



Opportunities and Challenges for the State

The Headwaters Forest

Introduction

On March 1, 1999, the state and federal governments purchased the world's largest remaining stand of unprotected old-growth coastal redwoods, known as the Headwaters grove. The purchase was part of a larger agreement that included a 50-year conservation plan to govern logging operations on adjacent land owned by the Pacific Lumber Company. The conservation plan seeks to protect threatened and endangered species by restricting logging and requiring various mitigation measures.

LAO Findings

The agreements associated with the Headwaters purchase leave a number of significant issues unresolved. Resolution of these issues is critical to protecting the state's interests. For example, a plan for managing the Headwaters property has yet to be developed. Such a plan would address, among other issues, the level of public access to the property and how the forest and wildlife will be protected. It is unknown which federal and state agencies will be involved in developing the plan, how the plan will be developed, and when the plan will be completed. In addition, it is currently unknown how the conservation plan that protects habitat on PALCO's remaining property will be enforced. Enforcement activities will be critical for the success of the habitat conservation plan, which was a major element of the agreement.

LAO Recommendations

We recommend that the Legislature take several steps toward clarifying its intent as regards the management of the Headwaters property and the enforcement of the conservation plan on PALCO's remaining property. Specifically, we recommend that the Legislature:

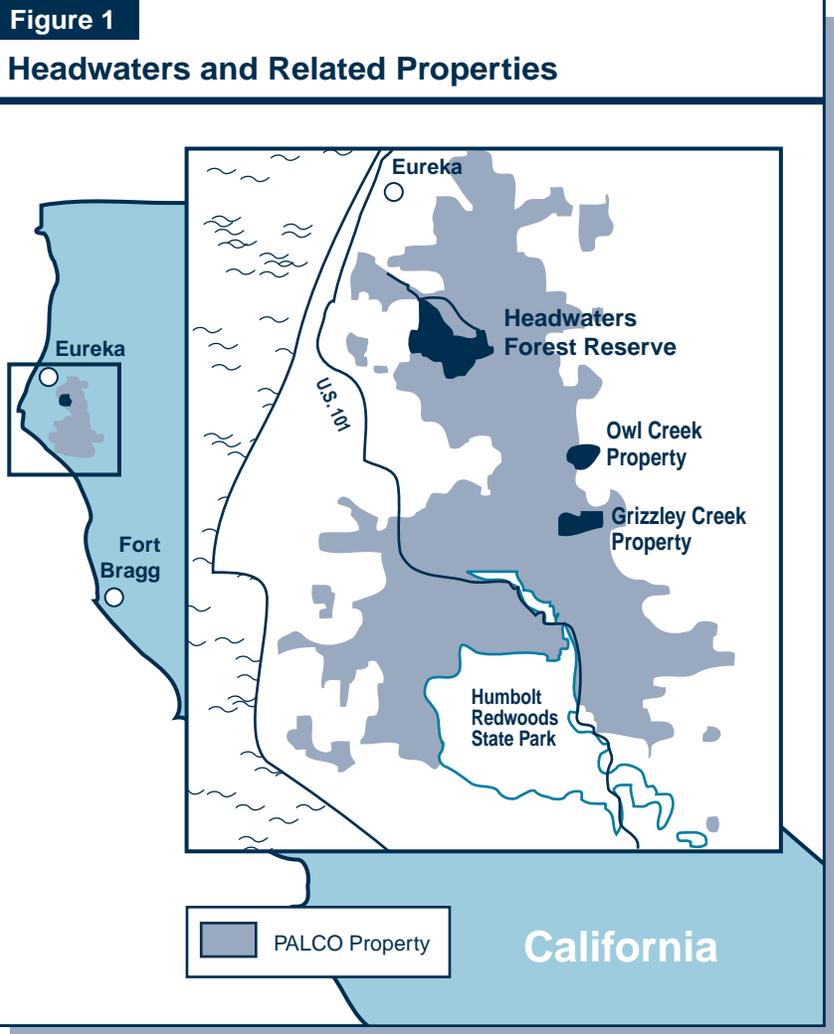
- ❖ Specify how the competing goals of habitat conservation and public recreation should be balanced in managing the Headwaters property.
- ❖ Support the creation of a group, composed of state and federal representatives, to oversee the management of the Headwaters property. This would help promote the state's interests.
- ❖ Specify the intended uses and restrictions for the two additional properties (Owl Creek and Grizzley Creek), which the state is currently negotiating to purchase from PALCO.
- ❖ Provide adequate resources for various enforcement and monitoring activities on PALCO's remaining property.



On March 1, 1999, the state and federal governments purchased the world's largest remaining stand of unprotected old-growth coastal redwoods, known as the Headwaters grove. Located in Humboldt County, the grove was owned by the Pacific Lumber Company and affiliated companies known collectively as PALCO (see Figure 1). The purchase was part of a larger agreement that included a 50-year conservation plan to govern logging operations on an adjacent 211,000 acres of PALCO's land. The conservation plan seeks to protect a number of threatened and endangered species by restricting logging operations and requiring various mitigation measures. As a result of the purchase and associated agreements, the state will need to develop mechanisms for enforcing the provisions of the conservation plan, ensuring good stewardship of the Headwaters forest, and proceeding with efforts to purchase additional properties in the region.

This report summarizes the major elements of the Headwaters purchase and associated agree-

ments, discusses the current status of the Headwaters property and the surrounding timberland that remains under private ownership, and identifies issues that warrant legislative consideration.



HISTORY OF THE HEADWATERS PURCHASE

THE HEADWATERS AGREEMENT

In September 1996, federal and state representatives signed an agreement with PALCO to pursue the public acquisition of the Headwaters forest. The agreement included two main components. First, it committed \$380 million in public money for the purchase of the 3,000-acre Headwaters grove and a 4,500-acre buffer of surrounding second-growth forest lands. (These combined properties make up the Headwaters Forest Reserve.) Second, the agreement stipulated that a mutually acceptable Habitat Conservation Plan (HCP) be developed and approved to allow limited logging on PALCO's remaining 211,000 acres. (The HCP and related documents are discussed more fully below.)

FEDERAL LEGISLATION

The U.S. Congress passed legislation (HR 2107) in October 1997, committing its share (\$250 million) of the \$380 million purchase price. The legislation imposed a number of conditions on the authorization, including California's contribution of the remainder of the purchase price (\$130 million), California's approval of a sustained yield plan for PALCO's remaining property (discussed below), and PALCO's withdrawal of certain legal actions (discussed below).

STATE LEGISLATION

The state appropriated \$130 million to purchase the Headwaters property in Chapter 615, Statutes of 1998 (AB 1986, Migden). The amount was provided contingent upon the final, approved HCP containing more stringent conditions than those

originally envisioned in the 1996 "Headwaters Agreement" and subsequent draft HCPs. In general, the more stringent state conditions included wider no-cut buffer zones along creeks and streams, prohibitions on logging activities within specified areas, and requirements for watershed analyses.

In addition, Chapter 615 dedicated another \$100 million toward the purchase of two additional pieces of property owned by PALCO. These properties would be purchased directly by the state, without any involvement by the federal government. Up to \$80 million of this money could be used to purchase the "Owl Creek" property, with the funds being available from July 1, 1999 until June 30, 2001. Up to \$20 million of the money could be used to purchase the "Grizzley Creek" property.

Finally, Chapter 615 committed \$12 million to Humboldt County for economic assistance. This money is supplemented by another \$10 million of economic assistance funds provided to the county by the federal government.

THE PURCHASE

After public hearings at the end of February 1999, the state Wildlife Conservation Board (WCB) authorized the release of the state's \$130 million after determining that the final, approved HCP met the conditions specified in Chapter 615. The Headwaters property was purchased on March 1.



The details of the purchase are somewhat complex, but essentially they involved the following three main elements:

- ◆ **Property Title.** Title for the property, and therefore ownership of the property, was transferred to the federal government. The property is now known as the Headwaters Forest Reserve, under the authority of the U.S. Bureau of Land Management (BLM).
- ◆ **Conservation Easement.** The federal government granted to the state a permanent conservation easement to the property. The easement limits all activities upon the Headwaters property to those that are

consistent with specified conservation goals. By holding this easement, the state is permitted access to the property in order to ensure that the federal government is abiding by those limitations.

- ◆ **PALCO Lawsuits.** In addition to receiving \$380 million, PALCO withdrew lawsuits that it had earlier filed against the state and federal governments. Those lawsuits had claimed that the governments' restrictions on its logging operations amounted to an unconstitutional "taking" of its property.

FEDERAL MANAGEMENT OF THE HEADWATERS RESERVE

CURRENT STATUS OF RESERVE

As the legal owner of the property, BLM, within the U.S. Department of the Interior, is the agency charged with direct responsibility for the Headwaters Forest Reserve. Since acquiring the property, BLM has made several modest improvements to facilitate public access. These included signage, a small gravel parking lot, and portable toilets. The public is currently able to enter the reserve on foot through a single entry point. No entry permits are required nor fees imposed.

Management of the property will be a federal responsibility, and all management costs are therefore expected to be borne by the federal

government. However, as discussed below, the state may have opportunities to influence the development of a management plan for the property.

STATE'S CONSERVATION EASEMENT

The conservation easement restricts activities on the Headwaters property to those which are consistent with specified goals: "to conserve and study the land, fish, wildlife and forests occurring on [the] land while providing public recreation opportunities and other management needs" These restrictions are described as "covenants, conditions, and restrictions" (CC&Rs). The ease-

ment does not elaborate on what specific activities might or might not conform to those CC&Rs.

The conservation easement provides the state with certain responsibilities and rights. Specifically, it permits the state to enter the Headwaters reserve at any time to inspect the property for possible violations of the CC&Rs. Further, the easement requires that the state provide to the federal government written notice of any suspected violations of the CC&Rs. If the federal government does not correct or begin to correct the violation within 90 days, the easement permits the state to file suit in federal court.

There is as yet no decision as to how the state might ensure that the conservation easement is observed. For example, no state department has been designated to monitor the conditions within the forest and enforce the easement.

MANAGEMENT PLAN

The federal government has convened a multiagency team of federal and state officials to develop an "interim management strategy" for the Headwaters reserve. The interim strategy will be a temporary set of guidelines for managing the reserve, as agreed to by certain federal and state agencies. The participating agencies include BLM, National Marine Fisheries Service (NMFS), U.S. Fish and Wildlife Service (USFWS), and the state Department of Fish and Game (DFG). The interim strategy will take the form of a Memorandum of Agreement (MOA) among those agencies, and is expected to be completed during the summer of 1999. Staff of the multiagency team do not expect the interim strategy to include significant changes

to the status quo on the reserve, preferring instead to avoid controversy and to expedite agreement on the MOA.

More detailed policies relating to public access, habitat preservation, forest management, law enforcement, and other activities concerning the Headwaters reserve will eventually be contained in a Headwaters "management plan." The management plan, mandated by the 1997 federal enabling legislation (HR 2107) is envisioned as a long-term set of regulations applying to the reserve. It will delineate the responsibilities of affected federal and state agencies, and will specify what human activities will be permitted in the reserve, during what times, and at what locations. Issues to be considered in the development of the management plan are partly described in the federal enabling legislation. For example, the plan must address scientific research, recreational opportunities, access, construction of facilities, and operating budgets.

The management plan will be subject to formal review procedures, including public hearings, pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). It will also be submitted to the U.S. Congress for review at least 90 days before becoming effective.

The U.S. Department of the Interior is the lead agency for developing both the interim management strategy and the management plan. However, the federal enabling statute (HR 2107) also allows the Secretary of the Interior the option of establishing a five-member "Headwaters Forest



Management Trust,” with three trustees appointed by the President of the United States and two appointed by the Governor of California. If created, the trust would serve as the management authority for the reserve. As part of this authority, the trust would develop and, as necessary, amend the management plan. At the time this analysis was prepared, it was unclear whether a management trust would be created.

It is expected that work on the management plan will not begin until the interim strategy is completed, probably during the summer of 1999. Completing a draft management plan will prob-

ably require at least a year, and the NEPA and CEQA review processes could take another year or more, depending on the level of controversy generated by the plan.

It is currently unclear what degree of input and authority the state will have in the development of the interim management strategy and the management plan. Both of these documents could be critical for enforcing the state’s conservation easement. If a management trust were to be established, the state would likely have a greater voice in the management of the reserve.

MANAGEMENT OF THE RESERVE— AREAS OF POTENTIAL CONTROVERSY

Developing a management plan for the Headwaters Forest Reserve could encounter potential areas of conflict between state and federal priorities for the property. Three issues in particular could be a source of some controversy: balancing public recreation and habitat conservation, forest management practices, and past logging activity.

BALANCING PUBLIC RECREATION AND HABITAT CONSERVATION

The conservation easement, the federal enabling legislation, and other related documents ascribe two major objectives to public ownership of the Headwaters property: (1) conserving species and habitat and (2) affording public recreation opportunities. While these two goals can complement one another, there is also poten-

tial for conflict between them. In particular, certain types and levels of public recreation can injure or degrade species and habitat. For example, hiking can compact soil, thereby restricting air and nutrients to tree roots. Food and debris from visitors can attract predators that attack endangered species. More intensive uses, such as bringing along dogs or riding mountain bicycles, can have a greater detrimental effect. All of these uses, as well as horse riding and all-terrain vehicle (ATV) use, have been proposed for the Headwaters reserve by citizens contacting BLM.

In order to effectively monitor and enforce its conservation easement, the two overarching objectives of public recreation and conservation will need to be reconciled. At the time this report

was prepared, BLM had established one public entry point at the northern end of the reserve, and was preparing to establish a second entry point in the south. Temporary rules announced in late March 1999 prohibit horses and motor vehicles in the reserve. In the longer run, the use of mountain bicycles and other equipment will need to be addressed, as will consideration of plans for trails, signage, and other facilities.

FOREST MANAGEMENT PRACTICES

A management plan for the Headwaters reserve will have to address not only use of the forest by people, but also policies and practices related to the protection of the forest against natural threats (such as wildfire and disease). For example, to what extent should wildfires be permitted to burn, thus creating diverse habitat and preventing the continuous buildup of flammable materials? How should a potential fire in the Headwaters reserve be prevented from threatening adjoining private timberland?

Federal and state agencies have in the past differed in their approaches to forest management. It is currently unclear what specific policies will prevail in the Headwaters reserve.

PAST LOGGING ACTIVITY

Although the Headwaters forest is typically described as an “unentered” old-growth grove, PALCO did cut a swath of trees out of the middle of the forest in the 1980s. It was this activity, which created a wide logging road in preparation for further logging operations in the Headwaters forest, that helped to galvanize support for governmental protection of the property.

It is as yet unclear what BLM intends to do with this road. Some groups support replanting it with new redwood trees or otherwise abating the road. Others see the road as part of a potentially longer hiking trail, or as a suitable clearing in which visitors might stand to view the surrounding old-growth trees.

STATUS OF PALCO'S REMAINING PROPERTY

After selling the Headwaters property, PALCO retains 211,000 acres of timberland in Humboldt County. While the land is privately owned, use of the land is restricted by various state and federal laws, as well as by documents signed as part of the Headwaters deal. The major provisions of these documents are listed in Figure 2 (see page 8) and described in more detail below.

HABITAT CONSERVATION PLAN AND INCIDENTAL TAKE PERMITS

As noted above, a major focus of the negotiations to purchase the Headwaters forest centered on the development and approval of an HCP for PALCO's remaining land. The federal Endangered Species Act sets out various requirements for the protection of animal and fish species that are



Figure 2

**Headwaters Forest Purchase
Key Provisions of Agreements Covering PALCO's Property**

Document	Issued By	Key Provisions
Habitat Conservation Plan (HCP)	USFWS	<ul style="list-style-type: none"> • Identifies how PALCO will protect threatened and endangered species on its property. • Prohibits logging in 12 identified Marbled Murrelet Conservation Areas (approximately 8,000 acres). • Prohibits logging within specified distances from creeks and streams. • Requires a watershed analysis.
Federal Incidental Take Permit	USFWS and NMFS	<ul style="list-style-type: none"> • Allows incidental take of federally listed species. • Based on HCP.
State Incidental Take Permit	DFG	<ul style="list-style-type: none"> • Allows incidental take of state-listed species. • Based on HCP.
Sustained Yield Plan (SYP)	CDFFP	<ul style="list-style-type: none"> • Establishes maximum logging rates for the next 100 years. • Sets specific logging rates for rolling ten-year period.
Timber Harvesting Plan	CDFFP	<ul style="list-style-type: none"> • Allows logging in specified areas, subject to certain conditions. • Based on SYP.
Implementation Agreement	Federal and state governments and PALCO	<ul style="list-style-type: none"> • Prescribes how HCP and other documents are to be implemented. • Describes remedies and recourse if any party should fail to perform obligations.
Enforcement Agreement	State government and PALCO	<ul style="list-style-type: none"> • Incorporates relevant provisions of Chapter 615 and HCP. • Ensures continuation of habitat conservation measures even if HCP is no longer in effect.

USFWS: U.S. Fish and Wildlife Service
 NMFS: National Marine Fisheries Service
 DFG: Department of Fish and Game
 CDFFP: California Department of Forestry and Fire Protection

deemed to be threatened or endangered. An HCP is designed to specify how a landowner will ensure the protection of threatened or endangered species

on the landowner's property. The USFWS is responsible for reviewing and approving HCPs.

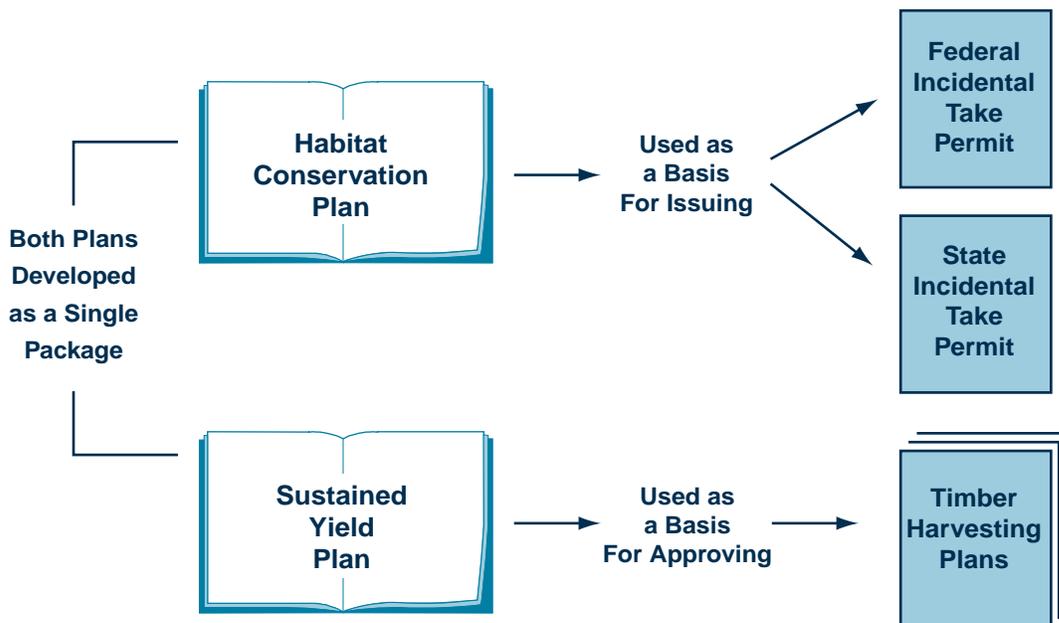
Many land uses, such as logging, can result in the unintentional killing or harming of endangered species, including the destruction of their habitat. Such "incidental take" requires an Incidental Take Permit (ITP), issued by USFWS and NMFS. Issuance of ITPs is based on the existence of an approved HCP, as shown in Figure 3. In essence, the landowner is permitted to incidentally "take" individual animals that are listed as endangered because that landowner has agreed to implement mitigating and compensating measures (through the HCP) that will ensure the long-term survival of the species' population on the property.

In addition to the federal Endangered Species Act, the California Endangered Species Act imposes its own requirements for the protection of certain species. A state ITP (issued by DFG) is therefore required for the incidental take of state-listed species. Many, but not all, of the species appearing on the federal list also appear on the state's list, and vice versa.

In the case of PALCO's land, the HCP includes mitigation measures for protecting the northern spotted owl, marbled murrelet (a small seabird) and coho salmon, among other species. (Figure 4 lists all of the species protected by the HCP.) The

Figure 3

Relationship Among Selected Documents Governing PALCO's Property





HCP prohibits logging for 50 years in a dozen specified “Marbled Murrelet Conservation Areas” (MMCA), totaling about 8,000 acres, in order to ensure adequate nesting areas for the birds. The HCP also prohibits logging within specified distances of most streams and creeks, thus helping to protect trees that can provide shade for the salmon and reduce erosion and silting of streams. The HCP includes a number of other, smaller restrictions on activities on the property.

Overall, the HCP’s restrictions go significantly beyond restrictions contained in state law for typical logging operations. As indicated earlier, these more stringent restrictions included wider no-cut buffer zones along creeks and streams, prohibitions on logging activities within specified areas, and requirements for watershed analyses. These enhanced restrictions respond in part to the importance of rare habitat to certain threatened and endangered species. PALCO’s consent to these enhanced restrictions was secured as part of its acceptance of the larger Headwaters package, which included the \$380 million payment.

Monitoring and enforcement of the HCP on PALCO’s property is critical to its success. While the federal government is directly responsible for ensuring compliance with the HCP, monitoring

and enforcement duties can be delegated to other parties, such as the state. Much enforcement activity can be directed through the review, issuance, and monitoring of individual timber harvesting plans (THPs), as discussed below.

SUSTAINED YIELD PLAN

Sustained yield plans (SYPs) are issued by the California Department of Forestry and Fire Protection (CDFFP). The plans establish the maximum timber harvest levels that will permit sustained production over a 100-year period. An SYP also must allow for the protection of wildlife and watersheds. In the case of the Headwaters negotiations, PALCO submitted its HCP and SYP as a single package, as shown in Figure 3. This helped to reduce the potential for conflict between the two plans. At the same time, the integration of the two plans will call for enhanced cooperation between federal and state authorities in enforcement activities.

Figure 4

Habitat Conservation Plan List of Protected Species

- | | |
|--|--|
| <ul style="list-style-type: none"> • Pacific fisher • Bald eagle • Peregrine falcon • Marbled murrelet • Northern spotted owl • Southern torrent salamander • Tailed frog • Northern red-legged frog | <ul style="list-style-type: none"> • Foothill yellow-legged frog • Northwestern pond turtle • California red tree vole • Western snowy plover • Bank swallow • Coho salmon • Chinook salmon • Steelhead trout • Cutthroat trout |
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How Much Timber Can Be Harvested Under the SYP? During the final days of negotiations on the Headwaters purchase, some controversy arose over how much timber PALCO would be able to cut annually under the HCP and SYP. The CDFFP's initial estimate was 138 million board-feet annually. PALCO at first rejected the agreement, citing its need to harvest closer to 200 million board-feet annually. However, in two last-minute "clarifying letters" to PALCO, USFWS estimated that the agreement would in fact allow about 180 million board-feet to be cut annually. The USFWS based this higher figure on a belief that CDFFP had "misidentified" some of PALCO's land as not suitable for logging under the HCP. The state's DFG generally concurred with the federal government's estimate.

While the federal government's letters are not legally binding, PALCO made it clear that it was those letters that convinced the company ultimately to sign the agreement. However, the SYP and HCP, both of which were approved shortly before the Headwaters purchase was completed, will permit logging in the areas in question only if planned analyses of watersheds, soils, and other factors, as well as more accurate mapping efforts, confirm the assumptions made in the clarifying letters. Those analyses are to be completed within five years, and are to be conducted by interdisciplinary teams with representatives from PALCO and the federal and state governments. While the state will participate in the watershed analysis process, it is unclear how and by whom the analyses will be approved or certified.

There is therefore some uncertainty as to what PALCO's total annual timber harvest could be under the HCP, and resolving this issue is partly beyond the state's control. At the same time, it should be noted that the state retains a role in monitoring PALCO's implementation of the SYP, through CDFFP's review of THPs.

Lawsuit Challenging State Approval of SYP. The SYP faces an additional complication: the Sierra Club and the Environmental Protection Information Center (in Garberville, California) filed a lawsuit in late March 1999 challenging the state's decision to approve PALCO's SYP. The suit, filed in Sacramento County Superior Court, claims that CDFFP overstepped its authority in approving the SYP. The suit argues that provisions of the SYP are in violation of the state's Endangered Species Act and state forestry laws. At this time it is unknown how this suit will affect the review and approval of THPs, discussed below.

TIMBER HARVESTING PLANS

With rare exceptions, any commercial logging activity on nonfederal timberland requires the approval of a THP by CDFFP. PALCO is required to submit a plan for each proposed timber harvest on its land. Although the HCP/SYP has already addressed many of the associated conservation questions considered by CDFFP in approving THPs, each proposed timber harvest still requires the submittal and approval of a separate THP.

The CDFFP reports that PALCO intends to significantly increase the number of THPs it submits (from about 60 to about 90 plans annually). If this



in fact happens, the task of reviewing THPs will increase the department’s workload. In addition, CDFFP advises that the extent and complexity of the provisions contained in the SYP and HCP will further complicate THP review.

IMPLEMENTATION AGREEMENT

Whereas the HCP and SYP impose various restrictions on logging practices and call for various mitigation measures, it is the Implementation Agreement (IA)—jointly agreed upon by the federal and state governments and PALCO—that prescribes how the HCP is to be implemented, and describes remedies and recourse if any party fails to perform its obligations (as specified in the HCP and elsewhere). Among other provisions, the IA requires that PALCO post \$2 million security to DFG for carrying out its ongoing obligations under the HCP, permit inspection of its property and monitoring by government agencies and independent third parties for the life of the HCP (50 years), submit annual reports of its activities on the land covered by the HCP, and provide assurances of its compliance with the agreement. The IA also provides assurances to PALCO of the governments’ compliance with the agreement (relating to such activities as issuing ITPs and accepting specified mitigation measures), and sets out procedures for resolving disputes.

ENFORCEMENT AGREEMENT

What If the HCP Were No Longer in Effect? In negotiating the Headwaters purchase, the state sought assurances that the various conservation provisions of Chapter 615 would be observed. As discussed above, those provisions were incorpo-

rated into the HCP. However, it is possible (though not currently anticipated) that PALCO at some future point could choose to “relinquish” its ITPs. Relinquishing the ITPs would terminate PALCO’s right to engage in activities, such as logging, that involve incidental take. It would also effectively end PALCO’s obligations to undertake any *new* mitigation measures under the HCP. In such an event, the IA would still require PALCO to *complete* its required mitigation efforts for the take that had already occurred. With this exception, the HCP would otherwise no longer be in effect, and PALCO would have to obtain approval for any further THPs on a “no take” basis. This is a difficult standard to meet, and would probably result in PALCO being unable to log as much timber as it otherwise would under the HCP.

Potential Solution—the Enforcement Agreement. To guard against the loss of the habitat conservation and restoration guarantees provided in the HCP, the state entered into a separate “Agreement Relating To Enforcement of AB 1986 [i.e., Chapter 615]” with PALCO. This Enforcement Agreement incorporates the relevant provisions of Chapter 615, such as the no-cut buffer zone requirements and the 50-year protection of the MMCAs, as well as monitoring and enforcement provisions included in the HCP.

The Enforcement Agreement provisions are in effect regardless of whether the HCP remains in effect. In other words, PALCO must abide by the provisions of the Enforcement Agreement irrespective of the status of the HCP. In principle, the Enforcement Agreement should not add any

requirements beyond what is contained in the HCP. However, since the Enforcement Agreement is an agreement between the state and PALCO, it

may provide the state with an opportunity to enforce the conservation provisions independent of federal enforcement of the HCP.

ADDITIONAL STATE PURCHASES

As noted earlier, Chapter 615 appropriates up to \$100 million for the state's purchase of two additional tracts of PALCO-owned land. Up to \$80 million is available to the WCB for the purchase of PALCO's Owl Creek property at fair market value. Chapter 615 also requires WCB to undertake an appraisal of the property, and to make a good faith offer on the property to PALCO by July 1, 2000. The Owl Creek property covers about 1,200 acres, and is located approximately ten miles southeast of the Headwaters reserve (see Figure 1). The property is covered largely by old-growth and second-growth redwoods. The HCP designates the Owl Creek property as an MMCA, and thus the property is protected from logging and other activities for 50 years, even if the state does *not* end up purchasing the property.

Up to \$20 million is available to WCB for the purchase of PALCO's Grizzly Creek tract. The property, which covers about 1,400 acres, adjoins the existing Grizzly Creek Redwoods State Park (see Figure 1). The property includes old-growth and second-growth redwoods, as well as some clear-cut sections of land. Although Chapter 615 does not require WCB to make any offer to PALCO for this tract, it does specify that any such

purchase be at fair market value. Further, as part of the Headwaters negotiations, the state committed to pursue purchase of the property.

The Enforcement Agreement prohibits timber harvesting on any portion of the Grizzly Creek tract for five years in order to provide an opportunity for the state's possible purchase of the land. If the property is not purchased by that time, the land would either (1) be designated as an MMCA, thus extending the prohibition on logging the property for the remainder of the HCP's 50-year life, or (2) be opened to logging under the remaining terms of the HCP. The USFWS and DFG would select one of these options based on their determination of whether the incidental take of marbled murrelet due to logging the property would be inconsistent with the federal and/or state Endangered Species Acts. If either agency determined that incidental take would be inconsistent with those acts, then the Grizzly Creek tract would be designated an MMCA, and PALCO would be prohibited from logging the property (even though it would continue to own the property) for 50 years.

Payment methods and other procedures for the potential purchases of both the Owl Creek and Grizzly Creek properties are outlined in "pur-



chase agreements” signed along with the other Headwaters documents. Among other points, they specify that the state’s purchase price for the two properties should be based on appraisals that

consider the value of the timber. In other words, actual or potential MMCA designations may not affect the estimated appraisal value.

ISSUES FOR LEGISLATIVE CONSIDERATION

The purchase of the Headwaters forest and the signing of the associated agreements mark not the end of the Headwaters story, but the beginning of a new chapter in that story. The challenge for the state now is to ensure that the purchase and agreements are implemented in a way that protects and furthers the interests of the state. To this end, there are a number of important policy issues which the Legislature should consider. The policy questions include the following.

HEADWATERS FOREST RESERVE

How can the state make the best use of its conservation easement for the Headwaters reserve? Because the federal government owns the Headwaters reserve, the state’s only legal interest in the property, toward which the state paid \$130 million, is the conservation easement. The state should protect this substantial investment.

Since the easement is written in broad, general language, it does not delineate which specific types of activities should be permitted on the Headwaters property. As mentioned earlier, a wide range of activities (hiking, mountain biking, horseback riding, ATV use) have been proposed for this property by various individuals and groups. The Legislature should consider clarifying

which specific uses and activities it considers to be consistent with the state’s easement, thus assisting state agencies responsible for enforcement of the easement. Such clarification could also be helpful to federal authorities in their development of enforcement and other policies for the Headwaters reserve. Further, the Legislature should consider providing direction to the Resources Agency to designate state agencies to monitor and enforce the state’s easement.

How should the state participate in the development of a management plan for the Headwaters reserve? The management plan will determine the level of public access that will be permitted, specify how the forest and wildlife will be protected, and address other critical issues related to the use and management of the property. To the extent that the management plan is developed to be consistent with the CC&Rs contained in the state’s conservation easement, compliance with the CC&Rs will be promoted and the need for the state to make use of the easement’s legal remedies will be reduced.

The state should therefore clearly and purposefully convey to the federal government its views of what should be contained in the management

plan. In order to help secure a formal voice for the state in the development of the management plan and ongoing management of the property, the Legislature should ask the Governor to request that the Secretary of the Interior create the Headwaters Forest Management Trust. This trust, which is an option under federal law, consists of five members, two of which are appointed by the Governor. If the trust is not created, the state should seek to participate in the development of the management plan through other channels, such as a multiagency plan development team. If the state is unsuccessful in attaining a management plan that reflects the state's interests in the Headwaters property, the Legislature may wish to explore other options for protecting those interests, such as invoking the Enforcement Agreement.

How should public recreation be balanced against protection of endangered species and their habitat in the Headwaters reserve? While both objectives have been expressed by the federal and state governments in the Headwaters negotiations, there is potential for conflict between the two objectives. Because of their impact on the environment, some forms of recreation are less likely to be compatible with the conservation goals of the Headwaters reserve. The Legislature should provide to state representatives working on the management plan guidance on its views as to which types of public recreation are compatible with the conservation goals of the Headwaters reserve.

ENFORCEMENT OF HCP

How can the state be assured that the HCP covering PALCO's remaining property will be enforced? An important component of the Head-

waters agreement is the protection of habitat on PALCO's remaining property. However, PALCO and some of its affiliated companies have in recent years committed hundreds of violations of environmental laws, and have had their logging licenses suspended. The protections provided in Headwaters-related documents such as the HCP require enforcement in order to be effective.

Although the HCP is a federal document, there are several ways in which the state can help to ensure that its provisions are observed. For example, as noted earlier, the state's review and approval of THPs provide opportunities to evaluate and respond to possible problems with HCP enforcement. In addition, the Enforcement Agreement, signed between PALCO and the state includes relevant conservation provisions from the HCP. If the federal government's enforcement of the HCP does not meet the state's expectations, or if the HCP itself is suspended or otherwise weakened, the Enforcement Agreement would still provide the state with a means for enforcing the conservation provisions of Chapter 615. The Legislature should request Legislative Counsel to issue an opinion explaining the specific remedies afforded by the Enforcement Agreement, among other sources, in the event that federal enforcement of the HCP is not consistent with state objectives. Further, the Legislature should direct the Secretary for Resources to discuss the agency's plans for responding to such a situation, should it arise.

What funding levels are justified for state agencies involved with THP review? The CDFFP and other state agencies have suggested that



PALCO will be submitting THPs at an accelerated rate, and that the review of THPs may be relatively labor-intensive in order to ensure that they comply with conditions of the HCP and SYP. Since the state's review of THPs is critical for ensuring that logging operations are consistent with the conservation objectives contained in the HCP, Chapter 615, and other documents, it is important that state agencies dedicate the necessary resources for conducting those reviews.

The Legislature should direct CDFFP to provide information identifying the likely workload increases resulting from Headwaters-related THP reviews, and its plans for handling any additional workload. Similarly, other agencies involved with THP reviews or other enforcement activities, such as watershed analysis and species preservation, should provide information on their anticipated workloads arising from the Headwaters agreement.

What role should the state play in developing and certifying the watershed analysis called for in the HCP? As indicated earlier, representatives from PALCO and the federal and state governments will conduct a watershed analysis to clarify what types and levels of logging activity, if any, are permissible in certain areas of PALCO's property. It is unclear how potential conflicts between the state and federal governments and/or PALCO in the certification of this analysis will be addressed. The Legislature should direct DFG to report on how it plans to resolve such conflicts. The Legislature should also direct DFG to report periodically on its progress in completing the watershed analysis.

PURCHASE OR TRANSFER OF ADDITIONAL PROPERTIES

How would state interests be served by the possible purchase of the Owl Creek and Grizzly Creek properties? As directed in Chapter 615, WCB is currently negotiating with PALCO toward purchase of these two properties. The Legislature should direct WCB to report on its progress, including information on the appraised value of the properties. In anticipation of a possible purchase by the state, the Legislature should consider how those properties might best be utilized toward the purposes envisioned in Chapter 615. For instance, should the Grizzly Creek property be part of a state park for public use? Might it more appropriately be established as protected habitat for species preservation?

It is important to note that habitat on the Owl Creek property is protected as an MMCA for 50 years, whether or not the state is successful in purchasing the property. As regards the Grizzly Creek property, it *may* be designated an MMCA, depending on the outcome of the review conducted by the multiagency team, discussed earlier. In other words, to the extent that the state is seeking ownership of the two properties for the purpose of protecting habitat, that goal *might* be accomplished even *without* a successful state purchase.

Should the state pursue the acquisition of any of the MMCAs on PALCO's property (in addition to Owl Creek and Grizzly Creek), if PALCO is willing to donate them? There have been some indications that PALCO may wish to donate some of its properties that are designated as MMCAs.

This is because the company is effectively prohibited from logging those areas for 50 years, and the company might benefit from possible tax reductions by donating those properties. The Legislature should consider whether acquisition of these stands surrounded by privately owned land would be in the state's best interest. In resolving this question, the Legislature must balance any maintenance costs, increased liability, and tax losses due to owning the property against the possible benefits of public ownership. One such benefit from acquisition is that it ensures public control of the property beyond the expiration of the 50-year MMCA designation. In addition, the Legislature may wish to consider whether it would, alternatively, be appropriate for the MMCAs to be transferred to private, nonprofit conservation groups.

FUTURE CONSERVATION EFFORTS

Should the Headwaters purchase serve as a model for future state efforts to conserve habitat and acquire land? The negotiations and purchase of the Headwaters property were complex and time-consuming. Yet they also resulted in innovative agreements and partnerships. The experience of the Headwaters negotiations may provide valuable lessons for future conservation efforts.

Three elements in particular of the Headwaters agreements could offer important insights. First, the federal-state partnership permitted the leveraging of funds sufficient to make a large purchase that might not have been affordable to either one of the governments acting alone. However, the federal government's holding of title to the property raises challenges for the state in ensuring that

its interest in the property is protected. Mechanisms such as the Enforcement Agreement and, potentially, the Management Trust may provide ways for the state's interest to be protected.

Second, the use of HCPs is still a relatively rare method for addressing potential impacts of logging on natural habitat and protected species. The HCP affords potential advantages by facilitating a detailed and cohesive plan for protecting threatened and endangered species, while allowing the incidental take of certain species. At the same time, the HCP is only as effective as the enforcement efforts connected with it.

Third, the Headwaters negotiations ultimately deferred resolution of certain issues until a later time. For example, determining the level of logging that PALCO would be permitted under the HCP and SYP will in part await a watershed analysis over the next five years. Similarly, deciding the final status of the Owl Creek and Grizzley Creek tracts must await appraisals, purchase negotiations, and, in the case of Grizzley Creek, a potential evaluation for an MMCA designation. While deferring these issues facilitated completion of the purchase agreement, they will remain unresolved for approximately five years.

The Legislature should monitor and evaluate the effectiveness of these three features of the Headwaters agreement. It then should consider whether any of the features might be applicable to future land conservation efforts.





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