



United States Department of the Interior



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Reply To: 8330.02713 (05)
File Name: Whiskey Creek HCP BO
TS Number: 05-1476

MAR 31 2005

Memorandum

To: Chief, Conservation Planning, Regional Office U.S. Fish and Wildlife Service,
Portland, Oregon

From: *Acting* *Neil R. Corbett*
State Supervisor/Deputy State Supervisor, Oregon Fish & Wildlife Office,
Portland, Oregon

Subject: Biological Opinion on the Proposed Issuance of an Incidental Take Permit for the
Bald Eagle to Mickey and Donna Ghormley (PRT-09-5539-0), Ken Bilyeu
(PRT-09-5550-0), and Forrest Dickerson (PRT-09-5548-0)

The U.S. Fish and Wildlife Service (Service) has reviewed the proposed Whiskey Creek Low-Effect Habitat Conservation Plan (HCP) addressing the potential development-related effects on the use of a bald eagle nest site located adjacent to Netarts Bay in Tillamook County, Oregon. At issue are the effects that the issuance of an incidental take permit to Mickey and Donna Ghormley, Ken Bilyeu, and Forrest Dickerson, by the Service in accordance with section 10(a)(1)(B) of the Endangered Species Act, may have on the threatened bald eagle (*Haliaeetus leucocephalus*).

This biological opinion is based on information provided in the "Low-effect Habitat Conservation Plan to Address Potential Development-Related Effects on the Whiskey Creek Bald Eagle Nest" (May 2004), the draft low-effect HCP screening form (FWS, 2004), and relevant scientific literature, field trips, and our files.

The Service determined that the proposed actions as described in the HCP are likely to adversely affect the bald eagle. We agree with the HCP's determination that although take of bald eagle may occur in the form of harassment or nest abandonment due to human disturbance, the bald eagle nesting habitat will not be significantly affected. Eight actions will be implemented to minimize human disturbance and mitigate the effects of the proposed development. No statutory critical habitat has been designated or proposed for this species; therefore, none will be affected. No other listed, proposed, or candidate species are known to occur in the project area.

DESCRIPTION OF PROPOSED ACTION

Three private landowners have applied to the Service for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The requested 25-year permit would authorize the incidental take of the federally-listed as threatened bald eagle. The project site is located adjacent to Netarts Bay south of the town of Netarts in Tillamook County, Oregon. The site comprises three undeveloped residential tax lots (lot 400, approx. 0.52 acre; lot 500, approx. 0.43 acre; and lot 201, approx. 4.3 acres). The two smaller tax lots are coincident with one another and the bald eagle nest tree is located on lot 400.

Proposed covered activities under this biological opinion include the construction of three conventional homes, associated utilities, access driveways and parking areas, and activities associated with occupation of the homes. The house plans and construction will follow Tillamook County building codes for set back from the bay (i.e., 50 feet landward of the high water line) and erosion control. Access road widths (16 feet) and the parking areas are prescribed by the local Fire District for fire access. The proposed septic system for the two houses closest to the nest tree will treat household waste water in a surface sand filter and then discharge the treated waste to a drainage field. Utility poles and lines to the houses will be above ground and will run along the access driveways. The poles will be outside the 50 foot and 40 foot radii for the nest tree and adjacent tree.

STATUS OF THE SPECIES

Legal Status and Trends

The bald eagle was listed on February 14, 1978, as a threatened species in Oregon and Washington under the Act. A Recovery Plan for the bald eagle in the Pacific states was issued in 1986 in accordance with section 4(f)(1) of the Act. The Pacific States Bald Eagle Recovery Plan established recovery population goals, habitat management goals, and management zones (e.g. Recovery Zones for a seven-state Pacific Recovery Region (Recovery Region)). It outlined the following criteria for delisting the bald eagle in the Recovery Region (USDI FWS 1986):

1. There should be a minimum of 800 pairs nesting in the Recovery Region.
2. These pairs should be producing an annual average of at least 1.0 fledged young per pair, with an average success rate per occupied territory of not less than 65 percent over a five-year period.
3. To ensure an acceptable distribution of nesting pairs, population recovery goals must be met in at least 80 management zones (e.g., 38 out of 47 Recovery Zones) identified in the Recovery Plan.
4. Wintering populations should be stable or increasing.

Currently available information indicates increasing bald eagle populations rangewide. In the Pacific States Recovery Region, the number of occupied territories has consistently increased since 1986 to 1482 pairs in 1998, thereby exceeding the 800 pair goal for 5 years beginning in 1990 when 861 territories were reported. The species' status recovered sufficiently to warrant

reclassification to threatened throughout the lower 48 states on July 12, 1995 (USDI FWS 1995; 60 FR 36000). However, this action did not change the status of the species for Oregon and Washington. Distribution goals and nesting targets in several Recovery Zones have not been met. Productivity objectives have been met and averaged 1.03 young per occupied territory since 1990. Currently, a proposal to delist the species in the lower 48 states has been under consideration by the Service since July 6, 1999 (USDI FWS 1999; 64 FR 36454).

In Oregon, 441 breeding territories were occupied in 2004. Productivity in 2004 resulted in a 5-year average of 1.04 young per occupied territory. Several Recovery Zones have productivity averages below 1.00 young per occupied territory indicating localized regions of poorer reproduction still persist within Oregon. Nesting success resulted in a 5-year average of 65 percent (Isaacs and Anthony 2004).

Within the Oregon Coast Recovery Zone, recovery management goals of a minimum of 45 occupied territories and productivity greater than one fledged bird per territory with an average success rate of not less than 65 percent have been exceeded. In 2004, Isaacs and Anthony (2004) documented 85 occupied territories with productivity resulting in a 5-year average of 1.12 young per occupied territory and a nesting success of 70 percent.

Life History, Habitat, and Ecology

A detailed account of the taxonomy, ecology, and reproductive characteristics of the bald eagle is presented in the Pacific States Bald Eagle Recovery Plan (FWS 1986), the final rule to reclassify the bald eagle from endangered to threatened in all of the lower 48 States (USDI FWS 1995; 60 FR 36000) and the proposed rule to remove bald eagle from the Endangered Species List in the lower 48 states (USDI FWS 1999; 64 FR 36454), and Stalmaster (1987).

In the Pacific Northwest, bald eagles typically nest in multi-layered, uneven-aged, coniferous stands with old-growth forest components that are located within one mile of large bodies of water (Anthony *et al.* 1982). Suitable habitat for bald eagles is characterized by the presence of large, mature trees, generally greater than 32 inches diameter at base height (dbh). Live, mature trees with deformed tops or large limbs and an open structure are required for eagle access and nest support. Factors such as tree height, diameter, tree species, position on the landscape, distance from water, availability of prey and distance from disturbance also appear to influence nest selection. Nest trees usually provide an unobstructed view of the associated water body. Availability of suitable trees for nesting and perching is critical for maintaining bald eagle populations.

Communal roosts (night roosts occupied by three or more bald eagles) tend to be located near a rich food resource (i.e. runs of anadromous fish, high concentrations of waterfowl) and in forest stands that are uneven-aged and have at least a remnant of the old-growth forest component (FWS 1986). Roosts tend to have more favorable microclimates and protection from inclement weather than surrounding areas and thereby facilitate energy conservation. Isolation is also an important feature of bald eagle wintering habitat (FWS 1986).

Bald eagles are territorial when breeding but gregarious when not (Stalmaster 1987). In Oregon, the bald eagle breeding season extends from January 1 through August 31 (Isaacs *et al.* 1983). Courtship may begin as early as January. Nest building and repair occurs any time of year, but is most often observed February to June (Isaacs and Anthony, unpubl. data). Egg laying takes place mid-February to late April with incubation lasting approximately 35 days. Hatching may occur from late March to late May. Chicks are not able to thermoregulate for at least two weeks after hatching (Stalmaster 1987). Fledging occurs in late June to mid-August (Isaacs and Anthony unpubl. data). Fledging typically occurs 11 to 13 weeks after eggs are laid.

The roosting period of the northern bald eagle typically extends from November 15 to March 15. However, depending upon weather conditions, the roosting period in Oregon may extend from October 31 to April 30.

The bald eagle is an opportunistic predator that feeds primarily on fish but also takes a variety of waterfowl and other birds, mammals up to approximately rabbit size, and turtles (both live and as carrion) when fish are less abundant or these other species are readily available (Sherrod 1978). The most common prey items for bald eagle on the West Coast are fish, waterfowl, jackrabbits, and various types of carrion, such as fish, mammals, and water birds (FWS 1986, Zeiner *et al.* 1990). Typical prey during the nesting season and the summer is fish.

Mammals are taken as live prey or carrion in all seasons but become more important during the winter months (Steenhof 1978). Wintering concentrations of bald eagles have been associated with an abundant food sources such as spawning salmonids (Knight and Knight 1983), road-killed jackrabbits (Platt 1976), or waterfowl concentrations (Keister *et al.* 1987).

Conservation Needs

The listed status of the bald eagle is a result of past and present destruction of habitat, harassment, disturbance, shooting, electrocution, poisoning, a declining food base, and environmental contaminants. Currently, the primary threats to bald eagles are habitat degradation and, in some areas, environmental contaminants.

One of the primary threats to bald eagles is the loss of or degradation to breeding and wintering habitat (Buehler 2000; FWS 1986). Bald eagles avoid human-developed areas for nesting, roosting and perching, or foraging; however, it is not known whether they are reacting to the development structures or associated human activity (Buehler 2000). Human disturbance at nest and roost sites can elicit responses that range from temporary agitation, to flushing, to the permanent displacement. Humans on foot appear to evoke the strongest negative reaction (Fraser *et al.* 1985, Buehler *et al.* 1991, Grubb and King 1991, McGarigal *et al.* 1991, Grubb *et al.* 1992). There is also great variation in how an individual bird may react to human disturbance. Experimental flushing studies show a wide range in sensitivity to disturbance from individuals and even populations (Stalmaster and Newman 1978, Knight and Knight 1984). Tolerance of both human development and disturbance may be increasing in some areas through habituation (Therres *et al.* 1993).

The Recovery Plan/Team and Bald Eagle Working Team for Oregon and Washington (BEWTOW) recommends site-specific planning as the best method for managing bald eagle habitat (FWS 1986; Bald Eagle Working Team for Oregon and Washington 1990). Site planning requires that each eagle nesting or roosting site be studied and managed according to the unique set of circumstances (e.g., landform land use, landowner, eagle use) at that site. Most site plans assist the recovery process by maintaining habitat conditions to support nesting, roosting, and foraging, and implementing conservation measures designed either to alleviate ongoing threats or to avoid conflicts with identified use activities which are identified to occur within the foreseeable future. Some site plans assist recovery by also incorporating habitat enhancement measures or habitat management measures to maintain or increase bald eagle use and long-term availability and viability of suitable and roosting habitat.

SPECIES IN THE PROJECT AREA

The Whiskey Creek nest was discovered in 2001 and has been monitored for the past four years. The territory has been occupied each year but no chicks or eggs observed to date (Isaacs and Anthony 2004). The Whiskey Creek territory is close to a well-established territory three miles to the north (Isaacs and Anthony 2004).

The bald eagle nest is located in a mature Sitka spruce tree within a young Western hemlock/Douglas-fir stand that includes red alder (Ruggiero *et al.* 1991). One other mature Sitka spruce tree (about 60 inches dbh) is located close to the nest tree. A survey of trees on the three lots indicate 24 large trees (> 30 inches dbh) and 41 small deciduous and evergreen trees (between 16 and 30 inches dbh).

The site is located in a rural residential area with a residence and a restaurant within 400 feet of the nest tree. A major roadway, Whiskey Creek Road, is located within 400 feet from the bald eagle nest tree. The roadway is part of the Three Capes Scenic Loop and experiences a significant amount of seasonal traffic.

EFFECTS OF THE ACTION

Direct Effects

The proposed construction of three home sites within close proximity to a bald eagle nest tree will directly affect one bald eagle nesting territory (two adult birds) within the project area. The proposed action will avoid the loss of nesting and perching habitat by retaining the current nest trees, most trees greater than 30-inch dbh, and all trees between 16-inch and 30-inch dbh outside the construction area. Potential direct effects to the bald eagle include the removal of one suitable perch tree. The suitable perch tree (36-inch dbh) will be removed from the proposed house footprint for the northern lot. Of the 41 trees that are between 16 and 30 inches dbh, twenty-six will be preserved; seven are in the drain field and may or may not be removed; and eight will be removed because they are located in house or roadway footprints. These smaller trees are located within the site interior and are not suitable as perches. The direct effects from the loss of breeding habitat are not significant because the current habitat structure will remain.

Indirect Effects

Indirect effects that degrade the habitat include the human disturbance associated with constructing the houses and residing in them. Disturbance (i.e., noise and human activity) at the site could result in periodic or complete abandonment or occupied but failed nesting status. The HCP avoids construction-related disturbance by limiting outside construction to avoid the breeding period, except for emergencies. When the houses are occupied, the bald eagles will be exposed to daily, routine activities during the breeding period, such as vehicle access and yard maintenance. Any human activities visible from the bald eagle's perch or nest will be minimized by preserving most of the canopy closure and through the use of plantings to screen the roadways. Noise will be managed by minimizing yard maintenance through the use of native plantings, hand tools, and use of an electric mower. Even with these measures, human disturbance at nest sites can elicit responses that include permanent displacement, and it is unknown how the bald eagles will react to additional human development.

The pair has shown a tolerance for human activity by selecting this site, which is close to other residences, a restaurant, and a seasonally busy major road. Given these circumstances and the elements in the HCP that manage noise and visual affects, the Service believes that there is a possibility that the pair will become habituated to the human disturbance associated with the proposed action.

Cumulative effects

Cumulative effects considered in this biological opinion include the effects of future state, tribal, local or private actions likely to occur in the project area. Future federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act. About a third of Oregon's bald eagle territories are on private lands (generally private timberlands) (Isaacs and Anthony 2003). However, the U.S. Fish and Wildlife Service (FWS) has received few, if any, proposals in the Oregon Coast Recovery Zone in which private landowners proposed to develop residences in close proximity to a bald eagle nest tree. Based on this information, the probability of significant cumulative impacts within the recovery zone from similarly situated projects is low.

Juvenile birds may encounter marginal or less suitable nesting habitat as the bald eagle population continues to increase. Oregon's occupied territories have increased by over 200 percent from 176 to 416 territories between 1990 and 2003 (Isaacs and Anthony 2003). This circumstance may increase the likelihood of private landowners seeking incidental take coverage, however the accompanying bald eagle population increase will reduce the environmental significance of future development actions.

CONCLUSION

After reviewing the current status of the bald eagle, the environmental baseline for the action area, the effects of the proposed project and the cumulative effects, it is the Service's biological opinion that the construction of three home sites within close proximity to a bald eagle nest tree, as proposed, is not likely to jeopardize the continued existence of the bald eagle. The risk of

abandonment of this nest site and its significance to the bald eagle breeding population along the Oregon Coast is considered minor because:

- 1) the bald eagle breeding territories (and population) have increased significantly in recently years, forcing the birds into more marginal nesting habitat;
- 2) the territory is located in an area that experiences human disturbance from nearby residences and a major roadway so the birds may adjust to any new disturbances;
- 3) the territory has not been productive since it was discovered in 2001;
- 4) the Oregon Coast Recovery Zone population and productivity goals have been exceeded, significantly reducing the overall risk to the population; and
- 5) therefore, the proposed activity will not appreciably reduce the distribution, numbers, or reproduction of bald eagles within the Pacific Coast Recovery Zone or the range of the species.

INCIDENTAL TAKE

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibits the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harm is further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the proposed action is not considered to be prohibited taking under the Act provided that such taking is in compliance with this Incidental Take Statement.

The proposed HCP and its associated documents clearly identify anticipated impacts to affected species likely to result from the proposed taking and the measures that are necessary and appropriate to minimize those impacts. All conservation measures described in the proposed HCP, together with the terms and conditions described in any associated Implementing Agreement and any section 10(a)(1)(B) permit or permits issued with respect to the proposed HCP, are hereby incorporated by reference as reasonable and prudent measures and terms and conditions within this Incidental Take Statement pursuant to 50 CFR 402.14(I). Such terms and conditions are non-discretionary and must be undertaken for the exemptions under section 10(a)(1)(B) and section 7(o)(2) of the Act to apply. If the permittee fails to adhere to these terms and conditions, the protective coverage of the section 10(a)(1)(B) permit and section 7(o)(2) may lapse. The amount or extent of incidental take anticipated under the proposed HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permits.

TERMS AND CONDITIONS

The Service through negotiations with the applicant has incorporated measures to mitigate and minimize effects in the HCP to the maximum extent practical. To be exempt from the

prohibitions of section 9 of Act, the Applicant must comply with the conservation and mitigation actions as outlined in the HCP.

The incidental take statement included in this biological opinion satisfies the requirements of the Endangered Species Act, as amended. To the extent that this statement concludes that take of any threatened or endangered species of migratory bird will result from the agency action for which consultation is being made, the Service will not refer the incidental take of any such migratory bird for prosecution under the MBTA of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified herein.

REINITIATION NOTICE

This concludes formal consultation on granting the subject incidental take permit to the Applicant. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where Federal agency involvement or control over an action has been authorized by law and if: (1) the amount or extent of incidental take is exceeded; (2) if new information reveals effects of this action that may affect listed species or critical habitat in a manner or to an extent not considered in this biological opinion; (3) if the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in this opinion; or (4) if a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation. If consultation is initiated for any of the above reasons, the permittee shall not make any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation of reasonable and prudent alternatives.

If you have any questions regarding this biological opinion, please contact Fred Seavey at (541) 867-4558 or Richard Szlemp at (503) 231-6179.

Cc: ODFW, Tillamook (R. Rehn)
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