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Timber Litigation - 9th Circuit Appeal  
in Forest Plan [3]

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

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DATE: November 22, 1995

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**Message:** On Monday, I distributed NFRC's motion for division of argument, with a note suggesting that we did not need to respond. However, one of the appellants (Native Forest Council) has responded to NFRC's request by suggesting that NFRC could be awarded some of our time. We do need to respond to this rather outrageous suggestion (which I just received).

I have attached a draft response, which I would like to file quickly -- on Friday if possible -- in light of the imminence of argument. I don't think we need worry much that the Court would go along with NFC's suggestion, but we need to register our objection. I have attached NFC's response, along with the response of the Forest Conservation Council (which did not suggest raiding our time) our time). If you have comments, please call by noon Friday.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

-----  
No. 95-35052

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

NATIVE FOREST COUNCIL

Plaintiff-Appellant

v.

JAMES LYONS,<sup>1/</sup> Asst. Secretary of Agriculture, et al.,

Defendants-Appellees,

-----  
No. 95-35214

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

SAVE THE WEST, et al.,

Plaintiffs-Appellants

v.

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

Defendants-Appellees,  
-----

<sup>1/</sup> James Lyons should be substituted for James R. Moseley as Assistant Secretary of Agriculture, pursuant to Fed. R. App. Proc. 43(c).

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No. 95-35215

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs

v.

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

Defendants-Appellees

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

---

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

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**FEDERAL APPELLEES' RESPONSE TO SUGGESTION OF APPELLANT  
NATIVE FOREST COUNCIL TO REALLOCATE SOME OF APPELLEES'  
ORAL ARGUMENT TIME TO APPELLANTS**

By notice of September 22, 1995, this Court scheduled the above three related appeals for oral argument on December 4, 1995. All three appeals are from the same district court judgment in Seattle Audubon Soc., et al. v. Lyons, et al., 871 F. Supp. 1291 (W.D. Wa. 1994), see also 871 F. Supp. 1286, and Clerks Rec. 880 (final judgment). The district court upheld a comprehensive ecosystem management strategy ("strategy") adopted by the Secretary of the Interior and the Secretary of Agriculture for managing some twenty-four million acres of federal lands within the range of the northern spotted owl.

This Court's hearing notice provided that maximum argument time would be "30 minutes per side." On November 16, 1995, Appellant in No. 95-35214, Northwest Forest Resource Council

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(NFRC), filed a Motion for Division of Argument, asking for a division of time that would allot NFRC 15 minutes of the 30 minutes allotted to appellants. On November 16, 1995, appellant in No. 95-35215, Forest Conservation Council, responded to NFRC's motion, taking the position that each of the three appellants should "start from an equal position of ten minutes each \* \* \*." Response at 2-3. On November 21, 1995, appellant in No. 95-35052, Native Forest Council, responded to NFRC's motion, taking the position that "NFRC's motion should be denied, or if granted, time for NFRC should be allocated from the Government's allotted thirty minutes." NFC Response at 2.

The federal appellees take no position on how the time of appellants should be divided. However, we strongly oppose the alternative relief requested by Native Forest Council, which would take time from the federal appellees and give it to appellant NFRC. The Court should not depart from its consistent practice of giving equal argument time to appellants and appellees. The federal appellees will need to respond to all of the various attacks mounted by appellants on the judgment below, whether they are substantive challenges to the federal agencies' ecosystem management strategy (as in appeals No. 95-35052 and 95-35214), or procedural challenges to rulings of the district court (as in NFRC's appeal in No. 95-35215). The federal appellees have strongly opposed the procedural challenges brought by NFRC in No. 95-35215. It would be extremely unfair to align appellant

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NFRC with the federal appellees, or to give some of the government's time to NFRC.

Accordingly, the allocation of argument time should remain at 30 minutes per side, as provided in the September 22 notice. We take no position on how appellants' time should be divided.

Respectfully submitted,

---

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- 5 -

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this     th day of November, 1995, a copy of the foregoing motion was served by mail, postage paid, to the following counsel of record:

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November 21, 1995

**VIA FEDERAL EXPRESS**

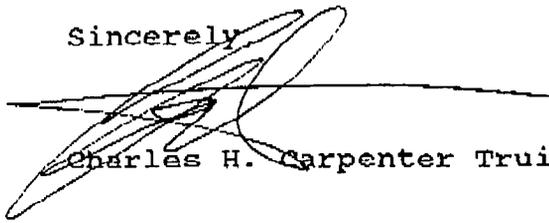
Ms. Cathy Catterson, Clerk  
United States Court of Appeals  
Ninth Circuit  
101 Spear Street  
San Francisco, CA 94105

Re: Seattle Audubon Society v. Mosely  
Case Nos. 95-35052, 95-35214 and 95-35215

Dear Ms. Catterson:

Enclosed for filing is the original and four copies of the Response of Native Forest Council to Motion for Division of Argument by Northwest Forest Resource Council. Please date-stamp the extra copy and return it in the enclosed stamped self-addressed envelope.

Sincerely,



Charles H. Carpenter Truitt

/rme  
Enclosures

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

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

NATIVE FOREST COUNCIL, et al.,

Plaintiffs-Appellants

vs.

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

Defendants-Appellees,

WASHINGTON CONTRACT LOGGERS ASS'N., et al.,

Defendants-Intervenors,

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

RESPONSE OF NATIVE FOREST COUNCIL TO  
MOTION FOR DIVISION OF ARGUMENT  
BY NORTHWEST FOREST RESOURCE COUNCIL

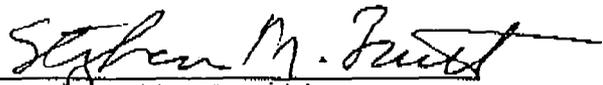
Northwest Forest Resource Council ("NFRC") intervened below "as a defendant to oppose [Seattle Audubon Society's] claims against the 1992 plan." (NFRC Opening Brief at 2). Thereby, NFRC unreservedly aligned itself with the federal defendants and against the plaintiffs on the central issue here on appeal: the legality of defendants' efforts to comply with various environmental laws. Having intervened to uphold the

government's plan, NFRC became disenchanted with Judge Dwyer and sought to extricate itself from litigation before him. This has led to its present appeal which NFRC states is "purely procedural," but might better be described as a procedural morass created by NFRC's breathtaking forum shopping.

In any event, the "procedural point" NFRC raises is a sideshow: the main event is the legality of the Northwest Forest Plan. In no case should NFRC's argument time be taken from the plaintiffs. Indeed NFRC moved for summary reversal here, apparently believing that oral argument was not even necessary. Now, however, NFRC not only wants argument but seeks to take time away from the plaintiffs it opposed below, rather than from the government with whom it was aligned and with whom it should be grouped here in determining allocation of argument time.

In sum, NFRC's motion should be denied, or if granted, time for NFRC should be allocated from the Government's allotted thirty minutes.

Respectfully Submitted,

  
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November 21, 1995

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CERTIFICATE OF SERVICE

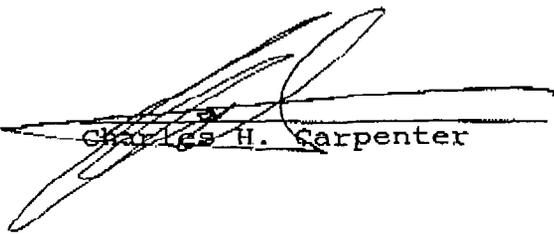
I hereby certify that on this 21st day of November, 1995, a copy of the foregoing Response to Native Forest Council to Motion for Division of Argument by Northwest Forest Resource Council was served by Federal Express to the following counsel of record:

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Charles H. Carpenter

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
vs.	)	
	)	
JAMES R. MOSELY, in his official	)	Nos. 95-35052, 95-35214
capacity as Assistant Secretary	)	and 95-35215
of Agriculture,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS	)	
ASSOCIATION, et al,	)	
	)	
Defendants-Intervenors,	)	
	)	
vs.	)	
	)	
NORTHWEST FOREST RESOURCE COUNCIL,	)	
	)	
Defendant-Intervenor-	)	
Appellant.	)	

---

APPELLANTS FOREST CONSERVATION COUNCIL AND SAVE THE WEST'S  
RESPONSE TO MOTION FOR DIVISION OF ARGUMENT

---

Appellants Forest Conservation Council and Save the West (collectively, "FCC") file this response to Appellants Northwest Forest Resource Council's ("NFERC's") Motion for Division of Argument.

Three separate appeals have been consolidated for argument before the Ninth Circuit Court of Appeals on December 4, 1995. The appellants are FCC, NFERC, and the Native Forest Council ("NFC"). A total time of thirty minutes has been allocated to all three

appellants. The equitable division of this time is ten minutes for each appellant to use or relinquish within its discretion. The parties may agree to a different division among themselves; however, in the absence of an agreement, the time should be divided equally among the appellants.

NFRC has requested fifteen minutes to present its appeal, leaving FCC and NFC with seven and one-half minutes each, or a total of fifteen minutes for the two appellants. FCC and NFC share the position that the federal defendants failed to comply with the applicable environmental laws in adopting the President's Forest Plan. However, each appellant has raised separate and distinct issues on appeal and is entitled to an equal amount of time to present those issues.

NFRC argues that the effect of the consolidation order is to reduce its argument time from 30 minutes to 10 minutes. If this motion is granted, FCC's argument time will be reduced from 30 minutes to 7 1/2 minutes. FCC is not willing to voluntarily relinquish its time for oral argument to NFRC.

The consolidation of these three appeals has resulted in reduced time for each appellant. NFRC is no more prejudiced by the consolidation than FCC or NFC. Appellants must start from an equal

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///

position of ten minutes each, after which they may voluntarily agree among themselves to a different division.

DATED this 16th day of November, 1995.

Respectfully submitted,

REEVES, KAHN & EDER

  
\_\_\_\_\_  
Peggy Hennessy, OSB #87250  
Of Attorneys for Forest  
Conservation Council and  
Save the West

## CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing APPELLANTS FOREST CONSERVATION COUNCIL AND SAVE THE WEST'S RESPONSE TO MOTION FOR DIVISION OF ARGUMENT on the following people on the date below, by mailing a true copy thereof, contained in a sealed envelope, with postage paid, addressed to them at their last known addresses, and deposited in the post office at Portland, Oregon, on said day:

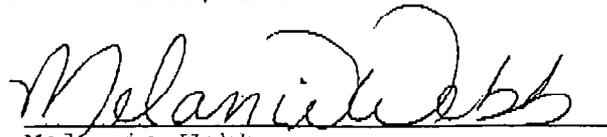
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DATED this 16<sup>th</sup> day of November, 1995.

  
Melanie Webb  
Secretary to Peggy Hennessy

No. 95-35052

---

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs

and

NATIVE FOREST COUNCIL,

Plaintiff-Appellant

v.

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

Defendants-Appellees

---

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

---

BRIEF OF APPELLEES JAMES LYONS, ET AL.

---

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**MISCELLANEOUS:**

Land and Resource Planning in the National Forests,  
64 Or. L. Rev. 1, 296 (1985) ..... 23

## STATEMENT OF JURISDICTION

Plaintiffs invoked jurisdiction in the district court pursuant to 28 U.S.C. 1331. The district court entered an Order On Motions For Summary Judgment on December 21, 1994, Clerk's Record ("CR") 802, which is published at 871 F. Supp. 1291, and reprinted in the Appellant's Excerpts of Record ("ER") at Tab 7.<sup>1/</sup> Native Forest Council ("NFC") filed its notice of appeal on January 6, 1995. CR 856, see ER at Tab 8, p. 93. The district court entered a partial final judgment pursuant to Fed. R. Civ. P. 54(b) on February 15, 1995. CR 880, Supplemental Excerpts of Record ("SER") at 88.<sup>2/</sup> Pursuant to Fed. R. App. P. 4(a)(2), the notice of appeal is treated as filed on February 15, and is timely. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

## ISSUES PRESENTED

In this appeal, NFC challenges the validity of a comprehensive ecosystem management strategy ("strategy") adopted by the Secretary of the Interior and the Secretary of Agriculture for managing some twenty-four million acres of federal lands within the range of the northern spotted owl. The issues presented are:

1. Whether the Record of Decision ("ROD") for the strategy complied with a Forest Service regulation, promulgated pursuant to the National Forest Management Act ("NFMA"), 16 U.S.C. 1604(g)(3)(B), which provides that "[f]ish and wildlife habitat shall

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<sup>1/</sup> As appellants have reprinted the published version, we will cite to that.

<sup>2/</sup> On April 17, 1995, the district court issued an order clarifying the judgment, so as to include an express finding that the "Court of Appeals will not be required to address legal or factual issues similar to those contained in any claims still pending in the district court," and reiterating its earlier finding that "there is no just reason for delay." CR 974, SER 93. On May 19, 1995, the district court resolved the remaining issues in the case, having to do with attorneys fees and plaintiffs' request to retain jurisdiction, which was denied. SER 97-104. Hence, there are no longer any pending claims in the district court.

be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area," 36 C.F.R. 219.19, and whether the ROD's compliance with that regulation was undermined by the decision of the District of Columbia Circuit in Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home"), 17 F.3d 1463 (1994), cert. granted, 115 S. Ct. 714 (1995).

2. Whether the Final Supplemental Environmental Impact Statement ("FSEIS") prepared for the strategy pursuant to the National Environmental Policy Act ("NEPA") considered an adequate range of alternatives.

#### STATEMENT

A. Nature of Case. -- The strategy at issue was adopted in response to orders entered in earlier phases of this litigation, and in related litigation in this Circuit. See 871 F. Supp. at 1300. As described by the district court, the strategy is "the result of a massive effort by the executive branch of the federal government to meet the legal and scientific needs of forest management," and "reflect[s] unprecedented thoroughness in doing this complex and difficult job." 871 F. Supp. at 1303. The strategy, issued in April 1994, was challenged by environmental groups and timber industry groups on procedural and substantive grounds. In a comprehensive opinion, District Court Judge Dwyer, who had presided over much of the earlier litigation, upheld the strategy against all challenges.

In this appeal, NFC challenges only two narrow aspects of the district court's ruling: (1) that the Secretary of Agriculture did not act arbitrarily or capriciously in finding that the strategy satisfied the requirements of a Forest Service regulation, 36 C.F.R. 219.19, regarding management of habitat to maintain viable populations of species (871 F. Supp. at 1316); and (2) that the FSEIS considered a reasonable range of alternatives (871 F. Supp. at

1319-20). To put these challenges in context requires a description of the strategy and its development, to which we now turn.

**B. Genesis Of The Strategy.** -- As the district court noted, the legal controversy over management of the forests which are the home of the northern spotted owl ("owl") has gone on since at least 1988. 871 F. Supp. at 1301. As the court recounted, earlier Forest Service strategies for protecting owl habitat were struck down by the courts. See Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081 (W.D. Wa. 1991), aff'd, 952 F.2d 297 (9th Cir. 1991); Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473 (W.D. Wa. 1992), aff'd sub nom. Seattle Audubon Soc'y v. Espy, 998 F.2d 699 (9th Cir. 1993). In Moseley, Judge Dwyer directed the Forest Service to prepare a new or supplemental EIS curing three specified defects in an earlier EIS, and entered an injunction against offering timber sales in spotted owl habitat. Concurrently, the District Court for the District of Oregon ruled that the Bureau of Land Management (BLM) had failed to comply with NEPA with regard to a plan to manage owl habitat in forests that it manages in Oregon, and entered a similar injunction. Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), aff'd sub nom. Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993); see also Lane County Audubon Soc'y v. Jamison, 958 F.2d 290 (9th Cir. 1992)(injunction under Endangered Species Act). Thus, the Administration taking office in January 1993 faced a situation in which injunctions existed against new timber sales of essentially all federal old growth forests in the range of the owl, covering large portions of Western Washington, Western Oregon and Northern California. As noted in the FSEIS, "the ongoing controversy concerning management of federal lands has resulted in what has been described as a gridlock of lawsuits, court rulings, appeals, and protests \* \* \*." FSEIS at 1-3.

On April 2, 1993, the President presided over a conference in Portland, Oregon, dealing with the controversy. 871 F. Supp. at 1303. Following the conference, the White House established three working groups to address issues which had arisen during the Conference and throughout previous planning initiatives. One of these groups was the Forest Ecosystem Management Assessment Team ("FEMAT"), which conducted a conservation and management assessment covering all federal forests within the range of the owl. See FSEIS App. C - Statement of Mission at 2-6).

**C. FEMAT And The Habitat Likelihood Ratings.** -- NFC has focussed on certain numerical ratings produced by FEMAT panels at an early stage in the process of formulating a strategy. Some background is necessary to understand how these ratings were used. FEMAT was an interdisciplinary team of scientists and other experts. See 871 F. Supp. at 1303. It was directed to develop a set of options for management of federal forests within the owl's range that would comply with existing laws, maintain biological diversity, provide for sustainable levels of timber harvest, and support rural economies and communities. FSEIS Appendix C at 2.

After a review of existing proposals, FEMAT evaluated fifty-four alternatives against ecological criteria. 871 F. Supp. at 1303. Thirty-five were selected for more detailed review; these were then narrowed to ten options chosen for final intensive assessment. As the district court found, "FEMAT assessed the predicted effects of the ten options on more than a thousand animal and plant species for the next century -- an unparalleled effort." 871 F. Supp. at 1303.

FEMAT broke into species assessment panels to address areas of specialty: the owl, marbled murrelet, other birds, at-risk fish, amphibians and reptiles, mammals, fungi, lichens,

bryophytes, vascular plants, mollusks, and arthropods. FSEIS at 3&4-116. Panelists assessed the likelihood that habitat under various options would support populations according to an outcome-based scale that represented a range of possible future conditions of habitat on federal lands. The four outcomes were as follows (FSEIS at 3&4-118):

Outcome A -- Habitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, well distributed across federal lands.

Outcome B -- Habitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, but with significant gaps in the historic species distribution on federal land. These gaps cause some limitation in interactions among local populations.

Outcome C -- Habitat only allows continued species existence in refugia, with strong limitations on interactions among local populations.

Outcome D -- Habitat conditions result in species extirpation from federal land.

FEMAT asked the panelists to assign 100 "likelihood points" across the four outcomes in the scale. The likelihoods were to represent degrees of belief in future outcomes for each option evaluated, expressed in a scale that could then be aggregated and compared. Uncertainty could be reflected by spreading votes over the outcomes. Id. at 118. Panelists also were asked to suggest mitigation measures for species and options that did not receive marks above a certain level, and to record other influences on the viability of species besides management of habitat on federal land. While the primary assessment focussed on adequacy of habitat on federal land, this latter step was designed to allow for consideration of relevant factors arising from non-federal land management. Id. at 121.

Results from the panels were advisory to the FEMAT team, who made their assessments regarding viability based upon the panel results, notes from panel discussions, published scientific reports, empirical experience of the panel leaders, and follow-up

discussion with panel members and additional experts. FSEIS App. A (FEMAT Report) at IV-40, 47-48 (SER 7, 14-15). The FEMAT team viewed the panel evaluations "not as precise analyses of likelihood of habitat and population conditions, but rather as judgments of knowledgeable experts \* \* \*," and stressed that the evaluations "should not be viewed as precise analyses of likelihoods of persistence or extinction \* \* \*." FEMAT Report II-29, quoted at FSEIS 3&4-116-117.<sup>3/</sup> Similarly in the ROD, the Secretaries noted that neither NFMA nor its implementing regulations required any concrete numerical standard for species viability (ROD at 43-44), and noted that the approach used by FEMAT was a "unique" response to an unusual situation (*id.* at 45).

**D. Development Of The Environmental Impact Statement.** -- In May 1993, the Forest Service and BLM began preparing a joint draft supplemental EIS to assess the environmental effects of the options FEMAT was studying, and to provide for public participation in accordance with NEPA. 871 F. Supp. at 1304. On July 28, 1993, the agencies published a Draft SEIS, which identified Option 9 as the preferred alternative. *Id.* The interagency team received more than 100,000 comments on the Draft SEIS. As the district court noted (*Id.*):

In response to comments and agency concerns, the interagency team did further analysis on cumulative impacts on several hundred species; changed the preferred alternative to furnish additional protection to LSOG forests; did more analysis of predicted employment effects; explained the rejection of proposals for further analyses; examined information that came into existence after publication of the DSEIS, including the most recent owl demographic data; and requested and financially sponsored the running of a computer model to simulate owl population dynamics.

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<sup>3/</sup> The panel ratings are set forth in the FSEIS at 3&4-146 (lichens); 132 (bryophytes); 150-154 (vascular plants); 166-169 (mollusks); 161 (arthropods); 174 (amphibians and reptiles); 243 (northern spotted owl and marbled murrelet); 179-180 (other birds); 184 (non-bat mammals); 188 (bats); 197 (fish).

The agencies published the Final SEIS in February 1994, and provided an additional thirty-day period for public comment. Additional changes were made in response to these comments. 871 F. Supp. at 1304. The FSEIS addressed a host of issues which cannot be discussed here due to space limitations. However, we will address some of the more egregious of NFC's misstatements regarding the contents of the FSEIS.

1. Consideration of Owl Demographic Data. -- NFC presents a seriously incomplete picture of the agencies' efforts to examine the most current research on owls and other species, particularly the research by biologists Anderson and Burnham (see NFC Br. 8-9). In December 1993, these biologists oversaw an initiative to compile and analyze the most recent demographic data on the owl. FSEIS App. J-1 at 2. The initiative was a follow-up to the workshop that produced the owl demographic analysis Anderson and Burnham released in early 1992.<sup>4/</sup> The key results of the most recent demographic analysis were published in January 1994, and are set forth in Appendix J-1 to the FSEIS.

The FSEIS discussed and analyzed these results. FSEIS at 3&4-212 & 3&4-223 - 3&4-229. The results show declines in the overall population level of owls and adult owl survival rate over the last decade. Id. at 3&4-212. Acknowledging that these findings are of concern, the FSEIS explains their ramifications for the degree of risk facing the owl. This is most important during the short-term, when the owl is in a "transition period" until its population reaches a new, stable equilibrium. Id. at 3&4-228-235. The FSEIS explains why there is no strong basis to support the theory that the owl is at or near a threshold which, if crossed, would lead to the owl's extinction. Id. at 3&4-229-230 & 3&4-234-235. Neverthe-

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<sup>4/</sup> Contrary to NFC's assertions (Br. 8), FEMAT was aware of, and thoroughly dealt with the 1992 Anderson/Burnham study. See FSEIS App. A at IV-183-184 (SER 23-24).

less, the FSEIS counsels that any management strategy adopted should be conservative in approach, and that ongoing research, monitoring, and evaluation should be a part of any such strategy. Id. at 3&4-234-235.

To examine more directly owl population dynamics in the near term, the SEIS team asked Forest Service researchers to conduct various runs of a computer model to evaluate the expected response of owl populations to projected future habitat changes. Id. at 3&4-236, see also SER at 43-51. The scientists operating the model concluded that their results supported the conclusions reached by FEMAT regarding the likelihood that Option 9 would provide for stable and well-distributed populations on federal lands, and also lent support to FEMAT's conclusion that the amount and distribution of habitat provided under Option 9 would be sufficient to prevent passing an extinction threshold for the owl. See FSEIS App. J-3 at 9, SER 51.

2. **Preventing Extinction of Aquatic Species** -- NFC's statement (Br. 11, emphasis in original) that "[t]he FSEIS and ROD, however, contain no discussion of how to prevent additional extinctions" of fish stocks is erroneous. The FSEIS contains extensive discussion of measures designed to prevent extinction of fish stocks, in particular the "Key Watershed" network. FSEIS at 3&4-69-82; see ROD at 9-10, 30, 46; see infra at 12-13. As the FSEIS notes at 3&4-70:

The maintenance and recovery of habitat within Key Watersheds will function to maintain and support the recovery of at-risk stocks of anadromous salmonids and resident fish species. Fish from these areas will be the sources for recolonizing habitats historically used by the fish.

The FSEIS concludes that Key Watersheds will "play an important role in the recovery of fish stocks listed under the Endangered Species Act \* \* \*." Id.

NFC expresses concern regarding bull trout (Br. 10-11), but again ignores the discussion of this species in the FSEIS. That FSEIS shows that the likelihood of attaining sufficient aquatic habitat to support well-distributed populations of bull trout is high, because "the vast majority of, if not all, bull trout habitat on federal land within the range of the \* \* \* owl occurred within Tier 1 Key Watersheds." FSEIS 3&4-199. Moreover, "additional standards and guidelines added to Alternative 9 (Appendix B11) would reduce the risk of cumulative effects from management-induced disturbances in areas outside the Tier 1 Key Watersheds where the bull trout occur." Id.

3. The Economic Value Of Unlogged Forests -- NFC's allegation (Br. 14) that the FSEIS "systematically ignored unlogged federal forests as a contribution to the stability of local and regional economies," is also inaccurate. The FSEIS recognizes the increasing demand for recreation in primitive areas, and the public preference for natural appearing landscapes and scenic areas for camping and hiking. FSEIS at 3&4-278, 287. The FSEIS discusses an attempt to calculate a dollar value for recreation. FSEIS at 3&4-278. This report (FEMAT Record # 2634 at 43) examines studies attempting to calculate an existence value for old-growth forests -- the value people are willing to pay merely for knowing old-growth exists. The FSEIS posits that some economic gains will be derived from habitat protection, but that at present there is insufficient information available to quantify the relationship between habitat protection and the economic value of resources such as air and water quality. FSEIS at F-75.<sup>51</sup> Finally, the agencies examined and responded to an economic critique of the FSEIS which addressed this issue. ROD at 72.

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<sup>51</sup> The FSEIS also refutes NFC's unsupported allegation (Br. 14) that receipts from timber sales are generally "far below the costs of operating the timber program \* \* \*." See FSEIS at F-75 ("below cost sales within the range of the northern spotted owl are very rare \* \* \*").

**E. The Biological Opinion.** -- While neither NFC nor any other party challenged the agencies' compliance with the Endangered Species Act (ESA), we briefly review that compliance because NFC's argument is based on the unsupported assertion (Br. 17) that the plan will "drive the spotted owl, and many other species, to extinction." On February 10, 1994, the Fish and Wildlife Service of the Department of the Interior (FWS) completed consultation with the action agencies under Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2). FWS's biological opinion concluded that Option 9 would not be likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. FSEIS, App. G at 3. FWS found that the strategy's late-successional and riparian reserves "are particularly important contributions to the conservation of the spotted owl and marbled murrelet." Id. FWS found that the reserve network, in combination with the other land allocations, "should enable [owl] critical habitat to perform the biological function for which it was designated." Id. at 22. FWS stressed the importance of the strategy's "approach to ecosystem management and its benefits to listed species." Id. at 3.

**F. Issuance Of The ROD.** -- In the ROD issued on April 13, 1994, the Secretaries jointly amended the planning documents of two Forest Service Regions, nineteen National Forests and seven BLM Districts. ROD at 1. The ROD selects, with modifications, Option 9 of the FSEIS as management direction for habitat of LSOG forest related species within the range of the owl. ROD at 25-28. While all federally administered lands in the planning area were considered during the agencies' analysis (along with the influence of activities on surrounding nonfederal lands), the management direction provided in the strategy applies only to lands administered by BLM and the Forest Service. ROD at 15-16.

**G. Description Of The Adopted Strategy.** -- In general, the strategy can be broken down into several key components: Reserve Areas, Matrix, an Aquatic Conservation Strategy, and a Monitoring and Evaluation Program.

1. **Reserves** -- The core of the terrestrial aspect of the strategy, comprising nearly 7.5 million acres, is the Late-Successional Reserve ("LSR") system. The objective of the LSRs is "to protect and enhance conditions of late-successional and old-growth forest ecosystems" which serve as habitat for the owl and other old-growth related species. ROD at C-9. With the other Reserve Areas, the LSRs form an interconnected network to provide for persistence of the LSOG ecosystem and its associated species. Forty-two percent of the acreage in the LSRs is dominated by LSOG forests. The balance consists of currently early-successional communities, a large percentage of which are projected to grow into late-successional communities as they mature. ROD at 6, FSEIS 3&4-39-43; Table 3&4-8 at 3&4-41; Figure 3&4-2 at 3&4-43. No programmed timber harvest is allowed in LSRs. Limited thinning and salvage operations are permitted under constraints designed to protect and foster the creation of LSOG forest conditions, and then only subject to review by regional interagency bodies. ROD at 8.

In addition, Riparian Reserves will provide protective zones around streams, wetlands, ponds, lakes and unstable areas. They constitute 11 percent of the lands in the planning area and are designed primarily to protect the health of the aquatic system and its dependent species. ROD at 7. They also improve connectivity of late-successional habitat and dispersal opportunity for associated terrestrial species, in particular the owl. No programmed timber harvest is allowed within Riparian Reserves, and stringent standards and guidelines dictate that effects of proposed management activities be minimized before

implementation goes forward. ROD at C-30 to C-38.

As the district court summarized (871 F. Supp. at 1305):

[T]he reserve areas taken together (including late-successional reserves, congressionally reserved areas, administratively withdrawn areas, and riparian reserves) protect about eighty percent of the remaining LSOG forest acres in the planning area from programmed timber harvest.

**2. Matrix and Adaptive Management Areas** -- Unreserved areas are designated as Matrix, in which timber harvest may go forward subject to restrictions. The Matrix represents 16 percent of the lands in the planning area. ROD at 2. Timber sales may be proposed in the Matrix, but only in compliance with standards and guidelines consistent with conservation objectives. These include standards requiring a supply of down logs and retention of a percentage of green trees on each unit. ROD at 10. In addition, six percent of the lands in the planning area are allocated to ten Adaptive Management Areas near communities affected by the reduction in the probable level of timber sales from federal lands. These areas are intended to provide opportunity for testing new management approaches to achieve ecological, economic and social and community objectives. ROD at 6, 8. The agencies estimated that the strategy, once fully implemented, will yield approximately a billion board feet of timber annually from Matrix and Adaptive Management Areas. FSEIS at 2-78. The average annual timber sale level projected under Option 9 represents a seventy-three percent reduction from the average annual timber sale level during the 1980s. FSEIS at 2-79 (Fig. 2-14).

**3. The Aquatic Conservation Strategy.** -- Working in conjunction with the Riparian Reserves discussed above, the Aquatic Conservation Strategy establishes Key Watersheds, a system of large refugia comprising watersheds that are crucial to at-risk fish

species and stocks and for high quality water. Key Watersheds, which amount to some 40% of the federal lands within the range of the owl, overlay portions of all Reserve Areas and the Matrix, and place additional management requirements on activities in those areas. ROD at 10, A-5. The Key Watersheds are designed primarily to function as anchors for the potential recovery of at-risk fish stocks. The Strategy provides strict standards and guidelines governing management activity within Key Watershed boundaries. See ROD at B-18 - B-32. In addition, the Aquatic Conservation Strategy adopts watershed analysis procedures for evaluating ecological processes operating in specific watersheds and provides for watershed restoration. ROD at 10, ROD at B-20 - B-32.

**4. Monitoring and Evaluation** -- The strategy adopts a tripartite process to evaluate new information through monitoring and evaluation. ROD at 34-38 & 57-58. First, implementation monitoring will be utilized to determine whether the standards and guidelines are being followed. Second, effectiveness monitoring will be used to verify whether standards and guidelines are achieving the desired results. Third, validation monitoring will be implemented to determine whether the underlying assumptions of the strategy are sound. Id. Supervision of monitoring is entrusted to interagency committees. See 871 F. Supp. at 1306.

**5. Additional Protections** -- Special allocations and standards and guidelines were adopted to further accommodate listed species, including the owl and the marbled murrelet, as well as rare and locally endemic species. Among other protections, approximately 100,000 acres of Managed Late-Successional Areas are designated by the strategy to provide additional protection around certain known owl activity centers and protection for rare and locally endemic species. ROD at 6-7, C-22 - C-28. In addition, 100 acres are protected around each known owl activity center in the Matrix and Adaptive Management

Areas. ROD at 10. With respect to certain rare plant and animal species, land managers are required to protect known sites and to survey for the presence of such species prior to conducting any ground-disturbing activities. ROD at C-5.

**H. Challenges To The ROD And The FSEIS.** -- Shortly after issuance of the ROD, several environmental groups challenged the strategy in the district court, alleging that the agencies' environmental analysis was insufficient and that the new strategy will not provide adequate habitat to maintain biological diversity. One challenge was brought by the coalition of environmental groups, led by Seattle Audubon Society, that had brought earlier challenges to management of spotted owl habitat in the Western District of Washington. That coalition has not appealed from the decision below.

NFC's complaint alleged that the ROD did not assure a viable population of owls or other old-growth dependent species. ER Tab 1 at 31. NFC also charged that the FSEIS failed to disclose all the impacts of the strategy, and failed to evaluate an alternative which included no logging of federal lands. *Id.* at 32-34.<sup>6/</sup>

Representing constituencies that desire greater timber harvest in the area, defendant-intervenor Northwest Forest Resource Council ("NFRC") had participated in earlier rounds of this litigation in the district court, but chose to assert claims against the most recent strategy in the United States District Court for the District of Columbia. See 871 F. Supp. at 1288 (SER 82-85). NFRC's suit against the Forest Service was transferred to the Western District of Washington, in order to assure that all challenges to the ROD would be reviewed together. *Id.* After NFRC voluntarily dismissed the transferred action, Judge Dwyer

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<sup>6/</sup> Plaintiffs Save the West and Forest Conservation Council bought similar claims in Civ. No. C94-758WD. The appeal of those parties is pending (see Statement of Related Cases).

permitted the federal defendants to file cross-claims for declaratory judgment against NFRC, in order to avoid duplicative litigation in two different circuits. 871 F. Supp. at 1289-1290. NFRC has appealed from the judgment (see Statement of Related Cases, infra).

The environmental plaintiffs and the federal agencies filed cross-motions for summary judgment. NFRC contended that summary judgment was unwarranted, but presented its challenges to the strategy in its opposition to the government's motion for summary judgment. By order entered on December 21, 1994, Judge Dwyer rejected all challenges presented by NFRC and the environmental groups to the strategy, and declared the ROD and standards and guidelines to be lawful under NEPA, NFMA and other statutes, as well as implementing regulations. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291 (W.D. Wash. 1994). For reasons of space, we will not summarize that lengthy opinion here. Relevant portions are summarized at appropriate points in the argument below.

### ARGUMENT

Standard of review. -- This is an appeal from a summary judgment upholding the strategy. This Court applies the de novo standard in reviewing summary judgments upholding agency decisions. This Court will review the underlying agency decision under the same standard as was applicable in the district court, that is, the "arbitrary and capricious" standard specified by 5 U.S.C. 706(2)(A). Nevada Land Action Ass'n v. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993). The administrative decision is entitled to a presumption of validity, Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1253 (9th Cir. 1979), cert. denied, 446 U.S. 982 (1980), and the courts will defer to the agency's reasonable interpretations of the statutes and regulations which it administers. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984); Nevada Land Action, 8 F.3d at 717.

I

**THE DISTRICT COURT PROPERLY FOUND THAT THE STRATEGY  
COMPLIED WITH THE FOREST SERVICE VIABILITY REGULATION  
AND WAS NOT ARBITRARY OR CAPRICIOUS**

NFC's primary attack on the strategy is that it allegedly does not provide sufficient protection to the owl and other old growth dependent species. Contrary to the findings of the Secretaries in the ROD, and the FWS in the biological opinion, NFC believes that "this plan will cause the extinction of protected species." Br. 24. NFC argues that the strategy thereby violates a Forest Service regulation, 36 C.F.R. 219.19 ("the viability regulation"), which requires as part of the planning process that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area." NFC also argues that the strategy's assumptions regarding viability are undercut by a recent court decision, Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home"), 17 F.3d 1463 (D.C. Cir. 1994), cert. granted, 115 S. Ct. 714 (1995).

The district court properly rejected these and all other attacks on the strategy based on alleged failure to comply with the viability regulation. The court recognized that this regulation implements a congressional delegation of authority that is both broad and highly discretionary. Section 6 of the National Forest Management Act (NFMA) directs the Secretary of Agriculture to "promulgate regulations \* \* \* specifying guidelines for land management plans \* \* \* which \* \* \* provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives \* \* \*." 16 U.S.C. 1604(g)(3)(B). The district court recognized that this statute contemplated "legislative regulations" which balance planning for species diversity with

multiple use principles. 871 F. Supp. at 1315-1316. In this situation, "Congress entrusts to the Secretary, rather than the courts, the primary responsibility for interpreting the statutory term.'" Id. at 1316, quoting Batterton v. Francis, 432 U.S. 416, 425 (1977).

The court found that the Secretaries did not act arbitrarily or capriciously in finding that the strategy "'satisfies the requirements of the statute and its implementing regulations because it will provide an amount and distribution of habitat adequate to support the continued persistence of vertebrate species in the planning area.'" 871 F.Supp. at 1316, quoting from ROD at 45. The court found that the Secretaries had adequately considered species populations, "[g]iven the current state of scientific knowledge," and had appropriately relied on findings by FEMAT and the FSEIS team that Option 9 "would provide an 80% or better likelihood of providing habitat supporting viable populations of all vertebrate species save three." Id. at 1316. Finally, the court found that the Secretaries had reasonably determined that Sweet Home did not require a revision in the strategy, since the government was seeking further review of that decision, which was of uncertain precedential value in the Ninth Circuit, and since the strategy could be reconsidered later if Sweet Home were to become applicable in the Ninth Circuit. 871 F. Supp. at 1312-1313.

NFC begins its attack with the wholly unsupported assumption that "numerous vertebrate species face a substantial risk of extirpation" under the strategy. Br. 19. This assumption is not based on any evidence from the agency record, but instead on a misreading of the results of the FEMAT panels, as we show infra at 24-27. More fundamentally, NFC's argument is based on a clear misreading of the viability regulation. NFC argues (Br. 20) that the regulation requires that the "risk of nonviability" to each species "must be minimized in absolute terms," which NFC defines (Br. 21) as something approaching a 95%

to 99% guarantee of viability. As we now show, this interpretation of the wildlife regulation disregards the statutory context, the language of the regulation itself, and the discretion that must be accorded the agency in interpreting its own regulation. Finally, as we show infra at 27-30, NFC's contention that the D.C. Circuit Sweet Home decision required revision of the strategy is untenable.

**A. The Determination That The Strategy Will Provide Adequate Habitat To Support Continued Persistence of Vertebrate Species Was Based On A Proper Interpretation of The Viability Regulation.** -- Proper interpretation of the viability regulation begins with the statute. The pertinent provision of NFMA simply directs that the Forest Service specify guidelines for land management plans which "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B). Nothing in this language supports NFC's argument that the Forest Service is required to reduce the chance of each species becoming extinct to some numerically-defined threshold. See NFC brief at 21-24 (arguing that the chance of extinction for each species must be reduced below 20%). Instead, NFMA directs only that the agency issue guidelines which "provide for diversity of plant and animal communities \* \* \*."<sup>7/</sup>

1. **The Language of the Regulation** -- The regulation, like the statute, speaks in general terms, and provides no support to NFC's argument that the viability of each species must be guaranteed to some numerical threshold. As directed by NFMA, the Forest

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<sup>7/</sup> This general language should be compared to Section 7 of the Endangered Species Act, 16 U.S.C. 1536(a)(2), which requires that each agency "shall \* \* \* insure that any action \* \* \* is not likely to jeopardize the continued existence of any endangered species or threatened species \* \* \*". No party has alleged a violation of that statute. See supra at 10.

Service promulgated the viability regulation as one of thirteen regulations designed to integrate planning for various forest resources. 36 C.F.R. 219.14 - 219.26. The regulation states that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area," and goes on to explain that "for planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." 36 C.F.R. 219.19.

Nothing in the regulation requires the agency to make findings respecting the probable viability of individual species, or to employ a probability-based approach. It simply instructs the agency that, "in order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area." 36 C.F.R. 219.19. NFC puts excessive weight on the word "insure" in this provision. In context, it does not require a numerically-defined level of protection for each of the thousands of species in a planning area, but instead that adequate habitat be provided to support minimum numbers of reproductive individuals, and that such habitat be "well distributed."

That flexibility is inherent in this regulation is confirmed by the circumstances surrounding its promulgation. The Forest Service, pursuant to the direction of NFMA, appointed a committee of scientists "to provide scientific and technical advice and counsel on proposed guidelines and procedures." 16 U.S.C. 1604(h). The committee reported that:

diversity as required by NFMA is one of the most perplexing issues dealt with in the draft regulations. We believe it is impossible to write specific regulations to "provide for" diversity \* \* \*. Although the statement of policy

[to provide for diversity] is clear, there remains a great deal of room for honest debate on the translation of policy into management planning requirements and into management programs.

44 Fed. Reg. 26,600-01 & 26,008. To read the viability regulation to impose a requirement for a numerical guarantee as to each species would be plainly inconsistent with its intent.

2. The Agency Interpretation of The Regulation -- Contrary to NFC's contention (Br. 23), the defendants did not adopt a "viability test of 80% against which to measure the selected plan \* \* \*." NFMA and the viability regulation were not interpreted as requiring a rigid numerical standard of this sort. Instead, the ROD, consistent with the language of the regulation, found that the strategy satisfied the requirements of NFMA and its implementing regulations "because it will provide an amount and distribution of habitat adequate to support the continued persistence of vertebrate species in the planning area." ROD at 45. This finding was based on a consideration of several types of evidence. The ROD pointed to the fact that the strategy protects approximately 80 percent of the 8.5 million acres of medium and large late-successional conifer forests in the planning area from programmed timber harvest (ROD at 45). The ROD also pointed to the fact that FEMAT had given "strong marks" to the original version of Option 9 regarding the likelihood that it would provide for functional late-successional forest ecosystem conditions, and the fact that "[o]ur decision contains measures in addition to those in the original Alternative 9 that are likely to further enhance the attributes of late-successional and old-growth forest ecosystems." ROD 46.<sup>8/</sup> The ROD, consistent with the regulation, did not focus on whether each species met a defined numerical viability standard, but instead focussed on the

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<sup>8/</sup> The ROD also rested its finding regarding viability on the fact that aquatic and riparian subsystems in the planning area "will receive significant protection" under the strategy. Id. at 46; see supra at 11-12, 12-13.

large amount of undisturbed habitat provided by the plan and the fact that it would be "well distributed," and "interconnected," with adequate "dispersal habitat" for wide-ranging species such as owls. Id.

The ROD explained why a rigid, numerical approach to viability was not required. The ROD points out that the viability regulation involves technical, complex issues at the frontiers of biological and ecological sciences and provides direction on management of dynamic ecosystems about which human understanding continues to evolve. Thus, "there is no specific or precise standard or technique for satisfying [its] requirements." ROD at 43. Since viability entails making long-term projections on the basis of complex ecological inter-relationships, compliance "is not subject to precise numerical interpretation and cannot be fixed at any one single threshold." ROD at 44. The risk that an action will result in unexpected or unintended effects cannot be eliminated entirely. Thus, "there is no way to avoid all risk to the continued persistence of species." ROD at 44; see also FSEIS at 3&4-4.

In addition, the ROD explains that the strategy is only one component of multiple measures that will influence habitat of species over the next 100 years. ROD at 45. "No one strategy or decision can for all time provide for the habitat needs of all species that exist in the planning area." Id. The opportunity to apply further analysis before development decisions are made, and the extensive monitoring required by ROD, argue against requiring numerical thresholds at this stage.<sup>9/</sup>

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<sup>9/</sup> As the ROD notes at 13, there are requirements for additional public involvement and NEPA, ESA and other environmental law compliance before decisions are made to offer timber sales in the Matrix or conduct other land management activities. As this Court has recognized, site-specific development that may impact wildlife only takes place after the application of these additional procedures and safeguards. Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1357 (9th Cir. 1994); Resources Limited, 35 F.3d at 1306.

The ROD points out that the viability regulation does not require an individual assessment of each of the hundreds of species in the planning area. ROD at 44, 45. The panel judgments of outcome probability levels for particular species were used by FEMAT on a one-time basis as a way to compare various alternatives for a strategy that affected multiple species. See supra at 4-6. The ROD notes at 45 that FEMAT's approach was a "unique" response to an unusual situation, and that "while sound, is not a controlling precedent for how such assessments need to be conducted in the future."

As the ROD shows, the agency which promulgated the viability regulation does not interpret it to require any rigid numerical guarantee of viability. This fatally undermines NFC's position, because courts must "give substantial deference to an agency's interpretation of its own regulations." Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994). In a recent case involving related provisions of 36 C.F.R. 219, this Court stressed that "[a]n agency's interpretation of its own regulations controls unless it is plainly erroneous or inconsistent with the regulations." Nevada Land Action, 8 F.3d at 717 (inner citation omitted); see also Westlands Water Dist. v. Firebaugh Canal, 10 F.3d 667, 671 (9th Cir. 1993)(judicial deference particularly important where Congress has vested broad discretion in an agency to interpret statute). Here, the Secretary's interpretation is entirely consistent with the actual language of the regulation, and should be upheld.

**3. Caselaw Supports The Agency Interpretation** -- Courts which have considered the wildlife viability and related regulations promulgated pursuant to 16 U.S.C. 1604(g)(3)(B) have universally found that the Forest Service has a great degree of flexibility and discretion in determining how to apply the regulations to the myriad of situations that arise in the process of forest planning. To begin with, courts have stressed the flexibility

inherent in the statutory source of these regulations. The courts recognize that "the NFMA diversity statute does not provide much guidance as to its execution; 'it is difficult to discern any concrete legal standards on the face of the provision.'" Sierra Club v. Marita, 46 F.3d 606, 615 (7th Cir. 1995), quoting from Wilkinson and Anderson, Land and Resource Planning in the National Forests, 64 Or. L. Rev. 1, 296 (1985). While the statute "'requires Forest Service planners to treat the wildlife resource as a controlling, co-equal factor in forest management,'" it does not specify how this is to be accomplished in particular situations. Id. See also Sierra Club v. Robertson, 810 F. Supp. at 1027, aff'd, 28 F.3d 753 (8th Cir. 1994)("the statutory language [of the NFMA diversity provision] is so qualified that 'it is difficult to discern any concrete legal standards'").

Courts have stressed that the statute and regulations cannot be read to demand any particular type of methodology or approach to making determinations respecting diversity. Marita, 46 F.3d at 619-621; see also Sierra Club v. Espy, 38 F.3d 792, 800 (5th Cir. 1994) ("this is just the type of policy-oriented decision Congress wisely left to the discretion of the experts -- here, the Forest Service"); Krichbaum v. Kelley, 844 F. Supp. 1107, 1111 (W.D. Va. 1994)("Though [NFMA] does restrain agency forest planning to some extent, the statutory command to 'provide for diversity' is a qualified one, and has required courts to defer substantially to the Forest Service's judgment and technical expertise"), appeal docketed, No. 94-1496 (4th Cir. filed April 18, 1994).

No court has ever interpreted the viability regulation, as NFC does, to require that the risk of nonviability to each species in the planning area be minimized to a certain numerical threshold. Imposing a rigid methodology like this on the Forest Service would be contrary to the inherent flexibility and discretion contained in the statutory scheme. It would also

conflict with NFMA's clear statement that diversity of plant and animal communities is a goal to be addressed in the light of "overall multiple-use objectives." 16 U.S.C.

1604(g)(3)(B).<sup>10/</sup> NFC's position that no timber harvesting can be allowed if any species has less than some numerically-defined probability of viability would improperly ignore other multiple-use considerations, such as providing a sustained yield of timber.

**B. In Any Event, The FEMAT Panel Findings Do Not Support NFC's Assertion That The Strategy Will Extirpate Species.** -- As just shown, the ROD did not rest its finding of compliance with the viability regulation directly on the panel assessments, as NFC implies. Indeed, the ROD specifically noted that "[t]he fish-and-wildlife-resource regulation does not require species-specific assessments." ROD at 45. The ROD simply considered the FEMAT panel findings, among other evidence, in determining that the strategy would provide an amount and distribution of habitat adequate to support the continued persistence of species found in the planning area. *Id.*

Thus, NFC's arguments regarding the panel findings are largely beside the point. However, it is important to note that NFC has grossly misinterpreted these findings. NFC asserts that "[a] mere 80% chance of viability comes nowhere close to the degree of protection called for by a regulation requiring that viability be 'insured'" because "[a] 20%

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<sup>10/</sup> The Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 74 Stat. 215, 16 U.S.C. 528 *et seq.*, provides that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Section 6(e)(1) of NFMA, 16 U.S.C. 1604(e)(1), states that Land and Resource Management Plans shall provide for multiple use and sustained yield of the products and services of the NFS unit, consistent with MUSYA, and shall "include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." This Court has recognized that the congressional direction in MUSYA to abide by multiple-use sustained-yield principles "can hardly be considered [to establish] concrete limits upon agency discretion [but] [r]ather, [] is language which 'breathe[s] discretion at every pore'". *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979).

Chance of Extinction of a Species Does not Comply with the Regulation." Br. 20, 21.

NFC's assumption that a panel rating of an 80% probability of achieving Outcome A (see supra at 5) implied "a 20% chance of extinction" is flatly incorrect. An 80% probability of achieving Outcome A (defined as habitat sufficient to allow the species population to stabilize, well distributed across federal lands), most often meant that the panel simply gave a 20% probability to Outcome B (defined as habitat of sufficient abundance to allow the species population to stabilize, but with significant gaps in the historic species distribution).<sup>11/</sup> It did not mean that there was a 20% probability of Outcome D (defined as species extirpation from federal land). With respect to the owl, for instance, the panel found that Option 9 would produce an 83% likelihood of Outcome A, an 18% likelihood of Outcome B, and a 0% likelihood of either Outcome C (restricted to refugia) or D (risk of extirpation). FSEIS 3&4-243.<sup>12/</sup>

The ROD notes that all but three vertebrate species received relatively high marks for

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<sup>11/</sup> Outcome B cannot be characterized as a result that fails to comport with the regulation. As the ROD points out, "[t]he gaps that may exist in the historic distributions of species under our decision do not preclude a finding of compliance with the fish and wildlife resource regulation, especially because most such gaps are already present." ROD 47. Nothing in the regulation requires that species be restored to their historic distribution, though that may be a worthwhile goal to strive for.

<sup>12/</sup> Contrary to NFC's argument (Br. 22), the October 25, 1993, memorandum from Bob Jacobs to Tom Tuchman (ER Tab 2) does not undercut the conclusions in the ROD. This internal memorandum, written before either the FSEIS or the ROD, simply set out Mr. Jacobs' tentative views on several "policy issues." With respect to viability, for instance, the memo stressed that "FEMAT did not make a conclusion on the definition of viability, appropriately leaving this determination to the decision maker. This determination should be made in the ROD \* \* \*." Tab 2 at "Policy Issue #5." The district court properly looked to the ROD for the agency interpretation of the regulation, not to a memorandum from a subordinate written long before the agency decision, and expressing only the tentative opinions of the drafter. NFC also ignores the fact that the issues which Jacobs identified were dealt with in the FSEIS and ROD by adding additional protections. See ROD at 61.

the probability that federal habitat under the original Option 9 would support populations that met either Outcome A or B.<sup>13/</sup> In place of this conclusion based on scientific analysis of habitat needs, NFC would substitute a conclusion based on the odds of rolling one with a single die. See NFC Br. at 23-24 (alleging that the chance that all species will remain viable "is equivalent to rolling the die 109 times, but never rolling a one")(emphasis in original). NFC does not cite to a single study or expert opinion which supports its analogy between species viability and rolling dice.<sup>14/</sup> The reason is obvious -- species do not act like dice. While each roll of a die is completely independent of other rolls, species are interdependent. The point of the Secretaries' strategy was to create large blocks of functioning old-growth ecosystems which can sustain all species. ROD at 46. The chance that a particular species will remain viable cannot be viewed as wholly independent of the chances of other species in the ecosystem. In any event, the Secretaries' reliance on extensive studies, a broad array of expert opinion, and complex computer models (see supra at 4-10) is surely entitled to more deference than NFC's unsupported dice-rolling methodology. See Inland Empire Public Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993)(courts "will not second-guess

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<sup>13/</sup> The ROD explains that the three exceptions were a salamander that was an "extremely local endemic," whose existing habitat would be fully protected, and two other salamander species whose habitats lay almost exclusively on non-federal land. ROD at 47.

<sup>14/</sup> The one expert opinion NFC references (Br. 20) speaks only to the question of whether the agencies sufficiently analyzed the near-term risk to the spotted owl, and in no way supports NFC's probability analysis. See Declaration of Daniel Doak, ER Tab 4. [This declaration was submitted by plaintiff groups who have not appealed]. Though Doak disagreed with some of the agencies' conclusions respecting the owl, it is not the function of the courts to resolve disagreements among the experts or to judge the merits of competing expert views. See, e.g., Mt Graham Red Squirrel v. Espy, 986 F.2d 1568, 1576 (9th Cir. 1993). The fact that some scientists might disagree with analytical conclusions of the agency concerning the effects of a challenged action is not sufficient to render them arbitrary or capricious. Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1993).

methodological choices made by an agency in its area of expertise").

In sum, the ROD's determination that the strategy is consistent with the NFMA diversity provision and the viability regulation is plainly not arbitrary or capricious. Deference is due to the ROD's determination, since it rests on interpretation of ecological, biological, and geographic data within an area of the agencies' particular expertise. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 375-78. NFC fails to show that the agencies overlooked any relevant factor or made any clear error of judgment; the ROD's determination accordingly must be upheld.

**C. It Was Not Arbitrary For The Secretary To Find That Compliance With The Viability Regulation Was Not Undercut By The D.C. Circuit Decision In Sweet Home.** --

As the district court noted (871 F. Supp. at 1312), shortly before the ROD issued, "a two-to-one panel in the District of Columbia reversed its own prior decision and held invalid the regulation defining 'harm' [under the ESA] to include habitat destruction." See Sweet Home, 17 F.3d at 1416. The ROD responded to the panel decision by highlighting government efforts to overturn it, and by pointing out that Ninth Circuit precedent was directly to the contrary. ROD at 69, citing Palila v. Hawaii Dept. of Land And Natural Resources, 852 F.2d 1106 (9th Cir. 1988). The district court found that this response was reasonable, given that Palila was the law of the Circuit where the forests are located "until and unless changed by the Supreme Court or by the circuit itself," and in light of the fact that the strategy could be changed later if necessary, should Sweet Home become binding. 871 F. Supp. at 1313. NFC fails to show that the district court erred in reaching this conclusion.

It is established that a court reviews a forest plan (or any other agency decision) "on the basis of the record before the agency at the time of the decision." Nevada Land Action,

8 F.3d at 718; see also Ass'n of Pacific Fisheries v. EPA, 615 F.2d 794, 811 (9th Cir. 1980); see generally Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554-555 (1978)(noting that "there is little hope that the administrative process could ever be consummated" if parties could demand rehearings "because some new circumstance has arisen, some new trend has been observed, or some new fact discovered"). The focus must accordingly be on the situation at the time of the ROD.

At that time, the effect of the D.C. Circuit decision in Sweet Home on non-federal lands in the Pacific Northwest was highly uncertain. First, there was a question as to whether the decision would survive at all, given the government's efforts to overturn it. Another possibility at that time was that the Supreme Court might deny review, leaving the conflict with Palila unresolved. If that had happened, the effect on non-federal lands in the three states at issue would have depended largely on the possible decisions of landowners to challenge future agency actions in the D.C. Circuit, rather than the Ninth Circuit. NFC's undocumented efforts (Br. 27-28) to show that the Sweet Home plaintiffs themselves might have logged considerable non-federal lands in the Pacific Northwest only serve to emphasize the great uncertainty regarding the potential impact of that case.

Even if Sweet Home comes to be the law in the Pacific Northwest, it is still highly speculative what the impact on the strategy would be. Sweet Home only dealt with non-federal lands, while the strategy is concerned with federal lands. While the Secretaries considered possible impacts from activities on non-federal lands, the finding of compliance with the viability regulation was based on the provision of adequate federal habitat. ROD at 45-46; see also ROD at 41 ("although non-federal lands are outside the scope of the SEIS, effects from their management have been considered in the SEIS to a degree appropriate for

a programmatic NEPA document at this scale"). The strategy's focus on federal habitat comports with the NFMA viability regulation, which directs that fish and wildlife habitat be managed to maintain viable populations "in the planning area," and defines "planning area" as the "area of the National Forest System" covered by the guide or plan. 36 C.F.R. 219.3, 219.19. NFMA does not require the Forest Service to compensate for conditions on areas surrounding the federal lands. Sierra Club v. Robertson, 845 F. Supp. 485, 502 (S.D. Ohio 1994). There is no NFMA-based duty to predict possible changes in habitat conditions on private lands, and NFC cites no authority which suggests such a duty.

Hence, any effect from the ruling in Sweet Home will be highly indirect. While the agencies recognized that there is a need for private lands to contribute to the recovery of the owl, FSEIS at 3&4-244, NFC has fallen far short of showing that the agencies were legally required to alter the ROD because of the possibility that Sweet Home might at some point change the habitat contribution from private lands. NFC's assertion (Br. 25) that "degradation of non-federal habitat \* \* \* is almost certain to follow the Sweet Home decision" is sheer speculation, and ignores that Sweet Home did not question the continued applicability to private lands of the prohibition against other types of "takings" besides habitat destruction. NFC's further assumption that "degradation" on private lands will undercut the strategy adopted here for federal lands is equally unsupported.

Moreover, NFC has disregarded the agencies' stated intention to adjust the strategy to changed circumstances where necessary. The ROD acknowledges that new information will continually come to light, and "will be considered, and supplements will be prepared and amendments adopted as the need arises." ROD 42. In addition, the strategy calls for continuous monitoring to determine if the standards and guidelines "are achieving the desired

results" and to "determine if underlying assumptions are sound \* \* \*." ROD at 57. Information gathered through monitoring and through other sources will "provide a basis for adaptive management changes to the selected alternative, including changes in the Standards and Guidelines." Id. Thus, even if NFC's dire predictions about the effect of Sweet Home on private lands turn out to be correct, the agencies can take action at the appropriate time to adjust the strategy. Particularly in the forest planning context, courts have accepted the propriety of adaptive strategies that account for new information as that information develops, rather than trying to account for all future contingencies at the first stage of the decision-making process. See, e.g., Resources, Ltd., 8 F.3d at 1401; Northern Alaska Env'tl. Ctr. v. Lujan, 961 F.2d 886 (9th Cir. 1992).

## II

### THE FSEIS CONSIDERED AN ADEQUATE RANGE OF ALTERNATIVES

Standard of Review. -- The district court found that an appropriate range of alternatives was considered in the FSEIS "to permit a reasoned choice." 871 F. Supp. at 1320. This conclusion, rendered on summary judgment, is reviewed de novo by this Court. This Court applies the same standard as the district court in reviewing the adequacy of an EIS and its discussion of alternatives. It employs:

a rule of reason that asks whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. A reviewing judge must make a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation. Once satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, the review is at an end.

Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992)(citations omitted). An agency's consideration of alternatives in an EIS is adequate "if it considers an

appropriate range of alternatives, even if it does not consider every available alternative."

Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174, 1180-81 (9th Cir. 1990).

"Alternatives that are unlikely to be implemented need not be considered, nor 'must an agency consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for the management of the area.'" Resources Limited, Inc. v. Robertson, 8 F.3d 1394, 1402 (9th Cir. 1993), quoting from Headwaters, 914 F.2d at 1180. The district court properly applied these standards, as we now show.

**A. An Alternative Which Permitted No Timber Harvesting In Federal Forests Was Not A "Reasonable Alternative" In Light Of Legal Constraints And Policy Objectives.** -- The district court supported its ruling by pointing out that "the ten alternatives analyzed in depth span a variety of measures and strategies and an eighteen-fold difference among probable average annual timber sale levels." It also noted that the EIS thoroughly considered an alternative (Alternative 1) that "would protect 'essentially all existing old growth forests.'" 871 F. Supp. at 1320, quoting ROD at 20. NFC argues (Br. 32-33) that NEPA required the agencies to evaluate an alternative that allowed no cutting at all in federal forests, even second growth. This attack is misguided, for several reasons.

The agencies did consider a no-harvest alternative at the beginning of the process, but reasonably rejected it as inconsistent with important policy objectives. FEMAT first examined a universe of 48 developed strategies, including an option with no protected reserves of LSOG forests at one extreme and an option with no harvesting at all at the other. FSEIS App. A at III-2 (SER 2); ROD at 17. Further assessment resulted in selection of ten options for detailed analysis. Extreme options, such as the no-harvest option, were screened out as non-responsive to the need to comply with legal constraints and policy objectives. As

the FSEIS explained at 2-68, "[t]he underlying need \* \* \* of providing for late-successional and old-growth forest habitat and minimizing adverse economic effects substantially limited the range of reasonable alternatives available for analysis." Thus, while the alternative of "no cutting on federal lands" was considered early in the EIS process, and was given initial ratings on five biological criteria (FSEIS App. A at III-2 to III-3 (alternative #48)(SER 2-3), it was not studied in greater depth because (FSEIS App. F-97):

A no-harvest alternative does not satisfy the purpose and need for the proposed action, which includes maintaining a sustained yield of renewable natural resources, including timber, other forest products, and other forest values, and maintaining rural economies and communities as described in Chapter 1 of this SEIS.

Agencies may screen out alternatives that do not comply with fundamental policy objectives or legal constraints. Nevada Land Action, 8 F.3d at 717 ("[t]he Service was not required to scrutinize alternatives that could not reasonably be considered feasible options"); Kilroy v. Ruckelshaus, 738 F.2d 1448, 1453-54 (9th Cir. 1984)(an agency need not evaluate an alternative that is contrary to statutory directives). Among the objectives the strategy was intended to meet was producing "a predictable and sustainable level of timber harvest." FSEIS at F-32. NFC does not explain how a no-harvest alternative could be considered reasonable in light of this objective. Nor does it explain how such an alternative could be squared with the legal mandate that National Forest and BLM lands are to be managed for multiple uses and the sustained yield of renewable resources. See supra at 23-24 & n.10.

This Court rejected a contention similar to NFC's in ICL v. Mumma, 956 F.2d at 1520-1522. There, plaintiffs urged consideration of an alternative to a forest plan that would have set aside more wilderness acreage, while allowing some cutting of timber. Id. at 1522. This Court upheld the agency's decision not to consider plaintiffs' alternative in depth, since

"the [Forest Service] was entitled to identify some parameters and criteria -- related to Plan standards -- for generating alternatives to which it would devote serious consideration." Ibid. The Service did not have to consider "alternatives known to be unacceptable at the outset." Ibid. Similarly, in Resources Ltd. v. Robertson, 8 F.3d at 1401-1402, this Court found an EIS on a forest plan to be adequate even though it did not consider any alternative with harvest levels more than 18 percent below existing levels. The Court again noted the agency's discretion to identify criteria for generating feasible alternatives.

The range of alternatives considered here was wider than in these earlier cases. Option 1, for instance, would have permitted less than three percent of historic harvest levels. See Figure ROD-1. This Court should accordingly reject NFC's contention that the agencies were required to give in-depth consideration to an even more extreme alternative of no cutting at all in federal forests.

**B. Option 1 Protected Essentially All Existing Old-Growth, And Provided A Reasonable Point Of Comparison.** -- NFC charges (Br. 32) that "the FSEIS and the ROD acknowledge the number of scientists calling for no further cutting of ancient forests, [but] this was not an alternative considered in the FSEIS." The district court, however, correctly found that Option 1 in fact protected "'essentially all existing old growth forests.'" 871 F. Supp. at 1320. NFC responds by arguing that the small amount of timber harvest contemplated for the matrix in Option 1 would harvest "the old growth of tomorrow." Br. 34. But the district court was clearly referring to true old growth, which is defined in the FSEIS as "a forest stand usually at least 180-220 years old with moderate to high canopy closure and similar characteristics." FSEIS Glossary at 11. Under NFC's contradictory definition, even "young" trees constitute "old" growth. But such "future" old growth is not

what the scientists NFC relies upon were suggesting be protected.

NFC is mistaken in its belief (Br. 33, 34) that Option 1 would have permitted salvage or other timber cutting in reserves. As noted by the ROD, Option 1 "would exclude management activity from all old-growth forest stands, preserving them from human management actions." ROD 25. Similarly, the FSEIS makes clear that in the late-successional reserves proposed in Option 1, "[t]here would be no cutting of trees or salvage of dead trees." FSEIS at 2-41; see also *id.* at S-10 (table indicates that Option 1 includes no timber harvest or salvage in LSRs).<sup>15/</sup>

Thus, Option 1 presented a reasonable point of comparison for the other alternatives considered. See ROD at 25 (finding that Option 1 was the "environmentally preferred alternative"). Under the "rule of reason," the agencies were not required to consider an alternative which allowed no cutting at all in federal forests.

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<sup>15/</sup> NFC at Br. 12-14 misuses parts of Appendix B to the FSEIS to suggest that, contrary to these clear statements, Option 1 contemplated cutting trees in reserves for purposes of salvage and fire prevention. The first page of Appendix B states that:

This appendix contains additional information about specific standards and guidelines or processes. The individual alternative descriptions in Chapter 2 indicate when and how these elements apply to each alternative.

FSEIS at B-1 (emphasis added). Thus, the specific descriptions in Chapter 2 control, and make clear that no harvest of trees in reserves was contemplated under Option 1.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.<sup>16/</sup>

Respectfully submitted,

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<sup>16/</sup> NFC's offhand request (Br. 35) that a reversal of the district court judgment be coupled with an injunction against "all logging in the planning area \* \* \*" is premature and unwarranted. An injunction is "an equitable remedy that does not issue as of course" but only on the basis of a showing of irreparable injury and after a balancing of competing equities and consideration of the public interest. Miller v. California Pacific Medical Center, 19 F.3d 449, 457 (9th Cir. 1994)(en banc), citing Weinberger v. Romero-Barcelo, 456 U.S. 309, 312 (1982); see, e.g., Texas v. Forest Service, 805 F.2d 524, 527 (5th Cir. 1986) (equities did not warrant injunction against plan which would, in long run, improve condition of forest). A full consideration of equitable factors must precede possible injunctive relief.

**STATEMENT OF RELATED CASES**

This appeal arises from the same district court judgment as the appeals in Seattle Audubon Soc'y and Save the West, et al. v. Lyons, et al., No. 95-35214, and Seattle Audubon Soc'y v. Lyons and Northwest Forest Resource Council, No. 95-35215. Hence, all three appeals should be argued before the same panel, to assure consistency and prevent needless duplication.

CERTIFICATE OF SERVICE

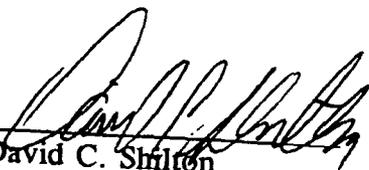
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**ADDENDUM**

STATUTE AND REGULATION AT ISSUE

1. Section 6(g) of the National Forest Management Act (NFMA), 16 U.S.C. 1604(g), provides:

(g) Promulgation of regulations for development and revision of plans; environmental considerations; resource management guidelines; guidelines for land management plans

As soon as practicable, but not later than two years after October 22, 1976, the Secretary shall in accordance with the procedures set forth in section 553 of Title 5 promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C.A. ss 528-5311, that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection. The regulations shall include, but not be limited to--

(1) specifying procedures to insure that land management plans are prepared in accordance with the National Environmental Policy Act of 1969 [42 U.S.C.A. s 4321 et seq.], including, but not limited to, direction on when and for what plans an environmental impact statement required under section 102(2)(C) of that Act [42 U.S.C.A. s 4332(2)(C)] shall be prepared;

(2) specifying guidelines which--

(A) require the identification of the suitability of lands for resource management;

(B) provide for obtaining inventory data on the various renewable resources, and soil and water, including pertinent maps, graphic material, and explanatory aids; and

(C) provide for methods to identify special conditions or situations involving hazards to the various resources and their relationship to alternative activities;

(3) specifying guidelines for land management plans developed to achieve the goals of the Program which--

(A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish;

(B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, and within the multiple-use objectives of a land management plan adopted pursuant to this section, provide, where appropriate, to the degree practicable, for steps to be taken to preserve the diversity of tree species similar to that existing in the region controlled by the plan;

(C) insure research on and (based on continuous monitoring and assessment in the field) evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land;

(D) permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned;

(E) insure that timber will be harvested from National Forest System lands only where--

(i) soil, slope, or other watershed conditions will not be irreversibly damaged;

(ii) there is assurance that such lands can be adequately restocked within five years after harvest;

(iii) protection is provided for streams, streambanks, shorelines, lakes, wetlands, and other bodies of water from detrimental changes in water temperatures, blockages of water courses, and deposits of sediment, where harvests are likely to seriously and adversely affect water conditions or fish habitat; and

(iv) the harvesting system to be used is not selected primarily because it will give the greatest dollar return or the greatest unit output of timber; and

(F) insure that clearcutting, seed tree cutting, shelterwood cutting, and other cuts designed to regenerate an even-aged stand of timber will be used as a cutting method on National Forest System lands only where--

(i) for clearcutting, it is determined to be the optimum method, and for other such cuts it is determined to be appropriate, to meet the objectives and requirements of the relevant land management plan;

(ii) the interdisciplinary review as determined by the Secretary has been completed and the potential environmental, biological, esthetic, engineering, and economic impacts on each advertised sale area have been assessed, as well as the consistency of the sale with the multiple use of the general area;

(iii) cut blocks, patches, or strips are shaped and blended to the extent practicable with the natural terrain;

(iv) there are established according to geographic areas, forest types, or other suitable classifications the maximum size limits for areas to be cut in one harvest operation, including provision to exceed the established limits after appropriate public notice and review by the responsible Forest Service officer one level above the Forest Service officer who normally would approve the harvest proposal: Provided, That such limits shall not apply to the size of areas harvested as a result of natural catastrophic conditions such as fire, insect and disease attack, or windstorm; and

population trends of the management indicator species.

(3) Biologists from State fish and wildlife agencies and other Federal agencies shall be consulted in order to coordinate planning for fish and wildlife, including opportunities for the reintroduction of extirpated species.

(4) Access and dispersal problems of hunting, fishing, and other visitor uses shall be considered.

(5) The effects of pest and fire management on fish and wildlife populations shall be considered.

(6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined. This monitoring will be done in cooperation with State fish and wildlife agencies, to the extent practicable.

(7) Habitat determined to be critical for threatened and endangered species shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined for threatened and endangered species that shall provide for, where possible, their removal from listing as threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

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

Defendants-Appellees,  
and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

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

BRIEF OF APPELLEES JAMES LYONS, ET AL.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 95-35215

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SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

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

Defendants-Appellees,

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor-Appellant.

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

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**BRIEF OF APPELLEES JAMES LYONS, ET AL.**

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**RELEVANT ORDERS AND OPINIONS BELOW**

The district court (Honorable William L. Dwyer) entered an Order Granting Leave To Federal Defendants To Amend Answer To Assert Cross-Claims, Denying Motion To Join Additional Parties, And Making Other Provisions on August 5, 1994. Clerks Record ("CR") 526. That order is published at 871 F. Supp. 1286. The district court entered an Order on Northwest Forest Resource Council's (NFRC's) Motions to Dismiss Cross-Claims, Etc. on October 12, 1994. CR 690. That order is unpublished. The district court entered an Order On Motions For Summary Judgment On December 21, 1994. CR 802. That order is published at 871 F. Supp. 1291.

## STATEMENT OF JURISDICTION

The district court found that it had jurisdiction over the cross-claims asserted against NFRC pursuant to 28 U.S.C. 1331. See CR 690 at 4. The district court entered a final judgment under Fed. R. Civ. P. 54(b) on the cross-claims against NFRC on February 15, 1995. CR 880. NFRC filed a timely notice of appeal on February 28, 1995. This Court's jurisdiction rests on 28 U.S.C. 1291.

## ISSUE PRESENTED

This appeal arises out of a dispute over the appropriate forum for resolving timber industry challenges to the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("ROD"). The ROD and its supporting Final Supplemental Environmental Impact Statement (FSEIS) were issued in response to orders of the court below, and various environmental groups challenged the ROD in that court. Industry (NFRC and allied plaintiffs) filed challenges to the ROD in the District Court for the District of Columbia. The issue in this appeal is whether the court below erred by allowing the federal defendants to assert cross-claims for declaratory judgment against NFRC (which was already a party to the proceeding below), when those cross-claims sought no more than a resolution of NFRC's already-filed challenges to the ROD, and where both the court below and the District Court for the District of Columbia had found that the interests of justice favored resolving these interrelated challenges to the ROD in a single proceeding in the court below.

## STATEMENT

This case involves challenges to a Record of Decision (ROD) issued on April 13, 1994, which adopted a strategy for managing millions of acres of federal land in the Pacific

Northwest within the range of the Northern Spotted Owl ("owl"). The strategy is described in detail in our opening brief in the related appeal captioned Seattle Audubon Soc. and Native Forest Council v. Lyons, No. 95-35052, at pp. 11-14. It is also described in the summary judgment opinion of the district court, CR 802 at 15-19.

**A. Background -- Litigation In The Western District Of Washington And The Ninth Circuit.** -- The strategy had as its impetus several years of litigation in the Western District of Washington and other courts within the Ninth Circuit. See CR 802 at 6-8. In 1988 the Forest Service adopted a plan for management of forests within its jurisdiction that were home to the owl. In 1989, the Seattle Audubon Society and the Washington Contract Loggers Ass'n both challenged the plan and its accompanying EIS, from opposite perspectives. See Seattle Audubon Soc. v. Evans, 771 F. Supp. 1081, 1083 (W.D. Wash. 1991), aff'd, 952 F.2d 297 (9th Cir. 1991); see CR 802 at 5. After extensive litigation, with full participation by the timber industry, Judge William Dwyer of the Western District of Washington entered an injunction against logging in owl habitat until the Service complied with the National Forest Management Act. See CR 802 at 6. This Court affirmed the judgment and the injunction. Seattle Audubon Soc. v. Evans, 952 F.2d 297.

In January 1992, the Forest Service published a supplemental EIS and in March adopted a ROD establishing guidelines for managing owl habitat. Seattle Audubon Society and co-plaintiffs challenged this ROD in civil action No. C92-479WD. The interests of the timber industry were again represented by Washington Contract Loggers Assn. and also by NFRC, along with other companies and individuals engaged in the timber industry. See Docket in C92-479WD at 6. In May of 1992, Judge Dwyer found that the new ROD and EIS violated NEPA, in three specific ways. Seattle Audubon Soc. v. Moseley, 798 F. Supp.

1473 (W.D. Wa. 1992), aff'd sub nom. Seattle Audubon Soc. v. Espy, 998 F.2d 699 (9th Cir. 1993). Judge Dwyer ordered the agency to prepare a new or supplemental EIS curing these defects, and enjoined the Forest Service from awarding additional timber sales in Regions 5 and 6 (comprising Western Washington, Western Oregon, and Northern California) that would log suitable habitat for the owl. Moseley, 798 F. Supp. at 1493-1494. A schedule for compliance was set for the new EIS. 798 F. Supp. at 1494. NFRC participated in the litigation and in the appeal. See 998 F.2d at 701.

At the same time, litigation filed in the United States District Court for the District of Oregon challenged the Bureau of Land Management's (BLM's) management of forests under its jurisdiction in that State and Northern California, with a particular focus on management of owl habitat. See CR 802 at 7-8; Portland Audubon Soc. v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), aff'd sub nom. Portland Audubon Soc. v. Babbitt, 998 F.2d 705 (9th Cir. 1993); see also Lane County Audubon Soc. v. Jamison, 958 F.2d 290 (9th Cir. 1992)(injunction under Endangered Species Act). This litigation, in which NFRC also participated (see, e.g., 998 F.2d at 707), resulted in injunctions against offering timber sales in owl habitat in BLM administered forests.

The Administration taking office in January 1993 thus faced a situation in which injunctions existed against new timber sales of essentially all federal old growth forests in the range of the owl, covering large portions of three states. As noted in the FSEIS, "the ongoing controversy concerning management of federal lands has resulted in what has been described as a gridlock of lawsuits, court rulings, appeals, and protests \* \* \*." FSEIS at 1-3.<sup>1/</sup> To break that gridlock, the President convened and presided over a conference in

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<sup>1/</sup> The ROD and the FSEIS are included in the Excerpts of Record submitted in related  
(continued...)

Portland, Oregon in April of 1993. At the President's instruction, working groups were set up to conduct assessments and devise plans that would comply with relevant statutes. The efforts of these groups and the federal agencies to develop an ecosystem management plan that would comply with all statutes and court directives are described in our Brief in related appeal No. 95-35052 at 4-10. Those efforts culminated in the issuance of the ROD on April 13, 1994. In the ROD, the Secretaries jointly amended the planning documents of two Forest Service Regions, nineteen National Forests and seven BLM Districts. ROD at 1. The ROD selected, with modifications, Alternative 9 (sometimes referred to as "Option 9") of the FSEIS as management direction for habitat of old-growth forest related species within the range of the owl. ROD at 25-28.

**B. The Controversy Over Whether The ROD Should Be Reviewed In One Court Or Two.** -- Defendants anticipated that issuance of the ROD would engender a host of claims, and therefore requested a status conference before Judge Dwyer, who had presided over the bulk of the preceding litigation and who had set the timetable for issuance of the new EIS and ROD. See supra at 3-4. As defendant-intervenor in the ongoing litigation, NFRC participated in that conference. In a scheduling order issued shortly after the conference, Judge Dwyer expressed his view that "[i]t is clear that all legal challenges to the ROD should be decided in the same district and reviewed by the same court of appeals." CR 426 at 2 (Apr. 21, 1994).

Pursuant to Judge Dwyer's direction, the plaintiffs who had initiated the litigation, Seattle Audubon Society et al., amended their complaint, and other environmental groups

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<sup>1/</sup>(...continued)  
appeal No. 95-35052.

quickly brought additional challenges to the new ROD, which were then consolidated. See Order Consolidating Cases, CR 446, in Supplemental Excerpts of Record. Despite NFRC's previous participation as a litigant in the Western District of Washington, NFRC and its co-plaintiffs chose to bring their challenges to the ROD in the District Court for the District of Columbia.<sup>2/</sup> NFRC filed separate suits against the Forest Service (NFRC v. Thomas, Civil No. 94-1032 (TPJ)(D.D.C.)("Thomas")), and the BLM (NFRC v. Dombeck, Civil No. 94-1031 (TPJ)(D.D.C.)("Dombeck")). These actions were assigned to Judge Jackson.<sup>3/</sup>

Defendants, in an effort to litigate the challenges to the ROD in the most expeditious and economical manner possible, asked the District of Columbia court to transfer the industry cases to the Western District of Washington, or in the alternative, to stay the cases. On June 30, 1994, the District of Columbia court granted defendants' motion to transfer the Thomas action to the Western District of Washington, concluding that the transfer would "best serve the convenience of the parties and the interests of justice in avoiding a waste of limited resources and preventing a duplicative review of the same complex administrative decision and a potentially inconsistent award of relief." CR 489 Exhibit C. The court

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<sup>2/</sup> In August of 1993, NFRC had brought suit in the District of Columbia alleging that the Forest Ecosystem Management Assessment Team, one of the working groups convened to develop a plan that would satisfy the court injunctions, was operating in violation of the Federal Advisory Committee Act, 5 U.S.C. App. 2. The district court, per Judge Thomas Penfield Jackson, ruled that the Team had been convened in violation of the Act's requirements. Northwest Forest Resource Council v. Espy, 846 F. Supp. 1009, 1012-13 (D.D.C. 1994). While the court granted declaratory relief, it refused to grant NFRC's request for injunctive relief forbidding the agencies from relying on the report of the Team, noting, inter alia, that "the effect and consequences of that [declaratory] judgment will be left to other courts and/or other cases." 846 F. Supp. at 1015.

<sup>3/</sup> The day after NFRC and its co-plaintiffs filed their complaints, the Association of Oregon & California Counties filed a complaint against the BLM which repeated many of their charges. Assn. of O & C Counties v. Babbitt, Civil No. 94-1044(TPJ) (D.D.C.)("AOCC").

declined to transfer the Dombeck and AOCC cases based on its finding that venue over the BLM would not lie in the Western District of Washington. Ibid. The court stayed the actions against the BLM, however, to "prevent a duplicative waste of judicial resources and prevent the award of potentially inconsistent relief by separate courts." Ibid.

Despite the express desire of two courts to use the Seattle Court as the single forum for litigating challenges to the ROD, NFRC attempted to keep its claims from being litigated there. Immediately after transfer of the Thomas case, NFRC and its co-plaintiffs in Thomas voluntarily dismissed their transferred claims. CR 486. That action, however, did not end NFRC's involvement in the Seattle litigation; it remained an intervenor.

Defendants thereupon moved to join NFRC, and its co-litigants in the Thomas and Dombeck actions, in the ongoing litigation before Judge Dwyer, asserting a need to have all challenges to the ROD decided in the same district and circuit. CR 490. Judge Dwyer, noting that NFRC had asserted difficulties in contacting the thirteen parties who were not already parties to the case in the Western District of Washington, asked the parties to brief whether the defendants should be permitted to file cross-claims for declaratory judgment against NFRC, which was already a party, CR 500 at 1-2, and the parties briefed that issue.

**C. Judge Dwyer's Rulings On The Cross-Claims For Declaratory Judgment. --**

After briefing, Judge Dwyer granted leave to defendants to assert cross-claims against NFRC with respect to all of NFRC's claims in the Thomas and Dombeck actions. CR 526. In a comprehensive explanation contained in this August 5, 1994 order, Judge Dwyer noted that NFRC had been a party in the case for some time, representing the interests of the forest products industry. CR 526 at 2. Judge Dwyer noted that NFRC and other industry plaintiffs had nevertheless filed challenges to the ROD in the District of Columbia (id. at 3). Judge

Dwyer recounted how the District of Columbia Court had transferred Thomas and stayed Dombeck, having "agreed with an earlier statement by this court that 'it is clear that all legal challenges to the ROD \* \* \* should be decided in the same district and reviewed by the same court of appeals.'" Id. at 4. Judge Dwyer found that NFRC had dismissed the Thomas claims in an effort to "defeat the transfer order" entered by the District of Columbia court, and that if NFRC were to succeed in its effort, "the result would be duplicative, expensive and prolonged litigation." CR 526 at 5. This problem was particularly acute because "[t]he environmentalists' challenges to the forest plan, and those raised by the industry groups, are largely interrelated." Ibid.

Judge Dwyer found that the defendants had standing to assert the cross-claims for declaratory relief, for the following reasons (id. at 7).

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.

Judge Dwyer found that the defendants could properly assert cross-claims against NFRC pursuant to Fed. R. Civ. P. 13(g) with respect to all claims asserted by NFRC in both the Thomas and Dombeck cases. Id. at 7-9. Judge Dwyer noted in this respect that "eleven claims in Dombeck duplicate claims asserted in Thomas," and that the three non-duplicative claims "are so closely related to the other statutory claims that all should be decided together if possible." Id. at 8 n. 3.

Pursuant to Judge Dwyer's ruling, the federal defendants filed an amended answer asserting cross-claims against defendant-intervenor NFRC. CR 536. The federal defendants

asserted that NFRC's actions in the District of Columbia seeking review of the ROD under the Administrative Procedure Act threatened to expose them "to multiple adjudications of their rights and duties with respect to the ROD and the FSEIS, and possible inconsistent legal obligations \* \* \*." CR 536 at 8. The defendants accordingly asked 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) in respect of each claim asserted in the complaints" filed by NFRC in the District of Columbia. Id. at 9.

NFRC responded by moving to dismiss the cross claims, or to transfer them back to the District of Columbia. CR 575. This motion was denied on October 12, 1994. CR 690. Judge Dwyer explained that "the declaratory judgment claims will permit the interrelated challenges to the 1994 forest plan to be adjudicated in the same district and reviewed by the same circuit," and that the threat of duplicative litigation and inconsistent results was sufficient injury for defendants to maintain the declaratory judgment claims. CR 690 at 2-3.

**D. Judgment On The Merits.** -- The federal defendants moved for summary judgment on all challenges by both the environmental groups and by NFRC. NFRC opposed the motion for summary judgment; it submitted a 120-page brief setting out its procedural claims and merits challenges to the ROD (CR 715)(in Supplemental Excerpts), along with extensive exhibits. NFRC submitted supplemental briefs on November 7, 1994 (CR 740), November 30, 1994 (CR 790), and December 8, 1994 (CR 799), and participated in oral argument on November 18, 1994 (CR 801).

After reviewing the briefing submitted by the parties and the extensive record in the case, Judge Dwyer granted the federal defendants' motion for summary judgment as against both NFRC and the environmental plaintiffs. CR 802, Order on Motions for Summary

Judgment (Dec. 21, 1994)(reported at 871 F. Supp. 1291). Judge Dwyer made a host of rulings in his 69-page order on summary judgment, resolving the interrelated challenges of the environmental groups and NFRC. For reasons of space, we will not summarize those rulings here, as they are not directly at issue in this appeal.

On February 15, 1995, Judge Dwyer entered final judgment pursuant to Rule 54(b) for federal defendants on all of the environmental plaintiffs' claims alleging that the ROD and the FSEIS were adopted contrary to law. CR 881 at 2. In the same document, Judge Dwyer entered judgment for federal defendants, and against cross-claim defendant NFRC, "declaring the said ROD and FSEIS lawful as against NFRC's claims pleaded in NFRC v. Thomas and NFRC v. Dombek, Civil Nos. 94-1032 and 94-1031 in the United States District Court for the District of Columbia." Separate appeals from the judgment were filed by plaintiff Native Forest Council (No. 95-35052), plaintiffs Forest Conservation Council and Save the West (No. 95-35214), and by NFRC (No. 95-35215).

On May 1, 1995, NFRC filed a motion for summary reversal in this Court, alleging that a recent decision, Director, Office of Workers' Compensation Programs, Department of Labor v. Newport News Shipbuilding and Dry Dock Co. ("Newport News"), 115 S. Ct. 1278 (1995), had undercut the district court's decision. That motion was denied on May 11, 1995, without prejudice to raising the issue on appeal.

#### STANDARD OF REVIEW

This Court reviews decisions to grant or deny declaratory relief de novo. Fireman's Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988).

## SUMMARY OF ARGUMENT

The cross-claims filed against NFRC by the government sought declaratory judgments as to the validity of claims that NFRC had brought in the District of Columbia. They were simply a device for bringing about a result that both Judge Dwyer and Judge Jackson had tried to achieve, but which NFRC's litigating tactics had thwarted: consolidation of the inter-related challenges of environmentalists and industry to the ROD in the Western District of Washington. The agencies were not claiming a right of review as parties adversely affected or aggrieved by their own decision, hence Newport News is inapposite. They were simply seeking to have their defenses to NFRC's challenges to the ROD adjudicated in an appropriate forum.

The Declaratory Judgment Act was appropriately invoked for this purpose. The agencies did not need specific statutory authorization to request declaratory relief as to claims which NFRC had brought against the agencies. Caselaw demonstrates that even if the government might have needed statutory authorization to bring a coercive suit against NFRC, this would not limit the government's access to the declaratory judgment remedy where the government was already defending against NFRC's claims, and asked for no more than a determination of the validity of those claims.

The agencies plainly had standing to request declaratory relief, based on the harm threatened by inconsistent adjudications in two different courts, which would have seriously interfered with management of federal forests in the Northwest. That harm was sufficiently impending, since litigation had actually been filed, and was plainly redressible by a single decree which contained rulings on all of the inter-related challenges to the ROD.

The district court properly exercised its discretion to grant the requested declaratory relief. The District of Columbia was not a more appropriate forum for adjudicating the issues, as both Judge Jackson and Judge Dwyer had found. The agencies were not "forum shopping," but simply trying to bring about the consolidated adjudication of challenges that both Judges had tried to achieve. No procedural unfairness resulted; NFRC was given an adequate opportunity to challenge the ROD.

## ARGUMENT

### I

#### **THE FEDERAL DEFENDANTS DID NOT NEED SPECIFIC STATUTORY AUTHORIZATION TO FILE CROSS-CLAIMS FOR DECLARATORY RELIEF AGAINST NFRC, WHEN THOSE CLAIMS WERE FILED SOLELY TO RESOLVE NFRC'S CHALLENGES TO THE ROD IN THE APPROPRIATE FORUM**

A. Introduction. -- NFRC's primary contention (Br. 11) in this appeal is that the agencies allegedly lacked "statutory standing" to file the cross-claims for declaratory judgment. NFRC asserts (Br. 12) that the Supreme Court's recent decision in Newport News establishes that the agencies had to demonstrate "specific statutory authorization for their claim against NFRC \* \* \*." As we show below, NFRC has misread Newport News. That case holds only that a federal agency is generally not an "aggrieved" party under statutes providing a right of review of agency decisions. Newport News is not applicable here, because the federal agencies did not sue NFRC under the Administrative Procedure Act, nor did they claim to be aggrieved by the ROD.

NFRC has confused the issue by proceeding as if the agencies in this case sought affirmative relief against NFRC unconnected to NFRC's suit against the agencies. NFRC ignores the most pertinent fact about the agencies' cross-claims, which is that they simply

sought to adjudicate claims that NFRC had already brought against the agencies in the District of Columbia. The cross-claims were a method, suggested by Judge Dwyer, to avoid the waste and duplication that would have resulted from litigation in two courts over interrelated challenges to the same government action. Both Judge Dwyer and Judge Jackson attempted to avoid the problem of waste and duplication by directing the industry challenges to the ROD to the court and circuit that had been handling the spotted owl litigation for several years.

The declaratory judgment procedure thus was used in this case simply to remedy the situation brought about by NFRC's efforts "to defeat the transfer order." CR 526 at 5. NFRC's protestations (Br. 27) that the government used the Declaratory Judgment Act to haul a hapless citizen into court to force it to litigate, and was guilty of using the Act as a "tool" to "oppress and intimidate citizens," are disingenuous. NFRC wants to litigate the legality of the ROD, but in its chosen forum. However, interests of economy, efficiency and fairness in this case dictated that the industry challenges to the ROD be adjudicated by a court which was close to the forests at issue, was familiar with the issues, and was already handling a host of other challenges to the ROD. The cross-claims for declaratory judgment were simply a mechanism for consolidating all challenges in the most appropriate forum.

Once the matter is properly characterized, the issue is easily resolved. As shown in more detail below, even assuming that the agencies might have lacked standing to bring new claims for affirmative relief against NFRC, they did not lack standing to use the declaratory judgment procedure to resolve NFRC's claims against the agencies, in order to avoid duplicative suits. See United Food & Commercial Workers v. Food Employers Council, Inc., 827 F.2d 519, 524-525 (9th Cir. 1987); United States v. Pennsylvania Dept. of

Environmental Resources, 923 F.2d 1071, 1072-1073 (3rd Cir. 1991). The agencies did not need specific statutory authorization to invoke the declaratory judgment procedure in these circumstances, but could file the cross-claims based on the compelling need to have the validity of the strategy adjudicated in a single forum.

All of the requisites for seeking a declaratory judgment were present in this case, as we show below. However, before we reach those particular requirements, it is helpful to explain why the Newport News decision, on which NFRC largely rests its case, does not apply.

**B. Newport News Does Not Govern The Cross-Claims In This Case.** -- In Newport News, the Director of the Labor Department's Office of Workers' Compensation Programs petitioned the court of appeals for review of a Benefits Review Board decision that denied full-disability compensation to a worker. 115 S. Ct. at 1282. That Board is appointed by the Director; its decisions are appealable to a United States court of appeals, at the instance of "any person adversely affected or aggrieved by" the Board's order. 33 U.S.C. 921(c). Though the worker in Newport News did not appeal, the Director claimed standing to appeal as a person "adversely affected or aggrieved" by the decision within the meaning of Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(c). Ibid. The Supreme Court held that the Director did not have standing to appeal the Review Board's decision. The Court found that the Director's asserted interest in ensuring adequate payments to claimants did not demonstrate that the Director was "adversely affected or aggrieved." 115 S. Ct. at 1286.

Unlike the Director in Newport News, who sought to have the court set aside a decision made by a unit of her own agency, the federal appellees here did not seek to set

aside their own decision to adopt the ROD. Unlike Newport News, they did not claim to be adversely affected or aggrieved by the final agency action at issue.

NFRC, on the other hand, sought to obtain rulings that the ROD was "arbitrary and capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law under 5 U.S.C. 706(2). See Complaint in NFRC v. Dombeck at 36; Complaint in NFRC v. Thomas at 50 (CR 536, Exs. A & B). The federal agencies, as a defense to NFRC's action, asserted that the ROD meets the standards of 5 U.S.C. 706(2).

The agencies' cross-claims here simply sought to have their defense to NFRC's claims adjudicated in the appropriate forum. CR 536 at 9, 10. The relief sought by the agencies was expressly limited to a declaration regarding the validity of NFRC's claims brought in the District of Columbia; no affirmative relief against NFRC was requested. Ibid.<sup>4/</sup>

A declaratory judgment claim such as the one brought here is simply a way to "determine the legitimacy of a defense;" this sort of suit does not "ask any affirmative remedy," and is not treated as a suit for affirmative relief. United Food & Com. Workers v. Food Employers Council, 827 F. 2d 519, 525 (9th Cir. 1987). Jurisdictional issues in such a case are resolved by looking to the character of the threatened or pending action, not to the declaratory judgment action itself. For instance, "[w]hen a declaratory judgment plaintiff

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<sup>4/</sup> NFRC complains (Br. 16) that the agencies "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." This complaint is disingenuous. NFRC's voluntary dismissal of the Thomas case for the purpose of defeating the transfer order (CR 526 at 5) leaves it free to refile that case at any time. The claims in Thomas, which largely overlap those in Dombeck in any event (see CR 690 at 5), are sufficiently "threatened" to warrant declaratory relief. See Societe de Conditionnement v. Hunter Engineering, 655 F.2d 938, 945 (9th Cir. 1981)(fact that threat of litigation is withdrawn does not render declaratory relief inappropriate if there is reasonable apprehension that it may be reinstated).

asserts a claim that is in the nature of a defense to a threatened or pending action, the character of the threatened or pending action determines whether federal question jurisdiction exists with regard to the declaratory judgment action." Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1315 (9th Cir. 1986) (emphasis added); see also cases there cited. Similarly, in determining which party has the burden of proof, it is the character of the threatened or pending action that governs.<sup>5/</sup> See generally Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941)("It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case"). These cases make clear that a party's defenses to a threatened or pending action in another forum are not somehow converted into affirmative requests for relief, simply because they are made the subject of a declaratory judgment action. They remain defenses.

Thus, NFRC distorts the nature of this case when it claims (Br. 14) that "[t]he federal agencies do not have standing under the APA for their claim against NFRC requesting review of their own decision." The agencies did not seek APA review, NFRC did. The government asserts, as a defense, that NFRC is entitled to no relief because the ROD is not arbitrary or capricious. Newport News, which considered whether an agency had standing to maintain a judicial challenge to its own decision, has no application, since the federal agencies here are simply defending their decision. As the cases make clear, the fact that the

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<sup>5/</sup> As the court below held (CR 802 at 24), the fact that the agencies brought the declaratory judgment action to resolve a particular dispute does not shift the burden of proof that would normally apply. Here, the burden remains with NFRC as the challenger to the agency action. Ibid. See Utah Farm Bureau Ins. Co. v. Dairyland Ins. Co., 634 F.2d 1326, 1328 (10th Cir. 1980); Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1176 (1st Cir. 1976), cert. denied, 429 U.S. 1053 (1977); Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 546 (9th Cir. 1949).

agencies brought a declaratory relief action does not change the basic nature of this case, which is an action by NFRC seeking review of the agency decision.<sup>6/</sup>

**C. The Agencies Did Not Need Specific Statutory Authorization To File Declaratory Judgment Cross-Claims, When They Were Already In Litigation With NFRC Over The Validity Of The ROD.** -- The district court properly rejected NFRC's contentions that the agencies lacked statutory authority to bring cross-claims for summary judgment. The court stated in a Sept. 6, 1994 order that "[d]eclaratory judgment practice is well established and is available to federal defendants." Memorandum Decision on NFRC's Motion to Stay Proceedings or Extend Time to Answer, CR 563 at 6 (in Supplemental Excerpts). See also CR 542 at 2 (in response to NFRC's authority argument, court cites cases "in which government agencies have sought declaratory judgments").

The 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. In United States v. 129.4 Acres of Land, Etc., 789 F.2d 715, 717-718 (9th Cir. 1986), for instance, this Court held that the Navy, having been subject to a condemnation claim for compensation for the taking of water rights, could file a counterclaim for declaratory judgment to order the plaintiff to continue delivering water to it. No specific authority for such a counterclaim was required. Similarly, where a party files suit against a federal agency seeking a declaration that certain conduct is legal, the agency can counterclaim for a declaratory judgment that the

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<sup>6/</sup> Newport News is distinguishable on other grounds as well. The majority's holding relied upon the fact that the Director of the Office Of Workers Compensation Programs had been given no duties in the area of assuring correctness of particular disability adjudications -- indeed, Congress had "taken pains to remove adjudication from her realm." 115 S. Ct. at 1287 (emphasis in original). This is plainly distinguishable from the situation of the federal appellees, who are directly responsible for determining appropriate management strategies for the federal lands within their respective jurisdictions.

conduct is not legal. See Sisseton-Wahpeton Sioux Tribe v. United States Department of Justice, 718 F. Supp. 755, 756 n.1 (D.S.D. 1989), rev'd on other grounds, 897 F.2d 358 (8th Cir. 1990). When sued, the United States has access to the same remedies as other persons. See Rex Trailer Co. v. United States, 350 U.S. 148, 151 (1955)(United States "may resort to the same remedies as a private person" to protect its property interests); Cf. United States v. Tafoya, 803 F.2d 140, 141 (5th Cir. 1986)(when a party sues United States for monetary relief, United States has "inherent" right to assert a claim for a setoff, "independent of any statutory grant of authority to the executive branch").<sup>2/</sup>

It follows that where a suit against the United States has been brought in an inappropriate forum, the government can file a corresponding declaratory judgment claim in the appropriate forum, without the need for specific congressional authorization. A case illustrating this point is United States v. Pennsylvania Dept. of Environmental Resources, 923 F.2d at 1072-1074. In that case, a state agency sued the United States Department of the Navy in state court, seeking to order the Navy to operate a base in compliance with the state's interpretation of state environmental statutes. The United States raised a sovereign immunity defense in state court, but also filed a declaratory judgment action in federal district court. The district court dismissed the Navy's action, but the court of appeals reversed. The court of appeals noted that the declaratory judgment claim asserted by the

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<sup>2/</sup> Contrary to NFRC's argument, Newport News did not purport to overrule the many cases that have upheld the implicit authority of the federal government to utilize remedies such as declaratory judgment actions in appropriate circumstances. NFRC plainly errs when it characterizes (Br. 16, emphasis in original) the holding of Newport News as that "a federal agency may not file any claim in court without specific congressional approval." Indeed, NFRC itself recognizes (Br. 13) that Newport News did not overrule the long line of cases (many decided by the Supreme Court) which have held that the United States has implicit authority to sue to protect its property or national security or to prevent a burden on interstate commerce, among other purposes.

government was the same as its defense asserted in the state court. 923 F.2d at 1072-1073. The court stated that the appropriate inquiry in a case like this is what forum "will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." Id. at 1075, quoting from 10A Wright, Miller, Kane, Federal Practice and Procedure § 2758 (1983). The court found that declaratory judgment was appropriate because "the United States has a compelling interest in adjudicating its sovereign immunity under federal statutes in a federal forum," 923 F.2d at 1072.

No specific statutory authorization to file a declaratory judgment action was required by the Court in Pennsylvania, and none is required here.<sup>8/</sup> Like the Navy in Pennsylvania, the agencies here had a compelling interest in adjudicating the claims against them in a forum that "will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." 923 F.2d at 1075. As in Pennsylvania, the agencies did not seek any relief beyond adjudication of their defenses to the actions previously filed by NFRC in an inappropriate forum. Indeed, the government had an even stronger case for declaratory judgment here, since, unlike Pennsylvania, the judge in the other forum specifically found that the issues should be resolved in the Western District of Washington. See supra at 6-7.

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<sup>8/</sup> NFRC attempts (Br. 13 n.7) to distinguish Pennsylvania on the ground that it involved a suit by the government in its capacity "as a landowner." Nothing in the opinion in Pennsylvania even adverts to the capacity in which the suit was brought, let alone suggests that the holding was limited to situations where the United States sues as a landowner. The basis for the ruling was the government's "compelling interest in adjudicating its sovereign immunity under federal statutes in a federal forum," 923 F. 2d at 1072, hardly an interest that is limited to cases involving government property. In any event, even if Pennsylvania could be limited to cases where the government is protecting its interests as a landowner, it would still support the district court's ruling here, since this case also involves the federal government's responsibilities as a landowner.

Another instructive case is Puget Sound Gillnetters Ass'n v. U.S. Dist. Court, 573 F.2d 1123, 1133 (1978), vacated on other grounds sub nom. Washington v. Fishing Vessels Ass'n, 443 U.S. 658 (1979), where this Court found that the United States could bring an injunction action against the State of Washington to keep it from using state courts to defeat the orders of the district court respecting Indian fishing rights. Like the situation here, the parties in that case had been proceeding before a federal district judge in the Western District of Washington. When the state courts, with the State's participation, began to issue inconsistent orders, the United States successfully obtained an injunction from the district court. This Court affirmed, noting that "[a]s a party to this action, the state was bound not to interfere with the district court's enforcement of its decree \* \* \*." 573 F.2d at 1133. The Court did not require the United States to identify a specific statutory authorization to seek an injunction against a party already in litigation with it over the same subject matter.

The authorization cases cited by NFRC (Br. 14, 21) are inapposite, as they involve situations where the United States sought affirmative relief beyond a mere declaration of the validity of its defenses to the claims of a party. United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979), for instance, involved a suit by the United States against state officials seeking injunctive relief to require better treatment of disabled persons.<sup>2/</sup> Marshall v. Gibson's Products, Inc. of Plano, 584 F.2d 668 (5th Cir. 1978), involved a suit by the Secretary of Labor to force an employer to submit to an inspection. Impro Products Inc. v. Block, 722 F.2d 845 (D.C. Cir. 1983), involved an agency's counterclaim for an injunction, a remedy which went well beyond adjudication of the agency's defenses to plaintiff's claims.

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<sup>2/</sup> Mattson nevertheless makes clear that "[e]ven if there is no express provision [of statutory authority], the government can sue if it has some interest that can be construed to warrant an implicit grant of authority." 600 F.2d at 1298. See infra at 23, n. 12.

In contrast to these cases, NFRC initiated the action against the federal agencies; the agencies simply sought declaratory relief before Judge Dwyer so that all of their duties with respect to the ROD could be adjudicated in one forum. No case cited by NFRC indicates that agencies need specific congressional authorization to utilize the declaratory judgment procedure for this limited purpose.<sup>10/</sup>

Assuming that the government might have needed statutory authorization to bring a coercive suit against NFRC, this would not have limited access to the declaratory judgment remedy. This characteristic of the declaratory judgment remedy is illustrated by this Court's decision in United Food & Commercial Workers v. Food Employers Council, Inc., 827 F.2d 519 (9th Cir. 1987). In United Food, the plaintiff unions sought a declaratory judgment that a clause in their collective-bargaining agreement was invalid under the antitrust laws. They alleged that the clause would require them to engage in activities that could cause them to be sued for unfair labor practices. The defendants, like NFRC here, argued that the unions did not have standing to bring a claim for declaratory relief because they would not have had statutory authority to bring an action for affirmative relief, as the antitrust laws only afford standing to either competitors or customers in these circumstances. See 827 F.2d at 522. This Court, while agreeing that the unions did not have authority to seek affirmative relief, nevertheless found that "the unions have standing to bring an action to secure the remedy the Declaratory Judgment Act provides." 827 F.2d at 524. The Court pointed out that the

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<sup>10/</sup> The agencies are not attempting "to use the DJA to circumvent congressional limitations on judicial review," as charged by NFRC at Br. 19, and thus the cases there cited by NFRC are inapposite. The strategy is reviewable in the district court; no party has suggested that review is barred by doctrines of lack of finality, mootness, sovereign immunity, etc. Nor can there be any reasonable claim that Congress has limited the agencies' ability to argue that all challengers have fallen short of sustaining their burden of showing that the strategy is arbitrary, capricious, or in violation of any substantive or procedural requirement.

injury asserted by the unions was that the allegedly illegal clause hampered their ability to negotiate and "creates uncertain legal liability \* \* \*." Id. The Court found that "a declaration that the clause is illegal would redress these injuries" and noted that "the unions are within the class of persons the Declaratory Judgment Act was intended to protect." Accordingly, it found that "[t]he unions have standing to bring an action to secure the remedy the Declaratory Judgment Act provides." Id.

United Food soundly rejected the argument, similar to that pressed by NFRC here, that a parties' lack of authority to obtain affirmative relief necessarily bars use of the declaratory judgment procedure to test the legitimacy of a defense. The Court reasoned that when a party "seeks only to be relieved of an illegal obligation and does not ask any affirmative remedy," there "is no apparent reason not to allow a party \* \* \* to test through declaratory judgment proceedings a defense that could be offered in a coercive suit \* \* \*." 827 F.2d at 525. United Food makes clear that standing to seek declaratory relief is present so long as the plaintiff is injured within the meaning of the Declaratory Judgment Act, and where a judgment would redress that injury. 827 F.2d at 524-525. Standing to obtain a declaration regarding the adequacy of a defense is present even if plaintiffs would not have had statutory authorization to seek affirmative relief based on that legal theory.<sup>11/</sup>

The reasoning of United Food is plainly applicable here. Assuming the agencies could not have brought their own action for affirmative relief against defendants under the

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<sup>11/</sup> NFRC fails to appreciate that whether or not a plaintiff has standing can vary depending on the nature of the relief sought -- plaintiffs may thus have standing to seek certain kinds of remedies even though they lack standing to seek others. See, e.g., Primate Protection League v. Administrators of Tulane Ed. Fund, 500 U.S. 72, 77 (1991)(the fact that plaintiffs may not have had sufficient injury to give them standing to challenge agency's treatment of monkeys did not mean that they did not have standing to challenge effort by agency to remove the controversy to a potentially hostile forum).

APA or other statutes, it does not follow that they cannot test the adequacy of their defenses to NFRC's action, where the other requisites for a declaratory judgment action have been fulfilled, as they have here. The federal government has the same right as other parties to invoke the declaratory judgment procedure for these purposes, and NFRC has cited no case which suggests otherwise.<sup>12/</sup>

**D. All Other Requisites For Declaratory Relief, Including Injury and Redressibility, Were Demonstrated In This Case.** -- As described supra at 8, the district court gave a detailed explanation of why the agencies had sufficiently demonstrated standing to bring the cross-claims for declaratory judgment. The court explained (CR 526 at 7) that the agencies

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<sup>12/</sup> While it is not necessary in this case to reach the question of whether the government would have had authority to seek affirmative relief against NFRC, we believe that the United States could have maintained such a suit under its inherent authority to protect federal property. NFRC concedes (Br. 13 & n.7) that "the United States has inherent power to sue to protect its property \* \* \*." The United States owns the lands that are the subject of the ROD, and is the conservator of the resources on those lands. NFRC's claims in the District of Columbia, which sought to force the federal agencies to cut vastly more timber than the agencies had concluded these forests could sustain, threatened the resources of the forests. In these circumstances, the government has inherent authority to sue to protect its property. See, e.g., Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201-202 (1967) (removal of sunken ship in navigable waterway); United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960) (U.S. allowed to obtain injunction against waste discharges into navigable river); United States v. San Jacinto Tin Co., 125 U.S. 273 (1888)(U.S. allowed to obtain injunction against fraudulent patent to public lands); United States v. Southern Florida Water Management Dist., 28 F.3d 1563, 1571 (United States could sue to protect federal lands without specific statutory authorization); United States v. Ray, 423 F.2d 16 (5th Cir. 1970)(injunction to protect coral reefs); United States v. County Board of Arlington County, 487 F. Supp. 137 (E.D.Va 1979)(suit to enjoin construction near national monuments). It makes no difference that the defendant federal agencies brought the cross-claims in their own name, rather than in the name of the United States. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144-146 (1971)(Court finds federal agency had implicit authority to bring an action in federal court to enjoin a state court action on grounds of federal preemption); see also Mitchum v. Foster, 407 U.S. 225, 235-36 (1972); S&E Contractors, Inc. v. United States, 406 U.S. 1, 10 (1972)(treating agency as United States); Small Business Administration v. McClellan, 364 U.S. 446, 449 (1960)(same). The fact that the environmental plaintiffs named government officials as defendants, rather than the United States itself, should not control whether the government may assert cross-claims against NFRC.

were faced with "important and substantial claims by NFRC and its co-plaintiffs" that "will surely be litigated." Since those claims were clearly "related to those pending herein, the federal defendants will encounter multiple adjudications of their rights and duties unless relief is afforded."

This conclusion was sound. The touchstone inquiry as to whether a party has standing to bring a declaratory judgment action is whether there is an "actual controversy" which is "definite and concrete, touching the legal relations of parties having adverse legal interests." Societe de Conditionnement v. Hunter Engineering, 655 F.2d at 943 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937)). NFRC does not appear to dispute the existence of an "actual controversy." It would be difficult for NFRC to deny that the dispute between it and the federal agencies is real and not hypothetical.

NFRC instead quarrels with the district court's finding that the federal defendants face a threatened injury that would be redressed by a favorable decision. See Br. 23-30. On this issue, NFRC sows confusion by mischaracterizing the government's position. NFRC claims (Br. 17), for instance, that the agencies' position is that the Declaratory Judgment Act "automatically confer[s] standing on a declaratory plaintiff \* \* \*."<sup>13/</sup> The agencies make no such claim of automatic standing -- their standing rests on the harm threatened by inconsistent adjudications, which could be redressed by a single decision on all challenges to the strategy.

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<sup>13/</sup> The agencies simply contend that the federal government, like any other party, may invoke the Declaratory Judgment Act where other procedural requirements (like jurisdiction and standing) are met, since the Act makes clear that a court 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." 28 U.S.C. 2201 (emphasis added).

NFRC also contends (Br. 22-23) that "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." Once again, NFRC has misunderstood the basis for the agencies' standing in this case. Standing here rests on the cumulative facts that 1) NFRC has standing to sue, and 2) has actually brought suit, and 3) has brought claims that are interrelated with the claims of other challengers in a way that could easily result in inconsistent adjudications if all claims are not decided together. It is the combination of these facts, particularly the danger of inconsistent adjudications, which gives the agencies standing to invoke the Declaratory Judgment Act.

Taking a slightly different tack, NFRC contends (Br. 24-25) that the pendency of its Dombeck action in the District of Columbia does not create injury, because "[o]nce 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." This argument ignores that injury for purposes of declaratory judgment standing may stem not only from the possibility of a future suit, but from the fact that already-filed litigation may lead to a multiplicity of suits and inconsistent adjudications. Thus, for instance, in Travelers Ins. Co v. Louisiana Farm Bureau Fed'n., 996 F.2d 774, 777 & n.9 (5th Cir. 1993), the court held that a company that had already been sued in three different state courts could bring a declaratory judgment action in federal court "to avoid a multiplicity of suits," noting that "[i]t is abundantly clear that multiple lawsuits on the same issue can result in differing and conflicting decisions and do result in a waste of judicial time and resources." See also Texport Oil Co. v. M/V Amolyntos, 11 F.3d 361, 365-366 (2d Cir. 1993)(declaratory relief appropriate where it will "serve a useful purpose in clarifying and settling the legal relations in issue" even though the matter was

currently before another court). Moreover, Fed. R. Civ. P. 57 instructs that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."<sup>14/</sup>

In the same vein, NFRC contends (Br. 27) that "[n]o 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." First of all, this argument ignores the fact that NFRC v. Dombeck, whose claims overlap those made in Thomas, is pending. In the district court, NFRC made clear that "at the conclusion of this case NFRC will renew its claims in NFRC v. Dombeck, and will pursue all available relief in that case and otherwise as permitted by law." CR 715; NFRC Memo. in Opp. to Motion for Summ. Judg. at 19. Second, NFRC has given no assurance that it will "wait[] several years" to refile Thomas, and presumably would try to get these claims litigated rapidly as well. Thus, the injury to the agencies, in the form of duplicative litigation with the potential for conflicting results, is sufficiently impending to support standing.

NFRC next asserts (Br. 28) that "no risk of inconsistent results ever existed," because "Judge Jackson had ended that risk by staying the Dombeck case until this case was decided." This argument is disingenuous. When Judge Jackson found that he could not

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<sup>14/</sup> As these cases indicate, the fact that an action involving the same parties is pending may provide grounds for a court to refuse to exercise its discretion to grant a declaratory judgment, at least where the issues "can be tried with equal facility" in the pending cases. Lippert Bros., 233 F. Supp. at 654, quoting from Aetna Casualty & Surety Co. v. Quarles, 92 F.2d 321, 324 (4th Cir. 1937). However, it does not deprive the court of jurisdiction, or undercut plaintiffs' standing. NFRC's argument that litigation of the validity of the ROD in two courts was preferable goes to the propriety of Judge Dwyer's exercise of discretion to grant declaratory relief, not to standing, and hence will be discussed infra at 29-31.

transfer NFRC v. Dombeck because of venue problems, he stayed that case to "prevent a duplicative waste of judicial resources and prevent the award of potentially inconsistent relief by separate courts." CR 489, Exh. C. The stay was based on the assumption that the transfer order in NFRC v. Thomas, entered the same day, would permit Judge Dwyer to adjudicate both industry and environmental group challenges to the strategy, thereby preventing "duplicative review of the same complex administrative decision and a potentially inconsistent award of relief." Ibid. However, NFRC defeated Judge Jackson's efforts to avoid inconsistent results by immediately dismissing, without prejudice, the complaint in Thomas. At that point, the threat of inconsistent results returned, and the declaratory judgment procedure was properly invoked to deal with the threat created by NFRC's litigating tactic: As Judge Dwyer explained, "[t]he pendency of Dombeck is not an obstacle to a declaratory judgment suit, especially where the court in the District of Columbia has stayed the lawsuit so the issues can be decided in this district." CR 526 at 8-9, n.3.

Similarly flawed is NFRC's contention (Br. 29) that there was no reasonable threat of inconsistent rulings because "[t]here was at most the chance that the agencies would perhaps win in one court and lose in the other." This ignores the real threat that the two courts could reach different constructions of the agencies' obligations under the various statutes and regulations which govern management of these forests. An example demonstrates this point. The ROD provides for, inter alia, Late Successional Reserves, which are protected from programmed timber harvest and are "designed to serve as habitat for late-successional and old-growth related species." It also designates areas as "matrix," where timber harvest will be allowed to occur. ROD at 6-11.<sup>15/</sup> NFRC takes the position that the reserves are

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<sup>15/</sup> A much fuller description of the strategy and the land allocations it makes may be found  
(continued...)

unauthorized, since allegedly "[t]here is no authority in [the Multiple Use Sustained Yield Act] to administer the national forests for old-growth forests, for ecosystems, for biological diversity or for plants." CR 715 at 97. In contrast, the environmental group plaintiffs in the related appeals before this Court take the position that the ROD failed to set aside enough protected forest land in order to assure that old-growth related species would remain viable. See, e.g., Opening Brief of Native Forest Council in No. 95-35052 at 17-24. A chaotic situation would have resulted had NFRC prevailed before Judge Jackson and had the environmental group plaintiffs prevailed before Judge Dwyer; the agencies could have been faced with a ruling that the Reserves were unauthorized, on the one hand, and a ruling that they were too small to insure viability of wildlife habitat, on the other. Similarly, the agencies could have been faced with a ruling in one court that the proper "no-action" alternative for consideration in the FSEIS was the high level of timber harvesting before the owl controversy developed (NFRC's position), and a ruling in another court that the proper "no-action" alternative was no harvesting at all (the position of some environmental groups). The threat of inconsistent adjudications was real, and was plainly sufficient to support the agencies' standing to obtain a declaratory judgment resolving their legal obligations.

Finally, there is no merit in NFRC's argument (Br. 30-31) that the federal agencies failed to offer "evidence to prove their standing." Standing was based on injury stemming from duplicative litigation and the real possibility of inconsistent adjudications. The agencies supplied the court with NFRC's complaints in the District of Columbia action (CR 536, Exs. A & B); the environmentalists' pleadings were already before the court. If the various

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<sup>15/</sup>(...continued)

in the Brief of Appellees' James Lyons et al. in No 95-35052 at 11-14.

parties had only threatened to bring suit, perhaps more evidence as to the likelihood of duplicative suits might have been required. Here there was no doubt -- complaints had been filed in both courts, and there was no indication whatsoever that either the environmental or industry plaintiffs were not in earnest. In this case, the pleadings themselves established the threat of duplicative and conflicting litigation, and no additional evidence was necessary.

In sum, the agencies were injured within the meaning of the Declaratory Judgment Act by the threat of inconsistent adjudications regarding the legality of their strategy for managing the forests. A declaratory judgment resolving the legal status of the strategy vis-a-vis all challenges would redress this injury. Hence, the district court properly found that the agencies had standing to seek a declaratory judgment.

## II

### THE DISTRICT COURT DID NOT ERR IN FINDING THAT DECLARATORY RELIEF WAS APPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE

Once it is established that there is before the court "a case of actual controversy within its jurisdiction," the determination whether to grant a declaration of the parties rights "rests in the sound discretion of that court." McGraw-Edison Co. v. Preformed Line Products Co., 362 F.2d 339, 342 (9th Cir.), cert. denied, 385 U.S. 919 (1966). NFRC contends (Br. 31-35) that the court should have refused to exercise its discretion to grant such relief, chiefly because NFRC's claims were pending in the District of Columbia. Its arguments on this score are similar to its arguments on standing, and fail for similar reasons.

A. The Fact That Cases Were Pending In The District Of Columbia Did Not Make Declaratory Relief Inappropriate. -- NFRC begins by citing cases which hold that refusal to grant a declaratory judgment is appropriate "where it is being sought merely to

determine issues which are involved in a case already pending and can be properly disposed of therein.' " Br. 32, quoting McGraw-Edison, 362 F.2d at 343. As McGraw-Edison indicates, courts apply this principle "if the issue is one involving a novel question of state law \* \* \* or is, for any other reason, one that can better be adjudicated in another court \* \* \*.'" Ibid, quoting from Yellow Cab Co. v. City of Chicago, 186 F.2d 946, 950-951 (7th Cir. 1951). This principle plainly does not apply here. Here, both Judge Jackson and Judge Dwyer recognized that the District of Columbia was not the appropriate forum for adjudicating industry challenges to the strategy. Judge Jackson recognized that trying the industry challenges in his court could result in "a waste of limited judicial resources" and bring about "duplicative review of the same complex administrative decision and a potentially inconsistent award of relief." CR 489, Exh. C. Judge Dwyer also recognized that "[i]t is clear that all legal challenges to the ROD \* \* \* should be decided in the same district and reviewed by the same court of appeals." CR 526 at 4. This was plainly not a situation where declaratory relief should have been denied because the issue could "better be adjudicated in another court \* \* \*." McGraw-Edison, 362 F.2d at 343.

NFRC's contention (Br. 33) that the summary judgment in this case "did not materially clarify, settle or terminate the dispute over the legality of the forest plan" is also incorrect. One must assume that Judge Jackson intended to defer to Judge Dwyer's rulings on the interrelated challenges by environmentalists and industry, otherwise there would have been no reason for him to transfer NFRC v. Thomas and to stay NFRC v. Dombek. In any event, res judicata will act to prevent repetitive litigation. See Boys Town, U.S.A., Inc. v. World Church, 349 F.2d 576, 578 (9th Cir. 1965), cert. denied, 383 U.S. 910 (1966);

McLaughlin v. Bradlee, 803 F.2d 1197, 1204 (D.C. Cir. 1986). Hence, Judge Dwyer was correct in believing that a declaratory judgment would serve to settle disputed issues.

**B. The Agencies Were Not Forum Shopping.** -- It ill becomes NFRC to allege (Br. 34) that "[t]he evident purpose of the cross-claim was forum-shopping \* \* \* ." If their purpose was "forum-shopping," why did the agencies choose a judge who had ruled against them in the two previous rounds of litigation in this long-running case? See supra at 3-4. The agencies simply recognized that it was in the interests of efficiency to submit the case to the judge who had been handling this litigation for several years, who was familiar with the issues, and who had directed preparation of the particular EIS that was now at issue.

Despite its previous participation in the litigation before Judge Dwyer, NFRC in August 1993 decided to begin taking aspects of this controversy to the District of Columbia, far from the lands that are at issue. NFRC has pinned the forum-shopping label on the wrong party.

**C. A Declaratory Judgment On The Industry Claims Was In The Public Interest.** -- The public interest is a factor in determining whether to grant declaratory judgment. See, e.g., Natural Resources Defense Council v. U.S.E.P.A., 966 F.2d 1292, 1299 (9th Cir. 1992). NFRC cites (Br. 33) Washington Public Power Supply System v. Pacific Northwest Power Co., 332 F.2d 87, 88 (9th Cir. 1964), for the proposition that declaratory relief is inappropriate in cases involving "issues of public moment \* \* \* ." But NFRC leaves out the critical next phrase in the sentence from which it quotes, which is "unless the need is clear, not remote or speculative." 332 F.2d at 88. In this case, the need for a consistent adjudication on all challenges to the strategy was not "remote or

speculative," since the ROD represented final agency action, ripe for review, and had been challenged by both environmental groups and industry.

The public interest plainly favored granting declaratory relief, as Judge Dwyer explained:

The environmentalists' challenges to the forest plan, and those raised by the industry groups, are largely interrelated. \* \* \* To adjudicate one set of challenges in the Ninth Circuit, and the other set in the District of Columbia Circuit, would inflict intolerable delay, expense, and confusion on the public. The federal courts must make the justice system work sensibly.

CR 526 at 5-6. In addition to the need for consistent adjudication of interrelated claims,<sup>16/</sup> the public interest also favored litigating these claims in the Pacific Northwest, rather than the District of Columbia, because that is where the forests are, as well as the great majority of people who depend on the forests for jobs, recreation, watershed, etc. Litigating cases in the locality where people will be affected is in the public interest because it "serves to further public participation in and the accountability of a judicial process that will result in decisions directly and vitally affecting large numbers of citizens." Adams v. Bell, 711 F.2d 161, 167 n.34 (D.C. Cir. 1983)(en banc), cert. denied, 465 U.S. 1021 (1984); see also Liquor Salesmen's Union Local 2 v. NLRB, 664 F.2d 1200, 1205 (D.C. Cir. 1981).

**D. No Procedural Unfairness Resulted From The Declaratory Judgment.** --

NFRC briefly raises (Br. 35) a number of other procedural issues, such as allegedly improper denial of its Rule 54(b) motion, improper use of the cross-claim procedure, and

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<sup>16/</sup> Contrary to NFRC's claim (Br. 35), the threat of inconsistent adjudications did not end with Judge Dwyer's rejection of the environmental plaintiffs' claims in December 1994, since some of those plaintiffs have appealed. Part of the problem that Judge Dwyer was trying to avoid was the complication of having two circuit courts of appeals adjudicating the validity of the ROD. In any event, Judge Dwyer had to make a determination on allowing the declaratory judgment cross-claims before he decided the merits; he should not be expected to foretell the future.

insufficient opportunity for discovery. NFRC does not assert these as independent grounds for reversal, but instead as reasons why permitting the declaratory judgment claims was unfair in this case. However, NFRC's claims of unfairness are implausible.

Judge Dwyer properly rejected NFRC's contention that the agencies' cross-claims for declaratory relief were compulsory counterclaims that were required to have been filed pursuant to Fed. R. Civ. P. 13(a) in the District of Columbia. See CR 690 at 4-5. In so doing, Judge Dwyer properly relied upon: 1) the fact that federal defendants had not yet had to file an answer in Dombeck, since that action had been stayed,<sup>17/</sup> and 2) the purpose of Rule 13(a), which is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters," would be defeated by a holding that the government could only litigate industry's challenges in a different forum than the environmental groups' challenges.<sup>18/</sup> NFRC has presented nothing to rebut these conclusions.

Judge Dwyer also properly denied NFRC's motion for entry of final judgment under Rule 54(b). NFRC filed this motion on July 28, 1994 (CR 519), more than two months after it had challenged the ROD in the District of Columbia, and after the agencies had sought to bring NFRC's challenge before Judge Dwyer first through a motion to transfer, then through motions to join and then the cross-claims for declaratory judgment. The Rule 54(b) motion was patently an effort to defeat Judge Dwyer's attempts to adjudicate all aspects of the controversy. The court did not abuse its discretion in refusing to grant the requested judgment.

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<sup>17/</sup> See 3 Moore's Federal Practice ¶ 13.12[2], n.2.

<sup>18/</sup> See Southern Construction Co. v. Pickard, 371 U.S. 57, 60 (1962).

Judge Dwyer made every effort to assure that NFRC had a fair chance to present its claims, consistent with the need for a prompt decision in this case of great public importance. See Aug. 5 Order Granting Leave to Amend Answer (CR 526) at 10 (vacating filing date for summary judgment motions and directing all counsel to jointly propose "a revised schedule for the prompt completion of these cases"); Aug. 23 Order Amending Schedule (CR 542)(noting that NFRC refused to offer a view as to revised schedule, but ordering revisions to existing schedule anyway). With respect to discovery, Judge Dwyer noted in his opinion on summary judgment (CR 802 at 25):

A late-filed motion by NFRC for additional discovery was granted in part, and the schedule adjusted to accommodate it. (Dkt. # 700.) No justification for additional discovery has been shown.

Moreover, Judge Dwyer noted that the agencies had produced a "voluminous administrative record" containing over 100,000 items, and found that this record was "sufficient to show the decision-making process and to permit judicial review under the APA." CR 802 at 26. NFRC fully briefed the issues of concern to it in its 120-page opposition to the agencies' motion for summary judgment, and in supplemental briefs. See supra at 9. Thus, there was no significant impediment to NFRC's full presentation of its claims against the ROD. Even if NFRC were correct that it did suffer some prejudice, it was not as a result of the cross-claims, but instead a result of its own repeated attempts to frustrate the actions taken by both Judge Jackson and Judge Dwyer to achieve an efficient and expeditious resolution of all challenges to the ROD in the most appropriate forum.

**CONCLUSION**

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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**JULY 1995**  
**90-1-4-3806**

**STATEMENT OF RELATED CASES**

This appeal arises from the same district court judgment as the appeals in Seattle Audubon Soc'y and Save the West, et al. v. Lyons, et al., No. 95-35214, and Seattle Audubon Soc'y and Native Forest Council v. Lyons, No. 95-35052. Hence, all three appeals should be argued before the same panel, to assure consistency and prevent needless duplication.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 1995, a copy of the foregoing Brief along with Supplemental Excerpts of Record was served by mail, postage paid, to the following counsel of record:

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE AUDUBON SOCIETY, et al.,  
Plaintiffs,  
and  
SAVE THE WEST, et al.,

v.

JAMES LYONS, Asst. Secretary of Agriculture, et al.,  
Defendants-Appellees,

---

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

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**BRIEF OF APPELLEES JAMES LYONS, ET AL.**

---

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 95-35214

---

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

and

SAVE THE WEST, et al.,

v.

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

Defendants-Appellees,

and

WASHINGTON CONTRACT LOGGERS ASS'N., et al..

Defendant-Intervenors.

---

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

---

**BRIEF OF APPELLEES JAMES LYONS, ET AL.**

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**STATEMENT OF JURISDICTION**

Plaintiffs invoked jurisdiction in the district court pursuant to 28 U.S.C. 1331. The district court entered an Order On Motions For Summary Judgment on December 21, 1994, Clerk's Record ("CR") 802, which is published at 871 F. Supp. 1291, and reprinted in the Appellant's Excerpts of Record. The district court entered a judgment pursuant to Fed. R. Civ. P. 54(b) on February 15, 1995. CR 880. Appellants Forest Conservation Council and

Save the West (hereafter collectively referred to as "FCC") filed a timely notice of appeal on February 21, 1995. CR 931. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

### ISSUES PRESENTED

In this appeal, FCC challenges the validity of a comprehensive ecosystem management strategy ("strategy") adopted by the Secretary of the Interior and the Secretary

1. Whether the Final Supplemental Environmental Impact Statement ("FSEIS"), prepared for the strategy pursuant to the National Environmental Policy Act ("NEPA"), considered an adequate range of alternatives.
2. Whether the agencies adequately considered the cumulative impacts of logging on state and private lands.

### STATEMENT OF THE CASE

The issues raised by FCC are quite similar to issues raised by appellant Native Forest Council (NFC) in a related appeal, Seattle Audubon Soc. and Native Forest Council v. Lyons, No. 95-35052. We accordingly rely on the statement set out at pp. 2-15 of the Brief of Appellees James Lyons, et al., in that appeal. See supplemental excerpts of record ("SER") at 10-23. We note as well that the district court opinion contains a full description of the background of this case. CR 802 at 2-21.

### STANDARD OF REVIEW

This Court applies the de novo standard in reviewing summary judgments upholding agency decisions. This Court will review the underlying agency decision under the same standard as was applicable in the district court, that is, the "arbitrary and capricious"

standard specified by 5 U.S.C. 706(2)(A). Nevada Land Action Ass'n v. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993).

## ARGUMENT

### I

#### **THE FSEIS CONSIDERED AN ADEQUATE RANGE OF ALTERNATIVES**

Our full argument regarding the adequacy of the consideration of alternatives in the FSEIS is presented in the Brief of Appellees in related appeal No. 95-35052 at pp. 30-34 (SER 38-42). In the interests of economy, we respectfully refer the Court to that brief for our full position on this issue. A few points deserve emphasis, however.

**A. The Agencies Were Not Required To Give In-Depth Consideration To An Alternative Permitting No Harvest In The Nineteen National Forests And Seven BLM Districts Subject To The Strategy.** -- As the district court pointed out, the agencies considered a wide range of alternative strategies for managing the 24 million acres of federal forests that are home to the Northern Spotted Owl ("the owl"), giving in-depth consideration to nine alternatives with an eighteen-fold difference in levels of probable annual timber sales. 871 F. Supp. at 1320; see also Record of Decision (ROD) at 20. As our brief in No. 95-35052 points out at 31-33 (SER 39-41), the agencies gave a reasoned explanation for refusing to give in-depth consideration to an alternative involving no harvest of timber throughout the 24 million acres covered by the ROD. Banning timber harvest throughout this huge area would have been inconsistent with legal mandates which require these lands to be managed for multiple uses and sustained yield of renewable resources, and contrary to important

policy objectives, such as minimizing adverse economic effects of the strategy on rural economies and communities. See, e.g., FSEIS App. F-97.

Citing the legislative history of the Multiple Use Sustained Yield Act, FCC contends (Br. 8, emphasis in original) that "'multiple use' does not require provision for all uses in all areas." This is true. But the legislative history of the Act refutes FCC's contention that this principle could be stretched to preclude timber harvesting throughout an enormous area comprising nineteen national forests and seven BLM districts, as is involved here.<sup>1/</sup> What the legislative history says is that multiple use "does not mean using every acre of land for all of the various uses; nor does it preclude managing some areas for less than all uses when necessary." 1960 U.S.C.C.A.N. 2379. This clearly refers to particular areas of national forests, not to entire forests or to multi-forest plans. This reading is confirmed by other parts of the report, which explain that:

In practice, the priority of resource use will vary locality by locality and case by case. In one locality timber use might dominate; in another outdoor recreation or wildlife might dominate. Thus, in particular localities the various resource uses might be given priorities because of particular circumstances. \* \* \* But no resource would be given a statutory priority over the others. The bill would neither upgrade nor downgrade any resource.

Ibid. As this language shows, Congress expected that various "localities" within national forests would be used for different purposes, not that entire forests or regions would be set aside for a single use. Planning was to aim for the "combination [of uses] that will best meet

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<sup>1/</sup> BLM forests are managed under similar multiple use - sustained yield principles, pursuant to the Federal Land Policy and Management Act, 43 U.S.C. 1725.3-1. See generally Headwaters, Inc. v. Bureau of Land Management, Medford Dist., 914 F.2d 1174, 1182 (9th Cir. 1990).

the needs of the American people." Id. at 2378-2379. There is no room in this scheme for a wholesale ban on timber harvest across 24 million acres of federal forest land, and hence that alternative was not a "reasonable" one.

FCC has lost sight of the fact that this case involves a broadly-scaled programmatic planning document, not a site-specific decision to authorize timber harvest in a particular area. For particular site-specific decisions, no harvest may be a reasonable alternative, since multiple-use does not require that the particular locality be used for timber production. City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990), cited by FCC at Br. 10, considered the adequacy of a "site specific EIS" (see 915 F.2d at 1309) prepared for an operating plan covering a portion of the Tongass National Forest in Alaska. For such a site-specific EIS, "suspension of harvesting within the entire sale area," was an appropriate "no action" alternative. 915 F.2d at 1312 n.3.<sup>2/</sup>

But suspension of harvest is not a reasonable alternative for a programmatic planning document covering multiple national forests and BLM Districts. Indeed, this Court has never required that a no-harvest alternative be considered in programmatic documents which cover a single national forest. See ICL v. Mumma, 956 F.2d 1508, 1520-1522 (9th Cir. 1992); Resources Ltd. v. Robertson, 8 F.3d 1394, 1401-1402 (9th Cir. 1993).<sup>3/</sup>

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<sup>2/</sup> Havasupai Tribe v. United States, 752 F. Supp. 1471 (D. Ariz. 1990), relied on by FCC at Br. 9, also considered a site-specific proposal, i.e., a permit for a uranium mine on National Forest lands. The alternative of denying the permit was plainly reasonable in that context. The Forest Service accordingly considered that alternative in its EIS, which was upheld by the court. 752 F. Supp. at 1490-1492.

<sup>3/</sup> The Court in Tenakee Springs, 915 F.2d at 1313, specifically noted the distinction between the site-specific EIS at issue in that case and the programmatic EIS which had been prepared for the Tongass National Forest as a whole.

FCC asserts (Br. 8, emphasis in original) that no harvest is nevertheless a reasonable alternative in this case because "[h]ere any current output would seriously impair the productivity of the land as habitat for the spotted owl and other ancient forest species." FCC provides no support whatsoever for this broad assertion. The assertion is flatly inconsistent with the agencies' findings, upheld by the district court decision (see 871 F. Supp. at 1316), which show that the alternative selected by the agencies will not only provide a sustained yield of timber but "will provide an amount and distribution of habitat adequate to support the continued persistence of vertebrate species in the planning area." ROD at 45.

**B. The CEO Regulations Did Not Require Consideration Of A No-Harvest Alternative.**-- FCC's reliance (Br. 7) on a regulation of the Council on Environmental Quality (CEQ), 40 C.F.R. 1502.14(d), is misplaced. That regulation simply requires that an agency consider a "no action" alternative; it does not define what the proper "no-action" alternative is in a particular case. In this case, FCC and other environmental group plaintiffs argued that the "no action" alternative should be no harvest at all on federal lands, while the industry intervenors claimed that the "no-action" alternative should be continuing the very high harvest levels which were prevalent in the mid-1980s, before the spotted owl litigation began.

The agencies found that neither of these extremes represented an appropriate "no-action" alternative, given current legal constraints requiring both multiple-use sustained-yield and protection of ecosystems. The agencies concluded that a literal "no-action" alternative would have been the management direction and plans in effect at the time the Interagency Scientific Committee To Address the Conservation of the Northern Spotted Owl ("ISC")

released its owl conservation strategy in July 1990. FSEIS at 2-19.<sup>4/</sup> Certain changes in administrative direction and biological understanding that occurred since that time,<sup>5/</sup> however, led the agencies to conclude that the literal "no-action" alternative was not a reasonable benchmark. See Memorandum from CEQ General Counsel at 2 (June 21, 1993)(contained in App. C to FSEIS)(SER at 2).

In addition, the General Counsel of CEQ advised that the agencies already had analyzed this literal "no action" alternative through consideration of the "no action" alternative in the Forest Service 1992 Final EIS on Management for the Northern Spotted Owl, the "no action" alternatives in Bureau of Land Management Draft Supplement EISs for affected Resource Management Plans ("RMPs"), and the selected alternatives from the completed Final Supplemental EISs for affected RMPs. CEQ Letter at 2 (SER 2). The letter stated that, "[b]ecause these alternatives have already been published and made available to the public, the FSEIS need not reprint all the details of these alternatives." Id. Finally, the letter noted that a new discussion of such a "no action" alternative was not necessary because it did not constitute a reasonable alternative under 40 C.F.R. 1502.14(a). Id.

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<sup>4/</sup> As noted in the ROD at 24-25, CEQ has explained that, for purposes of analyzing a proposed revision to an existing management plan, "no action" should be construed to mean "'no change' from current management direction or level of management intensity." CEQ, Response to Question 3 in "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations" (Mar. 23, 1981)(set forth at 46 Fed. Reg. 18,026, 18,027).

<sup>5/</sup> These changes included the listing of the owl and marbled murrelet as threatened species under the Endangered Species Act, additional field data and demographic analysis, amendments to existing management plans, and another round of litigation with attendant injunctions directing the agencies to develop new owl conservation strategies. FSEIS at 2-19.

As a proxy for the literal "no-action" alternative, the agencies developed Alternative 7 to approximate management direction they had reason to believe might have been implemented had the agencies adopted the basic elements of the Final Draft Owl Recovery Plan and continued with the planning processes in which they were engaged when the change in Administrations occurred in January 1993. FSEIS at 2-19. In addition to representing a potentially adoptable alternative, the agencies also were able to utilize Alternative 7 as it would have a "no-action" alternative insofar as it provided a comparative baseline for analytical purposes. See FSEIS at 2-20 & Table 2-1. The FSEIS used averages of relative criteria, or their equivalents, taken from the period between 1980 and 1989, to lend additional historical perspective to its comparative analysis. Id. at 2-20.

The district court properly found that this presentation of the "no action" alternative satisfied NEPA and the CEQ regulations. CR 802 at 53-54. As the court noted (id. at 53), it is significant that the agencies' approach to the no-action alternative was specifically endorsed by the General Counsel of CEQ. Such an opinion by CEQ's general counsel is entitled to deference. See Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1246-1247 (D.C. Cir. 1980), Gage v. U.S.A.E.C., 479 F.2d 1214, 1222 n.26 (D.C. Cir. 1973); see also Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1305 (1974)(Douglas, J., in chambers). FCC's contention that CEQ's regulations required the "no-action" alternative to be a "no-harvest" alternative is utterly unsupported.<sup>6/</sup>

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<sup>6/</sup> FCC's contention (Br. 10) that the "no-harvest" alternative, even if not the appropriate "no-action" alternative, is still a "reasonable" alternative fails for the reasons given supra at 3-6. That contention is also refuted in our brief in No. 95-35052 at pp. 31-33 (SER 39-41). FCC's contention (Br. 12) that the district court erred in finding that Alternative 1 as  
(continued...)

## II

### THE AGENCIES GAVE ADEQUATE CONSIDERATION TO CUMULATIVE IMPACTS

The district court found that the agencies had complied with their duty to consider cumulative impacts, in particular impacts from activities on non-federal lands. CR 802 at 62-63. As the district court noted (*id.* at 62), the FSEIS contained a full explanation of its assumptions and findings regarding cumulative impacts, especially as they relate to expected non-federal land management activities, at the outset of its chapters on the affected environment and environmental consequences. FSEIS at 3&4-4 - 3&4-10. In response to comments on the Draft SEIS, the agencies also prepared a 476-page appendix to the FSEIS which gave additional analysis to some 486 species and 4 groups of insects, and considered in detail cumulative effects from non-federal lands. See FSEIS App J-2. This was more than adequate consideration of cumulative effects, particularly for a programmatic planning document. See Resources Ltd. Inc. v. Robertson, 8 F.3d 1394, 1400-01 (9th Cir. 1993)(for a programmatic EIS, a court will not require detailed consideration of non-federal cumulative impacts where the Forest Service can analyze such impacts before specific projects are undertaken).

FCC presents nothing to undercut the district court's ruling that the agencies adequately discussed cumulative impacts. FCC's only argument is that the agency's treatment of cumulative effects assumed that the Endangered Species Act prohibition on

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<sup>6/</sup>(...continued)

analyzed in the FSEIS would have protected "essentially all existing old growth forests," see 871 F. Supp. at 1320, is refuted at pp. 33-34 of our brief in No. 95-35052 (SER 41-42).

"taking" listed species extended to habitat modification where it actually kills or injures wildlife, and that this assumption was allegedly undercut by the District of Columbia Circuit's decision in Sweet Home Chapter of Communities for a Great Oregon v. Babbitt ("Sweet Home"), 17 F.3d 1463 (1994), rev'd sub nom. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 63 USLW 4665 (to be reported at 115 S. Ct. 2407)(1995).

In our brief in No. 95-35052 at 27-30 (SER 35-38), we explained why the agencies properly declined to make changes in their analysis because of the District of Columbia Circuit Court decision. The agencies were vindicated in this respect when the Supreme Court reversed the D.C. Circuit and rejected the facial challenge to the Fish and Wildlife Service's regulation interpreting the ESA's prohibition on the taking of listed species. The Supreme Court's reversal in Sweet Home wholly undercuts FCC's argument (Br. 12-16) that the D.C. Circuit decision somehow vitiated the ROD.

### III

#### **INJUNCTIVE RELIEF WOULD BE UNWARRANTED IN ANY EVENT**

In its conclusion, FCC requests that a reversal on the merits result in an injunction "prohibiting all logging in the planning area pending full compliance with NEPA and NFMA." Br. 16. As we noted in our brief in No. 95-35052 at 35 n.16 (SER 43), such an automatic blanket injunction would be inappropriate under general principles of equity jurisprudence even if FCC were able to show that the ROD was somehow legally deficient. While we do not believe the Court will need to reach issues regarding injunctive relief, it should be aware of recent legislation having to do with implementation of the ROD. Pub. L. 104-19, the Emergency Supplemental Appropriations for Additional Disaster Assistance, for

Anti-terrorism Initiatives, for Assistance in the Recovery from the tragedy that Occurred at Oklahoma City, and Rescissions Act of 1995 became law on July 27, 1995. Subsection 2001(d) of that Act provides, in relevant part:<sup>2/</sup>

(d) **DIRECTION TO COMPLETE TIMBER SALES ON LANDS COVERED BY OPTION 9.** -- Notwithstanding any other law (including a law under the authority of which any judicial order may be outstanding on or after the date of enactment of this Act), the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts on Federal lands described in the "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl," signed by the Secretary of the Interior and the Secretary of Agriculture on April 13, 1994. The Secretary concerned may conduct timber sales under this subsection notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of the enactment of this section.  
\* \* \*

Subsection (i) of this provision goes on to state that "[t]he documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any [Option 9 or salvage] timber sale \* \* \* shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws) \* \* \*." The list of laws which are deemed satisfied includes NEPA, the National Forest Management Act of 1976 ("NFMA"), the Federal Land Policy and Management Act of 1976, the Endangered Species Act, and others. See Subsection 2001(i). Judicial review of such sales is limited, and expedited, and courts cannot grant restraining orders, preliminary injunctions or injunctions pending appeal against an Option 9 sale. Subsection 2001(f). The authority for

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<sup>2/</sup> The entire text of Section 2001 of Pub. L. 104-19 is reprinted in the supplemental excerpts of record at 46-63.

timber sales under this provision expires on December 31, 1996; timber sales offered under this provision before that date will continue subject to the terms and conditions of Section 2001 until completed. See Subsection 2001(j).

FCC's request for an injunction prohibiting all logging in the area pending further compliance with NEPA and NFMA is inconsistent with this legislation, which requires that timber sales under the ROD be expeditiously offered and awarded, notwithstanding any other law, including specifically these two statutes.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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**STATEMENT OF RELATED CASES**

This appeal arises from the same district court judgment as the appeals in Seattle Audubon Soc'y and Native Forest Council v. Lyons, et al., No. 95-35052, and Seattle Audubon Soc'y v. Lyons and Northwest Forest Resource Council, No. 95-35215. Hence, all three appeals should be argued before the same panel, to assure consistency and prevent needless duplication.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 1995, copies of the foregoing Brief and Supplemental Excerpts of Record were served by mail, postage paid, to the following counsel of record:

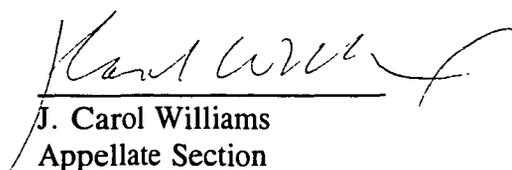
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