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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

CASCADIA WILDLANDS; OREGON WILD; and CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiffs,

vs.

JIM THRAILKILL, Field Supervisor, Roseburg Field Office, in his official capacity; UNITED STATES FISH AND WILDLIFE SERVICE, an agency within the United States Department of the Interior,

Defendants.

Civ. Case No. 14-1236

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Violation of Endangered Species Act and Administrative Procedure Act)

INTRODUCTION

1. The northern spotted owl (*Strix occidentalis caurina*) is one of the most studied birds in the world.

2. The species has been declining across its range for decades, historically due to the loss of the owl's old growth forest habitat, and more recently due to the continued effects of habitat loss, wildfire, and the rise of a new, more aggressive competitor, the barred owl.

3. In response to the continuing decline of the species, the United States Fish and Wildlife Service developed the Northern Spotted Owl Recovery Plan that establishes several Recovery Actions, the implementation of which the expert agency deemed necessary in order to stop the species' slide towards extinction and to bring it to the point where federal protections are no longer necessary.

4. These Recovery Actions specifically recommend the retention of spotted owl habitat, including habitat that has been burned in wildfires, as well as protection of sites where spotted owls are known to reside, both currently and in the past.

5. In southwest Oregon, the United States Fish and Wildlife Service and other federal and nonfederal entities have been following the spotted owl's viability for more than twenty years, collecting site-specific demography data that tracks spotted owl locations, breeding patterns, and habitat use.

6. While southwest Oregon provides excellent northern spotted owl habitat in many areas, the owl's old growth forest habitat has also attracted the attention of loggers, who have cut down essentially all of the owl's habitat on privately-owned lands, and have severely fragmented the remaining habitat on publicly-owned lands managed by the United States Bureau of Land Management.

7. Compounding this problem, the Bureau of Land Management's ownership in southwest Oregon is "checkerboarded:" every other square mile is owned by the public, with private industrial forestland owners holding title to the alternating nonfederal land.

8. While spotted owl populations at one time were stable in this landscape, recent survey data indicates that due to past habitat loss, wildfire, post-fire logging, and intrusions from barred owls, spotted owls in southwest Oregon are now declining in number.

9. Despite this decline and the relatively poor habitat conditions, surprisingly there are numerous, reproducing northern spotted owls in the Cow Creek Watershed, which burned with mixed intensity and severity in the summer of 2013 in the Douglas Fire Complex wildfires.

10. While the best available science indicates that spotted owls evolved with and can well tolerate wildfire, the same science indicates that they are unlikely to continue to persist in forests that have been logged, burned by wildfire, and are logged after the wildfire.

11. Rather than heed its own Recovery Plan and its instructions regarding how to recover the northern spotted owl, the Fish and Wildlife Service has authorized an unusually high amount of "incidental take," or regulated harm, of the spotted owl as a result of a proposal by the Bureau of Land Management to extensively clear-cut burned spotted owl habitat in the wake of the Douglas Fire Complex.

12. Fish and Wildlife Service's justification for this harm cannot be sustained given the best available science, the current status of the northern spotted owl, the recommendations of the Northern Spotted Owl Recovery Plan, and the mandates of the Endangered Species Act.

13. This is a civil action for declaratory and injunctive relief, arising under the Administrative Procedure Act (APA), 5 U.S.C. §§701 *et seq*., the Endangered Species Act (ESA) 16 U.S.C. §§ 1531 *et seq*., and alleging violations of the ESA, 16 U.S.C. §§ 1531 *et seq*.

14. Plaintiffs Cascadia Wildlands, Oregon Wild, Klamath-Siskiyou Wildlands Center , and Center for Biological Diversity (Plaintiffs) seek a declaration that Defendants Jim Thrailkill, Field Supervisor, Roseburg Field Office, and the United States Fish and Wildlife Service (Defendants or FWS) violated federal law by unreasonably and unlawfully authorizing the incidental take of northern spotted owls without observance of law.

15. By initiating this action, Plaintiffs seek to: 1) obtain a declaration that the FWS's failure to prepare an adequate biological opinion addressing the environmental consequences of the Douglas Fire Complex Recovery Project violates the ESA and APA; 2) vacate the Douglas Fire Complex Recovery Project Biological Opinion; and 3) remand the Douglas Fire Complex Recovery Project Biological Opinion to the FWS for the preparation of an adequate Biological Opinion for the Douglas Fire Complex Recovery Project.

16. Should Plaintiffs prevail, Plaintiffs will seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

17. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 1346 (United States as a defendant), 2201 (injunctive relief), and 2202 (declaratory relief). This Court has jurisdiction under the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). The current cause of action arises under the laws of the United States, including the APA and the ESA. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

VENUE

18. Venue in this court is proper under 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. The

FWS official who authorized and approved the decision is headquartered in Roseburg, Oregon, which is located within this district. Plaintiffs have offices within this district.

19. This case is properly filed in Eugene, Oregon pursuant to Local Rules 3.3 and 3.4 because the FWS Roseburg Office is located in Douglas County, Oregon, and much of the Douglas Fire Complex Recovery Project is located in Douglas County, Oregon.

PARTIES

20. Plaintiff CASCADIA WILDLANDS is an Oregon non-profit organization based in Eugene, Oregon and with additional offices in Roseburg, Oregon and Cordova, Alaska. Representing over 6,000 members and supporters, Cascadia Wildlands is devoted to the conservation of the Cascadia Bioregion, which extends from northern California to southeastern Alaska. Cascadia Wildlands uses a combination of education, organizing, outreach, litigation, advocacy, and collaboration to defend wild places and promote sustainable, restoration-based forestry. Cascadia Wildlands' members use the Douglas Complex area for a variety of professional and personal pursuits including viewing threatened and endangered species. FWS's issuance of the Biological Opinion and failure to comply with the ESA is causing irreparable injury to the interests of Cascadia Wildlands and its members in viewing, studying, and photographing threatened species.

21. Plaintiff OREGON WILD is a non-profit corporation with approximately 7,000 members and supporters throughout the state of Oregon and the Pacific Northwest. Oregon Wild and its members are dedicated to protecting and restoring Oregon's lands, wildlife, and waters as an enduring legacy. Oregon Wild members use the Douglas Complex area for hiking, recreation, bird watching, nature appreciation, and other recreational and professional pursuits. FWS's issuance of the Biological Opinion and failure to comply with the ESA is causing irreparable

injury to the interests of Oregon Wild and its members in viewing, studying, and photographing threatened species.

22. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is suing on behalf of itself and its members. The Center is a California nonprofit public benefit corporation with more than 48,000 members dedicated to the preservation, protection, and restoration of biodiversity and ecosystems in Oregon and throughout the world. On behalf of its members, the Center works to insure the long-term health and viability of animal and plant species and to protect the habitat those species need to survive. The Center also has a procedural interest in the proper management of these lands in full compliance with mandatory public land and environmental laws and regulations. The Center is a membership organization and has members who are injured by defendants' violations.

23. The aesthetic, recreational, scientific, educational, and other interests of Plaintiffs and their members in the survival and recovery of the spotted owl, as well as in 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. These are actual, concrete, particularized injuries caused by Defendant's failure to comply with mandatory duties under the ESA. These injuries would be redressed by the relief sought.

24. Defendant JIM THRAILKILL is the Field Supervisor for the Roseburg Field Office of the United States Fish and Wildlife Service. Defendant Thrailkill is responsible for the management of the Roseburg Field Office, and Defendant Thrailkill approved and signed the Douglas Fire Complex Biological Opinion (BiOp). He is sued in his official capacity.

25. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency of the United States Department of the Interior. FWS maintains an office in Roseburg, Oregon in Douglas County. With respect to terrestrial wildlife, FWS is charged with administering the ESA, and is the agency responsible for authoring the Douglas Fire Complex Biological Opinion.

LEGAL AND FACTUAL BACKGROUND

The Endangered Species Act

26. Congress enacted the ESA with the purpose to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," and to "provide a program for the conservation of such endangered species and threatened species." 16 U.S.C. § 1531(b).

27. An Endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1522(6); 50 C.F.R. § 424.02(e). A Threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(19); 50 C.F.R. § 424.02(m).

28. Section 7 of the ESA requires federal agencies to conserve species listed as endangered or threatened under the ESA, and whenever a federal action may affect an ESA-listed species, the agency undertaking such an action must consult the Service having jurisdiction over the relevant listed species. 16 U.S.C. 1536(a)(3).

29. The United States Fish and Wildlife Service (FWS) is responsible for administering the ESA with respect to terrestrial wildlife. 50 C.F.R. § 402.01(b).

30. FWS, as the consulting agency for terrestrial wildlife, evaluates the effects of the proposed federal action on the survival and recovery of Endangered or Threatened species and

any potential destruction or adverse modification of critical habitat in a biological opinion. 16 U.S.C. § 1536(a)(2).

31. A biological opinion (BiOp) is the heart of the ESA Section 7 consultation process, which requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

32. The biological opinion must be based on "the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

33. In the biological opinion, the FWS evaluates 1) the current status of the listed species or critical habitat; 2) the effects of the action; and 3) the cumulative effects to determine if the proposed action will jeopardize the existence of the listed species. 50 C.F.R. §§ 402.14(g)(2), (g)(3).

34. Effects of the action include both direct and indirect effects of an action "that will be added to the environmental baseline." 50 C.F.R. § 402.02. The environmental baseline includes "the past and present impacts of all Federal, State or private actions and other human activities in the action area" and "the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation." *Id.*

35. If the biological opinion concludes that jeopardy is not likely and that there will not be adverse modification of critical habitat, or that there is a "reasonable and prudent alternative" to the agency action that avoids jeopardy and adverse modification and that the incidental taking of endangered or threatened species will not violate section 7(a)(2), the consulting agency can issue

an Incidental Take Statement (ITS) which, if followed, exempts the action agency from the prohibition on takings found in Section 9 of the ESA.

36. Section 9 of the ESA makes it unlawful for any person to take an endangered species. 16 U.S.C. § 1538(a)(l).

37. Take is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in such conduct." 16 U.S.C. § 1532(19).

38. Harm is defined to include significant habitat modification or degradation that results in death or injury to a listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

39. In its biological opinion, FWS is required to analyze how the proposed action "affects the species or its critical habitat," including the impact of incidental takings of the species. 16 U.S.C. 1536(b)(3)(A).

40. In the incidental take statement (ITS), FWS must authorize and anticipate any incidental take that may result from the proposed project and explain how such take will not jeopardize the continued existence of the endangered or threatened species. The ITS must: (1) specify the impact of the incidental taking on the species; (2) specify the "reasonable and prudent measures" that the FWS considers necessary or appropriate to minimize such impact; (3) set forth "terms and conditions" with which the action agency must comply to implement the reasonable and prudent measures (including, but not limited to, reporting requirements); and (4) specify the procedures to be used to handle or dispose of any animals actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

41. Section 4 of the ESA states that FWS "shall develop and implement plans...referred to as 'recovery plans' for the conservation and recovery" of species listed under the Act. 16 U.S.C. § 1533(f).

42. "Conservation" refers to "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(3).

43. "Conservation" is synonymous with the "recovery" of a species in the ESA context.

44. Recovery plans must contain "(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species; (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal." 16 U.S.C. §§ 1533(f)(1)(B)(i)-(iii).

45. Congress expects FWS to proactively utilize the conservation measures contained in recovery plans to remove the species from the protection of the ESA.

The Northern Spotted Owl (*Strix occidentalis caurina*)

46. According to FWS, the northern spotted owl (*Strix occidentalis caurina*) is "a medium-sized, dark brown owl with a barred tail, white spots on the head and breast, and dark brown eyes surrounded by prominent facial disks." 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.

47. Spotted owls rely on older forest habitats because they generally contain the structures and characteristics 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 dominated by large overstory trees; moderate to high canopy closure; a high incidence of trees with large cavities and other types of deformities; numerous large snags; an abundance of large, dead wood on the ground; and open space within and below the upper canopy for owls to fly. Forested stands with high canopy closure also provide thermal cover as well as protection from predation. This habitat is known as "nesting, roosting, and foraging" or "NRF" habitat.

48. Due to concerns over its widespread habitat loss and habitat modification, and the lack of regulatory mechanisms to protect the species, the FWS listed the northern spotted owl as a threatened species under the Endangered Species Act on June 26, 1990. 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)).

49. Critical habitat was designated for the species in 1992, and revised in 2008. *Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Northern Spotted Owl; Final Rule*, 73 Fed. Reg. 47,325 (Aug. 13, 2008). A draft revised northern spotted owl critical habitat rule was published on March 8, 2012, and finalized on December 4, 2012. *Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Northern Spotted Owl: Final Rule*, 77 Fed. Reg. 71,876 (December 4, 2012).

50. The "primary constituent elements" (PCEs) of northern spotted owl critical nesting habitat "typically include a moderate to high canopy cover (60 to over 80 percent); a multilayered, multispecies canopy with large (greater than 30 in (76 cm) dbh) overstory trees; a high incidence of large trees with various deformities (e.g., large cavities, broken tops, mistletoe

infections, and other evidence of decadence); large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for northern spotted owls to fly." 77 Fed. Reg. 71,905.

51. Spotted owl critical habitat within the Oregon Klamath Province includes approximately 481,577 acres of spotted owl NRF habitat.

52. The Douglas Fire Complex BiOp concerns spotted owl Critical Habitat Unit (CHU) 9, which encompasses 1,197,389 acres and consists of nine designated subunits.

53. Within CHU 9, suitable spotted owl habitat within Subunit KLW 1 will be removed through post-fire logging.

54. Subunit KW 1 consists of 119,045 acres of spotted owl habitat, and FWS approximates that 500 acres of critical habitat in Subunit KLW 1 will be affected by the Douglas Fire Complex Recovery Project.

The Barred Owl (*Strix varia*)

55. Barred owls (*Strix varia*) are native to North America, but only recently arrived in the West. They were first documented in the range of the northern spotted owl in Canada in 1959 and in western Washington in 1973. Barred owls are slightly larger and more aggressive than spotted owls, and compete for the same habitat.

56. According to the FWS, "managing sufficient habitat for the spotted owl now and into the future is important for its recovery...Based on the best available scientific information, competition from the barred owl (S. varia) poses a significant and complex threat to the spotted owl." NSO Recovery Plan, vi.

57. "Research on barred owls and their interactions with northern spotted owls is lacking, but necessary to determine the specific effects barred owls may have on northern spotted owls and

their habitat. Forsman et al. (2011, pp. 69-70) found that the presence of barred owls led to a decrease in fecundity, apparent survival, and caused a decline in populations in most of the demography study areas included in their large scale modeling effort." BiOp, 92.

58. "Most recently, preliminary results from a barred owl and northern spotted owl radio-telemetry study in Washington reported two northern spotted owls fleeing their territories and traveling six and 15 miles, believed to be as a result of frequent direct encounters with barred owls (Irwin et al. 2010, pp. 3-4). Both northern spotted owls were subsequently found dead (Irwin et al. 2010, p. 4)." BiOp, 93.

59. "It is likely that all of the above analyses underestimated the effects of barred owls on the reproduction of spotted owls because spotted owls often cannot be relocated after they are displaced by barred owls (E. Forsman, pers. comm., cited in USDI FWS 2011, p. B-11)." BiOp, 93.

60. "The presence of barred owls has been reported to reduce spotted owl detectability, site occupancy, reproduction, and survival. Olson et al. (2005, p. 924) found that the presence of barred owls had a significant negative effect on the detectability of spotted owls, and that the magnitude of this effect did not vary among years." BiOp, 92.

61. "Dugger et al. (2011, pp. 2463-2467) confirmed the synergistic effects of barred owls and territory habitat characteristics on extinction and colonization rates of territories by northern spotted owls. Extinction rates of northern spotted owl territories nearly tripled when barred owls were detected (Dugger et al. 2011, p. 2464)." BiOp, 93.

62. Spotted owls are somewhat unique in that they are relatively easy to locate in the field by using a series of bird calls that mimic spotted owl hoots and whistles, to which the spotted owl will respond with its own call or fly in to the surveyor to investigate the source of the calls.

Surveyor calls, in conjunction with offering a mouse to an incoming bird, are used in FWS-approved protocol surveys to determine whether a forested stand or known spotted owl site is occupied by a spotted owl pair or individual.

63. "Monitoring and management of northern spotted owls has become more complicated due to their possible reduced detectability when barred owls are present (Kelly et al. 2003, pp. 51-52; Courtney et al. 2004, p. 7-16 ; Olson et al. 2005, p. 929; Crozier et al. 2006, p.766-767). Evidence that northern spotted owls were responding less frequently during surveys led the Service and its many research partners to update the northern spotted owl survey protocol (USDI FWS 2012b). The recent changes to the northern spotted owl survey protocol were based on the probability of detecting northern spotted owls when barred owls are present." BiOp, 93.

64. The best available science suggests that surveyors' efforts to identify spotted owl sites in the field using spotted owl calls are confounded by the presence of barred owls: spotted owls are increasingly not responding to survey calls, even though present in the forested stand, due to the presence of barred owls.

65. "Evidence suggests that barred owls are exacerbating the spotted owl population decline, particularly in Washington, portions of Oregon, and the northern coast of California (Gutiérrez et al. 2004, pp. 739-740; Olson et al. 2005, pp. 930-931). There is no evidence that the increasing trend in barred owls has stabilized in any portion of the spotted owl's range in the western United States, and "there are no grounds for optimistic views suggesting that barred owl impacts on northern spotted owls have been already fully realized" (Gutiérrez et al. 2004, pp. 7-38). In Oregon, Dugger et al. (2011, p. 2466) reported that some northern spotted owl pairs retained their territories and continued to survive and successfully reproduce during their study even

when barred owls were present, but that the effects of reduced old growth forest in the core habitat areas were compounded when barred owls were present." BiOp, 93.

Northern Spotted Owl Use of Fire-Affected Forests

66. "Spotted owls are territorial raptors that range widely in search of prey but are 'anchored' during the breeding season to a nest site (central-place forager). Evaluations of spotted owl habitat are usually conducted at two spatial scales; the home range and core areas. The home range is the "area traversed by the individual in its normal activities of food gathering, mating, and caring for young" (Burt 1943:351, cited in USDI FWS 2009). Within home ranges, areas receiving concentrated use, typically surrounding the nest site and favored foraging areas, are called core areas." BiOp, 84.

67. Pre-fire in the Douglas Fire Complex planning area, spotted owl core areas are typically identified as the 0.5-mile radius circular area encompassing 500 acres around known or likely nest sites. BiOp, 27.

68. Surrounding the 0.5-mile/500 acre core area is a larger concentric circle comprising a 3,398-acre home range, which represents a 1.3-mile radius from the known or likely nest site. BiOp, 28.

69. In unburned forests, the best available science indicates that retaining at least 40 percent of the estimated home range, and 50% percent of the estimated core area, as suitable (NRF) habitat provides the best spotted owl fitness. BiOp, 29.

70. The best available scientific information about spotted owl use of unburned forests indicates that "the most persistent and productive spotted owl sites contain about 40 percent NRF habitat at the home range scale and 50 percent at the core use area. However, the same

information also shows that spotted owls can persist and be productive under a range of habitat conditions that contain lesser amounts of NRF habitat....” BiOp, 41-42.

71. Indeed, the BiOp explains that “it is recognized that there is a high degree of variability in habitat used by spotted owls in the broader Klamath Province, including the Oregon portion of the province (see Courtney et al. 2004 and USDI FWS 2011).” BiOp, 15.

72. “Many spotted owl home ranges across the District have relatively little habitat pre-fire...and the Douglas Complex fire resulted in varied impacts to the habitat...[N]early half of the spotted owl sites had either no change and/or less than 10 percent change in NRF habitat at the home range scale.” BiOp, 24.

73. “Some sites experienced between 11 and 49 percent change in habitat...However, several sites...where the fire burned with the greatest intensity, experienced more than 50 percent habitat change.” BiOp, 24.

74. The Douglas Fire Complex Recovery Project planning area overlaps a long-term spotted owl demographic study area, the Klamath Demography Study Area (KDSA). BiOp, 10.

75. According to the BiOp, “there are 45 known spotted owl sites within or that overlap the action area. Of these, 39 sites have home ranges that overlap areas of proposed harvest activities consisting of salvage and road/route/landing construction.” BiOp, 36.

76. The demography data from the KDSA “show that in 2013, prior to the fire, that 48 of the 158 sites surveyed were occupied by spotted owl pairs. In recent years, there has been a steady decline in the number of non-juvenile spotted owls detected in the KDSA despite a relatively constant survey effort. The meta-analysis indicated that spotted owl survival was stable and the population trend was stationary with confidence intervals overlapping 1.0 on the KDSA (Forsman et al. 2011).” BiOp, 20-21.

77. "More recently though, Davis et al. 2013 documented many sites on the KDSA becoming vacant and most likely due to barred owls." BiOp, 56.

78. In the Douglas Fire Complex planning area, all but two historic and current owl sites (2619O and 2211O) are habitat deficit in pre-fire NRF at either the core or home range (or both), but many of these habitat-deficit owl sites are productive sites that regularly produce young.

79. There are spotted owl sites in the Douglas Fire Complex planning area that regularly produce young, including twin owlets.

80. The NSO Recovery Plan recommends that "Consistent with restoration goals, post-fire management in these areas should promote the development of habitat elements that support spotted owls and their prey, especially those which require the most time to develop or recover (e.g., large trees, snags, downed wood). Such management should include retention of large trees and defective trees, rehabilitation of roads and firelines, and planting of native species (Beschta et al. 2004, Hutto 2006, Peterson et al. 2009). We anticipate many cases where the best approach to retain these features involves few or no management activities. Forests affected by medium- and low severity fires are still often used by spotted owls and should be managed accordingly. Many researchers supported the need to maintain habitat for spotted owl prey. For example, Lemkuhl et al. (2006) confirmed the importance of maintaining snags, downed wood, canopy cover, and mistletoe to support populations of spotted owl prey species. Gomez et al. (2005) noted the importance of fungal sporocarps which were positively associated with large downed wood retained on site post-harvest. Carey et al. (1991) and Carey (1995) noted the importance of at least 10 to 15 percent cover of downed wood to benefit prey. The costs and benefits of post-fire harvest to the development of habitat for spotted owls and their prey should be evaluated by

interagency teams (e.g., Level 1 teams) during the consultation process." NSO Recovery Plan, III-49.

81. "Studies of spotted owls in post-fire landscapes indicate that spotted owls use forest stands that have been burned, but generally do not use stands that have been burned and logged." NSO Recovery Plan, III-48.

82. According to the BiOp, the "best available information suggests that even with loss of forest canopy cover and other key habitat components typically found in NRF habitat, burned areas can provide some habitat function for spotted owls depending on fire severity. For example, areas that burned at low severity in some cases still provided spotted owl nesting, roosting, and foraging function. Areas that were burned at moderate and high severity may provide some limited nesting and foraging depending on burn patch size, edge type, and proximity to known sites (Bond et al. 2002, Bond et al. 2009, Clark 2007, Clark et al. 2011, and Clark et al. 2013 plus other authors per Appendix C). During the [BLM's] post-fire habitat updates areas that were characterized as NRF habitat pre-fire and still had some structure present post fire were characterized herein as Post-Fire Foraging (PFF) Habitat. These areas generally burned at moderate and high severity and the Level 1 Team's interpretation of the best available information suggests that most likely for the Medford Douglas circumstances, limited spotted owl foraging opportunities may still be available in these stands, albeit depending on scale and proximity factors mentioned above. Depending on the mosaic of the burn, if spotted owl nest sites and core-use areas are relatively intact and adjacent to moderate and high severity burned areas, spotted owls have shown some use of these burned areas. However, some research shows reduced occupancy and survival of spotted owls in these conditions in the short-term." BiOp, 22.

83. Results from three radio-telemetry studies of spotted owls in post-fire landscapes indicate that spotted owls use forest stands that have been burned, but generally do not use stands that have been burned and logged. For example, California spotted owls tracked 4 years post-fire in burned, unlogged stands: (1) had 30 percent of their nonbreeding-season roost locations within the fire's perimeter (Bond et al. 2010); (2) selected low-severity burned forests for roosting during the breeding season (Bond et al. 2009); and (3) selected low-, medium-, and high-severity burned forests for foraging within 1.5 km of the nest or roost site, with the strongest selection for high-severity burned forest (Bond et al. 2009).

84. However, for spotted owls in stands that had been harvested post-fire: (1) infrequent foraging in stands burned with low-, medium-, and high-severity fires was restricted to areas with live trees such as those in riparian areas (Clark 2007), and (2) use shifted away from burned stands during 3 years post-fire (King et al. 1998). Comprehensive analyses quantifying how spatial configuration of forest type, burn intensity, and post-fire logging affects spotted owl demographic and occupancy rates will provide critical information for maintaining habitat during fuels-management activities.

85. While spotted owls prefer late-successional habitat when it is available, they have been observed foraging in areas burned by fires of all severity (wildfire burn intensity) categories (Clark 2007, Bond et al. 2009).

86. "This would suggest that low- to moderate-severity fires that retain adequate canopy can function for nesting or roosting and thus allow the continued use of spotted owl activity centers, while territories that burned at high-severity no longer supported nesting spotted owls. It is expected that within mixed severity burns, spotted owls will select the best available post-fire suitable habitat and Activity Centers at these locations may persist into the future." BiOp, 133.

87. Although Clark (2007) found that spotted owls did not use large patches of high-severity burns, Bond et al. (2009) found spotted owls selecting burned areas, even high severity burns, when they were within 1.5 km of a nest or roost site.

88. Results of several of these and other studies are confounded because of post-fire logging that occurred within the study areas (e.g., King et al. 1997, Clark 2007); NSO Recovery Plan, A-11,12.

89. "The use of burned landscapes by spotted owls may depend both on severity and the distance from the activity center (Bond et al. 2009, Clark 2007, Clark et al. 2011, and Clark et al. 2013). Because spotted owls exhibit site fidelity and are central-place foragers (Rosenberg and McKelvey 1999), spotted owls may continue to use the post-fire landscape depending on the remaining post-fire habitat conditions (sufficient habitat) in the area (Clark 2007, Clark et al. 2011, Clark et al. 2013, Gaines et al. 1995, King et al. 1998). Site selection for nesting and roosting, described above, would therefore also influence the areas used for foraging. The reverse is also true, as nest site selection may be influenced by the proximity to sufficient foraging habitat." BiOp, 133.

90. "Where spotted owl activity centers are affected by fire (any range of severities) but sufficient habitat remains in the home range and immediately adjacent area, site fidelity may cause spotted owls to increase the size of their home ranges or shift locations to encompass the best available habitats rather than vacate the burned site (King et al. 1998, Clark 2007, Clark et al. 2011, 2013). Thus, a shift by spotted owls may occur under conditions where the burned area is presumably still functional in terms of extant spotted owl habitat and the affected area is considered to be occupied. This shift is likely to occur within the pre-fire home range of the affected spotted owl(s)." BiOp, 32.

91. "Clark (2007) found that in high severity burned landscapes, and landscapes with salvage harvest, spotted owls are likely to increase their home ranges to compensate for the loss of suitable habitat and this will likely impact spotted owl habitat-fitness." BiOp, 43.

92. Spotted owls are likely to increase the size of their home ranges due to the fact that wildfire has reduce the amount of prey and their habitat, requiring the bird to increase the amount of and distance to foraging habitat to find new sources of food.

93. Despite the best available science indicating that spotted owls are likely to expand their home ranges post-fire in order to meet their life cycle needs, FWS' effects analysis relies on habitat benchmarks (i.e., effects to the 1.3-mile home range and .5-mile core area) that are based on spotted owl use of unburned habitat.

94. "Spotted owls may shift their habitat use patterns and/or increase their home range size to encompass the best available suitable habitat post-fire rather than vacate the affected site, unless very poor habitat conditions exist over much of their home range (King et al. 1998, Clark 2007)." BiOp, 33.

95. Moreover, successful dispersal of juvenile spotted owls may depend on their ability to locate unoccupied suitable habitat in close proximity to other occupied sites (LaHaye et al. 2001).

96. The NSO Recovery Plan states "It is not uncommon for an occupied spotted owl site to be unoccupied in subsequent years, only to be re-occupied by the same or different spotted owls two, three or even more years later (Dugger et al. 2009). While temporarily unoccupied, these sites provide conservation value to the species by providing habitat that can be used by spotted owls on nearby sites while also providing viable locations on which future pairs or territorial singles can establish territories. Where unique circumstances or questions arise (e.g., multiple

activity centers, etc.), the Service is available to assist land managers with applying this recovery action." NSO Recovery Plan, III-45; see also, Clark (2007).

97. Owl sites that may be abandoned are important post-fire, because they represent vacant territory that may be recolonized by shifting or dispersing owls. In a heavily fragmented and checkerboarded landscape like the Douglas Complex planning area, these "vacant" sites may represent some of the best remaining habitat.

98. "The term "Post-fire Foraging" (PFF) habitat characterizes suitable spotted owl habitat based on local conditions that may still provide some limited foraging function. While these burn areas may not meet the standard definitions of spotted owl foraging habitat, nonetheless, spotted owl use of these burned areas has been documented (Clark 2007 and Comfort 2014, Appendix C). As described herein, several landscape-scale studies of spotted owls have suggested that a mosaic of suitable habitat, albeit in a green tree environment, may confer some benefits to spotted owls, in particular those landscapes with a mix of late and early seral forest where edge habitat is available. Edge ecotone benefits likely include increased prey availability and increased spotted owl reproduction. In a post-fire environment, early seral habitat/ecotones and associated prey are likely to occur as well. It is likely that these relationships are somewhat similar (pre and post-fire) but salvage harvest likely diminishes this value to some degree because of the loss of stand structure." BiOp, 33.

99. Prior to the Douglas Fire Complex, PFF habitat was considered Nesting Roosting, and/or Foraging habitat for the spotted owl.

100. "While the role of this burned habitat is unclear in overall spotted owl population maintenance, available information suggests that in the short-term this habitat, in particular when

it is salvage logged, likely contributes to reductions in spotted owl survival and occupancy." BiOp, 33.

101. And, "spotted owl use of these burned areas is well documented (Bond et al 2002, Bond et al. 2009, Clark 2007, Clark et al. 2011, Clark et al. 2013, Gaines et al. 1995, Jenness et al. 2004, King et al. 1998, Lee et al. 2012, Roberts et al. 2011)." BiOp, 42.

102. This is the first FWS biological opinion in Oregon that utilizes the new concept of "post-fire foraging" or "PFF" habitat in its effects and jeopardy analysis.

Revised Recovery Plan for the Northern Spotted Owl

103. In 2011, FWS completed the Revised Recovery Plan for the Northern Spotted Owl (NSO Recovery Plan).

104. The Oregon Klamath Province, where the Douglas Complex Fire Recovery Project is located, is designated as a Recovery Unit for the spotted owl populations that inhabit it. NSO Recovery Plan, III-1.

105. "The intended function of this Recovery Unit is to support high quality spotted owl NRF and dispersal habitats." BiOp, 24.

106. "The Oregon Klamath Mountains Province provides a southward link to the California Klamath Province as well as connectivity easterly to the Oregon West Cascades Province." BiOp, 24.

107. Recovery criteria in the NSO Recovery Plan represent FWS' identification of the conditions that may result in a determination that delisting the spotted owl is warranted. The Recovery criteria are: (1) Stable Population Trend over ten years; (2) Adequate Population Distribution, where populations in Recovery Units achieve viability; (3) Continued Maintenance

and Recruitment of Spotted Owl Habitat, where NRF habitat is stable or increasing; (4) Post-delisting Monitoring. NSO Recovery Plan, III-3.

108. According to FWS, "Recovery actions are near-term recommendations to guide the activities needed to accomplish the recovery objectives and achieve the recovery criteria." NSO Recovery Plan, Executive Summary at x.

109. Recovery Action 10 (RA 10) directs agencies to: "Conserve spotted owl sites and high value spotted owl habitat to provide additional demographic support to the spotted owl population. The intent of this recovery action is to protect, enhance and develop habitat in the quantity and distribution necessary to provide for the long-term recovery of spotted owls." NSO Recovery Plan, III-44.

110. The NSO Recovery Plan states that "this recommendation includes currently occupied as well as historically occupied sites (collectively "spotted owl sites," see Appendix G: Glossary of Terms)." NSO Recovery Plan, III-42.

111. The NSO Recovery Plan defines "spotted owl sites" as "an occupied spotted owl site or a spotted owl site where spotted owls were documented to be present in the past." NSO Recovery Plan, G-2.

112. Interim guidance for RA 10 directs federal agencies to "prioritize known and historic spotted owl sites for conservation and/or maintenance of existing levels of habitat. The prioritization factors to consider are reproductive status and site condition." NSO Recovery Plan, III-44.

113. Specifically, the RA 10 interim guidance states that "the site conservation priorities for reproductive status are: 1) Known sites with reproductive pairs; 2) Known sites with pairs; 3)

Known sites with resident singles; and 4) Historic sites with reproductive pairs, pairs, and resident singles, respectively." NSO Recovery Plan, III-44.

114. NSO Recovery Plan Recovery Action 12 (RA 12) directs: "In lands where management is focused on development of spotted owl habitat, post-fire silvicultural activities should concentrate on conserving and restoring habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood)." NSO Recovery Plan, III-49.

115. Designated critical habitat for the northern spotted owl is "land[] where management is focused on development of spotted owl habitat."

116. Relevant to post-fire timber sales such as the Douglas Fire Complex Recovery Project is the retention of medium and large snags and downed wood, because post-fire logging particularly targets medium and large fire-killed trees (snags) for removal.

117. The BiOp states that "Within stands that burned at moderate to high severity, fire-killed and fire-injured trees 8 inches DBH and greater that exhibit a high probability of mortality will be targeted for salvage." BiOp, 11.

118. Regarding RA 12, "As a general rule, forest management activities that are likely to diminish a home range's capability to support spotted owl occupancy, survival and reproduction in the long-term should be discouraged." NSO Recovery Plan, III-45.

Post-Fire Timber Harvest

119. Post-fire timber harvest activities "undermine many of the ecosystem benefits of major disturbances" (Lindenmayer et al. 2004) and frequently "ignore important ecological lessons, especially the role of disturbances in diversifying and rejuvenating landscapes" (DellaSala et al. 2006).

120. The NSO Recovery Plan recognizes that logging owl habitat after wildfires poses a significant threat to the continued viability of the species and explains that "Detrimental ecological effects of post-fire timber harvest include: increased erosion and sedimentation, especially due to construction of new roads; damage to soils and nutrient-cycling processes due to compaction and displacement of soils; reduction in soil-nutrient levels; removal of snags and, in many cases, live trees (both of which are habitat for spotted owls and their prey); decreased regeneration of trees; shortening in duration of early-successional ecosystems; increased spread of weeds from vehicles; damage to recolonizing vegetation; reduction in hiding cover and downed woody material used by spotted owl prey; altered composition of plant species; increased short-term fire risk when harvest generated slash is not treated and medium-term fire risk due to creation of conifer plantations; reduction in shading; increase in soil and stream temperatures; and alterations of patterns of landscape heterogeneity (Perry et al. 1989, McIver and Starr 2000, Beschta et al. 2004, Karr et al. 2004, Donato et al. 2006, Lindenmayer and Noss 2006, Reeves et al. 2006, Russell et al. 2006, Thompson et al. 2007, Lindenmayer et al. 2008, Johnson and Franklin 2009, Peterson et al. 2009, Swanson et al. 2010)." NSO Recovery Plan, III-48.

The Douglas Fire Complex

121. The Douglas Fire Complex burned approximately 48,000 acres of federal and non-federally-managed land in the southern Oregon Klamath Mountains.

122. "Like the Oregon Klamath Mountains Province in general, the project sites and adjacent lands in the action area are composed of a fragmented landscape of alternating sections of Federal and intensively managed private lands dominated by clearcuts and young, homogenous conifer plantations...The action area is nearly an even mix of Federal Matrix lands and non-

federal managed lands that occur in alternating sections. Pre-Douglas Complex fire, in general, spotted owl habitat in the action area consisted of a mosaic of late and mid-successional habitat on Federal lands interspersed with sections of early seral habitat on private lands...According to the District's post-fire estimates, less than half of the action area is characterized as spotted owl NRF habitat with the majority of this habitat on Federal lands (Assessment) (Table 3). Total spotted owl habitat which includes both NRF and dispersal-only habitat accounts for approximately 47 percent of the action area." BiOp, 21.

123. "There are approximately 47,480 acres of non-Federal land within the Medford Douglas action area and a large proportion of it may be subject to salvage and/or green-tree harvest." BiOp, 50.

124. "While State and private lands comprise more than half of the area within 1.3 miles of the project area, these lands at best provide marginal habitat for the spotted owl, and do not notably contribute to the viability of this species, given the management practices on those lands. Portions of these lands do not currently provide any habitat for the spotted owl and most likely any burned habitat on non-Federal land that may have provided a [post-fire foraging] function has already been salvage given the industry's aggressive actions toward removal of burned forest." BiOp, 56.

The Douglas Fire Complex Recovery Project

125. In response to the Douglas Fire Complex, the Medford District of the Bureau of Land Management (BLM) prepared the Douglas Fire Complex Recovery Project.

126. The BLM issued the Douglas Fire Complex Recovery Project Environmental Assessment (EA) for public comment on May 7, 2014, and took public comment until July 22, 2011. Plaintiffs provided timely comments on the Douglas Fire Complex Recovery Project EA.

127. According to the EA, "Post-fire foraging habitat removed in CHU would retain four snags per acre of the largest available >16" dbh, clumped typically near sides or bottom of units or other logistically feasible areas, to reduce safety concerns with harvesting operational feasibility." Douglas Fire Complex Environmental Assessment, 106.

128. Snags will be retained along the edges of salvage units.

129. The BLM issued a Decision Record and Finding of No Significant Impact (DR/FONSI) approving the Douglas Fire Complex Recovery Project on June 26, 2014.

130. The BLM's DR/FONSI authorizes salvage logging on approximately 1,276 acres of BLM land.

131. The BLM submitted a Biological Assessment (BA) to Fish and Wildlife Service on April 28, 2014, determining the project "may affect and is likely to adversely affect" (LAA) spotted owls and their critical habitat.

132. The Douglas Fire Complex Salvage Timber Sales include the Rogue Cow, Burnt Rattler, and Rock Star Timber Sales. The sales are located in the Grants Pass Resource Area of the BLM's Medford District.

FWS Biological Opinion

133. FWS issued a Biological Opinion (Ref. No.: 01EOFW00-2014-F-0161) for the Douglas Fire Complex Recovery Project on June 25, 2014, in response to BLM's submission of the action agency's biological assessment.

134. FWS' Biological Opinion (BiOp) authorized the incidental take of spotted owls at 7 of 39 affected spotted owl home ranges. BiOp, 59.

135. FWS' BiOp concluded "the Service concludes that the proposed Project is likely to incidentally take 14 adult and up to10 young spotted owls at seven sites. The take is in the form

of harm caused by habitat destruction or degradation via timber harvest of up 33 acres of NRF habitat and 1,049 acres of PFF habitat that is likely to significantly disrupt the breeding, feeding, and sheltering behavior of these spotted owls to an extent that causes injury or death." BiOp, 59.

136. The BiOp also concludes that the Douglas Fire Complex Recovery Project "is not likely to result in jeopardy to the species or destruction or adverse modification of critical habitat." BiOp, 59.

137. There are 45 known spotted owl sites (90 owls) that overlap the planning area. BiOp, 36.

138. There are 39 known spotted owl sites (78 owls) that overlap proposed salvage units. BiOp, 36.

139. The BiOp does not explain the environmental effects to the 6 known spotted owl sites that overlap the planning area, but do not overlap proposed salvage units.

140. In the Biological Opinion, the FWS states that the proposed action is Not Likely to Adversely Affect (NLAA) spotted owls at 25 of the 39 sites that overlap proposed salvage units.

141. FWS's justification for the NLAA determination for these 25 owl sites is:

> "1. Post-project NRF habitat levels are generally near 40 and 50 percent at the home range and core-use scales, respectively at a site; or if multiple sites, the aggregate of NRF habitat approximating 40 and 50 percent at the home range and core-use area (Sites: 2016A, 2080A/C, 2211O, 2619O, 3928O, 4690A/C).
>
> 2. Post-fire NRF habitat amount is severely limited, usually less than 20 percent at both the home range and core-use areas, and surveys show a pattern (usually the most recent 3-5 years) of non-occupancy by spotted owls (Sites: 0919O, 0377B and 1911C).
>
> 3. Through surveys, spotted owls have been determined to not occupy these sites in the past 2-3 years or longer periods of times for some of the sites. Proposed NRF removal is no more than one acre. Proposed PFF removal is minimal at the core use area. Minor amount of PFF removal may occur in the outer perimeter of the home range and in relatively low habitat suitability areas (Sites: 0896O, 0906A, 1913O, 1989O, 2213O, 4579A/O, 4578O, 4607O, 4670O, and 4623O).
>
> 4. These spotted owl sites may have current occupancy. Two sites of the sites have proposed NRF removal of 1 and 5 acres at the home range scale and in habitat that is of

relatively low suitability. This removal is for road/landing construction. Minor amounts of PFF removal is planned at the outer perimeter of these home ranges and in areas of relatively low habitat suitability (Sites: 0377B, 0895B, 2298A, 2622A, 4534A/O, 4575A/O)."

BiOp, 42-43.

142. Terms such as "generally," "minimal," "minor," and "recent" are not defined in the BiOp.

143. The BiOp addresses the effects of the proposed action on 14 known spotted owl sites that overlap proposed salvage units, and concludes that the proposed action is Likely to Adversely Affect (LAA) 7 of these sites. BiOp, 39.

144. FWS's justification for the LAA determination for these 7 owl sites is:

- "Alteration of NRF habitat in the nest patch.
- Removal or downgrade of NRF habitat in core-use areas and home ranges with generally less than 50 and 40 percent NRF habitat, respectively.
- The scale and amount of PFF habitat removal within spotted owl core-use areas and home ranges resulting in a reduction of foraging opportunities that could likely lead to significant impairment of spotted owl survival and reproduction. This determination will be informed by a combination of factors, such as the amount, location and spatial arrangement of pre and postharvest habitat conditions.
- Removal of any spotted owl habitat in severely habitat-deficit spotted owl-occupied home ranges."

BiOp, 35-36.

145. Except for known spotted owl sites 2211O and 2619O, post-fire the remaining 39 known spotted owl sites that overlap proposed salvage harvest units have less than 40% suitable habitat available in the core area, home range, or both.

146. FWS provides no justification for the different methodologies for determining whether the proposed action is or is not likely to adversely affect the northern spotted owl.

147. The BiOp ultimately permits the incidental take of 14 adult spotted owls and 10 juvenile spotted owls at 7 owl sites, for a total of 24 owls. BiOp, 59.

148. The BiOp states that "forest restoration efforts are planned for harvested lands associated with the proposed action, assisting the areas to more quickly return to forest conditions providing PCEs." BiOp, 54.

149. These "forest restoration efforts" appear to entail replanting: "Post-harvest, the District plans to replant forest stands with species suited to the natural plant communities, including drought resistant tree species." BiOp, 10, 72.

150. However, the NSO Recovery Plan explains that replanting after wildfires poses a threat to the recovering and future forest: "support is lacking for the contention that reduction of fuels from post-fire harvest reduces the intensity of subsequent fires (McIver and Starr 2000), and planting of trees after post-fire harvest can have the opposite effect. For example, forests in southwest Oregon that were logged and planted after a 1987 fire burned more severely in a 2002 fire than areas that were not logged or planted due, evidently, to high fuel conditions in conifer plantations (Thompson et al. 2007)." NSO Recovery Plan, III-47.

151. Moreover, in its decision authorizing the project, the BLM stated that "Reforestation is not proposed in the Douglas Fire Complex Recovery Project...." Douglas Fire Complex Recovery project Finding of No Significant Impact (FONSI), 2.

The Administrative Procedure Act

152. The APA confers a right of judicial review on any person that is adversely affected by agency action. 5 U.S.C. § 702. Upon review, the court shall "hold unlawful and set aside agency actions…found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A).

FIRST CLAIM FOR RELIEF
(ESA Section 7 and APA Violations)

Failure to Support Assumptions and Methodologies Leading to No Jeopardy Conclusion

153. Plaintiffs incorporate by reference all preceding paragraphs.

154. The ESA requires FWS to review federal agency actions to determine if they are likely to jeopardize the continued existence of any endangered or threatened species using the best available scientific information. 16 U.S.C. § 1536(a).

155. There are 45 known spotted owl sites that overlap the planning area.

156. There are 39 known spotted owl sites that overlap proposed salvage units.

157. In the Biological Opinion, the FWS states that the proposed action is Not Likely to Adversely Affect (NLAA) spotted owls at 25 of the 39 sites.

158. FWS' failure to explain the amount or extent of the impacts of the proposed action on 6 known spotted owl sites that overlap the planning area but are not in proposed salvage units "entirely failed to consider an important aspect of the problem," and is therefore arbitrary, capricious, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 50 C.F.R. §402.14(i); 16 U.S.C. §§ 1536(a)(2), 1536(b)(4).

159. FWS' failure to explain the amount or extent of the impacts of the proposed action on 6 known spotted owl sites that overlap the planning area but are not in proposed salvage units "entirely failed to consider an important aspect of the problem," and is therefore arbitrary, capricious, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 50 C.F.R. §402.14(i); 16 U.S.C. §§ 1536(a)(2), 1536(b)(4).

160. FWS' conclusion that the proposed action is Not Likely to Adversely Affect (NLAA) 25 known spotted owl sites is arbitrary, capricious, and not in accordance with the ESA because the FWS has inconsistently applied its NLAA methodology, which has led to FWS' erroneous

conclusion that the proposed project is not likely to adversely affect 25 known spotted owl sites. Specifically: 1) post-project NRF habitat levels are not generally near 40 and 50 percent at the home range and core-use scales, respectively at a site; or if multiple sites, the aggregate of NRF habitat approximating 40 and 50 percent at the home range and core-use area (Sites: 2016A, 2080A/C, 2211O, 2619O, 3928O, 4690A/C); 2) while post-fire NRF habitat amount is severely limited, usually less than 20 percent at both the home range and core-use areas, surveys in fact do not show a pattern (usually the most recent 3-5 years) of non-occupancy by spotted owls (Sites: 0919O, 0377B and 1911C); and 3) in fact, surveys indicate that spotted owls do occupy these sites, and significant rather than minor amounts of PFF removal will occur in the home range (Sites: 0896O, 0906A, 1913O, 1989O, 2213O, 4579A/O, 4578O, 4607O, 4670O, and 4623O).

161. FWS' conclusion that the proposed action is Likely to Adversely Affect, but will not result in the incidental take of 7 known spotted owl sites, is arbitrary and capricious because FWS has inconsistently applied its LAA methodology, which has led to FWS' erroneous conclusion that the proposed project is likely to result in the incidental take of only 7 known spotted owl sites. Specifically: 1) all 14 identified LAA sites (not just the 7 incidental take sites) are already deficient in NRF and suitable habitat at the core area, home range, or both; 2) substantial amounts of PFF habitat will be removed from core areas and home ranges.

162. FWS' failure to explain the basis for the application of different methodologies to assess incidental take, and accurately apply its own methodologies in assessing whether the proposed action will or will not adversely affect known northern spotted owl sites—and therefore inaccurately account for numerous incidental take as a result of the proposed action—indicates that FWS has "offered an explanation that runs counter to the evidence before the agency," "has

failed to specify the impact of the incidental taking" on the spotted owl, and the Douglas Complex BiOp is therefore arbitrary, capricious, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 50 C.F.R. §402.14(i); 16 U.S.C. §§ 1536(a)(2), 1536(b)(4).

163. Because FWS did not accurately apply its methodologies for assessing whether the project is or is not likely to adversely affect the northern spotted owl, the biological opinion does not accurately reflect whether the Douglas Fire Complex Recovery Project will result in jeopardy of the northern spotted owl.

164. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

SECOND CLAIM FOR RELIEF
(ESA Section 7 and APA Violations)

Failure to Utilize the Best Available Science in Assessing Jeopardy

165. Plaintiffs incorporate by reference all preceding paragraphs.

166. FWS is required to utilize the best available science when determining whether a Federal action is likely to adversely affect or not likely to adversely affect a listed species. 16 U.S.C. § 1536(a)(2).

167. The spotted owl habitat in the action area is already highly fragmented. Half of the planning area is non-federal, mostly private land, and has either been clear cut or salvaged post-fire. Less than half of the remaining habitat in the planning area is NRF habitat.

168. The best available scientific information indicates that competition from the barred owl poses a significant and complex threat to the spotted owl.

169. According to the BiOp, "Numerous barred owls have been detected across the action area in that barred owls have been detected in almost half of the known spotted owl sites (Davis et al. 2014, Draft)."

170. The best available scientific information indicates spotted owls are often nonresponsive in habitat occupied by barred owls, which means surveys for spotted owls that indicate "no occupancy" may not accurately indicate the presence or absence of a spotted owl at that location.

171. "No occupancy" detections may underestimate spotted owl presence due to the numerous barred owls throughout the action area.

172. Whether or not a known spotted owl site is currently "occupied" is a central factor in FWS' methodologies for assessing whether the proposed action will or will not adversely affect the northern spotted owl, and therefore also the extent of incidental take authorized.

173. The issue of how barred owls are affecting the ability to positively determine site occupancy is not addressed in the Douglas Fire Complex BiOp.

174. The effects of potential false "no occupancy" determinations are not accounted for in FWS' consideration of the effects of the proposed action and the authorization of incidental take.

175. The best available scientific information also indicates that spotted owls expand their core areas and home ranges in post-fire environments in order to satisfy life cycle needs including roosting and foraging.

176. Despite the best available scientific information to the contrary, FWS uses suitable habitat within the 500-acre core area and 3,398-acre home range to assess effects to northern spotted owls.

177. The fact that heavy barred owl presence may be leading to false "no occupancy" determinations, and that spotted owls are likely expanding their core areas and home ranges to compensate for wildfire effects, are "important aspects of the problem" and undisclosed impacts of incidental taking on the species that FWS failed to consider in the Douglas Fire Complex BiOp, rendering the BiOp arbitrary, capricious, not based on the best available scientific

information, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(a)(2); 16 U.S.C. § 1536(b)(4).

178. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

THIRD CLAIM FOR RELIEF
(ESA Section 9 and APA Violations)

Failure to Accurately Assess and Authorize Incidental Take

179. Plaintiffs incorporate by reference all preceding paragraphs.

180. When FWS concludes that an action and the resulting take of a listed species will not violate section 7(a)(2) of the ESA, the FWS must provide an Incidental Take Statement (ITS) that authorizes the takings of the listed species. 50 C.F.R. § 402.14(i)(1).

181. The ITS must: (1) specify the impact, such as the amount or extent, of the incidental take on the species; (2) specify "reasonable and prudent measures" FWS considers "necessary or appropriate to minimize such impact;" (3) set forth terms and conditions, such as reporting requirements, whereby the federal agency is required to comply with the aforementioned reasonable and prudent measures; and (4) specify the procedures to be used to handle or dispose of any animals actually taken. 16 U.S.C. § 1536(b)(4); 50 C.F.R. §402.14(i).

182. Due to FWS' failure to support its assumptions leading to the biological opinion's no jeopardy conclusion (Claim 1), and its failure to use the best available science in assessing jeopardy (Claim 2), FWS has failed to accurately assess the extent of incidental take from the Douglas Fire Complex Recovery Project on the northern spotted owl, which is arbitrary, capricious, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1538.

183. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA, 28 U.S.C. § 2412.

FOURTH CLAIM FOR RELIEF
(ESA Section 4 and APA Violations)

Failure to Use the Best Available Science to Recover the Northern Spotted Owl
(Recovery Action 10)

184. Plaintiffs incorporate by reference all preceding paragraphs.

185. The ESA states that FWS "shall develop *and implement* plans (hereinafter in this subsection referred to as "recovery plans" for the conservation and survival of endangered species and threatened species...." 16 U.S.C. § 1533(f)(emphasis added).

186. Recovery Action 10 directs FWS to "[c]onserve spotted owl sites and high value spotted owl habitat to provide additional demographic support to the spotted owl population," and "includes currently occupied as well as historically occupied sites." 2011 Final NSO Recovery Plan, III-42 – 43.

187. FWS has authorized the incidental take of at least 7 "currently occupied as well as historically occupied sites."

188. FWS has departed from Recovery Action 10 and the Recovery Plan by authorizing the incidental take of at least 7 "currently occupied as well as historically occupied sites" without explaining why the Recovery Plan and Recovery Action 10 no longer represents the best available science, or why, based on the best available science, it does not need to conserve all currently or historically occupied spotted owl sites as recommended by the Recovery Plan.

189. FWS has not explained how extensive habitat removal in 39 owls sites "meets the intent" or is "reasonably consistent" with Recovery Action 10. FWS's conclusion that the project is reasonably consistent and meets the intent of Recovery Action 10 is arbitrary, capricious, and not in accordance with the ESA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1533(f).

190. Defendant FWS has failed to conserve currently occupied and/or historic spotted owl sites and has failed to explain its rationale for deviating from the Recovery Plan and Recovery Action 10 in violation of the ESA and APA. 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1536(a)(2).

191. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA. 28 U.S.C. § 2412.

FIFTH CLAIM FOR RELIEF
(ESA Section 4 and APA Violations)

Failure to Use the Best Available Science to Recover the Northern Spotted Owl
(Recovery Action 12)

192. Plaintiffs incorporate by reference all preceding paragraphs.

193. The ESA states that FWS "shall develop *and implement* plans (hereinafter in this subsection referred to as "recovery plans" for the conservation and survival of endangered species and threatened species...." 16 U.S.C. § 1533(f)(emphasis added).

194. Recovery Action 12 states "In lands where management is focused on development of spotted owl habitat, post-fire silvicultural activities should concentrate on conserving and restoring habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood)."

195. Designated northern spotted owl critical habitat consists of "lands where management is focused on development of spotted owl habitat."

196. The "habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood)" are also primary constituent elements (PCEs) of spotted owl critical habitat.

197. The BiOp concludes that FWS expects a decline of up to 33% of PCEs, which the agency states "is not insignificant or discountable" because PCEs "will be reduced in a meaningfully measurable manner...." BiOp, 54.

198. Although FWS maintains that the loss of PCEs "is not insignificant or discountable," this adverse effect may be mitigated because "the Project will provide for a higher retention of snags (up to 5 times more) and coarse woody debris within spotted owl critical habitat and 0.5 mile core-use areas of high priority sites as compared to the District's 1995 RMP standards for Matrix lands which is the underlying LUA of the action area. Under the Project, the largest snags and coarse woody debris will be targeted for retention and left in aggregates and are likely to provide both short and long-term benefits to spotted owl prey species." BiOp, 47.

199. However, BLM Project Design Criteria (PDC's) for snag and coarse woody debris retention states that snags will be "clumped typically near sides or bottom of units or other logistically feasible areas," and does not indicate that snags will be retained at five times the amount required by the applicable land management plan. EA, 106

200. Consequently, according to the BLM, harvest units will be devoid of snags, as their retention will be clustered at the edge of units or in other no-harvest areas.

201. At the very least, the BLM's PDCs are inconsistent with the contentions of FWS regarding snag retention.

202. The project does not "concentrate on" conserving and restoring habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood), but instead targets these habitat features for removal in violation of Recovery Action 12.

203. There are no specific binding or required plans to restore the Douglas Complex area. FWS is impermissibly relying on future projects, specifically replanting efforts, to offset

immediate negative effects and "assist areas to more quickly return to forest conditions providing PCEs" in order to comply with Recovery Action 12. BiOp, 54. However, BLM has stated that replanting is not part of the Douglas Fire Complex Recovery Project. FONSI, 2.

204. FWS concludes that "the Project is reasonably consistent with the intent of Recovery Action 12," but does not explain why the project is not wholly consistent with RA 12 (versus its "intent") or why RA 12 no longer represents the best available science necessary for the recovery of the spotted owl. BiOp, 48.

205. When an agency deviates from a Recovery Plan, at a minimum FWS must explain why it chose not to follow the Recovery Plan, and why the Recovery Plan no longer represents the best available science necessary for the recovery of the species.

206. FWS has failed to explain why the Douglas Fire Complex Recovery project need not conserve and restore habitat elements that take a long time to develop (e.g., large trees, medium and large snags, downed wood) in the Biological Opinion, using the best available science or otherwise.

207. FWS has not explained how the proposed salvage harvest, which will delay the attainment of PCEs in the future by the removal of potential legacy structures that take a long time to develop (i.e., large snags and down wood material), is "reasonably consistent" with Recovery Action 12.

208. Defendant FWS has failed to explain its rationale for deviating from the Recovery Plan and Recovery Action 12 in violation of the ESA and APA. 16 U.S.C. § 1533(f); 5 U.S.C. § 706(2)(A).

209. Plaintiffs are entitled to their reasonable fees, costs, and expenses associated with this litigation pursuant to the EAJA. 28 U.S.C. § 2412.

PLAINTIFFS' PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that FWS's Biological Opinion for the Douglas Fire Complex Recovery Project violates the ESA and its implementing regulations;

2. Declare that FWS's Biological Opinion and Incidental Take Statement for the Douglas Fire Complex Recovery Project is arbitrary, capricious, an abuse of agency discretion, and contrary to law, in violation of Section 706(2)(A) of the APA;

3. Vacate and set aside the Douglas Fire Complex Recovery Project Biological Opinion and remand the Biological Opinion to the FWS until such time as the FWS demonstrates to this court that it has adequately complied with the law;

4. Award Plaintiffs their costs of suit and attorneys' fees; and

5. Grant Plaintiffs such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 1st day of August, 2014.

/s/ Susan Jane M. Brown
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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRCP 7.1, Plaintiffs state that they have not issued shares to the public and have no affiliates, parent companies, or subsidiaries issuing shares to the public.

Respectfully submitted and dated this 1st day of August, 2014.

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