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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

CENTER FOR BIOLOGICAL DIVERSITY,  
UMPQUA WATERSHEDS, INC., CASCADIA  
WILDLANDS PROJECT, and KLAMATH-  
SISKIYOU WILDLANDS CENTER,

Case No.

Plaintiffs,

COMPLAINT

v.

PAUL HENSON, State Supervisor,  
Oregon State Office of the U.S. Fish and  
Wildlife Service, and ROBYN THORSON,  
Regional Director, Pacific Region, U.S. Fish  
And Wildlife Service,

Endangered Species Act

Defendant.

**INTRODUCTION**

1. Plaintiffs, Center for Biological Diversity, Umpqua Watersheds, Inc., Cascadia Wildlands Project, and Klamath-Siskiyou Wildlands Center (hereafter collectively “the Center”), bring this

action challenging Defendants, Paul Henson and Robyn Thorson of the U.S. Fish & Wildlife Service (hereafter collectively “FWS”), for violating the Endangered Species Act (“ESA”) and its regulations because FWS has failed to reinitiate formal consultation regarding the effects on the northern spotted owl of logging on the Elliott State Forest under the 1995 Incidental Take Permit and Habitat Conservation Plan (“HCP”). New information has come to light concerning the threats to and biological status of the northern spotted owl both rangewide and in the Elliott that indicate the effects of the logging under the HCP are and will be more severe than those effects considered in the FWS October 2, 1995 Biological Opinion.

2. For these reasons, Plaintiffs seek declaratory, injunctive, and other relief for Defendant’s violations. Plaintiffs also seek an award of costs and attorneys’ fees pursuant to the ESA, 16 U.S.C. § 1540(g)(4).

#### **JURISDICTION AND VENUE**

3. This action is brought pursuant to the Endangered Species Act, 16 U.S.C. §§ 1540(c) & (g). This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540 (c) (the Endangered Species Act).

4. By letter dated and postmarked June 3, 2008, Plaintiffs notified Defendant of their violations of the ESA and of Plaintiffs’ intent to sue for those violations in accordance with the requirements of commencing an action under the ESA, 16 U.S.C. § 1540(g).

5. This Court has the authority to grant the relief requested pursuant to 16 U.S.C. § 1540 (g) (ESA); 5 U.S.C. §§ 701-06 (APA); 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and 28 U.S.C. § 2412 (Equal Access to Justice Act).

6. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 and 16 U.S.C. § 1540(g)(3)(A) because Plaintiff organizations have offices and members who reside in this

district, named Defendants also have offices that reside in this district, and a substantial part of the events or omissions occurred here. This case is properly filed in Portland, Oregon, pursuant to Local Rule 3.4 because a substantial part of the events or omissions occurred in Portland Division counties because the Incidental Take Permit and Biological Opinion were prepared in and issued from Portland, Oregon.

### **PARTIES**

7. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit corporation with offices in Portland, Oregon; Phoenix and Tucson, Arizona; Silver City, New Mexico; San Diego, San Francisco, and Joshua Tree, California; and Washington, D.C. The Center is actively involved in species and habitat protection issues throughout North America, and has 180,000 members and online activists throughout North America, including in Oregon. The Center's members and staff include area residents with biological, health, educational, scientific research, moral, spiritual and aesthetic interests in the species implicated in this suit, and the habitat involved. The Center's members and staff have and hope to continue to utilize the Elliott State Forest for recreational, scientific and spiritual endeavors. The Center's members and staff have hiked, bird watched, camped and recreated in this area of the Elliott State Forest and have firm plans to return to do so again. One of the Center's primary missions is to protect and restore habitat and populations of imperiled species throughout western North America. The degraded conditions of the Elliott State Forest and the northern spotted owl are a detriment to achieving the Center's goal of protection and restoration, and the Center's members and staff continue to be injured by the mismanagement of the Elliot State Forest at issue in this action. The injuries would be redressed by the relief sought.

8. Plaintiff UMPQUA WATERSHEDS, INC. (Umpqua Watersheds) is a public non-profit corporation based in Roseburg, Oregon. Umpqua Watersheds is dedicated to the protection and restoration of the Umpqua, Coos and Coquille watersheds. The Elliott State Forest straddles the Umpqua and Coos watersheds. Umpqua Watersheds has been monitoring the timber sales in the Elliott State Forest for compliance with the Habitat Conservation Plan for over 7 years. Umpqua Watersheds staff, members and volunteers visits the Elliott State Forest several times a year to work and recreate and have firm plans to do so in the near future. Umpqua Watersheds has submitted comments annually, during the public comment period, on the Elliott's Annual Operation Plans since 2002. Over the years it has also communicated directly with the Oregon Department of Forestry and the Oregon Board of Forestry, as well as FWS, on numerous issues, including sales that did not comply with the Habitat Conservation Plan. While the Oregon Department of Forestry has made some minor changes due to these comments, the ODF has in general, not responded satisfactorily.

9. Plaintiff CASCADIA WILDLANDS PROJECT (CWP) is a Eugene, Oregon-based non-profit conservation organization with approximately 800 dues-paying members, many who use the forests and waterways of the Elliott State Forest for recreational, scientific, and aesthetic purposes. Plaintiff and its members derive substantial benefits from the existence of older forest habitat and spotted owls on the Elliott through observation, study, photography and recreation. For years, the Cascadia Wildlands Project has identified the remaining older forests on the Elliott as critical to the survival of a number of older forest dependant species, including spotted owl and marbled murrelet. The CWP has lead and participated in species surveying efforts, recreational hikes and campouts in the Elliott to showcase the incomparable natural resource that exists there and has firm plans to do so in the near future. The past, present, and future

enjoyment of these benefits by Plaintiff and its members has been, is being, and will continue to be irreparably harmed by Defendants' disregard of their statutory duty to reinitiate consultation.

10. Plaintiff KLAMATH SISKIYOU WILDLANDS CENTER (“KS Wild”) is a non-profit public interest conservation organization based in Williams, Oregon and Ashland, Oregon. KS Wild's organizational mission is to conserve the globally outstanding biological diversity of the Klamath-Siskiyou and southern Cascade ecoregions in southern Oregon and northern California. KS Wild and its staff and members seek to protect the ecological resources of the region by protecting and preserving the native habitat of public lands. KS Wild staff and members use and enjoy the public forests and watersheds within this ecoregion, including the Elliott State Forest and have firm plans to do so again in the near future.

11. The aesthetic, conservation, recreational, and scientific interests of Plaintiffs and their members in the survival and recovery of the northern 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 Defendants to comply with the law.

12. Defendant PAUL HENSON is sued in his official capacity as State Supervisor of the Oregon State Office of the United States Fish and Wildlife Service, located in Portland, Oregon. In that capacity, Henson is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial species, including threatened northern spotted owls. In 1995, the State Supervisor signed and issued the Biological Opinion for the Incidental Take Permit for logging on the Elliott State Forest and has the duty to reinitiate consultation on the Permit and accompanying HCP.

13. Defendant ROBYN THORSON is sued in her official capacity as Regional Director of the Pacific Region of the United States Fish and Service, with offices located in Portland, Oregon. In that capacity, Thorson is responsible for administering the provisions of the ESA with regard to threatened and endangered terrestrial species, including threatened northern spotted owls. In 1995, the Regional Director signed and issued the Biological the Incidental Take Permit for logging on the Elliott State Forest and has the duty to reinitiate consultation on the Permit and accompanying HCP.

### **THE ENDANGERED SPECIES ACT**

13. The ESA requires the Secretary of the Interior to promulgate regulations listing those species of animals that are “threatened” or “endangered” under specified criteria, and to designate their “critical habitat.” 16 U.S.C. § 1533.

14. Section 9 of the Endangered Species Act (“ESA”) makes it unlawful for any person to “take” an endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1)(B). FWS has extended the take prohibition to include threatened fish and wildlife. 16 U.S.C. § 1533(d); 50 C.F.R.

17.31(a). The “take” of a protected species includes “harm,” 16 U.S.C. § 1532(19), which, in turn, includes effects from any “significant habitat modification or degradation where it actually kills or injures wildlife.” 50 C.F.R. § 17.3. Any person who knowingly “takes” an endangered or threatened species is subject to substantial civil and criminal penalties, including imprisonment. See § 1540(a) and (b) (authorizing civil fines of up to \$25,000 per violation and criminal penalties of up to \$50,000 and imprisonment for one year).

15. Section 10 of the ESA creates an exemption from the ESA's prohibition on the take of covered species. It grants FWS the power to issue permits allowing for the take of listed species that incidentally results from lawful activities on private property. 16 U.S.C. § 1539(a)(1)(B). To

obtain such a permit, known as an “Incidental Take Permit” (“ITP”), a party must develop a “habitat conservation plan” (“HCP”) that provides for ongoing mitigation efforts to minimize the project's future impact on protected species. 16 U.S.C. § 1539(a)(2); 50 C.F.R. § 17.22. Before issuing an ITP, FWS must comply with Section 7(a)(2) of the ESA and prepare a Biological Opinion to ensure that the project will not jeopardize the continued existence of covered species. 16 U.S.C. §§ 1536(a)(2), (b)(3)(A).

16. Section 7(a)(2) of the ESA requires each federal agency 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 or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical.” 16 U.S.C. § 1536(a)(2).

17. The Biological Opinion completes consultation on the Incidental Take Permit and accompanying HCP. 16 U.S.C. § 1536(b). If the Service concludes that the proposed action will jeopardize the continued existence of any listed species or threatened species or result in the destruction or adverse modification of the species’ critical habitat, the Biological Opinion must outline any “reasonable and prudent alternatives” that the Services believe will avoid that consequence. 16 U.S.C. § 1536(b)(3)(A).

18. FWS must reinitiate consultation on the Incidental Take Permit and accompanying HCP if the amount or extent of take specified in the Permit is exceeded, if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, if the action is modified in a manner that causes an effect that was not considered in the biological opinion, or if a new species is listed or critical habitat designated that may be affected by the action. 50 C.F.R. § 402.16.

19. After the initiation of consultation or reinitiation of consultation under ESA § 7(a)(2) and prior to completion of consultation, ESA section 7(d) prohibits federal agencies from making any irreversible or irretrievable commitment of resources if doing so would foreclose the formulation or implementation of reasonable and prudent alternatives. 16 U.S.C. § 1536(d). This prohibition is not an exception to the section 7(a)(2) requirement; it remains in effect until the procedural requirements of § 7(a)(2) are satisfied. 50 C.F.R. § 402.09. Section 7(d) thus does not and cannot permit activities to continue that otherwise are in violation of the procedural or substantive requirements of § 7(a)(2); it does not grant permission to proceed with admittedly harmful activities while consultation is still ongoing. *See* 51 Fed. Reg. 19926, 19940 (June 3, 1986) (“section 7(d) is strictly prohibitory in nature”).

#### **FACTUAL BACKGROUND**

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

21. On October 2, 1995, FWS issued a Biological Opinion on the Proposed Issuance of an Incidental Take Permit (PRT-803344) for Northern Spotted Owls and Marbled Murrelets to the Oregon Department of Forestry on the Elliott State Forest, Coos and Douglas Counties, Oregon. The Biological Opinion is based, in part, on information provided in the 1995 Elliott State Forest Habitat Conservation Plan (“HCP”) and Implementation Agreement.

22. Based on the Biological Opinion, the HCP and the Implementation Agreement, FWS granted Oregon Department of Forestry (“ODF”) an Incidental Take Permit on October 3, 1995. The Permit allows ODF to log slightly over 22,000 acres of northern spotted owl habitat over the

60 years of the Permit and HCP in exchange for a number of mitigation measures, including maintaining 19% of the landscape in reserves, management of a portion of the Forest (ten of seventeen management basins) in long rotations, where some owl habitat would be preserved, and maintenance of dispersal habitat across the forest. For northern spotted owls, the Permit was to expire on October 3, 2055.

23. Despite the mitigation measures, logging on the Elliott was expected to have substantial impacts on the owl. At the time FWS developed the Biological Opinion, an estimated 35 owl sites were located on or adjacent to the Elliott State Forest, in whole or in part. The Biological Opinion estimated that the majority of these 35 sites would no longer support owls after the logging that FWS approved by issuing the Permit. FWS concluded in the Biological Opinion that “24 of the 35 sites will have insufficient quantities of habitat within the provincial home range circles to remain occupied.” Biological Opinion at 8. Of these 24 impacted sites, FWS expected nine would be lost primarily and directly as a result of the issuance of the Incidental Take Permit. Biological Opinion at 9. The other 15 of the 24 sites FWS expected would be lost due to a combination of the logging permitted by FWS under the Incidental Take Permit and HCP and past habitat loss and fragmentation, and habitat loss on adjacent lands, where FWS has also allowed take of owls.

24. The Biological Opinion, and subsequently issued Incidental Take Permit, thus condoned loss of northern spotted owl habitat expected to result in the loss of 63% of the Elliot State Forest’s owl population. Ultimately, FWS concluded in the Biological Opinion that “during the term of the HCP, 10-11 management basins will support up to 13 owl sites on a regular basis.” Biological Opinion at 9.

25. On February 18, 2002, ODF completed and submitted to FWS the “Five Year Review on the Elliott State Forest Habitat Conservation Plan.” This Review found that “[v]ery little was known of the demographics of the spotted owl subpopulation on the Elliott when the HCP was written,” but found that a demographic study, “noted a marked decrease in the number of territories and number of pair sites over the period of study.” Five Year Review at 16. “[T]he declining trends in density and adult survival over this five year period are cause for concern in this study area.” Five Year Review at 7. The demographic study “also noted that two sites in particular stood out as contributing to the productivity of spotted owls on the Elliott: Roberts Creek and Salander Creek.” Five Year Review at 16. This Review also found that “[s]ix spotted owl pair activity centers and two resident single activity centers are not included in an HCA [Habitat Conservation Area] or other reserve.” The Roberts Creek and Salander Creek owl sites do not receive any protection from reserves in the HCP. *Id.* “[T]he delineation of HCAs is not entirely consistent with known spotted owl core areas. Of the 15 core areas, only 6 are wholly or partially within HCAs.” *Id.* at 17. ODF recommended in this Review that the Elliott maintain existing spotted owl nest sites with any reproductive success, in particular Roberts Creek and Salander Creek; avoid tree harvest in core use areas, high use areas or areas of older forest within owl ranges; and maintain areas of mature and old forest that are used by spotted owls, particularly in core use areas and near nest trees. *Id.* at 18.

26. As part of the monitoring required by the Incidental Take Permit and HCP, ODF contracted with Kingfisher Ecological, Inc., to conduct a density survey of northern spotted owls in the Elliott State Forest in 2003. A density survey involves surveying all potential habitat within the study area for northern spotted owls. These survey results are used to estimate the

density of owl activity centers on the Elliott State Forest and to provide site occupancy and reproductive information.

27. All known owl sites were visited during the 2003 Survey, resulting in observation of owl pairs at 12 sites and a resident single at one site, for a total of 13 sites, including one that was newly documented in 2003. Thus, after only eight years of the 60-year Incidental Take Permit and HCP, the Elliott State Forest's northern spotted owl population declined from 35 sites to 13 sites – a loss of 63% of all owl sites.

28. The 2003 Survey also detected barred owls (*Strix varia*) at eight spotted owl sites, including six of the 13 that were active in 2003 and two sites that appear to have failed, likely in part because of barred owls.

29. In 2004, FWS conducted a review of the status of the northern spotted owl. U.S. Fish and Wildlife Service, "Northern Spotted Owl Five Year Review Summary and Evaluation," (Nov., 2004). In the Status Review, FWS concluded that there is "relevant new information" concerning competition from barred owls. Status Review at 29. According to the Status Review, the barred owl has dramatically increased in numbers and distribution. FWS specifically concluded that "barred owl populations appear to be increasing throughout the Pacific Northwest, particularly in Washington and Oregon" and pointed to the Coos Bay District of the BLM, which is adjacent to the Elliot State Forest, as an example, noting that "barred owl sites increased from one known site in 1990 to 40 sites in 2001." Status Review at 31.

30. In the Status Review, FWS also discussed considerable new information that has been gathered about the impact of barred owls on northern spotted owls. For example, FWS finds that "information collected to date indicates that encounters between these two species tend to be antagonistic in nature, and that the outcome is unlikely to favor the northern spotted owl." Status

Review at 33 (citing SEI 2004, pg. 7-25). FWS concluded that barred owls “may be able to displace or preempt northern spotted owls from territories”, and the barred owl’s “use of more diverse habitat types and prey may confer some competitive advantage to barred owls over northern spotted owls with respect to reproductive output.” *Id.* FWS also found compelling evidence to indicate that presence of barred owls near owl territory centers led to the northern spotted owls abandoning these territories. In one study near the Elliott State Forest, “46 percent of northern spotted owls moved more than 0.8 km, and 39 percent of northern spotted owls were not relocated again in at least 2 years after barred owls were detected within 0.8 km of the territory center.” *Id.*

31. New information also shows that northern spotted owls contain more disease parasites than barred owls, giving the latter subspecies a further potential competitive advantage and presenting a previously unknown threat to the survival of the northern spotted owl. Ishak HD, et al., “Blood Parasites in Owls with Conservation Implications for the Spotted Owl (*Strix occidentalis*) (2008).

32. ODF plans to clear-cut young-aged stands on the Elliott State Forest. FWS has stated that clear-cutting of young-aged stands appears to be a change from traditional forest management implemented by ODF on the Elliott, and that the loss of young stands would delay maturation of these stands that were previously looked upon as future in-growth of spotted owl habitat and could result in ODF not achieving their commitments with the existing HCP at the end of the permit term.

33. In 2007, the United States Court of Appeals for the Ninth Circuit held that FWS had violated the Endangered Species Act by issuing an Incidental Take Statement that authorized the “incidental take of all spotted owls associated with the removal and downgrading of 22,227 acres

of suitable spotted owl habitat.” *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031 (9<sup>th</sup> Cir. 2007). In nearly identical language, the Incidental Take Permit for logging on the Elliott State Forest authorizes the incidental take of “all northern spotted owls (*Strix occidentalis caurina*) associated with approximately 22,000 acres of suitable owl habitat” that is to be logged.

**CLAIM FOR RELIEF**  
**Violation of § 7(a)(2) and of the ESA and Reinitiation Regulation**

34. Plaintiffs hereby allege and incorporate by reference all of the preceding paragraphs.

35. Section 7(a)(2) of the ESA requires that each federal agency shall 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 or result in the destruction or adverse modification of habitat of such species. 16 U.S.C. § 1536(a)(2). Section 7(a)(2) of the ESA also requires consultation on such federal actions, which results in a Biological Opinion. 16 U.S.C. §§ 1536(a)(2); 1536(b).

36. ESA regulations require reinitiation of consultation where new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 50 C.F.R. § 402.16(b).

37. There is new information that triggers the duty to reinitiate consultation on the Incidental Take Permit and HCP for logging on the Elliott State Forest including but not limited to: the information in the 2003 Survey showing only 13 owl sites eight years into the Permit and HCP and barred owls at 8 owl sites, including 6 of the 13 active sites detected in 2003 and at 2 owl sites that have failed; the information in the 2004 Status Review showing dramatic increase in population of the barred owls and new information that demonstrates that barred owls displace and out-compete northern spotted owls, as well as have antagonistic encounters that likely do not

favor the northern spotted owl; the information in the 2008 study showing that northern spotted owls contain more disease parasites than barred owls disease parasite report; the information that ODF is clear-cutting young stands intended to provide spotted owl habitat in the future during the term of the Permit; and the Ninth Circuit's clarification in 2007 of the ESA regulatory requirements to establish a numeric limitation on authorized take of northern spotted owls.

38. As a result, based on this new information, FWS is in violation of Section 7(a)(2) of the ESA and implementing regulations for failing to reinitiate consultation on the Incidental Take Permit and HCP authorizing logging of northern spotted owl habitat on the Elliott State Forest. 16 U.S.C. §§ 1536(a)(2), 1536(b), 1540(g)(1)(A); 50 C.F.R. § 402.16(b).

#### **PRAYER FOR RELIEF**

- A. Declare that the U.S. Fish and Wildlife Service has violated and continues to violate Section 7(a)(2) of the Endangered Species Act and implementing regulations for failing to reinitiate consultation on the Incidental Take Permit and HCP authorizing logging of northern spotted owl habitat on the Elliott State Forest based on new information since the 1995 Biological Opinion;
- B. Enjoin the U.S. Fish and Wildlife Service to comply with Section 7 of the ESA and implementing regulations by reinitiating consultation on the Incidental Take Permit and HCP for logging on the Elliott State Forest;
- C. Award Plaintiffs their costs of litigation, including reasonable attorneys' and experts fees, as provided by the ESA, 16 U.S.C. § 1540(g)(4); and
- D. Award such other relief as this Court deems just and proper.

Respectfully submitted this 12<sup>th</sup> day of August, 2008,

s/Stephanie M. Parent

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to LR 83.16, Plaintiffs disclose that they do not have parent corporations, nor do the Plaintiff organizations have stock.

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