

**Implementation Agreement  
for Simpson Timber Company Habitat Conservation Plan**

by and among

**Simpson Timber Company  
National Marine Fisheries Service  
United States Fish and Wildlife Service**

dated as of

**October 13, 2000**

**SIMPSON TIMBER COMPANY IMPLEMENTATION AGREEMENT  
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## 1.0 PARTIES

The parties to this Implementing Agreement (as the same may be amended from time to time, the "Agreement") are Simpson Timber Company ("Simpson"), the United States Fish and Wildlife Service, an agency of the Department of the Interior of the United States of America ("FWS"), and the National Marine Fisheries Service, an agency of the Department of the Commerce of the United States of America ("NMFS"). In this Agreement, FWS and NMFS are referred to individually as a "Service" and collectively as the "Services."

## 2.0 RECITALS AND PURPOSES

**2.1 Recitals.** The parties have entered into this Agreement in consideration of the following facts:

(a) Simpson owns approximately 287,000 acres of commercial forestland distributed across Mason, Grays Harbor and Thurston counties in the State of Washington. Of these forestlands, Simpson has elected to develop a habitat conservation plan initially covering approximately 261,575 acres, which property is more fully described on the attached Exhibit A. The property identified on Exhibit A, as modified from time to time in accordance with Section 10 hereof, is referred to herein as the "Tree Farm."

(b) During the course of its ownership and operation of the Tree Farm, Simpson has identified a number of fish and wildlife species which visit or permanently reside in the Tree Farm or which may hereafter visit or permanently reside in the Tree Farm. These include marbled murrelets and bald eagles that are listed as "threatened" species under the federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (as the same may be amended or reauthorized from time to time and together with any successor statute or statutes, the "ESA"). These also include the additional species described on the attached Exhibit B.

(c) Under the ESA, it is unlawful for a landowner to "take" any member of a species listed as "endangered" in the course of carrying out an otherwise lawful land use activity without an "incidental take permit" issued under ESA Section 10(a) after approval by the applicable Services of a habitat conservation plan. Take of certain species listed as "threatened" is also prohibited by regulations promulgated by the Services, unless such take is authorized by an incidental take permit issued in conjunction with approval of a habitat conservation plan. Simpson has prepared a habitat conservation plan (as the same may be amended from time to time, the "HCP") and has applied for an incidental take permit (as the same may be amended from time to time, the "ITP") relating to its proposed activities on the Tree Farm. Notwithstanding anything herein to the contrary, however, Simpson reserves its right to deny that its current or future activities on the Tree Farm require an ITP.

(d) Under the Migratory Bird Treaty Act of 1918, as amended (16 U.S.C. §§ 703-712) ("MBTA"), and the Bald and Golden Eagle Protection Act of 1940, as amended (16 U.S.C. §§ 668-668d) ("BGEPA"), a landowner is precluded from "taking" migratory birds and bald eagles, respectively. Simpson has applied for a Special Purpose Permit under 50 CFR § 21.27 for the take of certain migratory birds. Where applicable, references in this Agreement to

the "ITP" shall be deemed to include a reference to such Special Purpose Permit. Simpson has also requested that the FWS exercise its prosecutorial discretion in not prosecuting Simpson with respect to any take of bald eagles under the MBTA or the BGEPA, in each case, resulting from activities taken on the Tree Farm in accordance with the HCP. Notwithstanding anything herein to the contrary, however, Simpson reserves its right to deny that its current or future activities on the Tree Farm require a Special Purpose Permit or would constitute an otherwise prohibited "take" under the MBTA or the BGEPA.

**2.2 Purposes.** The purposes of this Agreement are:

- (a) To ensure implementation of certain provisions of the HCP;
- (b) To describe the applicable remedies and recourse should any party fail to perform its obligations as set forth in this Agreement; and
- (c) To provide certain assurances to Simpson with respect to future requirements for additional mitigation.

**3.0 DEFINITIONS**

**3.1 Specific definitions.** The following terms as used in this Agreement will have the meanings set forth below:

**"Changed Circumstances"** means changes in circumstances affecting a Covered Species or the Tree Farm which are described in Appendix F of the HCP. Changed Circumstances are not Unforeseen Circumstances.

**"Core Areas"** means the areas of the Tree Farm described on Exhibit D.

**"Covered Activities"** means the following activities, provided that the conduct of these activities is otherwise lawful: all aspects of mechanized timber harvest, log transportation, road construction, road maintenance and decommissioning, site preparation and slash abatement, tree planting, fertilization, silvicultural thinning, experimental silviculture, wildfire suppression, stream restoration, research and monitoring pursuant to Section 9 of the HCP, the management, harvest, and sale of minor forest products and vertebrate control provided, however, that the application of pesticides is not a "Covered Activity." Notwithstanding the foregoing to the contrary, however, until completion of all required consultation under the National Historic Preservation Act, 16 U.S.C. § 470(f), "Covered Activities" shall not include any activity that but for the ITP would constitute unlawful take of a Covered Species and that will adversely affect a Designated Historic Resource. As used in this definition, "Designated Historic Resource" means any site, building, structure, or object located within the Plan Area (a) that is included in the National Register of Historic Places or (b) that is (i) specifically identified in a writing received by Simpson prior to the conduct of its activity from either Service or from any Interested Party and (ii) is eligible for inclusion in the National Register of Historic Places. As used herein, "Interested Party" means the Washington State Historic Preservation Officer, each Indian Tribe that attaches religious and cultural significance to sites, buildings, structures, or objects that may be affected by the activity and each other "consulting party" under 36 CFR §800.2. The Services may elect to conduct phased consultations by subregions within the Plan Area under 16

U.S.C. § 470(f) and consultation will be deemed to have been completed prior to any Simpson activity if the Services' obligations to consult with respect to the subregion where such activity is to be conducted has been completed. The Covered Activities are described in greater detail in Section 1.5 of the HCP.

**"Covered Species"** means each species identified on Exhibit B.

**"Incorporated HCP Sections"** means Sections 5, 8, 9, 10 and 14 of the HCP together with Appendices B, C, and F.

**"Mandated Modification"** means any modification to any existing regulation of either Service adopted after the date hereof where (i) such modification was expressly required by an Act of Congress enacted after the date hereof or (ii) a final order of any federal court has determined that but for such modification, compliance with or enforcement of an existing Service regulation by a Service would violate applicable law.

**"Unforeseen Circumstances"** means changes in circumstances affecting a Covered Species or the Tree Farm that (i) could not reasonably have been anticipated as of the date of this Agreement; and (ii) result in a substantial and adverse change in the status of a Covered Species. Changes in operational or management prescriptions resulting from adaptive management contemplated by the HCP are not Unforeseen Circumstances even though such changes may require more or less restrictions on operations than were provided for under the original HCP. Changed Circumstances are not Unforeseen Circumstances.

**3.2 General principles applicable to definitions.** Terms defined in Section 2.1 to this Agreement are used in the balance of the Agreement as therein defined. Terms used in this Agreement but not otherwise defined herein, shall have the meanings, if any, given in the ESA.

#### **4.0 OBLIGATIONS OF THE PARTIES**

**4.1 Obligations of Simpson.** Simpson will fully and faithfully perform all of the obligations assigned to it under this Agreement and under the Incorporated HCP Sections.

#### **4.2 Obligations of the Services.**

(a) Upon execution of this Agreement, the Services will issue the ITP to Simpson under Section 10(a)(1)(B) of the ESA. The ITP will authorize the incidental take by Simpson of each Covered Species resulting from Covered Activities on the Tree Farm provided, that as to any Covered Species which is not listed as "threatened" or "endangered" under the ESA as of the date of this Agreement, the ITP shall automatically become effective at such time as such species is listed as "threatened" or "endangered" under the ESA.

(b) The issuance of the ITP by the Services shall be deemed to be the issuance of a Special Purpose Permit authorizing the take of marbled murrelets and all other migratory birds listed on Exhibit B at such time as they may be listed which may result from Covered Activities on the Tree Farm conducted in accordance with the HCP; such Special Purpose Permit shall be valid for a period of three years from its effective date, provided that the associated ITP

remains in effect for such period; the Special Purpose Permit shall thereafter be automatically renewed, provided that Simpson remains in compliance with the terms of this Agreement in all material respects; and each such renewal shall be valid for the maximum period of time allowed by 50 C.F.R. § 21.27 or its successor at the time of such renewal.

(c) FWS will not refer the incidental take of any bald eagle for prosecution under the MBTA or the BGEPA during the term of this Agreement provided such take results from Covered Activities conducted in accordance with the HCP on the Tree Farm.

(d) To the maximum extent practicable, the Services will cooperate with and provide technical assistance to Simpson and attend meetings requested by Simpson to consider matters relevant to the Tree Farm, the HCP, the ITP, or any of the operations or other activities contemplated hereunder or thereunder.

(e) The Services will pursue the completion of their consultation obligations under 16 U.S.C. § 470(f) with all possible diligence and without interruption at all times after the date of this Agreement and in all events complete such consultation within twelve months after the date on which the ITP is first issued. If the Services elect to conduct phased consultations by geographic region within the Tree Farm, the Services agree to confer in good faith with Simpson to coordinate, to the extent reasonably possible, the consultations with Simpson's harvest and other activities. Upon request by Simpson, the Services agree to provide Simpson with reports as to the status of the consultations.

## **5.0 INCORPORATION OF HCP**

This Agreement is intended to specify the obligations of the parties hereto. The Incorporated HCP Sections are intended to be and by this reference are incorporated herein. The balance of the HCP is specifically not incorporated into this Agreement and the parties hereto have no obligations under such other Sections. 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.

## **6.0 TERM.**

**6.1 Term.** This Agreement and the HCP will become effective on the date that the Services first issue the ITP. This Agreement, the HCP and the ITP will remain in effect for a term of 50 years from issuance, except (a) as such term may be terminated early by Simpson pursuant to Section 12.2 below; (b) as such term may be terminated early by the Services pursuant to Section 12.1 below; (c) as such term may be extended by agreement between the Services and Simpson pursuant to Section 6.2 below.

**6.2 Extension of the Term.** Upon agreement of the parties and compliance with all applicable laws, the ITP may be extended beyond its initial term under regulations of the Services in force on the date of such extension. If Simpson desires to extend the permit, it will so notify the Services at least 180 days before the then-current term is scheduled to expire. Extension of the permit constitutes extension of the HCP and this Agreement for the same

amount of time, subject to such modifications as the parties may agree to at the time of the extension.

## **7.0 FUNDING**

Simpson warrants that it has, and will expend, such funds as may be necessary to fulfill its obligations under this Agreement and under the Incorporated HCP Sections.

## **8.0 MONITORING AND REPORTING**

**8.1 Planned Periodic Reports.** As described in the HCP, Simpson will submit periodic reports describing its activities and the results of its monitoring program provided for in the HCP.

**8.2 Other Reports.** Within 30 days of receipt of a request from the Services, Simpson will provide such additional information related to implementation of the HCP as may be requested by the Services, provided such information is in Simpson's possession or control and is available to Simpson without the expenditure of significant additional effort or funds.

**8.3 Material Adverse Changes.** Simpson will promptly notify the Services of any material adverse change in Simpson's ability to fulfill its obligations under the Incorporated HCP Sections.

**8.4 Certification of Reports.** All reports will include the following certification from a responsible Simpson official who supervised or directed preparation of the report:

I certify, to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of this report, that the statement of facts included in the report are true and accurate and the projections or estimates included in the report represent Simpson Timber Company's good faith projections or estimates of the matters described therein subject to identified or appropriate assumptions.

**8.5 Monitoring by Services.** Either Service may enter upon and inspect the Tree Farm from time to time in accordance with all applicable laws and regulations. Except for inspections performed in connection with an investigation by the Services' law enforcement officers, the Services agree to give Simpson reasonable advance notice of any such inspection and to allow Simpson's representatives to accompany the Service's representatives making such inspection. Except for inspections performed in connection with an investigation by the Services' law enforcement officers, the Services agree not to delegate their rights of inspection hereunder to any other person without Simpson's prior consent. Each Service shall ensure that any individual conducting an inspection of the Tree Farm on its behalf performs such inspection in a reasonable, safe and professional manner, in compliance with all regulations and statutes applicable to the Service.

## 9.0 CHANGED CIRCUMSTANCES AND ADAPTIVE MANAGEMENT

**9.1 Changed Circumstances.** Simpson will respond to Changed Circumstances in the manner provided for in Section 5 and Appendix F of the HCP.

**9.2 Adaptive Management.** Simpson will implement changes to the prescriptions in the HCP in accordance with and subject to the limitations of the adaptive management provisions set forth in Section 10 of the HCP.

**9.3 Other Listed Species.** Notwithstanding anything in this Agreement or the HCP to the contrary, Simpson will not take any listed species that is not a Covered Species unless and until the ITP is amended to add such species or Simpson is otherwise not precluded by applicable law from taking such species.

## 10.0 LAND TRANSACTIONS

### 10.1 Acquisition of Land by Simpson.

**(a) In General.** Nothing in this Agreement, the HCP or the ITP shall limit Simpson's rights to continue to own or 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, no such additional lands will be covered by the ITP and therefore such additional lands 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 Simpson to include in the Tree Farm or to add to the HCP or ITP any additional lands it may currently own or hereafter acquire. Any lands that Simpson 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 additional lands.

**(b) Inclusion of Certain Additional Property.** In its sole discretion Simpson may elect to include in the HCP and the ITP any lands that at the time of the proposed inclusion meet the following additional criteria:

(i) are within the outer boundaries of the area identified on the attached Exhibit A;

(ii) do not contain any lithotopo features or stream types not analyzed in connection with the original HCP; and

(iii) have been managed by Simpson in accordance with the prescriptions in the HCP (other than those prescriptions requiring Simpson to provide periodic reports or other information) at all times since the later of the first anniversary of the date on which the ITP is issued or the date Simpson first acquired such lands.

Simpson's right to elect to include lands under this Section 10.1(b) is further conditioned upon Simpson's providing to the Services (at the time any such lands are proposed for inclusion):

(iv) Simpson's written estimates, based upon the best available information (which will include, where appropriate, in-field verification) of the following baseline characteristics for the lands to be added: a map showing the lands to be added and the location of all roads on such lands; number of acres (total and by lithotopo unit); number of stream miles by the Washington Department of Natural Resource stream type and HCP channel class; number of RCR acres (as defined in the HCP); RCR timber stand age(s) and composition; number of wetland, lake and forested wetland acres; number of road miles; a general description of the condition of the roads; a general description of the unstable slopes; leave tree density (for snag distribution purposes); the location of any known cultural resources; and the distribution of Covered Species across the landscape; and

(v) A written analysis demonstrating that the net effect on the environment and on the Covered Species (and the level of take of Covered Species) on the lands proposed for addition that would result from the management of such lands in accordance with this Agreement and the Incorporated HCP Sections would not be significantly different from the net effect on the environment and the Covered Species (and the level of take of Covered Species) on the lands initially included in the Tree Farm that has resulted and will thereafter result from the management of such lands in accordance with this Agreement and the Incorporated HCP Sections.

Unless the Services object in a writing delivered to Simpson within 60 days of receipt of the materials referenced in subclauses (iv) and (v) above specifying in detail the reasons why in their judgment the proposed addition of lands has failed to satisfy one or more of the conditions set forth in subclauses (i) through (v) above, it will be conclusively presumed for all purposes that the proposed addition does satisfy such conditions. If the Services do deliver such a written objection, the Services and Simpson will confer in good faith and pursue the informal dispute resolution mechanisms set forth in Section 13.3 of this Agreement in an effort to reach agreement.

Upon satisfaction of the conditions set forth in subclauses (i) through (v) above, the lands proposed for addition will be added to the Tree Farm. The addition of any lands to the Tree Farm effected under this Section 10.1(b) shall be processed in accordance with Section 11.3(a) hereof provided, that in the event of any dispute between Simpson and the Services as to the satisfaction of the above-referenced conditions, Simpson may request that the proposed addition be processed in accordance with Section 11.3(b).

**(c) Further Acquisitions.** Simpson may request that the HCP and ITP be modified to include lands in the Tree Farm other than those described in Section 10.1(b). Any such request will be processed in accordance with Section 11.3(b) hereof.

## **10.2 Land Dispositions.**

**(a) In General.** Simpson 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:

(i) such sale or exchange does not involve a Core Area and after giving effect to such sale or exchange, the total acreage of all lands sold or exchanged under this Section 10.2(a)(i) would not exceed 39,200 acres; or

(ii) the lands are transferred to a Comparable Transferee as provided in Section 10.2(b) below; or

(iii) the HCP and ITP are modified to delete such lands in accordance with Section 11.3(b) hereof.

Any sale or exchange of land described in Section 10.2(a) (i) or (ii) above shall be processed in accordance with Section 11.3(a) hereof. If Simpson 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 to be a portion of the Tree Farm and all references to "Tree Farm" shall be deemed not to include a reference to such transferred lands. Simpson will not be responsible for the performance of the HCP on lands transferred in accordance with the terms of this Agreement.

**(b) Transfers to Comparable Transferees.** Simpson may sell, transfer or exchange lands comprising all or a portion of the Tree Farm to one or more Comparable Transferees. As used herein, a "Comparable Transferee" shall mean any of the following transferees:

(i) an agency of the federal government if, prior to transfer, the Services have determined that such transfer will not compromise the effectiveness of the HCP based on adequate commitments by that agency regarding management of such land;

(ii) a non-federal entity that has entered into an agreement acceptable to the Services (e.g., an easement held by the Washington Department of Fish and Wildlife with the Services as third-party beneficiaries) to ensure that the lands will be managed in such a manner and for such a duration as to not compromise the effectiveness of the HCP; or

(iii) any person or entity (A) who has elected to be bound by the HCP as it applies to the transferred lands; (B) who demonstrates 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) who has entered into an agreement with the Services covering the transferred lands containing terms and covenants substantially similar to the terms hereof. To the extent permitted by applicable law then in effect, upon request of such a person or entity and satisfaction of any required transfer criteria, the Services will issue an incidental take permit (and where applicable, a Special Purpose Permit) to such a transferee covering the transferred lands subject to such terms and conditions as the Services may require pursuant to § 10 of the ESA (See 50 C.F.R. § 13.25(b)).

## 11.0 MODIFICATIONS AND AMENDMENTS

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

**11.2 Modifications to ITP.** The ITP may be amended in accordance with applicable Services' regulations codified at 50 CFR Parts 13, 17, 200 and 222 as in effect on the date of this Agreement or as modified pursuant to a Mandated Modification, provided that a determination that "just cause" or "necessity" to amend the ITP exists will be made by either Service only if (i) the amendment is necessary to reflect a change in the boundaries of the Tree Farm made pursuant to Section 10 hereof; or (ii) the amendment is otherwise necessary to reflect an amendment to the HCP made pursuant to Section 11.3 or 11.4 hereof. The ITP may also be amended in connection with an approved permit amendment under Section 11.3(b) hereof.

**11.3 Modifications to HCP Proposed by Simpson.** The HCP may be modified in accordance with the following terms and conditions.

**(a) Simpson Minor Modifications.** Simpson may make the following minor modifications to the HCP. Such modifications will be effective thirty (30) days after receipt of written notice thereof by the Services except in the case of modifications under subclause (iii) below which will be effective sixty (60) days after receipt of written notice thereof by the Services. Such notice shall include a statement of the reason for the proposed modification and a brief analysis of its environmental effects, including its effects on operations under the HCP and on the Covered Species. The Services will promptly make the necessary conforming changes, if any, in the ITP. Such minor modifications are limited to the following:

- (i) corrections of typographic, grammatical, and similar editing errors that do not change the intended meaning;
- (ii) correction of any maps or exhibits (including corrections to channel classifications) to correct errors in mapping or to reflect previously approved changes in the ITP or HCP;
- (iii) the addition of lands as described in Section 10.1(b) of this Agreement; and
- (iv) the deletion of lands where such deletion is permitted pursuant to Section 10.2(a)(i) or 10.2(a)(ii) of this Agreement.

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

- (i) In connection with any requested modification initiated by Simpson other than a modification of the type described in Section 11.3(a), Simpson will provide the Services with a written description of the proposed modification, the purpose and rationale for the modification, a description of the likely effects of the proposal on the Covered Species and habitat types found on the Tree Farm and any other information

that Simpson is required by law to provide in connection with such a proposed modification.

(ii) Within sixty (60) days after receipt of the proposal and the related materials described in subclause (i) above (or such longer period as is agreeable to the parties hereto), the Services will notify Simpson if the proposed modification must be processed as a "permit amendment" pursuant to Section 11.3(b)(iii) below.

(iii) If the Services determine that any proposed modification must be processed as a "permit amendment", within sixty (60) days after receipt of Simpson's proposal and the related materials described in subclause (i) above (or such longer period as is agreeable to the parties hereto), the Services shall notify Simpson of the process they intend to use to review the proposal and, if such review process includes an opportunity for public comments, the date by which they expect the public comment period to be completed. The Services shall thereafter promptly initiate and at all times thereafter, diligently pursue the completion of such review.

(iv) Within the period commencing on the date that Simpson submits a proposed modification under this Section 11.3(b) and continuing to the Review Termination Date (or such longer period as is agreeable to the parties hereto), the Services shall provide Simpson with a written notice either approving the proposed modification in full, rejecting the proposed modification in full, or approving the proposed modification in part (e.g. as to some portions but not all of the Tree Farm, as to some but not all of the species or as to some aspect of but not all of the proposed modification) and rejecting the proposed modification in part. As used in this Section 11.3(b)(iv), "Review Termination Date" shall mean a date 60 days after (A) the date on which the Agencies notify Simpson that the proposed modification will not require a "permit amendment" or (B) the date identified pursuant to Section 11.3(b)(iii) as the anticipated date for the completion of the public comment period, unless, in the exercise of all due diligence, the Services could not complete their review by such date, in which case, the "Review Termination Date" will be the date on which the Services could have completed such review had they promptly begun such review upon receipt of Simpson's proposal and diligently pursued completion of such review at all times thereafter, provided, however, that in no event shall the Review Termination Date be later than 180 days after the dates described in subclauses (A) and (B) above. If the Services would otherwise reject all or part of a proposed modification hereunder, the Services shall first consult with Simpson and, where possible, shall suggest reasonable conditions or alterations to the proposal which if accepted by Simpson would permit the Services to approve the proposed modification. The Services may reject a proposed modification hereunder only if they include in the written notice to Simpson a finding 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. If the Services approve a proposed modification under this Section 11.3(b), such modification will become immediately effective and the Services will promptly make the necessary conforming changes, if any, in the ITP.

**11.4 Modifications to HCP Proposed by the Services.** Except as provided for in this Section 11.4, the Services may not require modifications to the HCP or further mitigation from Simpson, including without limitation, modifications or further mitigation to address Changed Circumstances or Unforeseen Circumstances.

(a) **Minor Modifications.** The Services may propose the following minor modifications to the HCP. Such modifications will be effective thirty (30) days after receipt of written notice thereof by Simpson. The Services will promptly make the necessary conforming changes, if any, in the ITP. Such minor modifications are limited to the following:

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

(ii) correction of any maps or exhibits to correct errors in mapping (including corrections to channel classifications) or to reflect previously approved changes in the HCP.

(b) **Modifications to Lift Suspension.** The Services may require additional mitigation pursuant to Section 12.1 as a condition to lifting a suspension of the ITP.

(c) **Unforeseen Circumstances.**

(i) If an Unforeseen Circumstance occurs, the Services may require Simpson to provide mitigation beyond that provided for in the HCP but only in accordance with and to the extent permitted by the "no surprises" regulations as such regulations are in effect on the date of this Agreement (see 50 C.F.R. §§ 17.22(b)(5), 17.32(b)(5), 222.22(g)), or as such regulations may be changed in the future pursuant to a Mandated Modification.

(ii) The Services shall have the burden of demonstrating, and where applicable, the burden of proving, that Unforeseen Circumstances actually exist and that, pursuant to Section 11.4(c)(i) hereof, the Services are entitled to seek additional mitigation from Simpson. The Services' findings of Unforeseen Circumstances must be clearly documented, based upon the best scientific and commercial data available, and based upon reliable technical information regarding the status and habitat requirements of the affected species.

(iii) Simpson shall be afforded an opportunity to present information concerning the Services' determination that Unforeseen Circumstances have occurred, to present information as to whether the Services are entitled to seek additional mitigation from Simpson under the terms of Section 11.4(c)(i) hereof, and to suggest alternative mitigation measures. Simpson will not, however, be required to conduct additional research, gather additional data or otherwise make any significant expenditure of funds to gather or analyze information in connection with this finding.

(iv) Simpson has no obligation to accept any proposed modification to the HCP made pursuant to Section 11.4(c) hereof but the failure to accept any such

proposed modification may constitute a basis for termination of this Agreement and the ITP as provided in Section 12.1 hereof.

## **12.0 SUSPENSION, REVOCATION AND TERMINATION OF PERMIT**

### **12.1 Services' Right to Suspend or Revoke.**

The Services may suspend or revoke the ITP for cause in accordance with the laws and regulations in force at the time of such suspension or revocation (see 50 C.F.R. §§ 13.27-13.29, 222.306(e); 15 C.F.R. Part 904). However, the Services may revoke the permit because of the need for additional mitigation from Simpson only if the Services determine that continuation of the Covered Activities would be likely to jeopardize the continued existence of the Covered Species and that the Services have not been successful in remedying the situation in a timely fashion through other means as provided herein in Sections 9 and 11 and in the no-surprises rule, 50 C.F.R. § 17.22(b)(5)-(6), 17.23(b)(5)-(6), 222.307(g)-(h), as in effect on the date of this Agreement. Any such suspension or revocation may apply to the entire ITP, or to specified Covered Species, portions of the Tree Farm, or Covered Activities.

**12.2 Simpson's Right to Terminate.** The ITP may be terminated in its entirety at any time by Simpson. At any time, Simpson 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 Covered Species. Except as otherwise provided in the HCP (as now in effect or as the same may be amended pursuant to Section 11.3 or 11.4 hereof), Simpson's termination of the ITP with respect to less than all of the Covered Species will not result in any change in Simpson's obligation to implement the HCP as and to the extent set forth in Section 4.1 of this Agreement.

### **12.3 Effect of Termination or Revocation.**

(a) Any revocation or termination of the ITP under Sections 12.1 or 12.2 (other than a termination or revocation limited to one or more species but less than all of the species then provided for in the ITP) automatically terminates the HCP and, subject to Sections 12.3(c) and (d) below, 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 partial termination or revocation pursuant to Sections 12.1 or 12.2 that is limited to one or more species but less than all of the species then provided for in the ITP shall apply only to the affected species and the ITP, HCP and this Agreement shall continue in full force and effect as to all other Covered Species.

(b) As analyzed in the HCP, and except as provided in Sections 12.3(c) and (d) below, the parties hereto acknowledge that Simpson's compliance with the HCP and this Agreement will result in Simpson having fully mitigated for any incidental take of any Covered Species (and for any incidental take that would have occurred had the Covered Species in question been listed under the ESA at all times since the date of this Agreement) simultaneously with or prior to the occurrence of such take. Therefore, and except as provided in Sections 12.3(c) and (d) below, if Simpson is in compliance with the terms of this Agreement, upon termination or revocation of the ITP, Simpson shall have no further obligations hereunder or under the ESA, the MTBA, or BGEPA with regard to Covered Activities that occurred during

the term of this Agreement. Without limiting the foregoing, at no time will Simpson be obligated to provide post-termination mitigation for the benefit of any of the species listed as Category C species on the attached Exhibit B.

(c) If the ITP is terminated or revoked at any time prior to the fiftieth anniversary of the date of this Agreement, Simpson agrees to provide the following post-termination mitigation until such fiftieth anniversary for the benefit of each of the species listed as a Category A or Category B species on the attached Exhibit B ("Category A" and "Category B Covered Species" respectively): (i) Simpson will refrain from harvesting any timber left in units operated during the term of the ITP where such timber was left in order to comply with prescriptions set forth in the Incorporated HCP Sections (e.g., timber left in riparian conservation reserves, wetland buffers, upland leave trees, trees left in mineral springs two acre no-harvest buffers); and (ii) Simpson will continue to apply the herbicide use restrictions developed for the band-tailed pigeon as described in Section 5.3.4 of the HCP to all operating units harvested during the term of the ITP.

(d) Certain additional post-termination mitigation may be required of Simpson for the benefit of Category A Covered Species if, prior to the applicable PTM Date, the Services revoke the ITP under Section 12.1 of this Agreement due to Simpson's failure to comply in any material respect with its obligations under this Agreement or Simpson elects to terminate the permit under Section 12.2 of this Agreement. If such a revocation or termination occurs, the Services may require Simpson to take additional actions to mitigate for the impacts of take to the Category A Covered Species that occurred during the term of the ITP if and to the extent that minimization and mitigation of the impacts of take to the maximum extent practicable was not adequately provided for prior to such revocation or termination.

(i) Additional mitigation which may be imposed in connection with any such revocation or termination shall not exceed an amount sufficient to ensure that the impacts of take of all threatened or endangered Category A Covered Species (and, to the extent permitted by applicable law, all other Category A Covered Species) that occurred during the term of ITP are mitigated and minimized as required by Section 10 of the ESA. If the Services elect to require any such post-termination mitigation, the Services shall bear the burden of proving the extent of the impacts of take that occurred, that the impacts of take that occurred had not been minimized and mitigated at the time of termination to the full extent required by Section 10 of the ESA, and that Simpson's performance of the additional mitigation requested by the Services would be necessary to satisfy such Section 10 requirements. In no event may the Services require post-termination mitigation in excess of the actions that would have been required of Simpson had Simpson not elected to terminate the permit. For purposes of establishing any post-termination mitigation under this Section 12.3(d)(i), to the extent permitted by applicable law, unlisted Category A Covered Species will be treated as though they were listed species in determining the amount of take, the amount of "minimizing and mitigating" that occurred prior to revocation or termination, and the amount of any post-termination mitigation which will be required.

(ii) Post-termination mitigation, if any, imposed under this Section 12.3(d) shall be determined separately for each Unit of the Tree Farm. The lands initially

included in the Tree Farm will constitute a single Unit (the "Initial Unit"). If, in accordance with the terms of this Agreement, lands are added to the Tree Farm after the date on which the ITP is first issued, such lands will constitute separate Units ("Subsequent Units"). All lands added to the Tree Farm at the same time will be included in the same "Subsequent Unit." In determining whether any post-termination mitigation will be required under this Section 12.3(d), the Services will analyze the effects of Simpson's Covered Activities on each Unit separately and will not impose post-termination mitigation obligations in respect of one Unit to mitigate for take which has occurred on another Unit.

(iii) As used herein "PTM Date" means, for any Unit, the earlier of (A) the first date on which all of the road inventory projects are completed or (B) the first date after the tenth anniversary of the Initiation Date on which the top 75% or more of the road inventory projects (as established in the priority ranking) are completed. As used herein, "Initiation Date" shall mean, for the Initial Unit, the date that the ITP is first issued and, for all Subsequent Units, the date on which such Units are first added to the Tree Farm. For the Initial Unit, road inventory projects include each road inventory project identified on the inventory list to be prepared pursuant to Section 5.2.4.1(c) of the HCP (including road inventory projects completed after the date the ITP is first issued and before the date on which such road inventory is completed) and the priority ranking will be established pursuant to Section 5.2.4.2(a) of the HCP. For each Subsequent Unit, the road inventory projects will include each road inventory project identified on the supplemental inventory list to be prepared pursuant to Sections 5.1 and 5.2.4.1(c) of the HCP (including road inventory projects completed in the Subsequent Unit after the applicable Initiation Date and before the date on which such supplemental road inventory is completed) and the priority ranking will be established pursuant to Sections 5.1 and 5.2.4.2(a) of the HCP. A road inventory project will be deemed "completed" when the identified repair or remediation work is completed to a level of workmanship comparable to that routinely performed for similar work in the timber industry.

(iv) At any time after the road inventory for any Unit has been completed, Simpson may provide written notice to the Services that in its judgment, the PTM Date for such Unit has occurred. Unless the Services object in writing within 60 days thereafter specifying in detail the reasons why in their judgment such PTM Date has not occurred, Simpson's determination will be conclusive and binding on all parties. If the Services do dispute Simpson's determination, the Services and Simpson will confer in good faith and pursue the informal dispute resolution mechanisms set forth in Section 13.3 of this Agreement in an effort to reach agreement. In any dispute, the Services shall bear the burden of proving that the PTM Date has not yet occurred.

**12.4 Procedure for Revocation.** If either Service provides notice of the proposed revocation of the ITP in accordance with the terms hereof, such Service shall comply with all procedural aspects of its applicable regulations and afford Simpson the procedural rights to objection and reconsideration set forth in the Services' regulations. These procedural rights shall be afforded prior to revocation without regard to any informal proceedings pursuant to Section 13.3 hereof.

### **13.0 REMEDIES, ENFORCEMENT, AND DISPUTE RESOLUTION**

**13.1 In general.** Except as set forth below, each party hereto shall have all remedies available to enforce the terms of this Agreement, the ITP and the HCP.

**13.2 Monetary Damages.** No party shall be liable in damages to any other party or other person for any breach of this Agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this Agreement or any other cause arising from this Agreement.

**13.3 Informal Dispute Resolution.** The parties recognize that disputes concerning the implementation of, compliance with, or termination of this Agreement, the HCP and the ITP may arise from time to time. The parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this Section or such other procedures upon which the parties may later agree. However, if at any time any party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolution. Unless the parties agree upon another dispute resolution process, or unless an aggrieved party has initiated administrative proceedings or suit in federal court, the parties may use the following process to attempt to resolve disputes:

(a) The aggrieved party will notify the other parties of the provision that may have been violated, the basis for contending that a violation has occurred, and the remedies it proposes to correct the alleged violation.

(b) The party alleged to be in violation will have 30 days or such other time as may be agreed, to respond. During this time it may seek clarification of the information provided in the initial notice. The aggrieved party will use its best efforts to provide any information then available to it that may be responsive to such inquiries.

(c) Within 30 days after such response was provided or was due, representatives of the parties having authority to resolve the dispute will meet and negotiate in good faith toward a solution satisfactory to all parties, or will establish a specific process and timetable to seek such a solution.

(d) If any issues cannot be resolved through such negotiations, the parties will consider nonbinding mediation and other alternative dispute resolution processes and, if a dispute resolution process is agreed upon, will make good efforts to resolve all remaining issues through that process.

## 14.0 FINDINGS

Based upon the best scientific and commercial data available, the Services make the following findings:

(a) the taking of any member of any Covered Species in accordance with the HCP and resulting from the Covered Activities will be incidental to the carrying out of otherwise lawful activities;

(b) assuming compliance with its obligations hereunder, Simpson will minimize and mitigate the impacts of the incidental taking of Covered Species to the maximum extent practicable;

(c) Simpson has ensured that adequate funding for the HCP will be provided;

(d) the taking of any Covered Species which may result from the Covered Activities will not appreciably reduce the likelihood of the survival and recovery of such species in the wild;

(e) the measures required by the Services as being necessary or appropriate for purposes of the HCP will be met;

(f) the Services have received the required assurances that the HCP will be implemented;

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

(h) for each Covered Species that is not a listed species, the HCP satisfies the permit issuance criteria under Section 10(a)(2)(B) of the ESA that would otherwise apply if such Covered Species were a listed species.

## 15.0 MISCELLANEOUS PROVISIONS

**15.1 No Partnership.** Neither this Agreement nor the HCP shall make or be deemed to make any party to this Agreement the agent for or the partner of any other party.

**15.2 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 10.3(b)(iii) hereof.

**15.3 No Third-Party Beneficiaries.** Without limiting the applicability of rights granted to the public pursuant to the ESA or other federal laws, 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.

**15.4 References to Regulations, Etc.** Except as expressly provided therein to the contrary, any reference in this Agreement or the HCP to any regulation or rule of any governmental entity including the Services, departments and subagencies thereof shall be deemed to be a reference to such regulation or rule as such regulation or rule exists at the time an action is taken.

**15.5 Relationship to the ESA and Other Authorities.** The terms of this Agreement shall be governed by applicable federal law and construed in a manner consistent with the ESA. Nothing in this Agreement is intended to limit or diminish the legal obligations of the Services as agencies of the federal government under the ESA or other applicable federal laws.

**15.6 Notices.** Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested an addressed as follows, or at such other address as any party may from time to time specify to the other parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. Notices shall be transmitted so that they are received within the specified deadlines.

Assistant Regional Director  
United States Fish and Wildlife Service  
911 N.E. 11<sup>th</sup> Ave.  
Portland, Oregon 97232-4181  
Telephone: 503-231-6159  
Telefax: 503-231-2019

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

Simpson Timber Company  
Attention: General Manager, Northwest Timber and Wood Products  
215 North Third  
Shelton, WA 98584-0460  
Telephone: 360-427-4729  
Telefax: 360-427-4709

With a copy to:

Simpson Timber Company  
Legal Department, Attention: General Counsel  
1301 Fifth Avenue, Suite 2800  
Seattle, WA 98101-2613

**15.7 Entire Agreement.** This Agreement, the ITP, and the Incorporated HCP Sections constitute the entire agreement among the parties. They supersede any and all other agreements, either oral or in writing, among the parties with respect to the subject matter hereof and contain 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 by anyone acting on behalf of any other party except as set forth in this Agreement, the ITP, and the Incorporated HCP Sections.

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

**15.9 Duplicate Originals.** 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 of the parties hereto.

**15.10 Successors and Assigns.** This Agreement and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignment or other transfer of the ITP shall be governed by the Services' regulations in force at the time of such assignment or transfer. (See 50 C.F.R. § 13.25(b)).

**15.11 Availability of Funds.** Implementation of the HCP and this Agreement by the Services shall be subject to 31 USC § 1341 and the availability of appropriated funds. The Services shall include in each of their annual budget requests sufficient funds to fulfill their respective obligations under this Agreement. Nothing in this Agreement, however, is intended to commit the United States Government to make any future appropriation of funds.

**15.12 Attorneys' Fees.** If any action at law or equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, each party to such litigation shall bear its own attorneys' fees and costs provided that attorneys' fees and costs may be recoverable against the United States as provided by applicable federal law.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement as of the 13th day of October, 2000.

By Rowan Gould  
Deputy Regional Director  
United States Fish and Wildlife Service  
Portland, Oregon

Date 10/12/00

By Joe Scorsini  
Deputy Regional Administrator  
National Marine Fisheries Service  
Seattle, Washington

Date 10/10/00

By Colin Moseley  
Colin Moseley, Chairman  
Simpson Timber Company

Date 10.X.00

**Exhibit A**  
**Map of Tree Farm and**  
**Outer Boundary for Automatic Land Inclusions**

Western Washington

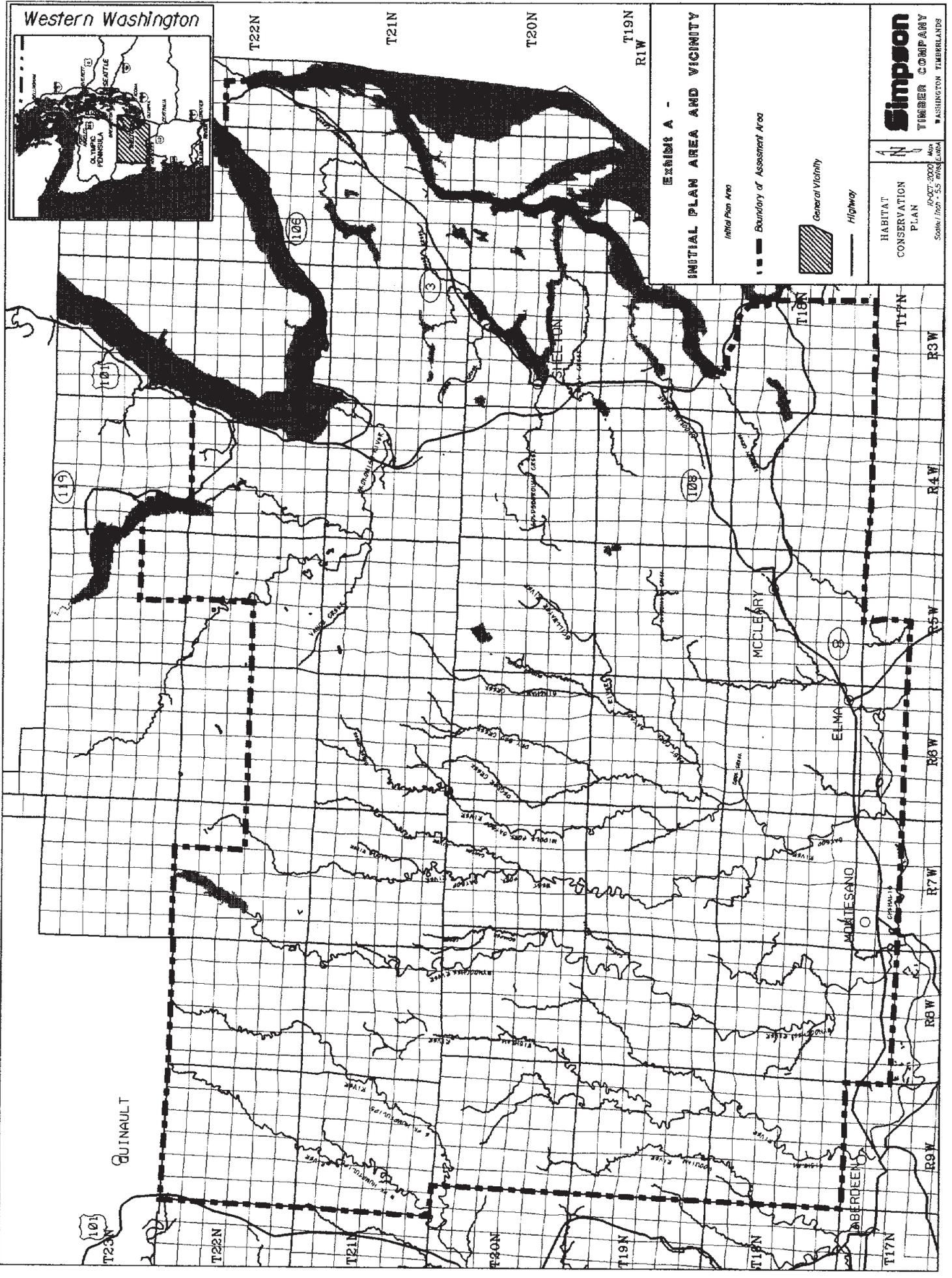
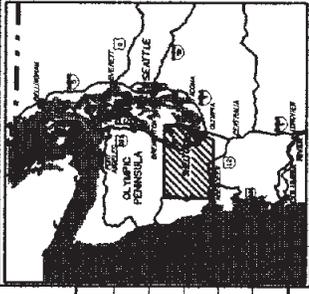


EXHIBIT A -  
INITIAL PLAN AREA AND VICINITY

Initial Plan Area

Boundary of Assessment Area

General Vicinity

Highway

HABITAT  
CONSERVATION  
PLAN

**Simpson**  
TIMBER COMPANY

WASHINGTON TIMBERLANDS

NOV. 2000  
Scale: 1 inch = 35 miles

**Exhibit B**  
**Covered Species List**

**Category A**

Torrent salamander  
Tailed frog  
Cope's giant salamander  
Western red-backed  
salamander  
Cutthroat trout  
Shorthead sculpin  
Van Dyke's salamander  
Coho salmon  
Chum salmon  
Riffle sculpin  
Coast Range sculpin  
Reticulate sculpin  
Speckled dace  
Brook lamprey  
Chinook salmon  
Steelhead trout  
Pink salmon  
Bull trout  
Dolly varden  
Torrent sculpin  
Longnose dace  
Pacific lamprey  
River lamprey  
Western Toad

**Category B**

Prickly sculpin  
Olympic mudminnow  
Threespine stickleback  
Northwestern salamander  
Long-toed salamander  
Red-legged frog  
Chestnut-back chickadee  
Western bluebird  
Purple martin  
Red-breasted sapsucker  
Tree swallow  
Violet-green swallow  
Hairy woodpecker  
Western screech owl  
Northern pigmy owl  
Northern saw-whet owl  
Northern flicker  
Pileated woodpecker  
Wood duck  
Common merganser  
Harlequin duck  
Band-tailed pigeon

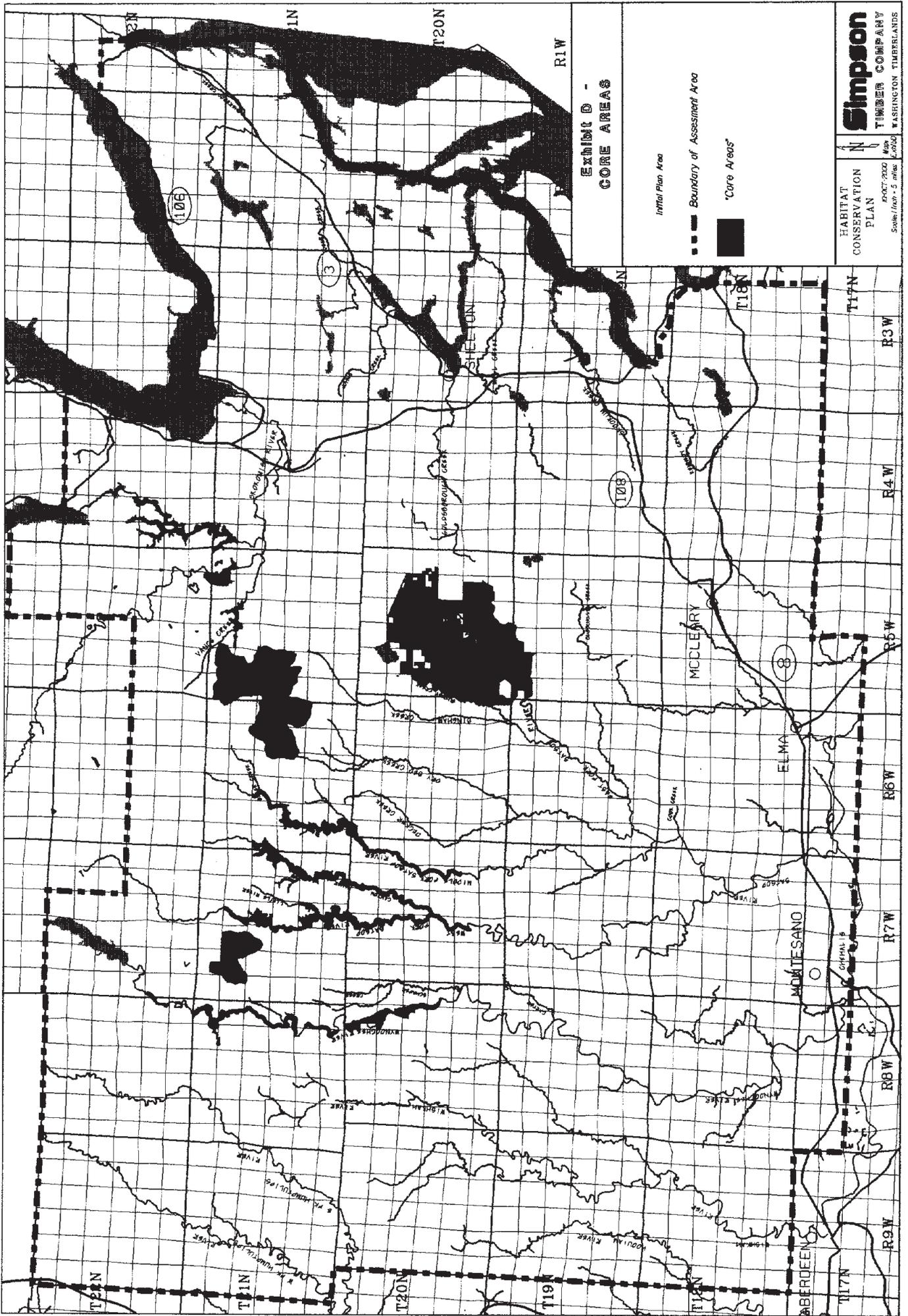
**Category C**

Marbled murrelet  
Bald eagle  
Roosevelt elk  
Downy woodpecker  
Black-capped chickadee

## **Exhibit C**

(Intentionally omitted)

**Exhibit D**  
**Map of Core Areas**



**EXHIBIT D -  
CORE AREAS**

Initial Plan Area

--- Boundary of Assessment Area

■ 'Core Areas'

HABITAT  
CONSERVATION  
PLAN

PROJECT: 2000  
Scale: 1 inch = 5 miles

**Simpson**  
TIMBER COMPANY  
WASHINGTON, TIMBERLANDS

T22N

T21N

T20N

T19N

T18N

T17N

T16N

R1W

R2W

R3W

R4W

R5W

R6W

R7W

R8W

R9W

106

3

108

8

