B. Appendix - Implementation Agreement

Appendix B. Implementation Agreement

IMPLEMENTATION AGREEMENT FOR THE WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES HABITAT CONSERVATION PLAN

THIS AGREEMENT is made and entered into as of the 30th day of January, 1997, by and between the Secretary of the Interior acting through the United States Department of the Interior, as represented by the UNITED STATES FISH AND WILDLIFE SERVICE ("USFWS"), an agency of the federal government, the Secretary of Commerce acting through the NATIONAL OCEANIC & ATMOSPHERIC ADMINISTRATION as represented by the NATIONAL MARINE FISHERIES SERVICE ("NMFS"), an agency of the federal government, and the WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES, ("DNR"), an agency of the State of Washington, which includes the WASHINGTON STATE BOARD OF NATURAL RESOURCES ("BOARD").

BACKGROUND

1.0 DNR manages approximately 2.1 million acres of forest lands within the State of Washington.

2.0 Approximately 1.6 million acres of DNR-managed forest lands are within the range of the Northern Spotted Owl (*Strix occidentalis caurina), ("the Owl").*

3.0 The Marbled Murrelet *(Brachyramphus marmoratus)*, Bald Eagle *(Haliaeetus leucocephalus)*, Grizzly Bear *(Ursus arctos)*, Gray Wolf *(Canis lupus)*, Peregrine Falcon (Falco peregrinus), Columbian White-tailed Deer *(Odocoileus virginianus leucurus)*, Aleutian Canada Goose *(Branta canadenis leucopareia)*, and Oregon Silverspot Butterfly *(Speyeria zerene hippolyta) (hereafter known collectively as "other federally listed species")* occur or may occur on the PERMIT LANDS.

4.0 The aforementioned species are listed as threatened or endangered under the Federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, ("ESA"), and any taking, as that term is used in the ESA, of these species is prohibited, except as permitted by the ESA.

5.0 Incidental takings in accordance with an Incidental Take Permit ("ITP") issued by the SERVICES in conjunction with approval of a Habitat Conservation Plan ("HCP") are authorized by the ESA.

6.0 DNR, with technical assistance from the SERVICES and others, has prepared an HCP for the Owl and other species that may use the types of habitat that occur on the PERMIT LANDS.

7.0 DNR has applied to have the ITP include the Owl and other federally listed species that may currently use the types of habitats that occur on PERMIT LANDS; and to have the ITP, as amended from time to time, include every species that becomes listed after the effective date of this Implementation Agreement ("Agreement") and that may now or hereafter use the types of habitats that occur within the five Westside Planning Units of the PERMIT LANDS and the Olympic Experimental State Forest (OESF).

8.0 The SERVICES require an Implementation Agreement to be signed by all PARTIES associated with issuance of an ITP for a long-term HCP.

9.0 The purposes of this Agreement are to obtain an approved HCP and ITP covering DNR-management activities on the PERMIT LANDS; to implement the HCP; to commit the PARTIES to fulfill and faithfully perform their respective obligations, responsibilities, and tasks to the extent consistent with their respective authorities; to identify remedies and recourse should any of the PARTIES fail to perform such obligations, responsibilities, and tasks; and to provide for regulatory relief, stability, and species conservation.

10.0 The SERVICES have given full consideration to the HCP and this Agreement and found them to meet the requirements for issuance of an ITP under the ESA.

11.0 DNR has given full consideration to the HCP, its alternatives, the ITP, and this Agreement and found the HCP, the ITP, and this Agreement to be in the best interest of each of the trusts.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained below, the PARTIES agree as follows:

AGREEMENT

12.0 Definitions. The terms of the HCP, and this Agreement shall be interpreted as supplementary to each other, but in the event of any direct contradiction between the terms of the HCP and this Agreement, the terms of this Agreement shall control. Terms capitalized in this document shall have the meanings set forth in this section.

12.1 The terms "PARTY" and "PARTIES" shall mean one or all of the following: the Secretary of the Interior acting through the United States Department of the Interior, as represented by the USFWS, the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration, as represented by NMFS, and DNR, including the BOARD.

12.2 The terms "SERVICE" and "SERVICES" shall mean the USFWS and/or the NMFS acting on behalf of their respective Secretaries.

12.3 The terms "ITP" and "PERMIT" shall mean an incidental take permit issued to DNR pursuant to Section 10(a) of the ESA to authorize any incidental take of listed species which may result from otherwise lawful DNR-management activities on PERMIT LANDS, which are conducted in accordance with the HCP and this Agreement.

12.4 The term "PERMIT LANDS" shall mean the lands covered by the ITP and HCP, as referred to in section 15.1 of this Agreement.

12.5 The term "HCP" shall mean the Habitat Conservation Plan prepared by DNR, and as amended.

12.6 The term "SPECIES ADDRESSED IN THE HCP" includes all species currently listed as threatened or endangered that may use the types of habitat found on the PERMIT LANDS, and all species hereafter listed as threatened or endangered that may use the types of habitat found within the five Westside Planning Units and the OESF. These species include species listed under the ESA or afforded similar status or protection by federal law or regulation applicable to or affecting the PERMIT LANDS during the term of the HCP.

12.7 The term "DAYS" shall mean calendar days.

12.8 The term "COMPLIANCE" shall mean substantial compliance with the commitments of the HCP, ITP, and this Agreement.

12.9 The terms "DEMONSTRATES" and "DEMONSTRATING" shall mean to establish the existence of a condition or development by use of the best scientific and/or commercial data available.

12.10 The term "PEER REVIEWED" shall mean that consistent with section B(1) of the Interagency Cooperative Policy for Peer Review in Endangered Species Activities (59 Fed. Reg. 34,270), the SERVICES will provide for peer review of the scientific data on which the agencies base any finding requiring peer review in this Agreement to ensure that any such findings are based on the best scientific and commercial data available. The SERVICES will request peer review so that the reviews will be completed within seventy-five (75) DAYS of DNR's request. In the event peer review of such data is not available in time to enable the SERVICES to meet their obligations established by statute, regulation, or this Agreement, the required finding or decision based on such data will be effective, but will be reconsidered by the SERVICES as soon as that information becomes available.

13.0 Incorporation by Reference. The HCP is intended to be, and by this reference is, incorporated herein.

14.0 Responsibilities of the PARTIES. The PARTIES agree to be bound by and to the commitments of the HCP, the ITP, and this Agreement, subject to amendment, renewal, or termination as provided herein.

15.0 PERMIT LANDS.

15.1 PERMIT LANDS Description. Contained in Map I.1 of the HCP, and incorporated herein by reference, are Geographic Information Systems (GIS) data describing the PERMIT LANDS subject to the HCP, the ITP, and this Agreement. Said lands are referred to in the HCP, the ITP, and this Agreement variously as the "DNR-managed lands in the area covered by the HCP," "PERMIT LANDS," the "DNR forest lands," the "DNR-managed lands," the "lands within the planning units," and other similar terms. All such terms, unless otherwise indicated, used in the HCP, the ITP, or this Agreement refer to those lands identified in Map I.1 of the HCP as "DNR-managed HCP lands."

15.2 Natural Area Preserves and Natural Resource Conservation Areas. DNR manages approximately 45,000 acres of Natural Area Preserves ("NAPs") and Natural Resource Conservation Areas ("NRCAs") that lie within the range of the Owl. Approximately 14,765 acres of these lands have been designated as important for achieving the commitments of the HCP. It is expected that the designated lands will continue to provide this habitat in the future and this habitat will count as mitigation so long as such habitat remains present. DNR will notify the SERVICES if the designated lands, or a portion thereof, will no longer be managed consistent with the commitments of the HCP. While not subject to the commitments of the HCP or this Agreement, so long as they are managed consistent with the commitments of the HCP, the SERVICES will give DNR credit for the habitat provided by the designated lands in terms of meeting the commitments assigned to DNR in the HCP, the ITP, and this Agreement. Whether the designated lands continue to provide this habitat, and the mitigation if they do not, will be considered by the SERVICES at the time the SERVICES are notified by DNR that the designated lands will no longer be managed consistent with the commitments of the HCP. Take incidental to DNR-management activities on the designated lands is authorized by the ITP so long as such take is in COMPLIANCE with the HCP, the ITP, and this Agreement.

16.0 Forest Product Sales and Other Management Activities Other Than Land Sales, Purchases, and Exchanges.

16.1 Management Activities Subject to this Agreement. DNR has an active management program for its PERMIT LANDS, including but not limited to forest practices, forest product sales, other valuable material sales, licenses, permits, leases, rights-of-way, and public uses. So long as the SERVICES have not suspended or revoked the ITP under section 26.0 of this Agreement or DNR has not terminated the ITP under section 27.0, the ITP will authorize any incidental take otherwise prohibited by the ESA which may result from otherwise lawful DNR-management activities that are conducted in accordance with the HCP and this Agreement.

16.2 Management Activities in Progress or Under Way.

a. Timber Sales. DNR will incorporate the relevant commitments of the HCP into all timber sales sold on or after January 1, 1999. DNR may, but is not required to, incorporate the commitments of the HCP into timber sales sold prior to January 1, 1999.

b. Nontimber Resource Activities. Excepting designations and leases under subsection 25.3.a(2) of this Agreement, DNR will incorporate the relevant commitments of the HCP into all nontimber resource transactional documents pertaining to PERMIT LANDS including, but not limited to, leases, licenses, permits, contracts, and sales, executed on or after January 1, 1999. DNR may, but is not required to, incorporate the commitments of the HCP into nontimber resource transactional documents pertaining to PERMIT LANDS including, but not limited to, leases, licenses, permits, contracts, and sales, executed prior to January 1, 1999. As leases, licenses, contracts, and permits of PERMIT LANDS are renewed, DNR shall alter such leases, licenses, contracts, and permits, to the extent permitted by law, to ensure compatibility with the commitments of the HCP. The level of nontimber resource activity and associated take, if any, of SPECIES ADDRESSED IN THE HCP will be reviewed annually in conjunction with the annual meeting under subsection 17.2 of this Agreement. The annual review meetings will be used by the PARTIES to ensure that any expansion in the level of DNR's nontimber resource activities, as described in

Chapter IV of the HCP, that occur on PERMIT LANDS do not result in increased incidental take of SPECIES ADDRESSED IN THE HCP. If increased incidental take will result, DNR will initiate the amendment process under subsection 25.3(b)-(c) of this Agreement. At the annual meeting, DNR will provide the SERVICES with the results of the nontimber resource monitoring efforts as described in the HCP.

16.3 Severability. Management activities on DNR lands are often accomplished through an agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser. Take incidental to otherwise lawful activities of these entities is authorized by the ITP so long as such take is authorized by DNR and is in COMPLIANCE with the HCP, the ITP, and this Agreement. A violation of the ITP by an agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser, which was not authorized by DNR, shall not result in the suspension, revocation, or termination of the ITP, nor shall it affect other benefits, rights, or privileges under the ITP, except as to that agent, lessee, licensee, contractor, permittee, right-of-way grantee, or purchaser.

17.0 Land Transfers, Purchases, Sales, and Exchanges. DNR has an active program of land acquisition and disposition, including but not limited to land transfers, sales, purchases, and exchanges. This program includes intergrant transactions. The HCP provides for continuation of this program.

17.1 Conservation Objectives of the HCP. The HCP and this Agreement recognize that it is necessary for DNR to continue to pursue an active land disposition program. In carrying out such an active land disposition program, DNR commits to maintaining the conservation objectives described in Chapter IV of the HCP in the course of its land disposition program. DNR may dispose of PERMIT LANDS, including PERMIT LANDS within any Watershed Administrative Unit ("WAU"), or any quarter-township in eastern Washington, even though such a disposition is not in accord with the habitat goals for a particular WAU, or quarter-township, so long as the conservation objectives described in Chapter IV of the HCP are maintained. Annual and other meetings held under section 17.2 will address whether disposition of PERMIT LANDS would have a significant adverse effect on the conservation objectives described in Chapter IV of the HCP.

17.2 Notification and Annual Review of Land Transactions. The PARTIES will hold annual meetings in December of each year, unless otherwise mutually agreed upon by the PARTIES, to review proposed and completed land transactions involving PERMIT LANDS. At such meetings, DNR will notify the SERVICES in writing of any known proposed land transfers, purchases, sales, or exchanges expected to occur within the upcoming year involving PERMIT LANDS. A follow up meeting will be held within sixty (60) DAYS after the annual meeting, if needed. Additional meetings may be convened on a more frequent basis or incorporated into the scheduled comprehensive reviews contemplated under section 21.0 with the mutual consent of the PARTIES. DNR will mail to the SERVICES preliminary transactional documents at the time such documents are mailed to the BOARD for all land transactions involving PERMIT LANDS that were not discussed during the annual meetings. DNR will also mail the closing documents to the SERVICES within thirty (30) DAYS of closing for all transactions involving PERMIT LANDS. Neither SERVICE, however, shall have the power to veto any land transaction. DNR will amend annually, or more frequently if it desires, the HCP pursuant to section 25.3 of this Agreement to reflect lands added to or removed from the PERMIT LANDS. In no event will DNR conduct management activities that will result in take on lands that will be added to the ITP prior to amendment of the HCP.

17.3 Land Acquisition by Transfer, Purchase, or Exchange. The PARTIES shall, upon request by DNR, add lands acquired by transfer, purchase, or exchange within the range of the Owl to the HCP, ITP, and this Agreement. DNR will incorporate the relevant commitments of the HCP into the management of these new PERMIT LANDS. No additional mitigation will be required unless the management of these new PERMIT LANDS increases take beyond the level authorized in the ITP. If the management of these new PERMIT LANDS increases take beyond the level authorized in the ITP, then any additional mitigation will be determined through amendment of the HCP based on mutual agreement among the PARTIES. DNR, at its sole discretion, may at any time add acquired lands to the WAU or quarter-township base referred to in Chapter IV of the HCP, but is not required to do so. So long as land DNR seeks to add to the HCP in accordance with this paragraph does not increase the level of take, it shall be the subject of a minor amendment to the HCP pursuant to section 25.3 and shall thereafter be PERMIT LANDS.

17.4 Land Disposition by Transfer, Sale, or Exchange. DNR, at its sole discretion, may voluntarily dispose of PERMIT LANDS by transfer, sale, or exchange. DNR, at its sole discretion, may require that the recipient of the disposed land commit to managing the disposed land in accordance with the HCP and this Agreement. DNR is not required by the HCP, the ITP, or this Agreement to require continuation of the commitments of the HCP or this Agreement on the disposed land. If DNR sells or exchanges DNR-managed lands, NAPs, or NRCAs, and the acquiring entity commits in writing to the SERVICES that the lands disposed by DNR will be managed in a manner which maintains the commitments of the HCP, DNR will continue to be given credit for such lands for the purpose of determining whether DNR is in COMPLIANCE with the HCP, the ITP, and this Agreement. If land disposed of by DNR does not remain subject to the provisions of the HCP, and the cumulative impact of the land disposition would have a significant adverse effect on the affected species, the PARTIES, based on the best scientific and commercial data available at the time, shall amend the HCP, this Agreement, and the ITP to provide replacement mitigation for the affected species pursuant to the standards and processes outlined in the extraordinary circumstances provisions of section 24 herein.

17.5 Federal Condemnation. In the event of condemnation of DNR-managed lands, NAPs, or NRCAs by the federal government, the PARTIES shall not be required to replace mitigation lost due to condemnation. The PARTIES' obligations relating to the condemned lands under the HCP and this Agreement shall be terminated.

17.6 Rights and Authorities Preserved. Except as otherwise specifically provided in this Agreement, nothing herein contained shall be deemed to restrict the rights, privileges, and powers of the State of Washington or DNR to manage the use of, or exercise all of the rights incident to, land ownership associated with the PERMIT LANDS. Nothing herein contained shall be interpreted to restrict the authority of the SERVICES to administer the ITP with respect to the PERMIT LANDS in accordance with this Agreement and the ESA.

18.0 Funding. DNR shall submit to the Washington State Legislature, on at least a biennial basis, an agency operating and capital budget for asset management that will be adequate to fulfill DNR's obligations under the HCP, ITP, and this Agreement. Failure by DNR to ensure adequate funding is provided to implement the HCP shall be grounds for suspension or partial suspension of the ITP.

The SERVICES shall include in their annual budget requests sufficient funds to fulfill their respective obligations under the HCP, ITP, and this Agreement.

19.0 Duration.

19.1 Term of PERMIT. The HCP, ITP, and this Agreement shall remain in full force and effect for a period of seventy (70) years from the effective date, or until revocation under section 26.0 or termination under section 27.0 of this Agreement, whichever occurs sooner. Amendments to the HCP, the ITP, or this Agreement shall be in full force and remain in effect for the then remaining term of this Agreement or until revocation under section 26.0 or termination under section 27.0 of this Agreement, whichever occurs sooner.

19.2 PERMIT Renewal. Unless revoked under section 26.0 or terminated under section 27.0 of this Agreement, DNR may renew the PERMIT, HCP, and this Agreement on the existing terms or other mutually agreeable terms three (3) times for a period of up to ten (10) years per renewal, provided:

(a) DNR is in COMPLIANCE with the HCP and this Agreement;

(b) the PARTIES have met approximately three (3) years prior to the scheduled PERMIT or renewal period expiration date to discuss the renewal of the PERMIT, HCP, and this Agreement, and DNR provides the SERVICES with at least eighteen (18) months notice of its intent to renew the PERMIT;

(c) DNR finds that renewal of the PERMIT, HCP, and this Agreement would be in the best interest of each of the trusts; and

(d) the sum of the original PERMIT term and any continuation or renewal periods does not exceed one hundred (100) years.

19.3 PERMIT Continuation. Unless revoked under section 26.0 or terminated under section 27.0 of this Agreement, the SERVICES may require DNR to continue implementing the HCP, PERMIT, and this Agreement for up to three (3) periods of up to ten (10) years apiece, provided that:

(a) at the end of the original PERMIT term or the continuation periods under this subsection, the SERVICES DEMONSTRATE that DNR has failed to achieve its commitments under the HCP as described in Chapter IV of the HCP;

(b) the PARTIES have met approximately three (3) years prior to the scheduled expiration date to discuss the potential for continuation or renewal of the HCP, PERMIT, and this Agreement, and the SERVICES provide DNR with at least eighteen (18) months notice of their intent to require continuation of the HCP, PERMIT, and this Agreement; and

(c) the sum of the original PERMIT term and any continuation or renewal periods does not exceed one hundred (100) years.

20.0 Reporting and Inspections. DNR will provide the SERVICES with two (2) copies of each report described in Chapter V of the HCP, at the addresses designated by the SERVICES, and any readily available existing information requested by either SERVICE to verify the information contained in such reports. Either SERVICE may inspect PERMIT LANDS in accordance with its then applicable regulations. Except as provided in its regulations, the inspecting SERVICE will notify DNR thirty (30) DAYS prior to the date they intend to make such inspections and allow DNR representatives to accompany SERVICE personnel when making inspections. To assist DNR in meeting its obligations under this Agreement, the SERVICE will brief DNR in writing on the factual information learned during any inspection within thirty (30) DAYS of such inspection, except as provided in its regulations.

21.0 Comprehensive Reviews. The PARTIES to this Agreement will conduct periodic reviews of the HCP, the ITP, and this Agreement, consulting with one another in good faith to identify any amendments that might more effectively and economically mitigate any incidental take. The PARTIES shall conduct comprehensive reviews within one month of the first, fifth, and tenth, anniversaries of the effective date and every tenth anniversary thereafter for the full term that this Agreement is in effect. Upon mutual agreement of all the PARTIES, additional reviews may be scheduled at any time.

22.0 Adequacy and Certainty.

22.1 Assurances. The HCP provides habitat conservation for all SPECIES ADDRESSED IN THE HCP, while providing regulatory relief, certainty, flexibility, and stability for DNR. Specifically, the conservation strategies afforded all habitat types, and the species specific measures of the HCP and this Agreement, adequately provide for all SPECIES ADDRESSED IN THE HCP and contain measurable criteria for the biological success of the HCP. Unless the SERVICES have suspended or revoked the ITP under section 26.0 of this Agreement or have not added a newly listed species to the PERMIT under subsection 25.1(b) of this Agreement, DNR is assured by this Agreement that any incidental taking of a SPECIES ADDRESSED IN THE HCP in the course of its otherwise lawful management activities will be authorized under the ESA. The SERVICES are assured by this Agreement that the incidental taking authorized by the ITP is consistent with the conservation of the species under the ESA.

22.2 Findings by the SERVICES. Based upon the best scientific and commercial data available and after careful consideration of all comments received, the SERVICES have found that with respect to all SPECIES ADDRESSED IN THE HCP:

(a) that any take on PERMIT LANDS under the HCP will be incidental;

(b) the impacts of any incidental take under the HCP will, to the maximum extent practicable, be minimized and mitigated;

(c) that DNR will ensure that adequate funding for the HCP will be provided in accordance with this Agreement and the HCP;

(d) that any taking of a SPECIES ADDRESSED IN THE HCP will not appreciably reduce the likelihood of the survival and recovery of such species in the wild; and

(e) that other measures and assurances required by the SERVICES as being necessary or appropriate for the purposes of the HCP are met.

23.0 Unforeseen Circumstances.

23.1 Unforeseen Circumstances Consultation. In the event of unforeseen circumstances arising in connection with the HCP, the ITP, or this Agreement, the appropriate SERVICE may request consultation with DNR regarding those circumstances and may suggest modifications to the commitments of the HCP, the ITP, or this Agreement. DNR shall consult with the SERVICE to explore whether there is a mutually acceptable means for adjusting the commitments of the HCP, the ITP, and this Agreement that maintains the interests of all PARTIES. If the cost of a mutually acceptable adjustment would be significant to DNR, then the PARTIES must strive to find further or different voluntary adjustments that would avoid or minimize the cost to DNR. The SERVICES shall not seek from DNR without its consent a commitment of additional land or financial undertaking beyond the level of mitigation which is provided under the commitments of the HCP, the ITP, and this Agreement.

23.2 Findings of Unforeseen Circumstances. The SERVICES shall have the burden of DEMONSTRATING that unforeseen circumstances have arisen. If DNR, after consultation and in its sole discretion, does not agree voluntarily to implement the requested changes, then the SERVICE must look to section 24.0 regarding extraordinary circumstances if it wishes to continue to pursue changes, and must satisfy the provisions of section 24.0 regarding such desired changes. The SERVICES agree that so long as DNR is in COMPLIANCE with its commitments under the HCP, ITP, and this Agreement, they will not impose on DNR any nonconsensual additional land-use restrictions, financial obligations, or any other form of additional mitigation for any SPECIES ADDRESSED IN THE HCP except under extraordinary circumstances as addressed in section 24.0.

24.0 Extraordinary Circumstances.

24.1 Extraordinary Circumstances Defined. Additional mitigation requirements shall not be imposed upon DNR without its consent provided DNR is in COMPLIANCE with the HCP, the ITP, and this Agreement, and the HCP is properly functioning, except under extraordinary circumstances. Extraordinary circumstances shall mean that continued DNR-management activities in accordance with the HCP, the ITP, and this Agreement would result in a substantial and material adverse change in the status of a species that was not foreseen on the effective date of this Agreement which can be remedied by additional or different mitigation measures on the PERMIT LANDS. The SERVICES shall have the burden of DEMONSTRATING that extraordinary circumstances exist.

24.2 Findings of Extraordinary Circumstances. Findings of extraordinary circumstances must be clearly documented in writing and based upon reliable, PEER REVIEWED technical information regarding the status and habitat requirements of the affected species. Furthermore, in deciding whether any extraordinary circumstances exist with respect to a particular SPECIES ADDRESSED IN THE HCP, which might warrant additional mitigation, the SERVICES shall consider, but not be limited to the following factors:

(a) the size of the current range of the affected species;

(b) the percentage of range adversely affected by the HCP;

(c) the percentage of range conserved by the HCP;

(d) the ecological significance of that portion of the range affected by the HCP;

(e) the level of knowledge about the affected species and the degree of specificity of the species conservation program under the HCP;

(f) whether the HCP was originally designed to provide an overall net benefit to the affected species and contained measurable criteria for assessing the biological success of the HCP; and

(g) whether failure to adopt additional conservation measures would appreciably reduce the likelihood of survival and recovery of the particular species in the wild.

Upon a finding of extraordinary circumstances, the SERVICES will have ninety (90) days to determine any additional mitigation necessary, during which time DNR will use its best efforts to avoid a substantial and material adverse change in the status of the affected species. If the SERVICES are unable to achieve appropriate additional mitigation, the SERVICES shall work with DNR to find the least disruptive method of continuing DNR-management activities.

24.3 Effect of Additional Mitigation Measures on the HCP. Any additional mitigation measures approved under this section shall change the original terms of the HCP only to the minimum extent necessary and shall be limited to modifications on the PERMIT LANDS, and any additional mitigation requirements under this Agreement shall not involve additional financial commitments by DNR or land use restrictions on DNR without its express written consent. The SERVICES may seek additional funding for mitigation from other sources.

24.4 SERVICES Free to Take Independent Action. Nothing in this Agreement shall be construed to limit or constrain either SERVICE from carrying out lawful additional mitigation actions at their own cost with respect to the protection of any listed species, or endeavoring to provide mitigation by means of other resources or financial assistance to DNR to the fullest extent possible in accordance with law and available appropriations.

24.5 Adaptive Management. Adaptive management provides for ongoing modifications of management practices to respond to new information and scientific developments. The monitoring and research provisions of the HCP are in part designed to identify modifications to existing management practices. The following adaptive management practices shall be implemented by DNR as reasonably necessary to respond to the following changes of circumstances and are not subject to subsections 23.1, 23.2, 24.1, 24.2, and 24.3:

(a) the best available scientific and commercial data indicate that an increase in the percentage of ground cover of dead and down wood is required for the support of the Owl in the definition of sub-mature habitat in Chapter IV section A of the HCP, provided DNR's responsibility shall be limited to 15 percent ground cover averaged over a stand;

(b) the best available scientific and commercial data indicate that the model used to delineate mass wasting on a site-specific basis under Chapter IV section D of the HCP can be reasonably improved to increase its accuracy;

(c) the best available scientific and commercial data indicate that the landscape-based road network management process described in Chapter IV section D of the HCP can be reasonably and practically improved, considering both the costs and benefits of implementing the improvement;

(d) the necessity for continued provision of nest patches has changed as a result of conducting research to determine the biological feasibility of using silvicultural techniques to create spotted owl nesting habitat;

(e) with specific reference to the marbled murrelet, the habitat definitions will be refined for each planning unit as a result of DNR's habitat relationships study;

(f) with specific reference to the marbled murrelet, the interim conservation strategy will be replaced with a long-term management plan upon completion of the inventory survey phase;

(g) management activities allowed within the riparian management zones will be refined within the first decade of the HCP;

(h) wind buffer management is refined as this priority research item is addressed;

(i) a long-term conservation strategy for forest management along Type 5 Waters is developed and incorporated into the HCP at the end of the first ten years of the HCP; and

(j) prescriptions resulting from a completed watershed analysis call for additional measures than those specified in the HCP.

All other adaptive management strategies are subject to subsections 23.1, 23.2, 24.1, 24.2, 24.3, and 24.4.

25.0 Amendments and Modifications.

25.1 PERMIT Amendments and Modifications. The ITP may be amended or modified as follows:

a. General Amendments to the ITP. The ITP can be amended or modified in accordance with SERVICE regulations as provided in this Agreement. If the federal regulations that govern PERMIT amendment have been modified from those codified at 50 C.F.R §§ 13.23, 220.11, 222.25, and 222.26, as of the effective date of this Agreement, the modified regulations will apply only to the extent the modifications are required by subsequent enactment of the Congress or

court order, or upon a determination by DNR that application of the modifications is in the best interests of the relevant trusts.

b. New Listings. The ITP for the Owl and other federally listed species that may currently use the types of habitats that occur on the PERMIT LANDS will be issued contemporaneously with the signing of this Agreement. In the future, the SERVICES shall add to the ITP, within sixty (60) DAYS of receipt by the appropriate SERVICE of a written request by DNR, each species that may use the types of habitats that occur within the five West Side Planning Units and the OESF that is listed as a threatened or endangered species during the term of this Agreement at the level of take requested by DNR and supported by the HCP without requiring additional mitigation, unless, within the specified sixty-day period, the SERVICE DEMONSTRATES that extraordinary circumstances under section 24.0 exist. If such extraordinary circumstances are found to exist, the SERVICE shall provide the appropriate additional mitigation or other amendments in a timely manner and amend the ITP to include the affected species if appropriated funds are available. If appropriated funds are not available, the SERVICES shall use all lawful means, including soliciting nongovernmental sources of funds and other alternative methods of mitigation or amendment, to endeavor to achieve the appropriate additional mitigation and amend the ITP to cover the particular species.

25.2 Amendments to the Agreement. This Agreement may be amended only with the written consent of each of the PARTIES.

25.3 HCP Amendments. The HCP may be amended as follows:

a. Minor HCP Amendments.

(1) The following types of minor amendments may be made to the HCP without notification, provided that the conservation objectives of the HCP are being maintained, there is no increase in the level of incidental take, and appropriate mitigation is provided. Amendments allowable under this subsection include the following:

(a) land acquisition and disposition as described in section 17.0, which provides for periodic notice and review of DNR land transactions involving PERMIT LANDS;

(b) corrections of typographic and grammatical errors and similar editing errors, which do not change the intended meaning of the HCP; and

(c) corrections to any maps, GIS data, or exhibits to reflect previously approved changes in the HCP or other new information.

(2) So long as appropriate mitigation is provided, the alteration of an HCP commitment or commitments, the formal designation of urban lands pursuant to state law, and the leasing of PERMIT LANDS for commercial, residential, or industrial purposes, or the implementation of one or more of the adaptive management strategies described in Chapter IV of the HCP or subsection 24.5 of this Agreement, that does not increase the level of take authorized by the ITP is a minor amendment effective sixty (60) DAYS after the SERVICES receive written notice

from DNR, unless the appropriate SERVICE responds in writing with specific concerns during the sixty-day notification period.

b. Major HCP Amendments. For other amendments of the HCP, including those amendments that would increase the level of take, proposed by DNR, DNR shall provide a written description of the proposed amendment, the effects of the proposal on the HCP, and any alternative ways in which the objectives of the proposal might be achieved. The proposed amendments shall become effective upon written approval by the appropriate SERVICE. The SERVICE shall approve or disapprove the proposed amendment within 180 DAYS after receipt of the DNR proposal.

c. HCP Amendments and the ITP. HCP amendments that will result in an increased level of incidental take will require amendment to the ITP under subsection 25.1.a of this Agreement. HCP amendments that do not increase the level of incidental take will not require amendment to the ITP under subsection 25.1.a of this Agreement so long as appropriate mitigation is provided.

26.0 ITP Suspension or Revocation. The SERVICES maintain the right to suspend or revoke the ITP in accordance with federal law and this Agreement. The SERVICES agree, however, that so long as DNR is in COMPLIANCE with the HCP, the ITP, and this Agreement, they will not suspend or revoke the ITP, or otherwise sanction DNR except to the extent that the sanction, suspension, or revocation of the ITP is required by applicable federal law or the terms of this Agreement. Any revocation of the ITP, in whole or in part, automatically terminates the relevant commitments of the HCP and this Agreement, and subjects activities no longer covered by the ITP to all applicable provisions of the ESA and SERVICE regulations relating to the taking of a listed species. If federal regulations should be modified from those codified at 50 C.F.R. §§ 13.26-13.29, and/or § 222.27, as of the effective date of this Agreement, the modified regulations will apply only to the extent the modifications are required by subsequent enactment of the Congress or court order, or upon a determination by DNR that application of the modifications is in the best interests of the relevant trusts.

27.0 Termination and Mitigation after Termination.

27.1 Generally. DNR reserves the right to terminate for any reason the HCP and this Agreement with thirty (30) DAYS written notice to the SERVICES. For listed species, the written termination notice shall contain a statement describing the species taken, the level of take, and the species mitigation provided prior to termination. DNR management activities not resulting in incidental take may continue after termination. Unlisted species are treated in subsection 27.5. The PARTIES agree that DNR may terminate the HCP and this Agreement in whole, or in part.

27.2 Effect of Termination. Subject to the provisions of this section and subsection 29.1 of this Agreement, any termination of the HCP and this Agreement, in whole or in part by DNR under section 27, automatically terminates the relevant commitments of the HCP, the ITP and this Agreement, except as otherwise provided in this section 27, and subjects activities no longer covered by the ITP to all applicable provisions of the ESA and SERVICE regulations relating to the taking of a listed species.

27.3 Mitigation After Termination for listed species. Subject to the provisions of subsection 29.1, if the HCP and this Agreement are terminated by DNR, in whole or in part, the appropriate SERVICE may require DNR to mitigate any incidental take of a listed species affected by the termination that occurred during the term of the HCP and this Agreement to the effective date of the termination. Such mitigation may require DNR to continue relevant mitigation measures of the HCP as to some or all of the PERMIT LANDS for some or all of the period which would have been covered by the HCP and this Agreement. The SERVICES shall not extend mitigation requirements to non-PERMIT LANDS, nor shall mitigation requirements be extended beyond the term of this Agreement. Mitigation requirements, if any, shall not exceed the difference between mitigation already provided under the HCP and that required by the HCP for listed species at the time of termination. Unlisted species are treated in subsection 27.5.

27.4 Delisting of a Species. In the event that a species is delisted under the ESA, the commitments of the HCP and this Agreement regarding such species shall be terminated. Mitigation measures designed primarily to benefit the delisted species need not be continued after delisting due to another species unless the appropriate SERVICE DEMONSTRATES that failure to continue those measures would not maintain the conservation objectives of the HCP for the other species, or DNR determines that continuation of such measures is in the best interest of the relevant trusts. The SERVICES shall have the burden of DEMONSTRATING that failure to continue the measures in question would not maintain the conservation objectives of the HCP for another species.

27.5 Unlisted Species. The PARTIES agree that DNR may terminate, in whole or in part, the commitments of the HCP and this Agreement regarding unlisted species upon seventy-five (75) DAYS written notice to the SERVICES. Termination of the commitments of the HCP with regard to an unlisted species relieves the SERVICES from their obligations under subsection 25.1.b to add the species to the ITP if it becomes listed.

Within said seventy-five (75) DAYS the SERVICES shall notify DNR in writing if they will require any mitigation as a result of such termination and, if so, the mitigation to be required. In order to require any mitigation after termination, the SERVICES shall DEMONSTRATE that termination would result in a substantial and material adverse change in the biological status of the affected species. Said DEMONSTRATION shall be based upon reliable, PEER REVIEWED technical information as to the species affected by the proposed termination.

To DEMONSTRATE whether the termination might warrant mitigation after termination and what mitigation might be required, the SERVICES shall consider, but not be limited to, the following factors:

(a) the size of the current range of the affected species;

(b) the percentage of range adversely affected by the termination of the HCP;

(c) the percentage of range conserved by the HCP;

(d) the ecological significance of that portion of the range affected and conserved by the HCP;

(e) the level of knowledge about the affected species and the mitigation provided to the species under the HCP; and

(f) whether the HCP was originally designed to provide an overall net benefit to the affected species.

During the said seventy-five (75) DAYS, DNR will use its best efforts to avoid a substantial and material adverse change in the status of the affected unlisted species. If the PARTIES are unable to agree on the necessity for or the amount of such mitigation, the SERVICES and DNR shall work to resolve any such dispute by using the interagency science team and non-binding mediation provisions under subsection 29.4 prior to final determination. The SERVICES shall not extend mitigation requirements to non-PERMIT LANDS, nor shall mitigation requirements be extended beyond the term of this Agreement. Requirements for such mitigation, if any, shall not exceed the difference between mitigation already provided under the HCP and that required by the HCP for unlisted species at the time of termination.

After the PARTIES mutually agree on a final determination of the potential mitigation to be provided after termination, if any, as to an unlisted species, DNR shall send final notice of such termination, or withdraw the notice of termination. Final notice of termination for an unlisted species shall be effective thirty (30) DAYS after written notice to the SERVICES.

28.0 Authority, Remedies and Enforcement. Each of the PARTIES to this Agreement shall have all remedies available in equity or at law to enforce the commitments of the HCP, the ITP, and this Agreement including specific performance. No PARTY shall be liable for damages to any other PARTY or person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement, or any other cause of action arising from this Agreement. The HCP, this Agreement, and the ITP shall be interpreted and administered in accordance with the ESA. Nothing contained in this Agreement is intended to unlawfully limit the authority or responsibility of the United States government or DNR to invoke penalties or otherwise fulfill their respective responsibilities as public agencies in accordance with law.

29.0 Informal Dispute Resolution Procedures.

29.1 Termination of the PERMIT. A SERVICE receiving a termination notice under section 27.0 of this Agreement shall notify DNR within sixty (60) DAYS after receipt of the notice if it disagrees with the statement of take or mitigation contained therein. Failure by a SERVICE to disagree with the statement of take or mitigation within sixty (60) DAYS shall constitute agreement with and approval of the statement. If the PARTIES cannot agree on the statement of take, or on necessary mitigation, if any, within sixty (60) DAYS after receiving the notice of disagreement, the PARTIES shall endeavor in good faith to resolve their disagreement through nonbinding mediation.

29.2 In the Event of a Possible Violation. If either SERVICE has reason to believe that DNR may have violated the commitments of the HCP, the ITP, or this Agreement, written notice must be provided to DNR regarding the specific provisions which may have been violated and the mitigation that the responsible federal agency proposes to correct the alleged violation. DNR will have sixty (60) DAYS from the date of receipt of notice, or such longer period of time as may be

mutually agreed upon, to respond. If the PARTIES cannot agree on the violation or necessary mitigation within thirty (30) DAYS after receiving DNR's response, the PARTIES shall endeavor in good faith to resolve their disagreement through nonbinding mediation.

29.3 Minor HCP Amendments Under Subsection 25.3.a(2). In the event that DNR receives timely notice from the appropriate SERVICE regarding a proposed minor HCP amendment under subsection 25.3.a(2), the proposed minor amendment shall not be effective and the PARTIES shall have thirty (30) DAYS from DNR's receipt of the notice within which to reach mutual agreement through discussion. DNR may convene an interagency science team to provide technical assistance on the disputed issue. If the issue is not resolved within the thirty (30) DAY time period, the PARTIES shall endeavor in good faith to resolve their disagreement through nonbinding mediation, unless an extension is mutually agreed upon by all PARTIES.

29.4 Scheduled Reviews. In the event that a dispute arises at one of the scheduled reviews under section 17.0 of this Agreement, the PARTIES shall have thirty (30) DAYS from receipt of the notice of disagreement to reach mutual agreement through discussion. DNR may convene an interagency science team to provide technical assistance on the disputed issue. If the issue is not resolved within the thirty (30) DAY time period, the PARTIES shall endeavor in good faith to resolve their disagreement through nonbinding mediation, unless an extension is mutually agreed upon by all PARTIES. For land transactions not discussed at the scheduled reviews referenced above, the PARTIES shall endeavor to reach mutual agreement through discussion; the convening of an interagency science team by DNR or other dispute resolution procedures described above will not occur until a scheduled review, absent mutual consent of the PARTIES.

29.5 Other Disputes. In the event of other significant disputes involving the HCP, the ITP, or this Agreement, any PARTY shall provide the other PARTIES with a written notice of disagreement. Within thirty (30) DAYS of receiving the notice of disagreement, the PARTIES shall endeavor in good faith to resolve the dispute through nonbinding mediation.

29.6 Termination of Mediation. Nothing in this Agreement shall prevent any PARTY from terminating nonbinding mediation at any time and seeking any remedy or enforcement procedure available by law or regulation.

30.0 General Provisions.

30.1 No Partnership. Except as otherwise expressly set forth herein, neither the commitments of the HCP, the ITP, nor this Agreement shall make or be deemed to make any PARTY to this Agreement the agent for or the partner of any other PARTY.

30.2 Not a Covenant Running With the Land. Neither the HCP, ITP, or this Agreement shall be construed to establish a covenant that runs with the land.

30.3 Severability. If any of the commitments of the HCP, the ITP, or this Agreement are found to be invalid or unenforceable, or this Agreement is terminated in part, all other commitments shall remain in effect to the extent they can be reasonably applied in the absence of such invalid, unenforceable, or terminated commitment or commitments.

30.4 Congressional Officials Not to Benefit. No member of or delegate to Congress shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

30.5 Availability of Funds. Implementation and ongoing adherence to the HCP and this Agreement by all PARTIES shall be subject to the availability of appropriated funds. Failure by DNR to ensure adequate funding to implement the HCP shall be grounds for suspension or partial suspension of the ITP.

30.6 No Third Party Contract Beneficiaries. The commitments of the HCP, the ITP, and this Agreement are not intended to create, and do not create, any third-party beneficiary interest herein in the public or in any member thereof, nor shall it authorize anyone not a PARTY to this Agreement to maintain a suit based in whole or in part on any provision of this Agreement, the HCP, or ITP. The rights of the public under the ESA are set forth in 16 U.S.C. §1540(g) and nothing in this Agreement expands or otherwise alters the rights of citizens thereunder.

30.7 Counterparts. This Agreement may be executed in counterparts with each copy constituting an original. A complete original of this Agreement shall be maintained in the official records of each of the PARTIES hereto.

30.8 Entire Agreement. This Agreement supersedes any and all other agreements, either oral or in writing, among the PARTIES hereto with respect to the subject matter hereof, and contains all of the covenants and agreements among them with respect to said matters except for The 1979 Cooperative Agreement for Endangered Plants and The Agreement for Establishment and Operation of the Washington Cooperative Fish and Wildlife Research Unit. Further, each PARTY to this Agreement acknowledges that no representation, inducement, promise, or agreement has been made by another PARTY or anyone acting on behalf of another PARTY that is not embodied herein.

30.9 Contents Not Binding in Other Litigation. The contents of the HCP, ITP, and this Agreement shall not be construed as statements against interest or admissions and are not binding in litigation except in matters related to enforcement by the PARTIES of the HCP, ITP, and this Agreement. In addition, DNR reserves the right to assert that its activities do not require an ITP.

31.0 Notices. The names, addresses, and telephone and facsimile numbers of the designated representatives may be changed at any time by written notice to the other PARTIES. Notices under this Agreement will be deemed received when delivered personally, on electronic confirmation that a facsimile message has been received at the "FAX" number most recently provided by the recipient representative, or five (5) DAYS after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as above.

32.0 Designated Representatives. Each PARTY to this Agreement will designate a representative through whom notices under this Agreement shall originate and to whom notices under this Agreement shall be directed. The initial designated representatives are:

for DNR: Department of Natural Resources Administrator
Washington State Department of Natural Resources
1111 Washington Street S.E.
P.O. Box 47000
Olympia, Washington 98504-7000
Telephone: (360) 902-1000
FAX: (360) 902-1796

for USFWS: Assistant Regional Director
United States Fish and Wildlife Service
911 N.E. 11th Avenue
Portland, Oregon 97232-4181
Telephone: (503) 231-6159
FAX: (503) 872-2771

for NMFS: Regional Administrator
National Marine Fisheries Service
7600 Sand Point Way N.E.
Seattle, Washington 98115-0070
Telephone: (206) 526-6150
FAX: (206) 526-6426

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementation Agreement to be in effect as of the date last signed below.

WASHINGTON DEPARTMENT OF NATURAL RESOURCES
including THE BOARD OF NATURAL RESOURCES

Date 1/30/97

JENNIFER M. BELCHER
Commissioner of Public Lands

Approved as to form this 30th day of January, 1997,

Paul A. Silver, Senior Assistant Attorney General

UNITED STATES DEPARTMENT OF THE INTERIOR
through the U.S. FISH AND WILDLIFE SERVICE

Date 1/30/97

MICHAEL J. SPEAR
Regional Director

UNITED STATES DEPARTMENT OF COMMERCE
through the NATIONAL MARINE FISHERIES SERVICE

Date 1/30/97

WILLIAM W. STELLE, Jr.
Regional Administrator