

In the Matter of
MOUNTAIN FORESTRY, INC. and
Francisco Cisneros
Case No. 30-05
Final Order of Commissioner Dan Gardner
Issued May 11, 2007

SYNOPSIS

Respondents, an individual and corporation, while acting jointly as a farm/forest labor contractor, failed to comply with the terms and conditions of lawful agreements made between Respondents and the Oregon Department of Forestry (“ODF”) and the Bureau of Labor and Industries (“BOLI”), in violation of ORS 658.440(1)(d). Additionally, Respondent Mountain Forestry, Inc. hired minors without first obtaining an employment certificate, in violation of ORS 653.307, and employed minors under 16 years old to fight wildland fires, in violation of OAR 839-021-0102(p). Although the Agency established that Respondents made or caused to be made false and misleading representations, and published or circulated false and misleading information to ODF and BOLI representatives, the Agency did not prove that any of the misrepresentations were about the terms, conditions, or existence of employment in violation of ORS 658.440(3)(b). For Respondents' failure to comply with the ODF Interagency Firefighting Crew Agreements in violation of ORS 658.440(1)(d), the Commissioner ordered Respondents Mountain Forestry, Inc. and Francisco Cisneros to pay \$43,500 in civil penalties (\$500 per violation for a total of 87 violations). For Respondents' failure to comply with BOLI agreements in violation of ORS 658.440(1)(d), the Commissioner ordered Respondents Mountain Forestry, Inc. and Francisco Cisneros to pay \$8,000 in civil penalties (\$1,000 per violation for four violations and \$2,000 per violation for two violations). Additionally, the Commissioner ordered Respondent Mountain Forestry, Inc. to pay \$1,000 for each of four violations of ORS 653.307, and \$1,000 for one violation of OAR 839-021-0102(p), for a total of \$5,000. Based on the whole record herein, the Commissioner further found that Respondents lacked the character, competence and reliability to act as farm/forest labor contractors and denied them a license pursuant to ORS 658.445. ORS 658.440; ORS 658.445; ORS 658.453; ORS 653.307; ORS 653.370; OAR 839-015-0520; OAR 839-015-0507; OAR 839-015-0508; OAR 839-015-0510; OAR 839-015-0512; OAR 839-021-0220; OAR 839-021-0102; OAR 839-019-0010; OAR 839-019-0015; and OAR 839-019-0020.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (“ALJ”) by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on

November 1-4, 7-11, 14-15, 2005, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine Street NE, Building E-1, in Salem, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries (“BOLI” or “the Agency”). Robert C. Williamson, Attorney at Law, represented Mountain Forestry, Inc. and Francisco Cisneros (“Respondents”). Michael Cox was present during the hearing as Mountain Forestry, Inc.’s corporate representative.

The Agency called as witnesses: Donald Moritz, Oregon Department of Forestry, Protection Contract Services contract manager; Benjamin Jones, former Respondent employee; Steven Johnson, Oregon Department of Forestry Contract Services compliance officer; and Stan Wojtyla, BOLI Farm Labor Unit compliance specialist.

Respondents called as witnesses: Michael Cox, Respondents' fire director; Donald Pollard, Respondents' tax preparer and enrolled IRS agent (telephonic); and Addison Johnson, free lance firefighting instructor.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-120 (generated prior to hearing) and X-121 through X-126 (generated after hearing);
- b) Agency exhibits A-1 through A-55 (filed with case summary), A-56 through A-59, A-68, A-69, A-71 through A-73, and A-78 (submitted during hearing);
- c) Respondent exhibits R-1 through R-3, R-6 through R-11, R-14 through R-16 (filed with case summary), R-19, and R-21 (submitted during hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 11, 2005, the Agency issued a Notice of Intent to Refuse to Renew/Revoke License and Intent to Assess Civil Penalties (“Notice”) to Mountain Forestry, Inc. and Francisco Cisneros (“Respondents”). The Notice informed Respondents that the Commissioner intended to revoke or refuse to renew Respondents’ farm/forest labor contractor license, pursuant to ORS 658.405 to ORS 658.503 and specifically ORS 658.445 and OAR 839-015-0520, and further intended to assess civil penalties against Respondents in the amount of \$112,000, pursuant to ORS 658.453 and OAR 839-015-0508. The Notice alleged the following bases for the Agency action: 1) Respondents, in their capacity as farm/forest labor contractors, failed to comply with the terms and provisions of lawful agreements or contracts, including contracts or agreements with the Oregon Department of Forestry (“ODF”)(96 violations), in violation of ORS 658.440(1)(d); 2) Respondents, in their capacity as farm/forest labor contractors, failed to comply with the terms and provisions of lawful agreements or contracts, including contracts or agreements with BOLI (four violations), in violation of ORS 658.440(1)(d); 3) Respondents willfully made “false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms and conditions or existence of employment at any place or by any person, including but not limited to [BOLI] and [ODF]” (102 violations), in violation of ORS 658.440(3)(b); 4) Respondents failed to obtain an annual employment certificate to employ minors (four violations), in violation of ORS 653.307 and OAR 839-021-0220; and 5) Respondents employed a minor in a hazardous occupation (one violation), in violation of OAR 839-021-0102(p). In determining the civil penalty amounts, the Agency alleged aggravating circumstances. Based on the alleged violations, the Agency proposed to revoke or refuse to renew Respondents’ farm/forest labor contractor license, pursuant to ORS 658.445(1) and OAR 839-015-0520(1)(b). Additionally, the

Agency alleged Respondents were unfit to act as farm/forest labor contractors because the alleged violations demonstrate they lack the requisite character, competence and reliability under ORS 658.445(3) and OAR 839-015-0520(2) and further alleged:

“[Respondents] willfully violated the terms and conditions of numerous agreements and contracts over a number of years as alleged [herein]. OAR 839-015-0520(3)(c); * * * Respondents, as alleged [herein] have violated numerous sections of ORS 658.405 to 658.485. OAR 839-015-0520(3)(a); * * * Respondents willfully made misrepresentations or false statements or concealments in their applications for a license by agreeing to comply with all laws and rules when in fact they were not in compliance. OAR 839-015-0520(3)(h); * * * Respondents willfully made or caused to made false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms, conditions or existence of employment at any place by any person including but not limited to the occasions set forth [herein]. OAR 839-015-0520(3)(i); * * * Respondents, as alleged [herein], engaged in a course of misconduct over a period of years in relations with individuals and organizations, including but not limited to [BOLI] and [ODF], with whom respondents conducted business.”

The Notice was served on Respondents on April 12, 2005.

2) On April 29, 2005, Respondents, through counsel, timely filed an answer to the Notice and requested a hearing. In its answer, Respondents admitted: 1) they conducted business in Oregon or took workers from Oregon to work in other states; 2) that for an agreed remuneration or rate of pay, they recruited, solicited, supplied or employed workers to perform labor, specifically to engage in fire suppression activities, during the 2000 through 2004 fire seasons; 3) Respondent Mountain Forestry, Inc. (“Mountain Forestry”) entered into agreements with ODF from 2000 through 2004; 4) Respondents employed Victor Cisneros, Andrew Williamson, Gerardo Herrera, and Samuel Cisneros as firefighters; 5) from July 1 through July 31, 2004, Alex Coronado worked two fire suppression activities, the Cole Complex fire and the Reno Standby, and Leticia Ayala worked the Cole Complex fire; and 6) Victor Cisneros is a relative of Respondent Francisco Cisneros (“F. Cisneros”). Respondents did not deny the validity of the ODF agreements or that they entered into the agreements in their joint capacity

as a farm/forest labor contractor. Respondents did not deny they entered into agreements with BOLI in their joint capacity as farm/forest labor contractors. Respondents affirmatively alleged that 1) the Agency refused to renew Respondents' license without proper notice and procedure and its investigation was "unreasonably long and unlimited in scope" and therefore "arbitrary and capricious"; 2) ODF did not provide for a pre-termination hearing as required by the Fourteenth Amendment to the U. S. Constitution before it terminated its agreement with Respondents and therefore the BOLI "complaint is unfounded, and Respondents are entitled to judgment in their favor"; 3) in terminating its contract with Respondents, ODF was motivated by F. Cisneros's race or ethnicity in violation of the Fourteenth Amendment to the U. S. Constitution and therefore the BOLI "complaint is unfounded, and Respondents are entitled to judgment in their favor"; 4) Respondents' Notice of Claim for Damages to the State of Oregon, reserving the right to bring a civil action "for ODF's Constitutional violations, was a substantial factor in BOLI's "decision to refuse to renew and revoke Respondents' license"; 5) a BOLI employee made a defamatory statement to a prospective insurer of Mountain Forestry and caused the insurer to decline to do business with Mountain Forestry which caused Respondents economic damage and damage to their reputation, "the amount to be determined at hearing"; 6) the Agency failed to state a claim; 7) the Commissioner and BOLI are not taking similar action to similarly situated regulated entities; and 8) entrapment and equitable estoppel.

3) On May 4, 2005, the Agency requested a hearing and on May 20, 2005, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on August 16, 2005. With the Notice of Hearing, the forum included a copy of the Notice, a language notice, a Servicemembers Civil Relief Act notification, and

copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

4) On June 3, 2005, the Hearings Unit received a letter from Respondents' counsel addressed to the ALJ that stated in pertinent part:

"I am in receipt of your Notice of Hearing, and have reviewed my calendar. I take three weeks vacation in August, and I am not scheduled to return until the final week. The hearing date needs to be moved to the latter part of September.

"Please accept this letter as my motion to reset the hearing date."

5) On June 7, 2005, the Hearings Unit received a letter from the Agency case presenter that stated in pertinent part:

"The Agency opposes Mr. Williamson [sic] request for postponement of the hearing set for August 16, 2005, in the above matter. No alternate dates were mentioned in Mr. Williamson's request and the Agency's docket is quit [sic] full, making it very difficult to reschedule the hearing."

6) On June 7, 2005, the ALJ denied Respondents' request for postponement for lack of good cause shown, but allowed Respondents additional time to submit sufficient information to meet the forum's good cause standard. By letter dated June 8, 2005, Respondent's counsel protested the Agency's objection to postponement. On June 10, 2005, Respondents filed a motion to extend the time set for hearing and included counsel's affidavit in support of the motion. Counsel requested the hearing "to be set in November on any date from November 1 to November 23." By letter dated June 13, 2005, the Agency stated that, "based on [counsel's] recent affidavit * * * the Agency does not oppose his motion to reset the hearing on November 1, 2005." On June 13, 2005, the ALJ issued an order granting Respondents' motion and the hearing was rescheduled to convene on November 1, 2005.

7) On June 14, 2005, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into

evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 21, 2005, and advised them of possible sanctions for failure to comply with the case summary order.

8) On June 16, 2005, Respondents filed a motion and affidavit to disqualify the ALJ on the following grounds: 1) Respondents “should be entitled to reassignment as a matter of course for any reason or no reason at all”; 2) the ALJ “may have a bias” in favor of the Agency and Agency case presenter and against Respondents; and 3) the ALJ “does not have the professional qualifications required to render an informed decision in this case.” On June 22, 2005, the Agency filed a response to the motion contending: 1) by statute, the Agency is exempt from the statutes and rules governing the Office of Administrative Hearings and therefore Respondents are not entitled to reassignment as a matter of course; 2) Respondents’ motion was not timely filed; 3) Respondents did not set forth sufficient cause to disqualify; and 4) the ALJ’s “professional training is irrelevant.” On June 23, 2005, Respondents filed a reply to the Agency’s response. On June 27, 2005, the ALJ issued an order denying Respondents’ motion to disqualify on the basis that it was not timely filed in accordance with the contested case hearing rules and even if it had been timely filed, Respondents failed to establish the required grounds for disqualification.

9) On June 28, 2005, Respondents moved for reconsideration of the ALJ’s ruling denying Respondents’ motion to disqualify the ALJ. On June 30, 2005, the ALJ denied Respondents’ motion for reconsideration.

10) On July 18, 2005, Respondents filed a motion to dismiss paragraph 12 of the Agency's Notice. Respondents contended the allegation was predicated on a rule that applies to "existing contracts of employment" and "because an *existing* contract of employment was not violated at the time the Agency brought the Notice of Intent, or, in the alternative that the ODF contract was not a 'contract of employment,' the Agency has failed to state a claim upon which relief can be granted according to its own rules."

11) On July 18, 2005, the Agency filed a motion and affidavit for an extension of time until August 24, 2005, to respond to Respondents' motion. Respondents subsequently filed an objection to the Agency's motion on July 20, 2005. The Agency responded to Respondents' objection on July 25, 2005, and filed a supplemental response and affidavit on July 26, 2005. On July 29, 2005, Respondents filed a response to the Agency's supplemental response, and, on the same date, filed a supplement to its motion to dismiss. The ALJ entered a ruling on the Agency's motion for extension of time on August 3, 2005, that stated in pertinent part:

"On July 19, 2005, the Hearings Unit received the Agency's timely motion for an extension of time until August 24, 2005, to file its response to Respondents' July 18, 2005, motion to dismiss. As grounds for the motion, the Agency case presenter states in her affidavit that she has previously scheduled commitments during the weeks of July 18, July 25, August 1, August 8, and August 15, 2005, that include a previously scheduled medical appointment, jury duty, previously scheduled case related interviews in La Pine, Oregon, and four previously scheduled hearings. Respondent's counsel submitted a response on July 22, 2005, stating that 'Respondents would not object to an extension of time until August 11, 2005 * * * provided that the Agency can establish the necessary "good cause" by supplemental affidavit.' Counsel also avers that 'to put this matter off for over one month is unreasonable.' On July 26, 2005, the Agency case presenter responded to Respondents' objection by filing an affidavit that reiterates the grounds set forth in her first affidavit and states 'there are a number of prescheduled hearings and related events that would be impracticable to reschedule' and '[t]here is no other employee available that could handle this matter on behalf of the Agency.' On July 27, 2005, the Agency case presenter filed a supplemental affidavit stating that she 'may need to confer with counsel in

preparing [the Agency's] response to the Respondents' motion to dismiss' and that the Agency has no control over its counsel's availability.

"On August 1, 2005, the Hearings Unit received Respondents' reply to the Agency's response and affidavits, along with Respondents' Supplement to Respondents' Motion to Dismiss the Agency's Notice of Intent.

"OAR 839-050-0050(3) provides that 'the administrative law judge may grant [an] extension of time only in situations where the requesting participant shows good cause for the need for more time or where no other participant opposes the request.' Under OAR 839-050-0010(11), '[g]ood cause means, unless otherwise specifically stated, that a participant failed to perform a required act due to * * * a circumstance over which the participant had no control.'

"In this case, the Agency case presenter provided specific information establishing that she is otherwise encumbered by previously scheduled hearings and events that are impracticable, if not impossible, to change and that impede her ability to prepare a proper response to Respondents' motion to dismiss. Although counsel asserts without elaboration that an extension until August 24 is 'unreasonable,' I find that in light of Respondents' August 1 Supplement to Respondents' Motion to Dismiss that cites case law the Agency may address only through legal counsel, and considering the Agency's current work load, the requested due date is reasonable. Moreover, the Agency case presenter is entitled to the same courtesy extended to Respondents' counsel when he moved for a postponement of the hearing based on his previously planned vacation. In that case, counsel provided sufficient information to establish that his plans were already in place when the notice of hearing issued, were impracticable to change, and he would suffer a hardship if his motion were denied. I find that the Agency case presenter will suffer a similar hardship if the Agency's motion is not granted.

"The Agency's motion for an extension of time until August 24, 2005 is hereby **GRANTED**.

"The Agency must file with the Hearings Unit and serve on Respondents its response to Respondents' Motion to Dismiss and Supplement to Motion to Dismiss no later than **Wednesday, August 24, 2005**, in accordance with OAR 839-050-0040(1)." (footnote omitted)

12) On August 9, 2005, Respondents, through counsel, filed a motion for a discovery order requesting certain documents and the Agency's response to Respondent Mountain Forestry, Inc.'s interrogatories. On August 15, 2005, the Agency sought an extension of time until September 7, 2005, to respond to the discovery order. On August 17, 2005, Respondents filed a motion for leave to depose two witnesses.

On August 18, 2005, the Agency, through counsel, filed its response to Respondents' motion to dismiss. On the same date, the Agency filed its response to Respondents' motion for depositions. On August 19, 2005, the Agency, through counsel, filed a motion to strike certain affirmative defenses set forth in Respondents' answer. On August 23, 2005, Respondents filed a reply to the Agency's response to Respondents' motion to dismiss.

13) On August 26, 2005, the ALJ entered a ruling on Respondents' motion to conduct depositions that stated in pertinent part:

"On August 18, 2005, pursuant to OAR 839-050-0200(3), Respondents moved for leave to conduct depositions of Javier Campa-Avila and Javier Sanches 'at a time mutually convenient to both the Agency and counsel for Respondents, but no later than September 2, 2005.' In an affidavit in support of the motion, Respondents' counsel states that his clients have informed him that Campa-Avila and Sanches, Respondent Mountain Forestry's former employees, have been 'approached by investigators' and the investigators questioned them about Respondents 'on topics of great importance to this case.' Counsel further states that his clients told him that Campa-Avila and Sanches were 'threatened with deportation if they do not provide incriminating information on Respondents.' According to counsel, both have been arrested and are currently detained in a federal facility 'awaiting deportation hearings.' Counsel states that 'the investigators that have interrogated these individuals have alleged that Respondent Francisco Cisneros knowingly hires illegal aliens, and makes personal loans to pay their way into this country.' Counsel seeks the depositions because Campa-Avila and Sanches 'deny those allegations,' will be deported before the November 1, 2005 hearing, and 'their testimony may be crucial to rebut similar allegations raised by other witnesses or by the Agency.' Counsel asserts that other methods of discovery are not adequate because they are 'less likely to lead to admissible evidence.'

"On August 23, 2005, pursuant to OAR 839-050-0150, the Agency filed a response and supplemental affidavit to Respondents' motion. Citing OAR 839-050-0200(3), the Agency objects to the motion to conduct depositions and asserts that Respondents failed to show that other methods of discovery are inadequate or that other discovery methods have been attempted. The Agency also contends that Respondents' 'very broad allegations' do not include the names of the 'investigators' or how they are connected with this case, or what the 'alleged topics of great importance to this case are or how they are relevant to this case.' Additionally, the

Agency asserts that there is no allegation in the Notice of Intent that Respondent Cisneros 'knowingly hires illegal aliens and makes personal loans to pay their way into this country' and, thus, the Agency contends, 'the proposed depositions would not lead to the discovery of generally relevant evidence.' In her affidavit, the Agency case presenter states that she ascertained that Campa-Avila is currently detained in a federal facility in Tacoma, Washington, and that 'if Mr. Javier Sanches is being detained, he would most likely be detained at that facility.' The case presenter also states that Campa-Avila was scheduled for a 'new master hearing' August 24, 2005, at which he 'may request a bond,' and that immigration court staff informed her that there was 'no indication when or if Mr. Campa-Avila would actually be deported.' Finally, in her affidavit, the case presenter also states she was informed that Homeland Security is 'in charge of the detention facility where Mr. Campa-Avila is being held.'

"My ruling is based on Respondents' and the Agency's arguments, the pleadings, and the applicable contested case hearing rules.

"OAR 839-050-0200(7) provides that:

'Any discovery request must be reasonably likely to produce information that is generally relevant to the case. * * * If the request appears unduly burdensome, the administrative law judge may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.'

"Here, Respondents have not shown how taking depositions from Campa-Avila and Sanches is likely to produce information that is generally relevant to this case. Whether or not Respondent Cisneros knowingly employed illegal aliens is not an issue before this forum, and short of amending its Notice of Intent, the Agency is precluded from raising 'similar allegations * * * [through] other witnesses' for Respondents to 'rebut.' Moreover, Respondents' assertion that unnamed investigators have asked the witnesses about 'topics of great importance to this case' does not sufficiently establish a connection between an apparently unrelated investigation and any of the issues in this case.

"Even if Respondents had established that the witness testimony was reasonably likely to produce information with some relevance, the request for depositions is unduly burdensome because, as a practical matter, the witnesses are inaccessible. While this forum may issue commissions for out-of-state depositions, it is not clearly established that the forum's authority to do so extends to detainees in a federal facility under Homeland Security jurisdiction. At best, the logistics of arranging depositions under those circumstances is unduly burdensome for all of the participants in this matter. Therefore, absent any evidence showing how the witness information is necessary or is likely to facilitate resolution of this case, the forum concludes that the burden created by granting

Respondents' motion far outweighs the dubious significance of information obtained by deposing the witnesses.

"Depositions, in any event, are only permitted in this forum under very limited circumstances. OAR 839-050-0200(3) states:

'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.'

"In this case, Respondents have not made any showing that other methods of discovery are so inadequate that Respondents will be substantially prejudiced if their motion is denied. So far, all Respondents have shown is that they are interested in deposing potential rebuttal witnesses about an issue that has not been raised in this case. They have not demonstrated how the other discovery methods, including but not limited to those described in OAR 839-050-0200(2), are inadequate and less likely to produce information that is generally relevant to the issues raised in the Notice of Intent. Notably, ORS 183.425 provides that an agency may order the deposition of any *material* witness in the manner prescribed by law for depositions in civil actions. However, the statute requires that the petition for deposition include, among other things, the name and address of the witness whose testimony is sought and a showing of the materiality of the witness's testimony. In this case, Respondents have not placed the witnesses at a verifiable address – in fact, the Agency case presenter determined that one of the witnesses was recently transferred to a Washington facility and the other witness's whereabouts are apparently unknown. More significantly, however, Respondents have not demonstrated the materiality of either witness's testimony.

"Finally, Respondents made no showing that they complied with OAR 839-050-0200(4) that requires participants to seek discovery through an informal exchange of information before requesting a discovery order.

"For all of those reasons, Respondents' motion is **DENIED.**" (footnote omitted)

14) On August 26, 2005, the ALJ entered a ruling on the Agency's motion for extension of time to respond to motion for discovery order that stated in pertinent part:

"On August 16, 2005, the Hearings Unit received the Agency's timely motion for an extension of time until September 7, 2005, to file its response to Respondents' Motion for Discovery Order. As grounds for the motion, the Agency case presenter states in her affidavit that she 'is in the middle of preparing for a hearing * * * scheduled for August 16, 2005,' in Bend, Oregon. She further states that after the Bend hearing has concluded she will be vacationing until August 30, 2005. Respondents

had seven days to respond to the Agency's request. OAR 839-050-0150. To date, Respondent has not filed a response.

"OAR 839-050-0050(3) provides that 'the administrative law judge may grant [an] extension of time * * * where no other participant opposes the request.' The forum infers from Respondent's lack of response that it does not oppose the Agency's request.

"Therefore, the Agency's motion for an extension of time to respond to Respondents' motion for discovery order is **GRANTED**.

"The Agency must file with the Hearings Unit and serve on Respondents its response to Respondents' Motion for Discovery Order no later than **Wednesday, September 7, 2005**, in accordance with OAR 839-050-0040(1)"

15) On August 26, 2005, Respondents filed a response to the Agency's motion to strike affirmative defenses. On September 6, 2005, the Agency, through counsel, filed a response to Respondents' motion for discovery order. On September 7, 2005, the Agency's counsel filed supplemental documents that were "inadvertently omitted" at the time of filing the Agency's response. On September 9, 2005, Respondents filed a reply to the Agency's response to motion for discovery order. The ALJ issued an order on September 14, 2005, granting, in part, Respondents' motion for a discovery order and a discovery order compelling the Agency to deliver to Respondents a complete copy of its investigative file, including any and all witness interview notes prepared by the Agency investigator. The discovery order stated that the Agency was not required to produce the case presenter's witness interview notes or communications with Agency staff.

16) On September 14, 2005, Respondents filed a "first amended answer" to the Agency's Notice. On September 26, 2005, the Agency filed a response to Respondents' amended answer and a motion for a discovery order and request for *in camera* inspection by facsimile transmission. In its response to the amended answer, the Agency alleged the amended answer was not properly before the forum and was "an attempt to make an end run around the Agency's Discovery Request."

17) On September 26, 2005, based on the participants' submissions, the ALJ entered a ruling on the Agency's motion to strike Respondents' affirmative defenses that stated in pertinent part:

"On August 23, 2005, the Agency filed a Motion to Strike Respondents' first through seventh affirmative defenses on various grounds. Respondents timely filed an objection to the motion contending that the Agency's motion is untimely and without merit. As Respondents accede, the contested case hearing rules do not limit the Agency's ability to file a motion to strike even though the rules do not include a procedure for filing such a motion. In this case, Respondents urge the forum to apply the Oregon Rules of Civil Procedure and hold the Agency to a 10 day time limitation from the date the answer was filed even though Respondents acknowledge that the forum is 'not necessarily bound' by the time limitation. In this forum, filing dates may be set or changed by the administrative law judge. OAR 839-050-005; OAR 839-050-0150. The Agency's motion was filed well over two months before the hearing date and Respondents have not established how they are 'severely prejudiced' if the Agency's motion is granted. For those reasons, I find the Agency's motion to strike was timely filed and make the following rulings.

"First Affirmative Defense

"In their first affirmative defense, Respondents allege (1) the Agency 'refused to renew [Respondents'] license * * * without proper notice and procedure' and (2) the Agency's investigation was 'unreasonably long and unlimited in scope' and therefore 'arbitrary and capricious.' The record shows that on or about April 11, 2005, the Agency issued to Respondents a notice proposing to refuse to renew and/or revoke Respondents' license. Respondents timely filed an answer and demanded a contested case hearing pursuant to ORS chapter 183.

"ORS 183.430(1) provides:

In the case of any license which must be periodically renewed, where the licensee has made timely application for renewal in accordance with the rules of the agency, such license shall not be deemed to expire, despite any stated expiration date thereon, until the agency concerned has issued a formal order of grant or denial of such renewal. In case an agency proposes to refuse to renew such license, upon demand of the licensee, the agency must grant hearing as provided by this chapter before issuance of order of refusal to renew.

"I infer from the record that Respondents 'made timely application for renewal in accordance with the rules of the agency,' and that they have continued to operate under a license that, by law, has not expired and will not expire until 'a formal order of grant or denial of such renewal' is issued

following the hearing in this matter that was scheduled in response to Respondents' 'demand for contested case hearing.' Respondents' contention that the Agency failed to renew its license without proper notice and procedure has no basis in fact.

“Moreover, the issues raised in the Agency’s pleadings are (1) whether Respondents complied with the terms and conditions of lawful agreements or contracts; (2) whether Respondents willfully made a false, fraudulent, or misleading representation to the Agency and the Oregon Department of Forestry (ODF) about the terms, conditions, or existence of employment; (3) whether Respondents failed to obtain an annual employment certificate to employ minors; and (4) whether Respondents employed a minor in a hazardous occupation, in violation of Oregon farm labor contracting and child labor laws. The length and scope of the Agency’s investigation has no bearing on the truth of those matters alleged. The Agency’s motion to strike Respondents' first affirmative defense is therefore **GRANTED**.

“Second and Third Affirmative Defenses

“In their second and third affirmative defenses, Respondents contend they are ‘entitled to judgment in their favor’ and allege, respectively, (1) that ODF terminated its contract with Respondent Mountain Forestry, Inc. without providing a ‘pre-termination hearing’ and (2) ODF’s motivation to terminate the contract was based on Respondent Cisneros’s ‘race or ethnicity.’ Neither issue is relevant to this case. As the Agency points out, ODF is not a party to this case and the Commissioner has no jurisdiction over its actions against Respondents. Additionally, the Agency’s proof of its allegations is not dependent on ODF’s reasons for terminating its contract with Respondents. Per its pleadings, the Agency must show the existence of a contract or contracts and establish that Respondents violated certain terms and provisions in violation of ORS 658.440(1)(d). Whether or not the alleged violations resulted in ODF terminating its contract with Respondents is not an issue before this forum. The Agency’s motion to strike Respondents’ second and third affirmative defenses is **GRANTED**.

“Fourth Affirmative Defense

“Respondents allege that ‘a substantial factor in the Commissioner’s decision to refuse to renew and revoke Respondents’ license was that Respondents had submitted a Notice of Claim for Damages to the State of Oregon, which reserved Respondents' right to bring a civil action against the State for ODF’s Constitutional violations.’ Respondents have not alleged facts that constitute an affirmative defense and the Agency’s motion to strike is **GRANTED**.

“Fifth Affirmative Defense and Counterclaim

“Respondents' defamation claim, based on allegations that an agency investigator made ‘false and misleading statements,’ that caused the

insurer to decline to do business with Respondent Mountain Forestry, Inc., 'which caused Respondents economic damage and damage to their reputation,' constitutes a civil matter that belongs in another forum. As the Agency correctly states, the Commissioner does not have the authority to hear and decide the defamation claim as alleged. Therefore, the Agency's motion to strike Respondents' fifth affirmative defense is **GRANTED**.

"Sixth Affirmative Defense

"Contrary to the Agency's contention, Respondents' allegation that 'the commissioner has failed to plead ultimate facts sufficient to constitute a claim for relief' is a proper pleading and the Agency's motion to strike Respondents' sixth affirmative defense is **DENIED**.

"Seventh Affirmative Defense

"By simply stating that the Agency 'is not taking similar action to similarly situated regulated entities,' Respondents have not alleged facts that constitute an affirmative defense. In their response to the Agency's motion, Respondents cite a U. S. Supreme Court case [*Village of Willowbrook v. Olech*, 528 U.S. 562, 563, 120 S. Ct. 1073 (2000) (*per curiam*)] to support their 'equal protection based defense,' but in their answer they fail to plead facts consistent with the holding in that case. Moreover, the Agency has alleged multiple causes of action and Respondents have not – in any of their defenses – referred to the specific cause of action to which each defense is intended to answer. The Agency's motion to strike Respondents' seventh affirmative defense is therefore **GRANTED**.

"Accordingly, Respondents' first, second, third, fourth, fifth and seventh affirmative defenses are stricken from their answer and I will not take evidence on those defenses at the hearing."

18) On September 26, 2005, the ALJ issued an order scheduling a prehearing conference on September 29, 2005. The purpose of the conference was "to clarify and narrow the issues posed by the pleadings and motions pertaining to the pleadings."

19) On September 27, 2005, the Hearings Unit received the Agency's original response to Respondents' amended answer, motion for a discovery order and request for *in camera* inspection.

20) On September 28, 2005, Respondents filed a motion to reconsider interim order striking affirmative defenses and a motion to file an amended answer. In their motion to amend, Respondents stated: "In light of the forum's rulings on Respondents'

Second, Third, Fourth, Fifth, and Seventh Affirmative Defenses, * * * Respondents hereby withdraw their First Amended Answer filed September 15, 2005, and move this forum for an order allowing Respondents to file a new Amended Answer, which is attached as exhibit A.”

21) On September 29, 2005, Respondents filed a motion and affidavit to postpone hearing and a motion for extension of time to file case summary.

22) On October 4, 2005, the ALJ entered an order summarizing the September 29 prehearing conference and ruling on Respondents’ motion to dismiss that stated in pertinent part:

“On September 29, 2005, at approximately 4:00 p.m., the participants convened in the conference room of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E-1, Salem, Oregon, to clarify and narrow the issues posed by the pleadings and motions pertaining to the pleadings. The issues for discussion included Respondents’ pending motion to dismiss paragraph 12 of the Agency’s charging document, Respondents’ first amended answer submitted by facsimile transmission on September 30, 2005, the Agency’s response to Respondent’s amended answer, motion for a discovery order, and request for *in camera* inspection of certain file documents submitted on September 28, 2005. During the prehearing conference, Respondents withdrew their first amended answer and instead submitted a motion to amend answer, including a revised first amended answer, pursuant to OAR 839-050-0140(1). Additionally, Respondents submitted a motion to postpone hearing and extend time for filing case summaries, a motion to reconsider interim order granting, in part, the Agency’s motion to strike, and a response to the Agency’s discovery order and request for *in camera* inspection.

“Ruling on Respondents’ Motion to Dismiss

“On July 18, 2005, Respondents timely filed a Motion to Dismiss the Agency’s Notice of Intent (‘Notice’). In the motion, Respondents moved for an order striking paragraph 12 from the Notice and the record and dismissing the Agency’s case to revoke or refuse to renew Respondents’ license pursuant to OAR 839-015-0520(1)(b). Respondents argued the rule provides that the Agency ‘will’ propose to deny or revoke a license when a contractor causes ‘an existing contract of employment to be violated,’ and ‘[b]ecause an existing contract of employment was not violated at the time the Agency brought the Notice of Intent, or in the alternative that the [Oregon Department of Forestry (“ODF”)] contract was

not a “contract of employment” the Agency has failed to state a claim upon which relief can be granted according to its own rules.’ Respondents also argued that even if the Agency alleges that its authority to refuse or revoke Respondents’ license in this case is based on broader statutory authority, the Agency is bound by its adoption of a rule that limits that authority. On August 1, 2005, Respondents filed a supplement to their Motion to Dismiss to include a recent Oregon Supreme Court decision that ‘[clarifies] points of law that are controlling and relevant to [Respondents’ motion].’

“The Agency was granted an extension of time to respond to the motion and on August 19, 2005, timely filed a response through counsel. In their submissions, the Agency and Respondents aptly explained at length their positions on the meaning of OAR 839-015-0520(1)(b). After considering the arguments, I found that Respondents correctly interpreted the rule and that the rule refers to existing employment contracts. I also found that paragraph 12 of the Agency’s charging document does not plead facts necessary for a cause of action under OAR 839-015-0520(1)(b). However, Respondents’ argument that the rule narrows the statute and therefore the Agency has not stated a cause of action under ORS 658.445(1) has no merit.

“Respondents’ Latest Motions

“During the prehearing conference, the forum granted the Agency’s request for a one day extension of time to file its responses to Respondents’ motion to amend, motion to postpone hearing and extend time for filing case summaries, and motion to reconsider order granting, in part, the Agency’s motion to strike. This order confirms that the Agency must file its responses by **Friday, October 7, 2005**.

“Agency’s Response To Respondents’ Amended Answer, Motion For Discovery Order, Request For *In Camera* Inspection

“The Agency’s response to Respondents’ amended answer was rendered moot after Respondents withdrew the first amended answer during the prehearing conference. Additionally, the Agency’s discovery order, for the most part, was rendered moot by the interim order granting the Agency’s motion to strike several of Respondents’ affirmative defenses. During the prehearing conference, the participants agreed that the Agency has leave to renew its request for a discovery order if the order granting the Agency’s motion to strike certain affirmative defenses is reversed.

“After reviewing documents the Agency provided with its request for *in camera* inspection, and based on the Agency’s representation that the documents were contained within the Agency’s investigative file, I ordered the Agency to provide Respondents with a copy of each of the documents, in accordance with the Discovery Order issued on September 14, 2005. Before the prehearing conference concluded, the Agency’s case presenter provided counsel with the documents at issue.”

23) On October 6, 2005, the Agency filed 1) a motion for an order altering the time line for Respondents to file a response to the Agency's second set of interrogatories; 2) a "response to Respondents' response to the Agency's motion for discovery order and *in camera* inspection"; 3) a response to Respondents' motions to postpone hearing and extend time to file case summaries; 4) a response to Respondents' motion to reconsider order striking affirmative defenses; 5) a response to Respondents' motion to file an amended answer; and (6) a motion to strike Respondents' first amended answer (in the alternative).

24) On October 7, 2005, Respondents filed a motion "to reconsider ruling on Respondents' motion to dismiss." On October 11, 2005, the Agency filed a response to Respondents' motion to reconsider motion to dismiss. On October 12, 2005, the ALJ entered an order ruling on Respondents' motion to reconsider and motion to amend, and the Agency's alternative motion to strike that stated in pertinent part:

"At the prehearing conference on September 29, 2005, Respondents submitted a motion to reconsider the forum's order striking certain affirmative defenses alleged in Respondents' original answer, withdrew the first amended answer filed on September 15, 2005, and submitted a motion to amend answer along with a revised first amended answer. Respondents also withdrew the alleged fourth, fifth and eighth affirmative defenses in their original answer. On October 7, 2005, the Agency timely filed responses to the motions to reconsider and to amend and, alternatively, moved to strike Respondent's September 29 first amended answer.

"Respondents' Motion for Reconsideration

1. Timeliness

"Respondents question why the Agency was not required to show 'good cause' for filing what Respondents characterize as an untimely motion to strike while Respondents were required to show good cause for requesting a postponement and were also held to an 'imposed deadline' after they exceeded the filing deadline for a motion to recuse by two weeks. The contested case hearing rules supply the answer to the question.

"There are numerous motions that do not have precise filing deadlines or require a good cause showing, such as motions to dismiss, motions to

consolidate, motions to make more definite and certain, motions to exclude witnesses, motions for summary judgment, and motions to amend. Although the rules describe certain motions that may be filed, the list is not exhaustive and the forum regularly considers motions that are not mentioned in the rules, such as motions to strike, which have no time limitation or good cause requirement. While a motion to postpone a hearing does not have a filing deadline, the rule pertaining to the motion is explicit and provides that, unless the participants agree to postponement, the ALJ may grant the motion 'for good cause shown.' OAR 839-050-0150(5)(a). Thus, when the Agency objected to Respondents' initial one sentence request for postponement, Respondents were required by rule to show good cause, *i.e.*, show that the need for postponement was due to excusable mistake or circumstances beyond Respondent's control. OAR 839-050-0020(11). Respondents were not held to a higher standard, they were in fact treated as every other participant who files a motion to postpone over another participant's objection, in accordance with the contested case hearing rules and Agency precedent.

"Additionally, notwithstanding Respondents' failure to prevail on the merits of their motion to recuse, Respondents' ongoing consternation at being held to the 14 day limitation for filing the motion is excessive given that they received a copy of the rules with the Notice of Hearing and the rules clearly state the filing deadline for that particular motion. On the other hand, the rules do not address motions to strike and in this case the forum found the Agency's motion was filed well over two months prior to the hearing date, which is not unreasonable. Furthermore, Respondents could not establish how they would be 'severely prejudiced' if the Agency's motion was granted. A 'good cause analysis' is not relevant to this particular motion and Respondents' assertion that the forum is holding them to a different standard has no merit.

2. First Affirmative Defense

"Respondents seek reconsideration of the forum's order striking their first affirmative defense that alleges (1) the Agency refused to renew their license 'without proper notice and procedure' and (2) the Agency's investigation was 'arbitrary and capricious' in its length and scope. As a supplement to the order striking Respondents' first affirmative defense, I find that contrary to Respondents' contention, the first allegation presents a conclusion rather than issuable facts and the second allegation fails to allege facts that constitute a substantive due process defense. Therefore, the order striking Respondents' first affirmative defense is hereby **AFFIRMED**.

3. Unfair Prejudice

"Respondents claim that striking their defenses at this juncture results in 'wasted time, energy, and effort' in case preparation and, thus, constitutes 'unfair prejudice.' Respondents also claim the forum has denied them the

opportunity to present their case at hearing. Those claims have no merit and further discussion about them is unnecessary.

4. Unlicensed Practice of Law

“Although Respondents ‘wish to revisit’ their previous contention, I have ruled on that issue and the ruling is final. Respondents’ position is in the record and I will not consider further argument on the subject.

“For all of the reasons stated above, Respondents’ motion to reconsider is **DENIED**.

“Respondents’ Motion to Amend Answer

“In their motion to amend answer, Respondents propose to insert additional language in paragraphs five, seven, and nine and withdraw their fourth, fifth and eighth affirmative defenses. Additionally, Respondents reallege their first affirmative defense, revise and renumber their second, third and fifth affirmative defenses, and raise a new sixth affirmative defense of equitable estoppel. The Agency objects to the motion as untimely and asserts that Respondents ‘should be made to show “good cause” for the amended answer.’ Alternatively, the Agency moves to strike the added language in paragraph nine of the first amended answer and Respondents’ alleged first, second, third, fifth and sixth amended affirmative defenses.

“OAR 839-050-0140(1) provides that:

‘a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. * * * Permissible amendments to answers include, but are not limited to, additions or deletions of affirmative defenses. Permission will be given when justice so requires.’

“Respondents filed their motion to amend over a month before hearing and the Agency has not established how it is prejudiced if Respondents’ motion is granted. Moreover, I find the merits of Respondents’ defense are served by allowing Respondents to partially amend their pleading. Having considered the Agency’s objection to Respondents’ proposed language in paragraph nine, I find that it is not well taken and Respondents are not precluded from alleging a mitigating factor that, in any event, is subject to proof at hearing. Therefore, Respondents are granted leave to amend their answer to include the proposed language in paragraphs five, seven and nine and to delete the fourth, fifth and eighth affirmative defenses from their answer. However, for the following reasons, the remaining proposed amendments are **DENIED**.

“First, Respondents’ first, second and third affirmative defenses have already been stricken from the answer and the proposed language in the second and third affirmative defenses does not ‘correct’ the pleading as

Respondents contend. In any event, Respondents are not precluded from arguing at hearing whether or not any weight should be given to another state agency's investigation and findings.

"Second, Respondents' seventh affirmative defense, now revised and renumbered as the fifth affirmative defense, previously was stricken because it failed to allege facts constituting a defense under *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000)(*per curiam*). Respondents' revised allegation still suffers from a failure to state facts that constitute a valid defense under that case. Respondents' proposed amended fifth affirmative defense does not correct the original pleading.

"Third, I find that Respondents' 'new affirmative defense of equitable estoppel' numbered as Respondents' sixth affirmative defense is a sham pleading. The forum takes official notice that the Oregon Farm/Forest Labor Handbook was first published in February 2005. Moreover, Respondents misrepresent the information contained in the handbook, which demonstrates a decided lack of good faith on Respondents' part. Even if the allegations were true, and I conclude that they are not, Respondents have not alleged facts that constitute an equitable estoppel defense in this forum.

"Accordingly, for the record, Respondents' answer is amended by interlineation as follows:

1. Paragraph five now includes the sentence, 'This allegation as pled in the Notice of Intent falls outside the scope of ORS 658.440(3)(b).'
2. Paragraph seven now includes the sentence, 'Moreover, the alleged aggravating factor is not germane to the nexus of the Notice of Intent.'
3. Paragraph nine now includes the sentence, 'Respondents further allege that the relationship between Respondent Francisco Cisneros and Victor Cisneros is a mitigating factor under ORS 653.365.'
4. Respondents' fourth, fifth and eighth affirmative defenses are deleted from the answer.

"Additionally, Respondents' first, second, third and seventh affirmative defenses have been stricken from the answer by a previous ruling, leaving Respondents' sixth affirmative defense intact.

"Agency's Motion to Strike

"To the extent that the forum granted Respondents leave to amend their answer to allege a mitigating factor in paragraph nine, the Agency's motion to strike the mitigating factor is **DENIED**. Otherwise, the remaining issues in the Agency's motion are moot as they pertain to affirmative

defenses that have been already stricken from the answer or amendments that were not allowed pursuant to this Order.”

25) On October 12, 2005, Respondents’ counsel sent the ALJ a letter by facsimile transmission that stated in pertinent part:

“Dear Judge Lohr:

“This letter and a following fax of this letter confirm my telephone message to Cynthia Domas and an in person conversation with Etta Creech requesting an in person status conference.

“It appears we are on the verge of narrowing the issues and I would like some direction from the court as to precisely (now after the agencies [sic] stipulations) what the remaining issues are to be tried.”

On October 13, 2005, the ALJ issued an order scheduling a prehearing status conference “to clarify the remaining issues for hearing and to resolve any remaining discovery issues.” Pertaining to discovery, the ALJ further stated:

“Bear in mind that under this forum’s hearing rules, discovery is not a matter of right – the ALJ has the discretion to order discovery and is not required to authorize any discovery. Moreover and most important, once the ALJ authorizes discovery, the ALJ ‘will control the methods, timing, and *extent of the discovery.*’ (emphasis added) OAR 839-050-0200(1). That means that I may cut off discovery if I find that the participants are using it as a means for delaying the hearing. Notably, since the Notice of Hearing issued on May 20, 2005, the participants will have had well over five months before the hearing date to prepare their cases. Having read what borders countless submissions from both participants, my observation is that they would better serve their cases by engaging in more cooperation and less fingerpointing.

“At the prehearing conference, the participants will be given the opportunity to identify the information they requested informally and have not yet received. I will determine at the prehearing conference if and when the information will be produced. If the Agency and Respondents are prepared to make stipulations or admissions at the prehearing conference, the stipulations or admissions will be placed on the record, will be binding on the participants, and will be regarded and used as evidence at the hearing. OAR 839-050-0280(1).

“At the conclusion of the conference, I will issue an interim order reciting any action taken and agreements reached by the Agency and Respondents during the prehearing conference.”

26) On October 12, 2005, the ALJ entered an order ruling on Respondents' motion to postpone hearing that stated in pertinent part:

"At the prehearing conference on September 29, 2005, Respondents, through counsel, moved for a second postponement of the hearing currently scheduled for November 1, 2005, the date Respondents initially requested for hearing. Respondents included counsel's affidavit with the motion. In his affidavit, counsel requested a 10 week postponement and stated that 'Respondents' goal is to avoid hearing by means of reasonable negotiation' and asserted that the 'delays by the Agency' and the Agency case presenter's 'refusal to cooperate on discovery issues' has hindered his ability to 'adequately prepare for the hearing.'

"The Agency timely filed an objection to the motion on October 6, 2005. In its response, the Agency provided a 'chronology of the case' and asserted, among other things, that counsel was granted their first postponement on June 13, 2005, and did not request discovery until July 18, 2005, three days after Respondents filed a motion to dismiss. The Agency further states that 'Respondents have filed numerous duplicitous pleadings requiring the Agency to respond in a short time frame' while, 'other than motions for extensions [of] time to respond to Respondents' numerous pleadings, the Agency has only filed two affirmative motions.'

"The Agency asserts that although it has produced over 2,500 documents, most in response to an informal discovery request, Respondents have not produced any of the documents that the Agency requested informally. In support of its objection, the Agency contends that 'the Agency is ready to proceed to hearing on November 1, 2005.'

"I have considered the requirements of OAR 839-050-0150(5) that says, in part, 'the administrative law judge may grant the request for good cause shown.' OAR 839-050-0020(10) provides, in pertinent part:

"'Good cause' means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or circumstance over which the participant had no control. 'Good cause' does not include a lack of knowledge of the law including these rules.'

"I have also considered OAR 839-050-0000 which states that one of the purposes of the hearings rules is to provide for timely hearings. I find Respondents' reasons given in support of their second request do not satisfy the requirements of these rules.

"Respondents were granted a previous postponement that resulted in the current November 1 hearing date. In their second request, Respondents seek a 10 week postponement based solely on Respondents' anticipated need for additional discovery and their 'goal [] to avoid hearing by means of reasonable negotiation.' Notwithstanding that 'settlement negotiations

do not serve as a basis for postponement of the hearing,' given the apparent enmity between the participants, the forum finds it highly unlikely the participants would actually spend the next 10 weeks in 'reasonable negotiation' to 'avoid hearing.' Additionally, Respondents have not demonstrated that they have made adequate efforts to timely complete discovery or to review the discovery they received during the four months since their first request for postponement was granted. Moreover, Respondents admit that the Agency provided over 2,500 pages of discovery well before September 29, 2005, and that the issues have been narrowed by the Agency's acknowledgement that one of the ODF contracts 'in question had no minimum age requirement for the contract years 2000, 2001, and 2002.' For those reasons and based on the record herein that shows Respondents' priorities did not include timely seeking discovery, I find that Respondents' reasons for their motion are not due to circumstances beyond their control.

"Respondents have not established good cause for postponing this matter and there is no basis for any claim of excusable mistake. Therefore, Respondents' motion for a second postponement is hereby **DENIED**."

27) On October 13, 2005, the ALJ denied Respondents' motion to reconsider ruling on Respondents' motion to dismiss.

28) On October 13, 2005, the Hearings Unit received 1) Respondents' "reply to Agency's response to motion to reconsider interim order striking affirmative defenses and motion to file an amended answer [and] Respondents' response to the Agency's motion to strike first amended answer"; 2) Respondents' "response to Agency's renewed motion for discovery order"; (3) Respondents' "response to Agency's motion to set time to respond to second set of interrogatories"; 4) Respondents' "motion to extend time to respond to interrogatories and informal discovery request"; 5) Respondents' "reply to the Agency's response to motion to postpone hearing [and] motion to extend time to file Respondents' case summary"; and, 6) by facsimile transmission, Respondents' letter stating in pertinent part:

"This is to notify the forum, pursuant to OAR 839-050-0300(1), that Respondent Francisco Cisneros is unable to speak or understand the English language. Interpreter services are hereby requested."

29) On October 14, 2005, the ALJ entered an order appointing an interpreter that stated in pertinent part:

“On October 13, 2005, Respondents, through counsel, submitted a letter dated October 12, 2005, via facsimile transmission, requesting an interpreter for Respondent Francisco Cisneros who counsel represents is ‘unable to speak or understand the English language.’

“OAR 839-050-0300(1) provides:

‘When a person unable to speak or understand the English language, * * * is involved in a contested case hearing, such person is entitled to a qualified interpreter * * *. All interpreters shall be appointed by the administrative law judge. A participant wishing to obtain the services of an interpreter * * * must notify the administrative law judge no later than 20 days before the hearing.’

“Although the forum was notified one day outside the time limitation established in the rule and even though Respondents’ counsel evidently knew of the need for an interpreter when the hearing notice issued in May, I am allowing the request. Respondent Cisneros’s right to participate in the hearing should not be jeopardized because counsel inadvertently missed the time limitation by one day. Additionally, after confirming with Respondents’ counsel by telephone that Respondent Cisneros’s native language is Spanish, the Hearings Unit Coordinator was able to obtain the services of Oregon Certified Court Interpreter Terry Rogers, who I have appointed to provide interpreter services in Spanish for the hearing’s duration.

“At hearing, I will instruct the participants and witnesses about the interpreter’s role in the conduct of the hearing.”

30) On October 14, 2005, the Hearings Unit received the Agency’s “motion for reconsideration of interim order ruling on Respondents’ motion to dismiss.” On October 18, 2005, the ALJ issued an order summarizing the prehearing status conference and authorizing mediation. The order stated, in pertinent part:

“On October 17, 2005, at 2 p.m., the participants convened in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon, to clarify issues and resolve discovery matters. The forum also addressed the Agency’s current motion to reconsider ruling on Respondents’ motion to dismiss.

“Agency’s Motion

“During the status conference, the Agency advised the forum that should its motion be granted, the Agency seeks only clarification of the forum’s

ruling on the subject rule's interpretation and not the rule's reinstatement in the pleading as a basis for the Agency's action. Since the rule will not be at issue during the hearing, I will rule on the Agency's motion in the proposed order. Respondents must file their response to the motion no later than **Friday, October 21, 2005**.

"Substantive Issues

"The Agency and Respondents agreed that at this juncture, the sole issues on the merits before the forum are (1) whether Respondents complied with the terms and conditions of lawful agreement or contracts; (2) whether Respondents willfully made a false, fraudulent, or misleading representation to the Agency and the Oregon Department of Forestry about the terms, conditions or existence of employment; (3) whether Respondents failed to obtain an annual employment certificate to employ minors; and (4) whether Respondents employed a minor in a hazardous occupation, in violation of Oregon farm labor contracting and child labor laws.

"The Agency stipulated that age requirements for firefighters were not written into the Oregon Department of Forestry contracts until 2003, but asserted that with or without contractual age requirements, the basis for the Agency's allegation regarding age requirements during contract years 2000 through 2004 is a matter of state law. Respondents argued that the Agency has not 'proven' that the alleged minors failed to meet the age requirements during the applicable contract years and therefore Respondents are entitled to summary judgment on that basis. The forum found summary judgment was not appropriate at this time because the age of the alleged minors during the contract years is still in dispute.

"Discovery

"During the prehearing conference, the Agency submitted a second motion for discovery order. After a recess to discuss the matters raised in the motion, the participants reported they exchanged information and Respondents agreed to provide a written response to the Agency's first interrogatory no later than Friday, October 21, 2005. Additionally, Respondents answered the Agency's second interrogatory pertaining to the familial relationship between Victor, Samuel, Ramon and Francisco Cisneros and provided the Agency with 'certified true copies of all documents indicating the age of the individuals listed in the Notice of Intent with the exception of Respondent Francisco Cisneros.' The participants also reported that the Agency voluntarily produced documents that Respondents had not requested and that they expect to resolve the few remaining discovery matters. The forum determined that any outstanding discovery issues should resolve after the participants file their case summaries on October 21, 2005.

“Mediation

“Judge Alan McCullough has agreed to conduct mediation in this case to facilitate resolution of the pending issues provided the participants agree to compromise on all issues, including the proposed refusal to renew license, and to include Respondent Cisneros and Wage and Hour Administrator Hammond in the mediation process. The participants agreed to those conditions. Judge McCullough and the participants will set a date and time for mediation during a telephone conference initiated by Judge McCullough. The conference call is tentatively scheduled to take place at 8:30 a.m. on Tuesday, October 18, 2005, subject to Judge McCullough’s availability.”

31) On October 18, 2005, the Agency and Respondents filed a joint motion to extend time to file case summaries. The ALJ verbally granted the motion and the Agency and Respondents timely filed case summaries on October 24, 2005.

32) On October 20, 2005, the Hearings Unit received a letter from the Agency stating, in pertinent part:

“The Agency has reviewed the Interim Order – Summarizing Status Conference and Authorizing Mediation and brings to the forum’s attention an error in the first full paragraph on page two. The Agency stipulated that the ODF contracts did not have an age requirement in the contract until 2003 (not 2004 as stated in the Interim Order). Prior to that time, age was [a] matter of state law.

“Although the ALJ requested that the Agency provide the forum with a copy of the stipulation at the close of the status conference, the Agency neglected to do so. I apologize for any inconvenience or confusion that may have caused and have enclosed a copy of the written stipulation. Part of the letter has been redacted for confidentiality purposes.”

The Agency enclosed a copy of a letter to Respondents’ counsel, dated October 10, 2005, a portion of which was redacted, which stated: “The Agency has not received a written stipulation from you. However, the Agency will stipulate that the ODF contracts did not have an age requirement in the contract until the 2003 contract. Prior to that time, age was a matter of state law.”

33) On October 21, 2005, the Hearings Unit received Respondents’ “response to the Agency’s motion to reconsider the forum’s ruling on motion to dismiss” by

facsimile transmission. On October 24, 2005, the Hearings Unit received the original (“hard copy”) document and Respondents’ “consent to law student appearance.”

34) On October 26, 2005, the Hearings Unit received the Agency’s “request to cross-examine document preparer” for three exhibits Respondents submitted in their case summary, including letters written by Donald Pollard and Addison Johnson, and “letters and evaluations from contracting officers and/or governmental agencies.” On the same date, the Agency submitted additional exhibits that were “inadvertently omitted” from the Agency’s case summary.

35) On October 26, 2005, the ALJ issued an order requesting that Respondents provide additional information pertaining to Respondents’ “consent to law student appearance.” On October 26, 2005, the ALJ issued an amended order correcting a typographical error. The amended order stated, in pertinent part:

“On October 24, 2005, Respondent Cisneros submitted a sworn statement entitled Respondents’ Consent to Law Student Appearance. Respondent Cisneros states that he is authorized to ‘execute the [statement] on behalf of Mountain Forestry, Inc.’ and that his counsel advised him that ‘paralegal, Kevin J. Jacoby, is eligible to appear’ on his behalf and that of Respondent Mountain Forestry, Inc., ‘pursuant to the Law Student Appearance Rule.’ Respondent Cisneros states: ‘I hereby consent to any appearance in this case by Kevin J. Jacoby as may be necessary to pursue the interests of Mountain Forestry, Inc. and myself individually.’

“While it is true that a certified law student may appear before an administrative tribunal with a client’s consent and under an attorney’s supervision, any appearance by a certified law student in this forum is subject to the administrative law judge’s approval. See Rule 13.10(6) of the Oregon Supreme Court Rules for Admission of Attorneys in Oregon. Respondents have not requested my approval or given the Agency an opportunity to weigh in on the efficacy of allowing Mr. Jacoby to appear in this case on Respondents’ behalf.

“Furthermore, I have misgivings about Respondent Cisneros’s affidavit. Respondents’ counsel previously represented that Respondent Cisneros was ‘unable to speak or understand the English language.’ Consequently, the Hearings Unit appointed a certified court interpreter to provide interpreter services in Spanish for two weeks of hearing at significant cost to the Agency. Yet, Respondent Cisneros signed and swore to a statement - written in English - representing that he understands the

nature and extent of Jacoby's participation in the hearing and giving his consent. Either Respondent Cisneros signed a document that he did not understand or he misrepresented his ability to speak and understand English.

"If Respondents expect a certified law student to appear on their behalf at the hearing in any capacity, they must comply with the following conditions before I will consider giving my consent:

"1. Prior to hearing, Respondents must file a true copy of Kevin J. Jacoby's certification to appear under the Law Student Appearance Rules showing approval by the Oregon Supreme Court and the date it was filed by the State Court Administrator.

"2. Within 24 hours, Respondents must advise the forum, in writing, whether or not Respondent Cisneros submitted valid consent on October 24, 2005. If it is valid consent, the forum will cancel the court interpreter's appointment to provide interpreter services in Spanish. If it is not valid consent, the forum will not consider giving approval until Respondents submit written consent prior to hearing establishing that Respondents were informed of the nature and extent of Jacoby's anticipated participation in the hearing before they consented. Respondents may submit their response to this condition by facsimile transmission to (971) 673-0762, or by hand delivery, but must do so within 24 hours of receipt of this interim order.

"Any objections the Agency has to allowing a certified law student to appear on Respondents' behalf in this matter must be filed no later than Friday, October 28, 2005."

36) On October 27, 2005, Respondents sent the forum a document by facsimile transmission that was missing the first page. On October 28, 2005, at the forum's request, Respondents sent page one of "Response to the Forum's Interim Order of October 26, 2005." On the same date, the Agency submitted an exhibit that was "inadvertently omitted from the case summary."

37) On October 31, 2005, the ALJ entered a ruling on Respondents' request for approval of law student appearance that stated in pertinent part:

"On October 27, 2005, Respondents faxed to the Hearings Unit a 'Response to the Forum's Interim Order.' The faxed response was incomplete and on October 28, at the forum's request, Respondents faxed the missing page to the Hearings Unit. A copy of a memo dated May 12, 2005, signed by James W. Nass, confirming that Kevin J. Jacoby's Law Student Appearance Rule Certificate was filed in the Supreme Court and

that he is 'eligible to practice under the Law Student Appearance Rules as of May 11, 2005,' was attached to the response and marked as Exhibit A. Respondents also included the Affidavit of Robert C. Williamson, marked as Exhibit B, which states in pertinent part:

'2. Respondent Francisco Cisneros does not speak English very well, and cannot read English.

'3. On the morning of October 21, 2005, Respondent Francisco Cisneros was in my office prior to our scheduled mediation for that date. I am fluent in Spanish, and translated the contents of the Consent to Law Student Appearance to him. He understood and gave his consent by signing the affidavit in the presence of a notary public.'

"Without determining whether or not counsel's affidavit complies with the forum's interim order dated October 26, 2005, I am withholding my consent to law student Kevin Jacoby's appearance in this matter.

"Although the forum wholly supports the underlying policy of the Law Student Appearance Rules, each case presents different circumstances that a presiding officer must consider before approving a law student's appearance.

"Here, I have considered the complexities of this particular case, which include the extensive record developed thus far, the multiple issues involved, the voluminous exhibits submitted with the participants' case summaries, and the need for a court interpreter's full time services throughout the entire hearing which necessarily correlates to the hearing's expected 10 day duration. Under these circumstances, allowing a law student to present any part of Respondents' case at hearing is not conducive to ensuring the orderly and timely development of the hearing record. Therefore, to ensure a complete and accurate record and a full and fair hearing, the forum will not consent to Kevin Jacoby's appearance during any part of the hearing in this matter.

"Respondents' request for approval is hereby **DENIED.**"

38) At the start of hearing, the ALJ swore in the interpreter and, pursuant to ORS 183.415(7), verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

39) At the start of hearing, Respondents withdrew their third affirmative defense and stipulated to certain Agency exhibits.

40) At the start of hearing, Respondents made a motion for reconsideration of the forum's ruling denying Respondents' request for approval of counsel's law clerk's appearance under the Student Appearance Rule and a motion to strike paragraph five of the Agency's Notice for failure to state a claim. The ALJ denied the motion for reconsideration and took the motion to strike "under advisement." The ALJ also overruled Respondents' objection to the Agency's case summary.

41) At the start of hearing, the Agency moved for summary judgment on paragraphs three, four, five, and eight of the Notice of Intent as they pertain to the 2004 Interagency Firefighting Agreement on the ground that the issues were fully litigated in a prior proceeding in another forum. The Agency proffered a court certified copy of Judge Dickey's ruling, dated August 20, 2004, and requested that the forum take judicial notice. Respondents argued the two proceedings were not identical and that the judge's ruling was "essentially arguably withdrawn in favor of an actual judgment that was entered in this case." The ALJ took official notice of the court certified ruling and gave Respondents' leave to provide supplemental documentation.

42) At the start of hearing, Respondents stipulated that 1) Francisco Cisneros is Mountain Forestry, Inc.'s majority shareholder and owns 52 percent of its shares; 2) Victor Cisneros is Francisco Cisneros's son and has a birthdate of July 27, 1984, 3) Victor Cisneros worked for his father through Mountain Forestry, Inc. as a firefighter for 30 days before 16th birthday during the 2000 fire season; 4) Victor Cisneros was engaged in firefighting activities for 30 days prior to his 16th birthday; and 5) Francisco Cisneros is uncle to Samuel Cisneros and Ramon Cisneros.

43) At the start of hearing, the Agency stipulated that the 2000 through 2002 Agreements did not include a specific minimum age requirement and that age was a matter of state law during that period. Both participants stipulated that the 2003 and

2004 Agreements included a provision requiring that firefighters must be 18 years old to engage in firefighting activities.

44) During the hearing, the Agency moved to amend paragraph five of the Notice of Intent to include the definition of “person” found in ORS 174.110(5). In a later motion, the Agency moved to amend the same paragraph to include the definition of “person” found in OAR 839-015-0004(20). The forum granted the Agency’s motions and denied Respondents’ motion to strike paragraph five of the Notice of Intent.

45) Following the Agency’s case-in-chief, Respondents moved to strike any references by witnesses to statements made by Alex Coronado. Respondents also made separate motions to dismiss paragraphs 3, 8, 9, 12, and 13 of the Notice of Intent. Respondents also renewed their previous motion to strike paragraph five of the Notice by moving to dismiss it for failure to state a claim and failure to put forward clear and convincing evidence to support the claim. Following argument, the ALJ denied Respondents’ motion to strike references to Alex Coronado’s statements and denied the motion to dismiss paragraphs 12 and 13 of the Agency’s Notice. The ALJ reserved ruling on Respondents’ motions to dismiss paragraphs three, eight, and nine until the proposed order and reserved discussion on the motion to dismiss paragraph five until the close of hearing.

46) At the close of hearing, the ALJ reserved ruling on any anticipated post-hearing motions until the proposed order and ordered the participants to submit simultaneous written closing arguments no later than November 30, 2005. The ALJ ordered the Agency to submit any rebuttal to Respondent’s closing argument no later than December 10, 2005. Respondents’ request to submit “rebuttal” to the Agency’s closing argument was denied. Additionally, after reconsidering her previous ruling, the ALJ requested that the participants submit simultaneous briefs addressing

Respondents' motion to strike paragraph five of the Notice of Intent and the Agency's motions to amend to include definitions of the term "person" no later than November 30, 2005.

47) On November 22, 2005, the Hearings Unit received a letter from Respondents' counsel, dated November 18, addressed to the ALJ that included a "wrap-up of some of the remaining post trial issues." Counsel enclosed a post-hearing motion for summary judgment on the issue of minimum age and training requirements and renewed its motion to dismiss paragraphs 12 and 13 of the Notice of Intent on grounds that the Agency had failed to state a claim for relief and had waived its right to seek revocation of Respondents' farm/forest labor contractor license. Counsel also included a copy of Judge Dickey's order denying Respondents' motion for a temporary restraining order. In the letter, counsel moved to strike witness Stan Wojtyla's testimony "regarding statements made to him by German Munoz and Israel Munoz" because it was "uncorroborated and unreliable hearsay," and reiterated Respondents' motion at hearing to strike Alex Coronado's testimony for the same reasons.

48) The ALJ issued an order on November 23, 2005, establishing post-hearing timelines for the Agency's response to the motions for summary judgment and to dismiss, and reiterated the timeline for filing simultaneous briefs and submitting closing arguments and rebuttal. The order further stated that the ALJ "will rule on all post-hearing motions in the proposed order."

49) The Agency and Respondents timely filed written closing arguments. On November 30, 2005, the Agency filed a response to Respondents' motion to dismiss and motion for summary judgment, and, through counsel, a response to Respondents' motion to dismiss paragraph five of the Notice of Intent. On the same date, Respondents filed a memorandum of law in support of Respondents' motion to strike

and a response to the Agency's motion to amend. Respondents also filed an "Affidavit of Robert C. Williamson Regarding Judge Dickey's August 2004 Order."

50) On December 12, 2005, the Hearings Unit received a letter addressed to the ALJ from Respondents' counsel that stated in pertinent part:

"Tendered herewith are documents for the forum's consideration.

"Replies to the two Motions to Dismiss are included for your review. The Department of Justice literally misses the point regarding the problems with paragraph 5; and in addition they choose to ignore the law as if it does not exist. [citation omitted]

"The Agency too misses the point in its response to our Motion to Dismiss Paragraphs 12 and 13, and grossly misinterprets OAR 839-015-0520.

"Enclosed also is the Respondents' last closing argument. You will find it brief and to the point and a clear demonstration of the Agency's failure to make its case at a preponderance of evidence standard let alone the higher standard of proof for fraudulent activity.

"I shared portions of the Agency's written closing with members of the bench and bar both in Salem and Portland. The personal attacks against me, my clients and witnesses are appalling. I don't know what invoked such a sense of personal hatred by Case Presenter Domas as revealed by the writing. I can only hope that, evaluated in a professional sense, it must arise from the difficulties of her case.

"It was a long and tiring hearing but I felt it was conducted with relatively good order and organization and although the record is long it is complete with full regard and cite to the law and well developed facts.

"I know that the proposed order will take some time to prepare because of the required length of consideration by the forum; and in the interim I would like to have a complete copy of the hearing tapes for my own review. Do I need to request them from Etta Creech?

"In closing please enjoy a Merry Christmas."

51) On December 12, 2005, the forum received the Agency's rebuttal argument dated December 10, and Respondents' "Rebuttal to the Agency's Written Closing" dated December 8, 2005.

52) The hearing record closed on December 12, 2005.

53) On December 14, 2005, the ALJ issued an order "Denying Consideration of Respondents' Reply to the Agency's Response to Motion, Reply to the Agency's

Brief, and Rebuttal to the Agency's Written Closing Argument. In the order, the ALJ addressed Respondents' request for the hearing tapes, and ruled, in pertinent part:

“As I advised the participants when the hearing concluded, I will provide copies of the hearing tapes to both participants, if they so request, after I issue the proposed order. Until then, the hearing tapes are part of the official record, which remains in my custody until I issue the proposed order for the Commissioner's consideration.”

54) On March 30, 2006, the Hearings Unit received Respondents' motion for an order re-opening the contested case hearing record to permit Respondents to offer new evidence that was not available at the time of hearing. Because the Agency's case presenter was not available to respond to Respondents' motion within seven days after service, the forum extended the filing deadline for the Agency's response to April 21, 2006, after which the Agency timely filed a response.

55) On August 25, 2006, the Hearings Unit received Respondents' motion to reconsider the forum's interim order regarding hearing tapes and motion to extend time for filing exceptions to the proposed order. On August 30, 2006, the Hearings Unit received the Agency's response to the motions. After considering the participants' arguments, the forum reconsidered its previous ruling and provided the participants with the hearing tapes following their subsequent written requests. The forum also extended the deadline for filing exceptions to the proposed order to no later than 30 days from the date the proposed order issued.

56) The ALJ has reconsidered that part of the December 14, 2005, order regarding Respondents' rebuttal to the Agency's closing argument. Since the ALJ requested simultaneous written closing arguments without giving Respondents an opportunity to respond to the Agency's argument as would have happened had the participants given oral closing arguments, the ALJ has read and considered Respondents' rebuttal argument for the purposes of this order.

57) For reasons stated in the rulings on motions section of this Final Order, Respondents' motions to dismiss paragraphs 3, 8, 9, 12, and 13 of the Notice of Intent are **DENIED**.

58) For reasons stated in the opinion section of this Final Order, Respondents' motion to strike paragraph five of the Notice of Intent is **DENIED**.

59) The ALJ issued a proposed order on January 22, 2007, that notified the participants they were entitled to file exceptions to the proposed order within 30 days of its issuance. The Agency did not file exceptions. Respondent timely filed exceptions that are addressed in the opinion section of this Final Order.

RULINGS ON MOTIONS

RESPONDENTS' MOTION TO DISMISS PARAGRAPHS THREE, EIGHT, AND NINE OF AGENCY'S NOTICE OF INTENT

Paragraph Three: Respondents argue that the allegations regarding Alex Coronado and Leticia Ayala “fail as a matter of pleading and fact.” Respondents contend Coronado and Ayala were dispatched to fires in Nevada under a federal contract “not subject to the jurisdiction or the ability of the Agency to bring the complaint regarding violations under a federal dispatch.” Respondents further argue that even if the Agency has jurisdiction, the federal contract did not arise under the Interagency Firefighting Crew Agreement (“Agreement”) and the Agency failed to allege it as a separate contract. Respondents' arguments are not well founded.

First, the Commissioner’s authority to regulate farm/forest labor contractors who recruit workers to perform forestation work out of state under federal contracts, particularly U. S. Forest Service (“USFS”) contracts, is well established. *In the Matter of Manuel Galan*, 15 BOLI 106, 130-31 (1996); *In the Matter of Jose Linan*, 13 BOLI 24, 36 (1994). Under the ODF agreements, Respondents were required to obtain a farm labor contractor license with a forestation endorsement before recruiting workers to perform

firefighting activities under government contracts. As a licensed farm/forest labor contractor, Respondents were at all times subject to ORS 658.405 to 658.503 and, therefore, subject to the Commissioner's authority to regulate their out of state firefighting activities, including those in Nevada as alleged.

Second, the Agency's allegation that Coronado and Ayala were Mountain Forestry employees who were recruited and dispatched to perform firefighting activities on two USFS fires in Nevada without the required pack testing under an agreement with the Oregon Department of Forestry, "as a matter of fact," is subject to proof and not a basis for dismissal for failure to state a claim. Consequently, Respondents' motion to dismiss the allegations pertaining to Alex Coronado and Leticia Ayala in paragraph three is **DENIED**.

Paragraph Eight: Respondents contended at hearing that the Agency failed to state a claim because it made "no showing of the requirement to have an annual employment certificate." The Agency expressly alleged Respondents violated ORS 653.307 and OAR 839-021-0220 by employing at least seven minor children without applying for, obtaining, or posting an annual employment certificate. Both the statute and rule require an employer who hires minors to first obtain an annual employment certificate before employing minors. The Agency alleged facts that, if proven, constitute a per se violation of ORS 653.307 and OAR 839-021-0220. Respondents' motion to dismiss paragraph eight is **DENIED**.

Paragraph Nine: Respondents contended at hearing that the Agency failed to state a claim because it "did not offer proof that a minor engaged in a hazardous occupation." Notwithstanding Respondents' stipulation that one of Mountain Forestry's employees was less than 16 years when he engaged in firefighting activities in 2000,

the Agency alleged sufficient facts to state a claim under OAR 839-021-0102(p). Respondents' motion to dismiss paragraph nine is **DENIED**.

RESPONDENTS' POST-HEARING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS PARAGRAPH 12 OF AGENCY'S NOTICE OF INTENT

Respondents filed a post-hearing motion requesting, for the second time, reconsideration of the ALJ's order denying Respondents' motion to dismiss paragraph 12 of the Notice of Intent. In particular, Respondents requested reconsideration of the forum's ruling that OAR 839-015-0520(1) does not limit the Agency's authority under ORS 658.445(1). Without further consideration, the forum's October 13, 2005, order denying Respondents' motion to dismiss paragraph 12 of the Notice of Intent is hereby **AFFIRMED**. Respondents' second motion for reconsideration is **DENIED**.

RESPONDENTS' POST-HEARING MOTION FOR AN ORDER DISMISSING PARAGRAPHS 12 AND 13 OF AGENCY'S NOTICE OF INTENT

Paragraphs 12 & 13: In a post-hearing motion, Respondents renewed its motion to dismiss paragraph 12 and moved to dismiss paragraph 13 on the ground that the Agency waived its right to pursue license revocation under ORS 658.445(1) & (3) when it made no effort to correct the ALJ's failure to include license revocation as an issue when the issues were summarized during a prehearing conference and at the commencement of the hearing. In its response to the motion, the Agency argued that it made no waivers and that waiver is an intentional act that must be plainly and unequivocally manifested either "in terms or by such conduct that clearly indicates an intention to renounce a known privilege or power," citing *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration*, 25 BOLI 12, 35 (2004), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 13 P3d 1212 (2004).

In order to establish that the Agency waived its right to litigate two of the allegations in its Notice of Intent, Respondents must show the Agency plainly and unequivocally manifested explicitly or implicitly *an intention* to renounce its power to do so. The forum notes that the first sentence in the Agency's Notice of Intent reads: **"THIS WILL NOTIFY YOU** that the Commissioner of the Bureau of Labor and Industries intends to revoke/refuse to renew the farm/forest labor contractor license of Mountain Forestry, Inc. and Francisco Cisneros." Respondents requested a hearing on that issue that resulted in a license revocation proceeding. While at the outset of the hearing the ALJ may have inadvertently failed to state the obvious and, instead, recited the issues requiring resolution before determining whether or not to revoke Respondents' license, the forum finds the Agency's failure to speak up when the issues were summarized does not unequivocally manifest an intention to waive the very reason for the contested case hearing. Indeed, if the Agency had intended to relinquish its right to pursue license revocation and Respondents *believed* the Agency intended to waive its right, then the participants would not have wasted the forum's time, or the interpreter's time, litigating the issue to the fullest extent over a two and one half week period. Respondents' argument is disingenuous and is redolent of invited error. There is no basis for Respondents' contention that the Agency intentionally and unequivocally renounced its right to litigate the license revocation issue raised in the Notice of Intent.

Although Respondents aptly pointed out that waiver is separate and distinct from the "issue of notice," the forum is compelled to address the notice issue based on ORS 183.415(7) which requires that the presiding officer at the start of hearing "explain the issues involved in the hearing and the matters that the parties must prove or disprove." Respondents do not contend they had inadequate notice of the license revocation proceeding. However, lest there be any misunderstanding, the forum concludes that,

despite the ORS 183.415(7) requirement, the ALJ's failure to mention the proceeding's purpose specifically, i.e., to determine if there was sufficient reason to refuse to renew or revoke Respondents' license, did not impair the fairness of the proceeding or deprive Respondents of due process or a full and fair hearing on all of the issues properly set forth in the Notice of Hearing as required under ORS 183.415(10). As previously noted, the entire proceeding was based on the Agency's Notice of Intent which squarely and unequivocally set forth the Agency's intent to revoke Respondents' farm/forest labor contractor license. Moreover, well after the ALJ summarized the alleged violations at hearing, Respondents sought to preserve certain constitutional issues by stating: "We believe the Agency's position to revoke the license – license of Mountain Forestry and F. Cisneros would be a taking or a deprivation of a fundamental right under the Oregon and United States Constitution for both of these individuals and corporations for the right to pursue a trade or calling." Later still, during cross-examination of a witness, Respondents' counsel objected to the Agency's question and stated: "That's an unfair characterization pretty far afield in litigation. I don't know what it has to do with the notice of intent to revoke the license." Respondents not only knew what the core issue was throughout this proceeding, they were zealously represented by counsel who fully litigated the issue.

For all of the reasons stated above, Respondents' motion to dismiss paragraphs 12 and 13 is **DENIED**.

RESPONDENTS' MOTION TO REOPEN CONTESTED CASE RECORD TO ADMIT NEW EVIDENCE

OAR 839-050-0410 provides:

"On the administrative law judge's own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the

record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.”

Respondents moved to reopen the record to permit Respondents to offer a document that “was not released to the general public until March 20, 2006.” The document is a 28-page “Audit Report” issued by the U. S. Department of Agriculture (“USDA”) Office of Inspector General (“OIG”) in March 2006. The report “presents the results of the OIG’s review of Forest Service (U. S. Forest Service) firefighting contract crews” and includes comments and recommendations based on OIG’s findings. Respondents contend the report 1) “shows the prevalence of records discrepancies throughout the industry, contrary to the Agency’s position regarding Respondents”; 2) “shows that ODF did not have specific experience requirements for supervisor personnel prior to 2003, contrary to Agency argument”; and 3) “rebukes the negative inference drawn by Steve Johnson’s testimony regarding the absence of training records from the NWSA database.” Respondents further contend that the report is “necessary for a full and fair adjudication of this case” and “shows that Respondents are well within the industry-wide margin of error for training record discrepancies.” Respondents further note that the report is necessary mitigating evidence.

In its response, the Agency contends that Respondents have not demonstrated good cause in that they did not submit an affidavit stating they were unaware of the federal audit at the time of hearing. To support its contention, the Agency proffered several reasons why Respondents may have been aware of the audit before the hearing record closed. Additionally, the Agency contends the proffered document is “not relevant, not controlling” and “does not stand for the propositions offered by Respondents.” The Agency points out that “the document actually shows ODF as a model of how to do things correctly and efficiently” and that “there were problems with owners administering pack tests (as there was in this case) and that the owners were

not doing a good job of self-policing the industry.” Finally, the Agency noted that the “main problem identified with USFS and ODF was inadequate resources and that is not an excuse for labor contracts [sic] to violate the law.”

Having considered the participants’ arguments and the proffered document, the forum concludes that the Audit Report, albeit interesting and informative about the industry, is not necessary to fully and fairly adjudicate this matter.

First, according to the report, the objective was to audit the USFS’s use of contract firefighting crews and evaluate its “direct administration of these contracts and its coordination with other parties that administer contracts for crews that fight wildfires on [Forest Service] land.” In the “results in brief” section of the report, the OIG “found that the [USFS] needed to improve contract oversight, strengthen training and experience requirements, address control weaknesses at wildfire suppression associations, improve language proficiency assessments, and coordinate with other Federal agencies to identify undocumented workers.” As the Agency pointed out, the report commended certain ODF practices and procedures and made recommendations to the USFS to follow the example, e.g., “Modify the national contract to incorporate experience requirements from the ODF agreement” and “Adopt ODF’s standardized field language assessment for national contract crews.” However, none of that information is relevant to whether Respondents violated Oregon’s farm/forest labor contracting statutes and rules.

Second, Respondents’ contention that OIG concluded that discrepancies in the contractor records were widespread in the industry, and were “due to the lack of information and training by the administering agencies, such as ODF and the [USFS],” is simply not true. In fact, the OIG found that in a “self-certifying” industry, contractors were not performing well. Significantly, OIG noted: (1) “numerous performance

problems with poorly trained and inexperienced crews under the PNWCG/ODF agreement”;ⁱ (2) that contractors “certified qualifications for crewmembers who had not satisfied standards and requirements for their positions * * * these records lacked documentation required for the individual firefighters’ positions. For example, training certificates were missing, task books were not completed properly, and firefighters were advanced to supervisory positions with inadequate work experience”; (3) that “since association officers and trainers may be the owners and employees of companies that provide firefighter contract crews, the associations may have a conflict of interest when performing duties that require independence * * * Association instructors may be vulnerable to pressure from their companies to cut corners when they provide training, and the integrity of training and qualification records may be compromised when owners or employees of contract companies have unchecked access to association databases.” Contrary to Respondents’ contention, the upshot of the report was “serious control weaknesses” and lack of oversight by the government due, in part, to lack of resources.

Third, the fact that other contractors in the same industry have similar performance problems does not mitigate the failure to comply with contract terms. By bidding on and accepting a contract award, Respondents represented they were able to perform under the contract. *In the Matter of Charles Hurt*, 18 BOLI 265, 276-77 (1999).

Notwithstanding Respondents’ failure to submit an affidavit showing they had no knowledge of the federal audit until the document was released on March 20, 2006, the forum concludes the document is not necessary to fully and fairly adjudicate this case. Respondents’ motion to reopen the contested case hearing record is **DENIED**.

OFFERS OF PROOF

1) During witness Don Moritz’s cross-examination, Respondents sought testimony concerning whether ODF found that contractors other than Mountain Forestry had used underage employees during 2000 through 2002. The Agency objected on the

basis of relevance. Respondents did not satisfactorily explain the question's relevance and the ALJ sustained the Agency's objection. However, Respondents were allowed to elicit Moritz's response to the question as an offer of proof. In response to the question, Moritz stated he had no "action sheets" for those years and could not answer the question. In a related question, Respondents sought the same information for the year 2003 and the Agency renewed its objection to Respondents' line of questioning as irrelevant. The objection was sustained but Respondents were allowed to elicit Moritz's response as an offer of proof. Moritz testified that two contractors had received a notice of noncompliance for employing underage firefighters in 2003. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), because it is not relevant to the issue of whether Mountain Forestry employed underage firefighters to fight wildfires. Moreover, even if it had been admitted, the evidence does not in any way alter the ultimate findings and conclusions found herein. The forum hereby affirms both rulings.

2) During cross-examination, witness Don Moritz was asked if he was aware of a "provision in the law that exempts children who are working under their parents under the age of 16?" When he responded, "No, I'm not," he was asked, "If that were the law, would you find a violation of underage workers for Mountain Forestry?" The Agency objected on the ground that the question called for speculation. The ALJ sustained the objection. Respondents requested and were allowed to elicit Moritz's response as an offer of proof. Moritz was then asked, "If I told you there was an exception to the application of the rule that [V. Cisneros] must be 16, and you as a contract officer for [ODF] knew that to be the law, would you sanction Mountain Forestry for having an underage worker?" Moritz responded that he would "go to the Agreement for guidance on that." The forum concludes that excluding the evidence did not violate

the duty to conduct a full and fair inquiry under ORS 183.415(10), because it was speculative and not relevant to the issue of whether Mountain Forestry employed underage firefighters. Moreover, even if it had been admitted, the evidence does not alter the ultimate findings and conclusions found herein. The forum hereby affirms the prior ruling.

3) During cross-examination, witness Don Moritz was asked, "If you were to take evaluations from 2001 through the years 2004, and they were all good, would that lead you to the conclusion that the contractor was competent?" The Agency objected on the ground that the question called for a conclusion and speculation on Moritz's part. The ALJ sustained the objection. Respondents requested and were allowed to elicit Moritz's response as an offer of proof. Moritz was then asked, "If you had evaluations from 2000 to 2004 for contractors in which all these 224's were positive, would that lead you to believe they were competent?" Moritz responded, "Yes." Respondents requested that the testimony be admitted as substantive evidence "because [the Agency] has alleged character, competence and reliability." The ALJ reserved ruling on the offer until the proposed order. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the testimony because it is not relevant to whether Respondents violated farm/forest labor contracting laws that would demonstrate they lack the character, competence and reliability to act as a farm/forest labor contractor. Even if the forum admitted the testimony, it does not alter the ultimate findings and conclusions found herein. Consequently, the testimony is not admitted as substantive evidence in this case.

4) Respondents subsequently asked Moritz, "For the years 2000, 2001, 2002, 2003, and 2004, if you've got the 224 evaluations in and were to look at those for

a contractor, and they were all positive, would that be a body of evidence saying that they are reliable?" The Agency again objected to the question on the ground it called for speculation. Respondents replied, "Same question, offer of proof." Moritz responded that "it would be an indicator that the people that evaluated them at the incident said that they gave them good reviews for their performance." Respondents' offer of proof continued with the following questions and responses:

"Q. [I]n the general scope of things, if you have 10 or 12 government officials spread in three to four different states all saying regarding a particular contract that they did a good job, they worked hard, would that be indicia of reliability? Would that be credible for your office? Yes or no? Would it be credible for your office?"

"A. Yes.

"Q. Now, you awarded Mountain Forestry a contract in 2005, did you not?"

"A. We did.

"Q. Given just what we have heard about the lack of negative evaluations, I'm going to ask you a hypothetical. If all the evaluations for Mountain Forestry were positive for the years 2000 through 2004, would that be a basis by which to award them the contract for 2005?"

"A. No.

"Q. And is that because you do not use these evaluations in awarding contracts?"

"A. We don't review those for award unless there's been an issue involving them and we've done an investigation and had a conclusion to it. But we do not go back to the 224's for consideration of award.

"Q. Okay. And I think that's consistent with what you told us earlier. So if an incident comes up in some of these years, you may use that regarding an award? Isn't that what you just told me?"

"A. No. I don't think I said that. I talked to you about future in 2006. That's not the current reality.

"Q. Okay. Well, let's talk about 2005. In the 2005 award, did your agency use the 224 evaluations for the award of contract to any contractor?"

"A. No.

"Q. Okay. And you awarded Mountain Forestry a 2005 contract?"

"A. That's correct.

“Q. And is it fair to say it was on the basis of past performance of responsiveness and responsibility?”

“A. That’s what we would award a solicitation to. Yes, that is a consideration.

“Q. Okay. Now, for the 2006 contract which you brought up, are you going to use these 224 evaluations in assessing the award to contractors?”

At this point in Respondents' offer of proof, the Agency objected to further questioning about 2006 as less relevant than the previous questions. The ALJ did not allow Respondents to continue questioning about prospective contracts in 2006 as an offer of proof. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the testimony because it is speculative and not relevant to whether Respondents violated farm/forest labor contracting laws that would demonstrate they lack the character, competence and reliability to act as a farm/forest labor contractor. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the prior ruling and further finds Respondents were not prejudiced by the ALJ’s refusal to allow testimony on prospective 2006 contracts as an offer of proof.

5) During cross-examination, witness Moritz was asked to read from a document that Respondents represented was a “224 evaluation form” prepared by an unidentified author and signed by Alex Coronado. The Agency objected based on Moritz’s lack of knowledge about the document or its origin and because the document was part of Respondents' case in chief and not provided previously in their case summary. Additionally, the Agency contended that the document was not relevant to the issues before the forum. Respondents did not satisfactorily explain why the document was not included in their case summary or how it was otherwise relevant and the ALJ sustained the Agency’s objection. However, Respondents were allowed to summarize the comment portion of the document through Moritz as an offer of proof. Moritz summarized, stating, “The comment said he [Alex Coronado] did a – he – it said

he was a knowledgeable crew boss. In one block he failed to communicate well, and in another area he needs to be more aware of where his crew is. That's what the evaluation says. Okay?" Respondents indicated their offer of proof was completed. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the summary because Respondents failed to establish its relevance to any issues before the forum. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the prior ruling.

6) During witness Michael Cox's direct examination, he was asked that "given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify records to present qualified crew bosses and squad bosses?" The Agency objected to the question on the ground it called for speculation. The ALJ sustained the objection but Respondents were allowed to elicit Cox's response to the question as an offer of proof. In response to the question, Cox stated, "That would have been the year that you would have – if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003." The ruling was thereafter reconsidered and the testimony was admitted as substantive evidence demonstrating Respondents' possible motive for falsifying records as alleged in the Notice of Intent.

7) During Michael Cox's direct examination, Respondents sought testimony concerning the contents of a document marked as exhibit R-20 and sought to have the testimony and document admitted as evidence. Both consisted of John Venaglia's statement in a letter addressed to F. Cisneros that "We have reviewed your response to our concerns * * * and are satisfied * * * that the requisite training, and pack tests were administered." The Agency had previously objected to the document on the ground that

it was not included in Respondents' case summary and did not constitute impeachment. Respondents did not articulate a satisfactory reason for not providing the document in their case summary and the forum excluded it as evidence. However, Respondents were allowed to submit the document and Cox's testimony as an offer of proof. After considering both, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding both based on their lack of relevance to any of the issues raised in the pleadings. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the ALJ's prior ruling.

8) During witness S. Johnson's cross-examination, Respondents sought testimony concerning whether S. Johnson, in his "investigation of trainers in the 2004 year," had ever declared any of their "qualifications as void or any of their certifications for any task books as void or invalid." The Agency objected to the relevancy as to Mountain Forestry. Respondents did not satisfactorily explain the question's relevance and the ALJ sustained the Agency's objection. However, Respondents were allowed to elicit S. Johnson's response to the question as an offer of proof. In response to the question, S. Johnson stated he does not make those determinations or recommendations and, when asked if he reported any trainers "to a specific Pacific Northwest Wildfire Coordinator in the 2004 year," S. Johnson responded that he had reported none. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), because it is not relevant to the issues set forth in the pleadings. Moreover, even if admitted, the evidence does not in any way alter the ultimate findings and conclusions found herein. The forum hereby affirms the ruling.

9) In a related question, Respondents asked if he had reported any trainers in 2004 to “his superior, Ed Daniels.” The Agency raised the same relevance objection which was sustained. Respondents were allowed to offer S. Johnson’s response, which was “no,” as an offer of proof. For the same reasons stated above, the forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10). Moreover, even if admitted, the evidence does not in any way alter the ultimate findings and conclusions found herein. The forum hereby affirms the ruling.

10) During cross-examination, Respondents asked S. Johnson whether “in the last half, from June through December of year 2004, after you had reported to the panel regarding a contractor’s failure to correct task book mistakes, do you know of any time the panel did not take action against the contractor?” The Agency objected on the basis the question was outside the scope of direct. The ALJ sustained the objection and Respondents were allowed to elicit a response from S. Johnson as an offer of proof. S. Johnson stated, “First of all, I make the suggestions to correct task books. As to fix a problem, the problem is what gets referred to the panel, not the fix, which is how to correct, alter as you put it, change the task book. That is how we remedy the problem. The problem is what gets referred to the panel, not whether or not they make the changes.” Respondents continued a line of questioning that was outside the scope of direct and after several Agency objections, the ALJ instructed Respondents to conclude the offer and reserve their questions for their case in chief. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10) because it is not relevant to any of the issues in this case. Even if it had been admitted, the evidence would not in any way alter the ultimate findings and

conclusions found herein. The forum hereby affirms the prior ruling and further finds that Respondents were not prejudiced by the ALJ's decision to end the offer of proof.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Francisco Cisneros (“F. Cisneros”) was president and majority shareholder of Respondent Mountain Forestry, Inc. (“Mountain Forestry”), an Oregon corporation, conducting business jointly as a licensed farm labor contractor with a forest endorsement (“farm/forest labor contractor”). Mountain Forestry incorporated in April 1988 and was licensed as a farm/forest labor contractor beginning in or around April 1989.

2) At all times material, Respondents conducted business from F. Cisneros's home at 4570 Independence Highway, Independence, Oregon.

3) At all times material, Penny Cox was Mountain Forestry's only other shareholder. From at least 2000 through 2004, Penny Cox owned 48 percent of Mountain Forestry.

4) At all times material, Michael Cox was Penny Cox's husband and Mountain Forestry's Fire Director and “overall boss” of Mountain Forestry's “Fire Fighting Services.” Michael Cox has known F. Cisneros and his family since 1980. In or around 1982, Michael Cox incorporated C&H Reforesters, Inc. (“C&H”) and at some point became co-owner of another farm/forest labor contracting company, Ferguson Management. During the 1980's, F. Cisneros worked for Ferguson Management until Mountain Forestry incorporated in 1988. F. Cisneros and Dennis Sickels co-owned Mountain Forestry until early 1990 when F. Cisneros “bought out” Sickels and Cox's wife became a 48 percent shareholder in Mountain Forestry. Until approximately 1996, Mountain Forestry provided reforestation workers and firefighters primarily to Ferguson Management and some workers to C&H. Thereafter, until the late 1990's, Mountain Forestry primarily “subcontracted” with C&H to “fulfill reforestation” and “firefighting”

contracts in order “to accomplish C&H bids.” C&H also administered Mountain Forestry’s payroll “to make sure that everything [was] paid.” During that time, Mountain Forestry provided C&H with crews to perform reforestation work and supplied fire suppression crews “under C&H’s name.” C&H, in turn, paid F. Cisneros a “management fee.”

5) In 1998, C&H sold some of its stock to Bob Gardner. In or around the fall of 1999, Cox joined Mountain Forestry “to help [Respondents] get their company – get their legs under them” and to perform firefighting contracts under the Mountain Forestry name. While continuing to perform some duties for C&H, Cox helped Respondents get their books in order “so they could keep good records and get their accounts lined up.” By late 1999, Cox was working full time for Respondents as their “Fire Director” from an office located at F. Cisneros’s home in Independence.

6) As Mountain Forestry’s Fire Director, Cox’s primary responsibilities included organizing and maintaining firefighter files, scheduling refresher classes and S-131, S-230, S-290, and other upper level classes, ordering equipment for the fire crews, making sure firefighting crews were properly dispatched, and negotiating contracts “with [the Oregon Department of Forestry].” Cox’s duties also included preparing payroll, doing the banking and paying bills, and advising F. Cisneros “on the costs of doing certain types of work.” Cox “made payments to insurance companies” and “lined up bonds for bonded jobs.” Additionally, Cox accompanied F. Cisneros in the field to “get a feel for production rates” and “to know how good the crew really was.” Cox prepared all of Mountain Forestry’s paperwork, including the renewal applications for Mountain Forestry’s farm/forest labor contracting license. F. Cisneros signed the renewal application forms and other documents that Cox prepared, but Cox regularly signed documents on Mountain Forestry’s behalf, including firefighter records, and had

signatory authority for Mountain Forestry checks. Additionally, Cox co-signed the firefighting contracts as Mountain Forestry's "Secretary" and for an unspecified period between 2000 and 2004, was Mountain Forestry's corporate secretary.

7) In February or March 2000, Cox acquired the C&H firefighting crew records for Mountain Forestry. Since "all of Francisco's people that had ever worked with him were at C&H working under that company, [Cox] had to get those records and have them moved over to Mountain Forestry." The records included firefighting files for each worker recruited by Mountain Forestry to work for C&H.

8) Each year, beginning in March 2000, Respondents entered into an Interagency Firefighting Crew Agreement ("Agreement") with the Oregon Department of Forestry ("ODF"). The purpose of the Agreement was to establish a listing of 20-person firefighting crews "for preparedness, initial attack, suppression and mop-up and other fire support activities at wildland fires within the States of Oregon and Washington and elsewhere." By entering into the Agreement each year, Respondents agreed to provide firefighting services to ODF under the terms and conditions of the Agreement without a guarantee of work. Under the Agreement, Respondents were independent contractors and each confirmed dispatch to a wildland fire constituted a separate and binding contract.

9) The parties to each Agreement included the State of Oregon, the State of Washington, and five federal agencies: the U. S. Forest Service ("USFS"), National Parks Service ("NPS"), Bureau of Land Management ("BLM"), Bureau of Indian Affairs ("BIA"), and U. S. Fish & Wildlife ("USFW"). At all times material, ODF was responsible for administering the Agreement and dispatching crews to wildland fires on behalf of Oregon, Washington, and the federal agencies. Each Agreement included additional requirements that were specific to each of those states and federal agencies. As a term

and condition of the Agreement, Respondents agreed to “comply with all other federal, State, county and local laws, ordinances and regulations applicable to [the] agreement.”

10) As a term and condition of the 2000 through 2004 Agreements, Oregon contractors were required to obtain and maintain an Oregon farm/forest labor contractor license from BOLI before performing any work under the Agreements. From 2000 through 2004, Respondents applied annually to renew their farm/forest labor contractor license. On each renewal application, F. Cisneros signed a statement under oath that Respondents agreed to “at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries.”

11) The Agreements from 2000 through 2004 contained terms and definitions that remained substantially the same from year to year. Unless otherwise noted, the following terms and definitions applied to all of the Agreements:

AGREEMENT: (or INTERAGENCY FIREFIGHTING CREW AGREEMENT) The Invitation to Bid (ITB), including all exhibits and attachments to the ITB, and the CONTRACTOR'S Bid submit[ted] in response to the ITB thereto.

BID: An offer by a CONTRACTOR to provide one or more fire suppression Crews according to the terms and conditions of the Interagency Firefighting Crew Agreement. *This definition was added in 2001.*

BID RATE: The hourly rate at which a Crew is paid. *This definition was added in 2001.*

BUSINESS ESTABLISHMENT: CONTRACTOR'S base of operations located in the geographic area in which CONTRACTOR submitted a quotation.

CERTIFYING AUTHORITY: CONTRACTOR or their designee who is responsible for all training, safety and employer requirements for Crew members. *This definition was added in 2001.*

CONFIRMED: The condition or status that exists when agreement is reached between CONTRACTOR and GOVERNMENT official that: 1) Crew(s) ordered are available; 2) agreement has been reached on time to start working and on estimated time of arrival at the Incident; 3) the Crew is specifically identified; 4) GOVERNMENT assignees request number and project order to the assignment.

CONTRACT: Same as AGREEMENT.

CONTRACTOR: An individual or legal entity with whom GOVERNMENT enters into an Agreement for the provision of firefighting services under the terms and conditions of this Agreement.

CREW, TYPE II: 20-person firefighting crew consisting of 16 Firefighter Type 2 (FFT2), and 1 Crew Boss (CRWB) and 3 Squad Bosses (SB); OR a 10-person crew consisting of 8 Firefighter Type 2 (FFT2), 1 Squad Boss (SB) and 1 Crew Boss (CRWB), and of whom 40% or more have at least one Season of firefighting experience. *This definition was added in 2003 and changed the previous years' crew configuration from two to three squad bosses per 20-person crew.*

CREW REPRESENTATIVE: Agent/employee of CONTRACTOR responsible for the welfare of the Crew and who provides a contact between the Crew and the appropriate Incident Command Organization.

CREW MEMBER or CREW PERSON: Basic wildland firefighter, who is a resource used in the control and extinguishment of wildland fires and who works as a member of a Crew under the supervision of a higher qualified individual.

GOVERNMENT: The party for whom CONTRACTOR is performing firefighting services and who has jurisdiction over a fire, which may include any of the following agencies, either singly or in combination: Oregon Department of Forestry (ODF), Washington Department of Natural Resources (WDNR), United State Forest Service (USFS), National Parks Service (NPS), Bureau of Land Management (BLM), and Bureau of Indian Affairs (BIA), and United States Fish & Wildlife Service (USF&WS).

GOVERNMENT REPRESENTATIVE: Any designated employee of one of the agencies listed under the definition of GOVERNMENT.

INCIDENT: Emergency or wildfire support activities and events managed by GOVERNMENT. *This definition was added in 2001.*

INCIDENT COMMANDER: GOVERNMENT Representative with responsibility for the overall management of the Incident, including evaluation and coordination of the status of Crews participating in the Incident. *This definition was added in 2001.*

INCIDENT MANAGEMENT TEAM: GOVERNMENT Representatives responsible for managing an Incident. *This definition was added in 2001.*

INTERAGENCY CONTRACT REPRESENTATIVE (IACR): GOVERNMENT agent/employee responsible for assisting in the administration of the Agreement.

OPERATIONAL PERIOD: A period of time (usually eight or twelve hours) determined for each Incident and which serves as the basis for determining the length of time of a Shift. *This definition was added in 2003.*

POINT OF HIRE [AKA DISPATCH LOCATION]: The physical location from which a Crew is hired, which may be the Dispatch Location, an Incident managed by GOVERNMENT, or another location agreed upon by CONTRACTOR and GOVERNMENT.

POSITION TASK BOOK (PTB): A component of the Wildland and Prescribed Fire Qualification System that documents the critical tasks required to perform Type II Crew position tasks and the individual Crew Member's ability to perform such tasks (See Exhibit J). The PTB is described in greater detail in the National Interagency Incident Management System publication PMS 310-1, Wildland and Prescribed Fire Qualification System Guide. *This definition was added in 2003.*

PREPAREDNESS: Activities assigned in advance of fire occurrence to ensure effective suppression action.

PRESUPPRESSION: Activities assigned in advance of fire occurrence to ensure effective suppression action.

RESOURCE ORDER REQUEST: Form used by GOVERNMENT to record resource order from an Incident for personnel, supplies, and equipment. *This definition was added in 2001.*

SEASON: Designation of a period of time of indeterminate length, within which a firefighter has documented satisfactory performance on at least three (3) Type 3, Type 2 or Type 1 Incident assignments that included hotline activities and constituted at least fifteen (15) Operational Periods. *This definition was added in 2003.*

SINGLE RESOURCE BOSS-CREW (CRWB): Individual responsible for supervising and directing a fire suppression Crew.

SHIFT: One continuous 8 to 16-hour period of time in a 24-hour period.

TRAINEE: An individual who is preparing to qualify for a Crew position. Trainee status requires that all required training courses and prerequisite experience has been completed prior to initiation of a Position Task Book, following which the Trainee is eligible for on-the-job training, task evaluation and position performance evaluation. *This definition was added in 2003.*

The definitions that were added in 2001 and 2003 were applicable to the subsequent Agreements through 2004.

12) The Agreements from 2000 through 2004 contained a provision describing the work environment which stated, in pertinent part:

"The work required under this Agreement is performed in a forest and rangeland environment in steep terrain where surfaces may be extremely uneven, rocky, covered with thick tangled vegetation, etc. Temperatures

are frequently extreme, either from the weather or from the fire. Smoke and dust conditions are frequently severe. Hazardous nature of the work requires that protective clothing be worn * * *.”

13) At all times material, the State of Oregon designated firefighting as a hazardous occupation. The minimum age for firefighters in Oregon was and still is 16 years old. The 2000 through 2002 ODF Agreements did not specify a minimum age requirement for firefighters and Respondents were subject to Oregon’s minimum age requirement. In 2003 and 2004, the Agreements added a provision to section 4.1.3 that stated: “All Crew Members provided by **CONTRACTOR** under this Agreement shall be at least 18 years of age.”

14) From 2000 through 2002, it was common practice and “quite prevalent” for contractors to hire and deploy 16 year old firefighters to wildfire incidents.

15) At all times material, the State of Oregon required employers to obtain a validated employment certificate from BOLI before employing minors from 14 through 17 years old in Oregon. Applications for an employment certificate are available upon request at the BOLI offices. After a completed application is returned, BOLI must either deny the application, stating the reasons for the denial, or issue a validated employment certificate to the employer. The employer must then post the employment certificate in a conspicuous place where all employees can readily see it. If the employer employs minors to perform work at more than one location, a copy of the employment certificate must be posted at the place where the minor receives management direction and control. As long as the employer continues to employ minors, the employer must apply for the employment certificate once each year by submitting a renewal application.

16) After researching BOLI records, BOLI compliance specialist Wojtyla found no record showing that Respondents had applied for or that BOLI had ever issued Respondents an employment certificate to employ minors in Oregon.

17) Under the 2000 through 2002 Agreements, the standard configuration for a firefighting crew was 1 Single Resource Crew Boss (“CRWB” or “SRB” or “crew boss”), 2 Squad Boss/Firefighter Type 1 (“FFT1” or “SQB” or “SB” or “squad boss”) crew members, and 17 Firefighter Type 2 (“FFT2” or “entry level firefighter”) crew members. In 2003 and 2004, the 20-person crew configuration changed to 1 CRWB crew boss, 3 FFT1 squad bosses, and 16 FFT2 entry level firefighters.ⁱⁱ Entry level firefighters with no experience could make up 60 percent of the firefighter crew, but 40 percent of the crew had to consist of returning firefighters with more than one year of firefighting experience.

18) The 2000 through 2004 Agreements required that each firefighting crew consist of 20 “properly trained individuals.” When monitoring the training and experience component of the Agreement, ODF relied on the Program Management System (“PMS”) 310-1, published by the National Wildfire Coordinating Group, which prescribes the standards and guidelines for the firefighter training and experience set forth in the Agreement. Training in accordance with the Agreement included classroom and supervised on-the-job training, which included on-the-job performance evaluations. Under the Agreement, contractors were responsible for qualifying and certifying their employees as firefighters in accordance with the Agreement specifications.

19) Whether for the entry level firefighter position or the squad or crew boss positions, firefighters began their training by taking required classes specific to each position level. The purpose of the coursework was to teach firefighters basic firefighting skills and to prepare for hazardous work conditions. Upper level course work was designed to teach supervisory skills necessary for managing firefighting crews under hazardous conditions. The Agreement only recognized instructors designated and approved by a recognized national or local training association or a government

approved educational institution. A training association or educational institution's authorization to train firefighters for ODF assignments derived from a Memorandum of Understanding ("MOU") executed by ODF with the Pacific Northwest Wildfire Coordination Group ("PNWCG"). Under the MOU, the trainers agree they will meet the course content and instructor standards set forth in the PMS guidelines.

20) In addition to the classroom training, trainees for any firefighter position were required to complete the performance tasks set forth in the Position Task Book ("PTB" or "task book").ⁱⁱⁱ The PTB (hereinafter "task book") is a component of the Wildland and Prescribed Fire Qualification System Guide Subsystem and is administered by the contractor to qualify employees to meet the position requirements set forth in the Agreement. The contractor is responsible for obtaining and issuing a task book appropriate for the position each employee will perform on a crew. A firefighter in training for a position or working on an "evaluation assignment" must carry the task book at all times while in training or during the evaluation period. Those who are already qualified in their position are not required to carry their completed task book. Upon completion of the task book, the contractor is responsible for certifying the firefighter-in-training for the position the firefighter trained to perform on the crew by using the procedures set forth in the task book. The Agreements specify that ODF is not involved in task book administration and its personnel will not sign the certification portion of the task book. However, before a firefighter is certified for the CRWB crew boss position, a government supervisor must review, approve, and sign the performance evaluation assignment.

21) From 2000 through 2002, trainees for any firefighter position were paid by the contractor while in training and their pay was not chargeable to the government. In 2003 and 2004, the Agreements added the provision: "Each trainee shall be a paid

Member of the 20-person Crew confirmed available to **GOVERNMENT** at the time the dispatch assignment was accepted.”

22) From 2000 through 2004, Michael Cox prepared and filed the company manifests presented to ODF in June each year and the crew manifests that were presented to ODF upon arrival at the wildfire site.

TRAINING REQUIREMENTS AND PROCEDURES: 2000 – 2002 AGREEMENTS

23) To become certified as a FFT2 entry level firefighter, individuals were required to complete the Firefighter Training (S-130) and Introduction to Fire Behavior (S-190) classes. Prior experience was not a prerequisite, but all FFT2's were required to successfully complete the classroom training and performance tasks set forth in the appropriate task book before assignment to a wildland fire.

24) To become certified as a FFT1 advanced firefighter squad boss, individuals were required to complete the S-130 and S-190 classes. No additional classroom training was required until 2001 when the requirement to successfully complete the Advanced Firefighter Training class (S-131) was added to the Agreement. All FFT1's were required to successfully complete the classroom training, demonstrate satisfactory performance as a FFT2, and demonstrate satisfactory position performance by completing the performance tasks set forth in the appropriate task book, including supervising a minimum of five firefighters on a wildfire incident, within the previous five years, before certification as a squad boss. The 2000 Agreement stated that meeting the position qualification standards for FFT1 squad boss was “required in the progression of qualifications from FFT2 to CRWB.”

25) To become certified as a CRWB crew boss, individuals were required to successfully complete the Intermediate Wildland Fire Behavior (S-290) class in addition to the S-130, S-190, and S-131 classes (effective 2001). For certification, individuals

also were required to demonstrate satisfactory performance as a FFT1 and successfully complete the performance tasks set forth in the appropriate task book, including satisfactory position performance as a crew boss, supervising a minimum of 18 firefighters on a wildland fire, within the previous five years.

26) The 2000 through 2002 Agreements included pre-incident, incident, and post-incident procedures that dictated how contractors were to use the task book for qualifying their employees to meet the specifications in the Agreements.

Pre-Incident Procedures

27) Under the Agreements, *prior to* assigning the employee to a “wildfire incident,” contractors were responsible for ensuring that each employee was issued a task book appropriate to the position using a three step procedure. Step one instructs the contractor to obtain the task books from the National Interagency Fire Center (“NIFC”) and recommends that “the Task Book Administrator’s Guide, PMS 330-1 be obtained” as well. Step two instructs the contractor to issue the task book to employees with the inside cover “Assigned To” and “Initiated By” information appropriately filled out. Step three instructs the contractor to assure that each employee has completed “**all** required training” for their position.

Incident Procedures

28) After assignment to a wildfire incident, in addition to the general provisions pertaining to PTB administration,^{iv} the following incident procedures applied:

“**CONTRACTORS** may use **GOVERNMENT** incidents, for which they are requested or assigned, to qualify and certify employees for FFT1 and CRWB positions. Only one training OR evaluation assignment will be permitted per crew on each incident. The coach/evaluator must, as a minimum, be certified in the position they are coaching or evaluating and will be paid as part of the contracted crew. The trainee will be in addition to the contracted crew and paid by the **CONTRACTOR** (not charged to the **GOVERNMENT**).

“a. **FFT2** personnel must be certified prior to arrival at the incident. No task book administration at an incident is required.

“b. **FFT1** personnel require a performance evaluation assignment on a wildfire to qualify for certification. The **GOVERNMENT** will NOT participate in the administration of the FFT1 PTB’s nor verify evaluation assignments.

“c. **CRWB** personnel require a performance evaluation assignment on a wildfire to qualify for certification. Refer to the procedures that follow for specific steps for PTB administration for these assignments.”

The procedures that followed included a five step process for evaluating CRWB trainees that contained the following provisions:

“**Step 1:** **CONTRACTORS** must identify any trainee in an evaluation assignment to the Incident Management Team at initial check-in. An incident performance evaluation form should also be requested and obtained at this time.

Step 2: During the assignment, the **CONTRACTOR’S** evaluator will observe the trainee’s performance as the crew boss and initial all tasks in the PTB that the trainee demonstrates successfully. The incident and evaluation assignment should be of sufficient duration and complexity so that the trainee has the opportunity to demonstrate all the tasks of the position. If the trainee does not have the opportunity to demonstrate all the tasks, a second evaluation assignment will be necessary.

“**Step 3:** Upon completion of the evaluation assignment, the **CONTRACTOR’S** evaluator will complete an ‘Evaluation Record’ in the back of the PTB.

“**Step 4:** The **CONTRACTOR’S** evaluator will ask their **GOVERNMENT** supervisor * * * to state in writing, under the PTB Evaluation Record completed by the evaluator, whether or not the incident was of sufficient complexity and duration to provide a valid opportunity to evaluate the CRWB trainee’s performance. The **GOVERNMENT** supervisor will sign the record next to their statement.

“1. If the **GOVERNMENT** supervisor states that the incident **was not** adequate to evaluate the CRWB trainee’s performance, a second evaluation assignment will be necessary before individual can be certified in the position.

“2. If the **GOVERNMENT** supervisor states that the incident **was** adequate to evaluate the CRWB trainee’s performance, the **CONTRACTOR’S** evaluator should complete the ‘Final Evaluator’s Verification’ portion of the inside front cover of the PTB.

“**Step 5:** The **CONTRACTOR’S** evaluator will complete a written rating of the trainee’s performance, using the **GOVERNMENT’S**

evaluation form that was provided during the initial check-in, and provide the Incident Management Team with a copy. A copy of this rating shall be kept by the **CONTRACTOR** to be included with the employee's training records. The IMT will maintain a copy with the final incident records."

Post Incident Procedures

29) Following an incident, the contractor was responsible for certifying their employees' task books by using the following five step procedure:

“Step 1: **CONTRACTOR** reviews all information written in each PTB to assure it has been properly completed. This review should include checking that an evaluator has initialed all tasks, the Evaluation Records in the back of the PTB have been appropriately completed, that **GOVERNMENT** supervisor's statements have been obtained, and the Final Evaluator's Verification has been completed.

“Step 2: **CONTRACTOR** reviews each employee's training and experience records to assure all other qualification standards for the position, as listed in EXHIBIT K are met.

“Step 3: When all EXHIBIT K qualification standards are met, **CONTRACTOR** completes the 'Agency Certification' portion of the inside cover of the PTB.

“Step 4: Place a copy of the completed PTB in the employee's training file.

“Step 5: If an individual leaves a **CONTRACTOR'S** employ, the original PTB will be given to the departing individual. It is recommended that the **CONTRACTOR** for future reference purposes keep a copy.”

30) To demonstrate satisfactory performance in a position under the PMS 310-1 guidelines, trainees were required to perform work on “one or more fires” after completing the task book before becoming qualified in a particular position. After qualifying for a position, the firefighter was required to perform work on at least one additional fire in that position before training for the next position.

31) Between 2000 and 2002, contractors, including Mountain Forestry, were “short-cutting” the training process by permitting trainees to begin and complete a task book for one position on one fire and begin and complete a new task book for another position on the next fire. In many cases, contractors had entry level firefighters who began and completed task books as a FFT2 on one fire and began and completed task

books as a FFT1 squad boss on the next fire without performing any work on a fire as a FFT2.

32) Due to a particularly “bad fire season” in 2002, ODF requested increased fire crews and contractors were “rushing” firefighters through the promotional process to get the extra crews out to the fires. During that time, ODF became concerned about the training and safety issues created by the rapid progression of inexperienced firefighters and revamped its 2003 Agreement to bolster existing requirements and implement more stringent training requirements.

33) Each year, ODF conducted meetings at several sites in October or November to discuss all changes in the upcoming Agreements. All interested contractors were notified of the meetings and could attend one in their area to update their knowledge and understanding of the Agreement specifications.

TRAINING REQUIREMENTS AND PROCEDURES: 2003 – 2004 AGREEMENTS

34) In the 2003 and 2004 Agreements, ODF added a minimum age requirement requiring that all fire crew members be at least 18 years old. The Agreements also added a requirement that firefighters engage in a prescribed amount of “fire suppression action on active flame (hotline)” before promoting to the next level. The Agreements reinforced the original requirements by detailing the training sequence for each position, including the number of incidents and “operational periods”^v required for qualification.

35) Except for the age requirement, the requirements for certification as an entry level firefighter FFT2 did not change in the 2003 and 2004 Agreements. As in previous years, no prior experience was necessary, but to become FFT2 certified, individuals were required to successfully complete the classroom training (S-130 and S-

190 classes) and the performance tasks set forth in the PTB before assignment to a wildland fire. The sequence for position qualification as a FFT2 was:

- “1. Complete S-130/S-190 training and FFT2 Task Book.
- “2. Pass pack test.
- “3. **Become certified as an FFT2.**
- “4. Work on at least three wildfire Incidents that include hotline activities and total at least fifteen (15) Operational Periods, 10 of them on Type 2 or 1 Incidents. This meets requirement for satisfactory performance as FFT2 and one season of experience.
- “5. Eligible to be considered for FFT1 **Trainee** once #1 through #4 above are met.”

36) To become FFT1 certified in 2003 and 2004, individuals were required to successfully complete the following sequence:

- “1. Complete S-131.
- “2. FFT1 task book is issued following S-131 training making the firefighter an FFT1 Trainee.
- “3. Complete annual refresher training prior to next season.
- “4. Pass pack test prior to next season.
- “5. As an FFT1 Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the FFT1 task book. This meets requirement for satisfactory position performance as an FFT1.
- “6. **Become certified as a FFT1/Squad Boss.**
- “7. Work on an additional three (3) wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 3, 2 or 1 fires. This meets the satisfactory performance requirement as FFT1/Squad Boss.
- “8. Eligible to be considered for **CRWB Trainee** once #1 through #7 above are met.”

37) To become certified as a CRWB crew boss in 2003 and 2004, individuals were required to successfully complete the following sequence:

- “1. Complete S-230 and S-290. [The S-290 (Intermediate Fire Behavior) class was added in the 2003 Agreement and had to be completed by December 31, 2004.]

“2. CRWB task book is issued following S-230 & S-290 training making the firefighter a CRWB Trainee.

“3. Complete Annual Refresher training prior to next fire season.

“4. Pass pack test prior to next fire season.

“5. As a CRWB Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the CRWB task book. This meets requirement for satisfactory position performance as a CRWB.

“6. **Become certified as a CRWB.**”

38) The 2003 and 2004 Agreements clarified requirements applicable to the 2000 through 2002 Agreements by specifically noting that 1) “all required training for a position must be completed before the firefighter can begin working on the task book for that position”; 2) “a firefighter may work on only one task book at a time”; and 3) all required prerequisite experience must be completed before the firefighter can begin working on the task book for the next higher position.”

39) The 2000 through 2004 Agreements required that all firefighters in every position successfully complete an annual refresher class prior to the next fire season. In the 2000 through 2002 Agreements, the annual refresher training consisted of “Standards for Survival” and “Your Fire Shelter” classes. Under the 2003 and 2004 Agreements, some firefighters, depending on their position, could satisfy the annual refresher requirement by successfully completing the “Standards for Survival” or “Look Up, Look Down” or “LCES (S-134)” classes, in addition to the mandatory “Your Fire Shelter” class. The annual refresher training also included updates on fire behavior and safety issues.

40) The 2000 through 2004 Agreements required that a firefighter must have at least one qualifying assignment every five years to maintain a current certification in a position. The Agreements also required that all trainees be identified at check-in and on the crew manifest.

41) Between 2000 and 2004, firefighting contracts were awarded after a bidding process. In response to an invitation to bid, contractors submitted a bid stating how many crews they expected to make available for dispatch. Contractors were required to make their company roster available for an initial inspection prior to the bid awards in or around May of each year. An ODF representative reviewed company rosters to determine how many supervisory personnel the contractors had listed. The bid was awarded in or around May based on the number of supervisors listed on the roster. The information was passed along to ODF's training manager, whose job was to verify the qualified supervisory personnel and the supporting entry level firefighters upon a contractor's request or at ODF's instigation as time and resources permitted. Prior to 2003, other than the initial records inspection to determine supervisory personnel, ODF relied on a contractor's representations and did not routinely audit contractors. However, ODF turned away crews in June if a company manifest failed to reflect enough qualified entry level firefighters to support the crews listed. ODF did not view discrepancies between the company rosters presented in May and the crew manifest presented in June as deliberate misrepresentations because the rosters were usually based on the contractor's anticipated crew numbers and sometimes employees failed to return for the next fire season. However, if it was determined that a company manifest was based on false documents created by the contractor, ODF could terminate the Agreement.

PACK TESTS

42) The 2000 through 2004 Agreements required that all firefighters pass the "Work Capacity Fitness Test" at the "arduous" level of physical fitness by taking a "pack test." The Agreements incorporated the work capacity guidelines published by the USFS. The pack test's purpose is to measure endurance and "requires completing a

three (3) mile hike with a 45-pound pack in 45 minutes.” Under the Agreements, contractors were required to administer annual pack tests to all firefighter crew members prior to providing the June 1 crew manifest and to include the score for each crew member and the date the test was taken on the manifest.^{vi}

43) Under the 2000 through 2004 Agreements, contractors were responsible for administering the pack tests. At that time, pack tests could be given by a company owner, a qualified employee of the company owner, e.g., squad or crew boss, or a certified trainer. The pack test was usually conducted on an oval, track-like, course or by sending the firefighter “out and back,” i.e., “a mile and a half down a road and back.” The “administering official” conducting the pack test was required to monitor the test from start to finish. On an oval track, the administering official can stand in the middle of the oval and observe everyone taking the pack test. On an “out and back,” the administering official either must move with those taking the test or enlist additional help to monitor them. The administering official is monitoring to ensure that those taking the pack test are walking and not running and that they are carrying the 45 pound packs for the duration of the test. On an “out and back” the official is also monitoring to ensure the test taker makes it to the mile and a half marker and back. The test is conducted on a “pass/fail” basis. A score of 45 or less is a passing score.

44) Between 2000 and 2004, pack tests were sometimes given in conjunction with the annual refresher training for the contractor and crew’s convenience. During that period, trainers sometimes sent ODF a list of those attending the training and included pack test scores representing that the trainees had been given pack tests following their training. The trainers sent the training rosters to the contractors showing the names and identification numbers of those who completed the refresher and the pack test scores of those who took a pack test. If for any reason a trainee did not take a

pack test, the trainer either left the score box blank or wrote "NT" signifying "not taken." Usually, the trainers included pack test information on the training certificates issued to the trainees. Under the Agreements, the contractors were ultimately responsible for ensuring the pack tests were properly administered and, unless ODF received a complaint indicating otherwise, it relied on the contractor's representations.

45) Before 2002, contractors were not required to notify ODF when they administered pack tests. In 2002, subsection 3.8.2 was added to the Agreement and stated, in pertinent part:

"CONTRACTOR shall report to the [ODF] Fire Operations Unit in writing * * * at least 3 working days * * * prior to administering each test. The report shall include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official. Within 7 calendar days following administration of each test, **CONTRACTOR** shall report to the Fire Operations Unit the names and company affiliation of each person who passed or failed the test. **GOVERNMENT** reserves the right to monitor the administration of the tests for compliance with 'Work Capacity Fitness Test Instructor's Guide.' If the test was not conducted as required, each **CONTRACTOR** with an employee present for testing will receive a Notice of Noncompliance. A second failure to comply with testing standards or tests performed without the 3-day notice will result in administrative action, up to and including termination of the Agreement."

Except for a slight change in language, the addition of a waiver for emergency training needs, and a change from a three to a five day notice requirement, the 2003 and 2004 Agreements included substantially the same pack test provisions as set forth in the 2002 Agreement.

46) The required advance pack test notice included the date, time, and address of the pack test and an estimated number of people taking the pack test. Following the pack test, contractors were required to provide the names and company affiliations of those who passed and failed the test. Although ODF discouraged the practice, contractors were in compliance with the notice requirements if they hired

certified trainers to administer the pack tests in conjunction with the classroom training and notified ODF by using the training rosters with the requisite information.

47) Under the 2000 through 2004 Agreements, all firefighters were required to carry a photo identification card, also known as an “incident qualification card,” “red card,” or “crew identification card,” that included the firefighter’s name and photograph, social security number, list of positions for which the firefighter was qualified, and the date the firefighter passed the pack test. A red or blue dot on the card designated the firefighter as a supervisor. The back side of the card consisted of a list of the firefighter’s training and training dates. The Agreements required that the “certifying authority,” i.e., the company owner, sign the identification card certifying that the firefighter “has met all training requirements of [the] Agreement.”

ODF INVESTIGATION

48) In or around July 2004, Mountain Forestry employee Alex Coronado went to the ODF office and told ODF contract officers Patricia Morgan and Don Moritz that he had worked on a federal wildfire in Reno, Nevada, and had been dispatched to the fire without taking a pack test. He told Moritz and Morgan that Mountain Forestry fired him after “he turned down a dispatch while he followed rest standards.” He also complained about food and housing conditions that were covered under a different contract. Shortly thereafter, Moritz contacted ODF compliance specialist S. Johnson to investigate the validity of Coronado’s complaint. At that time, S. Johnson was in the midst of a records audit involving several contractors, including Mountain Forestry.

49) S. Johnson’s audits included reviewing contractor files and filing systems, bookkeeping methods, and recordkeeping systems. He also examined each contractor’s database to see what kind of database was used, who had access to it, and how it was secured. His audits also included inspecting the premises for required

postings and licenses. As part of his records inspection, S. Johnson audited individual firefighter files to verify their qualifications. Due to the large number of contractors operating under the Agreement, he selected random files to audit based on company size. With a small company, he reviewed 100 percent of the supervisory files (FFT1 and CRWB) and 10 percent of the entry level firefighter (FFT2) files. With the larger companies, he audited only 10 percent of the supervisory files as well as 10 percent of the FFT2 firefighter files. S. Johnson could spend from four hours to a full day auditing individual files, depending upon the number of problems with the files. Usually he needed at least four hours to examine 20 files. He generally notified contractors of his visit on the day of the audit in order to get a sense of their actual practices.

50) Although he had audited contractors previously as part of his ODF duties, his compliance specialist position was created in 2004 to increase ODF's ability to monitor the growing number of firefighter crew contractors. His primary responsibility was to audit approximately 90 contractors and inspect the records of approximately 6,000 firefighters in Oregon and Washington. At all material times, he was the only person auditing contractors for ODF in that region.

51) S. Johnson began an audit at the Mountain Forestry office in Independence on or about July 7, 2004. F. Cisneros's daughter, Leticia, was the only Mountain Forestry employee present when he arrived and she identified herself as the bookkeeper and dispatcher. After examining Mountain Forestry's database, S. Johnson observed that it was susceptible to manipulation. The database was not secured by a "user name and password" and was set up in a manner allowing anyone access and the opportunity to change dates, test scores, and information in individual files, including crew identification card information. Leticia Cisneros acknowledged that anyone had access to the database and allowed S. Johnson to enter the database on his own and

he was able to observe files and photographs of firefighters taken and downloaded into the database by Mountain Forestry employees. Leticia Cisneros explained to him that Mountain Forestry matched the photographs with information in the database to create its own crew identification cards. At that time, contractors were not prohibited from making their own identification cards, but S. Johnson was concerned about Mountain Forestry's database security issues because "anyone [could] go in and enter pack test information or other things in that file that – with no documentation."

52) At some point during the Mountain Forestry audit, Moritz called S. Johnson and told him about Alex Coronado's complaint and asked him to investigate. At that point, the audit developed into an ongoing investigation of Mountain Forestry's practices and procedures. Over the next three days, S. Johnson examined Mountain Forestry's 2004 company manifests and training records and examined several firefighter files with F. Cisneros and Michael Cox present. He found possible infringements in three areas: pack testing, training certification, and the use of underage firefighters. During his investigation, S. Johnson interviewed former and current Mountain Forestry employees, Alex Coronado, Virgil Urena, Jose Avila, Leticia Cisneros, Brandon Creson, Benjamin Jones, and company officials, Michael Cox, and F. Cisneros. He also interviewed Bob Gardner from C&H Reforesters and Addison "Dick" Johnson ("A. Johnson"), owner of the APIFFI training association. His interviews primarily focused on reconciling the discrepancies he found in the company and crew manifests, training rosters, and firefighter files. Many of the discrepancies arose out of the 2004 Agreement, but as his investigation continued, he uncovered problems in some of the files that dated back to the 2000 through 2003 Agreements.

Pack Test Issues

53) On or about July 8, 2004, S. Johnson interviewed Mountain Forestry employee, Virgil Urena, about Alex Coronado's complaint. S. Johnson asked him about his credentials and Urena told S. Johnson that he had obtained certification as a trainer under A. Johnson who is part of the APIFFI training association in Bend, Oregon. Urena, whose office was located at a Mountain Forestry satellite office in Dallas, Oregon, showed S. Johnson the database where he maintained Mountain Forestry's training and test records. Urena acknowledged that he worked also as a crew boss for Mountain Forestry when he was not training firefighters. S. Johnson told Urena that ODF had received information that Mountain Forestry had used some firefighters on a wildfire incident without administering pack tests. Urena admitted that Alex Coronado had not completed a refresher course or pack test before he was sent to a fire in Nevada. Urena told S. Johnson that he had refused to sign Alex Coronado's refresher course certificate because Coronado did not stay for the entire class and, instead, left early without taking the pack test. Urena stated that he was sent to train firefighters in Nevada and when he arrived, he offered to administer a pack test to Alex Coronado who had been assigned to the Reno wildfire. Coronado declined stating that he "already had a card that showed he had completed a pack test." Urena told S. Johnson that he discussed the matter with Michael Cox but was told not to worry about it because Coronado had a card that showed he had completed the test. Urena told S. Johnson that Cox had told him to sign the annual refresher certificate for Coronado but Urena refused and told Cox that he would not put his own training certificate in jeopardy to "cover this up." Before S. Johnson concluded the interview, Urena agreed to send ODF a copy of his training roster with his handwritten test scores confirming that Alex

Coronado and another Mountain Forestry employee, Jose Avila, had not taken the pack test. S. Johnson later received a faxed copy of the training document from Urena.

54) On the same day he interviewed Virgil Urena, S. Johnson met with Alex Coronado to obtain additional information about his complaint. During the interview, Coronado stated he had not taken a pack test before he was sent to Nevada on a wildfire assignment. On the day he spoke to S. Johnson, Coronado stated he still had not been pack tested. He told S. Johnson that Michael Cox had given him an identification card that showed he had taken a pack test and confirmed that Urena had offered to give him a test and that he refused. Coronado stated he felt that if he already had a card stating he had taken it and could do the work, he did not need to take the test. He also told S. Johnson that he understood he needed to take the test before working for another company. When S. Johnson showed Coronado a Mountain Forestry training roster that had a handwritten date and pack test score next to his name, Coronado denied taking the test and had "no idea" who wrote the note.

55) Michael Cox issued Alex Coronado a crew identification card that showed Coronado completed a refresher course on February 29, 2004, and pack test on March 25, 2004. Cox signed his name on the "Owner Signature" line.

56) Mountain Forestry provided S. Johnson with a training roster from the February 29, 2004, refresher course that had Urena's handwritten scores for everyone on the roster except Alex Coronado and Jose Avila. On the document provided to S. Johnson, Michael Cox had written in pack test scores and test dates for Coronado and Avila and wrote his initials "M.C." next to the notes. Next to Coronado's name, Cox wrote "44 Pack 3/25/04," and next to Avila's name he wrote "41 Pack 3/15/04." In an interview with S. Johnson, Cox stated he had "personally" pack tested Jose Avila at the Mountain Forestry office and had written the score and date on the training roster. Cox

stated that he did not monitor Avila's pack test. He observed Avila leaving and coming back, but could not confirm the course was completed correctly. Cox also told S. Johnson that F. Cisneros had given Alex Coronado a pack test and that Cox wrote the date and score by Coronado's name on the roster when F. Cisneros gave him the pack test date. F. Cisneros was present during the interview and confirmed to S. Johnson that he had given Alex Coronado a pack test. Cox told S. Johnson that Coronado and Avila were the only firefighters tested at the Mountain Forestry office, the rest were tested by Urena at his training location in Rickreall. When S. Johnson asked whether Mountain Forestry had sent ODF notification that pack tests were going to be conducted on those dates at the Mountain Forestry office five days in advance as required under the Agreement, Cox and F. Cisneros stated they had not sent ODF the required notification.

57) During his interview with Cox and F. Cisneros, S. Johnson asked them about other pack test scores that he questioned during his investigation. Michael Cox acknowledged that he had prepared the Mountain Forestry manifest that was presented to ODF and that he prepared it from the "pack test/refreshers roster." S. Johnson asked to review the 16 files of those persons listed on the manifest whose scores he questioned. After looking at the files, S. Johnson determined that 4 firefighters had refresher certificates but no pack test scores and the remaining 12 had no certificates at all. Cox told S. Johnson that they had not received the certificates from Urena because he had been "busy." S. Johnson observed that two firefighters, Emilio Martinez and Jose Macias, were listed on the company manifest as having passing pack test scores (Martinez - 40 and Macias - 34), but on the refresher course roster prepared by Virgil Urena, Martinez was noted as having not taken the pack test due to a "hurt foot." Macias was listed on the same refresher course roster with no recorded test score. Cox

could not give S. Johnson a reason why the pack test scores were not documented. During the interview, S. Johnson also inquired about two other firefighters whose names appeared on the refresher course roster with test scores and dates handwritten next to their names that were different than what was reported on the company manifest. Firefighter Rosendo Cabral appears on the company manifest and shows a May 3, 2004, pack test date and a 45 pack test score. On the refresher course roster prepared by Urena, Cabral appears with a pack test score of 46 written by Urena. In different handwriting, a second number, 45, appears next to the 46 score with "5/31/04" handwritten alongside the score. Firefighter Leticia Ayala's file revealed that no pack test score appeared for Ayala next to the May 3, 2004, pack test date on the company manifest and on the refresher course roster, Urena had written "NT" for "not taken" where a pack test score ordinarily appears. On the refresher roster, in different handwriting, the number "44" is written above the "NT" notation and "5/30/04" is written next to the number. Cox told S. Johnson that he believed the handwriting in both cases belonged to Brandon Creson, a Mountain Forestry crew boss who was out of the country at the time of the interview. S. Johnson checked all test dates and determined that no pack tests were administered on May 30 or 31, 2004.

58) The day after his interview with Michael Cox and F. Cisneros, S. Johnson returned to the Mountain Forestry office to review additional records. He examined several crew identification cards and discussed them with Cox. One of the cards belonged to Jose Avila who came into the office while S. Johnson was examining the cards. Avila's crew identification card, issued by Cox, showed that Avila completed both a refresher course and a pack test on February 29, 2004, and had Cox's signature on the company owner's signature line. In response to S. Johnson's inquiry, Avila stated he had taken the test at the Mountain Forestry office and that it was administered by F.

Cisneros. Avila told S. Johnson that he would be “more than happy to take the test again” if there was a question about his pack test.

59) Later that day, S. Johnson met with Brandon Creson and they examined the Mountain Forestry refresher course rosters together. Creson confirmed that he had entered the pack test scores and dates for Leticia Ayala and Rosendo Cabral. He told S. Johnson he could not remember who told him to enter the information or why. Creson also stated that Ayala was Alex Coronado’s girlfriend and that they took the pack test together. After examining the class roster, Creson appeared surprised that the reported pack test dates for Coronado and Ayala were different. When Creson stated that the new pack test dates for Ayala and Cabral were from other pack tests, S. Johnson pointed out that there were no pack tests given on those dates and Creson “seemed surprised.” When S. Johnson asked Creson about other score changes on the rosters, Creson told him that he remembered a class where nobody passed the pack test and the firefighters took the test again later. Creson told S. Johnson that he “walked with them to help them maintain a more rapid pace” and the pack test scores were then changed on the roster.

60) Mountain Forestry, pursuant to the 2004 Agreement, gave ODF notification of the following pack testing dates:

On January 26, 2004, Virgil Urena notified ODF’s training manager, Ed Daniels, by facsimile transmission, of the annual refresher training and pack testing scheduled for January 31 and February 1, 2004, for Mountain Forestry.

On February 9, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for February 14 and 15, 2004, for Mountain Forestry.

On February 27, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for March 6, 2004, for Mountain Forestry.

On March 8, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for "3-12 → 3-15," 2004, for Mountain Forestry.

On May 3, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for "May 7-10-04" for Mountain Forestry.

On May 11, 2004, Urena notified Daniels and A. Johnson of the annual refresher training and pack testing scheduled for "5-14-05" [sic] for Mountain Forestry.

On June 18, 2004, Urena notified Daniels and A. Johnson of the annual refresher training and pack testing scheduled for June 24, 2004, for Mountain Forestry.

There are no records that show Mountain Forestry gave ODF the requisite notice for pack testing that, according to Mountain Forestry records, was administered in 2004 on the following dates: February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; and June 7, 2004.

61) On one of the days he reviewed records at Mountain Forestry, S. Johnson contacted Virgil Urena. Urena stated he had just given a pack test to Emilio Martinez in Milton-Freewater on July 12, 2004. Urena stated that Martinez had been listed on the training roster with a hurt foot but had now passed the test with a 41 score. Urena told S. Johnson that he did not notify ODF before he administered the pack test to Martinez in July. Urena also confirmed that Leticia Ayala had not taken a pack test administered by him. Later, on July 22, 2004, S. Johnson met with Urena in the ODF office in Salem to discuss his findings with Urena and to obtain his written statement. He asked Urena about Jorge Carbajal because Urena's refresher course roster for January 31, 2004, showed that someone had written the number "45" over other handwriting that indicated Carbajal had not taken the test. Urena confirmed that Carbajal had not taken the pack test and, after going over the pack test information S. Johnson provided, further confirmed that Emilio Martinez, Jose Macias, Alex Coronado, Jose Avila, Rosendo Cabral, and Leticia Ayala had not taken the pack test as Mountain Forestry records indicated. Urena showed S. Johnson the original training rosters he had sent to

Mountain Forestry, which confirmed his statement that the scores were added after he sent the rosters to Mountain Forestry. At S. Johnson's request, Urena hand wrote and signed a statement documenting what he had told S. Johnson during the interview.

62) Later in July 2004, S. Johnson contacted the federal Interagency Dispatch center in Nevada and confirmed that Alex Coronado (crew boss) and Leticia Ayala (FFT2) had worked on wildfires in their respective positions in Nevada after they were dispatched from Mountain Forestry without taking pack tests. Alex Coronado worked on the Cole Complex and Reno Standby wildfires and Leticia Ayala worked on the Cole Complex wildfire.

63) After a supplemental follow-up interview with Alex Coronado in August 2004, S. Johnson noted:

"On 08-11-04 at 1300 hours, I met Alex Coronado at the ODF office in Salem. Alex maintains that he did not take a pack test. During the time indicated (03-25-04) on the training roster obtained from Mountain Forestry, Alex told me that he was working on a job of budcapping near Astoria. During the time that Leticia Ayala was indicated as having taken the test, he [Alex Coronado] was working either in Warmsprings, Oregon or Grangeville, Idaho. Alex showed me the Mountain Forestry firefighting card, which had been issued to Leticia. The date for the refresher and pack testing was 05-03-04. When I checked the date of the class roster for 05-03-04, Leticia failed to complete the test and had an NT for score. A handwritten date of 05-30-04 and score was written by her name. Alex told me that both he and Leticia left for Nevada on 06-15-04. When Virgil Urena and Brandon Creson came to Nevada, they both tried to get Alex and Leticia to take a pack test. Alex knew that he should take the test, but went on a wildfire before he could take it. Alex also knew that he needed to take a pack test before going to a wildfire. I told Alex that Mountain Forestry is claiming that there was drug and alcohol abuse as a reason to terminate him. Alex told me NO, that was not true. He maintains that Mountain Forestry is upset because he refused to take a second wildfire assignment due to having a tired crew. I asked if there were any problems on the fire. Alex told me that he had a few medical concerns on the fire due to very hot fire line conditions. He stated that he failed to notify the Division Group Supervisor and took care of the situation himself. Alex also provided me additional information on possible falsified record [sic] that Mountain Forestry is allowing a firefighter to use another person's name and records to avoid paying child support."

Mountain Forestry's 2004 certified payroll reports show that Alex Coronado planted trees for Mountain Forestry in Warm Springs, Oregon, and in Grangeville, Idaho, from May 1 through 31, 2004. Mountain Forestry's 2004 certified payroll reports also show Alex Coronado performed work on the Reno Standby wildfire and he and Leticia Ayala both performed work on the Cole Complex wildfire from July 1 through 31, 2004.

Underage Firefighter Issues

64) During his initial interview with Alex Coronado regarding his crew identification card and the pack test issues, S. Johnson asked whether Mountain Forestry had made crew identification cards for other firefighters as well. Coronado told him that F. Cisneros's son, V. Cisneros, who was 20 years old in 2004, was certified as a crew boss with eight years of experience. When S. Johnson expressed his concern that it appeared V. Cisneros started fighting wildfires when he was 12 years old, Coronado told him he believed the records were taken from "another Victor Cisneros who formerly worked for the company."

65) During a later visit to Mountain Forestry, and while examining crew identification cards, S. Johnson pulled V. Cisneros's card and showed the card to Leticia Cisneros who told him that V. Cisneros was her 20 year old brother. S. Johnson asked to see V. Cisneros's file and located the page containing V. Cisneros's incident assignment history. He found that V. Cisneros's birthdate was reported as "07/27/77." When he examined the file carefully, he determined that someone had used "whiteout" to change the year "from something else to a 77." He asked Leticia Cisneros what V. Cisneros's birthdate was and she told him it was July 27, 1984. S. Johnson asked and she confirmed that the file belonged to her brother, V. Cisneros. He proceeded to examine the task book information in the file that showed the FFT2 task book was completed June 22, 1995, when V. Cisneros was 10 years old; the FFT1 task book was

completed March 1, 1999, when V. Cisneros was 14 years old; and the CRWB task book was completed August 30, 2000, when V. Cisneros was 16 years old. S. Johnson examined the training certificates in the file and they showed that the S-130 and S-190 classes were completed on June 22, 1995 (when V. Cisneros was 10 years old) and the S-131 class was completed on April 3, 1999 (when V. Cisneros was 14 years old). All of the training was provided by C&H Reforesters. S. Johnson observed that the fire experience records showed numerous wildfires in 1995 and 1996, with a gap until July 1999. The fire experience records for 2000 showed that V. Cisneros worked on at least three wildfires that year before he turned 16 years old.

66) Toward the end of July 2004, S. Johnson interviewed Bob Gardner from C&H Reforesters about V. Cisneros. Gardner told S. Johnson that F. Cisneros had a younger brother named Victor Cisneros who began working for C&H Reforesters in 1995. He told S. Johnson that F. Cisneros had a son also named Victor who was too young to have worked in 1995. Gardner stated that when Michael Cox left the company in 1999, he took "numerous original files" with him, including those for Victor and F. Cisneros. Gardner told S. Johnson that he was aware that F. Cisneros's son had been working as a crew boss "for the past several years," but stated that V. Cisneros was too young to have the proper training and experience. In a second interview in August 2004, Gardner reiterated his previous statements and told S. Johnson that C&H Reforesters was taking "Mountain Forestry (i.e. Mike Cox)" to court for undisclosed reasons. S. Johnson reviewed several portions of V. Cisneros's file with Gardner and Gardner confirmed that the "original person trained was [F. Cisneros's] brother." Gardner stated that F. Cisneros's brother, Victor, transferred from Ferguson Management Company to C&H in 1996. Gardner confirmed that he initialed some of the original pack test forms and that Michael Cox initialed others for pack tests taken by

F. Cisneros's brother. S. Johnson showed Gardner a 2001 refresher course training certificate with a photograph that Gardner identified as F. Cisneros's son, V. Cisneros. Gardner stated that he could not remember what happened to F. Cisneros's brother, Victor, but knew that he had two brothers, one who was killed in a car accident and one who was in jail. Gardner could not remember which one was Victor. Gardner told S. Johnson that Cox was an equal partner in C&H until he left in 2000. Gardner also told S. Johnson that Cox handles the management duties at Mountain Forestry and although Mountain Forestry is in F. Cisneros's name, Cox "previews all documents then shows Francisco where to sign."

67) During one of his interviews with Virgil Urena, S. Johnson asked if he knew V. Cisneros. Urena told him that V. Cisneros was F. Cisneros's son and was working as a firefighter when Urena began working for Mountain Forestry in 2000. Urena had not trained V. Cisneros but had given him some refresher courses. He stated that training courses were administered by John Berger prior to 2000. When S. Johnson mentioned that V. Cisneros was only 16 years old in 2000, Urena told him that was probably true and that he often asks firefighters for their identification when they look too young. During the interview, Urena also expressed concern that false identification can be purchased in Woodburn for less than \$50 and that it is not uncommon for firefighters to lie about their ages.

68) Benjamin Jones was not a firefighter but he was 16 years old when he worked for Mountain Forestry from June through August 2003. His birthdate is September 8, 1986, and he was recruited to work for Mountain Forestry by Michael Cox's wife, Penny. Jones had known the Coxes for seven years and Penny told him that Michael Cox needed help creating a computer program for making identification cards. Jones was very good with computers and he agreed to work for the summer

creating a computer program and doing data entry. Jones understood that the reason he was creating the identification cards in the computer was “because they had new crews that needed to be going out on fires fairly quickly and they didn’t have time to wait for the ID cards to come in the mail.” He was responsible for entering each employee’s name, height, weight, social security number, and training information. Virgil Urena provided the names and digital photographs and Michael Cox provided the rest of the information, including social security numbers. On August 8, 2004, S. Johnson interviewed Jones about his Mountain Forestry employment, summarizing the interview in notes that stated, in pertinent part:

“Benjamin gave me a sample of his work and explained how the [identification] cards were created and data entered. He used a Micro Soft program to create and design firefighter identification cards. He downloaded digital photos from a camera provided by Mountain Forestry trainer Virgil Urena then used a training class roster to match the photos with the correct person. He used numbers on the roster to match with numbers of the digital photos. Benjamin did not know the people, so Virgil would look over the cards for accuracy before they were printed.

“Benjamin often had to go to the Mountain Forestry office on short notice to create the identification cards quickly, as the firefighters were standing waiting and could not leave without the cards. Benjamin would take the class roster and enter the data. I showed Benjamin a copy of a training roster obtained from Mountain Forestry. Benjamin identified this copy as what he used to do the data entry. I asked how he knew if the firefighters on the list were the same ones who were waiting to go to a fire? Benjamin told me that he did not know the people and did not compare them with the pictures. He only made the cards. I asked how he knew what position the person was qualified for. Benjamin told me that Mike Cox would identify the positions for each name. Benjamin did the data entry; the cards were printed then signed by Mike Cox or [F. Cisneros] (both are co-owners of the company). The cards were cut apart, laminated, and then given out to the crew boss. The crew would then leave to go to a fire. I asked about experience dots. Benjamin told me that Mike Cox would have a sheet of dots to put on the cards.

“One night, Benjamin was comparing the roster to information on the cards to check for data entry errors. He noticed that the Social Security numbers did not look right. The numbers were very close with very little differences. Benjamin pointed this out to Mike Cox and stated that the numbers did not look right, as the names did not appear to be related.

Mike Cox told him not to worry about it, that the numbers are not totally accurate, that some people do not have numbers, but it is the only way to track people. On the roster, when a Social Security number was missing, Mike Cox would look in the personnel files then give a number to Benjamin to use on the card. Benjamin did not know if Mike Cox used a valid number or created one.

“I asked Benjamin to show me an example of what he meant about social security numbers not looking right. Benjamin explained that once the numbers were lined up together, he would see numbers that were identical except for 1 number. Example: 763-21-7896 and 763-31-7896. Another example would be 763-21-7896 and 763-21-7897.

“Benjamin told me that the identification cards were not maintained, that after each sheet was printed, the data would be changed and new persons entered into the template. Some of the information would remain the same and did not need to be changed or modified.”

69) Respondents prepared and filed Mountain Forestry's Quarterly Tax Reports with the Oregon Employment Department from 2000 through 2004. Respondents' records show that in 2001, at least four different Mountain Forestry employees were assigned the same social security number of "111-11-1111." The same records show that at least two people were assigned social security number "333-33-3333." Respondents' records show that in 2003, Mountain Forestry employed two persons named Elizar Puente, J. One Puente was assigned social security number "222-22-2222" and the other Puente was assigned social security number "587-73-7521." Respondents' records show that Mountain Forestry assigned "V. Urena" social security number "444-44-4444" in 2000 and "Mosquada Garcia J." the identical social security number in 2003. In 2000, Mountain Forestry assigned "J. Sanchez" social security number "555-55-5555" and "Jorge Hernandez" the identical number in 2002. Also in 2000, Mountain Forestry assigned a second "J. Sanchez" social security number "666-66-6666." In 2003, Mountain Forestry also assigned "Garcia, I" social security number "666-66-6666." In 2000, Mountain Forestry assigned "H. Sanchez" social security number "777-77-7777," "E. Alvarez" social security number "888-88-8888," and "M. Torres" social security number "999-99-9999." Finally, Respondents' records show

that in 2004, Mountain Forestry assigned “Cruz Herrera, Rigoberto” social security number “222-22-0000,” “Moreno, Octavio” social security number “222-22-0002,” and “Ochoa, Lorenzo” social security number “222-22-0003.”

70) While inspecting North Reforestation, Inc.’s (“North”) records in January 2005, S. Johnson examined Andrew Williamson’s firefighting file which had been transferred to North from Mountain Forestry. He identified what he believed to be a minimum age infringement and later summarized his findings in an investigation report along with findings resulting from his record inspections of other companies. The report stated, in pertinent part:

“During the [January 21, 2005] record inspection, I examined a file transferred from Mountain Forestry belonging to Andrew Williamson. Andrew Williamson had a date of birth of 01-04-84. Original training as an FFT2 was done on 05-28-01. An FFT1 task book was also dated 05-28-01. This made Andrew Williamson only 17 years of age when he was working on wildfires as an employee for Mountain Forestry. This is a violation of the age requirement as specified in the Interagency Crew Agreement due to the hazardous conditions of firefighting. Williamson also had a completed task book for Crew Boss.

“Upon returning to the Salem ODF office, I examined manifest records submitted by Mountain Forestry. On the 2001 company manifest for Mountain Forestry, Andrew Williamson is listed as an FFT2 with a training date of 05-28-01 (age 17). On the 2002 company manifest, Andrew Williamson is listed as an FFT1 with a training date of 02-10-02 (1 month after he turned 18). On the 2003 company manifest, Andrew Williamson is listed as a CRWB with the highest level training date of 03-03-03.

“By searching past fire manifests for incidents where Mountain Forestry had sent crews, I discovered that on 08-04-2001, Mountain Forestry accepted a dispatch to the Indian Springs fire near Klamath Falls, Oregon. I located a manifest which identified Andrew Williamson as an FFT2 on this fire. Williamson was only 17 years of age at that time.

“When completing record inspections for other companies, I discovered several firefighters who had received their original training from Mountain Forestry that were underage when they started fighting fire. All were located on company manifests. These persons are:

Samuel Cisneros Perez DOB 09-08-83 on fires at age 17 in 2000.

Ramon Herrera Cisneros DOB 10-17-87 on fires at age 16 in 2003.

Ryan Sims DOB 04-28-85 on fires at age 17 in 2002.

Antonio Valdez Perez (attempting to verify)

“It became clear after researching company manifests for Mountain Forestry, that there is no clear training date for Andrew Williamson after he turned 18. All his training appeared to have occurred while he was only 17 years of age. Training as an FFT1 and CRWB requires on the fire experience. No fires occurred during the certification dates listed for Andrew Williamson. Mountain Forestry repeatedly trained and used underage firefighters. This is a clear attempt by Mountain Forestry to falsify training records to obtain and use underage firefighters.”

S. Johnson’s conclusion that Andrew Williamson and Samuel Cisneros (“S. Cisneros”) were underage when they began working on wildfires was based on his erroneous belief at the time that ODF’s minimum age requirement was applicable to all Agreements prior to 2005. Although he primarily focused on what he perceived as Mountain Forestry’s use of underage firefighters, he also determined that in Williamson’s case there were file discrepancies including evidence that Williamson was certified as a FFT1 and CRWB crew boss without the necessary fire experience.

71) Ryan Sims, whose birth date is April 28, 1985, appears on Mountain Forestry’s company manifests and on Mountain Forestry’s quarterly tax report during the third quarter of 2002. He reportedly worked 323 hours for Mountain Forestry and earned \$2,917.83 during that period. Compliance specialist Wojtyla was not able to verify Sims’s employment through Mountain Forestry payroll records because Mountain Forestry did not file certified payroll reports with BOLI as required in 2002.

72) At times material, Ramon Cisneros (“R. Cisneros”) resided at 2450 Carlton Way NE, Salem, Oregon, and was F. Cisneros’s nephew. He was born on October 14, 1987, and his social security number was xxx-x8-6954.^{vii} His name and social security number appear on Mountain Forestry’s 2003 Quarterly Tax Reports, which show he worked 83 hours during the third quarter and earned \$819.03, and worked 75 hours during the fourth quarter and earned \$4,122.51. R. Cisneros’s name and address also

appear on Mountain Forestry's certified payroll reports that were submitted to BOLI by Michael Cox on November 24, 2003, and covered pay dates from September 1 through October 31, 2003. Each payroll report included the names and addresses of the crew members, along with their payroll information, the pay period and pay date, the name of the crew boss (SRB) and the location of the work. R. Cisneros appears on a payroll report that shows Herman Creek, a wildfire incident, as the location of work for the period September 3 through September 7, 2003, and Blackfoot Lake, a wildfire incident, as the location of work for the period September 7 through September 10, 2003. Russ Irwin was R. Cisneros's SRB at both locations. Another payroll report submitted by Cox in November 2003 shows that V. Cisneros was the SRB of a different crew at Blackfoot Lake in September 2003. R. Cisneros was 15 years old when he performed work at both locations.

73) In July 2003, R. Cisneros was certified by the APIFFI training association as having completed the S-130 Firefighter Training, the S-190 Introduction to Wildland, I-100 Basic ICS, and "Your Fire Shelter" courses. Following R. Cisneros's coursework on July 8, 2003, Virgil Urena, "Level One," issued a task book for the position of Firefighter Type 2 ("FFT2") to R. Cisneros. In July 2004, the APIFFI certified that R. Cisneros had taken the "Annual Refresher." R. Cisneros's instructor of record for his 2003 and 2004 coursework was Mountain Forestry employee, Virgil Urena.

74) The 2004 ODF Agreement included a provision requiring contractors to notify ODF within 24 hours when a firefighter transfers from one company to another. In August 2004, ODF received notification from Mountain Forestry that R. Cisneros was transferring to Mosqueda Reforestation. The "transfer request" was dated August 5 and the transfer date was listed as August 10, 2003. The notification included R. Cisneros's social security number and described his "Qualified Position" as "experienced FFT-2."

75) After the transfer from Mountain Forestry, Manuel Mosqueda from Mosqueda Reforestation brought R. Cisneros's Mountain Forestry file to ODF to "make sure that everything that was needed was in the file." R. Cisneros's file was one of seven files Mosqueda brought in for inspection and all were transfers from Mountain Forestry. Upon examining the file, S. Johnson noticed that "something didn't look quite right" and requested some documents from the U. S. Department of Justice to compare with the documents in the Mountain Forestry file. He discovered that the Employment Eligibility Verification form supplied by the Justice Department showed R. Cisneros's birthdate was October 14, 1987, instead of 1984, as the Mountain Forestry file indicated. Subsequently, S. Johnson interviewed Manuel Mosqueda and R. Cisneros. During the interview, R. Cisneros told S. Johnson he was 16 years old in 2004 when he went to work for Mountain Forestry.^{viii} He also verified he had filled out the employment eligibility form and that the information he provided to Immigration and Naturalization was correct, including his birthdate. He stated to S. Johnson that he had provided his photograph to "someone" at Mountain Forestry at Mountain Forestry's request and subsequently was given an identification card that showed an earlier birthdate than the one appearing on the employment eligibility form.

76) David Trujillo, whose birthdate is March 14, 1984, appears on Respondent Mountain Forestry's payroll certification reports dated July 21 and August 22, 2001. His reported wage rate on July 21, including regular and fringe rate, was \$43.92 per hour and his total reported earnings for that period were \$361.20. His reported wage rate on August 22, including regular and fringe rate, was 173.17 per hour and his total reported earnings for that period were \$1,830.73.

77) Mountain Forestry kept preliminary paperwork, such as W-4 forms and I-9 forms, in files for its firefighters. Michael Cox copied the personal identification provided

by the firefighter and placed it with the forms in the firefighter's file "so that when it comes time to dispatch them on a fire we're not delayed in trying to get this paperwork before they go out on a fire." In 2000, the forms and identification copies were kept separate from the firefighter files "for payroll purposes." The required I-9 forms included a date of birth for each firefighter.

Training and Certification Issues

1. Victor Cisneros

78) At material times herein, Mountain Forestry employed Victor Francisco Cisneros ("V. Cisneros"). V. Cisneros is F. Cisneros's son and his birthdate is July 27, 1984. At material times herein, V. Cisneros's social security number was xxx-x1-5979.

79) During S. Johnson's records inspection in July 2004, Mountain Forestry presented S. Johnson with V. Cisneros's complete file documenting his firefighting training and experience from 1995 through 2004. Mountain Forestry, through Leticia Cisneros, represented to S. Johnson that the file was V. Cisneros's complete firefighting record.

1995-96

80) V. Cisneros's firefighter records showed that "Victor Cisneros" had completed the S-130 and S-190 classes and all of the tasks required for certification as a FFT2 by June 22, 1995, when V. Cisneros was 10 years old. The records also showed that "Victor Cisneros" performed work on the Chelan Complex and Dry Creek wildfires in September 1995 when V. Cisneros was 11 years old. The records also showed that "Victor Cisneros" completed the annual refresher course in May 1996 when V. Cisneros was 11 years old. According to the records, in August 1996, "Victor Cisneros" worked on five wildfires (Simnosho, Wildcat and Bull Complex, Summit, and Thomas), was issued a task book for the FFT1 position on August 10, and thereafter

worked on three wildfires (Blaze, Hill Complex, and Big Bar) in September and October 1996, when V. Cisneros was 12 years old. While discussing the records with Mountain Forestry's fire director Michael Cox during the records inspection, S. Johnson pointed out that the records showed V. Cisneros started working on wildfires when he was only 12 years old. Cox replied that it "might be true because that was the culture."

81) An undated document included in V. Cisneros's file, entitled "Wildland Fire – Training and Experience Interagency Crew Contract (Verification Form for Each Employee)," showed that "Victor Cisneros" was qualified as a FFT2 for Ferguson Management Company (FMC). According to the document, his social security number was xxx-x9-7465. V. Cisneros's records also included an evaluation record for "Victor Cisneros" dated August 16, 1996, and contained the following information for "trainee Victor Cisneros" for the FFT1 position: the evaluator was Brandon Creson, a "SRB" from C&H Reforesters; the name of the incident was "Bull Complex" (the evaluation did not include the "type" or "location" of the incident as requested); the "Number & Type of Resources Pertinent to Trainee's Position" were listed as "5 FFT2" and the duration of the incident was between August 13 and 15, 1996; the complexity level of the fire was listed as "1" and the "NFFL Fuel Model(s)" was listed as "10." Creson recommended that the trainee "promote to FFT1." The evaluation was prepared and initialed by Brandon Creson.

1998-99^{ix}

82) V. Cisneros's records showed that on June 19, 1998, Ferguson Management Company transferred "Victor Cisneros's" firefighter file to C&H Reforestation. His file continued to accrue documentation and included training rosters addressed to C&H Reforestation from A.C.S. Technology that showed "Victor Cisneros-Martinez" had passed the annual refresher course effective June 20, 1998; that "Victor

Cisneros” had passed the annual refresher course effective March 15, 1999; and that “Victor Cisneros” had passed the S-130 class for a squad boss position effective April 3, 1999. The social security number listed for “Victor Cisneros” on all three rosters was xxx-x9-7465. In another record, dated March 1, 1999, Brandon Creson recorded for the second time the following information for “trainee Victor Cisneros” for the FFT1 position: the evaluator was Brandon Creson, but the evaluation did not include Creson’s title or company name; the name of the incident was “Bull Complex” and the incident “type” was listed as “wildfire”; the “Number & Type of Resources Pertinent to Trainee’s Position” was listed as “20 man crew” and the duration of the incident was between August 13 and 15, 1996; the complexity level of the fire was listed as “2” and the “NFFL Fuel Model(s)” was listed as “6.” Creson recommended that the trainee “promote to squad boss.” As with the August 1996 evaluation, Brandon Creson prepared and initialed the evaluation. On March 3, 1999, Creson certified that “Victor Cisneros” completed the FFT1 task book. The records also show that “Victor Cisneros” was pack tested on April 3, 1999. At that time, V. Cisneros was 14 years old.

83) The training records showed that, following his certification, “Victor Cisneros” performed work as a FFT1 on five wildland fires (Thomas, Blaze, Hill Complex, and Big Bar) between July and October 1999. At that time V. Cisneros was 15 years old.

2000

84) V. Cisneros started working for Mountain Forestry in 2000. The firefighter file presented to S. Johnson showed that “Victor Cisneros” completed the annual refresher course and a pack test effective May 22, 2000. According to the records, between June 18 and July 27, 2000, V. Cisneros performed work as a FFT1 on the Soldier, Tam Tam, and Wall fires. At that time, V. Cisneros was 15 years old.

85) V. Cisneros's file contained a document showing that while he was still 15 years old and working on the Wall fire, he was evaluated as a SRB (crew boss) trainee. The evaluator was Gustavo Cisneros ("G. Cisneros"). The evaluation, dated July 26, 2000, included a description of the incident type - "wildfire" - and the "Number & Type of Resources Pertinent to Trainee's Position" were listed as "20 man crew." The duration of the incident was from July 24 to July 26, 2000, and the complexity level was listed as "Type I." G. Cisneros certified that "[t]he individual has successfully performed all tasks for the position and should be considered for certification." The same document included a second evaluation, dated August 10, 2000, showing that after his 16th birthday, V. Cisneros was evaluated as a SRB trainee by G. Cisneros on the Coyote and Crusoe wildland fires between July 26 and August 10, 2000. A second document, dated August 27, 2000, showed V. Cisneros was evaluated as a SRB trainee by G. Cisneros on the Burnt Flats wildland fire between August 12 and 27, 2000.

86) During his records inspection, S. Johnson observed a task book for the CRWB crew boss position for V. Cisneros that was initiated on August 30, 2000. The task book included the three earlier wildfire evaluations and was initiated by G. Cisneros, but the required company certification, verifying and certifying that V. Cisneros had "met all requirements for qualification in this position and that such qualification had been issued" was not made until Mountain Forestry's Fire Director, Michael Cox, signed the certification four years later as the "certifying official" on April 8, 2004. Under the 2000 Agreement, Mountain Forestry was required to review V. Cisneros's task book and confirm that an evaluator had initialed all tasks, ensure that the evaluation records in the back of the task book had been appropriately completed, and confirm that the government supervisor's statements had been obtained and the final evaluator's verification had been completed. After reviewing the file and noting the

date that Mountain Forestry signed the certification, S. Johnson determined that V. Cisneros's task book was void because it was not properly verified and certified in accordance with the 2000 Agreement.

2001-04

87) Between 2001 and 2004, V. Cisneros continued to work for Mountain Forestry as a CRWB crew boss. His firefighter file included a document entitled "Employee Training and Qualification Form" for Victor F. Cisneros, dated February 2004, that recorded his "date of birth" as "7/27/77." The document listed his "Fully Qualified Jobs" progression as FFT2, FFT1, and SRB, and listed his SRB wildfire experience, including the Link, Fawn Peak Complex, Umpqua Preposition, ONC Sept. Support, Blackfoot Lake, and Coyote wildfires.

88) V. Cisneros's firefighter file also included a 2004 document entitled "Mountain Forestry Firefighter Training Records By: Cisneros, F. Victor" that sets forth detailed training information beginning in 1995 for "Firefighter: Cisneros F. Victor," social security number xxx-x1-5979. On its face, the document represents that V. Cisneros received the appropriate training to qualify as a CRWB crew boss, beginning with his completion of a FFT2 task book when he was 10 years old.

89) V. Cisneros's training records show that from August 30, 2000, when he completed the S-230 training for the CRWB position, through 2004, V. Cisneros completed no other training, other than the required annual refresher courses.

90) V. Cisneros's firefighter records show that he performed work as a FFT1 on the Soldier, Tam Tam, Wall, Coyote Complex, Crusoe Complex, and Burnt Flats wildfires in 2000.

91) V. Cisneros's firefighter records show that he performed work as a FFT1 on the Mill Creek, Bald Peter, and Union Valley wildfires and as a CRWB crew boss on

the Bald Peter, Union Valley, Boundary, Delango, Elko/Rodeo, Blue Complex, and Ollalie Complex wildfires in 2001.

92) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Eyerly Complex, Grizzly, Union Valley, Biscuit, Tiller Complex, and Large Fire Support wildfires in 2002.

93) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Link, Fawn Peak, Umpqua Preposition, Blackfoot Lake, Coyote Rock, 9-05 Complex, Isabel, ONC Sept. Support, and 7th Parallel wildfires in 2003.

94) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Beebe Ridge, Waterfall, Reno Standby, and Oregon wildfires in 2004.

2. Gerardo Herrera Silva

95) At material times herein, Mountain Forestry employed Gerardo Herrera Silva ("Silva") as a firefighter in 2003. Immigration and Social Security Administration records show his birth date is November 29, 1984, and his social security number is xxx-x4-3487. Mountain Forestry records show that Herrera's address was 3227 Beacon Street NE, Salem, Oregon.

96) In September 2004, as part of his ongoing investigation, S. Johnson inspected what Mountain Forestry represented as Silva's firefighter file. The file was a combination of documents that apparently pertained to five other individuals, including Genaro Herrera, Genaro Herrera Adame, Juan M. Herrera, Gerardo Herrera, Gerardo Herrera Adame, and Gerardo Herrera Silva. The documents, when organized chronologically and taken at face value, show that Genaro Herrera and Genaro Herrera Adame, assuming they are the same individual, completed the FFT2 task book in 1998, trained as a FFT1 in August 2000, and fought wildfires as a FFT2 through 2001. The documents also show, if taken at face value, that Gerardo Herrera, Gerardo Herrera

Adame, and Gerardo Herrera Silva completed the March 2001 annual refresher and Gerardo Herrera Adame completed a pack test. The file contains certificates for Juan M. Herrera and Gerardo Herrera Silva representing that they completed, respectively, the April and July 2002 annual refresher. The file documents include a certificate representing Gerardo Herrera Silva completed the February 2003 annual refresher course. Other than the annual refresher certificates, there are no training records for Silva and no records showing he completed a pack test.

97) Mountain Forestry's certified payroll records, provided to BOLI by Michael Cox, show that Silva performed work on at least five incidents during the 2003 fire season. According to the records, Herrera worked under "foreman" Gustavo Cisneros ("G. Cisneros") on the Link fire between July 6 and 20 and the I-5 Milepost 94/RAC – MOB incident between July 21 and August 2, 2003. The records also show he worked under R. Cisneros on the Chelan Butte (Washington) fire between August 1 and 8, 2003. He again worked under G. Cisneros on the RAC/MOB incident on August 3 and 4 and on the South Fork (Idaho) fire between August 12 and 23, 2003. He also worked under SRB Russ Irwin on the Herman Creek fire between September 3 and 7 and the Blackfoot Lake fire between September 7 and 10, 2003. Gerardo Herrera's address appears on all of the certified payroll records as 3227 Beacon Street NE, Salem, Oregon.

98) During the BOLI investigation, compliance specialist Stan Wojtyla requested that the NWSA provide to him all training records for Gerardo Herrera, ID number 001284. Wojtyla received a response from NWSA's executive secretary Debbie Miley that stated, in pertinent part:

"Per your request, the following information was found.

"I have attached Certificates of Training for Gerardo Herrera-Silva, and also the training records with 001284 assigned in our database.

“I do not find anything for the social security numbers you gave me xxx-x4-3487 or xxx-x7-2364. In addition, I did not find anything for Gerardo Herrera, Genaro Herrera or Genaro Herrera-Adame.

“Please provide NWSA with a copy of your findings and the outcome of this case for our records.”

The “Certificates of Training” included a certificate showing that Gerardo Herrera-Silva completed an annual refresher and pack test on February 15, 2003, and it was signed by John Berger and Michael Cox. The firefighter ID number for Gerardo Herrera-Silva was noted as 00041 and his “student training history” showed that he had taken two annual refreshers in March 2001, seven days apart. One was administered by Carl A. Sylvester in Albany, Oregon, on March 24, 2001, and the other was administered by John Berger in Philomath, Oregon, on March 31, 2001. According to the training history, Gerardo Herrera-Silva also received annual refreshers from John Berger in Philomath on July 2, 2002 and February 15, 2003.

99) During his investigation, Wojtyla met with Gerardo Herrera Silva in the fall of 2004. Herrera told Wojtyla that he worked for Mountain Forestry “for a few days” in 2003 and that he used social security number xxx-x4-3487. The Gerardo Herrera Silva he met with in 2004 was the same person whose photograph appeared on the February 15, 2003, Certificate of Training.

100) Gerardo Herrera’s file was one of the seven files transferred from Mountain Forestry to Mosqueda Reforestation. In his follow-up investigation notes, S. Johnson summarized the file as follows:

“On 09-09-04, I met Manuel Mosqueda at the Salem ODF Office to review 7 transferred firefighter files from Mountain Forestry. Each file I reviewed included experience, training and certification records from FFT2 up to their current position. Missing from several files were records of pack test information. Mosqueda was hesitant to employ these firefighters due to problems with their records.

“One of the files belonged to Gerardo Herrera. He was transferred by Mountain Forestry as an experienced FFT2. I began to review his file. Employment identification information provided was for Gerardo Herrera

Silva DOB 11-29-84 with social security number xxx-x4-3487. As I continued through the file, I located an Annual Refresher certificate signed by Virgil Urena for Mountain Forestry on 01-31-04. No pack test score was found in the file. Immediately following this certificate was a training roster from NWFF Environmental for a refresher and standards for survival/fire shelter deployment from 2001. I located the name Gerardo Herrera on this roster. The next item was another class roster from NWFF Environmental for refresher training in 2000. The name listed on this roster was Genaro Herrera Adame. A 1999 refresher training was done by C&H Reforesters and listed Genaro Herrera Adame with an ID number of 098612. Additional training records were for Genaro Herrera back to 1998.

“Wildfire experience records began in 2001 with Gerardo Herrera listed in Crew Time Reports as a FFT2. Immediately following were Crew Time Reports for wildfires in 2000, which listed Genaro Herrera as a FFT2. Next I located a training certificate for Gerardo Herrera in 2001 from NWSA, signed by John Berger. A Par-Q & You form dated 03-31-01 signed by Mike Cox had the name Gerardo Herrera Adame. A Par-Q & You form dated 05-28-00 also signed by Mike Cox had the name Genaro Herrera Adame. This was followed by one signed by Bob Gardner, C&H Reforesters, dated 04-24-99 for Genaro Herrera.

“A class roster for S-131 Advanced Firefighter Training dated 05-31-01 provided by Northwest Fire Fighters and signed by John Berger listed Gerardo Herrera. A FFT1 Task Book immediately followed this roster and was issued to Genaro Herrera by Mountain Forestry on 08-30-00. A FFT2 Task Book dated 08-02-98 was issued to Genaro Herrera by C&H Reforesters.

“I examined company manifests for Mountain Forestry in 2000. I located only the name Genaro Herrera Adame with social security number xxx-x9-8612 listed as a FFT2. Next, I examined company manifests for Mountain Forestry in 2001. I located only the name Gerardo Herrera Adame with social security number xxx-x4-3487 listed as a FFT1. Company manifests for 2002, 2003, and 2004 list only Gerardo Herrera as a FFT2. It became apparent from the file and manifests that a switch had occurred between Genaro and Gerardo between 2000 and 2001. Gerardo Herrera is NOT qualified as an FFT1 or FFT2 due to the fact he is using training and experience for Genaro Herrera.

“I talked with Bob Gardner from C&H Reforesters. He stated that Genaro Herrera was one of the files taken by Mike Cox when he left during the night and created Mountain Forestry in 2000. Cox took entire files and did not leave any copies. Gardner could not provide any additional information regarding Herrera.”

3. Andrew Williamson

101) Andrew Williamson's file, presented to S. Johnson in January 2005, consisted of training certificates, crew performance ratings, a "Wildfire Assignment History," crew time reports, "emergency personnel shift tickets," and three task books. Those records, taken at face value, show Williamson completed a task book for the FFT2 position in or around May 2001 and that Mountain Forestry fire director Michael Cox certified Williamson as a qualified FFT2 on June 28, 2001. The records also show that Williamson's task book for the FFT1 squad boss position was initiated by SRB Leopoldo Rincon on August 15 and that he was evaluated on the Bridge Creek fire between August 15 and 21, 2001. Williamson's name appears on a "Crew Performance Rating" in the box designated "Crew Boss (name)" that was prepared and signed on August 21, 2001. Although someone crossed out "crew boss" and hand wrote "FFT1" next to the preprinted words, the name Andrew Williamson appears in the signature section designated "Crew Boss (signature)" without correction. The FFT1 task book shows that on October 1, 2001, Cox certified that Williamson was qualified as a FFT1 squad boss. According to an evaluator's note in the task book, "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." The file contains no documentation that shows Williamson completed an additional assignment or was evaluated on all of the tasks required in the FFT1 task book. Williamson appeared on the June 2002 company manifest as a FFT1 and his records show he performed work as a FFT1 on the Eyerly Complex and Biscuit fires from June through September 2002.

102) Williamson's file shows that while he was working on the Eyerly Complex fire in August 2002, Cox initiated Williamson's task book for the crew boss (CRWB or SRB) trainee position. According to the task book "Evaluation Record," "Fire Director"

Cox evaluated Williamson as a crew boss on the Biscuit fire from August 31 to September 13, 2002, although Cox's evaluation (Evaluation #1) was not initialed and dated until a year later on October 1, 2003. Cox's evaluation included a check mark by the sentence: "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." The evaluation record also shows "SRB" Felix Cisneros ("F. Cisneros) initialed Evaluation #3 for the same fire (Biscuit) during the same period (from August 31 to September 13, 2002) on October 2, 2002. Evaluation #3 shows that F. Cisneros made no recommendations pertaining to Williamson's work on the Biscuit wildfire. Gustavo Cisneros ("G. Cisneros") apparently evaluated Williamson as a crew boss on the Eyerly Complex fire from August 1-20, 2002. G. Cisneros signed the evaluation (Evaluation #2) on October 10, 2002. His recommendation included a check mark next to the sentence: "The individual was not able to complete certain tasks (comments below) or additional guidance is required." There were no "comments" listed "below" as suggested in the notation. Classroom trainer John Berger initialed the fourth evaluation (Evaluation #4) on March 19, 2003, and indicated by a check mark that "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." All of the evaluations, except for Berger's, appear to be in the same handwriting.

103) According to the file presented to S. Johnson, Williamson was listed on Mountain Forestry's training roster as a qualified "SRB" or crew boss when he took the annual refresher course on February 1, 2003. Page two of Williamson's task book is designated as "Verification/Certification of Completed Task Book." The "Final Evaluator's Verification" section is blank. NWSA Trainer John Berger signed the company certification section on April 2, 2003, apparently certifying that Andrew Williamson "has met all requirements for qualification in this position and that the

qualification has been issued.”^x When Williamson’s file was transferred to North Reforestation and presented to S. Johnson, the file included a cover sheet listing Williamson’s training as a FFT1 and “Crew Boss/Single Resource Boss (CRWB).” According to the cover sheet, Williamson completed both the FFT1 and CRWB crew boss task books on April 2, 2003. Williamson’s file also included certificates issued by NWSA and signed by Cox and Berger showing Williamson completed the required S-230 and S-290 classes in March 2003. According to the “Wildfire Assignment History” in Williamson’s file and prepared by Mountain Forestry, Williamson worked on five wildfires (Large Fire Support, Roybal, Trampas, Eyerly, and Biscuit) in 2002 and four wildfires (Tobias, Cramer, Fawn Peak, and Slims Complex) in 2003. On a June 2004 company manifest, Williamson is listed as a SRB (crew boss) with a March 3, 2003, certification date. In a supplemental company manifest presented to ODF in September 2003, Williamson was listed as a SRB (crew boss) with an April 18, 2002, certification date.

104) Respondents introduced a file at hearing that they represented was Andrew Williamson’s “complete” firefighter file. Several documents are duplicates of those found in the file S. Johnson inspected for North in January 2005, including Williamson’s FFT2 task book. The file Respondents presented contained only one other task book and it did not resemble either of the two task books in the file S. Johnson inspected. Taken at face value, the “task book” appears to be a combination of two task books issued to Williamson for the same FFT1 squad boss position. The first page shows it was assigned to Williamson and initiated by squad boss Alejo Mejia on July 12, 2003. The third page is similar to the first, only it shows a task book was issued to Williamson and initiated by Mejia on July 23, 2003.

The document also includes two separate Evaluation Records. One represents that Mejia evaluated Williamson on the Cramer and Slims wildfires, and the other represents that Mejia evaluated him on the Tobias, Cramer, and Slims wildfires, and Jose Martinez evaluated him on the Fawn Peak wildfire. In Evaluation #1 of the first record, Mejia's evaluation is dated July 31, 2003, and represents that he evaluated Williamson on the Cramer wildfire during the period July 23-31, and notes, "not all tasks evaled [sic]." Evaluation #2 of the second record shows a similar evaluation of the same fire (Cramer) during the same period (July 23-31) and signed on the same day (July 31, 2003) with the comment, "finish all tasks."

In Evaluation #2 of the first record, Mejia's evaluation is dated September 9, 2003, and represents that he evaluated Williamson on the Slims wildfire during the period August 11 to September 9, 2003, and notes, "not all tasks evaled [sic]." Evaluation #4 of the second record is for the same fire (Slims) during the same period (August 11 to September 9, 2003), but dated September 10, 2003, and with a check mark next to the sentence, "The individual has successfully performed all tasks for the position and should be considered for certification."

Evaluations #1 and #3 of the second record represent that Williamson was evaluated on the Tobias and Fawn Peak wildfires in July and August 2003. Both evaluations indicate that "not all tasks were evaluated on this assignment" and add the note: "Finish all tasks." Although the record indicates that Mejia evaluated Williamson during the Tobias wildfire and Martinez evaluated him during the Fawn Peak wildfire, the handwriting on both evaluations appears identical.

105) The FFT1 task book in the file Respondents presented does not include a "Verification/Certification of Completed Task Book" section and there is no other document in the file that verifies or certifies that Williamson was qualified as a FFT1

squad boss. The file includes a list dated March 30, 2005, that represents Williamson's wildfire experience between 2001 and 2004. According to the list, Williamson performed work as a FFT1 on one wildfire (Bald Peter) in 2001 and on five wildfires (Large Fire Support, Biscuit, Eyerly, Roybal, and Trampas) in 2002. The list also represents that he performed work as a FFT2 on four wildfires (Tobias, Slims Complex, Fawn Peak Complex, and Cramer) in 2003 and two wildfires (Bee Be Bridge and Bland Mountain) in 2004. Other records in the file, including crew time reports, show Williamson worked as a SRB crew boss on the Tobias, Cramer, Bland Mountain, Bee Be Bridge, Fawn Peak Complex, and Slims Complex wildfires from 2003 through 2004. There is no task book or other records in the file that show Williamson was qualified as a SRB crew boss.

106) In April 2004, ODF inspected Mountain Forestry records, including Andrew Williamson's file. ODF inspector Tom O'Connor determined that Williamson was "not OK" as a CRWB crew boss and found that an additional "hot line assignment" evaluation was necessary. He also found that Williamson's FFT1 squad boss task book was lacking two hot line assignment evaluations for qualification as a FFT1. Respondents did not provide ODF with Williamson's complete firefighting file during the ODF inspection. S. Johnson had not seen the file Respondents represented was Andrew Williamson's complete firefighter file before the hearing date.

4. Samuel Cisneros

107) S. Johnson inspected S. Cisneros's firefighter file during his records inspection in or around January 2005 and determined that S. Cisneros (Samuel Cisneros Perez) had received his original training from Mountain Forestry. Initially, he erroneously determined S. Cisneros, born September 8, 1983, was underage when he began firefighting at age 17 in 2000. S. Cisneros's file included training certificates,

“Wildfire Assignment History” records, crew time records, and three task books. The records show Mountain Forestry initiated S. Cisneros’s FFT2 task book in April 2000 and Michael Cox certified S. Cisneros as a qualified FFT2 on May 4, 2000. Trainer and evaluator John Berger certified that S. Cisneros completed the necessary classroom training. There are no records showing S. Cisneros worked on wildfires as a FFT2 between his certification and his FFT1 training.

108) Mountain Forestry records show that Mountain Forestry SRB crew boss Alex Coronado initiated S. Cisneros’s FFT1 task book on July 24, 2000, at the Tam Tam wildfire. On the same day, Coronado certified that S. Cisneros was qualified as a FFT1 by completing and signing the “Verification/Certification of Completed Task Book” on Mountain Forestry's behalf. The evaluation record at the end of the task book shows Coronado completed two evaluations. In Evaluation #1, S. Cisneros purportedly supervised a 20 person crew on the Beatty Butte wildfire from July 13 to 15, 2000, before the task book was initiated or assigned to him. Alex Coronado put a check mark alongside the sentence, “The individual has successfully performed all tasks for this position and should be considered for certification.” Coronado also noted, “Elevate to FFT1.” In Evaluation #2, Coronado certified that S. Cisneros supervised a 20 person crew on the Tam Tam wildfire from July 23-24, 2000, and made the same recommendation to “Elevate to FFT1.” Although the qualification record section represents that S. Cisneros completed tasks on the Bilk Creek Complex (July 18-21), Coyote (July 26-August 6), Crusoe (August 6-10), and Wall (July 24-26) wildfires in 2000, no evaluations are recorded for those fires in the evaluation record section. S. Cisneros’s file includes a training certificate showing he completed the S-131 advanced firefighter training in May 2001.

109) In June 2001, during a routine records inspection to determine Mountain Forestry's supervisory capacity, ODF's Tom O'Connor inspected and approved approximately 32 Mountain Forestry supervisory files, including S. Cisneros's file that apparently showed he was qualified as a FFT1. Based on the file he reviewed in 2005, S. Johnson determined that S. Cisneros's FFT1 task book was void because it was not properly certified by a Mountain Forestry officer.

110) S. Cisneros's firefighter file also included the front page of a CRWB crew boss task book that shows S. Cisneros's name and the notation "SRB in training." The page does not include the company affiliation or the date and location the task book was initiated. S. Johnson subsequently concluded that the task book was never assigned or initiated. Mountain Forestry's records show S. Cisneros worked as a FFT1 squad boss on at least 12 wildfires (Apple Complex, Hensel-Reese, ABC Support, Beatty Butte, Way, Crusoe, Dam Water Tower, Pinus Underburn, Fawn Peak, Lightening Creek, Cob Complex, Biscuit) from 2001 through 2003. The records also show that in or around 2005, S. Cisneros began working for another contractor.

111) During the Mountain Forestry investigation and in the regular course of his duties as an ODF compliance specialist, S. Johnson maintained contemporaneous notes that documented his entire investigation and conversations with witnesses. The notes included a follow-up investigation in September 2004 when contractor Manuel Mosqueda requested ODF to review the files he had received from Mountain Forestry of firefighters who had transferred from Mountain Forestry to Mosqueda's company.

112) Early in S. Johnson's Mountain Forestry investigation, on or about July 7, 2004, Don Moritz sent an e-mail to Patricia Morgan instructing her to forward to John Venaglia, Contracting Officer at the National Interagency Fire Center, "the information

we received today concerning Mountain Forestry.” A subject line preceded the e-mail’s text and read: “FW: alcohol/drug report.” The text stated, in pertinent part:

“Contact person providing complaint information is Mountain Forestry crew boss Alex Coronado. Alex lives in Independence Oregon, and his telephone number is [(503) xxx-xxxx]. Alex claims that while participating on the national crew contract as a crew boss for Mountain Forestry several non-complaint actions took place. He claims he was terminated because he turned down a dispatch while he followed work rest standards. He plans on discussing this issue with the Oregon Bureau of Labor and Industry [sic]. John should be particularly interested in the following issues: 1) Alex claims Mountain Forestry falsified pack test records and sent him to fire without meeting the requirement. 2) Individuals on the crew were singled out and harassed. Alex will provide collaborative [sic] statements from crew members if requested. Keep a copy of your correspondence on file.”

Venaglia replied by e-mail shortly thereafter on July 7, 2004, and said:

“Thanks for the info. Earlier today I received a letter from Mountain Forestry stating that Alex Coronado has been fired and I have removed him from the list of key personnel from their contract. The specific reasons for his termination [are] not a matter normally in which a federal CO has privity. Alex may have rights under Oregon law for wrongful termination. While his allegations are disturbing the fact remains that they are not untypical of those sorts of complaints I’ve heard before from disgruntled employees. In any case, the burden is on the employee, but if performance is in anyway indicative of his claim I’ll go back to this as cause for further investigation.

“The further question is whether other such allegations have been made against the contractor. If you have data on that please forward it to me and I will discuss the matter with Mtn Forestry, and if necessary I will implement an audit of pack testing, or another related matters [sic]. Feel free to call me at * * *. Thanks.

113) Respondents’ records show that F. Cisneros, Michael Cox, and Penny Cox collectively earned \$1,422,988 in personal income from Mountain Forestry firefighting activities in 2002, and \$1,424,200 in personal income from Mountain Forestry firefighting activities in 2003. In both years, F. Cisneros personally earned over \$700,000 and the Cox’s collectively earned personal income of just under \$700,000. Mountain Forestry’s earnings for firefighting activities were over \$900,000 in 2000.

114) During a prior investigation, BOLI Compliance Manager Mortland wrote a letter, dated January 9, 2004, to Campbells Group that stated, in pertinent part:

“Per the request of Michael Cox, I am writing to inform you that Mr. Francisco Cisneros and Mountain Forestry, Inc. are currently authorized to act in the capacity of a licensed Farm/Forest Contractor.

“Mr. Cisneros and Mountain Forestry are expressly authorized to continue to engage in farm/forest contracting activities under their 2003 license #7185. An unsigned copy of the license is attached, although you should already have a copy signed by Mr. Cisneros in your files from last year.”

Respondents continued to operate in their capacity as a farm/forest labor contractor throughout the BOLI investigation and thereafter.

115) Following an investigation in or around April 2004, the BOLI Commissioner issued a Notice of Intent alleging Respondents had violated provisions of ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and assessing civil penalties of \$26,800. In May 2004, Respondents entered into a Consent Order with BOLI in which Respondents admitted to violating provisions of ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and agreed to pay a \$12,500 civil penalty. On June 1, 2004, BOLI issued a Final Order Based On Informal Disposition in which the Commissioner adopted and incorporated the terms of the Consent Order.

116) In July 2004, following the ODF investigation, S. Johnson, Don Moritz, and Patricia Morgan met with Mountain Forestry representatives, including F. Cisneros and Michael Cox, to discuss ODF’s findings and conclusions. During the meeting, ODF terminated its firefighting crew agreement (2004 Agreement) with Mountain Forestry. Thereafter, Contract Service Manager, Don Moritz, detailed the reasons for the termination in a letter, dated July 30, 2004, that stated:

“This is to notify you that the Oregon Department of Forestry (ODF) is terminating its Fire Crew Agreement with Mountain Forestry, pursuant to paragraph 3.15.3. For the reasons stated below, ODF finds Mountain Forestry to be in material breach of the Agreement, and declines its option

to provide an opportunity to cure. At this time, ODF is not taking additional steps to disqualify Mountain Forestry from bidding on future fire crew agreements, though it reserves the option to do so.

“As you know, ODF has audited certain Mountain Forestry employment records in order to evaluate contractor compliance. As a result of this audit, Mountain Forestry was found to be ‘materially deficient in contract performance’ under the 2004 Interagency Crew Agreement. In particular, the company failed to comply with the requirements of Sections 4.8.1 (Identification of Personnel); 4.12.1, 4.12.2, 4.12.4 (Pack Test); 4.14.1, 4.14.2 (Crew Training and Experience); and 4.15.1 (Crew Records).

“Mountain Forestry violated Section 4.12.1 by providing falsified documentation indicating that pack tests had been taken when in fact they had not. Mountain Forestry thus failed to ‘ensure that all Crew personnel assigned to Crew for the current fire season have passed the ‘Work Capacity Test.’ Mountain Forestry violated Section 4.12.2 by failing to notify ODF prior to administering each pack test.

“Under Section 4.14.1 of the Agreement, contractors represent and warrant ‘that each of CONTRACTOR’S employees serving as a Crew Member has met the minimum training and experience requirements [specified in the Agreement] for the position each such Crew Member is assigned.’ Mountain Forestry has violated Sections 4.14.1, 4.14.2, and 4.8.1 by issuing a falsified identification card to a Mountain Forestry crew boss who was dispatched to a fire incident, with knowledge that the crew boss had not been pack tested.

“Section 4.15.1 of the Agreement requires contractors to maintain complete training, experience, and fitness records for each Crew Member that documents compliance with all Exhibit I requirements for each position in which the Crew Member is certified to perform. This section further states that these records shall be complete and on file prior to accepting a dispatch assignment. In the audit of Mountain Forestry, ODF discovered sixteen training crewmember records, which were randomly selected, all failing to have pack test certification. In addition to the non-compliance of pack test certification, ODF’s training record review documented that records were falsified and altered. For example, one training record of a crewmember listed experience and fitness records which, if true, would mean the crewmember started firefighting at the age of eleven. These findings demonstrate that Mountain Forestry is in violation of Sections 4.15.1 and 4.14.2.

“For the foregoing reasons, ODF has determined that Mountain Forestry is in material breach of the Agreement and subject to termination under Section 3.15.3. Based on the findings of our investigation, Mountain Forestry falsified training documentation and used unqualified personnel during fire assignments in 2004. These material deficiencies suggest a serious and potentially dangerous pattern of unsatisfactory performance.

“ODF is hopeful that Mountain Forestry will take measures to rectify the concerns noted above such that it can successfully participate in future fire crew contracts.”

117) BOLI began investigating Respondents' fitness to act as a farm/forest labor contractor soon after ODF terminated Mountain Forestry's firefighting crew agreement. In a letter dated August 16, 2004, BOLI Compliance Manager, Michael Mortland, notified Respondents that their farm/forest labor contractor license renewal depended on the outcome of the BOLI investigation. The letter, addressed to F. Cisneros, stated, in pertinent part:

“The Farm Labor Licensing Unit of the Bureau of Labor and Industries for the state of Oregon has become aware that your company's wildland firefighting crew contract with the Oregon Department of Forestry has been terminated by the Oregon Department of Forestry. It is the Bureau's understanding that the termination is based on allegations of inaccurate record keeping and possible falsification of firefighter training and/or qualification records.

“As you were previously advised, your 2004 farm labor license has not been issued by the Bureau to date due to a prior investigation primarily involving your company's failure to file certified payroll records as required. Although that matter has now been satisfactorily resolved, this letter is to advise you that the Bureau will now be investigating the circumstances of the termination of your wildland firefighting crew contracts by ODF. Until this additional investigation is complete your farm/forest license will not be eligible for renewal.

“Under OAR 839-015-0520, if a licensee demonstrates that his character, reliability, or competence makes the licensee unfit to act as a farm/forest contractor, the Bureau shall propose that the license not be renewed. Because your contract fire crews have been terminated by ODF, and therefore do not possibly pose any serious danger to the public health or safety, in the event the Bureau does propose not to renew your license as a result of the investigation, you will first be provided with a formal notice and an opportunity for a hearing before your renewal license is denied.

“As was the case in relation to the previous investigation concerning your company, you are presently fully authorized to continue to engage in farm/forest contracting activities pursuant to your 2003 license #7185. The present investigation in no way prohibits you from continuing to act as a farm/forest labor contractor at this time.”

Respondents continued to operate in their capacity as a farm/forest labor contractor throughout the BOLI investigation and thereafter.

118) BOLI Compliance Specialist Stan Wojtyla was assigned to investigate the circumstances under which Mountain Forestry's 2004 Agreement with ODF terminated. As part of his investigation, he interviewed former Mountain Forestry employees, including brothers Jose Israel Munoz-Moreno and German Munoz-Moreno, and Alex Coronado, who alleged Respondents created false identification cards for some employees. The Munoz-Moreno brothers told him they each had taken an annual refresher course in 2001 using the identities of F. Cisneros's relatives, Juan Pantoja-Cisneros and Delores Cisneros-Martinez, at F. Cisneros's request. The brothers told Wojtla that the relatives were in Mexico at the time and F. Cisneros asked them to take the training so that the Cisneros's training records would reflect the 2001 refresher training. Wojtyla accepted their statements at face value and did not interview other witnesses to confirm their statements. Although Wojtyla obtained training documents that showed Pantoja-Cisneros and Delores Cisneros-Martinez had taken the refresher course in 2001, he found no evidence that supported the Munoz-Moreno brothers' story that they had taken the courses for them. In an interview with Alex Coronado, Coronado confirmed that he had not taken a pack test before he fought wildfires in 2004 even though his identification card showed otherwise.

119) Don Moritz's testimony was credible. As the ODF contract services manager, he had firsthand knowledge of the ODF Agreements and the ODF investigation. Despite occasional memory problems, his testimony was consistent and reliable. The forum credited his testimony in its entirety.

120) Steve Johnson was a credible witness. His testimony was based on his firsthand knowledge of the ODF investigation initiated during a routine records

inspection. As a longtime ODF employee, he had knowledge of the Agreements and their administration. Although he mistakenly applied ODF's minimum age requirement (effective as of 2003) to earlier Agreements when he reviewed firefighter files in 2005, there is no evidence that his conclusions regarding minimum age violations were motivated by bias against Respondents or any other contractor he was investigating at that time. Although he had done some audits prior to 2004, his position as compliance specialist was newly created and his territory covered two states, 90 contractors, and 6,000 firefighters.^{xi} Given the number of firefighter files those statistics necessarily imply, S. Johnson's misapplication of the minimum age contract provision in some instances is not particularly unexpected. The forum finds his belief in 2005 that certain firefighters were underage when they were hired was genuine, albeit erroneous. In any event, his investigation in 2004 was thorough and well documented, and his findings and conclusions were corroborated by Mountain Forestry records, Cox's testimony, and other witness testimony. The forum credits S. Johnson's testimony in its entirety.

121) Stan Wojtyla's testimony was generally credible. He acknowledged that he did not verify with other sources the information supplied to him by brothers Israel and German Munoz-Moreno and that he relied solely on their "self-declarations." He also readily acknowledged that although training records he obtained tended to discredit their contentions that they worked under different names for Mountain Forestry in 2000, he accepted the witness statements as fact. Wojtyla also displayed considerable confusion about which brother worked under which false name. For those reasons, the forum finds that, while the brothers no doubt made those statements to Wojtyla, the statements are not reliable hearsay and are afforded no weight in this proceeding. However, the forum credited Wojtyla's testimony when it was based on personal

knowledge and to the extent he verified ODF findings with documents or through interviews with witnesses identified by ODF.

122) Benjamin Jones was a credible witness. His memory was reliable, his testimony was straightforward, and his demeanor was courteous and composed. He was not impeached in any way and the forum credited his testimony in its entirety.

123) Addison “Dick” Johnson (“A. Johnson”) provided sufficient information to demonstrate his knowledge of training, certifying, and qualifying firefighters. Although he had some familiarity with the interagency Agreements, he readily acknowledged he was not an expert on government contract management and had no specialized knowledge of the Agreements. He also acknowledged that he was “friends” with Michael Cox, had discussed some of his testimony with Cox during the hearing, and had been at odds with ODF on occasion.^{xii} The forum finds those facts may have influenced some of his opinions at hearing, particularly his ultimate opinion that Mountain Forestry’s files established that all of the employees named in the Agency’s charging document met the minimum age and training requirements for the positions they held as firefighters from 2000 through 2004. For instance, according to his testimony, he reviewed all of the files the evening before he testified and found two files that were questionable. He opined that Gerardo Herrera Silva’s file appeared “a mix of several people,” but despite the mix-up concluded that Gerardo Herrera Silva was qualified to fight wildfires in 2001. He also testified that Victor Cisneros’s file raised an age issue that he resolved only by determining that the file was a “mixture of files” involving two persons named Victor Cisneros. According to A. Johnson, V. Cisneros’s file, “if I take them as two separate files,” raised a training issue because he then had to determine if the “younger Victor,” i.e., F. Cisneros’s son, had a “full record.” He concluded that V. Cisneros’s record showed he never completed the required classes

(S-130 and S-190) for his crew position, but opined that V. Cisneros's later completion of an annual refresher that included "critical components" of the S-190 satisfied the requirement. A. Johnson's opinion is not consistent with the 2000 Agreement that expressly requires successful completion of the S-130 and S-190 classes *and* the tasks described in the appropriate task books before assignment to a wildfire. Additionally, his testimony assumed that the "younger Victor" took the annual refresher course in March 2000 before he worked as a FFT1 on three wildfires in June and July 2000. However, other than his testimony that he believed V. Cisneros's file was combined with "another Victor Cisneros's file," there is no evidence establishing at which point the file becomes separate files. Even if it was F. Cisneros's son who took the March 2000 refresher course, the 2000 Agreement provides no exceptions to the core classroom training. Since A. Johnson is not qualified to interpret the Agreements and has an apparent bias toward Respondents, the forum has given no weight to his opinion that the firefighters at issue were qualified to fight wildfires in 2000 and 2001. For the same reasons, the forum gave A. Johnson's other opinions appropriate weight only when they did not conflict with the terms and conditions of the Agreements or when they were consistent with other credible testimony in the record.

124) Michael Cox was not a credible witness. On key issues, his testimony was internally inconsistent and was contradicted numerous times by his prior sworn testimony and other credible evidence in the record. For instance, during the hearing he consistently downplayed his role in Mountain Forestry and his knowledge of the firefighting industry by describing himself as the "office person" with little experience with firefighting contracts. He denied having a title or any knowledge of task books or crew manifests in 2000 and alluded that any discrepancies between the Mountain Forestry task books and crew manifests presented to ODF in 2000 were C&H's or

Ferguson Management's fault because they created the documents maintained in the firefighter task books that transferred to Mountain Forestry. Yet, in prior sworn testimony before a circuit court judge in August 2004, Cox described himself as Mountain Forestry's Fire Director and "overall boss" of the operations since 2000. He readily acknowledged that he was the contract negotiator and organized the staff files. During the hearing, he also acknowledged on cross-examination that he prepared most of the documents for Mountain Forestry, including the license applications, and that F. Cisneros signed where necessary. Cox admitted he had signatory authority for Mountain Forestry checks and his initials and signature show up on most of the firefighter documents, including several that transferred from C&H.

Cox was evasive about his business interests and, instead, another witness described Cox's ownership interests in three other farm/forest labor contracting companies. Cox did not reveal that he co-owned Ferguson Management at one time, but his current business partner, Don Pollard, testified that not only had they co-owned Ferguson, they had been business partners in GFP Enterprises, a wild land firefighting company, since at least 2000. When viewed in light of the entire record that includes credible evidence that Cox and his wife together earned well over half a million dollars in personal income from Mountain Forestry's firefighting activities in 2002 and 2003, the forum concludes that Cox's knowledge of and experience with the firefighting industry is far greater than he represented at hearing.

Cox was equally evasive about Alex Coronado's status with Mountain Forestry. When asked on direct examination if he fired Coronado, Cox said "no." When asked if Coronado was fired by anyone, he replied, "He was asked to return to the office in Independence." Later, on cross-examination, he denied that Coronado was ever fired and specifically stated that neither he nor F. Cisneros fired Coronado. However, in his

sworn testimony before a circuit court judge in August 2004, when he was asked if he had fired Alex Coronado, Cox responded, "I did not fire him. Francisco did." When asked when Coronado was fired, Cox responded, "more or less somewhere around the first of July" and alluded that drugs and alcohol played a role in his termination.

Cox, whose memory was dim when responding to questions on cross-examination, had perfect recall of the pack tests he claimed were administered to Alex Coronado, Leticia Ayala and Jose Avila. He first testified at counsel's suggestion that he and F. Cisneros had administered the pack tests to all three of them. Later, he claimed it was actually F. Cisneros who had administered Coronado's and Ayala's tests together on the same day and Cox claimed he had tested Avila on a different day. However, during the ODF investigation, Avila told S. Johnson that F. Cisneros administered his pack test and that he had taken the pack test with Coronado and Ayala. Moreover, Cox acknowledged he had documented the pack test scores on Virgil Urena's training roster and the crew manifest, but those records show that Coronado and Ayala purportedly took the pack test on different dates. Cox's testimony about the pack tests further stretches credulity when compared with documentary evidence that shows Cox issued an identification card to Avila with a different pack test date than the one Cox documented on the crew manifest.

Cox's responses to questions about V. Cisneros's training and qualifications were evasive and generally not credible. In his prior sworn testimony, he stated that V. Cisneros came to Mountain Forestry from C&H as a qualified FFT1 in 2000 and alluded it was possible that V. Cisneros had been working on wildfires for C&H since he was 10 years old. At hearing, he expressed limited knowledge of V. Cisneros's wildfire activity at C&H stating only that he had "knowledge that [V. Cisneros] fought fires in 1999." Although he has known the Cisneros family since 1980 and was the one witness who

could shed light on the issue, he did not refute any of the evidence suggesting F. Cisneros had a brother, also named Victor, who worked as a firefighter for C&H. Although he had ample opportunity, Cox never adequately explained the discrepancies in V. Cisneros's file or how documentation for Victor Cisneros Martinez became part of the file and part of V. Cisneros's firefighting history.

In some cases, his inconsistencies were the result of making up his story as he went along. For instance, during direct examination, when responding to the question about why the tasks in some task books were documented after the evaluation assignment, Cox replied:

"They – since fires are a dirty business, you get pretty dirty. To pack them around on a fire line would mean that they would get pretty ragged, pretty dirty. So, as a general rule, they're not packed on to the fire line. And, since fire hours are extremely long, meaning 12 to 16 hours per day, a lot of times the person that's administering or saying – checking off on the list as to the qualifications of the individual that is being qualified for that position – a lot of times they're at a later date than what the event actually indicates, because he's tired, and he wants to get in his eight hours rest, too."

Later, still on direct, when explaining how the task book is initiated, Cox stated:

"I can initiate the task book for Mountain Forestry. Then I can give the task book to either another squad boss or I can give it to the crew boss. Either one can evaluate FFT2 firefighter to the position of a squad boss, and they will continue the application of what's in the book to say this person did this on that fire.

"Question from counsel: So the task books are sent with the crew boss and the ID cards to the fire?

"Cox's answer: Yes, they are."

When he was asked if copies of the squad boss task book was kept at the office while the original was sent to the fire, Cox replied, no. Following counsel's statement:

"The squad boss completes the requirements on one fire. The firefighter who is aspiring to be a squad boss completes the squad boss requirements on one fire, and the crew comes back. Tell me what happens to the task book then.

“Cox’s response: The task book is then attached to his file, and it’s kept in the office.

“Question from counsel: So the original goes to the –

“Cox’s response: Goes in the person’s paperwork, yes.”

Finally, in testimony given as an offer of proof that the forum has since admitted as substantive evidence, Cox described when a contractor would have been likely to cheat during the period at issue. Counsel asked, “So, for the year 2003, given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify in records to present qualified crew bosses and squad bosses?” Cox responded, “That would have been the year that you would have -- if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003.”

For all of the reasons set forth above, the forum gave little or no weight to Cox’s testimony and credited it only when it was corroborated by other credible evidence.

125) Donald Pollard’s testimony was brief and offered by Respondents as foundation for a “To Whom it May Concern” letter that, according to his testimony, “had to do with, you know, some of the charges that have been filed against [Mountain Forestry, Michael Cox, and F. Cisneros] and – you know, I don’t have all the details to those, but that I – you know, that I’ve been doing – doing their books and things of that nature for quite some time and have a hard time believing that there’s – there’s major fraud or whatever.” The letter, dated September 21, 2005, and offered into evidence, stated, in pertinent part:

“I have owned and managed my own accounting practice for fifteen years and at one time serviced over five hundred clients. I also own a wild land firefighting company that has contracts or agreements with government agencies to provide 20 person hand crews and wild land fire engines. I have had ownership in a wild land firefighting company since 1997.”

He further stated that: “As the tax preparer for [Mountain Forestry, Michael Cox, F. Cisneros, and C&H], I have never had any reason to believe that they have done

anything of an illegal nature or participated in an illegal business activity.” Explaining his relationship with Respondents, Pollard wrote:

“I have known Michael Cox and Francisco Cisneros since 1991. At the time, I was controller of a large reforestation company and both Mike and Francisco worked for this company at the time. As time went by and the company struggled to keep pace in a decreasing reforestation market, I started my own accounting practice and this company, Mike Cox, C&H Reforesters, Inc., and Francisco Cisneros were all among my first clients. I have prepared income taxes and provided other related accounting services to Mountain Forestry, Michael Cox, and Francisco Cisneros ever since.”

When asked if the opinions he stated in the letter were his current opinions of Mountain Forestry’s practices, Pollard replied: “Yeah. I’m not aware of any – any material wrongdoing that would cause me to believe that I think they’re crooks, if that’s what you’re asking me.” On cross-examination, Pollard admitted he and Michael Cox had co-owned Ferguson Management at one time and that he and Cox have been business partners and co-owners of GFP Enterprises since approximately 2000. Pollard was not straightforward about those connections in his September 5, 2005, letter, or in his initial testimony. Moreover, he was evasive about the timeframes during which he and Cox established their business relationship. For those reasons, the forum found the letter misleading and Pollard’s testimony motivated by his business associations with Cox and Mountain Forestry. Other than his admission that he and Cox were longstanding business partners, the forum gave Pollard’s letter and testimony no weight.

126) Respondents offered Jose Avila’s prior testimony in a civil proceeding before a circuit court judge to support their contention that Mountain Forestry pack tested Alex Coronado and Leticia Ayala before dispatching them to wildfires in Nevada and California. His entire testimony was admitted as part of an Agency exhibit that includes a partial transcript of the previous proceeding. The forum finds Avila’s prior testimony unreliable for several reasons. First, the Agency introduced impeachment

evidence establishing that Avila had three felony convictions for which his release date from the penalty imposed was within 15 years of the hearing date.^{xiii} Avila did not appear at hearing to explain the circumstances of his prior convictions. Second, his prior testimony that he participated in a pack test with Coronado and Ayala is suspect because Michael Cox represented to S. Johnson that F. Cisneros pack tested Coronado on March 25, 2004, and Mountain Forestry employee Brandon Creson confirmed to S. Johnson that he had added a pack test date to a company training roster that showed Ayala ostensibly had been given a pack test on May 30, 2004.^{xiv} Creson also claimed he had administered a pack test to Coronado and Ayala together on the same day and appeared surprised to discover that different dates had been reported on the company roster. Additionally, during the ODF investigation, Avila acknowledged to S. Johnson that F. Cisneros had administered his pack test on February 29, 2004, as stated on the crew identification card that Cox signed and issued to Avila.^{xv} Yet, Cox told S. Johnson and testified at hearing that he had “personally” administered Avila’s pack test on March 15, 2004, and had recorded Avila’s pack test score and date on the company training roster.^{xvi} Avila’s prior testimony is further eroded by S. Johnson’s credible testimony that Coronado told him 1) he had not taken a pack test before Mountain Forestry dispatched him to wildfires in Nevada and California; 2) he was “bud-capping” near Astoria on March 25, 2004, the date Cox claims Coronado was pack tested at the Mountain Forestry office; and 3) he was working in Warm Springs or Grangeville on May 31, 2004, the day Ayala was purportedly pack tested. Coronado also showed S. Johnson Ayala’s crew identification card that showed a May 3, 2004, refresher and pack test date. Mountain Forestry’s payroll records confirm that Coronado planted trees for Mountain Forestry in Warm Springs and Grangeville from May 1 through 31, 2004.^{xvii} Furthermore, Mountain Forestry trainer Virgil Urena’s statement to S. Johnson that he

did not pack test Avila, Coronado or Ayala prior to their dispatch to wildfires lends additional credence to Coronado's statements to S. Johnson. Avila did not appear at hearing to explain the discrepancies between his prior testimony and the multiple versions propounded by Respondents of when and how Coronado and Ayala were pack tested. For all of the above reasons, the forum has discredited Avila's prior testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At all times material, F. Cisneros and Mountain Forestry conducted business jointly as a licensed farm/forest labor contractor.

2) At all times material, Penny Cox was Mountain Forestry's only other shareholder and Michael Cox, her husband, was Mountain Forestry's fire director.

3) At all times material, Michael Cox co-owned at least three farm/forest labor contracting companies, Ferguson Management, C&H Reforesters, Inc., and GFP Enterprises, before or while employed by Mountain Forestry, all of which have had contracts or agreements with government agencies to provide fire suppression crews to fight wildfires.

4) At all times material, V. Cisneros was F. Cisneros's son and R. Cisneros was F. Cisneros's nephew.

5) Respondents entered into Agreements with ODF each year from 2000 through 2004. Each of those years, Respondents agreed to provide firefighting services to ODF in accordance with the terms and conditions of the Agreements. Under each Agreement, Respondents were independent contractors and each confirmed dispatch to a wildfire constituted a separate and binding contract.

6) The parties to each Agreement included the States of Oregon and Washington and five federal agencies, the USFS, NPS, BLM, BIA, and USFW. At all

times material, ODF was responsible for administering the Agreement and dispatching crews to wildfires on behalf of Oregon, Washington, and the federal agencies.

7) As a term and condition of each Agreement, Respondents agreed to “comply with all other federal, State, county and local laws, ordinances and regulations applicable to [the] agreement.”

8) In order to perform any work under the 2000 through 2004 Agreements, Oregon contractors were required to obtain and maintain an Oregon farm/forest labor contractor license from BOLI.

9) Respondents applied annually to renew their farm/forest labor contractor license from 2000 through 2004. On each renewal application, F. Cisneros signed a statement under oath that Respondents agreed to “at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries.”

10) The work required under the Agreements from 2000 through 2004 was hazardous work, performed in forest and rangeland environments that included steep terrain, “extremely” uneven and rocky surfaces covered with thick tangled vegetation, and extreme temperatures, either from the weather or the fire conditions. Firefighters were exposed to smoke and dust conditions, frequently severe, and were required to wear protective clothing.

11) At all times material, the State of Oregon designated firefighting as a hazardous occupation. The minimum age for firefighters in Oregon was and still is 16 years old.

12) From 2000 through 2002, the Agreements did not specify a minimum age requirement for firefighters. During that time, Respondents were subject to Oregon’s minimum age requirement for firefighters. In 2003 and 2004, the Agreements provided

that all firefighters provided by contractors pursuant to the Agreements shall be at least 18 years old.

13) At all times material, the State of Oregon required employers to obtain a validated employment certificate from BOLI before employing minors from 14 through 17 years old in Oregon.

14) In 2000, Mountain Forestry employed at least three minors, V. Cisneros (DOB: July 27, 1984), S. Cisneros (DOB: September 8, 1983), and Jose Manuel Herrera Leon (DOB: February 23, 1983), without first obtaining a validated employment certificate.

15) In 2001, Mountain Forestry employed at least three minors, V. Cisneros (DOB: July 27, 1984), Andrew Williamson (DOB: January 4, 1984), and David Trujillo (DOB: March 14, 1984), without first obtaining a validated employment certificate.

16) In 2002, Mountain Forestry employed at least two minors, V. Cisneros (DOB: July 27, 1984) and Ryan Sims (DOB: April 28, 1985), without first obtaining a validated employment certificate.

17) In 2003, Mountain Forestry employed at least one minor, R. Cisneros (DOB: October 14, 1987), without first obtaining a validated employment certificate.

18) In 2004, Mountain Forestry employed at least two minors, Benjamin Jones (DOB: September 8, 1986) and R. Cisneros (DOB: October 14, 1987), without first obtaining a validated employment certificate.

19) Under the 2000 Agreement, Mountain Forestry employee V. Cisneros performed work as a squad boss on the Soldier, Tam Tam, and Wall wildfires before his 16th birthday in 2000.

20) Under the 2003 Agreement, Mountain Forestry employee R. Cisneros performed work on the Herman Creek and Blackfoot Lake wildfires before his 16th birthday in 2003.

21) The 2000 through 2004 Agreements required that each firefighting crew consist of 20 “properly trained individuals.” Under each Agreement, the training included required classroom work and supervised on-the-job training.

22) When monitoring the training and experience component of the Agreement, ODF relied on the Program Management System (“PMS”) 310-1, published by the National Wildfire Coordinating Group, which prescribes the standards and guidelines for the firefighter training and experience set forth in the Agreement.

23) Under the Agreement, contractors were responsible for qualifying and certifying their employees as firefighters using the specifications set forth in the Agreement.

24) All firefighters begin training for their positions by taking required classes specific to each position level. The purpose of the coursework is to teach firefighters basic firefighting skills and to prepare for hazardous work conditions.

25) The classroom training includes course work taught by certified instructors affiliated with authorized training associations or with a community college. A training association’s authorization to train firefighters for ODF assignments derives from a Memorandum of Understanding (“MOU”) executed by ODF.

26) In addition to the classroom training, trainees for any firefighter position are required to complete the performance tasks set forth in the appropriate task book. Task books are administered by the contractor to qualify employees to meet the position requirements set forth in the Agreement.

27) Under the Agreements, contractors are responsible for obtaining and issuing a task book appropriate for the position each employee will perform on a crew.

28) A firefighter in training for a position or working on an “evaluation assignment” is required to carry the task book at all times while in training or during the evaluation period. Those who are already qualified in their position are not required to carry their completed task books. Upon completion of the task book, the contractor is responsible for certifying the firefighter-in-training for the position the firefighter trained to perform on the crew by using the procedures set forth in the task books.

29) The task book is not complete until all tasks are properly performed and verified by the evaluator. Additionally, the contractor or contractor’s corporate officer must review the task book to ensure it has been properly completed, including checking that an evaluator has initialed all tasks, the evaluation records at the back are properly completed, the government supervisor’s statement has been acquired (for CRWB certification), and the Final Evaluator’s Verification has been completed. The contractor is responsible for reviewing each employee’s training and experience to ensure that all other qualification standards for the position have been met. Before the task book is valid, the contractor or contractor’s corporate officer must complete the company certification portion of the task book.

30) ODF is not involved in task book administration and its personnel do not sign the certification portion of the task book. Before a firefighter is certified for the crew boss position, a government supervisor is required to review, approve, and sign the performance evaluation assignment.

31) Under the 2000 through 2002 Agreements, trainees for any firefighter position were paid by the contractor while in training and their pay was not chargeable

to the government. In 2003 and 2004, trainees for the squad boss and crew boss positions were chargeable to the government.

32) Under the 2000 through 2002 Agreements, to become certified as a FFT2 entry level firefighter, individuals were required to complete the Firefighter Training (S-130) and Introduction to Fire Behavior (S-190) classes. Prior experience was not a prerequisite, but all FFT2's were required to successfully complete the classroom training and performance tasks set forth in the appropriate task book before assignment to a wildland fire.

33) Under the 2000 through 2002 Agreements, individuals were required to complete the S-130 and S-190 classes to become certified as a FFT1 advanced firefighter squad boss. No additional classroom training was required until 2001 when the requirement to successfully complete the Advanced Firefighter Training class (S-131) was added to the Agreement. All FFT1s were required to successfully complete the classroom training, demonstrate satisfactory performance as a FFT2, and demonstrate satisfactory position performance by completing the performance tasks set forth in the appropriate task book, including supervising a minimum of five firefighters on a wildfire incident, within the previous five years, before certification as a squad boss.

34) Under the 2000 through 2002 Agreements, to become certified as a CRWB crew boss, individuals were required to successfully complete the Intermediate Wildland Fire Behavior (S-290) class in addition to the S-130, S-190, and, effective 2001, S-131 classes. For certification, individuals also were required to demonstrate satisfactory performance as a FFT1 and successfully complete the performance tasks set forth in the appropriate task book, including satisfactory position performance as a crew boss, within the previous five years, supervising a minimum of 18 firefighters on a wildland fire.

35) The 2000 through 2002 Agreements included pre-incident, incident, and post-incident procedures that dictated how contractors were to use the task books for qualifying their employees to meet the specifications in the Agreements.

36) Under the 2000 through 2002 Agreements, *prior to* assigning the employee to a “wildfire incident,” contractors were responsible for ensuring that each employee was issued a task book appropriate to the position using a three step procedure. Step one instructed the contractor to obtain the task books from the National Interagency Fire Center (“NIFC”) and recommended that “the Task Book Administrator’s Guide, PMS 330-1 be obtained” as well. Step two instructed the contractor to issue the task book to employees with the “Assigned To” and “Initiated By” information appropriately filled out. Step three instructed the contractor to assure that each employee has completed “**all** required [classroom] training” for their position.

37) Under the 2000 through 2002 Agreements, after assignment to a wildfire incident, in addition to the general provisions pertaining to PTB administration, the following incident procedures applied:

“**CONTRACTORS** may use **GOVERNMENT** incidents, for which they are requested or assigned, to qualify and certify employees for FFT1 and CRWB positions. Only one training OR evaluation assignment will be permitted per crew on each incident. The coach/evaluator must, as a minimum, be certified in the position they are coaching or evaluating and will be paid as part of the contracted crew. The trainee will be in addition to the contracted crew and paid by the **CONTRACTOR** (not charged to the **GOVERNMENT**).

“a. **FFT2** personnel must be certified prior to arrival at the incident. No task book administration at an incident is required.

“b. **FFT1** personnel require a performance evaluation assignment on a wildfire to qualify for certification. The **GOVERNMENT** will NOT participate in the administration of the FFT1 PTB’s nor verify evaluation assignments.

“c. **CRWB** personnel require a performance evaluation assignment on a wildfire to qualify for certification. Refer to the procedures that follow for specific steps for PTB administration for these assignments.”

The procedures that followed included a five step process for evaluating CRWB trainees that contained the following provisions:

“Step 1: **CONTRACTORS** must identify any trainee in an evaluation assignment to the Incident Management Team at initial check-in. An incident performance evaluation form should also be requested and obtained at this time.

Step 2: During the assignment, the **CONTRACTOR’s** evaluator will observe the trainee’s performance as the crew boss and initial all tasks in the PTB that the trainee demonstrates successfully. The incident and evaluation assignment should be of sufficient duration and complexity so that the trainee has the opportunity to demonstrate all the tasks of the position. If the trainee does not have the opportunity to demonstrate all the tasks, a second evaluation assignment will be necessary.

“Step 3: Upon completion of the evaluation assignment, the **CONTRACTOR’s** evaluator will complete an ‘Evaluation Record’ in the back of the PTB.

“Step 4: The **CONTRACTOR’s** evaluator will ask their **GOVERNMENT** supervisor * * * to state in writing, under the PTB Evaluation Record completed by the evaluator, whether or not the incident was of sufficient complexity and duration to provide a valid opportunity to evaluate the CRWB trainee’s performance. The **GOVERNMENT** supervisor will sign the record next to their statement.

“1. If the **GOVERNMENT** supervisor states that the incident **was not** adequate to evaluate the CRWB trainee’s performance, a second evaluation assignment will be necessary before individual can be certified in the position.

“2. If the **GOVERNMENT** supervisor states that the incident **was** adequate to evaluate the CRWB trainee’s performance, the **CONTRACTOR’s** evaluator should complete the ‘Final Evaluator’s Verification’ portion of the inside front cover of the PTB.

“Step 5: The **CONTRACTOR’s** evaluator will complete a written rating of the trainee’s performance, using the **GOVERNMENT’s** evaluation form that was provided during the initial check-in, and provide the Incident Management Team with a copy. A copy of this rating shall be kept by the **CONTRACTOR** to be included with the employee’s training records. The IMT will maintain a copy with the final incident records.”

38) Under the 2000 through 2002 Agreements, following an incident, the contractor was responsible for certifying their employees’ task books by using the following five step procedure:

“Step 1: **CONTRACTOR** reviews all information written in each PTB to assure it has been properly completed. This review should include checking that an evaluator has initialed all tasks, the Evaluation Records in the back of the PTB have been appropriately completed, that **GOVERNMENT** supervisor’s statements have been obtained, and the Final Evaluator’s Verification has been completed.

“Step 2: **CONTRACTOR** reviews each employee’s training and experience records to assure all other qualification standards for the position, as listed in EXHIBIT K are met.

“Step 3: When all EXHIBIT K qualification standards are met, **CONTRACTOR** completes the ‘Agency Certification’ portion of the inside cover of the PTB.

“Step 4: Place a copy of the completed PTB in the employee’s training file.

“Step 5: If an individual leaves a **CONTRACTOR’s** employ, the original PTB will be given to the departing individual. It is recommended that the **CONTRACTOR** for future reference purposes keep a copy.”

39) To demonstrate satisfactory performance in a position under the PMS 310-1 guidelines, trainees were required to perform work on “one or more fires” after completing the task book before becoming qualified in a particular position. After qualifying for a position, the firefighter was required to perform work on at least one additional fire in that position before training for the next position.

40) Between 2000 and 2002, contractors were “short-cutting” the training process by permitting trainees to begin and complete a task book for one position on one fire and begin and complete a new task book for another position on the next fire. In many cases, contractors had entry level firefighters who began and completed task books as a FFT2 on one fire and began and completed task books as a FFT1 squad boss on the next fire without performing any work on a fire as a FFT2.

41) Due to a particularly bad fire season in 2002, ODF requested increased fire crews and contractors were “rushing” firefighters through the promotional process to get the extra crews out to the fires. During that time, ODF became concerned about the training and safety issues created by the rapid progression of inexperienced firefighters

and revamped its 2003 Agreement to bolster existing requirements and implement more stringent training requirements.

42) In the 2003 and 2004 Agreements, ODF added a requirement that firefighters engage in a prescribed amount of “fire suppression action on active flame (hotline)” before promoting to the next level. The Agreements reinforced the original requirements by detailing the training sequence for each position, including the number of incidents and “operational periods” required for qualification.

43) Except for the age requirement, the requirements for certification as an entry level firefighter FFT2 did not change in the 2003 and 2004 Agreements. As in previous years, no prior experience was necessary, but to become FFT2 certified, individuals were required to successfully complete the classroom training (S-130 and S-190 classes) and the performance tasks set forth in the PTB before assignment to a wildland fire. The sequence for position qualification as a FFT2 was:

- “1. Complete S-130/S-190 training and FFT2 Task Book.
- “2. Pass pack test.
- “3. **Become certified as an FFT2.**
- “4. Work on at least three wildfire Incidents that include hotline activities and total at least fifteen (15) Operational Periods, 10 of them on Type 2 or 1 Incidents. This meets requirement for satisfactory performance as FFT2 and one season of experience.
- “5. Eligible to be considered for FFT1 **Trainee** once #1 through #4 above are met.”

44) To become FFT1 certified in 2003 and 2004, individuals were required to successfully complete the following sequence:

- “1. Complete S-131.
- “2. FFT1 task book is issued following S-131 training making the firefighter an FFT1 Trainee.
- “3. Complete annual refresher training prior to next season.
- “4. Pass pack test prior to next season.

“5. As an FFT1 Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the FFT1 task book. This meets requirement for satisfactory position performance as an FFT1.

“6. **Become certified as a FFT1/Squad Boss.**

“7. Work on an additional three (3) wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 3, 2 or 1 fires. This meets the satisfactory performance requirement as FFT1/Squad Boss.

“8. Eligible to be considered for **CRWB Trainee** once #1 through #7 above are met.”

45) To become certified as a crew boss (“CRWB”) in 2003 and 2004, individuals were required to successfully complete the following sequence:

“1. Complete S-230 and S-290. [The S-290 (Intermediate Fire Behavior) class was added in the 2003 Agreement and had to be completed by December 31, 2004.]

“2. CRWB task book is issued following S-230 & S-290 training making the firefighter a CRWB Trainee.

“3. Complete Annual Refresher training prior to next fire season.

“4. Pass pack test prior to next fire season.

“5. As a CRWB Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the CRWB task book. This meets requirement for satisfactory position performance as a CRWB.

“6. **Become certified as a CRWB.**”

46) The 2003 and 2004 Agreements clarified its 2000 through 2002 requirements by specifically stating that 1) “all required training for a position must be completed before the firefighter can begin working on the task book for that position”; 2) “a firefighter may work on only one task book at a time”; and 3) all required prerequisite experience must be completed before the firefighter can begin working on the task book for the next higher position.”

47) The 2000 through 2004 Agreements required that all firefighters in every position successfully complete an annual refresher class prior to the next fire season.

48) The 2000 through 2004 Agreements required that a firefighter must have at least one qualifying assignment every five years to maintain a current certification in a position.

49) All Agreements required that all trainees be identified at check-in and on the crew manifest.

50) The 2000 through 2004 Agreements required that all firefighters pass the "Work Capacity Fitness Test" at the "arduous" level of physical fitness by taking a "pack test" and incorporated the work capacity guidelines published by the USFS. The pack test's purpose was to measure endurance and required completing a three mile hike with a 45-pound pack in 45 minutes.

51) Under the Agreements, Respondents were required to administer pack tests to all firefighters at the start of fire season prior to listing them on the June 1 crew manifest.

52) Under the 2000 through 2004 Agreements, contractors were responsible for administering the pack tests. Pack tests could be given by a company owner, a qualified employee of the company owner, e.g., squad or crew boss, or a certified trainer. The pack test was usually conducted on an oval, track-like course, or by sending the firefighter "out and back," i.e., a "mile and a half down a road and back." The "administering official" conducting the pack test was required to monitor the test from start to finish. On an oval track, the administering official can stand in the middle of the oval and observe everyone taking the pack test. On an "out and back," the administering official either must move with those taking the test or enlist additional help to monitor them. The administering official is monitoring to ensure that those taking the pack test are walking and not running and that they are carrying the 45 pound packs for the duration of the test. On an "out and back" the official is also monitoring to ensure

the test taker makes it to the mile and a half marker and back. The test is conducted on a “pass/fail” basis.

53) Between 2000 and 2004, pack tests were often given in conjunction with the annual refresher training for the contractor and crew’s convenience. During that period, trainers sometimes sent ODF a list of those attending the training and included pack test scores representing that the trainees had been given pack tests following their training. Contractors were ultimately responsible for ensuring the pack tests were properly administered and, unless ODF received a complaint indicating otherwise, it relied on the contractor’s representations.

54) Before 2002, contractors were not required to notify ODF when they administered pack tests.

55) In 2002, contractors were required to notify ODF in writing at least three days in advance prior to administering a pack test. The notification had to include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official. Within seven days following the pack test, contractors were required to report to ODF the names and company affiliation of each person who passed or failed the test. In 2003 and 2004, the notification period was changed from three days to five days.

56) Although ODF discouraged the practice, contractors were in compliance with the notice requirements if they hired certified trainers to administer the pack tests in conjunction with the classroom training and notify ODF by using the training rosters with the requisite information.

57) Under the Agreements, ODF reserved the right to monitor pack test administration. If ODF determined that a pack test was not conducted properly, ODF

could issue a notice of non-compliance to each contractor with an employee present for training.

58) Under the 2000 through 2004 Agreements, all firefighters were required to carry a picture identification card that included the firefighter's name and photograph, social security number, list of positions for which the firefighter was qualified, and the date the firefighter passed the pack test. A colored dot on the card designated the firefighter as a supervisor. The back side of the card consisted of a list of the firefighter's training and training dates. The Agreements required that the company owner sign the identification card certifying that the firefighter has met all training requirements of the Agreement.

59) Michael Cox issued Alex Coronado a crew identification card that showed Coronado completed an annual refresher course on February 29, 2004, and pack test on March 25, 2004. Cox signed his name on the "Owner Signature" line.

60) On a training roster dated February 29, 2004, Michael Cox wrote "44 Pack 3/25/04" next to Alex Coronado's name and "Late" in the pack score box along with his initials.

61) Michael Cox issued Jose Avila a crew identification card that showed Avila completed an annual refresher course and a pack test on February 29, 2004. Cox signed his name on the "Owner Signature" line.

62) On a training roster dated February 29, 2004, Michael Cox wrote "41 Pack 3/15/04" next to Jose Avila's name and "Late" in the pack score box along with his initials.

63) Virgil Urena prepared the training roster dated February 29, 2004, and entered pack scores for everyone except Alex Coronado and Jose Avila prior to Michael Cox's entries.

64) On the Mountain Forestry crew manifest for 2004, Jose Avila was listed as a SRB with a March 15, 2004, fitness training date and a 41 pack test score. Alex Coronado's name and pack test information was covered with white-out.

65) Leticia Ayala's name appeared on the April 29, 2004, training roster prepared by Virgil Urena. Urena wrote NT in the pack score box because Ayala had not taken the pack test. The same information appeared on the 2004 Mountain Forestry crew manifest.

66) Mountain Forestry employee Brandon Creson was told to write a pack score and date next to Ayala's name on the April 29, 2004, training roster. He wrote "44.00" and "5/30/04" next to the NT notation in Ayala's pack score box. No pack tests were administered on May 30, 2004. Alex Coronado was tree thinning in Warm Springs and Grangeland on May 30, 2004.

67) Respondents did not administer a pack test to Alex Coronado before dispatching him to the Cole Complex and Reno Standby wildfires in California and Nevada in 2004.

68) Respondents did not administer a pack test to Leticia Ayala before dispatching her to the Cole Complex wildfire in California in 2004.

69) Under the 2004 Agreement, Respondents agreed to notify ODF before administering pack tests to firefighters.

70) Respondents administered pack tests on the following dates in 2004: February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; June 7; and July 12, 2004, without providing the requisite notice to ODF.

71) Mountain Forestry did not administer pack tests to Jorge Carbajal, Emilio Martinez, Jose Macias, Alex Coronado, Jose Avila, Rosendo Cabral, and Leticia Ayala as indicated by Mountain Forestry records. Urena confirmed to S. Johnson that he had

not pack tested any of them and the scores were added after he sent the rosters to Mountain Forestry. Urena later told S. Johnson that he had administered a pack test to Emilio Martinez on July 12, 2004, but acknowledged he did not provide any notice to ODF.

72) V. Cisneros did not complete the entry level training classes (S-130 and S-190) or a FFT1 task book before he performed work as a FFT1 squad boss on three wildfires in 2000. Between 2000 and 2004, he did not complete any training to qualify as a FFT2 or FFT1 and was not qualified to progress to CRWB. During that time, he was dispatched to at least 35 wildfires as a Mountain Forestry CRWB crew boss.

73) Gerardo Herrera Silva did not complete the entry level training classes (S-130 and S-190) or a FFT2 task book before he performed work as a Mountain Forestry FFT2 firefighter on five wildfires in 2003.

74) Andrew Williamson did not complete all of the tasks required in the FFT1 task book before he performed work as a Mountain Forestry FFT1 squad boss and SRB crew boss on 11 wildfires between 2002 and 2004.

75) Samuel Cisneros was assigned a FFT1 task book and promoted to FFT1 squad boss on the same day, two months after he was certified as a FFT2, and after he had already performed work as a Mountain Forestry FFT1 on three wildfires. His FFT1 task book was not properly certified and ODF voided the task book. In total, S. Cisneros worked as a FFT1 squad boss on 12 wildfires from 2001 through 2003.

76) On or about July 30, 2004, ODF terminated its firefighting crew agreement (2004 Agreement) with Mountain Forestry. ODF determined that Mountain Forestry was "materially deficient in contract performance" under the 2004 Agreement. ODF's findings included Mountain Forestry's "failure to comply with the requirements of Sections 4.8.1 (Identification of Personnel); 4.12.1, 4.12.2, 4.12.4 (Pack Test); 4.14.1,

4.14.2 (Crew Training and Experience); and 4.15.1 (Crew Records).” ODF notified Respondents that based on their findings following the investigation, “Mountain Forestry falsified training documentation and used unqualified personnel during fire assignments in 2004.” ODF determined that the “material deficiencies suggest a serious and potentially dangerous pattern of unsatisfactory performance.”

77) Respondents, through F. Cisneros, knowingly and purposely made misrepresentations on its license renewal applications from 2000 through 2004 when they agreed to comply with all State laws and Commissioner’s rules.

78) Respondents signed a Consent Order in May 2004, in which they admitted to record keeping violations under ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and agreed to pay a \$12,500 civil penalty.

79) Respondents, through fire director Michael Cox, knowingly and purposely falsified pack test information on at least three crew identification cards prior to dispatching two of the firefighters to wildfires in 2004.

80) Respondents, through fire director Michael Cox, knowingly and purposely falsified training information on at least one crew identification card prior to dispatching the firefighter to wildfires from 2000 through 2004.

81) Respondents, through fire director Michael Cox, knowingly and purposely falsified at least two training rosters to show pack test scores for at least three firefighters who were not pack tested and presented the falsified records to ODF.

82) Respondents knowingly and purposely created false training records and task books for at least two firefighters to cover up training and minimum age deficiencies and presented the falsified records to ODF.

83) Respondents knowingly and purposely advanced at least four firefighters to positions they were not qualified or properly certified to perform.

84) Respondents knowingly and purposely falsified crew manifests to show the existence of pack tests that were not administered and presented the falsified manifests to ODF.

CONCLUSIONS OF LAW

1) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction over the subject matter and of Respondents Francisco Cisneros and Mountain Forestry, Inc. herein. ORS 658.405 to 658.503 and ORS 653.305 to 653.370.

2) The actions, inaction, and statements of Francisco Cisneros and Michael Cox are properly imputed to Mountain Forestry, Inc.

3) Respondents violated ORS 658.440(1)(d) by providing ODF with wildfire suppression crews that included at least two firefighters who did not meet the statutory minimum age requirements for firefighting in Oregon, which violated the terms and conditions of their legal and valid agreements with ODF that were entered into in Respondents' capacity as a farm/forest labor contractor.

4) Respondents violated ORS 658.440(1)(d) by dispatching at least four firefighters who did not meet the minimum training requirements for their positions under the 2000 through 2004 Interagency Firefighting Crew Agreements and who collectively performed work on at least 68 wildfires, which violated the terms and conditions of their legal and valid agreements with ODF that were entered into in Respondents' capacity as a farm/forest labor contractor.

5) Respondents violated ORS 658.440(1)(d) by dispatching at least two firefighters to fight wildfires without the requisite endurance testing required under the 2004 Interagency Firefighting Agreement, which violated the terms and conditions of their legal and valid agreement with ODF that was entered into in Respondents' capacity as a farm/forest labor contractor.

6) Respondents violated ORS 658.440(1)(d) by failing to notify ODF prior to administering endurance tests on 16 separate occasions as required under the 2004 Interagency Firefighting Agreement, which violated the terms and conditions of their legal and valid agreement with ODF that was entered into in Respondents' capacity as a farm/forest labor contractor.

7) Respondents violated ORS 658.440(1)(d) by employing minors in Oregon each year from 2000 through 2004 without first obtaining a validated annual employment certificate to employ minors pursuant to ORS 653.307, which violated the terms and conditions of five legal and valid agreements with BOLI that were entered into in Respondents' capacity as a farm/forest labor contractor.

8) Respondents violated ORS 658.440(1)(d) by employing at least two minor children less than 16 years of age in 2000 and 2003 to engage in firefighting, a hazardous occupation pursuant to OAR 839-021-0102(p), which violated the terms and conditions of legal and valid agreements with BOLI that were entered into in Respondents' capacity as a farm/forest labor contractor.

9) Mountain Forestry, Inc. violated ORS 653.307 and OAR 839-021-0220 by employing minors in Oregon each year from 2000 through 2004 without first obtaining a validated annual employment certificate to employ minors.

9) Mountain Forestry, Inc. violated OAR 839-021-0102(p) by employing at least two minor children less than 16 years of age in 2000 and 2003 to engage in firefighting, a hazardous occupation.

10) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Mountain Forestry, Inc. and Francisco Cisneros for each

violation of ORS 658.440(1)(d). The civil penalties assessed in the Order herein are a proper exercise of that authority. ORS 658.453(1)(c), OAR 839-015-0508(1)(f).

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Mountain Forestry, Inc. for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. ORS 653.370, OAR 839-019-0010(1)&(2), and OAR 839-019-0025.

12) Respondents' multiple violations of ORS 658.440(1)(d), course of misconduct in their dealings with ODF and BOLI, and willful misrepresentations on their license renewal applications demonstrate that their character, competence, and reliability makes them unfit to act as farm/forest labor contractors. ORS 658.420(1), OAR 839-015-0520(3).

OPINION

The Agency alleges Respondents, while jointly acting as a farm/forest labor contractor, failed to comply with the terms and conditions of lawful agreements or contracts; "made false, fraudulent, or misleading representations or published or circulated false, fraudulent, or misleading information concerning the terms, condition or existence of employment at any place or by any person, including but not limited to, the [BOLI] and the [ODF]"; failed to obtain an annual employment certificate to employ minors; and employed a minor in a hazardous occupation. The Agency contends the alleged violations demonstrate that Respondents lack the character, competence and reliability to act as a farm/forest labor contractor and seeks to revoke or refuse to renew their farm/forest labor contractor license. The Agency also seeks civil penalties totaling \$112,000.

FARM/FOREST LABOR CONTRACTOR VIOLATIONS

A. Failure to Comply with Lawful Contracts in Violation of ORS 658.440(1)(d)

In order to maintain a farm/forest labor contractor license in Oregon, contractors are required to abide by any lawful contracts and agreements entered into in their capacity as farm/forest labor contractors. The Agency must prove that Respondents, 1) acting jointly as a farm/forest labor contractor, 2) entered into legal and valid contracts or agreements with ODF and BOLI, 3) entered into the contracts or agreements in their capacity as a farm/forest labor contractor, and 4) violated provisions of those contracts or agreements. *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 36 (2003), *revised final order on reconsideration, affirm'd without opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639 (2004).

In their answer, Respondents did not deny they entered into legal and valid agreements with ODF from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor and those facts are deemed admitted by Respondents. OAR 839-050-0130(2). However, Respondents argue that “the [BOLI] license applications are not within the scope of the statute pleaded [ORS 658.440(1)(d)]” which applies only to “agreements or contracts entered into in the contractor’s capacity as a farm labor contractor” and that Respondents were not acting in that capacity each time they made application for a license. The issues, therefore, are 1) whether Respondents violated the terms and provisions of their contracts or agreements with ODF; 2) whether Respondents entered into legal and valid agreements or contracts with BOLI, in their capacity as a farm/forest labor contractor, when they submitted their annual applications for license renewal beginning 2000 through 2004; and, 3) if so, whether Respondents violated the terms and provisions of legal and valid agreements or contracts with BOLI as the Agency alleges.

1. Respondents violated the terms of their agreement with ODF when they provided firefighters to ODF during the 2000 through 2004 fire seasons who did not meet the minimum age and training requirements required under the Interagency Firefighting Crew Agreements.

Minimum Age Requirement

The participants agree that the 2003 and 2004 Agreements included a requirement that all firefighter crew members shall be at least 18 years old. The participants stipulated that the Agreements did not specify a minimum age for crew members prior to 2003. However, the Agency pled and proved that the Agreements from 2000 through 2004 included a provision that stated, in pertinent part:

“CONTRACTOR shall comply with all other federal, State, county and local laws, ordinances and regulations applicable to this Agreement.”

Respondents did not at any time dispute the Agency’s assertion that Respondents were subject to Oregon’s minimum age requirements under the child labor law provisions. At all material times the minimum age for minors employed as firefighters in Oregon was 16 years old. OAR 839-021-0102(1)(p).

The Agency established by a preponderance of credible evidence that Respondents employed at least one underage firefighter in 2000 (V. Cisneros) and one underage firefighter in 2003 (R. Cisneros).

Victor Cisneros

Respondents stipulated that V. Cisneros engaged in firefighting activities at least 30 days prior to his 16th birthday. Additionally, credible evidence, along with Respondents’ records, established that Mountain Forestry employed V. Cisneros as a firefighter when he was 15 years old during the 2000 firefighting season and that he performed work on at least three wildfires (the Soldier, Tam Tam, and Wall fires) as a squad boss and was evaluated on the Wall fire as a crew boss before he turned 16 on July 27, 2000. Accordingly, the forum concludes that Respondents violated the terms and conditions of the 2000 Agreement when Mountain Forestry employed V. Cisneros,

a 15 year old, to perform firefighting activities during the 2000 firefighting season in violation of Oregon child labor laws. By violating the terms and conditions of the 2000 Agreement, which included the condition that Respondents abide by all applicable state laws and rules, Respondents violated ORS 658.440(1)(d). Under the Agreement, each confirmed dispatch to a wildfire constitutes a separate contract. In this case, evidence showed V. Cisneros performed work on three wildfires while under the minimum age allowed and Respondents therefore are liable for three separate violations of ORS 658.440(1)(d). (Three violations @ \$500 per violation equal \$1,500 in civil penalties)

Ramon Herrera Cisneros

Credible evidence established that Ramon Herrera Cisneros (“R. Cisneros”) was employed by Mountain Forestry in 2003 and performed work as an entry level firefighter when he was 15 years old. Under the 2003 Agreement, the legal age for firefighters was 18 years old. In this case, R. Cisneros did not meet the minimum age requirement under Oregon child labor laws or the 2003 Agreement. Respondents' payroll records established that R. Cisneros performed work on at least two wildfires (the Herman Creek and Blackfoot Lake fires) as an entry level firefighter before his 16th birthday on October 14, 1987. Accordingly, the forum concludes that Respondents violated the terms and conditions of the 2003 Agreement when Mountain Forestry employed R. Cisneros, a 15 year old, to perform firefighting activities during the 2003 firefighting season and are liable for two separate violations of ORS 658.440(1)(d). (Two violations @ \$500 per violation equal \$1,000 in civil penalties)

Minimum Training Requirements

The Agency established by a preponderance of credible evidence that Respondents employed at least four firefighters (V. Cisneros, Gerardo Herrera, Andrew Williamson, and S. Cisneros) who did not have the minimum training or experience

necessary to perform the positions they held when they were deployed to wildfires under the Agreements. Moreover, the Agency provided clear and convincing evidence that V. Cisneros's and Gerardo Herrera's firefighter files were deliberately fabricated to support the positions held by both.

Victor Cisneros

Under the 2000 Agreement, the requisite training for a firefighter performing work as a FFT1 squad boss included successful completion of the entry level S-130 and S-190 courses and satisfactory performance as a FFT2. Although the FFT1 was not a required position under the Agreement in 2000, it was "required in the progression of qualifications from FFT2 to CRWB." Respondents' records established that V. Cisneros was not trained in accordance with the 2000 Agreement and therefore was not qualified to fight wildfires as a FFT2, FFT1, or CRWB.

Respondents stipulated that the V. Cisneros at issue in this case is F. Cisneros's son, his birthdate is July 27, 1984, and he engaged in firefighting activities in 2000 at least 30 days before his 16th birthday. Moreover, there is no dispute that V. Cisneros's social security number is xxx-x1-5979.

The records Respondents presented to ODF and BOLI included V. Cisneros's firefighter file that ostensibly documented his progression from an entry level FFT2 through CRWB crew boss certification. According to the file, he completed the S-130 and S-190 classes and was certified as a FFT2 in June 1995 when he was 10 years old. The file also showed he purportedly performed work on at least two wildfires in September 1995 when he was 11 years old. While still 11 years old in May 1996, V. Cisneros purportedly completed an annual refresher course. In August 1996, when he was 12 years old, V. Cisneros purportedly completed the FFT1 task book and engaged in firefighting activities as a FFT1 on at least six wildfires. There is no activity

documented in the file in 1997, but V. Cisneros purportedly completed an annual refresher course in June 1998 when he was 13 years old. In 1998, V. Cisneros purportedly transferred from Ferguson Management to C&H. According to the file, V. Cisneros took an annual refresher and completed the Advanced Firefighter training (S-131) course in April 1999 when he was 14 years old. His file shows he performed work on at least four wildfires in 1999 when he was barely 15 years old.

The documentation on its face, if believed, established he was qualified as a FFT1 squad boss, albeit underage, when he performed work as a FFT1 on the Soldier, Tam Tam, and Wall wildfires in June and July 2000. However, credible evidence plainly established that either V. Cisneros's file was inadvertently combined with the file of a person also named Victor Cisneros or his file was purposely created to support his wildfire activities as a FFT1 in June and July 2000 and his subsequent progression to CRWB crew boss in August 2000. Based on the following credible evidence, the forum finds the latter to be true.

First, V. Cisneros's file included training rosters addressed to C&H showing that Victor Cisneros-Martinez, social security number xxx-x9-7465, had completed the annual refreshers in 1998 and 1999. Cisneros-Martinez's name and social security number also appear on a training roster in the file showing it was he who actually completed the S-130 class in April 1999. Moreover, during his investigation, S. Johnson interviewed C&H's Bob Gardner, among others, who told him that F. Cisneros had a brother, Victor, who transferred from Ferguson Management to C&H in 1998. Gardner also told S. Johnson that F. Cisneros's son was too young to have worked during the years documented in V. Cisneros's file.

Even Respondents' expert A. Johnson testified that V. Cisneros's file set off "alarm bells" that raised an age issue he resolved only by determining that the file was a

“mixture of files” involving two persons named Victor Cisneros. According to A. Johnson, V. Cisneros’s file, “if I take them as two separate files,” raised a training issue because he then had to determine if the “younger Victor,” i.e., F. Cisneros’s son, had a “full record.” He concluded that V. Cisneros’s record showed he never completed the required classes (S-130 and S-190) for his crew position, but opined that V. Cisneros’s later completion of an annual refresher that included “critical components” of the S-190 satisfied the requirement. Other than A. Johnson’s opinion, there is no evidence that under the 2000 Agreement a contractor or a firefighter could substitute an annual refresher for the required entry level classes, particularly a firefighter progressing from FFT1 to CRWB crew boss.

Credible evidence demonstrated that the “mix-up” in files was not inadvertent or unintentional. First, the file contained a document entitled “Mountain Forestry Firefighter Training Records by: Cisneros F, Victor” that included a complete list of all the training courses for “Firefighter: Cisneros F. Victor SSN: xxx-x1-5979” purportedly completed, including dates and instructor information beginning in June 1995, when V. Cisneros was 10 years old. The training record was prepared in 2004 and was clearly meant to represent to ODF and any other interested party that V. Cisneros was fully qualified and properly certified as a CRWB crew boss. Second, the file also contained an “Employee Training and Qualification Summary Form” that recorded Victor F. Cisneros’s birthdate as “7/27/77.” S. Johnson’s credible testimony established that the training summary had been noticeably altered to change whatever was written there and replace with V. Cisneros’s birthdate using an earlier birth year. The file was riddled with inconsistencies, duplicate evaluations with different dates, and entries that were post dated, including a CRWB evaluation on a wildfire incident dated three days before the incident occurred. Respondents’ records established that V. Cisneros was

dispatched as a CRWB crew boss to at least 35 wildfires between 2000 and 2004. Each time Respondents deployed V. Cisneros, an improperly trained firefighter, on a wildfire, Respondents violated the terms and conditions of the 2000 through 2004 Agreements. The forum concludes that Respondents are liable for 35 violations of ORS 658.440(1)(d). (35 violations @ \$500 per violation equal \$17,500 in civil penalties)

Gerardo Herrera Silva

Under the 2003 Agreement, the requisite training for a firefighter performing work as a FFT2 entry level firefighter included successful completion of the entry level S-130 and S-190 courses prior to assignment on a wildfire. Evidence showed that Mountain Forestry employed Gerardo Herrera Silva as a firefighter in 2003 and that he performed work on at least five wildfire incidents as a FFT2 between July 6 and September 7, 2003. The firefighter file Mountain Forestry produced for S. Johnson's inspection during his investigation was a jumble of documents related to several people, only one of whom had any semblance of training. The file included documents pertaining to Genaro Herrera, Genaro Herrera Adame, Juan M. Herrera, Gerardo Herrera, Gerardo Herrera Adame, and Gerardo Herrera Silva. Other than a few annual refresher certificates, all of the substantive training documents apparently belonged to Genaro Herrera or Genaro Herrera Adame. Those documents dated back to 1998 and showed that Genaro Herrera was certified as a FFT2 in 1998, trained as a FFT1 in 2001, and worked on wildfires as a FFT2 from 1998 through 2002. There was no documentation in the file to show that Herrera Silva had received any training as a FFT2, much less certification as a FFT2. The only documents in the file that were related to Herrera Silva were three annual refresher certificates from 2001 through 2003. The certificates prior to 2003 were questionable. There is no other evidence that Herrera Silva worked for Mountain

Forestry prior to 2003 and Herrera Silva told BOLI compliance specialist Wojtyla that he only worked “a few days” for Respondents in 2003.

Notably, when Herrera Silva transferred from Mountain Forestry to Mosqueda Reforestation, Mountain Forestry represented to Mosqueda and ODF that Herrera Silva was an “experienced FFT2.” At hearing, Respondents' expert witness, A. Johnson, acknowledged the file was “mixed up,” but opined that when viewed separately, the documents demonstrated that all of the individuals were properly trained. His opinion does not comport with the evidence. The file presented to ODF and to BOLI is devoid of any training records related to Herrera Silva. As Cox testified, the time to cheat was in 2003, before the records inspection. The forum concludes Respondents purposely used Genaro Herrera’s training to establish a training history for Herrera Silva in 2003. Respondents dispatched Herrera Silva to at least five wildfires without the requisite training and therefore are liable for five violations of ORS 658.440(1)(d). (Five violations @ \$500 per violation equal \$2,500 in civil penalties)

Andrew Williamson

Respondents' records establish that Andrew Williamson was not qualified to supervise firefighters as a FFT1 squad boss when he worked as a FFT1 on the Eyerly and Biscuit wildfires in 2002. The records show Michael Cox, representing that he was a Mountain Forestry officer, “verified” that Williamson was qualified as a FFT1 and certified him on October 1, 2001. However, the task book entries do not support certification. In fact, two evaluators specifically noted that not all tasks were evaluated on one assignment and Williamson was unable to complete certain tasks on the other assignment. The evaluator on Williamson’s third assignment did not complete the evaluation. There is no evidence that Williamson ever completed the FFT1 task book in 2001 as Respondents represented to ODF.

Curiously, Respondents presented a file at hearing that they claimed was Williamson's complete firefighter file, although the file did not contain the FFT1 task book Cox initiated in August 2001. Instead, the file contained a FFT1 task book Alejo Mejia purportedly initiated on two different dates, July 12 and July 23, 2003. The 2003 task book includes two sets of evaluations found in different sections that include two conflicting evaluations pertaining to Williamson's performance on the Slims Complex wildfire. The contradictory evaluations were apparently written by the same evaluator for the same training period. The evaluation that purportedly was completed at the end of the wildfire incident indicated Williamson supervised 10 firefighters and was "unable to complete certain tasks." The other evaluation, purportedly completed one day later, indicated Williamson supervised 20 firefighters and "successfully performed all tasks for the position." That evaluation included a recommendation that Williamson promote to FFT1 squad boss. Because the evaluations reach very different conclusions and cannot both be true, the forum infers that Respondents intended only that the file reflect that Williamson completed the task book and was qualified as a FFT1 in September 2003. However, even if Respondents had not unwittingly included a contradictory evaluation establishing that Williamson had not successfully completed the task book, there is no documentation showing the task book was verified and certified by a Mountain Forestry corporate officer. Under the ODF Agreements, the only measure of a properly trained firefighter is a completed task book properly verified and certified by the contractor or the contractor's corporate officer. Neither the 2001 nor 2003 task book supports certification for FFT1 squad boss. The forum concludes that Andrew Williamson was not a properly trained firefighter when he was permitted to fight at least 11 wildfires from 2002 through 2004. Consequently, Respondents are liable for 11 violations of ORS 658.440(1)(d). (11 violations @ \$500 per violation equal \$5,500)

Samuel Cisneros

Respondents' records established that S. Cisneros was assigned a task book and purportedly certified as a FFT1 squad boss all on the same day in July 2000, within two months of his FFT2 certification. There is no evidence that he worked on any wildfires as a FFT2 between his FFT2 certification and his one day FFT1 "training." However, the records show he performed work as a FFT1 on at least two wildfires prior to his FFT1 "certification." As already noted herein, in order to be considered a "properly trained" firefighter under the ODF Agreements, the firefighter must have a task book that was certified by the contractor or contractor's corporate officer. In this case, a preponderance of credible evidence established that S. Cisneros's task book was not certified by a Mountain Forestry corporate officer. Instead, evaluator Alex Coronado certified S. Cisneros's qualification as a FFT1 and there is no evidence that he was authorized in any way to issue a task book let alone certify a trainee. The forum concludes that S. Cisneros was not properly certified as a FFT1 squad boss and Respondents breached their agreement with ODF by permitting him to supervise firefighters as a FFT1 squad boss without the requisite certification. Credible evidence shows S. Cisneros worked as a FFT1 on at least 12 wildfires from 2001 through 2003. Consequently, the forum finds Respondents liable for 12 violations of ORS 658.440(1)(d) based on their breach of the ODF Agreement. (12 violations @ \$500 per violation equal \$6,000)

2. Respondents violated the terms of their agreement with ODF when they failed to notify ODF before administering required testing and sent workers to fight forest fires without the required testing.

Respondents agreed the 2000 through 2004 Agreements included a requirement that each firefighter demonstrate an arduous fitness level by taking a pack test at the start of each fire season and before engaging in firefighting activities. Respondents

also agreed that the 2004 Agreement required that contractors report to the ODF Fire Operations Unit at least five working days before administering each pack test, the date, time, address, estimated number of those taking the pack test, and the name and phone number of the administering official.

The Agency alleged that Respondents “agreed to notify [ODF] before administering required testing of individuals for firefighting but did not do so.” The Agency further alleged that “in some instances, Respondents sent individuals to fight fires without the required testing.” The 2004 Agreement, Section 4.12, states, in pertinent part:

“4.12.1 CONTRACTOR shall ensure that all Crew personnel assigned to Crews for the current fire season have passed the ‘Work Capacity Fitness Test’ at the arduous level of fitness based upon the ‘pack test’ * * * CONTRACTOR shall provide, in each Crew Member’s training file, proof that the Crew Member has met this requirement.

“4.12.2 CONTRACTOR shall notify the [ODF] Protection Contract Services Section in writing * * * at least five (5) calendar days prior to administering each pack test. The notice shall include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official.

“ * * * * *

“4.12.4 Within seven (7) calendar days following administration of each pack test, CONTRACTOR shall report to the ODF Contract Services Manager the names and CONTRACTOR affiliation of each person who took the test, and whether this person passed or failed the test.

“4.12.5 GOVERNMENT reserves the right to monitor the administration of pack tests for compliance * * * If the test was not conducted as required, each CONTRACTOR with an employee present for testing will receive a Notice of Noncompliance. A second failure to comply with testing standards, or tests performed without the 5-day notice, will result in administrative action, up to and including termination of the Agreement by ODF.”

Respondents argue that “to prove a violation of the contract, the Agency must prove Respondents sent a person to a fire without a pack test” and that “what is material to the contract and what is shown by the manifests is that the contractor has individuals

prepared for dispatch.” Respondents contend the Agency failed to prove that “Alex Coronado, Leticia Ayala, Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, or Emilio Martinez was [sic] ever sent on a fire under the ODF contract without taking a pack test.” Respondents also argued that Respondents provided crews, including Alex Coronado and Leticia Ayala, under a federal contract that the Agency failed to properly plead or prove and that the Agency’s pleading “was a sham: good in form, but false in fact.” Respondents’ arguments have no merit in fact or in law.

The Agency was not required to prove that anyone was sent to a wildfire without a pack test in order to establish that Respondents violated the Agreement by failing to give ODF advance notice of the pack tests administered in 2004. The five day notice requirement stands alone and under the Agreement contractors risk administrative sanctions, including termination of the Agreement, if they perform pack tests without providing ODF the required notice.

Respondents’ Failure to Notify

In this case, Respondents’ company manifests for 2004 represented that pack tests were administered to specific Mountain Forestry employees on January 31; February 1, 15, 22, 29; March 7, 8, 14, 15, 27; April 25, 26, 29; May 1, 3, 9, 16, 17; and June 7, 2004. Additionally, in an interview with S. Johnson, Virgil Urena confirmed that Emilio Martinez had not completed a pack test on March 14, 2004, as the company manifest represented. Urena’s March 14 training roster showed that Martinez had not taken (“NT”) the pack test because he had a “hurt foot.” However, Urena told S. Johnson that he administered Martinez’s pack test on July 12, 2004, after Martinez’s foot healed.

Respondents do not dispute that Virgil Urena was a Mountain Forestry employee and a certified trainer who administered the pack tests for Mountain Forestry in 2004

following the refresher training courses. ODF records show Urena notified ODF that pack testing was scheduled to take place on January 31; February 1, 14 and 15; March 6, and 12 through 15; May 7 through 10, and 14; and June 24, 2004. The records also show Urena timely notified ODF on January 26; February 9 and 27; March 8; May 3 and 11; and June 18, 2004, of the test dates, the location of the tests, and the approximate number of employees to be tested. Urena admitted to S. Johnson that he did not notify ODF, and there is no evidence showing that he notified ODF, prior to administering Martinez's pack test on July 12, 2004. Absent any documentation that proves otherwise, the forum concludes that Mountain Forestry violated the terms of the 2004 Agreement by failing to provide ODF advance notice of the pack tests reportedly administered on February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; June 7; and July 12, 2004. Each date Mountain Forestry pack tested employees without notifying ODF beforehand pursuant to the 2004 Agreement constitutes a separate and distinct violation for a total of 16 violations. (Sixteen violations @ \$500 per violation equal \$8,000 in civil penalties)

Respondents' Failure to Administer Pack Test

The Agency properly pled and proved by a preponderance of credible evidence that Mountain Forestry dispatched Alex Coronado and Leticia Ayala to the Reno Standby (Nevada) and Cole Complex (California) wildfires without administering the requisite pack tests. The Agency was not required to plead or enter into evidence a specific federal contract as Respondents contend. Michael Cox admitted and credible evidence established that the 2004 Agreement was an interagency agreement to which the federal government was a party. Moreover, the stated purpose of the 2004 Agreement was to:

“establish a binding agreement between the State of Oregon, acting by and through the [ODF] on behalf of those state and federal agencies

identified in the MCFPA (GOVERNMENT), and CONTRACTOR whereby CONTRACTOR [sic] shall make available to GOVERNMENT one or more twenty (20)-person Type II wildfire firefighting Crews for initial attack, suppression, mop-up, and Severity Assignments within the States of Oregon and Washington and elsewhere.”

Based on the evidence herein, and in the absence of evidence demonstrating otherwise, the forum finds that all of Mountain Forestry’s firefighting activities at issue in this case in 2004 derived from the Agreement administered by ODF, including Mountain Forestry’s dispatches to the Nevada and California fires.

Respondents stipulated and Mountain Forestry’s certified payroll records established that Alex Coronado was dispatched to the Reno Standby and Cole Complex wildfires in July 2004. The same records established that Leticia Ayala was dispatched to the Cole Complex wildfire, also in July 2004. Respondents argue that Coronado’s statements to ODF that neither he nor Ayala were pack tested before dispatch are false and that there is “no basis” for finding his statements credible. However, ODF did not solely rely on Coronado’s statements to conclude that the two firefighters were dispatched to wildfires without the requisite pack testing. S. Johnson conducted a thorough investigation that included interviewing several Mountain Forestry employees and reviewing voluminous documents that when considered as a whole lend credence to Coronado’s statements. For instance, his statements were corroborated by Virgil Urena’s statements to S. Johnson that Coronado did not complete the annual refresher course and neither Coronado nor Ayala took a pack test before both were dispatched to the wildfires. In turn, Urena’s statements were bolstered by his original training records that showed he reported no pack test scores for Coronado or Ayala. In contrast, Respondents provided conflicting information throughout S. Johnson’s investigation that was not reconciled at hearing.

Through Michael Cox’s and Jose Avila’s collective sworn testimony in a previous court proceeding, Respondents contended that Coronado was pack tested on or about

May 24, 2004, along with Avila and Ayala at Mountain Forestry's office in Independence. During the hearing, however, Cox admitted he added pack test scores and dates on Urena's training records for Coronado and Avila that purportedly demonstrate Avila completed a pack test on March 15 and Coronado completed a pack test on March 25, 2004. Although he testified he personally pack tested Avila on March 15, he admitted he prepared and signed Avila's firefighter identification card that showed Avila purportedly completed a pack test on February 29, 2004. However, Avila's name does not appear on any of the company manifests that list the firefighters who pack tested on February 29. In a prior statement to S. Johnson, Cox claimed, and F. Cisneros confirmed, that although he had written a pack test score and completion date for Coronado on Urena's training roster, F. Cisneros actually administered Coronado's pack test. Cox also claimed that Mountain Forestry employee Brandon Creson had recorded a May 30, 2004, pack test score and completion date for Leticia Ayala on Urena's training roster. Creson confirmed in a follow-up interview with S. Johnson that he had written Ayala's score on the training roster, but stated he had administered pack tests to both Coronado and Ayala on that date. Later, in sworn testimony in another proceeding, Creson stated he had a discussion with Coronado at the Reno Standby wildfire sometime in "June" 2004 and that he asked Coronado if he had taken a pack test and Coronado replied that, "yes," he had taken a pack test. Despite the opportunity to do so, F. Cisneros and Creson did not testify at the hearing; consequently, the forum infers that their testimony would not have refuted S. Johnson's testimony in any way.

Respondents' conflicting versions of how and when the three firefighters completed pack tests are further corrupted by their certified payroll reports that show and confirm Coronado's statement to S. Johnson that Coronado was tree planting in

Warm Springs, Oregon, or Grangeville, Idaho, on the day Ayala was purportedly pack tested.^{xviii} Moreover, credible evidence established Coronado reported to S. Johnson that he was working in Astoria on a “bud-capping” project on March 25, 2004 - the date Respondents contend he completed a pack test administered by F. Cisneros.

Finally, Respondents' argument that Coronado was a “disgruntled” employee who falsely accused Respondents pales in light of the credible evidence establishing that several other Mountain Forestry employees also were not pack tested. Coronado may have complained because he was disgruntled, but that does not make him a liar as Respondents contend. Based on a preponderance of the credible evidence herein, the forum concludes that Respondents violated the terms and conditions of the 2004 Agreement by dispatching Coronado and Ayala to three fires without the requisite pack test. Or, put in Respondents' terms, they violated what is “material to the contract” and sent two firefighters who were not “prepared for dispatch” to fight three wildfires. In any event, Respondents are liable for three violations of ORS 658.440(1)(d). (Three violations @ \$500 per violation equal \$1,500 in civil penalties)

Credible evidence also established that Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, and Emilio Martinez were not pack tested as Respondents represented in the company manifests they provided to ODF in June 2004. During his investigation, S. Johnson found discrepancies between the training rosters Virgil Urena prepared and the company manifests Michael Cox prepared that showed the firefighters were pack tested on specific dates. In an interview, Urena confirmed that he had not pack tested any of the named firefighters except for Emilio Martinez who was pack tested on July 12 and not on March 14 as the company manifest represented. Respondents did not offer any credible evidence demonstrating otherwise and the forum concludes that Respondents knowingly and purposely misrepresented that

Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, and Emilio Martinez were prepared for dispatch as of June 1, 2004. However, in order to prove its specific allegation, the Agency was required to prove that each of those firefighters was dispatched on a fire without the requisite pack testing. The Agency presented no evidence that establishes Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, or Emilio Martinez worked on a wildfire after the company manifests were prepared and presented to ODF. Consequently, Respondents are not liable for the violations as pled by the Agency.

3. Respondents, in their capacity as a farm/forest labor contractor, entered into a legal and valid agreement with BOLI each time they applied for renewal of their farm/forest labor contractor license and Respondents violated those agreements each time they failed to obtain an annual employment certificate from 2000 through 2004, in violation of ORS 653.307 and OAR 839-021-0220, and each time they hired a minor child to perform hazardous work in violation of OAR 839-021-0102(p).

Credible evidence established that each year from 2000 through 2004, F. Cisneros signed an annual license renewal application form while licensed as a farm/forest labor contractor. Each of those years, F. Cisneros, on his and Mountain Forestry's behalf, confirmed under oath Respondents' agreement with BOLI to "at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries." To the extent that Respondents were a duly licensed farm/forest labor contractor each time they applied for renewal and certified to BOLI they would abide by all applicable laws and BOLI rules, the forum concludes they were acting in their capacity as a farm/forest labor contractor within the meaning of ORS 658.440(1)(d). Respondents' argument that they were not acting in their capacity as a farm/forest labor contractor when they applied for their renewal licenses has no merit. The Agency seeks \$8,000 in civil penalties for the alleged breach of Respondents'

agreement with BOLI to abide by all applicable laws and BOLI rules in violation of ORS 658.440(1)(d).

Employment Certificates

There is no dispute that Mountain Forestry employed firefighters during the years 2000 through 2004. As an employer and pursuant to their agreement with BOLI, Respondents were obliged to abide by Oregon child labor laws, including those requiring employment certificates.

ORS 653.307(2) provides:

“An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:

“(a) The estimated or average number of minors to be employed during the year.

“(b) A description of the activities to be performed.

“(c) A description of the machinery or other equipment to be used by the minors.”

OAR 839-021-0220 provides, in pertinent part:

“(1) Unless otherwise provided by rule of the commission, no minor 14 through 17 years of age may be employed or permitted to work unless the employer:

“(a) Verifies the minor’s age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and

“(b) Complies with the provisions of this rule.

“(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland, OR 97232, (971) 673-0836.

“(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.

“ * * * * *

“(3) The employer must post the validated employment certificate in a conspicuous place where all employees can readily see it. When the employer employs minors in more than one establishment, a copy of the validated employment certificate must be posted at each establishment. As used in this rule, ‘establishment’ means a distinct physical place of business. If a minor is employed by one employer to perform work in more than one location, the minor will be considered employed in the establishment where the minor receives management direction and control.

“ * * * * *

“(5) The employer must apply for a validated employment certificate once each year by filing a renewal application on a form provided by the Bureau of Labor and Industries. The renewal application must be received by any office of the bureau no later than the expiration date of the validated employment certificate.”

A preponderance of credible evidence established that Mountain Forestry employed or permitted at least nine minors under 18 years old to work during the years 2000 through 2003. Mountain Forestry’s records revealed the minors ranged in age from 15 through 17 years old and included F. Cisneros’s son, Victor Cisneros, born July 27, 1984; F. Cisneros’s nephew, Samuel Cisneros, born September 8, 1983; Ramon Herrera Cisneros, born October 14, 1987; Andrew Williamson, born January 4, 1984; Jose Manuel Herrera-Leon, born February 23, 1983; David Trujillo, born March 14, 1984; Gerardo Herrera, born November 29, 1984; Ryan Sims, born April 28, 1985; and Benjamin Jones, born September 8, 1986.

Agency investigator Wojtyla credibly testified that during his investigation his “research” revealed no record of Respondents having obtained an employment certificate between 2000 and 2003 or at any other time. Wojtyla’s unrefuted testimony, albeit succinct, was sufficient to prove the Agency’s allegation. Respondents’ argument that “the Agency offered no evidence to prove [Respondents] had no employment certificate” and failed its burden of production has no merit. Wojtyla’s credible testimony *is* evidence and it was not disputed or refuted in any manner by Respondents.

By hiring nine minors between 2000 and 2003, Respondents had an affirmative duty to apply for and obtain an employment certificate. Based on Wojtyla's testimony that his records search revealed no evidence that Respondents obtained an employment certificate and absent conflicting evidence, i.e., an employment certificate for each of those years, the forum concludes that Respondents violated ORS 653.307 and OAR 839-021-0220 by failing to apply for and obtain an employment certificate. By failing to conduct their business as a farm/forest labor contractor in accordance with Oregon's child labor laws each year between 2000 and 2003, Respondents violated the terms and conditions of their agreement with BOLI. Accordingly, Respondents are liable for four violations of the statute and rule, one violation for each year Respondents failed to obtain the required employment certificate.^{xix} (Four violations @ \$1,000 per violation equal \$4,000 in civil penalties)

Employing Minors in a Hazardous Occupation

Under Oregon child labor rules, firefighting is a hazardous occupation and employers are prohibited from employing minors under 16 years old to engage in firefighting activities. OAR 839-021-0102(p). Respondents stipulated that V. Cisneros engaged in firefighting activities prior to his 16th birthday in 2000. Respondents' own records establish that V. Cisneros worked in a supervisory capacity on at least three wildfires when he was 15 years old. Respondents' records also establish they employed at least one other minor, R. Cisneros, who engaged in firefighting activities in 2003. Respondents' records show R. Cisneros worked as a FFT2 on at least two wildfires when he was 15 years old. By permitting two minors less than 16 years old to engage in firefighting activities, Respondents violated OAR 839-021-0102(p) and, in turn, breached their agreement with BOLI to conduct their farm/forest labor contractor business in accordance with all applicable Oregon laws and the Commissioner's rules,

thereby violating ORS 658.440(1)(d). (Two violations @ \$2,000 per violation equal \$4,000 in civil penalties)

B. Respondents Willfully Made, or Published and Circulated, False, Fraudulent, or Misleading Representations or Information to ODF and BOLI.

The Agency alleged in paragraph five of the Notice of Intent, in pertinent part:

“Respondents made false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person, including but not limited to, the Bureau of Labor and Industries and the Oregon Department of Forestry. Respondents, among other things and as mentioned herein, misrepresented that workers were properly trained, the Respondents were complying with all state and federal laws and that Respondents were abiding by all lawful agreements and contract [sic]. Respondents published and caused to be circulated these misrepresentations on numerous occasions. This is in violation of ORS 658.440(3)(b).”

ORS 658.440(3)(b) provides, in pertinent part:

“(3) A person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, may not:

“ * * * * *

“(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person.”

Respondents argued that ORS 658.440(3)(d) does not apply to statements made or published to government agencies and that the Agency failed to plead any definition of “person” that would apply to the facts as pled. The forum need not decide that issue in this case. The Agency provided no evidence or argument that established how the false, fraudulent, or misleading representations that were established in this case are related to the “terms, condition or existence of employment” under ORS 658.440(3)(b). The Agency did not address that issue in any manner at hearing. Thus, the Agency failed to establish how Respondents violated ORS 658.440(3)(b). However, as discussed elsewhere herein, the forum finds Respondents made false and misleading

representations to ODF and BOLI that may be considered as aggravating circumstances when assessing civil penalties or determining Respondents' character, competence or reliability. *In the Matter of Andres Ivanov*, 11 BOLI 253, 266 (1993).

CIVIL PENALTIES FOR FARM/FOREST LABOR VIOLATIONS

The Agency proposed civil penalties for Respondents' failure to comply with the terms and conditions of lawful agreements entered into with ODF (\$500 per violation), in violation of ORS 658.440(1)(d), and Respondents' failure to comply with the terms and conditions of lawful agreements entered into with BOLI (\$8,000 for four violations), in violation of ORS 658.440(1)(d).

The Commissioner is authorized to assess a civil penalty not to exceed \$2,000 for each of the farm/forest labor violations found herein. ORS 658.453(1)(c) and OAR 839-015-0508(1)(f). When determining the amount of civil penalty to impose, the Commissioner may consider aggravating and mitigating circumstances that include, but are not limited to:

- “(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes and rules;
- “(b) Prior violations, if any, of statutes and rules;
- “(c) The magnitude and seriousness of the violation;
- “(d) Whether the contractor or other person knew or should have known of the violation.”

OAR 839-015-0510(1). Respondents were required to provide the Commissioner with any mitigating evidence. OAR 839-015-0510(2). Ignorance of the law, inexperience, and press of business are not mitigating circumstances. *In the Matter of Charles Hurt*, 18 BOLI 264, 276-77 (1999); *In the Matter of Francis Kau*, 7 BOLI 45, 54-55 (1987).

1. Failure to Comply with ODF Agreements

The Agency established by a preponderance of credible evidence that Respondents violated the terms of their agreement with ODF each time they 1)

employed firefighters who did not meet the minimum age or training requirements (68 violations), 2) failed to notify ODF before administering required pack tests (16 violations), and 3) sent two firefighters to three wildfires without the required pack testing (3 violations), for a total of 87 violations. Although the maximum civil penalty is \$2,000 per violation, the Agency sought a nominal amount of \$500 for each violation of ORS 658.440(1)(d).

Credible evidence demonstrated that Respondents knew or should have known of the violations. Respondents are charged with knowing contract requirements when they put in a bid for work. See *In the Matter of Charles Hurt*, 18 BOLI at 276-77. (“By bidding on and accepting the award of the contract, respondents represented that they were able to perform it”). In this case, Respondents agreed they would provide firefighting crews that were of legal age and properly trained in accordance with contract requirements. Not only did they breach that agreement, they purposely covered up any deficiencies to avoid sanctions, including falsifying training documents and task books. In the meantime, Respondents dispatched at least four untrained or improperly trained firefighters to fight wildfires on at least 68 occasions over a period spanning four years. The violations are particularly egregious because they included placing at least two untrained 15 year old firefighters at risk in a hazardous occupation and placed numerous other crew members and property at risk because at least one of the untrained 15 year olds was working in a supervisory capacity.

Credible evidence also established that Respondents knowingly misrepresented to ODF the pack test status of at least seven firefighters and subsequently dispatched at least two firefighters to wildfires who had not completed a pack test. Additionally, the firefighters were dispatched after fire director Michael Cox issued each of them a firefighter identification card showing false pack test scores for both. The violations are

further aggravated by credible evidence showing Cox also issued a firefighter identification card to a third firefighter showing a fabricated pack test score.

While there is evidence that Respondents, on some occasions, complied with the Agreement's requirement to provide advance notice of pack testing, there are at least 16 pack test dates in 2004 that were not reported to ODF. The violations are serious because they hinder ODF's ability to cross check the pack test information with the crew manifests and firefighter identification cards in order to prevent the type of deception that occurred in this case.

As an additional aggravating circumstance, the Agency pled and proved that Respondents had several prior violations of Oregon farm labor contracting laws that resulted in a written consent order, demonstrating Respondents' knowledge of their joint obligations as a farm/forest labor contractor. There is no evidence that Respondents took any actions to ensure their compliance with the ODF Agreements or the laws governing their farm/forest labor contracting activities.

Finally, the Agency established by clear and convincing evidence that Respondents knowingly and purposely misrepresented the training and pack testing status of several firefighters they supplied to ODF pursuant to the Agreements entered into between 2000 and 2004. Each time Respondents presented a manifest they knew contained false social security numbers or pack test scores, or provided a fabricated firefighter file to ODF during an inspection, they were willfully making or causing to be made a false, fraudulent or misleading representation. Although the forum has determined that the Agency failed to establish that Respondents' false, fraudulent, or misleading representations, as pled, constituted a violation of ORS 658.440(3)(b), this forum has previously held that "if such misrepresentations were made, it would constitute an aggravating circumstance to consider when assessing civil penalties for

other violations * * * [and] would reflect badly on [a respondent's] credibility and character." *In the Matter of Andres Ivanov*, 11 BOLI 253, 266 (1993). Consequently, the forum concludes Respondents knowingly, intentionally, and voluntarily made multiple misrepresentations to ODF and BOLI by publishing and circulating false documentation that further aggravates the seriousness and increases the magnitude of their multiple violations of ORS 658.440(3)(b).

All of the violations were of such magnitude and seriousness that the forum would have imposed the maximum civil penalty allowed for each violation. However, the Agency sought \$500 per violation and the forum is precluded from awarding an amount that exceeds the scope of the Agency's pleading. Consequently, the forum concludes that Respondents are liable for \$43,500 as a civil penalty for 87 violations of ORS 658.440(1)(d), computed at \$500 per violation.

2. Failure to Comply with BOLI Agreements

The Agency alleged and proved five violations of ORS 658.440(1)(d) based on Respondents' failure to comply with the terms and conditions of lawful agreements entered into with BOLI, and, whether due to mathematical error or oversight, sought the maximum \$2,000 civil penalty per violation for four, instead of five, violations. The total penalty is limited by the pleading; however, the forum may impose a lesser amount than sought for four violations in order to impose a civil penalty for the fifth violation that was properly alleged and proved.

Employment Certificate violations

Credible evidence established that Respondents knew or should have known of the violations. First, Mountain Forestry's fire director Michael Cox admitted Respondents regularly hired 16 year old firefighters and that hiring minors was a prevalent practice in the industry. Second, Cox's admission that he prepared most of

Mountain Forestry's paperwork and F. Cisneros's signature on every license renewal application submitted from 2000 through 2004 indicate Respondents knew they were obliged to comply with all applicable Oregon laws and commissioner's rules. In any event, ignorance of child labor laws does not mitigate the violations. Each time Respondents applied for license renewal, they assured BOLI that they would conduct their business as a farm/forest labor contractor in accordance with all applicable laws and, thus, had a duty to know and comply with those laws.

The violations are further aggravated by their seriousness. Failure to comply with the child labor laws by not obtaining an employment certificate hinders the Commissioner's ability to monitor and protect minors in the workplace, particularly a hazardous workplace. In this case, Respondents allowed at least two minors to work under hazardous work conditions. The Commissioner's charge to protect minors was seriously thwarted by Respondents' failure to comply with the law. Respondents breached its agreement with BOLI each year they failed to obtain an employment certificate. In the absence of mitigating circumstances, the forum concludes that \$4,000 (\$1,000 for each of four violations) is an appropriate civil penalty.

Hazardous workplace violations

Respondents knew or should have known they were violating child labor laws when they knowingly and purposely employed at least two underage firefighters in violation of OAR 839-021-0102(p). There is no question that F. Cisneros knew his son's age when Mountain Forestry allowed him to supervise firefighter crews on three wildfires when he was only 15 years old.^{xx} Not only was his son placed at risk, but his son's crew was at risk as well, given his son's tender years and complete lack of training or experience. By knowingly breaching their agreement with BOLI to comply with all applicable state laws and Commissioner's rules, Respondents not only

demonstrated a cavalier attitude about the import of the renewal application's provisions and conditions, but also undermined the Commissioner's ability to enforce the child labor laws. Respondents presented no mitigating evidence and the forum concludes that the violations are of such seriousness that the maximum penalty of \$4,000 (\$2,000 for each of two violations) is appropriate.

CHILD LABOR VIOLATIONS

The forum has already concluded that Respondents violated ORS 653.307 and OAR 839-021-0220 by failing to obtain an annual employment certificate to employ minors each year beginning 2000 through 2004. Likewise, the forum concluded that Respondents violated OAR 839-021-0102(p) by employing at least one minor child in 2000 to engage in firefighting activities.^{xxi} The forum determined that by violating the Oregon child labor statutes and rules, Respondents violated specific provisions of farm/forest labor contracting law warranting civil penalties under ORS chapter 658. However, Respondents' child labor violations are distinct from the farm/forest labor violations and therefore are subject to separate civil penalties under ORS 653.370 and OAR 839-019-0025.

Respondents argued that Mountain Forestry is exempt from civil penalties as they pertain to V. Cisneros because his employment fell under the "familial relationship exception to the rule against employing a minor in a hazardous occupation." Respondents cite ORS 653.365, which states, in pertinent part:

"The provisions of ORS 653.370 do not apply when minors under 18 years of age are employed under the following circumstances:

- (1) The minor is employed by the parent of the minor; or
- (2) The minor is employed by a person standing in the place of the parent of the minor and who has custody of the minor."

However, Respondents' records, including certified payroll records and quarterly tax reports, unequivocally establish that Mountain Forestry employed V. Cisneros. On its

face, the exemption is not available to a corporate entity even if the minor's parent is the corporation's majority shareholder. Respondents cite no authority that states otherwise and the forum concludes that the violations involving V. Cisneros are subject to civil penalties under ORS 653.370.

CIVIL PENALTIES FOR CHILD LABOR VIOLATIONS

The Agency alleged and proved five violations, one violation for each year Mountain Forestry failed to obtain a validated employment certificate and one violation for employing a minor to work in a hazardous occupation. Each violation is a separate and distinct offense. OAR 839-019-0015. Pursuant to OAR 839-019-0025(1), the maximum civil penalty for any one violation is \$1,000 and the actual amount depends upon "all the facts and any mitigating and aggravating circumstances." Additionally, the minimum civil penalty for employing minors without a valid employment certificate is \$100 for the first offense, \$300 for the second offense, and \$500 for the third and subsequent offenses. OAR 839-019-0025(2).

When determining the actual amount, the forum must consider Mountain Forestry's history in taking all necessary measures to prevent or correct violations; any prior violations, if any; the magnitude and seriousness of the violations; the opportunity and degree of difficulty in complying with the statutes and rules; and any mitigating circumstances. OAR 839-019-0020. Mountain Forestry was required to provide the Commissioner with evidence of any mitigating circumstances. OAR 839-019-0020(2).

In this case, the Agency alleged and established that Mountain Forestry knew or should have known of the violations, took insufficient measures to prevent or correct them, and that the violations were serious. The Agency sought the maximum penalty of \$1,000 for each of five violations. Mountain Forestry offered no evidence of mitigating circumstances.

Mountain Forestry had an affirmative duty to verify the age of its minor employees by requiring the minors to produce “acceptable proof of age.” OAR 839-021-0220(1)(a). According to Michael Cox, Mountain Forestry took copies of each firefighter’s personal identification and placed it in a file along with a completed I-9 form. Cox further testified that he has known F. Cisneros’s son, Victor, since he was at least 10 years old. F. Cisneros certainly knew his son’s age and more likely than not knew the age of his nephew, R. Cisneros. Additionally, Cox testified that from 2000 through 2002 it was common practice in the industry to use 16 year old firefighters on wildfires. Those facts establish that Mountain Forestry knew it was employing minors from 2000 through 2002 and actually had “proof of age” for those minors. There is no evidence that Mountain Forestry was impeded in any way from obtaining an annual employment certificate each year that it employed minors and ignorance of the law is not a mitigating circumstance. *In the Matter of Panda Pizza*, 10 BOLI 132, 144 (1992). Moreover, given clear and convincing evidence establishing that Mountain Forestry falsified documents to conceal the age and inexperience of its minor employees, the forum concludes that Mountain Forestry not only made no effort to prevent or correct the violations, it deliberately attempted to cover up the violations. Respondents’ calculated deception further aggravates the violations.

While there is no record of violations prior to 2000 in evidence, Mountain Forestry’s failure to obtain an annual employment certificate over a four year period^{xxii} while employing at least nine minors during that time indicates a continuing disregard for Oregon child labor laws that enhances the seriousness of the violations.

Finally, a preponderance of credible evidence established that Mountain Forestry permitted at least two minors (V. Cisneros and R. Cisneros) to engage in firefighting activities while under the legal age allowed, placing not only the minors at risk but all

other crew members as well. No one disputed at hearing that firefighting is a dangerous occupation that requires a minimum skill and experience level that cannot safely be met by hiring underage workers. As a matter of law, firefighting is a hazardous occupation and employers may not permit anyone under 16 years old to engage in that activity. Those facts further demonstrate the seriousness of Mountain Forestry's failure to obtain annual employment certificates that give the Commissioner the ability to monitor the employment of minors in that particularly hazardous occupation.

Having considered the above circumstances and, in the absence of mitigating circumstances, the forum concludes that \$1,000 for each year Respondents failed to obtain the required employment certificate and \$1,000 for employing at least one minor in a hazardous occupation^{xxiii} are appropriate civil penalties in this case. Credible evidence established that Mountain Forestry employed the minors and, hence, is liable for \$5,000 for the violations of ORS 653.307, OAR 839-021-0220, and OAR 839-021-0102(p).

REFUSAL TO RENEW 2004 LICENSE APPLICATION

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence and reliability and any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. When a license applicant demonstrates that the applicant's character, competence, and reliability make that applicant unfit to act as a farm/forest labor contractor, the Agency "shall propose that the license application be denied." OAR 839-015-020(2). The Commissioner will not issue a license unless satisfied as to the applicant's character, competence, and reliability. ORS 658.420(3). *See also, In the Matter of Robert Gonzales*, 12 BOLI 181, 199 (1994)(the commissioner was not

satisfied with respondents' character, competence and reliability and denied renewal of a license to act as a farm/forest labor contractor).

For the purposes of ORS 658.420, the forum adopts the pertinent definitions set forth in Webster's Third New International Dictionary for "character," "competence," and "reliability." As they pertain to farm/forest labor contractors, *character* means "9: reputation esp when good * * * 10: a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force and judgment,"^{xxiv} *competence* means "3a: the quality or state of being functionally adequate or of having sufficient knowledge, judgment, skill, or strength (as for a particular duty or in a particular respect),"^{xxv} and *reliability* means "the quality or state of being reliable," i.e., "syn DEPENDABLE, TRUSTWORTHY, TRUSTY, TRIED: RELIABLE describes what can be counted on or trusted in to do as expected or to be truthful * * * DEPENDABLE is a close synonym for RELIABLE and may indicate a steady predictability or trustworthiness or reliability worthy of fullest confidence * * * TRUSTWORTHY indicates meriting confidence for proved soundness, integrity, veracity, judgment, or ability * * * TRUSTY implies that the person or thing described has been tested and found dependable * * * TRIED likewise stresses proved dependability."^{xxvi}

Following an investigation, the Agency alleged Respondents were unfit to act as a farm/forest labor contractor because they lacked the requisite character, competence and reliability. Pursuant to OAR 839-015-0520(2), the Agency proposed that the Commissioner refuse to renew Respondents' farm/forest labor contractor license based on 1) their multiple violations of ORS chapter 658 provisions (OAR 839-015-0520(3)(a)); 2) their "willful" violations of the terms and conditions of "numerous agreements and contracts over a number of years" (OAR 839-015-0520(3)(c)); 3) their willful

misrepresentations or false statements in their license applications “by agreeing to comply with all laws and rules when in fact they were not in compliance” (OAR 839-015-0520(3)(h)); and 4) their course of misconduct “over a period of years in their relations with individuals and organizations, including but not limited to [BOLI] and [ODF], with whom Respondents conduct business” (OAR 839-015-0520(3)(m)). Any one of the alleged actions, if proved, demonstrates that Respondents' character, competence or reliability make them unfit to act as a farm/forest labor contractor. OAR 839-015-520(3).

A. Respondents violated provisions of ORS 658.405 to 658.485 - OAR 839-015-0520(3)(a).

Each time Respondents entered into a valid and legal agreement with ODF to supply firefighters who met the minimum training, fitness, and age requirements specified in each agreement, they agreed to comply with the terms and conditions of those agreements pursuant to ORS 658.440(1)(d). Similarly, each time Respondents applied for renewal of their farm/forest labor license application, they agreed with BOLI to comply with the provisions of ORS 658.405 to 658.485.

A preponderance of credible evidence established that Respondents violated multiple provisions of each Agreement they entered into between 2000 through 2004. During that time, Respondents engaged at least two firefighters who were underage and at least four firefighters who had insufficient or no training to perform firefighting activities on wildfires, violating their agreement with ODF to provide properly trained firefighters who meet the minimum age and training requirements. Moreover, by providing two firefighters who did not meet the state's minimum age requirement, Respondents violated their agreements with both ODF and BOLI. Respondents employed numerous minors from 2000 through 2004 without first obtaining annual validated employment certificates required under Oregon child labor laws, violating their

agreements with ODF and BOLI to abide by applicable state laws and rules. In 2004, Respondents failed to give the requisite advance notice to ODF prior to administering pack tests on at least 16 occasions, violating their agreement with ODF.

Respondents' multiple violations of ORS 658.440(1)(d) demonstrate that Respondents are not reliable because they cannot be trusted to do what is expected to hold a farm/forest labor contractor's license, i.e., comply with the applicable laws. Moreover, the violations show they lack the requisite blend of self-discipline, ethics and judgment that compels contractors to honor their contracts, pursuant to ORS 658.440. Respondents' deficiencies confirm they lack sufficient knowledge, judgment or skill to perform the multiple responsibilities of farm/forest labor contracting. For those reasons, the forum concludes that Respondents lack the reliability, character, and competence as defined herein to act as a farm/forest labor contractor.

B. There is no evidence to support the Agency's allegation that Respondents willfully violated terms and conditions of work agreements or contracts – OAR 839-015-0520(3)(c).

The forum has already concluded that neither the Agreements nor the license renewal applications constitute employment agreements or contracts. For similar reasons, the forum concludes they do not constitute "work" agreements or contracts. The term "work agreement or contract" is not ambiguous and the only reasonable interpretation is that the term is synonymous with employment agreement. Had the Agency intended the rule to mean *any* agreement or contract, it would have so stated or refrained from using the term "work" which is synonymous with "employment." The rule on its face and when read in context with the other related rules refers to employment contracts and is not applicable to this case.

C. Respondents willfully misrepresented on their license application that they would comply with all laws and rules as farm/forest labor contractors – OAR 839-015-0520(3)(h).

For the purposes of OAR 839-015-0520(3)(h), “knowingly” or “willfully” means:

“action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person ‘should have known the thing to be done or omitted’ if the person has knowledge of facts or circumstances which, with reasonable diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor * * * is presumed to know the affairs of their business operations relating to farm or forest labor contracting.”

OAR 839-0505(1). Misrepresentation is defined as “an assertion made by a license applicant [that] is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the commissioner’s decision to grant or deny a license.” *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 45-46 (2003), *revised final order on reconsideration, aff’d w/out opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639 (2005).

In this case, the Agency was required to prove that Respondents, through Mountain Forestry president F. Cisneros, 1) made an assertion on at least one license renewal application that was not in accord with the facts; 2) Respondents knew or should have known the falsity of the assertion; and 3) the assertion was of a substantive fact influential in the commissioner’s decision to grant or deny a license. The Agency was not required to prove intent to deceive or mislead to establish a willful misrepresentation. *Id.* at 46.

Credible evidence established that on July 15, 2000, F. Cisneros, on his and Mountain Forestry’s behalf, asserted under oath that Respondents would comply with the provisions of ORS 658.405 to 658.485 and other “applicable laws of the State of

Oregon and rules of the Commissioner of the [BOLI].” Each year, thereafter, through 2004, Respondents made the same assertion under oath each time they applied for license renewal.

Credible evidence also established that when F. Cisneros signed the renewal application on July 15, 2000, he knew or should have known of the following facts: 1) F. Cisneros’s son, V. Cisneros, was 15 years old when Mountain Forestry employed him to perform work as a squad boss on at least three wildfires between June 18 and July 27, 2000; 2) V. Cisneros had not received any training and was not certified as a FFT2 or a FFT1 squad boss prior to his wildfire assignments in June and July 2000; 3) the 2000 Agreement required that entry level firefighters and squad bosses complete the S-130 and S-190 training before assignment to a wildfire; 4) state child labor laws prohibited any child under 16 years old from engaging in firefighting activities. Moreover, V. Cisneros’s purported firefighter records from 2000 through 2004 demonstrated that V. Cisneros never made up the deficiencies in his training, and, thus, never received the preliminary training necessary to fight wildfires in accordance with any of the Agreements. Based on those facts, and because F. Cisneros knew his son was underage and an untrained firefighter before and after he signed an oath in 2000 stating he would comply with applicable Oregon laws and Commissioner’s rules, the forum infers that F. Cisneros knew the falsity of his assertion in 2000 and of each similar assertion he made under oath thereafter through 2004.

Additionally, credible evidence established that from 2000 through 2004, Mountain Forestry, in its capacity as a farm/forest labor contractor, employed minors to perform firefighting activities without obtaining the requisite employment certificates. Credible evidence established that Mountain Forestry knew it was employing minors under 17 years old and that it knew or should have known of the requirement to obtain

an employment certificate each year that it employed minors. Hence, each year, from 2000 through 2004, F. Cisneros knew, contrary to his representation on the license renewal application, that Respondents were not complying with all applicable State laws and the Commissioner's rules and presumably knew he was not going to comply at anytime thereafter.

Finally, F. Cisneros's assertion was of a substantive fact influential in the commissioner's decision to grant or deny a license. In fact, a contractor's commitment to comply with all applicable State laws and Commissioner's rules is the cornerstone of the farm/forest labor contractor license. Without that commitment, the Commissioner would not issue the license at all.

The Agency proved by a preponderance of evidence that Respondents willfully misrepresented that they would comply with all laws and rules as a farm/forest labor contractor. Respondents' willful misrepresentation shows they lack 1) the moral strength and ethics required to demonstrate good character, 2) the integrity and judgment required to demonstrate trustworthiness and reliability, and 3) the necessary judgment to carry on business as a competent farm/forest labor contractor. Consequently, the forum concludes Respondents are not fit to act as a farm/forest labor contractor.

D. Respondents engaged in a course of misconduct in its relations with ODF and BOLI – OAR 839-015-0520(3)(m).

For the purpose of OAR 839-015-0520(3)(m), any violation of applicable Oregon laws or the BOLI commissioner's rules by a contractor acting in the capacity of a farm/forest labor contractor is *per se* misconduct. A preponderance of credible evidence established that between 2000 and 2004 Respondents repeatedly disregarded the terms and conditions of their agreements with ODF and BOLI by providing wildfire suppression crews that included improperly trained or untrained individuals and, in

some cases, underage individuals, to fight wildfires, placing other crews and their workers at risk.

Moreover, credible evidence established that Respondents repeatedly violated the terms of the 2004 Agreement by failing to notify ODF that they were administering pack tests and by sending some of their firefighters to fight wildfires without the required testing.

Additionally, they violated their agreements with BOLI each time they certified they would comply with Oregon law because they knew they were already in violation beginning in 2000 when they created a firefighter record for 15 year old V. Cisneros out of whole cloth. From 2000 forward, Respondents continued to falsify records, including altering identification cards to cover up their failure to pack test certain individuals. The Agency was not required to prove Respondents' motive for fabricating documents, but Cox's testimony is telling: Respondents' counsel asked: "So, for the year 2003, given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify records to present qualified crew bosses and squad bosses?" Cox replied, "That would have been the year that you would have -- if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003."

Respondents' course of misconduct, characterized by Respondents' repeated disregard for its commitments to ODF and BOLI and their ongoing efforts to cover up the deficiencies in their training and recordkeeping, is sufficient to demonstrate again that Respondents lack the moral strength and ethics required to demonstrate good character and the reliability required to show they can be counted on or trusted to do what is expected of a farm/forest labor contractor. For all of the reasons stated herein, the forum concludes that Respondents lack the character, competence and reliability to

act as a farm/forest labor contractor and the forum hereby refuses to renew Respondents' license for a period not to exceed three years.

EXCEPTIONS

Pursuant to OAR 839-050-0380, Respondents timely filed 23 exceptions to the proposed order.

Exception 1 – Capacity as a Farm/Forest Labor Contractor

Respondents dispute the forum's statement in the opinion that "Respondents *agree* they entered into legal and valid agreements with ODF from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor," and argue the Agency was required to prove the allegation but failed to do so. Respondents did not deny the allegation in their answer and they did not raise the issue during hearing. The allegation was therefore deemed admitted pursuant to OAR 839-050-0130(2). The forum is precluded from considering new issues raised in Respondents' exceptions to the Final Order. OAR 839-050-0380(1). However, the forum has replaced the word "agree" with language that more accurately describes the finding and conclusion set forth in this Final Order. Respondents' exception 1 is **DENIED**.

Exception 2 – Number of Violations

Respondents except to the number of violations found in the order. Respondents correctly point out the apparent inconsistencies in the total number of violations stated in the order's synopsis and the actual number found in the body of the order. This Final Order corrects any inconsistencies due to mathematical errors or miscalculations in the number of violations found and in the civil penalty amounts assessed herein.

Exception 3 – Coronado and Ayala – Federal Contracts

Respondents object to the forum's conclusion that Alex Coronado and Leticia Ayala were dispatched to wildfires in Nevada and California under the ODF Interagency

Agreement. To support their argument, they rely on testimony taken out of context and mischaracterized. Contrary to Respondents' contention, Don Moritz never "confirmed that Coronado's statements to him arose under Mountain Forestry's national contract." Moritz testified that when Coronado initially filed the complaint he was working on a national contract and no longer working for Mountain Forestry. Although Moritz noted that some of Coronado's complaints involved unrelated housing and food issues that were covered federally and not subject to ODF's jurisdiction, he repeatedly stated that ODF verified that Coronado's pack test complaint was related to his work under the "regional agreement," i.e., the Interagency Agreement. There is no credible evidence in the record to support Respondents' contention that Coronado and Ayala were working under a "national contract" rather than the regional agreement when they were dispatched to wildfires in Nevada and California in 2004. Respondents' exception 3 is **DENIED**.

Exception 4 – Ultimate Finding of Fact 51

Respondents contest the finding that firefighters were required to complete an annual pack test "prior to providing the June 1 manifest." That finding has been clarified to more accurately reflect S. Johnson's testimony that contractors must provide a company manifest by June 1 listing all firefighters who have been properly trained and pack tested and who are ready for dispatch.

Exception 5 – Length of Time to Issue Proposed Order

Respondents take exception to the length of time between the close of hearing and issuance of the proposed order. Respondents misrepresent facts related to a separate proceeding that is not part of this record and characterize the time span as "vexatious, capricious, and oppressive." Their argument that the purported "delay" constitutes a violation of Article 1, § 10 of the Oregon Constitution apparently was

considered and rejected in another forum and will not be considered here.^{xxvii} In any event, Respondents have made no showing that the forum unreasonably delayed making a decision in this case. The record's scope is self-evident and Respondents are well aware that the 11 day hearing did not occur in a vacuum. Respondents bear some responsibility for the extensive record and complexity of the issues in this case. Indeed, Respondents' counsel, in a post-hearing letter to the forum, stated:

“It was a long and tiring hearing but I felt it was conducted with relatively good order and organization and although the record is long it is complete with full regard and cite to the law and well developed facts.

“I know that the proposed order will take some time to prepare because of *the required length of consideration by the forum * * **” (emphasis added)

Ensuring full and fair consideration of the issues and evidence presented in this case required time that was necessarily shared with other responsibilities and duties. Moreover, Respondents made no showing they were prejudiced by any perceived delay. The record shows the Agency permitted Respondents to continue operating under their farm/forest labor contractor's license during the pendency of this proceeding and Respondents were in no way denied the opportunity to engage in their chosen business. Consequently, the forum concludes that given the scope and nature of this case and the lack of prejudice to Respondents, the time span between the close of hearing and the issuance of the proposed order was not inordinate or unreasonable. Respondents' exception 5 requesting that the case be dismissed is **DENIED**.

Exception 6 – Respondents' Exhibits

Respondents except to the exclusion of Respondents exhibits marked R-4 (Samuel Cisneros's file), R-5 (Jose Avila's transcribed testimony), R-12 (A. Johnson's "to whom it may concern" letter), R-13 (letters and evaluations pertaining to reforestation contracts), and R-20 (John Venaglia's letter to F. Cisneros). According to the record, Respondents withdrew exhibit R-4 during the hearing and the ALJ excluded

exhibit R-20 because it was not included in Respondents' case summary in accordance with the ALJ's discovery order and was otherwise deemed to have no impeachment value. The ALJ reserved ruling on exhibits R-5, R-12, and R-13 until the issuance of the proposed order. The rulings on R-5, R-12, and R-13 were not explicit in the order and are hereby incorporated into the record as follows:

1) Respondents exhibit R-5 is already part of Agency exhibit A-78 which was received as substantive evidence in the record. Consequently, the forum excludes R-5 as unduly repetitious. Respondents' exception to the exclusion of R-5 is **DENIED**.

2) Prior to hearing, the Agency timely requested cross-examination of the document preparers of Respondents exhibits R-12 and R-13, pursuant to OAR 839-050-0260 that states, in pertinent part:

“(9) Any affidavit, certificate, or document included with a case summary or that a participant serves on the other participants at least ten days before hearing may be offered and received into evidence unless cross-examination is requested of the affiant, certificate preparer, or other document preparer or custodian no later than five days prior to hearing or, for good cause shown, by such other date as the administrative law judge may set. An affidavit or certificate may be offered and received with the same effect as oral testimony.

“(10) If cross-examination is requested of the * * * document preparer * * * as provided in section (9) of this rule and the preparer is not made available for cross-examination, but the * * * document is offered in evidence, the same may be received in evidence, provided the administrative law judge determines that:

“(a) The contents of the document are otherwise admissible; and

“(b) The participant requesting cross-examination would not be substantially prejudiced by the lack of cross-examination.”

A. Johnson prepared the letter offered as exhibit R-12 and gave lengthy testimony at hearing that included reiterating pertinent parts of the letter. The letter's remainder includes personal opinion statements that are not related to A. Johnson's qualification as an expert or to any issues in this case. Consequently, the forum has excluded R-12 from the record for the most part because it is not relevant to this proceeding and the

remainder that is relevant is unduly repetitious. Respondents' exception to the exclusion of R-12 is **DENIED**.

Respondents exhibit R-13 is a collection of letters and evaluations acquired by Mountain Forestry in September 2005 pertaining to Respondents' tree planting activities. Respondents did not make the document preparers available for cross-examination at hearing as the Agency timely requested and the forum must determine if the documents are otherwise admissible and whether the Agency is substantially prejudiced by the lack of cross-examination. Having reviewed each document, several of which were duplicates that contained similar handwriting, but with different dates and signatures, the forum concludes that if relevant at all, the probative value of the documents is too remote to be of any assistance in this case. At issue is whether Respondents' actions and inaction during their performance of the 2000 through 2004 firefighting contracts demonstrate they lack the character, competence and reliability to hold a farm/forest labor contractor license. How well they performed on small tree planting contracts between 2004 and 2005 is not pertinent to that issue. Moreover, Respondents' failure to make the document preparers available deprived the Agency and the ALJ the opportunity to question and resolve the anomalies contained in the documents. Consequently, the forum has excluded R-13 from the record and Respondents' exception to its exclusion is **DENIED**.

3) During the hearing, exhibit R-20 was excluded as substantive evidence because it was not included in Respondents' case summary in accordance with the forum's order issued pursuant to OAR 839-050-0210(1). Respondents did not offer a satisfactory reason for having failed to do so. Additionally, the exhibit, a letter addressed to Mountain Forestry and F. Cisneros from federal contracting officer, John Venaglia, was offered through a witness who had no knowledge of the letter or its

contents. Neither F. Cisneros nor Venaglia appeared as witnesses during the hearing and the forum concluded Respondents failed to lay a proper foundation. Alternatively, Respondents offered exhibit R-20 to impeach Alex Coronado's hearsay statements that he was not pack tested. The forum excluded the exhibit after ruling that it was not proper impeachment.^{xxviii} Consequently, the forum concludes the ALJ did not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit and the ruling excluding R-20 is hereby affirmed.^{xxix} OAR 839-050-0210(5).

Exception 7 – Respondents' Offers of Proof

Respondents made numerous offers of proof throughout the hearing and now request that “each and every offer of proof submitted [and] not already admitted be received as evidence by the forum.” Additionally, for offers of proof not admitted, Respondents “demand that a statement of the reasons for the denial be clearly stated in the order.” Respondents' offers are addressed herein in a separate section of this Final Order.

Exception 8 – Respondents' Affirmative Defenses

Respondents contend they were denied a full and fair hearing because some of their affirmative defenses were stricken from their answer. Respondents' affirmative defenses are fully addressed in the record and the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) was not violated by striking them from Respondents' answer. The prior ruling is hereby affirmed and Respondents' exception 8 is **DENIED**.

Exception 9 – Respondents' “Right to Counsel”

Respondents contend they were denied the “right to be represented by counsel of their choosing” which amounted to a “denial of a fair hearing.” Respondents merely reiterate their previous arguments that they were entitled to be represented by a

certified law student throughout the hearing and erroneously declare that ORS 183.415(3) confers upon them a right to counsel of their choice.

Under the Administrative Procedures Act and the contested case hearing rules, a party may be represented by counsel or an authorized representative. ORS 183.415(3); OAR 839-050-0110(1). Counsel means “an attorney who is a member in good standing with the Oregon State Bar” or, at the forum’s discretion, an out-of-state attorney who is a member in good standing of that state’s bar and associated with Oregon counsel. OAR 838-050-0020(9). Authorized representative means “a member of a partnership, an authorized officer or regular employer of a corporation, association or organized group, or an authorized officer or employee of a governmental agency who has been authorized by the partnership, corporation, association, organized group, or governmental agency to represent that entity during the contested case proceeding.” OAR 839-050-0020(3). Certified law students are not included in either definition. For reasons fully addressed on the record before and during the hearing, the forum concludes the ALJ properly exercised her discretion by not permitting counsel’s law clerk to represent Respondents during this particular hearing. The ALJ’s prior ruling is hereby affirmed. Respondents' exception 9 and “demand for new hearing” is **DENIED**.

Exception 10 – Alex Coronado and Leticia Ayala Hearsay Statements

Respondents take exception to “the admission of and the forum’s reliance on hearsay and multiple hearsay statements of Alex Coronado, as testified by Moritz, S. Johnson, and others.” Contrary to Respondents’ assertion, the forum’s findings and conclusions are not based solely on Coronado’s hearsay statements, but rather the totality of circumstances established by the credible evidence. Based on the whole record herein, the forum concluded there were sufficient indicia of reliability to support the statements made to S. Johnson and others about Respondents' failure to pack test

Coronado or Ayala before they were dispatched to wildfires. Respondents' assertion that they presented "volumes of countervailing evidence calling Coronado's veracity into question" is simply not supported by the record. Respondents offered two sources of rebuttal: Jose Avila's prior testimony in another proceeding and John Venaglia's letter purportedly concluding that Coronado and Ayala had taken the pack test. First, the forum considered Avila's prior felony convictions when evaluating the veracity of his "sworn" statement. The forum also concluded Avila's prior testimony was unreliable because it was contradicted by other credible evidence, conflicted with his prior statement to S. Johnson, and conflicted with Michael Cox's version of events, which, in turn, conflicted with Brandon Creson's version as told to S. Johnson. Second, Venaglia's letter was not admitted into evidence for reasons that are fully explained in this Final Order. Even if it had been admitted, any so called "conclusion" drawn by Venaglia was entirely based on information he received directly from Respondents. Finally, Respondents' assertion that they were prejudiced by the Agency's failure to call Coronado and Ayala as witnesses and, thus, denied the opportunity to cross-examine both witnesses is not well taken. Respondents had notice of the allegations pertaining to Coronado and Ayala and many months thereafter to ensure they both appeared at hearing.^{xxx} Instead, Respondents apparently opted to rely on the Agency's case summary that listed both as anticipated witnesses in the Agency's case. Notably, both participants listed several witnesses in their respective case summaries that they did not call at hearing. Neither participant should rely on the other to produce witnesses they consider critical to their case. Respondents' exception 10 is **DENIED**.

Exception 11 – Waiver and ORS 183.415(7)

Respondents object to the ruling on their motion to dismiss paragraphs 12 and 13 in the Agency's Notice of Intent. The ruling adequately sets forth the forum's

rationale for denying the motion and is hereby affirmed. Respondents' exception 11 and request for a new hearing are **DENIED**.

Exception 12 – Respondents' Motion to Re-Open Record

Respondents object to the ALJ's ruling on their motion to re-open the record to admit additional evidence and contend the denial "amounts to a denial of Respondents' right to submit rebuttal evidence under ORS 183.450(3)." Respondents' argument has no merit. Respondents' "right" to submit rebuttal evidence after the record has closed is limited by the contested case hearing rules that authorize the ALJ to admit new evidence if the ALJ determines it is necessary to fully and fairly adjudicate the case and good cause is shown for not having submitted it before the record closed. In this case, the ruling adequately sets forth the ALJ's rationale for denying the motion and the forum concludes that even if admitted, the new evidence would not have altered the findings and conclusions set forth herein. Consequently, the duty to conduct a full and fair inquiry was not violated by denying the motion and the ALJ's ruling is hereby affirmed and Respondents' exception 12 is **DENIED**.

Exception 13 – Proposed Finding – The Merits # 21

Respondents contend factual finding 21 on the merits is irrelevant. The forum agrees that the portion of the finding to which Respondents refer is irrelevant and has stricken that portion of the finding from this Final Order.

Exception 14 –Virgil Urena Hearsay

Respondents' contention that "the forum bases its conclusion that Respondents did not pack test certain individuals based solely on the hearsay statements of Virgil Urena" is not supported by the record. The record shows the forum's conclusions were based on the whole record that included credible testimonial and documentary evidence, including Respondents' own records. Respondents' exception 14 is **DENIED**.

Exception 15 – Bob Gardner Hearsay Statements

Respondents object to the forum's reliance on Bob Gardner's hearsay statements to S. Johnson to "conclude that the V. Cisneros file was a mixture of F. Cisneros's son and F. Cisneros's brother." First, hearsay, if reliable, is admissible in a contested case hearing. OAR 839-050-0260(1). In this case, the forum made an inference based on Gardner's statements to S. Johnson and documentary evidence that unequivocally established that another person named Victor Cisneros worked for F. Cisneros several years before Mountain Forestry hired F. Cisneros's son, also named Victor. F. Cisneros was present throughout the entire hearing and had ample opportunity to refute any of Gardner's statements to S. Johnson. The forum infers from his failure to testify that his testimony would not have contradicted Gardner's statements to S. Johnson. See *In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 128 (1990)(failure of a named respondent to testify allows the conclusion that such testimony would not contribute to that respondent's defense). Proof includes both facts and inferences. *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 132 (2005). Second, whether or not one of the Victors was brother to F. Cisneros is irrelevant and the answer to the question does not alter the ultimate findings and conclusions set forth herein. Consequently, Respondents' exception 15 is **DENIED**.

Exception 16 – Ramon Herrera Cisneros

Respondents allege facts not in evidence to support its contention that Ramon Herrera Cisneros ("R. Cisneros") is not related to F. Cisneros. Other than one document in the record that shows different addresses for "Ramon Herrera Cisneros" and "Ramon Cisneros," there is no other evidence including social security numbers or other identification that supports Respondents' contention. Even if R. Cisneros is not related to F. Cisneros, their relationship is not germane to the issues or findings in this

case and the distinction does not alter the ultimate findings and conclusions. As for Respondents' argument that "[t]here is no evidence in the record to support the finding that Mountain Forestry provided [R. Cisneros] with a fake identification card showing an earlier birthdate," the forum finds there is sufficient reliable evidence, including S. Johnson's credible testimony regarding his conversation with R. Cisneros, to establish that more likely than not Mountain Forestry provided R. Cisneros with fake identification. Respondents' exception 16 is **DENIED**.

Exception 17 – Michael and Penny Cox's Personal Income

Respondents except to references to Michael and Penny Cox's personal income "derived from Mountain Forestry and other corporate holdings," stating that Penny Cox's personal income is not relevant because she "was not a party or a witness to this proceeding" and the information "is not a matter of public record." First, the single finding and reference to the Cox's personal income only pertains to Mountain Forestry earnings and no other "corporate holdings." Second, the information derives from a document that was received into evidence without objection and is a public record. Respondents cited no public records law provision applicable to this case that exempts the information from public disclosure. Third, Penny Cox, as a 48 percent shareholder, co-owned Mountain Forestry, and was at all material times the corporate manager's wife. Their joint earnings from Mountain Forestry are relevant because they go to Michael Cox's bias and demonstrate that he had a substantial financial incentive to fashion his testimony in a manner that protected his pecuniary interest in Mountain Forestry. Respondents' exception 17 is **DENIED**.

Exception 18 – Conclusion of Law #5

Respondents except to the forum's conclusion that "Respondents violated ORS 658.440(1)(d) by dispatching at least seven firefighters to fight wildfires without the

requisite endurance testing required under the 2004 Interagency Firefighting Agreement * * *.” The conclusions of law have been corrected to more accurately reflect the number of violations found herein.

Exception 19 - Opinion

Respondents except to the forum’s conclusion in the opinion section of the order that “[b]y violating the terms and conditions of the 2000 Agreement, which required, among other things, that Respondents abide by all applicable state laws and rules, including the commissioner’s rule establishing a statutory minimum age requirement, Respondents violated ORS 658.440(1)(d).” Respondents contend that although the Notice of Intent alleges in paragraph three that “[t]he contracts or agreements included, among other things, a provision that Respondents would comply with all state, federal and local laws,” the allegation is not “notice” of a violation as required under ORS 183.415, “and the forum cannot find violations that were not properly notified.” After reviewing the pleading, the forum finds the Agency specifically alleged that Respondents employed underage firefighters, including V. Cisneros, and that by doing so, Respondents violated the terms and conditions of a legal and valid agreement, i.e., the 2000 ODF Agreement. The Agency proved that particular allegation by establishing that the Agreement included a term and condition that Respondents abide by applicable state laws and regulations which at material times included a minimum age requirement applicable to minors employed as firefighters. Respondents’ focus on paragraph three of the pleading ignores paragraph four that unambiguously alleges “Respondents * * * entered into legal and valid contracts or agreements * * * from 2000 through 2003 and failed to comply with the terms and provisions of those contracts and agreements by, among other things and in addition to the violations listed in paragraph 3 above, * * * employing minors in violation of OAR 839-021-0102.^{xxxii} This is a violation of ORS

658.440(1)(d).” The forum finds the Agency’s pleading in substance and form contains a “short and plain statement of the matters asserted or charged” in accordance with ORS 183.415(2)(d). The forum therefore concludes Respondents had adequate notice of the Agency’s charge that they failed to comply with the terms and provisions of legal contracts and agreements by hiring minors in violation of child labor provisions, specifically OAR 839-021-0102. Respondents' exception 19 is **DENIED**.

Exception 20 – Minimum Age and Training Requirements

Respondents except to the omission of findings in the order that pertain to the Agency’s allegations that Andrew Williamson and Samuel Cisneros failed to meet minimum age “and/or training requirements.” Respondents state that “the forum has presumably found nothing wrong with these two files” and assert that the finding should be noted in the record and factored into the credibility finding for S. Johnson. Although their presumption is inaccurate, they are correct to suggest that the forum is required to address every contested issue in a contested case.^{xxxii} Consequently, the forum has corrected its inadvertent omission in the factual findings and opinion section this Final Order.

Exception 21 - Capacity

Citing contract principals that do not apply in this case, Respondents except to the forum’s conclusion that they entered into an agreement with BOLI in their capacity as a farm/forest labor contractor each time they applied for license renewal. The issue was sufficiently addressed in the order and Respondents' exception 21 is hereby **DENIED**.

Exception 22 – Pack Test Notifications

Respondents correctly note an error in the factual findings pertaining to pack test notification. Accordingly, the forum has made appropriate corrections to the factual

findings, legal conclusions, and opinion and order that more accurately reflect the record. Additionally, Respondents claim that under the 2004 Agreement, “a [notification] violation can only be found if the contractor had been previously provided with a notice of noncompliance and continued to pack test without notification (i.e. a ‘second violation’ after receiving the notice of noncompliance).” Citing the Agreement, section 4.12.5, Respondents state that “under the plain language of the contract, without such notice, there is no violation.” Respondents misconstrue the provision and the violation at issue in this proceeding. The Agency alleged that “Respondents agreed to notify [ODF] before administering required testing of individuals for firefighting but did not do so” and by failing to do so they “failed to comply with the terms and conditions of lawful agreements or contracts,” in violation of ORS 658.440(1)(d). The 2004 Agreement unambiguously states that the contractor “shall notify [ODF] in writing * * * at least five (5) calendar days prior to administering each pack test.” Regardless of whether ODF issued a notice of noncompliance, Respondents either complied with that provision or they did not comply. Credible evidence established that Respondents did not provide the required notification to ODF and therefore did not comply with a term and condition of the 2004 Agreement, which is a violation of ORS 658.440(1)(d). Respondents' exception 22 is **DENIED**.

Exception 23 – Bias

Respondents allege facts that are not in the record to support their claim that the ALJ exhibited bias against Respondents during the hearing. Respondents had ample opportunity – two and one half weeks of hearing - to place on the record any occurrences Respondents perceived as bias on the ALJ's part. Indeed, the entire record reveals that Respondents' counsel was particularly diligent about preserving objections to procedural and evidentiary matters and had there been legitimate bias

concerns, the forum is satisfied they would have been raised by counsel on the record.^{xxxiii} In any event, the Commissioner renders the final decision based on the merits of each case heard in this forum. This case is no exception and Respondents have not alleged and there is no evidence that the Commissioner was biased in any way against Respondents or their counsel when considering the merits of this case. Respondents' exception 23 is **DENIED**.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for violations of ORS 658.440(1)(d), the Commissioner of the Bureau of Labor and Industries hereby orders **Mountain Forestry, Inc. and Francisco Cisneros** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of FIFTY ONE THOUSAND FIVE HUNDRED DOLLARS (\$51,500), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mountain Forestry, Inc. and Francisco Cisneros comply with the Final Order;

FURTHERMORE, as authorized by ORS 653.370, and as payment of the penalties assessed for violations of ORS 653.307, OAR 839-021-0220, and OAR 839-021-0102(p), the Commissioner of the Bureau of Labor and Industries hereby orders **Mountain Forestry, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND DOLLARS (\$5,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mountain Forestry, Inc. complies with the Final Order;

FURTHERMORE, the Commissioner of the Bureau of Labor and Industries hereby denies **Mountain Forestry, Inc.** and **Francisco Cisneros** each a license to act as a farm/forest labor contractor, effective on the date of the Final Order. **Mountain Forestry, Inc.** and **Francisco Cisneros** are each prevented from reapplying for a license for three years from the date of this denial, in accordance with ORS 658.445 and OAR 839-015-0520.

ⁱ The OIG also noted that “Since 2003, ODF personnel have performed pre-season reviews of contractors’ qualification records * * * and significantly enhanced this process in 2004 by adding more in depth compliance reviews throughout the year and in 2005 by monitoring pre-season work capacity fitness testing for a sample of contractors.”

ⁱⁱ Under certain circumstances not relevant to this case, ODF could request and approve a crew of less than 20 firefighters as long as the ratio of supervisory personnel to entry level firefighters remained the same.

ⁱⁱⁱ Prior to 2003, the Agreements referred to task books as either “performance” or “position” task books.

^{iv} See Finding of Fact – The Merits 19 for general provisions.

^v See Finding of Fact – The Merits 11 for “operational periods” definition.

^{vi} Contractors were required to administer pack tests to any new crew members hired after June 1 before dispatching them to a fire.

^{vii} References to social security numbers herein will be limited to the last five digits to protect the privacy of the persons involved in this case.

^{viii} Mountain Forestry records showed R. Cisneros actually was employed by Mountain Forestry in 2003 when he was 15 years old. See Finding of Fact – The Merits 70.

^{ix} The records show no firefighting activity in 1997. (Entire record)

^x The space for Andrew Williamson’s name was left blank; however, the certificate was on page 2 of Williamson’s task book and the forum infers that Berger was certifying Williamson as a crew boss rather than some other unnamed individual. Notably, there is no evidence that Berger was authorized to certify a crew boss on Mountain Forestry’s behalf as required under the ODF Agreement.

^{xi} See Finding of Fact – The Merits 50.

^{xii} Question: “Isn’t it true that you’ve had some problems with ODF in the past?” Answer: “Yes. I’ve been an employee of theirs. I have been at odds with them on fires over management styles, responsibility, pay documents, how many – in the course of business, normal course of business.”

^{xiii} Avila’s release date on the first conviction was 13 years prior to hearing. Avila’s release date on the two later convictions was seven years prior to hearing.

^{xiv} Avila’s brief prior testimony consisted of: “Q. Were you present before June 1 when Alex Coronado and Leticia Ayala took the pack test? A. Yes. Q. Did you walk with them? A. Sure. Q. And walk back? A. Right. Q. Did you tell Mr. Johnson that you had taken the pack test? A. Yes, I did. Q. And was that before you were dispatched on any fire? A. That is right.” (Exhibit A-78)

^{xv} See Finding of Fact – The Merits 58.

^{xvi} Cox acknowledged at hearing that he did not monitor Avila’s pack test, but only observed him leaving and returning from the pack test. See Finding of Fact – The Merits 56.

^{xvii} See Finding of Fact – The Merits 63.

^{xviii} See Finding of Fact – The Merits 64.

^{xix} Credible evidence established that Respondents employed at least one minor in 2004 and did not obtain the required employment certificate. However, the Agency confined its pleading to four years from 2000 through 2003 and the forum is limited by the scope of the pleading when assessing civil penalties.

^{xx} The record shows Mountain Forestry's fire director Michael Cox has known F. Cisneros and his family since at least 1980 and the forum infers he also knew how old F. Cisneros's son was at the time he was dispatched to three wildfires as a FFT1 advanced firefighter squad boss in 2000.

^{xxi} The forum notes that credible evidence established at least one other minor, Ramon Herrera Cisneros, engaged in firefighting activities in 2003 while only 15 years old. However, the Agency alleged only one violation and confined its allegation to the 2000 fire season; consequently, the forum is limited to determining civil penalties based on one violation of OAR 839-021-0102(p).

^{xxii} Evidence actually established that Respondents employed at least two minors in 2004 without first obtaining a validated employment certificate, but the Agency alleged only four violations from 2000 through 2003 and the forum is limited by the scope of the pleading when determining the amount of civil penalties.

^{xxiii} Although the Agency established that R. Cisneros performed work on at least two wildfires in 2003 when he was 15 years old, and V. Cisneros performed work on three wildfires in 2000 when he was 15 years old, the Agency only alleged one violation and did not amend its pleading to conform to the evidence. Consequently, the forum is bound by the pleading when determining the civil penalty in this case.

^{xxiv} Webster's Third New International Dictionary 376 (2002).

^{xxv} Webster's Third New International Dictionary 463 (2002).

^{xxvi} Webster's Third New International Dictionary 1917 (2002).

^{xxvii} The forum infers from Respondents' repeated references to "Plaintiff-Relators" and "this Court" that their argument was "cut and pasted" from a document filed in the other proceeding.

^{xxviii} Venaglia's letter was not based on his personal knowledge, but rather on what he was told by Respondents. See n.17.

^{xxix} In his letter to F. Cisneros, Venaglia stated: "We have reviewed your response to our concerns * * * and are satisfied * * * that the requisite training, and pack tests were administered." Without knowing Respondents' response to Venaglia's concerns, the forum is unable to draw any conclusions based on Venaglia's letter.

^{xxx} Participants typically issue subpoenas to ensure a witness's appearance at hearing.

^{xxxi} OAR 839-021-0102 is the Commissioner's rule establishing a minimum age requirement for firefighters.

^{xxxii} *Dan McCormack Agency v. Employment Division*, 99 Or App 47, 50 (1989).

^{xxxiii} Notably, Respondents first raised ALJ bias in their motion to disqualify that was untimely filed one month after the Notice of Hearing issued. The motion was denied and Respondents subsequently filed a motion for reconsideration on the same issue and it was denied. See Findings of Fact – Procedural 8 & 9. Those facts suggest Respondents are not reluctant to raise bias as an issue and presumably would have readily done so had there been sufficient basis.