Final Record of Decision
for the
Final Environmental Impact Statement
for
Authorization for Incidental Take and Implementation of Fruit Growers Supply Company's Multi-Species Habitat Conservation Plan

National Marine Fisheries Service
Southwest Region

I. Introduction and Background

This Record of Decision (ROD) was developed by the National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS) in compliance with its decision-making requirements, pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, and the federal Endangered Species Act (ESA) of 1973, as amended. The purpose of this ROD is to document NMFS' decision in response to an application submitted by the Fruit Growers Supply Company (FGS) under Section 10 of the ESA for an Incidental Take Permit (ITP) for aquatic species that are currently listed or may be listed in the future under the ESA, and may be indirectly taken during the conduct of FGS' timber operations. Analyses contained in this ROD includes, but is not limited to, information contained in FGS' ITP application and supporting Final Fruit Growers Supply Company Multi-Species Habitat Conservation Plan (HCP) dated March, 2012, and the Final Environmental Impact Statement (EIS) for Authorization for Incidental Take and Implementation of FGS' Multi-Species Habitat Conservation Plan dated June, 2012 related to issuance of ITPs and implementation of the HCP. In conjunction with their ITP application to NMFS, FGS has applied to the United States Fish and Wildlife Service (USFWS) for an ITP for the threatened northern spotted owl also relying on the supporting HCP and joint NMFS and USFWS (together "the Services") Draft and Final EIS. The USFWS has prepared a separate Record of Decision, Statement of Findings, and Biological Opinion with regards to issuance of their ITP.

This ROD is designed to: (1) state NMFS' decision and present the rationale for that decision; (2) identify the alternatives considered in the Final EIS in reaching the decision, stating the alternative(s) considered to be environmentally preferable; and (3) state whether all practicable means to avoid or minimize environmental harm from implementation of the selected alternative have been adopted, and if not, why they were not (40 CFR §1505.2).

Documents used in preparation of this ROD include the Draft and Final EIS, FGS' ITP application, FGS' Draft and Final HCP, the Final Implementing Agreement (IA) between the Services and FGS, NMFS' Biological and Conference Opinion for the Proposed Action, and NMFS' ESA Section 10 findings, all of which are incorporated into this ROD by reference.

II. Decision to be Made

This Record of Decision (ROD) documents the decision made by the NMFS Southwest Region to select the Proposed Action Alternative identified in the Final EIS for Authorization for Incidental Take and Implementation of Fruit Growers Supply Company's Multi-Species Habitat Conservation Plan. This ROD is issued pursuant to the NEPA, the Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR Parts 1500-1508, and NOAA NEPA environmental review procedures in NOAA Administrative Order (NAO) 216-6. This decision is based upon the analyses included within the FEIS, issued June, 2012.

III. Description of Alternatives

Four alternatives were analyzed in the Draft and Final EIS, including a no action alternative and three action alternatives. The alternatives included (1) Not issuing the ITPs (No Action) ; (2) Issuance of separate ITPs by the USFWS and NMFS and implementation of the HCP (Proposed Action); (3) USFWS would issue an ITP for northern spotted owl; NMFS would issue an ITP for Chinook salmon, coho salmon, and steelhead. However, the HCP conservation strategy for northern spotted owl conservation areas would be based on the Northwest Forest Plan (NWFP) system of late-successional reserves (LSRs) and the Aquatic Species Conservation Program would be based on concepts outlined in the Northwest Forest Plan (NWFP) for the protection of aquatic habitats ("Alternative A"); and (4) USFWS would issue an ITP for northern spotted owl, with spotted owl conservation based on management of foraging and dispersal habitat across the Plan Area. The applicant's operations and activities would be subject to the terms and conditions of an owl HCP as well as existing regulatory standards. Salmonid conservation would be based on California Forest Practice Rules (CFPR) requirements (14 CCR 916.9, 936.9), but NMFS would not issue an ITP for coho salmon, Chinook salmon, and steelhead ("Alternative B"). The following is a brief description of the four alternatives that were analyzed in detail.

3.1 No Action Alternative

Under the No Action Alternative, the Services would not issue take authorization to FGS under ESA Section 10(a)(1)(B). Instead, FGS would remain subject to the ESA's prohibition on unauthorized take, and the Services would enforce the prohibition against take of listed species through Section 9 of the ESA by prosecuting violations of the ESA, as appropriate. Under the No Action Alternative, FGS would remain subject to State regulatory requirements to avoid or mitigate adverse effects of timber harvesting on all wildlife, including species listed or proposed for listing under the Federal and State ESAs.

Under this alternative, no ITP would be issued for aquatic or terrestrial species. Most significantly, under the No Action Alternative, road inventories would not be conducted in a systematic and prioritized manner and would only cover the area identified in individual Timber Harvest Plans (THPs) prepared by FGS and submitted to the State of California for approval. Repairs and upgrades that address road-related sediment sources identified during the inventories would be limited to the THP area and appurtenant roads; therefore, many large-scale repairs could go unrepaired for several years if they are not associated with a THP.

3.2 Proposed Action: Issuance of an Incidental Take Permit by NMFS and USFWS and Implementation of the Proposed HCP

Under the Proposed Action Alternative, the Services would issue ITP's with a 50-year permit duration to FGS based on implementation of the Final HCP. NMFS would issue FGS an ITP with a term of 50 years for listed SONCC coho salmon and currently unlisted Upper Klamath and Trinity Rivers Chinook salmon, and Klamath Mountains Province steelhead. The USFWS would issue FGS an ITP for the Northern spotted owl, also with a 50-year term.

Potential benefits to listed species under the Proposed Action Alternative would generally be greater than under the No Action Alternative. For example, implementation of the HCP under the Proposed Action would result in sensitive steep slopes and unstable areas receiving additional protection by: (1) requiring review by a professional geologist where harvesting is proposed on a connected headwall swale to ensure that proposed activities do not present a greater risk of sediment delivery from mass wasting; (2) establishing Special Management Zones (SMZs) for inner gorges along Class I, II, and III watercourses; and (3) requiring FGS to perform an evaluation of slope stability measures effectiveness after 15 years of HCP implementation to evaluate how the measures are performing in reducing landslide frequency and extent. In addition, the road inventory and treatment prioritization schedule outlined in the HCP will accelerate removal of sediment that can deliver to salmonid habitat as compared to the No Action Alternative. These actions combined, are expected to increase the rate at which salmonid-bearing watercourses in the Action Area recover to a state of more "natural" watershed processes as compared to No Action. Higher tree retention standards in Watercourse and Lake Protection Zones (WLPZ) in the HCP, as compared to California Forest Practice Rules (CFPRs), are also anticipated to result in a reduction in sediment delivery from these areas compared to under the No Action Alternative. In summary, forested terrain watershed processes that support the establishment of salmonid spawning, rearing, feeding, and migratory habitats are anticipated to improve at faster rates during the 50 year permit duration as compared to timber management under the No Action Alternative, which is continued adherence to the CFPRs. In addition, data gathered through HCP aquatic monitoring can be used to make prescriptive changes to the HCP, if necessary, and NMFS will remain in a position to continue to work collaboratively with FGS through review of their monitoring data and implementation of the HCP. Finally, issuance of ITPs would provide greater regulatory certainty to FGS, which in turn may prevent conversion of timberland to other uses. Conversions could result in the loss of species habitat, resulting in potentially negative impacts to listed and unlisted fish and wildlife. Thus, issuance of ITPs would result in long-term protections for listed species by protecting their habitats, and help to insure such habitats remain intact for the duration of the permits.

3.3 Alternative A: Conservation Strategies for Aquatic and Terrestrial Species Based upon the Framework Established in the Northwest Forest Plan

Under Alternative A, the USFWS would issue an ITP for northern spotted owl; NMFS would issue an ITP for Chinook salmon, coho salmon, and steelhead. The applicant's operations and activities would be subject to the terms and conditions of the modified HCP as well as existing regulatory standards. Northern spotted owl conservation areas would be based on the Northwest Forest Plan (NWFP) system of late-successional reserves (LSRs) and the Aquatic Species

Conservation Program would be based on concepts outlined in the NWFP for the protection of aquatic habitats.

Under Alternative A, the applicant would not implement the comprehensive, ownership-wide Road Management Plan as outlined in the HCP, or additional slope stability measures contained in the HCP. Alternative A would provide a degree of protection against road-related sediment delivery and hillslope mass wasting in the Plan Area similar to the No Action Alternative. Due to wide riparian buffers of the NWFP, Alternative A is expected to enhance existing levels of stream shading and large woody debris (LWD) recruitment. Wider buffers would help insure that nutrient inputs from these habitat areas are maintained or increased over the long term as riparian vegetation becomes more diverse and stable. Overall, implementation of Alternative A would result in improved erosion and sediment control compared to conditions anticipated to occur under the No Action Alternative. The wider riparian reserves established under this alternative would not be harvested. Thus, under Alternative A, there would be no loss in total forest canopy along Plan Area watercourses and increased overstory canopy in the riparian reserves would impede surface erosion as a result of direct rainfall impact in these critical areas. On this basis, the riparian measures associated with Alternative A are anticipated to result in reductions in sediment delivery from surface erosion greater than the reductions expected to occur under the No Action Alternative.

3.4 Alternative B: Issuance of an ITP by the USFWS for Northern Spotted Owl, and no ITP Issued for Aquatic Species

Under this alternative USFWS would issue an ITP for northern spotted owl, with spotted owl conservation based on management of foraging and dispersal habitat across the Plan Area. The applicant's operations and activities would be subject to the terms and conditions of an owl HCP as well as existing regulatory standards. Salmonid conservation would be based on CFPR requirements but NMFS would not issue an ITP for SONCC coho salmon, Klamath and Trinity rivers Chinook salmon, or KMP steelhead. As such, effects of Alternative B for aquatic species would be similar to that described under the No Action alternative as most habitat protection for spotted owls would be located in owl conservation support areas, which are generally located higher in the watersheds and not near salmonid-bearing watercourses.

IV. Environmentally Preferred Alternative

NMFS is required by regulation to specify in the ROD "the alternative or alternatives which were considered to be environmentally preferable" (40 CFR 1505.29(b)). The environmentally preferred alternative generally means the alternative that causes the least damage to the biological and physical environment; it also means the alternative that best protects, preserves, and enhances historic, cultural, and natural resources.

NMFS has identified the Proposed Action Alternative as the most Environmentally Preferred Alternative. NMFS has chosen the Proposed Action Alternative as the Environmentally Preferred Alternative because we believe it takes the most comprehensive approach to salmonid conservation of any of the alternatives for the next 50 years. With implementation of the Proposed Action Alternative, FGS will be required to implement the HCP's Road Management

Plan which will prioritize sites for remediation taking into consideration the risk of road failures, and will prioritize road stabilization measures in watersheds that contain listed SONCC coho salmon. The assessment, inventory, and treatment schedule for repairs outlined in the HCP will reduce sediment delivery in important watersheds for SONCC coho recovery, as well as improve habitat for unlisted Upper Klamath and Trinity Rivers Chinook salmon and Klamath Mountains Province steelhead. The HCP will require FGS to maintain fish passage of roads used in timber operations, as well as repair the few fish passage barriers currently present on HCP Covered Lands. Protection of riparian vegetation critical to maintaining adequate habitat for salmonids will be slightly more protective than current CFPRs, and implementation of the HCP will provide for better protection of unstable slopes than current CFPR's. Further information on the benefits for salmonids NMFS expects with implementation of the HCP can be found in the Biological and Conference Opinion for the Proposed Action (dated May 17, 2012).

V. Decision and Rationale for Decision

In addition to identifying the environmentally-preferred alternative, CEQ and NEPA implementing regulations require agencies in the ROD to state what decision was made, discuss how the decision was affected by the preferences among alternatives based on relevant factors, including economic and technical considerations and agency statutory missions, and whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not (40 CFR 1505.2(a)(b)(c)).

NMFS' decision is to adopt the Proposed Action Alternative and issue an ITP to Fruit Growers Supply Company based upon the measures described in the Final HCP and IA, while also incorporating conditions described below in the Conditions Section. Issuance of the ITP authorizes the incidental take of the species listed in Appendix A in compliance with the Final HCP, IA, and specific provisions and conditions of the ITP. Species not currently listed under the ESA are included in the event that they become listed as threatened or endangered under the ESA during the 50-year term of the permit, pursuant to the Services' joint No Surprises Rule (50 CFR §17.32(b)(5) and §222.307(g)).

The rationale for this decision is based on the following:

(1) NMFS' Biological and Conference Opinion on the Proposed Action Alternative and Section 10 Findings indicate that by imposing the requirements described in the Conditions Section of this ROD the Proposed Action would not jeopardize species under NMFS' jurisdiction, and the ESA Section 10 statutory issuance criteria have been met (including the requirement for ITPs to minimize and mitigate the impacts of take of covered species to the maximum extent practicable).

(2) NMFS has identified habitat-based surrogates that will be monitored over the duration of the proposed permit to insure the level of authorized take is not exceeded without amendment of the HCP and reinitiation of ESA Section 7 consultation. Specifically, the plan analyzes habitat-altering activities that may result in take, and describes the causal link between such activities and harm to covered species. The Plan's Aquatic Species Conservation Program

includes specific measures that address those causal links and minimize and mitigate the impacts of taking the covered species.

(3) The Draft and Final EISs (NMFS and USFWS 2009, NMFS and USFWS 2012) demonstrate that, through a review of alternatives and environmental consequences, and after consideration of public comments, the Proposed Action Alternative will provide a level of conservation not achievable through the other alternatives, while also providing the greatest level of federal assurances to FGS. This combination of conservation and federal assurances will provide the greatest certainty that commercial timber operations will remain viable for the term of the ITP (50 years), and that the forestlands within the Covered Area will be maintained and not converted to other uses that may be less desirable for listed species conservation.

(4) The Proposed Action Alternative provides the most long-term and extensive protection and conservation for riparian and aquatic habitat for covered species. The Final HCP minimizes and mitigates the effects of authorized take to the maximum extent practicable, and it contains substantial conservation measures that will assist in the recovery of listed covered species. Further, the Final HCP will contribute to other efforts to preclude the need to list currently unlisted covered species in the future by providing early conservation benefits to those species. The HCP will accomplish this because its implementation will result in an overall improvement in habitat conditions for the covered species relative to current conditions or the conditions that would result under the No Action Alternative. The HCP would contribute to the development and maintenance of properly functioning habitat for salmonids and reduce existing adverse impacts. NMFS concludes that aside from HCP implementation, no additional conservation or mitigation measures are required.

(5) The National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of a proposed undertaking on cultural resources listed or eligible for listing on the National Register of Historic Places. Given the nature of the undertaking (issuance of ITPs) and the degree of federal involvement (minimal degree of control on non-federal lands), the Services determined that issuing the ITPs under the guidelines established within the HCP and corresponding IA, will not affect historic properties based on the following factors:

a. THPs will still be subject to California regulations for the protection of cultural resources;
b. CALFIRE, the regulatory body for timber harvest in California, requires that THP's be planned to avoid impacts to cultural resources or are subjected to mitigation measures; and
c. in the event that cultural resources are discovered during timber operations, the licensed timber operator will immediately stop operations within 100 feet of the discovery site and will notify CALFIRE.

The Services concluded that the level of effort that was taken for identifying historic properties in the EIS process was a reasonable and good faith approach as per 36 CFR 800.4(b)(1) and requested that the California State Historic Preservation Office (SHPO) concur with a determination that the identification efforts were adequate and that the undertaking will be a No Historic Properties Affected outcome. The consultation package to SHPO included a copy of the HCP and Draft EIS pre-public review draft, Plan Area location maps, map of the Area of

Potential Effects, a general map of areas surveyed for cultural resources, copies of Tribal consultation correspondence, and the requirements for cultural resources under California Forest Practice Rules.

The SHPO responded in March, 2010, with a request for additional information. Although the SHPO's request was beyond the 30-day response period as per 36 CFR 800.4(d)(i), the Services provided additional survey coverage and site location maps, an overview map and a list of known sites in a table format to SHPO on July 1, 2010. The SHPO did not have additional requests for information after the additional survey coverage and maps were provided to them. The Services determined that the responsibilities under Section 106 were fulfilled and thus moved forward with the finding of a No Historic Properties Affected outcome. In order to ensure this finding of no historic properties affected, the process that the applicant will follow for cultural resources was stipulated in the IA for the FGS HCP.

(6) NMFS expects the Proposed Action Alternative to engender the most participation by FGS in species conservation as compared with all other alternatives. Further, NMFS expects that under the Proposed Action FGS would be less likely to convert its forestlands to other, non-forestry uses that would take those lands out of the Plan Area land base as compared to the other alternatives.

(7) The Proposed Action Alternative will not be in conflict with any ongoing conservation programs, and the terms of its implementation are consistent with applicable Federal and State laws and regulations. FGS operates its timberlands under multiple regulatory controls. Commercial timber operations in California are governed by the Z'berg-Nejedly Forest Practice Act of 1973, and implemented through Forest Practice Rules. The California Forest Practices Act mandates the sustained production of high quality timber products and consideration of other significant values, including protection of fish, wildlife, and water quality, and regional economic vitality and employment. The Forest Practice Rules also incorporate other significant requirements contained in other State laws, including the Porter-Cologne Water Quality Control Act, the California Environmental Quality Act, and the California Endangered Species Act. Pursuant to California Fish and Game Code sections 1600-1603, the Department of Fish and Game (CDFG) regulates the alteration of streambeds through streambed alteration agreements.

(8) *Conditions*. As required by ESA 10(a)(1)(B), the ITP has been conditioned for implementation of the HCP to provide the necessary conservation benefits to the species for which incidental take is being authorized. These conditions, which are incorporated into the NMFS Biological and Conference Opinion and ESA Section 10 Findings, include implementation of the Final HCP dated March 2012 and Final IA. Any changes to the HCP shall be subject to the provisions of the IA for the Final HCP, section 11 on Modifications and Amendments.

VI. Public Involvement

The Services formally initiated public review of the action under consideration (development of an HCP and issuance of ITPs), via publication of a Notice of Intent (NOI) to prepare an EIS, and announce public scoping meetings in the Federal Register on Friday, February 22, 2008 (73 FR 9776**)**. The NOI provided information on the background and purpose of the proposed action, and provided preliminary information about the public scoping meetings. The official scoping comment period began with publication of the NOI and ended April 7, 2008. The public meetings were advertised in local newspapers, as well as through mailings to members of the public who had previously expressed interest in the process. The meetings informed the public and interested agencies about the planning process and solicited meaningful input related to the scale, scope, and issues associated with the proposed action. The meetings also afforded the public an opportunity to communicate issues and concerns at the onset of the planning process to help develop alternatives. The public scoping meetings were held on March 11−12, 2008, in Yreka and Happy Camp, California. The locations of the meetings were selected as they constituted communities most likely affected by the proposed action. The meetings were structured as an open-house-style workshop, with a brief formal presentation by the Services to provide the public with an overview of the proposed action and the Draft EIS process. Following the presentation, the audience was provided the opportunity to ask questions and provide input to the agencies on specific issues of concern and alternatives to be considered in the EIS. A public scoping report was produced from this public scoping effort. This report is available in NMFS' administrative record for this action.

A Draft EIS, Draft HCP, and Draft IA were subsequently developed and made available for a 90-day public comment period, announced in the Federal Register on November 13, 2009 (74 FR 58602). The Services issued a news release on the same day and a public meeting was held on December 2, 2009 in Yreka, CA, explaining the HCP goals and objectives and the public review process for the Draft EIS. The Draft EIS public comment period closed February 11, 2010. The documents were made available to the public in hardcopy format and also electronically via compact disks and as downloads from NMFS' Southwest Region website. During the comment period of the Draft EIS public review process, oral comments and comment letters were received from Federal and local agencies, environmental organizations, and the general public. During the public comment period NMFS received 28 individualized comments including verbal comments, letters, and mass e-mail comments from two environmental organizations.

In reviewing these comments, the Services identified nine recurring themes, which were responded to in Volume II of the Final EIS. The nine themes identified in review of the comments received were the following:

Theme 1: Sustainable Forest Management and HCP Funding
Theme 2: Northern Spotted Owl
Theme 3: Biased Purpose & Need Statement and Range of Alternatives
Theme 4: Adequacy of Analysis/Lack of Data ("Hard Look")
Theme 5: Climate Change
Theme 6: Permit Term and Issuance of an Incidental Take Permit/No Surprises
Theme 7: Role of the HCP in the "Recovery" of Listed Species

Theme 8: Role of the HCP in Meeting Water Quality Standards
Theme 9: Benefits of the HCP to Aquatic Species
Theme 10: Letters of Support for Issuance of the HCP and ITPs

In response to the public comments received, changes to both the EIS and HCP were made in the final documents. Changes to the EIS included the following:

1. A Changed and Unforeseen Circumstances section was added to Subsection 2.2.5
2. The applicant's decision not to cover additional species in the HCP was further explained in Subsection 2.5.3
3. Recovery actions for the Yreka phlox were further detailed in Subsection 3.3.3.2
4. Effects of beaver activity in riverine (and salmonid) habitat were described Subsection 3.3.3.3
5. The number of stream crossings on fish-bearing streams was revised reflecting updated information in Subsection 3.3.3.3
6. Great grey owl occurrence and survey information was added in Subsection 3.3.4.3
7. Goshawk occurrence and survey information was added in Subsection 3.3.4.4
8. Fisher occurrence, habitat, and survey information was added in Subsection 3.3.4.11
9. Tailed frog habitat information was added in Subsection 3.3.4.12

Changes to the HCP based on public comments included the following:

1. Table 4-5, Number of Stream Crossings on Streams in the Plan Area was updated in Section 4.6.2
2. Role of adaptive management for terrain-specific mass wasting prescriptions was clarified in Sections 5.2.4.2 and 5.2.4.3
3. A section on training of Registered Professional Foresters to address issues relating to the slope stability conservation measures was added in Section 5.2.4.4
4. A definition of "wet area" was added to the Road Management Plan -Operations Guide Appendix B
5. Clarification on the use of fords was added to the Road Management Plan -Operations Guide Appendix B
6. Updates to road maintenance and inspection schedules was added to the Road Management Plan - Operations Guide Appendix B

The Final EIS and Final HCP were subsequently produced, and made available to the public on June 22, 2012 (77 FR 37656), which included a 45-day "cooling off" (i.e. no decision) period that ended August 6, 2012. During the cooling off period, three comment letters were received and are summarized in Appendix B of this ROD. A review of the comments revealed that most of the issues had already been raised in public comments on the Draft EIS and Draft HCP, and they had been addressed in the preparation of the Final EIS and Final HCP. The rest of the comments were considered during NMFS' decision-making process.

VII. Mitigation Measures and Monitoring

An EIS must discuss "means to mitigate the adverse environmental impacts" stemming from the proposed action (40 CFR 1502.16(h)), even if the adverse impacts are not by themselves significant.

NMFS has determined that the FEIS has fully disclosed anticipated adverse environmental impacts from all Alternatives, including the Proposed Action Alternative, and that the Final HCP provides adequate mitigation for such impacts and contains a rational plan for long-term monitoring of FGS' impacts on covered aquatic species.

VIII. Summary Finding

NMFS has decided to select the Proposed Action Alternative and issue an ITP to Fruit Growers Supply Company. Issuance of an ITP will commence implementation of the Final Fruit Growers Supply Company Multi-Species Habitat Conservation Plan (HCP) dated March, 2012, and corresponding IA.

Through the EIS and the documentation in this ROD, NMFS has considered the objectives of the proposed action and has analyzed a reasonable range of alternatives that adequately address the objectives of the proposed action, and the extent to which the impacts of the action could be mitigated. NMFS has also considered public and agency comments received during the EIS review period. In balancing the projected effects of the various alternatives presented in the EIS and the public interest, NMFS has decided to implement the Proposed Action Alternative. Consequently, NMFS concludes that the approved alternative provides reasonable, practical and practicable means to avoid, minimize, or compensate for environmental harm from the action.

Signed,

For 26 November 2012

Rodney R. McInnis
Regional Administrator
NMFS
Southwest Region

Appendix A-Species Covered Under NMFS ITP
Appendix B-Comments and Response to Comments Received on FEIS

APPENDIX A
Species Addressed in NMFS' Proposed Action Alternative

Species addressed in NMFS' Proposed Action Alternative and for which incidental take authorization and assurances will be extended to FGS under ESA Section l0(a)(1)(B)

Species Under the Jurisdiction of NMFS

Federally Listed Species

Common Name	Scientific Name
Southern Oregon/Northern California Coast (SONCC) coho salmon ESU (T)	*Oncorhynchus kisutch*

(T)= Listed as threatened

Unlisted Species

Common Name	Scientific Name
Upper Klamath and Trinity rivers Chinook	*O. tshawytscha*
Klamath Mountains Province steelhead	*O. mykiss*

APPENDIX B-Comments and Response to Comments Received on FEIS

During the 45-day "cooling off" (i.e. no decision) period announced in the Federal Register Notice of Availability of Final Environmental Impact Statement, Multi-Species Habitat Conservation Plan, and Implementing Agreement (77 FR 37656), the Services received correspondence from two organizations, and one individual:

1. Jim Wells (individual) e-mail
2. Washington Forest Law Center letter and compact disk. The Law Center wrote to the Services on behalf of the Klamath-Siskiyou Wildlands Center, Environmental Protection Information Center, Klamath Forest Alliance, and the Center for Biological Diversity
3. The U.S. Environmental Protection Agency, Region IX letter

Comments submitted that focused on conclusions reached in NMFS' Biological Opinion are addressed in this ROD only to the extent they are relevant to the FEIS and the examination of environmental impacts associated with the Proposed Action. NMFS made the Opinion available during this "cooling off" period for informational purposes only. The Services address comments raised by each party below:

Commenter: Jim Wells

1) Mr. Wells believes HCPs are a means by which landowners successfully "get around the ESA." **Response:** HCPs are an important regulatory tool that facilitates lawful uses of private land while ensuring that impacts to listed species and their habitats are avoided or minimized and mitigated to the maximum extent practicable. By ensuring that impacts to species and their habitats are fully considered during activities carried out on private lands, HCPs can play an important role in the recovery of listed species. Refer to Themes 3 and 6 in Volume II of the FEIS. HCPs and incidental take permit programs were authorized by Congress nearly 30 years ago when it was clear the Services needed a tool to work with private landowners who were unintentionally taking listed species or harming their habitat during the conduct of otherwise lawful activities.

2) Mr. Wells questioned who will pay for the monitoring required under the multi-species HCP. **Response:** FGS will be responsible for the cost of the monitoring program outlined in the HCP. This is further clarified in the draft Implementing Agreement associated with the HCP. In response to Mr. Wells' concerns that the agencies will not have the resources to ensure accuracy of monitoring reported by FGS, the Services are committed to ensuring the compliance of the permits issued, which includes an assessment of the monitoring reports submitted by FGS. While agency resources are subject to Congressional appropriation, currently the Services have the resources to review any monitoring conducted by FGS and to verify the accuracy of the information reported and expect to have such resources throughout the permit term, if the permit is granted.

3) Mr. Wells questioned what will happen if FGS' management fails to adequately contribute to the recovery of the species of concern and whether the ITPs could be

revoked. **Response:** Refer to Theme's 6 and 7 in Volume II of the FEIS for clarification on FGS's future role in recovery of the species, the role of this HCP in the recovery of the listed covered species, and criteria for permit revocation. Mr. Wells expressed concern that the FGS HCP will not contribute towards the recovery of northern spotted owl and that the FEIS should reflect that HCP will only "slow the decline" of the NSO. **Response:** Refer to Theme 2 of the FEIS regarding the role of this HCP in the recovery of NSO.

Commenter: Washington Forest Law Center

1) The Washington Forest Law Center ("Law Center") states on behalf of their clients that they are opposed to issuance of ITPs to FGS. **Response:** The Services acknowledge the group's opposition to issuance of ITPs.

2) The Law Center refers to the case *Northwest Envt. Def. Ctr. V. Brown*, 640 F.3d 1063, 1080 (9th Cir. Or. 2011) as support for their position that pipes, ditches, and channels used for drainage on logging roads are point source discharges and asserts that the Services cannot issue a federal permit without FGS first obtaining a Section 401 water quality certification from the North Coast Regional Water Quality Control Board (NCRWQCB) for Clean Water Act (CWA) compliance purposes. The Law Center asserts that issuance of ITPs would violate the CWA. **Response:** FGS must comply with the CWA and all other applicable federal and state laws and the proposed issuance of ITPs to FGS under the ESA does not affect obligations the company may have under other law(s). We note that in EPA's May 23, 2012 Notice of Intent (NOI) referred to by the Law Center, EPA states that it is <u>their intent not to regulate logging roads as NPDES point sources;</u> that the NOI is seeking public comment on how to evaluate discharges from logging roads. Additionally, the Services received no comment from the NCRWQCB that issuance of the ITPs would constitute a violation of the CWA, nor do comments from the EPA indicate as such. Please refer to Theme 8 in Volume II of the FEIS for further clarification of the Services' position regarding compliance with the CWA. Finally, we note that ultimately it is the responsibility of FGS to comply with the CWA. Proposed issuance of ITPs under the ESA does not address or affect FGS' obligations under the CWA.

3) The Law Center states that both the NCRWQCB and the EPA "clearly state that the activities carried out under the HCP will lead to conditions that do not meet California water quality standards." **Response:** During the 45-day "cooling off" period after the FEIS was made public, the Services received no comments such as those expressed by the Law Center from the NCRWQCB after changes to the Road Management Plan were made in response to their comments on the Draft EIS and HCP. Additionally, EPA's letter on the FEIS does not state that EPA believes carrying out activities under the HCP will violate California water quality standards. We point out that the ITPs, if issued, would not authorize timber harvest activities *per se*; the permits would however, authorize the incidental take of HCP covered species under the ESA resulting from FGS' timber harvest activities.

4) The Law Center asserts that the HCP poses a significant risk to covered species due to significant data or information gaps, and asserts that the Services must require adaptive management. **Response:** In the Services Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process (also known as the five-point policy; 65 FR 35242), the Services state:

> Not all HCPs or all species covered in an incidental take permit need an adaptive management strategy. However, an adaptive management strategy is essential for HCPs that would otherwise pose a significant risk to the species at the time the permit is issued due to significant data or information gaps. Possible significant data gaps that may require an adaptive management strategy include, but are not limited to, a significant lack of specific information about the ecology of the species or its habitat (*e.g.*, food preferences, relative importance of predators, territory size), uncertainty in the effectiveness of habitat or species management techniques, or lack of knowledge on the degree of potential effects of the activity on the species covered in the incidental take permit.
>
> A practical adaptive management strategy within the operating conservation program of a long-term incidental take permit will include milestones that are reviewed at scheduled intervals during the lifetime of the incidental take permit and permitted action.

The Services do not consider the FGS HCP to place covered species at significant risk due to significant data or information gaps. The Services have considerable information about the covered species as well as experience working with timber companies who have approved HCPs on the effects of timber management on NSOs and Pacific salmonids in addition to the vast body of knowledge gained from working with the U.S. Forest Service on the effects of timber management. This work has allowed the Services to reduce, but not eliminate, uncertainty associated with timber management effects on these species. Therefore, and because the FGS HCP has a straightforward conservation strategy for the conservation of NSOs and covered salmonids, the Services do not consider a formal adaptive management strategy to be a necessary component of the FGS HCP. If ITPs are issued to FGS, the Services will review data collected through the HCP's monitoring program throughout the permit term. Additionally, changes to timber management are not precluded if data point to harmful effects on covered species that weren't previously recognized.

5) The Law Center expresses concern regarding FGS' financial standing and their ability to carry out the HCP. **Response:** Refer to Theme 1 in Volume II of the FEIS regarding funding of the HCP. Before issuing permits, we will consider whether or not FGS has provided adequate assurances of funding.

6) The Law Center asserts that the Services must base analysis of an HCP on the level of take, not what FGS asserts that it can afford. **Response:** The Services do evaluate an HCP based on the level of take anticipated under the permit. The five permit issuance criteria are:

(i) the taking will be incidental;
(ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking;
(iii) the applicant will ensure 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) other measures, as required by the Secretary, will be met.

The Services have carefully considered whether or not the FGS ITP applications have met each of the permit issuance criteria.

7) The Law Center believes that over the next 50 years, the Services should require additional mitigation from FGS should timber prices rise. **Response:** The Services disagree. The appropriate inquiry for the Services under Section 10(a)(2)(B)(ii) is whether the impacts of the take have been minimized and mitigated to the maximum extent practicable. In evaluating the Fruit Growers HCP, we properly focus on whether the mitigation provided is commensurate with the level and impacts of take anticipated under the plan; not on the theoretical ability of the applicant to provide additional mitigation under future financial conditions. The mitigation provided for in FGS's HCP should be commensurate with impacts of take expected from FGS' timber management activities outlined in the HCP. Just as timber prices may rise over the next 50 years, the cost of carrying out HCP will also rise (e.g. personnel costs, equipment costs, fuel costs, etc.), which is why the IA at section 7.3 requires adjustments for inflation in the required funding instruments every five years.

8) The Law Center requests that the Services explain "what economic analysis they perform, the independent basis for that analysis, whether that analysis is based on reliable indicators of future prices, and how FGS will "to the maximum extent practicable" minimize and mitigate incidental take if timber prices rise in the future." **Response:** The Services have performed an independent analysis of FGS' ability to fund the HCP and have concluded FGS is capable of implementing the HCP in an environment where timber prices rise and fall. See Theme 1 in Volume II of the FEIS for further clarification regarding funding, and Theme 2 for the Services conclusions regarding our determination of maximum extent practicable.

9) The Law Center believes the Services should "reject the FGS application and require FGS to submit alternatives with greater minimization and mitigation." **Response:** The Services' role in review of the FGS ITP applications, as with all ITP applications, is to determine whether the HCP will minimize and mitigate the impacts of take to the maximum extent practicable. As stated above, the Services have concluded that the measures included in the FGS HCP to minimize and mitigate take anticipated under the permit are commensurate with the impacts of such take and therefore meet the standard at 16 U.S.C. 1539(a)(2)(B)(ii). We note that the Services evaluated four (4) different alternatives in the EIS.

10) The Law Center asserts that the Services should make FGS' business models and plans available to the public to support approving the HCP and issuing the ITPs. **Response**: FGS' business models and plans are subject to protection from disclosure by the government to the public under Exemption 4 of the Freedom of Information Act. The Service's responsibility under Section 10 is to determine whether FGS has provided assurances of adequate funding for the HCP. Refer to Theme 1 in Volume II of the FEIS.

11) The Law Center believes the timing of mitigation should occur at the time take occurs, believing that there is insufficient mitigation for the first ten years of activity. **Response:** We disagree with this premise because the primary mitigation measures for NSO (conservation sites) are all established upon implementation of the HCP and therefore will pre-date any take of NSO that might occur during the proposed permit period. The USFWS has determined the long-term conservation strategy outlined in the HCP will minimize and mitigate the effects of take on the covered species over all periods of the proposed permit term.

12) The Law Center states the Services must separately analyze impacts to unlisted species covered in an ITP and cannot combine analyses with that of coho. **Response:** NMFS has analyzed impacts to unlisted species in our EIS, and Biological and Conference Opinion on issuance of an ITP to FGS. NMFS disagrees with the Law Center that our analysis of impacts to Chinook and steelhead is without basis. The three species of salmonids covered in the HCP have some variations in life histories, but do share many of the same freshwater habitat requirements such as a need for cool water temperatures, well-developed riparian habitat, large woody debris as habitat structures, and streams with sediment levels that are adequate for successful spawning, incubation, and emergence of juveniles. NMFS analyzed how the HCP would affect these habitat conditions for the three covered salmonids in an effort to be efficient in our analysis so as to not repeat the same information for each species. NMFS considers this approach is adequate to analyze whether implementation of the HCP would jeopardize the continued existence of all three covered salmonids.

13) The Law Center believes there is insufficient information for NMFS to make a non-jeopardy determination for unlisted salmonids. **Response:** NMFS disagrees. NMFS has substantial information on Klamath/Trinity Rivers Chinook ESU, as well as Klamath Mountains Province steelhead ESU to make a determination regarding the FGS HCP and these species.

Commenter: U.S. Environmental Protection Agency, Region IX

1) EPA urges FGS and the Services to engage the NCRWQCB staff on how the HCP operations can come into compliance with the water quality laws for the State of California. **Response:** The Services are ready to assist FGS to work with the NCRWQCB in the development of sediment source inventories (e.g. roads) and a prioritization scheme for repair that is both consistent with the HCP and acceptable to the

NCRWQCB. See Theme 8 in Volume II of the FEIS and Law Center responses 2 and 3 above.