

SETTLEMENT AGREEMENT

1.0 Parties and Effective Date

This Settlement Agreement is entered into by and between American Forest Products Council, Western Council of Industrial Workers, Douglas Education Service District, South Umpqua School District, Michael Roy McMurray, Nathan Smith, William Wynkoop, Myron Mead, Alden Lish, Daniel Newton, Galliher & Hugueuly Associates, Inc., Seneca Jones Timber Co., C & D Lumber Co., and Swanson Brothers Lumber Co. (jointly referred to as AFRC); and the Secretary of the Interior and Secretary of Agriculture (Secretaries). The Effective Date of this Settlement Agreement shall be the date it is last signed by the attorneys for AFRC, the Counties and the Secretaries, which signatures may be made in counterpart if necessary.

2.0 Recitations

- 2.1 On April 13, 1994, the Secretaries issued the Record of Decision (1994 ROD) for planning documents known as the Northwest Forest Plan (NWFP) to govern the administration of 22.1 million acres of federal land within 19 national forests in western Oregon, western Washington and northern California administered by the U.S.D.A Forest Service (Forest Service) and the Bureau of Land Management (BLM) Coos Bay, Eugene, Lakeview, Medford, Roseburg and Salem Districts as well as a BLM district in California. The Forest Service and BLM when collectively referred to in the Settlement Agreement are referred to as the Agencies.
- 2.2 The NWFP created 10 million acres of reserves where development of late successional or riparian habitat is the primary objective and timber harvesting is only allowed if it meets the goals of accelerating the development of the late successional or riparian habitat.
- 2.3 The Secretary of the Interior, through the BLM, manages 2.2 million acres of forest land in western Oregon of which the NWFP designated 1.6 million acres in Late-Successional and Riparian Reserves. These BLM lands are subject to the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act (O & C Act), 43 U.S.C. § 1181a. In 1995 the BLM adopted the Resource Management Plans for its Coos Bay, Eugene, Lakeview (Klamath Falls Resource Area), Medford, Roseburg and Salem Districts that adopted the reserve designations and other standards and guidelines of the NWFP.

- 2.4 Programmed timber harvest in the NWFP occurs in the 22 percent of the total area designated as Matrix or Adaptive Management Areas (AMAs).
- 2.5 The NWFP established ten AMAs as units designed to develop and test new management approaches to integrate and achieve ecological, economic, and other social and community objectives. The AMAs have scientific and technical innovation as goals, with a guiding principle of allowing freedom in forest management approaches to encourage innovation in achieving the goals of the NWFP. The primary technical objectives of the AMAs are development, demonstration, implementation, and evaluation of monitoring programs and innovative management practices that integrate ecological and economic values.
- 2.6 The NWFP estimated an annual probable sale quantity (PSQ) of 958 million board feet to be taken from the matrix and the AMAs over the first decade that the NWFP would be in effect (the period ending April 13, 2004). In addition, approximately 100 million board feet of other wood products not considered as merchantable were estimated to be produced annually on Matrix and AMA lands. Representing neither minimum nor maximum levels, the PSQ reflected the Agencies' best assessment of the average amount of timber likely to be offered annually in the NWFP area over the succeeding decade, following a start-up period.
- 2.7 Subsequent to the promulgation of the NWFP, the PSQ has been adjusted downward to 805 million board feet due to revised calculation of riparian reserves and adjustments to individual National Forest Land and Resource Management Plans and BLM Resource Management Plans.
- 2.8 A variety of factors have limited the ability of the Agencies to implement timber sales and produce the PSQ.
- 2.9 The objective of Late-Successional Reserves (LSRs) is to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species. Thinning (precommercial and commercial) may occur in stands up to 80 years old. The purpose of these silvicultural treatments is to benefit the creation and maintenance of late-successional forest.
- 2.10 The PSQ is based on the long-term sustained yield, from the lands suitable for timber production, from within the Matrix and AMA land use allocations. Harvest volume from treatments within LSRs and riparian reserves does not contribute to PSQ.

- 2.11 The Agencies estimate that 1.8 million acres of LSRs could benefit from thinning to enhance late successional conditions. Thinning one million of these acres could be accomplished with commercial timber sales.
- 2.12 The agencies estimate that with appropriate funding, thinning sales in the LSRs could produce approximately 4-6 billion board feet of timber over 20 to 30 years, after a start-up period.
- 2.13 The parties expressly acknowledge that in order to carry out the provisions of this Settlement Agreement, except for those obligations which can be accomplished in fiscal years 2003 and 2004 with funds budgeted for those years, additional funding targeted for the accomplishment of the objectives of this settlement will have to be obtained from Congress.
- 2.14 The Forest Service and BLM expected to use AMAs to explore alternative ways of managing, and the Agencies developed plans for the management of AMAs. In upholding the NWFP, the Federal District Court for the Western District of Washington specifically noted that alternatives designed to increase timber harvest could be tested in the AMAs.
- 2.15 A model was developed to evaluate outputs from silvicultural practices and resource values on private/federal land exchanges in the Umpqua Basin which is the Multi-Resource Land Allocation Model identified in §349 of the Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. 106-291 (October 11, 2000).
- 2.16 AFRC has pending a case in the United States District Court for the District of Columbia currently captioned *American Forest Resource Council et al. v. Clarke*, Civil No. 94-1031 TPJ (D.D.C.) (the AFRC O & C case), appeal pending No. 02-5024 (D.C. Cir.). The Second Amended Complaint in the AFRC O & C Case asserts 15 claims for relief alleging that in approving the 1994 ROD the Secretary of the Interior violated the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2; the O & C Act; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701, *et seq.* and the Federal Records Act (FRA), 44 U.S.C. §§ 3101, *et seq.* The O & C Act claims allege that the NWFP cannot establish reserves on O & C lands, and that the NWFP eliminates sustained yield timber harvest management of the O & C lands in violation of the O & C Act. The federal defendants have filed an answer to the Second Amended Complaint denying all such allegations.

- 2.17 The Counties filed an action against the Department of Interior captioned *Association of O & C Counties v. Babbitt*, Civil Number 94-1044 (the Counties O & C case), in the U.S. District Court for the District of Columbia also challenging the management of BLM lands in Oregon and California under the 1994 NWFP Record of Decision. In their complaint, the Counties alleged violations of the O & C Act, FLPMA, FACA, and NEPA. This action was settled by parties in 1997, and the matter was dismissed without prejudice. A copy of the settlement agreement (Counties O & C case Settlement Agreement) is annexed as Exhibit A. As part of the Counties O & C case Settlement Agreement, the plaintiffs in the Counties O & C case agreed to forbear from filing challenges “based on the allegations of violations made in the complaints in the present cases or on any allegations substantively similar to those made in those complaints prior to the year 2001.” Counties O & C case Settlement Agreement ¶ 1. In another provision of the Counties O & C case Settlement Agreement, the BLM agreed that “in any major revisions to the [BLM Resource Management Plans], the range of alternatives given detailed consideration would include an alternative that emphasizes sustained-yield timber production on the O & C lands, except insofar as limitations on timber management on the O & C lands would be necessary to comply with the Endangered Species Act, Clean Water Act, or any other law to which management of the O & C lands must adhere.” *Id.* ¶ 2.
- 2.18 Although neither the Secretary of Agriculture nor the Forest Service are defendants in the AFRC O & C case, or were defendants in the Counties O & C case, they are undertaking the obligations herein in the recognition that the NWFP is an integrated plan for management of BLM and Forest Service lands within the range of the Northern Spotted Owl, and that were AFRC to succeed in their O & C Act claims, or were the Counties to succeed in a new action raising a similar challenge to the management of O & C lands, a larger burden would fall on the Forest Service to meet the ecological objectives of the NWFP.
- 2.19 BLM Resource Management Plans in western Oregon would normally come up for revision every 15 to 20 years.
- 2.20 The O & C Act provides in part that O & C lands shall be “managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a timber supply, protecting watershed, and contributing to the economic stability of local communities and industries.” The O & C Act has been interpreted by the United States Court of Appeals for the 9th Circuit in *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174 (1990).
- 2.21 To avoid further costly litigation, and without admission of any liability or

wrongdoing by either party, the parties to the AFRC O & C Case desire to settle the claims raised in that case, and the parties to the Counties O & C Case desire to amend the Counties O & C case Settlement Agreement to modify the obligations and remedies set forth therein to conform to those set forth in this Settlement Agreement.

3.0 Agreements

- 3.1 Beginning with the budget for Fiscal Year 2005, the BLM and the Forest Service severally agree that their annual program and budget requests to the Department of the Interior in the case of BLM and to the Department of Agriculture in the case of the Forest Service, will include a request for additional funds targeted to fully fund the obligations expressed in paragraphs 3.2, 3.4 and 3.5 below.
- 3.2 Contingent upon obtaining the necessary funds as described in paragraphs 2.13 and 3.1 above, the Agencies will use their best efforts every year beginning in Fiscal Year 2005: (1) to offer timber sales in an amount equal to the annual PSQ in the NWFP, currently estimated at 805 million board feet, for as long as there is a PSQ for the area covered by the NWFP, and (2) to offer thinning sales as described in paragraph 2.12 of approximately 300 million board feet per year to the extent that and for so long as such sales are consistent with the ecological objectives of the NWFP.
- 3.3 The Agencies agree to propose research/demonstration projects (projects) in three AMAs to evaluate alternative silvicultural practices and standards and guidelines based on the principle of management across the entire landscape, as follows:
 - 3.3.1 By October 1, 2003, the BLM and the Forest Service will identify proposed projects which (a) meet the purpose for which the AMA was established; (b) provide an opportunity for significant experimentation; (c) can be implemented in a timely fashion; and (d) are cost effective.
 - 3.3.2 In consultation with the plaintiffs, the BLM and the Forest Service will select from the proposed projects identified pursuant to paragraph 3.3.1, two projects for which the environmental analysis can be completed in accordance with the schedule set forth in paragraph 3.3.4 below under current projected fiscal year 2003 and 2004 funding levels. A lead agency for each project will also be selected by the BLM and the Forest Service.
 - 3.3.3 At least one proposed project in one AMA will test the Multi-Resource Land Allocation model, or a variation thereof.

- 3.3.4 The schedule for the projects selected pursuant to paragraph 3.3.2 as being able to proceed under the 2003 and 2004 funding levels is as follows:
- 3.3.4.1 By November 1, 2003, the Agencies will identify the proposed projects, and the AMAs where they would be implemented;
- 3.3.4.2 If it is determined by the agency that an environmental Assessment (EA) is the NEPA documentation required for a particular project, the EA and any needed ESA section 7 consultation will be completed by September 1, 2004.
- 3.3.4.3 If it is determined by the agency that an Environmental Impact Statement (EIS) is the NEPA documentation required for a particular project, the EIS and any needed ESA section 7 consultation will be completed by April 1, 2005.
- 3.4 For the projects identified pursuant to paragraph 3.3.2 that do not have sufficient funding to proceed in fiscal years 2003 and 2004, a schedule for completion of the environmental analysis will be developed by the BLM and Forest Service, in consultation with the plaintiffs, upon receipt of required funding levels as described in paragraphs 2.13 and 3.1 above.
- 3.5 Contingent upon obtaining the necessary funds as described in paragraph 2.13 and 3.1 above, the BLM will revise the Resource Management Plans for its Coos Bay, Eugene, Lakeview, Medford, Roseburg and Salem Districts by December 31, 2008. At least one alternative to be considered in each proposed revision will be an alternative which will not create any reserves on O & C Lands except as required to avoid jeopardy under the Endangered Species Act. All plan revisions shall be consistent with the O & C Act as interpreted by the 9th Circuit Court of Appeals.

4.0 Miscellaneous Provisions

- 4.1 This Settlement Agreement resolves the disputes between the parties relating to the issues presented in the AFRC O & C case, and amends the Counties O & C case Settlement Agreement, superseding in its entirety the provisions beginning in

Paragraph 1 of the Counties O & C case Settlement Agreement with the words: “The Association of O & C Counties and Douglas County covenant . . .” through and including paragraph 2 thereof. This Settlement Agreement resolves all claims by the Counties or AFRC which were asserted or could have been asserted in both cases, but does not address or resolve any other pending, actual or potential dispute between the parties including all disputes presented in any other pending legal action. Nothing in the Settlement Agreement shall be construed as being prejudicial to any purchaser’s pending or future claim concerning any timber sale contract.

- 4.2 AFRC’s appeal is currently being held in abeyance in the Court of Appeals pending status reports from the parties. Provided the District Court indicates its disposition to dismiss the AFRC O & C case without prejudice in accordance with the terms of this Settlement Agreement, AFRC and the Secretaries will jointly request the Court of Appeals to remand the AFRC O & C Case to the District Court for dismissal without prejudice in accordance with this Settlement Agreement. Such dismissal shall not create, support or constitute a defense to any claims AFRC or the Counties may have against the outcome of any administrative action undertaken by the Agencies pursuant to this Settlement. The dismissal shall call for each party to bear its own costs and attorney fees.
- 4.3 The District Court shall retain jurisdiction through June 30, 2009 to consider any motion by AFRC and/or the Counties to enforce this Settlement Agreement, which may not be filed until 60 days after the moving party has given written notice to the Agencies of their failure to perform any agreement required by paragraphs 3.1 through 3.5. Alternatively, after giving such notice AFRC and the Counties or either of them may move, under Fed.R.Civ.P.60(b), to vacate, as the case may be, (1) the dismissal of the AFRC O&C case without prejudice pursuant to this Settlement Agreement, and/or (2) the dismissal of the Counties O&C case without prejudice entered March 17, 1997, and the federal defendants shall not, unless they dispute in good faith the moving party’s contention that they have failed to perform as alleged, oppose any such motion. Upon the entry of an order vacating the dismissal of its case, AFRC and the Counties shall each thereafter be free to pursue their claims for relief. In the event that the Agencies are otherwise in compliance with this Settlement Agreement, but Congress fails to provide necessary additional funding targeted for accomplishment of the objectives of the Settlement Agreement, and the objectives of the Settlement Agreement which are conditional on additional funding as set forth in paragraphs 3.2, 3.4 and 3.5 are not substantially performed for that reason, then AFRC and the Counties shall be entitled, as their sole remedy in this instance, to move to vacate the dismissals of their respective cases under Fed.R.Civ.P.60(b), in the manner and subject to the conditions set forth above, and pursue their claims for relief.

- 4.4 The election by AFRC or by the Counties to seek enforcement of this Settlement Agreement prior to June 30, 2009 as set forth in paragraph 4.3 shall preclude either of them from alternatively moving to vacate the dismissal of its case by reason of the alleged failure to perform that forms the basis for the motion to enforce the Settlement Agreement. Subsequent to June 30, 2009, the sole remedy of AFRC and the Counties for any alleged failure to perform shall be to move to vacate the dismissal of their respective cases. In the event that the Court shall enter an order vacating the dismissal of either the AFRC O&C case or the Counties O&C case, all obligations under this Settlement Agreement shall cease.
- 4.5 The parties agree that this Settlement Agreement shall not be taken or construed as an admission of liability or potential liability on the part of either party, or an admission of the existence of any facts upon which liability could be based, but rather that any such liabilities or potential liabilities have been and are expressly denied by the parties.
- 4.6 Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded the Agencies under any statutes administered by them or applicable to their activities or by general principles of administrative law.
- 4.7 Nothing in the terms of this Settlement Agreement shall be construed to limit or deny the power of the Agencies to promulgate or amend regulations or to otherwise amend or revise Resource Management Plans, Land and Resource Management Plans, the NWFP, or any other planning document contemplated by the NWFP.
- 4.8 No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that Defendants obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.
- 4.9 The terms of this Settlement Agreement constitute the entire agreement of the Parties, and no statement, agreement or understanding, oral or written, which is not contained herein, shall be recognized or enforced.
- 4.10 Each undersigned representative of the Parties hereto certifies that he or she is fully authorized to enter into and execute the terms and conditions of this Settlement Agreement. This Settlement Agreement becomes effective upon signature of the undersigned representatives as of the date of last signing.

IN WITNESS WHEREOF, the parties hereto have caused this Settlement Agreement to be

executed as of the date shown below.

Stoel Rives LLC

By:

/s/ Per A. Ramfjord.

Per A. Ramfjord

Attorneys for AFRC as that term is defined
above.

Date: August 1, 2003

/s/ Kevin Q. Davis.

Kevin Q. Davis

Attorney for the Counties as that term is
defined above.

Date: 8/1/03.

Thomas L. Sansonetti

Assistant Attorney General

Environment and Natural Resources
Division

U.S. Department of Justice

By:

/s/ Wells D. Burgess.

Wells D. Burgess

Attorneys for the Secretaries as that term is
defined above.

Date: July 29, 2003.

SETTLEMENT AGREEMENT

in the case of Association of O&C Counties and Douglas County, Oregon v. Babbitt and Dombeck, C.A. No. 96-5222 (D.C. Cir.); Civ. No. 94-1044 (U.S.D.C. D.C.)

1. The parties will jointly request the Court of Appeals to stay the appeal and issue a limited remand to the District Court on the basis of this settlement agreement to seek vacation of the District Court's dismissal of the cases, and instead enter voluntary dismissal without prejudice. Provided the District Court agrees to vacate its previous order on the basis of this settlement, the parties will then jointly request dismissal of the appeal. The Association of O&C Counties (AOCC) and Douglas County covenant that they will not file an action in any federal court against the Bureau of Land Management or its officers challenging the validity of the 1994 Northwest Forest Plan or the 1995 Resource Management Plans of the BLM in western Oregon (RMPs) based on the allegations of violations made in the complaints in the present cases or on any allegations substantively similar to those made in those complaints prior to the year 2001. The parties agree that the time between the date of execution of this Agreement and January 1, 2001, inclusive, will not be included in computing the time limited by any statute of limitations for any cause of action subject to this paragraph. Nor will that time period be considered on a defense of laches or similar defense concerning timeliness of commencing a civil action. The parties agree that any applicable statute of limitations shall be tolled during and for that period.
2. The BLM agrees that in any major revisions to the RMPs, the range of alternatives given detailed consideration would include an alternative that emphasizes sustained-yield timber production on the O&C lands, except insofar as limitations on timber management on the O&C lands would be necessary to comply with the Endangered Species Act, Clean Water Act, Clean Air Act, or any other law to which management of the O&C lands must adhere. It is understood that the BLM would not be making any commitment to select such an alternative as the preferred alternative, and that it is expected that the BLM will develop as wide a range of reasonable alternatives as possible for consideration. A minor amendment to a current RMP resulting from the adaptive management process would not be considered to be a major revision. The obligation to consider the sustained-yield timber production alternative would not apply to changes to RMPs short of major revisions, and nothing herein would alter the discretion of the BLM to amend the RMPs pursuant to the adaptive management process without undertaking a major revision. Agreement to include any such alternative in future revisions is not an admission that the current Resource Management Plans of the BLM are in violation of the O&C Lands Act, or any other law. Similarly, nothing in the settlement agreement, or the fact of settlement, would be construed as an admission by any party of either a violation of law or the lack thereof.

3. Under BLM's existing Resource Management Plans and planning regulations, the BLM conducts plan evaluations every three years. The BLM agrees to allow the county governments who make up the membership of the AOCC to participate in the development of these periodic evaluations, including consultation during preparation of, and review of, draft documents prior to their publication and dissemination to the general public. In addition to other relevant information and comments, BLM specifically agrees to give consideration in these evaluations to the studies and research developed by the State and AOCC referenced in the following paragraph. The BLM and the AOCC will cooperate in finding ways to make the county government participation in these plan evaluations as meaningful and effective as possible. The first plan evaluation on the BLM's western Oregon Resource Management Plans will be done in 1998, which will followed every three years thereafter (i.e. 2001, 2004, 2007, etc.).
4. The AOCC intends to request the State of Oregon to join in studies that examine ways to improve forest health and increase sustainable timber production on the O&C lands consistent with the objectives and goals of the Northwest Forest Plan. The BLM will agree to cooperate with the AOCC for purposes of these studies, including by providing requested existing information and data, and access to BLM's resource specialists, to the extent possible without interfering with the BLM's ability to carry out its program.
5. Nothing in this agreement will require the BLM to expend funds in excess of appropriations available under law.

Dated: Jan 30, 1997 .

For the Association of O&C Counties:

/s/ Rocky McVay .
Rocky McVay
Executive Director of the
Association of O&C Counties

Dated: 1-30-97 .

For Douglas County:

/s/ Doug Robertson
Doug Robertson
Commissioner, Douglas County

Dated: Jan 29, 1997

For the Bureau of Land Management:

/s/ Elaine Zielinski.

Elaine Zielinski
State Director, Oregon/Washington State
Office

Dated: Jan 28, 1997

For the Department of the Interior:

/s/ Paul Smyth.

Paul Smyth
Acting Associate Solicitor, Division of Land
and Water Resources

Dated: January 29, 1997

For the Defendants in Association of O&C Counties, et al. v. Babbitt, et al.:

/s/ David C. Shilton.

David C. Shilton
Attorney, Appellate Section
Environment & Natural Resources Division
Department of Justice