

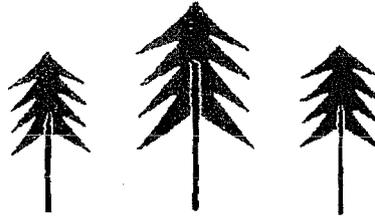
ASSOCIATION OF O & C COUNTIES

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July 3, 2012

Mike Mottice
Acting State Director
Bureau of Land Management
P.O. Box 2965
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RECEIVED

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Bureau of Land Management
Salem, Oregon

RE: RMP Scoping Comments

Dear Mike:

As you know, the Association of O&C Counties represents Western Oregon Counties with an interest in about 2.1 million acres of timberlands managed by the BLM pursuant to the O&C Act of 1937 and Title 7, Sec. 701(b) of the Federal Land Policy and Management Act (FLPMA). These forestlands are not National Forest or Public Domain lands, but a special category of lands commonly referred to as Oregon and California (O&C) and Coos Bay Wagon Road (CBWR) lands. The Association has been in existence since the 1920s. Its sole purpose is participation in the development and implementation of policies for the management of these federal lands that were originally part of the grant to the O&C Railroad, but were revested to the United States in 1916, as well as those that were a part of the CBWR land grant, but were re-conveyed to the United States in 1919. Management of these lands are directed by a unique statutory mandate to manage the timber resources for permanent, sustained yield timber production for the economic benefit of 18 O&C Counties and associated local communities.

County commissioners and staff attended most of the scoping meetings held in the planning area Districts and at the State office. Documents posted on your website have also been reviewed. We are very concerned that BLM is currently using the scoping process to downplay the significance of the O&C Act and allow the development of public expectations that are inconsistent with the laws that govern the management of O&C and CBWR lands. When several BLM managers were asked questions regarding interpretation of the O&C Act and Sec. 701(b) of FLPMA, their responses were either incorrect or incomplete.

We are also very concerned that your current schedule calls for immediately developing RMP alternatives without first determining the purpose and need for the plan revisions. Prior to developing alternatives the BLM must determine the boundaries (based on law) for making land use decisions. The published schedule does not include the development of two required

documents that are used to formulate the purpose and need for plans. An Analysis of the Management Situation is required by 43 CFR 1610.4.4 and a statement of the Planning Criteria is required by 43 CFR 1610.4-2 prior to developing alternatives. The Planning Criteria also requires public review that is intended to lead to a better understanding of the issues and possible solutions. Failure to complete these steps could lead to a loss in a court challenge under the Administrative Procedures Act.

THE O&C COUNTIES EXPECTATIONS FOR FOREST PLAN REVISIONS AND A FUTURE FOR THE O&C FORESTS

1. Planning Goals

The Association of O&C Counties expect RMP revisions for the O&C and Coos Bay Wagon Road lands to restore conformity with the statutory requirements of the O&C Act and FLPMA sec. 701(b) as those requirements were explained by the 9th Circuit Court of Appeals in Headwaters v. BLM, 914 F2d 1174 (9th Cir 1990).

The O&C Act is a dominant use law that requires the O&C and CBWR lands to be managed for permanent forest production and the timber thereon “sold, cut and removed in conformity with the principle of sustained yield for the purpose of providing a permanent timber supply, protecting watersheds, regulating stream flows, and contributing to the economic stability of communities and industries, and providing recreational facilities.” The O&C Act also says that the harvest level must be the sustained yield capacity of all timber lands but in no event less than 500 mmbf per year. In 2008, the BLM determined that the current standing volume of timber on the O&C timberlands was 73.3 billion board feet. Using this volume, the BLM determined that the annual productive capacity of the O&C timberlands, based on the entire land base of O&C and CBWR lands classified as timberlands, is approximately 1.2 billion board feet per year.

In 1976, Congress enacted FLPMA, establishing policies for multiple use management on public lands. The law contains a savings provision for the management of O&C and CBWR lands. Section 701(b) FLPMA states that “Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 and May 24, 1939, insofar as they relate to timber resources and the disposition of revenues from lands and resources, the latter acts will prevail”. The O&C Act, therefore, is the statutory authority for BLM to manage the O&C and CBWR lands. The mandatory requirements of the O&C Act will prevail if FLPMA or other land use policies conflict with sustained yield timber production and the distribution of revenues to O&C Counties.

The 9th Circuit’s Headwaters decision held as follows: (1) “Forest production” under the O&C Act means timber production; (2) the O&C Act makes timber production the “dominant use” for the O&C lands; (3) the purposes of the O&C Act were to provide revenues to counties through timber harvests and insure reforestation of lands as they were harvested; (4) “sustained

yield” means the amount of timber harvested does not exceed new growth; and (5) exempting timber resources from harvesting to serve as wildlife habitat is inconsistent with the principle of sustained yield required by the O&C Act. The Headwaters decision also said, through reference to legislative history, that protecting watersheds, regulating stream flows, contributing economic stability, and providing for recreation were expected outcomes from sustained yield timber management rather than separate goals that could compete with sustained yield timber management.

The United States Supreme Court ruled on June 25, 2007 in National Association of Home Builders v. Defenders of Wildlife that section 7(a)(2) of the Endangered Species Act applies only to discretionary agency actions and does not apply to actions that an agency is required by statute to undertake once certain specific triggering events have occurred. It concluded that when an agency is required to do something by statute, it simply lacks the power to insure that such action will not jeopardize listed species. The mandates of section 7(a)(2) are inapplicable where they would override otherwise mandatory statutory duties. The BLM has no discretion under the O&C Act to manage timber on the O&C lands other than for sustained yield harvests of in amounts less than 500 million board feet per year.

2. The Origins of Dominant Use Management for O&C and CBWR Lands

In 1866 and 1870 Congress passed legislation that led to grants of about 4.0 million acres of federally owned land in Western Oregon to the Oregon and California Railroad Company in exchange for construction of a north-south rail line from the Columbia River to California. The grant was conditioned on requirements that the land be resold by the railroad to “actual settlers” in parcels not to exceed 160 acres and for no more than \$2.50 per acre. Once acquired by the railroad, these lands became subject to County property taxes and were an important source of tax revenues for the 18 Counties in which the O&C lands are located. The railroad completed construction of the rail line and initially complied with the terms of the grant, but eventually ceased reselling the lands to actual settlers. Controversy followed, during which the railroad stopped paying property taxes to the O&C Counties. Following a lengthy court battle, Congress passed the Chamberlain-Ferris Act in 1916, revesting the grant lands to the United States, but requiring the government to pay the railroad company the amount it would have received had it sold the lands as the grant legislation originally required. A smaller amount of land associated with the CBWR was also re-conveyed to the United States in 1919 in a similar manner.

The 1916 Chamberlain-Ferris Act required that the O&C lands be classified as timberlands, agriculture lands or power-site lands, that the timber on these lands be sold as rapidly as reasonably possible, and that the cutover lands classified as timber or agricultural lands be returned to private ownership and County tax roles by selling them for \$2.50 per acre. An amount was appropriated from the U.S. Treasury to pay Counties the back taxes owed by the railroad at the time of revestment in 1916, and to pay the railroad what it would have earned from selling the lands as originally required. Future sums from expected land and timber sales were earmarked for sharing with the O&C Counties to offset the loss of property taxes after 1916

until the lands were finally once again all in private ownership. Those payments to Counties, however, would be delayed until the federal government had first recovered from land and timber sales all amounts appropriated in 1916 in connection with the terms of the Revestment Act.

For the next 10 years the land and timber sales were insufficient to repay the amount appropriated in 1916, and the O&C Counties, therefore, received nothing from 1916-1926. In order to relieve the financial plight of the Counties, Congress passed additional legislation in 1926 that appropriated monies to pay the equivalent of County taxes on the O&C lands still in federal ownership from 1916-1926.

The policy of selling timber and then selling the cutover lands continued after 1926, but the results were no better after than before. The 1926 law did not take into account that most of the remaining lands were unsuitable for agriculture and settlement, and did not consider the adverse impact that liquidating the timber with no provision for reforestation would have on local communities. Controversy regarding the lands continued.

In 1937, Congress enacted the O&C Act, abandoning the cut-and-dispose philosophy of the 1916 and 1926 laws and replacing it with a new policy calling for permanent timber production from the O&C lands based on the then new scientific forestry principle of sustained yield, requiring reforestation to produce a permanent timber supply and to provide revenues to the O&C Counties that had been promised but not delivered under prior legislation. Determination of a sustained yield timber harvest level for a forested area requires two facts: (1) the volume of standing timber and (2) the rotation period (the time for a tree to grow from a seedling to optimum harvest size). The volume of standing timber is divided by the years in the rotation period to calculate the allowable annual sustained yield timber harvest, which can then continue in perpetuity. In 1937 the best available estimate of the standing timber on the O&C lands was approximately 50 billion board feet. To set an interim timber sale level pending completion of more accurate volume and rotation determinations, Congress used an approximate 100 year rotation period and established 500 million board feet (mmbf) per year as the minimum required sale level until the larger sustained yield amount could be accurately determined. The O&C Act provides that in no event shall the harvest amount be less than 500 mmbf.

The O&C Act directed the Federal Government to carry out four non-discretionary duties, and the BLM is currently the agency responsible for carrying out these mandated statutory requirements.

It requires that the O&C and CBWR lands classified as timberlands be managed for permanent forest production, with the timber thereon sold, cut and removed on a sustained yield basis. (The vast majority of O&C and CBWR lands are classified as timberlands). The Act identifies recreation and the protection of watershed and stream flows as secondary benefits that would be derived from implementation of sustained yield harvesting practices.

It requires that the annual productive capacity for these lands to be determined and declared.

It requires the BLM to sell annually not less than one half billion board feet of timber until the annual sustained yield capacity was determined, and then increase harvests to the sustained yield capacity thereafter, but in no event sell less than 500 mmbf.

It requires BLM to pay and distribute 75 percent of the total receipts obtained from the sale of timber and other forest products to 18 O&C Counties on an annual basis. This revenue forms an essential part of County budgets, helping pay for health and social services, libraries, law enforcement and many other public services. (Since 1953. Counties have limited their share to 50 percent under annual appropriations act riders).

The O&C Act also authorized the Secretary to subdivide the revested lands into sustained yield forest units, the boundary lines of which are established so that a forest unit will provide a permanent source of raw materials for the support of dependent communities and local industries of the region. Six designated sustained yield units are located within the boundaries of the Coos Bay, Eugene, Medford, Roseburg and Salem Districts and in the Klamath Falls Resource Area.

Congress has not changed the substantive provisions of the O&C Act since 1937. To the contrary, when Congress enacted FLPMA in 1976 to adopt new national management rules for the BLM public domain lands, Congress preserved the non-discretionary mandates of the O&C Act as they relate to dominant use management of timber resources and the disposition of revenues to O&C Counties.

3. O&C Act Relationship to Other Laws

Endangered Species Act

The O&C Act and its non-discretionary requirements limit the authority of the BLM, U.S. Fish & Wildlife Service, National Marine Fisheries and other federal agencies to implement measures related to the conservation and recovery of species listed under the Endangered Species Act. The O&C Act requires that all O&C and CBWR timberlands suitable for sustained yield timber harvest be included in the timber base unless designated by Congress for another use. The O&C Act, however, does allow excluding certain areas from the timber base if doing so contributes to sustained yield forestry. For example, planned timber harvests should not be conducted in areas of fragile and highly erosive soils where reforestation would not be successful, where severe landslides are likely to result from timber harvest, or on rocky south facing slopes where reforestation would likely fail, or along stream corridors with a high potential for damaging erosion.

BLM is required to manage the O&C and CBWR lands that are in the timber base for sustained yield timber production. Creating reserves in which commercial timber harvest is not permitted or designating critical habitat for listed species would prohibit the BLM from fulfilling its non-discretionary statutory obligations. The Supreme Court ruling in National Home Builders v. Def. of Wildlife concluded that the ESA does not implicitly repeal or amend preexisting, nondiscretionary mandates, like those in the O&C Act, that give a federal agency no power to change a required action for the purposes of wildlife conservation.

The BLM does have discretion to use a variety of silvicultural practices to provide for Northern Spotted Owls, Marbled Murrelets and, other listed species, so long as the result is not an annual harvest of less than 500 mmbf. The BLM can, for example, temporarily defer the time of harvest in nesting or other areas that are known from field surveys to be actually occupied by the species of concern, with the deferral lasting until the listed species abandons the location and moves to another. Or, the BLM can adopt long rotation ages as part of its sustained yield management program, provided that the long rotation age does not result in sustained yield harvests of less than 500 mmbf per year. The prescription, timing, and method of harvest can be adjusted to provide benefits for listed species. To be effective, however, BLM would need to establish continuous field survey systems for all listed species. Before deferment or adjusting harvest practices can be justified, BLM would first need to determine whether a location is actually occupied based on confirmation of the physical presence of the species using the site for nesting, roosting or foraging (Northern Spotted owls) or nesting (Marbled Murrelets).

Clean Water Act

The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. To accomplish this objective, the statute requires that water quality standards consistent with the statutory goals of the Clean Water Act be established; water bodies be monitored to determine whether the water quality standards are being met, and if all the water quality standards are being met, then anti-degradation policies and programs including ambient monitoring, be employed to keep the water quality at acceptable levels. The responsibility for establishing these standards, developing a strategy for meeting these standards and monitoring their attainment in the state of Oregon has been delegated to the Oregon Department of Environmental Quality (DEQ).

The DEQ's Water Quality Program has developed water quality standards for Oregon's waters including regulating and controlling non-point sources of pollution on State and private forestlands. These rules also apply to Federal lands. Forest activities conducted on O&C and CBWR lands must meet State requirements and are subject to the DEQ's jurisdiction, and water quality standards are to be met through land management plans that include standards for water quality restoration, aquatic conservation strategies consistent with the O&C Act's sustained yield and minimum harvest requirements, and the use of best management practices.

Federal Land Policy and Management Act

FLPMA specifically provides that if there is any conflict between its provisions and the O&C Act related to the management of timber resources or the disposition of revenues from the O&C and CBWR lands, the O&C Act takes precedence. Thus, the multiple use management direction of FLPMA does not apply to the O&C and CBWR lands that are suitable for timber production. On the other hand, in contrast to the multiple use management direction, the planning process established by the FLPMA is applicable to these lands, because it is not in conflict with the O&C Act's management direction for those lands.

The following illustrate how management to effectuate FLPMA's multiple use mandate is affected by the nondiscretionary requirements of the O&C Act:

Areas of Critical Environmental Concern and Research Natural Areas.

The BLM is authorized to designate Areas of critical environmental concern to protect their relevant and important features on O&C and CBWR lands where management of the area of critical environmental concern would not conflict with sustained yield timber production and would not suppress timber harvest below 500 mmbf per year. The BLM is authorized to designate research natural areas on O&C and CBWR lands when the scientific value of the research is relevant to sustained yield forest management.

Wilderness Research Areas

BLM cannot designate additional wilderness study areas due to the expiration of that designation authority under FLPMA. BLM can manage lands outside of the existing wilderness study areas for wilderness characteristics on O&C and CBWR lands where management for wilderness characteristics would not conflict with sustained yield forest management or suppress harvests below 500 mmbf per year.

Visual Resources

FLPMA provides authority for protection of scenic values. However, the O&C Act prevails over FLPMA with regard to the management of timber resources. The BLM is therefore authorized to protect scenic values on O&C and CBWR lands where protection would not conflict with sustained yield timber production in areas dedicated to timber production. The BLM is authorized to protect scenic values at the expense of timber production where the protection is required as part of the management specified by Congress in subsequent legislation such as the Wild & Scenic Rivers Act.

Old Growth

The O&C Act requires that all age classes of timber be included in the timber base unless specifically excluded by Congress or removed because forest conditions do not warrant sustained yield timber management. The BLM and the Secretary of interior are not authorized to allocate or dedicate O&C and CBWR lands to create old growth ecosystems, late successional reserves or any other, similar uses that foreclose timber harvest and therefore are inconsistent with the non-discretionary requirements of the O&C Act. The BLM may allocate some areas for long rotation timber management, provided that in no event may the planned harvest be reduced below 500 mmbf.

Catastrophic Events

The O&C Act's principles of sustained yield calls for plan revisions that address how the BLM is going to respond rapidly to emergencies resulting from fire, flood, insect epidemics and ice and wind storms where prompt removal of dead and dying timber is necessary for the protection, reforestation, and rehabilitation of the resources as well as avoidance of economic loss. Sustained yield forestry does not permit the preventable waste of valuable timber resources by delay and indifference while dead or dying timber loses its value.

Special Status Species

Special status species include species that are listed under the Endangered Species Act, listed by the state of Oregon as threatened, endangered or candidate species, "Survey and Manage" species and those listed as "sensitive" by the BLM. BLM is authorized to manage and protect special status species on O&C and CBWR lands where protection would not conflict with sustained yield timber production in areas dedicated to timber production, provided that doing so does not suppress timber harvests below 500 mmbf per year.

Wild and Scenic Rivers Legislation

Congressionally designated wild and scenic rivers that have a "wild" classification must be excluded from the timber base.

Wild and scenic rivers on O&C and CBWR lands that have Congressional "scenic" and "recreation" classifications must be included in the timber base and the timber resources managed for sustained yield timber production. Congress authorized timber harvest as an allowable use with these wild and scenic river classifications. Any protections for riparian areas along wild and scenic rivers included in the timber base would be those riparian protections applicable for the land use allocation of the surrounding lands.

National Landscape Conservation System

O&C and CBWR lands are withdrawn from sustained yield timber management if Congress has designated the lands as a part of the National Landscape Conservation (NLC) system, requiring BLM to manage and protect such lands for uses other than timber production. The BLM is authorized to manage lands that are associated with but not Congressionally designated as NLC lands in a way that supports the purposes of the designated lands, provided that such management does not conflict with sustained yield timber production, and does not cause a reduction of harvest below 500 mmbf per year.

4. The O&C Act's Social and Economic Goals

The legislative history and case law are crystal clear: Federal law dedicates the O&C and CBWR lands to permanent timber production through long-term sustained yield forestry to help support local communities and local governments with revenues from the sale of timber and by supplying timber to local industries for the purposes of creating jobs and income. Planning decisions must therefore give the highest priority to achieving those results. Planning decisions must be designed to: Create jobs and increase income flow within the O&C Counties; create opportunities for growth in the timber and related industries; provide a sustainable source of revenues to O&C Counties based on the principles of sustained yield; increase tax revenue to the State of Oregon; and contribute to stable communities in Western Oregon.

When receipts from the sale of timber from the O&C lands are distributed, 50% is distributed to the 18 O&C Counties in which the revested lands are located. That 50% is distributed to the counties according to their proportion of the total assessed value of the revested lands and timber that existed in each of the counties in 1915. Those percentages range from 0.36% to 25.05% for the 18 counties. It does not matter in which Counties the timber is harvested. All Counties get their assigned percentages of whatever receipts are available each year.

The shared timber receipts are distributed pursuant to the O&C Act, they are available to the Counties without restriction, to be used according to local priorities. In some Counties the O&C revenue makes up 50 percent or more of the discretionary budget resources. The funds are necessary for essential services, including especially public safety programs such as sheriff patrols and corrections, as well as health a social services, libraries, and programs for juveniles and seniors. The healthy functioning of County governments and the communities they serve therefore depends in substantial part on the BLM's compliance with the O&C Act.

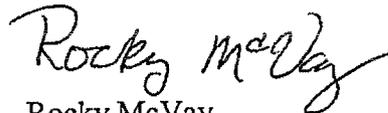
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RECOMMENDATIONS

The Association of O&C Counties recommends that the BLM and the cooperating agencies comply rigorously with the statutory requirements of the O&C Act and FLPMA 701(b), as set forth in the Headwaters case. In order to ensure timber production on a sustainable basis, a variety of timber management, watershed management and silvicultural practices must be applied on all the O&C and CBWR lands in the timber base. Timber sales should always be designed to minimize short-term environmental impacts and provide for long-term environmental protection of the O&C lands and its timber resources. In addition, BLM should employ the best science available, consistent with meeting the objectives of the O&C Act in revising its land use plans for Western Oregon.

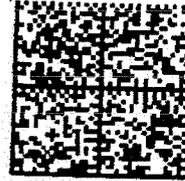
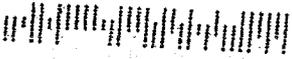
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Very truly yours



Rocky McVay
Executive Director

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