



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Oregon State Office
P.O. Box 2965
Portland, Oregon 97208

IN REPLY REFER TO:

1610 (WOPR) (OR-930)

DEC 30 2008

The Honorable Theodore R. Kulongoski
Governor of Oregon
160 State Capitol
900 Court Street
Salem, Oregon 97301-4047

Dear Governor Kulongoski:

Thank you for your letter of December 8, 2008, concerning the Bureau of Land Management's (BLM) Proposed Resource Management Plan (PRMP) for BLM-administered public lands, primarily in western Oregon. As set forth in the BLM's planning regulations, the purpose of the Governor's consistency review is to ensure consistency of the PRMP with officially approved or adopted resource-related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments, and Indian Tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies, and programs of Federal laws and regulations applicable to public lands (43 CFR 1610.3-2(a)).

First, let me say how much I appreciate your commitment to the completion of a plan that establishes certainty for Oregon's counties relative to funding for local governments, assures a continued, sustainable stream of wood products to contribute to local economies, and contributes the full range of other social and ecological benefits that the public lands must continue to provide. I especially appreciate the contributions to the planning process made by the Oregon Department of Environmental Quality (DEQ), the Oregon Department of Forestry, the Oregon Department of Fish and Wildlife, the Oregon Department of Transportation and six other State agencies. Since December 1, 2005, these agencies, along with other formal cooperators, have offered many comments and suggestions that helped the BLM shape the range of alternatives, improve the environmental analysis, and select the PRMP.

As you know, the planning process was designed to explore various approaches to managing BLM-administered public lands within the planning area, primarily lands classified as Oregon and California (O&C) Land Grant lands, for permanent forest production in conformity with the principles of sustained yield, consistent with the O&C Lands Act. The O&C Lands Act provides the authority for management of O&C lands, along with Coos Bay Wagon Road lands, and directs that these timberlands 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 intent of the O&C Lands Act was to provide a future source of timber which would contribute to local economic stability, protect watersheds, and help regulate stream flows. The O&C Lands Act also required that 75 percent of the revenue generated from management of the lands be returned to the 18 counties that contained the O&C lands. In 1953, the O&C counties began to return 25 percent of their share of the receipts to the Federal Government for the development and management of the O&C lands. These funds were originally used by the BLM for road construction, reforestation, and thinning of young forests and later for restoration work and watershed improvement projects. I am very proud of the many accomplishments attributed to the longstanding partnership between the O&C counties and the BLM.

In my correspondence to you dated October 8, 2008, initiating the 60-day Governor’s consistency review, the BLM provided you with its analysis of the PRMP’s consistency with applicable state plans. As explained in that analysis, the BLM found that the PRMP is consistent with state plans and the policies or programs contained therein. In your letter of December 8, 2008, you do not disagree with the BLM’s analysis, nor do you identify any officially approved plans, policies, or programs of State and local governments with which the PRMP is inconsistent. Your letter does, however, provide comments and concerns related to the PRMP based on the twelve principles you identified earlier in the planning process. I address each of these comments and concerns below.

Principle 1: You raise concerns about whether the BLM will be able to achieve the full implementation of the PRMP and question whether the plan will be “fully institutionalized” within the BLM. You specifically mention the direction of operating priorities to assure implementation and support from Congress and the future Administration.

Response: Whether the plan will achieve full implementation and be “fully institutionalized” depends on numerous factors. The PRMP does not identify the timing, place, or design of any future site-specific projects that would occur on these lands, nor does the PRMP create any legal right that would allow or authorize ground-disturbing activities without further agency decision-making and compliance with applicable statutes, including the Endangered Species Act (ESA). This is consistent with the purpose of land use plans as described in the Federal Land Policy and Management Act (FLPMA) and the BLM planning regulations, i.e., they are documents that are a preliminary step in the overall process of managing public lands and are designed to guide future management decisions but do not, by themselves, authorize any on-the-ground activities. The ultimate implementation of future site-specific management decisions that implement the vision established within the land use plan is dependent upon such factors as the will and commitment of future BLM decision makers, Departmental budget submissions, Congressional appropriations, the design of future project proposals, and the outcome of future National Environmental Policy Act (NEPA) processes and future ESA compliance. Also, if history is any guide, future site-specific decisions are likely to face administrative and judicial challenges that could delay or prevent projects from taking place. I recognize the controversial nature of forest

management decisions in the Pacific Northwest and agree that support for the implementation of the PRMP will be important. The BLM will work with the future Administration and Congress to implement the President's budget consistent with the policies and programs of the new Administration.

Principle 2: You state that it would be helpful if the PRMP more clearly pointed out the number of programs for effectiveness monitoring and identified how such monitoring will inform planned adaptive management.

Response: The PRMP establishes intervals and standards for monitoring of the plan based on the sensitivity of the resource to the decision involved. The monitoring plan is designed to focus specifically on monitoring the resource management plan itself and is not intended as an overarching plan that addresses all ongoing monitoring and research efforts. As such, the monitoring plan in the PRMP does not attempt to address science questions or issues of a regional or interagency scale. There are many ongoing local, regional, interagency, and research efforts in which the BLM currently participates and will continue to participate, such as the Aquatic Riparian Effectiveness Monitoring Program and the Watershed Research Cooperative with Oregon State University.

Principle 3: You suggest that the BLM consider a phased approach to increasing harvest that takes into account: (1) public sensitivity to clearcutting and harvest of older trees; (2) the philosophy and guidance of a new Presidential Administration; (3) the need to build the confidence and support of the Oregon delegation and Congress for the increased harvest levels, which will then translate into appropriations to the BLM; and (4) the fact that the Secure Rural Schools and Community Self-Determination Act provides additional time.

Response: The PRMP provides for a phased approach. For example, in accordance with the PRMP, for two years from the date the Record of Decision (ROD) is approved, the BLM will offer no regeneration (clearcut) sales in Northwest Forest Plan (NWFP) Late-Successional Reserves (LSR). For this two-year period, regeneration sales will only occur in the overlap between NWFP Matrix and Adaptive Management Areas (AMA), and the Timber Management Areas (TMA) of the PRMPs. In addition, the BLM will phase increases in the timber harvest program over a five-year period. This "ramp up" period approximately coincides with the end of the Secure Rural Schools payments in 2012, avoiding substantial disruptions in county budgets. The actual rate of implementation of the PRMP will be dependent on the President's annual budget requests and appropriations by Congress.

Regarding public sensitivity to the harvest of older trees, it is important to note that, under the PRMP, most of the older forests would be within land use allocations managed for non-timber resources and, thus, would not be harvested. In addition, substantially all of the remaining older forests would be deferred from harvest for at least 15 years. The PRMP actually provides a higher level of protection to older trees for the first 15 years than the current NWFP-based land use plans.

Regarding public sensitivity to clearcutting, the PRMP would emphasize thinning. In fact, almost twice as many acres would be harvested by thinning than by clearcutting in the first decade. Clearcutting would only be used within the TMA land use allocation, which constitutes only 26 percent of the lands within the planning area.

Principle 4: You raise several concerns related to the BLM's "no effect" determination under the ESA.

Response: Section 7(a)(2) of the ESA requires Federal agencies to ensure that their proposed actions will not be "... likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of the critical habitat of such species." 16 U.S.C. § 1336(a)(2). However, not all proposed actions of Federal agencies are subject to the consultation requirement. The Section 7 regulations state that consultation is required only when a Federal agency determines that its proposed action "... may affect listed species or critical habitat." 50 C.F.R. § 401.14(a).

In determining whether a proposed action "may affect" a listed species, or, conversely, whether there will be "no effect," a Federal agency must determine: what activities are encompassed by its proposed action, what the effects of those activities are likely to be on the environment, and whether those effects will "pose any effect" on a listed species or critical habitat. Only those proposed actions that "may affect" a listed species or critical habitat are subject to the ESA's Section 7 consultation requirements.

Consistent with Section 7 of the ESA, when an action agency determines that a Federal action will have no effect on listed species or critical habitat, the agency will make a "no effect" determination. In that case, the ESA regulations do not require concurrence from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services), and the agency's obligations under Section 7(a)(2) for that action are complete.

Here, the BLM has consulted with the Services throughout the development of the PRMP. Through our coordination efforts, the BLM and the Services have met and communicated regularly and often. The development of the PRMP has been greatly influenced by these efforts, and the new plan is consistent with the recovery plans and designations of critical habitat for listed species. In fact, the opportunity for the BLM to prepare a plan that was consistent with recovery plans was one of the factors considered when the decision was made to initiate the planning effort.

The adoption of the PRMP will, by itself, have no "direct effects" on listed species or critical habitat because the PRMP will be implemented only through the subsequent Federal approval of future proposed projects and activities consistent with the plan's management direction and because there are numerous steps and decisions that must occur before any on-the-ground activities can actually occur. I recognize, however, that it is reasonable to expect that some future actions that may affect listed species or critical habitat will be taken in conformity with the goals set forth in land use plans. That is, after all, the purpose of a land use plan – to provide a framework in which future decisions authorizing specific on-the-ground activities can be made.

Under the ESA regulations, however, before the Services treat the effects of any future action as “indirect effects,” the agency must find that such effects will be “caused by” the adoption of the plan and “reasonably certain to occur.”

The basis for our “no effect” determination is that the land use plan decisions themselves included in the PRMP have no indirect effects on listed species or critical habitat. This is because the effects on listed species or critical habitat of future actions taken in accordance with the PRMP do not meet the requirements necessary to be properly considered indirect effects of the adoption of the PRMP.

The PRMP does not identify the timing, place, or design of any future site-specific projects that would occur on these lands. Nor does the PRMP create any legal right that would allow or authorize ground-disturbing activities without further agency decision-making and compliance with applicable statutes, including the ESA. This is consistent with the purpose of a land use plan as described in the FLPMA and the BLM’s planning regulations. As you note, the ultimate implementation of site-specific management decisions that implement the vision established within the land use plan is dependent upon such factors as the will and commitment of future BLM decision makers, Departmental budget submissions, Congressional appropriations, and the outcomes of future NEPA processes and future ESA compliance. Site-specific decisions are subject to administrative and judicial challenges that could delay or prevent projects from taking place. In the future, when a specific project is proposed, sufficiently detailed information will be available for analyzing the effect of the project on listed species or critical habitat under Section 7(a)(2) before the BLM issues a contract, or any other form of a legal right, or otherwise approves any ground-disturbing activity.

It is important to recognize that the ESA’s “reasonably certain to occur” standard is a different and stricter standard than the “reasonably foreseeable” standard under NEPA. In the preamble to the ESA regulations, the Services explained that “reasonably certain to occur” requires “. . . more than a mere possibility that the action may proceed” and that agencies should “. . . [bear] in mind the economic, administrative, or legal hurdles which remain to be cleared” before the action may occur. 51 Fed. Reg. 19926 at 19933 (June 3, 1986).

The ESA Section 7 Handbook provides additional illustration of the exacting nature of determining whether the effect of an action is “reasonably certain to occur.” The Services explain in the discussion of cumulative effects that:

“Indicators of actions ‘reasonably certain to occur’ may include but are not limited to: approval of the action by State, Tribal, or local agencies, or governments (e.g., permits, grants); indications by the State, Tribal, or local agencies or governments that granting authority for the action is imminent; project sponsors’ assurance the action will proceed; obligation of venture capital; or the initiation of contracts.” ESA Section 7 Handbook, at 4-32.

This is further explained in a 2003 Joint Agreement among the BLM, Forest Service, and the Services, which states:

“‘Reasonably certain to occur’ requires existence of clear and convincing information establishing that an effect to the species or its habitat that will be caused by the proposed action is reasonably certain to occur. This is a rigorous standard; it is not based on speculation or the mere possibility that effects to the species may occur. Nor is this a foreseeability standard as is commonly used in NEPA analysis. If no such information exists, or is speculative or not credible, then that effect is not reasonably certain to occur and should be disregarded. In no event should a conclusion be reached that some effect is reasonably certain to occur absent clear and convincing information to support that finding in the record.”

Therefore, based on our understanding of the ESA regulations, the BLM determined that the effects of future projects taken in accordance with the PRMP are not indirect effects of the adoption of the land use plan. I also note that, because no actual projects can be identified at this time, the BLM’s decision to adopt the PRMP does not alter the environmental baseline or provide a basis for a determination of “incidental take,” which is typically part of a consultation process.

The “no effect” determination for the PRMP was made based on the planning decisions in the PRMP and does not necessarily establish a precedent for other broad, programmatic, and/or regional-level land use plans. Each plan will need to be evaluated on a case-by-case basis to determine whether it will have effects cognizable under the ESA. Moreover, the PRMP will not pose a problem for the State of Oregon in obtaining an Incidental Take Permit under a Habitat Conservation Plan for the Elliott State Forest. The PRMP is consistent with the recently adopted Recovery Plan for the Northern Spotted Owl and would result in relatively little change in management direction to the BLM-administered lands near the Elliott State Forest.

I recognize that the approach the BLM is taking here is different from the BLM’s past practices. I assure you, however, that the BLM carefully considered the PRMP and the ESA implementing regulations in making its decision. The recently published revised Section 7 regulations (73 Fed. Reg. 76272, Dec. 16, 2008) provide discussion of the Service’s interpretation of effects cognizable under the ESA. This discussion reaffirms the approach the BLM is taking here.

Principle 5a: You suggest that the BLM should strengthen the monitoring program and work directly with the Oregon DEQ and BLM science team to include greater effectiveness monitoring information so needed adjustments can be made to BLM land management in the future. You also suggest that the BLM should work with the Oregon DEQ and communities in advance of harvest in watershed areas above community drinking water intakes to address concerns on the part of water users.

Response: The BLM District Managers will continue to work directly with the Oregon DEQ to address water quality issues at the local level to ensure that BLM actions comply with the Clean Water Act (CWA) consistent with approved Total Maximum Daily Load (TMDL) Strategies and Water Quality Restoration Plans (WQRP). At the project level, if the BLM or the Oregon DEQ identifies specific watersheds or projects where the CWA standards would not be achieved, the BLM will work with the Oregon DEQ to address those concerns. Based on the analysis in the

Final Environmental Impact Statement (EIS), implementation of the PRMP would contribute to maintaining or improving water quality. The monitoring plan for the PRMP establishes intervals and standards for monitoring effects on water quality over the life of the plan. Your comments do not assert that the analysis in the environmental impact statement is flawed or that the PRMP would have unidentified effects on water quality or would in any manner not comply with the Clean Water Act. The ROD will make clear that the BLM is committed to working with the Oregon DEQ to achieve TMDL and WQRP performance objectives.

Principle 5b: You state your support for designation of Wild and Scenic Rivers, wilderness, and other sensitive areas and suggest that the PRMP should be amended to address the potential, future designation of these areas.

Response: The PRMP was developed consistent with the current Congressional designations of Wild and Scenic Rivers and Wilderness Areas. I am aware of your support for Wild and Scenic Rivers Act designation for additional lands along the Rogue River. Most of the approximately 70,500 acres of BLM-administered lands included in the proposed Oregon Treasures Act of 2008 are O&C lands. As you know, the BLM is mandated to provide for permanent forest production on the O&C lands while complying with other applicable laws, such as the ESA and the CWA. Applying the protections of the Wild and Scenic Rivers Act to non-designated segments within the O&C lands would not be consistent with the O&C Lands Act or necessary to comply with other existing law.

It is important to note, however, that approximately 51,100 acres of the BLM-administered lands in the proposed Oregon Treasures Act of 2008 are identified as a Late-Successional Management Area (LSMA) in the PRMP. This represents about 72 percent of the total BLM-administered land affected by the proposed legislation. Within the LSMA, timber harvest is limited to treatments such as thinning or creating small openings in the forest canopy in order to maintain or enhance older forest characteristics, consistent with the Final Recovery Plan for the Northern Spotted Owl.

The issue of management of eligible Wild and Scenic Rivers and lands with wilderness characteristics has already been raised in the public participation process and addressed in the Draft/Final EIS. As with any land use plan, in the event legislation affecting lands in the planning area is signed into law, the BLM would amend or revise the land use plans to be consistent with the new law. This is standard practice for the BLM. It is not necessary or appropriate to speculate about future legislation in a PRMP. Even introduced legislation is often modified before it is passed, so addressing potential, future legislation would make the planning process burdensome and inefficient.

Principle 10: You state that a number of private property owners have expressed concern over the designation of Off-Highway Vehicle (OHV) areas under the PRMP. You state that the PRMP does not adequately describe how the BLM will monitor and regulate OHV use.

Response: Consistent with your principle that the BLM provide a sustainable mix of outdoor recreation opportunities, the BLM considered to what extent lands could be made available for future OHV use. I recognize that OHV use continues to be an important recreational activity in

Oregon and that such use must be managed to address the associated environmental and social impacts. The PRMP-designated lands available for OHV use but described limits on where and under what conditions such use would occur to provide greater resource protection. Implementation of decisions in the PRMP will be accomplished through a subsequent route identification process, wherein the BLM will work with the public, including nearby private property owners, to identify specific roads and trails that would be designated for OHV use.

Several OHV emphasis areas were also identified where more focused OHV recreation opportunities will be provided. As more site-specific management plans for these areas are developed, the BLM will work with the public, including nearby private property owners, to address issues such as monitoring and overall site management.

Principle 12: You suggest that the BLM should enhance the PRMP with detailed strategies for monitoring for the effects of global warming, commit to supporting needed research to address critical uncertainties, and identify a decision framework for adaptations that will be needed.

Response: The BLM has participated and will continue to participate in regional and national efforts to monitor the effects of global warming and support needed research to address critical uncertainties. This continued participation and support does not require any change to the PRMP.

The Final EIS analyzed the potential future effects of climate change and identified important areas of uncertainty related to regional climate change over the next century. As new information becomes available on regional climate change, the BLM will evaluate the new information to determine if additional analysis and a resource management plan amendment or revision is necessary. This adaptive management decision framework is described in the Final EIS and is no different for new information on climate change than new information on other topics relevant to environmental concerns.

Furthermore, the Final EIS analyzed the effect the implementation of the PRMP has on carbon storage and concluded that implementation of the PRMP would result in an increase in carbon storage, contributing to a net reduction of overall emissions to the atmosphere.

General comment: You request that the BLM initiate “. . . a new comment period to allow Oregonians to address these issues” and that the BLM not adopt the Record of Decision until your concerns are addressed.

Response: The comments and suggestions raised in your letter were not related to any valid inconsistency between the PRMP and officially approved or adopted resource-related plans, nor did you recommend specific changes to the PRMP, which were not raised during the public participation process. As such, providing an additional comment period for the public to comment on your concerns would not be consistent with the BLM’s planning regulations.

This public planning process has been underway since 2005 and has included newsletters, meetings, workshops, comment periods, and a protest period. In addition, the BLM worked with cooperators from four Federal agencies, ten State agencies, and seventeen county governments.

The BLM also worked with nine Federally recognized tribes within the planning area or with interests in the planning area in government-to-government relationships. The BLM held over 170 public meetings around the state to allow the public opportunities to learn about the plan revision and engage the agency in a dialogue.

The public comment on the Draft EIS was extended to five months, rather than the usual three months. Given the variety of public involvement opportunities, the extended public comment period, the volume of submissions during that comment period, and the volume of submissions during the recently-closed protest period, there is no basis for concluding that the public has not had adequate opportunities for involvement regarding these resource management plan revisions or the topics you raise in your letter.

I am confident that the PRMP appropriately addresses the BLM's obligations to provide for permanent forest production on the O&C lands while achieving water quality standards and contributing habitat to the recovery of listed species. The plan also provides a full range of other social and ecological benefits. While not all those interested in the management of these lands will find that the plan adequately satisfies their personal interests, I believe that most who give the plan an objective review will find the plan worthy of their support, or at least deserving a chance to be tested on-the-ground.

Thank you again for your continued interest and involvement in the planning process. I remain committed to working closely with you and the State of Oregon to resolve issues and concerns as the plan is implemented. I look forward to working with you and your natural resources agencies to ensure that the BLM-administered lands in Oregon continue to be available for the use and enjoyment of Oregonians as well as the American public. I intend to make it a priority to ensure that the new BLM Director and Secretary of the Interior understand the important social, economic, and ecological values of these lands and the unique relationship between the BLM and the O&C counties under the O&C Act. I also plan to stress the importance of establishing consistent direction on forest management policy and clear expectations on implementing the new plan. If you have any further questions, please don't hesitate to give me a call.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward W. Shepard". The signature is fluid and cursive, with a large loop at the end.

Edward W. Shepard
State Director,
Oregon/Washington