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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES COUNCIL,
KLAMATH SISKIYOU WILDLANDS CENTER,
CASCADIA WILDLANDS PROJECT, SISKIYOU
REGIONAL EDUCATION PROJECT,
HEADWATERS, AND FRIENDS OF LIVING
OREGON WATERS,

Plaintiffs,

v.

DAVID B. ALLEN, in his official capacity as
Regional Director for United States Fish and Wildlife
Service's Pacific Region, and UNITED STATES
FISH AND WILDLIFE SERVICE,

Defendants.

Civ. No.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks review of the U.S. Fish and Wildlife Service (“FWS”) Biological Opinion on the fiscal years 2002-2003 timber sale program for the Medford, Oregon Bureau of Land Management (“BLM”) District and the Rogue River and Siskiyou National Forests (the “Biological Opinion”). The Biological Opinion concludes that the timber sale program, projected to impact 64,006 acres of federal land, is not likely to jeopardize the existence of the northern spotted owl (*Strix occidentalis caurina*) and is not likely to destroy or adversely modify designated critical habitat for the spotted owl. This action challenges the Biological Opinion because it fails to adequately assess the impacts of the timber sale programs on designated critical habitat; it misses key impacts on threatened spotted owls; it runs counter to evidence available to the agency; the incidental take statement issued with the Biological Opinion fails to adequately quantify the taking of spotted owls; and it authorizes the Forest Service and BLM to proceed with timber sales that are likely to jeopardize threatened spotted owls and result in destruction and adverse modification of the species’ designated critical habitat within the meaning of the Endangered Species Act section 7(a)(2).

2. For these reasons, this action seeks a declaration that the Biological Opinion is arbitrary, capricious, and contrary to the consultation requirements of the Endangered Species Act section 7(a)(2), 16 U.S.C. § 1536(a)(2) (“ESA”), in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (“APA”). This action also seeks an injunction directing FWS to withdraw the Biological Opinion, rescind its accompanying incidental take permit, and reinstate consultation in accordance with the ESA and APA.

JURISDICTION AND VENUE

3. This action is brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

4. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the claim occurred here. Defendant

FWS has its field office, which developed and issued the challenged Biological Opinion, in this district. Some of the plaintiff organizations and their members also reside in this district.

PARTIES

5. Plaintiffs in this action are:

A. Oregon Natural Resources Council (“ONRC”), a non-profit corporation headquartered in Portland, Oregon. ONRC has approximately 7,000 members throughout the state and Pacific Northwest. ONRC is dedicated to defending and conserving Oregon’s wild lands, wildlife, and waters – including the state’s remaining old growth and roadless areas – and restoring Oregon’s forest ecosystems to a naturally-functioning state with a full complement of native species. ONRC advocates throughout Oregon, including on BLM lands and in the Rogue River and Siskiyou National Forests. ONRC brings this action on its own behalf and on behalf of its members, many of whom regularly enjoy and will continue to enjoy educational, recreational, and scientific activities, including hiking, camping, and observing wildlife in northern spotted owl habitat.

B. Klamath Siskiyou Wildlands Center (“K-S Wild”), a non-profit conservation organization based in Williams, Oregon. K-S Wild’s organizational mission is to conserve the globally outstanding biological diversity of the Klamath-Siskiyou region in southern Oregon and northern California. To this end, K-S Wild seeks to ensure the preservation and recovery of threatened and endangered species, including the northern spotted owl, and their associated habitat.

C. Cascadia Wildlands Project (“Cascadia”), a project of the League of Wilderness Defenders, a non-profit organization. Cascadia is headquartered in Eugene, Oregon, and has members across the country. Cascadia’s mission is to defend the forests, waters, and wildlife of the Cascadia bioregion, which includes the lands covered in the Biological Opinion, by monitoring environmentally destructive projects and educating and organizing for a more responsible relationship with the earth. Cascadia members use and enjoy public lands

throughout the Pacific Northwest, and derive aesthetic, scientific, educational, spiritual, and recreational benefits from observing the northern spotted owl in its natural habitat, especially on BLM lands in Oregon and in the Rogue River and Siskiyou National Forests.

D. Siskiyou Regional Education Project (“SREP”), a non-profit corporation based in Cave Junction, Oregon. SREP advocates to protect the Klamath-Siskiyou Bioregion, a ten-million acre region in southwest Oregon and northwest California. SREP has 2,000 members throughout Oregon and the United States, who use the lands covered in the Biological Opinion for recreation, scientific, aesthetic, educational, and spiritual pursuits. SREP educates the public on issues essential to its conservation goals through field ecology courses and forest advocacy initiatives. The organization is currently conducting the Siskiyou Wild Rivers Campaign, a project to protect lands within the Klamath-Siskiyou Bioregion, including lands covered by the Biological Opinion, through wilderness and national conservation area designations.

E. Headwaters, a non-profit corporation dedicated to protecting and conserving Oregon’s wildlife, lands, waters, and natural resources. Headwaters is headquartered in Ashland, Oregon. Headwaters’ approximately 1,000 members live in and around southern Oregon and use the Medford BLM Ranger District and the Rogue River and Siskiyou National Forests for recreation, hiking, and other pursuits.

F. Friends of Living Oregon Waters (“FLOW”), a non-profit corporation advocating for the protection and restoration of Oregon’s waters. FLOW’s mission is to help protect Oregon’s rivers, watersheds, lakes, wetlands, and groundwater from the impacts of pollution and development, including the water quality degradation associated with timber sales. FLOW provides legal oversight of development and logging projects, and educates the public on these issues. FLOW is headquartered in Grants Pass, Oregon, and is particularly concerned with the quality of waters originating in and passing through BLM land in Oregon, and waters originating in and passing through the Rogue River and Siskiyou National Forests. FLOW is concerned about the effects of logging on the Wild and Scenic Rogue River, which is within the

region covered by the FWS's Biological Opinion. FLOW has commented on the Final Environmental Impact Statement for the Kelsey Whisky Management Plan, one of the series of timber sales covered by the Biological Opinion.

6. Plaintiffs and their members use the forests, public lands, and waterways affected by this Biological Opinion for recreational, scientific, and aesthetic purposes. Plaintiffs and their members derive, or but for the threatened status of the spotted owl, would derive, recreational, scientific, and aesthetic benefits from the existence in the wild of spotted owls through wildlife observation, study, and photography. The past, present, and future enjoyment of these benefits by plaintiffs and their members has been, is being, and will continue to be irreparably harmed by defendant's disregard of its statutory duties in the Biological Opinion and by the unlawful injuries imposed on spotted owls by the proposed timber sale program underlying the Biological Opinion.

7. The aesthetic, conservation, recreational, and scientific interests of these groups and their members in the survival and recovery of the spotted owl, as well as in the compliance with environmental law by federal agencies, have been, are being, and unless the relief prayed for is granted, will continue to be directly and adversely affected by the failure of FWS to comply with the law.

8. The defendants in this action are:

A. David B. Allen, Regional Director for the FWS Pacific Region. Mr. Allen is sued in his official capacity. In that capacity, he is responsible for the issuance of biological opinions in general, and the challenged Biological Opinion, in particular.

B. United States Fish and Wildlife Service, an agency of the United States Department of the Interior. FWS is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial species, including threatened northern spotted owls. FWS issued the Biological Opinion that is challenged in this action.

BACKGROUND

Threatened Northern Spotted Owl

9. The northern spotted owl occupies late-successional and old growth forest habitat from southern British Columbia through Washington, Oregon, and California as far south as Marin County. Spotted owls rely on older forest habitats because they generally contain the structures required for the owl's essential biological functions of nesting, roosting, foraging, and dispersal. These structures include: a multi-layered and multi-species tree canopy with moderate to high canopy closure and large overstory trees; trees with large cavities and other types of decadence; large snags, or standing dead wood; lots of large, dead wood on the ground; and open space within and below the upper canopy. Biological Opinion, at 12.

10. Due to concerns over its widespread habitat loss and habitat modification, on June 26, 1990, the FWS listed the northern spotted owl as a threatened species under the ESA, 16 U.S.C. § 1533(a). Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. § 17.11(h)).

11. When it listed the northern spotted owl as a threatened species, the FWS "recognized that critical habitat would be a valuable tool in the conservation of the owl." Determination of Critical Habitat for the Northern Spotted Owl, 57 Fed. Reg. 1,796 (Jan. 15, 1992) (codified at 50 C.F.R. § 17.11(h); § 17.95(b)) ("Critical Habitat Designation").

12. Recent studies indicate the spotted owl population is declining. Biological Opinion, at 14.

Critical Habitat for the Northern Spotted Owl

13. Critical habitat is defined in the ESA, 16 U.S.C. § 1532(5)(A), as: "(i) the specific areas within the geographic area occupied by a species . . . on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."

14. To help protect the spotted owl's vital habitat from further degradation, FWS designated critical habitat for the northern spotted owl on January 15, 1992. Critical Habitat Designation, 57 Fed. Reg. 1,796. In accordance with the ESA, the Critical Habitat Designation identified specific habitat units essential to the conservation of the northern spotted owl. Id. at 1,797.

15. The FWS has designated 22 Critical Habitat Units ("CHUs") for the spotted owl within the Medford BLM and the Rogue River and Siskiyou National Forests.

16. The FWS determined that the physical and biological features essential to the conservation of the northern spotted owl are those forest features that support the owl's nesting, roosting, foraging, and dispersal. Id. at 1,796. The Critical Habitat Designation includes habitat to meet the owl's conservation and recovery needs for nesting, roosting, foraging, and dispersal. Id. at 1,822.

17. Nesting, roosting, and foraging refer to the owl's reproducing, resting, and eating activities. Dispersal habitat, as used by the FWS in the Critical Habitat Designation, refers to habitat that allows movement of owls across the landscape, including local and range-wide linkages between blocks of nesting habitat, that are essential to the owl's conservation. Id. at 1,798.

18. Because the owl's designated critical habitat units are interrelated, every project undergoing consultation must be reviewed for its impacts at the local, provincial, and range-wide level. Id. Among the factors listed by the FWS to be considered at these levels are:

- the extent of the proposed action;
- the present condition of the habitat (e.g., percent of the area suitable for nesting, roosting, foraging, and dispersal; degree of fragmentation);
- the current number of pairs in the project area;
- the reproductive success of breeding pairs;
- the expected time to regenerate sufficient habitat to support an effective population in a particular area;
- consistency of the action with the intent of the Interagency Scientific Committee Plan, recovery plan, or other conservation plans;
- geographic considerations; and

- local and regional problems.

Id. In addition, ESA consultations should also consider the effect of the action on habitat that was not included in critical habitat, and the effects on critical habitat from actions planned outside the designated area. Id.

The Northwest Forest Plan and Its Programmatic Biological Opinion

19. On April 13, 1994, the Secretary of Agriculture and the Secretary of the Interior jointly amended the land management planning documents of 19 National Forests and 7 BLM Districts in the Northwest – including the Medford BLM District and the Rogue River and Siskiyou National Forests – that were affected by the FWS’s Critical Habitat Designation for the spotted owl. The Secretaries issued a Record of Decision for these amendments, referred to as “The Northwest Forest Plan.”

20. The Northwest Forest Plan established seven categories of land allocation. One of these categories, Late Successional Reserves (“LSRs”), represents 30 percent of the federal land within the range of the northern spotted owl. The LSRs were designed “to serve as habitat for late-successional and old-growth related species including the northern spotted owl.” Northwest Forest Plan, at 6. The LSRs act as an overlay of habitat that supports and supplements, but does not replace, designated critical habitat.

21. The LSRs are not comprised entirely of older forest areas. The LSRs include extensive areas of younger forest that will be allowed or managed to grow into late-successional condition. NWFP Biological Opinion, at 6.

22. Under the ESA, 16 U.S.C. § 1536(a)(2), and to ensure that the Northwest Forest Plan would not jeopardize spotted owls, or destroy or adversely modify its critical habitat, the Secretaries consulted with the FWS regarding the Plan.

23. The FWS issued its Biological Opinion for the Northwest Forest Plan on February 10, 1994, and concluded that the Plan would accomplish or exceed the standards expected for the Federal contribution to recovery of the northern spotted owl and assurance of adequate habitat for its reproduction and dispersal.

24. The Biological Opinion for the Northwest Forest Plan provides a general assessment of the impacts of the Plan on the threatened spotted owl. Biological Opinion for the Preferred Alternative (Alternative 9) of the Supplemental Environmental Impact Statement on Management of Habitat for Late Successional and Old Growth Forest Related Species on Federal Lands Within the Range of the Northern Spotted Owl, U.S. Fish and Wildlife Service, Feb. 19, 1994, at 3 (“NWFP Biological Opinion”). However, on-the-ground projects identified by the Forest Service and BLM require more site-specific analysis and more detailed information about the owl’s baseline conditions before projects are implemented. *Id.*; Biological Opinion, at 2. This information allows FWS to quantify project impacts before decisions about their final implementation are made. NWFP Biological Opinion, at 3.

25. In October 1995, the Medford BLM District and the Siskiyou National Forest issued an assessment of how well the LSRs in the western portion of southwest Oregon (Siskiyou National Forest, Grants Pass and Glendale Resource Areas of the Medford BLM District, and Coos Bay BLM District) were maintaining the viability of species associated with older forests. The assessment concluded that to maintain a well-functioning late-successional ecosystem on federal lands, at least 75 percent of an LSR must be older forest habitat. “None of the LSRs” in the assessment area “are presently in this condition.” Southwest Oregon Late-Successional Reserve Assessment, Medford District, BLM and Siskiyou National Forest, Oct. 1995, at 19 (emphasis added).

26. A significant percentage of the LSRs within the Medford BLM District and the Rogue River and Siskiyou National Forests do not currently provide habitat that supports the

owl's essential biological functions of nesting, roosting, foraging, and dispersal. Range-wide, less than 50 percent of the acreage within LSRs is "believed to provide currently suitable habitat for spotted owls." Biological Opinion, at 16.

27. While Critical Habitat Units sometimes overlap with Late Successional Reserves, the overlap varies by region. Biological Opinion, at 16. On average within the Medford BLM District and the Rogue River and Siskiyou National Forests, thirty percent of the CHUs do not overlap with the LSRs.

Endangered Species Act Consultation and the Challenged Biological Opinion

28. Under the Endangered Species Act, 16 U.S.C. § 1536(a)(2), "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species . . ." or "result in the destruction or adverse modification of [the designated critical] habitat" of a listed species.

29. Federal agencies must consult with FWS whenever their actions may affect the northern spotted owl or its designated critical habitat. 50 C.F.R. § 402.14. FWS then must issue a biological opinion, and considering the best available science, analyze whether the action is likely to jeopardize the species or result in adverse modification of its critical habitat. 16 U.S.C. § 1536(a)(2). If so, FWS shall suggest, if possible, reasonable and prudent alternatives that it believes will avoid jeopardy and adverse modification. 16 U.S.C. § 1536(b)(3)(A).

30. The timber sale programs of the Medford BLM District and the Rogue River and Siskiyou National Forests for fiscal years 2002-2003 (the "Timber Sale Programs") are federal actions of the BLM and Forest Service, respectively, that triggered consultation with the FWS to

ensure that the projects would not jeopardize threatened spotted owls or destroy or adversely modify their critical habitat.

31. To analyze the impacts of the Timber Sale Programs, the Forest Service and BLM (collectively, “the Agencies”) issued on July 18, 2001 a Biological Assessment for the Fiscal Years 2001-2003 Timber Sale Projects for the Medford BLM District and the Rogue River and Siskiyou National Forests.

32. In their Biological Assessment, the Agencies revealed that the Timber Sale Programs would involve up to 75 timber sales, with 18 of those sales authorizing logging in Late Successional Reserves. The logging of LSRs will remove 7,501 acres.

33. The Timber Sale Programs will directly impact 64,006 acres of federal land within the range of the northern spotted owl, and will destroy 22,227 acres of nesting, roosting, and foraging habitat. An additional 5,672 acres of nesting, roosting, and foraging habitat will be degraded.

34. The Agencies concluded in their Biological Assessment that the Timber Sale Programs are likely to adversely affect the spotted owl and its critical habitat. Based on this, the Agencies initiated formal consultation with the FWS in 2001.

35. FWS issued its Biological Opinion on the Timber Sale Programs on October 12, 2001. The Biological Opinion states that the proposed action “is expected to impact 10,443 acres of spotted owl critical habitat in 11 different CHUs.” This impact on critical habitat includes: 5,383 acres of nesting, roosting, and foraging habitat to be removed and downgraded; 2,168 acres of nesting, roosting, and foraging habitat to be degraded; 563 acres of dispersal habitat to be eliminated; and 2,329 acres of dispersal habitat to be degraded. Biological Opinion, at 40.

36. The FWS assumes that the loss of nesting, roosting, and foraging habitat precludes future spotted owl occupancy, “which is likely to adversely affect the species as a whole.” Biological Opinion, at 36.

37. The Biological Opinion concludes that notwithstanding the destruction of critical habitat, the Timber Sale Programs “[are] not likely to jeopardize the existence of the spotted owl . . . and [are] not likely to destroy or adversely modify designated critical habitat for the spotted owl.” Biological Opinion, at 48.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the ESA and APA by FWS With Respect to the Finding of No Destruction or Adverse Modification of Designated Critical Habitat

38. ESA § 7(a)(2) requires the FWS to ensure that a project will not “result in the destruction or adverse modification of [the designated critical] habitat” of a listed species.

39. The Timber Sale Programs will destroy thousands of acres of spotted owl critical habitat. Despite this fact, FWS concluded in its Biological Opinion that the Timber Sale Programs are “not likely to destroy . . . designated critical habitat for the spotted owl.”

40. FWS’s actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701 – 706.

SECOND CLAIM FOR RELIEF

Violation of the ESA and APA by FWS With Respect to the Finding of No Destruction or Adverse Modification of Designated Critical Habitat

41. ESA § 7(a)(2) requires the FWS to ensure that a project will not “result in the destruction or adverse modification of [the designated critical] habitat” of a listed species.

42. Critical habitat is necessary to support the northern spotted owl's survival and recovery. 50 C.F.R. § 402.02(d).

43. The Timber Sale Programs will destroy and/or adversely modify thousands of acres of critical habitat. The FWS failed to adequately analyze the effects of this destruction and degradation. Instead, it reached the unsupported conclusion that the essential physical and biological features lost through destruction and degradation of spotted owl critical habitat would be sufficiently provided for elsewhere.

44. In fact, if the FWS had adequately analyzed the Late Successional Reserves on which it purportedly relies to supply the essential physical and biological features lost through destruction and degradation of spotted owl critical habitat in the Timber Sale Programs, it would have learned that many of the LSRs are not capable of providing these features. For this reason, the decision of the FWS to rely on these LSRs to provide the essential physical and biological features lost through adverse modification of critical habitat is arbitrary and capricious and contrary to law.

45. FWS's actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701 – 706.

THIRD CLAIM FOR RELIEF

Violations of the ESA and APA by FWS With Respect to the Finding of No Jeopardy

46. ESA § 7(a)(2) requires FWS to review federal agency actions to determine if they are likely to jeopardize the continued existence of any endangered or threatened species. FWS must use the best available scientific information in its Biological Opinion.

47. The Timber Sale Programs will authorize logging in critical habitat units and LSRs that will jeopardize spotted owls in at least four ways: 1) through destruction and adverse modification of critical habitat; 2) through removal and degradation of LSRs that could otherwise serve as a backstop for the loss of critical habitat; 3) through removal and degradation of LSRs that supplement the owl's dispersal needs; and 4) through removal and degradation of LSRs that serve as vital connective corridors for the owls.

48. In its jeopardy analysis, the FWS failed to adequately assess these cumulative impacts of the Timber Sale Programs on the spotted owls.

49. The FWS also failed to analyze whether the LSRs, on which it relies to provide the essential physical and biological features destroyed through the Timber Sale Programs, in fact supply these features.

50. By missing these critical impacts in its jeopardy analysis, failing to adequately analyze the maturity and capability of the LSRs, and failing to use the best available science, FWS's actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701 - 706.

FOURTH CLAIM FOR RELIEF

Violation of the ESA and APA by FWS; the Biological Opinion Has an Improper Scope, Fails to Analyze Non-Federal Habitat, and Fails to Analyze Cumulative Effects

51. Pursuant to ESA § 7(a)(2), FWS must review and analyze the effects of the Timber Sale Programs on spotted owls and their designated critical habitat.

52. FWS' regulations define the scope of the consultation. The consultation must examine the effects in the "action area," defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02(d).

53. FWS defined the action area for the Timber Sale Programs as including all the lands managed by the Medford District of the BLM, and the Rogue River and Siskiyou National Forests. Biological Opinion, at 4.

54. FWS, however, defined its action area improperly and failed to analyze the effects of habitat removal on i) the owl's range-wide dispersal and linkage between blocks of nesting habitat, or ii) at the project-specific level.

55. FWS also failed to analyze the effects on spotted owls of actions on non-Federal habitat.

56. As a result of this improper scope and failure to analyze effects of actions on non-Federal habitat, FWS failed to analyze the cumulative effects on the northern spotted owl.

57. By failing to correctly define the action area, failing to analyze the effects of non-Federal habitat, and failing to analyze the cumulative effects, FWS' actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §§ 701-706.

FIFTH CLAIM FOR RELIEF

Violation of the ESA and APA by FWS For Failing to Quantify Take in the Incidental Take Statement

58. ESA § 7(b)(4) requires FWS to issue an incidental take statement whenever a proposed federal agency action will not jeopardize a protected species but will result in incidental take of members of the species. 16 U.S.C. § 1536 (b)(4). The incidental take statement must specify “those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact” and “the terms and conditions . . . that must be complied with by the Federal agency . . . to implement the measures.” *Id.*

59. The incidental take statement must also “specif[y] the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(i).

60. FWS has violated § 7(b)(4) of the ESA, 16 U.S.C. § 1536 (b)(4), by issuing an incidental take statement with the Biological Opinion that fails to adequately quantify take.

61. FWS’s actions and omissions are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C.

§§ 701 – 706.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court:

A. Declare FWS’s Biological Opinion on the fiscal years 2002-2003 Timber Sale Programs for the Medford BLM District and the Rogue River and Siskiyou National Forests invalid under the APA, 5 U.S.C. § 706(2)(A), because it fails to adequately assess the impacts of the timber sale programs on designated critical habitat; it misses key impacts on threatened spotted owls; it runs counter to evidence available to the agency; the incidental take statement issued with the Biological Opinion fails to adequately quantify the taking of spotted owls; it authorizes the Forest Service and BLM to proceed with timber sales that are likely to jeopardize threatened spotted owls and result in destruction and adverse modification of the species’ designated critical habitat within the meaning of ESA section 7(a)(2) and is thus arbitrary and capricious, and contrary to the ESA and its implementing regulations, in violation of the ESA § 7 and the APA, 5 U.S.C. § 706;

B. Order FWS to rescind the Biological Opinion and the incidental take statement issued in conjunction with it and reconsult to issue a valid biological opinion;

C. Award plaintiffs their costs and attorneys' fees in this action pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

D. Grant such other declaratory and injunctive relief as the Court may deem just and proper.

DATED this ___ day of July, 2003.

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