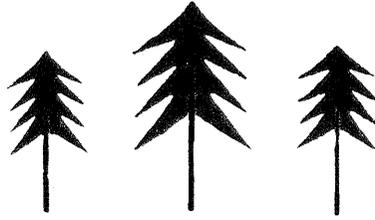


# ASSOCIATION OF O & C COUNTIES

COMM. DOUG ROBERTSON, PRES.  
DOUGLAS COUNTY COURTHOUSE  
ROSEBURG, OREGON 97470  
(541) 440-4201

COMM. MIKE PROPES, VICE-PRES.  
POLK COUNTY COURTHOUSE  
850 MAIN STREET  
DALLAS, OREGON 97338  
(503) 623-8173

COMM. TONY HYDE, SEC.-TREAS.  
COLUMBIA COUNTY COURTHOUSE  
ST HELENS, OREGON 97051  
(503) 397-4322



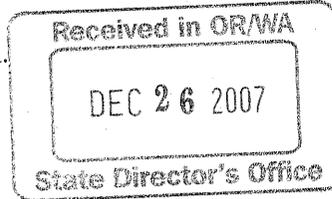
ROCKY McVAY, EXEC. DIR.  
16289 HWY. 101 SOUTH, SUITE A  
BROOKINGS, OREGON 97415  
(541) 412-1624  
FAX (541) 412-8325  
Email: rocky@blupac.com

KEVIN Q. DAVIS, LEGAL COUNSEL  
SUITE 1600, BENJ. FRANKLIN PLAZA  
ONE S.W. COLUMBIA  
PORTLAND, OREGON 97258  
(503) 517-2405

DAVID S. BARROWS, LEGIS. COUNSEL  
1201 S.W. 12TH AVENUE, SUITE 200  
PORTLAND, OREGON 97205  
(503) 227-5591

December 20, 2007

Ed Shepard, State Director OR/WA  
Bureau of Land Management  
P.O. Box 2965  
Portland, Oregon 97208



Re: Western Oregon Plan Revision EIS comments

Mr. Shepard:

The Association of O&C Counties represents the interests of Counties in Western Oregon within which lie the BLM managed O&C lands and Coos Bay Wagon Road ("CWBR") lands, including the 16 Counties which are formal cooperating agencies in the BLM's Western Oregon Plan Revision ("WOPR") process. This Association has represented County interests in the management of these lands for over 80 years. We have reviewed the WOPR draft EIS and provide the following comments:

## **BACKGROUND:**

The O&C Act requires that O&C Lands "which have heretofore or may hereafter been classified as timberlands, and power site lands valuable for timber, shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal of sustained yield . . ." 43 USC §1181a. The Act identifies two mandatory actions over which the BLM has no discretion: (1) If it is timberland, it must be included in the "timber base"; and (2) if it is in the timber base, it must be managed for sustained yield timber production. There remains, of course, at least some discretion in how the BLM implements the second of these requirements - - - there are a variety of ways to satisfy the requirement for sustained yield timber production.

When the WOPR process began, it was presumed that the Endangered Species Act ("ESA") "trumped" the O&C Act in some respects. Specifically, it was presumed that the O&C Act mandate to manage all timberlands for sustained yield had to stand aside if such management was inconsistent with the ESA's section 7(a)(2) requirement that "each Federal Agency shall, in consultation with . . . [the Secretary of Interior or Commerce] insure that 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 or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical . . . .” 16 USC §1536(a)(2). It was presumed that the creation of reserves from which timber was not harvested, otherwise impermissible under the O&C Act, was permitted if necessary to avoid jeopardy to a listed species. The corollary presumption was that O&C lands, if designated as critical habitat under the ESA, could be withdrawn from timber production and placed in reserves for the benefit of listed wildlife species. All of these presumptions were wrong.

In June 2007, the United States Supreme Court reversed the 9<sup>th</sup> Circuit Court of Appeals in a case that limits the scope of the ESA. The case did not involve the O&C Act, but its holding directly affects the extent to which the BLM may respond to the “no jeopardy” and “no adverse modification” requirements of the ESA. The key holding in the case is as follows:

“§7(a)(2)’s no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake once certain specific triggering events have occurred. This reading not only is reasonable, inasmuch as it gives effect to the ESA’s provision, but also comports with the canon against implied repeals [of other, earlier, conflicting legislation] because it stays §7(a)(2)’s mandate where it would override otherwise mandatory statutory duties.” Natl. Ass. of Homebuilders v. Defenders of Wildlife, No. 06-340 (June 25, 2007). (Emphasis in original.)

This holding specifically controls the scope of the ESA’s “no jeopardy” requirement, but it should also be read to control the scope of the “no adverse modification” requirement, since both requirements are in the same sentence of ESA §7(a)(2).

This new Supreme Court decision alters the legal framework for the development and selection of alternatives in WOPR. Since the O&C Act says all timberlands must be managed for sustained yield timber production, the BLM may not create reserves on O&C or CBWR lands to avoid jeopardizing a listed species, or to avoid adversely modifying critical habitat, since section 7(a)(2) of the ESA does not impliedly repeal the O&C Act’s nondiscretionary mandate to implement sustained yield forestry on all timberlands. What remains subject to §7(a)(2)’s “no jeopardy/no adverse modification” requirement is the BLM’s exercise of discretion in choosing the particulars of the sustained yield timber management it will employ. The BLM can and must seek to avoid jeopardy and adverse modification, but its effort in that regard must be consistent with the discretion allowed it under the O&C Act. This occasion is also a useful reminder that the BLM may only use its discretionary authority in contributing to the recovery of listed species pursuant to §7(a)(1) of the ESA. Thus, the limitations on the BLM are the same

for both contributing to recovery and avoiding jeopardy under the ESA---the scope of discretion under the O&C Act limits and defines the BLM's obligations under the ESA.

The 9<sup>th</sup> Circuit Court of Appeals decision in Headwaters v. BLM, 914 F.2d 1174 (9<sup>th</sup> Cir. 1990) is the controlling interpretation of the O&C Act and the BLM must follow it. The opinion in that case identifies the purposes and goals of the O&C Act, which are the guideposts for identifying the extent of the BLM's management discretion. The opinion in that case at pages 1183-84 provides as follows:

1. The term "forest production" in the O&C Act means "timber production." Timber production is the "dominant use" for O&C lands.
2. "Exempting certain timber resources from harvesting to serve as wildlife habitat is inconsistent with the principle of sustained yield." (Emphasis added.)
3. "The purposes of the O&C Act were two-fold. First, the O&C Act was intended to provide the counties with the stream of revenue which had been promised but not delivered . . . Second, the O&C Act intended to halt previous practices of clear-cutting without reforestation, which was leading to a depletion of forest resources." \* \* \* "Nowhere does the legislative history 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." (Emphasis added.)

The O&C Act says that timber on the O&C lands shall be managed with the timber thereon sold, cut and removed on a sustained yield basis "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." The Headwaters decision makes clear, through reference to the legislative history, that protecting watersheds, regulating stream flows, and providing recreation facilities were the expected outcomes from sustained yield timber management rather than separate goals that could compete with sustained yield timber management. Nevertheless, these projected outcomes are clues to the kind of management that BLM was expected to undertake to implement the sustained yield mandate of the O&C Act.

The limits of BLM's discretion are ascertained by reference to the terms of the O&C Act, on its face and as interpreted in the Headwaters decision, as well as by historic interpretations given the O&C Act by the BLM itself. For example, in a 1939 press release, less than two years after the O&C Act became the management mandate, the BLM's predecessor agency had a Chief O&C Forester, the equivalent of the BLM State Director, who described the newly adopted sustained yield forestry program in these words:

“This assures the continuous production of timber for the employment of Oregon industries without the danger of exhausting the timber supply and without the danger of destroying the tax base of the counties.” Press Release, March 31, 1939, W. H. Horning, O&C Chief Forester.

In 1940 the O&C Chief Forester elaborated, saying that “[a]ll the lands best suited for the growing of timber will be retained in public ownership and kept at work producing crops of timber. Continuous production of timber of commercial quality in the largest possible amount is the goal.” W. H. Horning, The O&C Lands and their Management, an Important Advance in Forest Conservation (1940).

All of these indications suggest that the BLM’s discretion when implementing sustained yield is narrowly bounded. The limited discretion under the O&C Act was preserved by Congress as recently as 1976, when Congress passed the Federal Land Policy and Management Act (“FLPMA”), which redefined the management direction for nearly all lands in the United States under the jurisdiction of the BLM, with the telling exception of lands managed under the O&C Act. FLPMA, P.L. 94-579, is a multiple use statute under which all uses for the land are given equal consideration, and the BLM has broad discretion to choosing the mix of uses it will adopt for lands managed under FLPMA. But Congress specifically preserved the dominance of timber production on the O&C lands by adopting section 701(b) of FLPMA, which says that “[n]otwithstanding any provision of this Act [FLPMA], in the event of conflict with or inconsistency between this Act and the . . . [O&C Act and Coos Bay Wagon Road Acts], insofar as they relate to management of timber resources, and the disposition of revenues from lands and resources, the latter Acts shall prevail.”

In 1986 the Interior Solicitor was asked if the BLM had authority to implement a plan for the protection of spotted owls. The legal opinion differentiated between lands managed by the BLM pursuant to FLPMA, and lands managed pursuant to the O&C Act. The Solicitor’s opinion describes the difference as follows:

“The freedom conferred on the Secretary under FLPMA is limited in one important way on certain federally-owned timberlands in western Oregon. There, any decision about managing northern spotted owls must be measured against the dominant use of timber production. \* \* \* In deciding whether to establish a program for managing northern spotted owls on O&C timberlands, the Secretary, then, must decide if it is possible to do so without creating a conflict with the dominant use there—timber production. If the Secretary can manage northern spotted owls and still produce timber on a sustained yield basis in the O&C timberlands, the O&C Act in no way will preclude him from making that choice. \* \* \* The converse, of course, also obtains. If a program for managing northern spotted owls conflicts with producing timber on a sustained yield basis in O&C

timberlands, the O&C Act will preclude the program's application to that realty." Gale Norton and Constance Harriman, Associate Solicitors, Memorandum to James Cason, Deputy Assistant Secretary for Land and Minerals Management (October 28, 1986).

The Association of O&C Counties does not, in these comments, offer a convenient description of the exact range of discretion we believe is consistent with the O&C Act, now that the constraints of the ESA cannot be viewed as a separate, modifying source of management authority by the BLM. It is clear that creation of reserves in which sustained yield timber production is not practiced is not allowed, but otherwise the boundary lines defining the BLM's discretion are not brightly drawn. Our comments below are guided by the purposes and goals of the O&C Act, as they are described in the paragraphs above. The BLM's discretion is defined by these same purposes and goals.

### **Minimum Harvest Levels**

There is a continuing debate about whether the O&C Act specifies a minimum harvest level, and if so, what the minimum harvest level is. The O&C Act, 43 U.S.C. §1181a says the following:

"The annual productive capacity for such lands shall be determined and declared as promptly as possible after August 28, 1937, but until such determination and declaration are made the average annual cut therefrom shall not exceed one-half billion feet board measure: *Provided*, That timber from said lands in an amount not less than one-half billion feet board measure, or not less than the sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market." (Italics in original, underlining added.)

This language equates the "sustained yield" with the "annual productive capacity"---the two terms refer to the same thing. This strongly suggests that "sustained yield" is not something that is administratively determined by application of policy decisions from a wide range of discretionary options. Rather, it appears that that "sustained yield"---the annual productive capacity---is determined primarily by reference to biological factors associated with tree growth and mortality.

In Portland Audubon v. Babbitt, 998 F.2d 705 (9th Cir. 1993), one question presented was whether an injunction on timber sales pending compliance with NEPA was appropriate. The BLM argued that an injunction would prevent it from achieving a harvest level of 500 mmbf, which it argued was compelled by statute. The 9<sup>th</sup> Circuit said that the O&C Act "has not deprived the BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care." The Court rejected the BLM's argument that NEPA did not apply, based on the Court's

understanding that NEPA “applies to all government actions having significant environmental impacts, even though the actions may be authorized by other legislation.” Id. at 709. This interpretation of NEPA is no longer correct with regard to nondiscretionary actions. See Dept. of Transportation v. Public Citizen, 541 U.S. 752 (2004). Moreover, the 9<sup>th</sup> Circuit’s statement in Portland Audubon about the BLM having at least some discretion under the O&C Act does not answer the question about how much discretion exists, nor does it definitively answer the question about minimum harvest levels that the BLM must attempt to achieve under the Act.

### **The 2003 Settlement**

In August, 2003, a settlement agreement was reached in American Forest Resource Council v. Clarke that requires the BLM to revise six resource management plans in Western Oregon that are associated with the Northwest Forest Plan. The settlement agreement requires that at least one alternative be considered for each plan that does not utilize any reserves except as required to avoid jeopardy under the ESA. In addition, all new plans must be consistent with the O&C Act as interpreted by the 9<sup>th</sup> Circuit of Appeals in the Headwaters decision. The U.S. Supreme Court’s Homebuilders decision establishing that section 7(a)(2) of the ESA does not modify or amend other, nondiscretionary statutory mandates, supercedes the settlement agreement in certain respects. To the extent that the settlement agreement can be read as suggesting that reserves are permissible on O&C lands to avoid jeopardizing listed species under the ESA, the settlement agreement is no longer consistent with applicable law. The second requirement of the settlement---that all plan revisions be consistent with the O&C Act as interpreted in the Headwaters decision---remains effective as a matter of contract, as well as a matter of statutory law.

### **EIS GENERAL COMMENTS:**

None of the alternatives as presently written in the draft EIS meet the statutory requirements of the O&C Act. Management that would occur in LSMAs under Alternatives 1 and 2, and in LSRs in the No Action Alternative, would not provide timber production on a sustained yield basis. Instead, significant amounts of O&C and CBWR land would be set aside and reserved for the conservation and recovery of species listed under the ESA. Alternative 3 contains no wildlife reserves, but is designed to maintain and promote a mature and structurally complex forest on BLM lands across the landscape. The rotation ages proposed under Alternative 3 were selected, not by reference to the goals and purposes of the O&C Act, but for the purpose of benefiting wildlife, which is not a goal of the O&C Act at all. Under Alternative 3, timber production on a sustained yield basis would be significantly limited to achieve the overall goal of an old growth forest. While extended rotation ages might be permissible on some parcels, their widespread application under Alternative 3 is out of compliance with the

purposes of the O&C Act. Viewing the landscape as a whole, one cannot say that timber production would be the “dominant use” under Alternative 3.

We believe that deficiencies in the alternatives and the draft EIS can be corrected in the final RMP/EIS without doing a supplemental EIS. This can be achieved by modifying Alternative 2 to incorporate the U.S. Supreme Court’s limitations on the reach of the ESA, and correcting certain other existing inconsistencies with the O&C Act. All information and data necessary for final EIS analysis is currently available in the draft EIS. The following are suggested changes for Alternative 2:

1. Maintain existing LSMA allocation boundaries identified in Alternative 2, but do not withdraw or reserve these lands from sustained timber production. Instead, develop long term rotation age strategies within the LSMA boundaries that would contribute to the conservation and recovery of federally listed species, while also providing for regeneration harvesting on a sustained yield basis. We suggest using the long rotation ages contained in Alternative 3 within the areas currently identified as LSMAs, and using landscape targets for regeneration harvest within LSMA boundaries similar to requirements in Alternative 3.
2. Develop timber management objectives within LSMA boundaries that maintain and promote the development of suitable habitat for federally listed ESA species. Examples include thinnings and partial harvests that would hasten development of structurally complex forests within the LSMA boundaries. All timber harvested within the LSMAs is in the timber harvest base and the volume should be included in ASQ calculations.
3. The Secretary, apart from the WOPR process, should eliminate critical habitat designations on O&C and CBWR lands. The BLM cannot participate in a system of reserves on O&C and CBWR lands. USF&W, at the direction of the Secretary, should revise its proposed critical habitat designation to account for the BLM’s non-discretionary mandates under the O&C Act.
4. Allow for green tree retention (legacy) trees within LSMA boundaries.
5. Establish continuous field survey and monitoring systems within LSMAs for all federally listed species. Determine whether a location is “actually occupied” based on confirmation of the physical presence of species using the site for nesting, roosting, or foraging (owls) or nesting (murrelets), but excluding locations where there are sightings of transient, dispersing birds.
6. Protect all sites (inside and outside of LSMAs) that are actually occupied by listed species by delaying regeneration harvest of sites for so long as sites are actually occupied. See definition of “actually occupied” in comment 5.

7. Allow salvaging in LSMAs for economic purposes with retention of legacy trees.
8. In areas south of Grants Pass and in the Klamath Falls resource area of the Lakeview District, apply uneven aged timber management principles where feasible to all BLM lands. This practice would reduce fire hazard and the acres of high severity fire when wildfires occur in these areas. It could also benefit suitable habitat conditions for ESA listed species.
9. Include in the sustained yield timber management base all Congressionally designated Wild and Scenic Rivers that have a scenic or recreation classification. Exclude only those rivers with a Congressional wild classification from the timber base. Include in the timber management base all rivers that have not been Congressionally designated. Any protections for riparian areas along Wild and Scenic rivers included within the timber base would be those riparian protections generally applicable for the land use allocation of the surrounding lands.
10. Withdraw O&C and CBWR lands located in the National Landscape System from sustained yield timber management only if they have a Congressional designation requiring protection.
11. Include all lands adjacent to the Coquille Tribal Forest in the sustained yield timber management base.
12. Maintain all other features for Alternative 2
13. Develop a sub-alternative for Alternative 2 that eliminates LSMA boundaries and establishes the maximum harvest that can be maintained in these areas without exceeding the amount of new growth.

**SPECIFIC DRAFT EIS COMMENTS:**

**SUMMARY:**

1. P. XLIV---Add a footnote regarding the Homebuilders decision by the U.S. Supreme Court, and explain that the ESA's requirements under section 7(a)(2) are not applicable to agency actions over which the BLM has no discretion under the O&C Act.
2. P. XLVI---Rewrite Alternative 2 summary consistent with the recommendations described above in these comments under the heading EIS General Comments.

3. P. XLIX---Rewrite Figure 1 and Table 1 as they apply to Alternative 2, so that they reflect the revisions to Alternative 2 recommended above.
4. PP. L-LXVI---The summary of environmental consequences should be rewritten to reflect changes recommended for Alternative 2. In addition, the Marbled Murrelet section (p. LVIII) should be totally rewritten based on detailed comments presented below for Chapters 3 and 4.
5. P. LIII---Reconsider whether environmental justice considerations should be more extensively discussed. For example, Douglas County experiences very high levels of impacts depending on which alternative is selected by the BLM. At the same time, Douglas County has high levels of poverty, so that impacts from the BLM decisions will be experienced disproportionately by low income populations. While the median income in Douglas County rose 4.5 percent in 2006, the number of people living in poverty in Douglas County also rose at the same time, from 11.8 percent to 16 percent of the total population. There was a corresponding increase in the number of children living in poverty, so that currently more than 25 percent of all children in Douglas live in poverty, a shocking and disturbing statistic that might be sufficient to require a fuller environmental justice analysis.

#### **CHAPTER 1---PURPOSE AND NEED**

1. PP. 3-6---The purpose and need for the plan revisions should be revised to accurately reflect the law following the Supreme Court's Homebuilders decision. For example, on page 6, the current text states: "The statutory requirements of the O&C Act are limited by other statutes providing for the need to conserve listed species and the habitat they depend on, not jeopardizing listed species and not adversely modifying critical habitat . . ." This is no longer an accurate statement of the law and must be revised. Other, similar statements should be modified as well.
2. P. 10---The last sentence of the 4<sup>th</sup> full paragraph states as follows with regard to the O&C Act: "Nor does it establish a minimum level of harvest or a minimum level of receipts." We agree that the O&C Act does not mandate a minimum level of receipts, but it does mandate a minimum harvest level. We request that you quote in full the second full paragraph of 43 U.S.C. §1181a. We recognize that the decision in Portland Audubon v. Babbitt, 998 F.2d 705 (9<sup>th</sup> Cir. 1993) states that the BLM does not completely lack discretion with regard to harvest levels, and that therefore an injunction to compel compliance with a procedural statute was not precluded by the O&C Act. But that is a limited holding (see discussion above) that cannot be said to eliminate the minimum harvest level requirements stated in the Act as they are applicable to the BLM.

2. P. 11---The section describing the ESA must be corrected to reflect the Supreme Court's ruling in the Homebuilder's case. It is no longer true that section 7(a)(2) requires the BLM to take actions that are inconsistent with the O&C Act's nondiscretionary mandates. As with obligations under section 7(a)(1), the BLM may only respond to section 7(a)(2) in ways that are consistent with the requirements of the O&C Act.
3. P. 23---The section titled "Endangered Species Act Section 7 Consultation" must be rewritten to reflect the Supreme Court decision distinguishing between discretionary and non-discretionary actions proposed by an action agency.

#### **CHAPTER 2---ALTERNATIVES:**

1. PP. 43-44---National Landscape Conservation System section should be rewritten to include only those management actions that are consistent with the O&C Act or specific Congressional designation. For example, on Congressionally designated Wild and Scenic rivers with a scenic or recreation classification, timber harvest is allowed, and lands with such classifications should be a part of the timber base for sustained yield calculations. Only sections of rivers with Congressional wild classifications are properly withdrawn from timber harvest. The BLM lacks authority to withdraw O&C and CBWR lands from timber production on an interim basis while Congress is considering eligibility of candidate areas for inclusion in Wild and Scenic system.
2. P. 45---Management actions associated with the Mt. Hood Corridor need to be re-examined for consistency with the O&C Act. Unless Congressionally designated, timber harvest should not be excluded.
3. PP. 46-47---Management objectives and management actions associated with federal and state listed plant species should be rewritten to reflect the Supreme Court decision regarding Section 7 of the ESA. The BLM should consider strategically placed green tree retention as a means of protecting localized plant populations in harvest units.
4. PP. 60-61---Management objectives and management actions associated with listed wildlife species must be rewritten to reflect the limitation on the ESA in light of the Homebuilders decision.
5. PP. 65-75---The discussion regarding the No Action Alternative and Alternative 1 should make clear that excluding the LSRs from sustained yield timber production can no longer be justified as being necessary to comply with the ESA.

6. PP. 76-89---Alternative 2 discussion needs to be modified and rewritten to incorporate the Supreme Court's ruling in the Homebuilders case. The discussion must distinguish between the Agency's non-discretionary and discretionary actions. (See the 13 specific suggestions discussed above for Alternative 2 in the section labeled "EIS General Comments.")

**CHAPTER 3---MARBLED MURRELET, AFFECTED ENVIRONMENT, PAGES 297-308**

1. Table 90 identifies 890,000 habitat capable acres of BLM land within the planning area that could potentially become nesting habitat for Marbled Murrelets. Additionally, 373,000 acres are identified as nesting habitat available today. Table 90 fails to accurately portray the effected environment from a landscape perspective within the planning area for the species and should be modified to include the following information:
  - a. Add a column that identifies total federal and state habitat capable acres within the planning area that could potentially become nesting habitat for the species. Show percentage of total habitat under BLM administration.
  - b. Add columns that break down total federal and state capable acres by zone 1 and zone 2, and show percentage of acres under BLM.
  - c. Add columns that break down total available habitat by ownership within the planning area by zone, distinguishing between mature and structurally complex forest, and showing percentage of BLM acres in each.
2. All BLM forest acres capable of growing trees within zone 1 and 2 are included as habitat capable acres for Marbled Murrelets. No other factors were included for determining suitable habitat for nesting other than growing a mature and structurally complex forest on BLM lands in proximity to a marine environment. The EIS fails to adequately describe the many other factors that must be considered in determining the capability of O&C lands to support nesting by the species. The effected environment section for Marbled Murrelets needs to be rewritten to include the following information:
  - a. The Marbled Murrelet recovery plan and proposed critical habitat rule have identified that the species requires large contiguous blocks of mature and structurally complex forest habitat with low amounts of edge and fragmentation and located far from human activity for successful nesting and fledging of young. BLM's checkerboard and fragmented land ownership is a significant constraint on the ability of BLM lands to contribute to the recovery of the species by providing nesting habitat

meeting these criteria. Large patches of structurally complex forest habitat with low amounts of edge do not exist on these lands.

- b. O&C and CBWR lands are located across the landscape in a checkerboard pattern with mostly private industrial lands in zones 1 and 2. Most mature and structurally complex forest habitat has been eliminated on private lands. In addition, regenerated forests on most private lands are planned for timber harvest prior to obtaining the forest characteristics of an older forest. Suitable habitat loss on private lands must, therefore, be considered permanent.
  - c. Large contiguous blocks of forests within zone 1 and 2 are located on the National Forest lands and on the Tillamook and Elliott State Forests
  - d. Marbled Murrelets are very sensitive to fragmentation and reproductive success is adversely affected by fragmentation. Large amounts of edge and fragmentation also result in increased populations of nest predators; increased visibility and vulnerability of flying or nesting adults to potential predators; and changes in microclimate regimes that stress the species.
  - e. The EIS (page 302) states that Marbled Murrelets nest in landscapes with large stands with less edge and farther from logged areas. It further states that patches of suitable nesting trees of only a few acres with only a few nesting trees are thought to be capable of supporting Marbled Murrelet nesting which is contrary to the large contiguous block requirement stated above. Is this a conclusion based on scientific evidence or is it just an opinion based on little to no evidence? The EIS should provide support for this statement.
3. The EIS does not adequately describe occupancy and actual use by the species on BLM lands in zones 1 and 2. Occupancy is determined by survey protocol that is based on the behavior of the species, but there is no discussion about actual use. Questions need to be answered about what nesting activities have actually been confirmed on the BLM lands. A source of information on this subject can be found on page 52 in the Marbled Murrelet recovery plan. For areas of known occupancy and use, the EIS should provide a detailed description of suitable habitat that includes size of stand, amounts of fragmentation, stand and nest tree characteristics and the occupied parcel's relationship to these criteria. Also, the EIS should describe whether nesting and fledging of young was successful or, if not, what caused failure. As an example, the recovery plan identified the "Valley of the Giants" (BLM) as an active but failed nesting area. This is an old growth parcel laying in a fragmented checkerboard ownership that contains some of the

oldest Douglas Fir trees in the Coast Range. Nest failure occurred because of egg predation.

4. In areas determined to be occupied by survey, what protocol was used for making a determination? Provide information in the form of a table and narrative showing occupied acres determined by different protocols. For example, the Coos Bay district had identified 19,775 acres as occupied by original protocol used until 2003. 1,447 acres have subsequently been added with a new protocol through 2006. Are acres identified under the old protocol still valid? If so, why? In addition, what documented follow-up studies based on field examination have been conducted on occupied lands that confirm that these areas are actually being used for nesting or have stand and nest tree characteristics that allows the parcel to be suitable for nesting.

### **CHAPTER 3--- EFFECTED ENVIRONMENT (Miscellaneous Comments)**

1. P. 262---Neither Bureau Sensitive Species, Bureau Assessment Species nor federal candidate species on O&C and CBWR lands can receive management protections that are inconsistent with sustained yield timber management..
2. P. 317---Bureau Sensitive Species on O&C and CBWR must be managed consistent with sustained yield timber production under the O&C Act.
3. PP. 422-424---The section concerning the National Landscape Conservation System should be revised to make clear that management within these lands will include sustained yield timber production under the O&C Act unless specific areas have received a Congressional designation that precludes such timber management.
4. Add a discussion of environmental justice for rural counties. The discussion should focus on levels of poverty and economic impacts on those at or near the poverty line that would result from each of the alternatives.

### **CHAPTER 4---ENVIRONMENTAL CONSEQUENCES, PAGES 473-793**

All sections in this chapter need to be revised to disclose environmental consequences resulting from addressing the Homebuilders decision by the Supreme Court as described above and other recommended changes identified above for Chapters 1 through 3. Significant modifications need to occur in sections on Socio-economics, Timber, Botany, Wildlife, Fire and Fuels, and the National Landscape Conservation System. The section on Environmental Justice should be updated with statistics more current than the 2000 census data used in the draft EIS. There should be additional discussion of how those living at or near the poverty line are affected by the employment

prospects associated with each alternative, and how those populations are affected by the level of county services that would be available or not, depending on the shared timber receipts associated with each alternative.

#### **CHAPTER 4---MARBLED MURRELET PAGES, PAGES 674-682**

The environmental consequences analysis is deficient and its conclusions are not supported by existing scientific data that can be found in the recovery plan or the critical habitat rule. The results described in the draft EIS are based on the growing of trees into mature and structurally complex forests on 891,000 acres of BLM lands within zones 1 and 2. Suitable nesting habitat, quality and quantity, cannot be based solely on this one factor. This analysis needs to be rewritten to reflect a more accurate depiction of the BLM lands' physical and biological capabilities to provide suitable nesting habitat for the species. (See comments above for Chapter 3, Marbled Murrelets.) The analysis in the EIS must address the affects of each of the nesting habitat issues listed below. Analysis of these issues must examine effects from a landscape perspective, as well as from the more limited BLM ownership perspective:

1. BLM's checkerboard ownership pattern and its ability to provide large contiguous blocks of mature and structurally complex forest habitat for nesting is limited. Use as a foundation data described on pages 13, 17, 68 and 183-191 of the draft EIS. For example, page 189 states that BLM's ability to influence resource outcomes often depends upon the amount and location of its land ownership in relation to a particular resource. In addition, page 191 states that most of the BLM lands comprise less than one-third of a 5<sup>th</sup> field watershed. By contrast, most of the lands managed by the Forest Service are in large contiguous blocks.
2. The BLM's ability to provide habitat with low amounts of edge and fragmentation, far away from human activity that has suitable nesting characteristics is limited.
3. Marbled Murrelets are very sensitive to fragmentation and reproductive success is adversely affected by fragmentation. Given BLM's scattered ownership in zones 1 and 2, how does this affect BLM's ability contribute to conservation and recovery of the species? Conversely, given the large contiguous blocks managed by the Forest Service, how does this affect its contribution to recovery?
4. Environmental consequences associated with reserving occupied sites based solely on survey needs to be addressed. Are these occupied sites being actually used for nesting or does the area really offer potential based on the above factors and requirements for suitable nesting habitat?

5. Increases/decreases in Marbled Murrelet nesting habitat for any alternative must be based on the habitat requirements of the species and not just on the capability of growing trees overtime. Tables for zone 1 and 2 should be developed to show suitable nesting habitat (quality and quantity) overtime by ownership at the landscape level.

### VOLUME 3

1. PP. A930-A932---Add a complete discussion of the Homebuilders decision by the U.S. Supreme Court and how it affects nondiscretionary actions by the BLM.
2. PP. A933-A934--- Add a discussion of the savings provision in FLPMA preserving the dominance of the O&C Act with regard to management of timber resources.
3. P. A931---The discussion of Portland Audubon includes the following statement: "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." What the court actually said was the O&C Act "has not deprived the BLM of all discretion with regard to either the volume requirements of the Act or the management of the lands entrusted to its care."

Thank you for considering our comments.

THE ASSOCIATION OF O&C COUNTIES

By:   
Kevin Q. Davis, Attorney for the Association

cc: Dick Prather