

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	)	Civil No.
<b>SWANSON GROUP MFG. LLC</b> , 2695	)	
Glendale Valley Road, Glendale, OR 97442;	)	
<b>ROUGH &amp; READY LUMBER LLC</b> , 30365	)	Action for Declaratory and Injunctive
Redwood Highway, Cave Junction, OR	)	Relief to Remedy Violations of the
97523;	)	Federal Land Policy and Management
<b>WASHINGTON CONTRACT LOGGERS</b>	)	Act, 43 U.S.C. §1701 et seq.; the Oregon
<b>ASSOCIATION</b> , 2421 Pacific Ave.,	)	and California Railroad and Coos Bay
Olympia, WA 98507;	)	Wagon Road Grant Lands Act of 1937
<b>AMERICAN FOREST RESOURCE</b>	)	(O&C Act), 43 U.S.C. §1181a; the
<b>COUNCIL</b> , 5100 SW Macadam Ave., Ste.	)	Endangered Species Act (ESA), 16 U.S.C.
350, Portland, OR 97239; and	)	§§1531 et seq.; and the Administrative
<b>DOUGLAS TIMBER OPERATORS, INC.</b> ,	)	Procedure Act, 5 U.S.C. §§551-706
3000 Stewart Parkway, Suite 208,	)	
Roseburg, OR 97470;	)	
	)	
	)	
Plaintiffs,	)	
v.	)	
	)	
<b>KEN SALAZAR</b> , Secretary of Interior,	)	
1849 C Street, NW	)	
Washington, D.C. 20240, and	)	
<b>TOM VILSACK</b> , Secretary of	)	
Agriculture, 1400 Independence Ave., S.W.	)	
Washington, DC 20250,	)	
Defendants	)	

COMPLAINT

For their complaint herein, plaintiffs allege as follows:

**INTRODUCTION**

1. This is an action against the Hon. Ken Salazar, in his official capacity as Secretary of Interior, and the Hon. Tom Vilsack, in his official capacity as Secretary of Agriculture, for declaratory and injunctive relief to remedy violations of the Federal Land Policy and Management

Act (FLPMA), 43 U.S.C. §1701 et seq.; the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 (O&C Act), 43 U.S.C. §1181a; the Endangered Species Act (ESA), 16 U.S.C. §§1531 et seq.; and the Administrative Procedure Act (APA), 5 U.S.C. §§551-706, by the Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service (FWS) and the U.S. Forest Service (USFS) relating to resource management and wildlife conservation in Washington, Oregon and California.

### **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331 (federal question), 2201 (declaratory relief) and 2202 (injunctive relief). Plaintiffs have challenged final agency action as defined by the APA, 5 U.S.C. §704. Venue in this district is proper under 28 U.S.C. §1391(e) because the challenged decisions and failures originated in this district, the events or omissions giving rise to the claims occurred in this district, and the defendants reside in this district.

### **PARTIES**

3. Plaintiff Swanson Group Mfg. LLC (Swanson) is a family-owned enterprise that operates forest product manufacturing facilities in Glendale, Roseburg, Springfield and Noti, Oregon and employs over 600 workers at its sawmills and related operations. Swanson is one of the largest purchasers of timber sales offered by the BLM in Oregon. Swanson normally processes between 190 million board feet and 400 million board feet of timber per year at its manufacturing facilities. The company is currently operating at only about 50% of its capacity due to market conditions, but it expects that given adequate timber supply it will ramp up its production substantially as the economy continues to recover. Swanson owns virtually no private timber land. For its supply of raw materials to operate its business, Swanson relies on federal timber provided by the BLM (principally the Medford, Roseburg, Coos Bay, Eugene and Salem districts), on federal timber from the Rogue-

Siskiyou, Umpqua, Willamette and Siuslaw National Forests within the USFS, and on timber supplied by other state, local and private timberland owners. The inadequate supply of BLM timber has already forced Swanson to curtail its operations. On August 19, 2010 Swanson announced the closure of its sawmill in Glendale, Oregon, which at that time employed 57 workers, down from its peak employment of 130 just a few years ago. The principal reason for its decision to close the Glendale mill is the lack of log supply from BLM lands. The Glendale mill has historically relied on timber from the BLM Medford District to provide the majority of its log supply. In the last 20 years Swanson invested heavily to update the Glendale mill to cut the small-dimension logs that are currently the primary output of the nearby federal forest lands. However, in 2010, the Medford District accounted for less than 3% of the log supply the Glendale mill requires to operate at its already-reduced level of operations. On October 20, 2010 Swanson was able to secure a short-term order that has allowed it to continue limited operations at the Glendale sawmill, with 27 employees, for 90 days. In addition, on September 1, 2010 Swanson reduced operations at its studmill in Roseburg, Oregon from 60 hours a week to 20 hours a week. The principal cause of this reduction is also lack of BLM timber supply. These two actions when completed will reduce employment at the company by 70 workers, more than 10% of its workforce. The current inadequate supply of BLM timber and USFS timber is likely if continued to cause further curtailments in operations and additional employee layoffs.

4. Plaintiff Rough & Ready Lumber LLC (Rough & Ready) is a family-owned enterprise that operates a forest product manufacturing facility in Cave Junction, Oregon that employs approximately 90 workers at its mill and associated facilities. Rough & Ready owns no private timber land, and primarily relies on timber competitively purchased from the BLM's Medford District and the Rogue-Siskiyou National Forest. Without an adequate supply of BLM timber and USFS timber, Rough & Ready may not be able to continue to operate its facility and keep its current

work force employed. Rough & Ready is the high bidder on the Chew Choo timber sale offered by the BLM's Medford District in 2006.

5. Plaintiff Washington Contract Loggers Association (WCLA), a corporation organized under the laws of the state of Delaware, is a trade association based in Olympia, Washington that was formed in 1970 and represents over 700 logging companies within Washington State. The majority of WCLA's members perform contract logging for large industrial landowners or land managers. WCLA's members log Forest Service timber sales on every national forest in the state of Washington. Most of these sales have been purchased by a lumber or plywood manufacturer who contracts the logging to the WCLA member. Some WCLA members on occasion purchase Forest Service timber sales directly and resell the logs to manufacturers. WCLA and its members have been injured by the reduction and delay in Forest Service timber sales caused by the violations described below.

6. Plaintiff American Forest Resource Council (AFRC), a nonprofit corporation organized under the laws of the state of Oregon, is a forest products trade association located in Portland, Oregon which represents approximately 90 lumber and plywood manufacturing companies and landowners throughout the states of Washington, Oregon, California and elsewhere in the midwestern and western United States. Among AFRC's members are Sierra Pacific Industries, with manufacturing facilities in Washington and California; Seneca Sawmill Company, based in Oregon; SDS Lumber Company, based in Washington; Hampton Industries, with operations in Washington and Oregon; and Roseburg Lumber Co., with operations in Oregon and California. Many of AFRC's members could not continue to operate without a reliable and adequate supply of timber sold by the national forests in Washington, Oregon and California and the BLM districts in Oregon that are located in areas containing habitat actually or potentially used by northern spotted owls. In recent years restrictions on land management by the USFS and BLM stemming from measures for the

conservation of the northern spotted owl have reduced the availability of USFS and BLM timber for most or all of AFRC's members, adversely affecting their business operations. AFRC supports sustainable and environmentally responsible management of public lands, and AFRC and its members actively participate in federal agency land management decisions that involve the allocation and use of forest resources in the areas where its members conduct business. AFRC and its members utilize all the resources of the public lands in those areas.

7. Plaintiff Douglas Timber Operators, Inc. (DTO), a nonprofit corporation organized under the laws of the state of Oregon, is a forest products trade association located in Roseburg, Oregon which represents approximately 145 timber and logging companies and other businesses operating in Douglas, Coos and Lane Counties and elsewhere in Oregon. DTO's membership includes businesses in every segment of the forest products industry, from logging companies and small independent sawmills to large integrated manufacturers. DTO's members include such companies as C & D Lumber Co., based in Riddle, Oregon; Herbert Lumber Co., based in Riddle, Oregon; Starfire Lumber Co., based in Cottage Grove, Oregon and Douglas County Forest Products, based in Winchester, Oregon. DTO's members purchase many timber sales that are offered by the Roseburg and Medford BLM districts as well other BLM districts and the Umpqua National Forest. These companies have historically depended in large measure on timber sold by the BLM and the USFS for their timber supply. One of DTO's primary purposes is to represent the interests of its members on matters relating to federal timber supply.

8. Defendant Ken Salazar, the Secretary of Interior, is the official responsible for supervising the BLM and the FWS. Defendant Salazar has been personally involved in decisions affecting federal timber supply in the northern spotted owl region including many of the decisions involved in this case. On October 25, 2010 Secretary Salazar convened a meeting in Roseburg, Oregon of industry and environmental advocates for the express purposes of discussing the causes of the current

reduction in BLM timber sales in Oregon as described below, and seeking solutions to this problem. Plaintiffs acknowledge and appreciate Secretary Salazar's personal involvement in this issues, but have no alternative to seeking relief from the courts to remedy the violations of law detailed herein.

9. Defendant Tom Vilsack, the Secretary of Agriculture, is the official responsible for supervising the USFS.

### **BACKGROUND ALLEGATIONS**

#### **A. The BLM's western Oregon "O & C lands."**

10. The BLM manages approximately 2,557,800 acres of federal forest land in western Oregon, including 2,151,200 acres extending from Salem, Oregon some 250 miles south to the California border that had been ceded in the 19th century to two expanding railroads -- the Oregon and California Railroad and the Coos Bay Wagon Road -- and were subsequently revested to public ownership by act of Congress in 1916. These revested areas, administratively divided among six BLM districts, are managed under the O&C Act, 43 U.S.C. §1181a, and are commonly referred to as the "O&C lands." The BLM Medford District, in Jackson and Josephine County, Oregon, contains 865,800 acres of federal land including 764,900 acres of O & C lands. The BLM Roseburg District, in Douglas County, Oregon, contains 426,300 acres of federal land including 406,500 acres of O & C lands.

11. The O & C Act directs that "[O & C lands] classified as timberlands ... shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [*sic*] of sustained yield." *Id.* The O & C Act further directs that 50%-75% of all receipts from O & C land timber sales must be returned to the 18 western Oregon counties in which those lands are found. Implementing the statutory direction, BLM management plans for its six western Oregon districts in effect for several decades into the 1990's permitted (and regularly achieved) annual sustained yield timber production of 1.176 billion board feet of timber.

12. The O & C Act led to the development of a robust family-owned forest products industry in western Oregon, consisting of small sawmills and plywood plants that generally did not own any private timber, and relied on timber sales from O & C lands, as well as timber sales from nearby national forests, to supply the raw materials required to conduct business. The 18 “O & C Counties” in western Oregon, in which the O & C land are found, came to rely on O & C timber receipts for a large proportion, often a majority, of their annual revenues needed to provide schools, police and other local services.

B. The Northern Spotted Owl

13. The spotted owl (*strix occidentalis*) inhabits forests of western North America from southern British Columbia through Washington, Oregon, California, Arizona and New Mexico and into northern Mexico. Three subspecies of the spotted owl have been recognized: northern (*strix occidentalis caurina*), California (*strix occidentalis occidentalis*) and Mexican (*strix occidentalis lucida*). The northern spotted owl is found in a range starting in lower British Columbia, Canada and extending into northern California almost to the San Francisco metropolitan area. It is most commonly found in forests containing stands of trees more than 80 years of age. The northern spotted owl is considered a territorial species which occupies an area of forested land called a “home range.”

14. The ESA protects fish, wildlife and plants through the process of “listing” a species of fish, wildlife or plant as threatened or endangered. 16 U.S.C. §1533(c)(1). On June 26, 1990 FWS listed the northern spotted owl as a threatened species throughout its range. 55 Fed. Reg. 26114. Section 7 of the ESA, 16 U.S.C. §1536, requires a federal agency planning to undertake an action that may affect a listed species to complete “consultation” with FWS (or, for certain marine species not relevant to this case, the National Marine Fisheries Service within the Department of Commerce), and to avoid taking any action that is likely to jeopardize the continued existence of a listed species

or result in the destruction or adverse modification of designated critical habitat for a listed species. Section 7 consultation can be formal or informal. Formal Section 7 consultation is required when a proposed agency action may adversely affect a listed species or critical habitat, and concludes with the issuance by the FWS of a biological opinion (BiOp), which can include authorization for incidental taking of a listed species, which is provided in the form of an incidental take statement. Informal Section 7 consultation concludes with a written FWS concurrence in an agency determination that the proposed action is not likely to adversely affect (NLAA) listed species or critical habitat.

15. Conservation of the northern spotted owl has been a continuing controversy in Washington, Oregon and California for a quarter of a century, principally in the federal forestlands in the three-state region. Federal forest managers have attempted to reconcile the spotted owl's conservation needs with other intended uses of the federal forests, including sustained-yield timber production, one of the original purposes of the national forest system established by Congress and President Roosevelt in 1903. Dozens of federal lawsuits have challenged those reconciliation efforts, which have sometimes been judged inadequate.

C. Recent Failures to Meet Sustained Yield Timber Sale Levels

16. In the early 1990's several court decisions relating to the conservation requirements of the northern spotted owl substantially disrupted and reduced the annual timber sale program on the O & C lands, and as a result significantly lessened the flow of timber receipts to the O & C Counties. Comparable timber sale disruptions and reductions also occurred on national forests in Washington, Oregon and California that contain habitat suitable for northern spotted owls.

17. On April 13, 1994 the Secretary of Interior issued the Record of Decision (1994 ROD) for planning documents known as the Northwest Forest Plan (NWFP) to govern the administration of the BLM's western Oregon districts, contemporaneous with the Secretary of Agriculture's approval



of the same decision for approximately 21,000,000 acres of national forest land within 19 national forests in western Washington, western Oregon and northern California. The plan was conceived by the Clinton Administration at President Clinton's direction as a means of resolving the regional conflict between species conservation and sustained-yield timber harvesting. The NWFP created several categories of reserves (including late-successional reserves, riparian reserves, wildlife reserves and adaptive management areas) where sustained-yield timber harvesting is prohibited or severely constrained, and permits sustained yield timber management on just 15% of the forested land base.

18. In 1995 the BLM adopted revised Resource Management Plans (RMPs) for each of its six western Oregon districts based on the direction in the NWFP. Collectively the six plans reduced the permissible annual sustained yield timber level on the O & C lands to 211 million board feet, an 82% reduction from the prior authorized level. The RMPs provided that the great majority of timber volume to be offered for sale would come from timber management techniques with the silvicultural objective of regenerating timbered stands following harvest, and which therefore include a considerable proportion of older and larger timber.

19. The 1995 Medford District RMP established an annual allowable sustained yield sale quantity of 57.1 million board feet of timber. The 1995 Roseburg District RMP established an annual allowable sustained yield sale quantity of 45.0 million board feet of timber.

20. Both plans identically state: "The actual sustainable timber sale level attributable to the land use allocations and management direction of the resource management plan may deviate by as much as 20 percent from the identified allowable sale quantity." Medford RMP at 72; Roseburg RMP at 61. The other four district plans contain identical language.

21. Since 2004 (and indeed well before that date) the BLM has offered for sale in the Medford District and the Roseburg District volumes of timber sales that are more than 20% below the

declared 1995 RMP allowable annual sale quantities. The Medford District cumulatively fell 124.8 million board feet (mmbf) short of the required minimum sale level since 2004, selling less than half the allowable sale quantity for that seven year period. The Roseburg District fell 19.5 mmbf short of the minimum level and achieved just 73% of the seven year allowable sale quantity:

<b>Volume of Timber Offered for Sale 2004-10: Medford BLM District and Roseburg BLM District (millions of board feet)</b>						
FY	NWFP ASQ	80% of ASQ	Medford District Annual Timber Sales Offered	NWFP ASQ	80% of ASQ	Roseburg District Annual Timber Sales Offered
2004	57	45.6	27.4	45	36	24.4
2005	57	45.6	53.0	45	36	22.6
2006	57	45.6	28.4	45	36	49.2
2007	57	45.6	15.8	45	36	30.2
2008	57	45.6	27.8	45	36	44.0
2009	57	45.6	16.2	45	36	26.3
2010	57	45.6	25.8	45	36	35.8
<b>7 Year Total</b>	<b>399</b>	<b>319.2</b>	<b>194.4</b>	<b>315</b>	<b>252</b>	<b>232.5</b>
<b>Cumulative Shortfall Below 80% of ASQ</b>			<b>124.8</b>			<b>19.5</b>

22. The timber sale shortfall in the Medford District and Roseburg District (and elsewhere) has steadily worsened since 2007 due to at least four separate factors all attributable to the actions and omissions of defendant Salazar and defendant Vilsack:

1. Adoption of Owl Estimation Methodology.

23. In February 2007 the Ninth Circuit ruled in *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031(9th Cir. 2007), that the incidental take statement the FWS used in many of its biological opinions on proposed federal actions likely to adversely affect northern spotted owls

improperly used acres of habitat to describe the amount or extent of permitted take without adequately explaining why FWS could not use numbers of owls to define the permissible take level, and also did not contain an adequate mechanism for triggering reinitiation of consultation in the event the amount or extent of permitted take was exceeded during implementation of the project.

24. In September 2007 FWS, BLM and the USFS jointly responded to the *Oregon Natural Resources Council* decision by approving and agreeing to employ a document entitled “Methodology for Estimating the Number of Northern Spotted Owls Affected by Proposed Federal Actions,” also known as the “Owl Estimation Methodology” (OEM). On September 15, 2008 the three agencies issued Version 2.0 of the OEM to supersede and replace the 2007 document. The OEM applies to any proposed BLM or USFS action that may affect forest stands containing habitat suitable for nesting, roosting or foraging (NRF) of northern spotted owls. The OEM describes its purpose as follows:

The following procedures are intended to reasonably estimate the number of northern spotted owls (*Strix occidentalis caurina*) that are likely to occur within the area affected by a proposed Federal action (in consultation terms, the “action area”) for the purpose of completing effect determinations in Biological Assessments (BAs) under informal consultation and jeopardy analyses and incidental take assessments in Biological Opinions (BiOps) under formal consultation. This information will be used to characterize, in part, the Environmental Baseline, Effects of the Action, and Cumulative Effects sections of a BiOp, and the amount of take, if any, exempted in an Incidental Take Statement (ITS).

25. The OEM requires that any proposed BLM or USFS action submitted for Section 7 consultation must be accompanied by a Northern Spotted Owl Occupancy Map (NSOOM) of the area surrounding the proposed action, which must be developed as specified in the OEM. For areas where historical on-the-ground surveys have been conducted to locate areas occupied by northern spotted owls, the map will rely on such surveys. However, there are millions of acres of federal and non-federal forest land where no spotted owl surveys have ever been conducted. For these unsurveyed areas, the OEM requires use of a computer-assisted tool that randomly places “computer-

generated” owl sites on the map within areas where spotted owl habitat is projected to exist in an amount and configuration such that spotted owls could be present. The OEM requires use of the assumption that spotted owls actual occupy every computer-generated site, although the document acknowledges this assumption is not correct.

26. Once the NSOOM map is completed, a representation of the proposed agency action is overlaid on the map. For a proposed agency action that is not sufficiently developed to be mappable, BLM or USFS must still prepare the NSOOM map using their best approximation of the location, size and configuration of the proposed action.

27. The OEM requires that the FWS, BLM and USFS must evaluate the effects of the proposed action at three specific geographic levels: 1) a “nest site” consisting of a circle with a 300 meter radius around the actual or computer-generated nest tree; 2) a “core area” consisting of a circle with a .5 mile radius around the actual or computer-generated nest tree; and 3) a “home range” consisting of a circle with a variable radius ranging from 1.2 miles to 2.7 miles around the actual or computer-generated nest tree based on data drawn from particular geographic sub-regions.

28. The OEM requires that the FWS, BLM and USFS must determine adverse effects and incidental take within each of these three circles through application of three precise formulae: 1) any reduction of suitable NRF habitat within the nest site circle; 2) a reduction of suitable NRF habitat below 50% within the core area circle; and 3) a reduction of suitable NRF habitat below 40% within the home range circle.

29. The OEM asserts that it is based on the “best available information,” and was reviewed and commented upon by “agency biologists responsible for the application of the methodology along with leading spotted owl researchers.” The OEM represents the settled position of the FWS, BLM and the USFS as to the manner in which incidental take determinations should be made for northern

spotted owls until such time, if ever, that the agencies revise the OEM “as new information becomes available.” The OEM constitutes judicially-reviewable final agency action.

30. The intended and practical effect of the OEM is to mandate its use for Section 7 review of any timber sale project proposed by the BLM or the USFS in an area containing spotted owl NRF habitat: “All projects scheduled for implementation as described in a BiOp will use a process similar to that described under Section A above to quantify (in advance of implementing the projects) and report the amount of incidental take on a project-by-project basis to ensure that the incidental take limit set forth in the ITS portion of the BiOp is not exceeded.” An exception to the mandatory use of the OEM by the BLM or USFS may be permitted only if the agency’s biological assessment submitted to FWS to initiate a consultation “include[s] a clear and complete discussion of the justification.” The OEM does not identify any justification that would be acceptable to FWS.

31. As a signatory to the OEM, the BLM has agreed to use the OEM for all of its biological assessments of proposed timber sale projects within the range of the northern spotted owl, and every BLM BA prepared since October 2008 on proposed timber sale projects within the range of the northern spotted owl has employed the OEM methodology. In every case where the OEM indicated that a proposed action would adversely affect spotted owls because following the action habitat would be below one or more of the three fixed levels, the BLM has initiated formal consultation; where the OEM did not indicate such adverse effects, the BLM requested the FWS to concur in an NLAA determination.

32. The BLM’s agreement or acquiescence to the mandatory use of the OEM has practical and substantial consequences to the BLM, the plaintiff companies and members of the plaintiff associations who rely on BLM timber sales. Since an OEM-compelled BLM determination that a proposed project is likely to adversely affect the northern spotted owl requires the BLM to submit the proposed project to FWS for formal consultation under 50 C.F.R. §402.14, Section 7(d) of the

ESA thereafter generally requires the BLM to refrain from proceeding with the project until the consultation is concluded and a biological opinion has been issued by FWS. These procedures can and do delay implementation of BLM projects months or years, and can and do make it impossible for the BLM to meet the annual allowable sale quantity of timber specified in its RMPs. Issuance of a biological opinion requires the FWS under 16 U.S.C. §1536(b)(4) to provide incidental take authorization, and to impose mandatory reasonable and prudent measures and terms and conditions to minimize such incidental take. These measures can and often do increase the cost and delay performance of the contract, which imposes additional expense on the bidder that ultimately is awarded the contract to perform the project. These measures may also or alternatively reduce the amount a bidder is willing to pay for the contract, lowering receipts to the BLM (and hence to the 18 O & C Counties) from the performance of the contract.

33. An OEM-compelled NLAA determination does not require the initiation of formal consultation, but requires submission to the FWS of a request for informal consultation and a written concurrence by the FWS with the BLM's NLAA determination. Unlike formal consultation, there is no statutory deadline for completion of informal consultation, and neither the BLM nor prospective bidders can accelerate issuance of an FWS concurrence letter. As with biological opinions, the delay and uncertainty resulting from informal consultation that is compelled by the OEM methodology can make it impossible for the BLM to meet the annual allowable sale quantity of timber specified in its RMPs, and can result in additional costs to the contractor or reduced revenue to the BLM.

34. FWS has employed the OEM in every biological opinion it has issued for BLM or USFS timber sale projects determined to be "likely to adversely affect" spotted owls since the OEM was adopted, including: 1) April 2, 2009 Biological Opinion Regarding the Effects of Habitat Modification Activities within the North Coast Province, FY 2009-2010, proposed by the BLM

Eugene District, BLM Salem District and Siuslaw National Forest; 2) the subsequent amendment to this opinion, issued July 24, 2009; 3) August 4, 2009 Biological Opinion on the Roseburg District BLM Fiscal Year 2009-10 Program of Activities; 4) June 10, 2010 Biological Opinion on the Proposed BLM Medford District Grants Pass Resource Area Fiscal Year 2010-11 Timber Harvest Activities; 5) July 19, 2010 biological opinion on the Summer 2010 Timber Harvest Activities Proposed by the BLM Medford District; 6) biological opinion on USFS timber sale projects on the Shasta-Trinity National Forest in California dated July 31, 2009; 7) biological opinion on USFS timber sale projects on the Gifford Pinchot National Forest in Washington dated July 20, 2009; 8) biological opinion on USFS timber sale projects on the Umpqua National Forest in Oregon dated July 1, 2009; 9) biological opinion on USFS timber sale projects on the Fremont-Winema National Forest in Oregon dated November 17, 2008; and 10) biological opinion on USFS timber sale projects on the Willamette National Forest in Oregon dated September 7, 2007 (based on the 2007 version of the OEM).

35. FWS has also employed the OEM in every letter of concurrence it has issued for BLM or USFS timber sale projects determined to be NLAA for spotted owls since the OEM was adopted.

36. The BLM has also agreed, or been ordered by defendant Salazar, to incorporate a set of restrictive management practices called Project Design Criteria into its proposed timber sale projects. "Project design criteria (PDC) are measures applied to project activities designed to minimize potential detrimental effects to proposed or listed species. PDC usually include seasonal restrictions and may also include clumping of retention trees around nest trees, establishment of buffers, dropping the unit(s)/portions, or dropping the entire project." Grants Pass Resource Area 2010-2011 BiOp at 70. The BLM's PDC impose mandatory restriction distances to avoid disturbance to spotted owl sites, and apply not only to known owl sites but also to computer-generated ("predictive" or "estimated") sites determined through the OEM. The PDC prohibit the use of chain saws, pile

drivers, jackhammers or rock drill within 195 feet of an owl site, an area encompassing approximately two-thirds of one acre of land. Blasting with less than two pounds of explosives is banned within 360 feet of an owl site. In this indirect manner, the OEM imposes further costs, burdens and uncertainties on timber sale purchasers, including an ongoing threat that the entire sale may be cancelled.

37. For the projects addressed in the Grants Pass Resource Area 2010-2011 BiOp and the July 19, 2010 Medford District BiOp, the BLM submitted biological assessments based on a set of Project Design Criteria that included the mandatory restriction distances discussed in paragraph 36. In those two biological opinions, the FWS unilaterally expanded the mandatory restriction distances for computer-generated ("estimated") owl sites: "Radius distances were increased by 656 feet (200 meters) around estimated nest sites to provide additional protection, since the exact location of owls is unknown in these areas." Grants Pass Resource Area 2010-2011 BiOp at 71; July 19, 2010 Medford District BiOp at 81. The FWS PDC expanded the prohibition on the use of chain saws, pile drivers, jackhammers or rock drills from 195 feet to 851 feet of an owl site, an area encompassing approximately 50 acres of land (*i.e.*, 70 times as much as in the BA). The small explosive no-blast zone was increased from 360 feet to 1,020 feet for estimated sites, restricting operations over an extra 60 acres. The FWS BiOps thus required the BLM to provide far more habitat protection at estimated sites, where no owl has ever been found, than at known occupied sites.

## 2. Northern Spotted Owl Recovery Plan

38. In May 2008 FWS published its final recovery plan for the northern spotted owl. Included among the recovery plan's recommended actions was "Recovery Action 32," which called for a 15-year moratorium on all timber sales containing stands of 80+ year old trees that have the characteristics of NRF habitat for the northern spotted owl. Compliance with Recovery Action 32



is not consistent with the terms of the 1995 BLM RMPs which contemplate that the majority of acres of harvested timber will contain such stands of trees.

39. During defendant Salazar's tenure in office, FWS has insisted that all timber sale projects submitted by the BLM for consultation under Section 7 of the ESA must be consistent with Recovery Action 32. As a result, the Medford District and the Roseburg District have been unable to proceed with timber sale projects in the above-described stands of 80+ year old trees despite the authority in their respective 1995 RMPs to conduct such projects, and the practical necessity to do so in order to achieve the established annual allowable sale quantity for each district. The FWS did not issue a biological opinion for any FY 2010 timber sale project in either district that involved any significant amount of regeneration harvest or harvest in areas inconsistent with Recovery Action 32.

40. The Northern Spotted Owl Recovery Plan was challenged by environmental advocacy groups who are intervenors in a case filed in this district captioned *Carpenters Industrial Council v. Salazar*, Civil Case No. 1:08-cv-01409-EGS (D.D.C. filed August 13, 2008). On September 1, 2010 the court granted the Service's motion for voluntary remand of the Recovery Plan to the agency. The Plan was not vacated and remains in use. On September 8, 2010 FWS initiated a comment period on a 2010 Draft Revised Northern Spotted Owl Recovery Plan, which proposed a substantial broadening of Recovery Action 32.

3. Purported Withdrawal of Western Oregon Plan Revision Records of Decision; Direction to Emphasize "Thinning" Sales.

41. On December 30, 2008 C. Stephen Allred, Assistant Secretary for Land and Minerals Management, approved six Records of Decision (RODs) comprising the Western Oregon Plan Revisions (WOPR), which revised the 1995 RMPs for the Medford District, the Roseburg District and the other four western Oregon BLM districts containing O & C lands. The six WOPR RODs went into effect immediately. The Medford District ROD declared the annual allowable sale quantity to be 97 million board feet of timber. The Roseburg District ROD declared the annual

allowable sale quantity to be 69 million board feet of timber. Collectively the six WOPR RODs declared an annual allowable sale quantity of 502 million board feet of timber.

42. On July 16, 2009 the Acting Assistant Secretary of Interior for Land and Minerals Management transmitted a memorandum to the Acting Director of the BLM stating “I am hereby withdrawing the WOPR RODs, effective immediately.” The memorandum directed the BLM to resume managing its lands under the 1995 RMPs. The withdrawal decision has been challenged in litigation pending in this court. *Douglas Timber Operators, Inc. v. Salazar*, Civil No. 1:09-cv-1704 JDB (filed September 8, 2009).

43. Defendant Salazar acknowledged when announcing the withdrawal decision on July 16, 2009 that in the BLM Medford and Roseburg Districts “timber harvest is particularly important.”

44. In conjunction with the withdrawal of the WOPR RODs, defendant Salazar directed the BLM to emphasize “thinning” sales rather than sales that include a portion of older and larger trees. As a result of this direction, in fiscal years 2010 and 2011 the BLM developed a timber sale program that identified most or all of the proposed volume as coming from thinning projects. This management approach resulted and continues to result in not implementing projects in areas where they are needed to achieve the full suite of landscape objectives, and thus diminishes the ecological value of the BLM’s management effort.

45. The FY 2011 program for the Roseburg District consists entirely of 12 thinning or density management timber sales including just 29.310 million board feet of timber, short of the non-discretionary minimum sale level of 36 mmbf. The Medford District is in such disarray that it has not even published a FY 2011 timber sale plan. In FY 2011 neither the Medford District nor the Roseburg District will offer an amount of timber for sale equal to 80% of the declared 1995 RMP allowable sale quantities, or equal to the allowable sale quantities declared in the 2008 WOPR RODs.

4. Uncertain Status of Northern Spotted Owl Critical Habitat.

46. The principal subject of the *Carpenters Industrial Council* case is the legal validity of the decision by the FWS on August 13, 2008 revising designated critical habitat for the northern spotted owl, which conferred legal protection on some 5.6 million forested acres in Washington, Oregon and California. On September 1, 2010 the court indicated its intent to grant Defendant's motion for voluntary remand of the 2008 critical habitat designation to the FWS, but to deny Defendant's motion for vacatur of the rule. On October 12, 2010 the court remanded the 2008 critical habitat designation to the FWS for issuance of a new critical habitat rule by November 15, 2012, without vacating the 2008 rule.

47. The practical effect of the uncertain status of the 2008 revised critical habitat designation has been that the BLM and the USFS have not generally been seeking to initiate, or preparing, timber sale projects in either 2008 critical habitat or 1992 critical habitat. This practical effect has severely limited areas where timber sale projects can be conducted, and has reduced the volumes of timber sales the BLM and the USFS have been able to offer since July 2009 and will be able to offer in the near future.

D. Uncompleted Section 7 consultation on the Chew Choo timber sale.

48. On July 11, 2003 the Medford District submitted a 180 page biological assessment to the FWS initiating Section 7 consultation on a package of projects planned for fiscal years 2004-08 including the Chew Choo timber sale on the Glendale Resource Area in southwestern Oregon. On October 20, 2003 the FWS issued a 124 page biological opinion on the package of sales finding no jeopardy or adverse modification of critical habitat; the opinion was reissued in corrected form on December 3, 2003. The opinion included authorization for incidental take of northern spotted owls in connection with the implementation of the planned projects.

49. In 2004 the U.S. Court of Appeals for the Ninth Circuit determined that biological opinions issued by the FWS in the northern spotted owl region had used an unlawful regulatory definition of destruction or adverse modification of critical habitat to make determinations that proposed federal actions were not likely to result in the adverse modification of designated critical habitat for endangered or threatened species. *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). The Medford District FY 2004-08 BiOp contained that legal error, and the FWS thereafter withdrew its 2003 biological opinion. On August 2, 2006 the BLM reinitiated consultation on the remaining FY 2006-08 projects by submitting a 70 page revised biological assessment. On August 21, 2006 the FWS issued a new 135 page biological opinion again finding no jeopardy or adverse modification of critical habitat, again with incidental take authorization.

50. On September 21, 2006 the BLM conducted an oral auction of the Chew Choo timber sale, which was estimated to contain 13.399 million board feet of timber. The appraised price of the sale (i.e., the minimum bid) was \$1,705,214.50. Plaintiff Rough & Ready won the auction with a high bid of \$1,978,546.80. The timber in the Chew Choo sale constitutes approximately 50% of the timber required to operate Plaintiff Rough & Ready's mill for one year.

51. The Medford FY 2006-08 biological opinion contained the flawed incidental take authorization rejected in *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031. On March 26, 2007 the FWS notified the BLM that it was withdrawing the Medford FY 2006-08 Medford District biological opinion, and requested the BLM to reinitiate consultation once again.

52. On April 3, 2008 Rough & Ready wrote the BLM formally requesting recognition as an "applicant" in the reinitiated consultation on the Chew Choo timber sale. On April 16, 2008 the BLM responded formally recognizing Rough & Ready as an applicant for the consultation under 50 C.F.R. §402.02 of the FWS consultation regulations. On May 22, 2008 the BLM again wrote Rough

& Ready confirming that FWS recognized Rough & Ready as an applicant for the consultation on the Chew Choo timber sale.

53. On October 20, 2008 the Medford District submitted a 141 page biological assessment to the FWS initiating a third Section 7 consultation on a package of 43 planned projects including 16 timber sales that had already been auctioned and/or awarded under previous withdrawn biological opinions. One of those 16 projects was the Chew Choo timber sale.

54. The FWS responded to the reinitiated consultation by asking the Medford District to “take another hard look at [the] proposed action for further potential reductions in NSO impacts.” The Medford District responded to the request with a letter to FWS advising that it was only proceeding with 15 of the previously auctioned and/or awarded timber sales, and requesting that the consultation be limited to those 15 projects. The District advised FWS that “we do not believe this update should cause any delay in completion of a biological opinion as these updates would further reduce any potential impacts to the NSO.” On March 5, 2010 FWS replied to the Medford District requesting the District to prepare an entirely new biological assessment limited to the 15 sales.

55. Section 7(b) of the ESA and implementing regulations require consultation on a proposed agency action to be concluded within 90 days of the date of initiation, and require a biological opinion to be issued within 45 days of the conclusion of consultation. For a consultation in which an applicant has been recognized, Section 7(b)(1)(B)(ii) provides that the FWS and the action agency cannot extend the consultation deadline unless they submit to the applicant within 90 days of the date consultation was initiated a written statement setting forth a) the reasons a longer period is required, b) the information that is required to complete the consultation and c) the estimated date on which consultation will be completed. Section 7(b)(1)(B)(ii) further provides that the consultation deadline cannot be extended more than 60 days without obtaining the consent of the applicant. Rough &

Ready has never consented to any extension of the consultation deadline. The consultation has not been concluded, and the FWS has not issued a biological opinion on the Chew Choo timber sale.

56. The actions, omissions and failures alleged herein are causing current and threatened injury to each plaintiff, who has no remedy at law for these injuries. These injuries include economic, environmental and procedural injuries.

### **FIRST CLAIM FOR RELIEF**

**(Against Defendant Salazar; violation of FLPMA, 43 U.S.C. § 1732(a), and the O & C Act, 43 U.S.C. §1181a; failure to comply with non-discretionary duty to offer for sale annual volume of timber equal to 80 percent of identified allowable sale quantity in applicable BLM resource management plans; agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. §706(1); arbitrary and capricious agency action under 5 U.S.C. §706(2))**

57. Plaintiffs repeat and reallege the allegations in paragraphs 1-56 as if fully set forth herein.

58. The O & C Act, 43 U.S.C. § 1181a, directs that timber on the O & C lands shall be sold, cut, and removed in conformity with the principle of sustained yield.

59. FLPMA directs that "[t]he Secretary shall manage the public lands ... in accordance with the land use plans developed by him under section 1712 of this title when they are available ...." 43 U.S.C. § 1732(a). The BLM's FLPMA planning regulations direct that "[a]ll future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a).

60. Each of the BLM's 1995 RMPs, including the Medford District RMP and the Roseburg District RMP, imposes on the BLM a non-discretionary duty to maintain an actual annual timber sale level that is not less than 80 percent of the annual allowable sale quantity.

61. Between 2004 and 2010 the BLM failed to maintain an actual annual timber sale level on the Medford District that is equal to 80 percent of the annual allowable sale quantity. The minimum

sale level for that seven year period is 319.2 million board feet, but the BLM offered for sale only 194.4 million board feet, leaving a shortfall of 124.8 million board feet.

62. Between fiscal year 2004 and 2010 the BLM has failed to maintain an actual timber sale level on the Roseburg District equal to 80 percent of the annual allowable sale quantity. The minimum sale level for that six year period is 252 million board feet, but the BLM offered for sale only 232.5 million board feet, leaving a shortfall of 19.5 million board feet.

63. Between fiscal year 2004 and 2010, the BLM violated its non-discretionary duty to maintain an actual annual timber sale level for the Medford District and the Roseburg District equal to 80 percent of the annual allowable sale quantity for the district. Unless and until the court in *Douglas Timber Operators, Inc. v. Salazar* overturns the withdrawal of the WOPR RODs and reinstates the WOPR RODs, the BLM will continue to operate under its 1995 RMPs, and will continue to violate its non-discretionary duty again in 2011 and future years unless this court intervenes to compel the BLM to comply with its non-discretionary duty. Even after the court in *Douglas Timber Operators, Inc. v. Salazar* reinstates the WOPR RODs, this court would retain the authority to remedy the BLM's past violations of its non-discretionary duties that occurred in the years from 2004 to 2010.

64. The BLM's past, current and likely future failure to comply with its non-discretionary duty to maintain an actual annual timber sale level for the Medford District and the Roseburg District equal to 80 percent of the annual allowable sale quantity for the district constitutes agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. §706(1), and is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

## SECOND CLAIM FOR RELIEF

### **(Against Defendants Salazar and Vilsack; violation of APA, 5 U.S.C. §553 – adoption of Owl Estimation Methodology without complying with APA rulemaking procedures)**

65. Plaintiffs repeat and reallege the allegations in paragraphs 1-56 as if fully set forth herein.

66. Under the APA, 5 U.S.C. §551(4), a “‘rule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” The Owl Estimation Methodology, Version 2.0 (September 15, 2008) is a rule under the APA, 5 U.S.C. §551(4). The OEM is a statement of general applicability to Section 7 consultations concerning northern spotted owls throughout a three-state region; it implements, interprets or prescribes law or policy for such consultations; and it describes the procedures to be followed by the FWS as well as the BLM and the USFS. The OEM asserts that it underwent review and some form of input from federal agency biologists, and that it was "finaliz[ed]" based on some consideration of that input. OEM at 2. The OEM constitutes the final, settled position of the FWS, the BLM and the USFS, and is the consummation of the agency's decision making process as to the issues addressed in the OEM:

... We believe the methodology provides a reasonable basis for the FWS to assess anticipated incidental take of the spotted owl caused by a proposed Federal action and includes procedures for monitoring take-related effects such that reinitiation of consultation can be triggered, as appropriate, prior to completion of the action. The methodology was reviewed by agency biologists responsible for the application of the methodology along with leading spotted owl researchers. Their comments were considered in finalizing this document.

67. In practice the OEM imposes the obligation on the BLM and the USFS to conduct effects analysis on proposed agency actions that may affect northern spotted owls in accordance with the OEM's precise methodology, and denies the BLM and the USFS the discretion to select a different



method of conducting effects analysis. Further, FWS considers that the OEM constitutes the "best available science" on the subjects it addresses, which effectively binds the FWS to employ the OEM in its consultations until such time as it determines the OEM does not constitute the best available science.

68. The OEM's effects formulae dictate when the BLM or the USFS must initiate formal consultation or informal consultation on a proposed agency action. The nature and course of such consultations influence the timing and content of the agency action, and ultimately impair the ability of the BLM to meet its non-discretionary duty to maintain an actual timber sale level for the Medford District and the Roseburg District (and its other districts) that is not less than 80 percent of the annual allowable sale quantity for each district.

69. The OEM also has the practical effect of requiring the FWS in formal consultation and informal consultation to conduct effects analysis on proposed agency actions that may affect northern spotted owls in accordance with the OEM's precise methodology. The fact that the FWS has employed the OEM on every occasion it has had the opportunity to do so since the OEM was issued in 2008, and that the BLM and USFS have also uniformly employed the OEM since the OEM was issued in 2008, demonstrates that the OEM is a final, binding agency rule for all three agencies.

70. The OEM has caused and threatened injury to the plaintiffs. The OEM has reduced the volume of timber that the BLM Medford and Roseburg districts (among others) have been able to offer for sale to meet their annual allowable sale quantity. The OEM compels the BLM and USFS to manage areas of unoccupied spotted owl habitat, where no spotted owl has ever been detected, as if a nesting pair of spotted owls is present, and to provide the same or greater protection to this unoccupied habitat as for occupied habitat. The consequence is to discourage the BLM and USFS from locating timber sales in spotted owl habitat of any kind. The OEM (page 9) states that one way to avoid a project having "adverse effects from disturbance" of spotted owls is "[a]void siting

projects within or immediately adjacent to NRF habitat." The OEM does not distinguish computer-generated owls from actual owls, and therefore leads the FWS to grant incidental take authorization in its biological opinions for owls that do not exist. Such take authorization allows the FWS to impose non-discretionary measures (called "reasonable and prudent measures") and other terms and conditions on the operation of a timber sale that encompasses a computer-generated owl site that the FWS would not be allowed to impose in the absence of the contrived OEM generated-site methodology. A decision by the FWS authorizing the taking of non-existent owls also provides the public with an exaggerated and inaccurate portrayal of the effects of timber sale projects on spotted owls, which may further limit BLM and USFS timber sale planning discretion.

71. Under the APA, a rule having the textual or practical force of law must be adopted through rulemaking procedures, including a requirement for notice to the public and an opportunity for the public to comment on a proposed rule. 5 U.S.C. §553(b).

72. The OEM was not adopted through APA rulemaking procedures. There was no notice to the public and no opportunity for the public to comment on a proposed rule as required under 5 U.S.C. §553(b).

73. Defendant's failure to adopt the OEM through APA rulemaking procedures violates 5 U.S.C. §553. Defendant's violation of 5 U.S.C. §553 is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

### **THIRD CLAIM FOR RELIEF**

#### **(Against Defendants Salazar and Vilsack; Arbitrary and Capricious Conduct And Abuse of Discretion - Adoption of OEM)**

74. Plaintiffs repeat and reallege the allegations in paragraphs 1-56 as if fully set forth herein.

75. The APA requires that any agency decision must articulate a satisfactory explanation for the decision including a rational connection between the facts found and the choice made, and may

not be arbitrary and capricious. The OEM does not present a rational connection between the facts found and the choice made, and has no rational basis.

76. The OEM requires the BLM and the USFS to assess the effects of their proposed actions based on the assumed existence of randomly centered pairs of computer-generated northern spotted owls that the OEM acknowledges do not in fact exist. The OEM also requires the BLM and USFS to assess the effects of their proposed actions based on the assumed existence of pairs of northern spotted owls at any nest site where a pair of northern spotted owls has ever at any time in the past been detected although there is no information showing that the site is currently occupied by northern spotted owls. The OEM requires the BLM and USFS to find that a proposed action is likely to adversely affect a pair of these assumed owls if after the proposed action is completed the proportion of forested areas classified as NRF habitat for northern spotted owls will be below 40 percent within an assumed randomly-drawn home range for the assumed owls, even though the OEM acknowledges that pairs of spotted owl occupy home ranges containing as little as 17 percent of such NRF habitat, and based on that information the OEM is parameterized to generate assumed owl territories with as little as 17 percent NRF habitat. The OEM does not explain or justify any of these decisions.

77. The OEM requires the FWS to find that a proposed action may cause incidental take of the pair of assumed owls if following the proposed action the NRF habitat percentage within the assumed home range will be below 40 percent. Thus, the OEM requires the BLM and the USFS to create computer-generated owl territories where any reduction of NRF habitat – as little as one acre or one tree – results in an FWS finding that incidental take may occur, and a recommendation from FWS to avoid any such reduction in NRF habitat. Additionally, if the percentage of NRF habitat within a core area or home range starts out below the required level (as many do), the OEM directs the FWS to determine that take may occur even if there is no reduction in such habitat. The OEM also does not explain or justify any of these decisions.

78. The OEM results in FWS authorization for the BLM or the USFS to incidentally take owls that do not exist, and authorizes FWS to impose costly and burdensome reasonable and prudent measures and terms and conditions on the agency and the contract purchaser to minimize the take of the non-existent owls. To the extent the FWS requires reinitiation of consultation when incidental take exceeds the number of assumed owl pairs authorized to be taken, the OEM overstates potential take and reduces the likelihood that reinitiation of consultation would ever occur. The OEM also does not explain or justify any of these decisions.

79. The OEM is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

#### **FOURTH CLAIM FOR RELIEF**

**(Against Defendant Salazar; violation of 16 U.S.C. §1536 (b)(1)(B)(ii) –failure to conclude consultation within statutory deadline – on behalf of Plaintiff Rough & Ready Lumber LLC)**

80. Plaintiffs repeat and reallege the allegations in paragraphs 1-56 as if fully set forth herein.

81. Defendant Salazar has violated 16 U.S.C. §1536 (b)(1)(B)(ii) by failing to conclude the consultation on the Chew Choo timber sale within 90 days of the date the BLM initiated consultation on that project. Defendant Salazar did not submit to Rough & Ready within 90 days of the date consultation was initiated a written statement setting forth the reasons a longer period is required, the information that is required to complete the consultation or the estimated date on which consultation will be completed, and never obtained the consent of Rough & Ready to end the consultation more than 150 days after it was initiated. As of the date of filing this complaint, more than two full years has passed since consultation was initiated, and the consultation has not yet been concluded. Defendant Salazar has a non-discretionary duty to comply with the consultation deadline in 16 U.S.C. §1536 (b)(1)(B)(ii).

82. Defendant Salazar's violation of 16 U.S.C. §1536 (b)(1)(B)(ii) is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment as follows:

1. A declaration that the BLM's past, current and likely future failure to maintain an actual annual timber sale level for the Medford District and the Roseburg District that is not less than 80 percent of the annual allowable sale quantity for each district violates the Federal Land Policy and Management Act, 43 U.S.C. §1701 et seq., and the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937 43 U.S.C. §1181a, constitutes agency action unlawfully withheld or unreasonably delayed under 5 U.S.C. §706(1), and is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

2. An order directing Defendant Salazar to maintain an actual annual timber sale level for the BLM's Medford District and the Roseburg District that is not less than 80 percent of the annual allowable sale quantity for each district for fiscal year 2011 and succeeding fiscal years, and for each district to offer an additional quantity of timber divided evenly between fiscal years 2011 and 2012 that is equal to the combined district shortfall from 2004 to 2010.

3. A declaration that Defendant Salazar's and Defendant Vilsack's failure to adopt the Owl Estimation Methodology through APA rulemaking procedures violates 5 U.S.C. §553, and that Defendant Salazar's and Defendant Vilsack's violation of 5 U.S.C. §553 is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

4. A declaration that the Owl Estimation Methodology is arbitrary and capricious and an abuse of discretion under 5 U.S.C. §706(2) because Defendant Salazar and Defendant Vilsack have

not presented a rational connection between the facts found and the choice made, or provided a rational basis for its adoption.

5. An order setting aside the Owl Estimation Methodology and prohibiting Defendant Salazar and Defendant Vilsack from using, citing, applying, employing or in any way relying on the Owl Estimation Methodology in or for any decision.

6. A declaration that Defendant Salazar's failure to conclude the consultation on the Chew Choo timber sale within 90 days of the date the BLM initiated consultation on that project violates 16 U.S.C. §1536 (b)(1)(B)(ii), and is arbitrary and capricious, an abuse of discretion, not in accordance with law and in excess of statutory authority under 5 U.S.C. §706(2).

7. An order directing Defendant Salazar to issue a biological opinion on the Chew Choo timber sale within 21 days of the date of the order.

8. An award of attorneys fees to plaintiffs American Forest Resource Council and Douglas Timber Operators, Inc. under the Equal Access to Justice Act, 28 U.S.C. §2412, and an award of attorney fees to plaintiff Rough & Ready Lumber LLC under 16 U.S.C. §1540(g).

9. Granting plaintiffs such further relief as may be just, proper and equitable.

Dated this 29<sup>th</sup> day of October, 2010.

By: \_\_\_\_\_/s/  
Mark C. Rutzick, D.C. Bar No. 979547  
markrutzick@cox.net  
Mark C. Rutzick, Inc.  
12402 Myra Virginia Ct.  
Oak Hill, VA 20171  
Telephone/Facsimile: (703) 870-7347  
Attorney for Plaintiffs