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## The Proposed Transfer of BLM Timber Lands to the State of Oregon: Environmental and Economic Questions

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## THE PROPOSED TRANSFER OF BLM TIMBER LANDS TO THE STATE OF OREGON: ENVIRONMENTAL AND ECONOMIC QUESTIONS

*Michael C. Blumm\* & Jonathan Lovvorn\*\**

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## I. INTRODUCTION

In 1976, thirty years after the founding of the Bureau of Land Management (BLM), Congress finally gave the BLM a mission comparable to that of the Forest Service<sup>1</sup> by enacting the Federal Land Policy and Management Act (FLPMA).<sup>2</sup> FLPMA's political centerpiece was its bold declaration of national policy that "the public lands be retained in federal ownership."<sup>3</sup> Today, twenty years later, FLPMA's resolution of the ques-

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1. See CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST* 98 (1992). See also Ken Miller, *BLM's 50th Marked by Unrest, Controversy*, GANNETT NEWS SERV., July 11, 1996, at A1.

2. 43 U.S.C. §§ 1701-1784 (1994).

3. 43 U.S.C. § 1701(a)(1) (1995). The first provision of FLPMA declares that "public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided in this Act, it is determined that disposal of a particular parcel will serve the national interest." *Id.* FLPMA permits sale only when a tract is "difficult and uneconomic to manage," the property at issue "was acquired for a specific purpose and . . . is no longer required for that or any other federal

tion whether unreserved federal lands should be retained or disposed endures, despite occasional attacks from "sagebrush rebels,"<sup>4</sup> "county supremacy" advocates,<sup>5</sup> and members of the "wise use" movement.<sup>6</sup>

The most recent challenge to the federal policy of public lands retention is being led by what might be called "forest production" advocates.<sup>7</sup> The forest production advocates, mobilized by the reduced annual timber harvest on federal lands in the Pacific Northwest, seek the transfer of more than two million acres of BLM timber lands to the state of Oregon.<sup>8</sup> A bill in the

purpose," or where "disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership." *Id.* § 1713(a).

4. See, e.g., Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL L. 847, 848 (1982); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

5. See Timothy Egan, *Court Puts Down Rebellion Over Control of Federal Land*, N.Y. TIMES, Mar. 16, 1996, at A3. See also Erik Larson, *Unrest in the West; Welcome to Nevada's Nye County, Whose Angry Residents are Spearheading the Region's Charge Against Washington*, TIME, Oct. 23, 1995, at 52. The county supremacy movement suffered a setback in March of 1996 when a federal district court in Nevada ruled, contrary to the position of the county supremacists, that "the United States owns and has the power and authority to manage and administer . . . public lands." *United States v. Nye County, Nevada*, 920 F. Supp. 1108, 1120 (D. Nev. 1996). Undeterred, Nevada voters recently approved a ballot measure amending the state constitution to remove a clause disclaiming all state interests in unappropriated public lands. Although primarily symbolic, the amendment aims to bolster Nevada's attempts to convince Congress to relinquish some or all of the federal lands that comprise 87% of Nevada. See Michelle DeArmond, *Vote for Public Lands Ballot Cheers Sagebrush Rebellion Supporters*, Las Vegas Rev.-J., Nov. 8, 1996, at 4B.

6. For a general discussion of the wise use movement, see Rene Erm II, Comment, *The "Wise Use" Movement: The Constitutionality of Local Action on Federal Lands Under the Preemption Doctrine*, 30 IDAHO L. REV. 631 (1993-1994). See also Keith Schneider, *Land Owners Unite in Battle Against Regulators*, N.Y. TIMES, Jan. 9, 1995, at A2.

7. We derive the phrase "forest production" from § 1181(a) of the Oregon & California Lands Act of 1937. See *infra* notes 95-99 and accompanying text. Section 1181(a) provides that O & C timber lands "shall be managed . . . for permanent forest production." In 1990, a panel of the Ninth Circuit Court of Appeals held that "forest production" in the O & C Act means "timber production," not the production of other forest values and amenities. *Headwaters, Inc. v. BLM, Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990), discussed *infra* notes 84-103 and accompanying text.

8. See Peter Sleeth, *Oregon Counties Will Ask Congress to Turn Over Land*, PORTLAND OREGONIAN, Jan. 15, 1995, at D1. See also Information Prepared by the Independent Forest Products Association, *The Oregon and California Railroad Lands, a Unique Oregon Asset*, <<http://www.transport.com/~ifpa/oandc.html>>. BLM estimates that the lands at issue contain 350,000 acres of old growth timber, 112 developed recreational sites, and are worth approximately \$29 billion. See Scott Sonner, *Land Bureau Wants Clinton to Veto Forest Transfer Bill*, PORTLAND OREGONIAN, July 26, 1996, at C4. In 1995 the Oregon legislature formally requested that Congress transfer BLM timber lands to the state. H. Con. Res. 14, 68th Leg. (1995). Shortly thereafter, Oregon Governor John Kitzhaber assembled a working group, led by Oregon Board of Forestry Chair Janet McLennan, to study the feasibility of the proposed transfer. In December of 1995, Governor Kitzhaber tentatively endorsed the proposed transfer, with the reservation that any transfer "must include high standards for restoring populations of threatened species and a prohibition on setting a

104th Congress, House Bill 3769, would have effected a wholesale transfer of the revested Oregon & California Railroad and related public lands ("O & C lands") managed by the BLM.<sup>9</sup> House Bill 3769 was actually a sibling of more grandiose land transfer proposals submitted in the early days of the 104th Congress's Republican revolution.<sup>10</sup> Like the transfer proposals that preceded it, House Bill 3769 drew vehement opposition from both environmentalists and the Clinton Administration.<sup>11</sup>

Just as the late 1970s sagebrush rebellion resulted from western ranchers' dissatisfaction with increased federal management and potential grazing reductions threatened by FLPMA's multiple-use mandate,<sup>12</sup> the forest production advocates represent a reaction to reduced annual timber harvests due to requirements of the Endangered Species Act and President Clinton's 1993 Northwest Forest Plan.<sup>13</sup> The rallying cry of the forest production advocates is hardly new or unique. In fact, the political and legal foundation for each of the modern public lands "insurrections" can be traced as far back as 1828, when several western states first challenged federal authority to manage public lands.<sup>14</sup>

minimum timber harvest." See Governor's Office Press Release, *Governor Willing to Discuss Land Transfer and Exchange Proposals*, Dec. 29, 1995, <<http://www.governor.state.or.us/governor/press/p951229b.htm>>. See also *Kitzhaber Plans to Explore State Takeover of O & C Lands*, PORTLAND OREGONIAN, Dec. 30, 1995, at B3.

9. H.R. 3769, 104th Cong. (1995).

10. See, e.g., H.R. 2032, 104th Cong. (1995); S. 1031, 104th Cong. (1995). Both of these bills would have authorized states to demand the transfer of all BLM lands located within their boundaries.

11. See, e.g., Oregon Natural Resources Defense Council, *Governor Approves Forest Giveaway*, Mar. 31, 1996, <<http://www.onrc.org/~onrc/alerts/010.giveaway.html>> (arguing that the transfer is "intended to take the forests out from under strong environmental standards and to allow environmentally destructive clear-cutting. By giving these lands to the state of Oregon or other entities, they will be open to increased clear-cutting under much weaker environmental protections."). See also Sonner, *supra* note 8; Jeff Mapes, *Kitzhaber May Support Transfer of O & C Lands*, PORTLAND OREGONIAN, Aug. 27, 1995, at D1; Brent Walth, *Bill Would Give BLM Lands to Oregon*, PORTLAND OREGONIAN, July 11, 1996, at A1.

12. See WILKINSON, *supra* note 1, at 99. See also Babbitt, *supra* note 4, at 848; Leshy, *supra* note 4, at 317-21.

13. See FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL AND STANDARDS AND GUIDELINES FOR MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994). See also R.O. Fety, *O & C Counties Had 126-Year History Behind Claim*, PORTLAND OREGONIAN, Oct. 10, 1995, at B7; Peter Sleeth, *GOP Plan Would Give U.S. Lands To State*, PORTLAND OREGONIAN, May 11, 1995, at B1; Information Prepared by the Independent Forest Products Association, *The Oregon and California Railroad Lands, a Unique Oregon Asset*, <<http://www.transport.com/~ifpa/oandc.html>>.

14. Between 1828 and 1833, the governor of Illinois, along with the governors of several other western states, argued that Congress lost the power to control or retain public lands within a state once that state was admitted to the Union. See PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 9 (1968). For a complete discussion of the "equal footing" doctrine and its relationship to

The O & C land transfer proposal is unusual in one respect, however. The O & C lands have a "peculiar history"<sup>15</sup> which sets them apart from the bulk of the BLM's public land holdings.<sup>16</sup> As a result, it may not be quite accurate to dismiss the forest production advocates as the latest "pseudopopulist group" to raise the sagebrush banner.<sup>17</sup>

Despite the unique history and status of the lands at issue in House Bill 3769, the basic questions about the loss of public ownership still apply: What does the national public gain? What does the national public lose? How does the state benefit? What are the potential effects on the state economy and the environment? The answers to these questions will determine not only the fate of the O & C lands but will affect all of the BLM's unreserved lands, since there remain serious proposals in the 105th Congress to transfer federal lands to the states.<sup>18</sup> Thus, the debate over the future of the O & C lands may be a harbinger of the resolution of larger proposals to defederalize public lands.<sup>19</sup>

Part II of this article provides a brief review of the "peculiar history" of the Oregon & California Lands. Part III explains the BLM's management duties under the O & C Act, FLPMA, NEPA, and the ESA. Part

the sagebrush rebellion and its predecessors, see Leshy, *supra* note 4, at 317-22. Conflict over the ownership and control of federal lands actually predates the Federal Constitution. In 1779, Maryland, which had no western land claims, refused to ratify the Articles of Confederation until colonies that held western land claims agreed to cede such lands to the federal government. See GATES, *supra*, at 49-57. See also MERRIL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781*, at 200-04 (1963).

15. See *infra* notes 20-53 and accompanying text.

16. See generally Paul G. Dodds, *The Oregon and California Lands: a Peculiar History Produces Environmental Problems*, 17 ENVTL. L. 739 (1987); Jeff Mornarich, Comment, *BLM Timber Management of Western Oregon's Public Domain Lands*, 28 WILLAMETTE L. REV. 653 (1992).

17. See George Cameron Coggins, *Overcoming the Unfortunate Legacies of Western Public Lands Law*, 29 LAND & WATER L. REV. 381, 390 (1993). Professor Coggins claimed that; the wise use movement . . . is the most recent pseudopopulist group to make these sorts of [anti-federal ownership] arguments. Such contentions may seem silly, and they are, but it would be a mistake to laugh them off. Whether articulated or not, these views are deeply held, and with them comes enormous antipathy toward those who want to disturb the status quo by enforcing environmental laws and standards. Many in the West profess to hate all things federal, but none of them turns down federal money.

*Id.* at 391.

18. See PUB. LANDS NEWS, Sept. 19, 1996, at 7 (explaining Senator Craig Thomas' (R. Wyo.) intent to reintroduce former Senate Bill 1031 in the 105th Congress); *Associated Press Political Service Report*, Friday Nov. 8, 1996 (reporting newly elected Wyoming Senator Mike Enzi's statement that Senator Thomas' federal land transfer bill "absolutely will" be considered in the next Congress). See also Matt Raymond, *Conrad Burns Opposes Bills to Transfer Federal Lands to the States*, WEBWIRE GOV'T PRESS RELEASE, Nov. 21, 1996.

19. For two recent analyses opposing defederalization, see George Cameron Coggins, "Devolution" in *Federal Land Law: Abdication By Any Other Name*, 3 HASTINGS W.-N.W. J. ENV'TL. & POL'Y 211 (1996); Michael C. Blumm, *The Case Against Transferring BLM Lands to the States*, 7 FORDHAM ENVTL. L.J. 387 (1996).

IV examines the proposal to transfer O & C lands to the state, emphasizing the potential benefits and burdens for the state government. Part V explores the effects of the proposed transfer on federal and state environmental regulation and planning for the O & C lands. The article concludes that the transfer scheme envisioned in House Bill 3769 is both economically and environmentally unsound. Moreover, most of the potential benefits cited by the proposal's sponsors can be achieved by less drastic means, such as transferring the O & C lands to the Forest Service, without the resulting loss of public ownership and federal environmental protection.

## II. BACKGROUND: THE "PECULIAR HISTORY" OF THE OREGON & CALIFORNIA RAILROAD LANDS

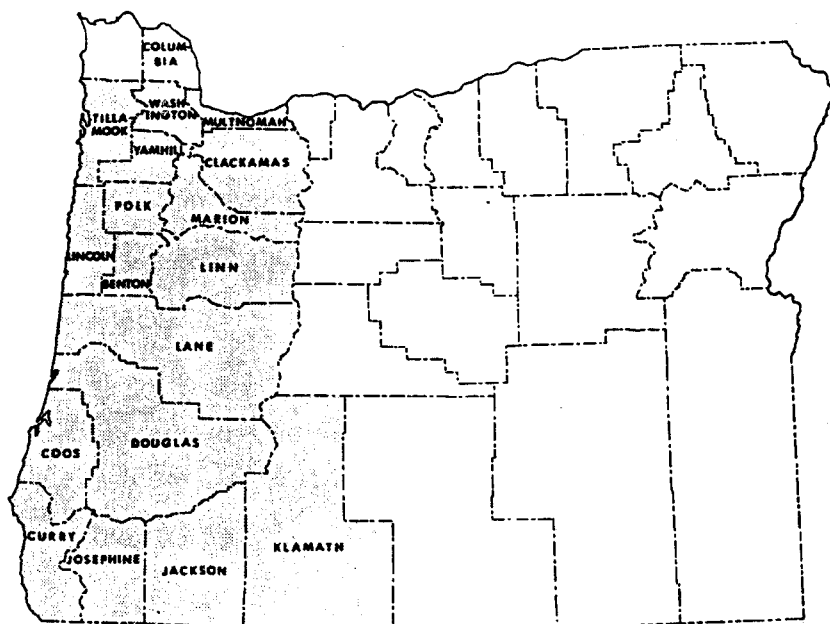
The public lands at issue in House Bill 3769 comprise approximately 2.2 million acres in southern and western Oregon (see map pg 21).<sup>20</sup> Historically, these lands have been extremely productive timber lands, with an average harvest level in excess of one billion board feet per year between 1983 and 1990.<sup>21</sup> The lands also have a "peculiar history" that must be considered in any evaluation of current BLM management prac-

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20. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, 1993 PUBLIC LANDS STATISTICS 9 (1993) [hereinafter 1993 PUBLIC LANDS STATISTICS]; H. R. 3769 § 4 (b), 104th Cong. (1995). Section 4(b)(1) of House Bill 3769 specifically excluded the "controverted lands" from the transfer proposal. See *infra* note 133. The "controverted lands" are approximately 463,000 acres of revested Oregon & California Railroad lands that Congress placed under the jurisdiction of the Secretary of Agriculture in 1954. 1993 PUBLIC LANDS STATISTICS, *supra*, at 9. These lands are managed like national forest lands under the provisions of the National Forest Management Act. *Id.* All revenues derived from the controverted lands, however, are distributed in accordance with the Oregon & California Lands Act of 1937. *Id.* See also 43 U.S.C. § 1181.

21. 1993 PUBLIC LANDS STATISTICS, *supra* note 20, at 33. See also GENERAL ACCOUNTING OFFICE, PUBLIC TIMBER: FEDERAL AND STATE PROGRAMS DIFFER SIGNIFICANTLY IN PACIFIC NORTHWEST 6 (1996) [hereinafter PUBLIC TIMBER]. In contrast, Oregon's roughly 800,000 acres of state owned timber lands yielded an average annual harvest of approximately 226 million board feet between 1977 and 1986. See Logan Jones, *State Forest Land*, in ASSESSMENT OF OREGON FORESTS 52 (Gary J. Lettman ed., 1988). Since 1991, BLM timber sales for the Oregon & California lands have averaged less than 50 million board feet per year, or less than five percent of pre-1990 annual harvest levels. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, BLM FACTS: OREGON AND WASHINGTON 15 (1994) [hereinafter BLM FACTS: OREGON & WASHINGTON]. This severe reduction in timber harvest is a result of the northern spotted owl controversy and the Clinton Administration's Northwest Forest Plan. See GENERAL ACCOUNTING OFFICE, PRIVATE TIMBERLANDS: PRIVATE TIMBER HARVESTS NOT LIKELY TO REPLACE DECLINING FEDERAL HARVESTS 1-2 (Mar. 7, 1995). There is some indication that current harvest levels are artificially low. The General Accounting Office concluded that the current low annual harvest levels are a temporary result of the changes in management structure imposed by the Northwest Forest Plan. *Id.* at 3-4. Because federal timber sales generally require several years to prepare, it may take several years for the Forest Service and BLM to achieve higher annual harvest levels. *Id.*

tices or a proposed change in management structure.<sup>22</sup> This history extends over 130 years and includes the violation of the terms of a federal railroad land grant;<sup>23</sup> reversion of the lands in federal ownership;<sup>24</sup> assignment of responsibility for managing the lands to the Department of the Interior (and eventually to the BLM);<sup>25</sup> dedication of a substantial amount of the revenue stream from the O & C lands to local governments;<sup>26</sup> high levels of timber harvest, especially in the 1980s;<sup>27</sup> and, most recently, a significant decline in timber cutting due to violations of environmental statutes.<sup>28</sup>



THE 18 O&C COUNTIES

22. We adapt the historical background largely from Dodds, *supra* note 16. See also ELMO RICHARDSON, BLM'S BILLION DOLLAR CHECKERBOARD: MANAGING THE O & C LANDS 37 (1980).

23. See *infra* notes 32-34 and accompanying text.

24. See *infra* note 35.

25. See *infra* note 40 and accompanying text.

26. See *infra* notes 48-51 and accompanying text.

27. See *supra* note 21 and accompanying text.

28. See *infra* notes 74-135 and accompanying text.



In 1866, Congress authorized a land grant to facilitate the construction of a railroad line that would connect Portland with the California border, some 300 miles.<sup>29</sup> Three years later, in 1869, Congress amended the 1866 Act to require that lands granted for the construction of the Oregon-California railroad line be sold only to actual settlers, in parcels of 160 acres or less, at a price not to exceed \$2.50 per acre.<sup>30</sup> The Oregon legislature eventually designated the Oregon and California Railroad Company (O & C Railroad Company) to receive this federal grant, which consisted of every odd-numbered alternate section of land for an average of twenty miles on each side of the proposed railroad line.<sup>31</sup>

The Oregon and California Railroad Company subsequently violated the terms of the grant by selling large tracts to various individuals and timber companies at prices well over \$2.50 per acre.<sup>32</sup> In 1908, the Department of Justice responded to increasing state and federal pressure to enforce the terms of the 1866 and 1869 Acts by filing suit against the railroad in the Federal Circuit Court for the District of Oregon.<sup>33</sup> The litigation eventually reached the U. S. Supreme Court, which in 1915 enjoined the O & C Railroad Company from selling any more land or removing timber until Congress had the opportunity to determine how to dispose of the remaining parcels.<sup>34</sup>

29. Act of July 25, 1866, ch. 242, 14 Stat. 239 (1866).

30. Act of April 10, 1869, ch. 27, 16 Stat. 47 (1869). The amendment reflected an 1868 congressional resolution to limit railroad land grants by inserting "homestead clauses" designed to ensure that grant lands were sold to "actual settlers." See David Maldwyn Ellis, *The Oregon & California Lands Grant; 1866-1945*, PAC. N.W. Q. 253 (Oct. 1948).

31. Act of July 25, 1866, ch. 242, 14 Stat. 239 (1866).

32. Dodds, *supra* note 16, at 748-49. For an account of illicit sales of railroad grant lands between 1870 and 1902, see RICHARDSON, *supra* note 22, at 5-10. In 1904, the Portland Oregonian exposed the "actual settlers" clause in the O & C and Coos Bay Wagon Road land grants. *Id.* at 10. This discovery ignited a movement in Oregon to reclaim the lands from the "tyranny of the railroad monopoly." *Id.* Three years later, the Oregon legislature petitioned Congress to enforce the provisions of the land grants. *Id.* In 1908, Congress responded by directing the Attorney General to investigate and take action in response to the O & C land grants problem. *Id.*

33. Dodds, *supra* note 16, at 749. See *United States v. Oregon & California R.R. Co.*, 186 F. 861 (C.C.D. Or. 1911) (declaring the railroad grant lands forfeited because the terms of the 1869 grants were enforceable conditions subsequent).

34. *Oregon & California R.R. Co. v. United States*, 238 U.S. 393, 431-439 (1915). The Supreme Court held that "the railroad company should not only be enjoined from sales in violation of the covenants, but enjoined from any disposition . . . , and from . . . the cutting or removal of any of the timber thereon, until Congress shall have a reasonable opportunity to provide by legislation for their disposition." *Id.* at 438. The Court reversed the Oregon Circuit Court's finding that the terms of the grants were "conditions subsequent" giving rise to forfeiture, holding instead that the grants contained enforceable covenants. *Id.* at 431. See also BUREAU OF GOV'T RESEARCH AND SERVICE, UNIVERSITY OF OREGON SCHOOL OF COMMUNITY SERVICE AND PUBLIC AFFAIRS, *THE O & C LANDS 7-9* (1981). The remedy for breach of covenant is damages or injunctive relief, not forfeiture. See RICHARD D. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 676 at 60-112 (1996). The Supreme Court also held that if and when the federal government reclaimed the lands, the O & C

The year after the Court's decision, Congress responded by reverting all remaining unsold O & C Railroad lands in the federal government.<sup>35</sup> The Chamberlain-Ferris Act of 1916 created a complicated multi-part distribution scheme for revenues derived from O & C timber sales.<sup>36</sup> Under the Act, timber sale revenues would first compensate the O & C Railroad Company for any unsold lands reverted in the United States;<sup>37</sup> the federal treasury then would recoup unpaid O & C Railroad Company local property taxes that the federal government previously advanced to the O & C counties.<sup>38</sup> The legislation divided any remaining timber revenues equally between the state and federal governments.<sup>39</sup> Notably, Congress placed responsibility for management of the reverted lands in the Department of the Interior, not the U.S. Forest Service.<sup>40</sup> The decision marked a major victory for the Department of the Interior in its decade old battle with the Forest Service for control of the nation's forest lands.<sup>41</sup>

By 1926, Congress concluded that the 1916 Chamberlain-Ferris Act was inadequate because the O & C Railroad Company had not been compensated for unsold grant lands, the federal government had not been reimbursed for unpaid taxes, and no residual funds had been disbursed to

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Railroad Company had to be compensated for the value of unsold lands granted by the Acts of 1866 and 1869. 238 U.S. at 439.

35. Act of June 9, 1916, ch. 137, 39 Stat. 218 (1916).

36. Act of June 9, 1916, ch. 137 § 5, 39 Stat. at 220.

37. The Supreme Court subsequently determined that compensation should be calculated at the statutory rate of \$2.50 per acre, as provided in the Act of 1869. Oregon & California R.R. Co. v. United States, 243 U.S. 549, 559-60 (1917).

38. Act of June 9, 1916, ch. 137 § 10, 39 Stat. at 220. The O & C Railroad Company ceased paying taxes in 1913, when the Oregon Circuit Court declared that unsold grant lands were forfeited. See RICHARDSON, *supra* note 22 at 15-16. Between 1913 and the U.S. Supreme Court's decision in 1915, the U.S. Treasury paid local property taxes on the O & C lands amounting to \$1.5 million, in the belief that the lands had been forfeited to the federal government. See BUREAU OF MUNICIPAL RESEARCH AND SERVICE, UNIVERSITY OF OREGON, O & C COUNTIES: POPULATION, ECONOMIC DEVELOPMENT, AND FINANCE 24 (1957).

39. Act of June 9, 1916, ch. 137 § 10, 39 Stat. at 220.

40. Act of June 9, 1916, ch. 137 § 2, 39 Stat. 219 (1916). Two commentators have suggested that the decision to place the reverted lands within the Department of Interior indicated that Congress intended the lands for eventual disposal, as opposed to reservation and management under the jurisdiction of the Forest Service. See, e.g., SAMUEL T. DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY 106 (2d ed. 1980).

41. For an account of the early political struggle between the Department of the Interior and the Forest Service for control of the O & C lands, see RICHARDSON, *supra* note 22 at 16-57. The Forest Service has continued its efforts to acquire Interior's O & C lands, with a major transfer of the "controverted" O & C lands in 1954, see *supra* note 20, and the preparation of a detailed proposal for consolidation of BLM and Forest Service lands in western Oregon during the sagebrush rebellion years of the early 1980s. See OREGON NATURAL RESOURCES COUNCIL, TRANSFERRING FORESTED WESTERN OREGON BLM LANDS TO THE NATIONAL FOREST SYSTEM 3-4 (May 14, 1996), <<http://www.teleport.com/~francis/unpquawater/oc/onrc.html>>.

the O & C counties.<sup>42</sup> As a result, the Stanfield Act of 1926 aimed to remedy the defects in the Chamberlain-Ferris Act by, among other things, authorizing lump-sum transfers of \$7 million to the O & C counties at a rate of \$500,000 per year after 1926.<sup>43</sup> However, the legislation failed to reform the timber management program, which had generated relatively few timber sales and remarkably little revenue between 1916 and 1926.<sup>44</sup> Because the railroad company had first rights to timber sale proceeds under the Chamberlain-Ferris Act, the O & C counties received none of \$3.5 million in timber revenue collected as of 1926.<sup>45</sup>

The O & C land situation worsened between 1926 and 1935, as the effects of the Great Depression and changes in the timber industry caused severe financial hardships for the O & C counties.<sup>46</sup> For example, by 1934, Lane County was forced to ask the Department of the Interior for nearly \$100,000 in order to pay for essential county services like public education.<sup>47</sup>

Three years later, Congress overhauled the timber management and revenue distribution scheme created under the Chamberlain-Ferris and Stanfield Acts by enacting the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O & C Act).<sup>48</sup> The heart of the new statute was a revised revenue formula that gave the O & C counties first claim to timber revenues collected for the O & C lands.<sup>49</sup> Under the new revenue distribution scheme, the federal government would pay fifty percent of "gross" timber revenues directly to the O & C counties,

42. See Dodds, *supra* note 16, at 753.

43. Act of July 13, 1926, ch. 897, 44 Stat. 915 (1926). See RICHARDSON, *supra* note 22, at 37.

44. RICHARDSON, *supra* note 22, at 36-38.

45. *Id.* See also Dodds, *supra* note 16, at 753-54; SHIRLEY WALTER ALAN, AN INTRODUCTION TO AMERICAN FORESTRY 282 (2d ed. 1950).

46. See RICHARDSON, *supra* note 22, at 44.

47. *Id.*

48. 43 U.S.C. § 1181 (1994). The BLM manages the Coos Bay Wagon Road Lands under the provisions of the O & C Act of 1937. See 1993 PUBLIC LANDS STATISTICS, *supra* note 20, at 9. The Coos Bay Wagon Road Lands comprise roughly 93,000 acres the federal government granted to the state of Oregon in order to facilitate the construction of a military wagon road between Coos Bay and Roseburg. See Kevin Hackworth & Brian Greber, *Timber Derived Revenues: Importance to Local Governments in Oregon*, in ASSESSMENT OF OREGON'S FORESTS 207 (Gary J. Lettman ed., 1988); Jim Ince, *O & C Land Transfer: Extremists in Congress Plot BLM Forest Giveaway*, HEADWATERS' FOREST NEWS, Summer 1996, at 20. The Coos Bay Wagon Road grants carried the same conditions and covenants as the O & C Railroad grants. Hackworth & Greber, *supra*, at 207. Illegal sales of grant lands, similar to those carried out on the O & C lands, led Congress to revest the lands in the federal government in 1919, four years after Congress took back the O & C lands. *Id.* House Bill 3769 included the Coos Bay Wagon Road lands in its proposed land transfer. See H.R. 3769, § 4(b)(2), 104th Cong. (1996).

49. See RICHARDSON, *supra* note 22, at 54.

plus twenty-five percent to the counties in lieu of taxes.<sup>50</sup> The federal government retained only the remaining twenty-five percent to pay for administration of the O & C lands.<sup>51</sup>

Unfortunately, the 1937 O & C Act tied annual O & C county revenues to the amount of timber harvested from the O & C lands.<sup>52</sup> This revenue distribution scheme, evolving from the "peculiar history" of the O & C lands, has helped to produce both past controversies over BLM management practices for the O & C lands and the current proposal to transfer the O & C lands to the state of Oregon.<sup>53</sup>

### III. BLM MANAGEMENT OF THE OREGON & CALIFORNIA LANDS

BLM management of the O & C lands is best examined in two historical phases. First, for half a century, between 1937 and 1987, the BLM and its predecessor, the General Land Office,<sup>54</sup> managed the O & C lands with unchallenged administrative discretion to interpret the 1937 O & C Act.<sup>55</sup> Second, beginning in the late 1980s and continuing into the mid-1990s, the BLM's management of the O & C lands came under increasing attack by citizen's groups concerned over the agency's failure to

50. Congress withheld the 25% marked for distribution in lieu of taxes in order to reimburse the federal treasury for unpaid O & C Railroad Company property taxes that the federal government paid the O & C counties between 1913 and 1915. See RICHARDSON, *supra* note 22 at 15-16. When timber revenues finally paid the O & C Railroad Company local property tax account in 1951, Congress inserted a rider into to the 1953 Appropriations Act for the Department of the Interior directing the Secretary to reserve the 25% share to cover the cost of road building and other capital improvements on the O & C lands. See *Skoko v. Andrus*, 638 F.2d 1154, 1156-57 (9th Cir. 1979) (upholding the legislation against various challenges by the O & C counties, including an asserted trust relationship between the counties and the federal government). See also Dodds, *supra* note 16, at 755 n.116.

51. 43 U.S.C. § 1181(f) (1994).

52. See Dodds, *supra* note 16, at 742, arguing that the revenue scheme "places too much pressure on the land management agency involved to allow excessive timber harvesting at the expense of multiple use of the lands."

53. The connection between annual timber sales and O & C county revenue is evident in every debate over the management of the O & C lands. The drive to increase county revenue by increasing the annual timber harvest was the impetus for the high harvest levels between 1937 and 1991, which prompted litigation over the effects on the northern spotted owl and other protected species. See *infra* notes 74-135. The O & C counties' desire for increased revenue is also the catalyst for the current push to transfer management of the O & C lands from federal to state control. See *supra* notes 7-11 and accompanying text.

54. Upon its inception in 1946, the BLM inherited the responsibilities of the former General Land Office, including land management authority for the O & C lands. See JAMES MUHN & HANSON R. STUART, *OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM* 54 (1988).

55. See Dodds, *supra* note 16, at 756-61 (describing BLM's pre-1990 management of the O & C lands and noting the absence of judicial review of the Department of the Interior's interpretation of the Act).

heed federal conservation directives such as those contained in FLPMA, NEPA, and the ESA.<sup>56</sup>

#### A. *Management Under the O & C Act of 1937*

The Oregon and California Grant Lands Act of 1937 serves as a kind of "organic act" for the revested Oregon and California lands.<sup>57</sup> Section 1181(a) of the Act provides that O & C timber lands:

Shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating streamflow, and contributing to the economic stability of the local Communities and industries, and providing recreational facilities.<sup>58</sup>

Although the O & C Act includes some familiar multiple-use principles,<sup>59</sup> the Department of the Interior has consistently maintained that the Act established timber production as the dominant use for the O & C lands.<sup>60</sup> For almost forty years, BLM managed the O & C lands to maximize timber production without equal consideration of other forest uses.<sup>61</sup>

Enactment of FLPMA in 1976 marked the beginning of increased citizen and agency concern over O & C land management practices.<sup>62</sup> FLPMA

56. See *infra* notes 74-135 and accompanying text.

57. 43 U.S.C. §§ 1181(a)-(f) (1994).

58. 43 U.S.C. § 1181(a) (1994).

59. See Dodds, *supra* note 16, at 755 (stating that the O & C Act became the first federal law to require multiple-use management of federal public lands). See also GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 20.04 at 54 (1990) [hereinafter PUBLIC NATURAL RESOURCES LAW] (noting that the O & C Act "is a direct precursor of current multiple-use legislation. Its aims are, to a degree, internally inconsistent: 'protecting watersheds' cannot be accomplished if all the stream-side and upland timber is removed.").

60. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 424 (1994) (noting that the O & C Act produced "a de facto ratification of dominant use principles."). The Department of the Interior did not issue a formal opinion interpreting the O & C Act, however, until after the enactment of FLPMA in 1976. See *infra* notes 60-61 and accompanying text.

61. See Dodds, *supra* note 16, at 756-61.

62. In 1977, the Director of the BLM sent an inquiry to the Solicitor of the Department of the Interior, asking whether the mandatory wilderness review requirements of section 603 of FLPMA, 43 U.S.C. § 1782 (1994), applied to the O & C lands. In response, the Solicitor issued a memorandum concluding that section 603 would apply only to the extent that wilderness review did not conflict with the O & C Act. Memorandum from Solicitor, U.S. Department of the Interior, to Director, BLM (June 1, 1977). See also Dodds *supra* note 16, at 756. Because the O & C Act "mandates dominant use management of the O and C lands for commercial forestry," the Solicitor reasoned that wilderness review under section 603 of FLPMA could only take place where it did not "interfere" with commercial forestry. *Id.*

establishes management policies for all public lands administered by the Secretary of the Interior through the Bureau of Land Management.<sup>63</sup> Section 101(a)(7) of FLPMA requires the BLM to manage public domain lands “on the basis of multiple-use and sustained yield unless otherwise specified by law.”<sup>64</sup> FLPMA also includes an O & C Act<sup>65</sup> savings provision which states:

[n]otwithstanding any provision of this act, in the event of a conflict with or inconsistency between this act and the acts of August 28, 1937 . . . , and May 24, 1939, insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter act shall prevail.<sup>66</sup>

These provisions raise some interesting questions about the applicability of FLPMA to the O & C lands.<sup>67</sup> First, does the O & C Act provide management criteria “otherwise specified by law” within the meaning of section 101(a)(7) of FLPMA? If so, FLPMA’s multiple-use mandate is inapplicable by its own terms.<sup>68</sup> Second, is there a “conflict with or inconsistency between” a provision of FLPMA and the O & C Act? If so, any inconsistent provision of FLPMA is inapplicable.<sup>69</sup> FLPMA thus provides two possible exemptions for the O & C lands.

Between 1977 and 1981, the Solicitor of the Department of the Interior issued a series of opinions concluding that the O & C Act is a dominant-use statute.<sup>70</sup> Consequently, the Solicitor maintained that

63. 43 U.S.C. §§ 1701-1784.

64. *Id.* § 1701(a)(7).

65. An Act of May 24, 1939 amended the O & C Act of 1937 in order to clarify the management and revenue structure for the reconveyed Coos Bay Wagon Road Lands. See RICHARDSON, *supra* note 22, at 55.

66. Federal Land Policy and Management Act of 1976, § 701(b), Pub. L. No. 94-579, 90 Stat. 2786 (1976)(uncodified)(citations omitted).

67. See Dodds, *supra* note 16, at 760 (noting that “if FLPMA were applicable to O and C lands, the BLM would have to manage the lands for multiple use, and consider a wider range of non-timber resources than it currently does. The BLM would not be able to manage the O and C lands for the dominant use of timber production.”).

68. Such an interpretation would be based upon the plain language of section 101(a)(7) of FLPMA. It is unclear whether the Department of the Interior has ever argued that FLPMA’s multiple-use requirements do not apply to the O & C lands because the O & C Act provides management duties “otherwise specified by law” under section 101(a)(7).

69. Federal Land Policy and Management Act of 1976, § 701(b), Pub. L. No. 94-579, 90 Stat. 2786 (1976)(uncodified)(citations omitted). There can be no doubt that this savings clause prohibits the application of FLPMA provisions that are “inconsistent” with the O & C Act. However, defining exactly what qualifies as an inconsistency may be a difficult undertaking. See *infra* note 180, discussing problems with the application of “consistency.” See also Dodds, *supra* note 16, at 761 (noting the absence of legislative history or judicial interpretations that might help define what types of inconsistencies trigger the savings clause).

70. Between 1977 and 1981, the Solicitor of the Department of the Interior made four separate

FLPMA's management requirements did not apply to the O & C lands because the multiple-use provisions of FLPMA were inconsistent with the dominant-use mandate of the O & C Act.<sup>71</sup>

The Interior Department's refusal to apply conservation statutes like FLPMA to timber sales conducted on O & C lands came under scrutiny in the late 1980s. By 1990, the BLM was under full-scale attack by environmental groups concerned over the environmental effects of the intensive timber harvesting<sup>72</sup> conducted under the O & C Act.<sup>73</sup>

### B. *The Application of FLPMA, NEPA and the ESA: Recent Changes in BLM Management*

In 1989, Headwaters, Inc. fired the first shot in what became a series of lawsuits challenging the BLM's management of the O & C lands.<sup>74</sup> At issue in *Headwaters* was the applicability of NEPA and

attempts to reconcile the O & C Act with the recently enacted provisions of FLPMA. Although the earlier opinions were more absolute about the inapplicability of FLPMA to the O & C lands than the later interpretations, the four opinions were consistent in their interpretation of the O & C Act as a dominant-use statute. See Dodds, *supra* note 16, at 756-61 (discussing the similarities and differences among the four opinions).

71. SOLICITOR'S OPINION, U.S. DEP'T OF THE INTERIOR, REVIEW OF BLM POLICY STATEMENT FOR MULTIPLE-USE MANAGEMENT OF THE OREGON AND CALIFORNIA RAILROAD AND COOS BAY WAGON ROAD REVESTED LANDS (Sept. 8, 1981). See also Dodds, *supra* note 16, at 762.

72. See *supra* note 21 and accompanying text.

73. Between 1984 and 1990, Congress inserted provisions into the annual Department of the Interior Appropriations Act which precluded judicial review of the BLM's compliance with NEPA when implementing timber sales on the O & C lands. See, e.g., Pub. L. No. 100-202, § 314, 101 Stat. 1329 (1987). See also Linda M. Bolduan, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decision Making*, 20 *Envl. L.* 329 (1990); PUBLIC NATURAL RESOURCES LAW, *supra* note 59, § 20.04 at 50.

74. *Headwaters, Inc. v. BLM*, 19 ELR 21,159 (D. Or. 1989), *aff'd* 914 F.2d 1174 (9th Cir. 1990). *Headwaters* and another plaintiff initiated two earlier suits challenging BLM management of public domain (non-O & C) lands in southern Oregon. See *Headwaters, Inc. v. BLM, Medford Dist.*, 665 F. Supp. 873 (D. Or. 1987) (denying plaintiff's motion for a preliminary injunction against a proposed timber sale on NEPA grounds because the equities favored defendants); *Friends of Walker Creek Wetlands, Inc. v. BLM*, 19 ELR 20,852 (D. Or. 1988) (rejecting plaintiff's NEPA claim because BLM's supplemental environmental assessment and an earlier environmental impact statement adequately considered the cumulative impacts of the proposed timber sale). However, the 1989 *Headwaters* case was the first challenge to BLM management of the O & C lands. Because O & C and public domain lands are often interspersed in a checkerboard fashion, most timber sales on O & C lands include public domain lands as well. See Mornarich, *supra* note 16, at 655-59 (discussing the relationship between O & C and public domain timber management in southern Oregon).

FLPMA<sup>75</sup> to BLM timber sales on the O & C lands.<sup>76</sup> Because this case was closely intertwined with the northern spotted owl controversy,<sup>77</sup> it took five years and promulgation of the Northwest Forest Plan to reach a definitive affirmative answer to the question whether BLM must comply with federal conservation statutes in managing the O & C lands.<sup>78</sup>

Although *Headwaters, Inc. v. BLM* was the first environmental challenge to BLM timber sales on the O & C lands, two previous Ninth Circuit decisions had addressed the meaning of section 1181(a) of the O & C Act in *dicta*. In 1979, in *Skoko v. Andrus*, an action by O & C counties against the Secretary of the Interior to compel disbursement of disputed O & C funds, the Ninth Circuit noted in passing that the O & C Act "provides that most of the O & C lands would henceforth be managed for sustained yield timber production."<sup>79</sup> Since the legal dispute in *Skoko* involved the revenue distribution provisions of the O & C Act, the decision did not otherwise address O & C land management.<sup>80</sup>

Eight years later, in *O'Neal v. United States*, an action by recreational hunters for personal injury and property damages sustained when a BLM road collapsed, the Ninth Circuit simply stated that the O & C Act "make[s] it clear that the primary use of the revested lands is for timber production."<sup>81</sup> The court concluded that the O & C Act did not preempt the Oregon recreational use statute at issue because the primary use of the revested lands is for timber production and not to provide recreational facilities.<sup>82</sup>

75. Both the *Headwaters* and *Portland Audubon Society* cases, discussed *infra* notes 84-119 and accompanying text, involved claims under FLPMA. In each case, environmental groups charged that the BLM's management of public domain lands, not the O & C lands, violated FLPMA. Nevertheless, the applicability of FLPMA to the O & C lands was at issue in *Headwaters*, at least indirectly, because *Headwaters* addressed the question whether the O & C Act is a dominant-use or multiple-use statute. See *infra* note 86 and accompanying text.

76. *Headwaters*, 19 ELR at 21,160.

77. For a discussion of the controversy and litigation concerning the northern spotted owl, see Victor M. Sher, *Travels with Strix: The Spotted Owl's Journey Through the Federal Courts*, 14 PUB. LAND L. REV. 41 (1993). See also Michael C. Blumm, *Ancient Forests, Spotted Owls, and Modern Public Land Law*, 18 B. C. ENVTL. AFF. L. REV. 605 (1991); Andrea L. Hungerford, *Changing the Management of Public Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL. L. 1395 (1994).

78. In 1994, Judge Dwyer of the U. S. District Court for the Western District of Washington answered this question in the affirmative. See *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291, 1313 (W.D. Wash. 1994), discussed *infra* notes 124-36 and accompanying text. However, the relationship between the O & C Act and federal conservation statutes is still at issue in litigation pending in the District Court for the District of Columbia. See *infra* note 137.

79. *Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979). The quoted language in *Skoko* is located in the preliminary portion of the opinion and appears to have been included as background material.

80. *Id.*

81. *O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987).

82. *Id.*



Thus, both opinions seemed to assume without analysis that the O & C Act established a dominant-use mandate, despite commentators' suggestions that the statutory language and legislative history reflected an intent to authorize multiple-use management.<sup>83</sup> This assumption was challenged in the 1989 *Headwaters* case.

### 1. *Headwaters, Inc. v. Bureau of Land Management*

In 1989, *Headwaters* challenged the BLM's proposed Wilcox Peak timber sale, located on both public domain and O & C lands.<sup>84</sup> *Headwaters* claimed that the BLM violated NEPA by refusing to prepare a site-specific environmental impact statement (EIS) in light of new evidence which established the presence of northern spotted owls in or near the sale area.<sup>85</sup> *Headwaters* also contended that the BLM violated the O & C Act by failing to administer the O & C lands for multiple uses.<sup>86</sup>

The district court rejected *Headwaters*' NEPA claim on the ground that the agency had previously considered the effects of timber operations and road building upon the northern spotted owl.<sup>87</sup> The BLM had addressed the issue in both a 1979 EIS on the Medford District timber management plan and in a 1986 site-specific environ-

83. See *Dodds*, *supra* note 16, at 759 (arguing that both the text and legislative history of section 1181(a) of the O & C Act anticipate multiple-use management). See also PUBLIC NATURAL RESOURCES LAW, *supra* note 59, § 20.04 (noting that "although the statutory language supports the dominant use construction in some ways . . . the statutory emphasis on watershed protection and sustained yield suggests that a somewhat more sophisticated analysis, considering other uses more carefully, might be appropriate.").

84. *Headwaters, Inc. v. BLM*, 19 *Env'tl. L. Rep.* 21,159 (D. Or. 1989). The Wilcox Peak timber sale comprised approximately 322 acres within the Jackson-Klamath Sustained Yield Unit of the Medford Timber District in southern Oregon. *Id.* at 21,160. The sale included roughly 234 acres of large saw and old growth timber near Sardine Creek, approximately five miles east of Interstate 5. *Id.* The presence of northern spotted owls in or near the Wilcox Peak sale area was confirmed in 1988. *Id.* A nest containing owlets was located within 100 feet of the sale area. *Id.*

85. *Id.* at 21,161. *Headwaters* also argued that BLM violated NEPA by failing to adequately consider reasonable alternatives, cumulative impacts, and water quality degradation. *Id.* The case did not involve an ESA claim, as the northern spotted owl was not listed until a year later, in 1990. See *infra* note 91.

86. *Id.* at 21,164. In addition, *Headwaters* claimed that BLM violated FLPMA by administering public domain (non-O & C) lands for the dominant purpose of timber production. *Id.* *Headwaters*' O & C Act claim was, in effect, an argument for the application of FLPMA to the O & C lands. If the court agreed with *Headwaters* that the O & C Act was a multiple-use statute, there would be no "conflict with or inconsistency between" FLPMA and the O & C Act that would trigger the savings clause provided in section 701(b) of FLPMA. See Pub. L. No. 94-579, 90 Stat. 2786 (1976)(uncodified). See *supra* note 67 and accompanying text. Without the savings clause, BLM might be obligated to manage the O & C lands in accordance with the provisions of FLPMA. See *Dodds*, *supra* note 16, at 761.

87. *Headwaters*, 19 *Env'tl. L. Rep.* at 21,162.

mental assessment (EA) on the Wilcox Peak sale.<sup>88</sup> As for Headwaters' claim that the BLM failed to manage for multiple-uses, the district court simply adopted the *dicta* from *Skoko* and *O'Neal* without analysis. The court announced that "the weight of authority on this issue suggests that O & C lands are to be managed with timber production as the dominant use."<sup>89</sup>

On appeal, the Ninth Circuit affirmed the district court's resolution of both issues.<sup>90</sup> The appeals court first disposed of Headwaters' NEPA claim, ruling that the BLM's decision not to prepare a supplemental EIS was not unreasonable in light of information available in 1986.<sup>91</sup> In reaching this conclusion, the panel only considered information about the northern spotted owl known to the BLM in 1986 and disregarded the plaintiff's expert testimony explaining the threat to northern spotted owls posed by the timber sale.<sup>92</sup>

As to whether the O & C Act required the BLM to manage the O & C lands for multiple uses, the Ninth Circuit cited the dominant-use *dicta* from *Skoko* and *O'Neal*.<sup>93</sup> Acknowledging the sparse analysis in those decisions, the court conducted its own analysis of the statutory language and legislative history of section 1181(a) of the O & C Act.<sup>94</sup> Headwaters argued that the statutory language "shall be managed for permanent *forest* production" in section 1181(a) encompassed both timber production and

88. *Id.* The district court concluded that, although "the issue is close," the BLM's failure to issue a supplemental EIS did not warrant the issuance of a preliminary injunction. *Id.*

89. *Id.* at 21,164 (citing *O'Neal v. United States*, 814 F.2d 1285, 1287 (9th Cir. 1987)). See also *Skoko v. Andrus*, 638 F.2d 1154, 1156 (9th Cir. 1979).

90. *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183 (9th Cir. 1990).

91. *Headwaters, Inc. v. BLM*, 914 F.2d at 1176. After the case was argued, but before the panel issued a written opinion, the U. S. Fish and Wildlife Service listed the northern spotted owl as a threatened species under the Endangered Species Act, 16 U.S.C. §§ 1531-1544. See 55 Fed. Reg. 26,114 (June 26, 1990). *Headwaters, Inc. v. BLM*, 914 F.2d at 1184. In response, BLM suspended the Wilcox Peak Timber Sale contract because of the presence of northern spotted owls in or near the sale area. *Id.* The dissenting judge in *Headwaters* argued that the panel should have remanded the NEPA claim to the district court for reconsideration in light of the northern spotted owl listing. *Id.* at 1185-86 (Ferguson, J., dissenting).

92. *Headwaters, Inc. v. BLM*, 914 F.2d at 1176. The district court allowed plaintiffs to supplement the administrative record with the testimony of expert witnesses regarding the potential threat to northern spotted owls in or near the sale area. *Headwaters, Inc. v. BLM*, 19 Env'tl. L. Rep. at 21,162 (D. Or. 1989). Before the Ninth Circuit, the BLM challenged the quality and relevance of plaintiff's expert testimony, but not the district court's decision to allow supplementation of the record. *Headwaters, Inc. v. BLM*, 914 F.2d at 1179. The Ninth Circuit outlined plaintiff's expert testimony regarding the northern spotted owl, and then essentially ignored it. *Id.*

93. *Headwaters, Inc. v. BLM*, 914 F.2d at 1183. The panel noted that "while these statements [interpretations of the O & C Act in *Skoko* and *O'Neal*] are arguably *dicta*, we are convinced of their accuracy." *Id.*

94. *Id.* at 1183.

the production of other forest values such as wildlife conservation.<sup>95</sup> But the court rejected this interpretation, concluding that an interpretation of the phrase "forest production" to include multiple uses such as habitat conservation would conflict with the sustained-yield timber management required under the O & C Act.<sup>96</sup> The panel assumed that multiple-use management and sustained-yield harvest are inherently contradictory, an assumption that is difficult to reconcile with the requirements of other federal land management statutes.<sup>97</sup> Examining the legislative history of the O & C Act, the court could find "no indication that Congress intended 'forest' to mean anything beyond the aggregation of timber resources."<sup>98</sup> The court concluded that:

Congress intended to use 'forest production' and 'timber production' synonymously. Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old-growth forests is a goal on par with timber production, or indeed that it is a goal of the O & C Act at all. The BLM did not err in construing the O & C Act as establishing timber production as the dominant use.<sup>99</sup>

On the other hand, nothing in the statute or the legislative history supports the conclusion that the word "forest" actually means "timber."<sup>100</sup> Moreover, the court's interpretation conflicted with the text of section 1181(a), which plainly requires BLM to manage the O & C lands for permanent forest production, on a sustained yield basis, for five related purposes: (1) to provide a permanent timber supply; (2) to protect water-

95. *Id.*

96. *Id.* See also 43 U.S.C. § 1181(a) (requiring that "timber . . . shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield.").

97. See, e.g., Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528-531 (1994) (MUSYA section 529 authorizes the Secretary of Agriculture to "administer the renewable surface resources on the National Forests for multiple-use and sustained yield"); National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-1614 (NFMA section 1601(d)(1) declares that all forested lands in the National Forest "shall be maintained . . . to secure the maximum benefits of multiple-use sustained yield management."); Federal Land Policy Management Act of 1976, 43 U.S.C. §§ 1701-1784 (FLPMA section 132(a) states that "the secretary shall manage the public lands under principles of multiple-use and sustained yield."). See also PUBLIC NATURAL RESOURCES LAW, *supra* note 59, at §§ 16.01-16.02.

98. *Headwaters*, 914 F.2d at 1183 (concluding that the legislative history of the O & C Act demonstrated two congressional purposes: (1) to provide the O & C counties with a stable source of timber revenue; and (2) to halt previous clearcutting practices that were depleting the forest resource). See also H.R. Rep. No. 1119, 75th Cong. 2 (1937).

99. *Headwaters*, 914 F.2d at 1184.

100. The conventional definition of "forest" is "trees and undergrowth covering a large area." OXFORD AMERICAN DICTIONARY 341 (1980). The word "timber" usually refers only to "wood prepared for use in building or carpentry" or "growing trees suitable for this [use]." *Id.* at 964.

sheds; (3) to regulate streamflow; (4) to provide recreational facilities; and (5) to foster economic stability for local communities.<sup>101</sup> The panel's interpretation eliminated at least the middle three of the five purposes established by Congress.<sup>102</sup>

Nevertheless, the Ninth Circuit's opinion in *Headwaters* settled most, if not all, of the unanswered questions about the meaning of the 1937 O & C Act. The case sanctioned the BLM's dominant use management of the O & C lands for permanent "timber production," even if that damaged other forest values or uses.<sup>103</sup> The BLM's success in *Headwaters* was short-lived, however. The agency's successful evasion of the apparent multiple-use directives in the O & C Act was eventually superseded by the application of the Endangered Species Act to the O & C lands.

## 2. *Portland Audubon Society v. Lujan*

In 1987, Portland Audubon Society and several other environmental groups challenged the BLM's timber management program for its seven western timber districts in the state of Oregon,<sup>104</sup> claiming that the agency was violating NEPA, the O & C Act, FLPMA, and the Migratory Bird Treaty Act.<sup>105</sup> In 1992, the district court concluded that BLM violated NEPA by failing to prepare a supplemental EIS concerning new information about the effects of old growth habitat fragmentation upon the long-term survival of the northern spotted owl.<sup>106</sup>

101. See 43 U.S.C. § 1181(a). See also H.R. Rep. No. 1119, 75th Cong. 2 (1937).

102. The phrase "permanent forest production" must mean more than providing "a permanent timber supply," unless the succeeding three clauses of section 1181(a) are superfluous. See *supra* text accompanying note 58.

103. The unstated conclusion in *Headwaters* was that the dominant-use mandate of the O & C Act is inconsistent with the multiple-use requirements of FLPMA. The Ninth Circuit decided by implication that BLM need not comply with FLPMA when administering the O & C lands. See *supra* note 86 (discussing *Headwaters*' allegations).

104. Portland Audubon Society's challenge necessarily included both O & C and public domain lands. See *supra* note 74.

105. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1492 (D. Or. 1992), *aff'd sub nom.* Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993). The *Portland Audubon Society* litigation began in the late 1980s but was thwarted by a series congressional appropriations riders that precluded judicial review of plaintiffs' challenges. The constitutionality of the riders was upheld by the Supreme Court in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). See Michael C. Blumm, *Ancient Forests and the Supreme Court: Issuing a Blank Check to Appropriation Riders*, 43 WASH. U. J. URB. & CONTEMP. L. 35 (1993). Plaintiffs reactivated their case in 1992 when the riders expired. For a full account of the *Portland Audubon Society* litigation, see Hungerford, *supra* note 77, at 1415-25.

106. *Portland Audubon Soc'y*, 795 F. Supp. at 1497. The court enjoined the BLM from logging further in habitat areas of the northern spotted owl until the agency prepared a supplemental EIS on the effects of continued logging on the owl. *Id.* at 1510.

The district court rejected the BLM's argument that NEPA compliance would interfere with a provision of the O & C Act that the agency interpreted to require selling no less than 500 million board feet of timber annually.<sup>107</sup> BLM argued that the O & C Act overrode NEPA to the extent NEPA compliance would reduce annual timber sales below 500 million board feet.<sup>108</sup> But the court disagreed, ruling that the O & C Act gave BLM discretion to sell less than 500 million board feet of timber annually.<sup>109</sup> Moreover, the district court concluded that nothing in section 1181(a) of the O & C Act authorized a NEPA exemption for the O & C lands.<sup>110</sup> The fact that BLM compliance with NEPA might cause a reduction in annual timber harvest was not an "irreconcilable conflict" excusing the agency's failure to follow NEPA.<sup>111</sup>

On appeal, the Ninth Circuit affirmed the district court.<sup>112</sup> The appeals court rejected the BLM's argument that the court's earlier decision in *Headwaters* meant that the agency had no obligation to supplement EISs in light of new information about potential threats to the northern spotted owl.<sup>113</sup> The Ninth Circuit distinguished *Headwaters* because that case involved the BLM's duty to prepare a site-specific EIS on a timber sale which already had been examined in a programmatic EIS,<sup>114</sup> while

107. *Id.* at 1506.

108. *Id.* at 1505. The BLM based its NEPA argument on the U. S. Supreme Court's decision in *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776 (1976). In *Flint Ridge*, the Supreme Court held that when a "clear and unavoidable conflict in statutory authority" exists between NEPA and another federal statute, "NEPA must give way." *Id.* at 788. Portland Audubon Society responded by pointing out that the BLM's interpretation was inconsistent with the agency's own regulations promulgated to implement the O & C Act. *Portland Audubon Soc'y*, 795 F. Supp. at 1505. See 43 CFR § 6220.0-1 (1992) (authorizing the BLM to "preserve, protect, and enhance areas of scenic splendor, natural wonder, scientific interest, primitive environment, and other natural values for the enjoyment and use of present and future generations"). In addition, plaintiffs argued that the language of section 1181(a) of the O & C Act authorized, but did not require, the BLM to offer a minimum of 500 million board feet of timber for annual sale. *Portland Audubon Soc'y*, 795 F. Supp. at 1505. The district court agreed that the O & C Act provides BLM discretion to reduce annual harvest below 500 million board feet per year. *Id.* at 1506. The district court neither adopted nor rejected the plaintiffs' argument regarding the BLM's O & C regulations. *Id.*

109. *Portland Audubon Soc'y*, 795 F. Supp. at 1506. The court ruled that "[i]n making this determination (setting annual timber harvest levels under section 1181(a) of the O & C Act) . . . , the BLM must comply with all applicable laws, including NEPA." *Id.*

110. *Id.*

111. *Portland Audubon Soc'y*, 795 F. Supp. at 1507. The court noted that BLM conceded "that the provisions of the Endangered Species Act must be enforced despite any adverse effects upon the amount of timber available on O & C lands." *Id.* at 1506.

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

113. *Id.* at 709.

114. *Id.* In fact, the timber sale at issue in *Headwaters* was analyzed in a 1979 EIS, a 1985 supplemental EIS, and a 1986 EA. None of these NEPA documents revealed the existence of northern spotted owls near the sale. See *Headwaters, Inc. v. BLM*, 19 Env't. L. Rep. 21,159, 21,160 (D. Or. 1989), *aff'd* 914 F.2d 1174 (9th Cir. 1990). The presence of owls was confirmed only after the sale, which the court refused to enjoin. *Id.*

Portland Audubon Society's allegation involved the agency's failure to supplement the underlying programmatic EISs on the timber management plans themselves.<sup>115</sup> Thus, the Ninth Circuit was able to characterize the issue in *Headwaters* as whether the BLM could "tier" a site-specific EA to a programmatic EIS instead of preparing a site-specific EIS for the timber sale.<sup>116</sup> In contrast, the court considered *Portland Audubon Society* to involve whether new information about the threat to northern spotted owls required the BLM to supplement ten-year old programmatic EISs on BLM's timber management plans.<sup>117</sup> The court noted that the issue in *Headwaters* was the adequacy of NEPA analyses on a single, site specific timber sale, while Portland Audubon Society challenged the BLM's "decision not to supplement the EISs underlying the [timber management plan] that control myriad land use decisions with new information relating to the possible extinction of a species through the systematic implementation of the BLM's timber-sale program throughout its lands."<sup>118</sup>

The implication of *Portland Audubon Society* for the BLM was obvious: The agency could no longer use the O & C Act to exempt tim-

115. *Portland Audubon Soc'y*, 998 F.2d at 709.

116. *Id.* The plaintiffs in *Headwaters* were forced to argue for a site-specific EIS, as opposed to a supplement to the EIS for the timber management plan, because all non-site-specific challenges were, at that time, barred by the Department of the Interior Appropriations Act. Pub. L. No. 100-446, § 314, 102 Stat. 1825 (1988); *Oregon Natural Resources Council v. Mohla*, 895 F.2d 627 (1990). See also Kirsten Hughes, *Environmental Quality: National Environmental Policy Act*, 21 ENVTL. L. 1159, 1168 n.57 (1991).

117. *Id.* The apparent conflict between the Ninth Circuit's previous holding in *Headwaters* and the decision reached in *Portland Audubon Society* was not fully addressed by either the district court or the court of appeals.

118. Compare 40 C.F.R. § 1502.20 (1996) (providing that "[w]henver a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or EA need only summarize the issues discussed in the broader statement.) with 40 C.F.R. § 1502.9(c)(1)(I) (1996) (providing that agencies "[s]hall prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.").

Since *Headwaters* was decided on the basis of an administrative record compiled before the northern spotted owl was listed as endangered under the ESA, see *supra* note 91, the Ninth Circuit's decision in *Portland Audubon Society* may have also been influenced by the subsequent listing of the northern spotted owl. If so, neither the district court nor the Ninth Circuit expressly mentioned the effects of the northern spotted owl listing on their analysis of the BLM's NEPA compliance. Although the Council on Environmental Quality's NEPA regulations do not directly address whether a species listing itself triggers the duty to prepare a supplemental EIS, a listing under the ESA would seem to be "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i) (1996). *But cf.* *Swanson v. U. S. Forest Service*, 87 F.3d 339, 344 (9th Cir. 1995) (holding that a listing under the ESA does not require preparation of a supplemental EIS, at least where the original EIS had considered the effects of the proposal on the species, and the ESA consultation process concluded with a "no jeopardy" opinion).

ber sales from the requirements of federal environmental statutes like NEPA and the ESA. Although not overruling *Headwaters*, *Portland Audubon Society* confirmed that BLM management of the O & C lands was subject to the same environmental constraints and judicial review as other public lands.<sup>119</sup>

### 3. *Seattle Audubon Society v. Lyons*

In late 1994, Judge William Dwyer of the U. S. District Court for the Western District of Washington reviewed consolidated legal challenges to the Clinton Administration's "Forest Plan for a Sustainable Economy and a Sustainable Environment" (Northwest Forest Plan), jointly adopted in 1993 by the Secretaries of the Departments of Agriculture and the Interior.<sup>120</sup> The Northwest Forest Plan comprises roughly twenty-four million acres of federal lands in Washington, Oregon, and Northern California, more than ten times the size of the 2.2 million acres of the O & C lands.<sup>121</sup> Included within the planning area are large tracts of O & C lands designated as late-successional and riparian reserves.<sup>122</sup> Within such reserves, the plan severely restricts and, in some cases, completely prohibits timber harvesting.<sup>123</sup>

119. The Ninth Circuit implied that the O & C Act did not override NEPA because NEPA was enacted after the O & C Act. *Portland Audubon Soc'y v. Babbitt*, 998 F.2. 705, 709 (9th Cir. 1993). This reasoning would preclude almost any claim that BLM management of the O & C lands is exempt from compliance with more recent federal conservation statutes. However, O & C land management decisions still might be exempt from statutes such as FLPMA containing express savings clauses. See *supra* notes 65-69 and accompanying text.

120. *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1299 (W.D. Wash. 1994), *aff'd sub nom.* *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996). The Clinton Administration promulgated the Northwest Forest Plan as a compromise between environmentalists and the timber industry, battling over old growth logging and the protection of the northern spotted owl and other species listed under the Endangered Species Act. See *Sher*, *supra* note 77. The conflict produced a series of court injunctions issued against the Forest Service and the BLM, halting virtually all timber sales within the geographic range of the northern spotted owl. *Id.* The Clinton Administration's compromise aimed to lift the injunctions and restart federal timber harvest in the Northwest. *Id.* Although the Northwest Forest Plan succeeded in lifting the injunctions, annual BLM timber harvest in the Northwest remains below half of the annual harvest levels authorized in the Northwest Forest Plan. See PUBLIC TIMBER, *supra* note 21, at 6, reporting a total O & C timber harvest of less than 100 million board feet for 1995. See also *supra* note 21 and accompanying text (annual timber harvest in excess of 1 billion board feet during 1983-1990).

121. *Seattle Audubon Soc'y*, 871 F. Supp. at 1300. Cf. *supra* note 20 and accompanying text (2.2 million acres of O & C lands).

122. *Seattle Audubon Soc'y*, 871 F. Supp. at 1313.

123. *Id.* at 1305. The plan designated key watershed areas of the O & C lands as refuges for at-risk fish stocks, required 150-year timber harvest rotation periods, and included some special provisions for late-successional forests classified as "matrix areas." *Id.* at 1313. The plan called for an annual harvest of only 201 million board feet from the O & C lands, as compared with the pre-1990 average of more than one billion board feet per year. See FOREST SERVICE, U.S. DEP'T OF AGRICUL-

In a lengthy opinion, Judge Dwyer upheld the 1993 Northwest Forest Plan against challenges asserted by both environmental and industry plaintiffs. Environmental plaintiffs claimed that the plan was not sufficient to satisfy the requirements of the ESA and other federal environmental statutes.<sup>124</sup> The timber industry argued, among other things, that the O & C Act prohibited the Northwest Forest Plan from imposing such restrictions on timber harvesting on O & C lands.<sup>125</sup> The district court rejected the industry's O & C Act claim for several reasons.

First, Judge Dwyer noted that the ESA specifically requires all agencies to ensure that their activities do not adversely affect listed species.<sup>126</sup> Second, the court pointed out that cases since *Headwaters*, like *Portland Audubon Society*, confirm that the BLM must fulfill conservation duties imposed by other federal statutes when managing the O & C lands.<sup>127</sup> According to Judge Dwyer, the plain language of both the ESA and the O & C Act gave the BLM sufficient discretion to change management policies to comply with the

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TURE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL §§ 3-4 at 263-68 (1994), discussed *infra* note 258 and accompanying text. See also *supra* note 21. For a full description of the layout and intricacies of the Northwest Forest Plan, see Henry B. Lacey, *New Approach or Business as Usual? Protection of Aquatic Ecosystems Under the Clinton Administration's Westside Forest Plan*, 10 J. ENVTL L. & LITIG. 309, 339 (1995). See also H. MICHAEL ANDERSON, THE WILDERNESS SOCIETY, CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN (1994). The habitat conservation provisions of the Northwest Forest Plan are also discussed *infra* notes 258-321 and accompanying text.

124. *Seattle Audubon Soc'y*, 871 F. Supp at 1302-04.

125. *Id.* at 1312. The argument was a modification of the BLM's claim in *Portland Audubon Soc'y* that the O & C Act preempted NEPA. *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. at 1505-06. The timber industry relied on *Headwaters* for the proposition that "exempting certain timber resources from harvesting to serve as wildlife habitat . . . [would be] inconsistent with principles of sustained yield." *Seattle Audubon Soc'y*, 871 F. Supp. at 1313, (quoting *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183-84 (9th Cir. 1990)). The industry also cited *Platte River Whooping Crane Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27 (D.C. Cir. 1992), for the proposition that because the "ESA does not empower an agency to do something that it has no power to do under its enabling statute," the Secretary of the Interior was prohibited from managing the O & C lands for habitat conservation. *Seattle Audubon Soc'y*, 871 F. Supp. at 1314. In *Platte River*, the D.C. Circuit held that FERC could not impose interim conditions on hydroelectric power licenses that were not authorized by the Federal Power Act, even when such conditions furthered the purposes of the ESA. 962 F.2d at 34. Because in *Headwaters* the Ninth Circuit had ruled that habitat conservation was not an authorized management use under the O & C Act, the timber industry claimed that the Secretary of the Interior lacked the authority to set aside O & C reserves for habitat conservation under the Northwest Forest Plan. *Seattle Audubon Soc'y*, 871 F. Supp. at 1314. The district court rejected the industry's arguments for the reasons discussed *infra* notes 126-35 and accompanying text.

126. *Seattle Audubon Soc'y*, 871 F. Supp. at 1314.

127. *Id.* (quoting *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. at 1500-02). See *supra* notes 84-119 and accompanying text. The court's discussion of *Portland Audubon Soc'y* neglected to mention one of the most important aspects of that case: When the BLM asserted its O & C Act defense to NEPA compliance, the agency conceded that the O & C Act would not override duties imposed under the ESA. *Portland Audubon Soc'y*, 795 F. Supp. at 1507. See *supra* note 111.



directives of the ESA and other conservation statutes.<sup>128</sup> Third, the court determined that the O & C Act required BLM management to “look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities.”<sup>129</sup> Therefore, Judge Dwyer reasoned, the O & C Act gave the BLM authority to manage O & C lands for habitat conservation.<sup>130</sup> This conclusion seemed to contradict the *Headwaters* court’s determination that habitat conservation was not an authorized “use” under the O & C Act.<sup>131</sup>

Finally, and most important, the district court noted that the late-successional and riparian reserves designated on O & C lands were an integral part of the Northwest Forest Plan.<sup>132</sup> Because the government conceded that the plan was just barely sufficient to satisfy the requirements of applicable laws and regulations, the district court determined that “any more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions.”<sup>133</sup> Without the O & C reserves, Judge Dwyer concluded that he would be obligated to remand the entire plan to the Forest Service and the BLM for revisions designating additional non-O & C reserves.<sup>134</sup> The court thus explicitly recognized the critical role of the O & C reserves to the viability of the Northwest Forest Plan.<sup>135</sup>

The effects of *Seattle Audubon Society v. Lyons* were far-reaching. Not only did the district court’s approval of the Northwest Forest Plan establish a

128. *Seattle Audubon Soc’y*, 871 F. Supp. at 1314.

129. *Id.*

130. *Id.*

131. See *Headwaters, Inc., v. BLM*, 914 F.2d 1174, 1184 (9th Cir. 1990) (noting that “[n]owhere does the legislative history suggest that wildlife habitat conservation or conservation of old-growth forests . . . is a goal of the O & C Act at all.”); see also *supra* note 99 and accompanying text. The Ninth Circuit’s opinion on appeal from the district court’s decision in *Seattle Audubon Soc’y* did not address this apparent contradiction. *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401 (9th Cir 1996). Professor Coggins has suggested that the appellate decision in *Seattle Audubon Society* indicated that the Ninth Circuit abandoned its previous decision in *Headwaters* without discussion. See PUBLIC NATURAL RESOURCES LAW, *supra* note 59, at § 20.04[1].

132. *Seattle Audubon Soc’y*, 871 F. Supp. at 1314.

133. *Id.* at 1299.

134. *Id.*

135. As discussed *infra* notes 255-64 and accompanying text, the O & C reserves play an indispensable role in the Clinton Administration’s attempt to ensure BLM and Forest Service compliance with the minimum requirements of the ESA, while also providing a substantial annual timber harvest in the Northwest. See Memorandum from President Clinton to Forest Conference Inter-Agency Working Groups from Forest Conference Executive Committee, reprinted in FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM, U.S. DEP’T OF AGRICULTURE, FOREST ECOSYSTEM MANAGEMENT: AN ECOLOGICAL, ECONOMIC, AND SOCIAL ASSESSMENT 2 (1993). The special role of the O & C reserves is an important factor when evaluating the environmental effects of the proposed transfer of O & C land management from federal to state control. See *infra* notes 218-24 and accompanying text.

partial truce in the battle over old growth forest protection, it also made clear that the BLM's management of the O & C lands enjoyed no special exemption from federal environmental laws. Despite the *Headwaters* court's interpretation of the O & C Act as a dominant-use statute, and regardless of any effects on the agency's ability to maintain a high level of timber production, the BLM must manage the O & C lands for non-timber uses when required to do so by federal environmental laws like NEPA and the ESA.<sup>136</sup>

Although the BLM's management of the O & C lands is still technically based on the O & C Act, the operation of the Northwest Forest Plan has almost completely preempted the application of the 1937 statute. This state of affairs, and the desire of some to return to the days of O & C timber management without the Clinton Administration's Northwest Forest Plan, encouraged the forest production advocates to propose the transfer the O & C lands out of federal control.<sup>137</sup>

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136. Presumably, BLM management of the O & C lands could also be circumscribed by statutes such as the Clean Water Act, the Wild and Scenic Rivers Act (WSRA), and the Migratory Bird Treaty Act. Environmental groups have used each of these statutes to successfully challenge timber sales on Forest Service lands. See *Northwest Indian Cemetery Protective Ass'n v. Petersen*, 795 F.2d 688 (9th Cir. 1986), *rev'd on other grounds* 485 U.S. 439 (1988) (enjoining proposed road building and timber operations in wilderness study area because Forest Service project would violate state water quality standards under the Clean Water Act, 33 U.S.C. § 1313); *Oregon Natural Desert Ass'n v. Thomas*, 940 F. Supp. 1534 (D. Or. 1996) (holding that Clean Water Act § 401 state water quality certification requirements apply to non-point sources such as cattle grazing, timber harvest, and mining operations); *Wilderness Soc'y v. Tyrrel*, 701 F. Supp. 1473 (E.D. Cal. 1988), *rev'd in part* 918 F.2d 813 (9th Cir. 1990) (enjoining a proposed salvage timber sale in a burned national forest area adjacent to a river segment protected under the Wild & Scenic Rivers Act, 16 U.S.C. §§ 1271-1287, because the Forest Service had neglected to prepare a comprehensive management plan for the segment, as required under § 1283 of the WSRA; the Ninth Circuit reversed the district court's issuance of a preliminary injunction because the particular river at issue was designated by the state of California before 1986, and therefore not subject to the comprehensive management plan requirement of § 1283); *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996) (enjoining proposed timber sale and harvest in a national forest area during migratory bird nesting season where timber harvest would result in destruction of migratory birds, nests, and eggs protected under the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712). See also PUBLIC NATURAL RESOURCES LAW, *supra* note 59, at § 20.03(3).

Nevertheless, the Ninth Circuit's holding in *Headwaters* that the O & C Act is a dominant-use statute probably precludes the application of FLPMA to the O & C lands. Although the BLM must comply with NEPA and the ESA when managing the O & C lands, the provisions of FLPMA appear inapplicable to the extent that they conflict with or are inconsistent with provisions of the O & C Act. See *supra* note 65-69 and accompanying text.

137. After this article was in press, the D.C. Circuit handed down *Northwest Forest Resource Council v. Dombeck*, \_\_\_ F.3d \_\_\_, 1997 U.S.App. LEXIS 4002 (D.C. Cir. Mar. 7, 1997), in which the court gave forest production advocates a procedural victory by reinstating their challenge to the President's Northwest Forest Plan. The district court had dismissed the suit on the ground that the advocates' claims were barred by the *stare decisis* effect of Judge Dwyer's upholding of the plan and the Ninth Circuit's subsequent affirmation, see *supra* notes 124-35 and accompanying text. The D.C. Circuit reversed, ruling that *stare decisis* does not require one district court to follow the decision of a district court in another circuit. Among the issues raised by the forest production advocates is the relationship between the O & C Act and requirements of other federal laws like the ESA.

#### IV. THE PROPOSED TRANSFER OF BLM TIMBER LANDS TO THE STATE OF OREGON

Proposals to transfer BLM lands come in all shapes and sizes. At one end of the spectrum are former House Bill 2032 and Senate Bill 1031 — radical proposals which would have authorized states to acquire all BLM lands within their borders.<sup>138</sup> At the other end of the continuum are small-scale proposals, such as the recent transfer of 5,400 acres of O & C timber lands to the Coquille Tribe of Coos County, Oregon.<sup>139</sup> Former House Bill 3769 (the O & C Transfer Act) lies somewhere between these two extremes, in that it would have transferred virtually all of the BLM's timber holdings in western Oregon to the state government.<sup>140</sup> The O & C Transfer Act provides a useful model of the economic and environmental effects of "moderate" size federal-to-state land transfers.<sup>141</sup>

138. H.R. 2032, 104th Cong. (1995); S. 1031, 104th Cong. (1995).

139. See Oregon Resource Conservation Act of 1996, S. 1662, 104th Cong. (1996). The Oregon Resource Conservation Act was adopted as Division B of the 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, — Stat. — (1996). Although this statute has not yet been reprinted as a public law, the full text of the Oregon Resource Conservation Act is reprinted in 142 Cong. Rec. S. 9756, 104th Cong. (Sept. 3, 1996). President Clinton signed the Omnibus Consolidated Appropriations Act into law on September 30, 1996.

The Coquille land transfer was not actually a "defederalization" statute because the Oregon Resource Conservation Act directed the Secretary of the Interior to transfer the lands at issue to the Bureau of Indian Affairs, which will hold title in trust for the benefit of the tribe. Oregon Resource Conservation Act of 1996 § 501(a)(4)(B), S. 1662, 104th Cong. (1996), reprinted in 142 Cong. Rec. S. 9756, 104th Cong. (Sept. 3, 1996). The Act gave management responsibility for the new Coquille Forest to the Assistant Secretary for Indian Affairs. *Id.* at § 501(a)(5). Because ultimate ownership and management authority is retained by the federal government, the Coquille Forest will remain subject to federal planning and conservation laws. In addition, the Oregon Resource Conservation Act included a citizen suit provision authorizing "any affected citizen" to bring suit in federal district court to enforce the provisions of the Act. *Id.* at § 501(a)(9)(A). Since the Act also required BIA to manage the lands in conformity with both federal and state environmental laws, the citizen suit provision may help ensure that the BIA timber management is carried out in accordance with applicable laws. *Id.* § 501(a)(5).

In contrast, the O & C Transfer Act would have transferred both title and management responsibility to the state of Oregon. H.R. 3769 § 4(a), 104th Cong. (1996) [hereinafter the O & C Transfer Act]. The O & C Transfer Act provides no citizen suit provision and no enforceable environmental guarantees. See *infra* notes 155-57 and accompanying text.

140. O & C Transfer Act, *supra* note 139. Former Representative Jim Bunn (R. Or.) introduced H.R. 3769 on July 10, 1996 in response to proposals developed by the Association of O & C Counties and the Independent Forest Products Association. See Mapes, *supra* note 11, at D1; Sleeth, *supra* note 8, at D1. See also Information Prepared by the Independent Forest Products Association, *supra* note 8.

141. Although the 2.2 million acres at issue in the 1996 O & C Transfer Act may not appear "moderate" in size, the land transfers proposed by former House Bill 2032 and Senate Bill 1031 would have completely swallowed both the O & C Transfer Act and the Coquille transfer. For a discussion of some of the adverse impacts of wholesale transfers of BLM lands to the states, see Blumm, *supra* note 19.

A. *House Bill 3769: The O & C Transfer Act*

The 1996 O & C Transfer Act had three substantive parts.<sup>142</sup> First, the Act included twenty Congressional “findings” that ranged from a description of the history of the O & C lands to a declaration that the O & C lands are “biologically capable of producing an excess of 1.6 billion board feet of timber per year on a sustained yield basis.”<sup>143</sup> Second, the O & C Transfer Act outlined procedural requirements for the transfer and described the federal lands involved.<sup>144</sup> The Act would have directed the Secretary of the Interior to transfer to the state of Oregon “all right, title, and interest of the United States in [the O & C lands], including [associated] resources and water rights.”<sup>145</sup> Third, the Act would have required the Oregon Legislature to file a “resolution of assent” with the Secretary of the Interior consistent with the conditions specified in the Act.<sup>146</sup>

The Act would have established more than a dozen transfer conditions pertaining to both timber management and revenue distribution under state ownership. These management requirements were modeled in part upon the O & C Act of 1937, and included some important structural changes for O & C land management. For example, the Act would have stipulated that the state of Oregon would hold the O & C lands in trust “for the financial benefit of the O & C counties.”<sup>147</sup>

142. O & C Transfer Act, *supra* note 139, §§ 1-5. The first two sections of H.R. 3769 provided a table of contents and a series of statutory definitions. *Id.* §§ 1-2.

143. *Id.* § 3. The latter statutory finding seemed to confirm that the Act was intended to subvert federal efforts to conserve wildlife habitat, by calling for a nearly eight-fold increase in annual timber sales above the 201 million board feet authorized by the Northwest Forest Plan. The O & C Transfer Act gave no explanation why the 1.6 billion board feet figure was selected.

144. *Id.* § 4.

145. *Id.* § 4(a). This section also required the transfer of all federally-owned structures, office equipment, vehicles, and all other stock and supplies held in inventory by the BLM. *Id.* §§ 4(b)(4)-(b)(5). Section 4(b) cataloged the affected federal lands, which included all O & C Railroad Grant lands, the Coos Bay Wagon Road Lands, and any other federal timber lands managed by the BLM under the O & C Act of 1937. *Id.* §§ 3(a)(1)-(a)(2). The “controverted” O & C lands managed by the Forest Service, see *supra* note 20, were not included within the transfer proposal, but the Act did include all BLM public domain timber lands located within O & C counties. *Id.* § 3(a)(3). This last clause converted the Act into a proposal to give the state title to virtually all BLM timber lands in western Oregon. Since the BLM manages approximately 239,000 acres of public domain timber lands in western Oregon, the O & C Transfer Act actually encompassed more than 2.4 million acres of O & C and public domain forest lands. See Don Preston & Bob Alverts, *Oregon's BLM Timber Resources*, in *ASSESSMENT OF OREGON'S FORESTS* 34 (Gary J. Lettman ed., 1988). See also Mornarich, *supra* note 16, at 653 (noting that public domain lands make up approximately 10% of the BLM's holdings in western Oregon).

146. O & C Transfer Act, *supra* note 139, § 4(a).

147. See *id.* § 5(a)(1) (requiring that the state “hold such lands in trust for the financial benefit for the O & C counties through sustained yield timber production, and manage such lands in accordance with such trust obligations and for the benefit of the people of Oregon and of the United States”). This provision

Another provision required the Oregon Department of Forestry to manage the lands

for permanent timber production under the principles of sustained yield for the purpose of contributing to the economic stability of local communities. While providing a permanent source of timber supply, the state of Oregon shall protect watersheds and fisheries, regulate streamflows, provide wildlife habitat and recreational opportunities, and institute a program that provides for blocking up of the lands through trades and other transfers with willing private and other public landowners within the O & C counties.<sup>148</sup>

This provision would have established the “economic stability of local communities” as the primary management directive for the O & C lands.<sup>149</sup> This provision also would have replaced the phrase “permanent forest production,” used in section 1181(a) of the O & C Act of 1937, with the phrase “permanent timber production.”<sup>150</sup>

More important, the Act would have required the state to manage the O & C lands under a state management plan that is “consistent with . . . the Northwest Forest Plan” only until January 1, 2004.<sup>151</sup> After that date, the Act would have called for state management pursuant to an approved habitat conservation plan (HCP) under the ESA.<sup>152</sup> The Act also would have imposed

would overrule a portion of the Ninth Circuit’s decision in *Skoko v. Andrus*, 638 F.2d 1154 (9th Cir. 1979). In *Skoko*, several O & C counties brought an action to compel the Secretary of the Interior to release the 25% of annual timber revenues pledged to the counties in lieu of taxes under the O & C Act of 1937, but withheld by Congress since 1954. See *supra* notes 79-80 and accompanying text. The Ninth Circuit rejected the counties’ claim, relying in part upon the court’s finding that:

Whatever the Congress did to alleviate the loss of tax revenues suffered by the O & C counties when the O & C lands were revested in the United States was an act of grace on the part of Congress. It conferred no rights upon the counties to the continuance of Congress’ bounty. Congress could amend or repeal the Act in question without infringing any right of the counties.

*Id.* at 1158. The O & C Transfer Act would nullify the Ninth Circuit’s analysis in *Skoko* by making the O & C counties the legal beneficiary of the state O & C lands.

148. O & C Transfer Act, *supra* note 139, § 5(a)(2).

149. By relegating uses other than timber production to an apparently secondary status, this provision was apparently designed to ensure that sustained yield timber production for the financial benefit of the O & C counties was to be the dominant use of the state O & C lands.

150. The shift in syntax from “forest production” to “timber production” is consistent with the Ninth Circuit’s conclusion in *Headwaters* that Congress actually meant “permanent timber production” when it provided for “permanent forest production” in the O & C Act of 1937. See *supra* notes 99-102 and accompanying text.

151. O & C Transfer Act, *supra* note 139, § 5(a)(4). The potential effects of the O & C Transfer Act upon the Northwest Forest Plan are discussed *infra* notes 218-24 and accompanying text.

152. O & C Transfer Act, *supra* note 139, § 5(a)(4). The potential effects of the O & C Transfer Act upon Endangered Species Act enforcement are discussed *infra* notes 226-240 and accompanying text.

conditions prohibiting the state from either selling transferred lands<sup>153</sup> or conducting timber operations in areas previously protected by Congress, such as wild & scenic river corridors and wilderness areas.<sup>154</sup>

Unlike the recently enacted Coquille land transfer,<sup>155</sup> the O & C Transfer Act would have provided no citizen suit authority of any kind. The only authorized remedy for failure to manage the lands according to the statute's conditions was a limited right of reentry for the federal government if either half of the eighteen O & C counties or the President of the United States requested that the Secretary of the Interior reenter the lands.<sup>156</sup> This right of reentry could be exercised only after the Secretary held a formal hearing and provided two years for the state to come into compliance with the terms of the O & C Transfer Act.<sup>157</sup>

Finally, the Act would have established a different revenue distribution scheme for revenues generated before and after January 1, 2004. Prior to January 1, 2004, the Act called for revenues to be distributed to ensure that the O & C counties continued to receive payments equal to the amount of annual revenue guaranteed under the Omnibus Budget Reconciliation Act of 1993.<sup>158</sup> After January 1, 2004, timber revenues would be divided equally between the O & C counties and the state.<sup>159</sup> Because the Act would have divided revenues based on "gross" timber proceeds, the state would have received only fifty percent of the gross annual timber sale proceeds, regardless of whether this amount was sufficient to cover the annual cost of managing the O & C lands.<sup>160</sup>

### B. *The Potential Benefits of State Management*

The O & C Transfer Act would have tripled Oregon's publicly owned timber lands overnight.<sup>161</sup> Proponents of the transfer contended that state

153. O & C Transfer Act, *supra* note 139, § 5(a)(10).

154. *Id.* § 5(a)(12). This provision would have applied only to areas "identified in and designated by Federal statute as of January 1, 1996." *Id.*

155. *See supra* note 139.

156. O & C Transfer Act, *supra* note 139, § 5(b)(2).

157. *Id.* Section 5(b)(2) would have required the Secretary to make a determination "on the record after an opportunity for a hearing." *Id.*

158. *Id.* § 5(a)(6). *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993). The Omnibus Budget Reconciliation Act of 1993 established a financial "safety-net" for Oregon counties historically dependent upon timber revenues. The Act guaranteed that the federal government will pay each county an annually decreasing percentage of its historic levels of annual timber revenues until the year 2003. *Id.* *See also* Dana Tims, *O & C Counties Fear Loss of Federal Funds "Safety-Net,"* PORTLAND OREGONIAN, Dec. 9, 1995, at B1.

159. O & C Transfer Act, *supra* note 139, § 5(a)(7).

160. *Id.*

161. The General Accounting Office estimated the state of Oregon's timber holdings at 876,000

management would have produced essentially five benefits.<sup>162</sup> First, supporters of the O & C Transfer Act, and the language of the 1996 Act itself, claimed that state ownership of the O & C lands would increase flexibility and opportunities to explore alternate strategies in order to improve management policies for the O & C lands.<sup>163</sup> Second, the proponents of the transfer argued that the state could manage the lands more efficiently, and therefore less expensively than the federal government.<sup>164</sup> Third, transfer advocates alleged that the federal government would save millions of dollars in annual appropriations if the lands were managed by the state of Oregon.<sup>165</sup> Fourth, the proponents touted the O & C land transfer as a solution to ongoing efforts to establish comprehensive ecosystem planning and management for the “checkerboard” patchwork of federal, state, and private land ownership in

acres as of 1992. GENERAL ACCOUNTING OFFICE, PRIVATE TIMBERLANDS: PRIVATE TIMBER HARVESTS NOT LIKELY TO REPLACE DECLINING FEDERAL HARVESTS 18 (Mar. 7, 1995) [hereinafter PRIVATE TIMBERLANDS]. The transfer of O & C timber lands to the state would increase Oregon's total timber holdings to well over three million acres. In comparison, the state of California managed only 107,000 acres of timber lands in 1992, while the state of Washington managed roughly 2.2 million acres. *Id.*

162. This discussion addresses the potential benefits of state management of the O & C and related lands under the O & C Transfer Act. For a discussion of the potential benefits of state management of all BLM lands, see ROBERT H. NELSON, HOW AND WHY TO TRANSFER BLM LANDS TO THE STATES (1996), recounting a number of possible benefits accruing from state management of BLM lands, such as increased management flexibility and experimentation, reduction in management costs from increased efficiency, increased revenues from resource use fees, and better long-term management accountability and sustainability. *Id.* at 4-15. Nevertheless, Professor Nelson concluded that, unlike other BLM lands, the O & C lands should not be transferred out of federal ownership because “the O & C lands are caught up in the polarizing struggles over the protection of the northern spotted owl . . . . Any proposal to transfer the O & C lands to the state of Oregon . . . would embroil the transfer legislation in the struggle over endangered species policy in the United States.” *Id.* at 39-40.

163. See O & C Transfer Act, *supra* note 139, § 3(15) (finding that “state management of these lands would enable the demonstration of the principles and promise of adaptive forest and watershed management in areas with an intricate mixture of public and private land. Oregon can be a laboratory for finding creative ways of managing forests and watersheds under multiple owners to meet a balance of environmental and commodity goals.”). See also Letter from Governor John Kitzhaber to Curry County Commissioner Rocky McVay, 2 (Dec. 22, 1995), <<http://www.governor.state.or.us/governor/press/p951229b.htm>>, including language identical to that found in the O & C Transfer Act. See generally Mapes, *supra* note 11, at D1.

164. Both former Representative Jim Bunn and Curry County Commissioner Rocky McVay have emphasized that the state of Oregon could manage the O & C lands “more efficiently” than BLM. See Brent Walth, *Bill Would Give BLM Lands to Oregon*, PORTLAND OREGONIAN, July 11, 1996, at A1; Rocky McVay, *O & C Land Transfer Bill Protects It*, PORTLAND OREGONIAN, July 5, 1996, at C7.

165. See O & C Transfer Act, *supra* note 139, § 3(17) (declaring that “it is in the national interest to reduce the size of the Bureau of Land Management, reduce the burden on the federal treasury of managing the Railroad Grant Lands, Wagon Road Grant Lands, and related federally owned timber lands, and transfer control of and land management authority over such lands to the most local level of government capable of effectively and efficiently managing the lands.”). See also Sleeth, *supra* note 8, at D1.

western Oregon.<sup>166</sup> Fifth, the proponents claimed that state management would allow increased timber harvests, and thus provide more revenues for public services in timber-dependent communities suffering from reduced annual harvest levels since 1991.<sup>167</sup>

Opponents of the O & C Transfer Act have vigorously disputed the validity of each of the purported benefits claimed by advocates of the O & C land transfer. For example, critics of the proposed transfer have argued that the O & C Transfer Act would not save public money; instead, it would merely transfer the burden of subsidizing the O & C counties from the federal to state government.<sup>168</sup> In addition, some have questioned the state's ability to adequately protect and manage threatened and endangered species dependent on habitat in the O & C lands.<sup>169</sup> Moreover, the concept of "efficiency" has been criticized as an inadequate measure of the desirability of competing methods of public land management.<sup>170</sup> Finally, a recent analysis of the effects of "salvage logging" has challenged the assumption that increased timber harvests will economically benefit the communities within which the resource is located.<sup>171</sup> Each of the purport-

166. See O & C Transfer Act, *supra* note 139, § 3(19) (finding that "national, state, and local interests both public and private, and both economic and ecologic, would be best served if the checkerboard pattern of property ownership in the O & C counties . . . was transformed through a process of blocking up ownerships"). See also Letter from Governor John Kitzhaber to Commissioner Rocky McVay, *supra* note 163, at 2.

167. See R.O. Fety, Editorial, *O & C Counties Had 126-Year History Behind Claim*, PORTLAND OREGONIAN, Oct. 10, 1995, at B7; Peter Sleeth, *GOP Plan Would Give U.S. Lands To State*, PORTLAND OREGONIAN, May 11, 1995, at B1. See also Information Prepared by the Independent Forest Products Association, *supra* note 8.

168. See, e.g., Jerry Rust & Neale Hyatt, *O & C Counties Just Greedy*, PORTLAND OREGONIAN, Sept. 18, 1995, <<http://www.teleport.com/~francis/umpquawater/oc/rust.html>>. The economic effects of the proposed transfer are addressed more fully *infra* notes 173-92 and accompanying text.

169. See Mapes, *supra* note 11. See also Rust & Hyatt, *supra* note 168. Governor Kitzhaber has also expressed concerns that the state does not have the money or resources to manage the late successional and riparian reserves that would be transferred to the state under the O & C Transfer Act. See Erin Kelly, *Opal Creek Bill Wins Two Victories*, GANNETT NEWS SERV., Aug. 2, 1996. The issue of state endangered and threatened species protection is addressed more fully *infra* notes 225-54 and accompanying text.

170. See, e.g., Scott Lehmann, *Privatizing Public Lands: A Bad Idea*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 231, 233-39 (1996). See also Coggins, *supra* note 19, at 213, (arguing that "Congress has chosen to require a great many procedural safeguards such as environmental evaluation and land use planning. Whether or not undue expense and frustration result, the most appropriate response to the complaint of [federal land management] inefficiency is: 'so what?'"). For an in depth, and mathematically complex analysis of the concepts of efficiency and productivity in the public land context, see SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* 109-17 (1995).

171. See Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 622-26 (1996) (arguing that "the quality of life in the Pacific Northwest has contributed significantly to growth and diversity in the regional economy. That quality of life depends significantly on the recreational and aesthetic values of the region's intact national forests."). Professor Axline cited a recent study which found that proposals to increase timber harvest on federal lands "offer little meaningful relief to those who are enduring much of the cost of the transition, and, in the end, they are likely to



ed benefits of state management, with the possible exception of the prospect of eliminating "checkerboard" land ownership,<sup>172</sup> relates to potential economic benefits for the local, state, and federal governments.

### C. *The Economic Effects of State Management*

The threshold economic issue presented is whether the state government can afford to take part in a complicated experiment like the O & C Transfer Act.<sup>173</sup> This section provides a brief analysis of whether such an unprecedented transfer would be economically feasible for the state of Oregon.<sup>174</sup>

do more harm than good." *Id.* at 622, (citing ECONOMIC WELL-BEING AND ENVIRONMENTAL PROTECTION IN THE PACIFIC NORTHWEST: A CONSENSUS REPORT BY PACIFIC NORTHWEST ECONOMISTS 9 (Thomas M. Power ed., 1995)).

172. The O & C Transfer Act is not the only proposal to eliminate the land ownership "checkerboard" that continues to frustrate efforts at ecosystem based planning and management. *See, e.g.*, Testimony of George Lea, President, Public Lands Foundation, Before the House Resources Subcommittee on National Parks, Forests and Lands, Aug. 1, 1995, available in LEXIS, Legis. file. (copy on file with the *Land and Water Law Review*), arguing that:

The need to reposition this [checkerboard] ownership pattern grows daily and is elementary to efficient management of all ownerships of land involved and particularly to effective management of the public lands . . . . We believe it is time for the federal government to become pro-active and committed to a program of land exchange and the selling of isolated public land tracts all designed to improve the ownership pattern of the public land areas.

*Id.* The Public Lands Foundation has proposed that Congress implement an accelerated land exchange program as an alternative to state acquisition of BLM lands. *Id.* Governor Kitzhaber has also suggested that land exchange programs might be an effective alternative to the wholesale land transfer contemplated by the O & C Transfer Act. *See* Letter from Governor John Kitzhaber to Curry County Commissioner Rocky McVay, *supra* note 163, at 2.

173. In 1995, Oregon Governor John Kitzhaber convened a working group to study the economic feasibility of BLM to state land transfers. *See supra* note 8. In December 1995, Governor Kitzhaber tentatively endorsed the land transfer proposals, with the reservation that any transfer "must include high standards for restoring populations of threatened species and a prohibition on setting a minimum timber harvest." *Id.* However, the governor subsequently opposed the O & C Transfer Act because it would have transferred wilderness areas, wild & scenic river areas, late successional reserves, and other land areas that the governor had previously ruled out as potential transfer candidates. Telephone Interview with Peter Green, Office of the Governor (Dec. 5, 1996). *See also* Letter from John Kitzhaber to Curry County Commissioner Rocky McVay, *supra* note 163, at 2. The governor also expressed concerns that the state does not have the money or resources to manage the huge timber acreage associated with the O & C Transfer Act. *See Kelly, supra* note 169.

174. In September 1995, after several months of research and public meetings, the scientific panel of Governor Kitzhaber's working group concluded that "The data covering all the O & C lands is so large as to be unmanageable, within a reasonable time and budget within one analysis for the entire O & C lands area . . . the complexity of technical issues is too great for a timely and economical analysis even *within* individual BLM districts." Memorandum from Janet McLennan, Chair, Oregon Bd. of Forestry, to Oregon Governor John Kitzhaber, DRAFT INTERIM REPORT OF THE OREGON & CALIFORNIA RAILROAD WORKING GROUP 10 (Sept. 29, 1995) (copy on file with the authors) [hereinafter O & C WORKING GROUP DRAFT INTERIM REPORT]. Similarly, the administrative and budgetary team of the working group concluded that 1) there is no simple method that will determine actual and total cost of BLM management; 2) there is no direct relationship between the BLM's revenues and costs, nor between anticipated costs and budgets for the same future fiscal year period; 3) the BLM budgets some portions of its field personnel costs in different budget units (headquarters),

The BLM's management costs for the O & C lands are approximately \$100 million per year.<sup>175</sup> In return, the O & C lands generated a gross annual revenue of roughly \$123 million in 1993 and \$48 million in 1994.<sup>176</sup> Under the O & C Transfer Act, the state of Oregon would assume full financial responsibility for managing BLM's timber lands in the state of Oregon.<sup>177</sup> Because the Act would divide gross annual revenues equally between the O & C counties and the state government, the relevant inquiry for the state government is whether one-half of the gross annual timber revenues for the O & C lands will cover the annual management expense incurred by the state. If not, the O & C Forest Transfer Act would require the state to subsidize the proposed transfer.<sup>178</sup>

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making a determination of total field personnel costs nearly impossible; 4) the BLM does not budget for its own legal costs, they are borne by the Regional Solicitor's Office of the Department of the Interior; 5) because BLM administrative appeals are handled by the Department of the Interior the costs of administrative appeals are not readily available; and 6) costs for BLM implementation of FLPMA and NEPA are unavailable. *Id.* at 11.

With these limitations in mind, the following discussion is intended to identify some of the more serious economic issues confronting the state regarding the proposed transfer. A detailed economic analysis of the O & C forest transfer proposal is beyond the scope of this article.

175. Neale Hyatt, *An Analysis of the Oregon Lands Revestment Project 2* (1995), <<http://www.teleport.com/~francis/umpquawater/oc/hyatt.html>>. O & C land management costs are difficult to assess for the reasons discussed *supra* note 162. The BLM reported a total expenditure for the O & C lands of \$89,598,932 for fiscal year 1993. 1993 PUBLIC LAND STATISTICS, *supra* note 20, at 117. This figure does not include annual expenditures for federal firefighting, construction and access, or land acquisition. *Id.* This figure is also based upon annual management expenses incurred by BLM in administering only the O & C lands. Since the O & C Transfer Act included more than 200,000 acres of public domain timber lands, see *supra* note 145, actual management costs for lands affected by the O & C Transfer Act would be somewhat higher.

BLM's total resource management cost for the state of Oregon in 1994 was roughly \$139 million. BLM FACTS: OREGON & WASHINGTON, *supra* note 21, at 7. BLM management expenditures include 1) forest management, development, health, and recovery; 2) range management and improvement; 3) soil and watershed conservation; 4) lands and minerals management; 5) wildlife management; 6) recreation management and construction; 7) resource protection; 8) fire suppression, suppression, and damage rehabilitation; 9) forest pest control; 10) law enforcement; 11) road construction; 12) building construction; 13) maintenance of capital investments; and 14) planning and data management. *Id.* In contrast, the Oregon Department of Forestry's 1995-97 bi-annual budget authorizes an expenditure of approximately \$34,480,000, about 17% of the BLM's \$100 million annual expenditure for the O & C lands. Telephone Interview with Logan Jones, Oregon Department of Forestry (Dec. 11, 1996).

176. BLM FACTS: OREGON & WASHINGTON, *supra* note 21, at 5. The figures for 1994 may be artificially low. *Id.* Annual gross revenues under the O & C Transfer Act would be slightly higher than the BLM's reported income for the O & C lands because of the revenues generated by an additional 200,000 acres of public domain timber lands. In 1993, the BLM's Oregon public domain lands generated approximately \$12 million in revenue. *Id.*

177. See *supra* text accompanying note 145.

178. Governor Kitzhaber has opposed transfer proposals that require state subsidies. See Letter from Governor John Kitzhaber to Curry County Commissioner Rocky McVay, *supra* note 163, at 3, (noting that "the state would not subsidize administration, protection and management . . . ; all state expenses would be covered before disbursements could be made to local governments or other beneficiaries."). See also Letter from Governor John Kitzhaber to Douglas County Commissioner Doug Robertson, 1 (Mar. 19, 1996) (copy on file with the *Land and Water Law Review*).

According to one analysis, the state would need to harvest 500 million board feet of timber per year in order to generate \$200 million in gross revenue — the amount necessary for the state to cover its costs.<sup>179</sup> If the state must generate \$200 million in gross revenue per year in order to recoup the state's management costs, and the state actually complies with the 201 million board feet annual harvest limitation imposed by the Northwest Forest Plan, state management under the O & C Transfer Act will require a subsidy of approximately \$61 million per year.<sup>180</sup>

Nevertheless, proponents of the proposed transfer argue that the state can manage the O & C lands more efficiently than BLM.<sup>181</sup> Even if true, in order for the state to recoup its management costs, state management would have to cost less than half of what O & C land management costs the BLM.<sup>182</sup> There are also unaccounted transition costs that must be considered as well. The proposed transfer is likely to generate substantial transition and start-up expenses for both state and federal governments.<sup>183</sup> In addition, transfer of the O & C lands from federal to state control

179. Hyatt, *supra* note 175, at 2. This conclusion is based upon an average timber price for 1994 of \$390 per thousand board feet, an annual state management cost of \$100 million, and an even split of gross revenues between the O & C counties and the state government. *Id.* The analysis assumes that state management of the O & C lands will cost the state the same amount annually expended by the BLM. This assumption is also used as a baseline in other economic analyses of BLM lands to state land transfers. See ROSS W. GORTE, LIBRARY OF CONGRESS, STUDY PREPARED FOR THE HOUSE RESOURCES COMMITTEE, CONGRESSIONAL RESEARCH SERVICE 11 (July 28, 1995); NELSON, *supra* note 162, at 15-16.

180. Assuming that the prescribed harvest of 201 million board feet of timber is sold at \$390 per thousand board feet and generates approximately \$78 million in gross revenues, the state would receive \$39 million annually under the O & C Transfer Act. If annual management for the lands at issue costs the state roughly \$100 million, the state treasury would have to absorb a deficit of approximately \$61 million per year. This figure is subject to fluctuations in timber prices and any discrepancies between state and federal annual management costs for the O & C lands. However, a 1995 study conducted by the Congressional Research Service estimated that state management of all BLM lands within the state of Oregon would result in an annual deficit of at least \$48 million. See GORTE, *supra* note 179, at 11. See also NELSON, *supra* note 162, at 15-16.

181. See *supra* note 164 and accompanying text. Cf. *supra* notes 170-71 and accompanying text (questioning the rule of "efficiency" analysis in public lands management).

182. This is based upon the assumptions that annual harvest at 201 million board feet per year will generate \$39 million for the state under O & C Transfer Act and that BLM management costs approximately \$100 million per year. See *supra* note 180.

183. See NELSON, *supra* note 162, at 4 (noting that the transfer of BLM lands "might also require financial sacrifices, especially in the short run, depending on how the transfer is undertaken."). Similarly, Governor Kitzhaber's working group concluded that "management costs connected with implementing option 9 per the Record of Decision [of the Northwest Forest Plan] would be significantly greater than projected receipts, and the state would face high planning and monitoring costs during the first ten years." O & C WORKING GROUP DRAFT INTERIM REPORT, *supra* note 174, at 2. The silviculture and forest management team of the working group identified several state start-up costs including 1) recruiting and training of a new work force; 2) data inventory and assimilation; 3) forest planning under the Oregon Forest Practices Act; and 4) compliance with the ESA, including a viability analysis for old-growth dependent species over the entire range of the transferred lands. *Id.* at 13.

would necessitate revisions in the Northwest Forest Plan, the cost of which would fall upon the federal treasury.<sup>184</sup>

However, the state might be able to recoup its management costs under the O & C Transfer Act if harvest levels were increased to 500 million or more board feet per year, more than twice the harvest authorized under the Northwest Forest Plan.<sup>185</sup> Because the O & C Transfer Act's requirement that state management be "consistent" with the Northwest Forest Plan is vague and perhaps unenforceable,<sup>186</sup> it is not difficult to imagine that the state might

184. As discussed above, *supra* note 133 and accompanying text, in 1994 Judge Dwyer determined that the removal of the O & C lands from the Northwest Forest Plan could require that the Secretaries of Agriculture and the Interior revise the entire plan. The issue would be whether state management "consistent" with the plan would be sufficient to keep the Northwest Forest Plan viable under federal environmental laws, eliminating the need for revisions in the federal plan. The relevant inquiry would seem to be whether the state and federal management plans can be "coordinated" in order to provide sufficient protection for old-growth dependent species. This issue would depend in part upon whether the proposed state O & C lands are managed "under" the Northwest Forest Plan, "consistent" with the plan, or independent of the plan. Neither the O & C Transfer Act nor the governor's working group have provided a concrete definition of exactly how the O & C lands would be managed under state ownership. See O & C WORKING GROUP DRAFT INTERIM REPORT, *supra* note 174, at 1-2 (noting that there are at least three possible management options: 1) management under the precise terms of the record of decision for the Northwest Forest Plan; 2) management under the "goals" of the Northwest Forest Plan, but not strictly in compliance with the record of decision; and 3) management under state goals and standards).

185. See *supra* note 123. An annual harvest of 500 million board feet of timber would generate roughly \$195 million in gross revenues at \$390 per thousand board feet. *Id.*

186. The O & C Transfer Act would have required the state O & C lands to be administered under a state plan "consistent with the Northwest Forest Plan" until 2004. See *supra* note 151. This provision is vague because it is unclear how closely the state would be required to adhere to the terms of the Northwest Forest Plan. The term "consistent" usually means "showing no significant change, unevenness, or contradiction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 484 (1986). Although several courts have cited the dictionary definition of consistency, judicial opinions exploring the precise meaning and contours of the term "consistency" are quite rare. See, e.g., *Environmental Defense Fund v. United States Envtl. Protection Agency*, 82 F.3d 451, 456 (D.C. Cir. 1996) (holding that Clean Air Act section 106's consistency requirement did not mandate exact correspondence but only congruity or compatibility); *Roanoke Mem'l Hosp. v. Kenley*, 352 S.E.2d 525, 529 (Va. Ct. App. 1987) (holding that "consistent with" does not mean "exactly alike" or "the same in every detail." It means instead, "in harmony with, compatible with, holding to the same principles, or in general agreement with."). See also John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 73 (1987) (suggesting that a particular treatment or interpretation of a legal rule may be viewed as consistent when it furthers the purposes of the legal rule and is equal to or superior to any other treatment or interpretation in serving that end).

The unresolved issue under the O & C Transfer Act is whether state management can be "consistent" with the Northwest Forest Plan without following each and every requirement of the standards and guidelines, see *infra* notes 258-64, in the record of decision. For example, would a state management plan that called for an annual harvest above 201 million board feet be "inconsistent" with the Northwest Forest Plan? A court may never supply an answer because the O & C Transfer Act probably is unenforceable. Although the Act provides the United States with a limited right of reentry, it contains no citizen suit authority or private right of action. See *supra* note 156. We consider the availability of appeal rights and judicial review under the O & C Transfer Act more fully *infra* notes 213-17 and accompanying text.

be motivated to increase harvest levels above 201 million board feet per year in order to recoup state management costs.<sup>187</sup>

The 1996 O & C Transfer Act would have provided the state with essentially only two options to pay for the cost of managing the transferred lands. First, the state could harvest timber from the O & C lands in accordance with the Northwest Forest Plan's 201 million board feet per year restriction until 2004. After that date, the state could manage the lands under an approved HCP and harvest more than 201 million board feet per year without running afoul of the O & C Transfer Act.<sup>188</sup> This option would result in a state subsidy of at least \$50 million per year until the year 2004. Alternatively, the state could immediately harvest in excess of 201 million board feet per year, recoup all management expenses, and violate an ambiguous and unenforceable provision of the O & C Transfer Act.<sup>189</sup> The probable outcome under the O & C Transfer Act is clear: Annual timber harvest for the O & C lands likely would double or possibly triple the harvest levels projected under the Northwest Forest Plan as a matter of state fiscal necessity.

The preceding discussion of economic feasibility does not address two other important issues: public access to the lands and environmental effects. The potential loss of public access and use of federal resources has been a contentious issue in debates over disposal of federal lands.<sup>190</sup> The O & C Transfer Act attempted to diffuse this issue by requiring the

187. Unlike BLM, the Oregon Department of Forestry depends on timber revenues to cover the expense of administration. The Oregon Department of Forestry receives no appropriation from the state to manage the state's timber lands. GENERAL ACCOUNTING OFFICE, PUBLIC TIMBER: FEDERAL AND STATE PROGRAMS DIFFER SIGNIFICANTLY IN PACIFIC NORTHWEST 7 (May 23, 1996). This arrangement encourages the state to actively market timber in order to increase revenues and reduce timber-related expenditures. *Id.*

188. See *supra* text accompanying note 152.

189. This assumes that in order for state management to be "consistent" with the Northwest Forest Plan, the state would have to abide by the 201 million board feet per year harvest level for the O & C lands. *But see supra* note 186.

190. Both environmental and resource users have expressed concerns about the potential loss of public access and use under state management. See NELSON, *supra* note 162, at 40 (noting that "the political feasibility of transferring BLM lands to western states may well depend on assurances that [public recreational] access will be maintained") Professor Nelson also speculated that western ranchers may oppose federal-to-state transfers of BLM lands because "state land managers might not recognize the de facto right to rangeland forage that ranchers have acquired under federal oversight." *Id.* at 36. Similarly, George Lea, President of the Public Lands Foundation expressed concerns over continued hunting, recreation, and mineral access under former House Bill 2032, discussed *supra* note 10. See Testimony of George Lea, President, Public Lands Foundation, Before the House Resources Subcommittee on National Parks, Forests and Lands, *supra* note 172. See also Blumm, *supra* note 19, at 340 (noting that in 1994, the public made more than 65 million visits to BLM lands for hunting, fishing, camping, and other leisure activities). Public concern over the potential loss of access and use under state ownership led Senator Craig Thomas (R. Wyo.), sponsor of former Senate Bill 1031, to amend his bill in order to guarantee continued public ownership and use of transferred lands under state ownership. See PUB. LANDS NEWS, *supra* note 18, at 7.

state to guarantee continued public access and use, but it is doubtful whether this is an enforceable guarantee.<sup>191</sup> Similarly, the potential environmental effects of state acquisition of federal resources has made many environmentalists wary of federal-to-state land transfers in almost any form.<sup>192</sup> State acquisition of the O & C lands, even if economically feasible, may still impose environmental costs that outweigh any purported economic benefits of state management of the resource.

## V. THE ENVIRONMENTAL EFFECTS OF STATE MANAGEMENT

The most controversial aspect of recent proposals to transfer federal lands to the states is potential environmental degradation due to the loss of federal planning and regulation. Although it is impossible to predict the specific environmental consequences of an unprecedented proposal such as the O & C Transfer Act, this section addresses some of the more important changes in applicable law should the O & C lands be transferred to state ownership.<sup>193</sup>

The proposed transfer would eliminate the applicability of numerous federal statutes, including the National Environmental Policy Act (NEPA),<sup>194</sup> the Administrative Procedure Act (APA),<sup>195</sup> the Fish and Wildlife Coordination Act,<sup>196</sup> the National Historic Preservation Act,<sup>197</sup> the Wilderness Act,<sup>198</sup> the Federal Land Policy and Management Act,<sup>199</sup>

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191. See O & C Transfer Act, *supra* note 139, § 5(a)(13), requiring the state to "hold the lands . . . open and accessible for hunting, fishing, hiking, swimming, boating, trapping, rockhounding and other recreational uses . . ." However, this promise, like other provisions of the O & C Transfer Act, may be unenforceable for the reasons discussed *supra* note 186.

192. See Walth, *supra* note 164, at A1; Mapes, *supra* note 11, at D1. See also Letter from Jim Britell, Kalmiopsis Audubon; Tim Lillebo, Oregon Natural Resources Council; David Bayles; Pacific Rivers Council; Paul Ketcham, Portland Audubon Society; Jean Crawford, Siskiyou Regional Education Project; and Robert M. Freimark, The Wilderness Society, to Michael Dombeck, Acting Director, Bureau of Land Management, (June 13, 1996) (discussing the organizations' concerns about the environmental and precedential effects of the Coquille land transfer), <<http://www.teleport.com/~francis/umpquawater/oc/coquille.html>>.

193. As discussed *supra* note 172, we attempt no comprehensive analysis of the environmental consequences of the O & C Transfer Act, or even all the changes in applicable law and regulations. Instead, the purpose of this section is to explore some of most significant of the numerous changes in resource planning and protection that would result from the transfer of the O & C lands to the state.

194. 42 U.S.C. §§ 4321-4370 (1994).

195. 5 U.S.C. §§ 500-706 (1994).

196. 16 U.S.C. §§ 661-666 (1994).

197. 16 U.S.C. §§ 470 (1994).

198. 16 U.S.C. §§ 1131-1136 (1994).

199. 43 U.S.C. §§ 1701-1784 (1994).

the Equal Access to Justice Act,<sup>200</sup> the Freedom of Information Act,<sup>201</sup> and section 7 of the Endangered Species Act.<sup>202</sup> The ensuing discussion focuses on two of the more significant changes in environmental regulation and planning under state management: 1) public participation and enforcement of environmental standards without NEPA or the APA; and 2) threatened and endangered species protection without the Northwest Forest Plan.

#### A. *Timber Management Without NEPA*

Unlike its sister west coast states, California and Washington, Oregon has no state NEPA equivalent.<sup>203</sup> The loss of NEPA procedures would produce a substantial decline in the quality of public participation in, and knowledge of, O & C land management activities such as timber sales and road building.<sup>204</sup> For example, the state of Oregon currently has no process capable of analyzing direct, indirect, or cumulative environmental effects of proposed timber sales or road building, as required to satisfy NEPA.<sup>205</sup> The only state planning procedure that affords consideration of environmental effects is the limited "goal 5" land use review process, applicable to state lands through the Oregon State Agency Coordination Program.<sup>206</sup>

200. 28 U.S.C. § 2412 (1994).

201. 5 U.S.C. § 552 (1994).

202. 16 U.S.C. § 1536 (1994).

203. See CAL. PUB. RES. CODE §§ 21000-21176 (West 1996); WASH. REV. CODE § 43.21C.010-910 (1983). See also *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 822 F.2d 104, 127 n.22 (D.C. Cir. 1987) (noting that NEPA procedures do not apply to state actions).

204. See Michael C. Blumm, *The National Environmental Policy Act at Twenty*, 20 ENVTL. L. 447, 453 (1990) (commenting that "there is considerable evidence that the open, pluralistic decision making demanded by NEPA has influenced many agency projects and policies."). For a critical analysis of the public participation process under NEPA, see Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53 (1996).

205. See Council on Environmental Quality's NEPA regulations, 40 C.F.R. § 1502 *et. seq.*, requiring federal agencies to "provide full and fair discussion of significant environmental impacts and . . . inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts." *Id.* § 1502.1. This discussion must include consideration of "(a) direct effects and their significance . . . (b) indirect effects and their significance . . . (c) possible conflicts between the proposed action and the objectives of federal, regional, state, and local . . . policies and controls . . . (d) the environmental effects of alternatives including the proposed action . . . (e) energy requirements [for various alternatives] . . . (f) natural or depletable resource requirements [for various alternatives] . . . (g) urban quality, historic and cultural resources . . . and (h) means to mitigate adverse environmental impacts." *Id.* § 1502.16.

206. See OR. ADMIN. R. §§ 629.20.00-629.20.080. Oregon Statewide Planning Goal Five requires conservation of twelve types of resources, including wildlife habitat, wetlands, waterways, wilderness areas, and scenic landscapes. See DEPARTMENT OF LAND CONSERVATION AND DEV., *Oregon Land Conservation and Development Commission's Goal Five, in OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES 8-9* (1995). Goal five requires local governments to inventory and evaluate these resources, to adopt local land use plans, and to submit those plans for review for

The Oregon Department of Forestry has voluntarily initiated a public participation program for the long-range planning process for state forest lands.<sup>207</sup> However, the public participation program, first employed by the Department of Forestry in preparation of the most recent plan for the Elliot State Forest, is not required by statute or regulation, and therefore does not obligate the agency to consider, address, or respond to public comments or criticisms.<sup>208</sup> In addition, unlike their federal counterparts, state land managers are not required to develop a reasonable range of alternative management options as part of the planning process.<sup>209</sup> Moreover, state management plans are not subject to the periodic review requirements applicable to federal land management plans.<sup>210</sup> Finally, public participation in state forest management is limited to long-range management planning.<sup>211</sup> In contrast, federal land managers are required to solicit, consider, and respond to public comment on both long-range planning and site-specific management decisions.<sup>212</sup>

Administrative and legal challenges to land management decisions for the O & C lands would be severely restricted by operation of the O & C

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consistency with statewide land use goals by the state Land Conservation and Development Commission (LCDC). See OR. ADMIN. R. §§ 660.16.000-660.16.030. Once LCDC approves a land use plan, state agencies must coordinate with the locality to ensure their activities are consistent with both statewide planning goals and local plans. See OR. ADMIN. R. § 629.20.000. For a full discussion of the statewide planning goals and process, see DEPARTMENT OF LAND CONSERVATION AND DEV., OREGON'S STATEWIDE PLANNING GOALS AND GUIDELINES 8-9 (1995).

207. See OREGON DEP'T OF FORESTRY, THE STATE LANDS MANAGEMENT PROGRAM, FOREST LOG, VOL. 64, No. 5 (1995), <<http://www.odf.state.or.us/pubaff/log/0013.html>>. The new public participation process aims to reduce legal challenges and to ensure that state land managers consider a broad range of interests and opinions when planning for the state's lands. See OREGON DEP'T OF FORESTRY, ELLIOT STATE FOREST HABITAT CONSERVATION PLAN J-10 (1995) [hereinafter ELLIOT STATE FOREST HCP]. See also PUBLIC TIMBER, *supra* note 21, at 8; Telephone Interview with Logan Jones, Oregon Department of Forestry (Dec. 11, 1996).

208. See OREGON DEP'T OF FORESTRY, THE STATE LANDS MANAGEMENT PROGRAM, FOREST LOG, *supra* note 207, at 1. See also ELLIOT STATE FOREST HCP, *supra* note 207, at J-10, discussed *infra* notes 274-77 and accompanying text.

209. See PUBLIC TIMBER, *supra* note 21, at 8. See also 40 C.F.R. § 1504.14(a), (Council on Environmental Quality NEPA regulation requiring federal agencies to "rigorously explore and objectively evaluate all reasonable alternatives.").

210. PUBLIC TIMBER, *supra* note 21, at 8-9. See also OR. REV. STAT. § 526.255(1) (1988) (calling for "long-range management planning based on current resource descriptions and technical assumptions, including sustained yield calculations for the purpose of maintaining economic stability . . ."). There are no specific renewal requirements for state plans; the most recent Elliot State Forest Long-Range Plan and HCP was initiated by resolution of the State Land Board. See ELLIOT STATE FOREST HCP, *supra* note 207, at S-1.

211. See PUBLIC TIMBER, *supra* note 21, at 8. See also OREGON DEP'T OF FORESTRY, THE STATE LANDS MANAGEMENT PROGRAM, FOREST LOG, *supra* note 207, at 1.

212. See PUBLIC TIMBER, *supra* note 21, at 8. See also Council on Environmental Quality's NEPA regulations, 40 C.F.R. § 1506.6 (providing standards for public participation in agency NEPA procedures).



Transfer Act. Currently, citizens may challenge federal land management decisions through administrative appeals to BLM and the Interior Board of Land Appeals.<sup>213</sup> Citizens may also seek judicial review of federal land management decisions in federal court under the APA.<sup>214</sup> But state land management decisions are not subject to administrative appeal and can be challenged only in state court proceedings.<sup>215</sup> Citizen challenges to Department of Forestry management decisions for state lands are exceedingly rare.<sup>216</sup> For exam-

213. See H. MICHAEL ANDERSON, *THE WILDERNESS SOCIETY, CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN*, App. F (1994) [hereinafter *CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN*] (providing a detailed description of BLM and Department of the Interior appeal procedures). BLM decisions may be appealed to the Interior Board of Land Appeals (IBLA) within the Department of the Interior. See 43 C.F.R. § 4.400, *et seq.*, describing IBLA appeal procedures.

214. See 5 U.S.C. § 704 (1994) (providing judicial review of agency actions “for which there is no other adequate remedy in a court”). Although agency decisions must be upheld unless found arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, see 5 U.S.C. § 706(2)(A) (1994), an agency is required to “articulate a satisfactory explanation for its action.” *Motor Vehicle Mfg. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1995) (concluding that an agency action is arbitrary and capricious where the agency fails to establish “a rational connection between the facts found and the choice made.”).

215. The administrative hearing procedures provided under ORS section 527.700 apply only to final orders of the State Forester issued under ORS sections 527.610 to 527.770. OR. REV. STAT. § 527.700. Oregon Administrative Rules define “orders issued under ORS sections 527.610 to 527.770” as: (1) an order denying approval of a written plan; (2) an order to correct and unsatisfactory condition; or (3) a temporary order to cease a particular activity. See OR. ADMIN. R. 9.672.100. See also PUBLIC TIMBER, FEDERAL AND STATE PROGRAMS DIFFER SIGNIFICANTLY IN PACIFIC NORTHWEST, *supra* note 21, at 10-11, noting that Oregon and Washington state land management decisions can be challenged only in state court proceedings.

Concerned citizens seeking to challenge Oregon state agency decisions must brave the state judicial review scheme, which former Chief Justice Paterson of the Oregon Supreme Court has described as “inefficient, unpredictable, ineffective, expensive, [and] unresponsive.” *Forman v. Clatsop*, 297 Or. 129, 133 (1984) (Peterson, C.J., concurring). See also Barbara J. Safriet, *Judicial Review of Government Action: Procedural Quandaries and a Plea for Legislative Reform*, 15 ENVTL L. 217, 219 (1985). A person “adversely affected or aggrieved” by a state agency order may appeal the order in an Oregon circuit court. See OR. REV. STAT. 183.480(1) (1988). An “order” is broadly defined as an agency action expressed orally or in writing directed to a named person or persons, other than employees, officers or members of an agency. See OR. REV. STAT. 183.310(5) (1988). An individual timber sale would seem to qualify as an agency order under ORS 183.310(5). See *Clarke Elec. v. State Highway Div.*, 93 Or. App. 693, 698 (1988) (holding that the award of a government contract to a particular bidder is an agency order). But the promulgation of a state timber management plan most likely would not be an order, since it is not directed “to a named person or persons, other than employees [of an agency].” However, citizens aggrieved by agency action other than an order may petition an Oregon circuit court to compel the agency to act where the agency has (1) unlawfully refused to act; (2) unreasonably delayed making a decision; or (3) failed to act in accordance with statutory mandates or its own regulations. See OR. REV. STAT. 183.490 (1988). See also *Wyers v. Dressler*, 42 Or. App. 799, 801 (1979) (upholding judicial review under ORS 183.490, where the State Energy Facility Siting Council failed to act according to its own regulations). We have been unable to find any reported cases involving citizen challenges to Oregon Department of Forestry land management decisions for state-owned lands. For a detailed description of judicial review of state agency actions in Oregon, see OREGON LAW INSTITUTE, *ADMINISTRATIVE LAW IN OREGON* (1994). See also Ted Kulongoski, *OREGON ATTORNEY GENERAL’S ADMINISTRATIVE LAW MANUAL AND UNIFORM AND MODEL RULES OF PROCEDURE UNDER THE ADMINISTRATIVE PROCEDURE ACT* (1995).

216. See PUBLIC TIMBER, *supra* note 21, at 2.10 (claiming that state management is less con-

ple, as of December 31, 1995, the Department of Forestry had only two pending legal challenges, both of which involved timber operators suing on timber contracts that were either modified or canceled in order to protect threatened and endangered species.<sup>217</sup>

The sharp distinction between federal and state public participation and appeal rights is most notable in the absence of a state NEPA equivalent. State land management decisions are subject only to minimal environmental analyses, no legally mandated public participation, and limited judicial review. In contrast, federal management decisions require full disclosure of environmental effects through the NEPA process, must undergo mandatory public participation, can be challenged in administrative appeals, and are reviewable in federal court under the APA.

### B. *Derailing the Northwest Forest Plan*

The potential loss of some or all of the habitat protection measures provided by the Clinton Administration's Northwest Forest Plan is perhaps the most worrisome consequence of the proposed transfer of the O & C lands to the state of Oregon. Advocates of the O & C land transfer acknowledge that the purpose of state management is to extricate the O & C timber lands from the environmental and management constraints imposed by the Northwest Forest Plan.<sup>218</sup> The O & C Transfer Act declared that state management shall be "consistent"<sup>219</sup> with the Northwest Forest Plan until January 1, 2004, but the Act would have permitted management independent of the federal plan after that date.<sup>220</sup>

Implementation of the O & C Transfer Act would have at least three major consequences for the Northwest Forest Plan. First, as discussed above, state management of the O & C lands would almost certainly precipitate revisions in the Northwest Forest Plan,<sup>221</sup> which in turn is likely to generate renewed legal battles over old growth management and wildlife protection in the Pacific Northwest.<sup>222</sup> Second, transferring the O

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troversial because state timber lands are primarily "second growth," as compared to the predominantly "old growth" harvests on federal forest lands).

217. Telephone Interview with Logan Jones, Oregon Department of Forestry (Dec. 11, 1996). See also PUBLIC TIMBER, *supra* note 21, at 10-11.

218. See *supra* note 167.

219. See discussion of "consistency" in *supra* note 186.

220. O & C Transfer Act, *supra* note 139, § 5(a)(4). Neither the O & C Transfer Act nor Governor Kitzhaber's O & C Working Group have determined exactly how the O & C lands would be managed under state ownership. See *supra* note 184.

221. See *supra* note 184. See also Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994) discussed *supra* notes 120-35 and accompanying text.

222. See O & C WORKING GROUP DRAFT INTERIM REPORT, *supra* note 174, at 5 (noting the

& C lands to the state might frustrate federal efforts to protect and recover listed species by nullifying section 7 of the ESA.<sup>223</sup> Third, habitat conservation goals established under the Northwest Forest Plan may be unattainable under state ownership because state forest management under the Oregon Forest Practices Act<sup>224</sup> differs substantially from the forest management practices required by the Northwest Forest Plan.

### 1. Threatened and Endangered Species Protection on State Lands

The distinction between federal and state ownership of the O & C lands is of critical importance for threatened and endangered species because the Endangered Species Act<sup>225</sup> supplies two distinct sets of species protection standards: section 7 for federal lands and section 9 for non-federal lands.<sup>226</sup> Section 7(a)(2) of the ESA requires each federal agency to "ensure that any action authorized, funded, or carried out by [a federal] 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."<sup>227</sup> A federal agency action jeopardizes the continued existence of a species if the action "reasonably would be expected . . . to reduce appreciably the likelihood of both the survival and recovery of a listed species."<sup>228</sup> In addition, federal land managers considering activities

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potential for substantial and costly legal challenges for a prolonged period of time). See also NELSON, *supra* note 162, at 40.

223. The effects of the proposed O & C land transfer on threatened and endangered species protection and recovery are discussed *infra* notes 214-42 and accompanying text. State and federal timber management practices and the ESA are closely related because the special protection for old-growth and aquatic habitats provided by the Northwest Forest Plan aims to satisfy federal agency obligations under section 7 of the ESA. See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. at 1314, discussed *supra* notes 124-35 and accompanying text.

224. OR. REV. STAT. §§ 527.260-527.292.

225. 16 U.S.C. §§ 1531-1543 (1994).

226. Compare § 7(a)(2) of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) with § 9(a)(1)(B), 16 U.S.C. § 1538(a)(1)(B).

227. Endangered Species Act, § 7(a)(2), 16 U.S.C. § 1536(a)(2) (1996). See also 50 CFR § 402.01(a). Section 7(a)(2) of the ESA provides, in relevant part, that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, 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 by the Secretary, after consultation as appropriate with affected States, to be critical, . . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2).

228. 50 C.F.R. § 402.02. Species are listed as either threatened or endangered by rulemaking conducted by the U.S. Fish & Wildlife Service or the National Marine Fisheries Service. *Id.* For an overview of the listing process, see James C. Kilbourne, *The Endangered Species Act Under The*

"likely" to adversely effect a listed species must initiate consultation with either the U.S. Fish and Wildlife Service or the National Marine Fisheries Service.<sup>229</sup> Management activities likely to adversely affect listed species cannot proceed until the Fish and Wildlife Service issues a biological opinion and, if necessary, an incidental take statement.<sup>230</sup> If a species is proposed for listing, federal agencies must "confer" with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service prior to undertaking an activity.<sup>231</sup> Moreover, section 7(a)(1) requires that federal agencies "in consultation with and with the assistance of [the Fish and Wildlife Service and the National Marine Fisheries Service], utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species."<sup>232</sup>

The Northwest Forest Plan imposes additional procedures designed to protect threatened and endangered species located on federal lands managed under the plan. For example, federal land managers must complete watershed analyses prior to conducting management activities in areas that the consulting service previously designated as critical habitat for the northern spotted owl.<sup>233</sup>

*Microscope: A Closeup Look From the Litigator's Perspective*, 21 ENVTL L. 499, 502 (1991).

229. 16 U.S.C. § 1536(a)(2). See also 50 C.F.R. § 402.01. The consultation process begins with a written request from the initiating agency and culminates in the Fish and Wildlife or National Marine Fisheries Service's issuance of a biological opinion. See 50 C.F.R. § 402.14.

230. See 50 C.F.R. § 402.14(a). The biological opinion identifies potential effects of the proposed agency action on listed species or critical habitat. If the Fish and Wildlife or National Marine Fisheries Service issues a finding of "jeopardy," that agency must also include a list of "reasonable and prudent alternatives that would allow the proposed activity to proceed without jeopardizing the continued existence of the species." 16 U.S.C. § 1536(b)(3). See also 50 C.F.R. § 402.02. If the U.S. Fish & Wildlife or National Marine Fisheries Service concludes that the proposed action is not likely to adversely affect listed species or their habitat, the Service issues a "no jeopardy" opinion. 50 C.F.R. § 402.14(h). In addition, the U.S. Fish and Wildlife or National Marine Fisheries Service may also issue an "incidental take statement" if the taking will not jeopardize a species' survival or adversely modify critical habitat. See 16 U.S.C. § 1539(a)(2)(A); 50 C.F.R. § 17.22(b) (1995). See also Kilbourne, *supra* note 228, at 530-64.

231. 16 U.S.C. § 1536(a)(4). If an affected species is not listed as threatened or endangered, but only proposed for listing, an informal conference with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service is required. The conference is an "informal discussion concerning an action that is likely to jeopardize the continued existence of the proposed species." See 50 C.F.R. § 402.10 (discussing proposed species conference procedures). See also Kilbourne, *supra* note 228, at 556.

232. 16 U.S.C. § 1536(a)(1). For an in depth exploration of the unrealized potential of section 7(a)(1), see J.B. Ruhl, *Section 7(a)(1) of the "New" Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL L. 1107 (1995).

233. FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL A-3 (1994) [hereinafter NORTH-

In contrast, section 9 of the ESA forbids the “taking” of endangered species on state and private lands.<sup>234</sup> The destruction of an endangered species’ habitat can constitute a “taking.”<sup>235</sup> However, the “taking” prohibition is limited in several ways. First, section 9 does not include the “no jeopardy” and consultation requirements applicable to federal land management activities under section 7(a)(2).<sup>236</sup> The ESA consultation procedures are valuable because they provide a systematic procedure for the examination and consideration of threatened and endangered species at an early stage of federal management planning.<sup>237</sup> Second, non-federal land owners are not obligated to carry out programs for the conservation of threatened and endangered species as federal agencies are by section 7(a)(1).<sup>238</sup> Third, the section 9 taking prohibition does not generally apply to threatened animal species or threatened and endangered plants.<sup>239</sup> Fourth, enforcement of the section 9 taking prohibition on non-federal lands is predominantly “reactive,” while section 7 requires “proactive” management through the consultation requirements.<sup>240</sup>

WEST FOREST PLAN FINAL EIS]. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 54. A watershed analyses is also required before conducting management activities in certain other management areas designated under the Northwest Forest Plan. See *infra* note 283.

234. See § 9(a)(1)(B) of the ESA, 16 U.S.C. § 1538(a)(1)(B) (1996) (making it “unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.”).

235. See 50 C.F.R. § 17.3 (1995) (defining “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”). See also *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, — U.S. —; 115 S. Ct. 2407, 2412-18 (1995) (upholding the U.S. Fish and Wildlife Service’s taking regulation as a permissible interpretation of section 9); Tara L. Mueller, *Babbitt v. Sweet Home Chapter of Communities: When is Habitat Modification a Take?*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 333 (1996).

236. See *supra* notes 227-31 and accompanying text.

237. See Ruhl, *supra* note 232, at 1119 (commenting that “the consultation procedure involves several feedback loops between the agency proposing the action and the reviewing agency . . . . Hence, the procedure section 7(a)(2) sets in motion . . . provides [the Fish and Wildlife Service and the National Marine Fisheries Service] with a strong presence in any federal action that involves potential take in violation of section 9(a).”).

238. See *supra* note 232. Although the potential for listed species protection under § 7(a)(1) has not yet been realized, transferring federal lands to the state would relinquish any potential benefits that section 7(a)(1) may eventually provide. See Ruhl, *supra* note 232, at 1121 (discussing the potential application of § 7 (a)(1) on federal lands).

239. See Ruhl, *supra* note 232, at 1123. Threatened and endangered plant species are protected under § 9 only if state law provides specific protection for individual species. See 16 U.S.C. § 1538(a)(2)(B). Similarly, the U.S. Fish and Wildlife Service has promulgated regulations under § 4(d) of the ESA that generally extend full endangered species protection under section 9 to threatened species. See 50 C.F.R. § 17.31 (1994). However, the Fish and Wildlife Service has discretion under section 4(d) to provide lesser protection for species listed as threatened. See 16 U.S.C. § 1533(d). In at least two cases the Fish and Wildlife Service has elected to provide lesser protection for threatened species under the § 4(d) regulations. See Ruhl, *supra* note 232 at 1123 (noting that the Fish and Wildlife Service sometimes issues specialized § 4(d) regulations for politically controversial species such as the California gnatcatcher and the northern spotted owl).

240. See John C. Kunich, *Species & Habitat Conservation: The Fallacy of Deathbed Conserva-*

Although section 9 prohibits the “taking” of endangered species, state land managers are not obligated to “ensure that no jeopardy” takes place, are not required to initiate consultation before taking action that may adversely affect threatened and endangered species, do not have a duty to affirmatively conserve listed species, and are not generally prohibited from destroying listed plant species. Thus, the real concern about the potential effects of state management on threatened and endangered species is not whether the state will comply with the minimal requirements of section 9 of the ESA, but whether threatened and endangered species dependent upon the O & C lands can endure the loss of section 7 protections.

Recent state interest in habitat conservation plans (HCPs) may improve proactive state protection for listed species.<sup>241</sup> Section 10(a) of the ESA authorizes the Secretary of the Interior to issue permits sanctioning the incidental taking of a listed species.<sup>242</sup> States or private parties seeking an incidental take permit must submit an HCP describing the likely impacts of the proposed takings, mitigation and monitoring procedures, an explanation of why there are no feasible alternatives to the proposed taking, and information establishing that sufficient funding exists to implement the proposed HCP.<sup>243</sup> Once an HCP and accompanying incidental

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*tion Under the Endangered Species Act*, 24 ENVTL. L. 501, 550 (1994). See also Paul D. Ort, *What Does it Take to Take and What Does it Take to Jeopardize? A Comparative Analysis of the Standards Embodied in Sections 7 and 9 of the Endangered Species Act*, 7 TUL. ENVTL. L. J. 197, 216 (1993). There are several problems with section 9 enforcement, including (1) selective enforcement by the Fish and Wildlife Service; (2) problems with acquiring and assembling data establishing that a taking has or will occur; and (3) the fact that prosecutors and plaintiffs bear the burden of establishing that future takings are both certain and imminent. See GENERAL ACCOUNTING OFFICE, WILDLIFE PROTECTION: ENFORCEMENT OF FEDERAL LAWS COULD BE STRENGTHENED 23-28 (Apr. 26, 1991). See also Daniel J. Rohlf, *THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION* 60-62 (1989) (discussing the limitations on enforcement of § 9's taking prohibition).

241. See OREGON DEP'T OF FORESTRY, *THE STATE LANDS MANAGEMENT PROGRAM*, *supra* note 208, at 1 (discussing the use of HCPs in the state's long-range management planning process). See also OREGON DEP'T OF FORESTRY, *NORTHWEST PLANNING PROCESS: HABITAT CONSERVATION PLANS*, <<http://www.odf.state.or.us/pubaff/horiz/1096c.html>> (discussing how the Oregon Department of Forestry is currently preparing the Northwest Oregon Long Range Plan, which will include some 600,000 acres of forest land between Lane County, Oregon and the Washington border). The Oregon Department of Forestry expects to complete the plan, as well as an application for a HCP, sometime in 1997. Telephone Interview with Logan Jones, Oregon Department of Forestry (Dec. 11, 1996).

242. 16 U.S.C. § 1539(a)(1)(B). Incidental takings are those takings resulting unintentionally from the pursuit of an otherwise lawful activity. See 50 C.F.R. § 402.02. See also Ruhl, *supra* note 232, at 1120.

243. See 16 U.S.C. § 1539(a)(2)(A). See also 50 C.F.R. § 17.22. Section 10(a) of the ESA authorizes the Secretary of the Interior to issue an incidental take permit if the Secretary finds (1) the taking is incidental to an otherwise lawful activity; (2) the applicant will minimize and mitigate impacts to the maximum extent practicable; (3) the applicant has demonstrated adequate funding for the plan; and (4) the proposed taking will not appreciably reduce the likelihood of the survival of the species in the wild. 16 U.S.C. § 1539(a)(2)(B). Issuance of an incidental take permit triggers the consultation requirements of section 7(a)(2) of the ESA. See UNITED STATES FISH AND WILDLIFE SER-

take permit are issued, the state or private actor need only follow the procedures in the HCP in order to comply with section 9 of the ESA.<sup>244</sup>

The HCP process has generated considerable controversy, due in part to the exceptionally long time frames contemplated by recent HCPs, and the potential effects of the so-called "no surprises" policy.<sup>245</sup> Many of the recent HCPs authorize incidental takings of listed species for sixty or even eighty years.<sup>246</sup> These long time periods for HCPs seem inconsistent with the reality that biological information about listed and unlisted species often changes significantly over a relatively short period of time.<sup>247</sup> In addition, the Clinton Administration's "no surprises" policy promises that

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VICE, PRELIMINARY DRAFT HANDBOOK FOR HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING 64 (1994). Issuance of an incidental take permit is also a federal action requiring agency compliance with the public participation and planning procedures of NEPA. See *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (holding that the National Marine Fisheries Service's issuance of an incidental take permit under § 10 of the ESA requires NEPA compliance). For a thorough discussion of the HCP process, see Albert C. Lin, Comment, *Participants' Experience with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 *ECOLOGY L.Q.* 369 (1996).

244. Incidental takings conducted pursuant to an incidental take statement issued under § 10 of the ESA are not illegal takings under § 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B). See 16 U.S.C. § 1536(o)(2).

245. See Marianne Lavelle, *Feds Settle to Save Act and Species, But Critics Say Deals May Hurt Not Help Endangered Species*, NAT'L L. J., Dec. 16, 1996, at A1; Deborah Schoch, *Developer-Environmental Pact Policy Is Challenged: Courts: Plaintiffs Say "No Surprises" Doesn't Allow for Disasters*, L.A. TIMES, Nov. 2, 1996 at B6. On October 31, 1996, several environmental groups, including the Biodiversity Legal Foundation, Klippstein's Spirit Sage Council, the Fund for Animals, the Shoshone Gabrielino Nation, and the Southwest Center for Biodiversity, filed suit in the District Court for the District of Columbia challenging the legality of the "no surprises" policy based on alleged violations of the notice and comment procedures required under the Administrative Procedure Act. *Id.*

246. For example, the Elliot State Forest HCP contemplates incidental takes of northern spotted owls for 60 years. See *ELLIOT STATE FOREST HCP*, *supra* note 207, at S-7. Similarly, Weyerhaeuser's recently completed HCP for 400,000 acres of the corporation's timber holdings in Oregon seeks an incidental take permit for northern spotted owls and marbled murrelets for at least 40, and preferably 80 years. See *Weyerhaeuser Submits Conservation Plan to Protect Fish and Wildlife Species on Willamette Forestland*, BUSINESS WIRE REPORT, Dec. 12, 1996. In addition, the state of Washington recently completed a HCP for state forest lands that would authorize the taking of northern spotted owls for 70 years. See *Washington Habitat Conservation Plan Draws Criticism*, GREENWIRE REPORT, Nov. 19, 1996. The exact duration of HCPs are set by the U.S. Fish and Wildlife Service as part of the § 10 permit issuance process. See 50 C.F.R. § 13.21(f).

247. See, e.g., Robert J. Taylor, *Biological Uncertainty in the Endangered Species Act*, 8 NAT. RESOURCES & ENV'T 6, 8 (Summer 1993) (noting that the complexity of species and habitat are not well understood in the scientific community); Daniel J. Rohlf, *There's Something Fishy Going on Here: A Critique of the National Marine Fisheries Service's Definition of Species Under the Endangered Species Act*, 24 ENVTL. L. 617, 636 (1994) (commenting that "biologists have identified areas of uncertainty in virtually all aspects of how organisms interact and behave"). See also J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Non-Federal Lands: Time For Something Completely Different?*, 66 U. COLO. L. REV. 555, 568 (1995); Michael Soule & Daniel Simberloff, *What Do Genetics and Ecology Tell Us About the Design of Nature Reserves?*, 35 *BIOLOGICAL CONSERVATION* 19, 35 (1986).

the federal government will impose no additional mitigation procedures during the life of the HCP.<sup>248</sup> The no surprises policy also precludes application of additional conservation measures on lands covered by approved HCPs in the event that a new species is subsequently listed.<sup>249</sup> In contrast, section 7(a)(2) of the ESA obligates federal land managers to reinitiate consultation if significant new information is discovered or if a new listing is made.<sup>250</sup> In short, the no surprises policy seems to recreate on non-federal lands the problem with federal land management in the late 1980s; static and outdated land management plans that fail to account for evolving scientific knowledge about wildlife and their habitats.<sup>251</sup>

Nevertheless, the 1996 O & C Transfer Act would have required that state management of the O & C lands after January 1, 2004 be conducted under a federally approved HCP.<sup>252</sup> A state HCP for the O & C

248. See U.S. DEP'T OF THE INTERIOR, *Administration's New Assurance Policy Tells Landowners: "No Surprises" in Endangered Species Planning*, News Release, Aug. 11, 1994.

249. *Id.* See also Lin, *supra* note 243, at 420 (noting that the U.S. Fish and Wildlife Service has a backlog of over 4000 species which are candidates to join the approximately 900 species already listed). According to a 1994 General Accounting Office report, at least 73% of currently listed species have more than 60% of their habitat on non-federal lands. See GENERAL ACCOUNTING OFFICE, *ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NON-FEDERAL LANDS 4-5* (1994). Accepting these figures as accurate, and assuming that the ratio of federal and non-federal habitat for listed species is representative of candidate species, there are some 2920 candidate species dependent upon non-federal lands for more than 60% of their habitat.

250. See Kilbourne, *supra* note 228, at 558 (noting that the "section 7(a)(2) obligation to avoid jeopardy is a continuing obligation so long as the federal agency retains some degree of involvement or control over the action"). Federal agencies are required to reinitiate consultation where (1) the amount or extent of taking specified in an incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (4) a new species is listed or critical habitat is designated that may be affected by the action. See 50 C.F.R. § 402.16 (1990). See also *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987) (holding that the U.S. Army Corps of Engineers had to reinitiate consultation where it failed to secure "mitigation lands" specified by the U.S. Fish and Wildlife Service as reasonable and prudent alternatives; this failure was "new information that might affect the listed species in a manner not previously considered").

251. See Rohlf, *supra* note 247, at 624 (arguing that Congress recognized that efforts to protect species could be undermined by scientific uncertainty and therefore created mechanisms in the ESA to ensure that agencies that "carry out federal policy do so in light of the most up-to-date scientific understanding"). The requirement that listing decisions be based upon the "best scientific and commercial data available," 16 U.S.C. § 1533 (b)(1)(A), is one of these mechanisms. *Id.* The duties to reinitiate consultation under § 7(a)(2) and to supplement deficient environmental impact statements under NEPA, discussed *supra* notes 112-18, are others. The events precipitating the *Portland Audubon Society* litigation, discussed *supra* notes 104-18, provide a paradigmatic example of an agency's failure to carry out its statutory duties in light of the most recent scientific understanding. The no surprises policy invites the same error under § 9 of the ESA by authorizing HCPs that will fail to evolve with new information about the relationship between threatened and endangered species and their habitats.

252. See *supra* note 152.



lands would likely resemble the current HCP for the Elliot State Forest in Oregon.<sup>253</sup> Unfortunately, the provisions of the Elliot State Forest HCP fall considerably short of the habitat conservation measures prescribed by the Northwest Forest Plan.<sup>254</sup>

## 2. Habitat Conservation Under State and Federal Timber Management

The Clinton Administration created the Northwest Forest Plan in order to discharge federal agency duties under section 7 of the ESA.<sup>255</sup> In contrast, the Oregon Department of Forestry developed the Elliot State Forest HCP in order to allow the state of Oregon to harvest timber consistent with section 9 of the ESA and the Oregon Forest Practices Act.<sup>256</sup> A brief comparison of some of the provisions of the Northwest Forest Plan, the Oregon Forest Practices Act, and the Elliot State HCP illustrates the major changes in habitat protection that would result from state management of the O & C lands.<sup>257</sup>

### a. Overview of the Northwest Forest Plan

The Northwest Forest Plan provides management standards for more than twenty-four million acres of federal lands in California, Washington, and Oregon.<sup>258</sup> The plan establishes a set of "standards and guidelines" governing planning and management on all federal lands within the estimated range of the northern spotted owl.<sup>259</sup> These standards and guide-

253. The provisions of the Elliot State Forest HCP are discussed *infra* notes 275-77 and accompanying text.

254. See *infra* notes 278-319 and accompanying text.

255. See *supra* note 135.

256. See ELLIOT STATE FOREST HCP, *supra* note 207, at 1-2.

257. Because it is impossible to define exactly how the state would manage the O & C lands under the O & C Transfer Act, see *supra* note 184, the following comparison is somewhat speculative. Since the O & C Transfer Act required that state management standards for the O & C lands after 2004 be established by a federally approved HCP, the following discussion includes potential differences between the provisions of the Oregon Forest Practices Act and the standards outlined in the recently approved Elliot State Forest HCP.

258. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at 1. FOREST SERVICE, U.S. DEPT OF AGRICULTURE, RECORD OF DECISION FOR AMENDMENTS TO FOREST SERVICE AND BUREAU OF LAND MANAGEMENT PLANNING DOCUMENTS WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL AND STANDARDS AND GUIDELINES FOR MANAGEMENT OF HABITAT FOR LATE-SUCCESSIONAL AND OLD-GROWTH FOREST RELATED SPECIES WITHIN THE RANGE OF THE NORTHERN SPOTTED OWL (1994)[hereinafter cited as NORTHWEST FOREST PLAN ROD]. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 13.

259. The standards and guidelines are located in the NORTHWEST FOREST PLAN ROD, *supra* note 258, at app. A-C. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 11.

lines supersede the standards established under individual Forest Service or BLM district plans, except where the local plans "are more restrictive or provide greater benefits to late-successional forest-related species."<sup>260</sup>

The plan divides all federal lands within the planning area into "key" and "non-key" watersheds,<sup>261</sup> and classifies all federal lands into one of seven management categories.<sup>262</sup> Applicable standards and guidelines differ for each of the seven management areas, except key watershed standards which apply wherever they occur.<sup>263</sup> The primary focus of the plan's standards and guidelines under the Northwest Forest Plan is to preserve wildlife habitat, while ensuring continued timber harvests on federal lands.<sup>264</sup>

*b. Overview of the Oregon Forest Practices Act and the Elliot State Forest Habitat Conservation Plan*

Forest management practices on state and private lands in the state of Oregon are regulated by the Oregon Forest Practices Act, which is administered by the Oregon Department of Forestry.<sup>265</sup> Under the Act, the Oregon Board of Forestry has promulgated rules prescribing specific timber management practices for state and private forests.<sup>266</sup> These forest

260. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-2.

261. *Id.* at B-84. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 12. Key watersheds are discussed *infra* note 279.

262. The seven categories are 1) congressionally reserved areas; 2) late-successional reserves; 3) adaptive management areas; 4) managed late-successional areas; 5) administratively withdrawn areas; 6) riparian reserves; and 7) areas not within a defined class that are denoted as matrix areas. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at A-4.

263. For a full description of the management requirement for each of the seven management areas under the Northwest Forest Plan, see CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 12-14. Specific management practices for key watersheds, riparian reserves, and late-successional reserves are discussed, *infra* notes 278-319 and accompanying text.

264. See Memorandum from President Clinton to Forest Conference Inter-Agency Working Groups from Forest Conference Executive Committee, reprinted in FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM, U.S. DEP'T OF AGRICULTURE, FOREST ECOSYSTEM MANAGEMENT: AN ECOLOGICAL, ECONOMIC, AND SOCIAL ASSESSMENT 2 (1993) (directing the creation of a forest plan that would "protect the long term health of our forest, our wildlife, and our waterways . . . [and] produce a predictable and sustainable level of timber sales."). See also PUBLIC TIMBER, *supra* note 21, at 5-6.

265. See Gary J. Lettman, *Timber Management Practices In Oregon*, in ASSESSMENT OF OREGON FORESTS 60 (Gary J. Lettman ed., 1988).

266. The Board of Forestry is responsible for promulgating and amending the forest practice rules. *Id.* This twelve-member body, appointed by the governor, has responsibility not only for administering the Oregon Forest Practices Act but also appointing the State Forester. See Peggy Hennessey, *The Oregon Forest Practices Act: Unenforced or Unenforceable?*, 17 ENVTL. L. 717, 720 (1987). The state Departments of Fish & Wildlife, Environmental Quality, and Water Resources are also involved in promulgating and revising the forest practice rules. *Id.* at 722. The Oregon Department of Forestry operates under the direction of the State Forester and is authorized to enforce the Oregon Forest Practices Act and the Forest Practice Rules. See PHIL KEISLING, OREGON SECRETARY

practice rules address road building, herbicide use, soil conservation and erosion control, reforestation, water quality protection, and protection of fish and wildlife habitat.<sup>267</sup> Originally adopted in 1971, the legislature substantially amended the Forest Practices Act in 1987, 1991, and 1996.<sup>268</sup> The 1996 amendments provided greater protection for wildlife trees and downed logs, reduced permissible harvest sizes, and augmented scenic highway corridor protection.<sup>269</sup>

The Oregon Forest Practices Act, widely regarded as one of the most protective state forest practices act in the nation,<sup>270</sup> seeks to encourage economically efficient forest practices that ensure "continuous growing and harvesting of forest tree species . . . consistent with sound management of soil, air, water, fish and wildlife resources."<sup>271</sup> Although the Act requires the Department of Forestry to manage state timberlands for multiple uses,<sup>272</sup> the primary focus of the state timber management program is to maximize revenues for the long-term financial benefit of state schools and counties.<sup>273</sup>

OF STATE, 1993-94 OREGON BLUE BOOK 62-63 (1993). See also BRITISH COLUMBIA MINISTRY OF FORESTS, INTEGRATED RESOURCE POLICY BRANCH, A COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS 25-26 (1995)[hereinafter COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS].

267. See OR. ADMIN. R. § 629.01 *et seq.*, prescribing forest management standards for each of three administrative regions: (1) Eastern Oregon; (2) Northwest Oregon; and (3) Southwest Oregon. See also COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS, *supra* note 266, at 84.

268. See House Bill 3396, 64th Leg. (1987); Senate Bill 1125, 66th Leg. (1991). See also OREGON DEPARTMENT OF FORESTRY, THE OREGON FOREST PRACTICES ACT: TWENTY FIVE YEARS OLD AND STILL GOING STRONG 1 (1996), <<http://www.odf.state.or.us/pubaff/news/fpa25.htm>>.

269. See House Bill 3485, 68th Leg., Special Sess. (1996). See also OREGON DEPARTMENT OF FORESTRY, *Forest Practices Act Changes: Update*, Mar. 1, 1996, <<http://www.odf.state.or.us/FP/0100.html>>.

270. See PUBLIC TIMBER, *supra* note 21, at 10; PRIVATE TIMBERLANDS, *supra* note 161, at 5.

271. OR. REV. STAT. § 527.630 (1995). See also PRIVATE TIMBERLANDS, *supra* note 161, at 32; COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS, *supra* note 266, at 19.

272. See OR. REV. STAT. § 530.500 (1996) (calling for management to enhance fish and wildlife environment, landscape expanse, protection against flood and erosion, and recreation and protection of water supplies). See also Sally K. Fairfax et al., *School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 797, 906 (1992).

273. See PUBLIC TIMBER, *supra* note 21, at 4. See also OREGON DEP'T OF FORESTRY, THE STATE LANDS MANAGEMENT PROGRAM, *supra* note 207, at 2 (noting that the Oregon Department of Forestry's state timber management program emphasizes the production of timber revenue while giving "due consideration" to other values). Management of state-owned lands is subject to additional legal requirements beyond the basic provisions of the Oregon Forest Practices Act and the rules. For example, Article VIII, section 5 of the Oregon Constitution directs the state land board to "manage lands under its jurisdiction with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management." A 1992 Oregon Attorney General Opinion concluded that this provision requires that state lands be

Recently, the Oregon Department of Forestry began managing certain state forest lands under HCPs approved under the ESA.<sup>274</sup> The stated purpose of the Elliot State Forest Long Range Plan and HCP is to provide "a comprehensive, integrated forest management plan that takes into account a wide range of forest values, including timber, threatened and endangered species, wildlife, fish, water quality, recreation, and other uses."<sup>275</sup> Management standards under state HCPs, such as the recently completed Elliot State Forest HCP,<sup>276</sup> are more protective than those required by the Oregon Forest Practices Act.<sup>277</sup> However, there are several important differences between federal management standards under the Northwest Forest Plan, the state standards under the Oregon Forest Practices Act, and the requirements of the Elliot State Forest HCP. The following sections provide an overview of some of the discrepancies between federal and state standards concerning aquatic habitat protection, timber harvest restrictions, and road construction.

### c. *Aquatic Habitat Protection*

The primary distinction between aquatic habitat protection standards under the Northwest Forest Plan, the Oregon Forest Practice Rules, and the Elliot State Forest HCP involves timber harvest restrictions in riparian areas. The Northwest Forest Plan and the Elliot State HCP prohibit all timber operations in riparian areas except those necessary to improve aquatic habitats, while the forest practice rules require only mitigation procedures.<sup>278</sup> However, the Northwest Forest Plan provides significantly wider buffer corridors, and hence greater stream protection, than either

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managed to maximize long-term income. See OPINION OF OREGON ATTORNEY GENERAL CHARLES S. CROOKHAM, 46 OP. ATTY. GEN. (1992), Opinion No. 8223, July 24, 1992. The opinion also suggested that state land management for "non-productive" uses, such as wildlife reserves, would likely violate the state constitution. *Id.* See also ELLIOT STATE FOREST HCP, *supra* note 207, at app. I (summarizing the legal framework applicable to state-managed lands).

274. See OREGON DEPARTMENT OF FORESTRY, THE STATE LANDS MANAGEMENT PROGRAM, *supra* note 207, at 1 (discussing the use of HCPs in the state's long-range management planning process). See also OREGON DEPARTMENT OF FORESTRY, NORTHWEST PLANNING PROCESS: HABITAT CONSERVATION PLANS, *supra* note 241, at 1.

275. ELLIOT STATE FOREST HCP, *supra* note 207, at S-1.

276. The Elliot State Forest comprises approximately 93,000 acres in the southern Oregon coast range, adjacent to BLM owned O & C timber lands. ELLIOT STATE FOREST HCP, *supra* note 207, at S-1 (1995). The state forest consists of primarily second-growth timber, with less than 1000 acres classified as 165 years or older. *Id.* at III-8. The HCP authorizes 28 million board feet of timber harvest per year. *Id.* at I-7. On October 3, 1995, the U.S. Fish and Wildlife Service issued the Oregon Department of Forestry a sixty-year incidental take permit for northern spotted owls and a six year permit for marbled murrelets. See 61 Fed. Reg. 17,317 (1996). See also 60 Fed. Reg. 32,706 (1995).

277. See ELLIOT STATE FOREST HCP, *supra* note 207, at IV. Provisions of the Elliot State Forest HCP pertaining to riparian area protection, timber harvest restrictions, and road construction are discussed *infra* notes 288-319 and accompanying text.

278. See *infra* notes 285-87 and accompanying text.

the forest practice rules or the Elliot State Forest HCP.

Aquatic protection standards vary considerably between the Northwest Forest Plan and the state's forest practice rules. For example, the federal plan establishes a comprehensive aquatic conservation strategy (ACS) that provides special protection for key watershed areas and riparian reserves.<sup>279</sup> Riparian reserves are "buffer zones" designed to protect aquatic habitats and other unstable areas from potentially damaging management activities, such as timber operations.<sup>280</sup> These reserves are divided into five categories, varying in width from 100 feet for non-fish-bearing intermittent streams to 300 feet or more for certain classes of permanent fish-bearing waterways.<sup>281</sup> The plan requires land managers to perform a watershed analysis<sup>282</sup> before harvesting timber in riparian re-

279. The ACS aims to "restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them" on federal lands managed by the Northwest Forest Plan. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-81. The ACS consists of four parts. First, there are special standards and guidelines for areas designated as key watersheds. Key watersheds are designed to preserve habitats "crucial to at-risk fish species and stocks" and which contain high quality water. NORTHWEST FOREST PLAN ROD, *supra* note 258, at B-84. The key watershed standards and guidelines provide no generic watercourse protection, but the required watershed analysis may prescribe standards as a result of site-specific analysis. See CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 12. There are also roadbuilding limitations in key watershed areas. Road building standards are discussed *infra* notes 308-319 and accompanying text. Second, there are standards and guidelines for areas designated as riparian reserves. The federal plan defines riparian reserves as those parts of the watercourse directly connected to streams and other waterways and any adjacent unstable areas that are essential for the maintenance of the watercourse. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-84. Third, a watershed analysis is required before land management activities are conducted in key watershed areas. A watershed analysis is a "systematic procedure for characterizing watershed and ecological processes to meet specific management and social objectives." NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-84. Fourth, watershed restoration programs are established. See Lacey, *supra* note 123, at 341.

280. The plan defines unstable areas as "lands where human activities such as road construction and timber harvesting are likely to increase landslide distribution in time and space." See U.S. FOREST SERVICE, DEP'T OF AGRICULTURE, A FEDERAL GUIDE TO PILOT WATERSHED ANALYSIS 44 (1993)[hereinafter A FEDERAL GUIDE TO PILOT WATERSHED ANALYSIS]. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at app. G.

281. The Northwest Forest Plan divides all waterways within the planning area into five categories. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-88, B-123. These categories define the interim buffer zone widths for each type of watercourse. *Id.* The five classes of waterways are (1) fish-bearing streams; (2) permanently flowing non-fish-bearing streams; (3) constructed ponds and reservoirs, and wetlands in excess of one acre in size; (4) lakes and natural ponds; and (5) seasonally flowing or intermittent streams, wetlands less than one acre in size, and unstable or potentially unstable areas. *Id.* at B-86. The interim buffer widths can be changed only as a result of a watershed analysis. *Id.* at B-88. For a complete discussion of watercourse classification and reserve areas under the Northwest Forest Plan, see Lacey, *supra* note 123, at 344.

282. The watershed analysis is intended to evaluate current riparian condition and evaluate the potential impacts of management activities in the watershed. See Lacey, *supra* note 123, at 341. The process is designed to enhance the NEPA decision-making process by providing "a scientifically based understanding of the processes and interactions occurring within a watershed." A FEDERAL GUIDE TO PILOT WATERSHED ANALYSIS, *supra* note 280, at 7. The watershed analysis is not intended

serves or key watershed areas.<sup>283</sup> Further, the plan limits timber harvesting within riparian reserves to certain salvage operations that further the purposes of the ACS.<sup>284</sup>

Oregon's forest practice rules provide special protection for three categories of riparian areas.<sup>285</sup> State-defined riparian management areas vary in width between 20 and 100 feet, but these areas are not reserved from timber operations, and they do not include adjacent unstable areas.<sup>286</sup> However, the state rules do require special management practices and mitigation procedures for timber operations within defined riparian areas.<sup>287</sup> The Elliot State Forest HCP retains the basic

as a decisional process in itself, but rather an intermediate level of analysis between large-scale plans and site-specific NEPA analyses. *Id.* at 8-9. The watershed analysis evaluates several factors, including "vegetative patterns and distribution; flow phenomena such as vegetation corridors, streams, and migration routes; dispersal habitat; terrestrial vertebrate distribution; locally significant habitats; human use patterns throughout the ecosystem; cumulative effects; and hydrology. NORTHWEST FOREST PLAN ROD, *supra* note 258, at E-21. *See also* CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 34. The plan authorizes public participation in the watershed analysis process. *See* NORTHWEST FOREST PLAN ROD, *supra* note 258, at E-20 (noting that "the participation in Watershed Analyses of . . . interest groups . . . will be promoted"). However, there are no specific standards for public participation. *See* A FEDERAL GUIDE TO PILOT WATERSHED ANALYSIS, *supra* note 280, at 10 (noting that the degree of public involvement used in any watershed analysis will vary based on the type and intensity of the issues involved, the prevalence of existing information, and the history of public participation within or adjacent to a watershed).

283. The plan requires a watershed analysis prior to undertaking management activities in key watersheds, roadless areas, or riparian reserves. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 258, at B-86. The plan defines "management activities" as "any activity undertaken for the purpose of harvesting, traversing, transporting, protecting, changing, replenishing, or otherwise using resources." NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at 10 (glossary). Certain minor activities, such as those categorically excluded from the requirements of NEPA, do not require a prior watershed analysis. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-7.

284. The plan permits salvage logging only where catastrophic events have degraded riparian condition and timber harvest is necessary to attain ACS objectives. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 258 at B-123. The purpose of the ACS is to "restore and maintain the ecological health of watersheds and aquatic ecosystems contained within them." *Id.* at B-81. *See also* Lacey, *supra* note 123, at 341. For a discussion of the relationship between the salvage harvest restrictions under the Northwest Forest Plan and the "salvage logging rider," Pub. L. No. 104-19, 109 Stat. 241 (1995), see Axline, *supra* note 171, at 632-35. *See also* Lacey, *supra* note 123, at 346.

285. The rules designate "riparian management areas" (RMAs), which vary in size depending upon the type of watercourse at issue. *See* OR. ADMIN. R. § 629.635.200. Waterways are divided into three different types: (1) Type F streams are fish-bearing streams that may also have domestic uses; (2) Type D streams have domestic uses but are not fish-bearing; and (3) Type N streams are other non-fish-bearing waterways. *Id.* These three types are further classified according to average water flow in order to assign the relative width of the RMA. *See* OR. ADMIN. R. § 629.635.310. *See also* A COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS, *supra* note 266, at 179-80.

286. *See* OR. ADMIN. R. § 629.635.310, designating the relative RMA widths for different stream types and classes. The rules permit timber operations in RMAs, provided that special mitigation procedures, such as live tree and snag retention, are observed. *See infra* note 287.

287. Operators proposing timber operations within RMAs must comply with recently revised water quality protection measures and vegetation retention requirements, described in OR. ADMIN. R.

riparian management area structure established by the rules, but adds certain protections.<sup>288</sup> For example, unlike the state rules, the Elliot State Forest HCP prohibits timber operations within riparian management areas on all types of waterways except non-fish-bearing intermittent streams.<sup>289</sup>

#### *d. Timber Harvest Restrictions*

Harvest practices on federal and state lands vary from site to site. For example, the Northwest Forest Plan designates large tracts of late-successional and riparian reserves.<sup>290</sup> The plan limits timber harvesting within such reserves to thinning and salvage procedures, requires operations to be preceded by a "management assessment"<sup>291</sup> and approval by the Regional Ecosystem Office, and restricts thinning operations to stands of less than eighty years in age.<sup>292</sup> Similarly, the plan permits salvage

§§ 629.635.310-629.666.060. The water protection rules are a separate requirement from the state water quality standards under the Clean Water Act. *See* OR. ADMIN. R. § 629.635.300. For example, proposed harvests within the RMA for a type F, fish-bearing stream, must retain all trees within 20-feet of the high water mark, all downed wood and snags that are not fire or safety hazards, and between 30-40 live conifer trees per 1000 feet along the stream bank. *See* OR. ADMIN. R. § 629.640.100. There are also additional requirements pertaining to live tree and snag retention for each of the three types of waterways designated under OR. ADMIN. R. § 629.635.200.

288. *See* ELLIOT STATE FOREST HCP, *supra* note 207, at IV-9.

289. *Id.* at IV-5. The HCP permits timber harvest where necessary to enhance riparian habitats within the RMA. *Id.* at IV-9. This provision is similar to the Northwest Forest Plan's requirement that salvage timber operations within riparian reserves be necessary to fulfill ACS objectives. *See supra* note 284. However, the Northwest Forest Plan differs from the Elliot State Forest HCP because the federal plan requires an interagency committee to approve harvests, *see infra* note 280, while the Elliot HCP requires no independent review and provides no applicable standards for determining whether harvest is necessary to improve aquatic habitats.

290. *See* NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at 3-41; NORTHWEST FOREST PLAN ROD, *supra* note 258, at 8.

291. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-11. This management assessment is conducted by the agency proposing the management activity and is similar to the watershed analysis, required for key-watersheds and riparian reserves, in that both studies are designed to evaluate the current status of the reserve and forecast the effects of future management activities. *See* CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 39.

292. *Id.* Timber harvest restrictions in riparian reserves are discussed *supra* note 272 and accompanying text. All management activities in late-successional reserves must be reviewed and approved by the Regional Ecosystem Office. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-12. The Regional Ecosystem Office is the operational arm of the Regional Interagency Executive Committee, an inter-agency group that oversees implementation of the Northwest Forest Plan. The Regional Interagency Executive Committee is comprised of regional agency heads of the U.S. Forest Service, the Bureau of Land Management, the Fish and Wildlife Service, the National Marine Fisheries Service, the Bureau of Indian Affairs, and the Environmental Protection Agency. *See* CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 17. The Regional Ecosystem Office evaluates proposed management activities in late-successional reserves and determines whether such activities are "beneficial to the creation of late-successional forest conditions" for "silvicultural treatments" such as thinning or whether the activity will "diminish habitat suitability now or in the future" for salvage operations. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-12-13. The "beneficial"

operations within riparian reserves only where harvest is necessary to achieve the purposes of the ACS.<sup>293</sup> Finally, commercial timber harvest in “matrix” areas<sup>294</sup> is limited by special live tree and snag retention requirements, a prohibition on harvest in watersheds with fifteen percent or less late-successional growth, and rotational cycles of up to 150 years.<sup>295</sup>

Neither the Oregon Forest Practices Act nor the state forest practice rules designate habitat reserve areas similar to the late-successional and riparian reserves established by the Northwest Forest Plan. The state rules do provide limited protection for “resource sites,” such as sensitive bird areas, threatened and endangered species nesting sites, and significant wetlands.<sup>296</sup> Such protections are primarily site-specific, however, and are not intended to serve as major habitat reserves.<sup>297</sup> The state rules also provide some special protection for riparian areas, but these areas are limited to 100 feet or less, do not include adjacent unstable areas, and are not reserved from commercial timber harvest.<sup>298</sup> Moreover, the state currently has no procedures equivalent to the watershed analyses and management assessments required under the Northwest Forest Plan.<sup>299</sup> Finally, the state forest practice rules provide no required rotational periods, although they do limit clearcuts to 120 acres in size.<sup>300</sup>

standard does not apply to salvage operations because salvage is not considered a “silvicultural treatment.” See CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 41-42. For a discussion of the limitations of the late-successional forest management program under the Northwest Forest Plan, see Lacey, *supra* note 123, at 341.

293. See *supra* note 284 and accompanying text.

294. Matrix lands are all BLM and Forest Service lands within the planning area of the Northwest Forest Plan that have not been classified into one of the other six types of management areas. See *supra* note 262. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 51. Most of the commercial timber harvest authorized under the plan is intended to take place on the roughly 4 million acres of matrix lands. See NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at 34-41. See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 51.

295. NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-41-45. See also Seattle Audubon Soc’y v. Lyons, 871 F.2d 1291, 1312 (W.D. Wash. 1994), discussed *supra* note 120 (noting that large portions of the O & C lands are designated for management under the “matrix” requirements).

296. See OR. ADMIN. R. §§ 629.24.690-629.24.813.

297. See, e.g., INTERIM REQUIREMENTS FOR NORTHERN SPOTTED OWL NESTING SITES, OR. ADMIN. R. § 629.24.809 (requiring a 70-acre reserve area around all known northern spotted owl nesting sites).

298. See *supra* note 286 and accompanying text.

299. See *supra* notes 282-84 and accompanying text. The state’s Endangered Species Act does require state land managers to consult with the Oregon Department of Fish & Wildlife prior to conducting management activities on state lands. See OR. REV. STAT. §§ 496.172-192. See also ELLIOT STATE FOREST HCP, *supra* note 207, at J-13, describing the state threatened and endangered species program.

300. See OR. ADMIN. R. § 629.24.121, limiting single ownership clearcuts to 120 acres and prohibiting any new clearcut within 300 feet of an existing clearcut if the total combined acreage of the new and existing clearcuts will exceed 120 acres. In comparison, clearcuts in U.S. Forest Service Region Six are limited to 60 acres. See A COMPARATIVE REVIEW OF THE FOREST PRACTICES CODE



The Elliot State Forest HCP designates three classes of timber management areas, each patterned after a management area established under the Northwest Forest Plan. Harvesting restrictions differ according to the intended use for the management area.<sup>301</sup> For example, the Elliot State Forest HCP designates approximately 7000 acres of "habitat conservancy areas," designed to "provide late-successional forest structure in discrete portions across the forest."<sup>302</sup> Although the HCP permits timber harvesting within habitat conservancy areas, clearcuts are not allowed, and harvest operations must be consistent with the goal of improving the late-successional character of the reserve.<sup>303</sup> In addition, timber operations in designated "matrix" areas are subject to eighty to 240-year rotational periods.<sup>304</sup>

The principal difference between timber harvest practices for the federal and state lands is the relative amount of land set aside for habitat conservation, and the management practices applicable to those reserves. The Northwest Forest Plan designates large tracts of late-successional reserves and severely restricts timber operations within those reserves to approved salvage and thinning operations.<sup>305</sup> The Oregon forest practice rules, on the other hand, provide virtually no habitat reserves, except small buffer zones for streams and certain wildlife sites.<sup>306</sup> The Elliot State Forest HCP designates some small habitat conservancy areas, but it also allows timber operations in such reserves as long as (1) clearcuts are not employed, and (2) the Oregon Department of Forestry concludes that the harvest will improve the late-successional character of the reserve.<sup>307</sup>

*e. Road Construction Standards and New Construction Limitations*

Road building standards and new construction limitations also vary widely between state and federal lands. The Northwest Forest Plan prohibits new road construction in "inventoried"<sup>308</sup> roadless areas within key

OF BRITISH COLUMBIA WITH FOURTEEN OTHER JURISDICTIONS, *supra* note 266, at 96.

301. See ELLIOT STATE FOREST HCP, *supra* note 207, at IV-4-5. The three management areas are: (1) riparian management areas; (2) habitat conservancy areas; and (3) matrix areas. *Id.*

302. See ELLIOT STATE FOREST HCP, *supra* note 207, at IV-4. The habitat conservancy areas make up approximately 9.5 percent of the total planning area. *Id.* Total reserve acreage for the Elliot State Forest HCP, including riparian management areas and habitat conservancy areas, is approximately 18,000 acres, or 19 percent of the state forest. *Id.*

303. *Id.* at IV-4-5. Thinning operations are also permitted in stands of 80 years or younger. *Id.*

304. *Id.* at IV-6. Matrix lands make up some 75,000, or 81%, of the total planning area under the Elliot State Forest HCP. *Id.*

305. See *supra* notes 290-95 and accompanying text.

306. See *supra* notes 296-300 and accompanying text.

307. See *supra* notes 301-04 and accompanying text.

308. "Inventoried" roadless areas are areas previously identified by the U.S. Forest Service or

watersheds.<sup>309</sup> In other areas of key watersheds, any new road construction must be offset by “decommissioning” or obliterating an equal amount of existing roads.<sup>310</sup> Moreover, the plan requires a watershed analysis before management activities, such as road construction, may begin in key watershed areas.<sup>311</sup> Similarly, the plan permits road construction in riparian reserves only where the proposed construction is both consistent with the ACS and conducted according to a special set of construction standards and guidelines.<sup>312</sup> Road construction in riparian reserves must be minimized,<sup>313</sup> but the plan does allow new road construction in late-successional reserves, although such construction is “not recommended.”<sup>314</sup>

Road construction standards under the Oregon Forest Practices Act and the forest practice rules consist primarily of general guidelines and recommendations, not specific requirements.<sup>315</sup> For example, new road construction must “minimize the risk of material entering waters of the state.”<sup>316</sup> Newly promulgated regulations restricting the use of earth-moving equipment in riparian management areas may also limit road construction near waterways.<sup>317</sup> Unlike the state rules, the Elliot State Forest HCP prohibits all new road construction within riparian management areas,

the BLM for potential inclusion in the wilderness system. See CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 33.

309. See NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-92.

310. See NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-7. The “decommissioning” of an existing road means the closure and stabilization of the road to eliminate potential storm damage and the need for periodic maintenance. NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-31. Decommissioning differs from obliteration in that a decommissioned road can be reconstructed. *Id.* See also CITIZEN GUIDE TO THE NORTHWEST FOREST PLAN, *supra* note 213, at 49-50.

311. See NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-86.

312. See NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-31. New road construction may begin only if (1) design, operation, and maintenance criteria are established; (2) disruption of natural hydrologic flow paths is minimized; (3) sidecasting is minimized to prevent sedimentation of waterways; and (4) wetlands are not disturbed. See NORTHWEST FOREST PLAN FINAL EIS, *supra* note 258, at B-124.

313. See NORTHWEST FOREST PLAN FINAL EIS, *supra* note 233, at B-123-24 (requiring federal land managers to reconstruct roads causing adverse impacts on aquatic ecosystems). *Id.* The plan does not prohibit new stream crossings in key watersheds or riparian reserves, but new crossings must be sufficient to endure a 100-year flood and not allow for the diversion of the watercourse onto the road in the event of a structural failure. *Id.* See also Lacey, *supra* note 123, at 347.

314. See NORTHWEST FOREST PLAN ROD, *supra* note 258, at C-16. Such construction may still be circumscribed by the plan’s restrictions on new construction in key watershed areas. See *supra* notes 309-311.

315. Road construction standards differ slightly for each of the three administrative regions described in OR. ADMIN. R. § 629.24, *et seq.*

316. Stream crossings must be sufficient to withstand a 50-year flood and allow for the migration of adult and juvenile fish up and down stream. See OR. ADMIN. R. §§ 629.24.620-629.24.623.

317. See OR. ADMIN. R. § 629.660.020 (prescribing certain “yarding” practices in riparian management areas.)

except construction for the purpose of stream crossing.<sup>318</sup> In addition, the HCP requires management activities, such as road construction, in habitat conservancy areas to be consistent with the goal of improving the late-successional character of the reserve.<sup>319</sup>

In sum, the state forest practice rules provide limited protection for aquatic habitats, minimal restrictions on timber harvesting, and only general guidelines for road construction. Moreover, state law provides limited opportunities for both public participation in and challenges to land management decisions on state lands. The federally approved HCP for the Elliot State Forest does include some of the habitat conservation measures provided under the Northwest Forest Plan. But the Elliot State Forest HCP standards are considerably less protective of wildlife habitat than the Northwest Forest Plan standards.<sup>320</sup> Therefore, state management of the O & C lands, even under a federally approved HCP, would necessarily involve increased risks for species dependent on old-growth and aquatic habitats. In light of the doubts about whether the provisions of the Northwest Forest Plan can actually protect and recover species dependent upon late-successional and aquatic habitats,<sup>321</sup> the less restrictive state program hardly seems a capable surrogate for federal management.

## VI. CONCLUSION

The proposed transfer of the O & C lands to the state of Oregon is neither economically nor environmentally sound. Not only would the transfer require a state subsidy of roughly \$60 million per year,<sup>322</sup> it would also precipitate a new round of federal forest planning, which in

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318. See ELLIOT STATE FOREST HCP, *supra* note 213, at IV-9.

319. *Id.* at IV-4.

320. This conclusion should not be interpreted as a claim that the Elliot State Forest HCP is deficient. The Northwest Forest Plan and the Elliot State Forest HCP were promulgated for two distinct purposes. The Northwest Forest Plan intended to discharge federal agency duties under § 7 of the ESA for wildlife dependent upon the last remaining stands of old-growth timber in the Pacific Northwest. The Elliot State Forest HCP, on the other hand, was designed to discharge the state of Oregon's duties as a land owner under § 9 of the ESA and the Oregon Forest Practices Act, as well as to regenerate the primarily second-growth commercial timber lands located within the Elliot State Forest. The problem lies with the 1996 O & C Transfer Act's erroneous assumption that state management of the O & C lands can be conducted under a HCP in the absence of § 7 protections without a resulting decline in threatened and endangered species protection and recovery.

321. See, e.g., Lacey, *supra* note 123, at 315 (summarizing reasons why the Northwest Forest Plan is not structurally capable of adequately protecting and recovering the Pacific Northwest's threatened and endangered species).

322. See *supra* note 180 and accompanying text.

turn is likely to generate protracted state and federal litigation over old-growth forest management in the Pacific Northwest.<sup>323</sup> Even the best-case state management scenario would produce substantial reductions in ESA enforcement, public participation, and habitat conservation standards. Although the Oregon Forest Practices Act may be a leader among state forest management laws,<sup>324</sup> its provisions are considerably weaker than the Northwest Forest Plan.<sup>325</sup> Even the more stringent management standards under the Elliot State Forest HCP are incapable of serving as a satisfactory substitute for federal management.<sup>326</sup>

Moreover, the laudable goals of ensuring stable funding for Oregon counties and improving land management practices may be attained by less drastic and more thoroughly considered solutions than transferring federal lands to the state. For example, Governor Kitzhaber's O & C working group has identified several alternative solutions for the problems of unstable county revenues and piecemeal management of federal, state, and private lands.<sup>327</sup> Similarly, the Oregon Natural Resources Council has suggested that the federal government transfer the BLM's O & C lands to the U.S. Forest Service.<sup>328</sup> According to the council, Forest Service and BLM timber land consolidation could deliver many of the benefits sought by proponents of the O & C Transfer Act without the accompanying loss of federal environmental regulation and public participation.<sup>329</sup>

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323. See *supra* note 222 and accompanying text.

324. See *supra* note 270 and accompanying text.

325. See *supra* notes 278-319 and accompanying text.

326. See *supra* note 320 and accompanying text.

327. See O & C WORKING GROUP DRAFT INTERIM REPORT, *supra* note 174, at App. C-14, suggesting various alternatives, including (1) selective federal-to-state land transfers focusing on lands adjacent to existing state forest and park lands; (2) improved land exchange programs designed to "block up" checkerboard lands in an effort to improve management efficiency, lower management costs, and achieve ecological goals; (3) increased state involvement in the watershed analysis process under the Northwest Forest Plan in order to improve state participation in the formulation of management goals; (4) state participation in the next long range planning process for the O & C lands in order to creating a new management structure that would better serve state interests; (5) a changed revenue distribution formula for the O & C lands that would provide a more stable source of county funding; and (6) improved federal land management efficiency by merging redundant federal infrastructure and streamlining procedural and planning requirements. *Id.*

328. See Oregon Natural Resources Council, TRANSFERRING FORESTED WESTERN OREGON BLM LANDS TO THE NATIONAL FOREST SYSTEM 1 (May 14, 1996), <<http://www.teleport.com/~francis/unpquawater/oc/onrc.html>>. The proposal to consolidate BLM and U.S. Forest Service lands predates the enactment of the O & C Act in 1937, when Secretary of the Interior Harold Ickes battled with former Forest Service Chief Gifford Pinchot and others over whether the Forest Service would become part of the Department of the Interior, the O & C lands would be transferred to the Forest Service, or Interior would continue administering the O & C lands. See RICHARDSON, *supra* note 22, at 55-57. Enactment of the 1937 O & C Act was a partial victory for Ickes, who recounted in his diary: "We . . . have a miniature forest service in Interior, and not very miniature at that." *Id.*

329. The Oregon Natural Resources Council has argued that consolidating O & C and Forest

Western states aspiring to acquire BLM lands under proposals such as those considered in the 104th Congress<sup>330</sup> should carefully consider the costs associated with managing lands whose economic value is considerably less than the O & C lands, with their wealth of timber.<sup>331</sup> If state management of the O & C lands would require either a \$60 million annual subsidy<sup>332</sup> or widespread over-harvesting, managing the arid, non-timber lands—which constitute the bulk of BLM lands in most western states<sup>333</sup>—is likely to prove quite expensive for state taxpayers.<sup>334</sup>

If federal to state land transfers must occur, it is imperative that transfer legislation be absolutely clear about what laws and regulations apply under state ownership. The 1996 O & C Transfer Act's "consistency" requirement is a prime example of poor legislative drafting, guaranteed to generate confusion and litigation—not effective land management. In contrast, the recent Coquille transfer provides both a clear statement of applicable law and an opportunity for citizen enforcement.<sup>335</sup> If state management of the O & C lands is inevitable, transfer legislation should follow the Coquille model, not the O & C Transfer Act. In particular, any transfer legislation should ensure that public participation rights, including appeal rights, are not diminished, and that the environmental evaluation obligations of NEPA and section 7 of the ESA are maintained.

The proposed transfer of BLM timber lands to the state of Oregon is just one among many proposals to solve the public land management and local revenue problems in the state of Oregon. Unfortunately, this proposal will produce substantial negative economic and environmental effects that cannot be reconciled with the limited economic benefits promised by the proposal's advocates.

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Service lands would facilitate ecosystem management by eliminating large portions of the land ownership checkerboard. This would decrease management costs by eliminating redundant infrastructure, which in turn would increase available revenues that could be shared with the O & C counties. See Oregon Natural Resources Council, TRANSFERRING FORESTED WESTERN OREGON BLM LANDS TO THE NATIONAL FOREST SYSTEM, *supra* note 328, at 2-4. This solution also was noted by the O & C Working Group as a potential alternative to the O & C land transfer. See O & C WORKING GROUP DRAFT INTERIM REPORT, *supra* note 174, at app. C-14.

330. See *supra* note 138 and accompanying text.

331. See *supra* note 20 and accompanying text.

332. See *supra* notes 179-87 and accompanying text.

333. See GEORGE CAMERON COGGINS, ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 138 (3rd. ed. 1992) (BLM's 180 million acres include "some of the least economically productive land in the country").

334. See NELSON, *supra* note 162, at 15-16; GORTE, *supra* note 179, at 11 (projecting the relative expense for each western state to assume management of BLM lands within its borders).

335. See *supra* note 139.