FINDINGS AND RECOMMENDATIONS
FOR ISSUANCE OF SECTION 10(a)(1)(B) INCIDENTAL TAKE PERMITS
(TE-096374-0 and TE-096373-0) ASSOCIATED WITH THE
WESTLAKE RANCH LLC HABITAT CONSERVATION PLAN
CLATSOP COUNTY, OREGON

I. DESCRIPTION OF THE PROPOSED ACTION

The Fish and Wildlife Service (Service) proposes to issue Incidental Take Permits (permits) to Westlake Ranch LLC and, Randy and Tasha Curs under the authority of section 10(a)(1)(B) and section 10(a)(2) of the Endangered Species Act (ESA) for a period of 50 years. Documents used in the preparation of this statement of Findings and Recommendations include the Westlake Ranch LLC Oregon Silverspot Butterfly Habitat Conservation Plan (Plan), the Service's biological opinion on the permit application (Fish and Wildlife Service 2005a), and the associated environmental action statement (Fish and Wildlife Service 2005b). All of these documents are incorporated by reference as described in 40 CFR §1508.13.

Under the permits, Westlake Ranch LLC and the Curs (collectively referred to as the Permittees) would receive incidental take authorization for certain covered activities as identified in the Plan. The Permittees are requesting a permit for the incidental take of the federally-listed as threatened Oregon silverspot butterfly (*Speyeria zerene hippolyta*) associated with residential development activities located on approximately 165 acres of land in Clatsop County, Oregon. Westlake Ranch LLC proposes to develop approximately 74 lots on 160 acres. Randy and Tasha Curs propose to develop one five acre homesite adjacent to their existing home and the Westlake property. A Mitigation Area totaling approximately 6.5 acres will be set aside and managed in perpetuity to maintain and enhance plant species important to the Oregon silverspot butterfly. The impacts under the Plan will primarily occur on the eight lots within the Westlake Ranch property that currently contain early blue violets. There are also five patches of early blue violets outside of the lot boundaries, adjacent to Neacoxie Creek that might be affected by landscaping activities. The remainder of the development could occur without the Plan and accompanying permits. Management activities within the Mitigation Area that currently contains three patches of violets may result in incidental take of Oregon silverspot butterflies. Measures will be taken to maximize the long-term benefits of management while minimizing the risk of incidental take. The Permittees would also receive "no surprises" assurances under the Service's regulations [50 CFR §17.22(b)(5), 17.3, and 17.32(b)(5)] for the Oregon silverspot butterfly.

The Oregon silverspot butterfly (OSB) was federally-listed as threatened, on July 2, 1980, (45 FR 44935) with designated critical habitat. Historically, the OSB was distributed along the coasts of Washington, Oregon, and northern California and was typically found in localities containing its larval host plant, the early blue violet (*Viola adunca*). At least 20 separate localities were known to have populations of the OSB in the past. Currently, OSB populations occur at only six known sites. OSBs are likely extirpated from Washington and only one population still exists in Del Norte County, California. In Oregon, two sites exist in Lane

County (Rock Creek-Big Creek and Bray Point), and two are in Tillamook County (Cascade Head and Mount Hebo). The population at a sixth site, the Clatsop Plains in Clatsop County where this development will occur, has declined in recent surveys with only one OSB documented in 1998 (VanBuskirk 1998). Habitat loss has resulted in isolation of the remaining OSB populations on the present-day landscape. Refer to the Status of the Species section of the Biological Opinion (Fish and Wildlife Service 2005) for more background information on the OSB.

Types of Covered Activities

Activities proposed to be covered under the permit are the otherwise lawful activities which are described in Part III.B. of the Plan. Covered activities are those activities for which incidental take coverage is sought under the provisions of section 10(a)1(B) of the ESA and in which incidental take of the OSB is likely to occur. Covered activities in the Plan include all earthmoving and ground disturbing activities associated with the construction of roads, installation of utilities, construction of buildings, and any landscaping activities associated with residential development in areas where violets occur. It is assumed that all OSB habitat will be permanently removed from areas where ground disturbing activities associated with residential development will occur. In addition, management activities within the Mitigation Area that include fencing (or another identifiable border), placement of signs, annual mowing, planting of native vegetation, and weed control are also covered.

II. ANALYSIS OF EFFECTS

The Service has determined that the impacts likely to result to the OSB from the proposed action will be minimized and mitigated to the maximum extent practicable by measures described in the Plan and the associated permits. The effects of the proposed action on the OSB are fully analyzed in the Plan and the Service's Biological Opinion, which are incorporated by reference (Fish and Wildlife Service 2005a), and a summary of the analysis is provided below.

Project construction will permanently remove 17-80 violet plants located in seven small patches within eight proposed residential lots. Ground disturbing activities associated with project construction, such as grading and excavation, would likely kill any OSB eggs, larvae and pupae associated with the violet plants. An additional 24-60 violet plants, within five patches located outside the residential lot boundaries along Neacoxie Creek, may also be removed in the course of future landscaping activities.

Based on research done with captive-reared OSB larvae, at least two average-sized violet plants (with about 55 leaves per plant), located within 20 cm of each other, would be required to sustain one larva through development (Mary Jo Anderson, Oregon Zoo, pers. comm. 2005 in Fish and Wildlife Service 2005a). Based on the survival rates of captive reared larvae, it is unlikely that more than one adult butterfly could be supported within each of the twelve small patches of violets. Three of the twelve patches are located away from the Neacoxie flight corridor, within a large area of degraded habitat. Female butterflies are not likely to lay their eggs in isolated patches within areas of low violet densities (Fish and Wildlife Service 1998). Therefore, the three violet patches located away from the Neacoxie Creek flight corridor are unlikely to support

butterfly larvae. The nine violet patches along Neacoxie Creek, that will be impacted by the proposed development, have the potential to support a maximum of about nine butterfly larvae (one per patch) through larval development. Therefore, a maximum of nine butterfly larvae could be potentially taken as a result of the residential development. If the development didn't occur and no other action was taken to enhance habitat within the proposed development area, the number of violets and consequently the number of OSBs that could be supported, would likely decline. The violets would be adversely impacted by the continued encroachment of non-native plants for space, sunlight, water, and nutrients.

Construction impacts and residential occupancy will increase habitat fragmentation between suitable OSB habitat patches and their flight corridor along Neacoxie Creek. An adult female OSB could be indirectly affected by the loss of the violet plants, causing her to travel longer distances in search of suitable egg-laying habitat elsewhere. OSB's are especially vulnerable to predation while in flight.

The Curs had previously been involved with a Conservation Agreement with the Service for the construction of their current home in which they agreed not to develop and actively manage 1.5 acres of habitat containing early blue violets. Under this Plan, those 1.5 acres will continue to be protected and managed and no additional violets will be impacted by their future residential development.

The direct effects of violet plant loss will be offset by the maintenance of violets within the 6.5 acre Mitigation Area. Within six months after issuance of the Westlake permit, Westlake or its agent will install and maintain markers around the Mitigation Area to make it readily identifiable. If Westlake commences development within the Plan Development Area and if Westlake is unable to sell the southern portion of its property that borders it, but is not part of this Plan, within three years after issuance of the Westlake permit, then Westlake or its agent will provide fencing around the Mitigation Area. The protection of the 6.5 acres will occur through the recording of a conservation easement with a third party prior to any surface disturbing activities that result in adverse impacts to the identified violet locations in the development area. Westlake will initially draft the conservation easement language and the Service will review and approve the language prior to finalization and recording. The mutually agreeable final language will outline the terms and restricted uses and management requirements for the Mitigation Area. Within six months after issuance of the permit, Westlake, its agent, or the third party holder of the conservation easement will complete and begin implementing an annual mowing plan approved by the Service within the Mitigation Area. Uses of the Mitigation Area will be limited to only those activities intended to improve OSB habitat conditions.

The Mitigation Area will be managed through site-specific, prescribed mowing to promote violet persistence over time, as well as to encourage the establishment of a higher density of violet plants that would increase its OSB larva carrying capacity. Additional management actions may be voluntarily carried out by the holder of the conservation easement once a management plan is established. A dense patch of goldenrod (*Solidago spathulata*) within the Mitigation Area may minimize the need for longer flights in search of nectar. Because the existing habitat in the area is fragmented into small patches surrounded by invasive, non-native plant species, violets and nectar plants would not be likely to persist over time, if not for the implementation of a

prescribed mowing plan that will occur in the Mitigation Area. Annual mowing within the 6.5 acre Mitigation Area may impact butterfly larvae. The 13-40 early blue violets within three patches have the potential to support three OSB larvae, one per patch, through larval development. A Management Plan will be developed to ensure mowing will be conducted in a manner to reduce the likelihood that larva will be impacted while promoting the growth and establishment of additional violet plants.

The 50-year permits will provide sufficient time for the property to be fully developed and to address any on-going actions, such as landscaping, that might impact early blue violets and OSBs. The Service does not anticipate much, if any, incidental take once full development has occurred, since there is a very low probability that any violets or OSBs are likely to occupy the development area or be impacted by activities associated with the residential development. The current habitat value of the development area is very low and the anticipated development will only degrade the remaining poor quality habitat. The 50-year permits provide the landowners with flexibility to develop the area as market conditions warrant.

III. PUBLIC COMMENT

A notice of availability of the Plan and application for an incidental take permit was published in the Federal Register on January 12, 2005 (*see* 70 *FR* 2183). Public comments on the permit applications, the proposed Plan, and the Environmental Action Statement were requested by February 11, 2005.

Five public comment letters were received, four of which supported the Plan and one which did not. The one commenter that did not support the Plan expressed concern about impacts to 165 acres of land from future residential lot development and did not believe the 6.5 acres of mitigation area was sufficient. Impacts to OSBs will not occur on the majority of the total 165 acres because suitable habitat does not exist throughout this area. The permits would authorize take where current and potential future OSB habitat may exist. Only eight of Westlake's proposed 74 residential lots contain the OSB's larval host plant and an additional five patches occur outside of these lots and might be affected by landscaping activities. These violet patches total about 0.14 acres. The current area of violets in the mitigation area is about 0.5 acres. Management within the Mitigation Area should at least maintain this amount of violets and is likely to increase the number and distribution of violets. In addition, the Mitigation Area will maintain the presence of dune goldenrod, which is a native plant that is used as a nectar source for adult OSBs. The presence of at least 0.5 acres of violets along with the close availability of a nectar source will support more OSBs and at a higher density than can currently be supported by the currently widely scattered violet patches. The maintenance of the goldenrod patch will provide a nectar source for OSBs traveling through the area. Thus, the permits would authorize incidental take on a relatively small acreage where the OSB might be affected and would thus have a low overall effect on the species.

Of the four letters of support, two were from adjoining landowners, and another was from a locally-based land trust. All four acknowledged the benefits of concentrating development in the northern portion of the property where the least amount of existing habitat still occurs, leaving the opportunity to take future actions to conserve the southern portion of the property. They also

stated their belief that the effects of the proposed development would be minimal to the OSB because of the limited amount of existing habitat and its relatively poor condition. One commenter stated that the Plan would advance the goal of the OSB recovery plan through the setting aside of habitat. Another commenter stated that the proposed effect is minimal for the OSB, the net effect of the Plan was positive, and that the low effect categorization was appropriate.

IV. INCIDENTAL TAKE PERMIT CRITERIA – ANALYSIS AND FINDINGS

Section 10(a)(2)(A) of the ESA states that no permit may be issued by the Secretary authorizing any taking referred to in paragraph (1)(B) of said section unless the permit applicant submits to the Secretary a conservation plan that specifies the following: (1) the impact which will likely result from such taking; (2) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps; (3) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and, (4) such other measures as the Secretary may require as being necessary or appropriate for the purposes of the habitat conservation plan.

Section 10(a)(2)(B) of the ESA mandates that the Secretary shall issue a permit if "...after opportunity for public comment , with respect to a permit application and the related conservation plan that (i) the taking will be incidental; (ii) the Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (iii) the Applicant will assure that adequate funding for the plan will be provided; (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (v) the measures, if any, required under subparagraph (A)(iv) will be met; and [s]he has received such other assurances as [s]he may require that the plan will be implemented...".

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

A. The taking will be incidental.

The Service finds that the taking of OSB under the Plan will be incidental to otherwise lawful activities. The proposed project involves residential development activities and management activities in the Mitigation Area. Any anticipated take would result from these activities and would not be the intended purpose of the covered activities.

B. The Permittees will, to the maximum extent practicable, minimize and mitigate the impacts of taking the Oregon silverspot butterfly.

Through negotiations, the Permittees have concentrated the development in the northern portion of the property and avoided impacts in the southern portion where the vast majority of OSB habitat occurs. Many potential development opportunities have been analyzed and considered by Westlake on its approximately 274-acre property. Westlake considered an alternative that would have allowed a 50 lot residential subdivision to be built with a golf course that would have covered almost the entire property and impacted a majority of the early blue violet sites.

Although this alternative maximized the economic benefit of the property, it would not have minimized the impact to OSB habitat. Another alternative that Westlake strongly considered was the development of 74 residential lots over the entire property maximizing the lakeshore view properties. The lot configuration was basically in two long linear areas, one along the lake shore and one on the other side of the dune. This alternative would have maximized the economics of the development by providing 14 more lakeshore lots than the current proposal. However, these lakeshore lots were located in the southern portion of the property where the violet survey indicated the highest concentration and number of violets. Although this alternative would maximize the economics of the development proposal, it would also have impacted a large portion of the known violet locations. Avoiding all violet sites would not have been practicable because the development area is limited in the number of developable lots and the lots with the best views would be the most profitable. By having buildable lots along Neacoxie Creek with good views, the total number of lots could be reduced, therefore, minimizing the potential impact to additional OSB habitat. The proposed Plan is the preferred alternative over other alternatives considered because it provides for a viable residential development project and conserves and minimizes the impacts to OSB habitat.

The Curs' Conservation Agreement with the Service is a 30 year agreement that will continue for the term of the Plan. The Curs considered alternatives including no action after the term of the Conservation Agreement but without active management the OSB habitat would be lost. The Curs proposed alternative to continue their commitments under the terms of the Conservation Agreement provide benefits to the OSB while preserving the option for the Curs to develop an additional home on their property. This is the preferred alternative because it meets the regulatory requirements under the ESA, and provides for continued maintenance and enhancement of the OSB habitat while providing for the opportunity for a new home site.

The Plan will result in the loss of a maximum of 12 known patches of early blue violets totaling approximately 0.14 acres within eight residential lots. Eleven of these patches are no more than 0.005 acres, with 10 containing less than 11 plants each and 1 containing more than 20 plants. In addition, an approximately 0.09 acre patch contains between 11 and 20 plants. No known violet patches are likely to be impacted by the Curs' single lot development. Westlake Ranch LLC is proposing to protect a mitigation area that totals about 6.5 acres and currently contains approximately 0.5 acres of violets, and 0.5 acres of dune goldenrod (*Solidago spathulata*) which is a native nectar source for the adult OSBs. The proposed management of these 6.5 acres should maintain or increase the quality and/or quantity of OSB habitat, although some incidental take may occur in the course of management activities. The management activities are designed to improve the quality and quantity of habitat and increase the carrying capacity for Oregon silverspot butterflies. The violet patches to be impacted by the residential development are small and isolated and are not likely to support many OSB larva. They are also currently found within an area that is primarily composed of non-native grasses that out-compete the violets for nutrients and light by over-topping them during the majority of the growing season, making them difficult to locate for adult female OSBs looking for oviposition sites. The Mitigation Area will be managed to reduce the canopy and duff layer of the non-native grasses which will increase the vigor of the existing plants. This can be accomplished through mowing alone. Increasing their vigor will result in more leaves and more blooms per plant. This in turn allows for the propagation of additional plants from seed which would not be as successful without

management. In addition, setting aside the native goldenrod patch and maintaining that patch will also benefit adult butterflies seeking nectar. The goldenrod patch is a unique feature in that it is the largest such patch on the entire property and there is a lack of good native nectar sources on the Clatsop Plains. The goldenrods juxtaposition to violets will attract adult butterflies and increase their likelihood of finding the violets. The use of these goldenrod plants should also sustain the OSBs and reduce their need to migrate long distances which would utilize valuable energy reserves and increase their susceptibility to predation. The adverse impacts of the residential development on the scattered violets will result in relatively low impacts to OSBs because they are not likely to support many in their current state. The mitigation is, at a minimum, commensurate with the impacts because the Mitigation Area contains higher quality habitat than the individual patches being impacted, a larger contiguous block of habitat containing larval host plants and nectar sources, and, the management will maintain and should improve the quantity and quality of habitat within the area.

The Service finds that the proposed Plan minimizes and mitigates the impacts of take of the OSB due to residential development and management activities to the maximum extent practicable in light of the low level of relative impacts anticipated and the range of alternatives considered. The Plan represents the most practicable alternative to minimize and mitigate impacts to the OSB. Other alternatives considered would have resulted in greater impacts to the OSB.

C. The Permittees will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.

Westlake LLC will provide the funding necessary for completion of the activities related to each of their commitments under this Plan. The commitments as described in the Plan include protecting in perpetuity approximately 6.5 acres for the Mitigation Area. Westlake currently owns this property and has also committed to record a permanent conservation easement. The Mitigation Area will be marked or fenced to make it readily identifiable. Westlake has committed to implementing an Annual Mowing Plan approved by the Service within the Mitigation Area. Based upon similar mowing projects in the local vicinity, it is estimated that the cost will be approximately $250.00 per year. The conservation easement, that will be approved by the Service and recorded prior to any surface disturbing activities that could adversely affect the OSB, will also reference or establish a funding mechanism to carry out management activities on those 6.5 acres. Westlake has the financial capability to meet these financial commitments in the Plan. Setting aside the property for the Mitigation Area is the most significant financial commitment, however Westlake already owns that property.

Limited changed circumstances are envisioned for this Plan. This Plan does not anticipate incidental take of any species other than OSB. If any other currently listed species, or any species that becomes listed in the future is impacted by implementation of this Plan, Westlake LLC and/or the Curs will consult with the Service and take appropriate actions, as necessary, to comply with the ESA. Any unforeseen circumstances not outlined in the Plan will be addressed according to the Service's 'no surprises' policy and related Plan regulations.

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

As the Service's Biological Opinion (Fish and Wildlife Service 2005a) concluded, the effects of the proposed action are limited to a very small area of degraded OSB breeding and dispersal habitat. Furthermore, very few OSBs would be potentially impacted by the project. If this habitat was left in its current state and unmanaged, it would likely not persist due to invasive species encroachment and succession. Even if this small amount of habitat was restored, it is not large enough to contribute significantly to supporting an OSB population. Based upon the small area of impact, and the very small number of OSBs that could be adversely affected by the actions taken under the Plan, the Service concluded that the issuance of these section 10(a)(1)(B) permits is not likely to appreciably reduce the likelihood of survival and recovery of the species in the wild over the term of the permit.

V. GENERAL CRITERIA AND DISCQUALIFYING 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) through (c). The applicants have met the criteria for the issuance of the permits and approval of the Plan, and do not have any known disqualifying factor that would prevent the permit from being approved under current regulations.

VI. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed actions, I recommend the approval and issuance of permits TE-096374-0 and TE-096373-0 to Westlake Ranch LLC and, Randy and Tasha Curs for the incidental take of Oregon silverspot butterflies in accordance with the Plan.

ACTING Thomas T Rainey
Deputy Regional Director
Region 1

May 18, 2005
Date

References

Fish and Wildlife Service. 1998. Biological Opinion for Oregon Military Department Camp Rilea Oregon Silverspot Habitat Management Plan, U.S. Fish and Wildlife Service, Portland, Oregon. 19 pp.

Fish and Wildlife Service. 2005a. Intra-Service Biological Opinion For Issuance of an Endangered Species Act Section 10(a)(1)(B) Permit for the Westlake Ranch LLC Habitat Conservation Plan. April 2005.

Fish and Wildlife Service. 2005b. Environmental Action Statement Screening Form. Portland, Oregon. May 2005.

VanBuskirk, R. 1998. Survey for the presence of the Oregon Silverspot Butterfly, *Speyeria zerene hippolyta* (Lepidoptera, Nymphalidae) on the Clatsop Plains in 1998. University of California. The Nature Conservancy, Portland, Oregon. 13 pp

Westlake Ranch LLC. 2004. Westlake Ranch LLC Oregon Silverspot Butterfly Habitat Conservation Plan. November 2, 2004.