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Forest Conference-Federal Advisory Committee Act (FACA) [2]

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S	61	7	2	2

April 8, 1994

To: Will Stelle

From: John Leshy

Re: Forest/FEMAT/FACA

Attached is the near-to-final draft of the FACA memo. I think we can get it into final by COB Monday - we're waiting on some last comments from Department of Agriculture. After talking with Pipkin, it would seem the best course would be to have Jim Lyons and Bob Armstrong send it out under a short cover letter that (1) says agencies should follow it, and (2) draws attention to the fact that, until the advisory committees the memo refers to are chartered in accordance with FACA, they should not operate as advisory committees.

Finally, I'm going to review the ROD over the weekend, and make sure its discussion of FACA conforms.

Let me know if you need anything else.

P.S. The "General Concerns" at the end of the draft will probably be deleted in the final version -

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

To	Will Stelle	From	John Leshy
Dept./Agency		Phone #	
Fax #	456-2710	Fax #	

NSN 7540-01-317-7368

5099-101

GENERAL SERVICES ADMINISTRATION

Attorney Work Product - Deliberative Information - Not for Release
Outside the Federal Government - April 8, 1994

Memorandum

DRAFT

To:

From:

Subject:

This responds to Will Stelle's memorandum to John Leshy and Jim Gilliland dated March 16, 1994. Mr. Stelle sought information regarding the implications of the Federal Advisory Committee Act (FACA) on implementing the President's Forest Plan. We have concluded that whether FACA compliance will be required, will depend on how the various groups are configured and function. For the most part the information describing the groups was obtained from the "Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl" (the "FSEIS").

This memorandum advises that some of the groups contemplated by the President's Forest Plan must be chartered under FACA if they are to function as set out in the FSEIS and related documents. We are not recommending either for or against chartering, pursuant to FACA, any of the groups discussed in this memorandum. We are providing minimal operational advice and recommend, if the decision is made to charter any of the groups, that the federal employees responsible for managing the groups contact either Robert H. Moll in the Division of General Law, Office of the Solicitor, Department of the Interior ((202) 208-5216) or the _____, in Office of General Counsel, Department of Agriculture ((202) _____) for more detailed operational advice.

In considering whether to charter any of the groups, it is important to consider the underlying reasons why FACA was passed. As noted by the Supreme Court, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 453 (1989). In enacting FACA Congress defined the term "advisory committee" very broadly, to include "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established by statute or reorganization plan, or established or utilized by the President, or established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." (emphasis supplied). 5 U.S.C. § 3(2).

When a group is chartered under the FACA, a charter and justification statement must be prepared, approved by the Office of

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Management and Budget (pursuant to Executive Order 12838) and the General Services Administration (GSA), and filed with the Library of Congress. FACA requires that the advisory committee's membership be balanced in terms of the points of view represented and the functions to be performed by the committee. After a committee properly is chartered and its membership appointed, its operations must include the following: providing notice of its meetings in the Federal Register; holding open meetings (except in fairly limited circumstances); establishing an agenda for each meeting; taking minutes for each meeting; providing for public access, subject to the Freedom of Information Act, to all information considered by the committee; and, upon request, making transcripts of meetings available. The level of participation in the meetings by non-members can be shaped by the committee. A committee can provide that no public participation in the meetings by non-members occur although it is advisable to provide for at least some opportunity for public participation in a meeting such as by providing an opportunity for public comment in the final part of the meeting.

Under GSA guidelines and case law, advisory committees may have working groups or task forces convened for the purpose of gathering information or conducting research for the advisory committee. These groups, which are composed of one or more members of the advisory committee and may have as participants non-advisory committee members, need not be chartered separately, and need not meet in public so long as the product of their efforts is deliberated in a public meeting of the advisory committee. These groups may not advise federal officials directly; their work must be channeled through, and deliberated by, the advisory committee.

EXECUTIVE SUMMARY

This memorandum discusses ten groups anticipated by the President's Forest Plan.

We understand that the FSEIS and the Interagency Steering Committee (ISC) anticipate that the following groups will have non-federal members: Regional Interagency Executive Committee (RIEC); Provincial Interagency Executive Committees (PIEC); and Regional Community Economic Revitalization Team (R-CERT). Accordingly, these groups must be chartered pursuant to FACA.

We understand that the following groups will have non-federal members, but could be structured as task forces or working groups of one of the chartered groups, and thus would not need independent charters: Adaptive Management Area Teams (AMAT); Watershed Analysis Groups; Late Successional Reserve Assessment Teams; and State Community Economic Revitalization Team (State CERT).

We understand that the ISC intends that the following groups will be staffed by federal employees only and thus will not need to be

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chartered: Regional Ecosystem Office (REO); the Research and Monitoring Committee (RMC); and the Multi-Agency Command (MAC).

We are aware that the Department of Agriculture has a limitation in its FY 1994 appropriations limiting the amount of appropriated funds that it can spend on its advisory committees. Consequently, the Forest Service may be unable to contribute its proportionate share of the costs of supporting the advisory committees and task forces during this fiscal year unless additional appropriation authority is provided by Congress.

DISCUSSION

Regional Interagency Executive Committee (RIEC)

This group "consists" of the Pacific Northwest federal agency heads of the Forest Service, the Bureau of Land Management, the U. S. Fish and Wildlife Service, the National Marine Fisheries Service, the Bureau of Indian Affairs, and the Environmental Protection Agency (EPA). "Participants" in the committee include the National Park Service, the States of Oregon, Washington, and California, and three tribal organizations. This committee must assure the successful implementation of the selected alternative from the FSEIS, and its "policy and planning decisions and recommendations will be made collaboratively". The RIEC will provide direction to the Regional Ecosystem Office, province teams [PIECs], and the Research and Monitoring Committee, and work with the Regional Community Economic Revitalization Team (R-CERT) to develop criteria and priorities for ecosystem investment opportunities. FSEIS p. 2-13.

RECOMMENDATION

As we understand how the FSEIS and the Interagency Steering Committee (ISC) intend the RIEC to operate, federal officials will meet with representatives of states and tribes to develop consensus recommendations for federal agency decision makers on managing the federal lands. Accordingly, this committee must comply with the provisions of FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

Until the RIEC is organized under FACA all of its members must be federal employees. Meanwhile, as one means of informing themselves, the federal members of the RIEC may accept information from those non-federal individuals or entities intended eventually to become members of the chartered advisory committee through several means including written

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comments, and in meetings between one or more federal officials and an individual or entity. The RIEC should advise these non-federal entities and individuals not to provide a consensus recommendation to the RIEC. The federal officials also may meet with members of the public who are not intended by the FSEIS to be members of the RIEC in much the same manner as described for those that are intended to become members, as well as in public hearings.

If the ISC decides to organize the RIEC under FACA, once it is chartered and its members appointed, the RIEC may operate as contemplated by the FSEIS.

Regional Ecosystem Office (REO)

This office provides staff support to facilitate RIEC decision making and prompt issue resolution in support of implementing the alternative selected from the FSEIS. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal people to obtain consensus advice.

Research and Monitoring Committee (RMC)

This committee, consisting of research scientists and managers from a variety of disciplines, will provide recommendations to the RIEC on the implementation of the selected alternative. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal people to obtain consensus advice.

Provincial Interagency Executive Committees (PIEC)

These teams will consist of representatives of federal agencies, states, American Indian tribes, and "others", and will: "provide or coordinate analyses at the province level that can provide the basis for amendments to Forest and District Plans"; "provide monitoring reports for provinces"; and "encourage and facilitate information exchange and complimentary ecosystem management among federal and non-

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federal land managers". FSEIS p. 2-14.

RECOMMENDATION

As we understand how the FSEIS and the ISC intend the PIECs to operate, a group of federal, state, and local government officials, and members of the public will develop consensus advice and recommendations for federal agency decision makers on managing the federal lands. Accordingly, these committees must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

Our recommendations and advice for the RIEC apply to the PIECs as well.

Adaptive Management Area Teams (AMAT)

The FSEIS designates ten adaptive management areas, and the REO has proposed that each area have a team to implement the FSEIS alternative chosen. These experimental areas will provide opportunities for land managing and regulatory agencies, other government entities, non-governmental organizations, local groups, landowners, communities and individuals to work together to develop innovative management approaches. Participation needs and opportunities will vary from one issue to the next. FSEIS. p. 2-62.

RECOMMENDATION

We understand that the FSEIS and the ISC intend that the membership of these teams will include federal employees and non-federal individuals representing local governments, land owners, environmental organizations, and other members of the public. It also is intended that these groups will develop consensus advice and recommendations on federal land management issues, and provide that advice and recommendations to the federal land managers. Accordingly, these groups must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

All members of these groups must be federal employees until the groups are organized pursuant to FACA. As an alternative to chartering these groups, if either the RIEC or PIECs are chartered pursuant to FACA, the AMATs could be organized as

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working groups or task forces that provide information and recommendations to the chartered group(s) and not directly to the federal decision makers. Under such a scenario, the chartered group must analyze and consider information and recommendations from the task force, and not merely pass them forward to the decision makers without review. Meanwhile, until there is compliance with FACA at some level, any advice, recommendations, etc., should be accepted from non-federal individuals or entities only in the manner described in the foregoing discussions of the RIEC.

Watershed Analysis Groups/Late Successional Reserve Assessment Teams

A watershed analysis will focus on collecting and compiling the information within a watershed that is essential for making sound management decisions. Any actions proposed as a result of the process will require NEPA documentation. The information from the watershed analyses will contribute to decision making at all levels. FSEIS p. 2-16. We understand that the Late Successional Reserve Assessments will use a process similar to the Watershed Analysis Groups. We also understand that non-federal individuals and entities will be involved in both processes.

RECOMMENDATION

As we understand the FSEIS and the intent of the ISC, these teams will be organized similar to the AMATS. Our recommendations and advice for the AMATS apply to these groups as well.

Multi-Agency Command (MAC)

Members of this committee include individuals designated by the Secretaries and Administrators who executed the Interagency Memorandum of Understanding for Economic Adjustment and Community Service (the parties). The committee is composed of one or more federal employees from the Office of Management and Budget, Small Business Administration, EPA, the Departments of Agriculture, Interior, Commerce, Labor, Housing and Urban Development, and the White House. The MAC, under the guidance of the parties, has oversight and policy making authority and responsibilities, consistent with the authority delegated by each party.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue.

Regional Community Economic Revitalization Team (R-CERT)

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The parties each designated one or more representatives to participate in the R-CERT. Other members include two representatives each from Oregon, Washington, and California. The Secretary of Agriculture and the Secretary of the Interior designate two of the federal representatives to serve as co-chairs. The R-CERT, under the guidance of the MAC and the parties, has decision making authority, consistent with federal law and the Strategic Plan. Matters unsettled or disputed within R-CERT are forwarded to the MAC for resolution.

RECOMMENDATION

We understand that this group is intended to function similar to the RIEC. Our advice and recommendations for the RIEC, therefore, are applicable to this group.

State Community Economic Revitalization Team (State CERT)

The parties and the governors of Oregon, Washington, and California have established State CERTS. Each State CERT includes representatives of each federal agency with program responsibility, representatives of the state government appointed by the governor, and representatives of local governments appointed by the governor with the approval of local government organizations. The chair of each State CERT was selected by its non-federal members. The State CERTS have authority to implement daily the Strategic and Implementation Plans, consistent with federal and state law. Matters unsettled or disputed within a State CERT are forwarded to the R-CERT for resolution.

RECOMMENDATION

If the federal government is obtaining advice from the State CERTS, all members of these groups must be federal employees until the groups are organized pursuant to FACA; except that if the R-CERT is chartered pursuant to FACA, the State CERTS could be organized as working groups or task forces that provide information and recommendations to the chartered group. In such an instance, our advice in the discussion of the AMATS regarding this scenario would apply to these groups.

GENERAL CONCERNS

We are concerned with statements that have appeared in several documents that indicate that events are occurring that appear to violate FACA. One such document is the January 21, 1994, memorandum from the Forest Service Regional Foresters for Regions 5 and 6, and the BLM State Directors for Oregon and California

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regarding the implementation of the PIECs. Although this memorandum recognizes the need to comply with FACA, we are concerned that it recommends going forward with forming and operating groups in a way that may violate FACA. Specifically, the language in Attachment B indicates that FACA compliance problems are avoided if only federal employees are involved with the management decision. This overlooks that, before the decisions are made, non-federal individuals participate in discussing, evaluating recommendations and recommending various alternatives.

Another document that concerns us is the position paper from the REO on FACA implications in implementing the Forest Plan. That document states that decision making for managing federal forests will be made in several different forums and that the RIEC believes that collaborative decision making with representatives of non-federal governments and collaborative decision building with the public are essential for successfully implementing the forest plan. These statements, and the policy underlying them, are appropriate only if the management decisions are reserved for those with the proper federal authority and if collaborative decision building processes include either compliance with FACA or are structured to avoid the need to comply.

Memorandum

To:

DRAFT

From:

Subject:

This responds to Will Stelle's memorandum to John Leshy and Jim Gilliland dated March 16, 1994. Mr. Stelle sought information regarding the implications of the Federal Advisory Committee Act (FACA) on implementing the President's Forest Plan. We have concluded that whether FACA compliance will be required, will depend on how the various groups are configured and function. For the most part the information describing the groups was obtained from the "Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl" (the "FSEIS").

This memorandum advises that some of the groups contemplated by the President's Forest Plan must be chartered under FACA if they are to function as set out in the FSEIS and related documents. We are not recommending that the groups discussed in this memorandum function in any particular way. We are indicating, however, that if they are to function as set forth in the FSEIS, they must be chartered under FACA. We are providing minimal operational advice and recommend, if the decision is made to charter any of the groups, that the federal employees responsible for managing the groups contact either Robert H. Moll in the Division of General Law, Office of the Solicitor, Department of the Interior ((202) 208-5216) or the Natural Resources Division, Office of General Counsel, Department of Agriculture ((202) 720-7121) for more detailed operational advice.

In considering whether to carry out the President's Forest Plan in a way that will require chartering under FACA, it is important to consider the underlying reasons why FACA was passed. As noted by the Supreme Court, "FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals." Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 453 (1989). In enacting FACA Congress defined the term "advisory committee" very broadly, to include "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established by statute or reorganization plan, or established or utilized by the President, or established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . ." (emphasis supplied). 5 U.S.C. § 3(2).

When a group is chartered under the FACA, a charter and justification statement must be prepared, approved by the Office of Management and Budget (pursuant to Executive Order 12838) and the General Services Administration (GSA), and filed with the Library of Congress. FACA requires that the advisory committee's membership be balanced in terms of the points of view represented and the functions to be performed by the committee. After a committee properly is chartered and its membership appointed, its operations must include the following: providing notice of its meetings in the Federal Register; holding open meetings (except in fairly limited circumstances); establishing an agenda for each meeting; taking minutes for each meeting; providing for public access, subject to the Freedom of Information Act, to all information considered by the committee; and, upon request, making transcripts of meetings available. The level of participation in the meetings by non-members can be shaped by the committee. A committee can provide that no public participation in the meetings by non-members occur although it is advisable to provide for at least some opportunity for public participation in a meeting such as by providing an opportunity for public comment in the final part of the meeting.

Under GSA guidelines and case law, advisory committees may have working groups or task forces convened for the purpose of gathering information or conducting research for the advisory committee. These groups, which are composed of one or more members of the advisory committee and may have as participants non-advisory committee members, need not be chartered separately, and need not meet in public so long as the product of their efforts is deliberated in a public meeting of the advisory committee. These groups may not advise federal officials directly; their work must be channeled through, and deliberated by, the advisory committee.

EXECUTIVE SUMMARY

This memorandum discusses ten groups anticipated by the President's Forest Plan.

We understand that the FSEIS and the Interagency Steering Committee (ISC) anticipate that the following groups will have non-federal members: Regional Interagency Executive Committee (RIEC); Provincial Interagency Executive Committees (PIEC); and Regional Community Economic Revitalization Team (R-CERT). Accordingly, these groups must be chartered pursuant to FACA.

We understand that the following groups will have non-federal members, but could be structured as task forces or working groups of one of the chartered groups, and thus would not need independent charters: Adaptive Management Area Teams (AMAT); Watershed Analysis Groups; Late Successional Reserve Assessment Teams; and State Community Economic Revitalization Team (State CERT).

We understand that the ISC intends that the following groups will be staffed by federal employees only and thus will not need to be chartered: Regional Ecosystem Office (REO); the Research and Monitoring Committee (RMC); and the Multi-Agency Command (MAC).

We are aware that the Department of Agriculture has a limitation in its FY 1994 appropriations limiting the amount of appropriated funds that it can spend on its advisory committees. The Forest Service, however, would not be subject to this limitation because its funding is provided by the Interior and Related Agencies Appropriation Act. Other USDA activities by the Office of General Counsel and the Office of the Assistant Secretary for Natural Resources and the Environment would be subject to the restrictions. Consequently, the Department of Agriculture may be unable to contribute its full proportionate share of the costs of supporting the advisory committees and task forces during this fiscal year unless additional appropriation authority is provided by Congress.

DISCUSSION

Regional Interagency Executive Committee (RIEC)

This group "consists" of the Pacific Northwest federal agency heads of the Forest Service, the Bureau of Land Management, the U. S. Fish and Wildlife Service, the National Marine Fisheries Service, the Bureau of Indian Affairs, and the Environmental Protection Agency (EPA). "Participants" in the committee include the National Park Service, the States of Oregon, Washington, and California, and three tribal organizations. This committee must assure the successful implementation of the selected alternative from the FSEIS, and its "policy and planning decisions and recommendations will be made collaboratively". The RIEC will provide direction to the Regional Ecosystem Office, province teams [PIECs], and the Research and Monitoring Committee, and work with the Regional Community Economic Revitalization Team (R-CERT) to develop criteria and priorities for ecosystem investment opportunities. FSEIS p. 2-13.

RECOMMENDATION

As we understand how the FSEIS and the Interagency Steering Committee (ISC) intend the RIEC to operate, federal officials will meet with representatives of states and tribes to develop consensus recommendations for federal agency decision makers on managing the federal lands. Accordingly, this committee must comply with the provisions of FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

Until the RIEC is organized under FACA all of its members must be federal employees. Meanwhile, as one means of informing themselves, the federal members of the RIEC may accept information from those non-federal individuals or entities intended eventually to become members of the chartered advisory committee through several means including written comments, and in meetings between one or more federal officials and an individual or entity. The RIEC should advise these non-federal entities and individuals not to provide a consensus recommendation to the RIEC. The federal officials also may meet with members of the public who are not intended by the FSEIS to be members of the RIEC in much the same manner as described for those that are intended to become members, as well as in public hearings.

If the ISC decides to organize the RIEC under FACA, once it is chartered and its members appointed, the RIEC may operate as contemplated by the FSEIS.

Regional Ecosystem Office (REO)

This office provides staff support to facilitate RIEC decision making and prompt issue resolution in support of implementing the alternative selected from the FSEIS. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.

Research and Monitoring Committee (RMC)

This committee, consisting of research scientists and managers from a variety of disciplines, will provide recommendations to the RIEC on the implementation of the selected alternative. FSEIS p. 2-14. We understand that the ISC intends that this office will be staffed only by federal employees.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue, unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.

Provincial Interagency Executive Committees (PIEC)

These teams will consist of representatives of federal

agencies, states, American Indian tribes, and "others", and will: "provide or coordinate analyses at the province level that can provide the basis for amendments to Forest and District Plans"; "provide monitoring reports for provinces"; and "encourage and facilitate information exchange and complimentary ecosystem management among federal and non-federal land managers". FSEIS p. 2-14.

RECOMMENDATION

As we understand how the FSEIS and the ISC intend the PIECs to operate, a group of federal, state, and local government officials, and members of the public will develop consensus advice and recommendations for federal agency decision makers on managing the federal lands. Accordingly, these committees must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated authority to make the decision.

Our recommendations and advice for the RIEC apply to the PIECs as well.

Adaptive Management Area Teams (AMAT)

The FSEIS designates ten adaptive management areas, and the REO has proposed that each area have a team to implement the FSEIS alternative chosen. These experimental areas will provide opportunities for land managing and regulatory agencies, other government entities, non-governmental organizations, local groups, landowners, communities and individuals to work together to develop innovative management approaches. Participation needs and opportunities will vary from one issue to the next. FSEIS. p. 2-62.

RECOMMENDATION

We understand that the FSEIS and the ISC intend that the membership of these teams will include federal employees and non-federal individuals representing local governments, land owners, environmental organizations, and other members of the public. It also is intended that these groups will develop consensus advice and recommendations on federal land management issues, and provide that advice and recommendations to the federal land managers. Accordingly, these groups must comply with FACA. In addition, while both federal and non-federal members of the FACA-chartered committee may participate in the collaborative process of making recommendations, all federal management decisions must be made by the particular federal official with the delegated

authority to make the decision.

All members of these groups must be federal employees until the groups are organized pursuant to FACA. As an alternative to chartering these groups, if either the RIEC or PIECs are chartered pursuant to FACA, the AMATs could be organized as working groups or task forces that provide information and recommendations to the chartered group(s) and not directly to the federal decision makers. Under such a scenario, the chartered group must independently analyze and consider the information and recommendations from the task force, and not merely "rubber stamp" or pass them forward to the decision makers without review. Under this arrangement the operations of the AMATs will have to be monitored very closely to assure that the product of the AMATs is fully considered and debated by the PIECs or RIECs and that it is these latter groups that actually advise federal decision makers. Meanwhile, until there is compliance with FACA at some level, any advice, recommendations, etc., should be accepted from non-federal individuals or entities only in the manner described in the foregoing discussion of the RIEC.

Watershed Analysis Groups/Late Successional Reserve Assessment Teams

A watershed analysis will focus on collecting and compiling the information within a watershed that is essential for making sound management decisions. Any actions proposed as a result of the process will require NEPA documentation. The information from the watershed analyses will contribute to decision making at all levels. FSEIS p. 2-16. We understand that the Late Successional Reserve Assessments will use a process similar to the Watershed Analysis Groups. We also understand that non-federal individuals and entities will be involved in both processes.

RECOMMENDATION

As we understand the FSEIS and the intent of the ISC, these teams will be organized similar to the AMATS. Our recommendations and advice for the AMATS apply to these groups as well.

Multi-Agency Command (MAC)

Members of this committee include individuals designated by the Secretaries and Administrators who executed the Interagency Memorandum of Understanding for Economic Adjustment and Community Service (the parties). The committee is composed of one or more federal employees from the Office of Management and Budget, Small Business Administration, EPA, the Departments of Agriculture, Interior, Commerce, Labor,

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Housing and Urban Development, and the White House. The MAC, under the guidance of the parties, has oversight and policy making authority and responsibilities, consistent with the authority delegated by each party.

RECOMMENDATION

So long as this office is staffed only by federal employees, there is no FACA compliance issue unless it convenes a meeting or meetings with non-federal persons to obtain consensus advice.

Regional Community Economic Revitalization Team (R-CERT)

The parties each designated one or more representatives to participate in the R-CERT. Other members include two representatives each from Oregon, Washington, and California. The Secretary of Agriculture and the Secretary of the Interior designate two of the federal representatives to serve as co-chairs. The R-CERT, under the guidance of the MAC and the parties, has decision making authority, consistent with federal law and the Strategic Plan. Matters unsettled or disputed within R-CERT are forwarded to the MAC for resolution.

RECOMMENDATION

We understand that this group is intended to function similar to the RIEC. Our advice and recommendations for the RIEC, therefore, are applicable to this group.

State Community Economic Revitalization Team (State CERT)

The parties and the governors of Oregon, Washington, and California have established State CERTS. Each State CERT includes representatives of each federal agency with program responsibility, representatives of the state government appointed by the governor, and representatives of local governments appointed by the governor with the approval of local government organizations. The chair of each State CERT was selected by its non-federal members. The State CERTs have authority to implement daily the Strategic and Implementation Plans, consistent with federal and state law. Matters unsettled or disputed within a State CERT are forwarded to the R-CERT for resolution.

RECOMMENDATION

If the federal government is obtaining advice from the State CERTS, all members of these groups must be federal employees until the groups are organized pursuant to FACA; except that if the R-CERT is chartered pursuant to FACA, the State CERTS

could be organized as working groups or tasks forces that provide information and recommendations to the chartered group. In such an instance, our advice in the discussion of the AMATS regarding this scenario would apply to these groups.

GENERAL CONCERNS

We are concerned with statements that have appeared in several documents that indicate that events are occurring that appear to violate FACA. One such document is the January 21, 1994, memorandum from the Forest Service Regional Foresters for Regions 5 and 6, and the BLM State Directors for Oregon and California regarding the implementation of the PIECs. Although this memorandum recognizes the need to comply with FACA, we are concerned that it recommends going forward with forming and operating groups in a way that may violate FACA. Specifically, the language in Attachment B indicates that FACA compliance problems are avoided if only federal employees are involved with the management decision. This overlooks that, before the decisions are made, non-federal individuals participate in discussing, evaluating recommendations and recommending various alternatives.

Another document that concerns us is the position paper from the REO on FACA implications in implementing the Forest Plan. That document states that decision making for managing federal forests will be made in several different forums and that the RIEC believes that collaborative decision making with representatives of non-federal governments and collaborative decision building with the public are essential for successfully implementing the forest plan. These statements, and the policy underlying them, are appropriate only if the management decisions are reserved for those with the proper federal authority and if collaborative decision building processes include either compliance with FACA or are structured to avoid the need to comply.

DEPARTMENT OF AGRICULTURE
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20250-1400

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To:		<u>Fax</u>	<u>Speed Dial</u>
Jim Lyons, Mark Gaede	USDA	720-4732	[031]
John Leshy, Ann Shields	DOI	208-5584	[033]
David Cottingham	DOI	371-2815	[040]
Tom Lee	AUSA-Pild	503-727-1117	
Karen Mouritsen, Kris Clark	DOI-Sol	219-1792	[052]
Bob Baum, Pete Raynor, David Gayer	DOI-Sol	208-3877	[054]
Roger Nesbit, Ron Swan, Diane Hoobler	DOI-R Sol	503-231-2166	[051]
Howard Corcoran, Tony Guadagno	EPA OGC	260-8393	[041]
Margaret Hayes	NOAA GC	301-713-0658	[042]
Will Stelle	OEP	456-2710	[048]
Tom Tuchmann		503-326-6254	[049]

Message:

Attached is a summary of today's status conference in "NFRC v. Espy". In brief, Judge Jackson expressed dismay at comments from the government that appeared in the press following his decision. In addition, Judge Jackson stated that he was retaining jurisdiction over the matter and scheduled another status conference for May 13.

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Summary of Status Conference in
Northwest Forest Resource Council v. Espy
March 25, 1994

The status conference was held in open court, with all parties represented and at least one reporter present. Counsel for the amici parties was present but did not say anything.

Judge Jackson began the status conference by sternly stating that he was dismayed by the government's public reaction to his March 21 decision. [Judge Jackson had apparently read the Washington Post and AP news stories in which, among other things, an unnamed administration official called the decision a "slap on the wrist". The decision had found FEMAT to have violated FACA but did not enjoin the use of the FEMAT Report]. Judge Jackson said the public statements made by the government were not a reaction to be proud of. Judge Jackson said he wanted to emphasize emphatically that his decision was not meant to be commending a good faith effort and was not a "slap on the wrist". Judge Jackson said he wanted to assure himself that the matter was not at an end.

Judge Jackson said that he did not issue an injunction because he did not regard himself to be in a position to instruct the President in what he can or cannot consider in making decisions. Judge Jackson said that the effect of the FEMAT Report in other contexts remains to be determined. A?

Judge Jackson then stated that he wanted to ask the parties what was likely to happen in the controversy. Plaintiffs answered that other courts were involved in the controversy and that a ROD was expected by April 14. Judge Jackson asked who was expected to sign the ROD, and plaintiffs answered the Secretary of Agriculture and the Secretary of the Interior.

Judge Jackson asked plaintiffs if they intended to challenge the ROD, and if so, would they challenge it in the U.S. District Court for the District of Columbia. Plaintiff's counsel answered that the press had quoted his client as saying that they would challenge the ROD if the preferred alternative were selected, that they would give serious consideration to filing the lawsuit in D.C., and that they would consider such a lawsuit a related case to NFRC v. Espy.

Judge Jackson then turned to the government. The government said that they deeply regretted the comments reported in the newspaper, and that the comments were not cleared and the commentor was not fully informed. Further, the government said that the comments did not reflect the actual views of the government toward the decision.

Judge Jackson asked the government if it would appeal the decision. The government responded that it had not yet decided.

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More importantly, Judge Jackson asked the government if had considered forbearing the administrative decision in light of his decision. The government responded that it was under court order in Seattle Audubon Society v. Lyons to issue a ROD by April 14, and that it still intends to do so. The government said the ROD would be signed by the Secretary of Agriculture and the Secretary of the Interior, or their delegates, and would be effective 30 days after it was signed. The government also described in greater detail the three injunctions facing the Forest Service and BLM.

Judge Jackson asked if Judge Dwyer had been informed of his decision. The government responded that it would file a status report before the end of the month and intended to provide a copy of the decision in the status report.

Judge Jackson then said that he accepted the government's contrition of its public comments. Judge Jackson observed that the situation still appeared fluid and that he wanted another status conference.

The government inquired if that meant the court did not intend for its order to be final, and thus not begin the time period for appeal. Judge Jackson responded that he regarded the order as final judgment that an appeal can be take from, but that he hopes that parties do not take the full 60 days to decide whether or not to appeal. Judge Jackson also stated that he intended to maintain jurisdiction over the matter to enforce his order.

Judge Jackson asked plaintiffs to respond. Plaintiffs said that they had nothing else today, but that they may seek some interim relief in the future. Plaintiffs suggested a status conference in mid-May so that enough time had elapsed for them to study the ROD after it is issued. Plaintiffs stated that by mid-May they would have reached some decisions on future actions.

Judge Jackson concluded the hearing by scheduling a status conference for Friday, May 13, at 9:30.

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**NORTHWEST FOREST
RESOURCE COUNCIL***

1500 S.W. First Avenue, Suite 770 • Portland, Oregon 97201 • (503) 222-9505

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March 15, 1994

The Honorable Jolene Unsoeld
US House of Representatives
1508 Longworth House Building
Washington, D.C. 20515-4703

Dear Representative Unsoeld:

As you may know, on March 4, U.S. District Court Judge Thomas Penfield Jackson heard arguments in the Northwest Forest Resource Council's challenge to the Clinton Administration northwest forest plan involving allegations that the Administration violated the Federal Advisory Committee Act (FACA) in developing this plan. Press reports from the hearing were somewhat confusing. Since we expect a decision within the next several days, we felt it would be helpful to provide our perspective on: (1) the current situation with the Clinton Administration's plan; (2) what is at issue in the NFRC challenge; and (3) why the industry was compelled to bring this action.

On the day the Judge issues a decision we will be available to you and your staff both in Portland and in Washington, D.C. to discuss the ramifications of the Judge's decision, however it comes down. We will also endeavor to have in your hands a summary of the decision and its significance. With that by the way of introduction, let me review where we are with the President's forest plan.

I. Status of Option 9

On February 23, the Administration released the Environmental Impact Statement (EIS) that will accompany the final forest plan for the spotted owl region. It contains much of the information that will be in the plan to be submitted to U.S. District Court Judge William Dwyer in Seattle. Here are some of the most significant things that can be deduced about the final plan from the recently-released EIS.

First, the plan reduces timber sale volumes below those in the Administration's July 1993 draft plan, and will likely reduce them still further if its new provisions for protecting spotted owl, riparian, and old growth areas are actually implemented. This represents a reduction of close to 85% from what were the timber sale levels provided by the federal forests in this region during the 1980's. Perhaps more importantly, the plan is not implementable, and the harvest levels may never be achieved for several reasons.

Ans.
*Representing

Associated Oregon Loggers
Columbia River District Cooperatives

Northwest Independent Forest
Manufacturers Association

Washington Citizens for World Trade
Washington Contract Loggers Association

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James per
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Answers to this

The plan represents a high-cost approach to managing federal forests and is based on a budget for which there is already a \$51 million shortfall for Fiscal Year 1994. The Forest Service has also admitted that the Fiscal Year 1995 shortfall will be in the neighborhood of \$110 million. This funding shortfall means that it will take longer to implement the plan and less timber volume will be produced.

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- The plan's timetable for implementation is already eight months behind, and the plan is so complex that Forest Service officials have already conceded that timber sales will never achieve projected levels in the first three years of implementation -- even if everything goes right. No new timber sales were offered in 1993, and it is probable that none will be offered in 1994.
- More to the point, everything is not going right. Legal challenges are already proliferating. The environmental community has publicly criticized the EIS as inadequate to protect old growth areas on federal forest lands. Both the Audubon Society and the Sierra Club Legal Defense Fund have been quoted as indicating that the plan is still unlawful in their view. In addition, the Oregon Natural Resources Council recently called for zero harvest on federal forests in the region. Given these developments, it is almost certain that: (1) the environmental community will litigate the final plan; and (2) even if that litigation is ultimately not successful, it will delay implementation of the plan significantly. Moreover, it is a virtual certainty that any subsequent implementing activities (e.g., individual timber sales) will be appealed and litigated. The Administration has already conceded that it will grant automatic stays on any timber sale appeals. So the prospect is very low for any timber moving in the foreseeable future.

II. Rationale for the FACA lawsuit

In the face of continuing environmental group litigation, we felt compelled to protect the interest of communities and employees dependent upon federal forest lands. Thus, we reluctantly decided last Summer to bring the Federal Advisory Committee Act challenge. We have been involved in legal work in other areas as well, and would be happy to review these with you or your staff at your convenience.

As indicated, on March 4 the oral arguments were held before Judge Jackson on the FACA challenge. We believe that those arguments were an important positive development in the industry's legal efforts. In the lawsuit before Judge Jackson, we are challenging whether the plan has been developed in violation of the Federal Advisory Committee Act's requirements governing open meetings and the use of

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federal land management statutes. Second, the forest industry felt compelled (albeit, reluctantly) to bring this challenge because the Administration's Forest Ecosystem Management Team declined to involve any scientific information or scientific opinion contrary to its own in the development of Option 9. Data provided by the industry were ignored. Also disregarded were the views of scientists knowledgeable about forest ecosystems and wildlife in the region, but with ideas different from the prevailing theories advanced by FEMAT Team members. Other scientists who were selected to participate withdrew from the effort when it became clear that the Team had chosen to exclude a body of science backed by rigorous testing and experience that was at variance with the prevailing views of the Team leaders, namely that it is good public policy to return federal forest lands to "presettlement conditions."

This process underscores the serious substantive concerns with the scientific basis for the FEMAT report. That is, by excluding opinions other than those it judged acceptable, the FEMAT Team skewed the range of options available to decisionmakers. Eliminated were options that would have inflicted far less suffering on mill workers and their families. Obtaining a full range of opinions is extremely important in a relatively young science such as wildlife biology. Unlike particle physics or mathematics, wildlife biology and its interrelationships to forest ecology are open to many interpretations due to the dearth of comprehensive scientific data.

Throughout the long history of this debate, many have argued persuasively that unlawful government actions must be put aside in favor of good faith compliance with the law. In our view, the Administration broke the spirit, intent, and letter of the Federal Advisory Committee Act. By breaking the law, the Administration broke one of the central promises it made last April -- that it would comply with all relevant laws and regulations. Admittedly, today this is only the opinion of the timber industry, soon it may be a decision of the federal court. Already, the government's attorneys admitted as much in court, emphasizing that the FEMAT effort was never intended to be one that reviewed all scientific points of view.

Arguments that the industry, its workers, and timber dependent communities may be the real losers as a result of the Judge's decision disregard the fact that Option 9 was not working, and would not work to sell timber in the foreseeable future. Even without Judge Jackson's decision, the pending proceedings in Judge Dwyer's court, and any subsequent legal challenges -- the Administration's plan will produce virtually no new sales during 1994. Consequently, while the workers and communities in the affected region are still in a dire situation, they will be no worse off after Judge Jackson's decision than they were before.

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outside experts. If the Judge rules in our favor, we hope to have increased access to the decision-making process that went into the development of the plan. This might provide us with ideas and options for suggesting alternative courses of action to the President's plan if that opportunity is presented to us.

During the oral arguments, Judge Jackson said that, as far as he was concerned, the Administration's Forest Ecosystem Management Assessment Team (FEMAT) "looks like, walks like, and quacks like a federal advisory committee." He seemed generally sympathetic to our arguments. He concluded by suggesting that his decision may not enjoin the plan, but he could rule that the Team's report is inadmissible for the record to be put before Judge Dwyer. When the government's attorney pointed out that without the report, the government could not make a decision, the Judge said, "that is the government's problem."

The Judge promised a decision before the end of March, so that his ruling on the Federal Advisory Committee Act question could be handed down before the government must take its plan to Judge Dwyer. It was on the basis of this commitment to an expedited ruling that the Judge denied the industry's request for a preliminary injunction, making that request unnecessary.

It is very risky to speculate on what the Judge might do. But based upon what he said at the hearing, Judge Jackson could find the government in violation of the Federal Advisory Committee Act, and then order that the final plan not be based upon the FEMAT report. This would allow the government to submit the final plan to Judge Dwyer on schedule, but would likely mean that any subsequent legal challenges to that plan by the environmental community or the industry (or anyone else for that matter) would meet with increased chances of success since the government would have to concede that: (1) the plan was developed through an unlawful process; and (2) failing to be able to depend on the report from that process, the government's decision is arbitrary and capricious. This obviously enhances the prospect that Judge Dwyer will retain the current injunction in place.

You may ask why this remedy is beneficial to the industry, its workers, and timber dependent communities. Some have already suggested that the industry has, by joining the litigation process, perpetuated the gridlock that already exists. We were sensitive to these concerns as we made the painful choice of initiating legal action last fall. Please consider the following points as our rationale for proceeding as we did.

Our challenge over whether the Clinton Administration's development of Option 9 violated the Federal Advisory Committee Act involves much more than arcane procedural or mere technical issues. First, it underscores substantive violations to

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III. Next Steps

Recriminations over the decision if it fails to support Option 9 will help no one, most particularly not timber workers and timber communities. What is needed now (irrespective of the decision) is a cooperative effort between the Administration and Congress to hammer out a solution which provides a better balance that can be implemented. The forest products industry is committed to working with both the Administration and Congress to achieve such a result. The industry urges all parties to move forward together from here toward a resolution.

We hope that the press coverage that follows the Judge's decision is informed. We will do our best to work with the media, however the decision comes out. If the decision is favorable to the industry's point of view, it is our hope to avoid recriminations with the Administration and in the media. As indicated, we will do our best to brief you as quickly as possible on this pending matter. Please do not hesitate to give me a call at (503) 297-7691, Jim Geisinger at the Northwest Forestry Association (503-222-9505), or Mark Ray at the American Forest & Paper Association (202-463-2750), if you have any questions regarding this legal action.

In closing, I want to emphasize that we do want to work closely with you and the Administration in developing a better solution than the one that presently confronts us. It is our strong view that, even in a perfect (i.e., litigation free) world, the Administration's plan is incapable of producing timber in 1994 and beyond. For this reason, we believe that the answer to a solution lies in cooperation with both the Administration and Congress - not in further confrontation.

Sincerely,



John Hampton
Chairman

FORISTS
FACA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

v.)

ESPY, et al.,)

Defendants.)

Civil Action No. 93-1521

FILED

MAR 21 1994

MEMORANDUM AND ORDER

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

In two recent cases six federal justices and judges have written at length on the problem presented in this case, namely, the implications of the constraints placed by the Federal Advisory Committee Act ("FACA" or "the Act"), 5 U.S.C. App. 2 (1988), on the President's ability to solicit and receive collective advice privately and without formality.¹ Their several opinions developed most of the research and reasoning that underlies this decision as well, and it need not, therefore, be reiterated here. Superficially characterized, however, their scholarship in the aggregate has revealed FACA to be an uncomfortably broad statute, dating from 1972, that would, if

¹In Washington Legal Foundation v. U.S. Dept. of Justice, 691 F. Supp. 483 (D.D.C. 1988), aff'd on other grounds sub nom. Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989), the Supreme Court held that a privately organized and funded committee of the American Bar Association, was not "utilized," in the sense Congress intended in FACA, by the President in making appointments to the federal judiciary.

In Association of Am. Physicians & Surgeons v. Clinton, 813 F. Supp. 82 (D.D.C.) reversed and remanded, 997 F.2d 898 (D.C. Cir. 1993) ("AAPS"), the D.C. Circuit held that the President's spouse could be deemed a de facto officer or employee of the federal government, thus making FACA inapplicable to a task force otherwise comprised of federal officials advising the President on health care reform.

literally applied, stifle virtually all non-public consultative communication between policy-making federal officials and a group of any two or more other people, any one of whom is not in government service. As a result, the majority opinions in those cases were at pains to elide the literal reading of FACA to avert what those courts believed were surely legislatively unintended consequences on the one hand, or a major constitutional issue on the other.

This case arises upon yet another attempt by the Executive Branch to escape the toils of FACA in formulating the current Administration's policy for the future of over 24 million acres of federally owned forest lands in the states of Oregon and Washington. The plaintiff Northwest Forest Resource Council ("NFRFC") is a not-for-profit association incorporated in Oregon representing the interests of the timber and other forest products industries in the two states. Defendants are the U.S. Secretaries of Agriculture and Interior, a group of individuals comprising the object of this suit, an entity known as the Forest Ecosystem Management Assessment Team ("FEMAT"), and FEMAT's chairman, a research wildlife biologist with the U.S. Forest Service.

Plaintiff alleges that, as convened and employed by the President, FEMAT constituted an "advisory committee" within the contemplation of FACA which, if so, then entitled NFRFC (and the public generally) to certain rights to be (or to have been) privy to and to have participated in FEMAT's proceedings. Having been denied those rights while FEMAT was engaged in preparing a

document, published in July, 1993, upon which the defendant secretaries will, at the President's direction, in major part rely in establishing and implementing a "Forest Plan," NFRC asks this Court to declare FEMAT to have been an "advisory committee" and accord NFRC as many of those rights as possible nunc pro tunc; to declare FEMAT's proceedings null and void for failure to comply with FACA; and to enjoin defendants from any reliance upon FEMAT's report in managing federal forest lands unless and until FEMAT complies with FACA.

Defendants respond that, for various reasons, FEMAT was never conceived, nor did it function, as an "advisory committee" under FACA, and, were this Court to find it so, then FACA itself must be deemed an unconstitutional invasion of the executive privilege for communications necessary to his exercise of the powers entrusted by the Constitution to the President. See United States v. Nixon, 418 U.S. 683, 705 (1974), and Nixon v. Administrator of General Services, 433 U.S. 425, 449 (1977).

The case is presently before the Court on cross-motions for summary judgment.¹ For the reasons to follow the Court will grant plaintiff's motion for summary judgment in part, deny the

¹Also pending is defendants' motion to dismiss the claims made in certain counts of the amended complaint, on the grounds that plaintiff lacks standing to assert those claims and the non-justiciable character of the relief they seek. The Court concludes that NFRC has standing, a fortiori as the plaintiffs had standing in Public Citizen, see 491 U.S. at 448-51, and that the disposition on the merits herein makes it unnecessary to address the issue of justiciability.

social contribution from the forests." Defendant Jack Ward Thomas, a biologist with the U.S. Forest Service, was named the leader of FEMAT and reported weekly on FEMAT's progress to the Executive Committee.

FEMAT was composed of six subteams whose participants admittedly included private contractors paid with federal funds. FEMAT also established 14 advisory subgroups to provide it with biological impact assessments on various forms of plant and animal life. Altogether somewhere between 600 and 700 people contributed in some way to FEMAT's work. The subteams and each of the advisory subgroups eventually had benefit of the services of some non-federal personnel, and although the parties are not in agreement as to which of the 600-700 individuals should be counted as "members" of FEMAT for purposes of FACA, in May, 1993, the Administration released a list of 37 FEMAT participants who defendants are presently willing to acknowledge must be deemed "members." At least five of those people, defendants also concede, were not regular federal employees. They were Norman Kenneth Johnson, Brian Greber, and George Stankey, full-time faculty members at Oregon State University; and Margaret Shannon and Jerry Franklin, both on the faculty of the University of Washington. None of those professors took leaves of absence from their institutions while working for FEMAT; all continued to

receive their full faculty paychecks, and they or their universities were paid varying sums by the federal government.³

On July 1, 1993, President Clinton announced his "Forest Plan for a Sustainable Economy and a Sustainable Environment" ("Forest Plan") which is based in significant part on Option 9, one of the ten forest management "options" presented by FEMAT in its Report. On July 16, 1993, the Forest Service released the FEMAT Report of over 1,000 pages,⁴ and an ensuing "Draft Supplemental Environmental Impact Statement" analyzed only the FEMAT-sanctioned options with option 9 appearing as the preferred alternative.

The final policy embodied in the Forest Plan is expected by all parties to go into effect on March 31, 1994, pursuant to the order of another district judge. See Seattle Audubon Soc'y v. Mosley, 798 F. Supp. 1484 (W.D. Wash. 1992).

II.

The defendants first argue that FEMAT was simply not an "advisory committee" or not the sort of "advisory committee" with which FACA is concerned. But FACA itself defines an "advisory committee" to which it applies as "any committee, board,

³Defendants estimate the total cost to the government of FEMAT at \$3.1 million, of which approximately \$443,000 (14%) was paid for non-federal contractors' services.

Expenditures were made for office space rental, travel, computers, overtime, and support services, as well as for salaries of replacements for federal employees detailed to FEMAT for extended periods.

⁴The FEMAT Report itself lists 104 names of major contributors to it, 24 of whom were not regular federal employees, although some of the 24 provided only clerical or support services.

commission, council, conference, panel, task force, or other similar group, or any subcommittee or subgroup thereof" that is "established or utilized" by the President or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government." 5 U.S.C. App. 2 § 3(2).

By any fair interpretation of the facts and certainly by a literal reading of the statutory definition, FEMAT was an "advisory committee" within the contemplation of FACA in form and function, unless elsewhere excepted in the statute. It was a consultative assembly of knowledgeable persons for a specific purpose; calling it a "team" does not alter its nature. It was both "established" and "utilized" by the President for his guidance in devising a forest management policy. And it did render him "advice" and "recommendations" which he accepted and followed.

Elsewhere in the statute, however, conclaves identical to FEMAT are excluded from the status of being "advisory committees," and exempted from any obligations as such, if, but only if, they are "composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. App. 2 § 3(a)(iii) (emphasis added). In other words, FACA does not apply if all of the people assembled to advise the President are already in government service.

As the Supreme Court observed in Public Citizen, "FACA was enacted to cure specific ills, above all the wasteful expenditure

of public funds for worthless committee meetings and biased proposals." Public Citizen, 491 U.S. at 453. Simply expressed, the counsel of persons who have been "appointed in the civil service," see 5 U.S.C. §§ 2104, 2105, costs the government nothing more in the way of compensation; their conduct is strictly hedged about by statute and rule to protect against temptation to profit financially from the advice they give; and they ostensibly have no parochial interests to serve apart from the general public good.'

In attempting to stretch the language of FACA's exception for committees "composed wholly of full-time officers or employees of the federal government" to reach FEMAT, however, the defendants take the concept of being in federal service to a meaningless extreme. They submit that the five outsiders, the professors who contributed to the work of FEMAT (and the only contributors they will concede to have been "members" of it) should still be regarded as "officers or employees of the federal government" within the meaning of the exception, because, as faculty at state universities, they were "state employees," and as such could have been "assigned," under an unrelated statute, 5 U.S.C. § 3372 (1988), to engage in the performance of a federal function had it occurred to anyone that it might be necessary.

Conversely, as another judge has put it, "[b]ecause committees not composed exclusively of federal officers and employees have members who are not required to forswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in the open." AAPS, 997 F.2d at 921-22 (Buckley, J., concurring).

substantial parochial interest in the outcome." Natural Resources Defense Council, Inc. v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986). Nowhere, however, does FACA or its history support the proposition that the only special interests with which Congress was concerned were those inspired by mercenary motives. Scholars no less than business people have been known to have personal agendas. And the composition of FEMAT, as a whole -- federal and otherwise -- at least suggests, as plaintiff alleges, that the vast majority of them were pro-"ecosystem management," having minimal sympathy for the forest products industry.

The defendants next argue that FEMAT was not an "advisory committee" because it made only a "technical assessment" of various management options, but did not provide "policy advice." The Court finds, however, that FEMAT absolutely did render policy advice to the President. FEMAT's mandate was to develop and analyze the effects of alternative ecosystem management policy options for presentation to the Administration, and it did so. The Administration considered, so far as is shown, only the work of FEMAT in selecting a policy to implement, and chose one of the options FEMAT proposed. FEMAT directly influenced the President's ultimate policy decision.

Moreover, there is nothing in the statutory language or case law to support the defendants' assertion that FACA should not apply to "advisory committees" consisting only of technicians who supply the decision-makers with data. To the contrary, several

But the presence of state employees on an advisory panel has, notwithstanding 5 U.S.C. §3372, not saved such panels from FACA in the past. See Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978). Moreover, none of the five professors were ever officially assigned federal duties, and none of the formalities that would be expected to attend such assignments were ever observed. See 5 U.S.C. § 3374.

Even if the Court were to find that the state university professors were "federal employees," they would not qualify as being "full-time" unless, as the defendants propose, they be given credit for full-time work because they each averaged over 40 hours per week for FEMAT during its existence. But the exception for "full-time officers and employees" only supports the purposes of FACA if the term as used in FACA is interpreted as drawing a distinction between regular civil servants and outsiders or hybrids; it clearly has no place in FACA as a wage-and-hour rule. As the AAPS court noted, "FACA would be rather easy to avoid if an agency could simply appoint 10 private citizens as special government employees for two days, and then have the committee receive the section 3(2) exemption as a body composed of full-time government employees." AAPS, 997 F.2d at 915.

The defendants then submit that academics on advisory committees shouldn't count as outsiders, because they do not implicate Congress' underlying concern that advisory committees not be dominated by "industry leaders and the like with

defendants' motion for summary judgment, and grant the relief hereinafter set forth.

I.

The material facts are of record and are not genuinely in dispute. On April 2, 1993, President Clinton, Vice President Gore, and other government officials (including the defendant Secretaries) attended a day-long "forest conference" in Portland, Oregon, to address the long-standing controversy between environmentalists and the forest products industry over the uses to be made of federal forest lands. At the conclusion of the conference, the President announced that the Administration planned to "begin work immediately to craft a balanced, a comprehensive, and a long-term policy" toward forest management. Concurrently (or nearly so) with the President's announcement, Katie McGinty, Director of the White House Office of Environmental Policy, in the Executive Office of the President, established an inter-agency group called the Forest Conference Executive Committee ("Executive Committee") to direct and supervise the work of FEMAT, which was then already in the formative stages. Ms. McGinty chaired the Executive Committee. Other active members of the Executive Committee included Thomas Collier, Chief of Staff of the Interior Department, James Lyons, Assistant Secretary of Agriculture for Natural Resources, and five other sub-Cabinet officials. The Executive Committee instructed FEMAT to identify management alternatives, employing an "ecosystem" approach, to attain the "greatest economic and

courts have applied FACA in just such circumstances. See Public Citizen v. National Advisory Committee on Microbiological Criteria for Foods, 886 F.2d 419 (D.C. Cir. 1989) (FACA applied to committee to develop microbiological criteria by which the safety and wholesomeness of food could be assessed); National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979) (single meeting of five experts in the field of obesity research was subject to FACA).

III.

Having concluded that FEMAT was subject to FACA, the Court also finds that FEMAT was convened and did its work in violation of the Act's requirements for the proper conduct of "advisory committee" business. Indeed, it is undisputed that: FEMAT refused to open its meetings to NFRC and the public in violation of section 10(a)(1); FEMAT failed to publish notice of meetings in the Federal Register contrary to section 10(a)(2); FEMAT failed to allow volunteers to attend meetings or otherwise participate in its activities in violation of section 10(a)(3); FEMAT failed to make its records and other documents available for public inspection as prescribed by section 10(b); FEMAT failed to keep detailed minutes of meetings in violation of section 10(c); the establishment of FEMAT was not properly authorized as required by section 9(a); FEMAT failed to file an advisory committee charter in violation of section 9(c); FEMAT made no attempt to fairly balance its membership as required by section 5(b)(2); FEMAT took no special precautions to assure that

its advice and recommendations were not inappropriately
---influenced by special interests in violation of section 5(b)(3);
and FEMAT did not comply with the termination provisions of
sections 10(d) and 14.

IV.

The defendants argue that if, as the Court has found, FEMAT was an "advisory committee" under FACA whose advice was integral to the Administration's decision to adopt the Forest Plan, the application of FACA to the FEMAT proceedings would transgress the constitutional doctrine of the separation of powers, thus rendering it inevitable that the Court must declare the statute unconstitutional as applied.

Both the Supreme Court majority in Public Citizen and the D.C. Circuit majority in AAPS were able, by adroit semantics and near-clairvoyant discernment of legislative intent, to avoid that drastic result in the circumstances of those cases, but not, however, without difficulty, and in doing so incurred stern disapprobation from concurring brethren who were less squeamish. In Public Citizen, the Supreme Court employed a narrow construction of the word "utilized" (as in "utilized by the President" in FACA) to avoid the constitutional implications of applying FACA to a privately organized and funded group of "advisors" who had, for years before FACA, been regularly offering its opinions of prospective federal judges to the Department of Justice. Proceeding on an opposite tack, the AAPS court adopted an expansive definition of the term "federal

officer or employee" as used in FACA to embrace the President's spouse de facto to enable the court to avoid a similar constitutional dilemma. Had she not been deemed such, her presence on the Health Care Task Force -- the sole "outsider" -- would have subjected the Task Force to FACA despite its "operational proximity to the President himself." AAPS, 997 F.2d at 909.

This Court has, however, rejected the opportunities offered by defendants to engage in similar creative statutory construction and interpretation, and no others have manifested themselves spontaneously. Nevertheless, the importance of avoiding the constitutional issue to the last, acknowledged by both the Public Citizen and AAPS courts, 491 U.S. at 465-67; 997 F.2d at 912, n. 13, must still be respected if at all possible, and the avenue by which escape lies for this Court is found in the measure of the remedy to be given on the plaintiff's complaint.

FACA itself does not prescribe remedies for violations of its requirements. Thus, the Court must exercise its general equitable powers (while observing its own constitutional limitations) to fashion any relief that would represent an

*The Court notes in passing that the decision-making apparatus employed by the President in AAPS is not dissimilar to that involved here. As the Health Care Task Force was to the "working group" in AAPS, so the Executive Committee is to FEMAT in this case, and the AAPS court made clear that the constitutional implications of applying FACA to the "working group," as distinguished from the Task Force, were greatly diminished.

appropriate remedy for plaintiff's injuries caused by the violation of FACA. Franklin v. Guinnett County Public Schools, ___ U.S. ___, 112 S.Ct. 1028, 1033-35 (1992)

NFRC has prayed for the following relief:

1. a declaratory judgment to the effect that FACA was violated by FEMAT as set out above;
2. an order that defendants make all FEMAT records immediately available to plaintiff, whether or not the documents would be subject to a FOIA exemption;
3. an order directing FEMAT to issue a report summarizing its activities at meetings, as required by section 10(d);
4. an order directing the leader of FEMAT to prepare detailed minutes of each meeting; and
5. an order prohibiting the government from utilizing the FEMAT report as a basis for federal policy or regulations until FEMAT completes an advisory process in compliance with FACA.

No reason is shown not to enter the requested declaratory judgment; indeed, if there is any conclusion inevitable from the foregoing, it is that the declaratory judgment prayed must be given.

As to production of all FEMAT documents, the defendants claim that they have assembled all documents from all 600-plus FEMAT "participants," and that those documents which are not subject to FOIA exemptions are now publicly available. Plaintiff has a separate FOIA request pending. It will fall to any reviewing court to determine the merit of the defendants'

decisions to withhold any documents on FOIA-exemption grounds when administrative appeals are exhausted.

As to plaintiff's request for preparation of a final report and the minutes of meetings, the defendants contend that the FEMAT Report itself satisfies the requirements of section 10(d) and that preparation of some comparable document at this late date would be redundant, superfluous, and overly burdensome; the FEMAT Report constitutes a sufficient "summary of [the committee's] activities and such related matters as would be informative to the public," say defendants, and the Court agrees.

To the extent that plaintiff seeks the minutes of meetings to reveal FEMAT's internal deliberations and decisionmaking processes, there are, as plaintiff itself acknowledges, more effective ways to gather this information. There is, moreover, no evidence that any "minutes," as such, exist.

Finally, plaintiff seeks an order enjoining the Administration from relying upon the FEMAT report to promulgate regulations implementing its Forest Plan. Such an injunction is, of course, the relief of which plaintiff is most desirous. In the Court's opinion, however, such an injunction would exceed the injury presently to be redressed. There is nothing in the record to suggest that the FEMAT Report, or its advice and recommendations to the President, would have in any way been altered had FACA been complied with to the letter. It would, moreover, be premature. At the moment the Forest Plan is merely a plan; it has yet to be translated into action. There will be

time enough when the Forest Plan is implemented to determine if any harm it does to NFRC and its constituents can be traced to FEMAT.

Of greatest significance to the Court in declining to issue the injunction is the affront it would represent to the separation-of-powers principle. The Court is aware of no authority upon which it could confidently rely in concluding that it may forbid the President and his Cabinet to act upon advice that comes to them from any source, however irregular.⁷ There is no "exclusionary rule" applicable to the decisionmaking processes of the President. And it is certainly no less presumptuous than would be a similar instruction from Congress to the President -- as plaintiff deems PACA to be -- as to what he can and cannot consider in executing the duties of his office.

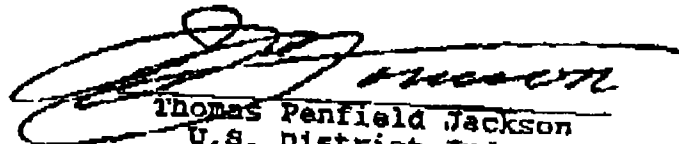
It is sufficient for present purposes, and all that this Court concludes it should award, that plaintiff have the declaratory judgment it has prayed for. The effect and consequences of that judgment will be left to other courts and/or other cases.

It is, therefore, this 22nd day of March, 1994,

ORDERED, that defendant's motion for summary judgment is denied, and plaintiff's motion for summary judgment is granted in part; and it is

⁷But see Alabama-Tombigbee Rivers Coalition v. Fish and Wildlife Service, Civil No. 93-AR-2322-S (N.D. Ala.) (December 22, 1993).

FURTHER ORDERED, ADJUDGED and DECREED, that the Forest Ecosystem Management Assessment Team was and is an advisory committee subject to the Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988), and that its proceedings from approximately April 2, 1993, to July 16, 1993, were conducted in violation of the Act.



Thomas Penfield Jackson
U.S. District Judge

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO: John Leshy
Jim Gilliland

FR: Will Stelle *WR*

RE: FACA and Forest Plan Implementation

DATE: 16 March 94

*Good that.
Add the
specification we
believe
about*

As we near the final decisions on the President's forest plan, we need a focused review of the degree to which the implementation regimes anticipated for the plan may cause FACA type problems.

I would like to request that you designate someone in your offices to undertake a specific review of the FACA issues raised by plan implementation, and that they provide to me a memorandum on the subject by next Wednesday, March 27th. We have already raised this issue with David Gayer and Mike Gippert of your staffs, and it may be that they are already pursuing it. I believe the following issues ought to be addressed:

a. Does the implementation plan for the President's plan raise potentially serious FACA issues?

b. Are there techniques for structuring the desired involvement of state, local and other officials in the plan implementation without running afoul of FACA? If so, please provide recommendations.

c. Are there unavoidable FACA problems with the current implementation scheme that cannot be avoided through restructuring proposals that retain the spirit of the implementation plan. If so, please identify them.

For information on the implementation regimes, Tom Tuchmann, Jim Pipkin, David Cottingham, Mark Gaede and the Regional Executives of the FS, BLM, and FWS would all be good sources.

Thank you for your assistance on this.

cc. K. McGinty
Todd Cambell
T. Tuchmann
Jim Pipkin
David Cottingham
Mark Gaede
P. Coppelman

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: Phil Lader
Mark Gearan
Pat Griffin
T.J. Glauthier
Lorraine Voles
Tom Epstein
Brian Burke
Peter Yu

FR: Katie McGinty 

RE: FACA Litigation and the President's Forest Plan

DATE: 17 March 94

An industry group has challenged the legality of the President's forest plan because of alleged violations of the Federal Advisory Committee Act in its formulation. Oral arguments have occurred, and we are awaiting a decision of the court by the end of the month.

This is potentially damaging because the attorneys who are following the litigation believe we will lose, and the only real issue is whether the Judge enjoins the government from using the report produced by the scientific team that was the basis of the President's original plan. If he does, then there is a good chance that we will not be able to submit a final plan to the court at the end of the month -- because we will be prohibited from using the report that was the basis of the plan.

This situation could, in turn, raise the specter of Congressional action on the forest plan. Discussions among key Members are already underway on this eventuality.

Attached for your review is a memorandum prepared by Todd Campbell on the lawsuit and a set of talking points for use when the decision is rendered.



OFFICE OF THE VICE PRESIDENT
WASHINGTON

March 16, 1994

MEMORANDUM FOR KATIE MCGINTY

FROM: Todd Campbell *TS*

RE: FEMAT Litigation

This is to give you an update on the status of the FEMAT litigation. (Northwest Forest Resource Council v. Mike Espy, et al.)

The Northwest Forest Resource Council filed suit last summer alleging that the Forest Ecosystem Management Assessment Team (FEMAT) was a Federal Advisory Committee Act (FACA) Committee. The plaintiff claims that FEMAT is a FACA Committee because it hired various outside consultants. A committee is subject to FACA unless it is composed solely of full-time government employees. The plaintiff seeks various forms of relief, but the most troubling is a request for an injunction against the use of the FEMAT Report. The FEMAT Report is the basis for implementing Option 9. Plaintiff also demands copies of all FEMAT documents.

FEMAT's position is that it is not a FACA Committee because the consultants should be considered full-time government employees. FEMAT has also challenged the constitutionality of FACA if it applies in this case.

It is my opinion that FEMAT will likely lose this case. It is very difficult to prevail on the argument that the consultants were full-time federal employees when they were simultaneously working for universities and other employers. However, most of the consultants were paid and worked long hours.

It is unclear what remedy the Court would order. An injunction against the use of the FEMAT Report would be a disaster since it is the basis for implementing Option 9. Most of the FEMAT documents already have been produced pursuant to the Freedom of Information Act (FOIA).

Also, a holding that FEMAT was a FACA Committee could have adverse political consequences in light of the Health Care Task Force FACA litigation. It could appear that the Administration does not want to comply with the FACA open meetings and records law. There also obviously would be a serious negative impact on our environmental politics and reform efforts in the Northwest.

The case is now under consideration by the Court on cross-motions for summary judgment. It is impossible to predict when the Court will decide the matter.

I will let you know when the Court rules. Please contact me if you want to discuss this further.

Thank you.

TJC:aw

Talking Points
Northwest Forest Resource Council v. Espy

If Judge Jackson finds for the complainants and rules that the FEMAT report cannot be used as the basis of the Record of Decision:

To say the least, we are deeply disappointed by Judge Jackson's decision. The Administration maintained, and still believes, that the FEMAT scientific committee did not fall under the jurisdiction of the Federal Advisory Committee Act (FACA). We therefore will file {have filed} an immediate appeal.

The unfortunate result of the ruling will be further delay in our effort to end the gridlock that has shut down the Federal timber sale program. And it is ironic that those causing this delay are the very same group that would most benefit from a speedy resolution -- the timber industry.

The primary effect of the timber industry's lawsuit is to keep the current injunction against timber sales in place, and add to the hardship of workers in the Northwest. Their objective is simple: to scuttle the entire effort by the FEMAT scientific team and start from scratch. They apparently would prefer a process that rejects the sound science of the FEMAT report, because they do not like what the science shows.

If the timber industry representatives are victorious with their "no compromise" approach, timber workers will be the losers. If the industry is victorious in its lawsuit, their spoils will be further delay -- perhaps the worst enemy of workers in the region.

Until the plan is implemented there will be no timber sales, which also means there will be no jobs. It makes no sense for the plaintiffs to delay the plan, but that is exactly what they are doing.

This Administration remains firmly committed to finding a balanced plan for managing the public forests in the Northwest, and calls upon all interested parties to join in a good faith effort to end the gridlock.

If Judge Jackson rules for the complainants but calls for a remedy that allows for the FEMAT report to be used in the decision:

While we respect Judge Jackson's finding, we are nonetheless disappointed by it. The Administration has maintained, and still believes, that the FEMAT scientific committee did not fall under the jurisdiction of the Federal Advisory Committee Act (FACA). We therefore will file {have filed} an immediate appeal.

That being said, it is important to focus on the remedy chosen by the judge. In allowing the FEMAT's work product to serve as the basis for the EIS and the Record of Decision, the judge clearly recognized a serious, impartial and good faith effort by the committee to address a complex problem.

**TALKING POINTS
EXTENSION ON ISSUANCE OF ROD**

*The Department of Justice has filed a motion requesting a two week extension to the deadline for signing the ROD. This measure was taken to ensure that any substantive comments submitted in regard to the SEIS can be given serious consideration.

*CEQ regulations require a 30 day wait between the issuance of an FEIS and the signing of the ROD. Although this waiting period is not specifically designated as a formal comment period, we do expect that comments will be received. USDA, and USDI want to be sure that we have adequate time to consider them, even if they are received at the end of the 30 day period.

*This does not mean that we will necessarily delay the signing of the ROD until April 14, should the court grant the motion. If the comments received can be reviewed and considered in less than the two weeks requested, USDA and USDI will issue the ROD immediately.

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**NORTHWEST FOREST
RESOURCE COUNCIL***

1500 S.W. First Avenue, Suite 770 • Portland, Oregon 97201 • (503) 222-9505

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Committee Chairman**
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**Wildlife Committee
Chairman**
R. Kirk Swart

March 15, 1994

The Honorable Jolene Unsoeld
US House of Representatives
1508 Longworth House Building
Washington, D.C. 20515-4703

FNZA

Dear Representative Unsoeld:

As you may know, on March 4, U.S. District Court Judge Thomas Penfield Jackson heard arguments in the Northwest Forest Resource Council's challenge to the Clinton Administration northwest forest plan involving allegations that the Administration violated the Federal Advisory Committee Act (FACA) in developing this plan. Press reports from the hearing were somewhat confusing. Since we expect a decision within the next several days, we felt it would be helpful to provide our perspective on: (1) the current situation with the Clinton Administration's plan; (2) what is at issue in the NFRC challenge; and (3) why the industry was compelled to bring this action.

On the day the Judge issues a decision we will be available to you and your staff both in Portland and in Washington, D.C. to discuss the ramifications of the Judge's decision, however it comes down. We will also endeavor to have in your hands a summary of the decision and its significance. With that by the way of introduction, let me review where we are with the President's forest plan.

I. Status of Option 9

On February 23, the Administration released the Environmental Impact Statement (EIS) that will accompany the final forest plan for the spotted owl region. It contains much of the information that will be in the plan to be submitted to U.S. District Court Judge William Dwyer in Seattle. Here are some of the most significant things that can be deduced about the final plan from the recently-released EIS.

First, the plan reduces timber sale volumes below those in the Administration's July 1993 draft plan, and will likely reduce them still further if its new provisions for protecting spotted owl, riparian, and old growth areas are actually implemented. This represents a reduction of close to 85% from what were the timber sale levels provided by the federal forests in this region during the 1980's. Perhaps more importantly, the plan is not implementable, and the harvest levels may never be achieved for several reasons.

*Representing

Associated Oregon Loggers
Columbia River Plywood Cooperatives

Northwest Independent Forest
Manufacturers Association
Oregon Forest Industries Council

Washington Citizens for World Trade
Washington Contract Loggers Association
Western Wood Products Association

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March 15, 1994

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- The plan represents a high-cost approach to managing federal forests and is based on a budget for which there is already a \$51 million shortfall for Fiscal Year 1994. The Forest Service has also admitted that the Fiscal Year 1995 shortfall will be in the neighborhood of \$110 million. This funding shortfall means that it will take longer to implement the plan and less timber volume will be produced.
- The plan's timetable for implementation is already eight months behind, and the plan is so complex that Forest Service officials have already conceded that timber sales will never achieve projected levels in the first three years of implementation -- even if everything goes right. No new timber sales were offered in 1993, and it is probable that none will be offered in 1994.
- More to the point, everything is not going right. Legal challenges are already proliferating. The environmental community has publicly criticized the EIS as inadequate to protect old growth areas on federal forest lands. Both the Audubon Society and the Sierra Club Legal Defense Fund have been quoted as indicating that the plan is still unlawful in their view. In addition, the Oregon Natural Resources Council recently called for zero harvest on federal forests in the region. Given these developments, it is almost certain that: (1) the environmental community will litigate the final plan; and (2) even if that litigation is ultimately not successful, it will delay implementation of the plan significantly. Moreover, it is a virtual certainty that any subsequent implementing activities (e.g., individual timber sales) will be appealed and litigated. The Administration has already conceded that it will grant automatic stays on any timber sale appeals. So the prospect is very low for any timber moving in the foreseeable future.

II. Rationale for the FACA lawsuit

In the face of continuing environmental group litigation, we felt compelled to protect the interest of communities and employees dependent upon federal forest lands. Thus, we reluctantly decided last Summer to bring the Federal Advisory Committee Act challenge. We have been involved in legal work in other areas as well, and would be happy to review these with you or your staff at your convenience.

As indicated, on March 4 the oral arguments were held before Judge Jackson on the FACA challenge. We believe that those arguments were an important positive development in the industry's legal efforts. In the lawsuit before Judge Jackson, we are challenging whether the plan has been developed in violation of the Federal Advisory Committee Act's requirements governing open meetings and the use of

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March 15, 1994

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federal land management statutes. Second, the forest industry felt compelled (albeit, reluctantly) to bring this challenge because the Administration's Forest Ecosystem Management Team declined to involve any scientific information or scientific opinion contrary to its own in the development of Option 9. Data provided by the industry were ignored. Also disregarded were the views of scientists knowledgeable about forest ecosystems and wildlife in the region, but with ideas different from the prevailing theories advanced by FEMAT Team members. Other scientists who were selected to participate withdrew from the effort when it became clear that the Team had chosen to exclude a body of science backed by rigorous testing and experience that was at variance with the prevailing views of the Team leaders, namely that it is good public policy to return federal forest lands to "presettlement conditions."

This process underscores the serious substantive concerns with the scientific basis for the FEMAT report. That is, by excluding opinions other than those it judged acceptable, the FEMAT Team skewed the range of options available to decisionmakers. Eliminated were options that would have inflicted far less suffering on mill workers and their families. Obtaining a full range of opinions is extremely important in a relatively young science such as wildlife biology. Unlike particle physics or mathematics, wildlife biology and its interrelationships to forest ecology are open to many interpretations due to the dearth of comprehensive scientific data.

Throughout the long history of this debate, many have argued persuasively that unlawful government actions must be put aside in favor of good faith compliance with the law. In our view, the Administration broke the spirit, intent, and letter of the Federal Advisory Committee Act. By breaking the law, the Administration broke one of the central promises it made last April -- that it would comply with all relevant laws and regulations. Admittedly, today this is only the opinion of the timber industry, soon it may be a decision of the federal court. Already, the government's attorneys admitted as much in court, emphasizing that the FEMAT effort was never intended to be one that reviewed all scientific points of view.

Arguments that the industry, its workers, and timber dependent communities may be the real losers as a result of the Judge's decision disregard the fact that Option 9 was not working, and would not work to sell timber in the foreseeable future. Even without Judge Jackson's decision, the pending proceedings in Judge Dwyer's court, and any subsequent legal challenges -- the Administration's plan will produce virtually no new sales during 1994. Consequently, while the workers and communities in the affected region are still in a dire situation, they will be no worse off after Judge Jackson's decision than they were before.

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March 15, 1994

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outside experts. If the Judge rules in our favor, we hope to have increased access to the decision-making process that went into the development of the plan. This might provide us with ideas and options for suggesting alternative courses of action to the President's plan if that opportunity is presented to us.

During the oral arguments, Judge Jackson said that, as far as he was concerned, the Administration's Forest Ecosystem Management Assessment Team (FEMAT) "looks like, walks like, and quacks like a federal advisory committee." He seemed generally sympathetic to our arguments. He concluded by suggesting that his decision may not enjoin the plan, but he could rule that the Team's report is inadmissible for the record to be put before Judge Dwyer. When the government's attorney pointed out that without the report, the government could not make a decision, the Judge said, "that is the government's problem."

The Judge promised a decision before the end of March, so that his ruling on the Federal Advisory Committee Act question could be handed down before the government must take its plan to Judge Dwyer. It was on the basis of this commitment to an expedited ruling that the Judge denied the industry's request for a preliminary injunction, making that request unnecessary.

It is very risky to speculate on what the Judge might do. But based upon what he said at the hearing, Judge Jackson could find the government in violation of the Federal Advisory Committee Act, and then order that the final plan not be based upon the FEMAT report. This would allow the government to submit the final plan to Judge Dwyer on schedule, but would likely mean that any subsequent legal challenges to that plan by the environmental community or the industry (or anyone else for that matter) would meet with increased chances of success since the government would have to concede that: (1) the plan was developed through an unlawful process; and (2) failing to be able to depend on the report from that process, the government's decision is arbitrary and capricious. This obviously enhances the prospect that Judge Dwyer will retain the current injunction in place.

You may ask why this remedy is beneficial to the industry, its workers, and timber dependent communities. Some have already suggested that the industry has, by joining the litigation process, perpetuated the gridlock that already exists. We were sensitive to these concerns as we made the painful choice of initiating legal action last fall. Please consider the following points as our rationale for proceeding as we did.

Our challenge over whether the Clinton Administration's development of Option 9 violated the Federal Advisory Committee Act involves much more than arcane procedural or mere technical issues. First, it underscores substantive violations to

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III. Next Steps

Recriminations over the decision if it fails to support Option 9 will help no one, most particularly not timber workers and timber communities. What is needed now (irrespective of the decision) is a cooperative effort between the Administration and Congress to hammer out a solution which provides a better balance that can be implemented. The forest products industry is committed to working with both the Administration and Congress to achieve such a result. The industry urges all parties to move forward together from here toward a resolution.

We hope that the press coverage that follows the Judge's decision is informed. We will do our best to work with the media, however the decision comes out. If the decision is favorable to the industry's point of view, it is our hope to avoid recriminations with the Administration and in the media. As indicated, we will do our best to brief you as quickly as possible on this pending matter. Please do not hesitate to give me a call at (503) 297-7691, Jim Geisinger at the Northwest Forestry Association (503-222-9505), or Mark Ray at the American Forest & Paper Association (202-463-2750), if you have any questions regarding this legal action.

In closing, I want to emphasize that we do want to work closely with you and the Administration in developing a better solution than the one that presently confronts us. It is our strong view that, even in a perfect (i.e., litigation free) world, the Administration's plan is incapable of producing timber in 1994 and beyond. For this reason, we believe that the answer to a solution lies in cooperation with both the Administration and Congress - not in further confrontation.

Sincerely,



John Hampton
Chairman

THE WHITE HOUSE

WASHINGTON

MEMORANDUM TO: Phil Lader
Mark Gearan
Pat Griffin
T.J. Glauthier
Lorraine Voles
Tom Epstein
Brian Burke
Peter Yu

FR: Katie McGinty

RE: FACA Litigation and the President's Forest Plan

DATE: 17 March 94

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This is potentially damaging because the attorneys who are following the litigation believe we will lose, and the only real issue is whether the Judge enjoins the government from using the report produced by the scientific team that was the basis of the President's original plan. If he does, then there is a good chance that we will not be able to submit a final plan to the court at the end of the month -- because we will be prohibited from using the report that was the basis of the plan.

This situation could, in turn, raise the specter of Congressional action on the forest plan. Discussions among key Members are already underway on this eventuality.

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OFFICE OF THE VICE PRESIDENT
WASHINGTON

March 16, 1994

MEMORANDUM FOR KATIE MCGINTY

FROM: Todd Campbell *TC*

RE: FEMAT Litigation

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Thank you.

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Talking Points
Northwest Forest Resource Council v. Espy

If Judge Jackson finds for the complainants and rules that the FEMAT report cannot be used as the basis of the Record of Decision:

To say the least, we are deeply disappointed by Judge Jackson's decision. The Administration maintained, and still believes, that the FEMAT scientific committee did not fall under the jurisdiction of the Federal Advisory Committee Act (FACA). We therefore will file {have filed} an immediate appeal.

The unfortunate result of the ruling will be further delay in our effort to end the gridlock that has shut down the Federal timber sale program. And it is ironic that those causing this delay are the very same group that would most benefit from a speedy resolution -- the timber industry.

The primary effect of the timber industry's lawsuit is to keep the current injunction against timber sales in place, and add to the hardship of workers in the Northwest. Their objective is simple: to scuttle the entire effort by the FEMAT scientific team and start from scratch. They apparently would prefer a process that rejects the sound science of the FEMAT report, because they do not like what the science shows.

If the timber industry representatives are victorious with their "no compromise" approach, timber workers will be the losers. If the industry is victorious in its lawsuit, their spoils will be further delay -- perhaps the worst enemy of workers in the region.

Until the plan is implemented there will be no timber sales, which also means there will be no jobs. It makes no sense for the plaintiffs to delay the plan, but that is exactly what they are doing.

This Administration remains firmly committed to finding a balanced plan for managing the public forests in the Northwest, and calls upon all interested parties to join in a good faith effort to end the gridlock.

If Judge Jackson rules for the complainants but calls for a remedy that allows for the FEMAT report to be used in the decision:

While we respect Judge Jackson's finding, we are nonetheless disappointed by it. The Administration has maintained, and still believes, that the FEMAT scientific committee did not fall under the jurisdiction of the Federal Advisory Committee Act (FACA). We therefore will file {have filed} an immediate appeal.

That being said, it is important to focus on the remedy chosen by the judge. In allowing the FEMAT's work product to serve as the basis for the EIS and the Record of Decision, the judge clearly recognized a serious, impartial and good faith effort by the committee to address a complex problem.

**TALKING POINTS
EXTENSION ON ISSUANCE OF ROD**

*The Department of Justice has filed a motion requesting a two week extension to the deadline for signing the ROD. This measure was taken to ensure that any substantive comments submitted in regard to the SEIS can be given serious consideration.

*CEQ regulations require a 30 day wait between the issuance of an FEIS and the signing of the ROD. Although this waiting period is not specifically designated as a formal comment period, we do expect that comments will be received. USDA, and USDI want to be sure that we have adequate time to consider them, even if they are received at the end of the 30 day period.

*This does not mean that we will necessarily delay the signing of the ROD until April 14, should the court grant the motion. If the comments received can be reviewed and considered in less than the two weeks requested, USDA and USDI will issue the ROD immediately.

Draft Talking Points
Northwest Forest Resource Council v. Espy

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If the timber industry representatives are victorious with their "no compromise" approach, timber workers will be the losers. If the industry is victorious in its lawsuit, their spoils will be further delay -- perhaps the worst enemy of workers in the region.

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That being said, it is important to focus on the remedy chosen by the judge. In allowing the FEMAT's work product to serve as the basis for the EIS and the Record of Decision, the judge clearly recognized a serious, impartial and good faith effort by the committee to address a complex problem.

IF YOU WANT FORE, THE WORST THING YOU CAN DO IS TO
 DELAY THE PLAN BECAUSE THEN THERE WILL BE NO TIMBER SALES AND NO
 FORE. YET THIS IS PRECISELY WHAT THE PLAINTIFFS ARE DOING. ITS CREEPY.

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL# of pages **2**

To: **Will Stelle**
 Dept./Agency

From: **Tom Amontree**
 Phone #

Fax # **157-5710**

Fax #

DRAFT PROPOSED STATEMENT FOR AG. SECRETARY

"Our objective all along has been to end the gridlock and put into place a workable plan that takes us beyond the stalemate. We are obviously disappointed by the judge's decision, as we are by the fact that the suit was filed in the first place, and we will naturally appeal that decision.

"The fact of the matter is that in order for us to move forward and end the gridlock, everyone -- and I mean everyone -- is going to have to give a little. This issue is not about what a particular industry or cause believes is in their best interest but what is in the best interest of the Pacific Northwest and America as a whole. It is time for proponents of gridlock to put aside their self interests so we can go forward with a science based approach to forest management that puts people back to work."



U.S. Department of Justice
Civil Division

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER SHEET

DATE: February 17, 1994

TO: Todd Campbell

FAX NUMBER: 456-6429

FROM: Robert Whitman
Fax: (202) 616-8202
Direct Dial: (202) 514-1494

THERE ARE A TOTAL OF 6 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

Rutzick's response to our settlement proposal

FILE FPMAT
LITIGATION

02-16-94 02:23PM FROM PRESTON LAW FIRM

TO 12026168470

P001/005

**PRESTON
THORGRIMSON
SHIDLER
GATES & ELLIS****ATTORNEYS AT LAW**3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204-3688Telephone: (503) 228-3200
Facsimile: (503) 248-9085

FACSIMILE COVER PAGE

February 18, 1994

To: Robert S. Whitman
(Individual)From: Mark C. RutzickU.S. Department of Justice
(Company)No. of Pages: 5
(including Cover Page)1-202-616-8470
(Teletype No.)Client/Matter No.: 21810-000321-202-514-1494
(Confirmation No.)Client/Matter Name: NFRC - FACA

If you do not receive all of the pages, please contact our teletype operator at (503) 228-3200.

- ☐ Original will not be sent.
☐ Original sent by U.S. mail.
☐ Original sent by overnight mail.

COMMENTS:

Attached: Letter responding to settlement offer.

The information contained in this facsimile is confidential and may also be attorney-privileged. The information is intended only for the use of the individual or entity to whom it is addressed. If you are not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any use, dissemination, distribution or copying of this communication is strictly prohibited. If you have received the facsimile in error, please immediately notify us by a collect telephone call to (503) 228-3200, and return the original message to us at the address above via the U.S. Postal Service. Thank you.

02-16-94 02:23PM FROM PRESTON LAW FIRM

TO 12026168470

P002/005

**PRESTON
THORGRIMSON
SHIDLER
GATES & ELLIS**

ATTORNEYS AT LAW

3200 U.S. Bancorp Tower
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February 16, 1994

Mr. Robert S. Whitman
Civil Division
Federal Programs Branch
Department of Justice
901 E. St., N.W. Room 910
Washington, D.C. 20530

Re: *Northwest Forest Resource Council v. Espy*

Dear Rob:

I am responding to your oral settlement offer conveyed to me by telephone on Monday. This letter and its attachment are privileged under FRE 408.

We have considered your settlement proposal. It is very difficult for us to give up on our challenge to the use of the FEMAT Report as the basis for the Administration's new forestry plan, since we now feel more strongly than ever, after completing the discovery of FEMAT members, that the secrecy of the FEMAT process irreparably tainted the entire decision-making process.

Nonetheless, we have concluded that there are certain circumstances in which we could agree to forgo our right to seek injunctive relief against the use of the FEMAT Report as the basis for any federal decision or policy. While preserving the Government's right to rely on the FEMAT Report, this would entail a significant restructuring of the current decision-making process. In the enclosed attachment we have outlined conceptually the necessary elements of a settlement that we believe would sufficiently remedy the harm caused by the unlawful secrecy of the FEMAT Report.

02-16-94 02:23PM FROM PRESTON LAW FIRM

TO 12026168470

P003/005

PRESTON THORGRIMSON SHIDLER GATES & BELLIS

Mr. Robert S. Whitman
February 16, 1994
Page 2

21810.00.0021101.00707.117

If these elements are acceptable to the Government I would be happy to work with you to produce a settlement agreement prior to our March 4 summary judgment hearing with Judge Jackson.

Very truly yours,



Mark C. Rutzick

MCR:cp

Northwest Forest Resource Council v. Espy**NFRC SETTLEMENT PROPOSAL****February 1994****Privileged Under FRE 408****I. FACA Compliance**

- A. Government consents to entry of declaratory judgment that it violated Federal Advisory Committee Act in the establishment and operation of FEMAT.
- B. Government files a charter for FEMAT in compliance with FACA § 9.
- C. Government files report required under FACA § 10(d) describing what occurred at meetings that were closed to the public.
- D. Government agrees it will hold no further meetings of FEMAT without following FACA procedures.

II. Reconstruction of FEMAT Process

- A. A reasonable number of FEMAT members to be designated by NFRC, not to exceed 25, will appear separately for a stenographically-recorded deposition, under oath, with representatives of NFRC to discuss the substantive and procedural components of the FEMAT Report, with no limitations as to the subject matter of the inquiry (with the exception that witnesses may object, subject to court ruling, on grounds of personal privacy) for a reasonable period not to exceed two business days (eight hours per day) per person. Government attorneys may attend the deposition to observe, but may not object to questions or participate in any way except to answer questions from the witness relating to the interpretation of the settlement agreement. Government will compensate non-federal FEMAT members for their time at a rate sufficient to secure their attendance at the deposition.

III. Reopening of EIS Process

- A. Government withdraws the current EIS (due in final form February 28).
- B. Government agrees to initiate development of a new EIS which may analyze FEMAT options but will also analyze, on an equal basis, other options including a) one option adopting current forest plans, b) one option with an allowable annual timber harvest level exceeding four billion board feet per year, and c) one option developed by NFRC. Government commits to an open EIS process with full involvement by interested parties beginning with option development stage of process.
- C. During development of new EIS Government continues to prepare and obtain necessary administrative and/or judicial approval for auction and award of timber sales in the greatest volume feasible.

IV. Documents

- A. Government makes all FEMAT documents (including all documents from consultants and non-team members) available to NFRC without asserting any FOIA exemptions and without redactions.
- B. No charge for copies of documents for NFRC.
- C. All documents produced and copied as soon as possible.
- D. Government commits to recontacting each FEMAT participant to assure that every one has submitted all documents.

V. Attorney Fees

- A. Government will agree to pay NFRC its reasonable attorney fees incurred in prosecuting this action.

02-16-94 02:23PM FROM PRESTON LAW FIRM

TO 12026168470

P002/005

**PRESTON
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SHIDLER
GATES & ELLIS**

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February 16, 1994

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Federal Programs Branch
Department of Justice
901 E. St., N.W. Room 910
Washington, D.C. 20530

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PRESTON THORGRIMSON SHIDLER GATES & BLLIS

**Mr. Robert S. Whitman
February 16, 1994
Page 2**

2181000.0921121.00707.1137

If these elements are acceptable to the Government I would be happy to work with you to produce a settlement agreement prior to our March 4 summary judgment hearing with Judge Jackson.

Very truly yours,



Mark C. Rutzick

MCR:cp

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TIMOTHY J. SERCOMB

February 3, 1994

Chief, United States Forest Service
Department of Agriculture
P.O. Box 96090
12th St. & Independence Avenue, S.W.
Washington, D.C. 20090-6090

Re: Appeal of Denial of Request Under Freedom of Information Act

Dear Sir:

We represent the Northwest Forest Resource Council and wish to appeal two denials of information requested by our client under the Freedom of Information Act (FOIA) and applicable regulations. A copy of the denial letter, a December 21, 1993 letter from Robert T. Jacobs, SEIS Team Leader, to Mark C. Rutzick, is attached.

Our appeal pertains to three of the four categories of records which were not disclosed:

1. Notes of the first community assessment workshop and the transcript of the second community assessment workshop (FEMAT record numbers 5313 and 5314). Justification for the withholding is claimed under FOIA Exceptions 4, 5, and 6.
2. The names of the communities considered in the assessment workshops and the identity of their evaluators, redacted from summaries of the information received at the workshops. The justification appears to be FOIA Exceptions 4, 5 and 6.
3. Maps and related data revealing the nesting sites or sightings of the spotted owl and marbled murrelet were not disclosed under FOIA Exception 2.

Community Assessment Workshop Documents

It is claimed that the notes and transcript reveals the assessments of residents of rural communities, given under a promise of confidentiality, of the ability of their

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communities to adapt to reductions in the level of timber supply. This is claimed to somehow be confidential business information (Exception 4), a protected agency memorandum (Exception 5) and information from a personal file subject to the personal privacy exception (Exception 6). Mr. Jacobs claims in the denial letter that this information could cause harm to communities judged to have low adaptability "through the denial of loans or grants" and "unduly reveal confidential Governmental decisionmaking processes."

Information about the community assessment workshops is not confidential business information under Exception 4. This exception is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

This information is neither a "trade secret" nor "commercial or financial information." It presumably is socio-economic data and observations about political communities. Disclosure of this information is not "likely to cause substantial harm to the competitive position" of the submitter under *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).

Nor is this information "privileged or confidential." It is not something that is customarily private. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C.Cir. 1992). In fact, information about the economic viability of timber communities is widely discussed and debated in those communities and throughout the Northwest.

The agency memoranda exception, Exception 5 (5 U.S.C. § 552(b)(5)), likewise does not justify withholding this information. That exception is for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Notes and transcripts are not agency "memorandums or letters." The conversations noted or transcribed involve persons who are not agency employees or consultants. Instead, many persons not connected with the Forest Service or Bureau of Land Management participated in these events. Documents about the meetings do not pertain to internal agency communications.

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The requested records are not for deliberations of any agency. We assume that much of the information in the notes and transcript is for factual or investigative material. Exception 5 protects internal deliberations and policy discussions, not external investigations of economic and political facts.

Finally, there is no privilege or discovery preclusion for this material, a necessary showing for Exception 5 to apply.

The last claimed exception, Exception 6 (5 U.S.C. § 552(b)(6)), is for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Here, the information does not come from any "file" specific to an individual. No individual is the focus of this information. It is absurd to argue that communities have personal privacy rights as implied by Mr. Jacobs.

Moreover, the assessment of rural communities in the spotted owl region is hardly a confidential and private exercise. As noted before, it is a key part of a very public debate that is occurring throughout the Northwest.

In sum, the disclosure of the requested information on community assessments is mandated by the Freedom of Information Act. This information is not confidential business or personal data and it is not the letter or memoranda record of internal policy deliberations of agency personnel.

Nesting Sites and Sightings Data.

The next substantive issue in this appeal concerns the applicability of Exception 2, 5 U.S.C. § 552(b)(2), to those portions of the requested documents describing the location of spotted owl nest sites and activity centers. That exception allows withholding of those portions of agency records containing matters that are "related solely to the internal personnel rules and practices of an agency."

This exception does not apply for several independent reasons:

- a. The spotted owl documents do not describe or relate to an agency rule or practice. There is no internal Forest Service policy.

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February 3, 1994
Page 4

guideline or practice which is revealed or invalidated by disclosing the location of spotted owl activity centers.

- b. The documents relate to matters that are not predominantly internal. The location of northern spotted owls, in particular, affects continuation of timber sale contracts, and bears directly on private citizens' obligations to comply with the Endangered Species Act and the Migratory Bird Treaty Act. Treating this information as confidential, but using the information to affect private rights and obligations, is the essence of "secret law." The FOIA was enacted to prohibit this very type of "secret law."
- c. The information sought is not trivial, does not abet circumvention of agency regulation of private conduct, and does not make an agency practice useless.

A more full discussion of the application of Exception 2 follows.

Overview of Exception 2.

The Freedom of Information Act revised the public disclosure provisions of the Administrative Procedures Act, 5 U.S.C. § 1002. According to the Senate Report on the act, the law reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

There are nine exclusive exceptions from the requirement mandating disclosure of agency records. As observed by the Supreme Court, however, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 362 (1976). Thus, the FOIA disclosure requirement is construed broadly by the courts, and the exemptions are narrowly confined. *Id.*, 425 U.S. at 367.

Exception 2, 5 U.S.C. § 552(b)(2), concerning records "related solely to the internal personnel rules and practices of an agency" was intended to narrow the earlier

PRESTON THORGRIMSON SHIDLER GATES & ELLIS

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exemption from disclosure under the APA for "any matter related solely to the internal management of an agency." *Id.*, 425 U.S. at 364; *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1141 (D.C. Cir. 1975).

The Supreme Court in the *Rose* case suggested a bifurcated analysis of Exception 2, an approach subsequently adopted by several circuits. While noting that the exception would not shield "secret law bearing directly on the propriety of actions of members of the public," the Court found that Exception 2 covered "routine matters" of "merely internal significance" "in which the public could not reasonably be expected to have an interest." 425 U.S. at 370-71.

On the other hand, the Court suggested that internal matters "subject to a genuine and significant public interest" must be disclosed "at least where the situation is not one where disclosure may risk circumvention of agency regulation." *Id.*

These two branches of Exception 2 are called the "Low 2" exception for trivial matters related to internal practices, and the "High 2" exception for more substantial internal matters whose disclosure would risk evasion of agency regulation. The standards for the "High 2" exception have developed largely in litigation on requested disclosures of agency prosecution and law enforcement policies and personnel evaluation practices.

The District of Columbia Circuit has decided a series of cases on Exception 2. Through the decisions in *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981)(en banc), *Founding Church of Scientology, Wash. D.C. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983), *NTEU v. U.S. Customs Service*, 802 F.2d 525 (D.C. Cir. 1986), 802 F.2d 525 (D.C. Cir. 1986), *Schwanner v. Department of Air Force*, 898 F.2d 793 (D.C. Cir. 1990) and *Schiller v. N.L.R.B.*, 964 F.2d 1205 (D.C. Cir. 1992), the court has determined that:

Exception 2 . . . applies to material "used for predominantly internal purposes." *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc). If the threshold test of predominant internality is met, an agency may withhold the material "by proving that either [1] 'disclosure may risk circumvention of agency

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regulation,' or [2] 'the material relates to trivial administrative matters of no genuine public interest.'" [citing *Schwaner*.]

These cases suggest two other parts to the analysis. First, the requested document must be an agency rule or practice or be closely "related" to a rule or practice. *Schwaner v. Department of Air Force*, *supra*, 898 F.2d at 797-98. Second, disclosure of agency practices may be excused when disclosure would make these practices "operationally useless" and the practices pertain solely to matters of internal significance. *NTEU v. U.S. Customs Service*, *supra*, 802 F.2d at 530-31.

Thus, for the requested documents here to be exempt from disclosure they must:

- (1) Disclose a Forest Service rule or practice or be closely related to a rule or practice of the agency;
- (2) The rule or practice must operate in a predominantly internal way, *i.e.*, it is not a "secret law" with external effect, used to regulate the conduct of persons beside agency personnel; and,
- (3A) The rule or practice must be trivial so that there is not a "genuine and significant public interest" in its disclosure or in disclosure of information related to it; or,
- (3B) Disclosure must render the rule or practice operationally useless or necessarily allow evasion of agency regulation or other law.

None of these tests is satisfied in this case.

Lack of Close Relationship to Agency Rule or Practice.

The first requirement is that the document disclose a Forest Service internal rule or practice, or at least be "closely related" to an internal rule or practice. This means that document must set out, discuss, or reveal a general internal policy on the conduct or practices of Forest Service employees.

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Page 7

There are many examples of internal practices: agency requirements for personnel training, rules on how often equipment is maintained, policies on the duration and location of staff meetings, guidelines on how often a forest is canvassed for violation of agency rules, etc. All of these examples involve instructions about behavior of Forest Service employees - the mechanics of how these employees do their job.

The requested spotted owl documents have nothing to do with regulating the conduct of Forest Service employees. The documents are those containing specific spotted owl information about a small area around the perimeter of a single timber sale. This information obviously is not an agency internal practice, directive or instruction.

Nor does this information "closely relate to" any regulation on the conduct of Forest Service employees. There is no internal employee practice related to spotted owls or secret locational techniques that would be revealed by disclosing the location of spotted owl activity centers.

Locations of spotted owl nests are chosen by the owls themselves, not by any design of the Forest Service. Disclosure of their placement may say something about the habits or practices of northern spotted owls. But identification of the area of these nests tells nothing about past or future actions of the Forest Service.

The only information closely related to employee practices is information about employees or how they act. Information about physical facts -- the location of bird nests, the temperature of natural springs, the height of mountains -- does not relate at all to USFS employees or describe their practices.

A mere showing that requested information is generally relevant to the mission of the Forest Service is not enough to prove that the matter is "related solely to the internal personnel rules and practices of" the Forest Service. Similarly, a showing that spotted owl information is relevant to the agency's obligations to maintain viable populations of species under 36 C.F.R. § 219.19, does not prove that the matter relates to an agency practice under Exception 2.

PRESTON THORGRIMSON SHIDLER GATES & ELLIS

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Page 8

Confidentiality under Exception 2, then, depends upon whether the document discloses a non-public practice or rule of the agency. The requested information in this case does no such thing.

For this reason alone, the exception does not apply.

Predominantly Internal Significance.

Even if the information were related to an agency practice, it could only be withheld from disclosure if the practice is one with predominantly internal effects. Here, spotted owl information clearly pertains to how the Forest Service manages public lands, what uses it allows or precludes on public property - matters of public and external significance and not related primarily to the internal workings of the agency. The external effect could be documented in any number of cases.

The requested information is relevant to the obligations of members of NFRC under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. §§ 701, *et seq.*

The U.S. Fish and Wildlife Service ("FWS"), which enforces the civil and criminal components of these laws, determines whether an illegal taking of a northern spotted owl occurs by examining habitat modification (through logging) within a certain distance from a spotted owl activity center. In many cases, the relevant distance according to the FWS is 1.2 miles from the activity center. Thus, any habitat modification within 1.2 miles of a spotted owl activity center could potentially expose our clients to prosecution (or a citizen suit) under the ESA or the MBTA. Information showing the location of spotted owl activity centers within 1.2 miles of the sale allows affected parties to assure that their logging activities will not bring them in violation of the ESA as interpreted by the FWS.

Information that diminishes the value of a pending timber sale contract, and that may determine whether a violation of federal criminal statutes and regulations will occur, cannot be considered "predominantly internal" to the Forest Service.

Left undisclosed, information that forms a key element of civil or criminal charges by the government is "secret law." If one thing is clear in the case law on

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Exception 2, it is that nothing in Exception 2, or anywhere else in the FOIA, shields practices or information directly relating to the regulation of public conduct or contracts. This is why the Ninth Circuit in *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, *supra*, flatly held that "administrative" materials that involve the definition of a violation of law must be disclosed, notwithstanding Exception 2. 631 F.2d at 657.

Thus, the Supreme Court in *Rose* indicated that "secret law bearing directly on the propriety of actions of members of the public" must be disclosed under FOIA. 425 U.S. at 370. The District of Columbia Circuit found that FOIA protected only information which:

does not purport to regulate activities among members of the public. Nor does it set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] disclosure provisions.

Cox v. Department of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam).

The location of spotted owl habitat here is far less protectible than the document at stake in *Don Drive-A-Way v. Skinner*, 785 F. Supp. 198 (D.D.C. 1992). There, the Federal Highway Administration devised an algorithm or formula to weigh the various factors used to determine a motor carrier's safety rating. The plaintiff sought disclosure under FOIA of documents describing the algorithm. The agency contended that Exception 2 allowed nondisclosure because the matter related solely to its internal practices.

An unsatisfactory safety rating affected a carrier's ability to haul certain freight or be used by certain federal agencies. The court found that:

The algorithm is not purely internal because its effect and the legal status it imposes on carriers are adopted by other agencies without any further analysis or discretion. . . . The algorithm may not define new safety violations, but it does determine whether and to what extent certain violations will have any legal effect or carry any legal penalty. Thus, the algorithm does not simply involve investigative techniques or procedures.

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... It is regularly followed in all ratings; it controls final agency action subject to review; and it has the same status as regulations or agency law. As such, FOIA offers no exemption.

785 F. Supp. at 200.

In the same vein, here the location of spotted owl activity centers affects the Department of Interior and implementation of the Endangered Species Act and the Migratory Bird Treaty Act. The existence of the activity center may determine whether and how to modify an existing contract between our client and the Forest Service. It has the same status as regulations and agency law and must be disclosed. *See also, EPPS v. Department of Justice*, 801 F. Supp. 787, 791 (D.D.C. 1992) (record of payments to non-government informants not "predominantly internal" and thus not protected by Exception 2).

Exception 2 shields only information on agency practices affecting its internal operations and not matters of external impact. This principle was reiterated by the District of Columbia Circuit in *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, *supra*, in distinguishing its earlier decision in *Jordan v. United States Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978).

In *Crocker* the court held that Exception 2 shielded from disclosure portions of an agent's training manual of the Bureau of Alcohol, Tobacco & Firearms relating to surveillance. The court overturned the reasoning adopted, but not the result reached, in the earlier *Jordan* case. The *Jordan* court required disclosure of Department of Justice internal guidelines on prosecutorial discretion. As the court held in *Crocker*:

The guidelines on prosecutorial discretion are instructions to agency personnel (e.g., prosecutors) on how to regulate members of the public. Knowledge of those regulations may be as significant to members of the public as is knowledge of statutory sentencing provisions. The BATF manual, on the other hand, is not concerned with regulating the behavior of the public, but consists solely of instructions to agency personnel. There is no attempt to modify or regulate public behavior--only to observe it for illegal activity. Accordingly, under the rule we announce

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today, the result in *Jordan*--release of the documents on prosecutorial discretion--would be the same.

670 F.2d at 1075 (emphasis supplied).

In sum, the location of spotted owl activity centers is not predominantly used by the Forest Service to develop or implement internal rules or practices. Instead, that data is used to implement public mandates imposed by statute and agency rule, dealing with the regulation of public land.

The spotted owl data is an indispensable part of the Forest Service regulation of timber sale contracts. It is also used by the Department of Interior in implementing its laws and regulations and defining illegal conduct by private citizens.

For these reasons, the requested information is not "predominantly internal" to the operations of the Forest Service. For the same reasons, the information is not by any measure "trivial." Documents containing this information must be disclosed under the Act.

Circumvention of Agency Regulation.

To reiterate, Exception 2 only allows the withholding of documents that describe or reveal an internal agency practice with predominantly internal effects if disclosure would allow circumvention or evasion of an agency regulation.

Mr. Jacobs overlooked the requirements that the requested information relate to an internal agency practice and that the practice have predominantly internal effects and not be "secret law." His reason for nondisclosure was that public disclosure of the location of spotted owl habitat would "interfere with the government's enforcement of laws and regulations protecting these species."

The "circumvention of agency regulation" factor arises largely in requests for law enforcement manuals. Nondisclosure is allowed because provision of sensitive law enforcement information might facilitate circumvention of a law regulating private conduct.

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"Circumvention" in this context means evasion of detection of law violations or escaping prosecution for those acts. The protected practice or information must pertain to how an agency interacts with suspected violators of its regulations. Confidentiality of such documents is allowed because disclosure would threaten how the agency works in enforcing its laws. (On the other hand, administrative practices that define violations of the law must be disclosed. *Dirksen v. United States Dept. of Health & Human Serv.*, 803 F.2d 1456, 1458 (9th Cir. 1986).)

The position of the Forest Service here broadens this factor beyond information on agency interactions with law violators. The agency is not protecting information on how the Forest Service guards spotted owl habitats or cooperates in the enforcement of the Migratory Bird Treaty Act. Disclosure of the information requested would not force modification of any general agency practice regarding the northern spotted owl.

Indeed, the Forest Service has no enforcement responsibilities under the ESA, the MBTA or any other wildlife statute. It has no authority to prosecute violations of these laws; that authority lies exclusively with the Departments of Interior and Justice. The so-called "viability rule" is at best an agency program which involves no enforcement of an either civil or criminal nature.

Mr. Jacobs seeks to preserve the confidentiality of this data because he speculates that disclosure might make it more expensive or difficult to carry out spotted owl protection mandates. Even if there were any proof this speculation has any basis in fact, the circumvention factor does not permit nondisclosure of a document simply because disclosure would inconvenience the agency or make its work more difficult.

Further, there is absolutely no proof that disclosing the location of these owl sites will affect the agency administration of its wildlife protection program, or cause any harm to the spotted owls. The opposite is true: an affected entity would be better able to avoid the owls, and to prevent a taking, if it knows where they are.

Even if there were any credible inconvenience to the Forest Service, or any added enforcement burden, the "circumvention of agency regulation" factor has never been stretched to cover agency inconvenience or expense in running federal programs. There are thousands of agency practices which, if revealed, would make it more expensive for the agency to operate. Information about these practices is not immune

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from disclosure because of budgetary impacts. As observed by the *Don Ray Drive-A-Way* court in ordering disclosure of the motor carrier safety algorithm:

Shrouding the process in secrecy and thereby keeping the carriers guessing as to why, when, and whether they will be banned from certain activities is not an acceptable solution to the agency's proper concern over severe budgetary restrictions.

785 F. Supp. at 200.

Nor can an agency withhold information based on its speculative effect on private conduct, because agency disclosure might facilitate private violation of agency regulations or law. No Exception 2 case supports this broad a reading of the circumvention factor.

Such a broad reading of Exemption 2 would swallow the rule of disclosure. Arguably, disclosure of almost any internal information held by federal agencies might facilitate violations of federal regulations. Not only is this exercise speculative, but it would allow withholding almost anything.

Almost any information disclosure can have some deleterious effect. Information disclosure could also have positive effects. Here, disclosure of spotted owl activity centers will help ensure that no inadvertent takings of the birds occurs.

But the potential of bad effects from the disclosure, or the outweighing of good effects by bad ones, is not reason to justify shielding the information from public scrutiny. This is why the motive or identity of the requestor is irrelevant in a FOIA request. *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 109 S. Ct. 1468, 1480-81 (1989) (except in cases where privileged communication at issue, "the identity of the requesting party has no bearing on the merits of his or her FOIA request"). Speculative and subjective reasons are insufficient to justify nondisclosure of public records.

Instead, the circumvention factor goes to the nondisclosure of agency practices that pertain to agency interaction with law violators. The circumvention factor is satisfied when "information is made available which allows persons simultaneously to

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violate the law and to avoid detection." *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 795 (6th Cir. 1972).

The circumvention factor does not justify keeping confidential factual information merely because release of the information would inconvenience the agency, make its work more difficult or expensive, or possibly assist in the violation of some law.

The requested information here has nothing to do with an agency practice, much less one involving suspected violators of Forest Service rules or any other law. It cannot be withheld because disclosure would risk circumvention of the law.

Practice or Document as Operationally Useless

In *NTEU v. U.S. Customs Service*, *supra*, the court construed Exception 2 to allow nondisclosure of internal agency practices in documents if the disclosure would render the practices "operationally useless" or "obsolete for the purpose for which they were designed." 802 F.2d at 530. There, "crediting plans," materials used to evaluate qualifications of job applicants, were held to be nondisclosable under Exception 2 because disclosure would make the standards no longer useful.

Again, this factor relates to an agency practice, not agency-held information. Moreover, *NTEU* related to personnel practices, matters "squarely within the statutory language" of Exception 2.

All cases decided on the "circumvention of agency regulation" or "rendering operationally useless" factors involve identification and disclosure of an agency practice, most typically dealing with law enforcement, personnel evaluation or other internal functions. See *Justice Department Guide to the Freedom of Information Act* (1992) (discussing case law allowing nondisclosure of law enforcement material, vulnerability assessments, guidelines for identifying law violators, testing materials for personnel, security techniques for prisons, and agency audit guidelines).

Here, no agency practice is threatened by disclosure of the location of spotted owl activity centers. The mission and techniques of the Forest Service will be the

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same, with or without disclosure of this data. The documents describing these locations will still be valid and useful descriptions. Thus, the requested information here does not fit within the statutory language of Exception 2. It has nothing to do with agency personnel or practice.

Moreover, as recognized in *NTEU*, when the requested information or practice governs public conduct, the document must be disclosed whether or not disclosure will render the material operationally useless:

Exception (b)(2) emphatically does not authorize the promulgation of "secret law" governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete.

802 F.2d at 531.

The requested material does not relate "solely to the internal personnel rules and practices" of the Forest Service. It relates to no practice of the agency at all. It does not regulate the past or future conduct of Forest Service personnel.

Instead, the information is crucial to the administration and modification of a Forest Service contract, and to compliance with a number of federal statutes and regulations.

Withholding this information cannot be justified because of administrative convenience or expense, or because of speculation that disclosure might assist a violation of law. The only violation of law relevant here is violation of the Freedom of Information Act by nondisclosure of documents requested.

Duty to Segregate Material.

The FOIA and its implementing regulations require segregation and disclosure of those portions of documents which are not exempt from disclosure. 5 U.S.C. § 552(b); 7 C.F.R. § 1.8(b). Even assuming that portions of the requested documents are exempt, the non-exempt parts must be disclosed.

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Here, it is clear that some portions of the community assessment workshop transcript and notes pertain to matters which are not deliberative or confidential (e.g., identity of attendees, discussion of purpose of meeting, statements on the rules of conduct for the meeting).

Similarly, we suspect that the "related data" to the nesting sites or sightings contain information that does not relate to enforcement of federal protective laws.

We ask, at a minimum, that disclosable material be segregated from material which you claim is exempt.

Conclusion.

We therefore ask that you overturn the decision of Mr. Jacobs and order the release of all of the requested documents. Exceptions 2, 4, 5 and 6 do not shield this data from disclosure; no other exceptions apply or are claimed. In the alternative, we ask that you consider discretionary release of this information.

We look forward to your decision within the 20 working-day time limit. Should you uphold the denial, please produce a complete list of the documents covered by the request and indicate with particularity which material is being withheld. This will facilitate judicial review of the denial.

If you have any questions or would like additional comment, please let us know. Thank you for your attention to this matter.

Very truly yours,



Timothy J. Sercombe
Mark C. Rutzick

Interagency SEIS Team
P.O. Box 3623
Portland OR 97208-3623

December 21, 1993

Mark C. Rutzick
Preston Thorgrimson et al.
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland OR 97204-3635
228-3200 fax 248-9085

Dear Mr. Rutzick:

This is in response to your requests under the Freedom of Information Act (FOIA) for documents of the Forest Ecosystem Management Assessment Team (FEMAT). We have been making FEMAT documents available to you as we have collected and processed them. Thus far, we have made eight releases, the last one being on December 9, 1993. This constitutes our final response to your request.

We have now contacted all of the 686 individuals who were involved in the work of FEMAT, as listed on Attachment 1. Each represented that he or she would send us any FEMAT documents that were still in his or her possession or advised us that no such documents were in his or her possession. Pursuant to this effort, we have now assembled approximately 5000 documents.

Except for the information and documents described below — which we are withholding pursuant to FOIA Exemptions 2, 4, 5, and 6 (5 U.S.C. §§ 552(b)(2), (b)(4), (b)(5), and (b)(6)) — we have now placed all of these documents in the Public Room of the Bureau of Land Management's Oregon State Office (Providence Office Park, 1300 N.E. 44th Avenue, Portland, Oregon), including the documents responsive to your FOIA request. If you wish to make copies of any of these documents you may do so on the copy machine provided for your use, at no charge, in the Public Room.

In response to a recent allegation that the FEMAT record did not include all reports purchased by FEMAT, we re-contacted sub-group leaders and confirmed that for all FEMAT purchase orders resulting in written reports, the written report was in fact part of the FEMAT record.

The Public Room now contains 20 boxes of FEMAT-related documents. Attachment 2 reviews when each box was placed in the Public Room and the numbers on the documents inside each box. Attachment 3 outlines what is in each box. There may be some duplication of documents due to the large number assembled from so many sources.

Boxes 18, 19, and 20 contain printouts of the files on 90 computer disks sent to us. Attachment 4 is an index to these disks, including a printout of the directories for each disk. Please note:

- Some of these documents may be duplicates of documents contained in other boxes.

- We were able to print only two files on disk 20; the other files were not printable because of disk errors or file errors, however we believe the files are redundant of hard copies already in the FEMAT record.
- Three Bernoulli disks (FEMAT record numbers 1623, 2093, and 5276) contain so much data it is not feasible to make a printout, so we printed only the disk directory (included in Attachment 4). Upon request, we will provide you any of the files contained on the Bernoulli disks except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.
- Five disks (FEMAT record numbers 5297, and 5302 - 5305) were not printed because the disks contain data on the nesting sites or sightings of spotted owls or marbled murrelets (see below). Attachment 4 shows the file names for these disks.
- Disks containing FORPLAN files (which contain land allocation, inventory, and restriction information) were not printed because they are very large and not usable in hard copy; let us know if you want a copy on disk. These disks are FEMAT record numbers 2481 - 2484, and 2486 - 2490.
- Finally, FEMAT relied on the very large GIS database maintained by the Forest Service and the Bureau of Land Management. A backup exists on 8-mm tapes. The files are so large it is not feasible to make printouts of these tapes. The FEMAT record already contains a description of those database files in the 4-volume document titled "Spatial Unified Database Theme Documents" (FEMAT record numbers 1870-1873). Individual files within that database will be made available upon request except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.

All of the maps prepared for or by FEMAT and its subgroups are in the Public Room except those which reveal the nesting sites or sightings of the spotted owl and the marbled murrelet. Attachment 5 lists all FEMAT-related maps and identifies those 42 maps that are being withheld, designated by "ESA" in the "BIN #" column. On occasion the SEIS Team must use those maps. Thus at any given moment some or all of those maps may be checked out from the Public Room. If that is the case and you want access to a particular map that is not being withheld, please let us know and we will make arrangements for you to have access.

The documents and information which we are withholding from the public and which will not be placed in the Public Room are as follows:

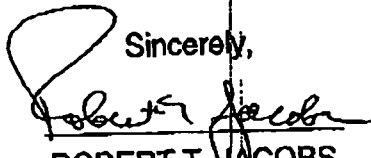
- Notes from the first community assessment workshop, consisting of approximately 170 pages (FEMAT record number 5313), and the transcript of the second community assessment workshop, consisting of approximately 1300 pages (FEMAT record number 5314), are being withheld in their entirety under FOIA Exemptions 4, 5, and 6. These documents reveal the assessments, given pursuant to a promise of confidentiality, by individuals from rural communities within the spotted owl region and others with special knowledge and insight into those communities, regarding the ability of those communities to adapt to reductions in the availability for harvesting of timber on Federal lands. Their disclosure would: result in an unwarranted invasion of privacy of those individuals who gave the assessments which outweighs any public interest in the material; result in harm to those communities judged to have low adaptability, such as through the denial of loans or grants; and unduly reveal confidential Governmental decisionmaking processes. No portions can reasonably be segregated for release.
- The names of the communities under consideration in the community assessment workshops and their respective "raters" have been redacted from narrative and

tabular summaries of the information obtained at the workshops for the same reason.

- Forty-two maps and related data revealing the nesting sites or sightings of the spotted owl and marbled murrelet are being withheld pursuant to FOIA Exemption 2. Disclosure of these maps and data would interfere with the government's enforcement of laws and regulations protecting these species.
- Home addresses, home phone numbers, and social security numbers have been redacted from personnel records under FOIA Exemption 6.

The FOIA provides you the right to appeal my decisions to withhold documents from your review. Any appeal must be made in writing to the Chief, USDA Forest Service, P.O. Box 96090, Washington DC 20090-6090, within 45 days from the date of this letter. The term "FOIA APPEAL" should be placed in capital letters on the front of the envelope.

Sincerely,



ROBERT T. JACOBS
SEIS Team Leader

Attachments

1. List of FEMAT participants
2. Log of documents in the Public Room
3. Narrative outline of box contents
4. Index to 90 computer disks
5. List of FEMAT maps

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TIMOTHY J. SERCOMBE

February 3, 1994

Chief, United States Forest Service
Department of Agriculture
P.O. Box 96090
12th St. & Independence Avenue, S.W.
Washington, D.C. 20090-6090

Re: Appeal of Denial of Request Under Freedom of Information Act

Dear Sir:

We represent the Northwest Forest Resource Council and wish to appeal two denials of information requested by our client under the Freedom of Information Act (FOIA) and applicable regulations. A copy of the denial letter, a December 21, 1993 letter from Robert T. Jacobs, SEIS Team Leader, to Mark C. Rutzick, is attached.

Our appeal pertains to three of the four categories of records which were not disclosed:

1. Notes of the first community assessment workshop and the transcript of the second community assessment workshop (FEMAT record numbers 5313 and 5314). Justification for the withholding is claimed under FOIA Exceptions 4, 5, and 6.
2. The names of the communities considered in the assessment workshops and the identity of their evaluators, redacted from summaries of the information received at the workshops. The justification appears to be FOIA Exceptions 4, 5 and 6.
3. Maps and related data revealing the nesting sites or sightings of the spotted owl and marbled murrelet were not disclosed under FOIA Exception 2.

Community Assessment Workshop Documents

It is claimed that the notes and transcript reveals the assessments of residents of rural communities, given under a promise of confidentiality, of the ability of their

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communities to adapt to reductions in the level of timber supply. This is claimed to somehow be confidential business information (Exception 4), a protected agency memorandum (Exception 5) and information from a personal file subject to the personal privacy exception (Exception 6). Mr. Jacobs claims in the denial letter that this information could cause harm to communities judged to have low adaptability "through the denial of loans or grants" and "unduly reveal confidential Governmental decisionmaking processes."

Information about the community assessment workshops is not confidential business information under Exception 4. This exception is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

This information is neither a "trade secret" nor "commercial or financial information." It presumably is socio-economic data and observations about political communities. Disclosure of this information is not "likely to cause substantial harm to the competitive position" of the submitter under *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974).

Nor is this information "privileged or confidential." It is not something that is customarily private. *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C.Cir. 1992). In fact, information about the economic viability of timber communities is widely discussed and debated in those communities and throughout the Northwest.

The agency memoranda exception, Exception 5 (5 U.S.C. § 552(b)(5)), likewise does not justify withholding this information. That exception is for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Notes and transcripts are not agency "memorandums or letters." The conversations noted or transcribed involve persons who are not agency employees or consultants. Instead, many persons not connected with the Forest Service or Bureau of Land Management participated in these events. Documents about the meetings do not pertain to internal agency communications.

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The requested records are not for deliberations of any agency. We assume that much of the information in the notes and transcript is for factual or investigative material. Exception 5 protects internal deliberations and policy discussions, not external investigations of economic and political facts.

Finally, there is no privilege or discovery preclusion for this material, a necessary showing for Exception 5 to apply.

The last claimed exception, Exception 6 (5 U.S.C. § 552(b)(6)), is for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Here, the information does not come from any "file" specific to an individual. No individual is the focus of this information. It is absurd to argue that communities have personal privacy rights as implied by Mr. Jacobs.

Moreover, the assessment of rural communities in the spotted owl region is hardly a confidential and private exercise. As noted before, it is a key part of a very public debate that is occurring throughout the Northwest.

In sum, the disclosure of the requested information on community assessments is mandated by the Freedom of Information Act. This information is not confidential business or personal data and it is not the letter or memoranda record of internal policy deliberations of agency personnel.

Nesting Sites and Sightings Data.

The next substantive issue in this appeal concerns the applicability of Exception 2, 5 U.S.C. § 552(b)(2), to those portions of the requested documents describing the location of spotted owl nest sites and activity centers. That exception allows withholding of those portions of agency records containing matters that are "related solely to the internal personnel rules and practices of an agency."

This exception does not apply for several independent reasons:

- a. The spotted owl documents do not describe or relate to an agency rule or practice. There is no internal Forest Service policy.

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guideline or practice which is revealed or invalidated by disclosing the location of spotted owl activity centers.

- b. The documents relate to matters that are not predominantly internal. The location of northern spotted owls, in particular, affects continuation of timber sale contracts, and bears directly on private citizens' obligations to comply with the Endangered Species Act and the Migratory Bird Treaty Act. Treating this information as confidential, but using the information to affect private rights and obligations, is the essence of "secret law." The FOIA was enacted to prohibit this very type of "secret law."
- c. The information sought is not trivial, does not abet circumvention of agency regulation of private conduct, and does not make an agency practice useless.

A more full discussion of the application of Exception 2 follows.

Overview of Exception 2.

The Freedom of Information Act revised the public disclosure provisions of the Administrative Procedures Act, 5 U.S.C. § 1002. According to the Senate Report on the act, the law reflected "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).

There are nine exclusive exceptions from the requirement mandating disclosure of agency records. As observed by the Supreme Court, however, "these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Department of Air Force v. Rose*, 425 U.S. 352, 362 (1976). Thus, the FOIA disclosure requirement is construed broadly by the courts, and the exemptions are narrowly confined. *Id.*, 425 U.S. at 367.

Exception 2, 5 U.S.C. § 552(b)(2), concerning records "related solely to the internal personnel rules and practices of an agency" was intended to narrow the earlier

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exemption from disclosure under the APA for "any matter related solely to the internal management of an agency." *Id.*, 425 U.S. at 364; *Vaughn v. Rosen (II)*, 523 F.2d 1136, 1141 (D.C. Cir. 1975).

The Supreme Court in the *Rose* case suggested a bifurcated analysis of Exception 2, an approach subsequently adopted by several circuits. While noting that the exception would not shield "secret law bearing directly on the propriety of actions of members of the public," the Court found that Exception 2 covered "routine matters" of "merely internal significance" "in which the public could not reasonably be expected to have an interest." 425 U.S. at 370-71.

On the other hand, the Court suggested that internal matters "subject to a genuine and significant public interest" must be disclosed "at least where the situation is not one where disclosure may risk circumvention of agency regulation." *Id.*

These two branches of Exception 2 are called the "Low 2" exception for trivial matters related to internal practices, and the "High 2" exception for more substantial internal matters whose disclosure would risk evasion of agency regulation. The standards for the "High 2" exception have developed largely in litigation on requested disclosures of agency prosecution and law enforcement policies and personnel evaluation practices.

The District of Columbia Circuit has decided a series of cases on Exception 2. Through the decisions in *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981)(en banc), *Founding Church of Scientology, Wash. D.C. v. Smith*, 721 F.2d 828 (D.C. Cir. 1983), *NTEU v. U.S. Customs Service*, 802 F.2d 525 (D.C. Cir. 1986), 802 F.2d 525 (D.C. Cir. 1986), *Schwanner v. Department of Air Force*, 898 F.2d 793 (D.C. Cir. 1990) and *Schiller v. N.L.R.B.*, 964 F.2d 1205 (D.C. Cir. 1992), the court has determined that:

Exception 2 . . . applies to material "used for predominantly internal purposes." *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc). If the threshold test of predominant internality is met, an agency may withhold the material "by proving that either [1] 'disclosure may risk circumvention of agency

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regulation,' or [2] 'the material relates to trivial administrative matters of no genuine public interest.'" [citing *Schwaner*.]

These cases suggest two other parts to the analysis. First, the requested document must be an agency rule or practice or be closely "related" to a rule or practice. *Schwaner v. Department of Air Force*, *supra*, 898 F.2d at 797-98. Second, disclosure of agency practices may be excused when disclosure would make these practices "operationally useless" and the practices pertain solely to matters of internal significance. *NTEU v. U.S. Customs Service*, *supra*, 802 F.2d at 530-31.

Thus, for the requested documents here to be exempt from disclosure they must:

- (1) Disclose a Forest Service rule or practice or be closely related to a rule or practice of the agency;
- (2) The rule or practice must operate in a predominantly internal way, *i.e.*, it is not a "secret law" with external effect, used to regulate the conduct of persons beside agency personnel; and,
- (3A) The rule or practice must be trivial so that there is not a "genuine and significant public interest" in its disclosure or in disclosure of information related to it; or,
- (3B) Disclosure must render the rule or practice operationally useless or necessarily allow evasion of agency regulation or other law.

None of these tests is satisfied in this case.

Lack of Close Relationship to Agency Rule or Practice.

The first requirement is that the document disclose a Forest Service internal rule or practice, or at least be "closely related" to an internal rule or practice. This means that document must set out, discuss, or reveal a general internal policy on the conduct or practices of Forest Service employees.

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There are many examples of internal practices: agency requirements for personnel training, rules on how often equipment is maintained, policies on the duration and location of staff meetings, guidelines on how often a forest is canvassed for violation of agency rules, etc. All of these examples involve instructions about behavior of Forest Service employees - the mechanics of how these employees do their job.

The requested spotted owl documents have nothing to do with regulating the conduct of Forest Service employees. The documents are those containing specific spotted owl information about a small area around the perimeter of a single timber sale. This information obviously is not an agency internal practice, directive or instruction.

Nor does this information "closely relate to" any regulation on the conduct of Forest Service employees. There is no internal employee practice related to spotted owls or secret locational techniques that would be revealed by disclosing the location of spotted owl activity centers.

Locations of spotted owl nests are chosen by the owls themselves, not by any design of the Forest Service. Disclosure of their placement may say something about the habits or practices of northern spotted owls. But identification of the area of these nests tells nothing about past or future actions of the Forest Service.

The only information closely related to employee practices is information about employees or how they act. Information about physical facts -- the location of bird nests, the temperature of natural springs, the height of mountains -- does not relate at all to USFS employees or describe their practices.

A mere showing that requested information is generally relevant to the mission of the Forest Service is not enough to prove that the matter is "related solely to the internal personnel rules and practices of" the Forest Service. Similarly, a showing that spotted owl information is relevant to the agency's obligations to maintain viable populations of species under 36 C.F.R. § 219.19, does not prove that the matter relates to an agency practice under Exception 2.

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Confidentiality under Exception 2, then, depends upon whether the document discloses a non-public practice or rule of the agency. The requested information in this case does no such thing.

For this reason alone, the exception does not apply.

Predominantly Internal Significance.

Even if the information were related to an agency practice, it could only be withheld from disclosure if the practice is one with predominantly internal effects. Here, spotted owl information clearly pertains to how the Forest Service manages public lands, what uses it allows or precludes on public property - matters of public and external significance and not related primarily to the internal workings of the agency. The external effect could be documented in any number of cases.

The requested information is relevant to the obligations of members of NFRC under the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. §§ 701, *et seq.*

The U.S. Fish and Wildlife Service ("FWS"), which enforces the civil and criminal components of these laws, determines whether an illegal taking of a northern spotted owl occurs by examining habitat modification (through logging) within a certain distance from a spotted owl activity center. In many cases, the relevant distance according to the FWS is 1.2 miles from the activity center. Thus, any habitat modification within 1.2 miles of a spotted owl activity center could potentially expose our clients to prosecution (or a citizen suit) under the ESA or the MBTA. Information showing the location of spotted owl activity centers within 1.2 miles of the sale allows affected parties to assure that their logging activities will not bring them in violation of the ESA as interpreted by the FWS.

Information that diminishes the value of a pending timber sale contract, and that may determine whether a violation of federal criminal statutes and regulations will occur, cannot be considered "predominantly internal" to the Forest Service.

Left undisclosed, information that forms a key element of civil or criminal charges by the government is "secret law." If one thing is clear in the case law on

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Exception 2, it is that nothing in Exception 2, or anywhere else in the FOIA, shields practices or information directly relating to the regulation of public conduct or contracts. This is why the Ninth Circuit in *Hardy v. Bureau of Alcohol, Tobacco & Firearms, supra*, flatly held that "administrative" materials that involve the definition of a violation of law must be disclosed, notwithstanding Exception 2. 631 F.2d at 657.

Thus, the Supreme Court in *Rose* indicated that "secret law bearing directly on the propriety of actions of members of the public" must be disclosed under FOIA. 425 U.S. at 370. The District of Columbia Circuit found that FOIA protected only information which:

does not purport to regulate activities among members of the public. Nor does it set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public. Differently stated, the unreleased information is not "secret law," the primary target of [the FOIA's] disclosure provisions.

Cox v. Department of Justice, 601 F.2d 1, 5 (D.C. Cir. 1979) (per curiam).

The location of spotted owl habitat here is far less protectible than the document at stake in *Don Drive-A-Way v. Skinner*, 785 F. Supp. 198 (D.D.C. 1992). There, the Federal Highway Administration devised an algorithm or formula to weigh the various factors used to determine a motor carrier's safety rating. The plaintiff sought disclosure under FOIA of documents describing the algorithm. The agency contended that Exception 2 allowed nondisclosure because the matter related solely to its internal practices.

An unsatisfactory safety rating affected a carrier's ability to haul certain freight or be used by certain federal agencies. The court found that:

The algorithm is not purely internal because its effect and the legal status it imposes on carriers are adopted by other agencies without any further analysis or discretion. . . . The algorithm may not define new safety violations, but it does determine whether and to what extent certain violations will have any legal effect or carry any legal penalty. Thus, the algorithm does not simply involve investigative techniques or procedures.

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... It is regularly followed in all ratings; it controls final agency action subject to review; and it has the same status as regulations or agency law. As such, FOIA offers no exemption.

785 F. Supp. at 200.

In the same vein, here the location of spotted owl activity centers affects the Department of Interior and implementation of the Endangered Species Act and the Migratory Bird Treaty Act. The existence of the activity center may determine whether and how to modify an existing contract between our client and the Forest Service. It has the same status as regulations and agency law and must be disclosed. *See also, EPPS v. Department of Justice*, 801 F. Supp. 787, 791 (D.D.C. 1992) (record of payments to non-government informants not "predominantly internal" and thus not protected by Exception 2).

Exception 2 shields only information on agency practices affecting its internal operations and not matters of external impact. This principle was reiterated by the District of Columbia Circuit in *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, *supra*, in distinguishing its earlier decision in *Jordan v. United States Dep't of Justice*, 591 F.2d 753 (D.C. Cir. 1978).

In *Crocker* the court held that Exception 2 shielded from disclosure portions of an agent's training manual of the Bureau of Alcohol, Tobacco & Firearms relating to surveillance. The court overturned the reasoning adopted, but not the result reached, in the earlier *Jordan* case. The *Jordan* court required disclosure of Department of Justice internal guidelines on prosecutorial discretion. As the court held in *Crocker*:

The guidelines on prosecutorial discretion are instructions to agency personnel (e.g., prosecutors) on *how to regulate members of the public*. Knowledge of those regulations may be as significant to members of the public as is knowledge of statutory sentencing provisions. The BATF manual, on the other hand, is *not concerned with regulating the behavior of the public, but consists solely of instructions to agency personnel*. *There is no attempt to modify or regulate public behavior--only to observe it for illegal activity*. Accordingly, under the rule we announce

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today, the result in *Jordan*--release of the documents on prosecutorial discretion--would be the same.

670 F.2d at 1075 (emphasis supplied).

In sum, the location of spotted owl activity centers is not predominantly used by the Forest Service to develop or implement internal rules or practices. Instead, that data is used to implement public mandates imposed by statute and agency rule, dealing with the regulation of public land.

The spotted owl data is an indispensable part of the Forest Service regulation of timber sale contracts. It is also used by the Department of Interior in implementing its laws and regulations and defining illegal conduct by private citizens.

For these reasons, the requested information is not "predominantly internal" to the operations of the Forest Service. For the same reasons, the information is not by any measure "trivial." Documents containing this information must be disclosed under the Act.

Circumvention of Agency Regulation.

To reiterate, Exception 2 only allows the withholding of documents that describe or reveal an internal agency practice with predominantly internal effects if disclosure would allow circumvention or evasion of an agency regulation.

Mr. Jacobs overlooked the requirements that the requested information relate to an internal agency practice and that the practice have predominantly internal effects and not be "secret law." His reason for nondisclosure was that public disclosure of the location of spotted owl habitat would "interfere with the government's enforcement of laws and regulations protecting these species."

The "circumvention of agency regulation" factor arises largely in requests for law enforcement manuals. Nondisclosure is allowed because provision of sensitive law enforcement information might facilitate circumvention of a law regulating private conduct.

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"Circumvention" in this context means evasion of detection of law violations or escaping prosecution for those acts. The protected practice or information must pertain to how an agency interacts with suspected violators of its regulations. Confidentiality of such documents is allowed because disclosure would threaten how the agency works in enforcing its laws. (On the other hand, administrative practices that define violations of the law must be disclosed. *Dirksen v. United States Dept. of Health & Human Serv.*, 803 F.2d 1456, 1458 (9th Cir. 1986).)

The position of the Forest Service here broadens this factor beyond information on agency interactions with law violators. The agency is not protecting information on how the Forest Service guards spotted owl habitats or cooperates in the enforcement of the Migratory Bird Treaty Act. Disclosure of the information requested would not force modification of any general agency practice regarding the northern spotted owl.

Indeed, the Forest Service has no enforcement responsibilities under the ESA, the MBTA or any other wildlife statute. It has no authority to prosecute violations of these laws; that authority lies exclusively with the Departments of Interior and Justice. The so-called "viability rule" is at best an agency program which involves no enforcement of an either civil or criminal nature.

Mr. Jacobs seeks to preserve the confidentiality of this data because he speculates that disclosure might make it more expensive or difficult to carry out spotted owl protection mandates. Even if there were any proof this speculation has any basis in fact, the circumvention factor does not permit nondisclosure of a document simply because disclosure would inconvenience the agency or make its work more difficult.

Further, there is absolutely no proof that disclosing the location of these owl sites will affect the agency administration of its wildlife protection program, or cause any harm to the spotted owls. The opposite is true: an affected entity would be better able to avoid the owls, and to prevent a taking, if it knows where they are.

Even if there were any credible inconvenience to the Forest Service, or any added enforcement burden, the "circumvention of agency regulation" factor has never been stretched to cover agency inconvenience or expense in running federal programs. There are thousands of agency practices which, if revealed, would make it more expensive for the agency to operate. Information about these practices is not immune

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from disclosure because of budgetary impacts. As observed by the *Don Ray Drive-A-Way* court in ordering disclosure of the motor carrier safety algorithm:

Shrouding the process in secrecy and thereby keeping the carriers guessing as to why, when, and whether they will be banned from certain activities is not an acceptable solution to the agency's proper concern over severe budgetary restrictions.

785 F. Supp. at 200.

Nor can an agency withhold information based on its speculative effect on private conduct, because agency disclosure might facilitate private violation of agency regulations or law. No Exception 2 case supports this broad a reading of the circumvention factor.

Such a broad reading of Exemption 2 would swallow the rule of disclosure. Arguably, disclosure of almost any internal information held by federal agencies might facilitate violations of federal regulations. Not only is this exercise speculative, but it would allow withholding almost anything.

Almost any information disclosure can have some deleterious effect. Information disclosure could also have positive effects. Here, disclosure of spotted owl activity centers will help ensure that no inadvertent takings of the birds occurs.

But the potential of bad effects from the disclosure, or the outweighing of good effects by bad ones, is not reason to justify shielding the information from public scrutiny. This is why the motive or identity of the requestor is irrelevant in a FOIA request. *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749, 109 S. Ct. 1468, 1480-81 (1989) (except in cases where privileged communication at issue, "the identity of the requesting party has no bearing on the merits of his or her FOIA request"). Speculative and subjective reasons are insufficient to justify nondisclosure of public records.

Instead, the circumvention factor goes to the nondisclosure of agency practices that pertain to agency interaction with law violators. The circumvention factor is satisfied when "information is made available which allows persons simultaneously to

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violate the law and to avoid detection." *Hawkes v. Internal Revenue Service*, 467 F.2d 787, 795 (6th Cir. 1972).

The circumvention factor does not justify keeping confidential factual information merely because release of the information would inconvenience the agency, make its work more difficult or expensive, or possibly assist in the violation of some law.

The requested information here has nothing to do with an agency practice, much less one involving suspected violators of Forest Service rules or any other law. It cannot be withheld because disclosure would risk circumvention of the law.

Practice or Document as Operationally Useless

In *NTEU v. U.S. Customs Service*, *supra*, the court construed Exception 2 to allow nondisclosure of internal agency practices in documents if the disclosure would render the practices "operationally useless" or "obsolete for the purpose for which they were designed." 802 F.2d at 530. There, "crediting plans," materials used to evaluate qualifications of job applicants, were held to be nondisclosable under Exception 2 because disclosure would make the standards no longer useful.

Again, this factor relates to an agency practice, not agency-held information. Moreover, *NTEU* related to personnel practices, matters "squarely within the statutory language" of Exception 2.

All cases decided on the "circumvention of agency regulation" or "rendering operationally useless" factors involve identification and disclosure of an agency practice, most typically dealing with law enforcement, personnel evaluation or other internal functions. See *Justice Department Guide to the Freedom of Information Act* (1992) (discussing case law allowing nondisclosure of law enforcement material, vulnerability assessments, guidelines for identifying law violators, testing materials for personnel, security techniques for prisons, and agency audit guidelines).

Here, no agency practice is threatened by disclosure of the location of spotted owl activity centers. The mission and techniques of the Forest Service will be the

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same, with or without disclosure of this data. The documents describing these locations will still be valid and useful descriptions. Thus, the requested information here does not fit within the statutory language of Exception 2. It has nothing to do with agency personnel or practice.

Moreover, as recognized in *NTEU*, when the requested information or practice governs public conduct, the document must be disclosed whether or not disclosure will render the material operationally useless:

Exception (b)(2) emphatically does not authorize the promulgation of "secret law" governing members of the public, and such documents would be unprotected whether or not disclosure threatened to make them operationally obsolete.

802 F.2d at 531.

The requested material does not relate "solely to the internal personnel rules and practices" of the Forest Service. It relates to no practice of the agency at all. It does not regulate the past or future conduct of Forest Service personnel.

Instead, the information is crucial to the administration and modification of a Forest Service contract, and to compliance with a number of federal statutes and regulations.

Withholding this information cannot be justified because of administrative convenience or expense, or because of speculation that disclosure might assist a violation of law. The only violation of law relevant here is violation of the Freedom of Information Act by nondisclosure of documents requested.

Duty to Segregate Material.

The FOIA and its implementing regulations require segregation and disclosure of those portions of documents which are not exempt from disclosure. 5 U.S.C. § 552(b); 7 C.F.R. § 1.8(b). Even assuming that portions of the requested documents are exempt, the non-exempt parts must be disclosed.

PRESTON THORGRIMSON SHIDLER GATES & ELLIS

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Here, it is clear that some portions of the community assessment workshop transcript and notes pertain to matters which are not deliberative or confidential (e.g., identity of attendees, discussion of purpose of meeting, statements on the rules of conduct for the meeting).

Similarly, we suspect that the "related data" to the nesting sites or sightings contain information that does not relate to enforcement of federal protective laws.

We ask, at a minimum, that disclosable material be segregated from material which you claim is exempt.

Conclusion.

We therefore ask that you overturn the decision of Mr. Jacobs and order the release of all of the requested documents. Exceptions 2, 4, 5 and 6 do not shield this data from disclosure; no other exceptions apply or are claimed. In the alternative, we ask that you consider discretionary release of this information.

We look forward to your decision within the 20 working-day time limit. Should you uphold the denial, please produce a complete list of the documents covered by the request and indicate with particularity which material is being withheld. This will facilitate judicial review of the denial.

If you have any questions or would like additional comment, please let us know. Thank you for your attention to this matter.

Very truly yours,


Timothy J. Sercombe
Mark C. Rutzick

Interagency SEIS Team

**P.O. Box 3623
Portland OR 97208-3623**

December 21, 1993

Mark C. Rutzick
Preston Thorgrimson et al.
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland OR 97204-3635
228-3200 fax 248-9085

Dear Mr. Rutzick:

This is in response to your requests under the Freedom of Information Act (FOIA) for documents of the Forest Ecosystem Management Assessment Team (FEMAT). We have been making FEMAT documents available to you as we have collected and processed them. Thus far, we have made eight releases, the last one being on December 9, 1993. This constitutes our final response to your request.

We have now contacted all of the 686 individuals who were involved in the work of FEMAT, as listed on Attachment 1. Each represented that he or she would send us any FEMAT documents that were still in his or her possession or advised us that no such documents were in his or her possession. Pursuant to this effort, we have now assembled approximately 5000 documents.

Except for the information and documents described below — which we are withholding pursuant to FOIA Exemptions 2, 4, 5, and 6 (5 U.S.C. §§ 552(b)(2), (b)(4), (b)(5), and (b)(6)) — we have now placed all of these documents in the Public Room of the Bureau of Land Management's Oregon State Office (Providence Office Park, 1300 N.E. 44th Avenue, Portland, Oregon), including the documents responsive to your FOIA request. If you wish to make copies of any of these documents you may do so on the copy machine provided for your use, at no charge, in the Public Room.

In response to a recent allegation that the FEMAT record did not include all reports purchased by FEMAT, we re-contacted sub-group leaders and confirmed that for all FEMAT purchase orders resulting in written reports, the written report was in fact part of the FEMAT record.

The Public Room now contains 20 boxes of FEMAT-related documents. Attachment 2 reviews when each box was placed in the Public Room and the numbers on the documents inside each box. Attachment 3 outlines what is in each box. There may be some duplication of documents due to the large number assembled from so many sources.

Boxes 18, 19, and 20 contain printouts of the files on 90 computer disks sent to us. Attachment 4 is an index to these disks, including a printout of the directories for each disk. Please note:

- Some of these documents may be duplicates of documents contained in other boxes.

- We were able to print only two files on disk 20; the other files were not printable because of disk errors or file errors, however we believe the files are redundant of hard copies already in the FEMAT record.
- Three Bernoulli disks (FEMAT record numbers 1623, 2093, and 5276) contain so much data it is not feasible to make a printout, so we printed only the disk directory (Included in Attachment 4). Upon request, we will provide you any of the files contained on the Bernoulli disks except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.
- Five disks (FEMAT record numbers 5297, and 5302 - 5305) were not printed because the disks contain data on the nesting sites or sightings of spotted owls or marbled murrelets (see below). Attachment 4 shows the file names for these disks.
- Disks containing FORPLAN files (which contain land allocation, inventory, and restriction information) were not printed because they are very large and not usable in hard copy; let us know if you want a copy on disk. These disks are FEMAT record numbers 2481 - 2484, and 2486 - 2490.
- Finally, FEMAT relied on the very large GIS database maintained by the Forest Service and the Bureau of Land Management. A backup exists on 8-mm tapes. The files are so large it is not feasible to make printouts of these tapes. The FEMAT record already contains a description of those database files in the 4-volume document titled "Spatial Unified Database Theme Documents" (FEMAT record numbers 1870-1873). Individual files within that database will be made available upon request except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.

All of the maps prepared for or by FEMAT and its subgroups are in the Public Room except those which reveal the nesting sites or sightings of the spotted owl and the marbled murrelet. Attachment 5 lists all FEMAT-related maps and identifies those 42 maps that are being withheld, designated by "ESA" in the "BIN #" column. On occasion the SEIS Team must use those maps. Thus at any given moment some or all of those maps may be checked out from the Public Room. If that is the case and you want access to a particular map that is not being withheld, please let us know and we will make arrangements for you to have access.

The documents and information which we are withholding from the public and which will not be placed in the Public Room are as follows:

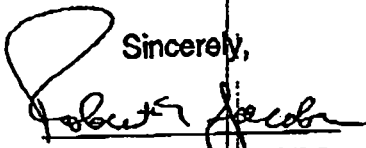
- Notes from the first community assessment workshop, consisting of approximately 170 pages (FEMAT record number 5313), and the transcript of the second community assessment workshop, consisting of approximately 1300 pages (FEMAT record number 5314), are being withheld in their entirety under FOIA Exemptions 4, 5, and 6. These documents reveal the assessments, given pursuant to a promise of confidentiality, by individuals from rural communities within the spotted owl region and others with special knowledge and insight into those communities, regarding the ability of those communities to adapt to reductions in the availability for harvesting of timber on Federal lands. Their disclosure would: result in an unwarranted invasion of privacy of those individuals who gave the assessments which outweighs any public interest in the material; result in harm to those communities judged to have low adaptability, such as through the denial of loans or grants; and unduly reveal confidential Governmental decisionmaking processes. No portions can reasonably be segregated for release.
- The names of the communities under consideration in the community assessment workshops and their respective "raters" have been redacted from narrative and

tabular summaries of the information obtained at the workshops for the same reason.

- Forty-two maps and related data revealing the nesting sites or sightings of the spotted owl and marbled murrelet are being withheld pursuant to FOIA Exemption 2. Disclosure of these maps and data would interfere with the government's enforcement of laws and regulations protecting these species.
- Home addresses, home phone numbers, and social security numbers have been redacted from personnel records under FOIA Exemption 6.

The FOIA provides you the right to appeal my decisions to withhold documents from your review. Any appeal must be made in writing to the Chief, USDA Forest Service, P.O. Box 96090, Washington DC 20090-6090, within 45 days from the date of this letter. The term "FOIA APPEAL" should be placed in capital letters on the front of the envelope.

Sincerely,


ROBERT T. JACOBS
SEIS Team Leader

Attachments

1. List of FEMAT participants
2. Log of documents in the Public Room
3. Narrative outline of box contents
4. Index to 90 computer disks
5. List of FEMAT maps

January 19, 1994

MEMORANDUM TO KATIE MCGINTY AND MARK GEARAN

FROM: Todd Campbell *TSC*

RE: ~~Forest Conference FACA Litigation~~
~~Confidential: Attorney-Client Privilege~~

The Court in the Forest Conference FACA litigation has canceled the hearing previously set for Thursday, January 27, 1994 on the Cross-Motions for Summary Judgment. I will let you know when the hearing is rescheduled.

As noted in my previous memorandum, it is likely that we will lose this litigation. (See attached copy). We need to get prepared to respond to the Court's ruling on the Cross-Motions for Summary Judgment. Please let me know if you want to discuss this.

TJC:aw

Attachment

cc: Jack Quinn

*Will
File I.
I'm arranging a
mtg. w/ Todd to
discuss implications.
You still attend.
Watch for plan my
Schedule.*

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: *M* DATE: *2/15/00*

2012-0765-1

December 28, 1993

MEMORANDUM FOR MARK GEARAN AND KATIE McGINTY

FROM: Todd Campbell TSC

RE: Forest Conference FACA Litigation
~~Confidential: Attorney-Client Privilege~~

This is to update you on the status of the Forest Conference FACA litigation. (Northwest Forest Resource Council v. Mike Espy, Secretary of Agriculture, Bruce Babbitt, Secretary of Interior, Jack Ward Thomas, Chairman, and Forest Ecosystem Management Assessment Team)

The Northwest Forest Resource Council filed suit last August alleging that the Forest Ecosystem Management Assessment Team (FEMAT) was a Federal Advisory Committee. The Plaintiff seeks access to all FEMAT documents and an injunction prohibiting the Government from using the FEMAT report to implement Option 9, as well as other relief. The basis of the FACA claim generally is that FEMAT included various professors who were not full-time federal employees. Generally, a task force is a FACA committee unless it is composed of all full-time federal employees.

The parties have now taken depositions and filed cross Motions for Summary Judgment. The Motions for Summary Judgment are set to be heard on January 27, 1994 at 3:00 p.m.

Also, most of the FEMAT documents have been produced pursuant to a Freedom of Information Act (FOIA) request. However, a small number of sensitive documents have not been released pursuant to various FOIA exemptions.

I want to prepare you for the worst. We will likely lose this lawsuit. The main problem is that although the professors were paid as consultants, it is difficult to make the case that they were "full-time" federal employees.

There is no way to determine when the court will rule on the Motions for Summary Judgment. However, it would be prudent for us to be prepared for a decision on January 27, 1994.

Please let me know if you want to meet to discuss this in detail.

TJC:aw

cc: Jack Quinn

KATE: I HAVE ASKED CAMPBELL TO
EXPLORE SETTLEMENT OFFERS ASAP, AND
THEN REPORT TO US ON THE POSSIBILITIES -
I THINK THIS IS SIGNIFICANT, AND
ABOUT W/ YOUR QUESTIONS - IT DOES
THE SETTLEMENT POSSIBILITY -

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: *W* DATE: *2/15/98*

2012-0784-6

December 28, 1993

MEMORANDUM FOR MARK GEARAN AND KATIE MCGINTY

FROM: Todd Campbell *TSC*

RE: ~~Forest Conference FACA Litigation~~
~~Confidential: Attorney-Client Privilege~~

This is to update you on the status of the Forest Conference FACA litigation. (Northwest Forest Resource Council v. Mike Espy, Secretary of Agriculture, Bruce Babbitt, Secretary of Interior, Jack Ward Thomas, Chairman, and Forest Ecosystem Management Assessment Team)

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Please let me know if you want to meet to discuss this in detail.

TJC:aw

cc: Jack Quinn

Please to [unclear] [unclear]

What is the likely fall-out here? Do we need to be preparing any kind of response or strategy in the event that further [unclear] follow?



U.S. Department of Justice

Washington, D.C. 20530

DETERMINED TO BE AN ADMINISTRATIVE

CIVIL DIVISION

MARKING INITIALS: W DATE: 2/15/94

FEDERAL PROGRAMS BRANCH

202-0744F

FAX TRANSMITTAL COVER SHEET

DATE: January 4, 1994TO: Todd CampbellFAX NUMBER: 456-6429FROM: Robert Whitman

Fax: (202) 616-8202

Direct Dial: (202) 514-1494

THERE ARE A TOTAL OF 3 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.~~CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION~~

FYI: This is the settlement proposal that the plaintiff made initially, and which was "still open" (according to Rutzick) when our settlement discussions ceased in October. Section I has already been achieved. Section II is either unacceptable (part A) or difficult/impossible (parts B and C). Section III is one area where we may have some negotiating room, perhaps by offering one or two on-the-record interviews regarding the substance of FEMAT's work. Section IV is completely unacceptable, especially since the SEIS team has been working for months and is now finishing-up. Section V is negotiable, though distasteful.

We'll be better able to address settlement once we receive the plaintiff's final briefs, which are due today, and see what kind of arguments they make regarding the scope and availability of relief. I'll get copies to you as soon as they arrive.

~~CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION~~

Northwest Forest Resource Council v. Espy**NFRC SETTLEMENT PROPOSAL****Privileged Under FRE 408****I. Documents**

A. Government makes all FEMAT documents (including all documents from consultants and non-team members) available to NFRC without asserting any FOIA exemptions (no deliberative process privilege) and without redactions.

B. No charge for copies of documents for NFRC.

C. All documents produced and copied as soon as possible.

D. Government provides list of all consultants and "non-team" participants in FEMAT.

E. Government commits to obtaining positive response from each participant regarding production of documents, and to obtaining all documents from all participants.

II. FACA Compliance

A. Government files a charter for FEMAT in compliance with FACA § 9.

B. Government files report required under FACA § 10(d) describing what occurred at meetings that were closed to the public.

C. Government agrees it will hold no further meetings of FEMAT without following FACA procedures.

III. Reconstruction of FEMAT Process

A. Recognizing that no minutes were maintained of FEMAT meetings, the following members of FEMAT will appear separately for a private stenographically-recorded interview with representatives of NFRC to discuss the substantive and procedural components of the FEMAT Report for a period not to exceed one business day (eight hours) per person:

1. Jack Ward Thomas
2. Martin G. Raphael
3. E. Charles Meslow
4. Jerry F. Franklin
5. James R. Sedell

6. Gordon H. Reeves
7. K. Norman Johnson
8. Brian Greber
9. Roger N. Clark

IV. SEIS Team

A. Recognizing that the taint from the unbalanced and inappropriately influenced FEMAT Report cannot fully be eradicated at this late date if the SEIS process is to continue as currently planned, the Forest Service/BLM SEIS Team will announce in advance, and allow members of the public to observe, all of its meetings between October 28 and the date the record of decision is issued, and will keep minutes of all meetings similar to minutes required for a FACA committee.

V. Attorney Fees

A. Government will agree to pay NFRC its reasonable attorney fees incurred in prosecuting this action.

K:\MCK\21510-01\02\1\KQ\00118.1QD

Interagency SEIS Team
P.O. Box 3623
Portland OR 97208-3623

December 21, 1993

Mark C. Rutzick
Preston Thorgrimson et al.
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland OR 97204-3635
228-3200 fax 248-9085

Dear Mr. Rutzick:

This is in response to your requests under the Freedom of Information Act (FOIA) for documents of the Forest Ecosystem Management Assessment Team (FEMAT). We have been making FEMAT documents available to you as we have collected and processed them. Thus far, we have made eight releases, the last one being on December 9, 1993. This constitutes our final response to your request.

We have now contacted all of the 686 individuals who were involved in the work of FEMAT, as listed on Attachment 1. Each represented that he or she would send us any FEMAT documents that were still in his or her possession or advised us that no such documents were in his or her possession. Pursuant to this effort, we have now assembled approximately 5000 documents.

Except for the information and documents described below — which we are withholding pursuant to FOIA Exemptions 2, 4, 5, and 6 (5 U.S.C. §§ 552(b)(2), (b)(4), (b)(5), and (b)(6)) — we have now placed all of these documents in the Public Room of the Bureau of Land Management's Oregon State Office (Providence Office Park, 1300 N.E. 44th Avenue, Portland, Oregon), including the documents responsive to your FOIA request. If you wish to make copies of any of these documents you may do so on the copy machine provided for your use, at no charge, in the Public Room.

In response to a recent allegation that the FEMAT record did not include all reports purchased by FEMAT, we re-contacted sub-group leaders and confirmed that for all FEMAT purchase orders resulting in written reports, the written report was in fact part of the FEMAT record.

The Public Room now contains 20 boxes of FEMAT-related documents. Attachment 2 reviews when each box was placed in the Public Room and the numbers on the documents inside each box. Attachment 3 outlines what is in each box. There may be some duplication of documents due to the large number assembled from so many sources.

Boxes 18, 19, and 20 contain printouts of the files on 90 computer disks sent to us. Attachment 4 is an index to these disks, including a printout of the directories for each disk. Please note:

- Some of these documents may be duplicates of documents contained in other boxes.

Will
FYI

Todd
Campbell

- We were able to print only two files on disk 20; the other files were not printable because of disk errors or file errors, however we believe the files are redundant of hard copies already in the FEMAT record.
- Three Bernoulli disks (FEMAT record numbers 1823, 2093, and 5276) contain so much data it is not feasible to make a printout, so we printed only the disk directory (included in Attachment 4). Upon request, we will provide you any of the files contained on the Bernoulli disks except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.
- Five disks (FEMAT record numbers 5297, and 5302 - 5305) were not printed because the disks contain data on the nesting sites or sightings of spotted owls or marbled murrelets (see below). Attachment 4 shows the file names for these disks.
- Disks containing FORPLAN files (which contain land allocation, inventory, and restriction information) were not printed because they are very large and not usable in hard copy; let us know if you want a copy on disk. These disks are FEMAT record numbers 2481 - 2484, and 2488 - 2490.
- Finally, FEMAT relied on the very large GIS database maintained by the Forest Service and the Bureau of Land Management. A backup exists on 8-mm tapes. The files are so large it is not feasible to make printouts of these tapes. The FEMAT record already contains a description of those database files in the 4-volume document titled "Spatial Unified Database Theme Documents" (FEMAT record numbers 1870-1873). Individual files within that database will be made available upon request except those which reveal the nesting sites or sightings of the spotted owl and marbled murrelet.

All of the maps prepared for or by FEMAT and its subgroups are in the Public Room except those which reveal the nesting sites or sightings of the spotted owl and the marbled murrelet. Attachment 5 lists all FEMAT-related maps and identifies those 42 maps that are being withheld, designated by "ESA" in the "BIN #" column. On occasion the SEIS Team must use those maps. Thus at any given moment some or all of those maps may be checked out from the Public Room. If that is the case and you want access to a particular map that is not being withheld, please let us know and we will make arrangements for you to have access.

The documents and information which we are withholding from the public and which will not be placed in the Public Room are as follows:

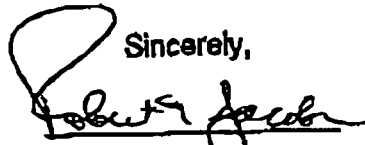
- Notes from the first community assessment workshop, consisting of approximately 170 pages (FEMAT record number 5313), and the transcript of the second community assessment workshop, consisting of approximately 1300 pages (FEMAT record number 5314), are being withheld in their entirety under FOIA Exemptions 4, 5, and 6. These documents reveal the assessments, given pursuant to a promise of confidentiality, by individuals from rural communities within the spotted owl region and others with special knowledge and insight into those communities, regarding the ability of those communities to adapt to reductions in the availability for harvesting of timber on Federal lands. Their disclosure would result in an unwarranted invasion of privacy of those individuals who gave the assessments which outweighs any public interest in the material; result in harm to those communities judged to have low adaptability, such as through the denial of loans or grants; and unduly reveal confidential Governmental decisionmaking processes. No portions can reasonably be segregated for release.
- The names of the communities under consideration in the community assessment workshops and their respective "raters" have been redacted from narrative and

tabular summaries of the information obtained at the workshops for the same reason.

- Forty-two maps and related data revealing the nesting sites or sightings of the spotted owl and marbled murrelet are being withheld pursuant to FOIA Exemption 2. Disclosure of these maps and data would interfere with the government's enforcement of laws and regulations protecting these species.
- Home addresses, home phone numbers, and social security numbers have been redacted from personnel records under FOIA Exemption 6.

The FOIA provides you the right to appeal my decisions to withhold documents from your review. Any appeal must be made in writing to the Chief, USDA Forest Service, P.O. Box 96090, Washington DC 20090-6090, within 45 days from the date of this letter. The term "FOIA APPEAL" should be placed in capital letters on the front of the envelope.

Sincerely,



ROBERT T. JACOBS
SEIS Team Leader

Attachments

1. List of FEMAT participants
2. Log of documents in the Pueblo Room
3. Narrative outline of box contents
4. Index to 90 computer disks
5. List of FEMAT maps

Attachment 2

Interagency SEIS Team
P.O. Box 3623
Portland OR 97208-3623

December 21, 1993

Box number —	Was placed in the Public Room on or about —	Containing documents within the series —
1	September 14, 1993	1 - 600
2	September 14, 1993	601 - 993
3	September 14, 1993	994 - 1200
4	October 4, 1993	1220 - 1539
5	October 4, 1993	2506 - 2676
6	October 7, 1993	1540 - 1889
8	October 7, 1993	1870 - 1929
7	October 7, 1993	1930 - 2096
8	October 6, 1993	2844 - 3147
9	October 13, 1993	3148 - 3390
10	October 13, 1993	2097 - 2505; 2677 - 2843
11	October 25, 1993	3331 - 3376
12	October 25, 1993	3439 - 3492
13	October 25, 1993	3493 - 3600
14	November 8, 1993	3601 - 3791
15	December 8, 1993	3792 - 3808; 5041 - 5253; 5277 - 5495
16	December 21, 1993	5254 - 5275
17	December 20, 1993	3809 - 4112
18	December 20, 1993	4113 - 4151
19	December 20, 1993	4152 - 4185
20	December 20, 1993	

U.S. Bureau of Land Management
Oregon State Office
Providence Office Park
1300 N.E. 44th Avenue
Portland, OR 97208

The Public Room is on the first floor of Providence Office Park. Hours are 8:30 am to 4:00 pm. Ask for the "FEMAT records." Visitors sign in at the entrance to BLM's State Office, and again sign a log book in the Public Room. Copies of FEMAT records can be made at no charge on the copy machine provided for this purpose.

DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: NS DATE: 2/15/14

2012-07694

December 28, 1993

MEMORANDUM FOR MARK GEARAN AND KATIE MCGINTY

FROM: Todd Campbell TSC

RE: Forest Conference FACA Litigation
Confidential: Attorney-Client Privilege

This is to update you on the status of the Forest Conference FACA litigation. (Northwest Forest Resource Council v. Mike Espy, Secretary of Agriculture, Bruce Babbitt, Secretary of Interior, Jack Ward Thomas, Chairman, and Forest Ecosystem Management Assessment Team)

The Northwest Forest Resource Council filed suit last August alleging that the Forest Ecosystem Management Assessment Team (FEMAT) was a Federal Advisory Committee. The Plaintiff seeks access to all FEMAT documents and an injunction prohibiting the Government from using the FEMAT report to implement Option 9, as well as other relief. The basis of the FACA claim generally is that FEMAT included various professors who were not full-time federal employees. Generally, a task force is a FACA committee unless it is composed of all full-time federal employees.

The parties have now taken depositions and filed cross Motions for Summary Judgment. The Motions for Summary Judgment are set to be heard on January 27, 1994 at 3:00 p.m.

Also, most of the FEMAT documents have been produced pursuant to a Freedom of Information Act (FOIA) request. However, a small number of sensitive documents have not been released pursuant to various FOIA exemptions.

I want to prepare you for the worst. We will likely lose this lawsuit. The main problem is that although the professors were paid as consultants, it is difficult to make the case that they were "full-time" federal employees.

There is no way to determine when the court will rule on the Motions for Summary Judgment. However, it would be prudent for us to be prepared for a decision on January 27, 1994.

Please let me know if you want to meet to discuss this in detail.

TJC:aw

cc: Jack Quinn

① The only issue may be an issue of remedy

② Davis Industries Federal

OFFICE OF THE VICE PRESIDENT
WASHINGTON

TO: Katie McGinty

FROM: Todd J. Campbell
Counsel

☐ FYI

☐ Comment

☐ Action

Will
please
review
this

Our reply briefs in the Forest
Conference case are due Tues.
Attached is a draft of the
Constitutional brief. The others
will be ready later. Call
if you want any changes
Thanks. x 7082

The case is set for hearing
on Jan 27 at 3:00 p.m.

DRAFT

12/17/93

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIANORTHWEST FOREST RESOURCE
COUNCIL,

Plaintiff,

v.

Case No. 93-1621
(TPJ)MIKE ESPY,
Secretary of Agriculture,
et al.,
Defendants.**REPLY MEMORANDUM
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT****PRELIMINARY STATEMENT**

Plaintiff's attempt to minimize the constitutional ramifications of its effort to subject FEMAT to the Federal Advisory Committee Act betrays a fundamental mischaracterization of both fact and law. Plaintiff first describes the formulation of a federal forest-management plan as if the President had little if any role in the process, a portrayal completely at odds with the facts. Plaintiff then advances an elaborate balancing formula that assertedly governs the constitutional inquiry, even though the formula is without legal support and, when applied to the facts of this case, works in defendants' favor.

As described in defendants' initial memorandum, the President and his advisors used FEMAT to receive a technical assessment of various approaches to federal forest management. In order to receive the best possible work product from FEMAT, the government supplemented its in-house expertise with the assistance of a number of academics whose normal employer is not

the federal government. The central issue in this case, in constitutional terms, is whether the President of the United States can take such action without triggering the FACA's requirements of, among other things, open meetings and balanced membership. Plaintiff never challenges defendants' contention that operating FEMAT according to strictures of the FACA would have been extraordinarily burdensome in light of the nature of the team's activities and the time and policy constraints imposed on it. Plaintiff also fails to confront the commonsense and legally well established proposition that Presidents should be able to seek and receive advice in private from whomever, and in whatever way, they choose.

Ultimately, plaintiff offers this Court nothing to counter defendants' argument that application of the FACA to FEMAT would be an impermissible incursion into the President's prerogatives under Article II. The constitutional ramifications of plaintiff's position should counsel this Court to hold that FEMAT is not an "advisory committee" subject to the Act. In the alternative, if this Court holds that FEMAT comes within the terms of the Act, it should hold the Act unconstitutional as applied.¹

¹ This memorandum addresses only defendants' constitutional argument. See Memorandum in Support of Defendants' Motion for Summary Judgment ("Defs. Mem.") at 35-46. Defendants pursue the statutory argument that FEMAT is not subject to the Act in a separate memorandum, filed simultaneously herewith.

ARGUMENT

Plaintiff initially suggests that there is a "contradiction" between defendants' constitutional and statutory arguments, insofar as the former describes FEMAT as "involved in the core of Presidential policy making" and the latter describes it as "merely engaged in processing information." Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Pl. Opp. Mem.") at 10. Plaintiff is able to so characterize defendants' position only by misinterpreting it. Defendants have not contended, here or elsewhere, that FEMAT was "involved in the core of presidential policy making." Rather, the contention is that FEMAT performed a technical assessment of forest-management options that was integral to the decisions of the President and his advisors in adopting a comprehensive forest-management plan.

The essence of plaintiff's position, however, is that application of the FACA to FEMAT has no constitutional ramifications because FEMAT did not meet with the President in person. See Pl. Opp. Mem. at 5-7, 16-17. The argument is deeply flawed, for several reasons.

First, it fundamentally misconceives the facts. Despite plaintiff's attempts to portray it otherwise, the process of formulating a forest-management plan, in which FEMAT played a central role, was a presidential effort from the very beginning. As demonstrated in defendants' initial memorandum, the President

convened and led the April 2, 1993 Forest Conference;² he instructed the Administration to craft an overall forest-management plan, applicable to all federal lands, and established general parameters for that effort, such as an "ecosystem" approach to forest management;³ his top environmental advisor, Katie McGinty, led the follow-up efforts, including close supervision of FEMAT;⁴ press releases about the process were issued by the White House;⁵ the President made the decision identifying the preferred management alternative;⁶ and the President personally announced the proposed plan on July 1.⁷ ✓

Deposition testimony has reinforced the evidence of the President's close involvement in this process. Thomas Collier, the chief of staff of the Department of the Interior and a member of the Executive Committee, stated that FEMAT was created because

² See ____.

³ See [closing remarks; Collier and Thomas decls.]

✓ ⁴ See [Collier and Thomas decls.] Ms. McGinty is the Director of the Office of Environmental Policy. Collier Decl. ¶ _____. Although plaintiff belittlingly terms her a "White House staffer," see Pl. Mem. at 1, in fact she is the President's primary advisor on environmental issues. In addition to the evidence of that fact that defendants presented initially, see Collier decl. ¶ 3, subsequent deposition testimony reiterated Ms. McGinty's position as a close presidential advisor. See Deposition of Thomas Collier at 8 (McGinty is the director of the Office of Environmental Policy, "the primary office for advising the President of the United States on what environmental policy his administration should follow," and as such she reports to the President); id. at 10.

⁵ See ____.

⁶ See ____.

⁷ See ____.

Ms. McGinty "wanted a group that could advise her with respect to the decisions that were going to be made in terms of implementing the President's instructions after the Forest Conference." Collier Dep. at 28 (emphasis added). The President "insiste[d] that we get together the best scientists and rely on their scientific advice in terms of developing options to him with respect to the Forest Conference." Id. at 41. Both Mr. Collier and Dr. Thomas stated that the goal of FEMAT was to present a series of options to the President for his consideration. See Collier Dep. at 19 ("I told [Dr. Thomas] that what I wanted the group to do was to bring to the President a scientific assessment of a number of options from which the President could select an option") (emphasis added); Thomas Dep. at 7 (the goal of FEMAT was "[t]o deliver an array of options for the President to select"); id. at 8 (question: "You understood that these [options] would be presented to the President; is that correct?"; answer: "That was my understanding, yes").

Toward this end, FEMAT reported to Ms. McGinty, see Thomas Dep. at 37 ("the person that I considered that I reported to was Katie McGinty"); Second Thomas Decl. ¶ 8 (FEMAT, through Dr. Thomas, "reported to and was responsible to Katie McGinty"), and kept in close contact with her and other Committee members, see Thomas Dep. at 37 (conference calls with Committee occurred usually once a week, more frequently toward the end of the process); Second Thomas Decl. ¶ 7 (Dr. Thomas "participated in frequent telephone conference calls with Committee members and

conducted three or four briefings for the Committee in person in Washington, D.C., either alone or with the subteam leaders or members").

In turn, the Executive Committee kept the President and the Vice President apprised of FEMAT's work. Throughout the FEMAT process, the President "was aware of many of the discussions going on within FEMAT," knew of "several of the decisions that the executive committee made with respect to guidance that was given to FEMAT," and was familiar with the options being addressed. Collier Dep. at ____; see also id. at 86 (Collier attended "at least two" meetings with the President on this issue of "[a] couple of hours each"); id. at 88 (McGinty had "several" meetings with the President on this issue); id. at 116-17 (when Collier was present in McGinty's office, she would frequently be interrupted by calls from the Vice President, usually relating to this issue). After FEMAT completed its work, the Executive Committee gave the President a summary of the information FEMAT provided, id. at 84-86, and made a recommendation to him, id. at 81-82.⁸

Given this extensive level of presidential involvement in

⁸ Plaintiff's description of the President's decisionmaking process contains a serious error of fact. According to Mr. Collier, the President had before him for consideration some forest-management options that were not assessed by FEMAT but that were suggested by members of Congress. Collier Dep. at 37-40. Plaintiff, however, asserts that "[a]s Mr. Collier conceded, the President was only offered the FEMAT options to choose from." Pl. Opp. Mem. at 25. Not only is the statement entirely untrue, but the citation plaintiff uses to support it, page 86 of Mr. Collier's deposition transcript, contains no discussion of that issue at all, let alone anything that supports the assertion.

this process,' plaintiff's view that constitutional ramifications would arise only if FEMAT met personally with the President is the epitome of form over substance. As a practical matter, every President works primarily through his staff and senior advisors. The fact that FEMAT reported to a senior presidential advisor in preparation for a recommendation from the advisor to the President has no effect on this Court's constitutional analysis.

Plaintiff's argument about the lack of communication between FEMAT and the President is flawed for a second reason as well. The Supreme Court's Public Citizen decision makes clear that the constitutional ramifications of a strict reading of the FACA are severe even if the alleged "advisory committee" does not actually communicate with the President. Plaintiff brushes this aspect of Public Citizen aside in one non-responsive footnote, see Pl. Opp. Mem. at 14 n.18, but the case is not so easily dismissed.

⁹ Plaintiff notes that FEMAT's final report was not finished when the President made his July 1 announcement of the Forest Plan. See Pl. Opp. Mem. at 17. This fact does nothing to suggest that FEMAT's work was, as plaintiff appears to believe, somehow irrelevant to the President's decisionmaking. First, the argument disregards the extensive evidence of presidential involvement in the FEMAT process, described above. Second, plaintiff ignores the numerous in-person briefings and constant communication between FEMAT and the Executive Committee. See Collier Dep. at 76 (there were "several" meetings between Dr. Thomas, other FEMAT members, and Administration officials in the Old Executive Office Building "where the FEMAT group described or briefed [the Executive Committee] on the options they had developed"); id. at 77 (there were at least two such meetings "toward the end of the [FEMAT] process where we were getting more complete information about each of the options"). Moreover, as Dr. Thomas testified, FEMAT had completed all of its technical and scientific work by the time of its mid-June briefing to the Executive Committee. All that remained at that point was completing the team's Report. Second Thomas Decl. ¶ 11.

As defendants have argued, the relationship between FEMAT and the President is much closer than the one in Public Citizen between the ABA committee and the President. Public Citizen involved a group that communicated only with representatives of the Department of Justice. Indeed, the Court described the committee not as providing advice to the President but as providing "confidential advice regarding Presidential appointments to the federal bench." 491 U.S. at 467 (emphasis added). This case, in contrast, involves a group that was supervised by a close presidential advisor, existed to fulfill a presidential mandate, and did its work in anticipation of a presentation of options from the President's advisors to the President.

In a similar vein, plaintiff cites the statement in the government's Draft Supplemental Environmental Impact Statement (DSEIS) to the effect that the implementing officials of the forest plan are the secretaries of Agriculture and the Interior. Plaintiff then makes the remarkable assertion that "[t]he President's role in this case is at best secondary to the formal statutory responsibilities of the two Secretaries assigned by Congress." Pl. Opp. Mem. at 18. The contention not only ignores the evidence of close presidential involvement in the formulation and identification of the proposed plan. More important, it bespeaks a misunderstanding of the nature of the Constitution's grant of Executive authority. It has long been recognized that even where Congress entrusts responsibility for certain

activities to an agency or Cabinet Secretary, the ultimate responsibility lies with the President. The Supreme Court explained this basic principle in Myers v. United States, 272 U.S. 52, 135 (1926):

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power [by Article II]. . . . Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered . . . are subjects which the President must consider and supervise in his administrative control.

The fact that the Secretaries have the delegated responsibility for implementing the forest plan thus does nothing to minimize the substantial role played by the President in this process.

A third flaw in plaintiff's argument about the lack of direct communication between FEMAT and the President is more subtle but no less important. Plaintiff appears to believe that this Court could apply the FACA's requirements to FEMAT, the process by which the President and his advisors solicited and received information, but, in deference to the Constitution, still maintain the confidentiality of the process by which the President receives advice (the role played by the Executive Committee). AAPS puts such a notion to rest. Even though FEMAT only assessed the effects of various forest-management options, and the Executive Committee and the President made the policy and ~~political~~ judgments, the exposure of one end of the process through application of the FACA necessarily exposes the other. See Defs. Mem. at 42-43 (citing AAPS, 997 F.2d at 910).

* * * *

The majority of plaintiff's opposition to defendants' constitutional argument is taken up by a discussion of a "test" that assertedly governs this Court's consideration of this issue. See Pl. Opp. Mem. at 13-16. The "test" is plaintiff's own creation. Several of the factors plaintiff suggests contain no citation of authority. Others are merely culled from non-FACA cases, and no authority supports the overall "balancing" inquiry that plaintiff divines. For present purposes, the two most relevant authorities are Public Citizen and AAPS -- cases where the courts addressed specific claims that the FACA, as applied, unduly impinged upon the President's Article II prerogatives.

The courts in those cases spoke not of the elaborate balancing formula plaintiff advances but of a general weighing of the intrusion on presidential authority that would be caused by application of the statute against its benefits. In both Public Citizen and AAPS, the courts viewed the implications of applying the statute as sufficiently serious, from a constitutional perspective, to resolve the statutory issue in the government's favor. In Public Citizen the Court's "unwillingness to resolve important constitutional questions unnecessarily thus solidifies [its] conviction that FACA is inapplicable." 491 U.S. at 467. In AAPS the court was "satisfied that the application of FACA to the Task Force seriously burdens executive power" to a likely-impermissible extent, and held that "[p]rudent use of the maxim of statutory construction allows us to avoid the difficult

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constitutional issues posed by this case." 997 F.2d at 910.

The same inquiry should guide this Court's consideration of the constitutional issue. As noted, FEMAT's mission was to assess options that were consistent with the policy parameters for forest-management established by the President and his advisors. See Defs. Mem. at _____. Application of the statute to FEMAT would have greatly diminished the President's ability to receive the kind and quality of advice on this issue that he and his advisors sought from FEMAT.

It is difficult to imagine, for example, how FEMAT could have operated if it had been forced to comply with the FACA's openness and public-participation requirements, see 5 U.S.C. App. 2 §§ 10(a)(1) (open meetings), 10(a)(3) (public attendance at meetings), and 10(c) (requirement of "[d]etailed minutes"). FEMAT was created as part of the government's effort to fulfill the President's mandate, announced at the end of the Forest Conference, to develop options for a comprehensive forest-management policy within 60 days. See Defs. Mem. (exhibit ____ thereto at ____). Given these time constraints and the difficulty of FEMAT's work, the team could not feasibly have provided advance notice of or public access to its meetings, nor could it have kept detailed minutes of such meetings. As Dr. Thomas testified:

Due to extremely tight deadlines, FEMAT functioned as a constantly evolving number of working groups. Formal and ad hoc work teams were meeting on unpredictable schedules as necessitated by the complexity and number of issues we were addressing. These meetings, of which there may have been 10 or more going on at any one

time, took place 10 to 14 hours a day, seven or so days a week, and often occurred on short notice.

Second Thomas Decl. ¶ 16.

Application of the FACA's other procedural requirements would have been even more constraining. The FACA requires that the membership of an "advisory committee" "fairly balanced" in terms of points of view, 5 U.S.C. App. 2 § 5(b)(2); that the committee not be "influenced" by the convening authority or by any special interest, *id.* § 5(b)(3);¹⁰ and that the President issue a public report explaining why he accepted certain advice and rejected other advice, *id.* § 6(c).

To apply the FACA here would effectively declare that the President cannot instruct his Administration to pursue a general policy direction and then receive expert outside advice consistent with that direction. Instead, the President would have to solicit and receive advice from all points of view (to comply with the FACA's "balance" provision), would have to refrain from imposing his policy parameters on that advice (to comply with the "inappropriately influenced" provision), and would have to report his reasons for accepting some advice and not other advice (to comply with the public-reporting provision). A President certainly can choose to address issues in that way, but the question for constitutional purposes is whether the FACA can force him to.

Even if the factors plaintiff suggests properly govern the

¹⁰ See Defendants' Renewed Motion to Dismiss Counts Six Through Ten, filed October 7, 1993.

constitutional inquiry, however, the balance tips strongly in favor of not applying the FACA here, or, in the alternative, of holding the statute unconstitutional as applied.

1. Proximity to the President: As shown above, plaintiff's contention that the President was simply a passive participant in the crafting of forest-management options is entirely belied by the evidence. Moreover, Public Citizen and AAPS make clear that direct communication between an "advisory committee" and the President is unnecessary.

2. The type of presidential power at issue: Plaintiff makes the startling suggestion that the presidential authority at issue here is somehow unimportant because it involves "no more specific constitutional power than the part of Article II, section 3 of the Constitution that commands him to 'take Care that the Laws be faithfully executed,'" Pl. Opp. Mem. at 18. The suggestion is nonsense.

The AAPS court held that application of the FACA would have had grave constitutional ramifications regardless of whether such application would impinge upon an explicit Article II grant of authority. Although the court rejected the government's argument that the statute as applied would have violated Article II's Recommendation Clause," it nonetheless accepted the government's "implicit[]" argument that the FACA would constrain the President's general capacity to solicit and receive advice from whomever and however he chooses. The court did not ground its

" U.S. Const., art. II, § 3, cl. 1.

decision in a specific textual provision of Article II. See 997 F.2d at 907-08. Nonetheless, the court was not nearly so dismissive of the "take care" clause as is plaintiff. It observed that hindrance of the President's ability to "take care" that the laws be faithfully executed would be of great moment because the clause creates an "affirmative duty" on the President, and because it is "[o]nly the President" who "can ensure that the laws be faithfully executed." Id. at 908.

3. Reservation of presidential control: Plaintiff makes two arguments here. The first is that, if the President does not want to trigger the FACA, he can simply appoint a committee wholly composed of full-time federal officers and employees. Pl. Opp. Mem. at 18-19. Plaintiff misses the point. The constitutional ramifications of applying the FACA arise from forcing the President to make that choice in the first place -- that is, restricting how and from whom he can seek and receive advice. See AAPS, 997 F.2d at 909. The effect would be that the President could never go outside the government for group advice without encountering the FACA, a result no court has ever countenanced.

Plaintiff's second argument is that Congress has enacted numerous statutes, in addition to the FACA, that "limit the efficiency, collegiality or confidentiality of federal agencies and officers in order to advance broader public purposes. Pl. Opp. Mem. at 10, 19-20. That is certainly true, but none of these statutes applies to the President or his high-level staff.

See, e.g., Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980) (Freedom of Information Act does not apply to "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President") (quoting H.R. Conf. Rep. No. 93-1380 at 15 (1974)); Franklin v. Massachusetts, 112 S. Ct. 2767, 2775 (1992) (President is not an "agency" under the Administrative Procedure Act). Indeed, the D.C. Circuit has held that the normal rules of openness applicable to the agencies are inapplicable where communications involving high-level presidential advisors are concerned. In Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993), for example, the court held that an entity that advised the President but had no independent authority in addition to its advisory role was not subject to the FOIA. See also Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985) (CEA not subject to FOIA); National Sec. Archive v. Archivist of the United States, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel's Office not subject to FOIA).

4. Specificity of constitutional authority:¹² Plaintiff argues that the Constitution expressly vests in Congress the authority to control federal property. Pl. Opp. Mem. at 20-21. The argument is a non-sequitur. The congressional encroachment at issue here is the FACA, not a property-based statute. Defendants contend not that Congress has exceeded its authority to control federal property, but that the FACA, as applied, would

¹² Plaintiff cites no authority for this factor.

unduly hinder important presidential authority.

5. The public interests at stake: Plaintiff extols the general benefits of openness in government,¹³ but fails to address any of the fundamental concerns raised in Public Citizen and AAPS regarding the costs of opening the proceedings of groups that advise the President and his high-level advisors. As noted above, the cases plaintiff cites all relate to the openness of agency processes, not presidential processes. Where presidential decisionmaking is at stake, courts have been far more reluctant to sanction public intrusions. See also Defs. Mem. at 37 (citing cases). And as shown above, the President could not have received the type or quality of advice he sought if FEMAT had been forced to operate in adherence to the FACA.

Of course, plaintiff's recitation of the benefits of openness on the FEMAT process tells only a small part of the story: application of the FACA does much more than open a committee's meetings to the public. It also requires that the committee's membership be "fairly balanced" in terms of points of view, that the committee not be "influenced" by the convening authority or by any special interest, and that the President issue a public report explaining why he accepted certain advice

¹³ Note the inaccuracy in the following statement, which contains no citation to evidence in the record and ignores plainly contrary evidence: "When an advisory committee functions to investigate and evaluate facts and to recommend courses of action, as was the case with FEMAT, openness ensures accuracy in the fact finding process." Pl. Opp. Mem. at 24. The record establishes, without contradiction, that FEMAT did not make recommendations. See Defs. Mem. at 29-30.

and rejected other advice. 5 U.S.C. App. 2 §§ 5(b)(2)-(3), 6(c).

6. The viability of alternate means to promote objectives: Plaintiff's position is equally weak on this point. The problems that normally would occur because of application of the FACA are particularly acute in this case because the benefits of openness that plaintiff cites are already being achieved. See [other brief at ____ (describing administrative comment period on the government's Draft Supplemental Environmental Impact Statement)]. The comment period ensures the accuracy of analysis (that is, if something is incorrect, it can be pointed out and corrected) and promotes confidence in government (by offering affected parties a chance to state objections or reservations). In contrast, those goals are not fostered if the government is hindered in its ability to devise a coherent and workable proposal in the first place.

CONCLUSION

For the foregoing reasons, if this Court determines that FEMAT was subject to the Federal Advisory Committee Act, it should hold that the statute is unconstitutional as applied.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.
United States Attorney

DAVID J. ANDERSON

Of Counsel:

WELLS D. BURGESS
Attorney
United States Department
Of Justice
Environment and Natural
Resources Division
General Litigation Section
Washington, D.C. 20530

ELIZABETH A. PUGH
ROBERT S. WHITMAN
C. GAIL WALKER

United States Department of Justice
Civil Division
901 E. St., N.W., Room 910
Washington, D.C. 20530
202-514-1494

Attorneys for Defendants

Date: December 21, 1993

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Memorandum in Support of Motion for Summary Judgment was served this 21st day of December 1993, by Federal Express, to:

Mark C. Rutzick
Preston, Thorgrimson, Shidler, Gates & Ellis
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, OR 97204-3688

and by first-class mail to:

William Gray Schaffer
Preston, Gates, Ellis & Rouvelas Meeds
Suite 500
1735 New York Ave., N.W.
Washington, D.C. 20006-4759

Stephen M. Truitt
Pepper, Hamilton & Scheetz
1300 19th St., N.W.
Washington, D.C. 20036

ROBERT S. WHITMAN

456-2710

To : Will Stelle

From : Don Knowles

FACA amendment

FYI

FDLRS; PLAN; FACA

508
326
3351

Dave Robertson:

Per my voice-mail message to you, here is the FACA text and my proposed amendment.

Please give me a call

Sometime tomorrow - 208-3019-

Thy-

Don Knowles

George - Here is my bootleg FACA amendment language. I have started with Senator Hatfield's Portland-based staff. They will advise his office if it is OK with them or if they will oppose it because it might undermine the industry's FACA lawsuit. If we can pass Senator Hatfield's review, we have a chance to proceed.

Don Knowles

cc- Don Baum
Jim Pipkin
Willy Stelle

5 U.S.C. App., Section 4(c) is amended by adding the following before the period:

" , or to meetings between full-time officers or employees of the Federal Government and either or both of the following: (1) representatives of state and/or local governments; and (2) Indian tribes"

assessed against the agency in aid by the agency).

r limits the present rights of his title, except that the n (c) of this section shall made pursuant to section 552 to recordings, or minutes described The requirements of chapter a. shall not apply to the ies described in subsection (f)

stitute authority to withhold does not authorize the closing thereof required by any other

authorizes any agency to record, including transcripts, this section, which is idual under section 552a of

FEDERAL ADVISORY COMMITTEE ACT

FEDERAL ADVISORY COMMITTEE ACT

5 U.S.C. app.

§1. Short title

This Act may be cited as the "Federal Advisory Committee Act."

§2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§3. Definitions

For the purpose of this Act--

(1) The term "Administrator" means the Administrator of General Services.

(2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

FEDERAL ADVISORY COMMITTEE ACT

(C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

(3) The term "agency" has the same meaning as in section 551(1) of Title 5.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

54. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by--

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

55. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

FEDERAL ADVISORY COMMITTEE ACT

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

56. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

57. Responsibilities of the Administrator of General Services; Committee Management Secretariat; establishment; review; recommendations to President and Congress; agency



Wheelabrator Shasta Energy Company, Inc

20811 Industry Road
Anderson, CA 96007
Tel. 916-365-9172
Fax. 916-365-2035

FARA: AMAS

▶ ▶ ▶ ▶ ▶ ▶ ▶ ▶ **FACSIMILE COVER SHEET** ◀ ◀ ◀ ◀ ◀ ◀ ◀

DATE: 7/18

WE ARE SENDING 4 PAGES, INCLUDING THIS COVER SHEET.

ATTN: Will Stelle

FROM: Melinda Brown & Mary Schroeder

► ► ► ► ► ► ► **SPECIAL INSTRUCTIONS** ◀ ◀ ◀ ◀ ◀ ◀ ◀

This letter to Mark Gaudy is the result of our discussion with you last week.

IF YOU DO NOT RECEIVE THIS TRANSMISSION CLEARLY OR HAVE ANY QUESTIONS, PLEASE CALL (916) 365-9172 OR FAX TO (916) 365-2035.

SENT BY:

Shasta-Tehama Bioregional Council

July 19, 1994

Mark Gaedy
Department of Agriculture
14th Street and Independence Avenue, SW
Washington, D.C. 20250

Dear Mark:

The attention you are giving to the FACA issue and how it restricts and conflicts with the efforts of bioregional groups, is very much appreciated. Our group has worked incredibly long hours to pull this consensus effort together and, notably, some of our most dedicated workers are agency personnel since many of our projects involve agency lands. Therefore, FACA looms as a serious hurdle to our joint efforts. It is important that our ability to continue working together is protected and we do not lose our valuable agency advisors.

The Lead Partnership meeting you attended is a perfect example of how innovative solutions can emerge from true collaboration. Although we did not come to a final conclusion, the brainstorming efforts were well worth the time. The biggest hurdle is that FACA undermines President Clinton's intent in the Forest Plan and "business as usual" (top down funnel organization) does not work in the new environment of collaboration and of Option 9.

The one potential solution to "the FACA problem" that was discussed at our meeting was for the various partnership groups to become working groups of the Province Interagency Executive Council (PIEC). This would allow us to function as we currently are and leaves room for development in the future. However, it is mandatory to formally protect our group's freedom in the charter of the PIEC.

STBC held an emergency meeting last week to discuss all of our options. We have major concerns about how this work group/task force arrangement will actually function. Our group feels it is very important that we are invited to participate in the development of the work plan, as well as review drafts of the PIEC charter. Our discussion stimulated a list of questions that we feel must be answered prior to our decision to become a working group.

MEMBERS

Dana Angelides
Vestra Resources
Jocelyn Buyer
Employment Development
Dept.
Jerry Brown
Shasta County Community
Action Agency
Melinda Brown
Shasta 2000
Rich Camilleri
Employment Development
Department
Jerry Duffy
Wheelabrator Shasta Energy
David DuBoys
Shasta College
Tom Engstrom
Western Shasta Resource
Conservation District
Mike Grissini
Alpine Land Information
System
Hilda Hatcher
Whiskeytown Environmental
School
Earl Jones
Conservationist
Richard Kelly
Shasta Alliance for Resources
and Environment
Wayne Kessler
Shasta 2000
Barbara Melver
Tehama County Supervisor
Charles Menoher
Shasta County Superintendent
of Schools
Gary Nakamura
University of California
Cooperative Extension Service
Bob Nash
Superior Co. Development
Council
Bruce Olson
Rimshur, Forest Products
Don Perry
Shasta County Private
Industry Council
Dave Rutledge
Shasta Alliance for Resources
and Environment
Mary Schroeder
Forest Values Task Force and
Wheelabrator Shasta Energy
Francie Sullivan
Shasta County Supervisor
Kathy Suvia
Shasta County Private
Industry Council
Dan Tomaschek
Kierro Pacific Industries
Bob Warren
Shasta Cascade Wonderland
Association
Carl Weldert
Conservationist
Charles Willard
Tehama County 20/20
Tom Wulfert
Forestry Consultant
Jim Zaubier
Economic Development Corp.

ADVISORS

Bob Bailey
Soil Conservation Service
Francis Berg
Bureau of Land Management
Bruce Deuel
Ca. Dept. of Fish and Game
Ralph Hinton
Dept. of Water Resources
Bud Ivey
National Park Service
Keith Johnson
Rural Development Association
Jim Kotzur
Soil Conservation Service
Duane Lyon
Shasta-Trinity National Forest
Shawne Mohoric
Shasta-Trinity National Forest
Robert Ramirez
Shasta-Trinity National Forest
Jeff Stephens
Ca. Department of Forestry
and Fire Protection
Gary Waldron
California Park Service
Bill Watkins
National Park Service
Kelly Williams
Bureau of Land Management

Mark Gaedy
July 19, 1994

Page 2

Questions we feel must be answered are:

1. How are PEIC members chosen? How will the PIEC be balanced, since balance implies competing interests? Regarding the open seats, such as those for environmental group and tourism representatives, who exactly do they represent and how broad is their perspective?

The selection process of open seats appears to be a good opportunity for participation from representatives of the Lead Partnership Group. Our concern is that interest groups may have little knowledge of local conditions and issues.

2. What will the process be for the PIEC to choose who can become a work group/task force? What are the qualifications?

The prospect of the PIEC having a hundred official subgroups, each representing a special point of view, is disturbing. Taking this into account in the chartering process can avert many problems and misunderstandings.

3. What level of detail will the PIEC require before approving the work plan of any group? Is the approval envisioned as being on a project level or a more general topic level? How quickly can they rule on work proposals and plans? How will project criteria be determined and who will set project criteria? How may this be best represented in drafting the charter?

If approval level is not very general, this becomes a serious filter in our group's progress and *defeats the very purpose of our grassroots effort.*

4. How will the strength and local knowledge of partnership groups be utilized for plans or projects on a local level? What mechanism will be built in for appeal or review?

Boundaries and restrictions could evolve in the future to an unacceptable level with changes in personalities of FACA group members and changes on Capitol Hill. We question the ability of a single PIEC to understand, intelligently respond to and work on the

Mark Gaedy
July 19, 1994

Page 3

plans for all groups within its jurisdiction on a case-by-case basis and in a timely manner.

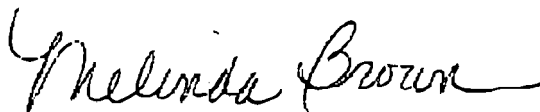
5. As far as language that could be incorporated into the PIEC charter, we would like to see something like this:

"A provincial team advisory committee is needed to review innovative new approaches to ecosystem management developed through collaborative planning activities within local task forces. Groups eligible to be considered as a Task Force to the PIEC Advisory Committee, include local civic organizations, local community economic teams, local interagency interdisciplinary teams, bioregional groups, adaptive management groups, watershed groups, or other community-based partnerships."

At this time it is premature for our group to participate as a sanctioned FACA work group until the above concerns are satisfied. We suggest that bioregion groups be full partners in formulating the details and setting up this effort, since our combined talents, points of view and consensus process have achieved unparalleled results thus far. Our efforts are too important to the President's plan to be jeopardized by quick answers or quick fixes.

What really needs to happen, of course, is to reinvent government-community relationships with a fresh approach. It is not in the interests of the workers or communities depending on resolutions to the issues to bring the progress we have made so far to a screeching halt. Once an interim solution has been proposed, we look forward to working with you on a final solution that reflects the path of reinventing government. Your continued attention to this urgent matter is most appreciated.

Sincerely,

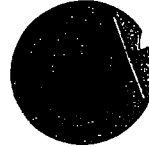


Melinda Brown
Chair



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 24, 1994



MEMORANDUM FOR DISTRIBUTION LIST

FROM: T.J. Glauthier, Katie McGinty, and Jim Lyons

SUBJECT: Review of Floodplain Management Report

We hope that each of you has taken the opportunity to review the floodplain management committee's report Sharing the Challenge: Floodplain Management into the 21st Century (report). We owe Gerry Galloway and the rest of the committee a debt of gratitude. They did a thoroughly professional job on schedule and within budget. One need hardly say more.

We believe that the report presents a great opportunity for this Administration to make a major contribution to restructuring the responsibility for reducing flood risks and to restoring natural functions and values to the Nation's floodplains.

There are many recommendations that we can and should implement as soon as possible. However, we need to go over the Committee's report carefully to decide which recommendations we really do want to adopt for the Administration. Then, we need to identify those recommendations that need more work, develop the implementing mechanisms for those that are ready, and get your advice and insights into the cost and other issues associated with implementation. It is now time for us to begin that process. To do this, we intend to take full advantage of the breadth and depth of expertise of the existing floodplain management task force.

Attached to this memorandum are forms that we want each agency to fill out for each of the report's recommendations and action items. The first simply lists in shortened form all of the recommendation and action items. You should check the appropriate boxes next to each item on the list.

Second, for each item that you have recommended for implementation, you should fill out the additional form providing information on how it would be best accomplished, costs, and other details.

Finally, we have attached an advance copy of the final report for your use only and not for public distribution. You should use this version, making additional copies for your agency's review as needed, for your review. While very similar to the previous version, we want to ensure that we are all singing from the same script.

We would appreciate your completing these forms -- one per agency -- and sending them (hard copy and disk containing the detailed implementation information) to Bruce Long (room 8225, New Executive Office Building) by July 6th. A task force meeting will be scheduled for the week of July 11th. At that meeting, we will have a discussion of the results of this review and next steps.

If you have any questions, call Bruce Long (395-4590) or Will Stelle (456-6224).

Attachments

DISTRIBUTION LIST:

Federal Agencies

Richard Krimm	FEMA
Morrie Goodman	FEMA
Stanley Genega	Army-CE
John Zirschky	Army
Mollie Beattie	DOI-FWS
Michele Altemus	DOI-FWS
Michael Huerta	DOT
Richard Sanderson	EPA
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Oleta Fitzgerald	USDA
Tom Hebert	USDA
James McMullen	USDA-ASCS
Karl Otte	USDA-SCS
Gene Morrison	HUD
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Eric Lichtenburg
Mark Weatherly
Ray Clark
Greg Simon
Salley Katzen
Joe Stiglitz
Ellen Seidman
Barbara Chow
Barry Toiv
Will Stelle
Bruce Long

**Listing of All Actions and Recommendations from the Final
Interagency Floodplain Management Review Committee Report
June 1994
(in the order presented in the report)**

RECOMMENDATION / ACTION

**IMPLEMENT
YES / NO**

Recommendation 4.1: Reduce the vulnerability of population centers to damages from the standard project flood (spf).		
Recommendation 4.2: Reduce the vulnerability of critical infrastructure to damage from the spf.		
Action 5.1: Enact a national Floodplain Management Act.		
Action 5.2: Revitalize the Water Resources Council.		
Action 5.3: Reestablish basin commissions.		
Action 5.4: Issue a new Executive Order to reaffirm commitment not to build, in the floodplain management.		
Action 5.5: OMB should direct all federal agencies to conduct an assessment of the vulnerability of flooding to it's facilities and to facilities constructed with federal funds.		
Action 5.6: Seek revision of Section 1134 of the 1986 Water Resources Development Act -- USACE leases in the floodplain.		
Recommendation 5.1: Revise the RCRA locational standards and contingency planning regulations.		
Recommendation 5.2: Increase the State role in all floodplain management activities.		
Recommendation 5.3: Restructure the scope of federal technical services programs, increase funding for certain USACE programs and for State s through the FEMA Community Assistance Program.		
Recommendation 5.4: Hold FEMA's and other agency's existing disaster assistance cost-sharing requirements to no more than 75/25.		
Action 5.7: For communities not participating in the NFIP, limit public assistance grants.		
Action 5.8: Encourage communities to obtain private affordable insurance for infrastructure.		
Action 5.9: Provide loans for the upgrade of infrastructure and other public facilities.		
Action 5.10: Establish new, co-equal economic and environmental objectives for planning water resources projects under Principles and Guidelines (P&G).		
Action 5.11: Establish an interdisciplinary, interagency review of the P&G by affected agency representatives.		

RECOMMENDATION / ACTION**IMPLEMENT
YES / NO**

Recommendation 5.5: Seek increased funding for federal agencies to support collaborative planning participation with other agencies.		
Recommendation 5.6: Promote the use of programmatic NEPA documents in the planning process.		
Recommendation 5.7: OMB should issue a directive that requires periodic reevaluation of federal water resources projects.		
Recommendation 5.8: OMB should use only the benefit-cost ratio for damage reductions to existing development in establishing Administration funding priorities unless a spf level of protection is provided.		
Action 6.1: The Administration should establish an interagency task force, jointly chaired by the USDA and EPA for watershed management.		
Action 6.2: The DOI, USDA, and EPA should coordinate and support federal riverine and riparian area restoration.		
Action 6.3: The Administration's legislative proposals for the 1995 Farm Bill should support conservation and voluntary land acquisition programs.		
Recommendation 6.1: Enhance pre-disaster planning and training.		
Action 6.4: Promote the NFIP Community Rating System.		
Action 6.5: Provide funding for community floodplain management and hazard mitigation planning.		
Recommendation 6.2: The FEMA should review its policy of issuing revisions to flood insurance maps.		
Action 6.6: Map all communities with flood hazard areas that are developed or could be developed.		
Action 6.7: Propose supplementing funds obtained for floodplain mapping from NFIP policyholders, with appropriated funds.		
Action 6.8: Utilize technology to improve floodplain mapping.		
Recommendation 6.3: Include information regarding floodplain management in education and public affairs initiatives.		
Recommendation 6.4: State floodplain management officials should encourage local school districts to include natural hazard education in their curricula.		
Action 7.1: Establish a lead agency for coordinating acquisition of environmental land title and easements.		

RECOMMENDATION / ACTION

IMPLEMENT
YES / NO

Recommendation 7.1: Support increased funding for the Refuge Revenue Sharing Act.		
Action 7.2: The Administration should develop emergency implementation procedures for environmental land acquisitions.		
Action 7.3: The DOI should formalize environmental considerations in multi-agency disaster recovery land restoration activity.		
Action 7.4: Seek legislative authority for flexibility in use of programmed funds in emergency situations.		
Action 7.5: The DOI should focus land acquisition efforts on river reaches and areas with significant habitat values or resource impacts.		
Action 7.6: Require agencies to co-fund ecosystem management using Operation and Maintenance funds.		
Action 7.7: Enact legislation allowing cost-share participation and eligibility requirements under Sections 906 and 1135 of the 1986 WRDA to include federal, State, and non-governmental contributions as well as work in-kind.		
Action 7.8: Allocate funds for mitigation lands at the same pace as project construction.		
Recommendation 8.1: Federal agencies should capitalize on opportunities to enhance the environment when reviewing operations or undertaking repairs or improvements to existing flood damage reduction programs.		
Action 8.1: Establish the USACE as the principal federal levee construction agency.		
Recommendation 8.2: The Administration should propose legislation that establishes consistent cost-sharing for like activities.		
Action 8.2: The Administration should reaffirm its support for the USACE criteria under the PL 84-99 levee repair program.		
Recommendation 8.3: The USACE should investigate procedures to minimize impacts associated with levee overtoppings.		
Recommendation 8.4: The USACE should coordinate with the SCS for development of criteria for evaluating the economics of levee repairs.		
Action 8.3: Federal and State officials should restrict support of floodfighting to those levees that have been approved for floodfighting by the USACE.		
Recommendation 8.5: Maintain flexibility in hazard mitigation programs.		

RECOMMENDATION / ACTION
**IMPLEMENT
YES / NO**

Action 8.4: Establish a task force to develop common procedures for federal buyouts and mitigation programs.		
Recommendation 8.6: Encourage establishment of State -chaired task forces to coordinate buyouts and other hazard mitigation activities.		
Action 8.5: Provide State s the option of receiving FEMA Section 404 Hazard Mitigation Grants as a block grant.		
Action 8.6: Provide funds for buyouts and hazard mitigation.		
Action 8.7: Establish a programmatic buyout and hazard mitigation program.		
Recommendation 8.7: Encourage use of CDBG, EDA, and other funding to acquire and relocate or take other mitigation actions.		
Action 8.8: The FEMA should decide on a definition of substantial damage and stick to that definition.		
Action 8.9: Support insurance coverage for mitigation actions necessary to comply with local floodplain management regulations.		
Action 8.10: Develop a program to reduce losses to repetitively damaged insured properties.		
Recommendation 9.1: Integrate federal flood response and recovery under the FEMA.		
Recommendation 9.2: Enhance the linkage among response, recovery, and floodplain management.		
Action 9.1: Hold a strategic planning meeting for Presidentially declared disasters.		
Recommendation 9.3: Continue to seek federal-State co-leadership of an interagency hazard mitigation team.		
Recommendation 9.4: State s should actively encourage flood insurance purchase.		
Action 9.2: Increase NFIP market penetration.		
Action 9.3: Provide for the escrow of flood insurance premiums or payment plans.		
Action 9.4: Develop improved marketing techniques.		
Action 9.5: Reduce the amount of post-disaster support to those who could have bought flood insurance but did not.		
Action 9.6: Require actuarial-based flood insurance behind all levees that provide protection less than the spf.		

RECOMMENDATION / ACTION

IMPLEMENT
YES / NO

Action 9.7: Increase the 5-day waiting period for flood insurance coverage.		
Action 9.8: Continue to support reform of Federal Crop Insurance.		
Action 10.1: Establish Upper Mississippi and Missouri basin commissions.		
Action 10.2: Expand the mission of the Mississippi River Commission.		
Action 10.3: Develop an Upper Mississippi River and Tributaries (UMR&T) system plan and for a major maintenance and major rehabilitation program.		
Action 10.4: Seek approval from the Congress to redirect the USACE Floodplain Management Assessment of the upper Mississippi River Basin.		
Action 10.5: Establish the UMR&T project.		
Recommendation 10.1: States should assume responsibility for regulating levee-related activities.		
Action 10.6: DOI should complete an ecological needs investigation of the upper Mississippi River Basin.		
Action 10.7: Provide an early report in the USACE Upper Mississippi River - Illinois Waterway Navigation Study.		
Action 10.8: Report on the ecological effects of relocating navigation pool control points under the USACE Navigation Study.		
Recommendation 10.2: The USACE should consider land acquisition as an alternative during planning and design of habitat rehabilitation and enhancement projects.		
Action 10.9: The Administration Interagency Ecosystem Management Task Force should select an Ecosystem Management Demonstration Project within the Upper Mississippi River Basin.		
Action 11.1: The USGS should establish a federal clearinghouse for data gathered during preparation of the Review Committee report.		
Action 11.2 FEMA should investigate the costs and feasibility of completing a national inventory of floodprone structures.		
Action 11.3: The USACE, NWS, and USGS, should continue development of basin-wide models for the upper Mississippi River system.		
Recommendation 11.1: Federal water agencies, should review and update, discharge-frequency relationships for streamflow gages in the upper Mississippi River Basin.		

RECOMMENDATION / ACTION**IMPLEMENT
YES / NO**

Action 11.4: The current standards for computing discharge-frequency relationships should be reviewed.		
Recommendation 11.2: Federal agencies should collaborate on an assessment of the effectiveness of the streamgaging network and flood forecasting during the 1993 Midwest floods		
Action 11.5: Support the USGS in development and acquisition of detailed digital topographic data and other land characteristics.		
Action 11.6: Identify state-of-the-art techniques or applications for estimating and assessing environmental and social impacts.		
Recommendation 11.3: The USACE and USGS should investigate relationships between high energy erosion zones, other zones in floodprone areas, and levee failure.		
Action 11.7: The USACE and USDA, in collaboration with the DOI, should evaluate the effect of natural upland storage and floodplain storage.		
Recommendation 11.4: Federal agencies should conduct research on biotechnical engineering techniques.		
Recommendation 11.5: OMB should review the current system of funding disaster relief.		
Recommendation 11.6: USDA should evaluate the impact of federal farm programs on agricultural land use decisions in and out of the floodplain.		
Recommendation 11.7: FEMA should conduct research on the issue of NFIP market penetration.		
Recommendation 11.8: The National Science Foundation should consider funding research.		

**IMPLEMENTATION OF THE
INTERAGENCY FLOODPLAIN MANAGEMENT REVIEW
COMMITTEE REPORT**

Date: _____

Agency: _____

Point of Contact: _____ **Phone/Fax:** _____

Report Recommendation or Action Item Number: _____

Agency Preliminary Recommendation:

Fully implement: _____ Partially implement: _____ (Describe in the discussion section)
Alternative: _____ (Describe in the discussion section)

Who should be the Lead Agency? _____

What other agencies should be involved? _____

What Administration priority would you place on this item?

High _____ Intermediate _____ Low _____

What would be required to implement?

Legislation _____ Executive Order _____ Administratively _____

What would be the timing?

Immediately _____ 1995 _____ 1996 _____ 1997-1999 _____

What would be the cost to your agency, in millions?

1994 _____ 1995 _____ 1996-1999 _____ Within existing ceilings/funds? (yes/no): _____

What would be the FTE requirements to your agency?

1994 _____ 1995 _____ 1996-1999 _____ Within existing ceilings? (yes/no): _____

How long would it take to develop agency policy and begin implementing a useful program?

_____ months _____ years.

What are the Congressional committees that would be involved?

House Authorizing: _____

Senate Authorizing: _____

House Appropriations: _____

Senate Appropriations: _____

Non-Federal interests:

(Discuss likely partners, those likely to support or oppose, those that are most affected, those responsible for implementation, recommended cost sharing, or discussion of responsibilities.)

Discussion:

(Discuss any of the above items in more detail, including the advantages and disadvantages of the report and agency recommendations, next steps, obstacles to be overcome, opportunities to be seized, and any impact on Federal and non-Federal budgets. You may add additional sheets if necessary.)