory goals of providing for diversity of plant and animal communities and the long-term health of federal forests, as well as the agencies' conservation policies, our decision satisfies a similar standard with respect to non-vertebrate species to the extent practicable.

Although NFMA regulations apply to lands administered by the Forest Service, the fish and wildlife resource regulation was used as a criterion in the development of the alternative we select today, which includes direction for management of BLM lands. Use of the regulation's goals in developing alternatives served the important policy goal and public interest in protecting the long-term health of all of the forests under federal management within the range of the owl, and the species which inhabit them, in accordance with direction and authority provided in NFMA, the Multiple-Use Sustained-Yield Act, the Federal Land Policy and Management Act, the Oregon and California Lands Act, and the Endangered Species Act.

In making our determination of compliance with the NFMA fish and wildlife resource regulation, we considered all existing or reasonably foreseeable conservation measures. This follows because no one strategy or decision, can for all time provide for the habitat needs of all species that exist in the planning area, especially in light of the dynamic nature both of ecosystems and of our understanding of them. Measures that may be considered include analyses and activities undertaken pursuant to internal policy directives (e.g., the Forest Service's sensitive species program) and steps taken at differing layers of planning. Regardless of the measures in place, actual on-the-ground conditions also should be considered to the extent practicable given available data.

The fish and wildlife resource regulation does not require species-specific assessments to support a finding that a proposal is consistent with its terms. Rather, in accord with the theme of ecosystem management, in making such a finding a decision-maker may place reasonable reliance upon assessments of (1) species with habitat needs that are essentially the same; (2) a group of species generally thought to perform the same or similar ecosystem functions; and/or (3) the continued integrity and function of ecosystem(s) in which a species is found. Flexibility in selecting methodology is especially appropriate in this context, given the expertise and knowledge of local forest officials concerning the lands they manage, the variety of complex issues involved, and the often-limited resources available. For example, the Assessment

Team's approach to evaluating the alternatives, while sound, is not a controlling precedent for how such assessments need to be conducted in the future. Such an approach, which endeavored to identify and assess impacts on more than one thousand species associated with late-successional forest ecosystems, has been unique, in part because it was designed to address specific court-identified deficiencies in previous planning efforts.

~~Our conclusions are intended to be consistent with previous Department statements and Forest Service practice. They are offered in light of the experience gained through more than a decade of applying the fish and wildlife resource regulation. That previous decisions may use somewhat different verbal formulations to define duties or make compliance determinations is no indication that such initiatives are inconsistent with this decision, so long as an underlying purpose was to plan for the continued persistence of vertebrate species.~~

We find that our decision and the data and analysis upon which it is based meet or exceed the obligations of the fish and wildlife resource regulation. The assessment of the alternatives' efficacy to provide habitat to support more than 1000 species across all major categories of taxa that exist in the planning area was probably the most comprehensive initiative of its kind ever undertaken. ~~Moreover, implementation of our decision through amendments to planning documents, and taking into account activities permitted under the management direction thereby provided, will provide or manage habitat in an amount and distribution substantially likely to support the continued persistence of species that exist in the planning area.~~ We base our determination on the following findings and evidence in the record:

First, our decision results in approximately 80 percent of the approximately 8.5 million acres of medium and large late-successional conifer forests in the planning area being within land allocations that do not allow for programmed timber harvest (FSEIS at 3&4-41). In addition, some forty-two percent of the areas within the LSRs to be designated under our decision are dominated by such forest types. LSRs provide for large contiguous blocs in which silvicultural treatments are severely limited, and thus, protect against potential adverse effects thought to result from fragmentation and edge effects on species associated with late-successional and old-growth forest habitat. The Assessment Team gave strong marks to the original version of Alternative 9 regarding the projected likelihood that it would provide for late-successional forest ecosystem conditions representative of a hypothesized long-term average. Our decision contains measures in addition to those in the original Alternative 9 that are likely to further enhance the attributes of late-successional and old-growth forest ecosystems (FSEIS at 3&4-49). Thus, we find ~~there is more than a substantial likelihood that our decision will allow~~ for the maintenance of a functional and inter-connected late-successional forest ecosystems within the planning area.

Second, the aquatic and riparian subsystems within the range of the owl also receive

significant protection under our decision. It places all riparian areas -- including rivers, streams, wetlands, lakes, and ponds -- within variously-sized reserves (FSEIS at 3&4-66). The minimum widths of the reserves range from 100 to 300 feet on each side of the applicable riparian area depending upon the type of area they are designed to protect, and total approximately 2.6 million acres in the aggregate (FSEIS at 2-39). The standards and guidelines for Riparian Reserves do not allow proposed projects to proceed within reserve boundaries unless they will serve the goal of restoring or maintaining the ecological function and processes of watersheds and aquatic ecosystems within natural disturbance criteria. The Assessment Team concluded that Alternative 9 as originally designed would work to reverse the trend of degradation and begin recovery of aquatic ecosystems on federal lands within the range of the owl (FSEIS at 3&4-65). Our decision provides even greater protection to aquatic ecosystems.

Third, our decision will provide for habitat of an amount and distribution that ~~will be~~ ~~substantially likely to~~ support the continued persistence of the northern spotted owl ("owl"). The owl is particularly important to our analysis because its range defines the planning area for our decision, it is a threatened species under ESA, and more data exist concerning it than for any other species in the planning area. Of the nearly 7.5 million acres of extant suitable owl habitat on federal lands within the planning area, the selected alternative protects all but about fifteen percent from programmed timber harvest (FSEIS at 3&4-222). Our decision also contains elements that provide for owl dispersal habitat, including the widest riparian reserves of those considered and allocation of Managed Late-Successional Areas, which protect the activity centers of known owl pairs and resident single owls in the matrix (FSEIS at 3&4-242).

We acknowledge that our decision does not prohibit all harvest of suitable owl habitat. Approximately two and one-half percent of the extant amount of habitat likely will be harvested per decade in light of the matrix lands allocated under our decision. Some have opined that this level of harvest of owl habitat -- indeed, any level of harvest of owl habitat -- ought not be permitted and take the view that Alternative 9 inadequately supports the owl's continued persistence. We have considered carefully such views, and the data upon which they are based. While some recent results call for a certain amount of caution, they do not compel a moratorium on all further harvest of suitable owl habitat (FSEIS at 3&4-229 - 3&4-235). Our decision today reflects a conservative approach, allowing for a limited amount of harvest of owl habitat in matrix lands while protecting large reserve areas from programmed timber harvest.

There is one other ESA-listed species directly associated with late-successional and old-growth forests that exists in the planning area, and thus, deserves special mention: the marbled murrelet. Under our decision, less than ten percent of the more than 2.5 million acres of suitable murrelet nesting habitat is in the matrix (FSEIS at 3&4-222). Even that habitat in the matrix will be protected from harvest as an LSR

under our decision if determined to be occupied in mandatory pre-project surveys (FSEIS at 2-28).

A variety of vertebrate species that use early-successional forests as primary habitat also exist in the planning area (FSEIS at 3&4-203). Although our decision primarily provides standards and guidelines for management of habitat of species associated with late-successional forests, it ~~will~~ ~~is substantially likely to support~~ the continued persistence of species that use early-successional habitat. The amount of early-successional forest in the planning area probably is greater now than at any time in the past (FSEIS at 3&4-203). Our decision will provide for additional early-successional forest through allowance of harvest of some late-successional forest stands in the matrix.

Eighty-seven other vertebrate species, races, or groups were assessed in addition to the owl and murrelet in the process leading up to this decision. The Assessment Team projected that, with just three exceptions, Alternative 9, as originally designed, would have a high likelihood of providing habitat to support stable populations of each of these vertebrates, either well-distributed when measured against their historic range on federal lands or with significant gaps in that range (FSEIS at 3&4-174, 3&4-179, 3&4-184, 3&4-188, & 3&4-197). ~~That there is a likelihood of gaps existing. That gaps may exist~~ in species' historic distributions under our decision does not render the decision inconsistent with the fish and wildlife resource regulation, especially because most such gaps are already present. Distribution cannot be evaluated on a monolithic scale for all species.

The three vertebrates that do not fit within the category described above are all amphibians: (1) the Columbia torrent salamander; (2) the Coastal and Olympic Peninsula populations of the Van Dyke's salamander; and (3) the Shasta salamander (FSEIS at 3&4-174). The first two of these exist almost exclusively on nonfederal land. Our decision meets the objective of the fish and wildlife resource regulation with respect to these ~~three~~ species because, of the amount and distribution of habitat to support their continued persistence on all lands, the decision provides a portion that is roughly commensurate with, or greater than, the fraction of the species' range in the planning area.

The Shasta salamander is an extremely local endemic whose habitat sites are essentially fully protected by our decision. Given its limited range, there is no way our decision can minimize the risk of extirpation of this species from federal lands. In the context of the natural bounds on the range of this salamander and in light of research showing that the presence of rare local endemic species generally is consistent with diverse ecosystems, ~~we find that our approach complies with the fish and wildlife resource regulation. we find that the likelihood our decision will provide for habitat to support the species' continued persistence is substantial.~~



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

April 5, 1994

To: Lois Schiffer
Peter Coppelman

From: James R. Lyons
Assitant Secretary for Natural Resources & Environment

Subject: Viability Standard for ROD and Court Review

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Attachment

cc: Will Stelle
Jim Pipkin

MEMORANDUM

April 5, 1994

To:

Will Stelle

Tim Obst

Steve Odell

202-456-2710

From:

Jim Pipkin

I gather from Will that Agriculture prefers the following formulation:

"... we find that compliance can be achieved through managing or providing for an amount and distribution of habitat that, in the judgment of the Secretary, will support the continued persistence of the vertebrate species that exist in the planning area."

DOJ?



U.S. Department of Justice

WMC:SJOdel1
90-1-4-3806

Washington, D.C. 20530

April 4, 1994

MEMORANDUM

To: Will Stelle
Associate Director
Office of Environmental Policy

James Pipkin
Counselor to the Secretary
Department of the Interior

CC: Tim Obst
Attorney
Office of General Counsel

From: Steve Odell
Trial Attorney

Re: Remaining differences on viability section in ROD

PREPARED BY COUNSEL PURSUANT TO LITIGATION & SUBJECT TO PRIVILEGE

I received this afternoon a courtesy copy of a memorandum dated today in which Jim Pipkin expresses frustration with apparent differences between USDA-OGC and this Department concerning language in the section of the Record of Decision addressing compliance with the NFMA fish and wildlife resource regulation. After having been under the impression that such differences had been resolved, Jim stated that he received comments last Friday from OGC suggesting major substantive changes to the section. This memorandum is a response to Jim's request that Tim and I try to get these issues worked out today and advise him as to the result. Before undertaking to present where things stand as of the end of the day, I should add that Lois Schiffer and Peter Coppelman have reviewed this memorandum and are in accord with its contents.

First, let me say that this Department remains willing and eager to continue to work with OGC to work out any remaining differences on the viability section of the ROD. In that vein, I am pleased to report that, after having spoken on a conference call with Marc Gaede, Mike Gippert, and Tim Obst this afternoon, only the first of the three issues raised in Jim's memorandum appears to remain unresolved. (The Department has not received a copy of all of OGC's suggested changes, so it cannot speak to any other than those set forth in Jim's memorandum.)

- 2 -

The second item set forth in Jim's memorandum involves OGC's request to substitute "reasonable likelihood" in place of the reference to the Assessment Team's actual numerical estimates in the current version of the ROD. While this Department objects to OGC's suggested change, and would prefer simply stating the actual projected outcomes as provided in the current version to avoid comparisons with past definitions of "high" and pegging "high" to a particular numerical standard, we and USDA-OGC agreed today on Jim's compromise language using "high likelihood" in the cited sentence on page 39 of the March 30 draft of the ROD.

The third item raised in Jim's memorandum involves OGC's request to eliminate the phrase "so long as an underlying purpose was to plan for the continued persistence of vertebrate species." While we would prefer to retain this language, which reflects an attempt to demonstrate that the regulation should have at least the purpose of maintaining viable populations of vertebrate species even under different implementation schemes, we do not object to its deletion at OGC's request.

That leaves the first point, which, as noted above, remains unresolved. It involves OGC's request to replace "substantial likelihood" in the statement of the regulatory standard with "reasonable likelihood." The Department must register its strong objection to this proposed change. Use of the term "reasonable likelihood" in the formulation of the standard would appear to be an attempt to weaken it, in that, to the extent "reasonable" conveys a sense of magnitude, it generally means "moderate." Webster's New Collegiate Dictionary 981 (9th ed. 1990). Seen in this light, the requested change is unacceptable because, in our estimation, it would be extremely difficult to demonstrate in court that the formulation is a reasonable interpretation of a regulation that speaks in terms of providing habitat to "insure" species viability. In addition, any such dilution is unnecessary given the way the language in the current draft applies "substantial likelihood" in light of biological and conservation-related factors. Under the current formulation, Alternative 9 can be found to satisfy the regulation even with respect to a rare local endemic species that received a low viability rating because the species has a low likelihood of persistence even under "natural" conditions. To the extent "reasonable" is an attempt to convey "supported by reason" or the like and not any sense of magnitude, we object to it because it could end up meaning almost anything given its vagueness. It also may reflect some confusion between the standard a court employs in reviewing an agency's interpretation of a regulation (which generally is that the interpretation must be reasonable and consistent with the regulatory language) and an agency's interpretation of regulatory language in the first instance, which are two distinct issues.

- 3 -

Finally, although I must admit that I too was surprised to learn that OGC proposed significant changes to the viability section of the ROD last Friday, I apologize for the frustration that has resulted concerning this matter. I was under the impression that, after the meeting held in Jim's office last Monday and a follow-up meeting on March 30 in which Tim and I got together to resolve wording problems, OGC and this Department had reached a mutually acceptable compromise. The compromise in principle was that the language proposed by this Department would be used to define the essential standard and provide the basis for a finding of compliance with the regulation, but that the ROD also would make clear that compliance can be accomplished in different ways and that the ROD's discussion of the regulation did not set forth a new standard requiring amendments to existing plans to satisfy it. It is our position that the language in the March 30 draft ROD reflects this compromise, as well as the other changes that Tim and I worked out during our March 30 meeting. Nevertheless, as noted above, this Department will continue to do whatever it can to work with OGC to resolve any remaining issues as expeditiously as possible.



WMC:SJodell
90-1-4-3806

U.S. Department of Justice

Washington, D.C. 20530

April 5, 1994

MEMORANDUM

To: Will Stelle
Associate Director
Office of Environmental Policy

James Pipkin
Counselor to the Secretary
Department of the Interior

Tim Obst
Attorney
Office of General Counsel

From: Steve Odell
Trial Attorney

Re: Discussion of viability standard in ROD

PREPARED BY COUNSEL PURSUANT TO LITIGATION & SUBJECT TO PRIVILEGE

I have received the two memoranda Jim Pipkin sent today in which he lays out five alternatives for language in the Record of Decision regarding the standard for compliance with the viability provision of the NFMA fish and wildlife resource regulation. The position of this Department with respect to each of the options is set forth below:

1. Substantial likelihood -- Of the five options, this one is in our view clearly the most preferable because it best balances the need for flexibility in application with the need to be within the ballpark of the regulatory language. Thus, from a litigation viewpoint, both in terms of putting ourselves in a sound position to win challenges to the ROD and seeking to forestall legal challenges to planning initiatives in other contexts, this option is by far the strongest.

2. Reasonable likelihood -- We strongly object to this option because it poses severe litigation risks. To the extent "reasonable" can be construed to convey magnitude, it generally means "moderate," and thus, would be extremely difficult to defend as a reasonable interpretation of a regulation that speaks in terms of "insuring" viable species populations. To the extent "reasonable" can be construed as "supported by reason" or the

- 2 -

like, it is risky because of its extreme open-endedness and essentially value-laden nature.

3. Habitat that will provide for the conservation of the vertebrate species that exist in the planning area -- We object to this option for three basic reasons. First, its use of the language "will provide" suggests a 100-percent likelihood, and thus, the standard may well be construed as much higher than can be sustained on the current record. Second, to the extent the option merely is an attempt to re-phrase the language of the regulation, it does not accomplish the purpose of providing a "common sense" gloss on the stringent regulatory language to which the court will have to defer. Third, the option may be interpreted using ESA concepts, and thus, could give rise to a supra-ESA being applied to all vertebrate species, not just those listed under the Act as threatened or endangered. NFMA does not define "conservation," while ESA defines it as "the use of all methods and procedures which are necessary" to bring listed species back to recovery. If a Court were to look to ESA to define this term, the standard could be construed as requiring habitat to keep species "above recovery," a status which would be difficult to determine and satisfy. Further, ESA requires federal agencies to utilize their authorities to carry out programs for the conservation of listed species. To date, courts have ruled that, while this requirement imposes affirmative obligations, agencies are to be given discretion in determining how to use their authorities for this purpose. In contrast, this option provides that agencies "will provide for the conservation of" species, which suggests a more stringent obligation.

4. Habitat that is likely to support the continued persistence of the vertebrate species that exist in the planning area -- We strongly object to this option because of the risk it poses to success in the owl litigation. "Likely" generally conveys a rough sense that something has a greater-than-50 percent chance of occurring. To argue that this is a reasonable interpretation of a regulation that speaks in terms of "insuring" viable species populations is problematic in the extreme.

5. Managing or providing for an amount and distribution of habitat that, in the judgment of the Secretary, will support continued persistence -- We object to this option primarily because, as in option 3, use of "will" in the standard suggests a 100-percent likelihood that the habitat will achieve the desired objective, a standard that we cannot satisfy on this record. It thus could well be construed to be significantly more stringent than is Option 1. To the extent it is construed in such a way, it may well put us in the awkward position of having to argue in court that the Secretaries' first statement on the viability provision does not really mean what it says and then having to have litigation counsel define an acceptable magnitude of likelihood, which will be granted no deference. It is

- 3 -

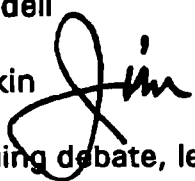
important to acknowledge that the record in this process is framed in terms of likelihood and, as a result, it is rather inevitable that the issue of what constitutes a minimally acceptable likelihood under the viability provision will arise in the litigation. As a final note, the phrase, "in the judgment of the Secretary" is superfluous because it is obvious that, unless expressly stated to the contrary, a finding of compliance with a regulation is the agency's to make.

I have shared this memorandum with Peter Coppelman, and he is in full accord with its contents. Please let me know if you would like further assistance or the views of the Department on other options concerning this matter.

MEMORANDUM

April 5, 1994

To: Will Stelle
Tim Obst
Steve Odell

From: Jim Pipkin 

To focus our continuing debate, let me lay out four alternatives:

1. Substantial likelihood (DOJ).
2. Reasonable likelihood (USDA-OGC).
3. Habitat that will provide for the conservation of the vertebrate species that exist in the planning area (original FWS proposal).
4. Habitat that is likely to support the continued persistence of the vertebrate species that exist in the planning area.

I added the fourth ("likely to support") because I find it clearer than "reasonable likelihood" -- at least in ruling out anything under 50 percent. However, there is no question that it lowers the crossbar when compared to "substantial likelihood."

I put the FWS proposal back on the table because it avoids the probability issue that has created the impasse.

Would Tim and Steve please discuss them — *and what thoughts does*
Will have?



**UNITED STATES
DEPARTMENT OF JUSTICE**

**ENVIRONMENT AND NATURAL
RESOURCES DIVISION
GENERAL LITIGATION SECTION**



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TO: Will Stelle **FAX#:** (202) 456-2710

FROM: Peter D. Coppelman

DATE: April 4, 1994

NUMBER OF PAGES (including cover sheet): 3

COMMENTS: Please see attached.



U.S. Department of Justice

PDC:WMC:SJodell
90-1-4-3806

Washington, D.C. 20530

April 4, 1994

MEMORANDUM

To: Will Stelle
Associate Director
Office of Environmental Policy

James Pipkin
Counselor to the Secretary
Department of the Interior

From: Peter D. Coppelman
Deputy Assistant Attorney General

Re: Recent developments that bear on ROD

RELATED TO LITIGATION -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

Since we sent to you our memorandum last week with comments on the March 30 Draft of the proposed Record of Decision on the old-growth forest ecosystem management strategy ("ROD"), two new developments have occurred that bear on the final language to be presented in the ROD.

First, we have learned that BLM presently intends to allow operation of awarded timber sales representing some 70 million board feet as soon as April 17, 1994. Some of these sales are in Key Watersheds and Late-Successional Reserves as delineated under Alternative 9. We are currently seeking to obtain more information about these sales to determine whether they have been adjusted in accordance with the representation on pages 11-12 of the March 30 draft ROD that sales awarded prior to September 1993 have been modified, as well as whether they otherwise have major conflicts with the selected alternative. The March 30 draft ROD does not set forth the amount of timber reflected by awarded sales, but instead merely states, without citation, that the environmental effects of awarded sales were considered as part of the baseline in the Final SEIS. If there is indeed no discussion of some detail concerning the location, volume, and harvest methods of awarded sales in the Final SEIS, if the volume they represent is more than can comfortably be considered to be de minimis, or if they are inconsistent in any significant way with Alternative 9, allowing operation of such sales without modification may pose serious litigation risks. We note in this regard that, while the March 30 draft ROD refers to a discussion of awarded and "prepared" sales in the aquatic

- 2 -

assessment section of the FEMAT Report, there is no similar reference to the terrestrial assessment section of the report. Moreover, allowing any sales to proceed as soon as April 17 could place us in a position of having to litigate the legal validity of the Final SEIS and ROD under the time pressure of a motion for a temporary restraining order or preliminary injunction. It also is much more likely that such litigation would not be before Judge Dwyer, given that he presently has no jurisdiction over BLM. We will keep you apprised of information concerning awarded sales as we become aware of it ourselves.

Second, at the end of last week we received the 200-plus comments that have been submitted on the Final SEIS. A number of these are substantive comments from parties to current litigation. While most of the issues raised in the comments can be addressed in an appendix to the Final SEIS specifically designed for such a purpose, it is our view that, for litigation-related reasons, it would prove extremely useful to address at least a few such issues in the body of the ROD as time permits. First, this would demonstrate that the decision-makers themselves were aware of certain comments and that the appendix of responses was not simply a set of post-hoc rationalizations. Second, a limited number of the comments (on the order of a half-dozen) bear on some of the major issues we expect to have to litigate in future litigation on the ROD or on the major findings in the ROD, or both. These include: plaintiffs' McKelvey Model results showing extinction of the northern spotted owl in approximately 85 years; the request to provide additional protection on federal lands and re-conduct viability assessments in light of the SHCC decision; criticism by one of the key architects of Alternative 9 (Jerry Franklin) concerning the change in the 15-percent green tree retention standard; and the alleged failure to discuss in the Final SEIS that 44 percent of the known owl pairs are in the matrix or AMAs under Alternative 9. Having the Secretaries explicitly discuss these issues, which likely will be raised again in litigation, enhances the deference we can argue the court owes to our findings on them. Given the tight time constraints under which we are operating, we will be glad to work with you and agency counsel to prepare suggested language concerning these issues for your consideration and possible inclusion in the ROD at the earliest possible time.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TRANSMISSION NOTICE

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AGENCY: WH/OEP

FAX NO: 456-2710 PHONE NO: _____

FROM: Jim Pytkin

NUMBER OF PAGES: 6 (including this page)

DATE: 4-4

MEMORANDUM**April 4, 1994****To: Will Stelle****cc: Tim Obst
Steve Odel****From: Jim Pipkin**

Twice during the past ten days, I have thought that USDA-OGC and USDOJ had resolved their differences on the viability regulation. In both cases, I was wrong. Now Tim Obst's Friday comments indicate that we still do not have agreement. Specifically, Tim wants (1) to change the test from "substantial likelihood" to "reasonable likelihood," (2) to substitute "reasonable likelihood" for the Assessment Team's finding of 80 point likelihood for certain vertebrate species (p. 41), and (3) to eliminate Steve's language that previous decisions are okay as long as "an underlying purpose was to plan for the continued persistence of vertebrate species." (p.39).

By copies of this memo, I am asking Tim and Steve to work out these issues today and let me know the result.

On the second point, my personal view is that the suggested change would be highly undesirable. We would be saying, in effect: (1) the test is reasonable likelihood, (2) reasonable likelihood is 80%, (3) therefore, the test is 80%. Unless I hear from Steve or Tim to the contrary, I will change the sentence to read: "The Assessment Team projected that ... Alternative 9, as originally designed, would have a high likelihood of providing habitat to support stable populations" etc.

Tim's other comments request, in my view, some significant substantive changes at the eleventh hour. We will be in touch with him to see how strongly he feels about them.

Tim also feels that your language on FACA "will anger Judge Jackson." Attached are Tim's proposed substitute and a draft prepared by Ellen Athas. I would appreciate your thoughts on which way to go.

One personal request to Tim. Please start spelling my name correctly.

SENT BY:

4- 1-84 ; 7:04PM ;

USDA, OGC, NRD-

A/S PMB:# 2/ 2

USDA OGC

10. Federal Advisory Committee Act

On March 21, 1994, the U.S. District Court for the District of Columbia found in Northwest Forest Resource Council v. Espy that the process for developing the FEMAT report had not complied with the requirements of the Federal Advisory Committee Act (FACA). We view any violation of law as a serious matter. We are faced in this Record of Decision, in which the FEMAT report has played a prominent role, with the dilemma of how to deal with the court's decision. Although the court did not enjoin the use or consideration of the FEMAT report, the Executive Branch has an independent obligation to reassess its use of the FEMAT report in light of the court's decision in Northwest Forest Resource Council v. Espy.

The Northwest Forest Resource Council has urged us to not adopt any alternative that was developed and analyzed by FEMAT. We have considered this request, evaluated our various legal obligations, and concluded that it is in the public interest to issue this Record of Decision. Important considerations to us were the extensive public involvement since the FEMAT report; our obligation to comply with the court's order in Seattle Audubon Society v. Lyons requiring a Record of Decision by April 14, 1994; a statutory obligation to consider the best scientific information available in our decision; and the strong public interest in and resolving the current gridlock and avoiding additional economic dislocation.

We do not intend our decision to condone any violation of law. We are requiring the implementation groups established by this decision to obtain concurrence from legal counsel with their approach to compliance with the FACA, or the decision that FACA is not applicable, prior to a meeting at which any nonfederal employees will participate as members. We will also welcome and consider petitions from the public proposing changes to the amended land management plans, including proposals to use other scientific approaches as the basis for management.

Justice

FACA Discussion

The discussion of the FACA decision (ROD at 46) goes too far in characterizing Judge Jackson as "refusing to grant" the injunctive relief sought because such a "draconian remedy of an outright prohibition" was not warranted. Instead, the Court really held that such an injunction would be "premature" and left it to another court and/or case to reach that issue. We recommend substituting the following language:

A primary source of information upon which the SEIS relies is the Report of the Forest Ecosystem Management Team ("FEMAT Report"). That report contains a description of options for managing federal old-growth forests that formed the basis of the ten alternatives analyzed in detail in the SEIS. It also provides a technical assessment of ecological, economic, and social impacts associated with these alternatives.

On March 21, 1994, the United States District Court for the District of Columbia ruled that the process by which FEMAT prepared its report violated the Federal

Advisory Committee Act ("FACA"). Northwest Forest Resources Council v. Espy, No. 93-1621 (D.D.C. Mar. 21, 1994) (Memorandum Decision and Order). The Court found that FEMAT was an "advisory committee" under FACA, and the decision then correctly sets forth FEMAT's failure to comply with the Act's strictures concerning open hearings, a public process and balanced representation.

The underlying purposes of FACA are to ensure open procedures, full opportunity for comment, and public participation, so as to avoid undue influence of special interest groups. These are, indeed, important goals. Fortunately, in the context of this decision, those goals have been achieved through the public participation afforded under the NEPA process. Here, the public, including the plaintiffs in the NFRC case, had a full 90 days to comment on all elements of the FEMAT Report and to offer new alternatives, or ideas for new alternatives, during the comment period on the Draft SEIS. That opportunity was fully taken advantage of by plaintiffs and the other affected members of the public, and all such input has been considered and responded to in the Final SEIS. In addition, the public was advised through two Federal Register notices of an opportunity to provide comments on the Final SEIS. Plaintiffs in the NFRC case have submitted their comments under this process, as well.

We have considered carefully the implications of the NFRC decision for our decision in light of the role the FEMAT Report played in describing the alternatives considered in detail in the SEIS and providing valuable information on their likely impacts. In balance, we had determined to proceed with the decisional process based on the fulfillment of the underlying purposes of FACA, as set forth above.

In addition, the Forest Service is under Court order to promulgate by April 14, 1994 guidelines for the management of the northern spotted owl curing defects found in the NEPA process by the Court in Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992).

Since 1991 the public lands in the Pacific Northwest have been under injunctions precluding the auction or award of timber sales in old growth areas of 17 National Forests and the BLM lands of Western Oregon for violation of various environmental and land management laws. Lifting these injunctions in a manner that complies with the affirmative mandates of these Courts regarding compliance with these laws is essential for the ecological health of these lands, and the social and economic well-being of the people of the Pacific Northwest. Further delay in this

process will necessarily cause hardship to those it is intended to help.

We believe the range of alternatives considered in the DSEIS and the FSEIS, and the treatment of comments made during the public comment period, to be consistent with the law. Finally, we have redoubled our efforts to ensure that the various groups that will play a role in implementing our decision will not violate FACA.

In addition, several other sentences raise questions of FACA compliance. The ROD announces the establishment of the "Regional Interagency Executive Committee, the Regional Ecosystem Office and province teams" to conduct monitoring and research (ROD at 4). Indeed, the Regional Interagency Executive Committee must "approve" thinning or other silvicultural activities (ROD at 7). We should be certain that each of these committees and teams is composed of all federal employees.

Title

a problem? The title has been altered to reference amendments to planning documents. This new title ignores the larger ecosystem framework and does not track the language of the DSEIS and FSEIS. We recommend returning to the full title: Record of Decision for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl.

Decision

Actually, the decision is to delete Attachment A. The ROD maintains that it "is not intended to cover aspects of the Standards and Guidelines" and further states that if inconsistencies exist between the ROD and the Attachment, the "latter is intended to control" (ROD at 4). The ROD is the decision document, and, as such, must control. We simply need to be certain that there are no conflicts between the Decision and the Appendix. We recommend completely deleting the last sentence of the first paragraph of the Decision section (ROD at 4), and replacing it with the following:

The primary purpose of Attachment A is to assist land managers in both agencies, by providing them a synopsis of the relevant standards and guidelines. It is not intended to replace or supersede this Decision.

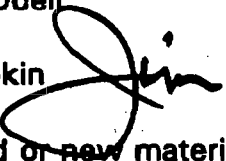
Changes From the FSEIS

Several changes raise questions of litigation risk. First, Green Tree Retention in the matrix has been altered based on dispersed and aggregated green tree retention, which "should be addressed in watershed and project analyses" (ROD at 31). It

MEMORANDUM

April 6, 1994

To: Will Stelle
Tim Obst
Steve Odell

From: Jim Pipkin 

Attached are revised or new materials on: consideration of high-timber alternatives; PSQ levels being estimates; application of viability standard to BLM lands; the NFMA viability regulation; and FACA.

At this point we are not interested in edits. However, we would like to know if there are mistakes or serious problems.

Attachments

management of northern spotted owl habitat or management of late-successional and old-growth forest ecosystems as potential alternatives. Forty-eight previously developed alternatives were considered, along with five hybrid alternatives containing mixtures of elements from existing plans, and an alternative with long timber harvest rotation (300 to 350 years) with no late-successional reserves.

After considering this range of 54 alternatives, and examining them in two selection processes, 46 were not considered by the Assessment Team for further refined analysis because it appeared that they would not meet all applicable statutory and regulatory requirements and the objectives articulated by President Clinton. Of the eight identified for further analysis, one was dropped because it was similar to another alternative, and three others were added, resulting in the ten alternatives studied in detail in the Draft and Final SEIS. This process and a description of the alternatives considered are included in Attachment A of the Final SEIS.

We have considered the Assessment Team's report, earlier analyses (including the report of the Interagency Scientific Committee (1990), Alternatives for Management of Late-Successional Forests of the Pacific Northwest (1991), the Final Draft Recovery Plan for the Northern Spotted Owl (1992), and the report of the Scientific Analysis Team (1993)), the Draft and Final SEIS, and all the submissions made by the public (including the timber industry) in response to both the Draft SEIS and the Final SEIS.

NEW We agree with the judgment of the SEIS drafting team in focusing on the ten action alternatives identified in the Final SEIS, plus the "no-action alternative." Other alternatives that would have produced greater amounts of timber than the ten action alternatives would not have been likely to satisfy the requirements of the statutes and regulations that are discussed in section VIII below. For example, the Interior Department recovery team for the northern spotted owl gave significant consideration to an option presented to it by the BLM in 1991 incorporating a concept called "total forestry." This option did not formally include reserves but attempted to continuously maintain suitable habitat through time in the general forest landscape. Since evidence was not available to indicate that this option could be successful, the recovery team limited its subsequent consideration to options that provided multi-pair areas (i.e., reserves) for owls. The recovery team also considered the "multi-resource strategy for the conservation of the northern spotted owl," proposed by the National Forest Products Association and the American Forest Council in 1991. The multi-resource strategy would have provided significant protection for owls only in about 20% of the owl's range, generally arranged in a narrow, linear band. The recovery team concluded that the strategy would not provide adequate assurance of recovery and the strategy was eliminated from further consideration.

NEW

In addition, in its initial screening process, the Assessment Team found that the multi-resource strategy rated low on all five biological criteria applied to it (spotted owls, marbled murrelets, at-risk fish stocks, other species closely associated with old-growth forests, and an interacting old-growth forest ecosystem). The same ratings were given by the Assessment Team to the existing forest plans and to both preservation plans for the northern spotted owl developed under Secretary Lujan in 1992. The Interagency Scientific Committee's conservation strategy was found to produce low or medium-low ratings for four of the five criteria, as was the Interior Department's "Jamison" strategy (1990). The Final Draft Recovery Plan for the Northern Spotted Owl was found to produce medium-low ratings for three of the criteria. BLM's preferred alternative, identified in draft resource management plans (1992) was similar. (See also the analysis of the BLM preferred alternative by the Scientific Analysis Team.)

The Assessment Team found that "to assure the viability of the threatened and at-risk species (and thereby satisfy the requirements of current law) some system of reserves was required" (FEMAT, p. II-6). Consequently, options that did not contain any reserves (such as a pure "long rotation" option) were not considered to satisfy the objectives of the analysis. However, a long rotation feature was incorporated into the selected alternative (e.g., 150-year rotations for some areas in Oregon on BLM land). Moreover, as the Final SEIS points out, research will continue to focus on the question of how best to perpetuate late-successional forest ecosystems, and some of the lands within adoptive management areas may be used to test a long rotation approach (Final SEIS, p.F-40). In addition to the information provided in the Assessment Team's report and in the Final SEIS, some other alternatives that would include higher levels of commodity production are analyzed in the underlying EISs that are supplemented by the Final SEIS.

Some of the ideas suggested during the public comment period on the Draft SEIS were already included in parts of the action alternatives. Other commenters suggested additional alternatives based on the "constant change" theory of ecology. The Final SEIS acknowledges that there is controversy in the scientific community regarding theories of ecosystem process and function. Alternatives 2 through 10 in the Final SEIS are in fact a mix of the "constant change" and "steady state" theories. All alternatives proposed by the public were considered. A summary of each and the reasons for not considering them in detail are described in Appendix F of the Final SEIS.

B. The Action Alternatives

The Final SEIS presents ten action alternatives. Based primarily on the "reserve" recommendations of previous efforts by the Interagency Scientific Committee, the Scientific Panel on Late-Successional Forest Ecosystems, and the Scientific

Analysis Team, these alternatives present various mixes of late-successional reserves, managed late-successional areas, riparian reserves, and, in Alternative 9, adaptive management areas. These reserves are integrated with existing congressionally reserved areas, administratively withdrawn areas, and matrix to create a network of late-successional forests and watershed protection. These alternatives provide for various levels of habitat for late-successional forest related species and result in various levels of social and economic benefits.

A summary and comparison of land allocations, including acres and standards and guidelines, is presented in Table ROD-1. An estimate of the sustainable timber harvest for each action alternative for the first decade was made. The estimate of that annual level for the first decade is expressed as the Probable Sale Quantity (PSQ). The PSQ levels estimated for each of the ten alternatives in the Final SEIS are shown in Figure ROD-1. Based on these estimated PSQ levels, estimates of the numbers of jobs that could be available in the timber industry were also projected. These estimates for the ten alternatives are shown by state and total in Table ROD-2.

NEW PSQ levels are estimates. They represent neither minimum levels that must be met nor maximum levels that cannot be exceeded. They are rough approximations because of the difficulty associated with predicting actual timber sale levels over the next decade, given the discretion that agency land managers possess in administering plans and deciding when and where to offer timber sales, as well as the complex nature of many of the standards and guidelines. They represent our best assessment of the average amount of timber likely to be awarded annually in the planning area over the next decade, following a start-up period.

During the first several years, it is unlikely that the annual PSQ estimates shown in Figure ROD-1 will be achieved. Our decision represents a new strategy that involves new land allocations and a new set of standards and guidelines. It will take time for the land management agencies to develop new timber sales that conform with the planning amendments effected by our decision. In addition, our decision contains requirements to perform various levels of analysis or survey work prior to awarding timber sales in certain areas.

We have considered the ten alternatives presented in the Final SEIS, as well as the no-action alternative required by 40 CFR 1502.14(d). Summary descriptions of these alternatives follow.

Alternative 1

This alternative protects essentially all old-growth forests. It was designed to offer the highest probability of meeting five biological objectives: (1) viability of northern

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April 5, 1994 • ROD • 17

both the major federal land-managing agencies, the Forest Service and the Bureau of Land Management need to adopt the alternative that will both maintain and restore the late-successional and old-growth forest ecosystem and provide a predictable and sustainable supply of timber, recreational opportunities, and other resources at the highest level possible. Alternative 9 best meets these criteria.

NEW Alternative 9, like all of the other action alternatives, applies the same criteria for management of habitat on both Forest Service and BLM lands. This was done in order to accomplish most efficiently the dual objectives discussed above -- that is, achieving the biological results required by law with the least adverse impact on timber harvests and jobs. The inefficiencies involved in applying different criteria on Forest Service and BLM land have been noted in previous analyses. For example, in the Report of the Scientific Analysis Team ("SAT Report"), the team found that BLM's plans were relatively high-risk, when compared to the plans of the Forest Service, in terms of conserving the northern spotted owl. As a result, the SAT found that in order for the Forest Service to "make up for significantly increased risks," it would have to dramatically increase the size of protected areas on Forest Service land (by 418,000 acres). (SAT Report, pp. 12-13).

We have reviewed the ten alternatives in the Final SEIS, their predicted environmental, economic and social consequences, and the risks and safeguards inherent in them. Alternative 9 in the Final SEIS is the best alternative for providing a sustainable level of human use of the forest resource while still meeting the need to maintain and restore the late-successional and old-growth forest ecosystem. We therefore select Alternative 9 as reflected in Attachment A as the management direction that best responds to the legal requirements and the policies enunciated by President Clinton.

We base our conclusion on a number of factors. Although management under Alternatives 7, 8, and the no-action alternative would provide somewhat higher levels of timber supply than Alternative 9, those alternatives would not provide adequate assurance that the late-successional and old-growth forest ecosystem would be maintained and restored, and would not provide adequate assurance that the riparian habitat essential for many aquatic and terrestrial species would be maintained and restored. The Assessment Team found that all alternatives except Alternatives 7 and 8 would "reverse the trend of degradation and begin recovery of aquatic ecosystems and habitat" (see Report of Forest Management Assessment Team [hereafter "FEMAT Report"], p. II-41; Final SEIS, p. 2-70). The Assessment Team found that the likelihood the marbled murrelet (listed as a threatened species under ESA) would remain well-distributed across its range was only 26 percent under Alternative 7 and 29 percent under Alternative 8 (FEMAT Report, pp. IV-153 and IV-168). As to the no-action alternative, that alternative is based on plans that existed prior to the listing of both the northern spotted owl and the marbled murrelet, and it makes no provision for the recovery of those species. In addition,

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April 5, 1994 • ROD • 24

Planning Act. In NFMA Congress established a comprehensive notice and comment process for adopting, amending and revising land and resource management plans ("forest plans") for units of the National Forest System. At the time of enactment of NFMA, ecological concepts and practices did not address ecosystem scales of the magnitude dealt with in this decision. The 24.5 million acres of land administered by the federal government within the range of the northern spotted owl is far beyond the "planning unit" focus of NFMA. 16 U.S.C. 1604 and 1611.

The approval of a forest plan establishes direction so that all future decisions in the planning area will include an "interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences." 16 U.S.C. Sec 1604. The forest plan provides direction to assure coordination of multiple-uses (outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness) and sustained yield of products and services.

Within the range of the northern spotted owl there are lands that will be administered pursuant to two regional guides and nineteen forest plans. Under Forest Service planning regulations, National Forest planning and decisionmaking occurs at four levels: nationwide, regionwide, forest plan, and project.

Planning is continuous at each level and between the levels rather than sequential. Continuous monitoring, evaluation and adjustment through amendment and revision is required by NFMA for forest plans. Despite the multiple levels of disclosure, all activities remain subject to site-specific and continuing compliance with federal environmental law such as the Endangered Species Act, National Environmental Policy Act, Clean Water Act, Clean Air Act and others.

a. Diversity Provision and Viability Provision of Fish and Wildlife Resource Regulation

The National Forest Management Act requires the Secretary of Agriculture to promulgate regulations to guide Forest Service planning that "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." In accord with this requirement, the Secretary promulgated a regulation for fish and wildlife resources, which provides in part: "Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." We find that this decision satisfies the requirement of the statute and its implementing regulation because it will provide an amount and distribution of habitat adequate to support the continued persistence of the vertebrate species in the planning area.

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April 5, 1994 • ROD • 39

The Committee of Scientists that provided scientific advice to the Forest Service on the crafting of NFMA regulations stated that "it is impossible to write specific regulations to 'provide for' diversity" and "there remains a great deal of room for honest debate on the translation of policy into management planning requirements and into management programs" (44 Fed. Reg. 26,600-01 & 26,608). Flexibility is needed in the manner by which the fish and wildlife resource regulation is implemented, and the use of different approaches is appropriate depending upon the particular context of its application.

Relevant factors include the life history of species, the current amount and distribution of habitat, the amount and distribution of species' ranges within the planning area, and other reasonably foreseeable protective measures. Our approach involves complex projections regarding the likely fate of species over the next 50 to 100 years, or more; certainty is not possible. There is no way to avoid all risk to the continued persistence of species. Even absent any human-induced effects, the likelihood that habitat will continue to support species' persistence can vary among species. For example, the continued persistence of local rare endemic species whose entire range may comprise only a few acres is intrinsically insecure. Thus, compliance with the regulation is not subject to precise numerical interpretation and cannot be fixed at any one single threshold.

By its own terms, the regulation applies only to vertebrate species. Nevertheless, consistent with the statutory goals of providing for diversity of plant and animal communities and the long-term health of federal forests, as well as the agencies' conservation policies, our decision satisfies a similar standard with respect to non-vertebrate species to the extent practicable.

Although NFMA regulations apply to lands administered by the Forest Service, the fish and wildlife resource regulation was used as a criterion in the development of the alternative we select today, which includes direction for management of BLM lands. Use of the regulation's goals in developing alternatives served the important policy goal of protecting the long-term health of all of the federal forests within the range of the owl and the species that inhabit them. This is in accordance with direction and authority provided in NFMA, the Multiple-Use Sustained-Yield Act, the Federal Land Policy and Management Act, the Oregon and California Lands Act, and the Endangered Species Act.

In making a determination of compliance with the NFMA fish-and-wildlife resource regulation, we may consider existing or reasonably foreseeable conservation measures. No one strategy or decision can for all time provide for the habitat needs of all species that exist in the planning area, especially in light of the dynamic nature both of ecosystems and of our understanding of them. Measures that may be considered include analyses and activities undertaken pursuant to internal policy directives (e.g., the Forest Service's sensitive species program) and

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April 6, 1994 • ROD • 40

steps taken at differing layers of planning. Regardless of the measures in place, actual on-the-ground conditions also should be considered to the extent practicable given available data.

The fish-and-wildlife-resource regulation does not require species-specific assessments to support a finding that a proposal is consistent with its terms. The Assessment Team's approach to evaluating the alternatives, while sound, is not a controlling precedent for how such assessments need to be conducted in the future. That approach, which endeavored to identify and assess impacts on more than one thousand species across all major categories of taxa that exist in the planning area, has been unique. It was the most comprehensive initiative of its kind ever undertaken.

We find that our decision and the data and analysis upon which it is based satisfy the obligations of the fish and wildlife resource regulation. We base our determination on the following findings and evidence in the record.

First, our decision results in approximately 80 percent of the approximately 8.5 million acres of medium and large late-successional conifer forests in the planning area being within land allocations that do not allow for programmed timber harvest (Final SEIS at 3&4-41). In addition, the late-successional reserves will provide large contiguous blocs in which silvicultural treatments are severely limited, protecting against potential adverse effects thought to result from fragmentation and edge effects. The Assessment Team gave strong marks to the original version of Alternative 9 regarding the projected likelihood that it would provide for late-successional forest ecosystem conditions over the long term. Our decision contains measures in addition to those in the original Alternative 9 that are likely to further enhance the attributes of late-successional and old-growth forest ecosystems (Final SEIS at 3&4-49). As a result, we find our decision will allow for the maintenance of functional and inter-connected late-successional forest ecosystems within the planning area.

Second, the aquatic and riparian subsystems within the range of the owl also receive significant protection under our decision. It places all riparian areas -- including rivers, streams, wetlands, lakes, and ponds -- within variously-sized reserves and establishes standards and guidelines that limit activities within the reserves (Final SEIS at 3&4-66). The Assessment Team concluded that Alternative 9 as originally designed would work to reverse the trend of degradation and begin recovery of aquatic ecosystems on federal lands within the range of the owl (Final SEIS at 3&4-65). Our decision provides even greater protection to aquatic ecosystems.

Third, our decision will provide for habitat of an amount and distribution that will support the continued persistence of the northern spotted owl. Of the nearly 7.5

PREDECISIONAL. NOT SUBJECT TO RELEASE UNDER FOIA.

April 6, 1994 • ROD • 41

million acres of extant suitable spotted owl habitat on federal lands within the planning area, the selected alternative protects all but about 20 percent from programmed timber harvest (Final SEIS at 3&4-222). Our decision also contains elements that provide for owl dispersal habitat, including wide riparian reserves and allocation of unmapped late-successional reserves that will protect 100 acres of habitat around the nest sites or activity centers of known owl pairs and resident single owls in the matrix (Final SEIS at 3&4-242).

Approximately two and one-half percent of the extant amount of spotted owl habitat likely will be harvested per decade under our decision. Some have opined that even this level of harvest of owl habitat ought not be permitted. We have considered carefully such views, and the data upon which they are based. While the results of some recent research call for a certain amount of caution, they do not compel a moratorium on all further harvest of suitable owl habitat (Final SEIS at 3&4-229 to 235). Our decision today, while not risk-free, reflects a conservative approach, allowing for a limited amount of harvest of owl habitat in matrix lands while protecting large reserve areas from programmed timber harvest.

As to marbled murrelets, under our decision less than ten percent of the more than 2.5 million acres of suitable murrelet nesting habitat on federal land is in the matrix (Final SEIS at 3&4-222). Even that habitat in the matrix will be protected from harvest as a late-successional reserve under our decision if determined to be occupied in mandatory pre-project surveys (Final SEIS at 2-28).

A variety of vertebrate species that use early-successional forests as primary habitat also exist in the planning area (Final SEIS at 3&4-203). Although our decision primarily provides standards and guidelines for management of habitat of species associated with late-successional forests, it will support the continued persistence of species that use early-successional habitat. The amount of early-successional forest in the planning area probably is greater now than at any time in the past (Final SEIS at 3&4-203). Our decision will provide for additional early-successional forest through allowance of harvest of some late-successional forest stands in the matrix.

Eighty-seven other vertebrate species, races, or groups were assessed in addition to the northern spotted owl and murrelet in the process leading up to this decision. With three exceptions, the Assessment Team gave the original Alternative 9 relatively high marks for providing habitat to support stable populations of each of these vertebrates, either well-distributed when measured against their historic range on federal lands or with significant gaps in that range (Final SEIS at 3&4-174, 179, 184, 188 & 197). The gaps that may exist in the historic distributions of species under our decision do not preclude a finding of compliance with the fish and wildlife resource regulation, especially because most such gaps are already present. Distribution cannot be evaluated on a monolithic scale for all species.

PREDECISIONAL. NOT SUBJECT TO RELEASE UNDER FOIA.

April 6, 1994 • ROD • 42

The three vertebrates that do not fit within the category described above are all amphibians: (1) the Columbia torrent salamander; (2) the Coastal and Olympic Peninsula populations of the Van Dyke's salamander; and (3) the Shasta salamander (Final SEIS at 3&4-174). The first two of these exist almost exclusively on non-federal land. Our decision meets the objective of the fish and wildlife resource regulation with respect to these species because, of the amount and distribution of habitat adequate to support their continued persistence on all lands, the decision provides a portion that is roughly commensurate with, or greater than, the fraction of the species' range in the planning area.

The Shasta salamander is an extremely local endemic whose habitat sites are essentially fully protected by our decision. In the context of the natural bounds on the range of this salamander and in light of research showing that the presence of rare local endemic species generally is consistent with diverse ecosystems, we find that our decision complies with the resource regulation.

For all of the above reasons, we have determined that this decision, amplified in the Standards and Guidelines, fully meets our statutory and regulatory requirement regarding fish and wildlife resources.

b. Regional Guide and Forest Plan Amendments

Regional guide and forest plan amendments are used to keep the management direction up to date. The amendment process includes programmatic compliance with NEPA and other environmental laws. If a proposed amendment is a significant change in the regional guide/forest plan, an Environmental Impact Statement (EIS) must be prepared, as we have done with this decision. The Forest Service planning regulations include the same planning steps for approval of a "significant change" in a forest plan as for approval of the plan itself (except for roadless evaluations).

Congress did not address simultaneous multiple forest plan amendments in NFMA, nor did the 1979 planning regulations consider multiple amendments. In this decision the amendments are being made to existing forest plans in the range of the northern spotted owl. As we move into ecosystem approaches to environmental issues, especially plant and animal issues, it is likely that the multiple forest plan amendment approach will have to be used.

Commenters on the Draft SEIS stated that the "Draft SEIS violates the National Forest Management Act because amendments to existing plans are 'significant' amendments and the procedures of NFMA and the NEPA regulations, including seeking public input and participation, have not been completed." Final SEIS, Appendix F-111. As summarized in the Final SEIS response to the comment, the

administered by the Forest Service and BLM within the range of the northern spotted owl will be maintained as natural systems providing public health, safety, welfare, and other public interest values.

8. Clean Air Act

At the scale of a programmatic plan such as this, the overall level of activities proposed under this decision are not anticipated to degrade air quality or violate state implementation plans. This finding is based on information presented in the Final SEIS regarding the projected reduction in estimated aggregated annual emissions from activities under the preferred alternative compared to the 1985 to 1992 baseline. The large geographic scope and programmatic nature of the SEIS precluded quantification of impacts, a necessary component of conformity determinations under the Clean Air Act. Conformity determinations and more detailed air quality impact analyses will be made at subsequent levels of planning and analysis where emissions can be more accurately quantified and reasonably forecasted, and local impacts can be assessed.

9. Clean Water Act

Full implementation of the preferred alternative is expected to maintain and improve water quality. We base this finding on the extensive water quality protection provided by the preferred alternative's comprehensive watershed-based approach. The system of late-successional reserves and riparian reserves, watershed restoration, and the other components of the preferred alternative's aquatic conservation strategy provide a sound framework for meeting Clean Water Act requirements. The system of riparian reserves provide protection zones around streams, wetlands, and waterbodies minimizing the potential for sediment, temperature, and dissolved oxygen problems. The riparian reserves will contribute to protecting or restoring the physical, chemical, and biological integrity of waters of the United States, the major goal of the Clean Water Act. Analysis to support subsequent levels of planning and site-specific projects and implementation of monitoring and adaptive management will be required to demonstrate compliance with the Clean Water Act and state water quality standards.

10. Federal Advisory Committee Act (FACA)

NEW | On March 21, 1994, the U.S. District Court for the District of Columbia found in Northwest Forest Resource Council v. Espy that the process for developing the FEMAT report had not met the requirements of the Federal Advisory Committee Act (FACA). The Court found that FEMAT was an "advisory committee" and that FEMAT had not met FACA's standards for open meetings and balanced participation. We view any violation of law as a serious matter.

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April 5, 1994 • ROD • 47

NEW

The District Court decision presents us with a difficult decision. The FEMAT report played an important role in the development of the alternatives analyzed by us in the Draft SEIS and Final SEIS. Although the Court did not enjoin us from using or considering the FEMAT report, the Northwest Forest Resource Council has urged us not to adopt any alternative that was developed or analyzed by FEMAT. However, the Forest Service is under Court order to promulgate by April 14, 1994, management guidelines that cure the defects found in the NEPA process in Seattle Audubon Society v. Moseley.

The underlying purposes of FACA are to ensure open procedures, full opportunity for public comment, and public participation so as to avoid undue influence of special interests. We have met these goals through the NEPA process for this plan. We provided all interested parties, including NFERC parties, 90 days to comment on the Draft SEIS. We responded in the Final SEIS to all of the substantive comments we received and made appropriate changes to the plan. We also invited comments on the Final SEIS. NFERC parties provided comments during the public comment periods. We ensured that those who wanted to participate were given the opportunity to do so. We took their contributions seriously and reviewed them closely. They improved our plan.

We have carefully considered the implications of the NFERC decision. We have determined to proceed with this decision because we believe that we have met the spirit of FACA for the reasons set forth above.

By proceeding with this decision, we are not condoning any violation of law. We are requiring all of the implementation groups established by this decision to comply fully with FACA. One prominent feature of the implementation regime we contemplate for our decision is the thorough inclusion of many different communities and perspectives in long-term forest management in the region. We strongly believe that broadened participation will strengthen and improve forest management from an ecological, social and economic perspective. However, because of the imperatives of the Federal Advisory Committee Act, we have taken and will take the necessary steps to ensure that all outside participation in the forest management process will accord with the strictures of the Act.

IX. Implementation

A. Interagency Coordination

The implementation of this decision calls for a high level of coordination and cooperation among agencies. A formal procedure for interagency coordination has been created by a Memorandum of Understanding for Forest Ecosystem Management that has been entered into by the White House Office on

PREDECISIONAL. NOT SUBJECT TO RELEASE UNDER FOIA.

April 6, 1994 • ROD • 48



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530



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FROM:

Lois Schaffer

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(INCLUDING
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4

TO:

Will Stelle

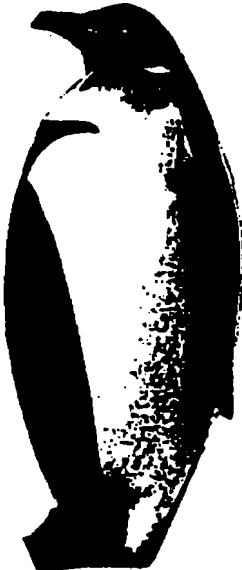
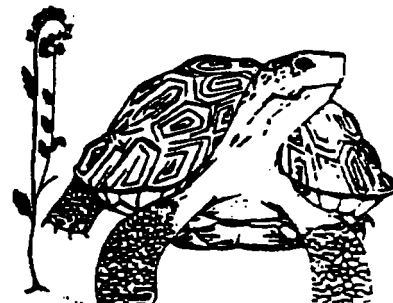
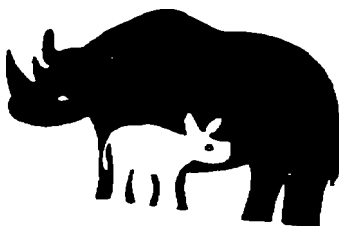
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MESSAGE:

Will - as we discussed Sunday
night. I'll talk to you Monday.
LoisPLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS
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WMC:SJodel1
90-1-43806

DRAFT

April 10, 1994

MEMORANDUM

TO: Katie McGinty and Will Stelle
Office of Environmental Policy

FROM: Lois Schiffer

RE: Viability section in Old-Growth Forest ROD

RELATED TO LITIGATION AND SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

This memorandum addresses the Department of Agriculture's April 8 memorandum setting forth Secretary Espy's interpretation and application of the National Forest Management Act ("NFMA") fish and wildlife resource regulation in the Record of Decision ("ROD") that will adopt management direction for federal old-growth forests in the Pacific Northwest. Upon review of that memorandum, and the language Secretary Espy states that he intends to include in the ROD as set forth in the attachment ("April 8 viability language"), we must inform you that the intended approach would pose severe risks to our ability to defend the President's federal old-growth forest strategy in court. As a result, we strongly counsel the Secretary to refrain from signing a ROD with the April 8 viability language. The reasons for our views are set forth below.

1. The intended approach represents a significant departure from previous policy statements. The April 8 viability language states that the viability provision establishes a "goal within the context of multiple use" and requires only that the Forest Service "not adopt a plan that it knows or believes would through its actions extirpate a vertebrate species." To our knowledge, this is the first time such an interpretation has been advanced by the Agriculture Department. Furthermore, it is inconsistent with and considerably weaker than previous high-level policy statements on the nature of the viability provision. In a 1985 administrative appeal decision, Deputy Assistant Secretary MacCleery stated that "[t]reatment of the fish and wildlife resource in the [NFMA] regulations is different than the other multiple uses, in that it is the only resource for which minimum production levels are specified by regulation, i.e., habitat necessary to support minimum viable populations must be provided regardless of impacts on other resources uses." The discussion of the viability provision in the 1988 and 1992 RODs revising

northern spotted owl management direction is consistent with this 1985 interpretation and, so far as we are aware, it has never been rejected. In addition, the Ninth Circuit previously has refused to accord any deference to a "belated" interpretation by the Forest Service of the viability provision in a prior round of northern spotted owl litigation. To avoid a similar result here, we strongly advise against making an abrupt, last-minute shift in interpreting the viability provision that appears to reflect a backing-away from conservation duties, especially in a case of this magnitude.

2. The intended approach is inconsistent with the overall positions the Ninth Circuit and Judge Dwyer have expressed concerning the viability provision, and has not been adopted in opinions of other courts. At no time has either the Ninth Circuit or Judge Dwyer referred to the viability provision as creating merely a "goal." Instead, both courts almost always have referenced the provision as a "requirement" or "conservation duty" to maintain viable populations of vertebrate species. Judge Dwyer has stated that NFMA regulations do not allow the Forest Service to adopt a conservation strategy for the northern spotted owl that it knows or believes would result in the extirpation of other vertebrate species, but the statements are dicta and inconsistent with other characterizations he has made of the viability provision. The reliance the April 8 viability language attempts to make on other district court opinions is in our view misplaced. None of these opinions directly address or purport to provide an interpretation of the viability provision.

3. The intended approach undermines our defense against the expected industry claim that the agencies failed to consider a reasonable range of alternatives as well as the policy position that Alternative 9 provides for the greatest amount of timber harvest possible while still satisfying NFMA conservation duties. To characterize the viability provision as simply barring extirpation leaves us vulnerable to the expected industry claim that the FSEIS failed to consider a reasonably broad range of alternatives as required by NEPA and NFMA. This follows because under such an interpretation it would be difficult to demonstrate that conservation duties arising from the viability provision constrained against consideration of alternatives with higher timber yield. For related reasons, the intended approach would make it difficult to support the policy positions reflected in the ROD that the reduction in projected timber harvest under Alternative 9 was mandated by satisfaction of NFMA conservation duties and that, of all the alternatives, it is the one that allows for the greatest amount of timber harvest while still being consistent with such duties.

4. The intended approach is inconsistent with the present record. The April 8 viability language is inconsistent with the record on which we will need to rely in litigating any challenges to the FSEIS and ROD. First, from the outset of this process, policy statements have couched viability in terms of providing

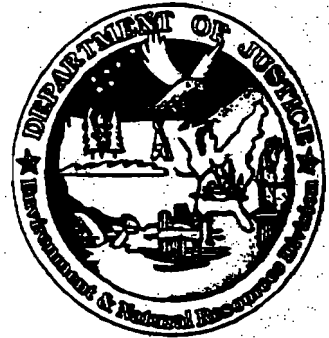
habitat to support well-distributed species populations. See, e.g., Statement of Mission from Executive Committee to Forest Conference Inter-agency Working Groups at iv. Second, the biological analysis proceeds upon the basis that viability reflects a likelihood that a species will continue to persist in a well-distributed population over time, FEMAT Report at II-99, and the viability assessment scale explicitly distinguishes between outcomes that represent such a condition (A and B) and one that is associated with extirpation (D). Id. at II-97.

5. The intended approach is inconsistent with the language and regulatory history of the viability provision. The interpretation of the viability provision presented in the April 8 viability language may well receive little or no deference upon judicial review because the NFMA fish and wildlife resource regulation contains no references to avoiding extirpation and the viability provision uses words like "shall," "insure," and "must," terms that generally are inconsistent with goal-setting language. Moreover, in deliberations by the Committee of Scientists on the viability provision, language calling for avoidance of species extirpation was explicitly considered in a draft version, and rejected, thus creating a strong implication that such is not the purpose of the provision. Minutes of Committee of Scientists (Sept. 21-23, 1977).

We are available to discuss the foregoing with you and others involved in the ROD process. Thank you for your consideration of our concerns.

**UNITED STATES
DEPARTMENT OF JUSTICE**

**ENVIRONMENT AND NATURAL
RESOURCES DIVISION
GENERAL LITIGATION SECTION**



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TO: James Pipkin

FAX#: (202) 219-1220

Will Stelle

(202) 456-2710

Tim Obst

(202) 690-2730

FROM: Peter D. Coppelman

DATE: April 6, 1994

NUMBER OF PAGES (including cover sheet): 3

COMMENTS: Please see attached re: current version of viability

section in ROD.



WMC:SJodel1
90-1-4-3806

U.S. Department of Justice

Washington, D.C. 20530

April 6, 1994

MEMORANDUM

To: Will Stelle
Associate Director
Office of Environmental Policy

James Pipkin
Counselor to the Secretary
Department of the Interior

Tim Obst
Attorney
Office of General Counsel

From: Peter Coppelman

Re: April 6 version of viability section in ROD

PREPARED BY COUNSEL PURSUANT TO LITIGATION & SUBJECT TO PRIVILEGE

We have just received the April 6 memorandum from Jim attaching a revised version of various sections of the Record of Decision, including the one that addresses compliance with the NFMA fish and wildlife resource regulation. You have asked to be alerted to "mistakes or serious problems." In that vein, we set forth our following concerns about the current draft:

1. It must be recognized that the current version does little more than rephrase the regulatory language. That is a definite improvement over the Agriculture version that would have reduced the requirement to a "goal." Nonetheless, we lose an important litigation advantage of having a standard set forth by the Secretaries in the ROD to which we can argue the Court owes deference. The result is a vacuum regarding what constitutes an "adequate" level of likelihood that the decision will provide habitat to support vertebrate species. Given the nature of the record, that this issue will arise in litigation is inevitable. The position we take as litigation counsel on the matter will not be entitled to deference.

2. Similarly, under the current version, the Secretaries' finding of compliance with the viability provision may be more difficult to defend in litigation than it would be under the March 30 draft. This follows because, under the current draft, the issue would be framed as whether the

- 2 -

Secretaries' finding that the decision provides for habitat to support vertebrate species is arbitrary or capricious and, under the March 30 draft, it would be framed as whether the Secretaries' finding that the decision provides for habitat that is substantially likely to support the continued persistence of vertebrate species is arbitrary or capricious. An extra layer of deference is thus peeled away.

3. Most important, the findings set forth to support the Secretaries' determination of compliance with the viability provision may not be consistent with, or supported by, the record. The current draft frames such findings in terms of stating that the decision "will" provide or allow for continued persistence of species. Statements such as these that evince certainty are not compatible with the record in this case and with much of the balance of the discussion of the viability provision in the ROD, which indicates that certainty simply is not possible to achieve in the context of the issues underlying the provision. We continue to be mystified by Agriculture's preference for certainty over probability. In this regard, the first two paragraphs on page 40 of the current draft may need to be substantially rewritten or deleted, absent other changes more in accord with the March 30 draft.

4. Although we prefer the current draft to the proposal sent out by USDA on April 5, we nevertheless have concerns with it, as expressed above. At the risk of stirring further what has proven to be a hornet's nest, we propose a slightly different compromise that would go a long way to avoid our major concern expressed in item 3, above, while at the same time steering clear of the concerns USDA has expressed. Our proposed compromise is to (1) re-insert references to "substantial likelihood" only in statements representing the Secretaries' findings on pages 41-43 (to make the section more consistent with the general discussion on viability in the ROD and the record) and (2) leave the first part of the section essentially the same, with the exception of replacing everything in the last sentence on page 39 after "regulation" with "for the reasons set forth below."

5. The second sentence of the first full paragraph on page 41 has been deleted. We strongly urge that it be re-inserted because of its importance in clarifying the kinds of findings upon which the Secretaries need to rely to support their determination of compliance with the viability provision (however it is finally formulated) in this decision and upon which decision-makers will need to rely in future planning efforts.

Please let us know if you would like further assistance or the views of the Department on other options concerning this matter.

fax

To: Tpm Tuchmann

503-326-7630
+ 7612

Will Stelle - 456-2710

RUSH Delivery!

Thanks M6 Thomas

DOI - ~~45~~ 208-4423
fx 208-5584



United States Department of the Interior

OFFICE OF THE SOLICITOR

APR 14 1994

Memorandum

To: Assistant Secretary, Natural Resources and Environment
Department of Agriculture

Assistant Secretary, Land and Minerals Management
Department of the Interior

From: General Counsel, Department of Agriculture *Bo Zuber*
Solicitor, Department of the Interior *Acting General Counsel*

Subject: Implementation of the President's Forest Plan and the
Federal Advisory Committee Act

In this memorandum, we consider the implications of the Federal Advisory Committee Act (FACA) on implementing the President's Forest Plan. We have concluded that whether FACA compliance will be required will depend on how the various groups are configured and function. For the most part the information describing the groups was obtained from the "Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl" (the "FSEIS").

This memorandum advises that some of the groups contemplated by the President's Forest Plan must be chartered under FACA if they are to function as set out in the FSEIS and related documents. We are not recommending that the groups discussed in this memorandum function in any particular way. We are indicating, however, that if they are to function as set forth in the FSEIS, they must be chartered under FACA. We are providing minimal operational advice and recommend, if the decision is made to charter any of the groups, that the federal employees responsible for managing the groups contact either Robert H. Moll in the Division of General Law, Office of the Solicitor, Department of the Interior ((202) 208-5216) or James P. Perry, Natural Resources Division, Office of the General Counsel, Department of Agriculture ((202) 720-7121) for more detailed operational advice.

In considering whether to carry out the President's Forest Plan in a way that will require chartering under FACA, it is important to consider the underlying reasons why FACA was passed. As noted by the Supreme Court, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 453 (1989). In enacting FACA Congress defined the term "advisory committee" very broadly, to include "any committee, board, commission, council, conference,

panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established by statute or reorganization plan, or established or utilized by the President, or established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." (emphasis supplied). 5 U.S.C. § 3(2).

When a group is chartered under the FACA, a charter and justification statement must be prepared, approved by the Office of Management and Budget (pursuant to Executive Order 12838) and the General Services Administration (GSA), and filed with the Library of Congress. FACA requires that the advisory committee's membership be balanced in terms of the points of view represented and the functions to be performed by the committee. After a committee properly is chartered and its membership appointed, its operations must include the following: providing notice of its meetings in the Federal Register; holding open meetings (except in fairly limited circumstances); establishing an agenda for each meeting; taking minutes for each meeting; providing for public access, subject to the Freedom of Information Act, to all information considered by the committee; and, upon request, making transcripts of meetings available. The level of participation in the meetings by non-members can be shaped by the committee. A committee can provide that no public participation in the meetings by non-members occur although it is advisable to provide for at least some opportunity for public participation in a meeting such as by providing an opportunity for public comment in the final part of the meeting.

Under GSA guidelines and case law, advisory committees may have working groups or task forces convened for the purpose of gathering information or conducting research for the advisory committee. These groups, which are composed of one or more members of the advisory committee and may have as participants non-advisory committee members, need not be chartered separately, and need not meet in public so long as the product of their efforts is deliberated in a public meeting of the advisory committee. These groups may not advise federal officials directly; their work must be channeled through, and deliberated by, the advisory committee.

EXECUTIVE SUMMARY

This memorandum discusses ten groups anticipated by the President's Forest Plan.

We understand that the FSEIS and the Interagency Steering Committee (ISC) anticipate that the following groups will have non-federal members: Regional Interagency Executive Committee (RIEC); Provincial Interagency Executive Committees (PIEC); and Regional Community Economic Revitalization Team (R-CERT). Accordingly, these groups must be chartered pursuant to FACA.

We understand that the following groups will have non-federal members, but could be structured as task forces or working groups

of one of the chartered groups, and thus would not need independent charters: Adaptive Management Area Teams (AMAT); Watershed Analysis Groups; Late Successional Reserve Assessment Teams; and State Community Economic Revitalization Team (State CERT).

We understand that the ISC intends that the following groups will be staffed by federal employees only and thus will not need to be chartered: Regional Ecosystem Office (REO); the Research and Monitoring Committee (RMC); and the Multi-Agency Command (MAC).

We are aware that the Department of Agriculture has a limitation in its FY 1994 appropriations limiting the amount of appropriated funds that it can spend on its advisory committees. The Forest Service, however, would not be subject to this limitation because its funding is provided by the Interior and Related Agencies Appropriation Act. Other USDA activities by the Office of General Counsel and the Office of the Assistant Secretary for Natural Resources and the Environment would be subject to the restrictions. Consequently, the Department of Agriculture may be unable to contribute its full proportionate share of the costs of supporting the advisory committees and task forces during this fiscal year unless additional appropriation authority is provided by Congress.

DISCUSSION

Regional Interagency Executive Committee (RIEC)

This group "consists" of the Pacific Northwest federal agency heads of the Forest Service, the Bureau of Land Management, the U. S. Fish and Wildlife Service, the National Marine Fisheries Service, the Bureau of Indian Affairs, and the Environmental Protection Agency (EPA). "Participants" in the committee include the National Park Service, the States of Oregon, Washington, and California, and three tribal organizations. This committee must assure the successful implementation of the selected alternative from the FSEIS, and its "policy and planning decisions and recommendations will be made collaboratively". The RIEC will provide direction to the Regional Ecosystem Office, province teams [PIECs], and the Research and Monitoring Committee, and work with the Regional Community Economic Revitalization Team (R-CERT) to develop criteria and priorities for ecosystem investment opportunities. FSEIS p. 2-13.

RECOMMENDATION

As we understand how the FSEIS and the Interagency Steering Committee (ISC) intend the RIEC to operate, federal officials will meet with representatives of states and tribes to develop consensus recommendations for federal agency decision makers on managing the federal lands. Accordingly, this committee must comply with the provisions of FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must

be made by the particular federal official with the delegated authority to make the decision.

Until the RIEC is organized under FACA all of its members must be federal employees. Meanwhile, as one means of informing themselves, the federal members of the RIEC may accept information from those non-federal individuals or entities intended eventually to become members of the chartered advisory committee through several means including written comments and in meetings with more than one individual for the purpose of exchanging facts or information or for obtaining the advice of individual attendees and not for the purpose of using the group to obtain consensus advice or recommendations. The federal officials also may meet with members of the public who are not intended by the FSEIS to be members of the RIEC in much the same manner as described for those that are intended to become members, as well as in public hearings. Finally, the federal officials also may meet with a group, at the group's request for the purpose of expressing the group's view, provided that the group is not used by the federal officials recurrently as a preferred source of advice or recommendations.

If the ISC decides to organize the RIEC under FACA, once it is chartered and its members appointed, the RIEC may operate as contemplated by the FSEIS.

Regional Ecosystem Office (REO)

This office provides staff support to facilitate RIEC decision making and prompt issue resolution in support of implementing the alternative selected from the FSEIS. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.

Research and Monitoring Committee (RMC)

This committee, consisting of research scientists and managers from a variety of disciplines, will provide recommendations to the RIEC on the implementation of the selected alternative. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal persons to obtain

consensus advice.

Provincial Interagency Executive Committees (PIEC)

These teams will consist of representatives of federal agencies, states, American Indian tribes, and "others", and will: "provide or coordinate analyses at the province level that can provide the basis for amendments to Forest and District Plans"; "provide monitoring reports for provinces"; and "encourage and facilitate information exchange and complimentary ecosystem management among federal and non-federal land managers". FSEIS p. 2-14.

RECOMMENDATION

As we understand how the FSEIS and the ISC intend the PIECs to operate, a group of federal, state, and local government officials, and members of the public will develop consensus advice and recommendations for federal agency decision makers on managing the federal lands. Accordingly, these committees must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

Our recommendations and advice for the RIEC apply to the PIECs as well.

Adaptive Management Area Teams (AMAT)

The FSEIS designates ten adaptive management areas, and the REO has proposed that each area have a team to implement the FSEIS alternative chosen. These experimental areas will provide opportunities for land managing and regulatory agencies, other government entities, non-governmental organizations, local groups, landowners, communities and individuals to work together to develop innovative management approaches. Participation needs and opportunities will vary from one issue to the next. FSEIS. p. 2-62.

RECOMMENDATION

We understand that the FSEIS and the ISC intend that the membership of these teams will include federal employees and non-federal individuals representing local governments, land owners, environmental organizations, and other members of the public. It also is intended that these groups will develop consensus advice and recommendations on federal land management issues, and provide that advice and recommendations to the federal land managers. Accordingly, these groups must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making

recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

All members of these groups must be federal employees until the groups are organized pursuant to FACA. As an alternative to chartering these groups, if either the RIEC or PIECs are chartered pursuant to FACA, the AMATs could be organized as working groups or task forces that provide information and recommendations to the chartered group(s) and not directly to the federal decision makers. Under such a scenario, the chartered group must independently analyze and consider the information and recommendations from the task force, and not merely "rubber stamp" or pass them forward to the decision makers without review. Under this arrangement the operations of the AMATs will have to be monitored very closely to assure that the product of the AMATs is fully considered and debated by the PIECs or RIECs and that it is these latter groups that actually advise federal decision makers. Meanwhile, until there is compliance with FACA at some level, any advice, recommendations, etc., should be accepted from non-federal individuals or entities only in the manner described in the foregoing discussion of the RIEC.

Watershed Analysis Groups/Late Successional Reserve Assessment Teams

A watershed analysis will focus on collecting and compiling the information within a watershed that is essential for making sound management decisions. Any actions proposed as a result of the process will require NEPA documentation. The information from the watershed analyses will contribute to decision making at all levels. FSEIS p. 2-16. We understand that the Late Successional Reserve Assessments will use a process similar to the Watershed Analysis Groups. We also understand that non-federal individuals and entities will be involved in both processes.

RECOMMENDATION

As we understand the FSEIS and the intent of the ISC, these teams will be organized similar to the AMATS. Our recommendations and advice for the AMATS apply to these groups as well.

Multi-Agency Command (MAC)

Members of this committee include individuals designated by the Secretaries and Administrators who executed the Interagency Memorandum of Understanding for Economic Adjustment and Community Service (the parties). The committee is composed of one or more federal employees from the Office of Management and Budget, Small Business Administration, EPA, the Departments of Agriculture, Interior, Commerce, Labor, Housing and Urban Development, and the White House. The MAC,

under the guidance of the parties, has oversight and policy making authority and responsibilities, consistent with the authority delegated by each party.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.

Regional Community Economic Revitalization Team (R-CERT)

The parties each designated one or more representatives to participate in the R-CERT. Other members include two representatives each from Oregon, Washington, and California. The Secretary of Agriculture and the Secretary of the Interior designate two of the federal representatives to serve as co-chairs. The R-CERT, under the guidance of the MAC and the parties, has decision making authority, consistent with federal law and the Strategic Plan. Matters unsettled or disputed within R-CERT are forwarded to the MAC for resolution.

RECOMMENDATION

We understand that this group is intended to function similar to the RIEC. Our advice and recommendations for the RIEC, therefore, are applicable to this group.

State Community Economic Revitalization Team (State CERT)

The parties and the governors of Oregon, Washington, and California have established State CERTS. Each State CERT includes representatives of each federal agency with program responsibility, representatives of the state government appointed by the governor, and representatives of local governments appointed by the governor with the approval of local government organizations. The chair of each State CERT was selected by its non-federal members. The State CERTS have authority to implement daily the Strategic and Implementation Plans, consistent with federal and state law. Matters unsettled or disputed within a State CERT are forwarded to the R-CERT for resolution.

RECOMMENDATION

If the federal government is obtaining advice from the State CERTS, all members of these groups must be federal employees until the groups are organized pursuant to FACA; except that if the R-CERT is chartered pursuant to FACA, the State CERTS could be organized as working groups or task forces that provide information and recommendations to the chartered group. In such an instance, our advice in the discussion of the AMATS regarding this scenario would apply to these groups.

**U.S. Department of Agriculture
Office of the Assistant Secretary
Natural Resources and Environment
(202) 720-7173 - Phone
(202) 720-4732 - Fax**

DATE: _____

TO:

Jim Pipkin

PHONE NUMBER: _____

FAX NUMBER:

219-1220

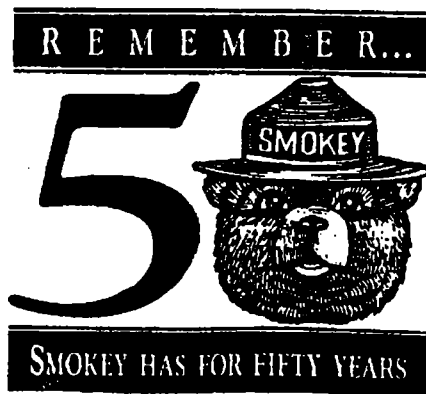
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Jim Lyons

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April 8, 1994

MEMORANDUM FOR JIM PIPER

FROM: James R. Lyons
Assistant Secretary for Natural Resources and Environment

SUBJECT: Changes to the 4/6/94 ROD

As a preliminary editorial matter, I would recommend that a copy of the ROD be printed off showing the most recent insertions and deletions using strike-through or shaded fonts. It would make it much more efficient for review purposes.

1. In several places (p. 8, 34 and others) the RIEC or REC has been given authority to approve or otherwise make decisions pursuant to NFMA. We question whether this may create unanticipated legal problems. Further, the MOW did not seem to contemplate such authority as it did not change line authorities. If the RIEC did approve projects, would its decisions be appealable under the IS appeals process? Even project review by RIEC raises questions of invasion of delegated decision authority, and possible elevation of administrative appeal review to the Assistant Secretary. Decisionmaking authority continues to be placed in the ROD despite comments from USDA to the contrary. I will recommend that the RIEC have parallel decisionmaking authority for implementing ESA as NFMA, as both have similar statutory delegations.

Similarly, the ROD attempts to direct future NFMA decisions, such as directing that the Standards and Guidelines be adopted in future plans (page 10 and 11). Such references should be phrased as "it is expected that", as was used in discussing future ESA decisions. I suggest that the ROD use similar language to direct future ESA and NFMA decisions.

2. On page 35, second bullet, a standard and guideline has been changed to apply only to mollusks and a vascular plant. The ISC decision was to apply the standard and guideline only to the vascular plant and known and newly discovered sites of certain mollusks (see p. C-6 of Attachment A).
3. On page 35, last sentence, I suggest we delete "as reflected by Assessment Team ratings" to reduce our reliance on the species panels and reflect the use of other analysis.
4. On page 7, the "Riparian Reserve" paragraph needs to reflect the fact that the reserve boundaries are expected to be changed after watershed analysis. The last sentence of the "Matrix" paragraph

should substitute "may be" for "are technically" to reflect the fact that other than technical considerations are used in the designation of land unsuitable for timber production.

5. On page 8, the "Late-Successional Reserves" paragraph, fourth sentence, should delete "or other silvicultural treatments" as the standard only applies to thinning and not salvage, which is also a silvicultural treatment.
6. On page 10, first sentence - what is the meaning of "high water quality"? Is the "high" necessary, or will it be misinterpreted as a new standard?
7. On page 10, "Matrix" paragraph, third paragraph - the sentence should state that the owl activity centers must be "initially" protected, as they may be changed later.
8. On page 10, "Survey and Manage" paragraph - I find the paragraph confusing as to what is required and suggest that the second sentence begin "These may include" so as to not to be read to require more than what is intended.
9. On page 12, paragraph "3. Application to Timber Sales", I suggest that the last sentence in the paragraph be deleted ("In addition ..."), and that "and all other applicable laws" be added to the prior sentence.
10. On page 14, first paragraph - a sentence should be added that the section 318 sales have been reviewed for their affect on aquatic ecosystems.
11. On page 14, second paragraph, I insist that the ISC decision to not affect existing ski area plans be effectuated. A sentence should be added at the end of the paragraph: "The Standards and Guidelines will not be applied in a manner that restricts NEPA reviewed plans for existing ski areas."
12. On page 15, first full paragraph, third sentence should read "The Fish and Wildlife Service is preparing a separate EIS specifically to analyze the impacts of any revised 4(d) rule protection measure"
13. On page 28, second paragraph, last sentence, should specify that "78 percent" includes lands designated by Congress.
14. On page 36, second paragraph, first sentence - delete the reference to "assured funding".

April 8, 1994

MEMORANDUM FOR JIM PIPKIN

FROM: James R. Lyons
Assistant Secretary for Natural Resources and Environment

SUBJECT: Changes to the 4/6/94 ROD

As a preliminary editorial matter, I would recommend that a copy of the ROD be printed off showing the most recent insertions and deletions using strike-through or shaded fonts. It would make it much more efficient for review purposes.

1. In several places (p. 8, 34 and others) the RIEC or REO has been given authority to approve or otherwise make decisions pursuant to NFMA. We question whether this may create unanticipated legal problems. Further, the MOU did not seem to contemplate such authority as it did not change line authorities. If the RIEC did approve projects, would its decisions would be appealable under the FS appeals process? Even project review by RIEC raises questions of invasion of delegated decision authority, and possible elevation of administrative appeal review to the Assistant Secretary. Decisionmaking authority continues to be placed in the ROD despite comments from USDA to the contrary. I will recommend that the RIEC have parallel decisionmaking authority for implementing ESA as NFMA, as both have similar statutory delegations.

"Report 2"
vs
"term"

Similarly, the ROD attempts to direct future NFMA decisions, such as directing that the Standards and Guidelines be adopted in future plans (page 10 and 11). Such references should be phrased as "it is expected that", as was used in discussing future ESA decisions. I suggest that the ROD use similar language to direct future ESA and NFMA decisions.

2. On page 35, second bullet, a standard and guideline has been changed to apply only to mollusks and a vascular plant. The ISC decision was to apply the standard and guideline only to the vascular plant and known and newly discovered sites of certain mollusks (see p. C-6 of Attachment A).
3. On page 35, last sentence, I suggest we delete "as reflected by Assessment Team ratings" to reduce our reliance on the species panels and reflect the use of other analysis.

4. On page 7, the "Riparian Reserve" paragraph needs to reflect the fact that the reserve boundaries are expected to be changed after watershed analysis. The last sentence of the "Matrix" paragraph should substitute "may be" for "are technically" to reflect the fact that other than technical considerations are used in the designation of land unsuitable for timber production.
5. On page 8, the "Late-Successional Reserves" paragraph, fourth sentence, should delete "or other silvicultural treatments" as the standard only applies to thinning and not salvage, which is also a silvicultural treatment.
6. On page 10, first sentence - what is the meaning of "high water quality"? Is the "high" necessary, or will it be misinterpreted as a new standard?
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13. On page 28, second paragraph, last sentence, should specify that "78 percent" includes lands designated by Congress.
14. On page 36, second paragraph, first sentence - delete the reference to "assured funding".

Compliance
w/ requirements
2 of 2

ADD:
Compliance

W

ADD

on
annual

+
initial

W&H

As we get into discussions on the ROD, I wonder if it is possible / practical / desirable to identify those elements that have to be in the ROD to document the decision and identify why it is the decision, and separate those elements from remaining issues on which people are still trying to get "their" view reflected in the ROD because that view is not in the "plan".

In the former category would be such items as the decision & its basis; viability; O+C lands, both in terms of application of viability from NFMA and in terms of reserve status for O+C lands; next steps re: implementation; responses to public comment; monitoring; assumptions re: the condition of non-Federal lands in order to achieve the goals on Federal lands; etc.

In the latter category would be the remaining issues of inviolate reserves (no salvage units); changes in the Plan for an interim period in order to achieve certain goals; ways to short-cut^{the} riparian buffer width review process; etc.

It may be helpful to start with agreement of what has to be in the ROD versus what some may want to be in the plan, and then try to agree on a list of issues in each category before we try to resolve the exact language for each issue raised in the plan.

TK.

Will

A suggestion re: Review + approval process
for the ROD.

Don

Don - A meeting at the US/ Bawian, Binekue + USDA resolved
to develop an outline of the ROD + key issues for purposes
of Thursday / Friday meetings of the Directors + the
ISC -

You should call Bob or Betty and get into the "loop".

Your suggestions here are good. Please return -

WS

Jim Ripkin-

~~Will-~~ Here is a brief paper one sticky note to be highlighted probably needs to be surfaced and addressed during the discussion on the ROD re: implementation. Give me a call if you want to discuss further - Don Barry

Here are some thoughts on implementation issues. It is a draft and, in addition to being incomplete, is redundant in places. But what else is new?

Any reaction? You could say that this will really piss off BLM + FS, so

you may want to talk to me first, to see how far I should push this point of view.

Thx -
Don Knudsen
2/28

CC George Frantz
Don Barry

Bob-
would you
take a quick
read through this
& can we
discuss after this
briefing?
Thy
OK

Implementation of the President's Forest Plan

I. Background:

The President's Forest Plan represents not only an effort to resolve the political gridlock gripping the region for the past several years, but is also a bold new approach to Federal multi-agency cooperation and coordination. The formal elements of the Plan are essentially a land allocation system (including late successional and riparian reserves, 10 adaptive management areas, and the matrix), and a set of standard and guidelines for management activities within each land allocation.

Over time, the Plan is expected to change in a number of ways. The riparian reserves, for example, feature interim streamside buffer widths (100 feet to 300 feet), pending watershed analysis. Also, the land allocations are to be incorporated into BLM and FS land and resource management plans and revised on a periodic (about every decade) basis. Boundaries may be revised during the decade, based on recommendations of the agencies and review by the Regional Ecosystem Office (REO). Further, the standards and guidelines are also to be responsive to research and monitoring programs and can be expected to change over time, again with review and approval of the REO.

There are essentially three types of implementation questions to be addressed by the monitoring program:

- (1) Is the Plan being implemented as prepared? This involves agency application of standards and guides; agency compliance with watershed analysis procedures, etc.
- (2) If implementation is consistent with the Plan, are the expected results occurring? For example, are the streamside buffers improving the aquatic ecosystem as anticipated?
- (3) If the Plan is producing the expected results, is the overall ecosystem of the region responding as anticipated?

These implementation issues are new and different from those previously encountered only in the sense that the Plan's elements and requirements cross agency boundaries. Bureau of Land Management and FS lands are to be managed to the same standard in the Plan in an effort to produce a certain ecosystem response.

The action agencies (BLM & ~~FWS~~^{FS}), along with the primary ESA consultation agency (the FWS), ~~are expected~~^{will} to adopt the new allocations, standard and guidelines, and procedural aspects of the plan. These agencies are the only organizational units authorized to actually implement the plan and produce outputs on the ground.

II. Implementation issues:

As the Memorandum of Understanding establishing the implementation scenario points out, the preparers of the Plan recognized that the "plan transcends traditional administrative boundaries", and that "bold changes are recognized". The agencies need to "improve their ability to adapt to change, such as new scientific understanding, in a cohesive manner" and to "improve the sharing of information and the pooling of agencies technology and expertise...."

A Regional Interagency Executive Committee (RIEC) was established to "develop, monitor and oversee the implementation" of the Plan. In effect, this formalized the notion that the regional leaders of the key agencies (BLM, FS, & FWS) need to be held responsible for the Plan's successful adoption.

There was a general recognition that the RIEC would need a dedicated staff to support its decision making process. Reliance on staff from each individual agency by the regional agency director would not produce the integrated, unified staff view required for the RIEC to be successful.

Therefore, a Regional Ecosystem Office (REO) was established. The REO was to provide a number of services and to play a number of roles, including the following three different types of actions:

- provide centralized, common support services (eg, GIS);

- provide scientific and technical advice regarding the consistency of implementation efforts with the designed elements of the plan (eg, a continuation of the SAG role;

- and an independent, credible voice on a number of issues around which "trust" concerns had arisen in prior years (eg, approving major changes in the plan based on the adaptive management process, involving both research and monitoring).

Even though the REO reports to the RIEC, the successful implementation of the plan requires the REO to be an independent, credible, arms-length reviewer of proposals to modify the plan. Neither the State Director, BLM nor the Regional Forester, USFS can be held accountable for deciding by themselves that riparian boundaries can be reduced or expanded, nor can they be responsible for recommending that elements of the Plan be modified based on the status of threatened and endangered species.

The developers of the Plan could have provided the regional agency leaders with such authority, but they chose not to do so.

III. Recommendations:

Current agency direction needs to be reviewed to determine whether the REO will have sufficient independence to successfully execute its role under the Plan. This review will assess the current implementation direction to determine its consistency with the original vision incorporated in the Plan. For example, the REO reports to the RIEC but is to play an independent role in some actions. Current plans call for the Executive Director to be a GS-15, in contrast to the SES status of the Regional Director, FWS; the State Director, BLM; and the Regional Forester, FS. While this may appear to be a minor point, it seems more likely that an equally graded Federal employee will be ^{more} able to effectively maintain his/her independence on issues such as major changes to the plan than if the Executive Director of the REO were to be established at a lesser grade.

Further, current plans appear to be for the regional agency leaders to select and detail staff to the REO, rather than to allow the Executive Director of the REO to recruit and select the best and brightest staff from the agencies to work in the REO. The Executive Director of the REO also needs to have personnel evaluation authority of the REO staff and not have the regional agency leaders retain that control over the REO detailees.

The REO - An Argument for a few critical elements

II. A key function of the REO is for independent oversight of agency implementation of the President's Forest Plan. The issue of trust pervades any discussion of the adequacy of the Plan. Many viability panelists and interest groups (on both sides) suspect that the Plan will not be implemented as prepared. The REO has been envisioned as THE independent implementation authority. It has been endowed with the sole authority to review and approve changes to elements of the plan, based upon the results of the research, monitoring, and adaptive management program.

In order to accomplish this mission, in my view the Executive Director must:

(1) Be an SES-level director, equivalent to the FS Regional Forester, the BLM State Director, and the Regional FWS Director. The ED & the REO will be evaluating agency programs, and the ED needs SES status.

(2) Have hiring authority to recruit select staff, and the authority to evaluate the performance of the REO staff, in lieu of having the regional agency directors "assign" staff to the REO to represent their agency.

(3) Have an independently developed budget, available for a work program developed by the REO & agreed to by the RIEC.

The REO is not responsible for actually implementing the President's Forest Plan. The Agencies must do this. However, the REO can play a valuable role integrating and evaluating FS, BLM, FWS, EPA, NMFS, & BIA views and proposals. As staff to the RIEC, the REO can help review and integrate independent agency plans and proposals. Again, independence and competence are key to the REO playing a successful role in Plan implementation.

There also appears to be some overlap between the REO and the Research & Monitoring Committee, in terms of determining who has the responsibility for designing the appropriate monitoring, research, and adaptive management process.

This overlap may account for the current lack of a detailed research, monitoring, and adaptive management plan. Agency organizational elements (eg, the FS Pacific Northwest Research Lab ^{and} ~~of~~ the BLM research coop unit at Oregon State) control their own budgets. However, the implementation scenario for the Plan envisions a focused, united plan, with consistent standards crossing agency lines. Despite the spotted owl having being listed for 3 years, there still exists no detailed, integrated, focused research and monitoring plan for owl on the Federal lands, much less one which incorporates ~~Non~~-Federal lands.

There is still no detailed implementation scenario for the Plan, despite the 9 months in which the IIT was supposed to develop such a plan. This seems proof positive to me that unless the REO is strengthened and asked to push the development of integrated research plans, and implementation plans, it is likely that 6 months from now, we still won't have a detailed road map to success. The RIEC hasn't done it to date. Shouldn't the REO play a lead role at the staff level?

MEMORANDUM OF UNDERSTANDING
FOR FOREST ECOSYSTEM MANAGEMENT

I. PARTIES

This is an understanding among five parties:

The Director of the White House Office on Environmental Policy
The Secretary of the Interior
The Secretary of Agriculture
The Administrator of the Environmental Protection Agency
The Under Secretary of Commerce for Oceans and Atmosphere

II. BACKGROUND

The President has proposed a comprehensive plan to alleviate the impasse over management of federal forest lands in the Pacific Northwest within the range of the northern spotted owl. The plan fulfills the President's request for "a balanced and comprehensive strategy for the conservation and management of forest ecosystems, while maximizing economic and social benefits from the forests." By taking an innovative approach based on ecosystem and watershed management, the plan transcends traditional administrative boundaries. Successful implementation will require unprecedented interagency cooperation, coordination, and collaboration, both in the long-term and in the short-term.

The report of the Agency Coordination team established by the President following the April 2, 1993 Forest Conference presents a mechanism to achieve better coordination and cooperation among the federal agencies that are involved in forest management issues. It concluded that "bold changes are required" in how agencies relate to one another and to the states, tribes, private landowners, and communities and people in the region.

III. PURPOSE

The purpose of this Memorandum of Understanding is to establish a framework for cooperative planning, improved decision making, and coordinated implementation of the forest ecosystem management component of the President's *Forest Plan for a Sustainable Economy and a Sustainable Environment* which is designed to resolve northwest forest issues within the range of the northern spotted owl.

Signatories to this Memorandum of Understanding agree to:

- develop a cohesive vision and shared sense of mission for the management of federal forest lands which balances multiple objectives;
- improve their ability to adapt to change, such as new scientific understanding or changing societal values, in a cohesive manner;
- cultivate greater trust, coordination, and cooperation among federal agencies, within individual agencies, and between federal agencies and non-federal interests;
- address inconsistencies among statutory mandates;
- improve integrated application of agency budgets to maximize efficient use of funds for overlapping or related efforts;
- improve the sharing of information and the pooling of agencies' technology and expertise;
- coordinate ecosystem management activities in concert with federal, state and local programs for economic, labor, and community assistance.

IV. STRUCTURE

The following interagency groups are established to develop, monitor, and oversee the implementation of the comprehensive forest management strategy for federal forests within the range of the northern spotted owl. They will support the development and implementation of land and resource management plans. This agreement does not substitute for or alter the line authority of individual agencies.

- A. Interagency Steering Committee: The Interagency Steering Committee will establish overall policies governing the prompt, coordinated and effective implementation of the President's forest management plan by all relevant federal agencies and address and resolve issues referred to it by the Regional Executive Committee, described below. The Committee will be located in Washington, D.C. The signatories will appoint representatives to this Committee which will be chaired by the Director of the White House Office on Environmental Policy or her/his designee. A White House appointed representative of the ISC will serve as interagency coordinator to provide general oversight and guidance of regional activities.

C-15

B. Regional Interagency Executive Committee (RIEC): This group will consist of regional representatives of the agencies signatory to this M.O.U. The chairmanship of the RIEC will alternate between the Regional Forester and State Director of the Bureau of Land Management. In appropriate situations this core group will consult with other federal and state agencies and tribes. The Regional Interagency Executive Committee will serve as the senior regional entity to assure the prompt, coordinated and successful implementation of the President's forest management plan at the regional level. It will serve as the principal conduit for communications between the Interagency Steering Committee and the region. It will be responsible for implementing the directives of the Interagency Steering Committee, reporting regularly on implementation progress, and referring issues relating to the policies or procedures for implementing the plan to the Interagency Steering Committee.

The RIEC will appoint an interim interagency implementation team to oversee and initiate actions during the interim period moving toward to full implementation of the new forest management strategy.

The Regional Interagency Executive Committee will work together with the Multi-Agency Command group (MAC) of the Northwest Economic Adjustment Initiative to develop criteria and priorities for restoration projects or other ecosystem investment opportunities.

The Regional Interagency Executive Committee will be accountable to the Interagency Steering Committee for establishment and oversight of the Regional Ecosystem Office, Research and Monitoring Committee and Provincial Teams. The Regional Interagency Executive Committee will also make recommendations for minimizing planning redundancies.

1. Regional Ecosystem Office: This office will provide a focal point for scientific and technical expertise in support of implementation of the forest management plan. It will also be responsible for evaluation of major modifications arising from the adaptive management process and will coordinate the formulation and implementation of data standards. This office will report to the Regional Interagency Executive Committee and will be responsible for development, evaluation, and resolution of consistency and implementation issues with respect to specific topics including, but not limited to, the following:

- Geographic Information Systems
- Prototype watershed analyses
- Restoration and reforestation guidelines
- Support of agency efforts to meet obligations of Endangered Species Act (e.g. Section 7 consultations, preparation of recovery plans)

- Adaptive management guidelines
- Monitoring
- Research
- Refining definition of reserve boundaries

Agencies will detail staff to the Regional Ecosystem Office as appropriate.

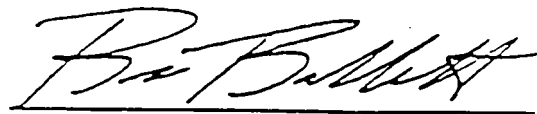
2. Research and Monitoring Committee: This committee, composed of research scientists and managers from a variety of disciplines will provide advice to the Regional Interagency Executive Committee on implementation of the forest plan including adaptive management areas and watershed assessments. The Research and Monitoring Committee will review and evaluate ongoing research, develop a research plan to address critical natural resource commodity and non-commodity questions, and address biological, social, economic, and adaptive management research questions. It will also develop scientifically credible, cost-efficient monitoring plans. The Research and Monitoring Committee will report to the Regional Interagency Executive Committee.
3. Provincial Teams: These teams will consist of representatives of federal agencies, states, tribes, and others. The Interagency Steering Committee and the Regional Interagency Executive Committee will determine the appropriate role for these teams at the level of physiographic provinces, adaptive management areas or particular watersheds.

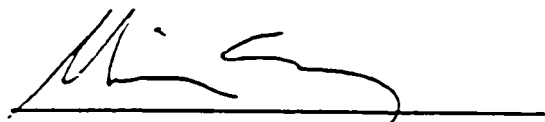
V. TERMS

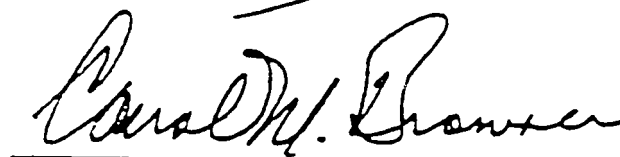
The term of this agreement is five years from the date of execution, after which time the parties may extend the agreement.

AGREED:


Director, White House Office on Environmental Policy


Secretary of the Interior


Secretary of Agriculture


Administrator, Environmental Protection Agency


Under Secretary of Commerce for Oceans and Atmosphere

MAJOR ROD ISSUES TO BE ADDRESSED
BY INTERAGENCY STEERING COMMITTEE

- I. Nature of Decision: The FSEIS states the ROD is not a permanent planning level, but rather amends Forest and District Plans. However, an argument can be made that not all the requirements of FS and BLM planning regulations have been completed.
 - A. What position will the ROD take on these procedures that have not been complied with?
 - B. How do AMA plans, watershed assessments, LSR plans and province plans fit into the current regulations?
 - C. How should the ROD characterize and what NEPA and other legal procedures apply to the various plans/analyses required in the preferred alternative?
 - D. Will the ROD include the current attachment of land allocations, standards and guidelines?
 - E. Should the government promulgate the watershed assessment handbook, AMA plans, province plans, LSR plans, etc.) through notice and comment procedures?
- II. What is the Administration's legal policy basis for the decision?:
 - A. At least two alternative approaches to interpreting the Forest Service viability regulation have been proposed: (1) use a standard of avoiding listing under ESA; and (2) use a substantive standard of a minimum likelihood of persistence. The ROD needs to select an interpretation.
 - B. How does the ROD justify applying the viability standard to O & C lands?
- III. Short Term Timber Supply: The FSEIS preferred alternative contains direction that would substantially constrict timber supply in the first several years. In addition, timber sales usually require several years to prepare and few sales are currently in the pipeline.
 - A. Can interim direction be added to the ROD to speed up timber sales?
 - B. Should areas that are effectively off-limits in the short to medium term be excluded from the timber base during that time to avoid overcutting in available areas (i.e. key watersheds, full-SAT mitigation)?
 - C. Should the ROD modify the 15% old-growth requirement for 5th field watersheds (considering both federal and non-federal lands)?
 - D. Should the ROD present an implementation schedule for the next five years, including timber volumes, completing watershed assessments, province plans, etc?
- IV. Watershed Analysis: The watershed analysis process in the FSEIS requires extensive analysis and leads to substantial decisions -- possibly triggering NEPA requirements and appeal procedures to make the anticipated decisions. Details of watershed analysis process will not be promulgated before the ROD. Modification without supplementing SEIS must be within the range of alternatives considered by the FSEIS.
 - A. Will the ROD modify watershed analysis to reduce future delay or cost?

- B. Will the ROD delay or modify the requirement of watershed analysis for an interim period?
 - C. Will the ROD modify the use of watershed analysis to reduce the likelihood of triggering NEPA for each watershed assessment?
 - D. What watersheds will have priority for assessments (key watersheds or watersheds near affected communities)? When will they begin? How will adjustments be made?
- V. Existing Contracts and Permits: Timber sales and other contracts and permits currently exist that are not consistent with the FSEIS preferred alternative. Changes to these existing rights may result in extensive liability.
- A. Will the ROD apply the standards where legal authority of agencies is doubtful -- ANILCA access rights, mining sites, etc.?
 - B. How will existing timber sales, contracts and permits be affected?
 - C. Will ROD change direction which could potentially force closure of ski areas?
- VI. Endangered Species Act: Further ESA consultation is necessary before projects affecting listed species can occur.
- A. Will the ROD streamline the consultation process?
 - B. Will spotted owl critical habitat be redesignated to match the ROD?
 - C. How will the recovery plans for the spotted owl and marbled murrelet be coordinated with the decision made in the ROD?
- VII. Compliance with the Federal Advisory Committee Act: Several coordination and public participation entities may violate FACA as described in the ROD.
- A. Will the ROD be modified to avoid FACA violations?
 - B. Will FACA Committees be formed?
 - C. Will a statutory exemption from FACA be obtained?
- VIII. Response to Public Comments on the FSEIS: The FSEIS contains information that was not discussed in the DSEIS (i.e. air quality, additional species assessments, spotted owl demographic studies and modelling information). The public has not been alerted to any deadlines for comment. Under the present schedule, time is not available to consider public comments.
- A. How will the ROD respond to public comments on the FSEIS?
- IX. Inviolate Reserves: The FSEIS preferred alternative allows thinning and salvage in LSRs after LSR plans are adopted under limited conditions. Some public comments have advocated making some of the LSRs off-limits to all harvesting, including salvage sales and thinning.
- A. Will the ROD adopt inviolate reserves? If so, how will they be identified?

760-4526

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Fax Number (202) 272-6815, 5775
Confirmation Number (202) 272-8056

TO: Will Stelle
Office on Environmental Policy
The White House

DATE: February 18, 1994

FAX NUMBER: 202 456-2710

PHONE NUMBER: 202 456-6224

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 4

FROM: Ellen Athas

PHONE NUMBER: 202 272-8236

MESSAGE: See attached.

Release
Forrest
SE 14



U.S. Department of Justice

PDC:EMathas
90-1-4-3806
(202) 272-8236

Washington, D.C. 20530

February 18, 1994

* ATTORNEY-CLIENT PRIVILEGED *

MEMORANDUM

To: Will Stelle
Office of Environmental Policy
The White House

From: Ellen Athas *EA*
Assistant Section Chief, General Litigation
Department of Justice

Re: Seattle Audubon Soc'y v. Lyons:
Comments of Ancient Forest Alliance

Peter Coppelman has asked me to respond to your memo and provide an update on where we stand on the issues you raise. The comments of the Ancient Forest Alliance and others raise several issues about the SEIS, most of which are scientific in nature and pose potential litigation risks.

Under NEPA and NFMA, process and procedure are essential in addressing the types of issues raised by the Ancient Forest Alliance. Further, the NFMA viability regulation imposes a substantive duty to manage habitat for the survival of the species. We are currently assisting the SEIS Team to satisfy these legal mandates. We have been informed that the SEIS Team intends to compile a very lengthy appendix to address the sensitivity analyses and all outstanding issues. They have requested DOJ's input on what that appendix might include, and we have produced the attached outline of items requiring additional analysis in the SEIS.

The outline specifically indicates the need for additional information on some of the very issues raised by the Ancient Forest Alliance and others, including the role of non-Federal lands, population viability, fragmentation and dispersal. This outline was faxed to Cay Ogden at SEIS Team Headquarters yesterday, and she and others have set aside time today, Saturday and Sunday to draft responses. On Monday, February 21, and Tuesday, February 22, Steve Odell will meet with Cay in Portland and review the draft responses. Once reviewed, Bob Jacobs intends to have these comments, together with the final results

on the viability studies and the McKelvey Model, incorporated into a 700-page appendix to the printed SEIS. The Team proposes that this appendix, Appendix J, be mailed to all parties to the pending law suit and be available to the public upon request.

The Ancient Forest Alliance also raises other, far broader issues that question the underlying assumptions of Option 9, including expansion of reserves and elimination of Adaptive Management Areas. In addition, the Alliance presents detailed assertions of failure to adopt SAT report recommendations for the murrelet and the possible existence of "holes" in biological connectivity for the owl in nine areas. To assure compliance with NEPA and NFMA procedural requirements, as well as NFMA's viability regulation, all issues must be reviewed by the appropriate SEIS group leaders to determine if they present any unaddressed or substantive issues on species survival. The SEIS Team should also look to whether these same issues were presented by the Ancient Forest Alliance or others in comments to the draft SEIS and review whether the responses to the comments are complete and scientifically supported. Any outstanding issues, procedural or scientific, should be fully addressed in the proposed Appendix J to the SEIS, if possible, and in the ROD. We are, of course, available to assist in the drafting or reviewing of any proposed language for the SEIS or ROD.

Please feel free to call me with any questions or concerns on the above. I can be reached at my office at 272-8236 or in the evenings at (202) 686-2058.

ATTORNEY WORK PRODUCT -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE**OUTLINE FOR ADDITIONAL ANALYSIS IN APPENDIX J OF SEIS****A. OWLS****1. Population viability**

a. Brief discussion of each of major factors thought to affect owl viability: prey base, predation, fragmentation, relationship of fragmentation to predation, relationship of younger forest stands to prey base availability, importance of dispersal habitat (and how each would be affected generally under alternatives)

b. Work in discussion of Orians's & Lande's & Boyce's points about fragmentation noted in PAS

c. Discuss briefly concept of adequate/minimum population size

d. Work in reference to BLM's study on relationship between reproducing pairs of owls and acreages of old-growth forest habitat available at site

2. Models

a. Reference to and brief discussion of results of previous model runs

- 1) USDA -- 1986, 1988a, & 1992
- 2) Lande -- 1988
- 3) Boyce & Irwin -- 1990
- 4) Lamberson et al. -- 1992
- 5) Salwasser et al. -- 1984
- 6) Shaffer -- 1987
- 7) ISC -- 1990

b. Explanation of how quantitative spatially explicit McKelvey Model is different from previous models and summary of new results (with fuller explication going in administrative record)

3. Nonfederal lands

a. Clarification of assumption re: nonfederal lands for FEMAT viability assessment panels

b. Percentage of suitable owl (NRF) habitat on nonfederal lands (BLM's '86 report states that only 5 percent is on nonfederal lands)

c. Incorporation of most recent states' data on nonfederal lands' habitat and populations

d. Current status of owl populations and habitat conditions for owl on nonfederal lands, and discussion of effect of 4(d) rule as set forth in scoping notice on owl populations and habitat conditions on nonfederal lands

4. Reference to request to delist the owl in northern

California and its status; additional discussion of different habitat and life history conditions for owl in this region

5. Necessary references (from PAS):

- a. Status review of owl by FWS (1982)
- b. 1988 Owl FSEIS & 1992 Owl FEIS
- c. NAS's Blue Ribbon Panel study (1986)
- d. Lande's analyses of viability (1985 & 1987)
- e. BLM's owl analyses (May 8, 1986; Jan. 16, 1987; & May 8, 1987)
- f. Status review of owl by FWS (1990)
- g. ISC Report
- h. Gang of Four Report

B. MURRELET

- 1. Effect on murrelets, if any, of 4(d) rule as proposed in Scoping Notice
- 2. Inclusion of most recent population/habitat data from states, other nonfederal landholders
- 3. Brief discussion of factors most germane to murrelet population viability, and how each is affected under alternatives (if at all)
- 4. Report on results of Beissinger's model, if possible
- 5. Any estimates on current population size and proportion thereof within 3-state area, as well as implications for SEIS's analysis, if any, of recent Pacific Seabird Group study finding that Japanese/Asian murrelet is separate species

TO: ~~Katie McGinty, Will Stelle~~
FROM: Ancient Forest Alliance
DATE: February 11, 1994

SUBJECT: Option 9 Recommendations

1. Thank you for the opportunity to meet with you this morning to present our views on the draft Environmental Impact Statement on the management of federal lands within the range of the northern spotted owl. We wish to emphasize once again our hope that the final EIS and the subsequent ROD are both scientifically sound and legally responsible. We believe the following changes must be made in order to meet those goals:
 - a. Protection of ancient forest areas outside of the projected reserves is absolutely necessary in order to provide the biological connectivity necessary to provide for the viability of old growth species required by federal law. Protecting additional ancient forests in revised and expanded reserves will significantly improve the viability ratings for terrestrial and aquatic species extant in Northwest forests.
 - b. Expansion of riparian corridors on ephemeral streams to meet the recommendations of the Scientific Analysis Team.
 - c. Protection of key watersheds (both Tier 1 and Tier 2) by removing them from the timber base.
 - d. Elimination of Adaptive Management Areas and the protection of ancient forests, Roadless Areas and riparian areas now imbedded in AMAs by designation of additional Late-Successional Reserves.
 - e. Protection of any remaining Roadless Areas from roading and logging which will ensure an additional margin of safety for species conservation, with minimum impact on timber cutting levels.
 - f. Protection of all remaining suitable marbled murrelet habitat on federal lands plus dedication of adequate acreage to grow back 50 percent more suitable acreage (an SAT report recommendation).
2. You requested information on areas where biological connectivity is lacking. Listed below, from North to South, are the areas where we have identified significant holes in connectivity between forests in the Pacific Northwest:
 - a. I-90 Corridor: Private lands and an AMA fragment the central section of the Cascade Range in Washington State.
 - b. Gifford Pinchot NF: North/South connectivity in the Gifford Pinchot

Katie McGinty/Will Stelle
February 11, 1994
Page 2

NF is hampered by the Sispus AMA, which cuts the NF in half.

- c. North/South connectivity in the Mt. Hood NF is impaired by Matrix lands.
- d. The Willamette NF is the most heavily fragmented national forest in Oregon, and suffers significant losses in North/South connectivity due to the designation of large areas of this forest as Matrix.
- e. In the Eastern portion of the Umpqua NF, lands in the Matrix prevent an East/West connectivity.
- f. A biological bridge between the Siskiyou biological province and the Cascade Range is broken by a checkerboard mix of private lands and federal lands proposed as Matrix, and by the Applegate AMA, which sits squarely between two Late-Successional Reserves.
- g. A similar failure in East/West connectivity appears between the Coast Range and the Roseburg SEA, where O&C lands and private lands act to bisect biological corridors.
- h. In Northern California, the Hayfork AMA blocks connectivity between Late-Successional Reserves in this region. North/South connectivity can be restored with the protection of Roadless Areas in this AMA as Late-Successional Reserves.
- i. In the Mendocino NF, a sordid history of overcutting has left a landscape almost devoid of connectivity. The only possibility of providing North/South connectivity in this fragmented area lies in protecting critical watersheds and Roadless Areas currently designated as Matrix lands.

Tim
Workbook 942-9950
P.O. 1127
D4402

WAFR

3/10/94

To: David Cottingham

From: Cay Ogden, SEIS staff

Cay O.

Re: BLM recommendations for change in ROD

I had to rush to get this done, but wanted to give you something before I left town. The BLM submitted a proposal dated 3/9/94 for changes in the ROD. I have reviewed the proposal and offer the following comment.

I. The first recommended change was a revision of the "Survey and Manage" standard and guideline. The BLM proposal would change the intent of the mitigation away from species protection, and toward habitat protection. As described in the Final SEIS on pages B-143 and 144, the mitigation measures appear as four steps, which would apply depending on the species.

The proposal would essentially leave the first step, "Manage known sites" as it is currently written. Except they dropped the reference to a species which was specially mentioned as needing immediate protection. Their reason for dropping this was to avoid any focus on a specific species.

The second step, "Survey prior to ground disturbing activities" is completely rewritten to focus on surveys for habitat of the species, rather than surveying for the species themselves. As presented in the in the Final SEIS, this mitigation would not be required to meet full implementation until 1997 and the BLM's proposal would not change that. The BLM's proposed change in focus to habitat surveys is not possible, since the species covered by this mitigation are the species of which we have very little knowledge. We do not know what their habitat needs are, nor their current distribution. The intent of this mitigation was to gather such knowledge. In addition, the intent of their proposal is within the flexibility of the current version, which allows for a transition to habitat surveys as we acquire the knowledge to make that adjustment and the REO and RIEC has the authority to incorporate new methods.

The third step, "Extensive surveys" has likewise been rewritten to emphasize habitat rather than species. It too is unlikely to achieve the intended results of identifying the sites. However, the scientists had developed this mitigation in recognition of the lack of information and the expectation of flexibility as we work towards full implementation. I have underlined on the attached pages from the FSEIS the sentences which currently give us flexibility in implementing this mitigation.

The final step, "General regional surveys" were intended to fill the gap in information which currently exists. The BLM rewrite would have the implementation begin in 1995, but not set any

schedule or deadline for completion. The BLM's point is that habitat needs can be described and used as the survey method once we gain sufficient knowledge. This flexibility already exists and is within the authority of the RIEC.

The BLM said they circulated the rewrite among agency staff, but generally did not share it with the scientists who were charged with developing the mitigations. It is my conclusion that the BLM proposed revision to these mitigation measures would not achieve the intended results, nor is it likely to receive the endorsement of the scientists who developed the original mitigation measure.

If the proposal is considered for the ROD, the introductory paragraphs would have to be rewritten to correct factual errors.

II. The second recommendation from the BLM was an allowance for an interim watershed analysis to allow activities in Key Watersheds and Riparian Reserves, without a "comprehensive watershed analysis". I do not know what they mean by "interim" and "comprehensive" watershed analysis, but it is the opinion of the SEIS team that the current document describes flexibility in watershed analysis in the short term. Please see page E-20 which says:

"Watershed analysis will be an ongoing, iterative process that will help define important resource and information needs. As watershed analysis is further developed and refined, it will describe the processes and interactions for all applicable resources. It will be an information-gathering and analysis process, but will not be a comprehensive inventory process. It will build on information collected from detailed, site-specific analyses. Information gathering and analysis will be related to management needs, and not be performed for their own sake."

The SEIS team and the REO have stated that watershed analysis can proceed immediately with the information at-hand. Therefore, there is adequate flexibility in the current version to accomplish the BLM's intent.

Finally, the BLM states that the idea was brought to SAG for review. To my knowledge, this has not occurred. They may have spoken with the fisheries members of SAG, but I am not aware of it being presented to the entire SAG. Since watershed analysis is also the vehicle to evaluate many terrestrial issues, I would want to be sure that the entire SAG membership had jointly met and discussed it.

David, I consider these to be major changes in the scientific intent of the mitigation measures, and I believe they would be unacceptable to the scientists. I also believe the watershed analysis recommendation is adequately provided for and Mike Tehan

(REO) and the SEIS team agree with me.

March 9, 1994

To: Bob Bierer (fax 202-208-3144)
Mike Penfold (fax 202-208-5010)

From: Phil Stanbro

Subject: Recommended changes to the Forest Ecosystem ROD

Issue #1. As we previously discussed, the present Survey and Manage Standards and Guidelines have reasonable and admirable objectives, but the language in the draft ROD has serious defects. It sets up unachievable expectations and moves away from an ecosystem approach and toward species by species management.

We are submitting the attached revised draft text with as little change as possible in order to avoid last minute conflicts. Our intent is to meet the desired short-term species protection level while moving toward a long-term habitat protection level that will support species viability. If you have questions, please contact Jim Alegria (OR930, 502-280-7090).

Issue #2. There should be some mention of the use of an interim watershed analysis process that could allow limited activities in FY 94 and 95, and perhaps FY 96, until comprehensive watershed analyses are completed. These interim watershed analyses or screens would be used where there would be very low risks of adverse effects and future options would not be precluded. The Regional Interagency Executive Committee (RIEC) and the Scientific Advisory Group (SAG) has supported the development and use of an interim watershed analysis process in concept but there is no mention of it in the ROD. A brief statement in the ROD about an interim process, that would be reviewed by the REO, could help in building acceptance and credibility when the process is implemented.

We recommend the following language be added in the draft ROD on page B-20, under 3. Watershed Analysis, second paragraph, after the next to last sentence (Timber harvest, including salvage, cannot occur in Key Watersheds without a watershed analysis.):

Individual actions may also be initiated in Key Watersheds and Riparian Reserves, in the short-term prior to completion of comprehensive watershed analysis, when they are consistent with an interim watershed analysis or screening process approved by the RIEC and with results reviewed by the REO that demonstrate consistency with Aquatic Conservation Strategy objectives.

I will be back in the office on Thursday, 3/9. Call (503-280-7081) if there any questions or you need more information. Thanks for your support with these issues.



THIS VERSION HAS BEEN REVISED SLIGHTLY

Pre-decisional, not subject to FOIA

Suggested amendments to Appendix B11—Standards and Guidelines Resulting from Additional Species Analysis and Changes to alternative 9

The following standards and guidelines were developed in response to public and internal comments to increase protection of habitat for species whose habitat (shouldn't this be "viability") assessments were relatively low under Alternative 9. They are incorporated in Alternative 9 as standards and guidelines in this Final SEIS.

Survey and Manage

The "survey and manage" standard and guideline would provide benefits to amphibians, bryophytes, mollusks, vascular plants, fungi, lichens, and arthropods. Although this standard and guideline is designed to maintain viable populations of the species that received low ratings under Alternative 9, a high priority would be given to habitat management. This approach is considered to be the most efficient and effective one available to achieve this objective in both the short and long term. Habitat is emphasized for several reasons. There is often a clear and strong correlation between the distributions of a species and the habitat(s) with which it is associated. Habitat-oriented management may also help the entire community of organisms associated with the habitat even though the full array of species present can not realistically be defined given the limited state of our present knowledge.

For species that disperse or migrate over great distances and do not reside on federal lands for a significant portion of their life cycle, management of habitat may be the only means available to provide for those species.

3/8/94 4:00pm

1. MANAGE KNOWN SITES

Management of known species sites and adequate buffers should receive the highest priority. Efforts must be undertaken to acquire information on these known sites and to manage this information so that it is available to all project planners. An effective way to accomplish this is to compile the information in a Geographic Information System (GIS) data base. Those efforts should be coordinated by the Regional Ecosystem Office, and should be completed expeditiously. As soon as the information becomes available, it should be used in the design or modification of activities. Activities that are implemented in 1994 should use this information to the greatest degree possible. Activities implemented in 1995 and later must include provisions for these known sites. In most cases, the appropriate action will be protection of relatively small sites, on the order of tens of acres. For some species, including some vascular plants, the appropriate action will include the use of specific management treatments such as prescribed fire. For rare and endemic fungus species, areas of 160 acres should be temporarily withdrawn from ground-disturbing activities around known sites until those sites can be thoroughly surveyed and site-specific measures prescribed. For one fungus species, *Oxyporous nobilissimus*, there are only six known sites and two of these do not currently have a protected status. Management areas of 600 acres are to be established around these two sites for the protection of those populations. The actions to protect *Oxyporous* must be undertaken immediately.

2. SURVEY PRIOR TO GROUND-DISTURBING ACTIVITIES

Surveys must precede the design of all ground-disturbing activities that will be implemented in 1997 or later, and management standards and guidelines will be developed to manage habitat for the species on sites where they are located. Prior to implementation of activities within the habitat area or buffer, a thorough search for species habitat must be completed. Management activities in or near a habitat known to be occupied by a species would be restricted to include tested mitigation measures or management activities directed at improving or maintaining the habitat.

For species that do not have readily identifiable habitat, the surveys will be species specific and be designed for maximum efficiency by focusing on the likely range and general requirements of the target species. To the degree possible, surveys should be designed to minimize the number of site visits needed to acquire credible information. Survey protocols and proposed site management should be developed and incorporated into interagency conservation strategies developed as part of ongoing planning efforts coordinated by the Regional Ecosystem Office.

3. EXTENSIVE SURVEYS

Measures to survey for species habitat are to be phased-in over a somewhat longer timeframe than the measures to protect currently known sites. For some habitats, these efforts have been ongoing through rare and sensitive species programs. Where such efforts have been ongoing, they should continue. However, protocols have not been developed for surveying all of these habitats, and the expertise needed to conduct them is not readily available in some cases. Efforts to design protocols and implement surveys should be started immediately.

The surveys may be conducted at a scale most appropriate to the habitat. For most habitats, this survey would start at the watershed analysis level and concentrate on high priority habitats. Species with poorly defined habitat requirements will require further investigation to identify key features which can serve as criteria to locate habitats, especially in cases where the presence of the species are not always apparent. For example, some fungi only produce fruiting bodies under specific climatic conditions. By identifying key features that are associated with the fungi, the ability to locate potential habitat areas will be greatly enhance.

Extensive surveys are
The surveys will be done according to a schedule that is most efficient, *with* and habitats *being* identified for protection at that time. ~~It is~~ recommended primarily for species whose characteristics make site and time-specific surveys difficult. It would be most efficient to do broad surveys for these species during times of appropriate conditions rather than attempting annual, site-specific surveys. Surveys under this strategy must be underway by 1996. As with surveys described in item 2 above, surveys should be designed for efficiency and standardized protocols should be developed.

4. GENERAL REGIONAL SURVEYS

The objective is to acquire additional information on these species and to determine necessary levels of protection. Species intended to benefit from this standard and guideline are species that are poorly known. Many species have not yet been described, and there is only general information available on the abundance and distribution of known species. The information gathered through these efforts may be useful in refining the selected alternative as part of the adaptive management process to better provide for these species.

Once basic life history requirements are documented, key features of their habitat can be identified and incorporated into the extensive survey component. The work is expected to be both intensive and expensive, but ~~the~~ information ~~from them~~ is critical to successful implementation of ecosystem management. This process will begin in fiscal year 1995.

Regional survey



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TRANSMISSION NOTICE

THIS MESSAGE WAS ELECTRONICALLY TRANSMITTED

TRANSMISSION NUMBER: 202-219-1220

VERIFICATION NUMBER: 202-208-4123

TO:

Will Steller

AGENCY:

WHA DEP

FAX NO:

456-2710

PHONE NO:

456-6225

FROM:

Jim Larkin

NUMBER OF PAGES:

3

(including this page)

DATE:

3-14-94

MEMORANDUM

March 14, 1994

To: Will Stelle, Mark Gaede, David Cottingham
From: Jim Pipkin
Re: Draft ROD

I know that the draft ROD will change radically in the next several days, but I wanted to flag a number of specific statements that need further thought. In my view, a number of statements in the present ROD (3/10/94) are either flatly wrong or at least highly questionable. Foremost among them are the following:

1. "All practicable means to avoid or minimize environmental harm have been adopted in the Forest Ecosystem Plan." (p.21). Nonsense. Even option 1 does not meet that standard, which would involve (1) zero timber harvest plus (2) restoration.
2. "All practicable measures to minimize harm to wetlands will be implemented." (p.35). Ditto.
3. "This decision reduces the amount of northern spotted owl habitat subject to timber harvest to less than half of the amount estimated in the 1992 decision." (p.30). This may be in error, since it fails to take into account thinning and salvage that will be allowed in reserves.
4. "[T]imber harvest is to be mitigated by various requirements including the retention of more than 15 percent late-successional stands per cutting unit and watershed" (p.18). We agreed not to apply the 15 percent test to an entire watershed; see p.21.
5. "Green tree retention ... serve as refugia for species which disperse only short distances." (p.19). Green tree retention, even if clumped, will only provide "edge" qualities. Retention was intended to provide connectivity (not refugia), plus providing core habitat that would contribute to a more rapid achievement of desired habitat conditions when harvested areas have grown back.
6. "Alternative 9 was assessed as the alternative with the highest likelihood of maintaining the ecological processes and function of late-successional and old-growth forest ecosystems in the long term." (p.16). I think most scientists would say that option 1 provides "the highest likelihood."

7. "[T]he decision also requires that administrative planning decisions be made under the current statutory and regulatory framework." (p.37). I do not think it is the intent, but as written, the ROD suggests we cannot change the framework (e.g., National Forests to provinces) without invalidating the analysis.

8. I would suggest a sharp focus on the new sentence that summarizes the "considerations used" in the decision: "Balancing of all these factors of sustainable timber harvest, viability of the owl and the murrelet, key watersheds, desired ecological objectives and social and economic conditions is accomplished in Alternative 9 and were [sic] the considerations used in this decision." (p.17). If this is intended to be a summary of the decision, it is a very important sentence, and we can do better.

03/10/94 18:58 25033267577

USDA FS R-6

--- LYONS

002/008

1 REINTERVIEW
FOR NEW BO?

TRANSITION TO THE PRESIDENT'S PLAN (VERSION 1)

This decision sets forth a new way of conducting management of BLM and FS lands. In addition to new land allocations, it requires new techniques of analyses, new kinds of decision-making forums, new kinds of interagency collaboration, new approaches to scientific oversight and monitoring, new surveying procedures, new public participation strategies and new standards and guidelines.

The move to this new way of doing business will proceed as quickly as possible. But it cannot be instantaneous. A transition period is needed to allow for procedures and analyses techniques to be developed; for training to occur; for budgets to reflect the new kind of work required; and for completion of the surveys, analyses and planning to support project proposals.

One choice is to stop all projects and activities until these new requirements are developed, budgeted, and completed. A better choice is to build in a transition period that allows the continued production of commodities and delivery of public services.

To this end, the following decisions are made:

GRAYBEAL DRAFT

1. Watershed Analysis - Projects and activities (including restoration, jobs-in-the-woods, projects for public safety, timber harvest as well as salvage) in FY 94-96 may proceed without comprehensive watershed analysis so long as the other terms and prescriptions of the Land Allocations and the Aquatic Conservation strategy are met.
(**important for timber sales but also projects like dam reconstruction, highway realignments, hazard tree removals that need to proceed as swiftly as possible)

*Revisions +
PRATICAL
JUSTIFICATIONS*

2. Decision Notices - DN's for timber sales to be offered and awarded in FY 94 will be signed at the Department level. (**gets volume on market more quickly; but at risk of increasing public mistrust).

*Antony unit
- disturbed
7-8 proposed
6 dispersed*

G/D

3. Green Tree Retention Requirements - Timber sales in FY 94 and 95 may use the green tree retention requirements in the Draft EIS if this eliminates need for rework, redesign, or recruising.

4. Consultation - A Regional Incidental Take of owl habitat will be issued for FY94 and 95 for timber sales proposed in the Matrix and AMA land allocations. (**FWS Regional Office has not seen nor concurred with this recommendation)

G/D/DEAFER

5. Manage and Survey Requirements - Ground-disturbing projects and activities, including timber sales, in FY 94-96 can proceed without this requirement, pending the development of the procedures and techniques.

N.Graybeal
3/10/94

①

03/10/94 16:59 5033267577

USDA FS R-6

--- LYONS

003/005

2

**TRANSITION TO THE PRESIDENT'S PLAN
(VERSION 2)**

This decision sets forth a new way of conducting management of BLM and FS lands. In addition to new land allocations, it requires new techniques of analyses, new kinds of decision-making forums, new kinds of interagency collaboration, new approaches to scientific oversight and monitoring, new surveying procedures, new public participation strategies and new standards and guidelines.

The move to this new way of doing business will proceed as quickly as possible. But it cannot be instantaneous. A transition period is needed to allow for procedures and analyses techniques to be developed; for training to occur; for budgets to reflect the new kind of work required; and for completion of the surveys, analyses and planning to support project proposals.

One choice is to stop all projects and activities until these new requirements are developed, budgeted, and completed. A better choice is to build in a transition period that allows the continued production of commodities and delivery of public services.

To this end, the following decisions are made:

1. Restoration and Jobs in the Wood activities in FY 94/95 can proceed prior to the development of LSR Management Plans and comprehensive watershed analyses, so long as the other terms and prescriptions of the Late Successional Reserves and the Aquatic Conservation strategy are met.

2. Projects and activities necessary to insure public safety are of the highest priority and may proceed in FY 94, 95, and 96 without comprehensive watershed analyses and LSR Management Plans, so long as the other terms and prescriptions of the Late Successional Reserves and the Aquatic Conservation Strategy are met.

(**projects like dam reconstruction, highway realignments, hazard tree removals needs to proceed as easily as possible)

3. Projects and activities (except timber sales) for FY94, 95 and 96 can proceed in riparian reserves and Key Watersheds without the benefit of a comprehensive watershed analysis so long as the other terms and prescriptions of the Aquatic Conservation Strategy are met.

4. Timber harvest activities (including road construction and logging corridors) can proceed in riparian reserves in FY94/95 without the benefit of a comprehensive watershed analysis so long as the other terms and conditions of the Aquatic Conservation Strategy are met.

5. Salvage can proceed in Key Watersheds and Late Successional Reserves in FY 94/95 without a comprehensive watershed analysis or in-place LSR Management Plans so long as the other terms and conditions of the Aquatic Conservation Strategy and the Late Successional Reserves are met.

03/10/94 16:58 5033267577

USDA FS R-6

+++ LYONS

004/005

3

6. Decision Notices for timber sales to be offered and awarded in FY 94 will be signed at the Department level. (**gets volume on market more quickly; but at risk of increasing public mistrust).

7. Timber sales in FY 94 and 95 may use the green tree retention requirements in the Draft EIS if this eliminates need for rework, redesign, or recruising. Comments on the ROD:

8. A Regional Incidental Take of owl habitat will be issued for FY94 and 95 for timber sales proposed in the Matrix and AMA land allocations. (**FWS Regional Office has not seen nor concurred with this recommendation)

N.Graybeal
3/10/94

03/10/94 17:00 5033267577

USDA FS R-6

--> LYONS

005/005

4

Comments on the ROD

1. Too much selling/rhetoric; tone down language to describe the decisions. For example, no reason for quote from Chief on pg. 6. or all the quotes from the President.
2. Eliminate references to short-term actions, like p. 4 reference to harvest acres over next 3 years - keep this a 10-year plan that describes allocations and standards and guidelines and new ways of doing business. Unwise to promise what will actually occur - as you know courts and budgets and all sorts of unforeseen things can get in the way.
3. P. 4 - I don't think we've set up timber sales and other site-specific project design to be an interagency process. Interagency PLANNING is expected at the regional and province level, and even the local level in many cases - but it's a stretch to say project design of timber sales or other site-specific projects will be interagency---some probably will depending on size, location, issues, consultation needs etc - others probably won't.

n Gray

3/10/94

**ROD
OUTSTANDING ITEMS**

3/11/94

Based on the 3/10 6:00 PM version of the ROD and last Wednesdays (3/9) ISC Alternates meeting, the following items are outstanding:

1. Executive Summary (page 1)

Needs to be condensed and re-written.

Responsibility Tim Obst, USDA OGC

2. Introduction (page 2)

Needs to be boiled down from previous version. The material that was in this section has been moved to the Findings section per Wednesday's meeting (3/9) of ISC Alternates.

Responsibility Tim Obst, USDA OGC

3. Decision (page 2)

Per Peter Coppelman's comments, better rationale for the decision to go with Alternative 9 needs to be developed for this section.

Responsibility Mark Gaede & David Cottingham

4. Application to Timber Sales (page 4)

*

This section needs to be written.

Responsibility Mike Gippert, USDA OGC

5. Application to other Contracts, Permits & Special Uses (page 4)

This section needs to be written.

*

Responsibility Mike Gippert, USDA OGC

6. Relationship to Other Plans and Proposals (page 4)

This section needs additional material and additional edits per Wednesday's meeting (3/9) of ISC Alternates.

Responsibility Dave Geyer, USDI

* = Nancy Graybed implementation language

7. **Relationship to Other Lands** (page 5)

This section needs additional material and additional edits per Wednesday's meeting (3/9) of ISC Alternates.

Responsibility Dave Geyer, USDI

8. **Alternatives** (pages 11-13)

Each of the alternative descriptions need to be reviewed for balance and to include employment & economic figures for each alternative.

Responsibility David Cottingham & Bob Bierer, USDI

9. **Findings** (pages 26-32)

This is the material that was previously in the Introduction section. Per decision at the 3/9 meeting of ISC Alternates it has been moved to this section but is in need of edits.

Responsibility Tim Obst, USDA

10. **National Forest Management Act** (page 33)

This entire section needs to be written.



ISC DECISION NEEDED ON HOW TO ADDRESS VIABILITY

Responsibility Mike Gippert, USDA

11. **Endangered Species Act** (page 34)

Edits and additional material is needed for this section.

Responsibility Dave Geyer, USDI

12. **Coastal Zone Management Act** (page 35)

Review of this section is needed by NOAA

Responsibility Mark Gaede, USDA

13. **Application of Standards and Guidelines** (page 36)



This entire section needs to be written. Specifically, the last sentence of the first paragraph of this section needs to be addressed.

Responsibility Mike Gippert, USDA

14. **Consultation and Coordination** (page 39)

This section needs to be re-written.

Responsibility Dave Geyer, USDI

ISC

15. Response to Comments on the Draft SEIS (pages 44-50)

A decision needs to be made on which language to retain in this section. All of the original and suggested edits have been retained for this section. All of the original language provided by the SEIS Team tracks to the FSEIS. Some of the suggested edits does not track with the FSEIS. In addition, #12 has been added per Roger Nesbit. **A DECISION NEEDS TO BE MADE WITHIN THIS ENTIRE SECTION FOR WHICH LANGUAGE TO RETAIN AND WHICH CONCERNS TO RETAIN.**

Responsibility Mark Gaede and David Cottingham.

16. Public Comments on the Final SEIS (page 53)

A decision is needed to determine to what extent comments to the final will be addressed in the ROD. This depends on the decision whether to extend the ROD signing by two weeks to accommodate comments in the ROD.

Responsibility Mark Gaede and David Cottingham.

17. Effective Date (page 54)

Decision is needed for whether the ROD decision is effective immediately upon signing or 30 days after signing. A difference of interpretation of the CEQ Regs exists between USDA OGC, Forest Service and USDI.

ISC DECISION NEEDED HERE, GIVEN THE DIFFEREING INTERPRETATIONS OF THE TIMING REQUIREMENTS OF THE CEQ REGULATIONS.

BRIEFING PAPER

AGENCY ISSUES AND PROPOSED REMEDIES

Phil Stanbro, BLM
Bill Bradley, BLM
Jerry Monesmith, USFS
Tom Nygren, USFS
Nancy Graybeal, USFS

GENERAL THOUGHTS

Our biggest challenge is number of requirements found throughout the entire FSEIS that set up expectations for performance that may be impossible to achieve, undesirable to attain; too expensive to implement; or make us vulnerable to appeal and litigation.

1 An option to consider shortterm is to let sales go forward FY94 that meet requirements of DSEIS - some forests who worked hard to get ahead are now faced with cost of re-doing sales; these are the sales with the greatest chance of moving forward quickly.

ISSUE - Full SAT requirement

REASON FOR ADDING REQUIREMENT

Improve dispersal habitat; improve aquatic protection; allows draft Biological Opinion from FWS to be non-jeopardy.

IMPLICATIONS/CONSEQUENCES

1. Underestimated effect on PSQ; magnitude unknown but field thinks it's substantial.
2. Creates harvesting difficulties in Matrix; results in "splinters" of land to manage.
3. Created concept of "permanant reserves" by dropping words "interim reserves". Lost idea that these reserves should be adjusted based on field conditions and appropriate analysis.
4. Exceeds current PACFISH standards.
5. Sales already laid out to 1/2 SAT requirements.

REMEDIES

1. Go back to 1/2 SAT requirements.
2. Reinstate "interim" description to riparian reserve boundaries.

ISSUE - Survey and Mangement Requirements

REASONS FOR ADDING REQUIREMENTS

Reduces risk of management activities adversely impacting 390 species.

IMPLICATIONS/CONSEQUENCES

1. High risk of successful challenges if agencies fail to meet any of these requirements -- we've already been challenged on this in the negotiated sales.

2. Continues a species-by-species approach.

3. High costs associated with development and implementation of surveys and protocols.

4. Unknown effects on PSQ; FEIS assumed negligibile effect but we assume effect will be much greater.

5. For the most part, science not yet available to understand habitat requirements, protection needs, and susceptibility to disturbance.

REMEDIES

1. Drop this requirement; accept risk ratings for these species as described in the DSEIS.

2. Direct agencies to set goals to meet intent of requirement and develop strategy to gain scientific-base that leads to improved management and protection of these species.

ISSUE - Watershed Analysis**REASONS FOR ADDING REQUIREMENT**

Not applicable.

IMPLICATIONS/CONSEQUENCES

1. High expectations; diverse expectations.
2. Protocols not yet developed; states/tribes reluctance to agree with "our" protocols.
3. Potential to stop all sorts of projects and activities in the shortterm, pending development of and completion of comprehensive watershed analysis.
4. Will require some amount of start-up time.
5. Concern about "how much is enough." -- another procedure that publics can disagree with agencies about the completeness and thoroughness of analysis.

REMEDIES

1. Allow projects (including restoration, jobs-in-the woods, projects for public safety, recreation projects, timber harvest including salvage) to move forward in FY94-96 without comprehensive watershed analysis.

Insert in ROD "Projects and activities in FY 94/96 may proceed without comprehensive watershed analysis so long as the other terms and prescriptions of the Land Allocations and the Aquatic Conservation Strategy Objectives are met."

2. Specify that analysis will still be required to insure that the terms and objectives are met and that analysis will be based on available information and management needs.

ISSUE - Grazing requirements

REASONS FOR ADDING REQUIREMENT

Increases species protection for arthropods, etc.

IMPLICATIONS/CONSEQUENCES

1. Wording is VERY restrictive; allows no impact to any arthropod from grazing; sets up overkill for objective sought.

2. Effectively, appears to eliminate grazing from NSO range without public comment.

REMEDIES

1. Drop this SEG.

2. Direct agencies to find less onerous way to meet the intended outcome.

****NOTE:** this is one of many examples of requirements found throughout the entire FSEIS (some probably unknown to us at this time) that set up public expectation for performance that may be impossible or undesirable to achieve.

ISSUE - Green Tree Retention Requirement,
specifically the requirement to clump in 2.5 + acre groups.

REASONS FOR ADDING REQUIREMENT

Provides additional interior habitat for a wide-variety of species.

IMPLICATIONS/CONSEQUENCES

1. 2.5 acre groups unlikely to provide interior habitat conditions (Jerry Franklin).
2. Does not meet original intent of providing for large tree structural component dispersed across the landscape (J. Franklin).
3. Requires resources to redo/recruise sales laid-out to the Draft EIS standard.
4. Sets up inconsistency between BLM/FS management.

REMEDIES

1. Go back to the Green Tree Retention requirement in the DSEIS.

ISSUE - Management Plans for LSR's**REASONS FOR ADDING REQUIREMENT**

To insure all projects will be consistent with longterm goals for LSR.

IMPLICATIONS/CONSEQUENCES

1. Low likelihood of accomplishing work needed for restoration, public safety, and to deal with catastrophic events in the shortterm.

REMEDIES

1. Allow projects to proceed without a LSR Management Plan.

State in ROD: "Projects and activities (including restoration, jobs-in-the-woods, projects for public safety, thinning and salvage) may proceed in FY 94-96 without a completed LSR Management Plan so long as the other terms and prescriptions of the land allocation are met."

ISSUE - Consultation**REASONS FOR ADDING REQUIREMENT**

Not applicable

IMPLICATIONS/CONSEQUENCES

1. Concern that new field requirements not in the ROD or FSEIS will be added during the Consultation process.
2. Concern that consultation decisions are too slow.
3. Concern that resources are being unnecessarily expended to accomplish Consultation, if no new requirements are expected as a result of Consultation.

REMEDIES

1. Issue a Regional Incidental Take of owl habitat for FY 94/95 timber sales proposed in the Matrix and AMA land allocations.

(This is recommended by BLM/FS only and has not been coordinated with FWS)

ISSUE - Regional Ecosystem Office Review Requirements**REASONS FOR ADDING REQUIREMENT**

Intended to focus oversight/review with REO to avoid specifying precisely what the oversight/review process would be; intent was not for REO to oversee and review project work.

IMPLICATIONS/CONSEQUENCES

1. Wording in FSEIS specifies that that REO will oversee and review project work; this requirement is onerous, time-consuming and bureaucratic. It would create a bottleneck and add a new layer of review. Nor, it does not meet the goal of the original intent.

REMEDIES

1. State in ROD the intent to substitute "REO to develop oversight and review process" wherever FSEIS currently reads "REO to review projects."

ISSUE - Reliability of PSQ estimates**REASONS FOR ADDING REQUIREMENT**

Not applicable

CONSEQUENCES/IMPLICATIONS

1. Agencies have low confidence in ability to deliver PSQ, both shortterm and longterm.

2. Prediction models not developed that can answer gross estimates like PSQ with a great deal of precision - Norm Johnson acknowledged limitations in paper shortly after DSEIS issue.

3. In addition to specific requirements that are probably underestimated (e.g. Full SAT consequences, 15% LSR habitat/watershed; etc) many unknowns lie ahead that aren't built into predictions.

4. We don't have "somewhere else" to go, if PSQ predicted for some area doesn't materialize for example in some key watersheds or roadless areas.

REMEDIES

1. Accept the limitations of PSQ predictive ability.

2. Explain that PSQ reliability will be less when moving from output-based plans to outcome-based ecosystem plans.

3. Avoid hard number promises until agencies have experience with the plan.

4. Acknowledge need for two-year transition to full PSQ production levels.

Note

March 15, 1994

To: David Cottingham
From: Denise Meridith *DM*
Subject: Comments for the Forest Plan ROD

As a follow-up to the ISC meeting on Monday, March 14, the following are BLM's recommendations for the issues discussed:

1. **Viability.** Accept the March 13th Agriculture Counsel draft which specifies "habitat". Also retain the language "existence".
2. **Survey and Manage standard and guide.** Adopt the attached BLM language for survey and management of sensitive species, including the elimination of the 1997 deadline.

3. **Watershed Analysis.** Adopt the following language (submitted by BLM Oregon State Office):

Watershed
"As described in the FSEIS, watershed analysis is an ongoing, iterative process. Information gathering and analysis will be related to present and future management needs ~~and not performed for its own sake.~~ Initial watershed analysis done during short-term plan implementation will be at a level of detail necessary to provide information to help ensure ~~that proposed actions will~~ promote or not preclude achievement of plan objectives, including those of the Aquatic Conservation Strategy. ~~Watershed analysis~~ will expand as necessary to consider and address additional available information, changing conditions and potential effects associated with long-term management issues and needed actions. Watershed analysis may initially be responsive to proposed management activities. In the longer term, however, watershed analysis will drive identification of and planning for management activities."

4. **Full SAT Requirement.** The full SAT requirement has an underestimating effect on PSQ, creates operational harvesting difficulties, creates the concept of permanent reserves by dropping the words "interim reserves", and impacts sales already laid out to 1/2 SAT requirements. We recommend restating the "interim" description for riparian reserve boundaries, to permit establishment of less than full SAT where appropriate after a watershed analysis is completed.

5. **Short-term Timber Supply.** BLM has 36 sold but unawarded sales in two categories. These sales - nine "Section 318" sales (24 MMBF) and 27 FY 1990-91 sales (61 MMBF) - have been modified after ESA consultation and aquatic screening. They represent 85 MMBF of low-risk volume that is available for short-term supply. We recommend these sales be "grandfathered" in the ROD so the BLM can proceed with award.

6. **Grazing.** Eliminate the prohibitive language regarding soil-living organisms and arthropods.

7. **LSRs.** Allow projects and activities (i.e. restoration, jobs-in-the-woods, projects for public safety, thinning, and salvage) to proceed in FY 1994-96 without a completed LSR Management Plan so long as the other terms and prescriptions of the land allocation are met. The Regional Ecosystem Office (REO) should be used in a review capacity with the Regional Interagency Executive Committee (RIEC) providing approval.

8. **Consultation.** FWS needs to develop clear and complete standards for evaluating actions and provide them to the BLM and Forest Service so we can provide owl information to FWS for consultation and avoid the need for reworking sales. We also endorse issuance of a regional incidental take of owl habitat consistent with this plan for FY 1994-96 timber sales in the matrix and AMA land allocations.

9. **Green Tree Retention Requirements.** We endorse use of the green tree retention marking requirements in the Draft SEIS during a transition period of FY 1994 and 95 to eliminate the need for reworking, redesigning, or recruising sales that have been laid out using the Draft SEIS standards.

10. **REO Review Requirements.** State in the ROD that the REO is to develop oversight and review processes; the RIEC will approve the projects.

11. **Reliability of PSQ Estimates.** Acknowledge the need for a two-year transition to full PSQ production levels, and avoid hard number commitments until the agencies have experience with the plan.

12. **Effective Date of Decision.** No problem for BLM to delay 30 days if the lawyers feel it is critical.

13. **Extension of Time.** We support a request to the court for a two-week extension to prepare the ROD.

CC: Jack Thomas
Elaine Zielinski
Mike Penfold
Will Stelle

Pre-decisional, not subject to FOIA

Suggested amendments to Appendix B11--Standards and Guidelines Resulting from Additional Species Analysis and Changes to alternative 9

The following standards and guidelines were developed in response to public and internal comments to increase protection of habitat and species whose viability assessments were relatively low under Alternative 9. They are incorporated in Alternative 9 as standards and guidelines in this Final SEIS.

Survey and Manage

The survey and manage standard and guideline provide benefits to amphibians, bryophytes, mollusks, vascular plants, fungi, lichens, and arthropods. This standard and guideline is designed to maintain viable populations of the species that received low ratings under Alternative 9, by emphasizing habitat management. This approach is considered to be the most efficient and effective one available to achieve this objective in both the short and long term. Habitat is emphasized for several reasons. There is often a clear and strong correlation between the distributions of a species and the habitat(s) with which it is associated. Habitat-oriented management may also benefit the entire community of organisms associated with the habitat even though the full array of species present can not realistically be defined given the limited state of our present knowledge.

I. MANAGE KNOWN SITES

Management of known species sites and buffers should receive the highest priority. Efforts must be undertaken to acquire information on these known sites and to manage this information so that it is available to all project planners. An effective way to accomplish this is to compile the information in a Geographic Information System (GIS) data base. Those efforts should be coordinated by the Regional Ecosystem Office, and should be completed expeditiously. As soon as the information becomes available, it should be used in the design or modification of activities. Activities that are implemented in 1994 should use this information to the greatest degree possible. Activities implemented in 1995 and later must include provisions for these known sites. In most cases, the appropriate action will be protection of relatively small sites, on the order of tens of acres. For some species, including some vascular plants, the appropriate action will include the use of specific management treatments such as prescribed fire. For rare and endemic fungus species, areas of 160 acres should be temporarily withdrawn from ground-disturbing activities around known sites until those sites can be thoroughly surveyed and site-specific measures prescribed.

3/9/94

Pre-decisional, not subject to FOIA

2. SURVEY PRIOR TO GROUND-DISTURBING ACTIVITIES

Habitat surveys must precede the design of all ground-disturbing activities that will be implemented in 1997 or later, and management standards and guidelines will be developed to manage habitat for the species on sites where they are discovered. Prior to implementation of activities within the habitat area or buffer, a thorough search for species must be completed. Management activities in or near a habitat known to be occupied by a species would be restricted to include tested mitigation measures or management activities directed at improving or maintaining the habitat.

For species that do not have readily identifiable habitat, the surveys will be species specific and be designed for maximum efficiency by focusing on the likely range and general requirements of the target species. To the degree possible, surveys should be designed to minimize the number of site visits needed to acquire credible information. Survey protocols and proposed site management should be developed and incorporated into interagency conservation strategies developed as part of ongoing planning efforts coordinated by the Regional Ecosystem Office.

3. EXTENSIVE SURVEYS

Measures to survey for species habitat are to be phased-in over a somewhat longer timeframe than the measures to protect currently known sites. For some habitats, these efforts have been ongoing through special status species programs. Where such efforts have been ongoing, they should continue. However, protocols have not been developed for surveying all of these habitats, and the expertise needed to conduct them is not readily available in some cases. Efforts to design protocols and implement surveys should be started immediately.

The surveys may be conducted at a scale most appropriate to the habitat. For most habitats, this survey would start at the watershed analysis level and concentrate on high priority habitats. Species with poorly defined habitat requirements will require further investigation to identify key features which can serve as criteria to locate habitats, especially in cases where the presence of the species are not always apparent. For example, some fungi only produce fruiting bodies under specific climatic conditions. By identifying key features that are associated with the fungi, the ability to locate potential habitat areas will be greatly enhanced. Surveys under this strategy must be underway by 1996. As with surveys described in item 2 above, surveys should be designed for efficiency and standardized protocols should be developed.

3/9/94

Pre-decisional, not subject to FOIA

4. GENERAL REGIONAL SURVEYS

The objective is to acquire additional information on these species and to determine necessary levels of protection. Species intended to benefit from this standard and guideline are species that are poorly known. Many species have not yet been described, and there is only general information available on the abundance and distribution of known species. The information gathered through these efforts may be useful in refining or defining management standards and guidelines for these species the selected alternative as part of the adaptive management process.

Once basic life history requirements are documented, key habitat features can be identified and incorporated into the extensive survey component. The work is expected to be both intensive and expensive, but regional survey information is critical to successful implementation of ecosystem management. This process will begin in fiscal year 1995.

3/9/94



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

February 24, 1994

MEMORANDUM

To: Will Stelle
Office of Environmental Policy
The White House

From: Peter Coppelman
Deputy Assistant Attorney General Designate
Environment and Natural Resources Division
Department of Justice

Re: Record of Decision for Northwest Old Growth Strategy

The draft proposed Record of Decision, consisting of a 53-page decisional document ("ROD") and a larger document entitled "The Presidents [sic] Forest Ecosystem Plan" ("annexed Plan"), has been released for agency comment and review. We have concluded our initial review and present at this time our major comments. As set forth below, these documents, as currently drafted, present serious litigation risks under the National Environmental Policy Act ("NEPA"), the Council on Environmental Quality ("CEQ") regulations, the National Forest Management Act ("NFMA") and the Administrative Procedure Act ("APA"). To assist in the redrafting of the ROD, we offer suggestions for revision.

Under CEQ's NEPA regulations, the record of decision shall:

- (a) State what the decision was.
- (b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy.

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- 2 -

which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. 1505.2. Here, the ROD fails to state what the decision was, does not thoroughly address factors considered in selecting the alternative, and omits a complete discussion of mitigation.

First, the ROD must state clearly what the decision is. The decision should be to "adopt the standards and guidelines and land allocations" set forth in an identified alternative in the FSEIS. See ROD, at 1. The function of the decision as it relates to existing BLM and Forest Service plans and future activities should be explained carefully in one place, up front, and references to it throughout the document should be consistent. At present, the document explains its functions in various, and often contradictory, ways. See ROD, at 3, 6, 9.

Further in this regard, the annexed Plan should be eliminated. The FSEIS must identify all the standards and guidelines and land allocations that will be part of the selected alternative. If it is necessary to summarize the selected alternative's key provisions, this should be done at the beginning of the document announcing the decision. A separate "Plan", that has never been subject to public review and comment, poses substantial litigation risks under both NEPA, NFMA and the Federal Land Policy and Management Act ("FLPMA"). The idea of appending a separate document to the ROD is, in fact, quite novel. To experiment with such a vehicle in this important litigation is unwise and unnecessary.

As to the decision itself, the selected alternative should be characterized as the selected alternative, and not "the plan" or "Federal Interagency Plan." The emphasis should be on the decision as a programmatic decision, which amends existing plans. The decision should not be characterized as a "plan" in and of itself. In addition, the legal authority for the decision should be stated up front.

Second, the ROD already sets out which alternatives were considered. See ROD, at 11-20. However, the ROD's current approach to designating the environmentally preferable alternative raises concerns. The decision to designate

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- 3 -

Alternative 9 as the sole environmentally preferable alternative appears unwise based upon the record. Also, while more than one environmentally preferable alternative can be designated, reliance on the presence of Adaptive Management Areas does not appear to be a firm basis for including Alternative 9 as the sole environmentally preferable alternative. The comments take sharp issue with this approach. At a very minimum, the concerns should be addressed in a straightforward manner.

The alternatives section should include reasons for the decision, indicating a reasoned basis for selection of one alternative over all others. This subsection must set forth the criteria for the decision and the legal, administrative, biological, multiple use, economic, social and policy factors used to arrive at the decision. The existing discussion of statutory standards found in the "Findings" section can satisfy some of this requirement, but more careful and thorough discussion is necessary. The discussion of the O&C Lands Act, for instance, needs careful revision to comport with the response to comments previously prepared. Failure to do so could create substantial litigation risks in that sensitive area. Some of the material found on pages 20-25 may be useful in explaining why the selected alternative is superior based on criteria subject to discretion and tradeoff, but much of the "rationale" section of the ROD seems to be a general explanation of the features of Alternative 9 and does not explain the basis for the selection.

Third, there must be a more thorough discussion of "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not." 40 C.F.R. 1505.2(c). This will involve a complete discussion of available mitigation, criteria for selecting mitigation and a more detailed explanation of what was and was not adopted and why. Finally, a full explanation of the monitoring and enforcement program must be discussed. Here, where monitoring represents a fundamental piece to the selected alternative, full explanations of the monitoring process will be critical in defending the ROD.

Lastly, the section entitled "Response to Comments on the FSEIS" needs to be rethought. The Final SEIS will present certain important information for the first time, and substantive responses to issues raised in comments will be necessary to insure NEPA compliance. Thus, even if changes are not made to the decision based on the comments, an analysis of the comments is still required.

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March 16, 1994

TO: WILL STELLE
FR: RIC ILGENFRITZ

RE: SKAGIT RIVER

Per our discussion of Wednesday morning, I am forwarding you some materials regarding the Skagit River Watershed. Included is a letter from the Nature Conservancy to Jim Lyons and a detailed map of the area. These materials accurately reflect the issue of concern within the watershed.

The Skagit River is a very high priority for Sen. Murray. It is her hope that the watershed can become a model of success for the watershed analysis/restoration strategies and well-reasoned land acquisition. Skagit represents all the values we are trying to protect through this process; therefore, what happens there has a tendency to become symbolic for the region overall.

Thanks for taking a look at this stuff. If you have any questions, please don't hesitate to let me know.

Please fax to
Teichmann, Gable
and Cottingham for
their review -
WJ
Done
Correct - not this cover note, just the
letter to Lyons



March 7, 1994

Mr. Jim Lyons
Assistant Secretary for Natural Resources
U.S. Department of Agriculture
14th and Independence Avenue SW, Room 217-E
Washington, D.C. 20250

Dear Mr. Lyons: *Jim,*

The Nature Conservancy of Washington would like to express dismay that an area greatly deserving of maximum protection under the newly issued Forest Plan has instead been placed in the "matrix". I refer to 36,000 acres on the upper Skagit River in Washington State (see attached map).

These National Forest lands lie immediately adjacent to the Skagit River Bald Eagle Natural Area. Here, no fewer than seven federal, state and private entities have invested millions of dollars in a long term effort to protect habitat for one of the largest wintering populations of bald eagles in the continental U.S. and the salmon upon which they depend.

The Nature Conservancy, with other conservation groups, has recommended inclusion of this area in Late Successional Reserve. The Mount Baker Snoqualmie National Forest has proposed key watershed status for the same lands.

The "matrix" designation is especially ironic in view of special emphasis given by Congress to the Skagit River watershed in FY 1994 appropriations. The FY 1994 Interior Appropriations bill directs the Forest Service to "recognize the Skagit River system in the Mount Baker Snoqualmie National Forest as a high priority area for rehabilitation." What logic can there be in permitting further fragmentation and degradation of a watershed targeted for major public investment in restoration? Furthermore, without at least a designation of "key watershed," the Skagit drainage may well lose out in future years when appropriations for watershed restoration will likely focus on areas so recognized.

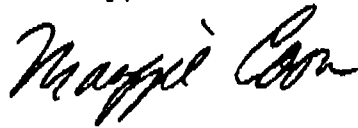
We respectfully request your final reconsideration of the Skagit River as Late Successional Reserve and pledge our continued support of the exceptional protection effort already underway there. I would greatly appreciate knowing your final determination in this matter.

Washington Field Office

217 Pine Street, Suite 1100, Seattle, Washington 98101

(206) 242 1244 FAX (206) 242 5408

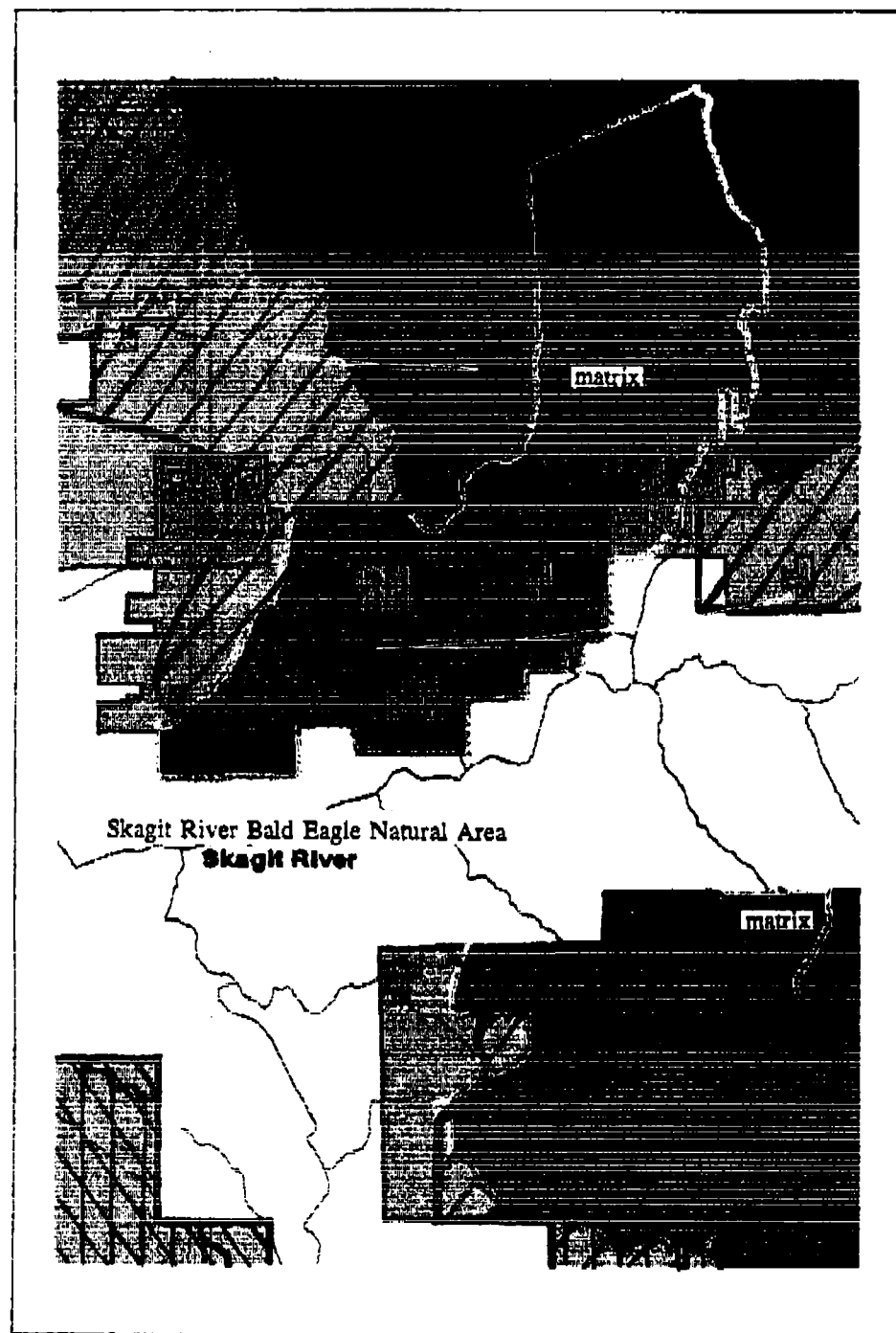
Sincerely,

A handwritten signature in black ink, appearing to read "Maggie Coon". The signature is fluid and cursive, with the first name "Maggie" written in a larger, more prominent script than the last name "Coon".

Maggie B. Coon
Director of Government Relations
The Nature Conservancy of Washington

cc: **Washington State Congressional delegation**
Robert Jacobs
George Frampton
Katie McGinty
Dennis Bschor

Map 1



- Late Successional Reserve
- Adaptive Management Area
- Tier 1 Key Watersheds
- Overlap with Reserve/Tier 1
- Overlap with Adaptive/Tier 1

- Proposed Late Successional Reserve
- National Forest Land
- State and Private Inholdings
- National Park Service Land
- Wilderness Areas
- State and Private Lands

- FOREST BOUNDARY
- RIVERS AND STREAMS
- WILDERNESS BOUNDARY
- RESERVE BOUNDARY

Scale: 0 5 10 mi

SKAGIT RIVER PROPOSED ADDITIONS TO LATE SUCCESSIONAL RESERVE 1993

THE NATURE CONSERVANCY

Map by Pacific Environmental Research Institute

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SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

ROD section addressing compliance with NFMA viability provision

The National Forest Management Act requires the Secretary of Agriculture to promulgate regulations to guide Forest Service planning that "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." In accordance with this directive, the Secretary promulgated a regulation for the fish-and-wildlife resource, which states in part: "Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." It also states that "habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area."

This regulation establishes a duty to manage and/or provide for an amount and distribution of habitat that has a substantial likelihood of supporting the continued persistence of the vertebrate species that exist in the planning area. The standard is framed in terms of likelihood because it involves projections about highly technical and complex issues as to which absolute certainty simply is not possible. Further, even absent any human-induced effects, the likelihood that habitat will continue to support persistence is not the same for any two species, and varies from the relatively secure for wide-ranging species that interact in a metapopulation to the relatively insecure for local rare endemic species whose entire range may comprise only a few acres. Thus, the duty cannot be framed in terms of a rigid binary determination and should be read in light of relevant biological and ecological factors, including the life history of species, the current amount and distribution of habitat, and the amount and distribution of species' ranges within the planning area.

Moreover, by its own terms, the duty applies only to vertebrate species. Nevertheless, consistent with the statutory goal to provide for diversity and its long-standing conservation policy, the Forest Service is committed to meeting a similar standard with respect to non-vertebrate species to the extent practicable. In addition, although NFMA and its regulations bind only the Forest Service, the NFMA fish-and-wildlife-resource regulation was used as a criterion in the development of the selected alternative, which includes direction for management of lands administered by the Bureau of Land Management. Use of the regulation in developing alternatives for this action was made in an effort to protect the long-term health of all of the forests under federal management within the range of the owl, in accordance with direction and authority provided in NFMA, the Forest Land and Policy Management Act, the Oregon and California Lands Act, and the

Endangered Species Act.

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In making a compliance determination, all existing or reasonably foreseeable conservation measures may be considered in addition to the proposed action. This follows to a degree because no one strategy or decision, no matter how comprehensive and well-conceived, can for all time provide its share of the habitat needs of all the species that exist in the planning area, especially in light of the dynamic nature both of ecosystems and of our continually evolving understanding of them. Measures that may be considered include analyses and activities undertaken pursuant to internal policy directives (e.g., the Forest Service's sensitive species program) and steps taken at differing layers of planning. Regardless of the measures in place, actual on-the-ground conditions also should be considered to the extent data exist.

The fish-and-wildlife-resource regulation does not require species-specific assessments. Indeed, the regulatory language expressly contemplates reliance upon "management indicator species" ("MISes") in the Forest Service's assessment of management or planning proposals for consistency with the regulation. Consistent with the theme of ecosystem management, reliance also may be placed upon assessments of (1) species with habitat needs that are essentially the same, regardless of whether formally designated as an MIS; (2) a group of species generally thought to perform the same or similar ecosystem functions; and/or (3) the continued integrity and function of ecosystem(s) in which a species is found. Flexibility in selecting methodology is especially appropriate in this context, given the expertise and knowledge of local forest officials concerning the lands they manage, the variety of complex issues involved, and the often-limited resources available. The Assessment Team's approach to evaluating the expected efficacy of the alternatives to provide habitat for species, for example, is not a controlling precedent for how such assessments need to be conducted in the future. Such an approach, which endeavored to identify and assess impacts on all species associated with late-successional forest ecosystems, has been unique, in part because it was designed to address specific court-identified deficiencies in previous planning efforts.

This interpretive guidance is not the first, nor will it be the last, word the Department will proffer on NFMA conservation duties. It is intended to be consistent with previous Department statements and Forest Service practice and is offered in light of the experience gained through more than a decade of applying the fish-and-wildlife-resource regulation. It does not represent a new standard then, but rather an elucidation of the duties the Forest Service has been executing in its planning and management activities since the current version of the regulation was promulgated in 1982.

Nevertheless, previous planning documentation may use

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somewhat different verbal formulations as compared with those set forth above in defining duties or making compliance determinations. That is no indication, however, that these previous initiatives are inconsistent with our guidance. The key issue, rather, is whether the purpose sought to be served by the strategy is essentially the same as that underlying the guidance provided here. That is, so long as the strategy has as one of its key underlying purposes management of well-distributed habitat to support the continued persistence of vertebrate species, it is fair to say that its application of the regulation generally is within the scope of this clarifying direction.

Applying that direction here, we find that the selected alternative meets the obligations of the NFMA fish-and-wildlife-resource regulation. Through implementation of our decision and taking into account activities that are likely to proceed under its terms, we find that habitat will be provided and managed in an amount and distribution that is substantially likely to support the continued persistence of species that exist in the planning area. We base our finding on the following factors:

First, our decision results in approximately 85 percent of the approximately 8.5 million acres of medium and large late-successional conifer forests in the planning area being within land allocations that do not allow for programmed timber harvest (FSEIS at 3&4-41). Such forests generally are the most important in serving as habitat for late-successional and old-growth associated species. In addition, some forty-two percent of the areas within the LSRs that are spread widely across the planning area under our decision are dominated by such forest types. LSRs provide for large contiguous blocs in which silvicultural treatments are prohibited unless they would be beneficial to the creation of late-successional forest conditions. LSRs therefore protect against potential adverse effects thought to result from fragmentation and edge effects on species associated with late-successional and old-growth forest habitat.

In large measure because of the extensive protection afforded the larger late-successional forests under our decision, there is more than a substantial likelihood that activities undertaken pursuant to it will allow for the maintenance of a functional and inter-connected late-successional forest ecosystem within the range of the owl. An Assessment Team Panel evaluated the extent to which seven of the alternatives, including Alternative 9 as originally composed, would provide for that quantity and quality of late-successional forest ecosystem conditions representative of a hypothesized long-term average. The panel divided its assessment into three separate components of basic ecosystem health: abundance and ecological diversity, processes and function, and connectivity. It gave Alternative 9, as originally conceived, strong marks with respect to each of these components, although none of the alternatives was projected to

DRAFT

provide as well for late-successional conditions in dry provinces as they would in moist provinces. Moreover, the selected alternative, while fundamentally the same as the originally conceived Alternative 9, contains additional measures not considered by the panel that are likely to enhance the attributes of late-successional and old-growth forest ecosystems. These measures include the incorporation of Riparian Reserve 1, which will protect additional old-growth forest fragments in the matrix, and standards and guidelines designed to further conserve certain conditions associated with old-growth forests (FSEIS at 3&4-49).

Second, the aquatic and riparian subsystems within the range of the owl also receive significant protection under our decision. It places all riparian areas -- including rivers, streams, wetlands, lakes, and ponds -- within a reserve (FSEIS at 3&4-66). The contiguous and linear nature of these Riparian Reserves allows for connectivity of all parts of the aquatic network. The reserves vary in size, from 100 to 300 feet in width on each side of the applicable riparian area, depending upon the type of area they are designed to protect, and total approximately 2.6 million acres in the aggregate (FSEIS at 2-39). The standards and guidelines for Riparian Reserves do not allow proposed projects to proceed within reserve boundaries unless they will serve the goal of restoring or maintaining the ecological function and processes of watersheds and aquatic ecosystems within natural disturbance criteria. Our decision also amends standards and guidelines to forbid construction of any new roads in inventoried (RARE II) roadless areas within Key Watersheds to protect remaining high-quality riparian habitat. As for those inventoried roadless areas in non-Key Watersheds, watershed analysis must be conducted before any land management activities may proceed. Moreover, the nearly 7.5 million acres our decision places inside LSRs also benefit aquatic ecosystems by substantially limiting management activities and, hence, the risk of disturbance associated with such activities (FSEIS at 2-60 & 3&4-65). The Assessment Team concluded that these elements of our decision would work to reverse the trend of degradation and begin recovery of aquatic ecosystems on federal lands within the range of the owl (FSEIS at 3&4-65).

Third, activities undertaken pursuant to our decision will provide for habitat of an amount and distribution that is substantially likely to support the continued persistence of the northern spotted owl. The owl is particularly important to our analysis because its range defines the planning area for our decision, it is a threatened species under ESA, and more data exist concerning it than for any other species in the planning area. Of the nearly 7.5 million acres of extant suitable owl habitat on federal lands within the planning area, the selected alternative protects all but about fifteen percent from programmed timber harvest (FSEIS at 3&4-222). It places nearly 3.2 million acres of suitable owl habitat in LSRs that occur in various elevation zones across the entire range of the owl. All are large enough to

DRAFT

support multiple pairs of interacting owl pairs. In fact, many LSRs contain relatively large numbers of currently known owl activity centers, with 42 LSRs having 15 or more such centers and 20 LSRs having between 20 and 29 centers (FSEIS at 3&4-231). In addition, our decision contains elements that will provide for owl dispersal habitat, including the widest riparian reserves of those considered and allocation of Managed Late-Successional Areas, which protect the activity centers of known owl pairs and resident single owls in the matrix (FSEIS at 3&4-242). Even before the addition of these last two measures to Alternative 9, which are incorporated into our decision, the Assessment Team projected that it would provide for habitat of sufficient quality, distribution, and abundance to allow the owl population to stabilize across federal lands and that there was no likelihood that it would result in restriction of the owl to refugia (FSEIS at 3&4-118 & 3&4-243).

We acknowledge that, notwithstanding the considerable protection afforded the owl under our decision, it does not prohibit all harvest of suitable owl habitat. Approximately one percent of the extant amount of suitable owl habitat likely will be harvested per decade in light of the size and configuration of the matrix lands allocated under our decision. Some have opined that this level of harvest of owl habitat -- indeed, any level of harvest of owl habitat -- ought not be permitted and thus take the view that Alternative 9 is inadequate to support the owl's continued persistence. Along these lines, on March 2, 1994, we received a letter from nineteen research scientists urging us to "ensure that the northern spotted owl's remaining habitat is fully protected" in our decision. The scientists based their concern on the results of a recent demographic analysis sponsored by the federal government and led by federal scientists Ken Burnham and Dave Anderson (App. J-1 to FSEIS). The analysis, released in January 1994, evaluated data from several demographic study areas and generated the following basic results: (1) the aggregate population of the owl in the study areas has declined during the study period and (2) the adult female annual survival rate in the study areas has continued to decline during the study period (FSEIS at 3&4-223). One can infer from these results, when considered together, that the decline in the overall owl population in the study areas has actually accelerated over the study period (FSEIS at 3&4-223).

their comments

We ~~too~~ regard these findings to be of concern, and considered ~~them~~ carefully in making our decision. We also, however, have taken into account the views of our own biologists, some of whom participated in the workshop out of which the demographic analysis of Drs. Burnham and Anderson arose and who provided much of the field data upon which it is based. Generally, as reflected in both the FSEIS and FEMAT Report, they hold somewhat different views about the implications of the 1994 (and 1992) demographic analyses for an owl conservation strategy that allows for a relatively limited amount of harvest of owl habitat in matrix

DRAFT

lands while protecting large reserve areas from programmed timber harvest. While the discussion in the FSEIS also counsels caution in light of the results of the most recent demographic analysis, it does not share the view that a moratorium on all further harvest of suitable owl habitat is necessarily a prerequisite to continued persistence of the owl in the planning area (FSEIS at 3&4-229 - 3&4-235). Instead, it posits that a conservative approach to owl management like that reflected in our decision today should be sufficient to provide for the continued persistence of the owl in light of several factors: (1) it is improper simply to make projections about future owl population rates on the basis of rates observed in the past, especially when the past rates were derived for a period of much greater habitat loss than that which will be allowed in the future; (2) the owl and its habitat are still widely distributed in numerous sub-populations, and there is evidence suggesting that population trends vary across the owl's range; (3) the LSRs allocated in our decision encompass a wide spectrum of environmental conditions, and many, if not all, of them should be large enough to function as stable sub-population clusters; (4) the density data for the same study areas have shown no real sign of significant decline in population; and (5) none of the principal investigators who oversee data collection on the long-term study areas have seen evidence to indicate that the owl sub-populations in the areas they administer are at or near an irreversible decline (FSEIS at 3&4-234). Finally, results of recent computer model runs simulating owl population dynamics tend to support the hypothesis that the amount and distribution of habitat provided under our decision are sufficient to prevent the owl from passing below an extinction threshold (App. J-3 to FSEIS at 9).

There is one other ESA-listed species directly associated with late-successional and old-growth forests that exists in the planning area, and thus, deserves special mention: the marbled murrelet. Listed as a threatened species in 1992, the marbled murrelet is a small seabird that comes inland to nest in old-growth trees with limbs large enough to support a nesting platform (FSEIS at 3&4-245 - 3&4-246). Under our decision, less than ten percent of the more than 2.5 million acres of suitable murrelet nesting habitat is in the matrix (FSEIS at 3&4-222). This decision also places in LSRs all but a tiny fraction of the most ecologically significant late-successional and old-growth forests within the range of the vast majority of marbled murrelet activity (FSEIS at 2-60). In addition, our decision contains guidelines that require pre-project surveys of marbled murrelet habitat, and delineation of an LSR for all contiguous and existing and recruitment habitat if species activity is detected (FSEIS at 2-28). The Assessment Team estimated that Alternative 9 as originally defined would provide habitat on federal lands in an amount and distribution such that there was roughly an 80 percent likelihood that it would support a well-distributed and stable murrelet population in the planning area (without factoring in non-federal effects) (FSEIS at 3&4-248). Our decision provides for more protection of murrelet habitat than

DRAFT

that reflected in the originally conceived Alternative 9 (FSEIS at 3&4-248). In light of these factors, we find that there is a substantial likelihood that our decision will provide for an amount and distribution of habitat in the planning area to support the continued persistence of the murrelet.

There are thirteen other ESA-listed species that exist in the planning area not directly associated with late-successional or old-growth forests (FSEIS at 3&4-250). The Fish & Wildlife Service found that this decision is not likely to adversely affect any of these species or the critical habitat of those species for which such has been designated (FSEIS at 3&4-250 - 3&4-258).

A variety of vertebrate species that use early-successional forests as primary habitat also exist in the planning area (FSEIS at 3&4-203). Although our decision provides standards and guidelines for management of habitat of species associated with late-successional forests, we discuss briefly the extent to which we expect our decision may affect species associated with early-successional forests. The baseline for our discussion is the fact that the amount of early-successional forest in the planning area reasonably is thought to be greater now than at any time in the past, in large measure because of logging that has occurred over the last several decades (FSEIS at 3&4-203). Not surprisingly then, species associated with early-successional forests generally have increased in abundance as compared with their estimated historical populations. Although there are no data to indicate that more is needed at the moment to support the continued persistence of any particular species, our decision will provide for additional early-successional forest through its allowance of harvest of some late-successional forest stands in the matrix. Thus, we find that our decision should provide for an amount and distribution of early-successional habitat that is substantially likely to support the continued persistence of species that use such habitat.

The foregoing analysis is more than sufficient upon which to base a compliance determination with the fish-and-wildlife-resource regulation. We continue our discussion only because of the extremely thorough nature of the biological inventory and analysis reflected in the NEPA documentation before us. Although not required, where there is information concerning individual species that are neither listed nor identified as an indicator, it should be considered.

Eighty-seven other vertebrate species, races, or groups were assessed in addition to the owl and murrelet in the process leading up to this decision. These break down into 36 other bird species; 11 bat species; 15 non-bat mammal species (15); seven fish species, races, and groups; and 18 amphibians and reptile species. The Assessment Team projected that, with just three exceptions, Alternative 9, as originally designed, would have roughly at least

DRAFT

an 80-percent likelihood of providing habitat to support stable populations of each of these vertebrates, either well-distributed when measured against their historic range on federal lands or with significant gaps in that range (FSEIS at 3&4-174, 3&4-179, 3&4-184, 3&4-188, & 3&4-197). Of the 84 vertebrates that fit within this category, all but two were projected to have a higher likelihood of achieving a stable population that is well-distributed when measured against their historic range, as compared with one that contains significant gaps; the vast majority were projected to have a much higher likelihood. Most of the species with an estimated likelihood of any magnitude of having significant habitat gaps in their historic distributions on federal lands under Alternative 9 already have significant gaps in their habitat distribution. Of itself, the fact that gaps in a species' historic distribution may occur under a planning decision does not preclude a finding of compliance with the fish-and-wildlife-resource regulation, especially where such gaps are already present. As the Assessment Team noted, distribution cannot be evaluated on a monolithic scale.

The three vertebrates that do not fit within the category described above are all amphibians: (1) the Columbia torrent salamander; (2) the Coastal and Olympic Peninsula populations of the Van Dyke's salamander; and (3) the Shasta salamander (FSEIS at 3&4-174). The first two of these exist almost exclusively on nonfederal land and no mitigation can create a substantial likelihood that they will continue to persist on the small portion of their range that occurs on federal lands. Given that such a significant portion of their range occurs beyond the planning area (and indeed, outside federal lands), we find that our decision satisfies NFMA conservation duties with respect to these species. Of the amount and distribution of habitat substantially likely to support these species' continued persistence on all lands, our decision provides a portion that is roughly commensurate with, or greater than, the fraction of the species' range in the planning area. The Shasta salamander is an extremely local endemic whose habitat sites are essentially fully protected by our decision. Because its range is so limited, however, there is no way of ameliorating the risk of extirpation of this species from federal lands in our decision. When evaluated in the context of the natural bounds on the range of this salamander, we find that our decision does provide for habitat giving rise to a substantial likelihood of supporting its continued persistence. We make this finding also in the knowledge that research has shown that the presence of rare endemic species generally is consistent with diverse ecosystems (cite to T. Lovejoy). Finally, we note that additional measures are included in our decision that were not a part of Alternative 9, as originally conceived, and thus, were not considered in the Assessment Team's ratings set forth above. Some of these additional measures were adopted specifically to provide additional protection for vertebrate species, especially those which have a relatively higher likelihood of having significant gaps in their historic ranges on federal lands. These include

DRAFT

adoption of Riparian Reserve 1, which will help to provide habitat conditions beneficial to fish, stream-dwelling amphibians, and the American marten and red tree vole; the standard requiring increased coarse woody debris in the matrix, which will provide additional habitat protection for terrestrial amphibians, the American marten and fisher, and certain bats; the standard requiring leaving clumps of snags and green trees in the matrix, which should help certain birds and bats; and the guideline providing additional protection for cave entrances, mines, etc., which also should help protect bats.