Appendix A. Legal Authorities

This appendix provides the background on the legal authorities and major court rulings that are related to this draft environmental impact statement.

In this appendix:

Settlement Agreement

In 1997, timber industry groups, county governments, and others filed a lawsuit (*AFRC v. Clarke*, Civil No. 94-1031-TPJ (D.D.C.)) in the United States District Court for the District of Columbia (D.C. District Court). This lawsuit alleged that the O&C Act had not been appropriately considered in applying the Northwest Forest Plan's management direction to the O&C lands. The allegation was that the Northwest Forest Plan's system of large reserves and its standards and guidelines, which restrict timber harvesting for the purpose of achieving conservation principles, differs from the ruling of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit Court) regarding the statutory direction for managing the O&C lands. The ruling from the Ninth Circuit Court (*Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183 (9th Cir., 1990)) stated that "exempting certain timber resources from harvesting to serve as wildlife habitat … is inconsistent with the principles of sustained yield". The *AFRC v. Clarke* lawsuit also alleged that the specific contribution of the BLM lands to the overall conservation strategy of the Northwest Forest Plan was not sufficiently analyzed in the Northwest Forest Plan's supplemental environmental impact statement to determine whether the extensive reservation of the O&C lands from timber harvesting in the Northwest Forest Plan was required in order to comply with the Endangered Species Act.

To resolve the lawsuit, the Secretary of Interior, the American Forest Resource Council, and the Association of O&C Counties entered into a settlement agreement that was approved by the United States District Court for the District of Columbia (D.C. District Court) on August 28, 2003. At the time of the settlement, the case was pending review in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) for the D.C. District Court's dismissal of the case as *res judicata*. Under the settlement agreement, the BLM agreed to revise its resource management plans in western Oregon and in that revision the BLM would consider an alternative that would not create any reserves on the O&C lands, except those reserves required to avoid jeopardy to species listed as threatened or endangered under the Endangered Species Act. The BLM also agreed that all resource management plan revisions shall be consistent with the O&C Act as interpreted by the Ninth Circuit Court.

Res judicata

A rule of civil law that says an issue cannot be relitigated after a final judgment has been rendered.

Major Court Rulings

The following are descriptions of the court rulings that are the most relevant to the decisions that must be made in revising the resource management plans for the BLM lands in western Oregon.

Headwaters, Inc. v. BLM, 914 F.2d 1174 (9th Cir. 1990)

In a 1990 lawsuit by Headwaters, Inc., the plaintiffs argued that the O&C Act requires the BLM to manage the O&C lands for multiple uses, including wildlife conservation, rather than for the dominant use of timber production. There were several issues in this case, including compliance with the National Environmental Policy Act. The issue most relevant to this revision of the resource management plans, however, is the interpretation of the O&C Act's reference to forest production.

In ruling on this case, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit Court) stated that "the primary purpose of the O&C Act lands is for timber production in conformity with the provision of sustained yield." Even more explicitly, the Ninth Circuit Court held that "exempting certain timber resources from harvesting to serve as wildlife habitat is inconsistent with the principle of sustained yield." The court also stated that "[i]t is entirely consistent with these goals to conclude that the O&C Act envisions timber production as a dominant use." The court further stated that "[t]he purposes of the O&C Act were twofold. First, the O&C Act was intended to provide the counties … with [a] stream of revenue … Second, the O&C Act was intended to halt previous practices of clear-cutting without reforestation" (*Headwaters, Inc. v. BLM*, 914 F.2d 1174 (9th Cir. 1990)). Citing the legislative history of the O&C Act, the Ninth Circuit Court explained that "[t]his type of [sustained-yield] management will make for a more permanent type of community, contribute to the local dependent industries, protect watersheds, and aid in regulating streamflow." In other words, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries were expected outcomes of managing these lands under the principles of sustained-yield management. The Ninth Circuit Court found nothing in the legislative history to "suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O&C Act at all" *Headwaters, Inc. v. BLM,* 914 F.2d 1183-84 (9th Cir. 1990).

This opinion was not the first to rule on the management of the BLM lands under the O&C Act, however, it is the most explicit. It followed previous rulings of the Ninth Circuit Court on the purposes of the O&C Act, specifically: *O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987); and *Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir.), *cert. denied*, 444 U.S. 927, 62 L. Ed. 2d 183, 100 S. Ct. 266 (1979).

Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993)

In this case, environmental groups challenged a decision made by the BLM to not supplement timber management plans with new information concerning the plan's effect on the northern spotted owl and asked the court to issue an injunction against logging operations in BLM forests that contained northern spotted owl habitat until a supplemental environmental impact statement was prepared. The BLM argued that the holding of the Ninth Circuit Court in *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1178-80 (9th Cir. 1990), *reh'g denied*, 940 F.2d 435 (1991), supports the conclusion that the BLM's decision not to supplement the environmental impact statements was reasonable, that the O&C Act requires the BLM to sell 500 million board feet of timber per year, and that relief provided by the court must not conflict with this congressional direction. The court, however, found that the National Environmental Policy Act (passed after the O&C Act) does apply to all government actions having significant environmental impact, even though the actions may be authorized by other legislation. The court also found that the O&C Act did not establish a minimum volume that must be offered every year notwithstanding any other law. Therefore, compliance with the National Environmental Policy Act, or enjoining timber harvests until the BLM complies with the National Environmental Policy Act, is not inconsistent with either the volume requirements of the O&C Act or the management of the lands entrusted to its care.

Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1314 (W.D. Wash., 1994)

This case was a challenge to the Northwest Forest Plan and was filed soon after the filing of *AFRC v. Clarke*.[1] In the challenge of the Northwest Forest Plan in the United States District Court for the Western District of Washington (Western Washington District Court), the court found that the management decision made about the O&C lands was a lawful exercise of the discretion of the Secretary of the Interior under the O&C Act because of the broad mandate to manage federal lands to conserve habitat for species listed for protection under the Endangered Species Act. The Western Washington District Court, however, did not identify the Northwest Forest Plan as the *only* decision that would meet the requirements of the Endangered Species Act (*Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1313-1314 (W.D. Wash., 1994)).

[1] *AFRC v. Clarke*, Civil No. 94-1031-TPJ (D.D.C.)

Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004)

In this case, the Ninth Circuit Court[2] rejected the regulatory definition of "destruction or adverse modification of critical habitat" and directed consulting agencies to consider the effects of an action on the critical habitat network without reference to other conservation programs, such as the late-successional reserves in the Northwest Forest Plan. The court stated that critical habitat must provide for both the survival and the recovery of a listed species and that the analysis of whether there is adverse modification always requires consideration of the impacts on the recovery of a species. This case highlighted the issue that resulted from the difference in the Northwest Forest Plan's late-successional reserves and the designated critical habitat for the northern spotted owl.

[2] United States Court of Appeals for the Ninth Circuit (Ninth Circuit Court)

Major Legal Authorities

The following is a list of the major legal authorities that are relevant to the BLM land use planning process. It is not an inclusive list.

- The Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O&C Act) (43 U.S.C. §1181a, *et seq.*) provides the legal authority for the management of O&C lands by the Secretary of the Interior. The O&C Act requires that the O&C lands be managed "for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities" (43 U.S.C. §1181a)
- The Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. 1701 *et seq*., provides the authority for the BLM land use planning.
  - Sec. 102 (a) (7) and (8) sets forth the policy of the United States concerning the management of the public lands.
  - Sec. 201 requires the Secretary of the Interior to prepare and maintain an inventory of the public lands and their resource and other values, giving priority to areas of critical environmental concern (ACECs), and, as funding and workforce are available, to determine the boundaries of the public lands, provide signs and maps to the public, and provide inventory data to State and local governments.
  - Sec. 202 (a) requires the Secretary, with public involvement, to develop, maintain, and when appropriate, revise land use plans that provide by tracts or areas for the use of the public lands.
  - Sec. 202(c)(1-9) requires that, in developing land use plans, the BLM shall use and observe the principles of multiple use and sustained yield; use a systematic interdisciplinary approach; give priority to the designation and protection of areas of critical environmental concern; rely, to the extent it is available, on the inventory of the public lands; consider present and potential uses of the public lands; consider the relative scarcity of the values involved and the availability of alternative means and sites for realizing those values; weigh long-term benefits to the public against short term benefits; provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and consider the policies of approved State and tribal land resource management programs, developing land use plans that are consistent with State and local plans to the maximum extent possible consistent with Federal law and the purposes of this Act.

  - Sec. 202 (d) provides that all public lands, regardless of classification, are subject to inclusion in land use plans, and that the Secretary may modify or terminate classifications consistent with land use plans.
  - Sec. 202 (f) and Sec. 309 (e) provide that Federal, State, and local governments and the public be given adequate notice and an opportunity to comment on the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for the management of the public lands.
  - Sec. 302 (a) requires the Secretary to manage BLM lands under the principles of multiple use and sustained yield, in accordance with available land use plans developed under Sec. 202 of FLPMA. There is one exception: where a tract of the BLM lands has been dedicated to specific uses according to other provisions of law, it shall be managed in accordance with such laws.
  - Sec. 302 (b) recognizes the entry and development rights of mining claimants, while directing the Secretary to prevent unnecessary or undue degradation of the public lands.

- The National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq*., requires the consideration and public availability of information regarding the environmental impacts of major Federal actions significantly affecting the quality of the human environment. This includes the consideration of alternatives and mitigation of impacts.
- The Clean Air Act of 1990, as amended, 42 U.S.C. 7418, requires Federal agencies to comply with all Federal, State and local requirements regarding the control and abatement of air pollution. This includes abiding by the requirements of State Implementation Plans.
- The Clean Water Act of 1987, as amended, 33 U.S.C. 1251, establishes objectives to restore and maintain the chemical, physical, and biological integrity of the Nation's water.
- The Federal Water Pollution Control Act, 33 U.S.C. 1323, requires Federal land managers to comply with all Federal, State, and local requirements, administrative authorities, process, and sanctions regarding the control and abatement of water pollution in the same manner and to the same extent as any nongovernmental entity.
- The Safe Drinking Water Act, 42 U.S.C. 201, is designed to make the Nation's waters "drinkable" as well as "swimmable." Amendments in 1996 establish a direct connection between safe drinking water and watershed protection and management.
- The Endangered Species Act (ESA) of 1973, as amended, 16 U.S.C. 1531 *et seq.*:
  - Provides a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and provides a program for the conservation of such endangered and threatened species (Sec. 1531 (b), Purposes).
  - Requires all Federal agencies to seek to conserve endangered and threatened species and utilize applicable authorities in furtherance of the purposes of the Endangered Species Act (Sec. 1531 (c) (1), Policy).

  - Requires all Federal agencies to avoid jeopardizing the continued existence of any species that is listed or proposed for listing as threatened or endangered or destroying or adversely modifying its designated or proposed critical habitat (Sec. 1536 (a), Interagency Cooperation).
  - Requires all Federal agencies to consult (or confer) in accordance with Sec. 7 of the ESA with the Secretary of the Interior, through the Fish and Wildlife Service and/or the National Marine Fisheries Service, to ensure that any Federal action (including land use plans) or activity is not likely to jeopardize the continued existence of any species listed or proposed to be listed under the provisions of the ESA, or result in the destruction or adverse modification of designated or proposed critical habitat (Sec. 1536 (a), Interagency Cooperation, and 50 CFR 402).

- The Wild and Scenic Rivers Act, as amended, 16 U.S.C. 1271 *et seq.*, requires Federal land management agencies to identify potential river systems and then study them for potential designation as wild, scenic, or recreational rivers.
- The Wilderness Act, as amended, 16 U.S.C. 1131 *et seq.*, authorizes the President to make recommendations to the Congress for Federal lands to be set aside for preservation as wilderness.
- The Antiquities Act of 1906, 16 U.S.C. 431-433, protects cultural resources on Federal lands and authorizes the President to designate National Monuments on Federal lands.
- The National Historic Preservation Act (NHPA), as amended, 16 U.S.C. 470, expands protection of historic and archaeological properties to include those of national, State, and local significance and directs Federal agencies to consider the effects of proposed actions on properties eligible for or included in the National Register of Historic Places. It also directs the pro-active management of historic resources.
- The American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996, establishes a national policy to protect and preserve the right of American Indians to exercise traditional Indian religious beliefs or practices.
- The Recreation and Public Purposes Act of 1926, as amended, 43 U.S.C. 869 *et seq.*, authorizes the Secretary of the Interior to lease or convey BLM lands for recreational and public purposes under specified conditions.
- The Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. 201 (a) (3) (A) (i), requires that coal leases be issued in conformance with a comprehensive land use plan.
- The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, requires application of unsuitability criteria prior to coal leasing and also to proposed mining operations for minerals or mineral materials other than coal.
- The Mineral Leasing Act of 1920, as amended, 30 U.S.C. 181 *et seq.,* authorizes the development and conservation of oil and gas resources.
- The Onshore Oil and Gas Leasing Reform Act of 1987, 30 U.S.C. 181 *et seq.*, provides that a study be conducted by the National Academy of Sciences and the Comptroller General that results in recommendations for improvements which may be necessary to

ensure the following are adequately addressed in Federal land use plans:

  - Potential oil and gas resources are identified;
  - The social, economic, and environmental consequences of exploration for and development of oil and gas resources are determined; and
  - Any stipulations to be applied to oil and gas leases are clearly identified.

- The General Mining Law of 1872, as amended, 30 U.S.C. 21 *et seq.*, allows the location, use, and patenting of mining claims on sites on public domain lands of the United States.
- The Mining and Mineral Policy Act of 1970, 30 U.S.C. 21a, establishes a policy of fostering the orderly development of economically stable mining and minerals industries and studying methods for reclamation and the disposal of waste.
- The Taylor Grazing Act of 1934, 43 U.S.C. 315, authorizes the Secretary of the Interior "to establish grazing districts, or additions thereto and/or to modify the boundaries thereof of vacant, inappropriate and unreserved lands from any part of the public domain . . . which in his opinion are chiefly valuable for grazing and raising forage crops[.] . . ." The Act also provides for the classification of lands for particular uses.
- Executive Orders 11644 (1972) and 11989 (1997) establish policies and procedures to ensure that off-road vehicle use shall be controlled so as to protect public lands.
- Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 49 *Fed. Reg.* 7629 (1994), requires that each Federal agency consider the impacts of its programs on minority and low-income populations.
- Executive Order 13007 (Indian Sacred Sites), 61 *Fed. Reg.* 26771 (1996), requires Federal agencies to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions to:
  - Accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and
  - Avoid adversely affecting the physical integrity of such sacred sites.
- Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) provides, in part, that each Federal agency shall establish regular and meaningful consultation and collaboration with Indian tribal governments in developing regulatory practices on Federal matters that significantly or uniquely affect their communities.
- Executive Order 13112 (Invasive Species) provides that no Federal agency shall authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species unless, pursuant to guidelines that it has prescribed, the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk or harm will be taken in conjunction with the actions.

- Secretarial Order 3175 (incorporated into the Departmental Manual at 512 DM 2) requires that if Department of the Interior (DOI) agency actions might impact Indian trust resources, the agency must explicitly address those potential impacts in planning and decision documents, as well as consult with the tribal government whose trust resources are potentially affected by the Federal action.
- Secretarial Order 3206 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act) requires DOI agencies to consult with Indian tribes when agency actions to protect a listed species, as a result of compliance with ESA, affect or may affect Indian lands, tribal trust resources, or the exercise of American Indian tribal rights.
- Secretarial Order 3215 (Principles for the Discharge of the Secretary's Trust Responsibility) guides DOI officials by defining the relatively limited nature and extent of Indian trust assets, and by setting out the principles that govern the Trustee's fulfillment of the trust responsibility with respect to Indian trust assets.