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Timber Litigation - 9th Circuit Appeal
in Forest Plan [2]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-35052

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

NATIVE FOREST COUNCIL,

Plaintiff-Appellant,

v.

BRUCE BABBITT, et al.,

Defendants-Appellees.

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

REPLY BRIEF OF APPELLANT NATIVE FOREST COUNCIL

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REPLY BRIEF OF APPELLANT NATIVE FOREST COUNCIL

Seeking to deflect attention from the fact that they have chosen a management plan for the federal forests of the Pacific Northwest that significantly increases the chance that forest dependant species will not survive as viable populations, Appellees characterize our central argument as an assertion that determining compliance with the viability regulation¹ is a mechanical, arithmetic operation. This seriously misstates our position, as we explain. First, however, we address the effect of the recent decision of the United States Supreme Court in Babbitt v. Sweet Home, 63 U.S.L.W. 4665 (1995).

I. The United States Supreme Court's Recent Decision in Babbitt v. Sweet Home Confirms that Appellees and the District Court Erroneously Relied Upon Endangered Species Act Regulations in Finding the Viability Analyses Adequate

Before the district court, and in our opening brief, we argued that the forest managers' reliance upon their ability to restrict logging on nonfederal lands,² a pivotal factor in determining how much federal land could be logged without driving forest species to extinction, was unfounded in the face of the D.C. Circuit's decision in Sweet Home v. Babbitt, 17 F.3d 1463, reh'g denied 30 F.3d 190 (1994). Appellees argued below, and the

1. Our central claim in this case is that Appellees did not comply with National Forest Management Act ("NFMA") implementing regulations, specifically 36 C.F.R. § 219.19. This section is referred to herein as the "viability regulation."

2. This ability derives from regulations under the Endangered Species Act ("ESA"), a disputed provision of which is 50 C.F.R. § 17.3, referred to herein as the "harm regulation." Nonfederal lands account for 57% of the total planning area. FSEIS 3&4-24.

district court agreed, that the Sweet Home decision should be disregarded because the management area is within the Ninth Circuit, where Palila v. Hawaii Dept. of Land & Natural Resources, 852 F.2d 1106 (1988), is the law, rather than the D.C. Circuit. The district court, however, agreed with NFC that if Sweet Home was applicable within the planning area, the viability analyses underlying the plan would have to be redone. 871 F. Supp. at 1313.

On June 29, 1995, the United States Supreme Court reversed the judgment of the D.C. Circuit. Babbitt v. Sweet Home, 63 U.S.L.W. 4665 (1995). Analysis of the decision, however, shows that Appellees' reliance on the ESA's prohibition of logging of old growth forest on private land remains error. First, the Supreme Court understood and analyzed Sweet Home as a facial challenge to the regulation at issue, an analysis which obliterates the supposed geographic limitations on its applicability. Second, although the Court rejected the proposition that the regulation is invalid in all cases, its decision fell far short of finding that the regulation is valid in all cases. Thereby the Supreme court rejected Appellees' and the district court's interpretation of, and reliance upon, this Court's decision in Palila. The district court's decision, therefore, cannot be sustained.

A. The Supreme Court did not Analyze Sweet Home as a Geographically Limited Challenge to the Harm Regulation

As the Supreme Court noted at the outset of its opinion in Sweet Home, "[r]espondents challenged [the harm] regulation on its face." Sweet Home, 63 U.S.L.W. at 4667. Thus, the issue was not whether the regulation should apply to particular plaintiffs, or whether it should or should not apply in states or areas. Sweet Home "present[ed] the question whether the Secretary [of Interior] exceeded his authority by promulgating that regulation." Id. at 4666. Had the Supreme Court either denied certiorari or affirmed, the only proper ultimate remedy would have been an order vacating the regulation.

Because the D.C. Circuit's opinion had not been reversed before the district court ruled, it was a controlling rule of law that should have been taken into account by Appellees in their viability analyses.³ The existence of the D.C. Circuit decision was not hypothetical or speculative -- rather it was the government that was speculating on reversal.⁴ Failure to substantively take Sweet Home into account was therefore error and failure to remand to Appellees was error on the part of the district court. Inasmuch as the focus of this Court's review,

3. Appellees intone that the D.C. Circuit decision in Sweet Home was reached by a divided panel on rehearing as if it had some significance. Appellees' Br. 27.

4. Nor is it unduly speculative to assume, as Appellees argue, that plaintiffs in a successful facial challenge to a regulation will decline to follow the vacated regulation, or that others with an obvious economic interest to log will do so in the absence of a regulation prohibiting logging.

like that of the district court's, is on whether the maker below properly applied the rules of law in effect at time of decision, see Nevada Land Action Ass'n v. Forest Serv. 8 F.3d 713, 718 (9th Cir. 1993), the district court's error remains a basis for reversal. The question now, however, is whether after the Supreme Court's decision, this error merits remand to the district court, and ultimately, Appellees.

There is obviously, at present, no reason for a remand to Appellees to reconsider their viability analyses to take cognizance of the now vacated D.C. Circuit decision. However, the Supreme Court's reversal vitiates Appellees' reliance upon Palila as we now show.⁵

B. Appellees' and the District Court's Interpretation of Palila is no Longer Tenable

Although it withstood a facial challenge, the harm regulation did not emerge from Sweet Home without serious limitation. The majority concluded that "[i]n the elaboration and enforcement of the ESA, the Secretary and all persons who must comply with the law will confront difficult questions of proximity and degree; for, as all recognize, the Act encompasses a vast range of economic and social enterprises and endeavors. These questions must be addressed in the usual course of the law,

5. Perhaps more important in the long run, there are a number of pending bills in Congress which would, if enacted, reverse the Supreme Court's decision in Sweet Home. Enactment of such legislation would thus end current reprieve from the effects of the district court's error. Although none of these bills now provides a basis for remand, should one be passed, supplemental briefing may be necessary.

through case-by-case resolution and adjudication." Sweet Home, 63 U.S.L.W. at 4671. The Court, while finding that the regulation was not invalid in all cases, thus stopped well short of finding the regulation to be valid in all cases.

Justice O'Connor's concurrence was pointed: "the challenged regulation is limited to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals . . . even setting aside difficult questions of scienter, the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability. These limitations, in my view, call into question Palila . . ." Id. (O'Connor, J., concurring). Moreover, Justice O'Connor presented Palila as an example of an instance in which the harm regulation should not be applied. Id. at 4673. The majority, although finding the harm regulation to be potentially valid in particular circumstances, did not endorse Palila, while three justices would have overruled Palila and affirmed Sweet Home. In this context, Appellees reliance upon their interpretation of Palila, that the harm regulation broadly protects nonfederal spotted owl habitat, cannot be sustained.

Given the regulatory adjustments that must follow in the wake of Sweet Home, the circumstance envisioned by the district court has come to pass. See 871 F. Supp. at 1313 ("If Palila ceases to be the law of the circuit . . . the administrative decision under review will have to be

A. The Viability Regulation Imposes Substantive Standards

Appellees cite cases in support of the unexceptional proposition that compliance with NFMA's mandate that forests be managed for diversity is largely committed to their discretion.⁶ Appellees' Br. 23. None of the passages cited, however, even remotely stands for the proposition that compliance with the viability regulation is unreviewable, or that the Forest Service may ignore the clear import of the viability regulation as written. This highlights a signal absence among the cases cited by Appellees: This court, in this case, affirmed the district court's holding that, at a minimum, the viability regulation imposes upon the Forest Service the obligation to refrain from adopting a plan it knows or believes will lead to the extirpation of a species. Seattle Audubon v. Moseley, 798 F. Supp. 1473, 1490 (W.D. Wash. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993).

6. Appellees quote the Seventh Circuit's decision in Sierra Club v. Marita, 46 F.3d 606, 615 (1995), for the proposition that NFMA gives them broad discretion. Appellees' Br. at 23 ("it is difficult to discern any concrete legal standards on the face of the provision"). However, the very next sentence in Marita after the quoted passage provides some clarification:

However, when the section is read in light of the historical context and overall purposes of the NFMA, as well as the legislative history of the section, it is evident that [this section] requires Forest Service planners to treat the wildlife resources as a controlling, co-equal factor in forest management and, in particular, as a substantive limitation on timber production.

Marita, 46 F.3d at 615 (citation omitted).

This oversight would abuse not only stare decisis, but law of the case as well.⁷

Avoiding extinction only provides the minimum requirement, of course. The language of the regulation as actually written is clear, and admits of an unmistakable meaning for this case. The requirement that habitat be managed to insure that viable populations will survive means that, when analyzing alternatives, the Forest Service must examine and choose an alternative that assures viability, and if viability cannot be assured, the alternative that provides the greatest likelihood of viability must be chosen. This is what it means for viability to be a "controlling" factor. *no wildlife cannot through anything else - its supposed* Sierra Club v. Marica, 46 F.3d 606, 615 (7th Cir. 1995). Appellees accuse NFC of putting "excessive weight" on the word 'insure' in the regulation, Appellees' Br. 19, but do not present any alternative meaning, either for the word "insure" or for the regulation as a whole.

B. Appellees Defined Compliance with their Viability Regulation Quantitatively

Appellees peevishly complain that their duty to insure the viability of forest species is not to be measured objectively, but is qualitative. However, it is Appellees who introduced the viability ratings, and it is Appellees who relied upon these ratings in concluding that Option 9 complied with the

7. The Court also found that the viability regulation imposes an affirmative duty upon Appellees in Seattle Audubon v. Evans, 952 F.2d 297 (9th Cir. 1991), absent as well from Appellees' list of cases on the viability regulation.

viability regulation.⁸ Only now that their numbers are shown to prove the opposite of what Appellees had originally hoped, do Appellees seek to evade their own quantitative measure of viability.

Similarly, Appellees, not NFC, introduced and relied upon separate species specific viability probabilities. Of course it is true that the probability of a particular species' viability may not be independent of that of other species. This hardly improves the forest managers' position. If anything, it renders the probability of non-viability for a set number of species even greater. Our dice hypothetical illustrates this principle: consider the consequences of having the result of one roll of the dice linked to the result of the previous roll. If, as a result rolling a five on the first try, the odds of rolling a six on the next roll are decreased, the odds of hitting a one are thereby increased.⁹

Appellees analyzed species viability, and their compliance with the viability regulation, as a series of independent probabilities, and the district court approved their

8. Other factors cited by Appellees, such as amount and condition of habitat, Appellees' Br. 20, only derive significance in this exercise from their effects on species viability, which were in turn measured by the viability panels.

9. We do not propose that rolling dice is an accepted methodology for deciding land management policy. The illustration does show unmistakably, the cumulative, catastrophic impact of a 20% chance of non-viability. See Appellees' Br. 26. As quantitative analyses and probabilities are employed by the government, we do not apologize for illustrating mathematical principles using simplified assumptions.

plan on that basis. Their retreat from that choice now demonstrates only the lack of reasoned basis for their prior decisionmaking.

C. Appellees' Plan does not Comply with the Viability Regulation

Regardless how viability is measured, Appellees have failed to insure viability. They have instead chosen a plan, that, even using Appellees' flawed, rosy assumptions, admittedly puts species at higher risk than under Option 1, and undoubtedly puts species at even higher risk than under the unexamined no-cut alternative. Appellees conspicuously fail to dispute our contention that only Outcome A is "viability," and that the probability of Outcome B is equivalent to a probability of non-viability. Rather, Appellees assert that Outcome B represents compliance with the viability regulation because it is, in effect, unavoidable. Appellees' Br. 25 n.11. If, as Appellees appear to assert, decades of unlawful logging have led to gaps in populations such that viability cannot be attained, the probability of Outcome A should be zero. That it is not indicates, if Appellees' studies have any validity at all, that Outcome B, and other degrees of non-viability, are not unavoidable. Moreover, Appellees assertion that the viability regulation does not require habitat restoration, *id.*, is flatly contradicted by the language of the regulation itself, see 36 C.F.R. §§ 219.19(a), 219.27(a) (referring to both maintenance and improvement of habitat), and the ESA. Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257, 262 (9th Cir. 1984).

Thus, Appellees have failed both objectively, and relatively, to insure viable population of forest species.¹⁰

III. Appellees Failed to Demonstrate that a No-Cut Alternative was Adequately Considered

Appellees' response to NFC's contention that they did not consider an adequate range of responses is two-fold. First they argue that they did in fact consider, briefly, a no-cut alternative, but that they rejected it as inconsistent with legal constraints and policy objectives. They then argue that, because it protects most existing old growth, Option 1 was functionally a no-cut alternative. Appellees do not, however, identify any

10. Appellees also attempt to direct attention from the effects of their plan by quibbling with supposed errors in our brief. NFC does not assert that FEMAT was unaware of the 1992 Anderson/Burnham study. Appellees' Br. 7 n.4. We asserted on the cited page that the notes of the FEMAT panel studying owl viability did not mention the report and attached the notes. NFC Br. 9. Significantly, Appellees do not dispute our recitation of the scientific reaction to the FEMAT report, id., nor with the fact that panel members were not qualified to assess owl viability. Id. n.8.

Appellees' response to another supposed error makes our point. NFC observed that neither the FSEIS nor the ROD discuss prevention of extinction among fish stocks, but simply acknowledge extinctions may occur. NFC Br. 11. Appellees respond that they discussed strategies for managing habitat, Appellees' Br. 8, but fail to cite to any document in the record showing discussion of how to prevent extinction of stocks.

Finally, Appellees' attempt to show they actually considered the value of unlogged forests is disingenuous. Appellees' Br. 9. There is much more to the value of clean air, clean water, and a healthy ecosystem than any measurement of "dollar value of recreation" or "the value people are willing to pay merely for knowing old-growth exists" can ever show. Moreover, the governments' practice of ignoring the replacement value of mature trees, an enormous subsidy to the timber industry, is never adequately accounted for in Appellees' economic analyses. Absent such accounting, Appellees' "economics" are ludicrous.

legal constraints which would have precluded implementation of a no-cut alternative. While Appellees are subject to mandates to manage the federal lands for a number of outcomes, they are not required to allow logging on every tract, or even on every unit of the system. As the district court noted, in response to the industry challenge to the plan, the viability regulation, although it requires that the Forest Service refrain from logging when viability is at issue, is, "in all respects . . . consistent with NFMA and with multiple use management. 871 F. Supp. at 1316. Having failed to demonstrate a legal prohibition on the no-cut alternative, Appellees first argument fails.

Appellees cite two cases, ICL v. Mumma, 956 F.2d 1508, 1522 (9th Cir. 1992), and Resources, Ltd. v. Robertson, 8 F.3d 1394 (9th Cir. 1993), as authority for their argument that they are not required to consider alternatives which are not consistent with the management direction the agencies wish to take. The agency actions, and challenges thereto, in those cases were fundamentally different from this case, however. There is neither a statutory nor a regulatory mandate that a particular quantum of wilderness area be set aside or timber to be cut in any forest plan, thus the failure of the forest service to propose a plan with more logging and wilderness was not an error in ICL. Similarly, the alternative suggested by challengers in Resources, Ltd., while it undoubtedly would have provided a

*Option 1 had very high ratings
for variables*

useful basis of analysis, was not required by statute.¹¹ Here, however, Appellees are bound by the viability regulation to consider an alternative that poses the least risk to viability.

*Shufft
is
argued*

In the context of preparing a management plan, on remand from this Court after years of failure to produce a plan that complies with the law, Appellees contention that they can ignore a plan which would very clearly improve the chances of viability of key species is simply stunning.

Appellees were also required to analyze a no-cut alternative under the NEPA implementing regulations. Those regulations require that the agency examine a "no action" requirement. 40 C.F.R. § 1502.14(d). Appellees and the district court interpreted "no action" incorrectly -- that is, to mean noncompliance with this Court's rulings. 871 F. Supp. at 1319-20. The true no-action alternative would have been to fail to produce a compliant plan, and, under the then pending orders, forego logging in owl country. Appellees' reading robs the requirement of its true import, and is unsupportable. The purpose of the no action alternative is to analyze the effects of

11. Appellees have argued, both before this Court and below, that they need not examine all specific impacts of their plan, because, as the Court held in Resources, Ltd., those impacts can be analyzed and challenged on a site specific basis. See Appellees Br. 21 n.9, 30. This argument, substantively similar to the ripeness argument rejected by the Court in Seattle Audubon v. Espy, 998 F.2d at 703, will not be available should certain pending legislation be enacted into law. Section 2001(e) and (f) of H.R. 1944 would severely limit the scope of any review of any timber sales "on Federal lands described in the [ROD]." § 2001(d). Should this or similar legislation be enacted, supplemental briefing may be required.

leaving the environment alone, of refraining from major federal action. In this case, the spirit and letter of the "no-action" alternative requirement could have been complied with only by considering the effects of foregoing the major federal action that is the source of most significant environmental impact -- logging native forests.

Appellees admit that Option 1, which was fully considered, is not the same as a no-cut alternative, which was considered briefly.¹² This analysis was, as Appellees indicate, performed purely on policy grounds, and does not appear to have had a scientific basis. Thus, Appellees contention, and the district court's conclusion, that Option 1 is functionally equivalent to no-cut, in terms of its effect on the viability of forest species, cannot be sustained on the record.

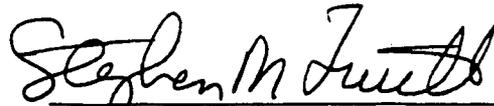
CONCLUSION

For the foregoing reasons and those provided in our opening brief, 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

12. Even with the apparent renunciation of salvage and fire management logging, Appellees' Br. 34 n.15, Option 1 would still have allowed substantial logging.

northern spotted owl, and other native forest dependent species, can be designed and implemented.¹³

Respectfully submitted,



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13. Reversal of the district court's decision approving the plan restores the status quo ante April 14, 1994. Appellees would have no lawful plan to manage the forests, a situation already found to justify injunction. Seattle Audubon v. Moseley, 798 F. Supp. 1473 (W.D. Wash. 1992), aff'd 998 F.2d 699 (9th Cir. 1993). Appellees' suggestion that further fact finding is required before an injunction can issue is therefore without merit.

Certificate of Service

I hereby certify that I served a copy of the foregoing,
this 18th day of July, 1995, by first class mail, upon:

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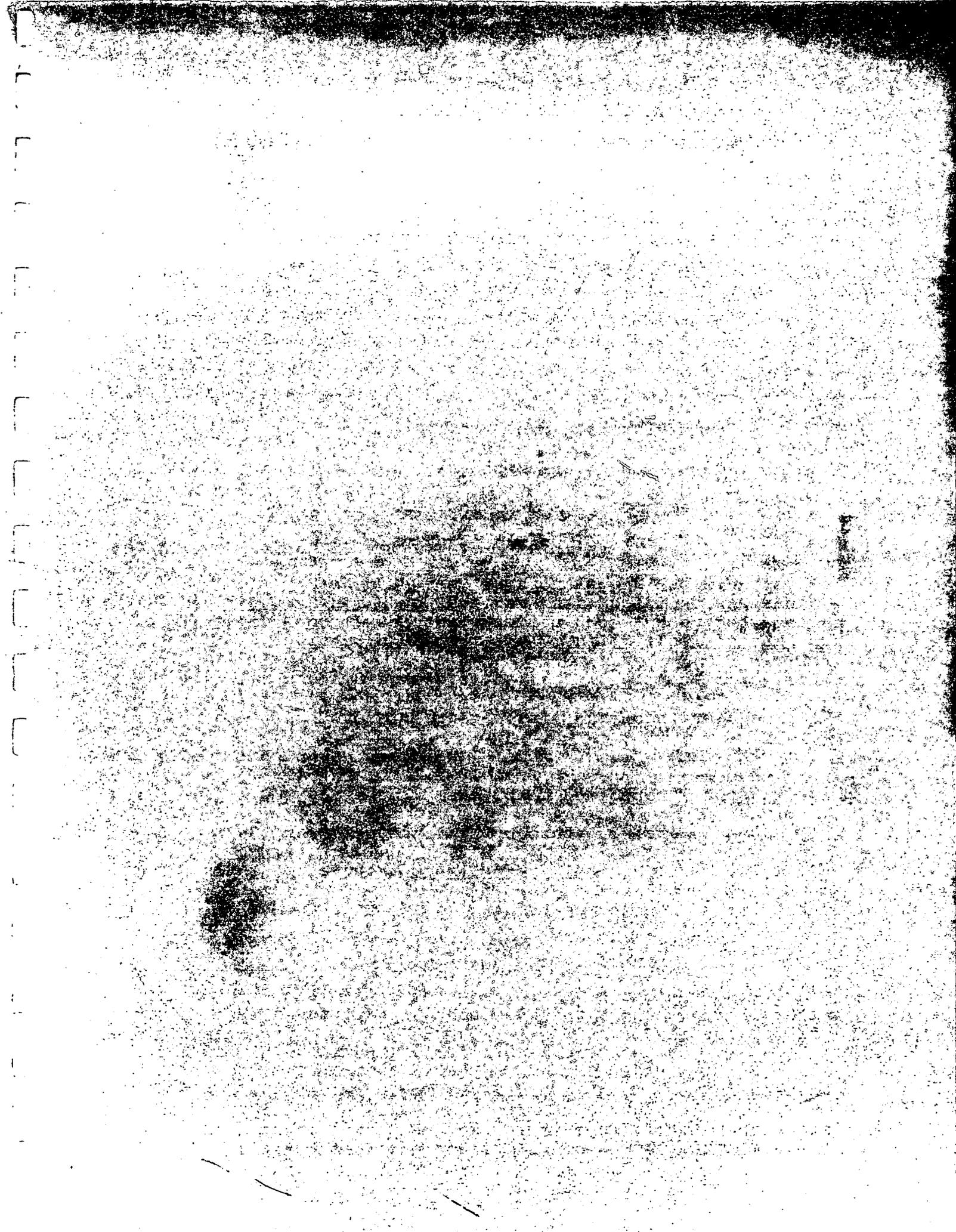
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No. 95-35215

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as Assistant Secretary of
Agriculture for Natural Resources and Environment,

Defendants-Appellees,

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL.,

Defendants-Intervenors,

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

APPELLANT'S OPENING BRIEF

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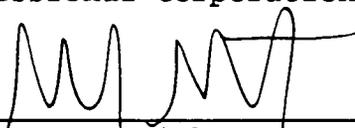
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**APPELLANT'S CORPORATE DISCLOSURE STATEMENT
UNDER FRAP 26.1**

Appellant Northwest Forest Resource Council has no parent companies, subsidiaries or affiliates.

Dated this 16th day of June, 1995.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the subject matter of the plaintiffs' claims against the federal defendants under 28 U.S.C. § 1331. The district court found that it had jurisdiction over the federal defendants' cross-claim against appellant Northwest Forest Resource Council ("NFR") under 28 U.S.C. § 1331. NFR disputes this finding, and contends that the district court did not have subject matter jurisdiction over the federal defendants' cross-claim against NFR.

Jurisdiction over this appeal is conferred by 28 U.S.C. § 1291. On February 15, 1995 the district court entered judgment under Fed. R. Civ. P. 54(b) on the cross-claim against NFR. NFR timely filed its Notice of Appeal on February 28, 1995. Fed. R. App. P. 4(a); 28 U.S.C. § 2107.

ATTORNEY FEES

NFR intends to seek attorney fees for this appeal, if successful, under the Equal Access To Justice Act, 28 U.S.C. § 2412(b), (d).

ISSUES PRESENTED FOR REVIEW

Whether federal agencies and officials have statutory and constitutional standing to obtain judicial review of their own forest plan by suing NFR for a declaratory judgment on claims asserted or formerly asserted by NFR in Administrative Procedure Act judicial review proceedings in the District of Columbia; and if so whether the district court properly exercised its discretion to grant declaratory relief.

STATEMENT OF THE CASE

This appeal involves district court procedures that are literally unprecedented in American jurisprudence. For the first time in the history of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-02, the district court allowed federal agencies and officials to assert a declaratory judgment claim against a citizen to determine if a decision by the agencies and officials is lawful. The district court granted

summary judgment to the agencies finding the forest plan they adopted in 1994 lawful under APA review standards.

This appeal relates solely to the procedural decisions by the district court to allow the agencies to assert this unprecedented claim against NFRC and to exercise jurisdiction to grant declaratory relief to the agencies on the claim. This appeal does not address the merits of any district court ruling on any claim.¹ The relevant background for the appeal relates to the procedural context and posture of the case:

1. In 1992 plaintiffs Seattle Audubon Society, et al. ("SAS") sued the Assistant Secretary of Agriculture and the United States Forest Service claiming that a northern spotted owl management plan for national forests in the Northwest permitted too much logging in violation of various federal laws. NFRC, a nonprofit Oregon corporation representing businesses and associations in the forest products industry in Oregon and Washington, intervened as a defendant to oppose SAS' claims against the 1992 plan. The district court granted judgment for SAS in 1992 on one claim, granted judgment for the Forest Service on one claim, and entered an injunction requiring a new plan. *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1473 (W.D. Wash. 1992). This court affirmed the injunction. *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993).

2. In the spring of 1993 the newly-elected Administration appointed a Forest Ecosystem Management Assessment Team ("FEMAT") to develop options for a new forest management plan for some 24 million acres of federal forests in the Pacific Northwest. C.R. 425 at 1, 2. The Team delivered 10 options in June 1993. *Id.*

3. In August 1993 NFRC filed a lawsuit in the U.S. District Court for the District of Columbia challenging the failure of the FEMAT Team

¹ As will be explained below, while NFRC disputes the district court's rulings on the merits of the various legal issues decided below, those issues should not have been addressed in this case at all.

to comply with the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2. In March 1994 the district court entered judgment for NFRC declaring that the government had violated 10 separate provisions of FACA in the establishment and operation of FEMAT. *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994). The court declined to enter injunctive relief against the forthcoming plan due to be adopted in April 1994, deferring that question to future litigation. *Id.* at 1015.

4. Government officials responded to the decision in *NFRC v. Espy* by brushing it aside in reported remarks as a "slap on the wrist." In response the court (Thomas Penfield Jackson, U.S.D.J.) called a status conference on March 25, 1994. The court stated:

THE COURT: I won't pretend I wasn't dismayed at the public reaction of the defendants to the ruling that I made in this case. I don't think that it's a reaction of which they ought to be particularly proud and I want to emphasize emphatically that I did not commend the defendants for their good faith effort and I did not intend this ruling to represent simply a slap on the wrist and so I called this status conference to assure myself that this matter is not at an end at this point.

So the upshot of my ruling is that I did not regard myself in the context of this lawsuit in a position to instruct the President as to what he can or cannot do, cannot consider in making, in formulating his policy. He can consider, I imagine, virtually anything. What the effect of the FEMAT report is in other contexts I certainly believe remains to be determined and I want to find out what were the plans of the parties with respect to the issues raised here and where the controversy is likely to go from this point.

Northwest Forest Resource Council v. Espy, Status Conference, March 25, 1994, C.R. 531 at 2. The court inquired into NFRC's litigation plans:

THE COURT: . . . [W]ere there to be a challenge to final agency action would you anticipate that it would be here, a related case to this or otherwise, or in some other forum?

MR. RUTZICK: If there is a challenge I think we have given serious consideration to filing it in the District of Columbia and . . . [w]ere it to be filed here I think that we would suggest that it is a related case based on your Honor's decision.

Id. at 5.

5. On April 13, 1994 the Secretaries of Agriculture and Interior adopted a Record of Decision ("ROD"), supported by a Final Supplemental Environmental Impact Statement ("FSEIS"), for a new forest management plan for 19 national forests in Washington, Oregon and California and for Bureau of Land Management ("BLM") timberlands in Oregon,² based on FEMAT's Option 9. C.R. 425. Option 9 reduced previous logging levels by approximately 80%. C.R. 425 at Figure ROD-1.

6. Even before the ROD was released, the government asked Judge Dwyer to hold a status conference in this case to discuss litigation challenging the new plan, C.R. 421, and such a conference was held on April 20, 1994. The government's stated goal was to persuade Judge Dwyer to prohibit NFRC from challenging the plan in the District of Columbia. C.R. 421 at 6.

7. The government hoped to keep this case alive, and to use NFRC's intervenor status as a procedural device to force NFRC to litigate its challenge to the 1994 plan in Judge Dwyer's court rather than in the District of Columbia. This strategy was possible since SAS also intended to challenge the 1994 plan. C.R. 432 at 7-8 (transcript, April 20, 1994 status conference).

8. SAS expressed a preference for terminating this case and filing a new case challenging the 1994 plan. *Id.* at 20. Judge Dwyer, however, encouraged SAS to leave this case alive by filing a supplemental complaint challenging the 1994 plan. *Id.* at 20-21. He suggested entry of a Rule 54(b) judgment and an interim attorney fee award to SAS as an inducement to leaving this case open. *Id.* at 21. He entered an order after the conference recognizing that he could not at that time force NFRC to litigate in his court, but expressing the hope that it would. E.R. 426.

² These lands have been the subject of other litigation. See *Portland Audubon Society v. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

9. In May 1994 NFRC and some 30 other citizens challenged the 1994 plan in two lawsuits in the District of Columbia seeking judicial review under the APA. One case, *NFRC v. Dombeck*, No. 94-1031 TPJ (D.D.C. May 11, 1994), concerns BLM timberlands in Oregon that are governed by the terms of the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act ("O & C Act"), 43 U.S.C. § 1181a. The *Dombeck* case asserts 11 claims under the O & C Act, FACA, the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, et seq.

10. The other case, *NFRC v. Thomas*, No. 94-1032 TPJ (D.D.C. May 11, 1994), involved national forest lands in Oregon and Washington, and asserted 19 claims under FACA, the Multiple-Use Sustained-Yield Act ("MUSY"), 16 U.S.C. §§ 528-31, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, et seq., NEPA and FLPMA. E.R. 536, Ex. A. Eight claims in both cases were identical. A third case, *Association of O & C Counties ("AOCC") v. Dombeck*, No. 94-1044 TPJ, was filed by other counsel on May 13, 1994, also alleging claims involving the O & C timberlands in Oregon. All three cases were assigned to Judge Jackson.

11. Later in May 1994, SAS filed a supplemental complaint in this case challenging the 1994 plan, which added BLM timberland to the case for the first time, and joined the Secretary of Interior, the BLM and the Secretary of Agriculture as new defendants. E.R. 444. Three other challenges to the plan by environmental groups were consolidated with this case.³ See C.R. 446.

12. In Washington, D.C., the defendants moved to transfer venue of NFRC's two District of Columbia cases and the AOCC case to the Western

³ *Save The West v. Lyons*, No. C94-758WD; *Native Forest Council v. Babbitt*, No. C94-803WD; *The Sierra Club v. Espy*, No. C94-820-WD. Plaintiffs Save The West and Native Forest Council have filed appeals from the district court decision rejecting their claims. No. 95-35214 (*Save The West*) and No. 95-35052 (*Native Forest Council*).

District of Washington. The District of Columbia court denied the motion as to the *Dombeck* case and the AOCC case (since the cases only involve BLM land in Oregon), and granted the motion as to the *Thomas* case (which involved Forest Service land in Oregon and Washington). E.R. 489, Ex. C. The court stayed the *Dombeck* and AOCC cases until the Western District of Washington litigation concluded "to prevent the award of potentially inconsistent relief by separate courts." *Id.*

13. NFRC and its co-plaintiffs thereafter dismissed the *Thomas* case voluntarily under Fed. R. Civ. P. 41(a)(1)(i). C.R. 543, Ex. A. It has not been refiled.

14. Frustrated at their inability to force NFRC and its co-plaintiffs to litigate in the Western District of Washington, in July 1994 the government asked Judge Dwyer for leave to join NFRC and all 13 of the *Thomas* co-plaintiffs as involuntary plaintiffs in this case. C.R. 490. Judge Dwyer declined to decide this motion, but instead entered an order asking the parties to consider a different proposal: whether he should allow the federal agencies to assert a cross-claim for declaratory relief against NFRC seeking a ruling on each of NFRC's claims in the *Thomas* case. E.R. 500.

15. The agencies supported this proposal, C.R. 505, and asked the district court to expand the cross-claim to allow them to seek declaratory relief on the claims in the *Dombeck* case. *Id.*

16. Judge Dwyer approved the expansion of the cross-claim, and entered an order on August 5, 1994 granting the agencies leave to file a cross-claim against NFRC for declaratory relief on all the claims in both the dismissed *Thomas* case and the stayed *Dombeck* case. E.R. 526. The order addressed the agencies' standing to sue:

The federal defendants are faced with important and substantial claims by NFRC and its co-plaintiffs. These claims will surely be litigated; they will not evaporate. Because the claims are related to those pending herein, the federal defendants will encounter multiple adjudications of their rights and duties unless relief is afforded. There is an

actual controversy; the federal defendants face an obvious and major threatened injury; and the injury would be redressed in the event of a favorable decision. The federal defendants thus have standing to seek declaratory relief.

E.R. 526 at 7.

17. The agencies filed the permitted cross-claim in an amended answer on August 12, 1994. E.R. 536.⁴ The standing allegation in the cross-claim states:

21. NFRC's claims are related to those pending in the consolidated actions before this Court. Federal defendants will be exposed to multiple adjudications of their rights and duties with respect to the ROD and the FSEIS, and possibly inconsistent legal obligations in respect of those rights and duties, unless NFRC's claims can be adjudicated in this proceeding. There is an actual controversy between federal defendants and NFRC; the federal defendants face an obvious and major threatened injury through subsequent litigation of the Thomas and Dombeck cases; and that injury will be redressed by a favorable decision. The federal defendants have standing to seek declaratory relief.

E.R. 536 at 8-9. The actual claim for relief states:

25. Federal defendants are entitled to declaratory judgment declaring, upon the administrative record, that the ROD and the FSEIS meet the standard of review set forth in 5 U.S.C. 706(2) (A), (C) and (D) in respect of each claim asserted in the complaints annexed as Exhibits A and B.

The annexed exhibits A and B are the complaints in *NFRC v. Thomas* and *NFRC v. Dombeck*. E.R. 536.

18. The district court thereafter entered a series of rulings forcing NFRC to meet already-established discovery and briefing deadlines starting just days after NFRC was sued, E.R. 542, foreclosing most of NFRC's discovery, E.R. 700, refusing to significantly change the schedule in response to NFRC's requests, E.R. 560, 700, relieving the agencies of any burden of proof on the cross-claim, E.R. 802 at 24, allowing the agencies to limit their cross-claim to an administrative record which they admitted was incomplete due to their own deliberate destruction of

⁴ The agencies amended the cross-claim in January 1995 to reflect their intervening decision not to seek declaratory relief on two claims raised in *Thomas* and *Dombeck*. C.R. 866.

relevant documents, E.R. 802 at 25-27, C.R. 478, 479, 480, and prohibiting NFRC from presenting oral argument on jurisdiction or standing. E.R. 758.

19. To preserve the record NFRC moved to dismiss the cross-claim on various grounds, asserting, *inter alia*, that the federal agencies do not have statutory authority to seek a declaratory judgment giving them APA judicial review of their own administrative decision, that the agencies did not have standing, that there was no cognizable case or controversy between the agencies and NFRC, that the cross-claim was an impermissible compulsory counterclaim in *NFRC v. Dombeck* that must be asserted in the District of Columbia case, and that a declaratory judgment was inappropriate for these and other reasons. C.R. 575.

20. The district court denied NFRC's motion to dismiss on October 12, 1994. E.R. 690. On the standing issue, the district court adhered to its prior conclusion:

The federal defendants have demonstrated sufficient injury to seek declaratory relief in that NFRC has asserted, and is asserting, claims of illegality against them. See *Societe de Conditionnement En Aluminium v. Hunter Eng'g Co.*, 655 F.2d 938, 944 (9th Cir. 1981). Without the cross-claims, the federal defendants would face duplicative litigation, with potentially inconsistent results, in different courts.

E.R. 690 at 3. Thereafter the agencies moved for summary judgment on the cross-claim. C.R. 739. NFRC opposed the motion and challenged the agencies' standing, but did not file a cross-motion for summary judgment. C.R. 740. On standing, the agencies merely argued that the district court had already found their standing and the ruling was the law of the case. C.R. 760 at 2.

21. On December 21, 1994 the district court granted the agencies summary judgment on every claim in *Dombeck* and *Thomas* except the two on which the agencies had withdrawn their motion. C.R. 802. The court also granted the agencies summary judgment on all the environmental groups' claims. *Id.* On the agencies' standing, the district court merely ruled

that ". . . standing . . . as to the federal defendants' cross-claims for declaratory judgment against NFRC in No. C92-479WD ha[s] been confirmed in earlier orders." E.R. 802 at 22.

22. On February 15, 1995 the district court entered judgment under Fed. R. Civ. P. 54(b) on the agencies' cross-claim against NFRC and on the environmental groups' claims against the agencies. E.R. 881. Against NFRC, the judgment reads:

2. Judgment is entered for the federal defendants in No. C92-479WD, and against cross-claim defendant Northwest Forest Resource Council ("NFRC"), declaring the said ROD and FSEIS lawful as against NFRC's claims pleaded in NFRC v. Thomas and NFRC v. Dombeck, Civil Nos. 94-1032 and 94-1031 in the United States District Court for the District of Columbia. . . .

E.R. 881 at 2.⁵

SUMMARY OF ARGUMENT

1. A recent Supreme Court decision confirms that a federal agency or official does not have statutory standing to sue without specific authorization from Congress, and determined that the APA does not confer statutory standing on federal agencies or officials. The federal agencies and officials who sued NFRC to obtain judicial review of their own forest plan do not have statutory standing for their claim under the APA, the DJA or Fed. R. Civ. P. 13(g).⁶ The failure of any government agency to ever seek such review previously in the history of our country confirms that agencies do not have this right. The agencies' cross-claim against NFRC should have been dismissed for lack of statutory standing.

2. The agencies also failed to establish the injury in fact and redressability required for standing under the Constitution. Their only standing allegation was that they faced injury from the pending *Dombeck*

⁵ The judgment went on to note the two claims on which no judgment was entered.

⁶ These enactments are reprinted in the Addendum at the end of this Brief.

case and a perceived threat that NFRC might refile the *Thomas* case. The pendency of an earlier-filed coercive case in another forum is an argument against declaratory judgment, not an argument in favor of it. Likewise, the unproven threat that NFRC might refile the *Thomas* case did not support declaratory relief since the threat of litigation creates injury for a declaratory action only where the declaratory plaintiff faces accruing monetary damages from the other party's delay in filing suit -- an injury not created by the threat of an APA review proceeding. The agencies' fear of inconsistent decisions if NFRC's case were decided in the District of Columbia is not injury in fact, and was not plausible in light of the actual relief requested, and in light of Judge Jackson's stay order in *Dombeck* expressly aimed at avoiding this result. Further, the cross-claim against NFRC did not redress the agencies' feared injury since the pending *Dombeck* and *AOCC* cases in the District of Columbia still expose the agencies to all the same problems they sought to avoid by suing NFRC. Finally, the agencies never offered any evidence to prove their standing.

3. Declaratory relief is discretionary, and all the relevant factors counsel against declaratory relief in this case: (1) the declaratory judgment entered here did not clarify, settle or terminate the dispute over the legality of the forest plan; (2) the issues could have been better decided in the pending *Dombeck* case; (3) the declaratory relief did not achieve an earlier decision on any issue in controversy; (4) declaratory judgment is inappropriate for broad legal issues like the validity of the forest plan; (5) the declaratory judgment claim was a compulsory counterclaim that should have been asserted in the earlier-filed *Dombeck* case if at all; (6) the agencies were patently engaged in forum-shopping to avoid Judge Jackson's court and to circumvent Judge Jackson's refusal to transfer the *Dombeck* case; (7) the district court should have declined jurisdiction to avoid the serious statutory and constitutional standing

issues; (8) the district court misused the Rule 13(g) cross-claim procedure since NFRC was not a "co-party" with the agencies on SAS' challenge to the forest plan in its supplemental complaint; and (9) no risk of inconsistent decisions remained, if it ever existed, and all justification for declaratory relief on the cross-claim accordingly disappeared, once the district court rejected the environmentalists' claims. The district court should have declined jurisdiction on the cross-claim even if statutory and constitutional standing are present.

ARGUMENT

I. CONGRESS HAS DENIED THE FEDERAL AGENCIES STATUTORY STANDING TO ASSERT THEIR CLAIM AGAINST NFRC FOR JUDICIAL REVIEW OF THEIR DECISION ADOPTING THE FOREST PLAN.

A. Standard of review.

Standing, an element of subject matter jurisdiction, is determined *de novo* by the court of appeals. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1351 (9th Cir. 1994); *American Intern. Enterprises, Inc. v. F.D.I.C.*, 3 F.3d 1263, 1266 (9th Cir. 1993).

B. Statutory standing must be established in addition to constitutional requirements.

"The doctrine of standing encompasses both constitutional and statutory considerations." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d at 1353. To establish statutory standing, "a claimant must establish that the injury he or she complains of 'falls within the zone of interests sought to be protected by the statutory provision whose violation forms the basis . . . [of the] complaint.'" *Id.*

C. The Newport News decision: federal agency standing must be expressly and specifically authorized by Congress.

The Supreme Court's recent decision in *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding And Dry Dock Co.* ("Newport News"), ___ U.S. ___, 115 S. Ct. 1278 (1995) announces the rule that controls this case: a federal agency acting in its governmental capacity does not have statutory standing to sue in

court unless Congress expressly and specifically authorizes standing. Without specific statutory authorization for their claim against NFRC, the agencies lacked statutory standing under *Newport News*, and the district court lacked jurisdiction over the claim.

In *Newport News*, the Director of the Office of Workers' Compensation Programs of the Department of Labor disagreed with a decision of a departmental review board to award benefits to a worker under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, *et seq.*, and petitioned for judicial review of the review board decision under the statute's general review section, 33 U.S.C. § 921(c).

The Supreme Court unanimously affirmed the dismissal of the director's claim for lack of standing. The LHWCA grants review to "a person adversely affected or aggrieved" by a review board decision. 33 U.S.C. § 921(c). The Court recognized that "the phrase 'person adversely affected or aggrieved' is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts." *Newport News*, 115 S. Ct. at 1283. The Court cited the APA as the prime example. *Id.*

The Court found that "the phrase 'person adversely affected or aggrieved' does not refer to an agency in its governmental capacity." *Id.* at 1285. The Court found no authority for the conclusion that agencies are granted standing by general statutory provisions:

Given the long lineage of the text in question, it is significant that counsel have cited to us no case . . . which holds that, without benefit of specific authorization to appeal, an agency, in its regulatory or policy-making capacity, is "adversely affected" or "aggrieved."

Id. at 1284. The Court found that the APA and the entire United States Code require an agency to have specific authority for standing:

That an agency in its governmental capacity is not "adversely affected or aggrieved" is strongly suggested, as well, by two aspects of the United States Code: First, the fact that the Code's general judicial review provision, contained in the APA, does not include agencies within the category of "person adversely affected or aggrieved." See 5

U.S.C. § 551(2) (excepting agencies from the definition of "person"). . . . And second, the United States Code displays throughout that when an agency in its governmental capacity is meant to have standing, Congress says so. . . .

Id. at 1285. (emphasis added, italics in original). The Court rejected the view that agencies have automatic authority to sue to advance their general statutory duties: "Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes." *Id.* at 1286.

The Court also emphasized that an agency does not have standing to seek judicial review of its own decision merely because citizens have standing to sue the agency for judicial review:

. . . Obviously, an agency's entitlement to party respondent status does not necessarily imply standing to appeal: The National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination. 29 U.S.C. §§ 152(1), 160(f).

Id. at 1284 n.2 (emphasis added).

D. Prior authority also confirms congressional control over federal agency standing.

The rule announced in *Newport News* is not new: courts have consistently held that Congress controls access to the courts by the United States and its agencies and officials, except in narrow circumstances where the United States has inherent power to sue to protect its property or national security or to prevent a burden on interstate commerce. *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); accord, *United States v. City of Philadelphia*, 644 F.2d 187, 201-03 (3d Cir. 1980); *Ruotolo v. Ruotolo*, 572 F.2d 336, 339-40 (1st Cir. 1978); *United States v. Solomon*, 563 F.2d 1121, 1124-25 (4th Cir. 1977); see *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 285 (1888).⁷

⁷ *United States v. Com. of Pa. Dept. of Envir. Resources*, 923 F.2d 1071 (3d Cir. 1991), is an example of a suit by the government in "its nongovernmental capacity" -- as a landowner -- that the Court in *Newport News* distinguished from a suit by a federal agency "in its governmental (continued...)

In *Mattson*, this Court held that the United States did not have standing to sue to remedy a civil rights violation since there was no express statutory authority for the government to file the suit, and the suit did not fall within the narrow limits of the inherent authority doctrine. *Id.* at 1297-99. The Court viewed its holding as an important element of the separation of powers doctrine. *Id.* at 1301.

Federal agencies and officials do not enjoy any inherent authority to sue, and can only sue when granted express authority by Congress. 28 U.S.C. § 1345 (jurisdiction over actions "commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress" (emphasis added)); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 676 (5th Cir. 1978); *United States Department of Agriculture v. Hunter*, 171 F.2d 793, 795 (5th Cir. 1949) (Department of Agriculture does not have authority to sue).

E. The agencies do not have standing under the APA for their claim against NFRC requesting review of their own decision.

Newport News held that federal agencies have standing to sue only when Congress specifically grants them standing, and found that federal agencies do not have standing under the APA because Congress precluded agencies from seeking judicial review by excluding "agency" from "persons adversely affected or aggrieved." *Newport News*, 115 S. Ct. at 1281. The statutory exclusion of agencies is sufficient to bar suit under the APA.

The APA also precludes agency standing for two additional reasons in this case, where the agencies sought judicial review of their own decision, rather than the decision of a different agency:

First, APA judicial review is limited to those "suffering legal wrong because of agency action, or adversely affected or aggrieved by

⁷ (...continued)
capacity." The government sought a declaration that a state agency could not force the government to remove and dispose of contamination on government property. *Id.* at 1072.

agency action," 5 U.S.C. § 702; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d at 1354, and the federal agencies have conceded they are not "adversely affected or aggrieved" under the APA by their own forest plan. Federal Appellees' Opposition to Appellant's Motion For Summary Reversal ("Federal Appellees' Opposition") at 11 (May 8, 1995). Since the agencies do not claim that any statute has been violated, they could not "fall[] within the zone of interests sought to be protected by the statutory provision whose violation forms the basis . . . [of the] complaint," *Salmon River Concerned Citizens v. Robertson*, 32 F.3d at 1354, and cannot have statutory standing to sue under the APA.

Second, the APA directs that "an action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. § 703 (emphasis added). Even if an agency could sue, it could not sue a citizen as the agencies did here; the defendant in a judicial review proceeding must be the United States or a federal agency or officer.

The agencies concede they cannot directly seek judicial review under the APA. Federal Appellees' Opposition at 15. They fall back on semantics, claiming they did not seek APA judicial review here, but merely secured a declaratory adjudication of their "defenses" to NFRC's pending APA claims for which, they maintain, they do not require standing. Federal Appellees' Opposition at 12.⁸

This semantic contortion is both disingenuous and irrelevant. It ignores what actually happened: the agencies filed a claim against NFRC

⁸ The district court addressed statutory standing only indirectly, and did not cite any statute authorizing the cross-claim:

5. The federal defendants have the authority to assert cross-claims in No. C92-479WD, the most senior of the cases pending in either district; the government did not commence this action as plaintiff, and its jurisdictional predicate is 28 U.S.C. § 1331, not § 1345

E.R. 690 at 4 (citations omitted).

asking the district court for "declaratory judgment declaring, upon the administrative record, that the ROD and the FSEIS meet the standard of review set forth in 5 U.S.C. 706(2)(A), (C) and (D)." E.R. 536. The district court granted them declaratory relief ruling on the merits that the ROD and the FSEIS are legal under APA review standards. The fact that the agencies used NFRC's complaints to define the issues on which they sought judicial review of their plan does not change the fact that the agencies sued NFRC to seek judicial review of the plan, and obtained judicial review upholding the plan.

In addition, the argument mischaracterizes the agencies' claim: they achieved more than adjudicating their "defenses" to the pending *Dombeck* case; they obtained declaratory relief on the merits of nine issues in the *NFRC v. Thomas* case although no case raising those issues was pending. In sum, the agencies obtained exactly what a citizen would obtain by seeking APA review: a ruling on the lawfulness of the forest plan. This is what Congress disallowed agencies to do in the APA.

Semantics aside, the legal premise of the argument ignores the core holding of *Newport News*: a federal agency may not file any claim in court without specific congressional approval. Congress has not authorized the agencies to assert their claim against NFRC, however they may choose to describe it.

The utterly unprecedented nature of the agencies' claim further shows the absence of authority. The agencies cite no case in the history of our country where a federal agency has ever before sought judicial review of its own decision, or has ever filed a declaratory judgment claim against a citizen to adjudicate the claims in the citizen's pending or threatened suit against the agency. See *Newport News*, 115 S. Ct. at 1284 (relying on absence of prior cases of agency standing).

The absence of any prior assertion of such a claim in two centuries of American jurisprudence is strong evidence that the right to assert the

claim does not exist. The failure of the government to exercise a statutory power over a long period of time creates a presumption that the power does not exist. *Bankamerica Corp. v. United States*, 462 U.S. 122, 131 (1983) (failure to exercise power for 60 years indicates power does not exist); *Federal Power Commission v. Panhandle E. P. L. Co.*, 337 U.S. 498, 513 (1948) (10 years); *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351-52 (1941) (25 years); *Peters v. United States*, 853 F.2d 692, 699-700 (9th Cir. 1988) (agency's "failure to point to a single case in which it was permitted to exercise" alleged statutory right indicates right does not exist).

F. The Declaratory Judgment Act does not grant statutory standing to federal agencies and officials.

The agencies argued below that "Federal defendants do not bring their claims under the APA, but rather under the Declaratory Judgment Act, 28 U.S.C. § 2201(a)." C.R. 760 at 5. This contention does not aid the agencies because the DJA does not confer statutory standing. In *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), the Supreme Court dismissed a citizen's declaratory judgment action for lack of statutory standing, finding that the statute on which the citizen sought a declaration did not confer standing on the citizen. *Id.* at 484-89. Both the dismissal and the court's reasoning show that the DJA does not automatically confer statutory standing on a declaratory plaintiff, as the agencies apparently contend here. The Supreme Court recognized a federal agency's statutory standing to seek a similar declaratory judgment solely because Congress had enacted a special statute expressly conferring standing on the agency. *Id.* at 484.

This result is consistent with longstanding DJA jurisprudence. The DJA "enlarged the range of remedies available to federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). A plaintiff must have standing to assert a declaratory judgment claim. *Los Angeles v. Lyons*, 461 U.S. 95, 104

(1983); *Golden v. Zwickler*, 394 U.S. 103, 104, 108-110 (1969); *United Food & Com. Workers v. Food Employers Council*, 827 F.2d 519 (9th Cir. 1987) (requiring standing for "defensive" declaratory claim). The DJA does not confer standing or justiciability. *Western Mining Council v. Watt*, 643 F.2d 618, 623-24 (9th Cir.), cert. denied, 454 U.S. 1031 (1981).

Thus, the DJA does not provide statutory standing for the agencies' claims against NFRC for two reasons: First, *Newport News* holds that general statutory authorizations to sue in the United States Code, like the DJA, do not grant standing to federal agencies: "the United States Code displays throughout that when an agency in its governmental capacity is meant to have standing, Congress says so. . . ." *Id.*, 115 S. Ct. at 1285 (emphasis in original). Second, the DJA cannot be a source of statutory standing for anyone. *FEC v. National Conservative PAC*, 470 U.S. 480.

It is firmly established that the DJA does not permit claims that are barred by the APA. In *Schilling v. Rogers*, 363 U.S. 666 (1960), the Supreme Court expressly held that preclusion of APA review of an agency decision also bars declaratory judgment review of the same decision. In that case, APA review of an agency decision was precluded by a statute (§ 7(c) of the Trading With The Enemy Act). *Id.* at 670. The plaintiff nonetheless argued that he was entitled to seek judicial review of the decision under the DJA. The Supreme Court disagreed:

Finally, petitioner's reliance on the Declaratory Judgment Act carries him no further. Section 7(c) of the Trading With The Enemy Act embraces that form of judicial relief as well as others. Additionally, the Declaratory Judgment Act is not an independent source of federal jurisdiction . . . ; the availability of such relief presupposes the existence of a judicially remediable right. No such right exists here.

Id. at 677 (emphasis added); accord, *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 246 (1952) ("[T]he declaratory judgment procedure will not be used . . . as a substitute for statutory methods of review"); *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540, 544-45

and n.4 (1946) (declaratory judgment review not available in U.S. district court where statute assigns exclusive review to Tax Court).

Congress did not intend declaratory judgments to be an alternative to APA review; Congress expressly directed that one form of APA judicial review proceeding could be "actions for declaratory judgments." 5 U.S.C. § 703. Thus, a plaintiff's right to seek declaratory review of federal agency action is defined by the judicial review provisions of the APA. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967).

This court has held that the DJA does not allow indirect judicial review of an agency decision where Congress has not permitted direct judicial review. *Wells v. United States*, 280 F.2d 275, 277-78 (9th Cir. 1960). Nor can the DJA be used to obtain district court review of an agency decision that Congress has made exclusively reviewable in the court of appeals. *Clark v. Busey*, 959 F.2d 808, 811-12 (9th Cir. 1992).

Other courts have uniformly rejected attempts to use the DJA to circumvent congressional limitations on judicial review. *Reuth v. U.S.E.P.A.*, 13 F.3d 227, 231 (7th Cir. 1993) (citizen can not use the DJA to circumvent Congress' decision to preclude APA review of EPA ruling); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1389-91 (5th Cir. 1989) (same); *Continental Bank and Trust Company v. Martin*, 303 F.2d 214, 215 (D.C. Cir. 1962) ("if the agency's action is not final so as to be reviewable under the Administrative Procedure Act appellant is not helped on the question of jurisdiction by the Declaratory Judgment Act . . . ; for that Act does not afford an independent basis for jurisdiction"); *Tennyson v. Gas Service Company*, 506 F.2d 1135, 1139 (10th Cir. 1974) (DJA could not be used to circumvent a congressional decision to bar federal court review of state regulatory decisions).

Schilling v. Rogers directly controls this issue: Congress' decision in the APA to preclude federal agencies from obtaining judicial review of administrative decisions, *Newport News*, 115 S. Ct. at 1285,

bars agencies from using the DJA to obtain relief indirectly since "the availability of such relief presupposes the existence of a judicially remediable right." *Schilling v. Rogers*, 363 U.S. at 677.

The Second Circuit rejected the only reported attempt by the government to use the DJA to obtain judicial review of an administrative decision. *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986). In that case, the government sought declaratory judgment review of a magistrate's decision denying extradition of a prisoner, which was not directly reviewable. Judge Friendly rejected the claim for DJA review as "somewhat startling," *id.* at 495, and outside the contemplation of Congress when it enacted the DJA. *Id.* at 497-500. He found it persuasive that, as here and as in *Newport News*, the government could not cite "a single case in which a declaratory judgment was used in a manner resembling that which the Government proposes here." *Id.* at 500.

G. Fed. R. Civ. P. 13(g) does not grant statutory standing to federal agencies or officials.

The agencies also argued that Rule 13(g), which states that "a pleading may state as a cross-claim any claim by one party against a co-party . . .," provided sufficient standing for its claim against NFRC: "Like any other litigant, the United States is free to advance cross-claims against co-parties." C.R. 611 at 10.

Newport News refutes this argument. The general terms of the Federal Rules of Civil Procedure no more authorize agency standing than the DJA, the APA or any other general enactment.

In addition, Fed. R. Civ. P. 13(g) does not grant standing to anyone. The Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts" Fed. R. Civ. P. 82; *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).

This court has held that Rule 13(g) is "not to provide a substantive rule governing the extent of the jurisdiction of a court." *Hagen v.*

Central Avenue Dairy, 180 F.2d 502, 503 (9th Cir. 1950).⁹ The Federal Rules of Civil Procedure do not expand federal agencies' power to sue: a federal agency may not assert a claim as a counterclaim under Rule 13 without congressional authorization. *Impro Products, Inc. v. Block*, 722 F.2d 845, 851-52 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 931 (1984) (Secretary of Agriculture could not assert counterclaim for declaratory and injunctive relief when Congress has not authorized the claim).

Standing must be established separately for every claim or defense in a federal court case. *Primate Protection League v. Tulane*, 500 U.S. 72, 77 (1991); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 458-59 (1958). Even if there is standing for a plaintiff's claim against two defendants, a defendant must demonstrate standing to be entitled to assert a cross-claim. *Jones v. Illinois Department of Rehabilitation Services*, 689 F.2d 724, 733 (7th Cir. 1982); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1219 (D. Id. 1993) (government obtained dismissal of a cross-claim for lack of standing where there was standing for the plaintiff's claim against the government), *aff'd on other grounds*, 42 F.3d 1399 (9th Cir. 1994).

In *Newport News*, the Supreme Court observed that procedural rights established in the Federal Rules of Civil Procedure do not confer standing on a federal agency. It noted that even though the Interior Department has a general duty to protect campers within the national parks, it "does not thereby have authority to intervene in suits for assault brought by campers" 115 S. Ct. at 1286 (emphasis added). A federal agency or official requires specific statutory authority to assert a claim as an intervenor. *Ruotolo v. Ruotolo*, 572 F.2d at 339.

⁹ Similarly, the Rule 13(a) mechanism for counterclaims does not expand federal court jurisdiction, *Desser, Rau & Hoffman v. Goggin*, 240 F.2d 84, 86 (9th Cir.), *cert. denied* 355 U.S. 813 (1957), and a claim may not be asserted as a counterclaim under Rule 13 without statutory and constitutional standing. *Mortgages, Inc. v. U.S. Dis. Ct. for D. of Nev.*, 934 F.2d 209, 211-14 (9th Cir. 1991).

Likewise, Rule 13(g) is not authority for a federal agency to assert a claim for which it otherwise lacks statutory permission.

H. *The fact that NFRC is suing the agencies in another forum does not give the agencies standing to sue NFRC.*

The agencies have also attempted to rest their standing on cases holding that a federal court has subject matter jurisdiction over a declaratory judgment case if the court would have had subject matter jurisdiction over a coercive case filed by the declaratory defendant against the declaratory plaintiff. *See, e.g., Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985).

Their argument fails because these cases do not address standing. Instead, they address the entirely separate issue of federal question jurisdiction under 28 U.S.C. § 1331, applying the rule that § 1331 jurisdiction must arise from an element of the plaintiff's claim rather than the defendant's anticipated defense to a claim. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983). None of these cases holds or even implies that a plaintiff has standing to sue a defendant because the defendant has standing to sue the plaintiff.

There is no "reciprocal standing" rule. In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court emphasized that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Id.* at 99; *see United States v. Mattson*, 600 F.2d at 1300. This doctrine applies fully to the government: "the Government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter." *United States v. San Jacinto Tin Co.*, 123 U.S. at 285.

Thus, the fact that NFRC has standing to sue federal agencies and officials over the forest plan does not give agencies and officials

standing to sue NFRC on the same issue.¹⁰ The Supreme Court made this clear in *Newport News* with its example that "[t]he National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination." *Id.*, 115 S. Ct. at 1284 n.2.

II. THE AGENCIES DID NOT PROVE INJURY IN FACT OR REDRESS-ABILITY SUFFICIENT TO ESTABLISH A CONSTITUTIONALLY COGNIZABLE CASE OR CONTROVERSY FOR THEIR CROSS-CLAIM AGAINST NFRC.

A. Standard of review.

The existence of standing is determined by the court of appeals *de novo*. See Argument I(A).

B. Constitutional requirements for standing.

A declaratory judgment can be issued only in "a case of actual controversy," 28 U.S.C. § 2201(a), which "is identical to Article III's constitutional case or controversy requirement." *American States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). Article III's standing requirements are:

. . . [T]he party who invokes the court's authority [must] show (1) actual or threatened injury (2) suffered as a result of the allegedly illegal conduct of the defendant, which (3) fairly can be traced to the challenged action and (4) is likely to be redressed by a favorable decision.

Salmon River Concerned Citizens v. Robertson, 32 F.3d at 1353. "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). In a declaratory judgment action, "the requirements for standing are strict." *Consumers Union v. Committee For the Implementation of Textile Agreements*, 561 F.2d 872, 874 (D.C. Cir. 1977), cert. denied 435 U.S. 933 (1978).

¹⁰ Similarly, even though a fugitive is denied access to the courts to sue the government, *Conforte v. C.I.R.*, 692 F.2d 587, 589 (9th Cir. 1982), a fugitive may of course be sued by the government.

C. The agencies established no injury in fact.

The district court never required the agencies to establish their standing for the cross-claim. In its August 5, 1994 order allowing the agencies to assert the cross-claim -- before a pleading was even submitted and with no factual record -- the court found that the agencies had standing. E.R. 526. The court never explained why it believed that the *Thomas* claims "will not evaporate," or that "the federal defendants face an obvious and major threatened injury," or that "the injury would be redressed in the event of a favorable decision." E.R. 526 at 7.

Having won the standing war without firing a shot, the agencies made no further evidentiary showing on standing -- in the cross-claim, in response to NFRC's motion to dismiss or in their summary judgment motion. On summary judgment, the district court refused to consider standing, E.R. 802 at 22, and prohibited NFRC from addressing standing at the summary judgment oral argument. E.R. 758 at 2-3.

1. The pendency of the Dombeck case in the District of Columbia does not create injury in fact.

The district court found that the pendency of the *Dombeck* case in the District of Columbia created sufficient injury to confer standing for the declaratory judgment cross-claim. This unprecedented ruling is contrary to well-settled declaratory judgment law.

This court has noted "the perversion of the purpose of declaratory judgment legislation which occurs when it is used to anticipate the result of litigation pending in another forum" *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951), cert. denied 342 U.S. 905 (1952). The pendency of a coercive action in another forum is an argument against declaratory relief, not in favor of it. *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 343 (9th Cir.), cert. denied 385 U.S. 919 (1966). The "central purpose" of the Declaratory Judgment Act is to "provide the opportunity to clarify rights and legal relationships without waiting for an adversary to file suit." *Fireman's*

Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988) (per curiam) (emphasis added). A declaratory action "brings an issue before the court that otherwise might need to await a coercive action brought by the declaratory relief defendant." *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 539 (9th Cir. 1985) (emphasis added).

Once the feared coercive case has been filed, there is no longer a threat of potential litigation, and there is no basis for a declaratory suit. *Mailer v. Zolotow*, 380 F. Supp. 894, 896 (S.D.N.Y. 1974). Thus, the pendency of litigation in another forum destroys rather than creates injury sufficient for declaratory judgment standing.

2. ***The possibility that NFRC might refile the Thomas case in another forum does not create injury in fact.***

The district court also believed the possibility that NFRC might refile the *Thomas* case in another forum was sufficient injury in fact to give the agencies declaratory judgment standing in this case. This belief also runs counter to well-settled declaratory judgment law.

The general rule is that filing a declaratory judgment action merely to anticipate a coercive case elsewhere is strongly disapproved:

The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse.

Hanes Corp. v. Millard, 531 F.2d 585, 593 (D.C. Cir. 1976) (footnote omitted). The declaratory judgment procedure is not to be used for forum-shopping when the declaratory judgment defendant is likely to file a coercive case elsewhere. *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367, 1371 (9th Cir. 1991). A party is not "permitted to distort the purpose of a declaratory judgment by using it as a vehicle to secure a forum of its own choosing." *Associated Mills v. Regina Co., Inc.*, 675 F. Supp. 446, 448 (N.D. Ill. 1987).

The district court ignored this rule, and incorrectly relied on the rule that where a patent holder has threatened to sue a manufacturer but

has not done so, the manufacturer may seek a declaratory judgment on the validity of the patent. *Societe de Conditionnement En Aluminium v. Hunter Eng'g Co.*, 655 F.2d at 943-45; see E.R. 690 at 3.

The reasoning of that case is not applicable here. The injury supporting the declaratory judgment case in *Hunter Eng'g Co.* was the continuing accrual of damages while the patent holder decided whether to enforce the patent. *Id.* at 938 (noting that the declaratory judgment procedure serves to "forestall the accrual of potential damages"). A declaratory judgment action avoided the accrual of potentially enormous damages if patent infringement were later determined.

This narrow principle is limited to similar commercial disputes where the declaratory judgment plaintiff is using property the defendant claims to be protected, and faces mounting damages over time. In these cases, the injury recognized by the courts is "the unnecessary accrual of damages," *United Food & Com. Workers v. Food Employers Council*, 827 F.2d at 524, or the "accrual of avoidable damages to one not certain of his rights," *Luckenbach Steamship Co. v. United States*, 312 F.2d 545, 548 (2d Cir. 1963), resulting from delay by the other party in filing a damage suit. The declaratory judgment plaintiff must be using the disputed property, and must have a "real and reasonable apprehension that he will be subject to liability." *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542 (9th Cir. 1990) (copyright); *Texas v. West Publishing Co.*, 882 F.2d 171, 176 (5th Cir. 1989), cert. denied 493 U.S. 1058 (1990) (copyright); *Simmonds Aerocessories v. Elastic Stop Nut Corp.*, 257 F.2d 485 (3rd Cir. 1958) (trademark); also see *Spokane Indian Tribe v. U.S.*, 972 F.2d 1090 (9th Cir. 1992) (declaratory proceeding to resolve threatened loss of property by Indian tribe).

The accruing damages rationale may be appropriate in commercial disputes, but it is highly antithetical to the basic principles of judicial review under the APA. Congress gave citizens the right to sue

federal agencies under the APA, and set a generous six year statute of limitations on those suits. *Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988). An agency's fear that a citizen may sue the agency some time in the future, even if reasonable, cannot justify a declaratory suit by the agency against the citizen at the time and place of the agency's choosing. Such a suit turns APA review procedures on their head, and improperly converts the APA from a means for citizens to use the courts for protection from unlawful government action, *Abbott Laboratories v. Gardner*, 387 U.S. at 140-41, into a tool for the government to use the courts to oppress and intimidate citizens. See *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

Fear of future litigation cannot justify a declaratory judgment case for APA judicial review because there is no injury to the agencies if a citizen withholds an APA suit against the government. To be cognizable for standing, threatened injury must be "certainly impending." *Whitmore v. Arkansas*, 495 U.S. at 158. No injury is "certainly impending" if NFRC waits several years and then refiles and prevails on some of the *Thomas* claims: there is no ongoing accrual of damages, and the agencies would merely continue to implement their forest plan. In these circumstances, there is no constitutionally cognizable injury. *Collin County, Tex. v. Homeowners Ass'n (Haven)*, 915 F.2d 167, 172 (5th Cir. 1990) (local government may not sue citizen for declaration that environmental impact statement is legally sufficient); *Dixie Elec. Co-Op. v. Citizens of State of Ala.*, 789 F.2d 852, 857-58 (11th Cir. 1986) (dismissing claim "that merely seeks validation of a statutory scheme and allows for the adjudication of potential issues that have not actually arisen.").

3. ***The alleged risk of "potentially inconsistent results" from litigation in another district is not sufficient injury in fact.***

The district court apparently believed that "potentially inconsistent results," E.R. 690 at 3, between two courts constitutes injury in

fact sufficient to support the agencies' standing. No case has ever held that a defendant may use a declaratory judgment action to avoid inconsistent results in two different pending cases. To the contrary, it has been held that "to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tortfeasor would be a perversion of the Declaratory Judgment Act." *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165, 1167 (7th Cir.), cert. denied 395 U.S. 959 (1969).

Similarly, fear of potentially inconsistent results does not permit a defendant to use Fed. R. Civ. P. 19 to consolidate litigation from multiple forums into a single forum of the defendant's choice, as the agencies did here, for the defendant's litigation efficiency. *Field v. Volkswagonwerk AG*, 626 F.2d 293, 301-02 (3d Cir. 1980); *Micheel v. Haralson*, 586 F. Supp. 169, 171 (E.D. Pa. 1983). Joinder under Rule 19 is proper only if there is a substantial risk of "multiple obligations on the same cause of action." *Kuhlmeier v. Hazelwood School District*, 578 F. Supp. 1286, 1293 (E.D. Mo. 1984) (emphasis added); *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 411 (3d Cir. 1993). Here, NFRC did not have the same "cause of action" as the environmental groups; its injuries, interests and legal claims were all different.¹¹

In any event, no risk of inconsistent results ever existed. Judge Jackson had ended that risk by staying the *Dombeck* case until this case was decided "to prevent the award of potentially inconsistent relief by separate courts." E.R. 489, Exhibit C.

While some of the environmentalists' claims (such as the absence of a "no action alternative") were similar to a claim raised by NFRC, there

¹¹ Although the agencies sought joinder under Rule 19, the district court never granted joinder, and could not have since most of the *Dombeck* and *Thomas* plaintiffs are not amenable to personal jurisdiction in the Western District of Washington. C.R. 496.

was no risk of inconsistent obligations on these claims. There was at most the chance that the agencies would perhaps win in one court and lose in the other. The environmental plaintiffs and NFRC were like tort claimants injured by the same wrongful act, where a single declaratory judgment action by the tortfeasor is not permitted. *Cunningham Brothers, Inc. v. Bail*, 407 F.2d at 1167.

Nor was there risk of inconsistent injunctive remedies. The only relevant injunctive relief sought in *Dombeck* or *Thomas* was an injunction ordering the agencies "to promptly offer as many new sales of timber as possible to return management of the national forests to the principles of multiple use and sustained yield." *NFRC v. Thomas*, Complaint, Prayer For Relief, ¶ 14; see *NFRC v. Dombeck*, Complaint, Prayer For Relief, ¶ 14. This relief would be subject to any injunction against timber sales that Judge Dwyer might have issued in this case.

Finally, any threat of inconsistent results, obligations or remedies ended when the district court granted summary judgment rejecting the environmentalists' claims in December 1994. At that point no threat of inconsistent remedy remained, and any prior standing for the cross-claim disappeared. "A plaintiff must maintain standing throughout all stages of his litigation. Standing is a limitation on a court's jurisdiction." *Powder River Basin Resource Council v. Babbitt*, No. 93-8117, 1995 WL 229573 (10th Cir. April 18, 1995); *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1086 (6th Cir. 1989).

D. Even if an injury existed, the declaratory judgment claim against NFRC would not redress the injury since the *Dombeck* case and the AOCC case will continue in the District of Columbia.

The agencies also fail the redressability requirement of standing: their efforts to force NFRC to defend their cross-claim in this case did not avoid the injury they feared, even if that injury were sufficient.

The ongoing *Dombeck* case involves 17 other plaintiffs who are not parties to this case, were not represented by NFRC and are not bound by

the decision in this case. They will continue with the *Dombeck* case, with or without NFRC. In addition, the pending and still unresolved AOCC case in the District of Columbia presents almost all the same claims as the *NFRC v. Dombeck* case (some claims almost verbatim to some of the *NFRC v. Dombeck* claims), and leaves the agencies facing exactly the same situation as if they had never sued NFRC. Thus, the agencies did not avoid the injuries they feared, even if those injuries were constitutionally cognizable. The whole litigation effort against NFRC was futile from the start since *Dombeck* and AOCC were destined to remain pending.

E. The agencies never proved the required elements of standing.

The agencies never offered any evidence to prove their standing. To excuse their failure, the agencies argued that they did not have to prove standing as part of their summary judgment motion because, although NFRC had moved to dismiss the cross-claim for lack of standing and had opposed the agencies' motion based on lack of standing, NFRC did not file its own cross-motion for summary judgment. C.R. 760 at 3 ("Here, NFRC has not moved for summary judgment on any issue, and cannot require proof by federal defendants of standing.") (footnote omitted).

The agencies are dead wrong. "To invoke federal jurisdiction, plaintiffs must allege facts adequate to confer standing; to obtain a judgment and remedy, plaintiffs must establish the truth of these or other adequate allegations." *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1333 n.26 (9th Cir. 1979) (emphasis added). Standing allegations "must ultimately be proven for a plaintiff to prevail." *Fernandez v. Brock*, 840 F.2d 622, 626 (9th Cir. 1988). The plaintiff must "provide cognizable evidence of specific facts," *Snake River Farmers' Assn., Inc. v. Department of Labor*, 9 F.3d 792, 795 (9th Cir. 1993), "through affidavit or other competent evidence." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d at 1352 n.11.

The burden of producing evidence on a summary judgment motion is on the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The plaintiff's summary judgment burden exists whether or not the defendant also moves for summary judgment. "The plaintiff's obligation to establish standing should not be passed to the defendant by the simple device of waiting for a summary judgment motion." *American Postal Workers Union v. U.S. Postal Service*, 861 F.2d 211, 213 (9th Cir. 1988). A defendant may challenge jurisdiction through a motion to dismiss or by opposing summary judgment, as NFRC did, without filing a cross-motion for summary judgment. *U.S. v. Arkwright, Inc.*, 690 F. Supp. 1133, 1138 (D.N.H. 1988); *Walls v. United States*, 651 F. Supp. 1049, 1050 (S.D. Ind. 1987). Thus, the agencies were obligated to prove their standing in order to obtain the judgment they received from the district court; their failure of proof requires dismissal of their claim.

III. THE DISTRICT COURT SHOULD NOT HAVE GRANTED DECLARATORY RELIEF IN THIS CASE.

A. Standard of review.

The court of appeals "reviews decisions to grant or deny declaratory relief de novo." *Tashima v. Administrative Office of U.S. Courts*, 967 F.2d 1264, 1273 (9th Cir. 1992). "The customary deference for the district court is not applicable to its determination to grant a declaratory judgment." *United States v. State of Washington*, 759 F.2d 1353, 1356 (9th Cir.), cert. denied, 474 U.S. 994 (1985).

B. Factors affecting exercise of declaratory judgment jurisdiction.

"The decision to grant declaratory relief is a matter of discretion . . . , even when the court is presented with a justiciable controversy." *United States v. State of Washington*, 759 F.2d at 1356. "[I]f there is a case or controversy within its jurisdiction, the court must decide whether to exercise that jurisdiction." *American States Ins. Co. v. Kearns*, 15 F.3d at 143-44.

Declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relationship in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings." *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d at 342; *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 703 (9th Cir. 1992). "Declaratory relief should be denied" when it will accomplish neither of these goals. *Greater Los Angeles Council on Deafness Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987).

"The fact that another action, involving substantially the same issue, is pending in another state or federal court is a potent factor in discretionary refusal to assume jurisdiction." *Fern v. Turman*, 736 F.2d 1367, 1370 (9th Cir. 1984), cert. denied 469 U.S. 1210 (1985). Declaratory judgment is refused "where it is being sought merely to determine issues which are involved in a case already pending and can be properly disposed of therein." *McGraw-Edison*, 362 F.2d at 343.

The broad policy ramifications of a particular declaratory remedy also counsel against granting relief. "We have been cautioned against making declaratory judgments upon issues of public moment unless that need is clear, not remote or speculative." *Washington Public Power Supply System v. Pacific Northwest Power System*, 332 F.2d 87, 88 (9th Cir. 1964).

Courts should decline jurisdiction over a declaratory judgment action filed "as a means of forum shopping," *Continental Cas. Co. v. Robsac Industries*, 947 F.2d at 1371, or "when the purpose of the suit is to deprive a plaintiff of his choice of forum." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 670 F. Supp. 424, 432 n.10 (D.D.C. 1987).

C. The district court should not have granted declaratory judgment on the cross-claim.

The district court never made a finding that these factors justify the exercise of declaratory judgment jurisdiction in this case. They do

not. Declaratory judgment on the cross-claim did not serve any of the purposes of the remedy, and every discretionary factor weighed against the district court's exercise of power in this case:

1. The judgment did not materially clarify, settle or terminate the dispute over the legality of the forest plan -- for the agencies, for NFRC or for the other citizens that are challenging the plan in the District of Columbia. *Greater Los Angeles Council on Deafness Inc. v. Zolin*, 812 F.2d 1103. The *Dombeck* case is continuing in the District of Columbia, and NFRC and its co-plaintiffs have recently amended their complaint to add 14 additional claims not addressed in this case, and to add two additional plaintiffs. The AOCC case with closely related issues (some identical) also remains pending in the District of Columbia. The judgment below did not settle or terminate anything.

2. The issues decided in this case were better suited for determination in the pending *Dombeck* case, where they would be resolved along with the newly added claims and with the companion claims in AOCC. *Fern v. Turman*, 736 F.2d at 1370; *McGraw-Edison*, 362 F.2d at 343.

3. Since NFRC had already filed suit in *Dombeck* the "central purpose" of declaratory judgment -- achieving earlier resolution of otherwise unresolvable legal issues -- could not be achieved here. *Fireman's Fund Ins. Co. v. Ignacio*, 860 F.2d at 354.

4. Declaratory judgment was inappropriate since this case involved "issues of public moment," *Washington Public Power Supply System v. Pacific Northwest Power System*, 332 F.2d at 88, where the agencies avowedly sought "a ruling . . . that would reach far beyond the particular case." *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 243-44 (1952).

5. The declaratory judgment claim was a compulsory counterclaim in *NFRC v. Dombeck* under Fed. R. Civ. P. 13(a), and it was inappropriate for the district court to proceed on the later-filed cross-claim in this

case. *Pacesetter Systems Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982) (declining jurisdiction in later-filed declaratory case); *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960).

6. The evident purpose of the cross-claim was forum-shopping -- to avoid litigation in Judge Jackson's court in the District of Columbia, and to circumvent Judge Jackson's denial of the agencies' motion to transfer the *Dombeck* case to the Western District of Washington. Declaratory judgment is not appropriate as a tool for forum-shopping. *Continental Cas. Co. v. Robsac Industries*, 947 F.2d at 1371.

7. Declining declaratory relief would have avoided the obvious statutory and constitutional standing problems for the agencies. *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (court declined declaratory relief to avoid novel jurisdictional issues).

8. Declining jurisdiction would have avoided other procedural errors by the district court: misusing the cross-claim procedure in Rule 13(g) and improperly denying NFRC's motion for Rule 54(b) judgment as to the 1992 forest plan, C.R. 519; E.R. 534:

a. NFRC was not named as a party in the supplemental complaint concerning the 1994 forest plan, C.R. 444, and announced its intention to refrain from participating in all proceedings on the supplemental complaint. C.R. 448. In these circumstances, NFRC was not a party to SAS' claims on the forest plan, and could not be sued by the agencies on a cross-claim relating to the forest plan. *U.S. Philips Corp. v. Windmere Corp.*, ___ U.S. ___, 114 S. Ct. 425 (1993) (dismissing certiorari as improvidently granted because the petitioner, named as defendant on one claim below, was "not a party to this particular civil case" involving a separate claim where the petitioner was not named, and where the petitioner "took affirmative steps to avoid being characterized or involved as a party"); *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 730-31 (Fed. Cir. 1992).

b. Before the cross-claim was asserted NFRC filed a Rule 54(b) motion for judgment on the 1992 claims. The district court improperly denied the motion without explanation, E.R. 534, although the agencies had earlier agreed that those claims were moot, C.R. 421 at 4, the court had previously held the 1992 case moot, C.R. 466, and had itself earlier proposed such a judgment. C.R. 432 at 21. Declining jurisdiction would have avoided the serious and prejudicial errors by the district court in permitting the cross-claim and denying the Rule 54(b) motion, as well as avoiding other errors concerning the burden of proof, the administrative record and denial of discovery.

9. The agencies' worry about avoiding inconsistent decisions, if ever valid, ended when the district court rejected all the environmental plaintiffs' claims in December 1994. At that point the district court should have refrained from exercising declaratory judgment jurisdiction over the agencies' cross-claim.

CONCLUSION

The judgment of the district court on the cross-claim against NFRC should be vacated and remanded to the district court with instructions to dismiss the cross-claim for lack of jurisdiction.

Dated this 16th day of June, 1995.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: 

Mark C. Rutzick

Of Attorneys for Appellant
Northwest Forest Resource
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ADDENDUM

Administrative Procedure Act:

5 U.S.C. § 551
5 U.S.C. § 701
5 U.S.C. § 702
5 U.S.C. § 703

Declaratory Judgment Act:

28 U.S.C. § 2201
28 U.S.C. § 2202

Fed. R. Civ. P. 13

§551. Definitions

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Rule 13. Counterclaim and Cross-Claim

(a) **Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) **Permissive Counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **Counterclaim Exceeding Opposing Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **Counterclaim Against the United States.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) **Counterclaim Maturing or Acquired After Pleading.** A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) **Omitted Counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) **Cross-Claim Against Co-Party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a

claim asserted in the action against the cross-claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

**STATEMENT OF RELATED CASES
UNDER NINTH CIRCUIT COURT RULE 28-2.6**

The following cases are related cases under Court Rule 28-2.6:

Native Forest Council vs. Bruce Babbitt, Ninth Circuit No.
95-35052

*Save the West; Forest Conservation Council v. James R.
Moseley*, Ninth Circuit No. 95-35214

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S OPENING BRIEF on:

David C. Shilton
Attorney, Appellate Section
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on June 16, 1995, by delivering to said attorneys via Federal Express true copies thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorneys' last known addresses, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Todd True
Sierra Club Legal Defense Fund
203 Hoge Building
705 Second Avenue
Seattle, Washington 98104-1711

on June 16, 1995, by mailing to said attorney a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address, and deposited in the post office at Portland, Oregon, on said day.

Dated this 16th day of June, 1995.

MARK C. RUTZICK LAW FIRM,
a Professional Corporation

By: 

Mark C. Rutzick

Of Attorneys for Appellant
Northwest Forest Resource
Council

No. 95-35215

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as Assistant Secretary
of Agriculture for Natural Resources and Environment,

Defendants-Appellees,

WASHINGTON CONTRACT LOGGERS ASSOCIATION, ET AL.,

Defendant-Intervenors,

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

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INTRODUCTION

A. The Opposition Brief ("Opp. Br.") filed by appellees James Lyons, et al. (the "federal agencies") concedes several key points raised in the opening brief of appellant Northwest Forest Resource Council ("NFRC"), and defends their declaratory judgment claim against NFRC on a single narrow ground:

1. The agencies do not contend they have "specific statutory authorization" for their declaratory judgment claim against NFRC. Opp. Br. at 17-23.

2. The agencies admit they can not sue NFRC under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq. ("APA"), to obtain direct judicial review of their own Forest Plan because they are not aggrieved by their own plan. Opp. Br. at 12.

3. The agencies do not argue that the general language of any land management or environmental law¹ or Fed. R. Civ. P. 13(g) authorizes federal agencies to sue a citizen as they did here. *Id.*

4. The agencies do not argue that they have legal authority to sue NFRC for "affirmative relief." Opp. Br. 13, 17-23.

5. The agencies do not dispute that this is the first time in the history of our country that a federal agency has sued a citizen to determine the legality of the agency's own decision, or to obtain a declaratory ruling on a citizen's claims against an agency decision.

Conceding all these points, the agencies now rest their case on a single two-part contention: (1) they do not need specific statutory authorization for their claim against NFRC, and (2) the general terms of

¹ Such laws include the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, et seq., the Multiple-Use Sustained-Yield Act ("MUSY"), 16 U.S.C. §§ 528-31, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, et seq., the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act ("O & C Act"), 43 U.S.C. § 1181a, National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., or the Endangered Species Act, 16 U.S.C. §§ 1531, et seq.

the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-02, are sufficient to authorize their "defensive" claim against NFRC since NFRC is engaged in litigation against them in another court. Opp. Br. 17-23.

In this reply brief NFRC will show that both parts of the agencies' argument are wrong. Federal agencies acting in a regulatory or administrative capacity, as the agencies are here, always require congressional authorization to assert a claim in court. The DJA does not authorize any federal agency suit against a citizen.

B. The agencies did not prove the injury in fact or redressability required for standing.

C. The district court allowed the agencies to misuse the declaratory judgment procedure for forum shopping, even though the agencies gained nothing since two active cases challenging the Forest Plan remain pending in the District of Columbia.

ARGUMENT

I. **THE FEDERAL AGENCIES DO NOT HAVE AUTHORITY TO SUE NFRC FOR DECLARATORY JUDGMENT UPHOLDING THEIR FOREST PLAN UNDER THE APA.**

A. *The executive branch of government requires legal authority to sue in court.*

The doctrine that the executive branch of government requires legal authority to file a lawsuit in court is well-established. A leading contemporary case addressing executive branch authority to sue is *United States v. Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd* 563 F.2d 1121 (4th Cir. 1977). In *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979), this court was "in substantial agreement with the reasoning" in *Solomon*, and embraced it as "well-reasoned." *Id.*, 600 F.2d at 1297.

In *Solomon*, the court stated:

Basic to the philosophy of the American Constitution is the notion that the branches of the federal government have no "natural" power, but only such power as is provided by the Constitution itself. . . . Thus, the discussion of executive power in this case must start from the premise that the executive branch of the federal government has

no power and therefore no legal standing to bring this suit unless such authority can be found, either explicitly or implicitly, in the scheme of government laid out by the Constitution.

United States v. Solomon, 419 F. Supp. at 362; accord, *Mattson*, 600 F.2d at 1297-98.

The court recognized that "[t]he Supreme Court long ago made it clear that the executive does have authority to bring suit in some situations even though the Constitution says nothing explicitly concerning such power and even though Congress has not expressly granted such power." *Solomon*, 419 F. Supp. at 363; *Mattson*, 600 F.2d at 1298. However, recognition of an "inherent" power to sue implicates the separation of powers doctrine, *Solomon*, 419 F. Supp. at 366; *Mattson*, 600 F.2d at 1301, and has occurred only very rarely, in cases involving federal contracts, *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 4 L. Ed. 362, 364 (1818), federal property, *Cotton v. United States*, 52 U.S. (11 How.) 229, 13 L. Ed. 675, 676 (1850), fraud against the government, *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), interference with interstate commerce, *In re Debs*, 158 U.S. 564 (1895), and national security, *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), cert. denied, 409 U.S. 1063 (1972). See *Solomon* at 363-364; *Mattson* at 1298.

As far back as 1850 the Supreme Court recognized that under the Constitution the government's inherent power to sue "as a body politic" is distinct from its limited powers as a sovereign:

But the powers of the United States as a sovereign . . . must not be confounded with their rights as a body politic. It would present a strange anomaly indeed if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. . . .

Cotton v. United States, 13 L. Ed. at 676.

The courts have refused to allow the executive branch to bring lawsuits without congressional authorization outside the few narrow areas where inherent power to sue has been found. In *United States v. Standard*

Oil Co., 332 U.S. 301 (1947), the court rejected a government suit against a citizen for tort liability because Congress had not authorized the suit. *Id.* at 314. "When Congress has thought it necessary to take steps to prevent interference with federal funds, property or relations, it has taken positive action to that end." *Id.* at 315.

In *Gartner v. United States*, 166 F.2d 728 (9th Cir. 1948), this court refused to allow the executive branch to sue a citizen to recover the cost of medical care without authorization from Congress because creating liabilities in favor of the government is "a field properly within the control of Congress." *Id.* at 730.

In *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), the court refused to allow the government to sue a citizen for violating an executive trade agreement "in the absence of express authorization by Congress." *Id.* at 658. The court distinguished the inherent authority cases:

This is not a case where the government stands in the shoes of a private person and sues on a contract which it has made as such. It is a case where the government sues in its sovereign capacity to recover damages which it claims to have sustained while engaged in the exercise of governmental powers

Id. at 660. Lack of statutory authority similarly barred government claims in *United States v. Doherty*, 786 F.2d 491 (2d Cir. 1986); *Impro Products, Inc. v. Block*, 722 F.2d 845, 851-52 (D.C. Cir. 1983), *cert. denied*, 469 U.S. 931 (1984); *United States v. FMC Corp.*, 717 F.2d 775 (3d Cir. 1983); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 676 (5th Cir. 1978), and *Pennsylvania National Mutual Cas. Ins. Co. v. Barnett*, 445 F.2d 573, 576 (5th Cir. 1971).

The Supreme Court's recent decision in *Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding And Dry Dock Company ("Newport News")*, 115 S. Ct. 1278 (1995), reaffirms and strengthens these principles. The court recognized the government's

right to sue without statutory authorization "in what might be called its nongovernmental capacity," 115 S. Ct. at 1284, and contrasted that capacity with "the status of the Government as regulator or administrator." *Id.* This dichotomy honors the Court's distinction in *Cotton v. United States* between the government as "sovereign" and as a "body politic." *Cotton*, 13 L. Ed. at 676.

For the government "as regulator or administrator," an agency can sue in court only where it has been granted "specific authorization to appeal," *Newport News*, 115 S. Ct. at 1284, since "the United States Code displays throughout that when an agency in its governmental capacity is meant to have standing, Congress says so." *Id.* at 1285 (emphasis in original). "We are not aware of any case in which . . . a 'policy interest' by an agency has sufficed to confer standing under an 'adversely affected or aggrieved' statute or any other general review provision." *Id.* at 1284.

The agencies seek to distinguish *Newport News* by arguing that in that case the agency claimed to be adversely affected or aggrieved by the decision it sought to review in court, while here "[u]nlike Newport News, [the agencies] did not claim to be adversely affected or aggrieved by the final agency action at issue." *Opp. Br.* at 15. This distinction highlights the agencies' anomalous position here: since Congress has not allowed an agency to sue a citizen to obtain judicial review of another agency's decision even when it claims to be "adversely affected or aggrieved," then Congress surely has not allowed an agency to sue a citizen for review of its own decision when the agency is not injured.²

² Nor can *Newport News* be distinguished as a case of one agency suing another agency. The official in that case sued a private citizen -- the *Newport News Shipbuilding and Dry Dock Co.* -- to obtain judicial review of the decision in question, just as the agencies here sued NFRC to obtain judicial review of their own Forest Plan. *Newport News*, 115 S. Ct. at 1282.

Thus, two centuries of law culminating in *Newport News* establish the rule that controls this case: a federal agency must have statutory authorization from Congress to sue a citizen unless its suit falls within one of the narrow areas of inherent constitutional authority to sue.

B. *The agencies have no statutory or inherent authority for their claim against NFRC.*

1. *No statutory authority.*

The agencies do not contend there is any express statutory authority for their claim against NFRC. They do not claim that any land management law or environmental law authorizes their claim against NFRC. They do not claim Fed. R. Civ. P. 13(g) authorizes their claim against NFRC.

Instead, the agencies put all their statutory authorization eggs into a single basket: they argue that the general terms of the DJA implicitly authorize their claim against NFRC in the context of this case. Opp. Br. 17-23.

Yet the Supreme Court's decision in *Newport News* forecloses this argument: it holds that agencies require "specific authorization to appeal" and cannot rely on the authority of a "general review provision," 115 S. Ct. at 1284, because "the United States Code displays throughout that when an agency in its governmental capacity is meant to have standing, Congress says so." *Id.* (emphasis in original). Thus, the general terms of the DJA (a "general review provision" of the United States Code) do not authorize federal agencies to sue citizens for declaratory relief.

Even if some general review statutes could authorize agency suits, the DJA does not. The agencies cite no case holding that the DJA authorizes federal agencies to sue citizens. A case decided shortly after enactment of the DJA held that it does not. In *Mashunkashey v. United States*, 131 F.2d 288 (10th Cir. 1942), the government sought a declaratory judgment interpreting an Indian's will. The court stated:

Appellant challenges the right of the government to maintain this action. It is true, as asserted by appellant, that the declaratory judgment act creates no new rights. The right of the government to maintain this action must be found in the general law.

Id., 131 F.2d at 290-91.

In *United States v. FMC Corp.*, 717 F.2d 775, the court held that the United States could not assert a declaratory judgment claim against a citizen for violation of a patent law because Congress had not specifically authorized the claim in the underlying patent law. *Id.* at 776, 780, 787. In *United States v. Doherty*, 786 F.2d 491, the court similarly found that the DJA does not permit the United States to sue for declaratory relief where suit is not authorized by another statute.³

These courts all look to the underlying statute rather than to the DJA to find an agency's authorization to sue. The courts in *FMC* and *Doherty* held that suit under the DJA was not permitted because there was no statutory authorization to sue in an underlying statute. Yet in this case the agencies do not claim that any underlying land management or environmental law authorizes their suit against NFRC; they rely solely on the DJA to authorize their claim.⁴

Citing no case holding that the DJA authorizes an agency to sue a citizen for a declaratory judgment, the agencies instead rely on

³ The Supreme Court has also held that the DJA does not independently authorize suits by citizens against agencies: in *Schilling v. Rogers*, 363 U.S. 666, 677 (1960), the Court held that where Congress has precluded a citizen from seeking APA review of an agency decision, the DJA does not permit the citizen to obtain declaratory judgment review of the same decision. And in *FEC v. National Conservative PAC*, 470 U.S. 480 (1985), the Court dismissed a citizen's declaratory judgment claim brought under the DJA for lack of statutory standing because the underlying statute did not authorize the suit. *Id.* at 484-89.

⁴ An agency can not overcome the absence of statutory authority through artful pleading. *Impro Products, Inc. v. Block*, 722 F.2d at 851 n.13 (where Congress has not granted the Secretary of Agriculture statutory authority to enforce a federal statute "the Government may not create that authority merely by styling its complaint as one in nuisance.").

scattered cases where the government used the declaratory judgment mechanism to "enlarge[] the range of remedies available to federal courts," *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) when it already had authority to sue to protect its property rights or to enforce federal treaties and laws:

(1) In *United States v. 129.4 Acres of Land, Etc.*, 789 F.2d 715 (9th Cir. 1986), the government obtained a declaratory judgment concerning its ownership of water rights -- a classic case where the government as property owner has inherent authority to sue without statutory authorization. *Sanitary District of Chicago v. U.S.*, 266 U.S. 405, 425-26 (1925). The court in *129.4 Acres* never held that the DJA authorized the suit, and the government's authority to sue was never challenged or decided.⁵

(2) Similarly, in *United States v. Pennsylvania Dept. of Environmental Resources*, 923 F.2d 1071 (3d Cir. 1991), the dispute involved the government's obligations as a landowner to clean up a hazardous waste site on federal land -- another classic case where the government has inherent authority to sue to "protect their property." *Cotton v. United States*, 13 L. Ed. at 676. As in *129.4 Acres*, the government's authority to sue was not raised or decided.

(3) In *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court*, 573 F.2d 1123 (9th Cir. 1978), vacated on other grounds sub nom. *Washington v. Fishing Vessels Ass'n*, 443 U.S. 658 (1979), the government was in court enforcing Indian treaty rights, an area where it has always had access to the courts. *Heckman v. U.S.*, 224 U.S. 413, 442-43 (1911); *Moe v.*

⁵ Since the issue of the government's authority to sue was never raised or decided, this case does not stand as precedent on this issue. *Losado v. Golden Gate Disposal Co.*, 950 F.2d 1395, 1399 (9th Cir. 1991); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985), cert. denied 475 U.S. 1081 (1986) ("unstated assumptions on non-litigated issues are not precedential holdings binding future decisions").

Salish & Kootenai Tribes, 425 U.S. 463, 473-74, n.13 (1976). It sought an injunction against state court actions that threatened to interfere with an existing federal court judgment. The case did not involve the DJA, and the government's authority to sue was not questioned or decided.

(4) In *Sisseton-Wahpeton Sioux Tribe v. United States Department of Justice*, 718 F. Supp. 755 (D.S.D. 1989), *rev'd on other grounds*, 897 F.2d 358 (8th Cir. 1990), the government sought a declaratory judgment that the defendant tribe was violating the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21. The government has express authority to enforce Indian gaming laws. *Id.* at 758; 25 U.S.C. §§ 2706, 2709, 2713, 2715, 2716. The government's right to sue was not disputed or decided.

In each of these cases the government's authority to sue existed either inherently (*129.4 Acres, Pennsylvania, Puget Sound*) or as a matter of express statutory authorization (*Sisseton-Wahpeton*). None of the opinions suggests that the DJA is statutory authorization for any claim by a federal agency, and none of them supports the agencies' argument that "[t]he United States and its agencies do not need specific congressional authority to seek declaratory relief against a party who has already sued the United States." *Opp. Br.* at 17.

The agencies' argument that they have broader authority to sue NFRC because NFRC had sued them in another court is also supported by no authority, and is contradicted by *Impro Products, Inc. v. Block*, 722 F.2d at 851 n.13, where the court held that lack of statutory authority barred the Secretary of Agriculture from asserting counterclaims against a plaintiff that had already sued the Secretary under a federal statute.

(5) The final case relied on by the government, *United Food & Com. Workers v. Food Employers Council*, 827 F.2d 519 (9th Cir. 1987), is not relevant here because it does not involve a federal agency. *Newport News, Solomon and Mattson* all make it clear that the government does not enjoy the right to bring suit simply because a citizen may do so in a

similar situation. Unlike a citizen, even if an agency is "adversely affected or aggrieved," it may not sue in court without "specific authorization" from Congress. *Newport News*, 115 S. Ct. at 1285. Thus, the labor union's right to bring the declaratory judgment action in *United Food & Com. Workers* does not imply that a similar right exists for a federal agency.⁶

The agencies claim they only seek the right to assert a "defensive" declaratory judgment claim, eschewing any right to seek what they call "affirmative relief" from NFRC under the DJA or otherwise. Opp. Br. at 12-13, 22-23. Yet no case gives federal agencies the right to assert "defensive" claims without statutory or inherent authority. In addition, the Supreme Court has held that "ordinarily the practical effect of injunctive and declaratory relief will be identical," *Wooley v. Maynard*, 430 U.S. 705, 711 (1977) (quotes and citations omitted), and 28 U.S.C. § 2202 authorizes a court to grant "further relief" following any declaratory ruling. *Doe v. Gallinot*, 657 F.2d 1017, 1025 (9th Cir. 1981). Thus, there is no valid distinction between "defensive" declaratory claims and other claims.

In any event, the actual claim asserted against NFRC in this case was not merely "defensive." The agencies obtained rulings from the district court on nine major legal issues that were not pending in any case against the government -- claims that had been asserted in *NFRC v. Thomas*, dismissed in July 1994 and never again reasserted or threatened

⁶ In addition, the agencies misinterpret the holding in *United Food & Com. Workers*. The court did not hold that the DJA confers statutory standing to sue for declaratory relief even where the plaintiff could not sue for affirmative relief, as the agencies suggest. The court did not resolve whether statutory standing is conferred by the DJA or by an underlying statute, *id.* at 524. Its holding is best interpreted to be that since the plaintiff union had statutory standing under an underlying labor law and would also have standing under the DJA, the court did not have to resolve the issue. However, the Supreme Court's decision in *FEC v. National Conservative PAC*, 470 U.S. 480, shows that the DJA does not confer statutory standing.

elsewhere.⁷ When the district court upheld the Forest Plan against all of these potential claims before any citizen ever presented them to a court for decision, the agencies obtained "affirmative relief" under any definition.

2. *No inherent authority.*

The agencies do not directly ask the court to find that they have inherent authority for their claim against NFRC, Opp. Br. at 23 n.12, but suggest in a footnote that the claim would have been supported by "inherent authority to protect federal property." *Id.* No such inherent authority exists here.

NFRC does not claim ownership to the public lands involved in this case. The government did not sue NFRC to quiet title or clarify its ownership interest in these lands. The agencies sued NFRC to determine whether their administrative decision complies with the procedural and substantive requirements of the federal land management and environmental laws they administer at the direction of Congress. In seeking this ruling they were acting not as a property owner but "as regulator or administrator," *Newport News*, 115 S.Ct. at 1284, where no inherent authority to sue exists and "specific authorization" is required.

There is no historical precedent for extending the government's limited inherent right to sue to "protect their property," *Cotton v. United States*, 13 L. Ed. at 676, to cover declaratory judgments on agency compliance with federal statutes under APA review standards, and *Newport News* precludes such a holding. Courts cannot extend the inherent right to sue to cover this case for two additional reasons:

(1) As the Supreme Court found in *Newport News*, and as the agencies now admit, Congress has denied federal agencies access to the courts to obtain APA review -- the remedy they now claim they have an

⁷ These were the Fourth through Twelfth Claims in *NFRC v. Thomas*, concerning the NFMA, MUSY and Forest Service regulations.

inherent right to obtain indirectly through a declaratory action. Where Congress has denied the executive branch a right, the executive's inherent power is "at its lowest ebb," *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981). Courts are most reluctant to find an inherent power for the executive branch to do what Congress has refused to permit. *Solomon*, 419 F. Supp. at 371; *Mattson*, 600 F.2d at 1301.

(2) The Constitution assigns Congress plenary authority over the public lands, U.S. Const. art. IV, § 3, cl. 2; *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987). Likewise Congress has constitutional power to control the jurisdiction of the federal judiciary. *Greenwood v. Peacock*, 384 U.S. 808, 833 (1966); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 311 (9th Cir. 1974). "When the independent executive authority is sought to be exercised in an area of concern . . . where the role of Congress is predominant under the Constitution, the executive's burden of showing the need for an independent authority to act is most severe." *Solomon*, 419 F. Supp. at 372. The agencies made no showing whatever to establish the executive branch's inherent right to override Congress' dominant role both in land management and in establishing the jurisdiction of the federal judiciary.

3. The absence of any prior exercise of this power is compelling evidence it does not exist.

The agencies cite no prior case in the 206 year history of our country where a federal agency has ever sued a citizen to determine the legality of the agency's own decision, or to obtain a declaratory ruling on a citizen's claims against an agency decision. This is compelling evidence that no such right exists. The Supreme Court in *Newport News* found absence of prior cases persuasive in its interpretation of federal agency power, 115 S. Ct. at 1284, as did the court in *United States v. Doherty*, 786 F.2d at 500. See NFRC Opening Brief at 16-17, 20.

II. THE AGENCIES FAILED TO SHOW INJURY IN FACT OR REDRESSABILITY TO SUPPORT THEIR CLAIM.

The agencies offer fancy footwork but no authority for their contention to have shown injury in fact and redressability for their claim against NFRC. They have abandoned reliance on the "accruing liability" theory of injury from patent infringement cases, (see NFRC Opening Brief at 25-27) and rely solely on a threat of inconsistent rulings as the basis of their injury. They have neither facts nor law on their side.

There never was a threat of inconsistent rulings. Judge Jackson stayed the *NFRC v. Dombeck* to avoid that result, and *NFRC v. Thomas* was dismissed and never refiled.⁸ Had Judge Dwyer ruled for the environmental plaintiffs in this case, Judge Jackson would have taken those rulings into account when *Dombeck* was reactivated. The agencies' argument suggests that two federal judges in two different courts cannot avoid a head-on collision on a related matter, a proposition well-disproven by judicial restraint and coordination shown in many federal cases.⁹

The agencies concede they offered no proof of injury, Opp. Br. at 28-29, they have abandoned their prior argument that they had no obligation to do so, NFRC Opening Brief at 30-31, and they merely argue that the complaints in *Dombeck* and *Thomas* were enough to establish the injury they alleged. They admit that if the parties "had only threatened

⁸ The agencies admit that there would have been no risk of inconsistent results, and no injury in fact, if *NFRC v. Thomas* had been transferred to Seattle and not dismissed. Opp. Br. 27. If that had occurred Judge Dwyer would not have decided the three *Dombeck* claims that were not pleaded in *Thomas* (the Fourth, Fifth and Sixth *Dombeck* claims, under the O & C Act, 43 U.S.C. § 1181a). The agencies must now agree there was no basis for a declaratory judgment claim on those three claims.

⁹ The stated purpose of Judge Jackson's stay order in *Dombeck* was to avoid the very result the agencies believe unavoidable. The agencies themselves make this argument on page 30 of the Opposition Brief ("One must assume that Judge Jackson intended to defer to Judge Dwyer's rulings on the interrelated challenges by environmentalists and industry"). If this is true, there was no need for the declaratory judgment claim to avoid inconsistent rulings between the two courts once the stay in *Dombeck* was granted.

It is still wasteful of everyone's time & resources

Should follow

to bring suit, perhaps more evidence as to the likelihood of duplicative suits might have been required." Opp. Br. at 29. Yet they premise their injury on NFRC's alleged threat to refile the *Thomas* case in the future, Opp. Br. at 26-27, without ever proving any likelihood that this would occur.

Finally, the agencies never answered NFRC's argument (Opening Brief at 29-30) that the declaratory judgment in this case did not redress the injury they alleged since *Dombeck* and the *Association of O & C Counties* cases remain pending in the District of Columbia, with multiple plaintiffs that were not parties to this case, and will proceed irrespective of the outcome of this case.

III. DECLARATORY JUDGMENT WAS NOT PROPER IN THIS CASE.

The district court never applied the factors that control its discretion to grant declaratory judgment. *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 343 (9th Cir.), cert. denied 385 U.S. 919 (1966). The agencies' attempt to supply a rationale for the court's decision is unconvincing.

The agencies seem to view the issue as one of determining who was forum shopping. Opp. Br. at 31 ("NFRC has pinned the forum-shopping label on the wrong party"). A plaintiff enjoys a "venue privilege" to select any proper forum for a suit, *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964); a defendant does not. When NFRC filed the *Dombeck* case in the District of Columbia, the agencies moved to transfer the case to the Western District of Washington, but Judge Jackson denied the motion on the ground that Western Washington was not a proper forum for the case. E.R. 489.¹⁰ Only after Judge Jackson denied the transfer motion did the

¹⁰ Thus, the record flatly contradicts the agencies' contention that Judge Jackson "recognized that the District of Columbia was not the appropriate forum for adjudicating industry challenges to the strategy." Opp. Br. at 30 (emphasis in original). In reality, Judge Jackson found that the District of Columbia was an appropriate forum for the *Dombeck* case and the Western District of Washington was not.

agencies pursue their novel declaratory judgment strategy in the district court here, to force NFRC to litigate in the district Judge Jackson had already held improper.

As the Fifth Circuit stated in a case cited by the agencies (Opp. Br. at 25): "Using a declaratory judgment action to race to *res judicata* or to change forums is thoroughly inconsistent with the purposes of the Declaratory Judgment Act and should not be countenanced." *Travelers Ins. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 776 n.7 (5th Cir. 1993); accord, *Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367, 1371 (9th Cir. 1991).

The district court's declaratory judgment ruling did not serve a "useful purpose in clarifying and settling the legal relationship in issue [and did not] terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d at 342. It merely furthered the agencies' forum shopping strategy.

CONCLUSION

The judgment of the district court on the cross-claim against NFRC should be vacated and remanded to the district court with instructions to dismiss the cross-claim for lack of jurisdiction.

Dated this 17th day of August, 1995.

MARK C. RUTZICK LAW FIRM,
A Professional Corporation

By: _____

Mark C. Rutzick

Of Attorneys for Appellant
Northwest Forest Resource
Council

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANT'S REPLY BRIEF on:

David C. Shilton
Attorney, Appellate Section
Environment & Natural Resources Division
Department of Justice
10th & Pennsylvania Avenue N.W., Room 2339
Washington, D.C. 20530

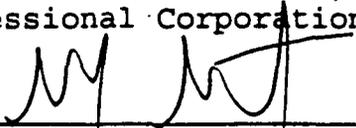
on August 17, 1995, by delivering to said attorney via Federal Express a true copy thereof, certified by me as such, contained in sealed envelopes, prepaid, addressed to said attorneys at said attorney's last known address, and deposited with Federal Express in Portland, Oregon, on said day, and on:

Todd True
Sierra Club Legal Defense Fund
203 Hoge Building
705 Second Avenue
Seattle, Washington 98104-1711

on August 17, 1995, by mailing to said attorney a true copy thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney at said attorney's last known address, and deposited in the post office at Portland, Oregon, on said day.

Dated this 17th day of August, 1995.

MARK C. RUTZICK LAW FIRM,
a Professional Corporation

By: 

Mark C. Rutzick
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