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TO: All Member Counties of the Association

FROM: Rocky McVay, Executive Director
Kevin Davis, Legal Counsel

DATE: March 5, 2004

RE: County and Association Participation in New BLM Planning Process

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The BLM is embarking on a planning process that will lead to revised Resource Management Plans ("RMPs") for its Western Oregon Districts. We have been asked to help clarify the roles the BLM can expect Counties and the Association to play in the process. This memo will provide background information, and also propose an arrangement intended to facilitate County involvement.

Why is the BLM revising its RMPs?

The current RMPs were originally adopted about ten years ago as part of the Northwest Forest Plan ("NWFP") under the Clinton administration. This Association has been particularly disappointed with the failure of the NWFP to deliver on its promises of economic and community stability benefits.

Litigation against the government over the NWFP had been pending in the federal courts in Washington D.C. since 1995. This Association was an original party, then suspended active participation in 1997, but was considering resuming active participation in 2001. At about that time, the government and other parties expressed a desire to explore settlement possibilities, and the Association was invited to join in negotiations.

Negotiations proceeded and eventually succeeded with a signed Settlement Agreement in mid-2003. A copy of the Settlement Agreement is attached. One of the provisions of the Agreement says that, contingent upon Congress appropriating funds to support the planning process:

". . . 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." (Emphasis added.)

The Settlement Agreement therefore provided the impetus for the BLM to begin preparing new RMPs.

What has the 9th Circuit said about the O&C Act?

The 9th Circuit Court of Appeals has addressed the O&C Act numerous times, most importantly in Headwaters, Inc. v. Bureau of Land Management, 914 F2d 1174 (9th Cir., 1990). Headwaters, Inc. was an environmental organization that challenged the Wilcox Peak timber sale. The following, lengthy passage is quoted from the Headwaters decision, with case citations deleted. This passage represents the 9th Circuit view of the O&C Act that is referred to in the Settlement Agreement and to which the new BLM RMPs must adhere:

*Headwaters also contends that the BLM has misinterpreted the Oregon and California Sustained Yield (or McNary) Act, 43 U.S.C. §1181a, et seq. (O&C Act). * * * Headwaters contends that the O&C Act requires the BLM to manage these lands for multiple use, including wildlife conservation, rather than for the dominant use of timber production.*

We have previously observed that "[t]he provisions of 43 U.S.C. §1181a make it clear that the primary use of the [O&C Act] lands is for timber production to be managed in conformity with the provisions of sustained yield."

While these statements are arguably dicta, we are convinced of their accuracy. 43 U.S.C. §1181a states that O&C Act lands

> *shall be managed, except as provided in section 1181c of this title [since repealed], for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties.*

Headwaters argues that the phrase "forest production" in section 1181a encompasses not merely timber production, but also conservation values such as preserving the habitat of the northern spotted owl. However, Headwaters's proposed use-exempting certain timber resources from harvesting to serve as wildlife habitat- is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O&C Act lands, we conclude that Headwaters's construction is untenable. There is no indication that Congress intended "forest" to mean anything beyond an aggregation of timber resources.

Nor does the legislative history support Headwaters's reading. The purposes of the O&C Act were twofold. First, the O&C Act was intended to provide the counties in which O&C Act land was located with the stream of revenue which has been promised but not delivered by the Chamberlain-Ferris Revestment Act, 39 Stat. 218 (1916). The counties had failed to derive appreciable revenue from the Chamberlain-Ferris Act primarily because the lands in question were not managed so as to provide a significant revenue stream; the O&C Act sought to change this. Id. Second, the O&C Act intended to halt previous practices of clear-cutting without reforestation, which was leading to a depletion of forest revenues.

> *All land classified as timber in character will continue in Federal ownership and be managed for permanent forest production on what is commonly known as a sustained-yield basis. Under such a plan the amount of timber which may be cut is limited to a volume not exceeding new growth, thereby avoiding depletion of the forest capital. This type of management will make for a more permanent type of community, contribute to the economic stability of local dependent industries, protect watersheds, and aid in regulating streamflow.*

H.R. Rep. No. 1119, 75th Cong., 1st Sess. 2 (1937). This report concludes that the O&C Act "establishes a vast, self-sustaining timber reservoir for the future." Id. at 4.

It is entirely consistent with these goals to conclude that the O&C Act envisions timber production as a dominant use, and that Congress intended to use "forest production" and "timber production" synonymously. Nowhere does the legislative history suggest that wildlife habitat conservation or conservation of old growth forest is a goal on a par with timber production, or indeed that it is a goal of the O&C Act at all. The BLM did not err in construing the O&C Act as establishing timber production as the dominant use.

What are possible roles for the Association and individual counties in the BLM planning process?

Every county and the Association could proceed independently, without coordination. Each has the standing of any other member of public. Each county, but not the Association, also has the position of elevated standing conferred by the statutory interests of counties under the O&C Act. The Association, but not individual counties, has a position of elevated standing as a result of being a party to the Settlement Agreement with the BLM, and therefore being an entity to which the BLM owes contractual duties.

In addition to the foregoing, individual counties, but not the Association, can choose to participate in the BLM process as "cooperating agencies." Attached are some materials provided by the BLM that discuss nonfederal cooperating agencies. That status is not well defined, but likely will have some advantages, including entitlement to more active consultation by the lead agency (in this case the BLM). The Association cannot qualify as a cooperating agency because it does not have governmental authority.

While the Association cannot be a cooperating agency in its own right, it can serve as the representative of cooperating agencies. That is, individual counties, each of whom might choose to be a cooperating agency, can name the Association as their representative for purposes of attending meetings, providing information, communicating with the BLM, etc. If the Association is named as the representative, the individual counties for which it serves as representative do not give up any of their individual rights. Each may also participate individually, and an individual county may assert positions that vary from that of the Association if the county finds that its individual interests on a particular issue are not identical to those asserted by the Association. In other words, having the Association serve as the representative may offer advantages without the county having to give up any of its individual rights to participation.

Is there funding available for planning participation?

PL 106-393 (the safety-net legislation) authorizes counties to use funds allocated to Title III for certain kinds of projects selected by the county. One authorized use is "planning efforts to reduce or mitigate the impact of development on adjacent federal lands and to increase the protection of people and property from wildfires." The legislative history confirms that planning for management activities on federal lands can be an appropriate use of Title III funds. The legislative history contains just one example of an authorized use for Title III funds, and it is this:

> "For example, fire prevention and county planning efforts provided under section 302(b)(5) may be conducted in cooperation with federal efforts to reduce wildfires risk in the wildland-urban interface. It would be appropriate in this case for a county to leverage county [Title III] funds against federal funds allocated to do the project planning and NEPA analysis required for forest thinning and other forms of vegetation management."

It therefore appears that a county can allocate Title III funds to help support its participation in the planning process that will be conducted for the BLM RMPs. Please note the limitations of Title III, however: Such use of funds is appropriate only to the extent they are used for planning to address wildfire issues or the impacts of development.

What is the goal of the Association in the new planning process?

The Association's mission has always been the implementation of the O&C Act and protection of the benefits to communities under that legislation. The Association's goal in the new planning process is simple: RMPs that comply with the O&C Act, as that Act is interpreted in the Headwaters decision.

Limitations on the Association's ability to participate.

This Association operates with limited funding and minimal staff. Current time and financial resources are committed, some might say overcommitted, to various aspects of implementation and (hopefully) reauthorization of PL 106-393. Yet, the upcoming BLM planning process is every bit as important, particularly if efforts to achieve reauthorization are not successful.

Fortunately, the Association will have the benefit of efforts already contracted for by Douglas County, which has retained Van Manning, former District Manager of the BLM's Salem District. Van, now retired, had over 30 years of experience with the BLM and knows the planning process very well. Just as importantly, Van is very familiar with the O&C Act and the management obligations it imposes on the BLM. Van has always been respectful of the relationships of the counties with the O&C Lands. Douglas County has retained Van to participate in the planning process on all of the Western Oregon BLM Districts.

A Proposal for efficient participation.

We propose the following course of action to maximize efficient, effective participation in the planning process:

(1) All counties interested in the BLM planning process should write to the BLM to identify themselves as interested in participating as cooperating agencies. A draft letter is attached that can be used for this purpose. Even if your county has already notified the BLM that it desires cooperating agency status, please do so again using the enclosed letter.

(2) Counties that are interested in the planning process, choose to participate as cooperating agencies and wish to have the Association's assistance, should communicate to the BLM that the Association is appointed as their representative. The enclosed letter accomplishes this step. Having the Association serve as your representative does not thereafter limit your rights in any way.

(3) The Association will enter into an arrangement with Van Manning, under which Van would attend planning meetings for the Association as well as Douglas County, and provide

guidance to the Association. Rocky or Kevin would also participate in some of the meetings, but for those they do not attend, Van would provide regular reports. Any individual county could also choose to participate as much as little as they deemed appropriate. The Association would provide regular written reports to the counties about progress in the RMP planning process.

If you have any questions, please feel free to call Rocky or Kevin, or plan on attending the next meetings of the Association's Board of Directors on April 16 in Roseburg (time and location to be announced). The Association is currently discussing with the BLM the possibility of a workshop for counties interested in the planning process. We will let you know if and when such workshop is scheduled.

Attachment 1 ..... Settlement Agreement

Attachment 2 ..... Guidance Re: Non-federal Cooperating Agencies

Attachment 3 ..... Proposed County Letter to BLM

CA 94-1031 Attachment 1

SETTLEMENT AGREEMENT

1.0 Parties and Effective Date

This Settlement Agreement is entered into by and between American Forest Resource 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 & Huguely Associates, Inc., Seneca Jones Timber Co., C & D Lumber Co., and Swanson Brothers Lumber Co. (jointly referred to as AFRC); the Association of O & C Counties and Douglas County (jointly referred to as the Counties); 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 this 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 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 the 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 watersheds, 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 paragraphs 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 this 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 dismissals 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 LLP
By: _____
Per A. Ramfjord
Attorneys for AFRC as that term is defined above.

Date: August 1, 2003

_____
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: _____
Wells D. Burgess
Attorneys for the Secretaries as that term is defined above.

Date: July 29, 2003

Dated: 29 [illegible]

For the Bureau of Land Management:

Elaine Zielinski

Elaine Zielinski
State Director, Oregon/Washington State Office

Dated: JAN 28 1997

For the Department of the Interior:

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

Dated: 29 [illegible]

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

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

January 30, 2002

MEMORANDUM FOR THE HEADS OF FEDERAL AGENCIES

FROM: JAMES CONNAUGHTON
Chair

SUBJECT: COOPERATING AGENCIES IN IMPLEMENTING THE PROCEDURAL REQUIREMENTS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of this Memorandum is to ensure that all Federal agencies are actively considering designation of Federal and non-federal cooperating agencies in the preparation of analyses and documentation required by the National Environmental Policy Act (NEPA), and to ensure that Federal agencies actively participate as cooperating agencies in other agency's NEPA processes. [1] The CEQ regulations addressing cooperating agencies status (40 C.F.R. §§ 1501.6 & 1508.5) implement the NEPA mandate that Federal agencies responsible for preparing NEPA analyses and documentation do so "in cooperation with State and local governments" and other agencies with jurisdiction by law or special expertise. (42 U.S.C. §§ 4331(a), 4332(2)). Despite previous memoranda and guidance from CEQ, some agencies remain reluctant to engage other Federal and non-federal agencies as a cooperating agency. [2] In addition, some Federal agencies remain reluctant to assume the role of a cooperating agency, resulting in an inconsistent implementation of NEPA.

Studies regarding the efficiency, effectiveness, and value of NEPA analyses conclude that

[1] Cooperating agency status under NEPA is not equivalent to other requirements calling for an agency to engage another governmental entity in a consultation or coordination process (e.g., Endangered Species Act section 7, National Historic Preservation Act section 106). Agencies are urged to integrate NEPA requirements with other environmental review and consultation requirements (40 C.F.R. § 1500.2(c)); and reminded that not establishing or ending cooperating agency status does not satisfy or end those other requirements.

[2] Memorandum for Heads of Federal Agencies, Subject: Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, dated July 28, 1999; Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process, Subject: Questions and Answers About the NEPA Regulations (NEPA's Forty Most Asked Questions), dated March 16, 1981, published at 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended.

stakeholder involvement is important in ensuring decisionmakers have the environmental information necessary to make informed and timely decisions efficiently.[3] Cooperating agency status is a major component of agency stakeholder involvement that neither enlarges nor diminishes the decisionmaking authority of any agency involved in the NEPA process. This memo does not expand requirements or responsibilities beyond those found in current laws and regulations, nor does it require an agency to provide financial assistance to a cooperating agency.

The benefits of enhanced cooperating agency participation in the preparation of NEPA analyses include: disclosing relevant information early in the analytical process; applying available technical expertise and staff support; avoiding duplication with other Federal, State, Tribal and local procedures; and establishing a mechanism for addressing intergovernmental issues. Other benefits of enhanced cooperating agency participation include fostering intra- and intergovernmental trust (e.g., partnerships at the community level) and a common understanding and appreciation for various governmental roles in the NEPA process, as well as enhancing agencies' ability to adopt environmental documents. It is incumbent on Federal agency officials to identify as early as practicable in the environmental planning process those Federal, State, Tribal and local government agencies that have jurisdiction by law and special expertise with respect to all reasonable alternatives or significant environmental, social or economic impacts associated with a proposed action that requires NEPA analysis.

The Federal agency responsible for the NEPA analysis should determine whether such agencies are interested and appear capable of assuming the responsibilities of becoming a cooperating agency under 40 C.F.R. § 1501.6. Whenever invited Federal, State, Tribal and local agencies elect not to become cooperating agencies, they should still be considered for inclusion in interdisciplinary teams engaged in the NEPA process and on distribution lists for review and comment on the NEPA documents. Federal agencies declining to accept cooperating agency status in whole or in part are obligated to respond to the request and provide a copy of their response to the Council. (40 C.F.R. § 1501.6(c)).

In order to assure that the NEPA process proceeds efficiently, agencies responsible for NEPA analysis are urged to set time limits, identify milestones, assign responsibilities for analysis and documentation, specify the scope and detail of the cooperating agency's contribution, and establish other appropriate ground-rules addressing issues such as availability of pre-decisional information. Agencies are encouraged in appropriate cases to consider documenting their expectations, roles and responsibilities (e.g., Memorandum of Agreement or correspondence). Establishing such a relationship neither creates a requirement nor constitutes a presumption that a lead agency provides financial assistance to a cooperating agency.

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[3] E.g., *The National Environmental Policy Act – A Study of its Effectiveness After Twenty-Five Years*, CEQ, January 1997

Once cooperating agency status has been extended and accepted, circumstances may arise when it is appropriate for either the lead or cooperating agency to consider ending cooperating agency status. This Memorandum provides factors to consider when deciding whether to invite, accept or end cooperating agency status. These factors are neither intended to be all-inclusive nor a rote test. Each determination should be made on a case-by-case basis considering all relevant information and factors, including requirements imposed on State, Tribal and local governments by their governing statutes and authorities. We rely upon you to ensure the reasoned use of agency discretion and to articulate and document the bases for extending, declining or ending cooperating agency status. The basis and determination should be included in the administrative record.

CEQ regulations do not explicitly discuss cooperating agencies in the context of Environmental Assessments (EAs) because of the expectation that EAs will normally be brief, concise documents that would not warrant use of formal cooperating agency status. However, agencies do at times – particularly in the context of integrating compliance with other environmental review laws – develop EAs of greater length and complexity than those required under the CEQ regulations. While we continue to be concerned about needlessly lengthy EAs (that may, at times, indicate the need to prepare an Environmental Impact Statement (EIS)), we recognize that there are times when cooperating agencies will be useful in the context of EAs. For this reason, this guidance is recommended for preparing EAs. However, this guidance does not change the basic distinction between EISs and EAs set forth in the regulations or prior guidance.

To measure our progress in addressing the issue of cooperating agency status, by October 31, 2002 agencies of the Federal government responsible for preparing NEPA analyses (e.g., the lead agency) shall provide the first bi-annual report regarding all EISs and EAs begun during the six-month period between March 1, 2002 and August 31, 2002. This is a periodic reporting requirement with the next report covering the September 2002 – February 2003 period due on April 30, 2003. For EISs, the report shall identify: the title; potential cooperating agencies; agencies invited to participate as cooperating agencies; agencies that requested cooperating agency status; agencies which accepted cooperating agency status; agencies whose cooperating agency status ended; and the current status of the EIS. A sample reporting form is at attachment 2. For EAs, the report shall provide the number of EAs and those involving cooperating agency(s) as described in attachment 2. States, Tribes, and units of local governments that have received authority by Federal law to assume the responsibilities for preparing NEPA analyses are encouraged to comply with these reporting requirements.

If you have any questions concerning this memorandum, please contact Horst G. Greczmiel, Associate Director for NEPA Oversight at 202-395-5750, Horst_Greczmiel@ceq.eop.gov, or 202-

456-0753 (fax).

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Factors for Determining Whether to Invite, Decline or End Cooperating Agency Status

Attachment 2-4

1. Jurisdiction by law (40 C.F.R. § 1508.15) – for example, agencies with the authority to grant permits for implementing the action [federal agencies shall be a cooperating agency (1501.6); non-federal agencies may be invited (40 C.F.R. § 1508.5)]:

- Does the agency have the authority to approve a proposal or a portion of a proposal?
- Does the agency have the authority to veto a proposal or a portion of a proposal?
- Does the agency have the authority to finance a proposal or a portion of a proposal?

2. Special expertise (40 C.F.R. § 1508.26) – cooperating agency status for specific purposes linked to special expertise requires more than an interest in a proposed action [federal and non-federal agencies may be requested (40 C.F.R. §§ 1501.6 & 1508.5)]:

- Does the cooperating agency have the expertise needed to help the lead agency meet a statutory responsibility?
- Does the cooperating agency have the expertise developed to carry out an agency mission?
- Does the cooperating agency have the related program expertise or experience?
- Does the cooperating agency have the expertise regarding the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

3. Do the agencies understand what cooperating agency status means and can they legally enter into an agreement to be a cooperating agency?

4. Can the cooperating agency participate during scoping and/or throughout the preparation of the analysis and documentation as necessary and meet milestones established for completing the process?

5. Can the cooperating agency, in a timely manner, aid in:

- identifying significant environmental issues [including aspects of the human environment (40 C.F.R. § 1508.14), including natural, social, economic, energy, urban quality, historic and cultural issues (40 C.F.R. § 1502.16)]?
- eliminating minor issues from further study?
- identifying issues previously the subject of environmental review or study?
- identifying the proposed actions' relationship to the objectives of regional, State and local land use plans, policies and controls (1502.16(c))?

(40 C.F.R. §§ 1501.1(d) and 1501.7)

6. Can the cooperating agency assist in preparing portions of the review and analysis and resolving significant environmental issues to support scheduling and critical milestones?

7. Can the cooperating agency provide resources to support scheduling and critical milestones such as:

- personnel? Consider all forms of assistance (e.g., data gathering; surveying; compilation; research.
- expertise? This includes technical or subject matter expertise.
- funding? Examples include funding for personnel, travel and studies. Normally, the cooperating agency will provide the funding; to the extent available funds permit, the lead agency shall fund or include in budget requests funding for an analyses the lead agency requests from cooperating agencies. Alternatives to travel, such as telephonic or video conferencing, should be considered especially when funding constrains participation.
- models and databases? Consider consistency and compatibility with lead and other cooperating agencies' methodologies.
- facilities, equipment and other services? This type of support is especially relevant for smaller governmental entities with limited budgets.

8. Does the agency provide adequate lead-time for review and do the other agencies provide adequate time for review of documents, issues and analyses? For example, are either the lead or cooperating agencies unable or unwilling to consistently participate in meetings in a timely fashion after adequate time for review of documents, issues and analyses?

9. Can the cooperating agency(s) accept the lead agency's final decisionmaking authority regarding the scope of the analysis, including authority to define the purpose and need for the proposed action? For example, is an agency unable or unwilling to develop information/analysis of alternatives they favor and disfavor?

10. Are the agency(s) able and willing to provide data and rationale underlying the analyses or assessment of alternatives?

11. Does the agency release predecisional information (including working drafts) in a manner that undermines or circumvents the agreement to work cooperatively before publishing draft or final analyses and documents? Disagreeing with the published draft or final analysis should not be a ground for ending cooperating status. Agencies must be alert to situations where state law requires release of information.

12. Does the agency consistently misrepresent the process or the findings presented in the analysis and documentation?

The factors provided for extending cooperating agency status are not intended to be all-inclusive. Moreover, satisfying all the factors is not required and satisfying one may be sufficient. Each determination should be made on a case-by-case basis considering all relevant information and factors.

ATTACHMENT 3

[COUNTY LETTERHEAD]

[DATE]

Elaine Marquis-Brong
Oregon State Director
Bureau of Land Management
333 SW First Avenue
Portland, OR 97204

Re: Participation in RMP Process

Dear Ms. Marquis-Brong:

We are pleased to learn that the BLM will soon commence a planning process for revisions to the Resource Management Plans for its Westside Districts. _____ County would like to participate as a non-federal cooperating agency. The Association of O&C Counties is hereby appointed to serve as the representative of _____ County in the planning process. The Association and its agents will generally represent the County, but from time-to-time the County may also participate directly through County Commissioners or employees.

We look forward to working cooperatively with the BLM on this important project.

Very truly yours,

_____
For the County

cc: Rocky McVay