

Chapter 2

Legal Context

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2.1 Legal and Policy Mandates for Western Oregon State Forests

The Oregon Department of Forestry (ODF) manages about 93,000 acres of consolidated ownership near Coos Bay, Oregon known as the Elliott State Forest. Of this total, 87,934 acres are Common School Forest Lands, or 91 percent. The remaining 9,088 acres of state forest lands in the planning area are Board of Forestry Lands, or 9 percent. In this plan all lands will be referred to as the Elliott State Forest. These state forest lands are managed by ODF according to several legal requirements.

2.1.1 Common School Forest Lands

The Common School Forest Lands are owned by the State of Oregon, which, acting through its State Land Board, contracts with ODF to manage these lands. The State Land Board is comprised of the Governor, the Secretary of State, and the Treasurer. The Oregon Constitution (Article VIII, Section 5) authorizes the State Land Board to manage the Common School Forest Lands “with the object of obtaining the greatest benefit for the people of this state, consistent with conservation of this resource under sound techniques of land management.”

An opinion of Oregon’s Attorney General (Crookham 1992) establishes that the “greatest benefit for the people” standard requires the State Land Board to use the lands for schools and the production of income for the Common School Fund. The resources of the lands are not limited to those such as timber, which are currently recognized as revenue generators for the Common School Fund, but include all of the features of the land that may be of use to schools. The State Land Board should consider other resources that may offer revenue for the fund, such as minerals, water, and plant materials. In addition, the State Land Board may take management actions that reduce present income if these actions are intended to maximize income over the long term.

2.1.2 Department of State Lands Asset Management Plan

The Department of State Lands (DSL) is the administrative agency of the State Land Board and implements State Land Board policy in providing stewardship of lands, wetlands, waterways, unclaimed property, estates, and the Common School Fund. The DSL Asset Management Plan guides management of Common School Lands through overall and resource-specific policies and objectives. Key policies included in the plan are to manage forest lands “primarily to produce a sustainable, even-flow harvest of timber, subject to economic, environmental and regulatory considerations,” and to manage lands “according to long-term management plans which address the ecosystem dynamics and revenue-producing capability of each forest area.”

2.1.3 Board of Forestry Lands

Oregon Revised Statutes (ORS) establish that Board of Forestry lands can be acquired by the State of Oregon through “purchase, donation, devise or exchange” (ORS 530.010). The majority of the lands currently under Board of Forestry management were acquired through the transfer of deeds by counties. The conveyance of county lands was made “in consideration of the payment to such county of the percentage of revenue derived from such lands” (ORS 530.030). Oregon Revised Statutes 530.050 directs Board of Forestry lands to be managed “so as to secure the greatest permanent value of such lands to the state.” To this end, the statutes authorize the State Forester to produce timber and other commodities as well as to conserve, protect, and use a variety of natural resources.

Oregon Administrative Rule (OAR) 629-35-0000 to 629-35-0110, “Management of State Forest Lands,” provides additional direction to the Oregon Department of Forestry on managing Board of Forestry lands. OAR 629-35-0020(2) states that: “To secure the greatest permanent value of these lands to the state, the State Forester shall maintain these lands as forest lands and actively manage them in a sound environmental manner to provide sustainable timber harvest and revenues to the state, counties, and local taxing districts. This management focus is not exclusive of other forest resources, but must be pursued within a broader management context that:

- “Results in a high probability of maintaining and restoring properly functioning aquatic habitats for salmonids, and other native fish and aquatic life;
- “Protects, maintains, and enhances native wildlife habitats;
- “Protects soil, air, and water; and
- “Provides outdoor recreation opportunities.”

2.1.4 Forest Management Plans

For lands managed by the Department of Forestry, forest management plans (FMPs) are developed in accordance with the requirements set forth in Oregon Administrative Rules. The Oregon Administrative Rules require the State Forester to “develop Forest Management Plans, based on the best available science, that establish the general framework for the planning area of forest land” (OAR 629-035-0030). The FMPs are subject to State Land Board and Board of Forestry reviews and approvals, which represent their determination that activities carried out under these plans meet the obligations to produce revenue for the Common School Fund and to secure the greatest permanent value to the state. Implementation and annual operation plans complement FMPs and are developed to “describe smaller-scale, more specific management activities within the planning area.” The FMPs are founded in stewardship principles and include strategies that:

- Provide for active management;
- Contribute to biological diversity of forest stand types and structures at the landscape level and over time;

- Manage forest conditions to result in a high probability of maintaining and restoring properly functioning aquatic and native wildlife habitats;
- Provide for healthy forests;
- Maintain or enhance long-term soil productivity;
- Comply with all applicable provisions of the law concerning state and federally listed threatened and endangered species;
- Maintain and enhance forest productivity, and;
- Utilize the best scientific information available to guide forest resource management actions and decisions.

2.1.5 Forestry Program for Oregon

Policies for managing state forests are based on the Oregon Constitution and statutory direction, as described above. In addition, the Oregon Department of Forestry is guided in the management of state forest lands by policies established by the Board of Forestry. The Board of Forestry is a seven member board appointed by the Governor to “supervise all matters of forest policy and management under the jurisdiction of this state and approve claims for expenses incurred under the statutes administered by the board except as otherwise provided by law” (ORS 526.016). The Forestry Program for Oregon is the strategic plan established by the Board of Forestry. It sets forth the board’s mission and vision for Oregon’s forests and the values and strategies that guide the board’s decisions. The Forestry Program for Oregon sets forth seven strategies adapted from internationally recognized criteria for discussing and measuring progress toward sustainable forest management in Oregon. Sustainable forest management means forest resources across the landscape are used, developed, and protected at a rate and in a manner that enables people to meet their current environmental, economic, and social needs, and also provides that future generations can meet their own needs (based on ORS 184.421).

The Elliott State Forest Management Plan was developed to be consistent with the State Land Board’s obligation to maximize revenue over the long term, and the Board of Forestry’s strategies and policies in regard to making state forest lands productive and able to secure the greatest permanent value to the state while protecting resources. The HCP describes how Oregon Department of Forestry will meet federal and state Endangered Species Act requirements for all listed species identified in the plan, including the northern spotted owl, marbled murrelet and coho salmon. The incidental take permit being applied for will provide the most efficient and effective way for the State Land Board and the Board of Forestry to legally meet both the federal Endangered Species Act requirements and constitutional and statutory responsibilities to the State of Oregon. The HCP does not revisit decisions made in either the Forestry Program for Oregon or forest management plans. Therefore, the HCP should not be seen as an alternative to these documents, rather as a way of providing more substance and detail to existing policies. The state forest lands to be covered by this permit are described in detail in Chapter 3.

2.2 Regulatory Framework

2.2.1 Endangered Species Act

The federal Endangered Species Act (ESA) was enacted in 1973 and has subsequently undergone several modifications. The stated purposes of the Act are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species” (Section 2(a)(5)(b)), and to act on specified relevant treaties and conventions. The Secretary of the Interior oversees the administration of the Endangered Species Act, with the U.S. Fish and Wildlife Service acting on the Secretary’s behalf. The Secretary of Commerce, through NOAA Fisheries, is the authority for listing marine mammals and anadromous fish.

The federal ESA lists several factors that individually can be the basis for listing a species as endangered or threatened. These factors include “the present or threatened destruction, modification, or curtailment of its habitat or range;...the inadequacy of existing regulatory mechanisms; other natural or man made factors affecting its continued existence” (Section 4(a)(1)(A),(D),(E)).

Once either Secretary has listed a fish or wildlife species as endangered, the federal ESA defines several prohibited activities, including the “take [of] any such species” (Section 9(a)(1)(B)). “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” (Section 3(18)). The U.S. Fish and Wildlife Service has further defined “harm” to mean “an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering” (50 C.F.R. 17.3). Under Section 4(d), the listing Secretary may apply, and usually has applied, the same prohibitions of activities to threatened species.

Congress amended the ESA in 1982 to allow taking of listed species “if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity” (Section 10(a)(1)(B)). A nonfederal landowner may apply for an incidental take permit by submitting an application that contains a conservation plan to the Secretary. The terms “conserve” and “conservation” mean “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary” (Section 3(3)).

Under section 10(a)(2)(A), the applicant’s habitat conservation plan must describe the impacts that are likely to result from the incidental take and the measures the applicant will carry out to minimize and mitigate such impacts. As well, the plan must include a discussion of alternative actions to such taking that the applicant considered and the reasons the alternative actions are not being utilized. Finally, the plan will include “such other measures that the Secretary may require as being necessary or appropriate for the purpose of the plan.”

Section 7 of the Endangered Species Act requires federal agencies to ensure “any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species” (Section 7(a)(2)). This section also prohibits “the destruction or adverse modification of habitat of such species...determined, after consultation as appropriate with affected States, to be critical” to the recovery of the species. Critical habitat includes areas occupied by the species at the time of listing, essential to the conservation of the species, and that may require special management considerations or protection (Section 3(5)(A). Once designated, critical habitat enters the federal rule making process within 90 days (Section 4(b)(5).

Recovery of listed species is not the primary objective of conservation planning but an important consideration in the development of a habitat conservation plan (HCP). Criteria established for the approval of an HCP (Appendix D) ensure consistency with critical habitat recovery goals. Where a recovery plan has not been adopted, the HCP should thoroughly consider recovery opportunities and be based on known limiting factors for the species. It should be noted that an HCP is not a surrogate or substitute for a recovery plan, but only one part of a much larger federally supported species recovery effort.

The permit can be issued following opportunities for public comment and a finding by the Secretary that “the taking will be incidental” and the applicant will, “to the maximum extent practicable, minimize and mitigate the impacts of such taking.” The Secretary’s finding must also show that “adequate funding for the plan will be provided, the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and the measures, if any, required will be met” (Section 10(a)(2)(B)(iii)). Granting an incidental take permit is a federal action, making a conservation plan subject to a jeopardy analysis and biological assessment, as set forth in Section 7(a)(2) and 7(c). A more thorough discussion of habitat conservation planning may be found in Appendix D.

2.2.2 National Environmental Policy Act

The National Environmental Policy Act (NEPA) was signed into law on January 1, 1970. NEPA establishes environmental policy for the nation, provides an interdisciplinary framework for federal agencies to prevent environmental damage, and contains “action-forcing” procedures to ensure that federal agency decision-makers take environmental factors into account (42 U.S.C 4321; 40 C.F.R. 1500.1). The four purposes of NEPA are to: 1) declare a national policy which will encourage productive and enjoyable harmony between people and the environment; 2) promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate health and welfare; 3) enrich the understanding of ecological system and natural resources important to the nation; and 4) establish a Council on Environmental Quality.

The U.S. Fish and Wildlife or National Oceanic and Atmospheric Administration, Fisheries (NOAA Fisheries) must comply with NEPA when evaluating potential impacts related to the issuance of an incidental take permit. NEPA requires every federal agency to prepare an environmental impact statement for proposed legislation or other major federal actions significantly affecting the quality of the human environment U.S.C 4332;

40 C.F.R. 1501). An environmental impact statement provides an analysis of environmental impacts related to a proposal and considers all reasonable alternatives that would avoid or minimize adverse impacts. NEPA provides for public involvement throughout the review process.

It is important to understand the difference between the requirements of an incidental take permit, as set forth in the federal Endangered Species Act, and those of NEPA. A habitat conservation plan (HCP) identifies potential impacts to species listed under the Endangered Species Act and describes the planned measures that will minimize and mitigate to the maximum extent practicable those impacts, and other measures if necessary. An HCP also describes alternatives to the proposed taking and why those alternatives are not considered feasible. A NEPA analysis, on the other hand, examines additional environmental impacts not necessarily related to a listed species.

2.3 Federal Plans and Rules

Section 4 of the Endangered Species Act requires the Department of the Interior to prepare and implement recovery plans for all listed species, unless the Secretary of the Interior determines that a recovery plan would not benefit a species. Recovery plans generally establish target conditions on federal and non-federal lands that would constitute ecological recovery for that particular species or population. Federal recovery plans are not binding on nonfederal lands, where they serve as recommendations only. The federal government has published a recovery plan for the marbled murrelet; for the northern spotted owl, the recovery plan is still a draft. A Pacific Region recovery plan for the bald eagle was adopted in 1986 (USFWS). The Pacific Coast American Peregrine Falcon Recovery Team prepared a recovery plan in 1982.

The federal government has also proposed a plan to restore viable murrelet and owl populations on federal lands through the Northwest Forest Plan. In addition, the Secretary of the Interior can issue regulations called 4(d) rules regarding the conservation of listed species on nonfederal lands. Such a rule has been proposed but not enacted for the spotted owl in Oregon. Brief discussions of the relevant plans are included due to their potential to affect state forest management.

2.3.1 Northwest Forest Plan

Federal forest land management controversies in the Pacific Northwest led to the convening of the Northwest Forest Conference in April 1993. The Forest Ecosystem Management Assessment Team (FEMAT), a team of resource specialists, was asked to identify management alternatives that would achieve the greatest economic and social contributions from forestlands while meeting the requirements of applicable laws and regulations.

The Forest Ecosystem Management Assessment Team was also asked to develop long-term management alternatives that would maintain or restore:

- Habitat conditions for the northern spotted owl and marbled murrelet that would provide for the viability of each species.
- Habitat conditions to support viable populations, well distributed across their current range, of species known to be associated with old-growth forests.
- Rearing habitat on U.S. Forest Service, Bureau of Land Management, National Park Service, and other federal lands to support the recovery and maintenance of viable populations of anadromous fish species and other fish species considered “sensitive” or “at risk.”
- Fully implement all strategies and monitoring plans.

The Preferred Alternative, or Option 9, was approved by the Secretaries of the Interior and Agriculture and the Record of Decision issued in 1994 (USDA Forest Service et al. 1994b). In 2001 changes were made to the survey and manage provisions (USDA Forest Service et al. 2001). In 2004, a decision was made to remove the Survey and Manage Mitigation Measure standards and guidelines and rely instead on the Forest Service and Bureau of Land Management special status species programs. In a separate decision, the plan’s aquatic conservation strategy was clarified to apply at the watershed level rather than at the individual project level.

2.3.2 Draft Recovery Plan for the Northern Spotted Owl

The northern spotted owl was listed as a federal threatened species on July 23, 1990 in Oregon, Washington, and California. A *Draft Recovery Plan* for the northern spotted owl was issued in 1992 and revised after the public comment period (USDI 1992a). The revised plan has not received final approval; it is referred to as the *Final Draft Recovery Plan* (USDI 1992b).

2.3.3 Critical Habitat Rule for the Northern Spotted Owl

The U.S. Fish and Wildlife Service first proposed the areas to be designated for critical habitat for the northern spotted owl in May 1991. The agency announced a revised proposal on August 5, 1991, which recommended that 8.2 million acres of land be designated as critical habitat. The revised proposal included 3.8 million acres in 77 locations in Oregon. The final rule on critical habitat was published in the Federal Register on January 15, 1992 (Volume 57, Number 10, pp. 1796–1838). The final rule designates 6,887,000 acres as critical habitat, including 3,257,000 acres in 76 locations in Oregon.

2.3.4 Recovery Plan for the Marbled Murrelet

The marbled murrelet was listed as a federal threatened species in Washington, Oregon, and California on October 1, 1992. A *Draft Recovery Plan* for the murrelet was issued

August 1995 (USDI 1995a) in response to a requirement in Section 4 of the Endangered Species Act (16 U.S.C. 1533(f)). In 1997, the U.S. Department of the Interior (USDI) Fish and Wildlife Service completed the *Recovery Plan for the Marbled Murrelet (USDI Fish and Wildlife Service 1997)*. The Recovery Plan addresses management needs on federal lands, nonfederal lands, and in the marine environment. Federal recovery plans are not binding on nonfederal lands unless federal funds or activities are involved, such as the issuance of an incidental take permit.

A scientific team assisted by representatives of affected states and other federal agencies developed the draft and final plans. The plan includes information on (a) the biology, including habitat needs, of the species, (b) reasons for population decline and current threats, (c) current management, and (d) recommendations for recovery efforts for Oregon, Washington, and California. The objectives identified in the plan are to stabilize the population at a sustainable level throughout its range, provide future conditions that support viable, self-sustaining populations, and gather the scientific information necessary to develop criteria for de-listing the species.

The Northwest Forest Plan specifically addresses marbled murrelets and their habitat on federal lands. The Northwest Forest Plan was recognized as a cornerstone of the recovery plan's strategy. The Northwest Forest Plan identifies and protects large reserve areas where marbled murrelet habitat will increase over 50 to 100 years and known occupied marbled murrelet sites. The Recovery Plan includes nonfederal lands that were not considered by the Forest Plan. Actions necessary to achieve the objectives of the Recovery Plan include: (1) establishing six conservation zones with specific management strategies for each; (2) identifying and protecting habitat in each zone through designating critical habitat or using other methods, such as habitat conservation plans and developing management plans for these areas; (3) monitoring populations and habitat, and surveying potential breeding habitat to identify occupied sites; (4) implementing actions to stabilize and increase the population in the immediate future and increase population growth in the long term, and; (5) initiating needed research and establishing a regional research coordinating body.

2.3.5 Critical Habitat Rule for the Marbled Murrelet

The U.S. Fish and Wildlife Service published its first draft rule for marbled murrelet critical habitat in January 1994. After reviewing public comments and additional information, the agency released a revised draft rule in August 1995, at the same time it published the *Draft Recovery Plan* for the murrelet. In the August 1995 revision, U.S. Fish and Wildlife Service proposed designating 4.5 million acres in Washington, Oregon, and California as critical habitat for the marbled murrelet. On May 15, 1996, a final critical habitat rule for the marbled murrelet was published in the Federal Register (Volume 61, pp. 26255–26320).

The rule designated 3.88 million acres as critical habitat, a reduction of almost 600,000 acres from the previous proposal. The designation includes 175,000 acres of land owned by the State of Oregon. The 175,000 acres is mostly state forest land; a small amount is in state parks or other state ownerships. Lands covered by a “legally operative incidental

take permit for marbled murrelets issued under section 10(a) of the ESA” will be excluded from this designation according to the 1996 rule. The Elliott State Forest was covered by such a permit at that time and was not designated as part of the critical habitat.

2.3.6 Unlisted Species

This habitat conservation plan is addressing the conservation of certain native vertebrate species that may occur in the planning area and become listed during the permit period. Federal regulation establishes that “in the event an unlisted species addressed in the approved conservation plan is subsequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act” (H.R Report No. 97-835, 97th Congress, Second Session, and 50 FR 39681-39691).

2.4 Other Legal Requirements

2.4.1 State Endangered Species Act

The state Endangered Species Act was passed in 1987 and included both plant and animals. Revisions that outline listed species protection requirements were added by 1995 legislation. The bald eagle, northern spotted owl, and marbled murrelet were listed as threatened species under the Act in the following years: the bald eagle in 1987, the spotted owl in 1988, and murrelet in 1995. The American peregrine falcon was listed as an endangered species in 1987.

For threatened or endangered species listed after 1995, the Fish and Wildlife Commission must establish quantifiable and measurable guidelines considered necessary to ensure the survival of individual members of the species. These survival guidelines may include take avoidance and measures to protect resource sites, such as nest sites, spawning grounds, etc. Since the bald eagle, northern spotted owl, marbled murrelet, and peregrine falcon were all listed in or prior to 1995, state survival guidelines were not developed for these species. In the absence of survival guidelines, the Oregon Department of Forestry will rely on measures in this HCP to comply with the federal Endangered Species Act and as the means of protecting state listed species.

2.4.2 Oregon Forest Practices Act

Activities on forest lands are subject to the Forest Practices Act (FPA), Chapter 527 of the Oregon Revised Statutes, and the Oregon Administrative Rules pursuant to these statutes. The Forest Practices Act declares it public policy to encourage economically efficient forest practices that assure the “continuous growing and harvesting of forest tree species and the maintenance of forest land for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish, and wildlife resources and scenic resources in visually sensitive corridors...” (ORS 527.630(1)). The Board of Forestry is granted the exclusive authority to develop and enforce rules protecting forest resources and to coordinate with other agencies concerned with forests.

The Forest Practices Act has developed in an evolutionary manner since the original act was passed in 1971. The original act established minimum standards for reforestation, road construction and maintenance, timber harvesting, application of chemicals, and disposal of slash.

2.4.3 Oregon Plan for Salmon and Watersheds

In 1997, the Oregon Legislature adopted The Oregon Plan for Salmon and Watersheds, focused on coho salmon. In 1998 the Steelhead Supplement of the Oregon Plan was added.