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Timber Litigation - 9th Circuit Appeal  
in Forest Plan [1]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; WASHINGTON NATIVE  
PLANTS SOCIETY; SAVE THE WEST;  
THE SIERRA CLUB, a non-profit  
corporation,  
Plaintiffs,

and

NATIVE FOREST COUNCIL,  
Plaintiff-Appellant,

v.

JAMES R. MOSELEY, in his official  
capacity as Asst. Secretary of  
Agriculture; JAMES LYONS, in his  
official capacity as Asst. Secretary  
of Agriculture for Natural  
Resources and Environment;  
UNITED STATES FOREST SERVICE, an  
agency of the United States;  
BUREAU OF LAND MANAGEMENT, an  
agency of the United States;  
MICHAEL ESPY, in his official  
capacity as Secretary of  
Agriculture; BRUCE BABBITT, in his  
capacity as Secretary of the  
Interior,  
Defendants-Appellees,

and

*To JP*  
*NW Timber Plan*  
*Forest Plan case.*  
*KW*  
*Elements*  
*what is the*  
*case in the*  
*set*  
*to*

No. 95-35052  
OPINION

WASHINGTON CONTRACT LOGGERS  
ASSOC.; BURGESS LOGGING CO.;  
LONE ROCK TIMBER COMPANY, INC.;  
JACKIE BRYAN COX; FRERES LUMBER  
COMPANY, INC.; NORMAN V.  
PERSONS; A. TROY REINHART;  
GREGORY A. MILLER; NORTHWEST  
FOREST RESOURCE COUNCIL,  
Defendants-Intervenors.

SEATTLE AUDUBON SOCIETY;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; THE SIERRA CLUB, a non-  
profit corporation; NATIVE FOREST  
COUNCIL,  
Plaintiffs,  
and

No. 95-35214

SAVE THE WEST; FOREST  
CONSERVATION COUNCIL,  
Plaintiffs-Appellants,

v.

JAMES R. MOSELEY, in his official capacity as Asst. Secretary of Agriculture; JAMES LYONS, in his official capacity as Asst. Secretary of Agriculture for Natural Resources and Environment; UNITED STATES FOREST SERVICE, an agency of the United States; BUREAU OF LAND MANAGEMENT, MEDFORD DISTRICT, an agency of the United States; MICHAEL ESPY, in his official capacity as Secretary of Agriculture; BRUCE BABBITT, in his capacity as Secretary of the Interior, Defendants-Appellees,

and

WASHINGTON CONTRACT LOGGERS ASSOC.; BURGESS LOGGING CO.; LONE ROCK TIMBER COMPANY, INC.; JACKIE BRYAN COX; FRERES LUMBER COMPANY, INC.; NORMAN V. PERSONS; A. TROY REINHART; GREGORY A. MILLER; NORTHWEST FOREST RESOURCE COUNCIL, Defendants-Intervenors.

SEATTLE AUDUBON SOCIETY;  
WASHINGTON ENVIRONMENTAL  
COUNCIL; SAVE THE WEST; THE  
SIERRA CLUB, a non-profit  
corporation; NATIVE FOREST  
COUNCIL, FOREST CONSERVATION  
COUNCIL,  
Plaintiffs-Appellees,

v.

JAMES R. MOSELEY, in his official  
capacity as Asst. Secretary of  
Agriculture; BRUCE BABBITT, in his  
capacity as Secretary of the  
Interior; UNITED STATES FOREST  
SERVICE, an agency of the United  
States; BUREAU OF LAND  
MANAGEMENT, MEDFORD DISTRICT,  
an agency of the United States;  
MICHAEL ESPY, in his official  
capacity as Secretary of  
Agriculture,  
Defendants,

No. 95-35215  
D.C. No.  
CV-92-479-WLD

WASHINGTON CONTRACT LOGGERS  
ASSOC.; BURGESS LOGGING CO.;  
LONE ROCK TIMBER COMPANY, INC.;  
JACKIE BRYAN COX; FRERES LUMBER  
COMPANY, INC.; NORMAN V.  
PERSONS; A. TROY REINHART;  
GREGORY A. MILLER;  
Defendants-Intervenors,

and

JAMES LYONS, in his official  
capacity as Asst. Secretary of  
Agriculture for Natural Resources  
and Environment,  
Defendant-Appellee,

NORTHWEST FOREST RESOURCE  
COUNCIL,  
Defendant-Intervenor-Appellant.

Appeals from the United States District Court  
for the Western District of Washington  
William L. Dwyer, District Judge, Presiding

Argued and Submitted  
December 4, 1995--San Francisco, California

Filed April 10, 1996

Before: Alfred T. Goodwin, Mary M. Schroeder and Harry  
Pregerson, Circuit Judges.

Per Curiam

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SUMMARY

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COUNSEL

Stephen M. Tuitt, Pepper, Hamilton & Scheetz, Washington, D.C., and John S. Karpinski, Vancouver, Washington, for plaintiffs-appellants-cross-appellees Native Forest Council.

Peggy Hennessy, Reeves, Kahn & Eder, Portland, Oregon, for plaintiffs-appellants-cross-appellees Forest Conservation Council and Save the West.

Mark C. Rutzick, Mark C. Rutzick Law Firm, Portland, Oregon, for defendants-intervenors-appellants Northwest Forest Resource Council.

David C. Shilton, Environmental and Natural Resources Division, United States Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

PER CURIAM:

All three of these appeals arise from challenges to the April 13, 1994 decision by the Secretaries of Agriculture and Interior to approve a plan to manage federal land with spotted owl habitat in the Pacific Northwest. ]

I.

In appeals nos. 95-35052 and 95-35214, Native Forest Council, Forest Conservation Council and Save the West ("the environmental plaintiffs") appeal the district court's grant of summary judgment upholding the United States Forest Service and Bureau of Land Management's ("the federal defendants") Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within Range of the Northern Spotted Owl ("ROD"), adopted April 13, 1994. The district court's opinion is published at *Seattle Audubon Society v. Lyons*, 871 F.Supp. 1291 (W.D. Wash. 1994) ("SAS"). We have jurisdiction pursuant to 28 U.S.C. S 1291, and we affirm the judgment of the district court.

The lengthy procedural history underlying these appeals is discussed at length in, inter alia, *Seattle Audubon Soc'y v. Espy*, 952 F.2d 297 (9th Cir. 1991) and *Seattle Audubon Soc'y v. Moseley*, 998 F.2d 699 (9th Cir. 1993). District Judge Dwyer discusses fully the history and procedure underlying the appeals at issue here in his opinions. We need not repeat them in detail here, but will summarize briefly.

After our earlier opinions in cases in which environmental groups had sought to preserve the habitat of the northern spotted owl, President Clinton in April 1993 established the Forest Ecosystem Management Assessment Team ("FEMAT") to examine options and make recommendations to the Secre-

taries of Agriculture and Interior in aid of their joint development of a forest management plan to cover federal lands in the Pacific Northwest. After reviewing 48 possible strategies, FEMAT narrowed the field to ten alternatives and assessed each in a single environmental impact statement ("EIS") prepared jointly by the Forest Service and the Bureau of Land Management ("BLM"). The Secretaries of Agriculture and Interior adopted Alternative 9 on April 13, 1994. These challenges to the legality of that decision followed.

[1] The environmental plaintiffs contend that the district court erred in concluding that the federal defendants considered a reasonable range of alternatives for managing old growth owl habitat. They further contend that the federal defendants failed to comply with the viability regulation of the National Forest Management Act because the selected alternative provides for only an 80% likelihood that listed species will continue to be viable after implementation of the selected alternative, and the resulting 20% likelihood of extinction is impermissible under the regulation. 16 U.S.C. S 1604(g)(3)(B); 36 C.F.R. S 219.19. The environmental plaintiffs further contend that the district court erred in holding that the federal defendants considered adequately the cumulative environmental impacts associated with their preparation of the Environmental Impact Statement and selection of Alternative 9. See National Forest Management Act ("NFMA"), 16 U.S.C. S 1604 (f)(5); National Environmental Policy Act ("NEPA"), 42 U.S.C. SS 4321 et seq. These contentions fail for the reasons set forth below.

[2] We first deal with the environmental plaintiffs' contention that the federal defendants failed to consider adequately a "no action" alternative, thereby failing to consider a reasonable range of alternatives in violation of NEPA. See 40 C.F.R. S 1502.14 (d). Our review of the record leads us to conclude that the federal defendants fully evaluated a reasonable range of alternatives before making their final decision. An agency is under no obligation to consider every possible alternative

to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives. See *Resources Limited, Inc. v. Robertson*, 8 F.3d 1394, 1401-02 (9th Cir. 1993); *Headwaters v. Bureau of Land Management*, 914 F.2d 1174, 1180-81 (9th Cir. 1990). Here, the federal defendants did consider a no harvest alternative as part of their preliminary discussion, but abandoned this alternative as inconsistent with their need to find a balance between competing uses. Moreover, the federal defendants' consideration of Alternative 1, which would have protected all old growth timber (less some salvage operations) provided a reasonable point of comparison for the other nine alternatives. Accordingly, the analysis performed by the federal defendants was adequate.

[3] There is similarly little or no support for the environmental plaintiffs' contention that the selected alternative violates the applicable viability standards. The district court correctly explained that the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA. See *SAS*, 871 F.Supp. at 1315-16; see also 16 U.S.C. S 1604 (g)(3)(B) (diversity is to be addressed in light of "overall multiple-use objectives"); 36 C.F.R. SS 219.27(a)(6) (habitat maintained and improved "to the degree consistent with multiple-use objectives"); 219.26 (provide for diversity consistent with multiple-use objectives); 219.27(a)(5) (forest plans should "maintain diversity of plant and animal communities to meet overall multiple-use objectives"). Here, the record demonstrates that the federal defendants considered the viability of plant and animal populations based on the current state of scientific knowledge. Because of the inherent flexibility of the NFMA, and because there is no showing that the federal defendants overlooked any relevant factors or made any clear errors of judgment, we conclude that their interpretation and application of the NFMA's viability regulations was reasonable. See *Batterson v. Francis*, 432 U.S. 416, 425-

26 (1977) (the Secretary's interpretation of a statutory term is entitled to substantial deference).

[4] Finally, the arguments advanced by the environmental plaintiffs concerning alleged deficiencies in the cumulative impact analysis fail because the United States Supreme Court has reaffirmed our court's long held position that the Endangered Species Act protects listed species from harm caused by habitat modification or destruction. *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S.Ct. 2047 (1995); *Palila v. Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106, 1108 (9th Cir. 1988). The environmental plaintiffs insist on reading Justice O'Connor's concurring opinion in *Sweet Home* as an invitation to private landowners to manage their land without regard to any obligation to avoid modifications which would harm listed species. Such a reading, however, ignores the fact that five Justices affirmed *Palila* in all respects. Therefore, contrary to plaintiffs' assertions, the cumulative impact analysis reasonably assumes that non-federal land will be managed to avoid harm to threatened species. We affirm the judgment of the district court in appeals nos. 95-35052 and 95-35214.

## II.

In appeal nos. 95-35215, the Northwest Forest Resource Council ("the Council") appeals the district court's grant of summary judgment in favor of the federal defendants on their cross-claims for declaratory relief. The district court's order granting leave to the federal defendants to amend their answer to assert cross-claims against the Council is published at *Seattle Audubon Soc'y v. Lyons*, 871 F.Supp. 1286 (W.D. Wash. Aug. 5, 1994); the district court's opinion granting summary judgment is published at *Seattle Audubon Soc'y v. Lyons*, 871 F.Supp. 1291 (W.D. Wash. 1994). We have jurisdiction pursuant to 28 U.S.C. S 1291, and affirm.

[5] The Council wishes to litigate its challenges to the plan in the District of Columbia. The Council characterizes this

case as one where the district court has conspired with the United States to manipulate the Declaratory Judgment Act ("The Act") and federal jurisdiction principles to thwart this wish by creating a novel right of review in the Western District of Washington. The Council contends that the district court lacked jurisdiction to consider the cross-claims or, if it did have jurisdiction, abused its discretion by exercising it. These contentions are untenable.

[6] A declaratory judgment offers a means by which rights and obligations may be adjudicated in cases "brought by any interested party" involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy and in cases where a party who could sue for coercive relief has not yet done so. See 28 U.S.C.S 2201; Wright & Millér, Federal Practice and Procedure: Civil 2d, S 2751, p. 569 ("Wright & Miller"). While the Council correctly points out that the Declaratory Judgment Act does not expand the jurisdiction of the federal courts, where jurisdiction exists, the

Act is intended to allow earlier access to federal courts in order to spare potential defendants from the threat of impending litigation. See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950); Wright & Miller, at pp. 569-570. The Act is also intended to help potential defendants avoid a multiplicity of actions by affording an adequate, expedient, and inexpensive means for declaring in one action the rights and obligation of the litigants. *Id.* at pp. 570-71.

Declaratory judgment actions are justiciable if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *National Basketball Ass'n v. SDC Basketball Club*, 815 F.2d 562, 565 (9th Cir. 1987) (citations omitted). The cases cited by the Council are inapposite. For example, this is not a situation where a non-aggrieved government official is seeking first-time review in the Court of Appeals of a Benefits Review Board's decision regarding a third party's entitlement to statutory benefits, as

was the case in *Dir. Office of Workers' Compensation Programs, DOL v. Newport News Shipbuilding and Dry Dock Co.*, 115 S. Ct. 1278, 1283-85 (1995). Instead, this situation is more akin to that presented in *United States v. COM. of PA. Dept. of Envir. Resources*, 923 F.2d 1071, 1074-75 (3rd Cir. 1991). There, the State of Pennsylvania was proceeding in state court against the United States Navy seeking compliance with state environmental laws. The Navy raised sovereign immunity as a defense in the state action and simultaneously filed a declaratory judgment action in the district court. The issue on appeal was not whether the district court had jurisdiction over the Navy's action, but whether it abused its discretion by declining to exercise it. The Third Circuit held that the district court should have exercised jurisdiction under the Declaratory Judgment Act to resolve the dispute. *Id.* at 1079. Here too, in the context of an ongoing lawsuit and in the face of duplicative legal challenges brought in a different forum, the United States simply cross-claimed within the ongoing proceeding for a judgment affirming the defenses it would otherwise be forced to offer for a second time in the duplicative action.

[7] Nothing in the Act bars a federal agency from seeking declaratory relief. Instead, the question is whether the district court would have had jurisdiction to hear a coercive action brought by the declaratory judgment defendant. *NBA*, 815 F.2d. at 566. The answer here is obviously yes. The Council has been a long time intervenor in the underlying action, vigorous in its opposition to the successive forest management plans. Although never dismissed from the action underlying these appeals, the Council nevertheless filed additional actions in the District of Columbia challenging the 1994 forest management plan. Thus, not only could the Council have filed a coercive action in the district court against the Secretaries of Agriculture and Interior, it actually did.

[8] Here, the district court was presented with a substantial controversy arising under federal law between parties with

adverse interests surrounding a plan designed to bring some much needed coherence to the management of federal forests in the Pacific Northwest. This controversy presented concrete legal questions in the context of the federal defendants' real and reasonable apprehension that unless the Council's claims were litigated within a single proceeding, they faced the likelihood of confusion caused by differing judgments or, at least, the uncertainty and expense associated with proceeding later in another forum. In fact, both Judge Dwyer in the Western District of Washington and Judge Jackson in the District of Columbia specifically noted that the actions proceeding in both forums were substantially similar, and although unable to transfer venue in the cases arising from the Oregon dispute, Judge Jackson stayed proceedings in his court to "prevent a duplicative waste of judicial resources and prevent the award of potentially inconsistent relief by separate courts." SAS, 871 F.Supp at 1288; Northwest Forest Resource Council v. Thomas, CV-94-1032 (TPJ) (D.C.C. June 30, 1994) (order transferring action to W.D. Wash.); Northwest Forest Resource Council v. Dombeck, CV-94-1031 (TPJ) (D.C.C. June 30, 1994) (order staying proceedings).

[9] Because the resolution of the Council's claims against the federal defendants in a single action was both possible and desirable, the district court did not abuse its discretion by exercising jurisdiction to grant relief. We therefore affirm the judgment of the district court in the Council's appeal no. 95-35215.

AFFIRMED.

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the end

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
APPELLATE SECTION  
WASHINGTON, D.C. 20530

FAX NUMBER (202) 514-4240  
VOICE (202) 514-5580

DATE: Dec. 8, 1995

FROM: David Shilton

Re: Seattle Audubon Soc., et al. v. Lyons, et al. (9th  
Cir No. 95-35052, et seq.)

To: David Gayer (202) 208-3877  
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Nancy Hayes 208-5242  
Elena Kagan 456-1647  
Dinah Bear 456-0753

**Message:** Attached is a draft response to the motion filed by Seattle Audubon Society for Leave to Respond to Order. While the Court will make up its own mind as to whether it needs supplemental briefing on the effect of the Rescissions Act, I think it's important to establish that SAS cannot leap back into this appeal after sitting on the sidelines so long, and that it especially cannot ask for any alteration of the judgment. I need to mail this on Monday, so I would like to get comments by COB today if possible. Thanks.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

-----  
No. 95-35052

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

NATIVE FOREST COUNCIL

Plaintiff-Appellant

v.

JAMES LYONS, Asst. Secretary of Agriculture, et al.,

Defendants-Appellees,

-----  
No. 95-35214

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

SAVE THE WEST, et al.,

Plaintiffs-Appellants

v.

JAMES LYONS, Asst. Secretary of Agriculture, et al.,

Defendants-Appellees,  
-----

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No. 95-35215

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs

v.

JAMES LYONS, Asst. Secretary of Agriculture, et al.,

Defendants-Appellees

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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**FEDERAL APPELLEES' RESPONSE TO MOTION OF PLAINTIFFS'  
SEATTLE AUDUBON SOCIETY, ET AL. FOR  
LEAVE TO RESPOND TO ORDER**

Oral argument was heard in these appeals on December 4, 1995. On November 28, 1995, the Court issued an order stating that "[t]he parties are directed to address at oral argument the effect, if any, of recent legislation on these appeals."

Accordingly, the parties at argument addressed, at some length, Pub. L. 104-19, usually referred to as the "Rescissions Act."

On the day of argument, plaintiffs Seattle Audubon Society, et al., filed a Motion For Leave To Respond To Order. The Motion requests that the Court "direct the parties to submit supplemental briefs \* \* \* to address the effects of the Rescissions Act Rider on these appeals and to seek such relief with respect to the rider and these appeals (including, but not

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limited to, a motion for a remand) as may be appropriate."

Motion at 6.

The Court is in the best position to determine whether the parties adequately addressed the Rescissions Act at argument. While we believe that additional briefing is not necessary, we would be happy to provide whatever briefing the Court believes would be helpful.

However, we object to Seattle Audubon Society seeking this relief, and in particular to its suggestion that it may seek a remand to the district court. In the district court, judgment was entered against all plaintiffs, including Seattle Audubon. Three notices of appeal were filed, but none was filed by Seattle Audubon or its associated plaintiffs. Nor has Seattle Audubon participated in briefing, as an appellee or otherwise. Seattle Audubon accordingly may not at this juncture seek to become a party to these appeals, and in particular may not seek relief which would alter the judgment entered against it by the district court. "In federal appellate practice, only a party who has formally requested review within the prescribed time may seek vacation or alteration of a judgment." 9 Moore's Federal Practice ¶ 204.11[2] at 4-51 (1995). "The general principle that a judgment will not be altered on appeal in favor of a party who did not appeal also applies to cases in which the interests of the party not appealing are aligned with those of the appellant." Id. ¶ 204.11[4] at 4-63. Hence, even if it were otherwise appropriate for Seattle Audubon to seek to become a participant

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in the appeals at this late date, it plainly cannot seek vacation or remand of the judgment of the district court.

Respectfully submitted,

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DAVID C. SHILTON  
Attorney, Department of Justice  
Washington D.C. 20026  
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## U.S. Department of Justice

## Environment and Natural Resources Division

Appellate Section

Washington, D.C. 20530

December 7, 1995

From: David Shilton  
To: Owl team  
Re: Report on oral argument in Seattle Audubon Soc., et al. v. Lyons, 9th Cir. Nos. 95-35052, et seq.

The oral argument took place on December 4, 1995, in San Francisco. Wells Burgess accompanied me, and Robert Simmons from the Department of Agriculture Regional Counsel's office was also present. Judge Schroeder led the questioning, with Judge Goodwin only asking two questions. Judge Pregerson did not ask questions. At the outset, Judge Schroeder noted that the panel was particularly interested in hearing about "recent legislation," and asked if counsel had received the Court's Nov. 28 order asking for argument on this subject. She also noted an interest in the Sweet Home issue.

The appellants each were allotted ten minutes. Steve Truett, for Native Forest Council, went first, and focussed almost exclusively on the Rescissions Act. Wells and I concurred that his argument was hard to follow, and it did not appear that the Court was having any easier time than we were. It seemed as if Truett's argument was that Congress could not constitutionally bar injunctive relief in this case without violating the separation of powers. He discussed the Supreme Court decisions in Klein and Plaut v. Spendthrift Farms at some length. Judge Schroeder noted that the panel was well aware of those cases (this was the same panel that decided Robertson, which was reversed by the Supreme Court). Truett's bottom line, apparently, is that the panel is free to enter an injunction against all timber sales in the area if it decides to remand the case. Truett also maintained (consistent with our position) that the Rescissions Act did not affect the ROD, and did not moot any challenge to the ROD. Truett ran out of time before he could make any substantive points about why the ROD should be invalidated.

Peggy Hennessy for Forest Conservation Council and Save the West focussed primarily on the issue of whether the FSEIS should have considered a no-harvest alternative. Judge Schroeder pressed her on whether such an alternative would be consistent with statutory directives requiring Multiple Use - Sustained

Yield management, but otherwise the panel did not seem greatly interested in this point.

Mark Rutzick, for Northwest Forest Resource Council, did not mention the Rescissions Act, and the panel did not question him about it. He focussed entirely on the government's alleged lack of authority to file a claim for declaratory judgment to get the validity of an agency action resolved. In a series of questions, Judge Schroeder stressed that the government was only trying to get NFRC's claims resolved. Judge Goodwin asked whether the Executive Branch's authority to see that the laws were faithfully executed wasn't sufficient authority to bring the cross-claim. Judge Schroeder asked whether NFRC wasn't in fact already a party to the case before Dwyer, and after some hemming, Rutzick conceded that it was. Rutzick also made clear that NFRC intended to proceed with its action against the BLM as soon as the stay in that case is lifted.

I was able to make my introductory points without interruption regarding what a massive effort this was, how it responded to the legal deficiencies identified by the Ninth Circuit in earlier plans, how it was an adaptive plan with procedures for dealing with new circumstances, how Judge Dwyer had rejected all challenges of both industry and environmental groups, etc. On the Rescissions Act, Judge Schroeder said she had difficulty with the language of subsection (d) pertaining to injunctions, particularly the language "notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section." I noted that the Act had a number of provisions where the drafting presented difficult interpretation issues, that this particular phrase didn't have any effect here, and that the more relevant language was in subsections (f) and (i), which prospectively bar challenges or injunctions against Option 9 timber sales based on the environmental statutes at issue in this case. I was able to describe the other relevant parts of the Act without interruption, and also make our points regarding why the Act did not undercut the ROD and did not undercut Judge Dwyer's decision. I mentioned again that the ROD provides an adaptive process for taking account of new circumstances like this and noted in a general way that the agencies were taking a look at the effects of timber sales required by the Act. Having said that, I felt it necessary to mention the restriction on amending the plan in subsection (l), but noted our position that this only applied for the period of time during which the Act is in effect. I also mentioned the NFRC v. Glickman litigation and the pending appeal to be argued the second week of January, but could not tell how interested the judges might be in grabbing that case. [My guess is that these three judges had to take time from their normally-assigned cases to take on this appeal as a special assignment, and that they are unlikely to want to further burden themselves with Rescissions Act cases.]

The panel did not appear to have problems with our position on the adequacy of the alternatives discussed in the EIS, and the unreasonableness of a no-harvest alternative. On the Sweet Home point, I was able to make the point that Judge Dwyer had commended our discussion of cumulative impacts from timber harvesting on non-federal lands, and that his ruling that Sweet Home did not undercut the ROD was vindicated by the Supreme Court reversal. Judge Schroeder was interested in what would have happened if Justice O'Connor's concurrence had prevailed. [O'Connor opined that the FWS taking regulation was facially valid, but Palila was incorrectly decided because of the lack of proximate causation between the act and death or injury to a species.] I replied that the agencies would then have had to consider whether the assumptions of the plan were still valid, and repeated the points about the adaptive nature of the plan.

Judge Goodwin asked about the 80% viability level mentioned by Judge Dwyer, and asked whether the regulation would have been satisfied by a finding of 20%, and whether there was any precedent on this subject. In response, I tried to make a number of points: that the outcome probability results of the panels were a unique response to the enormous task that confronted the agencies here, and not a required methodology; that there was accordingly no other cases considering this methodology; that neither the regulation nor the statute requires a showing of a certain percentage chance of viability, but that the panels' 80% probability of Outcome A findings did lend support to the ultimate conclusion that the amount and distribution of habitat under the strategy was adequate to maintain viable populations. I said that the only real precedent on this was Judge Dwyer's previous ruling that we could not intentionally plan to eradicate a species, but that Judge Dwyer had found that we had complied with this requirement.

On rebuttal, Peggy Hennessy asked for supplemental briefing on the Rescissions Act point. She also said that the Act prevented the agencies from assessing the effect of sales required by the Act, but did not elaborate. Rutzick's rebuttal again focussed on the lack of statutory authority for the government's declaratory judgment claim. Steve Truett's rebuttal took a swipe at NFRC's "forum shopping" and briefly restated the probability-based argument in NFC's brief that the ROD will lead to the extirpation of species.

Shortly before argument, the Clerk handed us Seattle Audubon Society's Motion for Leave to Respond to Order, which seeks an opportunity to brief the effect of the Rescissions Act. I will shortly be sending around a proposed response to that motion.

The Court said it would take under advisement the request for supplemental briefing regarding the Rescissions Act. [I couldn't tell whether they were referring to Peggy Hennessy's

oral request or Seattle Audubon's motion.] The Court gave no indication how quickly it might rule on the merits.

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
APPELLATE SECTION  
WASHINGTON, D.C. 20530

FAX NUMBER (202) 514-4240  
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DATE: December 5, 1995

FROM: Al Ferlo for David Shilton

Re: Seattle Audubon Soc., et al. v. Lyons, et al. (9th  
Cir No. 95-35052, et seq.)

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Elena Kagan	456-1647
Dinah Bear	456-0753

Message:

Attached is a motion filed by SCLDF seeking leave to respond to the court's November 28, 1995 request to the parties to address the impact of recent legislation on the appeal.

Dave is out of the office (he has an oral argument today in Seattle), and will coordinate the government's response, if any, upon his return on Thursday.

Al Ferlo



Sunrise, Mt. McKinley

Ansel Adams

# SIERRA CLUB LEGAL DEFENSE FUND, INC.

*The Law Firm for the Environmental Movement*

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## FAX TRANSMITTAL MEMO

TO: David C. Shilton (202) 514-4240  
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 Charles H. Carpenter (202) 828-1665

FROM: Todd True

DATE: December 4, 1995

RE: SAS v. Moseley, 9th Cir. #95-35052, 95-35214, & 95-35215

DOCUMENTS: SAS' Motion for Leave to Respond

# OF PAGES (including this cover memo): 13

### COMMENTS:

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Nos. 95-35052, 95-35214, 95-35215

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs-Appellees,

v.

JAMES R. MOSELEY, in his official capacity as  
Assistant Secretary of Agriculture,

Defendant,

and

WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,

Defendant-Intervenor,

v.

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
Civil No. 92-00479-WLD

---

MOTION FOR LEAVE TO RESPOND TO ORDER

---

TODD D. TRUE  
PATTI A. GOLDMAN  
Sierra Club Legal Defense Fund  
705 Second Avenue, Suite 203  
Seattle, Washington 98104-1711  
(206) 343-7340

Attorneys for Plaintiffs-Appellees

Plaintiffs-appellants, Seattle Audubon Society, et al. ("SAS"), hereby move for leave to respond in writing within thirty (30) days to the Court's Order of November 28, 1995, which states in relevant part:

The parties are directed to address at oral argument the effect, if any, of recent legislation on these appeals.

Order of November 28, 1995.

#### INTRODUCTION

SAS seeks an opportunity to respond in writing to the Court's Order because, as explained below, it raises important issues regarding the effect of Section 2001 of the FY 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19 (July 27, 1995) (the "Rescissions Act Rider"), on these consolidated appeals. These issues are too complex and significant to be fully addressed at oral argument. Moreover, many of the SAS plaintiffs (and defendant-intervenor-appellant Northwest Forest Resources Council as well as the federal defendant-appellees) are currently involved in a series of lawsuits over the scope and meaning of the Rescissions Act Rider in this Court and in the district courts in Oregon and Washington. This litigation could have a direct bearing on these appeals.

Accordingly, supplemental briefing from SAS -- and the other parties to these appeals -- is both necessary and important to a full and fair determination of the issues raised by the Court's Order.

### DISCUSSION

Briefly, the Rescissions Act Rider, a copy of which is attached to this brief as Exhibit A, addresses the President's Northwest Forest Plan, the subject of these appeals, both directly and indirectly in at least the following ways:

1. Subsection 2001(d) of the rider states in part:

Notwithstanding any other provision of law (including a law under the authority of which any judicial order may be outstanding on or after the date of enactment of this Act), the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts on Federal lands described in the "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl," signed by the Secretary of Interior and the Secretary of Agriculture on April 13, 1994. The Secretary concerned may conduct timber sales under this subsection notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of enactment of this section.

This provision addresses directly the Record of Decision ("ROD") at issue in these appeals.

Its effects, if any, on the ROD are subject to considerable controversy. On the one hand, the government has taken the position that this language does not affect its ability to implement the ROD. On the other hand, in supplemental proceedings in Seattle Audubon Society v. Evans, No. C89-160WD (W.D. Wash.), counsel for the Northwest Forest Resources Council has taken the position that:

Congress was extremely careful and precise in not directing or endorsing Option 9. What they have done in section D is to allow timber sales to go forward in the Option 9 region, notwithstanding any other law. But there is no direction that sales must comply with Option 9.

SAS v. Evans, No C89-160WD, Transcript of Hearing, November 1, 1995. No court has yet issued a decision that interprets the

scope and application of subsection 2001(d) of the rider to this or any other case.

The language of subsection 2001(d) is relatively straightforward. It does not appear to compel any particular timber sale or any particular volume of such sales. It does not appear to have any direct legal effect on the Record of Decision at issue here. Nor does it appear to affect this Court's ability to issue any ruling in these appeals that may be appropriate, including injunctive relief. Nonetheless, the Court should allow the parties to these appeals to address in written briefs this and other inter-related subsections of the Rescissions Act Rider before determining how, if at all, the rider affects these appeals.

2. Subsection 2001(f) of the rider addresses judicial review of individual timber sales "conducted under subsection (d)" of the rider, quoted above. The scope and effect of this provision on two timber sales offered under the ROD is currently at issue in Oregon Natural Resources Council v. Thomas, No. 95-6272-HO (D. Ore. 1995). One of the SAS plaintiffs in this case is a party to ONRC v. Thomas. The district court held a hearing on the merits of this case on November 28, 1995. A core issue in that case is the extent to which the government may be required to comply with the ROD, an issue that could have great impact on these appeals. The Court should allow the parties an opportunity to address the potential effects of this subsection of the rider on these appeals as well.

3. Subsection 2001(k) of the rider provides in part:

(1) Notwithstanding any other provision of law, within 45 days after the date of enactment of this Act, the Secretary concerned shall act to award, release and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745). The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

(2) No sale unit shall be released or completed under this subsection if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.

The interpretation and scope of these subsections of the rider are at issue in Northwest Forest Resources Council v. Glickman, No. 95-6244 (D.Ore. Sept. 13, 1995), appeal pending, Ninth Cir. No. 95-36038, Pilchuck Audubon Society v. Glickman, No. 95-6384-TC (D. Ore.), and in motions to enforce or modify prior court orders in Smith v. Forest Service, 33 F.3d 1072 (9th Cir. 1995) (on remand to the district court), and Seattle Audubon Society v. Evans, No. C89-160WD (W.D. Wash.).

The district court in NERC v. Glickman already has interpreted this subsection of the rider to apply to timber sale contracts offered or awarded after the effective date of Section 318, although this ruling is on an expedited appeal and scheduled for hearing by this Court on January 8, 1995. Further proceedings in the district court in Oregon are pending to determine the application of this subsection of the rider: (a) to timber sales offered under Section 318 that provide essential habitat for the threatened marbled murrelet (hearing held

November 7, 1995, no ruling issued); (b) to certain previously enjoined timber sales offered both under and outside Section 318 (hearing set for December 12, 1995); (c) to timber sales that were cancelled prior to the enactment of the rider; and, (d) to timber sales offered before October, 1990, when Section 318 was enacted. The decisions on these matters may directly implicate these appeals by, among other things, requiring the government to proceed with timber sales that conflict with the standards and guidelines of the ROD and fundamentally alter the bases for the district court's ruling in this case. For this additional reason, the Court should allow the parties to file supplemental briefs to address the effects of the Rescissions Act Rider on these appeals.

4. Finally, subsection 2001(1) of the rider provides in part:

Compliance with this section shall not require or permit any administrative action, including revisions, amendment, consultation, supplementation, or other action, in or for any land management plan, standard, guideline, policy, regional guide, or multiforest plan because of implementation or impacts, site-specific or cumulative, of activities authorized or required by this section . . . .

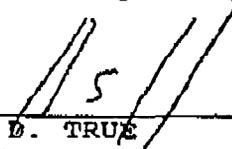
This provision appears to affect the government's ability to take at least certain actions in response to implementation of the Rescissions Act Rider. Because this provision also may affect these appeals, it is an additional reason the Court should order supplemental briefing in these appeals on the Rescissions Act Rider.

CONCLUSION

Because the interaction between these appeals and several provisions of the Rescissions Act Rider is likely to be both complex and significant -- and may require remand of these appeals to the district court for further proceedings -- SAS respectfully requests the Court to direct the parties to submit supplemental briefs of up to 30 pages within 30 days to address the effects of the Rescissions Act Rider on these appeals and to seek such relief with respect to the rider and these appeals (including, but not limited to, a motion for a remand) as may be appropriate.

DATED: This 4th day of December, 1995.

Respectfully submitted,

  
\_\_\_\_\_  
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456RIDER.MTN

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TITLE II—GENERAL PROVISIONS

EMERGENCY SALVAGE TIMBER SALE PROGRAM

SEC. 2001. (a) DEFINITIONS.—For purposes of this section:

(1) The term "appropriate committees of Congress" means the Committee on Resources, the Committee on Agriculture, and the Committee on Appropriations of the House of Representatives and the Committee on Energy and Natural Resources, the Committee on Agriculture, Nutrition, and Forestry, and the Committee on Appropriations of the Senate.

(2) The term "emergency period" means the period beginning on the date of the enactment of this section and ending on September 30, 1997.

(3) The term "salvage timber sale" means a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.

(4) The term "Secretary concerned" means—

(A) the Secretary of Agriculture, with respect to lands within the National Forest System; and

(B) the Secretary of the Interior, with respect to Federal lands under the jurisdiction of the Bureau of Land Management.

(b) COMPLETION OF SALVAGE TIMBER SALES.—

(1) SALVAGE TIMBER SALES.—Using the expedited procedures provided in subsection (c), the Secretary concerned shall prepare, advertise, offer, and award contracts during the emergency period for salvage timber sales from Federal lands described in subsection (a)(4). During the emergency period, the Secretary concerned is to achieve, to the maximum extent feasible, a salvage timber sale volume level above the programmed level to reduce the backlogged volume of salvage timber. The preparation, advertisement, offering, and awarding of such contracts shall be performed utilizing subsection (c) and notwithstanding any other provision of law, including a law under the authority of which any judicial order may be outstanding on or after the date of the enactment of this Act.

Contracts.

(2) USE OF SALVAGE SALE FUNDS.—To conduct salvage timber sales under this subsection, the Secretary concerned may use salvage sale funds otherwise available to the Secretary concerned.

(3) SALES IN PREPARATION.—Any salvage timber sale in preparation on the date of the enactment of this Act shall be subject to the provisions of this section.

(c) EXPEDITED PROCEDURES FOR EMERGENCY SALVAGE TIMBER SALES.—

(1) SALE DOCUMENTATION.—

(A) PREPARATION.—For each salvage timber sale conducted under subsection (b), the Secretary concerned shall prepare a document that combines an environmental assessment under section 102(2) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)) (including regulations implementing such section) and a biological evaluation under section (a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(2)) and other applicable Federal law and implementing regulations. A document embodying decisions relating to salvage timber sales proposed under authority of this section shall, at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible, consider the environmental effects of the salvage timber

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sales and the effect, if any, on threatened or endangered species, and to the extent the Secretary concerned, at his sole discretion, considers appropriate and feasible, be consistent with any standards and guidelines from the management plans applicable to the National Forest or Bureau of Land Management District on which the salvage timber sale occurs.

(B) **USE OF EXISTING MATERIALS.**—In lieu of preparing a new document under this paragraph, the Secretary concerned may use a document prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) before the date of the enactment of this Act, a biological evaluation written before such date, or information collected for such a document or evaluation if the document, evaluation, or information applies to the Federal lands covered by the proposed sale.

(C) **SCOPE AND CONTENT.**—The scope and content of the documentation and information prepared, considered, and relied on under this paragraph is at the sole discretion of the Secretary concerned.

(2) **REPORTING REQUIREMENTS.**—Not later than August 30, 1996, the Secretary concerned shall submit a report to the appropriate committees of Congress on the implementation of this section. The report shall be updated and resubmitted to the appropriate committees of Congress every six months thereafter until the completion of all salvage timber sales conducted under subsection (b). Each report shall contain the following:

(A) The volume of salvage timber sales sold and harvested, as of the date of the report, for each National Forest and each district of the Bureau of Land Management.

(B) The available salvage volume contained in each National Forest and each district of the Bureau of Land Management.

(C) A plan and schedule for an enhanced salvage timber sale program for fiscal years 1995, 1996, and 1997 using the authority provided by this section for salvage timber sales.

(D) A description of any needed resources and personnel, including personnel reassignments, required to conduct an enhanced salvage timber sale program through fiscal year 1997.

(E) A statement of the intentions of the Secretary concerned with respect to the salvage timber sale volume levels specified in the joint explanatory statement of managers accompanying the conference report on H.R. 1158, House Report 104-124.

(3) **ADVANCEMENT OF SALES AUTHORIZED.**—The Secretary concerned may begin salvage timber sales under subsection (b) intended for a subsequent fiscal year before the start of such fiscal year if the Secretary concerned determines that performance of such salvage timber sales will not interfere with salvage timber sales intended for a preceding fiscal year.

(4) **DECISIONS.**—The Secretary concerned shall design and select the specific salvage timber sales to be offered under subsection (b) on the basis of the analysis contained in the document or documents prepared pursuant to paragraph (1).

to achieve, to the maximum extent feasible, a salvage timber sale volume level above the program level.

(6) **SALE PREPARATION.**—

(A) **USE OF AVAILABLE AUTHORITIES.**—The Secretary concerned shall make use of all available authority, including the employment of private contractors and the use of expedited fire contracting procedures, to prepare and advertise salvage timber sales under subsection (b).

(B) **EXEMPTIONS.**—The preparation, solicitation, and award of salvage timber sales under subsection (b) shall be exempt from—

(i) the requirements of the Competition in Contracting Act (41 U.S.C. 253 et seq.) and the implementing regulations in the Federal Acquisition Regulation issued pursuant to section 25(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 421(c)) and any departmental acquisition regulations; and

(ii) the notice and publication requirements in section 18 of such Act (41 U.S.C. 418) and 8(a) of the Small Business Act (15 U.S.C. 637(e)) and the implementing regulations in the Federal Acquisition Regulations and any departmental acquisition regulations.

(C) **INCENTIVE PAYMENT RECIPIENTS; REPORT.**—The provisions of section 516(b)(1) of the Federal Workforce Restructuring Act of 1994 (Public Law 103-226; 5 U.S.C. 5597 note) shall not apply to any former employee of the Secretary concerned who received a voluntary separation incentive payment authorized by such Act and accepts employment pursuant to this paragraph. The Director of the Office of Personnel Management and the Secretary concerned shall provide a summary report to the appropriate committees of Congress, the Committee on Government Reform and Oversight of the House of Representatives, and the Committee on Governmental Affairs of the Senate regarding the number of incentive payment recipients who were rehired, their terms of reemployment, their job classifications, and an explanation, in the judgment of the agencies involved of how such reemployment without repayment of the incentive payments received is consistent with the original waiver provisions of such Act. This report shall not be conducted in a manner that would delay the rehiring of any former employees under this paragraph, or affect the normal confidentiality of Federal employees.

(8) **COST CONSIDERATIONS.**—Salvage timber sales undertaken pursuant to this section shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities.

(7) **EFFECT OF SALVAGE SALES.**—The Secretary concerned shall not substitute salvage timber sales conducted under subsection (b) for planned non-salvage timber sales.

(8) **REFORESTATION OF SALVAGE TIMBER SALE PARCELS.**—The Secretary concerned shall plan and implement reforestation of each parcel of land harvested under a salvage timber sale conducted under subsection (b) as expeditiously as possible after completion of the harvest on the parcel, but in no case

later than any applicable restocking period required by law or regulation.

(9) **EFFECT ON JUDICIAL DECISIONS.**—The Secretary concerned may conduct salvage timber sales under subsection (b) notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section.

(d) **DIRECTION TO COMPLETE TIMBER SALES ON LANDS COVERED BY OPTION 9.**—Notwithstanding any other law (including a law under the authority of which any judicial order may be outstanding on or after the date of enactment of this Act), the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts on Federal lands described in the "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl", signed by the Secretary of the Interior and the Secretary of Agriculture on April 18, 1994. The Secretary concerned may conduct timber sales under this subsection notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section. The issuance of any regulation pursuant to section 4(d) of the Endangered Species Act of 1973 (16 U.S.C. 1533(d)) to ease or reduce restrictions on non-Federal lands within the range of the northern spotted owl shall be deemed to satisfy the requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), given the analysis included in the Final Supplemental Impact Statement on the Management of the Habitat for Late Successional and Old Growth Forest Related Species Within the Range of the Northern Spotted Owl, prepared by the Secretary of Agriculture and the Secretary of the Interior in 1994, which is, or may be, incorporated by reference in the administrative record of any such regulation. The issuance of any such regulation pursuant to section 4(d) of the Endangered Species Act of 1973 (16 U.S.C. 1533(d)) shall not require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

(e) **ADMINISTRATIVE REVIEW.**—Salvage timber sales conducted under subsection (b), timber sales conducted under subsection (d), and any decision of the Secretary concerned in connection with such sales, shall not be subject to administrative review.

(f) **JUDICIAL REVIEW.**—

(1) **PLACE AND TIME OF FILING.**—A salvage timber sale to be conducted under subsection (b), and a timber sale to be conducted under subsection (d), shall be subject to judicial review only in the United States district court for the district in which the affected Federal lands are located. Any challenge to such sale must be filed in such district court within 15 days after the date of initial advertisement of the challenged sale. The Secretary concerned may not agree to, and a court may not grant, a waiver of the requirements of this paragraph.

(2) **EFFECT OF FILING ON AGENCY ACTION.**—For 45 days after the date of the filing of a challenge to a salvage timber sale to be conducted under subsection (b) or a timber sale to be conducted under subsection (d), the Secretary concerned shall take no action to award the challenged sale.

(3) **PROHIBITION ON RESTRAINING ORDERS, PRELIMINARY INJUNCTIONS, AND BELIEF FINDING REVIEW.**—No restraining

order, preliminary injunction, or injunction pending appeal shall be issued by any court of the United States with respect to any decision to prepare, advertise, offer, award, or operate a salvage timber sale pursuant to subsection (b) or any decision to prepare, advertise, offer, award, or operate a timber sale pursuant to subsection (d). Section 705 of title 5, United States Code, shall not apply to any challenge to such a sale.

(4) **STANDARD OF REVIEW.**—The courts shall have authority to enjoin permanently, order modification of, or void an individual salvage timber sale if it is determined by a review of the record that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (3)).

(5) **TIME FOR DECISION.**—Civil actions filed under this subsection shall be assigned for hearing at the earliest possible date. The court shall render its final decision relative to any challenge within 45 days from the date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirement of the United States Constitution. In order to reach a decision within 45 days, the district court may assign all or part of any such case or cases to one or more Special Masters, for prompt review and recommendations to the court.

(6) **PROCEDURES.**—Notwithstanding any other provision of law, the court may set rules governing the procedures of any proceeding brought under this subsection which set page limits on briefs and time limits on filing briefs and motions and other actions which are shorter than the limits specified in the Federal rules of civil or appellate procedure.

(7) **APPEAL.**—Any appeal from the final decision of a district court in an action brought pursuant to this subsection shall be filed not later than 30 days after the date of decision.

(g) **EXCLUSION OF CERTAIN FEDERAL LANDS.**—

(1) **EXCLUSION.**—The Secretary concerned may not select, authorize, or undertake any salvage timber sale under subsection (b) with respect to lands described in paragraph (2).

(2) **DESCRIPTION OF EXCLUDED LANDS.**—The lands referred to in paragraph (1) are as follows:

(A) Any area on Federal lands included in the National Wilderness Preservation System.

(B) Any roadless area on Federal lands designated by Congress for wilderness study in Colorado or Montana.

(C) Any roadless area on Federal lands recommended by the Forest Service or Bureau of Land Management for wilderness designation in its most recent land management plan in effect as of the date of the enactment of this Act.

(D) Any area on Federal lands on which timber harvesting for any purpose is prohibited by statute.

(h) **RULEMAKING.**—The Secretary concerned is not required to issue formal rules under section 553 of title 5, United States Code, to implement this section or carry out the authorities provided by this section.

(i) **EFFECT ON OTHER LAWS.**—The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any salvage timber sale subject to sub-

section (b) and any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

(1) The Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.).

(2) The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.).

(3) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(4) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(5) The National Forest Management Act of 1976 (16 U.S.C. 472a et seq.).

(6) The Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528 et seq.).

(7) Any compact, executive agreement, convention, treaty, and international agreement, and implementing legislation related thereto.

(8) All other applicable Federal environmental and natural resource laws.

(j) **EXPIRATION DATE.**—The authority provided by subsections (b) and (d) shall expire on December 31, 1996. The terms and conditions of this section shall continue in effect with respect to salvage timber sale contracts offered under subsection (b) and timber sale contracts offered under subsection (d) until the completion of performance of the contracts.

(k) **AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED TIMBER SALE CONTRACTS.**—

(1) **AWARD AND RELEASE REQUIRED.**—Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745). The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

(2) **THREATENED OR ENDANGERED BIRD SPECIES.**—No sale unit shall be released or completed under this subsection if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.

(3) **ALTERNATIVE OFFER IN CASE OF DELAY.**—If for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of the enactment of this Act, the Secretary concerned shall provide the purchaser an equal volume of timber, of like kind and value, which shall be subject to the terms of the original contract and shall not count against current allowable sale quantities.

(l) **EFFECT ON PLANS, POLICIES, AND ACTIVITIES.**—Compliance with this section shall not require or permit any administrative action, including revisions, amendment, consultation, supplementation, or other action, in or for any land management plan, standard, guideline, policy, regional guide, or multiforest plan because of implementation or impacts, site-specific or cumulative,

of activities authorized or required by this section, except that any such administrative action with respect to salvage timber sales is permitted to the extent necessary, at the sole discretion of the Secretary concerned, to meet the salvage timber sale goal specified in subsection (b)(1) of this section or to reflect the effects of the salvage program. The Secretary concerned shall not rely on salvage timber sales as the basis for administrative action limiting other multiple use activities nor be required to offer a particular salvage timber sale. No project decision shall be required to be halted or delayed by such documents or guidance, implementation, or impacts.

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ENRD APPELLATE  
TO 12025144240/746612/05/95 TUE 13:09 FAX 2025144240  
12/04/95 09:59AM FROM SIERRA CLUB LEGAL NW

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the county of King. I am over 18 years of age and not a party to this action. My business address is 705 Second Ave., suite 203, Seattle, Washington, 98104.

On December 4, 1995, I served a true copy of MOTION FOR LEAVE TO RESPOND on the persons listed below by telefax and by placing said copy in a sealed envelope with postage full prepaid, in a United States Postal Service mail box in Seattle, Washington, addressed as follows:

David C. Shilton  
Appellate Section  
Env't & Natural Resources Div.  
Department of Justice  
P.O. Box 23795  
L'Enfant Station  
Washington, D.C. 20026

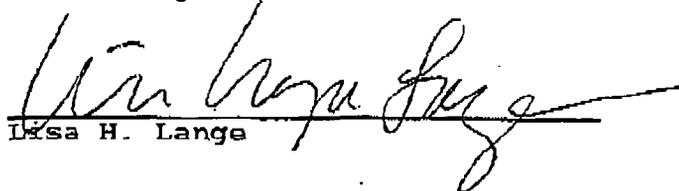
J.J. Leary, Jr.  
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Mark Rutzick  
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Peggy Hennessey  
Gary Kahn  
Reeves, Kahn, & Eder  
4035 S.E. 52nd Avenue  
Portland, Oregon 97206

I, Lisa H. Lange, declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of December, 1995, at Seattle, Washington.

  
Lisa H. Lange

U.S. DEPARTMENT OF JUSTICE  
 ENVIRONMENT & NATURAL RESOURCES DIVISION  
 APPELLATE SECTION  
 WASHINGTON, D.C. 20530

FAX NUMBER (202) 514-4240  
 VOICE (202) 514-5580

DATE: November 8, 1995

FROM: David Shilton

To:

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Mike Gippert	
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Elena Kagan	456-1647
Dinah Bear	456-0753

**Message:** The Ninth Circuit oral argument in the appeals from Judge Dwyer's decision upholding the Forest Plan will be on December 4 in San Francisco. I would like to hold a moot court the week before argument. The afternoon of Wednesday November 29th, in the afternoon, would work for me, but I could shift it to another day or time if the 29th is bad. By that time, we should know who will be on our panel.

To recap, the issues presented in the appeals are:

**Enviros:** 1. Did the strategy comply with the viability regulation? 2. Should the FSEIS have considered a "no-harvest" alternative? 3. Have the agencies' assumptions regarding regulation of harvest on private lands been fatally undercut?

**Industry:** 1. Did the Agencies need specific statutory authorization to file cross-claims for declaratory relief against NFRC? 2. Was Declaratory Relief appropriate in light of the fact that the issues were pending in the D.C. District Court?

If you have questions or need copies of briefs, let me know.

Peter Kopelman

9th Cir. argument

Order - address impact of res. plan.

We said plan was still viable - didn't affect it  
even

→ Rudzick didn't mention.

Arg went well. Anyway to uphold Dwyer, will.  
Good panel

Expedited schedule -

---

Env TTs have filed for TRO in Boulder Co.

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT & NATURAL RESOURCES DIVISION  
APPELLATE SECTION  
WASHINGTON, D.C. 20530

FAX NUMBER (202) 514-4240  
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DATE: November 27, 1995

FROM: David Shilton

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Message: FYI -- The oral argument on December 4 will be heard by Judges Goodwin, Schroeder, and Pregerson, a.k.a. "the owl panel."

Moot court is still scheduled for Wednesday at 3:15.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al, )  
)  
Plaintiffs, )  
)  
and )  
)  
SAVE THE WEST, et al, )  
)  
Plaintiffs-Appellants, )  
)  
vs. )  
)  
JAMES R. MOSELEY, in his official )  
capacity as Assistant Secretary of )  
Agriculture, et al, )  
)  
Defendants-Appellees, )  
)  
and )  
)  
WASHINGTON CONTRACT LOGGERS )  
ASSOCIATION, et al, )  
)  
Defendants-Intervenors. )  
)

No. 95-35214

DC No. CV-92-479-WLD

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Appeal from the United States District Court for Western District of Washington  
DC No. CV-92-479-WLD

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PLAINTIFFS-APPELLANTS' OPENING BRIEF

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*1) where's our brief  
2) job w/ District  
what were arguing re  
impact of new rules on*

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## I. STATEMENT OF JURISDICTION

This is an appeal from the final judgment of the United States District Court for the Western District of Washington granting Defendants' motion for summary judgment and upholding the challenged agency action. Seattle Audubon Society, et al. vs. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994). Plaintiffs challenged the Defendants' April 13, 1994 Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("ROD"). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellants Forest Conservation Council and Save The West (hereafter collectively referred to as "FCC"), raise the following challenges to the District Court's judgment:

1. Whether the District Court erred in concluding that Defendants considered an adequate range of alternatives.
2. Whether the District Court erred in concluding that Defendants adequately considered the cumulative impacts of logging on state and private lands.

## III. STATEMENT OF THE CASE

### A. NATURE OF THE CASE

FCC challenged Defendants' adoption, as the preferred alternative, of the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("ROD") and its supporting final supplemental environmental impact statement ("FSEIS"), collectively referred to as "Option 9."

FCC's challenge was based upon Defendants' failure to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. ("NEPA") and the National Forest Management Act, 16 U.S.C. § 1600 et seq. ("NFMA"). The District Court found that the Defendants acted within the lawful scope of their discretion in adopting Option 9.

## B. BACKGROUND

The controversy over the management of forests of the Pacific Northwest has been ongoing for more than a decade. Ancient forests of the Pacific Northwest are a unique ecological resource, generally characterized by a dominant overstory of trees over 200 years old. These forests provide a last refuge for many species of fish and wildlife, including Northern Spotted Owls and numerous anadromous salmonid stocks. As a result of significant habitat alteration, largely due to logging, the populations of many species that depend upon these forests have declined, moving at an accelerating rate towards extinction.

On July 23, 1990, the U.S. Fish and Wildlife Service listed the Northern Spotted Owl as a threatened species pursuant to the Endangered Species Act, 16 U.S.C. § 1531, et. seq. 55 Fed. Reg. 26114 (June 26, 1990). The Marbled Murrelet, another species that depends on these forests for its nesting habitat was added to the list of threatened species on October 1, 1992. 57 Fed. Reg. 45328.

There have been numerous administrative and legal proceedings regarding the federal government's management of these forests. On February 8, 1989, several of the Plaintiffs in this lawsuit filed suit against the Forest Service, alleging that the then-existing Owl Management Plan and the accompanying EIS violated NEPA, NFMA, the APA and the Migratory Bird

Treaty Act. 16 U.S.C. § 703, *et seq.* Seattle Audubon Society vs. Robertson, C89-160 WD (W.D. Wash.) (hereinafter referred to as "SAS I"). After an administrative action withdrawing the challenged decision, but indicating that timber sales would continue, Plaintiffs amended their Complaint on October 22, 1990. On March 7, 1991, the District Court granted summary judgment for the Plaintiffs. Subsequently, the District Court issued a permanent injunction protecting owl habitat and enjoining further timber sales pending the adoption and implementation of a management plan that assured the owls' viability. Seattle Audubon Society vs. Evans, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd.*, Seattle Audubon Society vs. Evans, 952 F.2d 297 (9th Cir. 1991). Thereafter, the Forest Service prepared a supplemental EIS and adopted a record of decision establishing guidelines for managing spotted owl habitat.

On March 25, 1992, this lawsuit was filed challenging the adequacy of the ROD and the supplemental EIS under NEPA and NFMA. On July 2, 1992, the District Court granted Plaintiffs' motion for summary judgment, and issued a permanent injunction. Seattle Audubon Society vs. Moseley, 798 F. Supp. 1484 (W.D. Wash. 1992) *aff'd.*, 998 F.2d 699 (9th Cir. 1993). Following that court order, the government conducted additional analysis, issued a draft Supplemental EIS for the Management of Habitat for Late Successional and Old Growth Related Species Within the Range of the Northern Spotted Owl. In February 1994, the Forest Service and Bureau of Land Management jointly issued a Final Supplemental EIS, followed by the ROD on April 13, 1994. The present dispute is a challenge to the decision made in that ROD to adopt Option 9. The District Court upheld the agency action, finding that the Defendants acted within the lawful scope of their discretion in adopting Option 9.

#### IV. STATEMENT OF FACTS

Option 9 provides for several "reserve" areas in which logging is generally, but not completely, prohibited. These areas include the late successional reserve ("LSR"), riparian zones, and other administratively withdrawn areas. Land which has not been designated as a reserve area may be logged, as part of the "matrix." In addition, certain key watersheds are entitled to protection to preserve aquatic species by limiting ground disturbing activities. The plan also includes a monitoring and evaluation program.

The challenges to the decision below focused on several issues, including the viability of the northern spotted owl and other late successional and old-growth forest dependent species, the range of alternatives considered, and the failure to consider the cumulative effects of logging on state and private lands in light of the Sweet Home decision.

##### A. VIABILITY

Option 9 does not ensure viability of the northern spotted owl and other late successional and old-growth dependent species. The FSEIS shows that Option 9 will provide only an 80% chance of viability. FSEIS 3&4-243; see also id. at 174, 179, 184, 188, and 197. Because Option 9 does not assure viability, a broader range of alternatives, including a no-cut option, must be explored.

##### B. REASONABLE RANGE OF ALTERNATIVES

Defendants did not analyze a "no-cut" alternative. The District Court found that Alternative 1 would protect essentially all old growth forests. Appendix A at 54. Furthermore, Defendants stated that Alternative 1 was designed to have the "highest probability of meeting . . . viability of northern spotted owls, . . . marbled murrelets, . . . fish species . . . [and] other

species associated with old-growth forests." FSEIS 2-41. However, Alternative 1 allows logging of 114 million board feet of timber each year for the first ten years of the plan. FSEIS 3&4-265. *pc?*

Alternative 1 would allow extensive logging under the management provisions for late successional reserve areas. "[R]oad construction in late successional reserves for silvicultural, salvage, and other activities generally is not recommended unless potential benefits exceed the costs of habitat impairment." FSEIS B-129. Fuel wood-cutting is also allowed in the LSR area. Some research activities may also be performed in the reserve areas. In addition, fire risk provisions allow management to go beyond the guidelines if the fire risk levels are particularly high. FSEIS B-74-75. Alternative 1 would result in the destruction of a significant amount of habitat on which the northern spotted owl and other late successional and old-growth dependent species rely.

### C. CUMULATIVE IMPACTS

*See Elk Creek memo*

The Option 9 cumulative impact analysis presumed that Endangered Species Act regulations pertaining to nonfederal lands would remain in effect. One critical regulation prohibits habitat modification which may result in the "take" of a threatened or endangered species. 50 C.F.R. § 17.3. Sweet Home Chapter of Communities for a Greater Oregon vs. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994) held that because "take" implies affirmative action directed toward the endangered species, congress could not have intended the term to preclude habitat modification on non-federal lands. The Sweet Home case has been argued before the U.S. Supreme Court, but a final opinion has not been issued. Reduction of suitable habitat on nonfederal land increases the pressure on federal land to provide suitable habitat.

## V. ARGUMENT

### A. STANDARD OF REVIEW

Whether Defendants complied with the requirements of NEPA and NFMA in adopting Option 9 is a question of law, and is reviewed de novo. Sierra Club vs. Espy, 38 F.3d 792 (5th Cir. 1994). Under the Administrative Procedures Act, 5 U.S.C. § 706, the Court can reverse a decision if it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Citizens to Preserve Overton Park vs. Volpe, 401 U.S. 402, 414 (1971).

While Defendants are entitled to some deference in interpreting and applying their regulations, (NRDC vs. Hodel, 819 F.2d 927, 929 (9th Cir. 1987), this deference is not absolute. The Court may not defer to an agency interpretation that is inconsistent with a mandate of Congress or that is not reasonably based. Mines vs. Sullivan, 981 F.2d 1068, 1070 (9th Cir. 1992), cert. denied 113 S. Ct. 2993 (1993).

Defendants' finding that Option 9 will assure the continued viability of the spotted owl and other late successional and old-growth dependent species is inherently unreasonable. The viability ratings confirm that species are certain to be eradicated by Option 9. Consequently, Defendants' should have considered a no-cut alternative to determine whether it had higher rating and would ensure continued viability. Furthermore, Defendants' refusal to consider the cumulative impacts of logging on state and private lands, as allowed under the Sweet Home decision, renders Option 9 and its reliance on non-federal lands arbitrary, capricious, an abuse of discretion and not in accordance with the requirements of law.

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1. District Court Erred in Determining that Defendants Fully Evaluated a Reasonable Range of Alternatives.

The adequacy of Defendants' alternatives analysis presents a question of law and is reviewed de novo before the Ninth Circuit. Nevada Land Action Association vs. United States Forest Service, 8 F.3d 713, 716-717 (9th Cir. 1993).

a. No-Cut as the No-Action Alternative

NEPA regulations require consideration of a "no action" alternative. 40 C.F.R. § 1502.14. FCC maintains that "no action" means "no harvest" for purposes of establishing a meaningful baseline against which to measure the action alternatives.

Defendants assert that they have addressed the "no cutting on federal lands" alternative, citing Table III-1 at page III-2 of the FEMAT report. That table contains a single line item showing that under the "no cut" alternative, the ratings for five biological criteria were "high," including:

1. rating for spotted owls;
2. rating for marbled murrelets;
3. rating for at-risk fish stocks;
4. rating for other species closely associated with old growth forests; and
5. rating for providing interacting old-growth forest ecosystems.

These high ratings for the biological criteria do not provide a basis for dismissing the "no-cut" alternative without further consideration. The ratings show that the "no-cut" alternative will further the goal to protect and preserve a balanced ancient forest ecosystem.

The no-action alternative is intended to establish a baseline from which to evaluate the action alternatives. Defendants argue that the no-action/no-cut alternative is not an appropriate

baseline because they are required to provide multiple use-sustained yield and protection of ecosystems. Defendants' Response Brief at 65. Defendants also state in the FSEIS that:

A no-harvest alternative does not satisfy the purpose and need for the proposed action, which includes maintaining a sustained yield of renewable natural resources, including timber, other forest products, and other forest values, and maintaining rural economies and communities as described in Chapter 1 of this SEIS. Alternative 1 most restricts programmed timber harvest by limiting it to 12 percent of the available land base.

Comment Response at F-97, FSEIS.

However, "multiple use" does not require provision for all uses in all areas.<sup>1</sup> "Multiple use" does not mandate the harvesting of timber in all ancient forests.<sup>2</sup> Moreover, "sustained yield" is intended to provide a ceiling, not a floor.<sup>3</sup> Sustained yield is designed to protect forest resources for future generations and to maintain a regular periodic output "without impairment of the productivity of the land." See 16 U.S.C. § 531 (b). Here any current output would seriously impair the productivity of the land as habitat for the spotted owl and other ancient forest species. Therefore, Defendants' position that it must provide for timber harvest in ancient forest habitat area is mistaken.

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<sup>1</sup> "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people \* \* \* some land will be used for less than all of the resources \* \* \* consideration [will be] given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output. 16 U.S.C. § 531 (a).

<sup>2</sup> The legislative history for the Multiple Use Sustained Yield Act acknowledges that the "priority of resource use will vary locality by locality and case by case . . . [In one locality] outdoor recreation or wildlife might dominate." 1960 U.S.C.A.N. 2379.

<sup>3</sup> One of the purposes of the sustained yield provision is to protect the national forest resources from possible overutilization in the future as a result of economic pressures or those of single-interest groups. 1960 U.S.C.A.N. 2382.

Defendants note that agencies may consider existing legal constraints in determining the appropriate "no action" alternative. Kilroy vs. Ruckelshaus, 738 F.2d 1455 (9th Cir. 1984) ("No action" alternative was comprised of a yet to be implemented Consent Decree proposal, as a reasonable benchmark and baseline from which to evaluate the action alternatives.). The Court recognized that the existing system was illegal and need not be fully analyzed as the no-action alternative.

*Want existing system allowed must make their Option*

Similarly, here, the existing plans and their implementation, have been found illegal,<sup>4</sup> therefore, they need not, and cannot, be analyzed as an appropriate benchmark or baseline. There is no consent decree or legally enforceable substitute plan to maintain a status quo. Therefore, given the recognized risks to the ancient forest ecosystem, the high biological values assigned to the no-harvest option [FEMAT, at III-2], and the futility of analyzing an illegal "no-action/status-quo" alternative, the "no-action/no-cut" alternative is the appropriate baseline.

In considering the "no action" alternative, a recent Arizona case found that the Forest Service must consider the disapproval of a mining plan of operation and no mine, even though the Forest Service did not have the authority to disapprove reasonable plans of operation. The range of alternatives was not limited by the agency's authority. Havasupai Tribe vs. U.S., 752 F. Supp. 1471 (D. Ariz. 1990). (No-action/no-mining alternative is a no project option which provides a sound baseline against which all other options can be compared). Here, the

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<sup>4</sup> Seattle Audubon Society vs. Moseley, 798 F. Supp. 1484 (W.D. Wa. 1992), aff'd sub nom., Seattle Audubon Society vs. Espy, 998 F.2d 699 (9th Cir. 1993)(Court enjoined timber sales in spotted owl habitat pending the issuance of a supplemental EIS because it found that the existing EIS and ROD establishing guidelines for managing spotted owl habitat violated NEPA).

"no-action/no-harvest" alternative establishes an appropriate baseline against which the impacts of the action alternatives can accurately be measured.

City of Tenakee Springs vs. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990), supported a "no-action/no-cut" alternative which would suspend harvesting within the entire timber sale area. The Forest Service could not consider maintenance of current level of harvest as the "no action" alternative. Because the contract could be modified or canceled under forest service regulations due to environmental degradation or resource damage [36 C.F.R. § 223.116 (a) (5) and 36 C.F.R. § 223.113], the court found that the no action alternative meant a no-cut alternative, notwithstanding the current harvest procedures and historical contract compliance.

Having failed to seriously consider the "no-harvest" alternative, Defendants have not complied with the requirements of NEPA under 40 C.F.R. § 1502.14 (d) which mandates consideration of a "no-action" alternative.

b. No-Cut as a Reasonable Alternative

Even if the Court determines that the "no-harvest" alternative is not the appropriate "no-action" alternative, it is an inherently reasonable alternative due to the potential catastrophic impacts of continued logging and must be considered. NEPA requires that an agency consider a reasonable range of alternatives. 40 C.F.R. § 1502.14. The existence of a viable, yet unexplored alternative renders an EIS inadequate. Idaho Conservation League vs. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992). In light of scientific evidence regarding impacts on the ancient forest and potential catastrophic results, consideration of a no-cut alternative is not only reasonable, but necessary.

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An EIS must consider every reasonable alternative in order to be adequate. Friends of Endangered Species vs. Jantzen, 760 F.2d 976 (9th Cir. 1985). An EIS is rendered inadequate by the existence, by a viable, but unexamined, alternative. Citizens for a Better Henderson vs. Hodel, 768 F.2d 1051 (9th Cir. 1985).

The alternatives section is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14. It is designed to "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." Id. Consideration of the no-cut alternative is necessary to provide a clear basis for choice.

Defendants allege that the FSEIS explains why the no-harvest alternative was unreasonable, citing FSEIS at F-97. However, as discussed above, Defendants' maintenance of a sustainable yield and provision of multiple uses does not render a no-harvest alternative "unreasonable." Sustainable yield means that some [or all] trees must be left standing, not that some trees must be harvested on an annual basis. Multiple use does not require all uses in all areas. Therefore, a no-harvest alternative is reasonable.

Moreover, due to the significant overcutting of forests in the 1980s, and the relatively small amount of spotted owl habitat left, the alternative of no further harvest of spotted owl habitat on federal lands is reasonable and should have been evaluated in the FSEIS. The failure to include this reasonable alternative renders the FSEIS inadequate. See Citizens for a Better Henderson, at 1057; see also Tongass Conservation Society vs. Cheney, 924 F.2d 1137, 1140 (D.C. Cir. 1991).

The District Court found that Alternative 1 was fully considered and would protect essentially all existing old growth forests. 871 F. Supp. at 1320. However, Alternative 1 would allow harvesting of more than 100 million board feet of timber each year in riparian areas, administratively withdrawn areas, matrix areas, and some late successional reserve areas. Alternative 1 is not the equivalent of a no-cut alternative and it will not protect essentially all existing old growth forests.

2. District Court Erred in Finding the Defendants had Adequately Considered the Cumulative Impacts of Logging on State and Private Lands, in Light of Sweet Home.

Among other items, an EIS must analyze and disclose the environmental consequences of spatially and temporally cumulative actions. 40 C.F.R. § 1508.25. Cumulative impact is defined as:

The impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. The regulation makes it abundantly clear that the environmental analysis must include the consequences of actions, such as private logging, taking place on non-Federal lands.

Habitat for the Northern Spotted Owl exists on private lands adjacent to federal lands.

The FSEIS notes that:

there are potentially direct impacts from non-Federal forest management on species that move between federal and non-federal habitats during the year, or during their life cycle. The role of non-Federal lands was considered in the assessment of the effects of the alternatives on those species and ecosystems.

\* \* \*

An endemic species with range and habitat located on both types of ownership might be forced to rely on the federal portion of its range if the non-Federal portion were altered to the point of unsuitability.

FSEIS, pp. 3&4-8. Since the federal government cannot directly control management activities on non-federal lands, the FSEIS necessarily makes assumptions regarding how those lands will be managed. At the time the analysis was conducted, regulations promulgated pursuant to the Endangered Species Act, 16 U.S.C. § 1531, et. seq., applied with equal force to federal and non-federal lands. However, a recent decision from the District of Columbia Circuit Court of Appeals has changed some of the rules with respect to private land. Sweet Home Chapter for a Greater Oregon vs. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994).

Under the Endangered Species Act, no entity, either federal or non-federal may conduct any activities which "take" any member of a listed species without an incidental take permit. 16 U.S.C. § 1538. "Take" was broadly defined under the Act to include any actions which "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C. § 1532(19). The term "harm" was defined by the U.S. Fish and Wildlife Service to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

In Sweet Home, the D.C. Circuit held that the Fish and Wildlife Service exceeded its statutory authority in defining harm to embrace habitat modification. The practical effect of this ruling is to eliminate many of the restrictions that were present on the management of private

land comprising habitat for the Northern Spotted Owl. Habitat modification actions which "harm" the northern spotted owl are no longer prohibited. Thus, the assumptions in the FSEIS regarding the limitations on private land are no longer valid. Therefore, the conclusions regarding the viability of owl populations on federal lands are similarly invalid since the species will no longer have the same level of protection on private land.

This concern was pointed out to the drafters of the SFEIS. The ROD at pages 65 to 69 contains summaries of substantive comments submitted to the government regarding the FSEIS. The responses to these comments are also included. Two comments directly pertain to the Sweet Home decision:

**Comment:** The Sweet Home decision illustrates that the cumulative effects analysis used in the Final SEIS was an inadequate treatment of the land that makes up nearly half of the land within the planning area.

**Response:** We note the recent decision of the Court of Appeals for the District of Columbia in Sweet Home Chapter of Communities for a Greater Oregon vs. Babbitt, No. 23-5255, \_\_\_ F.3d \_\_\_ (D.C. Cir. March 11, 1994). The Secretary of the Interior has filed a motion seeking to stay issuance of the mandate in this matter and has recommended requesting rehearing by the full Court of Appeals. The Secretary believes that the case is wrongly decided and, most importantly, that it is contrary to the law in the Ninth Circuit, as set out in Palila vs. Hawaii Department of Land and Natural Resources, 852 F.2d 1106 (1988). Thus, we have determined that the Sweet Home decision has no impact on Alternative 9.

**Comment:** The Sweet Home decision will lead to less protection of spotted owl habitat on non-federal lands and therefore should be compensated by additional owl protection on federal lands.

**Response:** Based on the response to the previous question, the owl habitat provided by the selected alternative will be adequate to meet the objective of the decision. No change is necessary.

ROD p. 69. Subsequent to the issuance of the ROD, the D.C. Circuit Court of Appeals rejected the government's request for reconsideration and suggestion for rehearing on en banc. 1994 W.L. 419073, August 12, 1994.<sup>5</sup> The responses dismiss the effect of Sweet Home because the Government felt that the case was wrongly decided and had requested rehearing. Since rehearing has been denied, and there is a U.S. Supreme Court decision pending, it can no longer be ignored.

The second comment indicates the Sweet Home decision will lead to less protection of spotted owl habitat on non-federal lands. As a result of Sweet Home, the government's assumption regarding the level of owl protection on federal lands is no longer valid. The failure of the government to include an assessment of the results of logging on state and private lands renders the FSEIS invalid.

In National Wildlife Federation vs. U.S. Forest Service, 592 F. Supp. 931 (D. Or. 1984), plaintiffs challenged timber sales on a ranger district of the Siuslaw National Forest. In part, plaintiffs argued that the environmental analysis must include the impacts of timber harvests on private lands adjoining the ranger district. The Court agreed, holding that the "CEQ regulations. . . require that the forest service analyze the cumulative impacts [of non-federal activities] in order to comply with NEPA." Id. at 942. The FSEIS assessment team recognized the need for nonfederal contributions to spotted owl recovery. FSEIS at 3&4-244. The

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<sup>5</sup> The response in the ROD indicates that the Secretary of the Interior believes that Sweet Home was wrongly decided. While FCC agrees that the case was wrongly decided, the decision stands and is binding absent review by the U.S. Supreme Court. The case has been argued before the U.S. Supreme Court, but a written opinion has not been issued.

government's failure to consider the cumulative impacts likely to take place on non-federal lands renders the FSEIS invalid.

Without reliance on non-federal lands for additional habitat, Option 9 is clearly inadequate assure viability of late successional and old-growth dependent species. By ignoring Sweet Home, and its devastating impacts on habitat for late successional and old-growth dependent fish and wildlife species, Defendants have failed to consider the reasonably foreseeable cumulative impacts of timber harvest on non-federal land. The District Court erred in finding to the contrary.

✓ Only  
valid  
proof

#### VI. CONCLUSION

Based on the foregoing, FCC respectfully requests that the District Court judgment be reversed, and that the case be remanded to the District Court directing the entry of an injunction prohibiting all logging in the planning area pending full compliance with NEPA and NFMA.

DATED this 23rd day of June, 1995.

Respectfully submitted,

REEVES, KAHN & EDER



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## STATEMENT OF RELATED CASES

There are two other appeals from the District Court's Judgment in this case: Nos. 95-35052 and 95-35215. The opening brief for No. 95-35052 was filed on May 8, 1995 and the opening brief for 95-35215 is due in June, 1995.

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

NATIVE FOREST COUNCIL,

Plaintiff-Appellant,

v.

BRUCE BABBITT, et al.,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

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BRIEF OF APPELLANT NATIVE FOREST COUNCIL

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BRIEF OF APPELLANT NATIVE FOREST COUNCIL

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the district court granting defendants' motion for summary judgment, thus upholding a challenged final agency action. Seattle Audubon Society v. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994). The agency action under review in the district court was the April 13, 1994 adoption by the Secretaries of Interior and Agriculture of a Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (the "ROD").<sup>1</sup> The district court had jurisdiction pursuant to 28 U.S.C. § 1331. See 871 F. Supp. at 1307. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Appellant Native Forest Council ("NFC") raises two challenges to the district court's judgment:

1. Whether the district court erred in concluding that in adopting the ROD, defendants Espy and United States Forest Service had complied with applicable regulations, which require inter alia, that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native . . . vertebrate species in the planning area."

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1. Pursuant to Circuit Rules 30-1.2(d) and 17-2.2, copies of the ROD and both volumes of the Final Supplemental Environmental Impact Statement on Management of Habitat for Late Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl ("FSEIS") are filed herewith as Excerpts of Record volumes 2, 3, and 4.

2. Whether the district court erred in concluding that the FSEIS included an adequate range of proposals, and that the proposal selected was adequately examined.

*White dy. m  
point 2*

STATEMENT OF THE CASE

A. Nature of the Case

This appeal challenges federal agency action selecting "Option 9" of the alternative forest management plans considered by defendants United States Forest Service and Bureau of Land Management for the forests of the Pacific Northwest. Under this Option more than one billion board feet of old growth forest will be logged annually. ROD at 24. Such logging has been almost entirely prohibited for the last four years by various injunctions mandating compliance by defendants with various organic laws under which they operate.

Appellant Native Forest Council ("NFC"), sued below seeking review of the Record of Decision ("ROD") issued by the Secretaries of the Interior and Agriculture on which Option 9 was grounded (No. 94-803). The basis of appellant's challenge was the agencies' failure to comply with the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. Numerous other environmental groups also sought review raising many of the same general objections. These actions were consolidated before Judge William Dwyer, who for nearly a decade

has presided over cases involving federal compliance with NFMA, NEPA, and other laws applicable to the forests in question.

B. Course of Proceedings Below

1. Background and Related Litigation

For the better part of a decade, environmental groups have been litigating with the federal government over whether its management of federal lands in the Pacific Northwest would cause the extinction of the northern spotted owl, and other native forest dependent species.<sup>2</sup> The dispute has never been about the northern spotted owl qua owl. The significance of the owl is that it has been chosen by the Forest Service as an indicator species under 36 C.F.R. § 219.19(a)(1) for forest ecosystem health -- a canary in the coal mine. Thus, the challenges to successive government management plans implicate far more than the health of the owl. The current plan, while more comprehensive than its predecessors, nonetheless fails to ensure the survival of the owl, and thereby of the ecosystem.

The northern spotted owl was originally chosen by the Forest Service as an indicator species in the 1980's. Environmental groups challenged the promulgation of forest plans which did not assure the viability of the northern spotted owl,

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2. See, e.g., Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993); Seattle Audubon Society v. Espy, 998 F.2d 699 (9th Cir. 1993); Seattle Audubon Society v. Robertson, 931 F.2d 590 (9th Cir. 1991); Portland Audubon Society v. Lujan, 884 F.2d 1233 (9th Cir. 1989), cert. denied, 494 U.S. 1026 (1990); Oregon Natural Res. Council v. United States Forest Service, 834 F.2d 842 (9th Cir. 1987).

and, at the same time, separately challenged the government's failure to list the northern spotted owl as an endangered species under the Endangered Species Act ("ESA"), 16 U.S.C. 1531 et seq. In 1988, the district court found the failure to list the owls as endangered, in the face of scientific evidence that "continued old growth harvesting is likely to lead to the extinction of the subspecies," to be arbitrary and capricious. Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 481 (W.D. Wash. 1988). Six months later the owl was listed as threatened. Although the district court found that plan to protect the owl was inadequate and illegal, Congress intervened, and legislatively directed that sales put forward in that fiscal year be implemented.<sup>3</sup>

After the government's assumptions about the owl's viability were found to be incorrect, an interagency task force was convened to develop a conservation plan for the owl. Although the Forest Service announced that it intended to follow the recommendations of this group, this declaration was found to be insufficient under both NFMA and NEPA. Consequently all further logging in spotted owl habitat was enjoined until a management plan could be put into effect. Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash.), aff'd, 952 F.2d 297 (9th Cir. 1991). A year later, the Forest Service adopted a Record of Decision implementing new guidelines. Once again, this plan was challenged, and once again, because in

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3. See Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992).

adopting the new plan the Forest Service had not complied with NEPA, all logging in spotted owl habitat was enjoined. Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1493-94 (W.D. Wash. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993).<sup>4</sup>

The most critical flaw in the plan challenged in Moseley was, according to the reviewing court, the government's failure to take proper account of a 1992 study of the northern spotted owl by Drs. Anderson and Burnham. Moseley, 798 F. Supp. at 1480-83. This study showed that the spotted owl was in a period of decline, that the decline in owl populations was proceeding at a faster pace than the government had previously acknowledged, and that the rate of decline was accelerating. Id. at 1481. Of particular significance was the evidence of decreasing probability of survival of adult females, id., because without a sufficient female population, even if habitat conditions were stabilized at some point in the future, the owl would not survive a transition period from decline to stability.

## 2. Development of the Current Plan

In April 1993, the President established the Forest Ecosystem Management Assessment Team ("FEMAT") to examine options and make recommendations to the Secretaries of Agriculture and

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4. Although Evans and Moseley were both challenges to Forest Service management, there were similar challenges to management of forests by the Bureau of Land Management ("BLM"). As a result of these challenges, logging was enjoined in BLM forests from June 1992 forward. Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1510 (D. Or. 1992), aff'd, 998 F.2d 705 (9th Cir. 1993).

Interior in development of a new forest management plan. FEMAT was composed of both government employees -- its chair was a Forest Service biologist -- and private citizens -- research scientists from the academic community. FEMAT conducted its business out of the public eye, and, to ensure secrecy, FEMAT staff shredded a great number of deliberative documents and internal reports. A number of parties, including a timber industry group, sought to participate in FEMAT meetings, but were rebuffed. The industry group sued in the District of Columbia alleging that the FEMAT's composition and activities violated FACA, and sought an injunction precluding reliance by the government on the FEMAT report.<sup>5</sup> The district court found that FEMAT had indeed violated FACA. Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009, 1015 (D.D.C. 1994). The court declined, however, to enjoin use of the FEMAT report, deferring this issue to any later court reviewing agency action taken in reliance on the FEMAT report. Id.

FEMAT selected ten alternatives, each of which was assessed in a joint environmental impact statement ("EIS") prepared by the Forest Service and BLM. A draft supplemental EIS based on the FEMAT report was issued in July 1993. The FSEIS followed in February 1994. With some adjustment, the alternative recommended by FEMAT and by the FSEIS -- Option 9 -- was adopted by the Secretaries of Agriculture and Interior on April 13, 1994, effective May 14, 1995.

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5. NFC participated in this suit as an amicus curiae.

C. Statement of Facts

The core of Option 9 is its designation of reserve areas, mainly the Late-Successional Reserves ("LSR"), in which logging is generally, but not completely, prohibited. In addition to the LSR, reserved areas include riparian zones, and other administratively withdrawn areas. Federal land not included in the reserves is denoted "matrix," and may be logged. In addition, several areas are designated as key watersheds, where activities are restricted to conserve aquatic species. Option 9 also includes a monitoring and evaluation program, one component of which is "adaptive management areas," designated for experimentation in new methods of achieving management goals.

The challenges below to the ROD focused on a number of areas, the most important of which were (1) the viability of the northern spotted owl, (2) the viability of anadromous fish species, (3) the range of alternatives considered in the FSEIS, (4) the economic effects of various alternatives considered, and (5) the Secretaries' dismissive analysis of recent changes in underlying law.

1. Viability of the Northern Spotted Owl and Other Forest Dwelling Species

Option 9 does not ensure the continued viability of native forest dwelling species, but allots the marbled murrelet, the spotted owl, and numerous other forest vertebrates only an 80% chance of viability. FSEIS 3&4-243; see id. at 174, 179, 184, 188, 197. The government's figure for the spotted owl --

83% -- appears, without explanation or elaboration, in the work of a FEMAT panel charged with assessing the viability of the owl under Option 9. The panel's deliberations, as reported, do not even mention the 1992 Anderson and Burnham demographic study or problems of owl emigration, previously found to be critical by the district court. FEMAT 3030.<sup>6</sup> Instead, for both outcomes A and B for spotted owls, the two most positive outcomes for an alternative,<sup>7</sup> the panel simply assumed that populations will survive the transition period. Id. Thus, the FEMAT expert panel repeated what had been done before in prior, insufficient efforts: it assumed the owl would survive the near-term loss of additional habitat and rated the ability of the alternative to provide habitat to support a viable owl population, should any owls survive.<sup>8</sup>

*clearly studied in EIS - evidence of mitigation in notes is inadequate*

*describe our efforts re mitigation, record in FSEIS, Appendix*

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6. The reported deliberations of the Spotted Owl Panel were submitted into the record below, and are included in Excerpts of Record volume 1.

7. Under outcome A, "[h]abitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, well distributed across federal lands." FSEIS 3&4-118. Cf. 36 C.F.R. § 219.19 ("a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area"). Outcome B is realized when "[h]abitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, but with significant gaps in the historic species distribution on federal land." FSEIS 3&4-118.

8. The composition of the FEMAT panel illustrates the conclusory nature of the government's study. The FEMAT expert panel did not include any of the critics of prior studies, or any of the many scientists both inside and outside the government who had expressed concern over the transition period. Instead, the panel members included a scientist who had already expressed a  
(continued...)

A broad cross-section of the scientific community responded to FEMAT's ignoring of the 1992 Anderson and Burnham demographic study in a letter of September 29, 1993, to Secretaries Espy and Babbitt requesting them to undertake a further demographic analysis of additional spotted owl data collected since 1992. See FSEIS Appendix J at 27-29. Consequently, in December of 1993, the government belatedly convened a group of scientists to conduct another demographic analysis of the available data on spotted owls. See SEIS Team Memo Policy Issue No. 4 (recognizing that the failure to analyze this data would lead to a repeat of the district Court's ruling in Moseley).<sup>9</sup> This group was led by Drs. Burnham and Anderson. The findings from the workshop, set forth in a paper by Drs. Burnham, Anderson and White which appears as Appendix J to the FSEIS, reaffirmed the conclusions of the earlier 1992 Anderson and Burnham study.

In sum, in 1992 this Court affirmed the district courts' rejection of the prior plan as inadequate, for failing to

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8. (...continued)

lack of concern for the transition period, a biologist employed by a timber industry research group, an employee of the U.S. Fish and Wildlife Service, and an owl biologist with extensive field experience in one of the owl study areas.

Incredibly, two of these owl panelists had stated before the establishment of FEMAT, in sworn testimony, that they are not qualified to assess the viability of the northern spotted owl. See Declaration of Todd D. True in Support of Motion for Summary Judgment, C.R. 627 Exhibit A at 5-6. NFC adopted Moseley plaintiffs' briefs below by reference.

9. This memorandum was submitted into the record below and is included in Excerpts of Record volume 1.

adequately address critical demographic evidence of the owl's ability to survive the transition period. Now the government has produced another plan that ignores the best empirical demographic data about the owl and the critical transition period, the very touchstone of the prior plan's invalidity.

2. Viability of Fish Species

Some 214 native, naturally spawning Pacific salmon and steelhead populations or groups of populations ("stocks") in California, Oregon, Washington, and Idaho face a high or moderate risk of extinction, or are of special concern. Pacific Salmon at the Crossroads: Stocks At Risk From California, Oregon, Idaho, and Washington, 16 Fisheries 4, 8-10 (1991).<sup>10</sup> At least 106 major populations of salmon and steelhead on the West Coast have already been extirpated. Id. at 17. The FEMAT panel identified 257 stocks of fish on federal lands at high or moderate risk of extinction. FSEIS 3&4-191. Thus, most of the salmonid populations within the range of the northern spotted owl face a substantial chance of extinction, and a regional pattern of population-by-population extinction is already well underway.

Freshwater species also are at risk of extinction due to logging activities. In June 1994 the Fish and Wildlife Service ("FWS") determined that bull trout were threatened with extinction but could not be listed under the ESA "due to other

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10. A copy of this report is in Excerpts of Record volume 1.

higher priority listing actions." 59 Fed. Reg. 30254, 30255  
(June 10, 1994). The bull trout

has been extirpated from most of the large mainstream rivers in which it historically occurred. The majority of remaining individuals exist within headwater streams. These fragmented and isolated populations are subject to local extirpation . . . as a result of aquatic habitat degradation due to forest management practices, road building, dams, water diversions, mining, and grazing. . . . Id.

Thus, degradation of fish habitat through roadbuilding and logging is one of the main reasons that so many fish populations are at risk of extinction. The alarming decline in fish populations has severe economic consequences as well. The Pacific Fisheries Management Council severely limited fishing in 1994, due to catastrophically low projected populations. 59 Fed. Reg. 22999 (May 4, 1994). According to the FSEIS, there are hundreds of stocks at high-to-moderate risk of extinction within the range of the northern spotted owl, and many stocks have already become extinct.<sup>11</sup> FSEIS at 3&4-190. The FSEIS and ROD, however, contain no discussion of how to prevent additional extinctions. They simply observe that extinctions may occur.<sup>12</sup> } *refute*

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11. The possibilities for extirpation of various fish species are much greater under Option 9 than other alternatives considered, including Option 1. FSEIS 3&4-197.

12. The ROD states that the Fish and Wildlife Service issued a "no jeopardy" opinion for the selected alternative. That opinion, however, addressed only species already formally listed under the ESA. ROD at 50-51.

### 3. Range of Alternatives Considered

Of the ten alternatives developed by FEMAT, none proposed the cessation of logging of native forests on federal lands. The closest the government came to examining a "no-cut" alternative was Option 1. Although "designed to have the highest probability of meeting . . . viability of northern spotted owls, . . . marbled murrelets, . . . fish species . . . [and] other species associated with old-growth forests," this alternative was far from no-cut. FSEIS 2-41. Option 1 explicitly called for logging 114 million board feet of timber per year in the first decade after implementation of the plan. FSEIS 3&4 265. At least one million board feet would be cut from every administrative unit of Forest Service or BLM lands within the planning area. Id at 268. While Option 1 would have provided more protection for old growth owl habitat than Option 9, it still allowed logging in less than 80 year old native forests.<sup>13</sup> These forests are the old growth of tomorrow, and would, if protected, provide habitat for old growth dependent species into the foreseeable future.

Although it appeared from the description of Option 1 that salvage logging was precluded, FSEIS 2-41, in fact Option 1 would allow extensive logging, even in the "protected" LSR. Appendix B7 to the FSEIS applies "to Late-Successional Reserves

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13. All logging, not just logging in old growth, contributes to the degradation of fish habitat. Option 1 was therefore less favorable to fish species than a "no-cut" alternative would have been.

and Managed Late-Successional Areas in all alternatives." including Option 1. FSEIS B-129. This appendix states that "[r]oad construction in Late-Successional Reserves for silvicultural, salvage, and other activities generally is not recommended unless potential benefits exceed the costs of habitat impairment." FSEIS B-129. Fuelwood cutting is also allowed in LSR under Appendix B7. Id. Logging can also occur in LSR under the guise of research. "Some [research] activities (including those within experimental forests) not otherwise consistent with the objectives may be appropriate . . . ." FSEIS B-131.

The exception under which possibly the most logging is allowed in old-growth forests under Option 1, however, is contained in Appendix B7 under the heading Fire Suppression and Prevention. "Fuels management in Late-Successional Reserves will utilize minimum impact suppression methods in accordance with guidelines for reducing risks of large-scale disturbances." FSEIS B-130-31. These guidelines are found in Appendix B5. Thus, Appendix B7 incorporates by reference the fire "risk reduction" provisions from Appendix B5 which would otherwise only apply to Options 2 through 10. See FSEIS B-73. These fire risk reduction guidelines provide that

[i]n some Late-Successional Reserves in [the Eastern Cascades and Klamath] provinces, management that goes beyond these guidelines may be considered. Levels of risk in those Late-Successional Reserves are particularly high and may require additional measures. Consequently, management activities designed to reduce risk levels are encouraged in those Late-Successional Reserves even if a portion of the activities must take place in currently late-successional habitat.

. . . Such activities in older stands may also be undertaken in Late-Successional Reserves in other provinces if levels of fire risk are particularly high. FSEIS B-74-75 (emphasis added).

Thus, substantial logging, including clearcutting of healthy green old-growth, can occur in Late-Successional Reserves under Option 1 under the rubric of fire risk reduction, research, road construction, and fuelwood cutting.

#### 4. Underlying Economic Analysis

Option 1 was not, however, adopted by the Secretaries. The government chose Option 9 over Option 1, primarily on economic grounds. In addition to increased receipts<sup>14</sup> to the government from its timber program, FSEIS 3&4-299, forest industry employment would be 5.5% higher under Option 9 than Option 1 according to the government's estimate. See FSEIS 3&4-297. However, the supporting economic analysis in the FSEIS did not discuss crucial economic evidence that would markedly change the economic picture had it been considered. In particular, the FSEIS systematically ignored unlogged federal forests as a contribution to the stability of local and regional economies. The economic analysis also magnified other economic considerations so that the overall economic picture is sharply distorted: the FSEIS exaggerated the ability of higher timber harvests from federal lands to contribute to the stability of

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14. These receipts are far below the costs of operating the timber program, which include millions of dollars in subsidies for road building. *no support*

local and regional economies, while exaggerating as well the negative economic effects of lower timber harvests.<sup>15</sup>

5. Other Assumptions Affecting the Viability Analysis

A central tenet of the FEMAT viability panels' work was the assumption -- contrary to fact -- that the then current regulations implementing the ESA on private and nonfederal lands would remain in force over the life of the new standards and guidelines. See SEIS Team Memo Policy Issue No. 8. One of these regulations, 50 C.F.R. § 17.3, prohibits habitat modification or degradation on non-federal lands which may "take" an endangered species within the meaning of 16 U.S.C. § 1538(a)(1)(B). This regulation underpinned the design of a management regime for federal lands: maintenance of the adequate habitat on non-federal lands relieves pressure to preserve federal habitat; reduction of the carrying capacity of non-federal habitat adds to the burden that must be borne by federal habitat.

In Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 17 F.3d 1463 (D.C. Cir. 1994), individuals and groups involved in the timber industry brought suit in the District of Columbia seeking an order invalidating the regulation including habitat modification in the definition of "take." 50 C.F.R. § 17.3. The district court granted defendants' motion for

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15. The district court found the evidence regarding the economic flaws in the FSEIS "persuasive but subject to debate. . . ." 871 F. Supp. at 1325. Thus, the district court found the government's economic analysis, if not actually accurate, adequate to meet the minimum standards required by NEPA. Id.

summary judgment, 806 F. Supp. 279, 287 (D.D.C. 1992), and a divided panel of the D.C. Circuit affirmed. 1 F.3d 1 (D.C. Cir. 1993). On petition for rehearing, the D.C. Circuit concluded that because "take" implies affirmative action directed towards the endangered species, Congress could not have intended this term to preclude habitat modification on non-federal lands. 17 F.3d 1463. Thus, on March 11, 1994, the D.C. Circuit held invalid the inclusion of habitat modification within the definition of "harm" in 50 C.F.R. § 17.3.

When considering this decision in preparing the ROD, the Secretaries observed tersely:

We note the recent decision of the Court of Appeals [sic] for the District of Columbia in Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt, [17 F.3d 1463 (D.C. Cir. 1994)]. The Secretary of the Interior has filed a motion seeking to stay issuance of the mandate in this matter and has recommended requesting rehearing by the full Court of Appeals.<sup>16</sup> The Secretary believes that the case is wrongly decided and, most importantly, that it is contrary to the law in the Ninth Circuit, as set out in Palila v. Hawaii Department of Land and Natural Resources, 852 F.2d 1106 (1988). Thus we have determined that the Sweet Home decision has no impact on Alternative 9.

ROD at 69 (footnote added). The Secretaries did not explain how their belief in the invalidity of the Sweet Home decision might benefit owl populations. In response to a comment that "the Sweet Home decision will lead to less protection of spotted owl

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16. Subsequent to the ROD, the D.C. Circuit denied reconsideration. 30 F.3d 190 (1994). The United States Supreme Court granted the government's petition for certiorari, 115 S. Ct. 714 (1995), and heard oral argument on April 17, 1995.

habitat on non-federal lands" defendants replied that, based on the quoted response, "the owl habitat provided by [Option 9] will be adequate to meet the objectives of the decision" and that "no change is necessary." Id.

After the adoption of the ROD, the Moseley plaintiffs filed supplemental complaints, and NFC filed a complaint (later amended) challenging a number of substantive and procedural flaws in the ROD. The district court granted the government's motion for summary judgment, and denied NFC's motion for summary judgment, in December 1994. 871 F. Supp. 1291 (W.D. Wash. 1994). NFC appeals.

#### ARGUMENT

#### I. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT DEFENDANTS' PLAN COMPLIES WITH THE VIABILITY REGULATION

The central issue in this case is whether defendants may lawfully manage the nation's forest resources so as to drive the spotted owl, and many other species, to extinction. In NFMA, Congress mandated that National Forests be managed to "provide for diversity of plant and animal communities . . . ." 16 U.S.C. § 1604(g)(3)(B). Accordingly, when adopting or amending forest plans, the Forest Service is required to ensure that

Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will

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be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area. 36 C.F.R. § 219.19.

The regulations that implement NFMA require that forest planning not only assure the continued viability of vertebrate populations, but also the "maintenance and improvement of habitat." Id. § 219.19(a) (emphasis added); see also Id. § 219.27(a)(6) (maintenance and improvement of habitat for indicator species is a "minimum specific management requirement"). This dovetails with the requirement of the ESA that endangered species not only be saved from extinction, but that any trend towards extinction be "reversed." Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984) (quoting Tennessee Valley Authority v. Hill, 437 U.S. 153, 184 (1978)), cert. denied, 470 U.S. 1083 (1985). Option 9 meets neither the viability nor rehabilitation parts of this standard.

*not derived from ECA*

A. Standard of Review

Whether Option 9 complies with 36 C.F.R. § 219.19 is a question of law, and is reviewed de novo. See Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994). The Secretaries' determination that Option 9 did comply cannot stand if it is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971) (citing 5 U.S.C. 706(2)).

Defendants are entitled to some deference in interpreting and applying their regulations. NRDC v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987). This deference is not unbounded, however. The Court may not defer to an agency interpretation that is inconsistent with the mandate of Congress or that is not reasonably based. See Mines v. Sullivan, 981 F.2d 1068, 1070 (9th Cir. 1992), cert. denied, 113 S. Ct. 2993 (1993); Ft. Wayne Community Schools v. Ft. Wayne Educ. Ass'n, 977 F.2d 358, 366 (7th Cir. 1992), cert. denied, 114 S. Ct. 90 (1993); Shoshone Indian Tribe v. Hodel, 903 F.2d 784, 787 (10th Cir. 1990). Here, defendants' finding that Option 9 would ensure the viability of the northern spotted owl is unreasonable in two respects: (1) the viability ratings themselves do not establish that federal lands are being managed to ensure viable populations of vertebrate species, but rather confirm that species are certain to be eradicated by Option 9, and (2) the government's refusal to address the effect of increased logging on private land that would follow the Sweet Home decision, leaves out a critical link in the chain of decisional logic, and was therefore arbitrary.

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B. The Viability Panel's Conclusions Support a Conclusion that Option 9 will Cause the Extirpation of Vertebrate Species

There are two areas in which Option 9 fails utterly to comply with the viability regulation. First, there is the acknowledged fact that under Option 9, numerous vertebrate species face a substantial risk of extirpation. Second, using

the government's own species' survival assumptions, it is certain that some vertebrate species will be eradicated.

1. A 20% Chance of Extinction of a Species Does not Comply with the Regulation

Defendant's scientists found that under Option 9, the northern spotted owl and the marbled murrelet each had only an 80% chance of surviving as a viable species, and argued that this finding showed that Option 9 will not jeopardize the continued existence of any listed species under the ESA. As the record below demonstrated, however, the government's methodology and assumptions that led to the conclusion that there was an 80% chance of own survival squares neither with accepted scientific standards or with actual field conditions. See Declaration of Daniel Doak in Support of SAS' Motion for Summary Judgment.<sup>17</sup> Assuming arguendo the validity of the 80% probability, this finding does not satisfy the viability regulation.

The viability regulation itself does not set a numerical threshold at which risk of nonviability may be considered to be acceptable. See ROD at 43. The mandatory nature of the regulation, however, means that risk to viability must be minimized in absolute terms. The regulation states that a viable population is one where its number and distribution of breeding individuals will "insure its continued existence is well

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17. Defendants argued below that, under the deferential standard of review applicable to APA actions, the contentions in Moseley plaintiffs' affidavits were not sufficient to invalidate the FSEIS. The district court agreed. 871 F. Supp. at 1320-21.

distributed in the planning area . . ." 36 C.F.R. § 219.19. To "insure" is to "make sure, certain or secure . . ." American Heritage Dictionary. But an 80% chance of survival is a 20% chance of extinction -- a grotesque distortion of the regulation and of the English language.

Undoubtedly other management alternatives would present even greater dangers to the spotted owl than Option 9. This does not avail the defendants. Because Option 9 significantly degrades habitat, it increases the risk of nonviability of the spotted owl. (Had defendants evaluated a true "no-cut" alternative, see Section II below, the extent of added risk would be more apparent). It is therefore beyond dispute that the plan knowingly causes or allows the extinction of vertebrate species.

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Even if defendants may approve forest plans posing a slight risk of nonviability, Option 9, with its very high 20% risk of nonviability, is outside the regulation. When the consequences of a regulatory choice are severe -- "non-viability" of an entire species -- the protection against that outcome must be substantial. A mere 80% chance of viability comes nowhere close to the degree of protection called for by a regulation requiring that viability be "insured." A comparison to individual human health decisions is instructive here. Government regulators assuring safety of the nation's food supply routinely set risk goals of 95% and 99% probability that the food (or drug) in question is "safe" or "safe and effective" in the

case of a drug. These probability values are widely used by other government departments in regulatory decisions. Here, as shown in Appendix A attached hereto, the consequence of using the 80% risk target for viability is the mathematical assurance of a 99% likelihood that 12 species will no longer be viable, and 95% likelihood that 15 species will suffer this fate. This cannot comport with the applicable law.

The vulnerability of the 80% viability standard was recognized by defendants. At Policy Issue No. 6 of the SEIS Team Memo, the team states that "Dwyer may disagree. The standard for knowingly will probably cause extirpation of a species is not known, and could be set at the 20% level or any other level determined by the courts. The SEIS Team feels this is potentially a fatal flaw of Alternative #9." The panel did not have the duty, as did the Secretary, of squaring the 80% standard with the governing law and regulations.

The SEIS Team Memo also indicated that 30 vertebrate species have a less than 80 percent chance of achieving an A Outcome for viability. Id. at Policy Issue No. 5. In order to try to avoid a finding of non-viability, the FSEIS and the ROD changed a basic FEMAT assumption of viability equally an 80 percent likelihood of achieving Outcome A, to achieving an 80 percent Outcome of A or B, notwithstanding that on its face, Outcome A represents viability and Outcome B does not.<sup>18</sup> Id. In this context, defendants' adoption and application of a

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18. See note 7 infra.

viability test of 80% against which to measure the selected plan, Option 9, was error.

2. The Chances of Vertebrate Extinction Greatly Exceed 80%

FEMAT determined 109 species had a 20 percent likelihood of Outcome D (habitat conditions that would result in species extirpation from Federal land).<sup>19</sup> Id. at Policy Issue No. 6. Thus, there is real doubt that Option 9 will even stop the slide of these species towards extinction, much less reverse it.

That defendants fell woefully short of the standard required by their own viability regulation is easily demonstrated by simple arithmetic. Defendants acknowledge that, under their plan, 109 different species have only an 80% chance of survival (a 20% chance of extinction), considered separately. Even if this optimistic estimate is correct -- and there is sufficient doubt on that score -- the government's figures translate statistically into a virtual certainty that some species will be made extinct as a result of their management. The practical significance of this figure can readily be appreciated by considering the likelihood of the "full viability" scenario. The government estimates that the northern spotted owl has an 83% chance of viability. Eighty-three percent is the probability of

in violation D  
19. Spotted owl populations, according to the most recent demographic study by Anderson/Burnham, are declining at an annual percentage rate of 7.5% a year, and this population decline is accelerating. etc

not rolling a "one" with a single die, i.e., of rolling a two, three, four, five, or six. With this in mind -- and using the higher 83% figure for all species -- the full viability scenario is equivalent to rolling the die 109 times, but never rolling a one. It is obvious that the chance of this happening is remote in the extreme.<sup>20</sup>

Thus, although NFC doubts the validity of the 80% figure, and do not agree with Defendants that a 20% chance of extinction of any particular species is acceptable under NFMA, defendants own estimates show that, taken as a whole, this plan will cause the extinction of protected species. Even the deference due an agency in interpreting its own regulations does not go so far as to allow an agency to claim that black is white.

C. The Decision of the D.C. Circuit in Sweet Home, which Defendants Improperly Ignored, Invalidates the Viability Analyses

When the D.C. Circuit invalidated one of the regulatory assumptions upon which defendants had relied, defendants took no additional steps to ensure the spotted owl's viability. Instead, defendants ignored the decision and pinned their hopes on reversal. This was an error at the time it was made, and that

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20. The probability of 109 species survival -- one minus .8 raised to the 109th power -- is .999999999973 that at least one species will be extinguished. Even without taking account of the interrelationship of species, and the extent to which factors causing one species to go extinct will have similar effects on other species, the probability of extinction for ten species is .9982181478, for twenty exceeds 60%. It is much more likely than not, then, that 20 species will be extinct under Option 9.

error will be compounded if the Supreme Court affirms Sweet Home.<sup>21</sup>

Defendants' response to the D.C. Circuit's decision, upheld by the district court, 871 F. Supp. at 1312-13, reveals two fatal errors in the ROD. First, by ignoring the important change in the law brought about by the D.C. Circuit's decision in Sweet Home, Defendants failed to comply with their statutory duties under NEPA and NFMA to consider fully the impacts of their decision on the environment. Second, and more important for the long term, by ignoring the degradation of non-federal habitat that is almost certain to follow the Sweet Home decision, Defendants failed to promulgate standards and guidelines that will adequately protect forest species in the real world.

1. Defendants were not Justified in Ignoring Sweet Home

Obviously, because the Sweet Home decision invalidating 50 C.F.R. § 17.3 was not entered until March 11, 1994, Defendants could not have considered it in their FSEIS issued in February 1994. However, this does not mean that they were free to ignore the impact of this decision before signing the ROD or, for that matter, before May 14, 1994, the date the ROD became effective. See ROD at 74 (defining effective date).

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21. If, on the other hand, the Supreme Court reverses Sweet Home, defendants' actions would still have been erroneous at the time they were taken. However, there would be no purpose in remand on this issue alone. |||

In response to comments about Sweet Home, Defendants did not argue that the regulatory change mandated by the D.C. Circuit was "already considered," nor did they urge that the inherent impact of this decision was insignificant to the environment. Rather, their sole basis for declining to consider Sweet Home is the alleged inapplicability of the decision. In short, Defendants did not argue that Sweet Home is insignificant; they argued instead that it is not good law. The district court agreed.

The sole support for district court's ruling that Defendants were not bound to consider the changes wrought by Sweet Home in this case is the purported geographic limitation of the mandate of the D.C. Circuit. Thus, while defendants might be bound by Sweet Home when considering the enforceability of the invalidated regulation in the District of Columbia, this decision does not bind them in any other part of the country.

This was error. As is apparent from the complaint filed in Sweet Home, this case and its holding has no such geographic limitation. Sweet Home was brought by eleven plaintiffs: (1) an organization comprised of "individuals and families who reside in and around Sweet Home [Oregon];"<sup>22</sup> (2) an

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22. Sweet Home is in Linn County, some 20 miles southeast of Albany, Oregon. Defendants' maps indicate that there are significant private landholdings in the portion of the Willamette National Forest closest to Sweet Home.

organization of residents of the Mill City, Oregon area;<sup>23</sup> (3) an Olympic Peninsula landowner; (4) a Port Angeles, Washington based logging company; (5) a Carson, Washington landowner;<sup>24</sup> (6) a Sweet Home, Oregon based logging company; (7) a Sweet Home Oregon based timber falling company; (8) the owner and operator of a Sweet Home, Oregon based logging company; (9) the co-owner of another Sweet Home, Oregon based logging company; (10) an association of small sawmill and planing mill operators in the southeastern United States; and (11) a trade association of timber purchasers in the southeastern United States. See Sweet Home Complaint ¶¶ 4-14.<sup>25</sup> Eight of these plaintiffs either operate or participate in timber businesses within the range of the northern spotted owl.<sup>26</sup>

Neither defendants nor the district court contended that the Sweet Home decision is anything other than res judicata as to the actual plaintiffs in that case. Montana v. United States, 440 U.S. 147 (1979); United States v. Stauffer Chemical

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23. Mill City is in Marion County, east of Salem, Oregon. Defendants' maps indicate that the BLM lands near Mill City are thoroughly interspersed with private lands.

24. Carson is on the Columbia River in Skamania County.

25. The Complaint from Sweet Home was submitted to the district court by NFC with its reply memorandum to the government's opposition to plaintiffs' motion for summary judgment. The Sweet Home Complaint is included in the Excerpts of Record volume 1.

26. Each of the Sweet Home plaintiffs alleges sufficient injury for standing purposes. However, none alleges any particularized injury, nor was any such injury relied upon by the D.C. Circuit, that would distinguish these plaintiffs from any other loggers or landowners.

Co., 464 U.S. 165 (1984); see United States v. Mendoza, 464 U.S. 154, 162-64 (1984) (res judicata precludes relitigation of same question between same parties). These persons and groups were, at the time the ROD was adopted, therefore perpetually free of the restriction formerly imposed by defendants' regulations, and may operate their businesses accordingly.

The activities of these Sweet Home plaintiffs alone may be sufficient to alter defendants' calculus about the survival of a great number of species. As defendants refused to consider this possibility, the matter is presently uncertain. It is certain, however, that the private landowner plaintiffs, as well as members of the organizational plaintiffs, are now free to log their thousands of acres of non-federal lands within the range of the northern spotted owl. Logging companies that are "free" of the regulation defining "harm," would presumably be allowed to log even lands owned by non-plaintiffs.

This fact alone dooms defendants' viability analyses, but there is more. Despite defendants' wish to the contrary, the impact of Sweet Home cannot be considered limited only to the particular plaintiffs in that case. This could be true only if one adopted the preposterous notion that each and every participant in the timber economy must bring his own suit in order for the regulation to be invalidated as to his activities.<sup>27</sup> Moreover, even if each participant in the entire

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27. In this respect, Sweet Home is fundamentally different from the case cited by the district court. Claims for retirement  
(continued...)

industry were compelled to bring individual suits, each would only need to file in the United States District Court for the District of Columbia -- where venue is always proper to challenge a federal regulation, and where the court would be obligated by D.C. Circuit's Sweet Home decision to invalidate the regulation as to that plaintiff.<sup>28</sup> Thus, even without resort to nonmutual offensive collateral estoppel, as a practical matter, anyone who wants to take advantage of the Sweet Home decision may do so.

As a result, the district court's conclusion that Sweet Home did not overrule Palila v. Hawaii Dep't of Land & Natural Resources, 852 F.2d 1106 (9th Cir. 1988), or that circuit splits serve a useful function in the formulation of a coherent body of administrative law, was beside the point. Whether or not defendants (or plaintiffs, for that matter) approve of the decision, Sweet Home has worked a very significant post-EIS change in the regulatory background of this ROD. This change required that defendants recalculate the amount of federal

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27. (...continued)  
benefits such as those at issue in Johnson v. United States Railroad Retirement Board, 969 F.2d 1082 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1842 (1993) are expected to be filed and reviewed one at a time. In this context, it is not unreasonable to develop regional bodies of law as to the various legal elements of such claims. In contrast, review of the validity of a statute or regulation need not be sought by each affected person.

28. Given the D.C. Circuit's unequivocal rejection of intracircuit nonacquiescence, see Johnson v. United States Railroad Retirement Bd., 969 F.2d 1082, 1091-93 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1842 (1993), it is unlikely that defendants could resist application of Sweet Home to any new suits filed in D.C.

forests needed to sustain protected species, and, in their recalculation, take fully into account the ramifications of Sweet Home on their viability analyses.

Thus, notwithstanding the contrary holding in Palila, the holding of the D.C. Circuit in Sweet Home effectively obviated any reliance upon the ESA to maintain suitable habitat for endangered and threatened species on non-federal lands.<sup>29</sup> The district court's decision to the contrary was error.

## 2. Sweet Home Destroys Viability Analyses

Even if Defendants were justified in ignoring the Sweet Home decision when they first adopted the ROD, if Sweet Home is affirmed, that option will be available to them no longer. Private landowners in spotted owl habitat will be able to exploit timber and other resources to an extent not contemplated for two decades. As a direct result of the Sweet Home decision, one of

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29. With all due respect to defendants, their assertion that they could ignore Sweet Home because it was "wrongly decided" is amazing. Pursuant to the Administrative Procedures Act, a court of competent jurisdiction ruled that a federal regulation is invalid. Notwithstanding that ruling, the executive agencies are apparently asserting that they may continue to enforce the regulation, in direct violation of court order. Whether the Secretary of the Interior agrees with Sweet Home or not, the decision is binding upon him and his agency. Should the agencies attempt to enforce the regulation, they can expect to be subject to injunction; if they fail to comply, they can expect a contempt citation. Only if the Secretary intends to ignore these sanctions may his decision to ignore a court ruling he considers "wrongly decided" be characterized as "reasonable."

If, on the other hand, the Secretary does not intend to enforce the regulation, then Defendants necessarily should have dropped their presumption that the regulation will prevent significant habitat degradation on non-federal lands.

the most important underpinnings of the ROD, i.e., that non-federal lands would not undergo significant habitat degradation, has been completely removed. Now, significant deterioration is not merely foreseeable, it is inevitable. For this reason, the standards and guidelines, which assumed much more non-federal habitat than will soon be available, are wholly inadequate to preserve threatened and endangered species.

The extent of the shortfall is, as yet, not known. Having ignored Sweet Home, defendants did not study the viability of the northern spotted owl, anadromous fish, and other forest dependent species in the context of reasonably foreseeable development and use of non-federal lands. However, as the record clearly demonstrates that even with the presumption concerning non-federal lands there was doubt as to the viability of many species, one can only assume that the loss of habitat directly attributable to Sweet Home will bring a number of species to the brink of extinction. For this reason, even if defendants were justified in ignoring Sweet Home in April 1994, now they simply cannot. Without non-federal lands, the standards and guidelines are plainly inadequate and new standards and guidelines must be established, in accordance with NEPA and NFMA, which recognize the new regulatory reality.

In view of the "perilous point" at which the spotted owl, and other species currently exist, 871 F. Supp. at 1321, it was arbitrary and capricious for the Forest Service to conclude that Option 9 complied with 36 C.F.R. § 219.19. The district

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Does not include following changes in law  
too speculative

court's conclusion to the contrary, 871 F. Supp. at 1316, was error and should not stand.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE AGENCIES HAD CONSIDERED AN ADEQUATE RANGE OF ALTERNATIVES

Whether the range of alternatives examined by the agencies is adequate under NEPA or NFMA is a question of law, and is reviewed de novo. Nevada Land Action Ass'n v. United States Forest Service, 8 F.3d 713, 716-17 (9th Cir. 1993). Thus, the Court "view[s] the case from the same point as the district court." Id.

The examination of alternatives is "the heart of the environmental impact statement." 40 C.F.R. § 1502.14; see 36 C.F.R. § 219.12(f). Indeed the "existence of a viable but unexamined alternative renders an [EIS] inadequate." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992). Although the FSEIS and the ROD acknowledge the number of scientists calling for no further cutting of ancient forests, < 90? this was not an alternative considered in the FSEIS. Defendants' decision not to evaluate a "No-Cut" alternative will of itself invalidate the FSEIS unless, and only unless, the conclusion that leaving out this alternative was reasonable.

A. Defendants were Obligated to Consider a No-Cut Alternative

The range of alternatives of an EIS is analyzed under a rule of reason. Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180 (9th Cir. 1990). The "touchstone for [this]

inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." California v. Block, 690 F.2d 753, 767 (9th Cir. 1982). Here, the "No Further Cutting of Native Forests" alternative was never considered. Instead, Option 1 was presented, which still allowed the harvest of more than 100 million board feet per year of federal forest in riparian areas, administratively withdrawn areas, and matrix areas, and under some circumstances, even in Late Successional Reserves. The district court did not disagree with NFC's argument that a no-cut alternative should be considered. Rather, the district court simply found that Option 1 embodied a no cut alternative. 871 F. Supp. at 1320.

This conclusion was an error of law and is not a mere technical failure, with only technical consequences. Evaluation of No Cut was essential here. Given the fact that the entire purpose of the EIS was to determine what the impacts of further timber harvesting would have on native forests, it appears that a No Cut alternative would be a useful baseline of information that would assist the decision-maker in reaching a decision. This No Cut alternative would provide baseline numbers of the number jobs available without harvesting such forests, the survival likelihood of the spotted owl, marbled murrelet, and other species without further timber harvesting on Federal lands. Therefore, under the rule of reason, a No Cut alternative should have been included in the FSEIS.

B. Option 1 was Not a No-Cut Alternative

On its face it is apparent that Option 1 allowed substantial logging of native forests. Most of this logging would come from native forests not yet considered old growth -- the old growth of tomorrow. In addition, numerous loopholes are allowed under Option 1 which belie the district court's belief that Option 1 would protect "essentially all existing old growth forests." 871 F. Supp at 1320. Logging under these "loopholes" could easily surpass the projections in the ROD for "regular," i.e., allowed logging. Finally, the ROD concedes that 26,000 acres of timber harvesting will be allowed under authority of section 318 in proposed Late Successional Reserves without meeting the criteria of Option 9. This same logging would have been allowed under Option 1, without regard to its impact on the viability of native forest species.<sup>30</sup>

The agencies therefore clearly failed to put forward an alternative that honestly and unambiguously embodied the cessation of logging in native forests in the planning area. This failure was error under NEPA and NFMA, and requires that the district court's judgment be reversed.

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30. Defendants violated NEPA by failing even to discuss the impact of section 318 logging on Option 9. The only real analysis of this shows up at Page 13 of the ROD, which indicates that between the Draft and Final EIS, the size of various reserves increased. However, there is simply no analysis that this "additional land" designation in any way mitigates for the guaranteed loss of spotted owl habitat, and the Situation Assessment of Defendants even notes that there may not be any spotted owls in the land so added. (SEIS Team Memo, Policy No. 7).

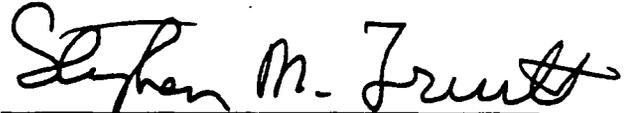
CONCLUSION

For all the foregoing reasons, NFC asks that the judgment of the district court be reversed, and that the case be remanded with instructions that the district court order defendants to cease all logging in the planning area until a plan that ensures the viability of the northern spotted owl, and other native forest dependent species, can be designed and implemented.

STATEMENT OF RELATED CASES

There are two other appeals from the district court's judgment in this case: Nos. 95-35214 and 95-35215. Opening briefs in both cases are due to be filed in June 1995.

Respectfully submitted,



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Dated: May 8, 1995

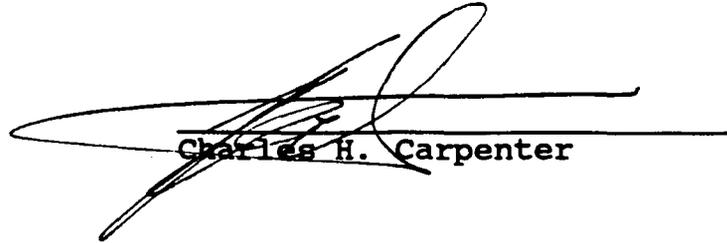
**APPENDIX A**



Certificate of Service

I hereby certify that I served a copy of the foregoing,  
this 8th day of May, 1995, by hand, upon:

David C. Shilton  
U.S. Department of Justice  
Environment & Natural Resources Division  
P.O. Box 23795 L'Enfant Station  
Washington, D.C. 20026



Charles H. Carpenter