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Folder Title:
Forest Conference-Section 4(d) of Endangered Species Act-Fish and Wildlife Service

Stack:	Row:	Section:	Shelf:	Position:
S	61	7	2	2

BALL, JANIK & NOVACK
ATTORNEYS AT LAW10TH FLOOR, 1101 PENNSYLVANIA AVE. N.W.
WASHINGTON, D.C. 20004
TELEPHONE (202) 638-3307
TELECOPY (202) 783-6947101 E.W. MAIN ST. SUITE 1100
PORTLAND, OREGON 97204 3274
TELEPHONE (503) 225 2525
TELECOPY (503) 295-1056

JAMES A. BEALL

May 18, 1994

Congresswoman Jolene Unsoeld
1527 Longworth House Building
Washington, D.C. 20515

Dear Jolene:

Just a note to thank you for all that you are doing for the treefarmers of Washington. My phone has been ringing off the hook with calls from various Interior officials and we may be on the road to working something out on the 4(d) Rule.

In the past month, I have met regularly with Don Barry, Don Knowles, Tom Tuckman, Gerry Jackson and others. They have admitted that the initial 4(d) process may not have been structured in an ideal manner and have expressed a willingness to sit down with Northwest treefarmers to explore alternative means of addressing their concerns.

Pursuant to these discussions, we have agreed to convene a session in Olympia, on Thursday, May 26, at which the treefarmers and Interior can have a full airing of the relevant concerns. The session will begin at 10:00 am at the Westwater Hotel and will end no later than 2:00 pm. Don Barry and Gerry Jackson will lead the delegation from Interior. Nels Hanson and the board of WFFA will lead the delegation of treefarmers.

As you know, WFFA's principal concerns relate to (1) the legal and biological justification for extending the ESA to nonfederal lands; (2) the absence of common goals and definition of "success" (i.e., how many owls are "enough?"); (3) the need to minimize the regulatory impact on private landowners; (4) the need for an alternative approach to the development of a 4(d) Rule (i.e., one that is based upon a mutually-agreeable, negotiated plan); and (5) specific problems relating to the scoping notice published in December (e.g. absence of a strong "safe harbor" provision, absence of a meaningful definition of suitable habitat, absence of basic data relating to land ownership and owl populations, etc.).

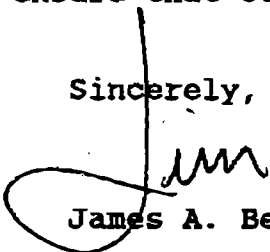
WFFA is looking forward to sitting down with Interior on the 26th to address these and related concerns. We will, of course, keep you and the rest of the delegation apprised of our progress.

BALL, JANIK & NOVACK

Page 2

In the meantime, many thanks to you and others in the delegation who are working so hard to ensure that our concerns are given a forum for resolution.

Sincerely,

A handwritten signature in dark ink, appearing to be "Jim", with a large, loopy flourish underneath the name.

James A. Beall

cc: Nels Hanson (for WFFA distribution)
Washington Congressional Delegation
Don Barry
Gerry Jackson



United States Department of the Interior

FISH AND WILDLIFE SERVICE

WASHINGTON, D.C. 20240



ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

In Reply Refer To:

FWS/AES

MAR 10 1994

Mr. Mark Rey
Vice President, Forest Resources
American Forest and Paper Association
1111 Nineteenth Street, N.W., Suite 800
Washington, D.C. 20036

Dear Mr. Rey:

Secretary Babbitt has asked me to respond to two letters from the American Forest and Paper Association (AFPA) dated March 10, 1994, and March 23, 1994, regarding the Fish and Wildlife Service's (Service) Endangered Species Act (ESA) Section 4(d) rulemaking for the northern spotted owl. In your letters, AFPA endorsed the continuation of the Section 4(d) process in general, and set out certain key policy issues which the organization believed needed to be specifically addressed in any proposed rule.

Secretary Babbitt and I would like to express our appreciation for your continued support for the Section 4(d) rulemaking process. We remain committed in our belief that a carefully constructed Section 4(d) rule can address the conservation needs of the spotted owl and still provide significant regulatory relief to non-Federal landowners. Your letter indicates that you continue to share this point of view.

As for the particular issues raised in your letter of March 10, I would like to offer the following comments. First, it is our current intention for the States of Washington and California to include a "safe harbor" concept in the proposed 4(d) rule. It is also our intention to leave the existing regulatory definition of "take" unchanged and to forego any sort of fixed "bright line" for suitable owl habitat that might result in automatic violations of the ESA. We will continue to assert, however, that there is a very significant risk that such a violation will occur if suitable habitat drops below 40 percent of the home range of an owl.

We also remain willing to consider any alternative concept for a 4(d) rule that might be developed by non-Federal landowners or the State of Oregon. As you know, the Oregon Congressional delegation has requested that the Service suspend the 4(d) process for now as applied to that State. Given our intention to move forward with a 4(d) rule for Washington and California, the Service will be unable to "suspend" the rulemaking process for Oregon alone. Nevertheless, it is our desire to be responsive to the concerns

Mr. Mark Rey

2

expressed by the Members of Congress from Oregon, as well as to the unique problems of that State. Our current thinking concerning a proposed approach for Oregon is set out in the enclosed letter to the Oregon delegation. There is nothing in that letter which would preclude consideration of an alternative 4(d) concept should one be developed by the State or other non-Federal landowners. In fact, we continue to gather and analyze data on non-Federal ownership, and will persist in our efforts to find an acceptable approach for the 4(d) rule for Oregon.

I believe that the frank and constructive exchange of views between AFPA and the Department of the Interior has provided us all with a better understanding of the concerns of non-Federal landowners within the range of the spotted owl. While our major focus must remain, as a matter of law, on the conservation needs of the spotted owl, I am convinced that an appropriate balance can be struck that provides significant relief to private timberland owners. I look forward to continued progress on this quest.

Sincerely,

MOLLIE H. BEATTIE

DIRECTOR

Enclosure

cc w/enc.: Mr. Dan Dutton
Stimson Lumber Company
308 Pacific Building
Portland, Oregon 97204

bcc w.enc: White House/Will Stelle
FW/Don Barry
FW/Don Knowles
FWS/Mike Spear
FWS/Marv Plenert
FWS/Gerry Jackson
FWS/Curt Smitch
SOL/Ron Swan

cc: 3024-MIB-AES
3012-MIB-Directorate Reading File
3012-MIB-CCU

FW:DJBarry:mbn:5/11/94

**AMERICAN
FOREST &
PAPER
ASSOCIATION**

1111 19TH STREET NW, SUITE 800, WASHINGTON, DC 20036
PHONE: (202) 463-2700 DEPARTMENT FAX: (202) 463-2708

FOREST RESOURCES GROUP

March 10, 1994

The Honorable Bruce Babbitt
Secretary
Department of the Interior
1849 C Street, N.W. Room 6151
Washington, D.C. 20240

Dear Secretary Babbitt:

On behalf of the American Forest & Paper Association Forest Resources Group, I want to thank you for meeting with us on March 8 to discuss the pending Endangered Species Act (ESA) Section 4(d) rulemaking for the Northern Spotted Owl. During our meeting, we reviewed three principal areas of concern with the upcoming rule.

First, we noted that the rule should not be structured to cause a landowner to be automatically in violation of the ESA if he or she fails to adhere to the rule's timber harvesting prescriptions. Instead, the rule should provide a "safe harbor" shielding landowners from any ESA violation if they adhere to the strictures specified in the rule. This is an especially important element which will determine industry and landowner support for the rule.

Second, flowing from the "safe harbor" approach to rulemaking, the rule should not define what constitutes an ESA violation (specifically, it should not define what landowner actions would result in a "take" of the Northern Spotted Owl under ESA Section 9(a)). At one time, we worked with your staff to try to agree on a joint definition of "take." At this point in the process we are prepared to leave the existing regulatory definition unchanged. Subsequent implementation experience or litigation will further define "take." To that end, the rule should provide that landowners who choose not to adhere to its stricture will be subject to: (1) investigation to determine whether a "take" as defined by existing law has occurred or will occur; and (2) appropriate enforcement action if a "take" is found.

Third, we ask you to consider in the draft Environmental Impact Statement (EIS) a different alternative for dealing with nonfederal lands in Oregon. Oregon forest landowners are committed to working with the Oregon Department of Forestry, the Department of Fish and

Wildlife, and the State Land Board to jointly develop a state program to protect the Northern Spotted Owl on nonfederal lands. We would like to be able to develop this alternative in concert with the Section 4(d) rulemaking.

We are pleased that you share our desire for predictability and a reasonable approach to dealing with nonfederal lands. We are particularly pleased that you agreed to look at the alternative that we would propose for Oregon. I have asked Mark Rey of the AF&PA staff to contact Don Berry of your staff to get further details on: (1) when you would need this alternative for inclusion in the DEIS; and (2) what form our submission should take.

We are also pleased that you are now able to focus and intend to work on the Section 4(d) rule to achieve the outcome that both you and we desire. We hope that we can work with you throughout this process in a close and cooperative effort to make the ESA work.

To this end, we were especially pleased that you agreed to meet again on May 18, in conjunction with AF&PA's Spring Legislative Conference. I have asked Mark Rey to be in contact with the scheduling office to arrange this meeting. We would at that time like to include other forest landowning companies who are eager to participate in the rulemaking and/or are working with the Department in the development of Habitat Conservation Plans.

If there is anything that we can do to help in this rulemaking effort, please do not hesitate to give me a call. I look forward to working with you in this novel and challenging effort to make endangered species protection compatible with other social, economic, and environmental goals.

Sincerely,



Dan Dutton
Chairman
Forest Resources Group

cc: Donald Berry
Laura Daniel Davis

**AMERICAN
FOREST &
PAPER
ASSOCIATION**

1111 18TH STREET NW, SUITE 800, WASHINGTON, DC 20036
PHONE: (202) 463-2700 DEPARTMENT FAX: (202) 463-2708

FOREST RESOURCES GROUP

March 23, 1994

The Honorable Bruce Babbitt
Secretary
Department of the Interior
1849 C Street, N.W., Room 6151
Washington, D.C. 20240

Dear Secretary Babbitt:

Building upon our March 8 meeting with you and the March 10 letter that followed, forest industry representatives met on March 17 with your staff concerning the Department's Endangered Species Act (ESA) Section 4(d) rulemaking on the Northern Spotted Owl. In our March 17 meeting, we discussed the issues that we had reviewed earlier with you: (1) the "safe harbor" approach to rulemaking and the definition of "take;" and (2) the prospect of developing an alternative approach in the rule for dealing with non-federal lands in Oregon.

Subsequent to our meeting with your staff, we believe that it is helpful to reiterate our views on the rulemaking. First, notwithstanding the litigation referenced, below, the forest products industry remains committed to the Section 4(d) rulemaking process, and our shared objective of reducing the burden of Endangered Species Act regulation on non-federal lands in the affected region. While there are elements of the December scoping notice that may not achieve this objective, we nevertheless remain confident that through additional cooperative efforts between the industry and the Department (and with the assistance of the affected congressional delegation and the states involved), a reasonable rule representing an innovative approach to addressing non-federal lands under the ESA can be achieved.

Second, we remain committed to working with the Oregon state agencies in the development of an alternative approach for non-federal lands in Oregon. We share the desire to improve the rule expressed in the March 17 letter to you from members of the Oregon congressional delegation. We discussed a schedule for submitting materials to your staff in time for the possible inclusion of an alternative approach in the draft Environmental Impact Statement (EIS) accompanying the proposed rule. This would allow further analysis and refinement between draft and final EIS publication. It is possible that the time necessary to develop these materials will require some extension in the Department's schedule for publishing the draft EIS. We agreed to keep your staff apprised of our progress in this area.

On a related matter, we would like to explore alternative approaches for at least some areas of Washington as well. For example, we would like to work on alternatives to the Olympic Peninsula SEA which recognize the significantly improved information about population levels of the Olympic Peninsula. It is now known that Peninsula owl populations exceed the Draft Recovery Plan Goal by 50%. Federal and state protection efforts make this one of the most highly protected provinces of the Northern Spotted Owl. In this case as well, we would like to prepare an alternative for consideration in the DEIS.

Third, we wish to reiterate the importance of a "safe harbor" approach to this rulemaking. As we indicated in our earlier letter to you, this is an essential element in the industry's agreement to proceed.

Finally, the outcome of Sweet Home Chapter of Communities for a Greater Oregon, et. al. v. Babbitt and Northwest Forest Resource Council v. Clinton should not, in our view, discourage either the industry or the Administration from continuing in the effort to pursue reasonable and innovative regulatory approaches through the use of the Endangered Species Act Section 4(d) authority. You have our commitment to continue to work toward the success of the Section 4(d) regulatory process.

We will continue our discussions with your staff and our efforts to develop the materials necessary to move the Section 4(d) process forward. We look forward to our meeting with you on May 18. In the interim, if you have any questions, please do not hesitate to have your staff contact us at AF&PA.

Sincerely,



Mark Rey
Vice President, Forest Resources



United States Department of the Interior

FISH AND WILDLIFE SERVICE

WASHINGTON, D.C. 20240



ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

In Reply Refer To:
FWS/AES

MAY 10 1994

Honorable Mark O. Hatfield
United States Senate
Washington, D.C. 20510

Dear Senator Hatfield:

Secretary Babbitt has asked me to respond to your letter of March 17, 1994, expressing your concerns over the proposed Section 4(d) rule for the northern spotted owl as applied to non-Federal lands in Oregon. In particular, you have asked that the 4(d) rulemaking process be suspended so as to provide an opportunity for further discussions among the Fish and Wildlife Service (Service), the State and private landowners over the scope and content of such a rule. I would like to briefly review the original goals of the 4(d) proposal and then discuss the specific steps that the Service will now undertake with regard to a 4(d) rule.

When the spotted owl was listed as a threatened species in the summer of 1990, it became illegal to "take" the owl throughout its range, including owls within the State of Oregon. In a previous regulation issued under Secretary James Watt in 1981, take had been defined under the concept of "harm" to include significant habitat modification that actually killed or injured a listed species by significantly impairing essential behavioral patterns. Thus, since the time of its original listing in 1990, it has been illegal to take an owl in Oregon through significant habitat modification activities such as timber harvesting.

The absence of subsequent enforcement action may well have left many landowners with the impression that take from timber harvesting is not currently prohibited unless an owl is struck by a falling tree or is otherwise killed or injured by the direct application of force. As evidenced by its original 1991 incidental take guidelines on timber harvesting, however, the Service has consistently taken the position that certain harvest activities within a significant portion of an owl's home range could constitute a take of that owl. This is one reason why the Service intends to seek a rehearing of the recent D.C. Circuit Court of Appeals' decision in the case of Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt 1994 WL 71984 (D.C. Cir. 1994).

When President Clinton chose a Federal forest strategy last July that had the Federal Government shouldering the primary burden for spotted owl conservation, he directed the Service to begin work on a Section 4(d) rule which would provide significant relief to non-Federal landowners from current take restrictions for the owl. The EIS Scoping Notice published on December 29, 1993, in the Federal Register represented the first preliminary step in the 4(d) rulemaking process.

The "proposed action" identified in the Scoping Notice was not actually a proposed rule but rather a detailed description of the Service's preferred strategy for a 4(d) rule at that time. The primary benefit of a Scoping Notice of this sort is that it provides the public with an opportunity to shape and influence Federal regulatory policy prior to the issuance of a draft proposed rule. Thus, the concerns and criticism that you heard from your constituents regarding the Service's December 29 "proposed action" is welcomed by the Department of the Interior, and is viewed as the very sort of constructive public comment that the Scoping Notice process was designed to generate. It enables the Service to refine its own thinking on the 4(d) proposal, and also identifies areas of misunderstanding on the part of the public as to the effects of the 4(d) rule itself. As you noted in your letter, the Service has considerable work ahead of it in both of these areas. The following addresses the particular concerns that were raised in your letter.

Foremost was your request that the Service suspend further work on the 4(d) rule for Oregon until such time as a broader understanding emerges regarding the role of non-Federal lands in the conservation of the owl. Clearly, landownership patterns in Oregon make it the most complicated State for a 4(d) rule for the spotted owl. On the other hand, the development of a 4(d) rule that provides significant relief to non-Federal landowners in Washington and California is more straightforward.

Under the implementing regulations for the Endangered Species Act, the Service cannot issue a "special regulation" or 4(d) rule governing only a portion of the range of a threatened species. Thus, the Service cannot proceed with a 4(d) rule for California and Washington but exclude the State of Oregon. Moreover, there are strong public policy reasons for proceeding to publish a proposed 4(d) rule that would remove unnecessary restrictions in California and Washington, and there is continued support for the 4(d) rule process from the timber industry, affected communities, and political leaders in those States, as demonstrated by the enclosed letter from the American Forest and Paper Association.

Under these circumstances, the Service is still planning to go forward with a proposed 4(d) rule for Washington and California which would ease current Federal owl conservation restrictions for large areas of non-Federal lands. It would include such features as a defined "safe harbor" (absolving landowners who comply with certain prescriptions from any subsequent liability for incidental take) and a small landowner exemption for private timber activities in those States. It would also include a provision encouraging the development of alternative approaches to the 4(d) rule which were capable of achieving the overall conservation goals for the spotted owl. Thus, if small woodlot owners, the State or other non-Federal timberland owners ultimately proposed a different mechanism for addressing the conservation of the owl on non-Federal lands, a "bookmarker" would already be set in the regulations to accommodate such an initiative.

While Oregon must be included in a proposed 4(d) rule, the Service will not propose to change the existing regulatory status quo for the owl in Oregon at this time. Thus, for purposes of the EIS for the 4(d) rule, the Service would move up the analysis of the "no action" alternative for Oregon and include it in the "proposed action" description instead. By mimicking verbatim the regulatory restrictions articulated in the original rulemaking listing the owl in 1990, and by not addressing the question of Special Emphasis Areas, the Service will create the equivalent of a "suspension" of the 4(d) process for Oregon while still allowing a new 4(d) rule to move forward for Washington and California.

It is still our hope that in the weeks and months ahead, the State and private landowners could assist in the development of a new and broader consensus for a more active approach to the 4(d) rule. If such a shift were to occur prior to the publication of the draft EIS and proposed rule, it could be folded into the 4(d) rule as the new preferred alternative for Oregon. Such an approach would be outlined as an alternative in the draft EIS. Thus, the proposed rule for Oregon would leave existing (current) restrictions on timber harvesting intact.

Two recent administrative decisions should provide additional opportunities for this to happen. First, in light of the final adoption of a new Federal forest plan, and given the development of new computer models on owl persistence that were unavailable during the past recovery planning effort, the Service has decided that it would be useful to conduct a reassessment of key owl conservation assumptions for non-Federal lands prior to the issuance of the 4(d) rule. This will result in a delay in the publication of the draft EIS and rule until September at the earliest. Coincidentally, the reassessment will also provide additional time for an expanded

Honorable Mark O. Hatfield

4

dialogue to take place over the proper scope of the 4(d) rule. The Service is also reviewing the relationship between such a reassessment and the finalization or revision of a spotted owl recovery plan. This may cause further delay.

In addition, I have tasked the Service's Regional Office in Portland with developing a new substantive public outreach initiative on 4(d) for Oregon, targeting in particular State officials and private landowners. This effort is not intended to be a one dimensional public information campaign but rather is intended to generate substantive discussions on 4(d) with affected non-Federal landowners. It should also provide an expanded forum for the exchange of ideas as part of the NEPA scoping process that could lead to the resumption of the 4(d) rule process for Oregon.

I hope you will agree that the above items are fair and measured responses to the concerns raised in your letter of March 17, 1994. The Service is committed to working closely with the State of Oregon in an effort to achieve our goals of providing relief to non-Federal landowners in a manner which is legally consistent with the requirements of the Endangered Species Act. We also will keep the Oregon Congressional delegation apprised of any new developments which might affect the scope of the 4(d) rule for your State.

Sincerely,

MOLLIE H. BEATTIE

DIRECTOR

Enclosure

IDENTICAL LETTERS SENT TO:

Honorable Bob Packwood, United States Senate
Honorable Ron Wyden, House of Representatives
Honorable Peter DeFazio, House of Representatives
Honorable Mike Kopetski, House of Representatives
Honorable Bob Smith, House of Representatives

bcc w/enc.: White House/Will Stelle
OCI/Stephanie Solien
FW/Don Barry
FW/Don Knowles
FWS/Mike Spear
FWS Region 1/Director Plenert
FWS Region 1/Gerry Jackson
FWS Olympia/Curt Smitch

cc: 3024-MIB-AES
3012-MIB-Directorate Reading File
3012-MIB-CCU

FW:DJBarry:mbn:5/4/94
REVISED:5/10/94

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1115 15TH STREET NW, SUITE 800, WASHINGTON, DC 20005
PHONE: (202) 463-2700 DEPARTMENT FAX: (202) 463-2703

FOREST RESOURCES GROUP

March 23, 1994

The Honorable Bruce Babbitt
Secretary
Department of the Interior
1849 C Street, N.W., Room 6151
Washington, D.C. 20240

Dear Secretary Babbitt:

Building upon our March 8 meeting with you and the March 10 letter that followed, forest industry representatives met on March 17 with your staff concerning the Department's Endangered Species Act (ESA) Section 4(d) rulemaking on the Northern Spotted Owl. In our March 17 meeting, we discussed the issues that we had reviewed earlier with you: (1) the "safe harbor" approach to rulemaking and the definition of "take;" and (2) the prospect of developing an alternative approach in the rule for dealing with non-federal lands in Oregon.

Subsequent to our meeting with your staff, we believe that it is helpful to reiterate our views on the rulemaking. First, notwithstanding the litigation referenced, below, the forest products industry remains committed to the Section 4(d) rulemaking process, and our shared objective of reducing the burden of Endangered Species Act regulation on non-federal lands in the affected region. While there are elements of the December scoping notice that may not achieve this objective, we nevertheless remain confident that through additional cooperative efforts between the industry and the Department (and with the assistance of the affected congressional delegation and the states involved), a reasonable rule representing an innovative approach to addressing non-federal lands under the ESA can be achieved.

Second, we remain committed to working with the Oregon state agencies in the development of an alternative approach for non-federal lands in Oregon. We share the desire to improve the rule expressed in the March 17 letter to you from members of the Oregon congressional delegation. We discussed a schedule for submitting materials to your staff in time for the possible inclusion of an alternative approach in the draft Environmental Impact Statement (EIS) accompanying the proposed rule. This would allow further analysis and refinement between draft and final EIS publication. It is possible that the time necessary to develop these materials will require some extension in the Department's schedule for publishing the draft EIS. We agreed to keep your staff apprised of our progress in this area.

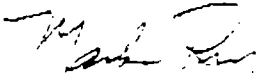
On a related matter, we would like to explore alternative approaches for at least some areas of Washington as well. For example, we would like to work on alternatives to the Olympic Peninsula SEA which recognize the significantly improved information about population levels of the Olympic Peninsula. It is now known that Peninsula owl populations exceed the Draft Recovery Plan Goal by 50%. Federal and state protection efforts make this one of the most highly protected provinces of the Northern Spotted Owl. In this case as well, we would like to prepare an alternative for consideration in the DEIS.

Third, we wish to reiterate the importance of a "safe harbor" approach to this rulemaking. As we indicated in our earlier letter to you, this is an essential element in the industry's agreement to proceed.

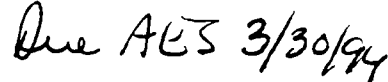
Finally, the outcome of Sweet Home Chapter of Communities for a Greater Oregon, et. al. v. Babbitt and Northwest Forest Resource Council v. Clinton should not, in our view, discourage either the industry or the Administration from continuing in the effort to pursue reasonable and innovative regulatory approaches through the use of the Endangered Species Act Section 4(d) authority. You have our commitment to continue to work toward the success of the Section 4(d) regulatory process.

We will continue our discussions with your staff and our efforts to develop the materials necessary to move the Section 4(d) process forward. We look forward to our meeting with you on May 18. In the interim, if you have any questions, please do not hesitate to have your staff contact us at AF&PA.

Sincerely,



Mark Rey
Vice President, Forest Resources



DO NOT REMOVE THIS SLIP FROM CORRESPONDENCE

Subject
CONG. REQ: THAT RULEMAKING PROCESS RE: MGT OF STATE & PRIVATE FOREST
LANDS IN OREGON BE SUSPENDED & PROPOSED RULE WITHDRAWN UNTIL AN
ACCEPTABLE 4 RULE WITH NONFEDERAL LANDOWNERS IN OREGON HAS BEEN
DEVELOPED

[illegible]

_____ COMMENTS _____

- FISH AND WILDLIFE SERVICE, Correspondence Control Unit, Room 3012, Main Interior, 208-6231

CCU CORRESPONDENCE

DEPARTMENT OF THE INTERIOR
TASKING PROFILE

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Fiscal Year: 94

Received Date -----	Document Date -----	Due Date -----	Action Office -----	Action Required -----
03/18/94	03/17/94	04/06/94	/ FWS /	A/S

Addressee: Secretary Babbitt

From: Hatfield, M.; Packwood, B.; Wyden, R.; Smith, B.; DeFazio, P.;
Kopetski, M.
Senators\Representatives
Congress of the United States
Washington, DC

Subject Text: Six members of Congress request that the rulemaking process regarding management of state and private forest lands in Oregon be suspended and the proposed Rule withdrawn until an acceptable 4(d) Rule with nonfederal landowners in Oregon has been developed.

Recommended Surnames: SOL\PMB\CL

Copies To: ES:PL

Cross-Reference:

Special Interest: Special Interest Id:

Acknowledgement Letter Sent Within 24 Hours

SRO	Analyst	ES Phone	Source
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JHARRELL	CHOWARD	208-7571	CM

Congress of the United States

Washington, DC 20515

March 17, 1994

The Honorable Bruce Babbitt
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Mr. Secretary:

We are writing to request your assistance on a matter relating to the Department's proposed regulations for the management of state and private forest lands under the provisions of Section 4(d) of the Endangered Species Act of 1973, as amended. Specifically, we are requesting, with regard to lands in Oregon, that the rulemaking process be suspended and the proposed Rule withdrawn until the Department has made much greater efforts to develop an acceptable 4(d) Rule with nonfederal landowners in Oregon.

As stated in the Department's December 10 press release, the proposed 4(d) rule was designed to "ease restrictions on timber harvesting on private and state lands" in the Pacific Northwest. The Department apparently was intending to develop a rule that would be of benefit to the nonfederal landowners of Oregon. The public perception of this process, however, has been the opposite. The proposed rule has created tremendous concern and anxiety among the nonfederal landowners. It appears that the federal government is attempting to extend the recovery requirements of the Act to nonfederal lands through Section 4(d) procedures.

The proposed Rule, as written, is not supportable. Inequalities have been created between landowners within and outside the proposed Special Emphasis Areas, and the safe harbor provisions were poorly drafted. Similarly, we are puzzled that the Administration has not chosen to wait until rules implementing Oregon's 1993 Forest Practices Act are adopted to determine the full implications for the conservation of owl habitat. Further, there is great confusion about the application of the 40% standard and the definition of suitable habitat.

At this point, numerous parties have asked that the Section 4(d) rulemaking process simply be terminated. In light of the considerable confusion and concern that has been generated by the proposed Rule, we have a great deal of sympathy with that point of view. For the time being, however, we would ask that the

Honorable Bruce Babbitt
March 17, 1994
Page 2

Department simply suspend the rulemaking process, withdraw the proposed Rule, sit down with the state and private landowners in Oregon, and work with them to develop an acceptable and implementable Section 4(d) Rule. Once an acceptable Rule has been developed, the Department -- and Congress -- can determine the most appropriate course of action on how best to proceed, if at all.

We look forward to an early response to our request.

Sincerely,



Mark O. Hatfield
United States Senator



Bob Packwood
United States Senator



Ron Wyden
Member of Congress



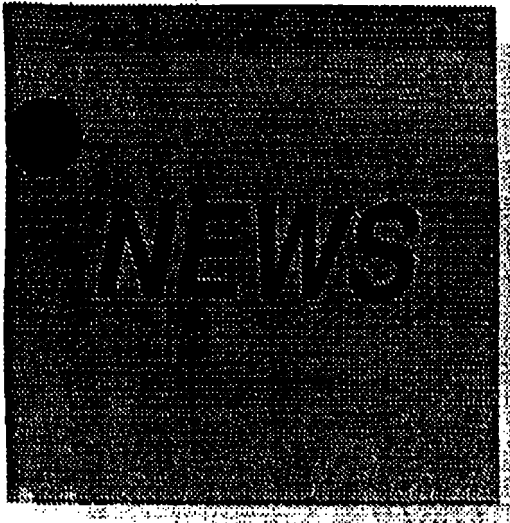
Bob Smith
Member of Congress



Peter DeFazio
Member of Congress



Mike Kopetski
Member of Congress



From
U.S. REPRESENTATIVE

**PETER
DeFAZIO**

4th Congressional District,
Oregon

WASHINGTON, D.C.
1233 Longworth House Office Building
Washington, D.C. 20515
EUGENE

211

El

CC

CC

21:

Co

ROS

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PROG

To Katie McGinty

copy to
will - FYI

John H. for my
4(d) - briefing

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Erin
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will before
1/1/94
over there)

CONTACT: Patrick Dorton
202-225-6416

REP. DEFAZIO BLASTS ADMINISTRATION FOR 4(d) RULE

Cites "Cozy Relationship" And "Backroom Deal" Between Weyerhaeuser And Interior

WASHINGTON, D.C. -- Citing his "strong objections to the 4(d) rule," Rep. Peter DeFazio (D-OR) today blasted the Administration proposal in a strongly worded letter to George Frampton, the Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

"The 4(d) rule is the product of a backroom deal," said Rep. Peter DeFazio. "This flawed proposal slaps absolutely unreasonable restrictions on the small landowner in Drain, Oregon, while letting Weyerhaeuser, a powerful multinational corporation, get off virtually scot-free."

The 4(d) proposal would allow the government to restrict logging on 40 percent of the land owned by private landowners in 10 "special emphasis areas" located in designated connectivity corridors for the spotted owl. As it now stands, the 4(d) restrictions fall disproportionately on small private landowners in Douglas, Coos, Clatsop, and Tillamook Counties in Oregon.

"Cozy relationships between multinational corporations and the Department of Interior should not govern forest policy in the Northwest," stated Congressman DeFazio. "In the weeks before the 4(d) ruling, there is clear evidence of repeated contact between Weyerhaeuser and officials at the highest levels of Department of Interior regarding the exemption of Weyerhaeuser lands from 4(d) restrictions."

The Administration recently released a December 7, 1993 letter from Weyerhaeuser Vice President C.W. Bingham to Interior Secretary Babbitt's Chief of Staff Tom Collier citing "previous conversations" allowing Weyerhaeuser to "assume that Southwest Washington will not be included in the area of concern for spotted owls." Given this assumption about the exemption of more than 850,000 acres of Weyerhaeuser timberland, the Weyerhaeuser letter then goes on to enthusiastically endorse the 4(d) proposal.

"The Administration claims 4(d) is a rule based on biological science," added the Congressman. "Well, it's not based on biological science, it's based on political science."

Once again the government and big business has combined to shaft the little guy. It's time to expose this conspiracy. The truth needs to be told."

"The best and only alternative is to withdraw this clearly unequitable proposal and restart from scratch," said DeFazio. "Let's begin anew with a completely open and public process that allows input from all parties concerned — that allows this issue to be judged on its merits."

Attached is a copy of the letter from Rep. DeFazio to Assistant Secretary Frampton and also a copy of the Weyerhaeuser letter to Interior Chief of Staff Collier.

PETER A. DEFAZIO
4TH DISTRICT, OREGON

NATURAL RESOURCES
SUBCOMMITTEES:
NATIONAL PARKS, FORESTS AND
PUBLIC LANDS
ENERGY AND MINERAL RESOURCES
OVERSIGHT AND INVESTIGATIONS

PUBLIC WORKS AND TRANSPORTATION
SUBCOMMITTEES:
AVIATION
SURFACE TRANSPORTATION



Congress of the United States

House of Representatives

January 27, 1994

The Honorable George Frampton
Assistant Secretary for Fish
and Wildlife and Parks
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Dear Secretary Frampton:

I am writing to strongly object to your proposed section 4(d) action limiting timber management activities on private lands in Western Oregon.

The proposed action would create a number of so-called "special emphasis areas" where private timber harvests would be highly restricted. The special emphasis areas are concentrated in Oregon and fall especially heavily on smaller private landowners.

One of the purposes of the special emphasis areas seems to be providing connectivity between isolated spotted owl populations. Under your proposed action, the northernmost connecting corridor between the Coast Range and the Cascades falls within Douglas County, Oregon. In fact, Douglas County contains not just one, but two very substantial connectivity corridors.

However, there is no connectivity in Washington State between the Cascade Range and the Olympic peninsula and areas in the southwest corner of the state -- areas that would seem to have been better protected under the ISC spotted owl strategy.

The entire north coast of Oregon is also included in a special emphasis area. It's not clear what purpose this area serves, especially since there is no corresponding special emphasis area immediately across the Columbia River in southwest Washington.

This proposed action is another cruel blow to rural communities in Western Oregon. In particular, Douglas County, Oregon, which will suffer the lion's share of the job losses resulting from the administration's federal forest management changes, also bears the brunt of your proposed 4(d) action.

PLEASE RESPOND TO:

WASHINGTON OFFICE:

233 LONGWORTH HOUSE OFF. BLDG.
WASHINGTON, DC 20515-3704
(202) 225-6416

HOME OFFICES:

211 EAST 7TH AVENUE
EUGENE, OR 97401
(503) 485-8732
IN OREGON
1-800-944-8603

215 SOUTH 2D STREET
COOS BAY, OR 97420
(503) 288-2609

612 S.E. JACKSON ST
SUITE 9
P.O. BOX 2460
ROSEBURG, OR 97470
(503) 440-3523

January 27, 1994
Page 2

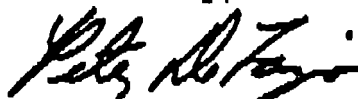
I am extremely suspicious about the science that informed your proposed rule. The Weyerhaeuser Corporation, one of the region's largest corporate landowners with huge holdings in southwest Washington, is virtually exempted from regulation. Based on correspondence between Secretary Babbitt's Chief of Staff Tom Collier and Weyerhaeuser Vice President Charles Bingham, it is clear that Weyerhaeuser was given assurances that its southwest Washington holdings would be exempted at least three weeks before your proposed action was released.

Under these circumstances, it is not unreasonable to suspect that political science may have triumphed over biological science.

To add insult to the injury you propose, Weyerhaeuser is the region's largest exporter of logs to the Far East. Relieving timber harvest restrictions on Weyerhaeuser's holdings will provide a windfall for Japanese mills, while doing little to improve timber supplies for domestic manufacturers in the Northwest.

Given these circumstances, as well as the extraordinary new protections likely on federal lands under the administration's final forest plan, I urge you to withdraw the proposed action and develop an equitable rule in the full light of day.

Sincerely,



PETER DeFAZIO
Member of Congress

FAD/jks

species of trout, and other fishes always will be a main Quinault objective. All other wildlife in this area also is considered in the management scheme. Because the Quinault Reservation originally was allotted to individual Indians in 40- and 80-acre parcels, management of the area as a single unit historically has been difficult. To protect this resource, the Quinault Nation has placed a high priority on consolidation of the river valley into Tribal ownership through land purchase. With consolidated ownership, the Tribe will affect a more consistent and improved riparian zone management. The valley will continue to offer wildlife and fish protection as the primary management objective.

Western Washington Lowlands Province

Province description.

The western Washington lowlands province is in southwestern Washington and consists largely of nonfederal ownership, including major urban, industrial, and agricultural areas. The province occupies a key position in the spotted owl's range; it is the only area where connectivity could be reestablished with the currently isolated population of spotted owls in the Olympic Peninsula province.

Land ownership and management of the 6.5-million-acre province are illustrated in the province summary, which shows the dominance of nonfederal lands (Figure 3.10). Federal lands in the province are managed by the Department of Defense. Most forestlands in this province are owned by the State of Washington and large industrial timber corporations. As a result of timber harvest, spotted owls have been virtually eliminated from the province; only 10 owl activity centers are known.

In addition to the threats to the province (discussed next), a contributing concern in this province is the risk to the owl population in the adjacent Olympic Peninsula province. If the Olympic Peninsula owl population should exhibit a further demographic decline, or spotted owls become locally extirpated due to catastrophic events, then demographic and habitat connectivity to other owl populations is essential to restoring this owl population.

Because of the distances involved in the western Washington lowlands province, the presence of breeding population clusters will be necessary to provide a meaningful level of connectivity. Reestablishing population connectivity is the main recovery goal in this province.

Threats to the western Washington lowlands province.

This province exhibits seven severe threats to spotted owls. These include owl population concerns, but focus on habitat related issues.

Declining habitat: The threat of continued loss of habitat in the province is considered severe. Historical observations of spotted owls are documented from the early communities of Seattle and Tacoma (WDW 1991). Permanent habitat loss has been extensive from Tacoma north to the Canadian border, and probably will increase significantly during the next 100 years as human populations and urban areas increase. But extensive forestlands still remain in the southwestern part of the state. Many of these lands already have been logged twice. As a result of timber harvest on nonfederal lands, spotted owl habitat is a very minor acreage in the province. The little suitable habitat remaining probably will be

reduced further unless immediate action is taken. Of equal or greater concern is the rate of harvest of mature forest, which may serve as the potential foundation for restoration of owl habitat in the province.

Limited habitat: The limited amount of spotted owl habitat is also a severe threat. Forestlands in the western Washington lowlands province were logged early in the settlement of the state, and a considerable area was converted to urban, industrial, and agricultural lands.

Because spotted owl habitat has been greatly reduced during the past 60 to 80 years, late-successional forests currently remain in relatively small, scattered parcels, seldom more than a few hundred acres in size. The few existing spotted owls are in these parcels surrounded by young forest or are inhabiting younger forest stands that have retained snags and/or down logs from previous harvest or natural disturbance.

Declining populations: The decline of spotted owl populations in this province is a severe threat. This conclusion is based on the virtual absence of spotted owls from large landscapes that were suitable habitat until timber harvest occurred.

Low populations: There is considerable concern about spotted owls in this geographic region (Thomas et al. 1990, USDI 1990), and low population levels are considered a severe threat. Currently six owl pairs and four territorial singles are known in the province. With spotted owls essentially eliminated, the population stability is seriously hindered.

Distribution of habitat and populations: As reflected in the Limited Habitat discussion, the distribution of owls and habitat is a severe threat in the province. Known owl activity centers are extremely isolated, with little opportunity for interchange among activity centers.

Province isolation: Because of the poor owl distribution in the province, isolation is considered a severe threat for the entire province population. The province currently does not provide for significant demographic interchange with any neighboring province.

Predation and competition: The effects of predation are a severe threat in the province. Predation by great horned owls may threaten the few remaining owls or the development of nonfederal clusters in the future. A reflection of the impact of great horned owl predation is recent surveys which suggest that great horned owls are numerous (Table 2.5).

The threat of competition with barred owls is unknown in the province due to lack of information about the occurrence of barred owls.

Vulnerability to natural disturbances: Wind and fire are moderate threats to the remaining spotted owls in the province. Portions of the province along the coast may be susceptible to wind damage.

Biological goals and implementation on federal lands.

Essentially the only federal lands in the province are on the Fort Lewis Military Reservation, which is recommended as a DCA (WD-45) (Tables 3.7 and 3.8). Habitat is generally young forest. No spotted owls currently are known to occur on these lands. However, Fort Lewis is in an important location to assist in reestablishing demographic interchange between owls in the Cascade Mountains and owls on the Olympic Peninsula. While forestlands should be managed to develop characteristics of spotted owl habitat,

Because WD-45 is in relatively young forest with unusual ecological conditions and does not currently support spotted owls, it may be appropriate to use management techniques that are more extensive than would be recommended for other DCAs. Experimental approaches to developing spotted owl habitat are being conducted in WD-45 by the Forest Service's Pacific Northwest Laboratory. These studies may provide valuable information and should be continued.

Fort Lewis may provide an important habitat link between the Cascade Mountains and the Olympic Peninsula. However, this can only be accomplished if nonfederal lands ownerships in the region also manage for suitable nesting and dispersal habitat conditions between federal lands in the Cascade Mountains and the Olympic Mountains.

There are no other federal lands in the province, so no federal matrix management is recommended (Figures 3.11 and 3.12).

Biological goals and implementation on nonfederal lands.

The biological goals for the western Washington lowlands province are based on the need to reestablish habitat and population connectivity between the Olympic Peninsula province and other provinces. Providing needed connectivity will require developing subpopulation centers, essentially by growing habitat for a number of nonfederal clusters.

Low habitat quantity and poor habitat distribution require that the entire province be identified as an area of special management emphasis. However, within the province there are areas that should receive focused attention to be most effective in achieving the province goal of reestablishing population connectivity. To achieve this goal, nonfederal clusters and dispersal habitat are recommended. Nonfederal lands should be managed to provide nonfederal clusters of supplemental pair areas. These nonfederal clusters should be designed for a minimum of 15 future spotted owl pairs and spaced a maximum of 12 miles apart. In addition, dispersal habitat should be provided between the clusters with dispersal conditions as continuous as feasible.

The province goal may be difficult to achieve for several reasons. Since there are few existing owl sites in this province, prohibition on take or negotiating conservation in trade for authorization of take may prove to be negligible means of contributing to recovery, if they were restricted to opportunities within this province. In southwestern Washington, there are few relatively small preserved areas, such as the State Natural Heritage Program lands, but they are too small to support clusters of breeding pairs or cannot provide dispersal habitat because of their location. Finally, protection of breeding habitat independent of known owl sites cannot be required under the current Endangered Species Act or state forest practices laws.

To establish nonfederal clusters in this province, land acquisition appears to be the only effective strategy because there are limited opportunities for federal/nonfederal lands exchanges. However, purchase of land and timber sufficient to meet the province objective would be prohibitively expensive (more than \$2 billion).

To reduce this cost, purchase of bare land or land with some timber harvest rights reserved to the seller may be feasible (possibly reducing costs to \$150 million). This approach would delay achieving the recovery goal for the province by several decades because the forest would have to regrow into owl habitat. However, the severe threat to the owl population on the Olympic Peninsula, which necessitates reestablishment of connectivity, is anticipated to continue for many decades. Even at the lower cost, funding for this approach is unlikely and would have to be considered along with other acquisitions needed to meet recovery goals in other Washington provinces.

To fill the need for dispersal habitat, the only effective mechanism appears to be a combination of incentives for landowners, along with changes in forest practices regulations. New forest practices regulations would have to be developed, and dispersal habitat would have to be well defined. Achieving the dispersal habitat objective is probably feasible, and would best contribute to recovery if applied in combination with successful establishment of nonfederal clusters.

In the interim period, as long-range protective management is being developed, the following specific recommendations are made to facilitate recovery in the western Washington lowlands province:

- Continue surveys of potential owl habitat.
- Continue protection of spotted owl activity centers. These owls should be protected with supplemental pair areas at least as large as the median home range size for pairs in the neighboring Olympic Peninsula province (home range size information from the Olympic Peninsula province is referenced because studies have not been conducted in the western Washington lowlands province). It is recommended that delineation and management of these areas follow guidelines similar to those for reserved pair areas or managed pair areas on federal lands, as described in section III.C.
- Initiate long-range planning efforts to develop conservation measures for the spotted owl.
- Manage nonfederal lands in WD-45 to develop spotted owl habitat over time.

Western Washington Cascades Province

Province description.

The western Washington Cascades province is west of the Cascade crest from the Columbia River north to the Canadian border and east of the western Washington lowlands province. Significant habitat differences occur between the northern and southern portions of the province. The northern area is dominated by high mountains and ridges unsuitable for spotted owls and has lower valleys with suitable spotted owl habitat. The resulting landscape pattern is a mosaic of alternating valleys of suitable habitat and unsuitable ridges, a naturally fragmented environment for spotted owls. The southern portion is more dominated by forested areas, and spotted owl habitat is more continuous, although still highly fragmented by past timber harvest and fires.

Land ownership and management of the 6.2-million-acre province are illustrated in the province summary (Figure 3.13). Federal lands in the province are dominated by the Mt. Baker-Snoqualmie and Gifford Pinchot National Forests and the North Cascades and Mt. Rainier National Parks.

Approximately 335 spotted owl activity centers, including 290 known pairs, occur in the province. Of these, 303 owl activity centers (including 263 pairs) are on federal lands.

Five areas of special management emphasis have been identified and are discussed in the nonfederal province objectives and recommendations. Management concerns in some of these areas also lead to special matrix recommendations on federal lands. These areas are: 1) northern part of the province (north of Interstate 90 (I-90)), 2) the I-90 corridor (north of Mt. Rainier to I-90), 3) the Mineral Block (portion of the Gifford-Pinchot National Forest), 4) Siouxi Creek (southwest of Mount St. Helens) and 5) the Columbia River Gorge area.

November 19, 1993

Don:

I had Dave send me a copy of the original questions that were developed, along with the index to the Administrative Record, following the July 15 meeting with the States. As you can see, they were questions seeking the opinion of the States on different aspects of what a 4(d) Rule might consider. We never got any real input on these questions from the States because, as you may recall, they were very reserved about diving into the process. Therefore, I have limited my "answering efforts" to the latest questions you developed. I have made use of Dave's response (which was based primarily on the team member input), but tried to place our responses in a positive light. Let me know if this is OK or if you have questions.

1. What is the relationship between the 4(d) Rule and the Recovery Plan and does Option 9 plus the 4(d) Rule equate to recovery?

Neither Option 9 nor the 4(d) Rule attempted to define recovery. Based upon review of the Draft Final Recovery Plan, the Service does not believe Option 9 plus the proposed 4(d) Rule will, by themselves, constitute a full recovery strategy. Rather, the Service sees its role to work with the States and other non-Federal parties to secure adequate dispersal habitat throughout the range of the owl, as well as re-establish spotted owl populations in areas where numbers of breeding pairs have been significantly reduced over time. It should be understood that the Service does not view that it has full responsibility to recover species. The Service is directed by the ESA to identify the pathway to recovery through Recovery Plans, and then work with all parties, public and private, to accomplish the objectives for recovery. After the President's plan and a final 4(d) rule are in place, the Service will evaluate what, if any, additional measures will be necessary for recovery. A decision will then be made whether an additional Recovery Plan will be necessary.

2. What is the justification for lifting the owl circles in southwest Washington?

The Service reviewed the existing quality of habitat in SW Washington, as well as the number of owl pairs (approximately 10) and concluded that regulation of this area would offer little to the conservation of the owl overall. This was based upon the regulatory limitations of the Service to only create regulations to prevent "take". The present legal position of the Service concludes that we cannot "require a private landowner to grow habitat". In order to re-establish SW Washington as a viable portion of the owl's range, habitat for nesting, roosting, foraging, and dispersal would have to be established. Therefore, the use of regulation in this area would not provide the desired result. The Service will work with landowners in SW Washington for voluntary actions that would establish habitat structure necessary for healthy owl movement.

OPTIONAL FORM 96 (7-90)

11/22/93

FAX TRANSMITTAL

Page 1 of 12

To	Don Barry	From	Dale Hall
Date	11/22/93	Page #	203-231-6158
Fax #	202-708-4684	Fax #	203-231-2019

NEN 7-940-01-3-7-7360

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GENERAL SERVICES ADMINISTRATION

3. What is the justification dropping big owl circles on the Olympic Peninsula, and trading owl circles on the east side for circles on the west side?

The Service is presently retaining owl home range circles around the entire Olympic Peninsula. However, the law establishing the State Experimental Forest required that a management plan be written that would ensure ecological stability while researching new forest management techniques. The majority of owls centered on non-Federal lands are found in the State Experimental Forest. Once an acceptable plan is in place, the Service intends to reevaluate the need for additional protection of owls on private lands and, if scientifically supported, could relieve the prohibition against take on lands to the northeast, east and south of the Peninsula. This would not be a "trade" of owls, but a focus of protection on the west, where the most positive overall results could be secured.

4) What is the expected benefit to the owl of dropping owl circles outside Special Emphasis Areas down to 70 acres?

The Service would require protection of the 70 acre activity center only for occupied sites. The purpose for this requirement is simply to give the existing pair the possibility of fledging their young until the surrounding habitat is harvested and rendered unsuitable to support migrating juveniles. In addition, additional benefits may be provided to migrating owls as they move across the landscape. Once the nest is abandoned, there would be no requirement to protect the site.

5) What is the impact to owl survival and stability in the Federal Reserves if owls can be "taken" on non-Federal lands adjacent to Federal Reserves ("owl shadow effect")?

In discussions with FEMAT biologists (Jack Ward Thomas, Eric Forsman, Charles Meslow, and Ed Starkey), it was their contention that the Reserves were created with self-reliance expected. By that they mean that, because of the restrictions within reserves, no additional support from surrounding areas was deemed necessary for the Reserves to provide their intended values. As such, the concept of "owl circles" does not exist in Reserves and, therefore, no shadow is cast. For owl shadows in the checkerboard ownership of the matrix, the Service is considering options a landowner may select as management scenarios, such as the Riparian and greentree prescription on Federal lands, that might replace the prohibitions on non-Federal lands.

6) What is the difference between the "local option" and habitat conservation planning?

The local option is intended to provide the landowner the opportunity to submit management scenarios that will accomplish the biological objective of the regulated area, and receive permission to manage in that manner with take authorization. A HCP, on the other hand, is a permit granted when a non-Federal entity seeks permission to take a listed species while carrying out

otherwise lawful activities. It is the intent of the Service to have the EIS prepared for the 4(d) Rule suffice for NEPA compliance for the "minor changes" to the rule that would be authorized through a local option. The local option will also be usually limited to authorization for the species covered by the 4(d) Rule. A HCP, on the other hand, must go through the requirements of Section 10 of the ESA, to include public comment, and must be accompanied by an EA or EIS for additional public comment. If the 4(d) EIS is found to suffice for local option changes to the rule, NEPA compliance and public review may be waived.

7) What are the negative effects of reducing owl circles to 70 acres in large portions of the owl's range in Oregon and Washington, and maintaining the tougher standard in California?

The question really addresses the issue of "lacking any standards in the 4(d) rule beyond State requirements, will the Board of Forestry substantially relax protection under State rules?" This impulse may be encouraged by some. The Service will, however, monitor changes in State rules and expect to see a well-distributed population maintained as a condition of the relief. If the State rules do not meet this standard, the Service has stated it reserves the right to reevaluate the situation and reinstate prohibitions necessary to achieve the biological goals. In addition, the Service and Department are investigating ways to provide the State with financial assistance to carry out monitoring, thus providing benefits to private landowners.

8) What effect will Option 9 and the 4(d) Rule have on critical habitat designation for the spotted owl?

Critical habitat is currently designated only on Federal lands. The Service expects that measures implemented in Option 9, and complimented by the 4(d) Rule, will offer substantial biological justification to modify or rescind critical habitat regulation. However, until Option 9 has gone through the public review process and a Record of Decision signed, the Service cannot base changes in critical habitat on the merits of the plan. Once Option 9 and the 4(d) Rule are in place, the Service will immediately begin evaluation of the need for critical habitat. This would also include any critical habitat proposed or designated for the marbled murrelet.

9) How will the 4(d) Rule be affected, if at all, by the petition to delist the owl in northern California?

The Service has just begun analysis of the merits of the petition and will, by law, provide a 90 day finding as to whether the petition contains sufficient information to warrant further review. However, since the Service currently anticipates delisting the owl by physiographic province (as the petition requests), there should be little impact in Oregon or Washington of the status evaluation or possible delisting action in California.

4

10) What will the 70-acre prohibition outside Special Emphasis Areas require?

The prohibition will require that all habitat within 1000 feet (70 acres) be protected at all times, as long as the site is occupied. In addition, seasonal restrictions during nesting will require that there be no timber harvest or related activities within .25 mile of the nest site.

I hope these answers are appropriate and reflect the thinking that has taken place over the last four months. Let me know if you have any concerns.



Dale

Threats to the western Washington Cascades province.

Because of the differences in ecological and management situations between the southern and northern parts of this province, many of the threats must be discussed separately for these areas. For the purposes of this discussion, the division of the province is at Mt. Rainier, and is shown in Table 2.4, where the province threats are divided into two areas.

Threats to spotted owls in the province include low rates of reproduction in the northern portion and loss of habitat throughout the province.

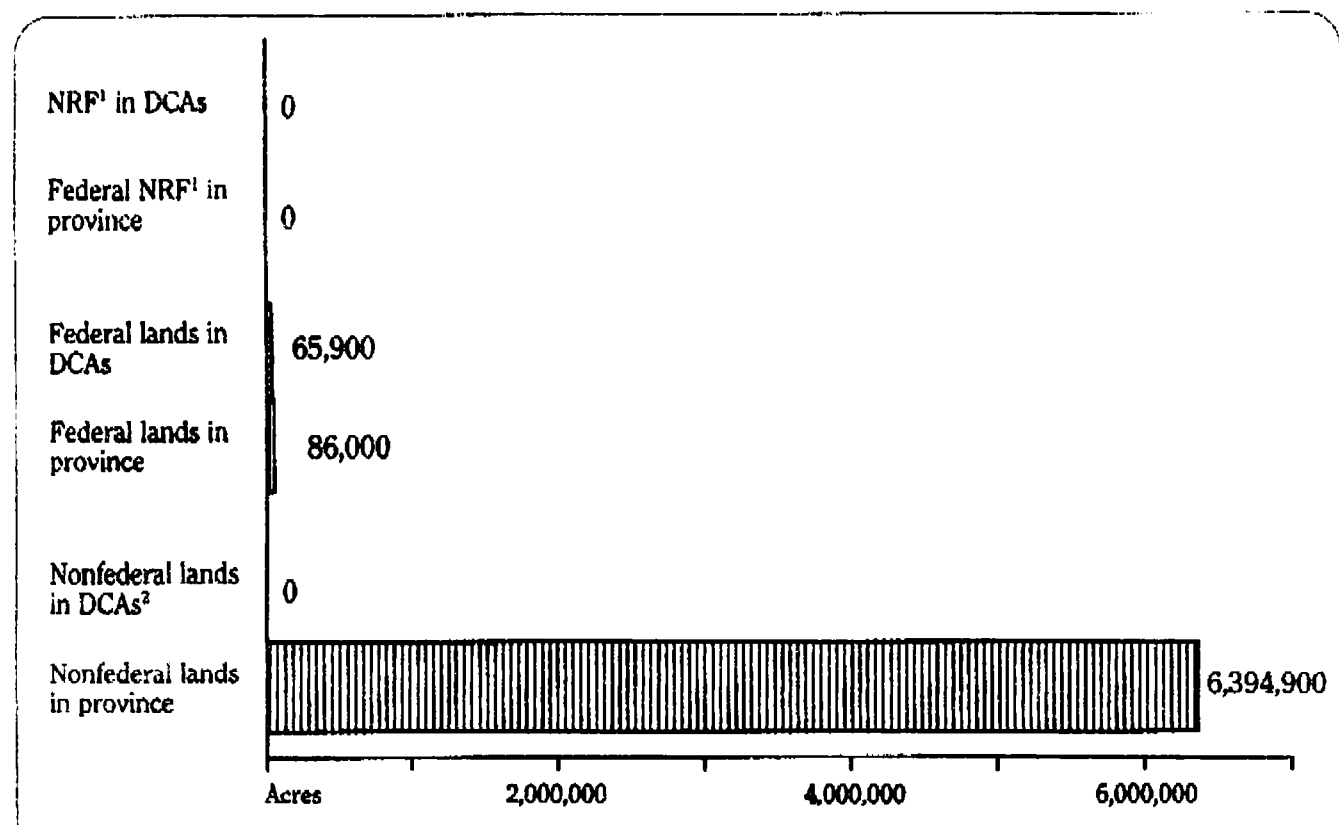
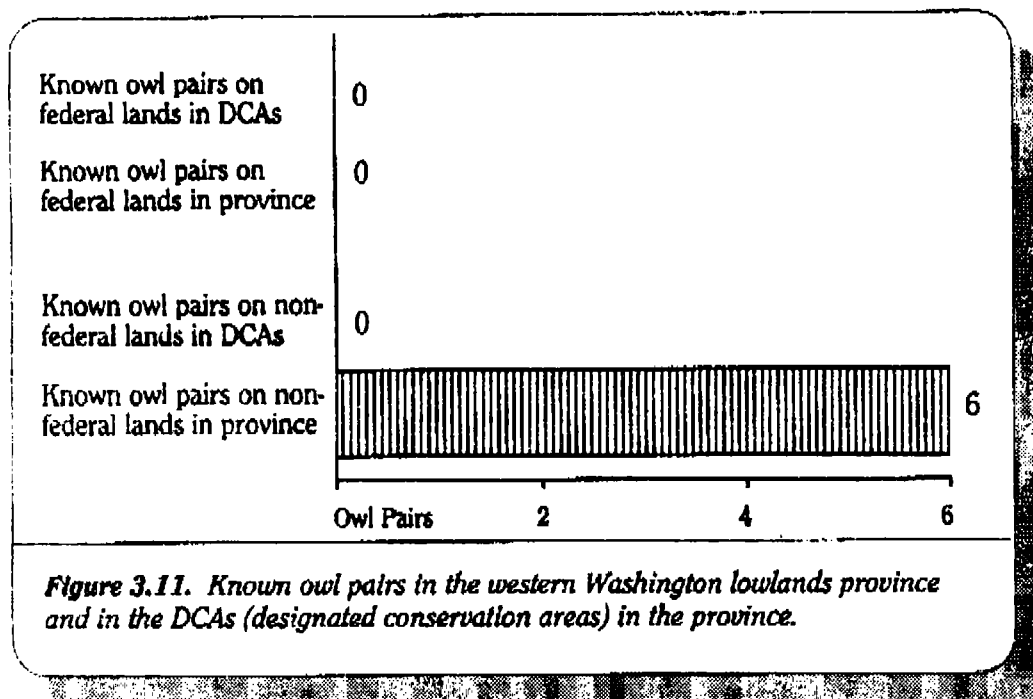
Declining habitat: This threat is considered severe throughout the province. Spotted owl habitat in national forests in the province has declined significantly in the last 30 years, similar to habitat loss in the other provinces. During that time the proportion of old-growth forest that was potential spotted owl habitat decreased from about 60 percent to about 40 percent of the area of the Mt. Baker-Snoqualmie National Forest, with similar decreases from about 40 percent to 30 percent for the Gifford Pinchot National Forest (Henderson 1990). These reductions were primarily due to logging. The relatively low proportions of old-growth in the Gifford Pinchot National Forest resulted from the Yacolt Burn of 1902, the eruption of Mount St. Helens in 1980, as well as logging.

During the past 20 years habitat decline has been most severe in the checkerboard lands of the I-90 corridor and the Mineral Block in the Gifford Pinchot National Forest. (The Mineral Block is a disjunct portion of the national forest north of Highway 12 and west of Highway 17). These lands currently support low levels of suitable habitat. As a measure of the low habitat levels in the province, habitat surrounding 38 randomly selected spotted owl management areas on the Mt. Baker-Snoqualmie and Gifford Pinchot National Forests was analyzed in 1984 (Allen et al. 1989). The average proportion of suitable habitat within 1.5 and 2.1 miles of the center of those areas varied between 49 and 55 percent of the total area. In 1991 a similar assessment was prepared as information presented in the 1991 Forest Service Timber Sale Biological Assessment. This 1991 analysis indicated that the average proportion of suitable habitat within 1.8 miles of spotted owl territories was near 40 percent (Hays pers. comm.). The difference between the 1984 and 1991 habitat estimates, though not using exactly the same techniques, is an indication of habitat decline in a relatively short period of time. In the near future, the expected net rate of habitat loss without protective measures for the spotted owl will continue to decrease the potential for recovery in the province.

Limited habitat: This threat is considered moderate in the southern part of the province and severe in the northern part. Current spotted owl habitat generally is at mid-elevations, and predominantly on national forest lands. Much of the low-elevation habitat has been logged and regenerated to stands which generally are less than 80 years old.

Few blocks of old-growth forest remain on state, private, and municipal lands. Most of the currently known spotted owls on these lands (outside of checkerboard ownership lands) inhabit patchwork mosaics of remnant old-growth stands that survived historic forest fires in larger naturally regenerated second-growth stands.

Declining populations: The impact of this threat is considered moderate in this province, though no demographic studies have been conducted here. However, there have been limited population studies, and based on knowledge of the occupancy rates of known spotted owl home ranges, there is cause for concern.



¹NRF = nesting, roosting, and foraging habitat. This information is available only for federal lands.

²Management of nonfederal lands within the perimeter of designated conservation areas is discussed in the province narrative.

Table 3.7. Summary of acreage and owl numbers for designated conservation areas (DCAs) in the western Washington lowlands province. (More detailed information, including owl numbers on nonfederal lands, is in Appendix I, Table I.2)

DCA Ident. Number	Acreage		Owl Numbers					
	Total	Percent Federal Lands ¹	NRF Habitat Federal ²	Known Owls ³		Current Projected		Future Projected
				Federal Pairs	Nonfederal Singles	Federal ⁴		Federal ⁵
WD-45	65,900	100	0	0	0	0	0	8

¹Management of nonfederal lands within the perimeter of DCAs is discussed in the province narrative.

²NRF - nesting, roosting, and foraging habitat for spotted owls. Habitat information was not available for nonfederal lands.

³Numbers of spotted owl activity centers verified in a 5-year period; generally 1987 through 1991.

⁴Estimate of the number of pairs of owls that the DCA would be expected to support on federal lands if the population stabilized with current habitat conditions. See Appendix I for further details.

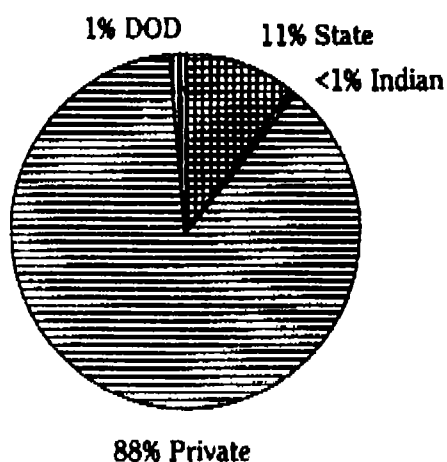
⁵Estimate of the number of pairs of owls that the DCA might support in the future on federal lands if habitat were recovered. See Appendix I for further details.

Table 3.8. Summary comments on the designated conservation area (DCA) network in the western Washington lowlands province. (Section III.C.1. and Appendix I provide further information about the criteria and process used to delineate these areas.)

Category 2 DCA	Comments
WD-45	This DCA is located entirely on the Fort Lewis Military Reservation. Forests are generally less than 70 years old. It will improve connectivity with the Washington Cascade Mountains and the Olympic Peninsula populations. The area has the future habitat capability to support 8 pairs of owls.

native prairies, which occupy approximately 21,000 acres of the 86,000-acre military reservation, should be managed to maintain the biological diversity in the region. To maintain these prairies, some areas in WD-45 may not be developed into spotted owl habitat.

Several thousand acres at Fort Lewis are committed to continued military use and cannot be managed as spotted owl habitat; wherever feasible, these areas were excluded from the DCA. Other types of military training occur in a forest setting and are expected to be compatible with spotted owl habitat management. The importance of the military mission at Fort Lewis is recognized and it is understood that some areas in WD-45 may not be developed into spotted owl habitat or may be reduced in habitat quality due to military training needs.



Acres	Ownership / Management
683,500	State of Washington
29,900	Indian Lands
5,681,500	Private Ownership
86,000	U.S. Department of Defense (DOD)
6,480,900	TOTAL

Federal nesting, roosting, foraging habitat: none

Known owl activity centers:

	Federal		Nonfederal	
	Pairs	Singles	Pairs	Singles
Inside the DCAs	0	0	0	0
Outside the DCAs	0	0	6	4

Federal recommendations:

	Number	Activity Centers	Acres	
			Reserved	Nonreserved
Category 1 DCAs	0	NA	-	-
Category 2 DCAs	1	0	0	65,900

Nonfederal recommendations:

See province narrative.

Figure 3.10. Western Washington lowlands province summary.

DCAs - designated conservation areas.

- = unknown.

NA - not applicable.

OREGONIAN 12/31/93

Protection through cooperation

*Administration pushes private lands planning
to ease burden of Endangered Species Act*

The Clinton administration is emphasizing cooperation over regulation in protecting owl habitat on private timberlands. That adds up to an important test of the Endangered Species Act's workability.

Officials announced in mid-December a proposal to lift regulatory protection for the owl on state and private lands except for the immediate vicinity of owl sites and 10 especially important areas for owl habitat.

The government hopes to encourage large nonfederal landowners to work out cooperative plans that will protect habitat for all species, including the owl. Those plans could give the land managers much more flexibility and predictability in planning timber harvests. At the same time the government would be assured that the necessary quantity and quality of habitat would be maintained overall.

It's a good idea, one worth trying.

Initial stabs at such plans have produced encouraging results. Georgia-Pacific Corp. is managing its Southern timberlands under a conservation plan for protecting the red-cockaded woodpecker. And Simpson Timber Co. is managing its Northern California timberland under a spotted-owl protection plan worked out with the U.S. Fish and Wildlife Service. In both cases, company officials say operating

under the plan is far preferable to regulatory alternatives.

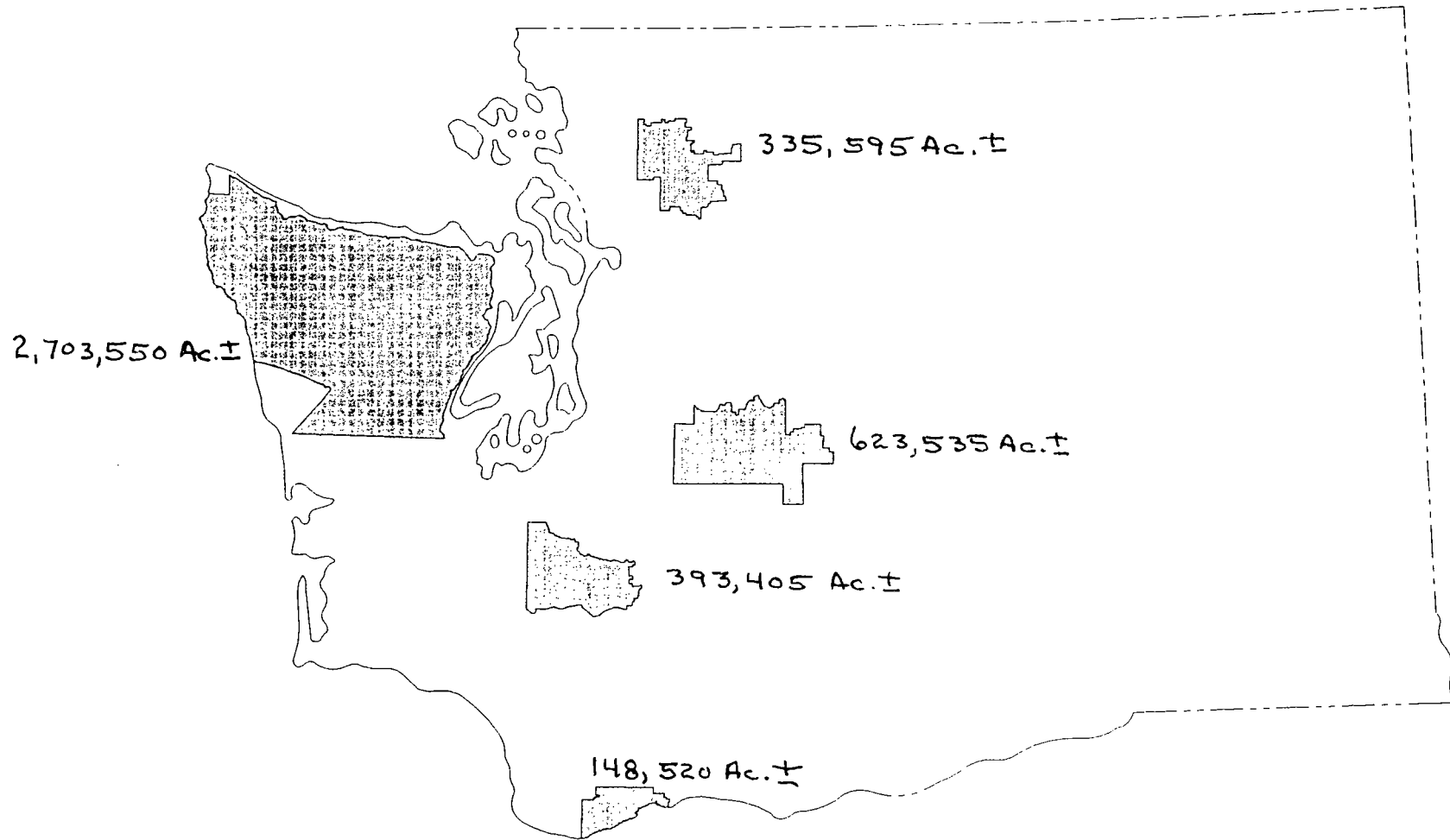
Such cooperative deals could be good for the owl, private owners and the Endangered Species Act.

The act's funding is up for reauthorization in Congress. That has generated heavy opposition from private landowners concerned about the regulatory burden on their property.

Administration officials hope successful cooperative agreements will counter that concern by showing that species can be protected without unduly burdening private property.

The agreements might be helpful, but they won't by any means make the act conflict-free. Environmentalists will be wary of any deal that affects habitat. Too, such plans likely are much more feasible for large landowners than small ones, who lack the large owners' flexibility. And federal agencies will have to ensure that plans afford adequate protection.

Still, effective protection of endangered species often requires cooperation by private landowners. That's where many species at risk live — or die. And cooperative plans worked out in advance can provide assured protection at far less cost than emergency regulations imposed at the last minute before extinction.



[943] From: JOHN LESHY 11/24/93 3:39PM (1341 bytes: 20 ln)
To: ROBERT BAUM, PETE RAYNOR, DAVE GAYER
cc: JOHN LESHY
Subject: 4d rule

----- Message Contents -----

I'm not sure whether this tempest is in a teapot or not, but Will Stelle tells me there is some confusion and uncertainty among those working on the owl 4d rule whether it will be "enforceable" under the ESA. Will says his understanding is that the approach will be, first, to retain the traditional enforcement standard for "take" so that a violation of the 40% owl circle rule will not, absent a dead critter, subject the violator to a taking prosecution; and second (and this is the controverted point), that the rule per se will still be "enforceable" - meaning, I guess, that violators of the 40% owl circle requirement can be subject to civil penalties for violating a rule, but not for criminal "take" penalties. Others apparently believe the rule is not "enforceable" at all except through the "take" provisions when there is a dead body - that is, point #1.

Do you know what I'm trying to get at? Is it a real problem? What is your understanding, or the answer?

TO: Will Stelle -
fax# 456-2710
Answer to my inquiry is
on P. 2 - Does this
Answer you?
John Lesky
~~ascl~~

[943] From: JOHN LESHY 11/24/93 3:39PM (1341 bytes: 20 ln)
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TO: Will Stelle -
fax # 456-2710
Answer to my inquiry is
on p. 2 - Does this
ANSWER yours?
John Lesky
~~esl~~

[946] From: JOHN LESHY 11/24/93 4:36PM (2864 bytes: 49 ln)
cc: JOHN LESHY
Subject: Re: 4d rule

----- Message Contents -----

My understanding is a bit different:

1. Yes, the Service will retain a traditional enforcement standard, but this does not require a corpus delicti. Using the definition of "harm," the Service will be able to demonstrate that a take has occurred if it can prove that the violator's activities actually killed or injured an owl. If the Service can demonstrate, for instance, that timber cutting in a particular area must necessarily have forced a known owl pair to move out during breeding season, and that the pair had no other easily available nesting habitat, then the Service could prove that a take had occurred even though no dead owls would have been found.

2. The Service would not be able to cite a timber operator simply for having violated the 40% owl circle standard, i.e., violation of the 40% standard will not per se be a take. The scientific basis for the 40% standard does not seem to be strong enough to support a finding that violation of the 40% standard will always create a high probability of injury to an owl. Moreover, from what Don Barry is hearing, even the "friendly" timber companies are ready to go to war if we turn the 40% standard, which has never really been more than a guideline, into an enforceable rule. For these reasons, my understanding is that the 4(d) rule would not incorporate the 40% standard. In a particular case, the Service could use the biological principles that underly the standard in building the case, but the Service will also have to go beyond mere reliance on the standard to show that in the particular case the timber activity caused harm to an owl by modifying its habitat in a way that killed or injured the owl.

Thus the current preferred alternative to to have the 4(d) rule eliminate the prohibition against incidental take of owls by timber cutting on all non-Federal lands except for the 10 special emphasis areas. On these areas, the status quo would remain. In other words, the Service will have addressed the "where" issue (which areas get out from under the take prohibition), but will have punted, at least for the time being, on the "what" issue (what constitutes incidental take of the owl resulting from timber activities).

Thanks, Dave, this is helpful. John L.



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

12/02/93

9:00 AM

NOTE

To: Katie McGinty
Will Stelle
Tom Collier
Tom Tuchmann
Stephanie Solien

From: Don Barry 

This has a very short fuse (tomorrow) and could have important symbolic ramifications regarding this Administration's enforcement posture for spotted owls. It needs to be coordinated carefully given our decision to require actual death or injury to prove a take of a spotted owl. No upper-level policy person has read this yet or made any decisions. I wanted you to get it as quickly as possible once it landed in my lap this morning.

Attachment

4 (d)



United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

PHONE: 503-231-6119

FAX TO: Director, USFWS
Wash., D.C.

DATE: 12/1/93

FROM FAX NUMBER: 503-231-2122

TO FAX NUMBER:

FROM: USFWS
Regional Director - R-1
Portland, OR

TIME: 1:25 pm

SUBJECT: Request for Immediate injunctive Relief

NUMBER OF PAGES 18

COMMENTS:

If for some reason you do not receive all pages, pls contact Sandi, 503-231-6125. Hard copy to follow by overnight mail.





United States Department of the Interior
FISH AND WILDLIFE SERVICE

911 N.E. 11th Avenue
Portland, Oregon 97232-4181

DEC 1 1993

Memorandum

To: Associate Solicitor--Conservation and Wildlife
Washington, D.C.

Through: Director, U.S. Fish and Wildlife Service
Washington, D.C. (D)

From: Regional Director, Region 1
Portland, Oregon (ALE)

Subject: Request for Immediate Injunctive Relief

We are requesting your assistance in obtaining injunctive relief to halt an impending timber harvest on private land in Washington State. This harvest will result in the illegal take (pursuant to Section 9 of the Endangered Species Act of 1973, as amended) of two or more northern spotted owls (*Strix occidentalis caurina*), a threatened species. The evidence is clear that, based on the best scientific and commercial information available, take will occur if the harvest is permitted. This injunctive relief would have to be pursued in the U.S. District Court for the Western District of Washington. The Office of the U.S. Attorney is prepared to petition that court for such an order subsequent to a formal request from the Department of the Interior.

It is our understanding that the formal request should be made by the Office of the Solicitor through the Wildlife and Marine Resources Section, Environment and Natural Resource Division, U.S. Department of Justice. All affected offices have been made fully aware of circumstances surrounding the request, including the critical time limitations placed on the Government. By copy of this correspondence, we are also requesting assistance from the Office of the Regional Solicitor, Pacific Northwest Region.

On December 18, 1992, the Washington Department of Natural Resources approved a Forest Practice Application (Application) to allow the harvest of old-growth trees within the median annual home range radius of a spotted owl pair. The approved Application was granted to Anderson & Middleton Logging Company (A&M), P.O. Box 240, Hoquiam, Washington, for the clearcut harvest and road construction of 71.82 acres of old-growth cedar/hemlock/douglas fir forest. The harvest unit is located on a private inholding within the northern boundary of the Quinalt Indian Reservation, inside the Queets River corridor, immediately adjacent to the Olympic National Park.

Harvest of the unit would impact the median annual home range radii of three spotted owl sites. However, the activity is expected to take only the spotted owls occupying the Queets River Lower spotted owl site. Harvest of the 71.82 acres would further reduce and fragment the amount of suitable habitat within the pair's home range. The best scientific and commercial information available indicates that the removal of this habitat would significantly impair the owls' ability to breed, feed, or shelter.

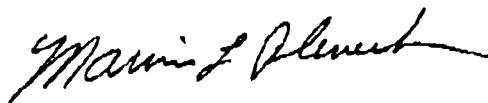
In reference to the proposed 4(d) rule that the U.S. Fish and Wildlife Service (Service) is preparing for the spotted owl, the 71.82 acres proposed for harvest by A&M is located in an area of concern where the prohibition of take will remain in effect.

On November 24, 1993, the U.S. Attorney's office received notice from A&M's attorneys of their clients' intention to commence harvest of the 71.82 acre unit. The attorneys for A&M requested to know what position the Government would take concerning this harvest, and whether the U.S. Attorney would seek injunctive relief. A&M will delay harvest until December 3, 1993, while they await a response from the Government.

The U.S. Attorney's office has the complete file regarding this matter and is prepared to go forward with a petition for injunctive relief pending the Department of the Interior's approval.

Attached is a copy of a draft affidavit from Dr. E. Charles Maslow, an acknowledged expert on the spotted owl, which concludes that this logging would result in a taking of spotted owls.

Thank you for your prompt attention to this matter.



MARVIN L. PLENERT

Attachment

OFFICE: (5-03) 737-1955

DECLARATION OF E. CHARLES MESLOW, Ph.D.

I, E. Charles Meslow, do declare and say:

1. I am presently employed by the United States Fish and Wildlife Service, an agency within the Department of the Interior as a Research Wildlife Biologist. I am the Leader of the Oregon Cooperative Wildlife Research Unit and a Professor of Wildlife Ecology at Oregon State University in Corvallis, Oregon. I have served in that capacity since 1976.

2. Attached hereto and marked as Exhibit A to this declaration is a full and complete copy of my curriculum vitae. To summarize, I received my Bachelor of Science in Fish and Wildlife Management from the University of Minnesota in 1959. In 1966, I received a Masters Degree in Wildlife Management, also at the University of Minnesota. In 1970, I received my doctorate in Wildlife Ecology/Zoology from the University of Wisconsin.

3. Throughout the years I have published numerous articles pertaining to the relationship between forest habitat and species of forest wildlife, including the northern spotted owl. Since 1975, I have served as the principal investigator on a number of research projects pertaining to the northern spotted owl for, among others, the Fish and Wildlife Service, the United States Forest Service, the Bureau of Land Management and the Oregon Department of Fish and Wildlife. The topics examined in these research projects include spotted owl distribution, life history, home range and habitat use, juvenile dispersal, habitat characteristics, great horned owl - spotted owl relation to forest fragmentation, demographic studies, prey ecology, and population studies.

DECLARATION OF E. CHARLES MESLOW - 1
(CWS)

UNITED STATES ATTORNEY
3600 Seattle Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 535-7970

1 4. In addition, I am one of six members of the Interagency
2 Scientific Committee to Address the Conservation of the Northern
3 Spotted Owl (hereafter referred to as "the ISC"). The ISC was
4 established under the authority of an interagency agreement between
5 the Forest Service, BLM, the Fish and Wildlife Service and the
6 National Park Service to develop a scientifically credible
7 conservation strategy for the Northern Spotted Owl in the United
8 States. Ultimately, in May, 1990, the ISC produced a report
9 entitled "A Conservation Strategy for the Northern Spotted Owl." I
10 will refer to this document in my declaration as "the ISC report."
11 A true and correct copy of this report is being submitted with this
12 declaration and is marked as "Exhibit B." This ISC report was
13 produced after the committee had reviewed the available literature
14 on the northern spotted owl, heard presentations from most of the
15 scientists doing research on spotted owls, examined owl habitat in
16 northern California, Oregon and Washington and interviewed dozens of
17 biologists and land managers. Although the purpose of the ISC was
18 to develop a conservation strategy for the northern spotted owl that
19 could be implemented on land owned and controlled by the United
20 States Government, much of what we learned about the owl, how its
21 population has declined as a result in changes in its habitat, and
22 what can be done to protect its long term survival is applicable to
23 both private and public land.

24 5. I have asked for my opinion on the question of whether a
25 logging project that is proposed by the Anderson and Middleton
26 Logging Company, and which has been approved by the State of
27 Washington in Department of Natural Resources Forest Practices
28

DECLARATION OF E. CHARLES MESLOW - 2

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 533-7970

1 Permit No. PP-02-12909 will constitute a "take" of a northern
2 spotted owl pair known to inhabit an area in close proximity to the
3 proposed logging project. I am informed that the term "take" as
4 used in the Endangered Species Act includes acts which either "harm"
5 or "harass" an endangered or threatened species. I am informed that
6 the term "harm" for this purpose means:

7 [A]n act which actually kills or injures wildlife. Such
8 act may include significant habitat modification or
9 degradation where it actually kills or injures wildlife by
significantly impairing essential behavioral patterns,
including breeding feeding and sheltering

10 and the term "harass" for this purpose means:

11 [A]n intentional or negligent act or omission which
12 creates the likelihood of injury to wildlife by annoying
13 it to such an extent as to significantly disrupt normal
behavioral patterns which include, but are not limited to,
feeding or sheltering.

14 Based on my review of the characteristics of the habitat within the
15 estimated home range of the spotted owl activity center that has
16 been identified in close proximity to the Anderson and Middleton
17 property, information that I have received from the Olympia office
18 of the U.S. Fish and Wildlife Service and the Washington Department
19 of Wildlife, and my own experience and knowledge regarding the
20 relationship of the northern spotted owl to its surrounding habitat,
21 it is my opinion, based on the best scientific information now
22 available, that the felling of the timber identified in the Anderson
23 and Middleton permit will constitute a "take" of the spotted owl
24 pair.

25 6. In 1991, Washington Department of Natural Resources (DNR)
26 surveyors detected single spotted owls within one mile of the
27 proposed Anderson and Middleton harvest unit. In 1992, a second DNR
28

DECLARATION OF E. CHARLES MESLOW - 3

UNITED STATES ATTORNEY
3600 Centreat Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 553-7970

1 survey identified a spotted owl pair with a juvenile owl
2 approximately 1.5 miles northeast of the proposed Anderson and
3 Middleton harvest unit. The Washington Department of Wildlife (WDW)
4 was not able to locate the exact nest tree because the juvenile had
5 already fledged from the nest. However, WDW staff were able to
6 determine the activity center of that pair's annual home range based
7 on observations and survey responses. The owl site was named "the
8 Queets River Lower" spotted owl pair site. Two additional spotted
9 owl activity centers (a pair and a resident single) are located 1.4
10 miles north and 3 miles east of the Queets River Lower spotted owl
11 pair. The estimated home ranges of these two other owl sites
12 overlap the Queets River Lower spotted owl circle but do not overlap
13 the proposed Anderson and Middleton harvest unit.

14 7. The DNR Forest Practices permit allows for clearcut
15 harvesting and road construction on Anderson and Middleton property
16 of 71.82 acres. The harvest unit is an individual stand of low
17 elevation old-growth cedar/hemlock forest with some scattered old-
18 growth douglas fir. I am informed that the majority of the cedar
19 trees are approximately 3-5 feet in diameter at breast height (DBH),
20 with several trees measuring 12 feet DBH. The larger cedar trees
21 are estimated to be approximately 1,000 years old. I am also
22 informed that the stand has never previously been entered for timber
23 harvest purposes and is characteristic of classic old-growth spotted
24 owl habitat, having large diameter trees, numerous snags of various
25 decay classes, a large volume of downed woody debris, and a multi-
26 layered canopy.

27
28
DECLARATION OF E. CHARLES MESLOW - 4

UNITED STATES ATTORNEY
3600 Sunfirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98106
(206) 323-7070

1 8. As indicated above, the harvest unit described in the
2 preceding paragraph is located approximately 1.5 miles southwest of
3 the site center of the Queets River Lower spotted owl pair. This
4 places the stand within the estimated home range -- a 2.2 mile
5 radius circle based on the site center. The owl pair's site center
6 is located in the Olympic National Park, within the Queets River
7 corridor. In preparing this declaration, I reviewed various maps,
8 including 1988 landsat imagery and habitat characterizations with an
9 overlay of known owl circles. I also reviewed orthophotos maps of
10 the area surrounding the activity center of the Queets River Lower
11 spotted owl pair. These maps and graphics were supplied by the WDW
12 and DNR. This information demonstrates that at present, forest
13 conditions are seriously degraded in the estimated home range radius
14 of the pair site. Only 3,050 acres -- 31% of the habitat within the
15 circle -- are suitable as spotted owl habitat. The suitable habitat
16 remaining is also highly fragmented. By fragmented, I mean that the
17 suitable habitat is found in separate parcels -- essentially
18 isolated islands of suitable habitat -- that are scattered over the
19 landscape.

20 9. In order to understand why, in my opinion, the
21 clearcutting of the timber on the Anderson and Middleton property
22 will result in a "take" of the Queets River lower spotted owl pair
23 it is first important to appreciate the relationship between the
24 spotted owl and its habitat. This was well-summarized in the ISC
25 report as follows:

26 Habitats selected by northern spotted owls typically
27 exhibit moderate to high canopy closure; a multilayered,
28 multispecies canopy dominated by large overstory trees; a

1 high incidence of large trees with large cavities, broken
2 tops, and other indications of decadence; numerous large
3 snags; heavy accumulations of logs and other woody debris
4 on the forest floor; and considerable open space within
5 and beneath the canopy. These attributes are usually
6 found in old growth, but they are sometimes found in
7 younger forests, especially those that contain remnant
8 large trees or patches of large trees from earlier stands.
9 In younger forests that support breeding owls, the nest
10 and major roost sites are usually found where large trees
11 from the earlier, older stands remain.

12 As a general rule, a stand of timber on the Olympic Peninsula cannot
13 begin to exhibit the old growth characteristics suitable to the
14 northern spotted owl until the stand has reached the approximate age
15 of 80 years.

16 10. With respect to the survival of the northern spotted owl
17 the Olympic Peninsula has been identified as an area of special
18 concern. ISC Report, p. 66-67. The reason for this is because the
19 owl population on the Olympic Peninsula is isolated from other areas
20 where populations of northern spotted owls are found, such as the
21 Cascade Mountains. As the result of previous clearcutting south of
22 the Olympic Peninsula and urbanization around the Puget trough there
23 is little chance of immigration from other areas because of the
24 paucity of suitable habitat around the Olympic Peninsula which will
25 support such immigration. This situation is reflected in a landsat
26 pictorial of the Olympic Peninsula. A true and correct copy of this
27 pictorial is attached hereto and marked as Exhibit _____. This means
28 that when spotted owls die on the Olympic Peninsula it is extremely
unlikely that they will be replaced by spotted owls immigrating from
other areas. There is also little probability that spotted owls on
the Olympic Peninsula will benefit from genetic mixing with other
spotted owl populations. Thus, as recognized in the ISC report, the

DECLARATION OF E. CHARLES MESLOW - 6

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 553-7970

isolation of spotted owls on the Olympic Peninsula makes the survival of each existing pair critical to the overall survival of the Olympic Peninsula population. ISC Report, p. 67.

11. Studies which have been conducted reflect that the northern spotted owls which inhabit the Olympic Peninsula maintain a large annual home range. By annual home range, I mean the area within the outermost points visited by the owl pair during a one year period. Literally, this is the area occupied by a spotted owl pair during the course of a year for nesting, roosting and foraging. Radio telemetry studies of owl pairs on the Olympic Peninsula demonstrated an annual home range varying from a low of 4,497 acres used by one monitored owl pair to a high of 27,309 acres. ICS Report, p. 194, Table II. In light of the wide ranges reflected in the studies, the ISC determined that the median annual home range provided the most realistic measure. The median (i.e. the annual home range of the owl pair in the middle of all the owl pairs followed in the study -- half of the owl pairs were using more area and half were using less) was 9,930 acres.¹ From this information we derived a circle of 9,930 acres (2.2 miles in radius from the activity center) as the most reasonable geometric model of the annual home range of the typical spotted owl pair. These are commonly referred to as "owl circles." Biologists look at the size

1 Note: Dr. Maslow, please take a look at the 1/5/93 [sic] memo from Jon Bart to Jim Michaels. This seems to indicate a mathematical error and that the 9,930 acres in the ISC Report should have been 14,271 acres. This would also apparently change the 31% figure.

1 probably causes some decrease in productivity and survivorship of
2 owls. This study also found that, with respect to the areas
3 surveyed on the Olympic Peninsula, the number of spotted owl pairs
4 decreased precipitously as the amount of older forest found in those
5 areas dropped to between 40% and 80%.

6 13. Although the reasons for the correlation between the well-
7 being of the northern spotted owl and the amount of suitable habitat
8 available to it are not entirely clear, it is probably primarily a
9 function of food availability. The northern spotted owl subsists
10 almost entirely on small arboreal nocturnal creatures and, on the
11 Olympic Peninsula, in excess of 50% of their diet is flying
12 squirrels. It is generally accepted that flying squirrels are
13 associated with old growth forests and younger forests which have
14 aged to the point that they have taken on some degree of old growth
15 characteristics. A shortage of suitable habitat has its most
16 pronounced effect on the owls during breeding season. The male owl
17 is exclusively responsible for feeding the female and offspring
18 until the offspring reach the age of three weeks. During this time,
19 feeding takes place every four hours. Even if plentiful prey is
20 found within 1/2 mile of the nest, the male spotted owl has to
21 hustle to keep his family fed. If he must range further than 2.2
22 miles from the nest the male owl is spending all his time and
23 considerable energy hunting prey and carrying it back to nest. At
24 a certain point the owl can no longer fly range far enough to find
25 an adequate amount of food to sustain the family and starvation
26 follows. In fact, starvation of the owls is thought to be one of
27 the principal reasons for the species decline. Moreover, in having
28

DECLARATION OF E. CHARLES MBSLOW - 9
(c93-_____)

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 553-7970

1 to range long distances over unsuitable terrain to reach suitable
2 terrain for hunting, the male owl leaves the protection of its old
3 growth-type habitat and increases its exposure to predators who live
4 on the edges. These same factors also inhibit reproduction. To the
5 extent the owls are expending vast amounts of energy on foraging
6 activities they have much less energy left for mating.

7 14. Based on these studies, as well as my own knowledge and
8 experience, it is my opinion, and the opinion of other owl experts
9 with who I am familiar, that 40% is the minimum amount of suitable
10 habitat that must be present in an owl circle in order for a spotted
11 owl pair to survive and reproduce. Certain characteristics of the
12 suitable habitat within the owl circle will influence the success of
13 the owl pair within such a circle. Among these is the proximity of
14 the suitable habitat to the activity center. In general, the closer
15 the better. Owls concentrate their foraging activities close to the
16 nest, particularly during breeding season. Foraging close to the
17 nest reduces the distance a male owl must travel to support the
18 female and offspring and it thereby reduces the amount of energy the
19 owl must expend in that effort. This may increase the ability of
20 the parents to protect the young and also may limit the exposure of
21 the male owl to potential predators he may encounter during foraging
22 activities. Moreover, to the extent that owls must expend greater
23 efforts in foraging as the result of the need to cover greater
24 distances to find sustenance, less energy is available to engage in
25 mating behavior. Also important is the degree of fragmentation of
26 the suitable habitat within the owl circle. As a general
27 proposition, large contiguous areas of suitable habitat are
28

1 preferable to isolated patches of suitable habitat. Primarily this
2 is because the northern spotted owl derives protection from its
3 habitat. Having to traverse unsuitable areas, such as clearcuts,
4 exposes the owls to predators who inhabit the edges of the habitat,
5 such as the great horned owl, the primary predator of the northern
6 spotted owl.

7 15. Radio telemetry studies also demonstrate that the northern
8 spotted owl is very selective about its habitat. These studies
9 demonstrate that the birds concentrate their activities in older
10 forest and forests with old growth characteristics and avoid younger
11 forests which do not have those characteristics. It is generally
12 accepted among owl biologists that this phenomenon is indicative of
13 an ecological dependency of spotted owls for older type forests
14 under the following premise:

15 When patterns of a species abundance and distribution show
16 a consistent, close association with a particular type of
17 habitat we assume that the habitat is essential for the
18 species' persistence. We contend that habitat selection
19 is a behavior that reflects the long-term needs of a given
20 species, and that it has so evolved over thousands of
21 years of varying environmental conditions as a result of
22 natural selection. Consequently, preference for a given
23 habitat or habitat attribute likely indicates a need.

24 ISC Report, p. 144.

25 16. Because the basis of the Washington State regulation upon
26 which Anderson and Middleton's permit was approved depends on the
27 existence of at least 500 acres of suitable habitat in proximity to
28 the activity center of a northern spotted owl, it is interesting to
note that I am not aware of any case in which a pair of spotted owls
is surviving when only 500 acres of suitable habitat is present
around a nest.

1 17. With reference to the premises stated above, I reiterate
2 my position that the felling of the timber on the Anderson and
3 Middleton tract will constitute a taking of the Queets River Lower
4 spotted owl pair. I believe that the timber proposed to be removed
5 in this Forest Practices permit is crucial both to the survival of
6 this pair and their ability to reproduce offspring who can also
7 survive. I also believe that the removal of this timber will harm
8 this pair because the removal of this old growth timber from this
9 owl circle, indeed the removal of any further suitable habitat from
10 this owl circle will cause actual injury by interfering with their
11 essential behavioral patterns, particularly, breeding, feeding and
12 sheltering.

13 18. Attached hereto and marked as Exhibit ___ is a composite
14 aerial photograph of the area which surrounds the Queets River Lower
15 spotted owl activity center. An overlay is provided which
16 identifies the boundaries of the owl circle and the areas of
17 suitable habitat remaining within the circle including the
18 Anderson and Middleton parcel. As demonstrated by this photograph,
19 given the amount of remaining suitable habitat within this owl
20 circle and its fragmentation, it is apparent that the habitat within
21 this circle is woefully inadequate for the survival of this spotted
22 owl pair. The amount of suitable habitat within this owl circle has
23 been calculated by the DNR as 31% -- well below the 40% which is
24 considered to be minimally adequate. Moreover, the suitable timber
25 within this circle is highly fragmented and there is no longer a
26 continuous forest present. The circle is characterized by small,
27 isolated patches of forest transecting a landscape where large
28

DECLARATION OF E. CHARLES MESLOW - 12
(cont.)

UNITED STATES ATTORNEY
1600 Second Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 553-7970

1 chunks of recent clearcuts predominate and which, as reflected by
2 DNR's calculations is in area 69%[?] unsuitable for habitation by
3 northern spotted owls. The area immediately outside the 2.2 mile
4 radius of this owl circle is also largely unsuitable. With an owl
5 circle which has the characteristics of this one, every remaining
6 piece of suitable habitat within the home range of the spotted owl
7 pair becomes crucial to its survival and the survival of any
8 fledglings. The further the circle falls below 40% in terms of
9 suitable habitat, the more precious each remaining patch of suitable
10 habitat becomes.

11 19. While no radio telemetry studies have been done on this
12 owl pair, I consider it very likely that this owl pair has used the
13 forest proposed for cutting in the past and that they will continue
14 to do so in the future. I say this for two reasons. First, as
15 discussed above, because the spotted owl is highly habitat
16 selective, I consider it extremely unlikely, particularly given the
17 small amount of remaining habitat within this owl circle, that the
18 Queets River Lower pair have not used this forest. My belief is
19 reinforced by the fact that the tract to be cut is top quality
20 habitat which would be extremely attractive to the pair and the prey
21 they rely on for sustenance. Second, I note that because of the
22 Queets River corridor, much of the remaining suitable habitat
23 projects from the owl site center directly toward the Anderson and
24 Middleton site. Thus, it is likely that this owl pair forages along
25 this line of suitable habitat which would lead them directly to the
26 Anderson & Middleton site.

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28
DECLARATION OF E. CHARLES MESLOW - 13
(CVS-_____)

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98106
(206) 553-7970

1 20. The survival of an owl pair whose estimated home range is
2 an owl circle which bears these characteristics is precarious.
3 However, this is an obviously experienced pair who have managed to
4 adapt to their present surroundings at least sufficiently to
5 survive. However, the chances for the survival of another owl pair
6 who might in the future attempt to inhabit this same area but who
7 lack the adaptive experience of the present pair becomes
8 increasingly problematic. The removal of the forest which Anderson
9 and Middleton proposes to cut undoubtedly threatens the
10 reproductivity and chances for survival of this pair and their
11 successors. Given the characteristics of this circle, the habitat
12 represented by the Anderson and Middleton tract must be considered
13 precious to the survival of the Queets River Lower pair. While this
14 stand of timber would be even more valuable to the pair if it were
15 closer to their activity center, it is nevertheless well within the
16 median home range estimates of spotted owl pairs studied on the
17 Olympic Peninsula. The likely result of the removal of this timber
18 would be to force them to range farther to find replacement suitable
19 habitat in which to forage. With this forced modification of their
20 behavior comes the additional expenditure of energy by an owl pair
21 that is probably already taxed to the limit, and the likely
22 attendant side effects including impairment of reproductivity and,
23 in a worse case scenario, death by starvation or exposure to
24 predators.

25 21. For these reasons, I believe that the removal of the old
26 growth forest which is contemplated by the Anderson and Middleton
27 Forest Practices permit will directly harm the Queets River Lower
28

DECLARATION OF E. CHARLES MESLOW - 14
(93-)

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98106
(206) 553-7970

1 spotted owl pair and, in the terms of the Endangered Species Act as
2 I understand it, constitute a take.

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

5 Executed this _____ day of _____, 1993 at
6 Corvallis, Oregon.

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9 E. CHARLES MESLOW

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DECLARATION OF E. CHARLES MESLOW - 15
(C93-_____)

UNITED STATES ATTORNEY
1600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98106
(206) 533-7970

1 and structure of the forest stands within these owl circles to
2 determine the adequacy of the habitat to sustain the pair.

3 12. The available scientific data establishes a direct
4 correlation between the amount of suitable habitat available and the
5 productivity and survivorship of owls. In the ICS report the median
6 amount of suitable habitat found within the annual home range of the
7 owl pairs studied was 4,579 acres. ICS Report, p. 195, Table I2.
8 In percentage terms, this means that the median suitable habitat
9 within the median annual home range of the birds represented in the
10 study is 46%. Yet, it is important to observe that, even with these
11 sizeable home ranges, the spotted owl population on the Olympic
12 Peninsula is declining at a statistically significant rate. This is
13 documented in the U.S. Department of the Interior's draft "Recovery
14 Plan for the Northern Spotted Owl" (4/92) in Table C.4., at page
15 323. A true and correct copy of this draft recovery plan is
16 attached hereto and marked as Exhibit _____. The need for a certain
17 minimum amount of suitable habitat within a spotted owl circle to
18 sustain the species also finds support in a recent article written
19 by Jonathan Bart and Eric D. Forsman and published in Biological
20 Conservation. A true and correct copy of this article is attached
21 hereto and marked as Exhibit _____. The study which was the focus of
22 the article reflects an unmistakable linear relationship between the
23 amount of older forest and the density and reproductive success of
24 northern spotted owls in the areas surveyed. That is to say, the
25 more older growth habitat available in the areas surveyed in the
26 study, the more spotted owls were found and the greater was their
27 reproductivity. Stated conversely, removing any suitable habitat
28

DECLARATION OF E. CHARLES MESLOW - 8
(cont.)

UNITED STATES ATTORNEY
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104
(206) 553-7970



U.S. Department of Justice

Environment and Natural Resources Division

Wildlife and Marine Resources Section

Washington, D.C. 20530

December 1, 1993

VIA TELEFAX AND MESSENGER

Charles P. Raynor
Assistant Solicitor,
Fish and Wildlife
U.S. Department of the Interior
Washington, D.C. 20240

Dear Pete:

Re: United States v. Anderson and Middleton Logging
Company (W.D.Wash.)

Following up on our conversation this morning, I am including a copy of the letter we discussed from Anderson and Middleton (A&M) lawyers to AUSA Brian Kipnis. As mentioned, Brian, Ron Swan, Jean Williams and I discussed this letter on Monday. I also spoke with Don Barry and Dave Gayer about it yesterday and faxed a copy of the letter to Don yesterday.

As mentioned this morning, Justice will not bring an injunctive action against A&M for this proposed timber harvesting nor will it indicated to A&M lawyers that that is its intent unless Interior requests us to do so. However, if there is any chance that Interior may want to request Justice to bring an injunction action, it is imperative that we have some communication with A&M lawyers by Friday so that we can preserve our options and A&M cannot later say their notice letter to us went unanswered. This could simply be a request for additional time.

In the meantime, we are continuing to work with the AUSA and local FWS personnel to prepare a complaint and associated papers should a decision be made to seek declaration and injunctive relief.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jim", written in dark ink.

James C. Kilbourne

Smith & Leary
ATTORNEYS AT LAW

James A. Smith, Jr.
J.J. Leary, Jr.
Terrence L. Fredrickson
James R. Hennessey

The Burke Building
Suite 500
316 Occidental Avenue South
Seattle, Washington 98104-2840
Telephone: (206) 292-1770
Facsimile: (206) 292-1790

Kevin D. Swan
Catherine R. Hoover
Patrick J. Franko

Connie K. Haslam
Of Counsel

November 24, 1993

VIA FACSIMILE AND U.S. MAIL

Brian C. Kipnis
Assistant United States Attorney
3600 Seafirst Fifth Avenue Plaza
Seattle, Washington 98104-3190

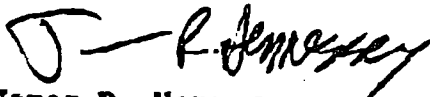
Re: Anderson & Middleton Logging Company

Dear Mr. Kipnis:

Anderson & Middleton intends to commence harvest operations on their property located in Jefferson County Section 35, Township 24 North, Range 12 West, consistent with the permit No. FP-02-12909 issued by the Washington State Department of Natural Resources. Please let me know what position the Government will take concerning this harvest, including whether injunctive relief will be sought by your office. Anderson & Middleton will delay harvest activities until December 3, 1993, while we wait for your response.

Very truly yours,

SMITH & LEARY


James R. Hennessey

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cc: James C. Middleton
J. J. Leary, jr.

FAX TRANSMITTAL FORM

To: Will Stelle

Phone #: _____

From: Don Knowles

Phone #: 202-3019

Date

11/19

Number of Pages to Follow

11

Special Instructions:

FLZ
4 (cd)

Don Knudsen 11/1/9

Will:

Here are three things for your information. One, an update on our discussions with the timber industry. As I prepared it yesterday afternoon, it is already out of date, but only in a minor way. Two, a copy of Pete Raynor's write-up after our meeting on 11/9, when we agreed on the take treatment to be used in the 4d rule. To my knowledge, Tom Collier has not seen it, nor has Don Barry.

On a different topic, Dale Hall has agreed to meet with Fran Hunt and several other enviros, mostly locals I think, Monday morning at 9am in Portland, to discuss our 4d rule. They called and asked for the meeting. Dale has been meeting with landowners (ie, timber companies), showing them maps of our special emphasis areas, and discussing the 4d rule provisions. He has probably met with 5 or 6 companies to date. The purpose of the industry meetings has been to provide them with a sufficient understanding of the rule that they will be able to stand with the administration and publicly support our actions.

Dale is going to do a similar briefing with the enviros. He has been asked by Marv to use a map without the actual boundaries, and to indicate general areas where the take circles will remain until HCPs or local options are adopted.

Tom Collier is of the understanding that the enviros will try to attack Alternative 9 by asserting that the 4d rule will permit additional harvest of non-federal land, and that will reduce the effect of the federal land. I have pointed out to him that the 4d rule is consistent with the direction given to the viability panelists when they were convened. The third attachment is the central quote from FEMAT.

In any case, we should be prepared for some criticism from the enviros following their briefing.

Tom Collier will be out of town all next week. If you want to discuss take with him, you should try to reach him today. We are scheduled to meet with Boise Cascade at 2:30 today, and may have two conference calls later, one with Plum Creek at 4:30 and one with Simpson at 4:00.

Let me know if I need to do anything else. I will be here all day and home all weekend (703/750-1361). By the way, Don Barry is scheduled into Dulles Saturday night at 11:00, but is on American. He may be stranded in the South Seas forever, due to American's strike.

Cheers.

TIMBER INDUSTRY AND STATE RESPONSES TO 4(d) RULE

1. STATE RESPONSE

- A. **WASHINGTON** - Support from Governor Lowery and Public Lands Commissioner Jennifer Belcher up in the air. Lowery has expressed concern about the adequacy of Option 9 based upon a briefing that he received from the environmental community with new GIS maps attacking the choices made under Option 9. Belcher's reported initial comment on viewing the 4(d) rule map for Washington was that the decisions appeared to be based upon political considerations rather than scientific considerations. She was particularly concerned about the lifting of restrictions in Southwest Washington and the attempt to tie the lifting of restrictions on the eastern end of the Olympic Peninsula to the approval of an acceptable owl conservation plan for the State forest on the west side of the Peninsula. No direct communication with Lowery. Chief point of State contact: Amy Bell (206) 902-1045.

11/18/93 UPDATE: Talked to Amy Bell on November 10. Offered to discuss directly with Belcher. Amy will check and let me know if we need to have further conversations. Received a copy of State Scientific Advisory Group's recommendation for spotted owl habitat from Jack Hulsey (206) 902-1400. This report lists several (about five) areas as "essential", whereas the 4(d) rule would lift owl circles in those areas; conclusively rejects the validity of 500 acre owl circles.

- B. **OREGON** - Support from Governor Roberts estimated by State natural resource staff to be lukewarm at best. Governor has been heavily lobbied by timber industry against 4(d) rule that imposes new restrictions on private lands. Governor out of pocket for another week due to death of her husband. Two State forests would be hit with large owl circles but State intends to do HCPs for these areas. Chief point of State contact: Paula Burgess (503) 378-3225.

11/18/93 UPDATE: No further contact.

- C. **CALIFORNIA** - Support from State likely to be positive based upon past statements from Doug Wheeler, head of the State Natural Resources Agency. State will be subjected to pressure from industry to scale back level of protection for the owl given 70 acre protection to be afforded owl in Oregon and Washington. Chief points of contact: Mike Mantell (916) 653-5656 and Terry Gorton (916) 757-1993.

11/18/93 UPDATE: Met with Terry Gorton and Bob Ewing on November 17. Their proposal was to further develop our strategic thinking regarding California. For example, could we agree to announce soon a workshop to be held by May or June to review owl data if the industry withdraws its petition to de-list? Also, what is our position of the State moves to ease its owl protection?

2. INDUSTRY RESPONSE

- A. **WEYERHAEUSER** - Generally comes out a big winner in terms of geography and areas to be lifted from owl circles. Prepared to be publicly supportive of 4(d) rule as far as geography goes but has very strong objections to defining a take as the retention of less than 40 percent of suitable owl habitat within an owl circle. Has committed to keeping "freed up" logs for domestic mills (could equal 150+ million board feet). Met with senior company officials on November 5. Chief point of contact: Fred Benson (202) 293-7222.

11/18/93 UPDATE: Tom Collier had follow-up discussion with Fred Benson. Collier conveyed three messages to Weyerhaeuser: (1) his inclination is to eliminate the presumption of take based on a habitat threshold; (2) we are not likely to reduce the size of owl circles below range size; and (3) Coos Bay area is still open. Weyerhaeuser reported to be pleased.

- B. **BOISE CASCADE** - Generally comes out a winner on geography except for I-90 Corridor and the northwest coast of Oregon, the latter a key area for the company. Very strong objections to proposed definition of take (40 percent rule) and use of home range owl circles. Will reserve judgment on geography and issue of HCPs until it sees 4(d) maps. Numerous phone calls with a Company VP and a conference call on November 7 with the Company President. Want to meet personally with Tom Collier. Chief point of contact: Donald Smith (208) 384-6519.

11/18/93 UPDATE: Hall meeting held November 12 to describe the rule. Reportedly a good meeting. Donald Smith and group to meet with Tom Collier at 2:30 p.m., Friday, November 19.

- C. **SIERRA PACIFIC** - Largest timber company in California; already has a "no take" agreement on owls with FWS. Given current no take agreement on owls, wasn't sure that proposed 4(d) rule added anything for them regarding their current operation. Little incentive to do an HCP for owls but didn't rule out possible advantage for multiple species HCP. Strong objections to defining take

based upon 40 percent of owl home range. Generally doesn't export logs. Conference call with Senior VP and Company President on November 4. We need to circle back for final response. Chief point of contact: Dan Tomashevski (916) 365-3721.

11/18/93 UPDATE: Tomashevski confirms that the 4(d) rule under consideration is sort of a wash for Sierra Pacific. Has asked if a California company can do an HCP or a local option agreement and avoid State regulation? If so, who enforces such an agreement and how would our rule reflect this? One downside of FWS deferring to California regulations is that the FWS (Wayne White and Phil Detreich) is much better to deal with than California State Fish and Game. If we do an event, they will consider participating.

- D. SIMPSON - Negotiated the first owl HCP for its lands in California. Has key 300,000 acre parcel on the east and southern side of the Olympic Peninsula. Only three owl circles affect operation on the Olympic Peninsula at this point. Also owns significant amount of property on the northwest coast of Oregon, an area for proposed big owl circles. Given current HCP which addresses owl problems in California and minimal owl problems on the Olympic Peninsula, impact on holdings on the northwest coast of Oregon could "net" out overall impact of 4(d) rule as negative rather than positive. Company has been very cooperative to work with and has approached FWS to begin discussions about a multiple species HCP for Washington and California lands. Very strong objections to defining take based upon 40 percent of owl home range. Numerous attempts to set up personal meeting and conference calls have failed due to schedule conflicts with grazing fight. Chief point of contact: Wayne Whitlock (415) 233-4528.

11/18/93 UPDATE: Simpson met with Dave Frederick and Wayne White in lieu of Dale Hall on November 16(?). Reportedly a good meeting. Wayne Whitlock thinks a 4(d) rule is a very interim step for Simpson, as they are headed for a multi-species HCP. Wayne thinks Simpson might be able to characterize the 4(d) rule as a "real step forward," if <40 percent NRF is not defined as a presumptive take. Simpson wants MOU (or some other agreement) between FWS and NMFS and themselves before proceeding with pre-listing agreements or multi-species HCPs. Wayne is checking to see if they want to discuss further with Collier or if they are ready to publicly support the rule.

- E. **GEORGIA PACIFIC** - Generally unfamiliar with Georgia Pacific lands in northwest although likely to have mixed results under 4(d) rule (e.g., Coos Bay lands appear to be okay but Newport lands appear to be a problem). Meeting set up with Georgia Pacific for November 8. No present indication of likely response to 4(d) rule although comments made two months ago suggest strong opposition to 40 percent rule. Chief point of contact: John Turner (202) 659-3600.

11/18/93 UPDATE: Dale Hall met with Georgia Pacific on November 16. Reported to be a pleasant and detailed meeting. They raised questions about our goals in northwest Oregon. John Turner to check with Carl Ehlen and report back to me.

- F. **PLUM CREEK** - Will generally be hard hit under 4(d) rule given significant land holdings in the I-90 Corridor which would retain large owl circles. Does okay in southwest Washington (Longview area). Very strong objections to defining take based upon 40 percent of owl home range. Is planning on proposing an HCP/land exchange for addressing owl problems in the I-90 Corridor. Numerous attempts to set up personal meeting and conference call have failed due to schedule conflicts with grazing fight. Chief contact point: Bob Manne (206) 467-3612.

11/18/93 UPDATE: Plum Creek met with Dale Hall on November 17. Reported to be a thorough review. Plum Creek asked three questions: (1) can we reach an agreement with Plum Creek before completion of the 4(d) rule and reflect that agreement in the final 4(d) rule?; (2) will our EIS on the 4(d) rule suffice to cover local option agreements without additional NEPA compliance?; and (3) how will we word the actual HCP/local option agreement -- "compliance with this standard means no take", or "take will occur and be authorized"? Plum Creek has asked to meet or talk with Tom Collier, and we are scheduling. Plum Creek has a meeting scheduled with Jim Lyons Monday, November 22 in Seattle, as their interest includes a land exchange program.

- G. **INTERNATIONAL PAPER** - Reportedly would get significant relief in Southwest Washington but would likely be hit on the Northwest coast of Oregon. No direct contact established yet with company. Potential points of contact: Dennis Thomas and Art Brownell (202) 785-3666.

11/18/93 UPDATE: No contact.

- H. ITT RAYIONER - Owns lands on western side of Olympic Peninsula. Has approached FWS about doing an HCP for those lands. No direct contact established yet with company. Potential point of contact: J. Fredrickson, (company headquarters in Connecticut) () - .

11/18/93 UPDATE: Bob Meier met with Dale Hall on November 16(?). Meeting reportedly was a bust, as all ITT Rayioner holdings are on the Olympic Peninsula. Reportedly not interested in an HCP or a local option. A follow-up effort is being made to contact Wendy Pagnetti, (206) 248-4135, per Mike Bagley and Stephanie Solien.

- I. GIUSTINA BROTHERS - A medium/small size company that reportedly would be a big winner in Oregon. No direct contact established yet with company.

11/18/93 UPDATE: No contact.

- J. BARON AND ASSOCIATES - A medium/small size company that reportedly would be a big winner in Oregon. No direct contact established yet with company.

11/18/93 UPDATE: No contact.

- K. LONGVIEW FIBRE - A large/medium size company that stands to be a big winner in Southwest Washington and north Central Oregon under the proposed 4(d) rule. No direct contact established yet with company although we have had one lengthy meeting with Les AuCoin who now apparently represents Longview Fibre.

11/18/93 UPDATE: No Contact.

- L. NEW CONTACT - Returned call November 11 to Jim Jones, General Manager, Western Timber and Logging Division, Willamette Industry, (503) 926-7771, Albany, Oregon. Willamette owns 328,000 acres in Oregon, both east side and west side. Jim was aware that some meetings were occurring and he wanted to know if Willamette would be impacted by our proposal. I generally described our areas of interest and he agreed to send us an ownership map for our initial review. If we needed to need follow-up, we would arrange a meeting in Portland. Jim characterized the current requirement for a take prosecution as a dead owl and any change will restrict their flexibility. Jim did not send maps or call again. I later heard from Mark Rey that Willamette thinks they are in a Special Emphasis Area and are not pleased.

7-10-93 11:18AM 200
The Endangered Species Act (ESA) established prohibitions against the "take" of endangered species. These prohibitions serve to focus the Act. Other elements of the Act provide means to address the concern established by the prohibition against take. Thus, section 7 of the ESA provides a means whereby Federal agencies can ensure that they will not take endangered species. Similarly, section 10(a)(1) establishes a mechanism whereby state or private parties not subject to the section 7 process can similarly ensure that they will not take endangered species.

The prohibition against take is found in section 9(a)(1)(B) of the Act. Take itself is defined in the Act at section 3(27). As applied to endangered species, the concept of take is rearticulated (but not further explained) at 50 CFR section 17.21. The Fish and Wildlife Service (FWS) has further defined several elements of the statutory definition of take (harm and harass) at 50 CFR section 17.3.

The prohibition against take does not automatically apply to threatened species. Section 9(a) speaks to endangered species only. Section 4(d) is the vehicle through which the concept of take is applied to threatened species. The second sentence of that subsection provides that the prohibitions of section 9(a)(1) may be applied to threatened species. This provision is reenforced by section 9(a)(1)(G) of the Act which makes it a prohibited act to violate any regulation adopted by the Secretary pursuant to the ESA. In essence, a section 4(d) rule adopts the prohibitions for endangered species of section 9(a)(1) by regulation; and, section 9(a)(1)(G) makes it a prohibited act to violate that regulation.

The FWS has implemented this aspect of section 4(d) in a generic manner. At the present time, 50 CFR section 17.31 provides that unless there is a special rule to the contrary the prohibitions applicable to endangered species, with one minor exception, apply to threatened species. Section 17.31(a) provides that the prohibitions of section 9(a)(1), as found in 50 CFR section 17.21, are applicable to threatened species unless there is a special rule to the contrary. Special rules are found in 50 CFR section 17.40. With regard to the Northern Spotted Owl (NSO), there is no special rule so the general provisions of section 17.31 apply.

In accord with this statutory and regulatory framework, a section 4(d) rule for the Northern Spotted Owl would change the application of section 17.31 to this threatened species. It would serve to more precisely detail which prohibitions of section 9(a)(1) of the Act and section 17.21 of the regulations will apply to the NSO. This could be done in two different ways. One approach would be to completely abandon the take prohibitions of the present regulations -- the provisions of section 17.21 and the definitions of "harm" and "harass" in section 17.3 of 50 CFR -- and establish a new framework for the NSO. The alternative would be to apply the existing framework of section 17.21 in a more precise manner.

The FWS has now identified two types of areas on non-federal lands within the traditional range of the NSO that can be the topic of more focused protection pursuant to a section 4(d) rule with regard to timber production activities. The first is a 70 acre area encompassing each activity center for Northern Spotted Owls. The second is 10 or 11 special emphasis or corridor areas that have been identified by FWS as connectors between federal protection areas.

It has now been proposed that these two types of areas will be protected by a section 4(d) rule. This rule would reduce the generic provisions of 50 CFR section 17.31 and apply the take prohibitions presently found in 50 CFR section 17.21 in a more focused manner. Non timber production activities will not be effected. They will continue to be the subject of the protections provided by 50 CFR section 17.31 and section 17.21 throughout the range of the NSO. With regard to timber production activities, however, the FWS will propose a special rule that will lift the general prohibitions of section 17.31 throughout the range of the owl. This rule will apply the existing prohibitions found in section 17.21 to the two types of habitat areas described above -- 70 acre activity centers where ever found and the 10 or 11 special emphasis or corridor areas -- that have been specifically identified by the FWS.

With regard to the two types of areas covered, such a rule would rely on the existing take regulations of the FWS. The prohibitions of 50 CFR section 17.21 and the definitions of 50 CFR section 17.3 would apply. In addition, however, there is agreement that the FWS should also highlight in non-regulatory language (probably in the preamble to the section 4(d) rule itself) the precise nature of its concerns for these two types of areas. In specific, the large circle protections concept applicable to the corridor areas would be spelled out in great detail. This would provide the public with a clear understanding of the nature of the FWS' biological concerns and the interpretation that the FWS would apply in a NSO context to the existing regulatory provisions of section 17.21 and the definitions of section 17.3.

In addition, the possibility of increased or more specific regulatory protection is also to be discussed in the prefatory remarks to the section 4(d) rule. The proposed rule should clearly indicate that in the event that the proposed prohibition scheme is not adequate to protect the owl, in conjunction with implementation of some version of option 9 on Federal lands, additional and very specific prohibitions may be proposed.

In this regard, a second element of section 4(d) should also be considered. The initial sentence of that subsection provides:

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.

This sentence has been interpreted as a separate and independent grant of authority to the Secretary to protect threatened species. This authority clearly provides a basis for additional levels of protection necessary and advisable to provide for the conservation of the NSO. Accordingly, to the degree that application of the prohibitions of section 9(a)(1) of the Act to this threatened species -- as authorized by the second sentence of section 4(d), discussed above -- may not provide the requisite measure of protection, implementation of conservation regulation would be the next logical step. A discussion of this possibility should be included in the proposed rule. The rule itself, however, will be limited to revising section 17.31 to limit section 17.21 to the two types of areas identified by the FWS as requiring protection with regard to timber production activities.

little understanding to venture an informed opinion. The entire panel could also choose not to rate a species if they thought there was inadequate scientific knowledge about the species. These species were marked "not rated" on the assessment forms, but they were of no less concern than rated species. Discussions about the need to study and provide for these species was captured in the panel transcripts and panel leaders' reports.

We adopted the likelihood voting methodology in an effort to quantify scientific and personal uncertainty (Tinkel 1990). We felt that honest expressions of how little or how much was known about species/option interactions could help us and decisionmakers better understand the issues and make more informed tradeoffs. We emphasized to panelists that the likelihoods are not probabilities in the classical notion of frequencies. They represented degrees of belief in future outcomes, expressed in a probability-like scale that could be mathematically aggregated and compared across options and species. This use of the "judgmental probabilities" is consistent with the theory and practice of decision analysis and decision science (von Winterfeldt and Edwards 1986; Howard and Matheson 1983).

Panel facilitators and leaders encouraged panelists to be candid and protected panelists' ratings from domineering personalities. The pattern of likelihood votes across the options reflected the panelist's rationale, knowledge base, and assumptions. It allowed panel leaders and panelists to detect and clarify key uncertainties and ambiguities in the option descriptions or panelist's interpretation of them.

Panel Process Mechanics

All panel assessments followed the same process flow. Panels lasted one to two days depending on the number of species being assessed. Two panels were usually combined for orientation to help standardize the process and to stimulate questions.

Each orientation consisted of the following:

1. *Welcoming statement.* We reviewed the purposes of the overall Forest Ecosystem Management Assessment Team assessment and reasons for reconvening the panels. Some panelists were suspicious that the second round of assessments was politically motivated to obtain "new" results. Introductory remarks responded to these concerns.
2. *Orientation to the rating scale.* We presented and explained the rating scale. We defined terms and encouraged panelists to discuss their understanding of the scale. The points received particular consideration. The first was the definition of "well-distributed". The second was the separation of federal habitat from other influences on species viability. This was discussed with reference to figure IV-1.

This diagram displays six factors that could influence species populations. These are habitat conditions on federal lands; life history characteristics of the species; "bottleneck" periods of low habitat and population; landownership patterns and habitat conditions on nonfederal lands; habitat conditions outside the range of the northern spotted owl; and other environmental conditions caused by activities off federal lands.

For the purposes of the rating, panelists were asked to focus their assessment on habitat conditions on federal lands; life history characteristics of the species; and any bottlenecks in habitat (and population) that would occur under the option. For this assessment, they were asked to assume that the other three factors would be adequate to support a stable, well-distributed population of the species if habitat on federal land was adequate to support such a population. These assumptions were relaxed later in the process when the likelihood rating had been completed. Panelists were then asked to describe the actual influence that these last three factors might have on overall population viability.

3. *Orientation to the assignment (likelihood) scale component.* We presented the likelihood scheme, its methodological rationale, and examples. The purpose of the group discussion was information exchange not consensus, and it was important to spend time in calibrating judgments, customizing the outcome definitions, and discussing the concept of likelihood points.
4. *Orientation to process flow.* We described the roles of the facilitator, panel leader, panelists, scribe and observers.

The facilitator's role was to clarify the task and the use of materials, keep the process moving and the discussions relevant to the task, stimulate thinking and interchange about the assessments, probe for consistency, biases, and misunderstandings and identify opportunities for improving the assessment process.

The scribe captured the discourse during the session, displaying the transcripts to the panel with an overhead projection from the computer screen. These transcripts were useful in clarifying and tracking points cited by panelists and supporting the later interpretations.

At times, panels were visited by members of the Supplemental Environmental Impact Statement Team and other observers. These observers were asked to limit their involvement to occasional clarifying questions; their primary role was passive observation.

Description of the Options

We presented the seven options in a 1-hour briefing with opportunities for panelists to ask questions. In order to make the panel process workable, we assessed only seven of the 10 options (1, 3, 4, 5, 7, 8 and 9). In an attempt to emphasize the biological nature of the judgment task, only information relative to the bio-physical aspects were presented; no economic, harvest level (allowable sale quantity), or community assessment information was provided. The briefing was supplemented with visual materials provided to the panelists and displayed in the panel work area. In addition, an option expert was available to answer questions at any time during the panel assessments. Materials provided for the seven options included:

- Maps of options, color-keyed to depict spatial allocations of reserves. These 1:500,000 maps, one for each state for each option, were displayed on walls around the work area.

DEC-08-'93 12:35 ID: DNR ADMINISTRATION

TEL NO: 206-902-1775

#359 P01

Post-It brand fax transmittal memo 7871		# of pages 4
To Don Knowles	From Amy Bell	
Co.	Co. DNR	
Dept.	Phone # 206/902-1045	
Fax # 202/208-4684	Fax # 206/902-1775	

STATEMENT ON THE PRESIDENT'S FOREST PLAN

TO

THE HOUSE AGRICULTURE SUBCOMMITTEE ON
SPECIALITY CROPS AND NATURAL RESOURCES

December 2, 1993

by

JENNIFER M. BELCHER
Commissioner of Public Lands
State of Washington

4 (d)

Mr. Chairman, members of the subcommittee. Thank you for allowing me this opportunity to comment on the President's Forest Plan.

I want to commend the President and the administration for the courage they've shown in attempting to end the gridlock that has existed in the Northwest over forestry issues. However, I have grave concerns about the proposals they are formulating and I want to bring those concerns to your attention.

Let me tell you first that, as the elected Commissioner of Public Lands for Washington State, I am responsible for overseeing the management of 5.2 million acres of lands, including 2.1 million acres of forested lands. These lands were granted, in trust, to the state at statehood, and in addition to being some of the most commercially productive forest lands in the world, are also home to the spotted owl, the marbled murrelet, and many other important species. Our lands do not exist in isolation, but are co-mingled with federal, other public, and private lands across the state.

As Commissioner, I also am responsible for the regulation of 12 million acres of state and private lands for forest practices. This year we will process more than 13,000 applications to build roads, harvest timber and conduct other forest practices. As you can understand, we are intimately involved with the issues of timber supply and protection of wildlife. We were, therefore, encouraged to learn of the President's plans to hold a conference in the Northwest and bring to bear on this issue the full influence of his office.

Page 2

Officials from the Governor's cabinet and I have met with administration officials since the President took office, offering our assistance and the knowledge that comes from many years of involvement in these issues. From the beginning we have worked to assure that the President and his advisors develop a comprehensive approach to resolving the forestry conflicts. The people of the Northwest are ready for solutions. Our requests were straight forward:

1. Do not treat this as a "federal lands only" issue. Wildlife do not recognize property boundaries, and there are many spotted owls on nonfederal lands. We must have a solution that acknowledges this fact and acts accordingly.
2. The proposed solutions must be scientifically sound and, therefore, legally defensible.
3. Recognize, as do we, that the harvests of the mid-1980's will probably not be possible again, and provide financial assistance to support our communities while they respond to lower levels of timber supply.

Therefore, when we first learned of Option 9, we had concerns that it did not meet our first requirement -- a comprehensive approach. We worked diligently to both review Option 9 and to convince the administration that it was only a partial answer. We discussed with them again the need for legitimate relief (based on a biological analysis) for nonfederal landowners, through the development of a 4(d) rule that would clarify what part nonfederal lands should play in conservation of the species.

Page 3

Governor Lowry and I submitted a joint state response to Option 9 (a copy of that letter is attached). Even with its deficiencies, Option 9 is probably the best that we could expect on federal lands in this region given our past practices. However, it is only one piece of the solution. And recent discussions with Department of Interior officials lead me to believe that the 4(d) rule that is being considered is seriously flawed as it relates to our second requirement -- that it be scientifically sound. That, then calls into question the entire package.

For the past several months we have had a group of Washington scientists working to recommend critical habitat for the spotted owl on nonfederal lands, given likely conservation actions on federal lands. The group includes two scientists from state government, one from the industry and one from a tribe. All have recognized expertise in spotted owl biology. This group's report to the State Forest Practices Board concludes that areas of Southwest Washington are essential to the conservation of the owl, among other recommendations. The proposed 4(d) rule, however, does not include coverage of this area. If it is indeed an essential geographic area it should be covered by the rule. My grave concern is that the proposed rule, coupled with Option 9, does not constitute a scientifically sound, and therefore legally defensible proposal. And we will, once again, be caught in the dilemma of having proposals before us which appear to be political in nature rather than sound biologically. The administration's attempts to protect this area through voluntary efforts should come after the 4(d) rule is adopted -- not before. It must be made clear that healthy ecosystems and species viability are not "uses" to be traded or

Page 4

"balanced" with commodity production. Healthy ecosystems must be the baseline from which all other uses are considered.

I believe Option 9 should be considered as only one part of our solution. The critical role played by nonfederal forest lands in protecting wildlife species viability should also be recognized. While federal forest lands often provide the backbone of species protection, it is nonfederal forest lands that help ensure species diversity, distribution, and viability. Again, I ask the federal government to assist and support us in our efforts by adopting section 4(d) regulations under the Endangered Species Act that are scientifically rigorous and based on an ecosystem approach to species protection, rather than an ownership approach. The 4(d) rule, Option 9, and a new federal-state partnership designed to develop agreement on sustaining our forest ecosystems, our timber-producing capacity, and our communities form a coherent package. To adopt one component of this package without the others, or in disregard of the others, will weaken our efforts.

We must define common goals and make them our shared focus. The Washington State Department of Natural Resources shares many federal agency goals. Like our federal counterparts, we recognize the importance of healthy, vital ecosystems for their inherent value, and as the basis for sustainable economies. We can have both timber and wildlife if we work together. We look forward to continued cooperation and coordination in the months ahead.

Attachment



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

TRANSMISSION NOTICE

This message is electronically transmitted on a Xerox, 7033
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Transmission Number: 202/208-4684

Verification Number: 202/208-6655

To: Name: Will StelleAgency Phone Number: 456-2710From: A/S Staff Member: Don Barry

Department of the Interior
Assistant Secretary for Fish
and Wildlife and Parks
1849 "C" Street N. W.
MS-MIB-3156
Washington, D.C. 20240

Number of Pages to follow: 3Date: 12/06/93Time: 9:55 AM

4 (d)

AMERICAN
FOREST &
PAPER
ASSOCIATION

December 2, 1993

Donald Barry
Special Assistant to the Secretary
Department of the Interior
18th & C Streets
Washington, D.C.

Dear Don:

On behalf of the AFPA Section 4(d) Task Group, I would like to express our sincere appreciation to you, Don Knowles, and Mike Spear for participating in our meeting earlier this week. Your presentations were excellent and went a long way toward helping our members better understand many of the ideas that would be incorporated in any forthcoming rulemaking. As an industry, we are interested in continuing these helpful dialogues, and we are eager to provide any additional information that you might require.

As you might expect, while our discussions today answered a number of questions, they -- at the same time -- raised several issues and concerns which we would like to review with you at your earliest opportunity. These are as follows.

First, you should understand that the definition of "take" is probably the most important element of the rule for the industry. We are generally supportive of the approach you articulated which requires a two part test to determine whether a take has occurred. That is, a landowner's harvesting activity must reduce suitable habitat within a circle below 40% and the agency must confirm the presence of an injured or dead animal. It is fair to assume that the industry's continued participation and interest in the rulemaking effort is contingent upon maintaining this approach through the rulemaking process.

Second, we discussed the need for a specific definition of suitable habitat on a province- by-province basis for the northern spotted owl. Under separate cover, several of our members will provide examples of field-level inconsistencies in defining suitable habitat. We would very much like to see a more uniform definition included in the proposed Section 4(d) rule. We would be happy to work with you further as to the contents of such a definition. Without such a definition, our companies will lack confidence that they are, in fact, adhering to the rule.

Third, we are concerned that the very real problems associated with securing access across federal lands to private lands will not in any way be addressed in this rulemaking. To be sure, the problems that we are experiencing arise, as you indicated, under Section 7 of the Act, not Section 4. At the same time, we fear that failure to address this issue could result in the imposition of conditions -- as a consequence of federal agencies' Section 7 consultation over right-of-way permits -- that off-set and undermine the carefully constructed provisions of the upcoming Section 4(d) rule.

We appreciate your concern that the rule not be overloaded with a number of controversial items. However, at the same time, statutory measures to deal with the access problem have been included in most of the bills introduced by members of Congress addressing the forest crisis in the Pacific Northwest and northern California. This matter appears to be one of the least controversial issues involved in this general area. We would hope that you would be willing to reconsider. At a later date, we could provide you with more detail concerning a reasonable approach to the Section 7 issues currently involved in securing rights-of-way across federal lands.

Fourth, we share your concern about how the 40% threshold would be applied in areas of mixed nonfederal ownership within the areas of special concern. Clearly, there must be some better way than "first come, first cut." We would like to work further to assess how this might be accomplished while avoiding antitrust concerns.

Fifth, we spoke at some length about the appropriate survey requirements for different owners in different situations in the affected region. You understand our concern that federal landowners are not doing their fair share as far as collecting survey data is concerned. We concur that such data will be necessary to support any eventual delisting initiatives. Therefore, we would like to work with you to secure adequate support and funding for expanded federal survey work. At the same time, we are skeptical that any good purpose will be served by requiring expensive surveys by non-federal landowners outside of areas of special concern. A better approach would be to work together in the population sample areas to assure that, where they involve mixed ownerships, we are providing adequate survey information for population trend studies.

Sixth, we discussed at some length the appropriate size for circles in areas of special concern. As best we can tell, there is no biological basis for any larger circle size than those specified in the 1990 interim "take" guidelines. Therefore, while we believe that these guidelines are themselves excessive, there is no justification for exceeding them in the areas of special concern. We would strenuously object to increasing the size of these circles without biological justification beyond that which has been presented to date.

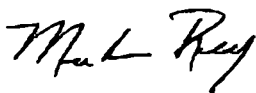
Seventh, we understand your view concerning the biological relationship and linkages between the Section 4(d) rule and the FEMAT plan. You will appreciate that we will continue to voice our opposition to the FEMAT plan in whatever forums are available to us. Nothing in our effort to work cooperatively with the Administration on the Section 4(d) rule should be misinterpreted as an endorsement of the FEMAT plan.

We would like to visit with you to discuss these issues after you have had a chance to digest this letter. If the scoping notice involves sufficient detail such that these issues would be better addressed in that notice, we urge that you delay the notice until we can talk through some of these concerns. Otherwise, we can address them as you complete work on the proposed rule.

As a final note, we listened closely as you explained Secretary Babbitt's desire as far as the industry response to this rule. We believe the stakes in this rule are extremely high. We will be requesting an opportunity for a few company chief executive officers to meet with the Secretary and appropriate staff to discuss the industry's reaction to this rulemaking effort prior to the publication of the proposed rule. We would like to work with you in organizing that meeting. Our ultimate position on the rule will likely depend heavily on our discussions at these meetings.

I want to close by again noting how much we appreciated the opportunity you provided us to discuss the rule and, more generally, the openness with which the Department has conducted this process. Please do not hesitate to contact us if you need additional information relative to any of the concerns or questions described above or any other elements of the rulemaking.

Sincerely,



Mark Rey
Vice President, Forest Resources Group

cc: Tom Collier
Don Knowles
Mike Spear