

## IMPLEMENTATION AGREEMENT

### Port Blakely Robert B. Eddy Tree Farm

This IMPLEMENTATION AGREEMENT ("Agreement") is entered into as of this \_\_\_\_\_ day of \_\_\_\_\_, 1996, by and between PORT BLAKELY TREE FARMS (LIMITED PARTNERSHIP) ("Port Blakely"), the UNITED STATES FISH AND WILDLIFE SERVICE, an agency of the Department of the Interior of the United States of America ("USFWS"), and the NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, through the National Marine Fisheries Service ("NMFS"), an agency of the Department of Commerce of the United States of America. USFWS and NMFS are each referred to herein individually as an "Agency" and collectively as the "Agencies."

#### BACKGROUND INFORMATION

A. Port Blakely owns approximately 7,486 acres of commercial forest land distributed across 18 sections within T15N,R06W and T15N,R07W in Southwest Washington, as more fully described on the attached Exhibit A. Such property, as modified from time to time in accordance with Section 4 hereof, is referred to herein as the "Tree Farm."

B. The forest area of the Tree Farm was naturally regenerated following clearcut logging in the late 1920s, 1930s and early 1940s. Second-growth Douglas-fir and Western Hemlock are now dominant on approximately 79% of the Tree Farm. Hardwoods comprise approximately 13% of the ownership with Red Alder as the dominant species. Douglas-fir plantations (<15-year old) comprise 4% of the Tree Farm. Nonforest areas comprise another 4% and include wetlands, rockpits and roads. Port Blakely acquired most of the Tree Farm in 1969 and has managed the Tree Farm primarily for commercial timber production with some minor collateral uses such as rock quarries since that time.

C. During the course of its ownership and operation of the Tree Farm, Port Blakely has identified a number of wildlife species which visit or permanently reside in the Tree Farm and which are either (1) listed as "threatened" or "endangered" under the federal Endangered Species Act, 16 U.S.C. § 1531, et seq. (the "ESA"); (2) have been proposed by the Agencies for listing as "threatened" or "endangered" under the ESA; or (3) are identified by the Agencies or Port Blakely as candidates for listing as "threatened" or "endangered" under the ESA. A complete list of such species which have been identified as visiting or residing on the Tree Farm as of the date of this Agreement is attached hereto as Exhibit B. A complete list of all species known to visit or reside on the Tree Farm is attached hereto as Exhibit C.

D. Under the ESA and current Agency regulations, it is unlawful for a landowner to "take" any member of a species listed as "threatened" or "endangered" in the course of carrying out an otherwise lawful land use activity without an "incidental take permit" issued under ESA § 10(a) after approval by the applicable agencies of a habitat conservation plan. Port Blakely has applied for an incidental take permit ("ITP") relating to its proposed activities on the Tree Farm authorizing the incidental take of any member of any covered species listed during the life of the ITP as "threatened" or "endangered" under the ESA as amended or any successor statute. Notwithstanding anything herein to the contrary, however, Port Blakely reserves its right to deny that its current or future activities on the Tree Farm require an ITP.

E. In order to preserve additional habitat for the covered species, in order to support the issuance of an incidental take permit in respect of species currently listed as "threatened" or "endangered," and in order to qualify as soon as possible for an addition to the ITP should any additional species be listed as "threatened" or "endangered," Port Blakely has prepared a habitat conservation plan ("HCP") for the conservation of the covered species. The HCP has been prepared with the cooperation and assistance of the Agencies, the Washington State Department of Wildlife, and many others after lengthy study and discussion and is based upon the best scientific and commercial data currently available.

F. Each of the parties hereto recognizes that Congress has expressed its intention that the federal government work closely with the non-federal sector to protect listed and unlisted species and their habitats over the long term, as follows:

"Although the conservation plan is keyed to the permit provisions of the Act which only apply to listed species, the Committee intends that conservation plans may address listed and unlisted species. . . .

The Committee intends that the Secretary may utilize this provision to approve conservation plans which provide long-term commitments regarding the conservation of listed as well as unlisted species and long-term assurances to the proponent of the conservation plan that the terms of the plan will be adhered to and that further mitigation requirements will only be imposed in accordance with the terms of the plan. In the event that an unlisted species addressed in an approved conservation plan is sub-

sequently listed pursuant to the Act, no further mitigation requirements should be imposed if the conservation plan addressed the conservation of the species and its habitat as if the species were listed pursuant to the Act. . . .

It is also recognized that circumstances and information may change over time and that the original plan may need to be revised. To address the situation the Committee expects that any plan approved for a long-term permit will contain a procedure by which the parties will deal with unforeseen circumstances."

H.R. Rep. No. 97-835, 97th Cong., 2d Sess.  
30-31 (1982).

G. Among other things, the Secretaries of the Interior and Commerce have authority under the ESA to determine whether any species is endangered or threatened, to regulate the taking of an endangered or threatened species, to encourage interested parties to develop and maintain conservation programs, to issue permits for the taking of endangered or threatened species and to enforce the provisions of the ESA. In executing this Agreement, the Agencies are also acting pursuant to the Fish & Wildlife Coordination Act, 16 U.S.C. § § 661-666(c).

H. Among other things, the HCP has been designed to provide immediate and long-term benefits to local and regional populations of covered species and, to the maximum extent practical, to minimize and mitigate the effects of any incidental take of any covered species from otherwise lawful uses of the Tree Farm by requiring Port Blakely to, among other things, (a) engage in certain silvicultural activities designed to develop stands of timber which will serve as suitable habitat for certain covered species; (b) adjust harvest rates to provide nesting, roosting and foraging habitat as well as dispersal opportunities for the Northern Spotted Owl; (c) establish reserves or refuge areas for the preservation and protection of certain covered species; and (d) maintain certain no-harvest and limited harvest zones in riparian areas for the protection of salmon and other species dependent upon the riparian areas for certain of their life requisites. Port Blakely will also provide information on the use of managed timber stands by certain species through monitoring and reporting.

I. The purpose of this Implementation Agreement is to implement the HCP on which the ITP is based.

NOW THEREFORE, the parties hereto hereby agree as follows:

## AGREEMENT

1. **Definitions.** The following terms shall have the following meanings for all purposes of this Agreement:

a. "Agency" means either USFWS or NMFS, as appropriate.

b. "Agreement" shall mean this Implementation Agreement as the same may be amended from time to time.

c. "Covered Species" shall mean all species of fish and wildlife (including vertebrate and invertebrate species) which now or hereafter visit or permanently reside in the Tree Farm and which are dependent for all or part of their life requisites on habitat types found in the Tree Farm. Such species include but are not limited to those species (1) listed as "threatened" or "endangered" under Section 4 of the ESA, (2) listed on Exhibit B, or (3) listed on Exhibit C.

d. "Endemic Species" shall mean any Covered Species where eighty percent (80%) or more of its members are located on the Tree Farm. Any determination of which Covered Species are Endemic Species shall be based on the best scientific information then available.

e. "ESA" shall mean the Endangered Species Act, 16 U.S.C. § 1531, et seq., as the same may be amended or reauthorized from time to time and any successor statute or statutes.

f. "Extraordinary Circumstances" shall have the meaning given in and shall be determined in accordance with the terms of Sections 5(d)(ii) through (vi), inclusive.

g. "HCP" shall mean the habitat conservation plan prepared by Port Blakely pursuant to Section 10(a) of the ESA in connection with this Agreement as the same may be amended from time to time in accordance with the terms hereof.

h. "ITP" shall mean the incidental take permit to be issued by the Agencies to Port Blakely as provided in this Agreement as the same may be amended from time to time in accordance with the terms hereof.

i. "Mandated Modification" shall mean any modification to existing Agency regulations adopted after the date hereof where such modification was required by (1) an Act of Congress enacted after the date hereof or (2) a final order of any federal court determining that but for such modification,

compliance with or enforcement of such regulation by the Agency would violate applicable law.

j. "New Species Addition Date" shall have the meaning given in Section 3(c)(iii).

k. "Required Factors" shall mean

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

(B) the percentage of such species' range adversely affected by the HCP;

(C) the percentage of such species' range conserved by the HCP;

(D) the ecological significance of that portion of the range of the species 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 affected species in the wild.

1. "Tree Farm" shall mean the Robert B. Eddy Tree Farm, owned by Port Blakely in Southwest Washington as described on the attached Exhibit A, as it may be modified in accordance with this Agreement.

2. **Findings.** *The following findings are included here for illustration only at this time. They will not become final until after the opportunity for public comment on the HCP and related documents.* Based upon the best scientific and commercial data available, the Agencies make the following findings:

a. The taking of any member of any Covered Species in accordance with the HCP will be incidental to the carrying out of otherwise lawful activities;

b. assuming compliance with its obligations hereunder, Port Blakely will minimize and mitigate the impacts of

the incidental taking of Covered Species to the maximum extent practicable;

c. Port Blakely has ensured that adequate funding for the HCP will be provided;

d. this Agreement provides adequate procedures to address unforeseen circumstances which may arise hereafter;

e. the taking of any Covered Species identified on Exhibits B or C hereto which is currently or hereafter listed as endangered or threatened under the ESA in accordance with the HCP will not appreciably reduce the likelihood of the survival and recovery of such species in the wild;

f. the measures required by the Agencies as being necessary or appropriate for purposes of the HCP will be met;

g. the Agencies have received the required assurances that the HCP will be implemented;

h. the protection afforded by the implementation of the HCP adequately provides for all Covered Species which now occur or hereafter will occur on the Tree Farm;

i. the HCP meets each of the requirements of a conservation plan as described by Section 10(a)(2)(A) of the ESA; and

j. where the terms of the HCP have been determined by reference to state law and regulation as in effect on the date hereof, such as the current provisions of Washington Administrative Code Chapter 222-24, the resulting prescriptions are adequate and necessary for the purposes of this Agreement.

### **3. Responsibilities of the Parties**

**a. Port Blakely's Responsibilities.** In consideration of the issuance of an ITP authorizing any incidental take which may result from activities conducted in accordance with the HCP, and in consideration of the assurances provided by this Agreement, Port Blakely agrees to

(i) perform all obligations in the HCP, the ITP and this Agreement for the term of this Agreement; and

(ii) to fully fund all costs needed to perform its affirmative obligations under the ITP and the HCP.

**b. Agencies' Responsibilities.** The Agencies each agree pursuant to their respective jurisdictions

(i) to issue an ITP substantially in the form previously provided to Port Blakely upon execution of this Agreement authorizing any incidental take of the Northern Spotted Owl, the Marbled Murrelet, the Bald Eagle, and the Peregrine Falcon which may result from activities conducted in accordance with the HCP;

(ii) to add to the ITP any other species which is listed as "threatened" or "endangered" under the ESA during the term of this Agreement in accordance with Section 3(c) hereof; and

(iii) to the maximum extent practicable, to cooperate with and provide technical assistance to Port Blakely as well as to attend meetings requested by Port Blakely to consider matters relevant to the Tree Farm, the HCP, the ITP, or any of the operations or other activities contemplated thereunder.

**c. Additions of Species to ITP.**

(i) Each Covered Species which is listed as "threatened" or "endangered" under the ESA after the date hereof but during the term of this Agreement, shall upon written request by Port Blakely be added by the Agencies to the ITP on or before the New Species Addition Date unless either (A) Port Blakely is in material breach of the terms and conditions of this Agreement; or (B) (1) the addition of such species without additional mitigation would result in an appreciable reduction in the likelihood of survival and recovery of such species in the wild; (2) drawing upon all means available to the Agencies, including nongovernment sources of funds and other alternative methods of mitigation or adjustment, the Agencies will be unable to achieve the necessary mitigation unless the HCP is amended; (3) the Agencies shall have proposed amending the mitigation measures required of Port Blakely in the HCP so as to avoid an appreciable reduction in the likelihood of survival and recovery of such species in the wild, to the extent such an amendment is possible; (4) such proposed amendment shall propose changing the mitigation measures required of Port Blakely in the HCP to the minimum extent possible to avoid an appreciable reduction in the likelihood of survival and recovery of such species in the wild and shall not include payment of additional compensation, apply to parcels of land available for harvest or other uses under the HCP, or apply to lands not in the Tree Farm; and (5) Port Blakely shall have refused to consent to such proposed amendment and shall have failed to propose an alternative amendment to the mitigation measures set forth in the HCP which, if adopted, would avoid the appreciable reduction in the likelihood of survival and recovery of such species in the wild which would otherwise have resulted from the addition of such species to the ITP.

(ii) In respect of any Agency refusal to add a species under Section 3(c)(i)(B) hereof, the Agencies shall have the burden of demonstrating that each of the factors justifying such refusal exists through clearly documented written findings based upon the best scientific and commercial data available. Consistent with Section (B)(1) of the Interagency Cooperative Policy for Peer Review in Endangered Species Activities (59 Fed Reg 34, 270), each Agency will obtain the peer review of the scientific data on which the Agency bases such findings to ensure that such findings are based on the best scientific data available. The Agency will request peer review in a timely manner so that the reviews will be completed within thirty (30) days. In the event peer review is not available prior to the New Species Addition Date findings made without peer reviewed data will be effective although, at the request of Port Blakely, such findings may be subject to reconsideration by the Agency as soon as such peer reviewed data becomes available. Port Blakely shall be afforded an opportunity to present any information concerning the Agencies' determinations or to suggest alternative mitigation measures. Port Blakely will not, however, be required to conduct any additional research, gather any additional data or otherwise make any significant expenditures of funds to gather or analyze information in connection with the potential inclusion of such species in the ITP. In deciding whether to refuse to add a species under Section 3(c)(i)(B) hereof, the Agencies shall consider all relevant factors including, but not be limited to, the Required Factors.

(iii) As used herein "New Species Addition Date" shall be defined as follows:

(A) In the case of a listing of a new species under the ESA (other than an emergency listing), the "New Species Addition Date" shall be the later of the date one hundred ninety-five (195) days after notice from Port Blakely requesting that such species be added to the ITP or the date on which the listing first becomes effective.

(B) In the case of an emergency listing of a species other than an Endemic Species, the "New Species Addition Date" shall be the later of thirty (30) days after notice from Port Blakely requesting that such species be added to the ITP (the "Emergency Listing Notice") or the date on which the emergency listing first becomes effective. The addition of such species to the ITP pursuant to this subsection shall continue to be effective until the later of the date one hundred ninety-five (195) days after the Emergency Listing Notice or the effective date of any related final listing regulation, provided, however, if prior to such date the species is added to the ITP pursuant to subsection (D) hereof or such species is no longer listed as "threatened" or "endangered" under the ESA, the addition of such

species pursuant to the terms of this subsection 3(c)(iii)(B) shall cease to be effective.

(C) In the case of an emergency listing of an Endemic Species, the "New Species Addition Date" shall be the soonest possible date after the Emergency Listing Notice. The addition of such species to the ITP pursuant to this subsection shall continue until the later of the date one hundred ninety-five (195) days after the Emergency Listing Notice or the effective date of any related final listing regulation provided, however, if prior to such date the species is added to the ITP pursuant to subsection (D) hereof or such species is no longer listed as "threatened" or "endangered" under the ESA, the addition of such species pursuant to the terms of this subsection 3(c)(iii)(C) shall cease to be effective.

(D) In the case of a final listing of a species that was the subject of an emergency listing, the "New Species Addition Date" shall be the later of the date one hundred ninety-five (195) days after the Emergency Listing Notice or the effective date of any final listing regulation.

If the Agency has found that adding a species to the ITP without additional mitigation would jeopardize the continued existence of such species in the wild and, that drawing upon all means available to the Agency, the Agency will be unable to achieve the necessary mitigation unless the HCP is amended, the "New Species Addition Date" may be extended by the parties hereto to permit additional opportunity to discuss and, where possible, agree upon appropriate additional mitigation measures. The Agency shall complete any necessary consultations and shall take all other acts, if any, which it is obligated to take under the ESA and under any other applicable laws prior to the New Species Addition Date. Port Blakely shall be entitled to request inclusion of any species in the ITP at any time.

**d. Monitoring and Inspection Rights.**

(i) Port Blakely will provide the Agencies with the reports described in Section 5.0 of the HCP at the notice address then in effect for such Agencies and will provide any available information reasonably requested by either Agency to verify the information contained in such reports. In addition, in connection with each monitoring report to be delivered pursuant to Section 5.2 of the HCP, an officer of Port Blakely (or its general partner) shall provide a certificate to the effect that Port Blakely has sufficient resources to fund its remaining affirmative obligations under the HCP as of such date.

(ii) Either Agency may inspect the Tree Farm in accordance with its applicable regulations. Except where an

Agency has reason to believe that Port Blakely may be acting in violation of applicable laws or regulations or in breach of the ITP or this Agreement (an "Enforcement Inspection"), any Agency intending to inspect the Tree Farm will notify Port Blakely at least twenty-four (24) hours in advance of its inspection and will allow Port Blakely's representatives to accompany the Agency's representatives making such inspection. If under applicable law either Agency is entitled and elects to delegate its inspection rights hereunder to another federal agency, to a state agency, or to some other entity or individual the delegating Agency shall provide (or shall cause its delegatee to provide) Port Blakely with a complete list of the individuals who will be conducting an inspection on its behalf reasonably in advance of the time when any such individuals shall enter upon the Tree Farm provided, however, that this requirement will not apply to an Enforcement Inspection. Each Agency shall ensure that any individual conducting an inspection of the Tree Farm on its behalf performs such inspection in compliance with all regulations and statutes applicable to the Agency and in compliance with all of the terms and conditions of this Agreement, including without limitation, the requirement of advance notice where applicable. Except in the case of an Enforcement Inspection, to assist Port Blakely in meeting its obligations under the HCP, any Agency inspecting the Tree Farm (whether directly or through its delegatee) will promptly brief Port Blakely on the information learned during any such inspection. However, any proposed or tentative conclusions regarding legal consequences of activities or conditions observed in such inspection may be withheld from Port Blakely pending review by Agency's attorneys and officials, and disclosed to Port Blakely only when the Agency is prepared to disclose such conclusions as an official position of the Agency. Nothing in this Agreement is intended to restrict or otherwise limit the authority of federal or state officers to conduct compliance checks relating to the enforcement of hunting and fishing regulations or laws other than the ESA to the extent authorized by applicable laws and court rulings.

#### **4. Changes in Land Base.**

##### **(a) Land Acquisitions.**

**(i) In General.** Nothing in this Agreement, the HCP or the ITP shall limit Port Blakely's rights to acquire additional lands in and around the Tree Farm or elsewhere. Unless such lands are added to the Tree Farm in the manner provided below, however, any such lands as may be acquired by purchase, exchange or otherwise will not be covered by the ITP and therefore will be subject to the same ESA provisions and related regulations with respect to fish and wildlife species as if owned by another private party. Nothing in this Agreement,

the HCP or the ITP shall require Port Blakely to include in the Tree Farm or to add to the ITP any additional lands it may acquire. Any lands which Port Blakely elects to include in the HCP and the ITP in accordance with this Agreement shall thereafter constitute a portion of the Tree Farm and all references to the "Tree Farm" shall be deemed to include a reference to such acquired lands.

**(ii) Inclusion of Certain Additional Property.** If Port Blakely acquires any additional lands which lands are (A) within three miles of any lands in the Tree Farm; (B) do not contain any new habitat types or new habitat features not analyzed in the original HCP; and (C) are not inhabited or regularly visited by any listed species of wildlife not included in the Covered Species, Port Blakely, in its sole discretion, may elect to include such lands in the HCP and the ITP in accordance with Section 5(c)(i) hereof.

**(iii) Further Acquisitions.** Port Blakely may acquire any other lands and request that the HCP and ITP be modified to include such lands in the Tree Farm. Any such a request will be processed in accordance with Section 5(c)(ii) hereof.

**(b) Land Dispositions.**

**(i) In General.** Port Blakely may not sell any lands included in the Tree Farm to, or exchange any portion thereof with, any other party during the term of this Agreement unless either (A) the HCP and ITP are modified to delete such lands in accordance with Section 5(c)(ii) hereof or (B) the lands are transferred to a third party who has agreed to be bound by the terms of the HCP and otherwise meets the requirements set forth in Section 4(b)(ii) below. In responding to any request to delete lands from the HCP and the ITP where such proposed modification is to be processed under Section 5(c)(ii) hereof, the Agencies shall consent to such proposed modification unless they find that the requested deletion of land would compromise the effectiveness of the HCP. If Port Blakely sells or exchanges any of the lands comprising a portion of the Tree Farm and such transfer is permitted by the terms hereof, from and after such transfer, such lands shall not be deemed a portion of the Tree Farm and all references to "Tree Farm" shall be deemed not to include a reference to such transferred lands.

**(ii) Transfers to New Landowner Bound by HCP.** Port Blakely may sell or exchange lands comprising a portion of the Tree Farm to a Permitted Transferee. As used herein, a "Permitted Transferee" shall mean a transferee (A) who has elected to be bound by the HCP as it applies to the transferred lands; (B) who has, in the reasonable opinion of the Agencies,

sufficient financial resources to adequately fund its affirmative obligations under the HCP and who meets the requirements under 50 CFR § 13.21(b) and (c); and (C) who has entered into an agreement in form and substance reasonably satisfactory to the Agencies, which agreement may identify the responsibilities under the HCP which apply to the transferred lands and shall contain terms and covenants substantially similar to the terms hereof provided, however, that such agreement may limit the right of the Permitted Transferee to terminate its agreement prior to the termination of this Agreement. Upon request of the Permitted Transferee, the Agencies will issue an incidental take permit to the Permitted Transferee covering the transferred lands. Port Blakely will not be responsible for the performance of the HCP on lands transferred to a Permitted Transferee.

## **5. Modifications.**

**a. Modifications to Agreement.** This Agreement may be amended only with the written consent of each of the parties hereto.

**b. Modifications to ITP.** The ITP may be amended in accordance with applicable Agency regulations codified at 50 C.F.R. Parts 13, 17, 200 and 222, provided that a determination that "just cause" or "necessity" to amend the ITP exists will be made by either Agency only if (i) the amendment is necessary to add a species as required pursuant to Section 3(c) hereof; (ii) the amendment is necessary to reflect a change in the boundaries of the Tree Farm made pursuant to Section 4 hereof; or (iii) the amendment is necessary to reflect an amendment to the HCP made pursuant to Section 5(c) or 5(d) hereof.

**c. Modifications to HCP Proposed by Port Blakely.** The HCP may be modified in accordance with the following terms and conditions.

**(i) Port Blakely Minor Modifications.** Port Blakely may make the following minor modifications to the HCP. Such modifications will be effective sixty (60) days after receipt of written notice by the Agencies. The Agencies will promptly make the necessary conforming changes. Such minor modifications are limited to the following:

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

(B) correction of any maps or exhibits to correct errors in mapping and to reflect previously approved changes in the HCP; and

(C) the addition of lands where such addition is permitted pursuant to Section 4(a)(ii) of this Agreement.

(ii) **Other Port Blakely Modifications.** In addition, the HCP may be modified in response to other requests made by Port Blakely in accordance with the following procedure:

(A) In connection with any requested modification initiated by Port Blakely other than a modification of the type described in Section 5(c)(i), Port Blakely will provide the Agencies with a written description of the proposed modification and a brief description of the likely effects of the proposal on the Covered Species and habitat types found on the Tree Farm.

(B) Within sixty (60) days after receipt of the proposal and the related materials described in subclause (A) above (or such longer period as is agreeable to the parties hereto), the Agencies will notify Port Blakely if the proposed modification must be processed as a "material modification" pursuant to Section 5(c)(ii)(C) below.

(C) If the Agencies determine that any proposed modification is a "material modification", within sixty (60) days after receipt of Port Blakely's proposal (or such longer period as is agreeable to the parties hereto), the Agencies shall notify Port Blakely of the process they intend to use to obtain public comments on the proposal and the date by which they expect the public comment process to be completed. The Agencies shall thereafter promptly initiate and complete the process for obtaining public comments.

(D) Within thirty (30) days (or such longer period as is agreeable to the parties hereto) after (1) the date on which the Agencies notify Port Blakely that the proposed modification is not a "material modification" or (2) the date identified pursuant to Section 5(c)(ii)(C) as the anticipated date for the completion of the public comment period, the Agencies shall provide Port Blakely with a written notice either consenting to the proposed modification in full, declining to consent to the proposed modification in full, or consenting to the proposed modification in part (e.g. as to some portions but not all of the Tree Farm or as to some but not all of the species) and declining to consent to the proposed modification in part. If the Agencies would otherwise decline to consent to all or part of a proposed modification hereunder, the Agencies shall first consult with Port Blakely and, where possible, shall suggest reasonable conditions or alterations to the proposal which if accepted by Port Blakely would permit the Agencies to agree to the proposed modification. The Agencies shall not

decline to consent to a proposed modification hereunder unless they find, following review of public comments, if applicable, that the HCP, after giving effect to such modification, and the conduct of the permitted activities thereunder would not meet the requirements of Section 10(a)(2)(B) of the ESA.

(E) If because of material changes in circumstances, continued compliance with the HCP would place Port Blakely at a competitive disadvantage as compared to other private owners of comparable commercial timberlands in the area that are then occupied or used by Covered Species, then, at the request of Port Blakely, the Agencies will use their best efforts to minimize such economic penalties by consenting to proposed modifications to the maximum extent possible, while still meeting their responsibilities under the ESA.

**d. Modifications to HCP Proposed by Agencies.**

Except as provided for in this Section 5(d), the Agencies may not seek modifications to the HCP or further mitigation from Port Blakely, including without limitation, modifications or further mitigation to address unforeseen circumstances related to a Covered Species.

(i) The Agencies may propose the following minor modifications to the HCP:

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

(B) correction of any maps or exhibits to correct errors in mapping and to reflect previously approved changes in the HCP.

(ii) The Agencies may require additional mitigation pursuant to Section 7(a) as a condition to lifting a suspension of the ITP.

(iii) The Agencies may seek additional mitigation from Port Blakely in accordance with this Section 5(d)(iii) if Extraordinary Circumstances have occurred. If an Agency determines that additional mitigation is required due to Extraordinary Circumstances, such mitigation shall be provided on federal land or through other means available to the Agency, including nongovernment sources of funds and other methods of mitigation, to the maximum extent possible. Only if the protective measures available to the Agency are insufficient may the Agency request additional mitigation from Port Blakely, which in any event shall be limited to the original terms of the HCP to the maximum extent possible. Without the consent of Port Blakely, additional mitigation requests shall not involve the

payment of additional compensation, apply to parcels of land available for harvest or other uses under the HCP, or apply to lands other than Tree Farm.

(iv) As used in this Agreement, "Extraordinary Circumstances" shall mean a major adverse change not reasonably anticipated on the date of this Agreement in the condition or population of a Covered Species included in the ITP or in the condition of the habitat or other biological resources of the Tree Farm in respect of which revisions of the HCP to add additional mitigation measures are necessary to avoid appreciably reducing the likelihood of the affected species' survival and recovery in the wild. Changes in operational or management prescriptions resulting from adaptive management contemplated by the HCP are neither unforeseen circumstances nor Extraordinary Circumstances even though such changes may require more or less restrictions on operations than were provided for under the original HCP.

(v) The Agency shall have the burden of demonstrating that Extraordinary Circumstances actually exist and that, pursuant to Section 5(d)(iii) hereof, the Agency is entitled to seek additional mitigation requirements from Port Blakely. The Agency's findings of Extraordinary Circumstances must be clearly documented and based upon the best scientific and commercial data available. In determining whether Extraordinary Circumstances exist, the Agencies shall consider all relevant factors, including without limitation, the Required Factors. Peer review of such technical information will be conducted pursuant to Section 5(d)(vii) hereof.

(vi) Port Blakely shall be afforded an opportunity to present information concerning the Agency's determination that Extraordinary Circumstances have occurred, to present information as to whether the Agency is entitled to seek additional mitigation from Port Blakely under the terms of Section 5(d)(iii) hereof, and to suggest alternative mitigation measures. Port Blakely will not, however, be required to conduct additional research, gather additional data or otherwise make any significant expenditures of funds to gather or analyze information in connection with this finding.

(vii) Consistent with Section (B)(1) of the Interagency Cooperative Policy for Peer Review in Endangered Species Activities (59 Fed Reg 34, 270), the Agency will obtain the peer review of the scientific data on which the Agency bases a finding of Extraordinary Circumstances to ensure that any such finding is based on the best scientific data available. The Agency will promptly seek peer review so that the reviews will be completed within thirty (30) days. In the event peer review is not available in time to enable the Agency to meet its

obligations established by statute, regulation or this Agreement, a finding of Extraordinary Circumstances made without peer reviewed data will be effective although, at the request of Port Blakely, it may be subject to reconsideration by the Agency as soon as peer reviewed data becomes available.

## **6. Remedies and Enforcement.**

**a. In General.** The parties hereto shall have all the remedies available in equity (including specific performance and injunctive relief) and at law to enforce the terms of this Agreement and the ITP provided, however, no party shall be liable in damages to any other party for breach of this Agreement, for any performance or failure to perform a mandatory or discretionary obligation arising under this Agreement, or for any other cause of action arising under this Agreement. All parties shall retain whatever liability they would possess for their present and future acts or failure to act without the existence of this Agreement and Port Blakely shall retain whatever liability it possesses as an owner of interests in land.

**b. Informal Dispute Resolution.** If either Agency has reason to believe that Port Blakely may have violated the ITP, the HCP or this Agreement with respect to any Covered Species, including unlisted species, it will notify Port Blakely in writing of the specific provisions which may have been violated, the reasons the Agency believes Port Blakely may have violated them, and the mitigation the Agency proposes to impose to correct or compensate for the alleged violation. Port Blakely will then have sixty (60) days, or such longer time as may be mutually acceptable, to respond. If any issues cannot be resolved within thirty (30) days, or such longer time as may be mutually acceptable, after Port Blakely's response is due, the parties will consider non-binding mediation and other alternative dispute resolution processes. The parties reserve the right, at any time without completing informal dispute resolution, to use whatever enforcement powers and remedies are available by law or regulation, including but not limited to, in the case of the Agencies, suspension or revocation of the ITP.

## **7. Termination, Revocation and Suspension.**

### **a. Right to Suspend ITP.**

(i) In accordance with the process contained in applicable regulations (currently codified at 50 C.F.R. Parts 13, 17, 220 and 222 and 15 C.F.R. Part 904, Subpart D) either Agency may suspend the ITP for (A) any material violation by Port Blakely of the ITP or this Agreement; (B) any material violation by Port Blakely of any applicable laws or regulations governing the conduct of the permitted activity; (C) any failure by Port

Blakely to pay any fee, penalty or cost owed to the Agencies; or (D) any other basis for suspension expressly provided for in a Mandated Modification to an Agency regulation.

(ii) Except where the Agency determines that emergency action is necessary to protect any endangered or threatened species, such Agency shall not suspend the ITP without first providing Port Blakely notice in writing of the facts or conduct which may warrant the suspension and the actions necessary to redress the violation(s) and achieve compliance with the ITP and this Agreement. Such notice will be provided in accordance with applicable regulations. The Agency shall also consult with Port Blakely concerning actions to be taken to effectively redress the violation(s) that would otherwise necessitate a suspension. In addition, the Agencies agree to make good faith efforts to resolve any disputes with Port Blakely in accordance with the informal dispute resolution mechanism described in Section 6(b) hereof prior to suspending the ITP, unless an immediate suspension is necessary to protect any Covered Species.

(iii) In connection with any notice of suspension given to Port Blakely hereunder, the Agencies shall at the same time provide Port Blakely with a written statement of the actions reasonably required to redress the violation(s). Any suspension under this subsection 7(a) shall be lifted immediately upon the reasonable determination by the Agency, that the violation(s) has been effectively redressed. Upon full performance of the necessary actions specified by the Agency in its written notice, the Agency shall immediately lift the suspension.

(iv) It is the intent of the parties hereto that in the event of any suspension of the ITP, all parties shall act expeditiously to cooperate to lift any suspension of the ITP to carry out the objectives of this Agreement.

**b. Right to Terminate and Revoke.**

(i) The ITP may be terminated at any time by Port Blakely in accordance with applicable regulations. At any time, Port Blakely may also elect to terminate the ITP with respect to one or more particular species and to leave the ITP in effect as to all other species therein provided for.

(ii) The ITP may be revoked by the Agencies only if (A) Port Blakely has materially violated the terms of the ITP or this Agreement and such breach continues for sixty (60) days after Port Blakely receives written notice thereof from the Agencies (or if such breach cannot reasonably be cured within such sixty (60) days, Port Blakely has failed to take reasonable steps to effect such cure and to diligently pursue the completion

thereof at all times thereafter) provided, however, that the Agencies need not provide such an opportunity to cure if the violation is willful; (B) Port Blakely fails to take any actions reasonably identified by the Agencies as necessary to redress any violation pursuant to Section 7(a)(iii) within sixty (60) days (or if such actions cannot reasonably be completed within such sixty (60) days, Port Blakely has failed to take reasonable steps to implement such actions and to diligently pursue the completion thereof at all times thereafter); (C) Port Blakely becomes a "disqualified person" as such term is defined in 50 C.F.R. § 13.21(c); (D) the population of any listed species covered by the ITP declines as the result of an Extraordinary Circumstance to the extent that continuation of the permitted activity would be detrimental to maintenance or recovery of the affected population; or (E) any other basis for revocation occurs where such basis is expressly provided for in a Mandated Modification to an Agency regulation.

The Agencies agree not to exercise their rights of revocation under Section 7(b)(ii)(D) unless Port Blakely has declined to consent to a modification to the HCP requested by the Agencies in accordance with Section 5(d)(iii) hereof. The procedures and burden of demonstration provided for in Sections 5(d)(v), (vi) and (vii) shall apply to any revocation under Section 7(b)(ii)(D). Any revocation under Section 7(b)(ii)(D) shall be limited to the affected species. The parties recognize and intend that the bases for revocation of the ITP hereunder may limit the discretion of the Agencies otherwise afforded by applicable regulations.

**c. Effect of Termination or Revocation.** Any termination or revocation of the ITP under Section 7(b)(i) or (ii) (other than a termination pursuant to Section 7(b)(i) limited to one or more species but less than all of the species then provided for in the ITP or a revocation pursuant to Section 7(b)(ii)(D)) automatically terminates the HCP and this Agreement. Activities thereafter conducted on the Tree Farm will be subject to all applicable provisions of the ESA and related regulations all as if the ITP had never been issued. A termination pursuant to Section 7(b)(i) limited to one or more species but less than all of the species then provided for in the ITP or a revocation pursuant to Section 7(b)(ii)(D) shall apply only to the affected species and the HCP and this Agreement shall continue in full force and effect as to all other Covered Species.

(i) As analyzed in the HCP, and subject to the proviso in the next succeeding sentence, the parties hereto acknowledge that Port Blakely's compliance with the HCP and this Agreement will result in Port Blakely having fully mitigated for any incidental take of any Covered Species identified on Exhibit B prior to the occurrence of such take. Therefore, if Port Blakely

is in compliance with the terms of this Agreement, upon termination or revocation of the ITP, Port Blakely shall have no further obligations hereunder or under the ESA with regard to Covered Species identified on Exhibit B for take that occurred during the term of this Agreement provided, however, that if this Agreement is terminated at any time during the first five (5) years after the date hereof, Port Blakely shall provide such further mitigation as the Agencies may reasonably determine to be necessary to fully mitigate for the take of any species of fish then listed as threatened or endangered under the ESA for which adequate mitigation was not provided under the HCP prior to termination.

(ii) For any Covered Species not identified on Exhibit B which is hereafter listed as "threatened" or "endangered" under the ESA and which Port Blakely proposes to have added to the ITP, on or before the New Species Listing Date, the Agencies shall make a clearly documented written determination based upon the best scientific and commercial data then available (which data shall be peer reviewed to the extent practicable) and notify Port Blakely in writing as to whether Port Blakely's compliance with the HCP and this Agreement will result in Port Blakely having fully mitigated for any incidental take of such species prior to the occurrence of such take. The Agencies will not decline to find that Port Blakely's compliance with the HCP and this Agreement would result in Port Blakely having fully mitigated for any incidental take as herein required based solely on the possibility that in the future information might be developed or discovered which would support a contrary finding. In determining whether compliance with the HCP will result in Port Blakely's having fully mitigated for any incidental take of such species prior to the occurrence of such take, the Agency shall include in its assessment of the mitigation to be provided by Port Blakely, all actions taken by Port Blakely pursuant to the HCP since the date of this Agreement including actions taken prior to the listing of the such species and shall credit Port Blakely with such pre-listing actions benefiting the affected species. In assessing the likely level of incidental take of such species, only actions constituting "take" under the ESA after the date that such species is added to the ITP shall be considered.

(iii) If, under Section 7(c)(ii), the Agencies determine for any species that full mitigation will occur prior to any take of such species, upon termination or revocation of the ITP thereafter, if Port Blakely is in compliance with the terms of this Agreement, Port Blakely shall have no further obligations hereunder or under the ESA with regard to such species for take that occurred during the life of this Agreement.

(iv) If, under Section 7(c)(ii), the Agencies determine for any species that full mitigation will not necessarily have occurred prior to any take of such species, Port Blakely shall have the right to revoke its request that such species be added to the ITP. If Port Blakely does not revoke its request and if such species is added to the ITP, upon termination or revocation of the ITP thereafter, Port Blakely shall provide such further mitigation as the Agencies may reasonably determine to be necessary to fully mitigate for the take of any such species for which adequate mitigation (both pre- and post-listing) was not provided under the HCP prior to termination.

(v) If Port Blakely challenges any determination or finding made by either Agency under this Section 7(c), the Agency shall have the burden of demonstrating that each such determination was justified and based upon the best scientific and commercial data then available (which data shall be peer reviewed to the extent practicable). Port Blakely shall be afforded an opportunity to present information concerning the Agencies' determinations.

d. **Procedure for Revocation.** If either Agency revokes the ITP in accordance with the terms hereof, such Agency shall comply with all procedural aspects of its applicable regulations.

**8. Miscellaneous.**

a. **Severability.** If any provision of this Agreement is found invalid or unenforceable, all of the other provisions of this Agreement shall remain in effect to the extent they can be reasonably applied in the absence of such invalid or unenforceable provision.

b. **Notices.** Each party will designate a representative to whom notices under this Agreement shall be directed. The initial designated representatives are:

Port Blakely:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_

USFWS:

Regional Director  
U.S. Fish & Wildlife Service  
911 N.E. 11th Avenue  
Portland, Oregon 97232-4181  
Telephone: 503-231-6118  
Fax: \_\_\_\_\_

NMFS:

Regional Director  
National Marine Fisheries Service  
7600 Sand Point Way, N.E.  
Seattle, Washington 98115-0070  
Telephone: \_\_\_\_\_  
Fax: \_\_\_\_\_

Names, addresses, telephone and facsimile numbers of the designated representatives may be changed at any time by notice to the other parties hereto. Notices will be deemed received when delivered personally to the office of the designated representative, on electronic confirmation that facsimile message has been received at the "fax" number most recently provided for the recipient representative, or five days after deposit in the United States registered mail, addressed to the recipient representative at the address most recently provided by the party being notified.

**c. Terms Do Not Run With the Land.** The terms hereof are not intended to run with the land and will not bind subsequent purchasers of timberlands in the Tree Farm except as set forth in Section 4 hereof.

**d. Entire Agreement.** This Agreement supersedes any and all other agreements, either oral or written, between 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. Each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any party which are not contained herein.

**e. Execution in Counterparts.** This Agreement may be executed in any number of duplicate originals. A complete original of this Agreement shall be maintained in the official records of each party hereto.

**f. No Third-Party Beneficiaries.** This Agreement is not intended to create and does 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 for personal injuries, property damages or otherwise in respect hereof.

**g. References to Regulations, Etc.** Any reference in this Agreement or the HCP to any regulation or rule of any governmental entity including the Agencies, departments and subagencies thereof shall be deemed to be a reference to such regulation or rule as such regulation or rule is then in effect, except that if such regulation or rule has been modified after

the date hereof and if such modification was not a Mandated Modification, then at the request of Port Blakely, such reference shall be deemed to be a reference to such regulation or rule as in effect on the date of this Agreement.

**h. Term of Agreement.** The ITP, the HCP, and this Agreement will remain in effect for fifty (50) years from the effective date of the ITP unless earlier terminated as herein provided. Amendments to the ITP issued during the term of this Agreement for Covered Species unlisted at the time of signing of this Agreement but subsequently listed as threatened or endangered under the ESA shall remain in effect from the date such species are added to the ITP for at least the then remaining term of this Agreement.

**i. Relationship to HCP.** The HCP and its terms are incorporated herein by this reference. The terms of this Agreement and those of the HCP shall be interpreted as supplementary to each other, but in the event of any direct contradiction, the terms of this Agreement will control.

**j. Relationship to ESA.** The terms of this Agreement shall be governed by and construed in accordance with the ESA. Moreover, nothing in this Agreement is intended to limit or diminish the legal obligations and responsibilities of USFWS and NMFS as agencies of the federal government.

**k. Availability of Funds.** Implementation of the HCP and this Agreement by the Agencies shall be subject to the availability of appropriated funds.

IN WITNESS WHEREOF the parties hereto have caused this Agreement to be executed as of the date first above written.

PORT BLAKELY TREE FARMS (LIMITED PARTNERSHIP)

By \_\_\_\_\_  
Its \_\_\_\_\_

UNITED STATES FISH & WILDLIFE SERVICE

By \_\_\_\_\_  
Its \_\_\_\_\_

NATIONAL MARINE FISHERIES SERVICE

By \_\_\_\_\_  
Its \_\_\_\_\_