

FINDINGS AND RECOMMENDATIONS
FOR THE ISSUANCE OF SECTION 10(a)(1)(B)
INCIDENTAL TAKE PERMITS
ASSOCIATED WITH THE
WHISKEY CREEK HABITAT CONSERVATION PLAN

I. DESCRIPTION OF THE PROPOSED ACTION

A. Introduction

The U.S. Fish and Wildlife Service (Service) proposes to issue Incidental Take Permits (Permits) for 25 years to Donna and Mick Ghormley, Kenneth Bilyeu and Forrest Dickerson for the bald eagle (*Haliaeetus leucocephalus*), a Federal and State listed threatened species. The Service is authorized to complete this action under the authority of section 10(a)(1)(B) and section 10(a)(2) of the Endangered Species Act of 1973, as amended (Act). The purpose of the Permits is to authorize the incidental take of bald eagles associated with the development of three lots in Tillamook County, Oregon.

In support of their section 10(a)(1)(B) permit applications, and as required by the Act, the applicants have submitted to the Service a habitat conservation plan entitled "Low-Effect Habitat Conservation Plan to Address Potential Development-Related Effects on the Whiskey Creek Bald Eagle Nest" (HCP) (Jones & Stokes 2004). The effects of the Service issuing the section 10(a)(1)(B) permits are analyzed in the Service's low-effect habitat conservation plan determination and in a Biological Opinion (USFWS 2005a,b). All of these documents are incorporated by reference as described in 40 CFR § 1508.13.

The Service has determined that activities conducted in compliance with the incidental take permits are not likely to jeopardize the continued existence of the bald eagle. This document presents the Service's analysis and finding regarding whether the HCP meets the incidental take permit issuance criteria described in section 10(a)(2)(B) of the Act.

B. Description of the Site Development Plan

The proposed action involves three lots totaling 5.3 acres (Lot 400, 0.5 acre; Lot 500, 0.5 acre; and Lot 201, 4.3 acres) that are platted in a subdivision located adjacent to Netarts Bay in Tillamook County, Oregon. A bald eagle nest is located in a mature Sitka spruce tree within a young Western hemlock/Douglas-fir stand between Lots 400 and 500. One other mature Sitka spruce tree that is about 60 inches diameter at breast height (DBH) is located close to the nest tree; both these trees constitute the "nest trees." The applicants have an interest in developing or selling the property for later development. They are proposing to implement a site development plan (Figure 1) that describes how each lot will be developed in the future.

The site development plan identifies the permitted locations for three residential homes, associated utilities, access driveways and parking areas. The proposed house envelopes are diagrammatic to allow some leeway in design; however construction will be permitted only inside each described envelope. Any future residential development will be consistent with the Tillamook County land-use and zoning regulations. Conventional track hoes and track dozers will be used to excavate foundations and prepare roadways, which will be constructed of porous materials. Access road widths and the parking areas are prescribed by the local Fire District for fire access and are required to be at least 16 feet wide.

The septic system for the two houses closest to the nest trees (Lots 400 and 500) is a sand filter that will treat household waste water in a surface sand filter and then discharge the treated waste to a drain field. The drain field will require excavation along drain lines. The houses, sand filters, drain fields, and roadways are located a minimum distance from the nest trees, as defined by the distance of the tree's drip edge plus 25 percent (e.g., a 50 foot minimum distance for a tree with a 40 foot radius from the drip edge). The distance of this buffer is 50 feet for the main nest tree and 40 feet for the adjacent nest tree.

Utility poles and lines (conductors) to the houses will be above ground and will run along the access driveways. The poles will be set by trucks with augers outside the minimum distance identified for the nest trees. The lines will be pulled from pole to pole through pulleys set by bucket trucks.

C. Types of Activities Covered

Activities proposed to be covered under the Permit are the otherwise lawful activities that include the construction and maintenance activities necessary for residential housing, including utilities and access roadways. The applicants are seeking incidental take coverage for a total of 5.3 acres to construct three homes.

D. Conservation Strategy

The purpose of the HCP is to minimize human disturbance to nesting bald eagles and to avoid, minimize, and mitigate effects to the bald eagle nesting habitat. The conservation strategy contains the following: (1) identification and implementation of incidental take avoidance, minimization, and mitigation measures to reduce impacts to the bald eagle; (2) monitoring, reporting and notification requirements; and (3) responses to unforeseen and changed circumstances.

Incidental Take Avoidance, Minimization and Mitigation Measures

The proposed action describes a number of measures to avoid, minimize or mitigate the adverse effects to the bald eagle. Collectively these proposed actions reduce the likelihood of an adverse effect, preserve the habitat (especially the large evergreen trees), and restore the disturbed areas with native plants. These measures include:

Preserving both large Sitka spruce trees (the nest trees) and establishing a tree protection zone (40 to 50 feet radius, Figure 1) around each tree that prohibits construction activity or tree removal within the zone;

1. Protecting all suitable perch trees (greater than 30 inches DBH) except for the 36-inch DBH tree in the proposed house footprint on the northern lot that will be removed. Four trees greater than 30 inches DBH along the drive to the northern house will be avoided but the proposed right-of-way will fall within the drip line of four of the trees with a DBH greater than 30 inches. Road excavations adjacent to these four trees will be limited to what is practicable and what is safe. Tree root disturbance will be reduced by minimizing deep excavations for the driveways and by using porous materials for the roadways. If excavation can be avoided, gravel will be placed on a scraped surface to remove the duff layer (i.e., six inches or less). If one or more of these four trees do not survive and if they present a safety hazard, they will be removed;
2. Preserving canopy closure by retaining all trees greater than 30-inch DBH during the site development (except as noted in item 2) and removing trees greater than 16-inch DBH only within the construction footprint of the house envelopes, utilities rights-of-way, septic systems, and parking areas;
3. Providing a septic system that minimizes the area needed for operation (e.g., sand filters on Lots 400 and 500 instead of a septic tank.
4. Prohibiting outdoor construction (except for safety purposes such as repairing damage due to a storm, vandalism or other repairs to maintain the integrity of the house) during the bald eagle breeding period based on bald eagle nest monitoring. Examples of allowed maintenance activities include work on: roof and other exterior siding that might allow wind or rain to enter the house, trees leaning on or about to lean on the house, downed electric or phone lines, malfunctioning water or sewer line and trees blocking road or walkway access to the houses. Outdoor construction activities will be prohibited from 15 January to 15 August of any year if the nest is active and from 15 January to 15 May of any year if the nest is inactive or is unoccupied;
5. Planting western hemlock and/or western red cedar (greater than four feet tall) to screen the driveways and parking areas. Trees will be staggered (not lineal) on approximately 15-foot centers. Existing evergreen trees can be substituted for and serve as screen trees;
6. Seasonally prohibiting (15 January to 15 August) activities that may result in significant noise disturbance. Native plants will be used for restoration along driveway parking lots and the side of houses facing the nest trees. Lawn will only be planted on the side(s) of the houses away from the nest trees. Yard maintenance equipment used during this time period will be non-motorized (e.g., rake, broom, push mower). No two-cycle engines will be allowed during this time period. The only exception will be an electric mower if the permittees choose a lawn instead of native plantings; and

7. Changing the property line for Lot 400 to the north in order to maintain the tree protection zone within Lot 400.

Monitoring, Reporting, and Notification

The HCP does not propose biological monitoring at the site because Oregon State, in cooperation with the Service, monitors the productivity of the nest site each year as part of a state-wide bald eagle survey. The monitoring, reporting, and notification requirements focus on the success of the proposed plantings, permanently identifying the trees that will be preserved on the site, and a notification process necessary for the Service to ensure HCP compliance. These requirements include:

1. Allowing the Service or their designee access to the project site and nest trees in perpetuity for biological monitoring purposes;
2. Annual monitoring and reporting for four years of the plantings that are proposed to screen the roadways and parking areas from the bald eagles and to re-vegetate the disturbed areas between the houses and the nest trees;
3. Permanently marking each tree greater than 16 inches DBH that will be preserved by the HCP within 60 days of permit issuance;
4. Notifying the Service of lot development at least 60 days prior to construction;
5. Notifying the Service of emergency actions within 30 days for those emergencies that may affect the management actions identified in the HCP; and
6. Notifying the Service of the sale of the property at least 30 days prior to the legal transfer of the property to provide an opportunity for the new landowner to assume the conditions of the HCP and to arrange for the transfer of the permit.

Unforeseen and Changed Circumstances

HCP assurances ('no surprises'), described in 63 FR 8859, provides a foundation for contingency planning in a HCP. The contingency planning is addressed by identifying potential unforeseen and changed circumstances and the appropriate response to these events. Unforeseen circumstances means changes in circumstances that could not be anticipated or planned for that result in a substantial and adverse change in the status of a covered species. Changed circumstances are those changes that can be reasonably anticipated or planned for. Given the limited geographic scope of the HCP and the low amount of incidental take anticipated by the proposed action, unforeseen circumstances are unlikely for this HCP; however, should they occur, the process for responding to them in 50 CFR 17.32(a)(5) or 17.22(a)(5) will be followed.

The HCP does identify actions associated with six changed circumstances that may occur during the duration of the permit. First, upon the Federal listing of a new species, the Service will

evaluate the HCP-covered activities and modify them, as necessary, to ensure that activities covered under the HCP are not likely to jeopardize the species or result in adverse modification of any designated critical habitat of the listed species. The permittees will implement the recommended modifications until such time that the HCP is amended. Second, if the bald eagle is delisted or if it becomes endangered, then the HCP conditions will remain unchanged. Third, when no nesting is documented by 15 May of any year, surface disturbance and residential construction may begin after the permittees receive notification from the Service. Fourth, the permittees will be allowed to conduct repairs to their houses, utilities and driveways if the nest trees are toppled by wind. The HCP prescriptions will be maintained assuming that nesting is possible in another tree. Fifth, any plantings that are vandalized will be replaced by the permittees. And sixth, if fire occurs in the project area and harms either nest tree, then the permittees will work with the Service to determine if either tree poses a danger. Under this circumstance, the permittees will be allowed to remove the damaged nest tree from the site but will maintain the HCP prescriptions assuming that nesting is possible in the other tree.

II. ANALYSIS OF EFFECTS

The Service has determined that the impacts likely to result to the bald eagle from the proposed action will be minimized and mitigated to the maximum extent practicable by measures described in the HCP and the associated Permits. The effects of the proposed action on the bald eagle are fully analyzed in the HCP and the Service's Biological Opinion, which are incorporated by reference, and a summary of the analysis is provided below.

In the Pacific Northwest, bald eagle nests are usually located in uneven-aged stands of coniferous trees with old-growth forest components that are located within one mile of large bodies of water. Factors such as relative tree height, diameter, species, form, position on the surrounding topography, distance from the water, and distance from disturbance appear to influence nest site selection. Nests are most commonly constructed in Douglas-fir or Sitka spruce trees, with average heights of 116 feet and size of 50 inches DBH (Anthony *et al.* 1982). Bald eagles usually nest in the same territories each year and often use the same nest repeatedly. Availability of suitable trees for nesting and perching is critical for maintaining bald eagle populations (USFWS 1986). Perching trees are selected that provide a good view of the surrounding territory, typically the tallest perch tree available within close proximity to a feeding area (Stalmaster 1987). Perch trees range in diameter from 12 to 43 inches and 49 to 197 feet in height (Buehler 2000).

One of the primary threats to bald eagles is the loss of, or degradation to, breeding and wintering habitat (Buehler 2000; USFWS 1986). Bald eagles generally 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 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 resulting disturbance may be increasing in bald eagles in some areas through habituation (Therres *et al.* 1993).

Issuance of the Permits will directly and indirectly 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 inches DBH, and trees greater than 16 inches DBH outside the construction area. Potential direct effects to the bald eagle that may result from the proposed action include the loss of a 36-inch DBH suitable perch tree within the proposed house footprint on the northern lot. The HCP identified 24 trees in the project area that are over 30 inches DBH and 41 trees that are between 16 and 30 inches dbh. The proposed action preserves 23 of 24 trees that are over 30 inches DBH. Twenty-six of 41 trees that are greater than 16 inches DBH will be preserved. The remaining 15 trees are located in the interior of the action area and are not suitable for perching. Seven of the trees are located in the drain field and may or may not be removed. The other eight will be removed because they are located in the house or roadway footprints. Therefore, the proposed action will remove one suitable perch tree but preserve the nest trees and 23 other potential perch trees. The direct effects from the loss of breeding habitat are not significant because the current habitat structure will remain as the nest trees and all but one perch tree will be preserved through the HCP.

Indirect effects that degrade the habitat include the human disturbance associated with constructing the houses and residing in them. The HCP minimizes construction-related disturbance by limiting outside construction during the breeding period, except for emergencies. Outdoor construction activities will be prohibited from 15 January to 15 August of any year if the nest is active and from 15 January to 15 May of any year if the nest is not successful or unoccupied. There will also be seasonal prohibitions on activities that may result in significant noise disturbance from 15 January to 15 August.

When the houses are occupied, the bald eagles will be exposed to daily, routine activities such as vehicle access and yard maintenance. Visible human activities from a perch or nest in the canopy will be minimized by retaining the existing canopy closure, planting a lawn on the side(s) of houses away from the nest trees if one is desired, 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 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. This bald eagle 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 effects, the Service believes that there is a possibility that the pair will become habituated to the human disturbance associated with the proposed action.

III. PUBLIC COMMENT

On November 30, 2004, the Service published a Notice of Availability for the draft proposed HCP in the Federal Register (69 FR 69617). Public comment was solicited during the 30-day period to gather comments on the permit application and on whether the proposed HCP qualified as a "low-effect" HCP. A low-effect HCP is eligible for categorical exclusion under the National Environmental Policy Act of 1969, as amended. The process of reviewing and considering these comments led to no changes to the original proposed HCP.

We received five comment letters: two from the Pacific Rainforest Wildlife Guardians, one from The Humane Society of the United States, one from the Oregon Department of Fish and Wildlife, and one from an interested individual. The comments from the interested individual were identical to those of the Pacific Rainforest Wildlife Guardians. A summary of the Service's responses to the three primary commenters are below:

Pacific Rainforest Wildlife Guardians – Letter of December 20, 2004

Comment 1. The public comment period was too short and the public was not adequately notified of the public comment period, as required by law.

Response: The Service determined that the proposed action met the requirements of a low-effect HCP. A low-effect HCP is categorically excluded under Council on Environmental Quality (CEQ) regulations (40 CFR 1508.4) because it is expected to have minor or negligible effects on federally-listed and candidate species and their habitats and to have minor or negligible effects on other environmental values or resources. Under the Service's five-point policy (65 FR 35242), a 30-day public comment period was found to be sufficient time for interested parties to review low-effect HCPs. A 30-day comment period exceeds the CEQ regulations for a categorical exclusion, which do not have a public participation requirement.

Comment 2. A concern was expressed that too many potential perch and nest trees will be removed from the project area.

Response: The HCP process led to an agreement between two of the applicants to modify their property lines to allow one proposed house site (Lot 500) to move approximately 50 feet further away from the nest trees to protect their roots. In addition, the applicants have agreed to delineate the specific locations of homes on the site development plan, which will minimize impacts to the existing and potential nest and perch trees.

The bald eagle nest trees are approximately 60 inches DBH and are the largest trees in the area. A survey of trees on the three lots indicated 24 large trees greater than 30 inches DBH and 41 smaller trees between 16 and 30 inches DBH (Figure 1). One large and eight small trees will be cut. There is the possibility that an additional seven small trees in the drain field may be avoided during construction. The smaller trees are located in the forest interior beneath the canopy of

large trees and are not used by bald eagles for perching. We believe the removal of the trees on the three lots will not significantly contribute to the loss of canopy structure or bald eagle habitat.

Comment 3. One comment noted that Tillamook County must rezone the subdivision appropriately to forest land for exclusive use as wildlife habitat.

Response: The Service does not have the authority to change local zoning or land use laws. The three tax lots are regulated through Tillamook County and will be developed according to state and local regulations.

Comment 4. A concern was expressed that the nest trees would likely be lost from having their roots cut by construction activity and that the trees along the bluff would be affected by the proposed action.

Response: An evaluation by Stillwater Consulting (September 19, 2003) states that limiting activities within the tree protection zone would reduce compaction, gouging from equipment, ripping of roots from trenching, and other ground disturbing activities that might occur during construction. The Service concludes that the minimization and mitigation measures proposed in the low-effect HCP would provide adequate protection for the nest trees. All potential perch trees along the shoreline bluff will be conserved through this HCP.

Comment 5. The commenter was concerned that high winds can uproot trees and that the nest and perch trees would be susceptible to wind-throw.

Response: The objective of this low-effect HCP is to conserve bald eagle breeding habitat potential by preserving canopy closure and stand integrity. This is achieved by retaining all trees greater than 30 inches DBH during the site development (except for one tree on the northern lot) and removing trees greater than 16 inches DBH only within the construction areas. The nest trees are not likely to be susceptible to wind-throw because of the stand's age difference classes (the trees are considered open grown). Trees along the shoreline bluff will not be removed, thereby acting as a buffer to interior trees on the property. A low number of smaller trees will be removed from the interior of the site, leaving the stand's integrity intact. To the extent possible, the root system of the trees will be protected.

Comment 6. The low-effect HCP does nothing to curb all human activity outside of the breeding and fledgling season or to limit disturbance during the nesting season from a variety of potential disturbances.

Response: There will be some limits to what can and cannot be done outdoors seasonally through the minimization and mitigation measures. The lawn will only be planted on the side(s) of the houses away from the nest trees and yard maintenance equipment will be non-motorized (rake, broom, push mower). Two-cycle engines will not be allowed outside of the construction period, with the exception being an electric mower if the permittees choose a lawn. Outside of the construction window, outdoor construction (except for safety purposes such as repairing

damage due to a storm, vandalism, or other repairs to maintain the integrity of the house) will be prohibited. In our evaluation, there is some risk that the bald eagles will abandon the nest or the site altogether, despite these measures. However, in order for the HCP to be practicable, all human activity around the nest tree cannot be limited.

Comment 7. The commenter noted that no surveys were done for the Oregon salamander, marbled murrelet or the northern spotted owl.

Response: The Oregon salamander is not a federal or state-listed species; therefore, it is not required to have protective measures in place. Although no surveys have been conducted on the project site for the marbled murrelet or spotted owls, monitoring of the site for eagles has occurred for 3 years and no owls or murrelets have been identified at the project site. Furthermore, they have not been known to nest immediately adjacent to the coast and are unlikely to use such habitat for nesting.

Pacific Rainforest Wildlife Guardians – Second Letter of December 20, 2004

Comment 8. A concern was expressed that the take of bald eagles had already occurred through harassment by the landowners during the breeding period.

Response: The Service has no knowledge of the applicants' or other person's actions that may have caused harm to the bald eagle pair. The purpose of the low-effect HCP is to minimize and mitigate for the potential adverse effect to the bald eagle through future development of the project area. The applicants initiated the HCP process to comply with the Endangered Species Act.

Comment 9. The commenter noted that the HCP indicated that the surveys continued for four years but the material provided only shows three years of surveys.

Response: The fourth year of data has recently been made available in a report titled "Bald Eagle nest locations and history of use in Oregon and the Washington portion of the Columbia River Recovery Zone, 1971 through 2004". During the HCP process, Frank Isaacs, the biologist that coordinates the bald eagle monitoring for Oregon, reported on the status of the nest site in 2004, as indicated in Table A-1 of the "Low-Effect Habitat Conservation Plan to Address Potential Development-Related Effects on the Whiskey Creek Bald Eagle Nest."

Comment 10. A concern was noted over the potential disturbance to the bald eagles in 2003 by the activities needed to develop information for the HCP.

Response: In order to analyze the effects of the proposed action, it was necessary that a variety of technical experts visit the project area in 2003 and 2004. None of these visits led to harm or harassment of bald eagles.

Comment 11. Indoor construction could occur any time of year, which will result in significant noise as well as pedestrian and vehicle activity in the immediate vicinity of the nest tree.

Response: HCPs have to be practicable and the allowance for indoor construction was necessary in order to meet the construction schedule, which can take longer than a year.

Comment 12. The commenter was concerned that the seeding with non-native or genetically altered grasses could affect wetlands along Netarts Bay.

Response: Under the HCP, wetlands and floodplains would not be affected because the ground disturbing activities would be conducted outside of these areas. Any grasses that may potentially be used for lawn establishment would be commercially available, widely used, are currently found at existing residences, and are not typically adapted for shaded wetland areas.

Comment 13. A concern was expressed that the project area was not suitable for a residential development because of the potential to increase erosion to the coastal bluff.

Response: The proposed development actions will need to be completed in accordance with state and local land use zoning and regulations. The Oregon Land and Development Commission has adopted 19 state-wide planning goals to guide planning in cities and counties. Goal number 18, Coastal Shorelands, requires a setback to protect coastal bluffs.

Comment 14. The septic system may contaminate the oyster beds in Netarts Bay.

Response: The proposed development actions will need to be completed in accordance with state and local land use zoning and regulation. A permit and periodic inspections are required for on-site sanitation in Tillamook County. These requirements are adopted from Oregon Department of Environmental Quality regulations, which insure they are properly designed and monitored to prevent contamination of ground or surface waters.

Comment 15. The commenter was concerned about the potential impact the proposed development may have on Netarts Bay wetlands.

Response: Water quality and quantity of the area should not be affected because ground-disturbing activities will require the implementation of best management practices by Tillamook County through the grading and building permit process. Refer response to number 12 above.

The Humane Society of the United States – Letter of December 30, 2004

Comment 16. The commenter believes that the proposed action would disturb breeding bald eagles. He provided literature citations that recommended a 1,640-foot buffer around the bald eagle nests to minimize disturbance, restrictions to human activities within 2,625 feet of a nest between January 1 and August 31,

(presumably if the nest is occupied and young are produced), and that 75 percent of bald eagle alert and flight responses to human activity occurred when the activity was within 1,640 feet and 656 feet, respectively.

Response: The guidelines on distance referenced above address “no effect” actions. The lawful development of the project may affect the bald eagle in terms of activities such as use of motorized equipment, vehicle access and pedestrian activity, thereby requiring an HCP and issuance of an Incidental Take Permit.

Indirect effects, such as human disturbance, will be managed by seasonal restrictions. The implementing measures in the HCP will minimize disturbance to the bald eagle during the breeding period from 15 January to 15 August. The applicants understand that they are responsible for implementing this HCP in accordance with the specifications for mitigation, monitoring, reporting, and funding described within the HCP and will perform all obligations assigned to them in the section 10 permit and the HCP.

Comment 17. Disturbance from indoor construction during courtship, egg laying, and incubation could be sufficient to cause the pair to abandon the nest and it may also be sufficient to displace eagles at any time of year from foraging areas.

Response: See response to Comment 11.

Comment 18. The commenter noted that the bald eagle territory has not been successful since its discovery in 2001 and that it is unclear whether this pair produced young at the site prior to its discovery.

Response: Oregon State University has conducted an annual bald eagle breeding survey since 1978. This survey is comprehensive so it is unlikely that this bald eagle territory was established for any length of time prior to its discovery. The Service is not aware of any information indicating young were produced at this site prior to its discovery in 2001.

Comment 19. The commenter urged the Service to examine the likelihood that prior activities in the project area may have prevented successful reproduction by this pair of bald eagles, either through disturbance of the eagles or through degradation of important habitat features.

Response: The purpose of the low-effect HCP is to minimize and mitigate for the potential adverse affect to the bald eagle pair through future development of the site and to provide incidental take through a Federal permit.

The proposed action and Service’s Biological Opinion are based on site specific characteristics, the bald eagle territory breeding history, and the current status of the bald eagle in the Pacific recovery area. The site is located in a rural residential area with a residence and a restaurant within 400 feet of the nest trees. A major roadway, Whiskey Creek Road, is located within 400

feet of the nest trees. The roadway is part of the Three Capes Scenic Loop and experiences a significant amount of seasonal traffic. The bald eagles selected the site in 2001, despite all these developments having already been established. The proposed action will not significantly change this setting and the accompanying human disturbance level.

The Whiskey Creek territory is newly established and is close to two other well established territories to the north and south. The close proximity of these three territories limits the available habitat for the establishment of new or alternative nest sites in the area. Important habitat features such as perch trees, and roost sites will not be degraded by the proposed action.

Comment 20. A recommendation was made to change the period during which indoor and outdoor construction is prohibited to between 1 January and 31 May (or 31 August if young are hatched).

Response: The HCP prohibits certain activities from 15 January to 15 August of any year if nesting is successful and from 15 January to 15 May of any year if nesting is not successful or the territory is unoccupied. This timing is consistent with the breeding chronology for bald eagles in Oregon. Isaacs *et al.* (1983) found that bald eagle pre-nesting activities, including courtship and nest building, begin in February and that fledging is completed by mid-August. Issacs and Anthony (2003a) recently confirmed this chronology by reporting that nest building and repair occurs most often from February to June and that fledging occurs from late-June to mid-August.

Comment 21. The commenter noted that a push mower should be required for any lawn and that other yard maintenance equipment should be non-motorized.

Response: The HCP emphasizes the use of native plants for landscaping; however, it does provide the permittees an option to install a lawn on the side(s) of the houses away from the nest trees. No two-cycle engines will be allowed during the breeding period for yard maintenance. The only exception will be an electric mower if the permittees choose a lawn instead of native plantings.

Electric mowers operate in the 65- to 85-decibel range and are much quieter than gas-powered mowers that run at about 90 decibels. Normal conversation measures about 75 decibels. Noise levels from an electric mower will be further minimized by the location of the lawn on the side of the house furthest from the nest trees. Therefore, the Service concludes that the indirect effects of using an electric mower will be negligible.

Comment 22. The commenter recommended that root pruning or other means of minimizing root damage should be required for protection of other trees suitable for diurnal perching, night roosting, or as alternative nesting sites.

Response: The proposed action sufficiently minimizes the loss of potential perch trees in the project area. Although root pruning is not mentioned in the low-effect HCP, reducing tree root disturbance by minimizing deep excavations and using porous materials for the roadways are a

priority. Road excavation will be limited to what is practical, and if it can be avoided, gravel will be placed on a surface scraped to remove the duff layer only. The HCP also avoids impacts to many of the large trees. Of the 24 trees greater than 30 inches DBH, one will be cut, the roots of four others may be affected by roadway construction, and 19 will be conserved.

Comment 23. The HCP does not qualify as a categorical exclusion under the National Environmental Policy Act. The HCP suggests the impact on the bald eagle population [of] the proposed construction is likely to be minor, in part because the expansion of the bald eagle population has pushed nesting bald eagles into marginal habitat. To determine the impact of this Incidental Take Permit together with other impacts on bald eagles and their habitat in Oregon, the Service must, at minimum, consider the current rate at which suitable bald eagle nest sites and other bald eagle habitat features are being lost or degraded in Tillamook County, in the state of Oregon, and in the larger Pacific Northwest region, and over the length of the 25-year Federal permit.

Response: The information requested by the commenter is not available. Using the best scientific information available, the Service determined that the proposed action met the requirements of a low-effect HCP. A low-effect HCP is categorically excluded under CEQ regulations (40 CFR 1508.4) because it is expected to have minor or negligible effects on federally listed and candidate species and their habitats and to have minor or negligible effects on other environmental values or resources. 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) bald eagle breeding territories (and population) have increased significantly in recent 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, and 4) the Oregon Coast Recovery Zone population and productivity goals (45 occupied territories, greater than one fledged bird per territory and a 65 percent success rate) have been exceeded, significantly reducing the overall risk to the population. In 2003, Isaacs and Anthony (2003b) 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.

Oregon Department of Fish and Wildlife – E-mail of December 27, 2004

Comment 24. The monitoring of the bald eagle territory relies on a third party that is not a signatory to the HCP so there is no guarantee that the nest will be monitored over time and that the purpose of the survey is to determine nest occupancy and nesting success based on two widely separated visits. For the purpose of the HCP, the survey does not determine if the birds using the Whiskey Creek site are the same birds nesting to the north or if the birds are nesting in the project area by May 15.

Based on annual monitoring data collected by Oregon State University, it was confirmed that the Whiskey Creek pair established a new territory in 2001. Although a minimum of two visits are made to nest sites annually, additional visits by volunteers to the site are coordinated by Oregon State which would help determine if nesting occurs by 15 May. This survey is also well established and has occurred annually since 1978. In addition, the Service will have access to monitor the site and will do so as needed.

Comment 25. The commenter expressed that the adaptive management section should consider additional funding to determine if the birds have an alternate nest site in the area.

The applicants are currently not in a position to fund additional studies. However, as noted above, several additional visits to the site by volunteers in addition to the Oregon State monitoring efforts may help to determine whether an alternate nest is nearby.

IV. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

Section 10(a)(2)(A) of the Act requires that no permit may be issued by the Service authorizing any taking unless the applicant submits a conservation plan that specifies the following: the impact that will likely result from such taking; what steps the applicant will take to minimize and mitigate such impacts and the funding that will be available to implement such steps; what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and such other measures as the Service may require as being necessary or appropriate for the purposes of the plan. Section 10(a)(2)(B) of the Act mandates that the Service issue a permit if the taking will be incidental; the impacts of such taking are minimized and mitigated to the maximum extent practicable; the applicant assures adequate funding for the plan; and if the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

With regard to this specific project, permit actions, and section 10(a)(2)(B) requirements, the Service makes the following findings:

1. The taking will be incidental.

The Service finds that the taking of bald eagles under the HCP will be incidental to otherwise lawful activities. The activities for which incidental take coverage are sought under the Permits are the residential development of legal tax lots in Tillamook County, Oregon. Any take of bald eagles from human disturbance associated with the development will be incidental to, and not the purpose of, these lawful activities.

2. The Permittees will, to the maximum extent practicable, minimize and mitigate the impacts of taking of covered animal species and the effects to other Covered Species that may occur within the Permit Areas.

The Service finds that Mr. and Mrs. Mickey Ghormley, Mr. Kenneth Bilyeu, and Mr. Forrest Dickerson will minimize and mitigate the impacts of take of bald eagles to the maximum extent practicable. They have developed a HCP, pursuant to the incidental take permit requirements codified at 50 CFR 17.22(b)(1) and 50 CFR 17.32(b)(1), which require measures to minimize and mitigate the effects of issuing the Permits. Under the provisions of the HCP, the impacts of take will be minimized, mitigated, and monitored through the following measures:

- (a) Identification and implementation of incidental take avoidance and minimization measures to reduce impacts to the bald eagle, as described above in Section D and in Section 4.4 of the HCP;
- (b) The preservation of the nest trees and most of the potential perch trees in the project area for the duration of the Permits; and
- (c) The establishment of a monitoring and reporting plan to ensure the success of the mitigation and notification of the Service.

To make the finding that the conservation measures included in the HCP avoid, minimize and mitigate the impacts of take to the maximum extent practicable, the Service must first evaluate whether the conservation measures are rationally related to the level of take anticipated under the plan. Take is defined under the Act to include those actions that harass, harm or kill listed fish or wildlife. In effect, the conservation measures need to address the biological needs of the bald eagle in a manner that is commensurate with the impacts to the species allowed under the HCP. The Service believes the level of avoidance, minimization, and/or mitigation provided for in the HCP compensates for the impacts of take of the bald eagle that will or could potentially occur under the plan. The primary form of take is harassment resulting from the human disturbance associated with the proposed action. Harass is defined as actions that create the likelihood of injury to listed fish or wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering.

Thus human disturbance, in and of itself, does not result in take; take results when the human disturbance significantly disrupts normal behavioral patterns, such as, in this case, breeding. Having evaluated the effects to the bald eagle, the Service concludes that the level of take will be low, affecting not more than one bald eagle territory. The proposed action may result in periodic or complete nest abandonment from human disturbance. 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) 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, and 4) the Oregon Coast Recovery Zone population and productivity goals (45 occupied territories, greater than 1 fledged bird per territory and a 65 percent success rate) have been exceeded, significantly reducing the overall risk to the population (Isaacs and Anthony 2003b).

The Service further concludes that with respect to the bald eagle the impacts of take will be effectively minimized and mitigated by three conservation actions. First, the project area's habitat potential will be maintained by the preservation of suitable nest and most perch trees. Second, any outdoor construction activities will be completed outside the breeding season. Third, noise disturbance and visual effects will be managed by prohibiting any activities that may result in loud noises during the breeding season and by reducing visibility by screening the roadways with trees and by preserving most of the current canopy closure. Direct modifications to the listed species habitat are so limited that the impacts to the species are negligible and indirect effects, such as human disturbance, will be managed by seasonal restrictions.

To make a finding that the HCP minimizes and mitigates the impacts of take to the maximum extent practicable, the Service first must find that the minimization and mitigation measures provided under the plan are rationally related to the level of take anticipated under the plan. As explained above, the Service believes that the level of take likely to occur is low, the impacts of that take on the species are minor, and the HCP prescriptions effectively compensate for the take anticipated to occur.

Three alternatives were considered in the HCP to determine its practicability: no action, alternative sites, and a reduced project. Under the no action alternative, no section 10(a)(1)(B) permit would be issued for the take of the bald eagle and no HCP would be implemented by the applicants. This alternative was rejected because it was inconsistent with the development goals of the applicants and did not provide long-term assurance that a portion of the trees would not be harvested for timber production. Under the alternative sites approach, other property was considered for development. This proposal was rejected because these three lots are the last to be developed in the subdivision and the value of comparable size lots approached \$1 million. The reduced project alternative reduced the size of the house envelopes, however this alternative would not locate the houses substantively further from the nest trees. This alternative was rejected because it did not significantly reduce the potential impact nor did it meet the needs of the applicants for the marketability of the lots.

In addition to evaluating the effectiveness of the minimization and mitigation provided under the HCP, the Service must also evaluate whether these measures minimize and mitigate the impacts of take "to the maximum extent practicable." This requires evidence in the record that additional mitigation would not be feasible. However, the Service does not believe that feasibility can be divorced from considerations of proportionality (that is, the mitigation under the plan must be proportional to the impacts of take under the HCP). Thus, when considering whether additional minimization and mitigation measures are feasible, the Service first and foremost, must consider the adequacy of the mitigation provided to compensate for the impacts of take and determine that the mitigation is sufficient and fair. The proposed action is a "low effect" HCP that may affect bald eagles associated with one bald eagle territory. Any additional measures, such as off-site mitigation, would be impracticable to the applicants. No unoccupied suitable habitat is known near the project area and, if any was identified, it would likely be of similar value to the current property.

3. The applicant(s) will ensure that adequate funding for the plan and procedures to deal with unforeseen circumstances will be provided.

The Service finds that Mr. and Mrs. Mickey Ghormley, Mr. Kenneth Bilyeu, and Mr. Forrest Dickerson will ensure funding adequate to implement the HCP. The main emphasis of the HCP is the site development plan that identifies the areas that can be developed in the project area. The additional HCP prescriptions include plantings, monitoring, notification requirements and procedures to address changed circumstances. The costs to the permittees for implementing the monitoring and notification requirements are small with minor out of pocket expenses. The estimated costs for the tree plantings require only modest expenditures of approximately \$1500 between the permittees. The permittees have also committed to addressing changed circumstances by replacing any planting lost due to fire, vandalism, and storm or wind throw. Funding these management actions as outlined in the HCP is not likely to cause any monetary hardship on the permittees and they are both capable and willing to fulfill all of their obligations under the HCP.

4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The Service finds that the taking to be authorized under the proposed Permits will not appreciably reduce the likelihood of the survival and recovery of the bald eagle in the wild. The Act's legislative history establishes the intent of Congress that this issuance criterion be identical to a finding of "no jeopardy" pursuant to section 7(a)(2) of the Act and the implementing regulations pertaining thereto (50 CFR 402.02). As a result, the Service has reviewed the HCP under section 7 of the Act. In a Biological Opinion (USFWS 2005b), which is incorporated herein by reference, the Service has concluded that the issuance of the proposed Permits are not likely to jeopardize the continued existence of the bald eagle. Our conclusion is based on annual monitoring that shows that the territory has not been productive since it was discovered in 2001 and that the Oregon Coast Recovery Zone recovery goals are met.

5. Other measures, as required by the Director of the Fish and Wildlife Service, as necessary or appropriate for purposes of the plan will be met.

The Service finds that no additional measures are required for the purposes of the HCP to be met.

6. The Service has received the necessary assurances that the plan will be implemented.

The Service finds that the HCP provides the necessary assurances that the plan will be carried out by Mr. and Mrs. Mickey Ghormley, Mr. Kenneth Bilyeu, Mr. Forrest Dickerson or future permittees.

V. MIGRATORY BIRD TREATY AND BALD EAGLE PROTECTION ACTS

The Service finds the HCP and the Permits associated with the section 10(a)(1)(B) permit are consistent with the Migratory Bird Treaty and the Bald Eagle Protection Acts. Mr. and Mrs. Mickey Ghormley, Mr. Kenneth Bilyeu, and Mr. Forrest Dickerson have made a sufficient showing that the Effects to the bald eagle will be avoided or minimized to the maximum extent practicable. Therefore, the Service will not refer the incidental take of any bald eagle for prosecution under the Migratory Bird Treat Act of 1918, as amended (16 U.S.C. §§ 703-712), or the Bald Eagle Protection Act of 1940, as amended (U.S.C. §§ 668-668d), if such take is in compliance with the terms and conditions (including amount and/or number) specified in the Permits.

VI. GENERAL CRITERIA AND DISQUALIFYING FACTORS -- FINDINGS

The Service has no evidence that the Permit applications should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b) - (c).

VII. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, I recommend approval of permits for Donna and Mick Ghormley (PRT-09-5539-0), Ken Bilyeu (PRT- 09-5550-0), and Forrest Dickerson (PRT-09-5548-0) for the incidental take of the bald eagle in accordance with the HCP.

Carolyn D. Bohas
Acting Deputy Regional Director, Region 1

4/19/05
Date

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Figure 1. Site Development Plan

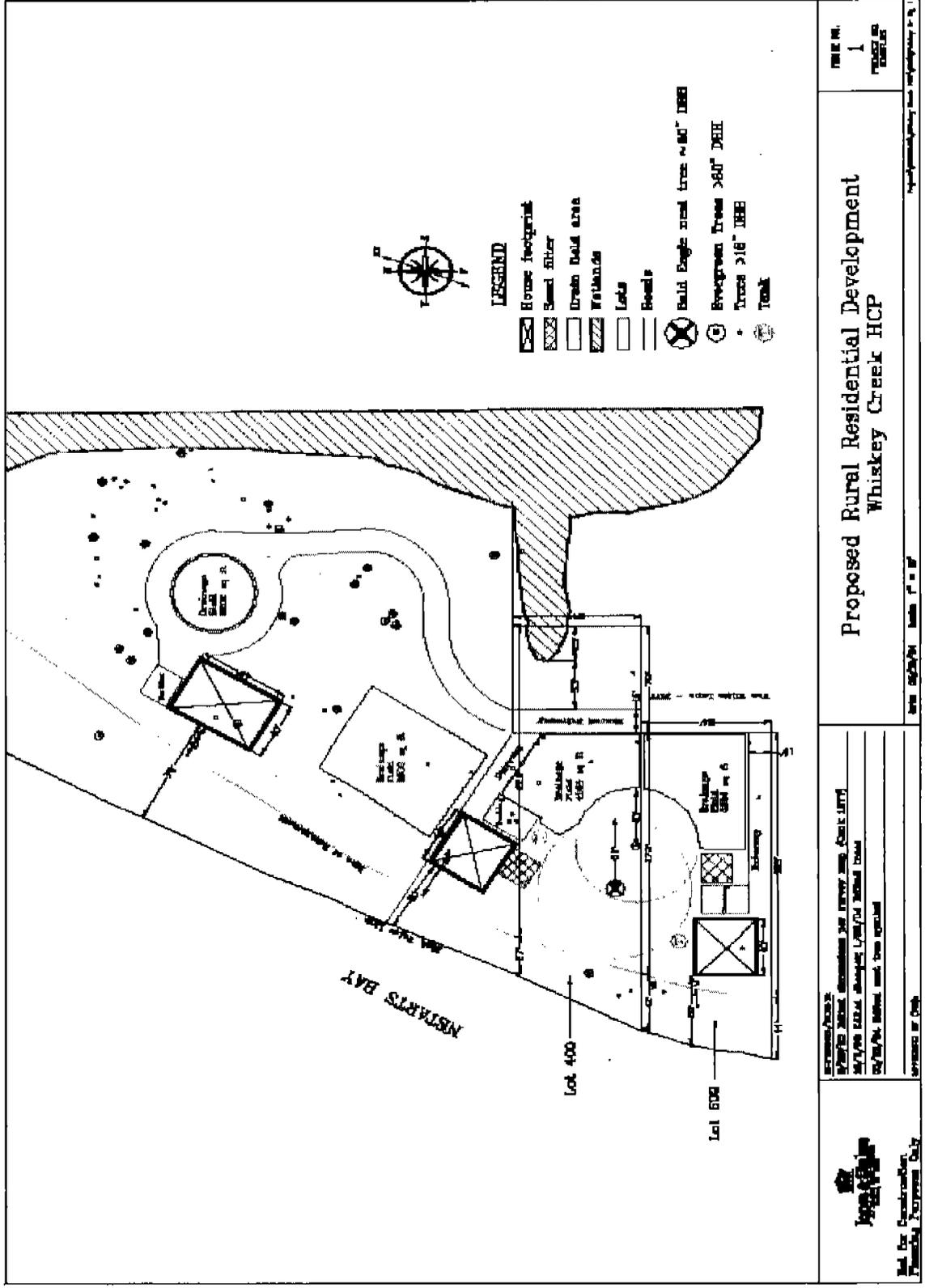


Figure 1. Site Development Plan