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Forest Conference-Forest Plan Litigation [1]

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9/2 FYI. ~~8~~ Katie, see my
comment on page 3

~~SECRET~~ LRM #I-3711

RESPONSE TO LEGISLATIVE REFERRAL MEMORANDUM

file w/ Forest
Plan Legislation

If your response to this request for views is **simple** (e.g., concur/no comment) we prefer that you respond by **faxing** us this response sheet. If the response is **simple** and you prefer to call, please **call the branch-wide line** shown below (NOT the analyst's line) to leave a message with a secretary.

You may **also respond** by (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); (2) sending us a memo or letter; or (3) if you are an OASIS user in the Executive Office of the President, sending an E-mail message. Please **include** the LRM number shown above, and the **subject** shown below.

Faxed 9/2/97 to OMB

TO: Craig CRUTCHFIELD
Office of Management and Budget
Fax Number: (202) 395-5691
Analyst/Attorney's Direct Number: (202) 395-3857
Branch-Wide Line (to reach secretary): (202) 395-6194

FROM: Sept. 2, 1994 (Date)
MICHAEL L. DAVIS (Name)
WHITE HOUSE OFFICE ON ENV. POLICY (Agency)
456-6224 (Telephone)

SUBJECT: OMB Request for Views RE: HR 4196, USDA Rural
Development Administration loans for
timber-dependent communities

The following is the response of our agency to your request for views on the above-captioned subject:

☐ Concur
☐ No objection
☐ No comment
☒ See proposed edits on pages 3
☐ Other: _____
☐ FAX RETURN of _____ pages, attached to this response sheet

*I absolutely and emphatically
agree. [Signature]*

DAVIS

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

August 17, 1994

LEGISLATIVE REFERRAL MEMORANDUM

LRM #I-3711

TO: Legislative Liaison Officer -

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COMMERCE - Michael A. Levitt - (202)482-3151 - 324
HUD - Edward J. Murphy, Jr. - (202)708-1793 - 215
INTERIOR - Jane Lyder - (202)208-4371 - 329
JUSTICE - Sheila F. Anthony - (202)514-2141 - 217
TREASURY - Richard S. Carro - (202)622-1146 - 228
EPA - Thomas C. Roberts - (202)260-5414 - 326

FROM: RONALD K. PETERSON (for) *Ronald K. Peterson*
Assistant Director for Legislative Reference

OMB CONTACT: Craig CRUTCHFIELD (395-3857)
Secretary's line (for simple responses): 395-6194
Adrienne ERBACH (395-3446)

SUBJECT: OMB Request for Views RE: HR 4196, USDA Rural
Development Administration loans for
timber-dependent communities

DEADLINE: September 6, 1994

COMMENTS: Attached is an amendment in the nature of a
substitute to HR 4196 that was adopted in House Agriculture
subcommittee markup on 8/11/94. USDA is requested to prepare a
report on the bill as marked up in subcommittee. Other
agencies are requested to provide any comments on the bill to
this Office by the deadline.

OMB requests the views of your agency on the above subject before
advising on its relationship to the program of the President, in
accordance with OMB Circular A-19.

Please advise us if this item will affect direct spending or
receipts for purposes of the the "Pay-As-You-Go" provisions of
Title XIII of the Omnibus Budget Reconciliation Act of 1990.

CC:
B. Burke
K. McGinty
P. Barr

AUGUST 10, 1994

AMENDMENT IN THE NATURE OF A
SUBSTITUTE TO H.R. 4196

Strike all after the enacting clause and insert the
following:

1 SECTION 1. TEMPORARY EXPANDED ELIGIBILITY OF CER-
2 TAIN TIMBER-DEPENDENT COMMUNITIES IN
3 THE PACIFIC NORTHWEST FOR RURAL DE-
4 VELOPMENT GRANTS.

5 (a) FINDINGS.—The Congress finds that—

6 (1) timber-dependent communities in the Pa-
7 cific Northwest have contributed significantly to the
8 economic needs of the United States and have
9 helped ensure an adequate national supply of timber
10 and timber products;

11 (2) a significant portion of the timber tradition-
12 ally harvested in the Pacific Northwest is derived
13 from Federal forest lands, and these forests have
14 played an important role in sustaining local econo-
15 mies;

16 (3) a number of traditionally timber-dependent
17 communities are experiencing significant economic
18 difficulties as a result of their proximity to the range
19 of the northern spotted owl; and

August 10, 1994 (7:57 p.m.)

F:\QME\FOREST\HB4196.AM1

2

1 (4) these timber-dependent communities need
2 economic assistance to help them diversify, including
3 support from water and waste facility loans and
4 grants and community facilities loans and grants
5 funded through the Rural Development Administra-
6 tion.

7 (b) EXPANDED ELIGIBILITY.—During the period be-
8 ginning on the date of the enactment of this Act and end-
9 ing on September 30, 1998, the terms "rural" and "rural
10 area", as used in title III of the Consolidated Farm and
11 Rural Development Act (7 U.S.C. 1921 et seq.), shall in-
12 clude any town, city, or municipality—

13 (1) part or all of which lies within 100 miles of
14 the boundary of a national forest covered by the
15 Federal document entitled "Forest Plan for a Sus-
16 tainable Economy and a Sustainable Environment",
17 dated July 1, 1998;

18 (2) that is located in a county in which at least
19 15 percent of the total primary and secondary labor
20 and proprietor income is derived from forestry, wood
21 products, or forest-related industries such as recre-
22 ation and tourism; and

23 (3) that has a population of not more than
24 25,000 inhabitants.

F:\CME\FOREST\HR4196.AMI

3

- 1 (c) EFFECT ON STATE ALLOTMENTS OF FUNDS.—
2 This section shall not be taken into consideration in allot-
3 ting funds to the various States for purposes of title III
4 of the Consolidated Farm and Rural Development Act (7
5 U.S.C. 1921 et seq.), or otherwise affect or alter the man-
6 ner in which such funds have been allotted to States before
7 the date of the enactment of this Act.

Amend the title so as to read: "A Bill to ensure that
timber-dependent communities ^{covered} ~~adversely affected~~ by the
Forest Plan for a Sustainable Economy and a Sustain-
able Environment qualify for loans and grants from the
Rural Development Administration.

should not
say "adversely
affected."

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

*file of Forest
Plan Litigation*

FAX NUMBER (202) 272-6817, 6815, 5775
CONFIRMATION NUMBER (202) 272-8056

MEMORANDUM

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DATE: September 9, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 19

FROM: Lisa Holden, paralegal (202) 272-8051

MESSAGE: Attached is the Reply Memorandum in Support of SAS' Motion to Compel Production of Documents.

JUDGE DWYER

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IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON

SEATTLE AUDUBON SOCIETY, et al.,	)	
	)	
Plaintiffs,	)	No. C92-479WD
	)	
v.	)	
	)	
JAMES LYONS, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
WASHINGTON CONTRACT LOGGERS	)	
ASSOCIATION, et al.,	)	
	)	
Defendant-Intervenors.	)	

SAVE THE WEST,	)	No. C94-758WD
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JAMES LYONS, et al.,	)	
	)	

REPLY MEMORANDUM IN SUPPORT OF SAS' MOTION
 TO COMPEL PRODUCTION OF DOCUMENTS

Defendants.)

NATIVE FOREST COUNCIL,)

No. C94-803WD)

Plaintiff,)

v.)

BRUCE BABBITT, et al.,)

Defendants.)

THE SIERRA CLUB,)

No. C94-820WD)

Plaintiff,)

REPLY MEMORANDUM IN SUPPORT
OF SAS' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS)

v.)

MICHAEL ESPY, et al.,)

Defendants.)

REPLY MEMORANDUM IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS

INTRODUCTION

In this reply memorandum in support of its motion to compel the production of 177 Administrative Record documents, SAS shows that: (1) federal defendants have failed to establish the bases for their claimed privileges (Section I); and, (2) even if federal defendants had justified their claimed privileges, the need to make these Administrative Record documents part of the public record and, SAS' need for the documents in this litigation, outweighs federal defendants' interest in confidentiality (Section II).

ARGUMENT

I. FEDERAL DEFENDANTS HAVE FAILED TO JUSTIFY THEIR ASSERTIONS OF PRIVILEGE

A. The Meridith/Unger Declaration Fails To Establish The Elements Of The Deliberative Process Privilege.

Federal defendants must establish that each of the 176^{1/} documents withheld in whole or in part on the basis of deliberative process privilege satisfy both the "predecisional" and "deliberative" prongs of the privilege. Assembly of California v. United States Dept. of Commerce, 968 F.2d 916, 920 (9th Cir. 1992).

This requires that the assertion of privilege be justified by "precise and certain reasons for preserving' the

^{1/} Even at this late date, federal defendants are changing their assertions of privilege previously indicated on their index of privileged documents. Now there is only 1 requested document that is not subject to a deliberative process claim (PR # 31), and federal defendants no longer differentiate between the "White House Communication" and deliberative process privileges. See also infra note 9 (noting other changes in assertion of privilege).

1 confidentiality of the communications." United States v. O'Neil,
2 619 F.2d 222, 226 (3rd Cir. 1980) (quoting Smith v. Federal Trade
3 Comm'n, 403 F. Supp. at 1016) (emphasis added). This burden is
4 imposed on the agencies "because serial de novo review of
5 documents may not be a wise use of increasingly burdened judicial
6 resources." City of Virginia Beach v. United States Department
7 of Commerce, 995 F.2d 1247, 1254 (4th Cir. 1993) (internal
8 quotation marks and citations omitted). The agency's
9 explanations for invoking the claimed privilege must be
10 sufficient to enable the reviewing court to determine which
11 documents are, in fact, privileged. Id.

12 The Meridith/Unger Decl. does not make this showing. First,
13 the Meridith/Unger Decl. misapplies both the "predecisional" and
14 "deliberative" prongs of the privilege. As the Ninth Circuit
15 held in Assembly of California, a "predecisional" document is
16 "prepared in order to assist an agency decisionmaker in arriving
17 at his decision . . . [m]aterial which predates a decision
18 chronologically, but did not contribute to that decision, is not
19 predecisional in any meaningful sense." 916 F.2d at 921
20 (citation and internal quotation marks omitted).

21 The Meridith/Unger Decl., however, makes the assertion that
22 "[t]hese documents are also a classic example of deliberative
23 documents because they are drafts, and thus do not reflect the
24 agency's final position." Decl. at ¶13 (emphasis added).^{2/} The
25

26 ^{2/} This assertion that documents are "draft" or "preliminary"
27 is repeated throughout the Meridith/Unger Decl. as the only
justification for invoking the deliberative process privilege.
See ¶¶ 13, 16, 18, 19, 20, 21, 24, 25, 26, 27, 29, 30, 35, 39B,

fact that a document is a "draft" and "does not reflect the agency's final position" at most shows that the document is chronologically "predecisional." Moreover, the document may not even qualify as "predecisional" within the meaning of the privilege if it "did not contribute to the decision." Assembly of California, 916 F.2d at 921. A document's "draft" status thus does not even address the "deliberative" prong, which requires that privileged materials "reveal the mental processes of decision-makers." Id.^{3/} It also does little to establish that the document is "predecisional." Thus, deliberative process privilege has not been established for those Administrative Record documents (enumerated supra n.3) withheld due only to their "draft" status.

Second, for additional documents, the Meridith/Unger Decl. adds only the unsupported assertion that "release will inhibit frank discussion" among agency staff or between agency staff and

39C, 39D, 39E, 39F, 39G, 39H, 39J, 39M, 39N, 39P, 39R, 39S, 39T, and 41.

3/ Federal defendants rely exclusively on National Wildlife Fed'n v. United States Forest Service, 861 F.2d 1114 (9th Cir. 1988), to assert that the draft nature of the withheld documents -- without more -- makes them privileged. NWF, however, made a meticulous inventory of the characteristics of the draft documents in that case that made them "deliberative" and "predecisional." The Ninth Circuit's subsequent opinion on the deliberative process privilege, Assembly of California, holds that all of these characteristics must be identified in the assertion of privilege. 968 F.2d at 920-922. As Judge Pregerson warns in his concurring opinion in NWF, " . . . nearly everything an agency generates is somehow related to the deliberative process . . . [e]ven though this result is not intended by the majority, the opinion could be misconstrued to protect from disclosure virtually any government document that does not constitute a final decision." 861 F.2d at 1124. The government has misconstrued NWF in just this way here.

1 government counsel. See Meridith/Unger Decl. ¶¶ 14, 23, 32, 36,
2 37, 39I, and 39L. This assertion, without more, does not show
3 either the documents' "predecisional" or "deliberative"
4 character. Where the agency has failed to explain "the role that
5 staff discussion and memoranda play in [the decision at issue]
6 and the manner in which such decisions are memorialized and
7 explained" the agency has failed to provide enough information to
8 determine whether the privilege applies. SafeCard Services, Inc.
9 v. Securities and Exchange Comm'n, 926 F.2d 1197, 1204 (D.C. Cir.
10 1991). Federal defendants thus also have failed to justify the
11 deliberative process privilege for the documents listed in the
12 Meridith/Unger Decl. at ¶¶ 14, 23, 32, 36, 37, 39I, and 39L.

13 Third, the Meridith/Unger Decl. contends that the withheld
14 documents "illustrate the development of the advice and
15 recommendations" of attorneys. See Meridith/Unger Decl., ¶¶ 12,
16 15, 28, 31, 33, 39O. In O'Neil, the Third Circuit held that
17 "[e]ven when asserted by the President of the United States, [the
18 claim of privilege failed] . . . when it depended solely on the
19 broad, undifferentiated claim of public interest in the
20 confidentiality conversations." 619 F.2d at 227 (emphasis in the
21 original) (internal quotation marks and citations omitted).
22 Federal defendants' sweeping claim of a general interest in the
23 confidentiality of legal advice fails to establish the
24 deliberative process privilege. The documents listed in
25 Meridith/Unger Decl., ¶¶ 12, 15, 28, 31, 33, and 39O, have not
26 been shown to be privileged.

27 Fourth, federal defendants have clarified that the Varney

Decl. does not attempt to assert the executive privilege -- only the deliberative process privilege. See Fed. Dfts. Opp. Mem. at n.9. By Ms. Varney's own admission, most^{4/} of these documents were not directed towards the agency decision-makers, but rather the President and other White House Officials.^{5/} Because the agency decision-makers could not and did not rely on these documents -- and the executive privilege is not invoked -- the Varney Decl. does not establish any privilege.^{6/}

Finally, the remaining documents, identified in the Meridith/Unger Decl. at ¶¶ 17, 22, 38, 39A, 39P, 39Q, 40 and 43, assert various grounds for the deliberative process privilege other than the boiler-plate assertions described above. Even for these documents, however, the government does not adequately explain how they are "deliberative" or "predecisional" within the narrow scope intended by the privilege. With respect to these documents at least, in camera review is necessary to determine

^{4/} The exceptions, identified as Documents 95, 100, 201, 260, and 150, do not describe the bases for assertion of deliberative process privilege with any more particularity than the Meridith/Unger Decl. Thus, they too are not protected.

^{5/} Ms. Varney's Declaration contradicts the assertions made in ¶ 42 of the Meridith/Unger Decl. Whereas Ms. Varney explains in ¶ 5 that Documents 4, 9, and 10 were only provided to the President or Vice-President, the Meridith/Unger Decl. contends that these memoranda were also "provided to the agency for its consideration." The basis for the deliberative process privilege is not established in the face of such conflicting assertions.

^{6/} Federal defendants' reliance on Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) is inapposite. At issue was whether oral communications between White House staff and the EPA needed to be summarized and docketed on the rulemaking record. Unlike the documents at issue here, the summaries were not Administrative Record documents and were not relied upon in the agency's decision-making process. Id. at 404-408.

1 whether the deliberative process applies, and they probably
2 should be released outright.

3 B. Federal Defendants Have Failed To Establish That The
4 Attorney Work-Product Privilege Applies To The Withheld
Administrative Documents.

5 Federal defendants claim that 84 out of the 177
6 Administrative Record documents are protected in part by the
7 attorney work-product privilege. The Meridith/Unger Decl.
8 explains that these documents were all "prepared by attorneys at
9 a time when the agencies anticipated litigation." See
10 Meridith/Unger Decl. at ¶¶ 12, 13, 14, 15, 17, 18, 19, 21, 24,
11 25A-H, 26, 27, 28, 29, 30, 31, 33, 38, 41, 42, and 43. Federal
12 defendants offer no other justification for claiming this
13 qualified privilege.^{7/}

14 In this case, however, the entire Administrative Record was
15 prepared "in anticipation of litigation." For this reason, the
16 well-recognized exception to the work-product rule for routine
17 reports and memoranda prepared in the "ordinary course of agency
18 business" is important. See, e.g., Sterling Drug, Inc. v.
19 Harris, 488 F. Supp. 1019, 1026 (S.D.N.Y. 1980) (not all attorney
20 documents concerning "Alevaire" prepared since the time drug
21 company was in litigation with FDA were privileged as work-
22 product); Colorado v. Schmidt-Tiago Constr. Co., 108 F.R.D. 731,
23 734 (D. Colo. 1985) (highway department computer print-outs were
24

25 ^{7/} See Admiral Ins. Co., 881 F.2d at 1494 (work-product
26 privileged documents discoverable by showing of need); see also
27 Holmgren v. State Farm Mutual Auto. Ins. Co., 976 F.2d 573, 576-
77 (9th Cir. 1992) (even opinion work-product may be discoverable
based on compelling need).

1 for use in the regular course of agency business and were not
2 protected work-product); Resolution Trust, 137 F.R.D. at 644 n.3
3 (not work-product if document was prepared as a regular agency
4 practice).

5 The importance of this exception in this context is
6 explained by the D.C. Circuit:

7 The executive branch of our government employs an
8 uncountable and ever-growing number of attorneys, and
[attorney work-product privilege] can hardly be
understood as protecting everything they put on paper.

9 Bristol-Myers Co. v. Federal Trade Comm'n, 598 F.2d 18, 28 (D.C.
10 Cir. 1978). Here, federal defendants claim the work-product
11 privilege on behalf of 35 different government attorneys.
12 Meridith/Unger Decl. ¶4. Federal defendants' undifferentiated
13 assertion of attorney work-product privilege for so many
14 attorneys, for documents as generic as "memoranda regarding BLM
15 planning processes" (¶12), "various drafts of the SEIS" (¶13),
16 and "memoranda, notes, and draft ROD language" (¶33), do not
17 allow either SAS or the Court to distinguish between documents
18 prepared as part of agency practice and legal documents actually
19 prepared for this litigation. Federal defendants' boiler-plate
20 assertion simply fails to establish attorney work-product
21 privilege. In light of this failure, documents claimed under
22 this privilege should be produced.

23 C. Federal Defendants Have Failed To Establish All
24 Elements Of The Attorney-Client Privilege.

25 The Meridith/Unger Decl. claims the attorney-client
26
27

1 privilege for 77 documents.^{8/} Federal defendants bear the
2 burden of proving the attorney-client privilege, and "[o]n
3 raising the privilege, a general allegation is insufficient."
4 Colorado v. Schmidt-Tiago Constr. Co., 108 F.R.D. 731, 734 (D.
5 Colo. 1985).

6 The attorney-client privilege "is narrowly construed and is
7 limited to those situations in which its purposes will be
8 served." Coastal States, 671 F.2d at 862. The attorney-client
9 privilege "protects only those disclosures -- necessary to
10 obtain informed legal advice -- which might not have been made
11 absent the privilege.'" Id. (quoting Fisher v. United States,
12 425 U.S. 391, 403 (1976)).^{9/}

13 To establish the privilege, the government's justification
14

15 ^{8/} The Meridith/Unger Decl. again changes the assertions of
16 privilege contained in federal defendants' index of privileged
17 documents. Whereas the index claims attorney-client privilege
18 for 99 documents, the Meridith/Unger Decl. claims that only 77
19 documents are so privileged. The Varney Decl. claims that an
20 additional 4 documents are attorney-client privileged
21 communications. Apparently, the other 18 documents listed in the
22 index could not be construed as attorney-client confidences after
23 all.

24 ^{9/} The bases for federal defendants' assertion of attorney-
25 client privilege must be separate and distinct from its reasons
26 for asserting the attorney work-product privilege. Legal advice
27 is the indicator of the attorney-client privilege, as opposed to
the attorney work-product privilege. The attorney-client
privilege is "unrelated to writings which reflect an attorney's
mental impressions, conclusions, opinions, or legal theories."
Hickman v. Taylor, 329 U.S. 495, 508 (1947); see also Admiral
Ins. Co. v. United States District Court, 881 F.2d 1486, 1492
(9th Cir. 1989) (listing essential elements of the attorney-
client privilege). When a government agency is the "client" with
respect to the privilege, the agency "must bear the same burden
of establishing all the . . . elements of the privilege."
Resolution Trust Corp. v. Diamond, 137 F.R.D. 634, 643 (S.D.N.Y.
1991).

1 must indicate "that the information was communicated for the
2 purposes of primarily securing legal advice or a legal opinion,
3 services, or assistance." Mobil Oil Corp. v. Department of
4 Energy, 102 F.R.D. 1, 10 (N.D.N.Y. 1983). "Information that
5 happens to be addressed to or by counsel" does not satisfy the
6 privilege. Resolution Trust, 137 F.R.D. at 643.^{10/}

7 The Meridith/Unger Decl. fails to establish the elements of
8 attorney-client privilege. Instead, the Declaration relies on
9 the generic assertion that "legal advice" was given based on
10 "confidential communications." See Meridith/Unger Decl. ¶¶ 12,
11 15, 16, 18, 19, 21, 22, 24, 25A-H, 27, 28, 31, 35, 36, 37, 38,
12 41, and 42. Similarly, the Varney Decl. makes the same
13 conclusory assertions in ¶¶ 10, 11, and 15. In Resolution Trust,
14 the court dismissed unsupported labels such as "legal advice" or
15 "legal opinion" as unacceptable "paltry and self-serving
16 descriptions." 137 F.R.D. at 643.

17 Only in ¶¶ 13, 14, 17, 26, 29, 30, 32, 33, and 43 does the
18 Meridith/Unger Decl. also describe the documents as assessing
19 "litigation risks" or "litigation strategy." This additional
20 description, however, still does not supply the Court with enough
21 information to determine whether federal defendants have
22 established each element of the attorney-client privilege.

23
24 ^{10/} Thus, in Coastal States, the court found that the attorney-
25 client privilege did not protect the agency lawyers' memoranda
26 that "seem to be neutral, objective analyses of agency
27 regulations." 671 F.2d at 863. The court held that these
memoranda were not privileged because they "do not contain
private information concerning the agency" and are not
"'counseling' intended to assist the agency in protecting its
interests." Id.

1 Resolution Trust, 137 F.R.D. at 643. In short, federal
2 defendants have failed to establish the elements of the attorney-
3 client privilege for the 81 documents withheld in whole or in
4 part under a claim of this privilege and hence they should be
5 produced.

6 II. EVEN IF FEDERAL DEFENDANTS HAD ESTABLISHED THE CLAIMED
7 PRIVILEGES (WHICH THEY HAVE NOT), THE NEED TO MAKE THESE
8 ADMINISTRATIVE RECORD DOCUMENTS PART OF THE PUBLIC RECORD,
9 AND SAS' NEED FOR THE DOCUMENTS, OUTWEIGHS FEDERAL
10 DEFENDANTS' INTEREST IN CONFIDENTIALITY

11 The deliberative process and attorney work-product
12 privileges are qualified privileges only, and federal defendants'
13 interest in non-disclosure must be balanced "against the interest
14 of litigants, and ultimately of society, in accurate judicial
15 fact finding and the public interest in opening for scrutiny the
16 government's decision making process." Resolution Trust, 137
17 F.R.D. at 642 (internal quotation marks and citations omitted).
18 In this case, the balance tips easily in favor of disclosure.

19 SAS seeks production of documents that federal defendants
20 have identified as part of the Administrative Record in this
21 case. Federal defendants cannot dispute that every document SAS
22 seeks is an Administrative Record document, and that such
23 documents are presumptively part of the public record and not
24 confidential. See Order On Motion To Compel Discovery, (May 13,
25 1992) at 2. Federal defendants must be able to overcome this
26 strong presumption in favor of disclosure to properly claim any
27 asserted privileges.

28 To explain the unprecedented number of allegedly
29 confidential Administrative Record documents in this case,

1 federal defendants state that because "the process of developing
2 the interagency strategy was so unprecedented, the agencies
3 generated a high volume of deliberative and legal documents."
4 Meridith/Unger Decl. at ¶9. Something is amiss if the Forest
5 Service and BLM cannot communicate without creating confidential
6 documents. Meaningful judicial review requires more than the
7 partial record federal defendants have chosen to produce.^{11/}

8 "The whole administrative record, however, is not
9 necessarily those documents that the agency has compiled and
10 submitted as 'the' administrative record." Thompson, 885 F.2d at
11 555 (emphasis in the original) (citation and internal quotation
12 marks omitted). Rather, the "whole administrative record"
13 includes all documents "directly or indirectly considered by
14 agency decision-makers and includes evidence contrary to the
15 agency's position." Id. (emphasis in the original) (citation and
16 internal quotation marks omitted); see also Walter O. Boswell
17 Mem. Hospital v. Heckler, 749 F.2d 788, 790-794 (D.C. Cir. 1984)
18 ("to review less than the full administrative record might allow
19 a party to withhold evidence unfavorable to its case").

20 This dispute is not about federal defendants' failure to
21 designate Administrative Record documents -- they have done
22 that -- it is about their failure to make the whole

23 _____
24 ^{11/} The Ninth Circuit has often affirmed the Supreme Court's
25 holding that "judicial review is to be based on the full
26 administrative record." Thompson v. United States Dept. of
27 Labor, 885 F.2d 551, 555-56 (9th Cir. 1989) (citing Citizens to
Preserve Overton Park, 401 U.S. 402, 420 (1971)); see also
Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d
1434, 1548 (9th Cir. 1993) ("an incomplete record must be viewed
as a fictional account of the actual decision-making process").

1 Administrative Record available for public and judicial review.
2 Under similar circumstances, the court in Smith v. Federal Trade
3 Comm'n, found FTC's interest in non-disclosure was easily
4 outweighed by the interest in review of the complete
5 administrative record: "some of the documents sought appear to
6 be part of the administrative record and as such will, of course,
7 be made available to plaintiffs." 403 F. Supp. at 1018 n.55
8 (emphasis added).^{12/}

9 In addition, many of the withheld documents appear to
10 address some of SAS' particular, articulated concerns regarding
11 the agencies' decision. For example, in "Comments on the DSEIS
12 by SAS," submitted to the agencies on October 26, 1993, SAS
13 discussed at length the reasons for its concern that Option 9
14 does not comply with NFMA viability regulations. The
15 Meridith/Unger Decl. at ¶¶ 34, 35, 41, and 43 suggest that these
16 withheld documents address this concern raised by SAS to the
17 agencies. Not only should the withheld documents be produced to
18 complete the administrative record in this case, but SAS needs
19 these documents to adequately review the grounds for the
20 agencies' decision.

21
22
23 ^{12/} The D.C. Circuit has written that a "strong theme" in its
24 frequent consideration of deliberative process privilege is that
25 the agencies cannot operate "hidden behind a veil of privilege."
26 Coastal States Gas Corp. v. Department of Energy, 671 F.2d 854,
27 867 (D.C. Cir. 1980) (holding that government's assertion of
deliberative process was unjustified). Federal defendants' broad
and undifferentiated assertions of privilege fail to overcome the
presumption that Administrative Record documents should be
disclosed.

CONCLUSION

Federal defendants have belatedly attempted to use the proper procedure -- declarations by high-ranking agency officials -- to invoke the claimed privileges.^{13/} These declarations, however, do not establish the elements of the claimed privileges as required by law. Accordingly, the Court should grant SAS' motion to compel.

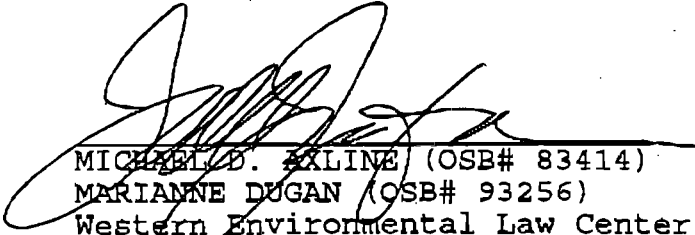
DATED: This 8 day of September, 1994.

Respectfully submitted,

TODD D. TRUE (WSB# 12864)
LAURA S. ZIEMER (WSB# 21352)
Sierra Club Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104

Attorneys for Plaintiffs
Seattle Audubon Society, et al.

^{13/} Federal defendants indicate that they will likely seek leave to file a sur-reply to respond to SAS' showing that the privileges claimed in the Meridith/Unger Decl. are not justified. By waiting to file this declaration until filing a brief in opposition to a motion to compel, federal defendants have not only left SAS with less than 48 hours to respond to their justifications of privilege, but they knowingly short-circuited the usual discovery process: this declaration should have been filed at the outset. Federal defendants' contention that they are not required to properly invoke their claimed privileges until forced to by the threat of a court order is ridiculous. Fed. R. Civ. P. 34(b) does not endorse a conclusory assertion of privilege, and courts have found that "an improperly raised claim of privilege is no privilege at all." Smith v. Federal Trade Comm'n, 403 F. Supp. 1000, 1017 (D. Del. 1975) (where FTC had been made aware in prior discovery disputes of the shortcomings in its assertion of privilege, court was justified in ordering production of documents when FTC failed again to properly justify its claimed privilege). In short, the agency's own delay in filing this declaration should not delay resolution of this motion. These discovery disputes need an efficient and timely resolution. Any request for additional briefing should be denied.



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Western Environmental Law Center
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Eugene, OR 97401

Attorneys for Plaintiffs Lane
County Audubon Society and
Oregon Natural Resources Council

456REPLY.CMP

CERTIFICATE OF SERVICE

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

On September 8, 1994, I served a true copy of REPLY MEMORANDUM IN SUPPORT OF SAS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS on the persons listed below by telefax and Airborne Express, addressed as follows:

Stephen J. Odell
Wells Burgess
Jean Williams
Department of Justice
Environment and Natural Resources Division
General Litigation Section, Room 868
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004

FAX: (202) 272-6815

and on the persons listed below by Airborne Express, addressed as follows:

Mark C. Rutzick
888 SW Fifth Ave., 500 Pioneer Tower
Portland, OR 97204-2089

Peggy Hennessey
Gary Kahn
610 S.W. Alder, Suite 910
Portland, OR 97205

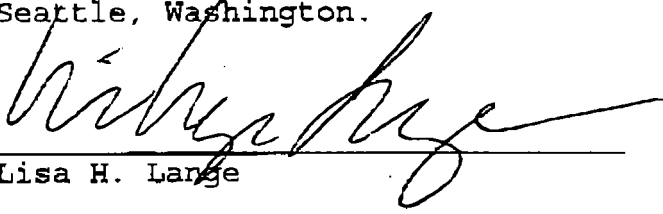
John S. Karpinski
2612 E. 20th St.
Vancouver, WA 98661

and by messenger on the persons listed below, addressed as follows:

J.J. Leary, Jr.
James R. Hennessey
Smith & Leary
316 Occidental Ave. S., Suite 500
Seattle, WA 98104-2840

1 Gregory T. Costello
Riddell Williams Bullitt & Walkinshaw
2 1001 Fourth Ave. Plaza, Suite 4400
Seattle, WA 98154

3
4 I, Lisa H. Lange, declare under penalty of perjury that the
5 foregoing is true and correct. Executed on this 8th day of
6 September, 1994, at Seattle, Washington.

7 
8 Lisa H. Lange
9
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27

THE WHITE HOUSE
WASHINGTON

Mike,

I don't think we have to do anything with this.

On August 25, SAS, the plaintiffs, filed a motion to compel production of 177 privileged documents. This memo is the response from the government formally asserting the privilege on the documents filed with the court. Included with the memo is affidavits from various federal employees as declarations of privilege. On September 12, the judge ordered the government to produce the 177 documents for an in camera spection. This means that he will do an internal view of the documents without releasing them to the plaintiffs.

Connie

Great Job.
p/s f.l.a
m

ROUTING AND TRANSMITTAL SLIP

Date

TO: (Name, office symbol, room number, building, Agency/Post)		Initials	Date
1. <u>Michael Davis</u>			
2. <u>Conner, pls review</u>			
3. <u>and let me know if we</u>			
4. <u>need to do anything.</u>			
5. <u>Thz</u>			

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

This is a copy of the latest filing in Seattle.

Paula Clinedinst

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
<u>Paula (DOJ/ENRD/GLS)</u>	Phone No. <u>272-8019</u>

5041-102

☆ U.S.G.P.O. 1992 312-070/60005

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

JAMES LYONS, in his official
capacity as Assistant Secretary of
Agriculture, and UNITED STATES
FOREST SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

JAMES LYONS, et al.,

Defendants.

Civ. No. 92-479WD

FEDERAL DEFENDANTS'
OPPOSITION TO
SAS'S MOTION TO
COMPEL

Civ. No. C94-758WD

FED DEFS' OPPOSITION TO
SAS'S MOTION TO COMPEL

United States Department of Justice
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Washington, D.C. 20044-0663
Telephone: (202) 272-8056

1 NATIVE FOREST COUNCIL,
2 Plaintiff,

Civ. No. C94-803WD

3 v.

4 BRUCE BABBITT, et al.,
5 Defendants.

6 THE SIERRA CLUB
7 Plaintiff,

Civ. No. C94-820WD

8 v.

9 MICHAEL ESPY, et al.,
10 Defendants.

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FED DEFS' OPPOSITION TO
SAS'S MOTION TO COMPEL

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I. INTRODUCTION

1 Plaintiffs Seattle Audubon Society, et al. (collectively
2 "SAS") have filed a motion to compel seeking production of 177
3 privileged documents which are protected by the attorney-client
4 privilege, the attorney work-product privilege, and/or the
5 deliberative process privilege. SAS argues that the federal
6 defendants have not properly asserted privilege, and that the
7 "law of the case" requires the production of deliberative
8 materials.

9 With this opposition, federal defendants submit the joint
10 Declaration and Assertion of Privilege of David G. Unger,
11 Associate Chief of the U.S. Forest Service, and Denise Meridith,
12 acting Director of the Bureau of Land Management, and the
13 Declaration and Assertion of Privilege of Christine A. Varney,
14 Deputy Assistant to the President and Cabinet Secretary. These
15 Declarations formally assert the various privileges for the
16 respective documents, specify their subject matter, and describe
17 the privileged nature of the documents. As the Declarations
18 fully meet all requirements for assertion of privilege, SAS's
19 arguments have been met. SAS's further contention that the "law
20 of the case" requires production of deliberative materials is
21 ill-founded. "Law of the case" is simply inapplicable where, as
22 here, the Court has before it documents which were not even in
23 existence at the time of the 1992 ruling on which SAS seeks to
24 rely, with new facts and issues. Federal defendants have
25 properly asserted and invoked privilege with regard to the 177

26
FED DEFS' OPPOSITION TO
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documents requested by SAS and the motion to compel should be
1 denied.

2 **II. STATEMENT**

3 On August 3, 1994, federal defendants filed their answer to
4 SAS's Interrogatory No. 12, which sought "a list of all documents
5 withheld from the administrative record on a claim of privilege."
6 Federal defendants' answer attached an index¹ of the requested
7 documents, identifying each document (to the extent possible) by
8 author and author agency, recipient and recipient agency, date,
9 general subject matter and applicable privilege(s). Federal
10 Defendants also reserved the right to formalize their assertions
11 of privilege if necessary:

12 Should plaintiffs file a motion to compel production of
13 any documents on the attached index, on the ground that
14 such documents should be part of the record on which
15 judicial review shall be conducted or any other ground,
16 federal defendants reserve the right to object and to
17 formally assert any or all of the privileges indicated
18 on the index or any other applicable privilege.

19 Federal Defendants' Answer to Interrogatory Number 12, p.1.²

20 ¹ When compiling this index, federal defendants determined
21 not to assert the deliberative process privilege with regard to
22 39 documents which relate to the preparation of the SEIS, were
23 predecisional and deliberative in nature and therefore
24 privileged, but which were provided as a supplement to the
25 record. See, Federal Defendants' Notice of Filing of
26 Supplemental Index to the Administrative Record. Federal
defendants determined to waive the deliberative process privilege
as to these documents because there have been allegations that
papers generated during preparation of the SEIS that should have
been a part of the administrative record may have been
selectively discarded, and the agencies therefore desire to be
especially forthcoming with regard to such papers. *Id.*

² Federal Defendants' Answer to Interrogatory No. 12 was
previously provided to the Court by SAS as two exhibits to its
(continued...)

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SAS subsequently made a request of federal defendants for
1 production of 179 of the 275 documents on the index; in response,
2 federal defendants provided two documents and portions of three
3 other documents, and maintained federal defendants' objection to
4 production of the remainder on the grounds of privilege. This
5 motion to compel followed.

6 The privileged documents withheld were all generated during
7 the development of the Final Supplemental Environmental Impact
8 Statement on Management of Habitat for Late-Successional and Old-
9 Growth Forest Related Species Within the Range of the Northern
10 Spotted Owl (FSEIS) or the Record of Decision for Amendments to
11 Forest Service and Bureau of Land Management Planning Documents
12 Within the Range of the Northern Spotted Owl (ROD) which was
13 signed on April 13, 1994. Many of the documents are the product
14 of interagency teams, including the Supplemental Environmental
15 Impact Statement Team (SEIS Team) and the interagency team which
16 drafted the Record of Decision (ROD drafting team), each of which
17 included various staff from the Forest Service (FS) and the
18 Bureau of Land Management (BLM). Thus, in opposition to this
19 motion to compel, federal defendants have formally asserted
20 privilege by means of the joint Declaration and Assertion of
21 Privilege of David G. Unger, Associate Chief of the U.S. Forest

22
23 2 (...continued)
24 motion to compel and will not be separately provided here. The
25 Answer to Interrogatory No. 12 is Exhibit D to the True
26 Declaration; the index (with circles made by SAS around the
identification numbers for the documents it seeks) which was
attached to the Answer is Exhibit A...

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Service, and Denise Meridith, acting Director of the Bureau of
1 Land Management, as to both inter-agency and intra-agency
2 documents. See, Unger/Meridith Declaration, attached hereto as
3 federal defendants' Exhibit 1. Federal defendants also submit
4 the Declaration and Assertion of Privilege of Christine A.
5 Varney, Deputy Assistant to the President and Cabinet Secretary,
6 as to documents generated by or sent to senior White House staff.
7 See, Varney Declaration, attached hereto as federal defendants'
8 Exhibit 2.³

9 The Unger/Meridith Declaration formally asserts the
10 deliberative process privilege for deliberative FS and BLM agency
11 documents and asserts the attorney-client and attorney work-
12 product privilege for documents seeking or providing legal advice
13 or prepared in anticipation of litigation. The Varney

14
15 3 Though SAS does not seek production of all the privileged
16 documents, the request reaches the majority of the documents.
17 Further, federal defendants have received, by letter dated August
18 26, 1994, a request from counsel for defendant-intervenor,
19 Washington Contract Loggers Ass'n and cross-defendant Northwest
20 Forest Resource Council (hereinafter "WCLA"), for production of
21 42 documents in addition to those sought by SAS motion. On the
22 basis of privilege, federal defendants advised WCLA by letter
23 dated August 31, 1994, that none of the requested documents would
24 be produced. Thus, while not all the privileged documents have
25 been requested by SAS, federal defendants anticipate a motion to
26 compel from WCLA for the documents it has requested, and possibly
the entire balance of the documents. Therefore, the attached
Declarations cover all privileged documents, and though this
opposition is directed to those sought by SAS, the same
principles apply to the other documents not currently before the
Court on SAS's motion to compel. For the Court's information,
neither SAS nor WCLA has requested Documents No. 18, 20, 22, 23,
30, 33, 38, 39, 41, 42, 51, 83, 88, 94, 105, 110, 117, 125, 126,
137, 139, 149, 150, 152, 168, 170, 172, 173, 184, 185, 192, 193,
199, 202, 208, 209, 216, 220, 223, 226, 227, 228, 234, 236, 237,
245, 248, 257, 263, 264, 265, 267, and 268.

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Declaration formally asserts the deliberative process privilege
1 for documents representing deliberative communications between
2 the agencies and White House senior staff, and asserts the
3 attorney-client privilege for documents from White House senior
4 staff seeking legal advice, or to White House senior staff
5 providing legal advice.

6 The agencies' decision, as set forth in the ROD and its
7 attachment, to adopt an interagency strategy for management of FS
8 and BLM lands within the range of the northern spotted owl was,
9 in the words of these agencies, "an unprecedented effort in
10 public land management." ROD, p.1. The strategy implemented by
11 the ROD is the first interagency effort to develop and adopt a
12 unified management approach to over 24 million acres of public
13 lands the FS and BLM administer throughout an entire ecological
14 region. Id.

15 Thus, as noted in the Unger/Meridith Declaration, this
16 effort generated a significant need for intensive and critical
17 intra- and inter-agency predecisional analysis and discussion on
18 a myriad of issues regarding development and implementation of
19 such a comprehensive interagency approach. Due to the nature of
20 the effort, it of necessity also required substantial and
21 detailed legal advice, opinion, recommendations and work-product.
22 Unger/Meridith Dec., paras. 6-7. Further, because this
23 interagency effort was conducted pursuant to this
24 Administration's policy of developing a long-term, balanced
25 approach that would focus on the ecosystem of the owl while

26 FED DEFS' OPPOSITION TO
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considering human and economic needs, the effort also involved -
1 coordination with White House senior staff on policy issues.
2 Varney Dec., parag. 2-4. Against this background, the agencies
3 have properly invoked the various privileges discussed below, and
4 this Court should deny SAS's motion to compel.

5 **III. ARGUMENT:**

6 **A. Summary**

7 The 177 documents sought by SAS are protected by the
8 deliberative process privilege, the attorney-client privilege,
9 and/or the attorney work-product privilege. As is further
10 described below and in the attached Unger/Meridith and Varney
11 Declarations, the government has properly asserted the
12 deliberative process privilege and has satisfied the criteria
13 necessary to support assertion of the attorney-client and
14 attorney work-product privileges.

15 Much of SAS's argument concerns proper assertion of
16 privilege, focusing on the index previously provided in discovery
17 proceedings herein. However, as was stated in federal
18 defendants' Answer to Interrogatory No. 12 -- which provided the
19 index -- federal defendants reserved the right to formally assert
20 privilege when and if a motion to compel was filed. Thus, the
21 issue of whether the agencies have properly asserted privilege
22 must be assessed in the context of the Declarations submitted
23 with this opposition.⁴

24
25 ⁴ SAS implies that federal defendants should have submitted
a formal assertion of privilege at some earlier point in these
(continued...)

26 **FED DEFS' OPPOSITION TO
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An examination of the Declarations reveals that the agencies manifestly have met all the requirements for the assertion of privilege. Because SAS has raised no substantive challenge to the privileged nature of the documents, this memorandum will generally discuss the elements of the respective privileges and demonstrate that the agencies have properly invoked them.⁵

B. Attorney-client privilege

Of the documents SAS seeks, 99 are protected by the attorney-client privilege. This privilege protects documents which, if disclosed, will reveal confidential communications made from a client to an attorney for the purpose of obtaining legal

⁴(...continued)
proceedings. To the contrary, during discovery proceedings reliance on an objection is the proper course. See, Fed. R. Civ. P. 34(b) (response to request for production shall state that inspection will be permitted, "unless the request is objected to, in which event the reasons for the objection shall be stated"). Particularly where, as here, the documents are so numerous, SAS was provided a complete index, and federal defendants responded to SAS's request for production in an expedited fashion, the agencies' assertion of privilege in opposition to the motion to compel is timely. In any event, waiver is not lightly imposed, and is inapplicable here. See, e.g., United States v. Jacobs, 322 F.Supp. 1299, 1303 (C.D.Cal. 1971) (no waiver implied merely by failure to assert); Mobil Oil Corp. v. DOE, 102 F.R.D. 1, 13 (N.D.N.Y. 1983) (court found that, had DOE submitted detailed affidavit with DOE's opposition to motion to compel production of privileged documents, it would have been timely; finding DOE's filing of a more detailed index untimely only when submitted with DOE's Motion for Reconsideration of ruling on the motion to compel).

⁵ The Declarations of course address each document, but because the documents are so voluminous, this memorandum will refer to documents by categories, or by example. Should SAS challenge specific documents or raise any other challenge not raised in SAS's motion to compel, federal defendants anticipate seeking this Court's leave to file a surreply.

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advice. See, e.g., Matter of Fischel, 557 F.2d 209, 211 (9th
1 Cir. 1977). Once the elements of the privilege are established,
2 the privilege is absolute and disclosure prohibited. See, e.g.,
3 Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d
4 1414, 1429 (3rd Cir. 1991); Diversified Indus., Inc. v. Meridith,
5 572 F.2d 596, 602 (8th Cir. 1978) ("[T]he privilege, where it
6 exists, is absolute. . . .")

7 The privilege extends to both confidential communications
8 between a client and its attorney --here, the various proposals
9 for action the agency was considering -- and to the attorneys'
10 advice with regard to these proposed actions. See, e.g., In re
11 Fischel, 577 F.2d at 211 (the privilege "extends both to the
12 substance of the client's communication as well as the attorney's
13 advice in response thereto"); Coastal States Gas Corp. v.
14 Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (the
15 privilege extends to an attorney's written communications to a
16 client "to ensure against inadvertent disclosure, either directly
17 or by implication, of information which the client has previously
18 confided to the attorney's trust.") A formal request for legal
19 advice from the client is not necessary; the provision of
20 information with an expectation of obtaining advice is sufficient
21 to qualify as a confidential communication. See, e.g., Hercules.
22 Inc. v. Exxon Corp., 434 F. Supp. 136, 144-145 (D. Del. 1977)
23 ("[c]lient communications intended to keep the attorney generally
24 appraised of continuing . . . developments with an implied
25 request for legal advice thereon, or self-initiated attorney

26
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communications intended to keep the client posted on legal

1 developments and implications may also be protected. . . .")

2 As noted, SAS seeks production of 99 documents which
3 are clearly protected by the attorney-client privilege. The
4 Unger/Meridith Declaration establishes, as to each document, that
5 the document is either a confidential communication from the
6 client to an agency or Department of Justice (DOJ) attorney with
7 regard to which legal advice is sought, or is legal advice to the
8 client from the agency or DOJ attorney.⁶ In the context of
9 agency decisionmaking, as here, this exchange of communications

10 and advice took many forms all of which relate to a core of
11 confidential communication: the agencies' proposals for
12 management of FS and BLM lands under an unprecedented strategy
13 within the range of the northern spotted owl.

14 As described in the Unger/Meridith Declaration, the client
15 agencies involved in this decisionmaking process sought legal
16 advice on a day-to-day basis on the myriad of issues involved in
17 developing this complex interagency scheme. Unger/Meridith
18 Declaration, para. 8. This exchange took many forms and involved
19 numerous subjects: attorney advice on drafts of the SEIS and the
20 ROD provided for legal input; attorney drafting and editing of

21 ⁶ Either the attorney or the client may assert the
22 attorney-client and attorney work-product privilege. See, E.
23 Epstein & M. Martin, The Attorney-Client Privilege and Work
24 Product Doctrine 1 (ABA 1989). Though assertion of these
25 privileges does not require the formal assertion necessary for
the deliberative process privilege, in this case, since many of
the documents are both deliberative and protected by either the
attorney-client or work-product privilege, the Unger/Meridith
Declaration asserts these privileges as well.

26
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1 ROD language for particular issues primarily legal in nature or
2 anticipated to be at issue in litigation; formal attorney
3 memoranda on issues raised by agency proposals, including
4 responses to comments on the SEIS; impacts on timber under
5 contract and with Section 318 status; implementation of the
6 preferred alternative; compliance with Endangered Species Act
7 consultation requirements, application and interpretation of the
8 viability provision of 36 CFR 219.19; interagency land management
9 under FS and BLM planning provisions and compliance with this
10 Court's injunction in particular and the general requirements of
11 the National Environmental Policy Act, the Federal Land Policy
12 and Management Act and the National Forest Management Act. See,
13 generally, Unger/Meridith Declaration.

14 In addition, as described in the Varney Declaration,
15 several of the documents protected by the attorney-client
16 privilege are memoranda to or from White House senior staff and
17 agency or DOJ counsel seeking or providing legal advice with
18 regard to the agencies' decisionmaking. These documents concern
19 requests for legal advice and legal advice on the draft ROD
20 analysis and structure and on implementation of the preferred
21 alternative. See, Varney Declaration, parag. 15.

22 The obtaining and providing of this legal advice is pure
23 attorney-client communication and is not subject to production.
24 Finally, there has been no disclosure of the documents; they were
25 disclosed only between the various inter-agency personnel and
26 agency attorneys involved in the agency decisionmaking process,

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and to Department of Justice attorneys working on the past and
1 anticipated litigation. Unger/Meridith Declaration, para. 11.
2 Thus, the elements of the attorney-client privilege have been
3 satisfied, and the 99 documents on which federal defendants have
4 established this privilege are not subject to disclosure. See,
5 e.g., Resolution Trust Corp. v. Diamond, 773 F. Supp. 597, 601
6 (S.D.N.Y. 1991) (Court upheld as "absolutely privileged"
7 documents RTC established were protected by the attorney client
8 privilege including requests for legal advice and legal advice,
9 opinion or strategy memoranda generated by in-house and outside
10 counsel, documents prepared based on the substance of the
11 counsel's opinion or advice, reports of attorney-client
12 communications, and drafts of documents prepared by counsel).

13 **C. Attorney work-product privilege**

14 Of the above-described documents protected by the attorney-
15 client privilege, many are also protected by the attorney work-
16 product privilege. Because the absolute protection of the
17 attorney-client privilege applies to all these documents, the
18 Court need not closely examine this privilege. In short, the
19 work-product privilege, which is "distinct from and broader than
20 the attorney-client privilege," U.S. v. Nobles, 422 U.S. 225,
21 238, n.11 (1975), protects documents prepared by an attorney in
22 anticipation of litigation. Coastal States, 617 F.2d at 864 (the
23 privilege provides an attorney with a "zone of privacy" within
24 which to operate). When the prospect of litigation exists
25 because a potential claim has been identified, the claim of work

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product is prima facie valid, and the burden shifts to the party
1 seeking discovery to show substantial need. See, e.g., Kent Corp
2 v. NLRB, 530 F.2d 612, 623-624 (5th Cir.), cert denied, 429 U.S.
3 920 (1976).

4 Any legal work that meets this criteria may be protected
5 under this privilege. See, e.g., In Re Sealed Case, 676 F.2d
6 793, 809 (D.C. Cir. 1982) (work-product privilege applies to
7 material "obtained or prepared by an adversary's counsel" in the
8 course of his legal duties). Further, work product which
9 contains an attorney's mental impressions, legal strategies and
10 opinions -- the vast majority of the work-product documents
11 described in the Unger/Meridith Declaration -- is due greatly
12 heightened protection. Holmgren v. State Farm Mut. Auto Ins.
13 Co., 976 F.2d 573, 577 (9th Cir. 1992) ("A party seeking opinion
14 work product must make a showing beyond the substantial
15 need/undue hardship test required . . . for non-opinion work
16 product.")

17 Here, many of the attorney-client documents were also
18 prepared in anticipation of litigation and in fact concerned
19 compliance with this Court's Orders. Not only did the
20 development of the interagency strategy arise from litigation,
21 but throughout the decisionmaking process various plaintiffs and
22 other commentators stated or clearly evinced their intention to
23 pursue litigation under specific laws. Where claims that will
24 likely lead to litigation have been identified, documents
25 prepared in anticipation of those claims are protected by the

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work-product privilege. See, e.g., Safecard Services v. S.E.C.,
1 926 F.2d 1197, 1202 (D.C. Cir. 1991) (Actual litigation need not
2 be identified; only some articulable claim need be identified.)
3 Here, the attorneys for the agencies had been made well aware of
4 the very high likelihood of litigation; the assertion of work-
5 product privilege is manifestly justified. Unger/Meridith
6 Declaration, paras. 5-7.

7 **D. Deliberative process privilege**

8 The deliberative process privilege protects from disclosure
9 documents which are "predecisional" and "deliberative," in order
10 to protect "the confidentiality of the give-and-take that occurs
11 among agency members in the formulation of policy," and to
12 encourage candid and open circulation of ideas and opinions.
13 National Wildlife Federation v. U.S. Forest Service, 861 F.2d
14 1114, 1117 (9th Cir. 1988). As the Supreme Court has noted,
15 "human experience teaches that those who expect public
16 dissemination of their remarks may well temper candor with a
17 concern for appearances to the detriment of the decisionmaking
18 process." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-151
19 (1975), quoting United States v. Nixon, 418 U.S. 683, 705 (1974).

20 Of the 78 documents SAS requests which are protected by the
21 deliberative process privilege, the overwhelming majority are
22 drafts of the ROD and of the Standards and Guidelines for
23 Management of Habitat for Late-Successional and Old-Growth Forest
24 Related Species Within the Range of the Northern Spotted Owl
25 (Standards and Guidelines) which accompanied the ROD as

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Attachment A, and comments and edits on drafts of the ROD or the
1 Standards and Guidelines.⁷ These drafts reveal the
2 recommendations, proposals and tentative approaches on the whole
3 range of issues to be resolved in developing the interagency
4 strategy including, e.g., the watershed analysis requirement,
5 survey-and-manage standards, and the impacts of the proposed land
6 allocations. See, Unger/Meridith Declaration, parag. 39. These
7 documents are classic examples of materials which reflect the
8 deliberative process and are therefore protected from disclosure
9 by the deliberative process privilege. In National Wildlife
10 Federation, the Court of Appeals for the Ninth Circuit
11 resoundingly rejected an attempt to limit the protection due such
12 materials:

[T]he deliberative process privilege has been held to
cover all "recommendations, draft documents, proposals,
14 suggestions and other subjective documents which
reflect the personal opinion of the writer rather than
15 the agency," as well as documents which would
"inaccurately reflect or prematurely disclose the views
16 of the agency."

* * * * *

17
18 ⁷ As described in the Unger/Meridith Declaration, many of
the documents protected by the attorney-client privilege are also
19 protected by the deliberative process privilege because the
attorney-client documents themselves are deliberative. Because
20 these documents are absolutely protected by the attorney-client
privilege, they will not be addressed further, except to note
21 that the same chilling effect on the development of candid legal
advice and consideration of that advice would result in the
22 agency deliberative process if tentative legal advice or legal
advice on tentative positions or recommendations was revealed.
23 See, Murphy v. Dep't of the Army, 613 F.2d 1151, 1154 (D.C. Cir.
1974) (series of memoranda to the Secretary of the Army from the
24 General Counsel of the Army recommending legal strategy in light
of a particular controversy were "a classic case of the
25 deliberative process at work.") See, generally, the
Unger/Meridith Declaration.

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To the extent that [plaintiffs] seek . . . to uncover any discrepancies between the findings, projections, and recommendations between the draft Forest Plans and draft EISS prepared by lower-level Forest Service personnel and those actually adopted in the final Forest Plan and EIS published by the Forest Service, it is attempting to probe the editorial and policy judgment of the decisionmakers. Materials that allow the public to reconstruct the predecisional judgment of the administrator are no less inimical to [the deliberative process privilege's] goal of encouraging uninhibited decisionmaking than materials explicitly revealing his or her mental processes.

National Wildlife Federation, 861 F.2d at 1122.⁸

Here, disclosure of these many draft documents, which reflect the intensive deliberations of many approaches and careful scrutiny given the decisionmaking process for this agency decision, would provide plaintiffs a very clear roadmap of the decisionmakers' mental processes. This is exactly what the deliberative process privilege is designed to avoid, and the documents are therefore protected from disclosure by the privilege.

Federal defendants have also submitted the Declaration of Christine A. Varney, Deputy Assistant to the President and Cabinet Secretary. As described in Ms. Varney's Declaration, the confidentiality interest protected by the deliberative process

⁸ SAS's contention that the broad protection for deliberative documents reiterated in NWF is limited to only those drafts which are shown to "identify and assign priority to the issues deemed relevant to the formulation of policy," NWF at 1121, is groundless. Plainly, as quoted above, the court viewed the privilege as far broader; the documents described in the material quoted by SAS were just one type of draft document deemed subject to the privilege.

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privilege is especially strong with regard to documents sent to

1 or from senior White House staff:

2 All of the documents described [in the Varney
3 Declaration] are predecisional to the President's July
4 1, 1993, policy statement or the issuance of the FSEIS
5 or the ROD. These documents, which were generated by
6 various participants in the inter-agency process
7 established and coordinated by the White House, reflect
8 the advice, opinions, recommendations and deliberations
9 that were part of the process by which these
10 governmental decisions and policies were formulated.

11 Varney Declaration, para. 12.

12 This inter-agency decisionmaking process involved national
13 interests, and within the confines of such a process, the White
14 House staff must have a confidential and candid relationship with
15 all participants in policy development. Varney Declaration,
16 para. 13. The need for protection of the deliberative process is
17 most imperative where it involves close development of policy
18 between the agencies and the White House. Varney Declaration,
19 para. 13. Thus, the documents discussed in the Varney
20 Declaration are due the utmost protection of the deliberative
21 process privilege, and should not be produced.⁹ See, Sierra Club
22 v. Costle, 657 F.2d 298, 405, 406 (D.C. Cir. 1981) (discussing
23 importance of "consultative privacy" in connection with White
24 House efforts "to monitor the consistency of executive agency
25 regulations with Administration policy" and noting that "[o]ur

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form of government simply could not function effectively or
rationally if key executive policymakers were isolated from each
other and from the Chief Executive"); see also, C. DeMuth and D.
Ginsburg, White House Review of Agency Rulemaking, 99 Harv. L.
Rev. 1075, 1085-86 (1986) (protecting such communications
benefits regulatory processes.)

E. SAS has demonstrated no need for the documents.

Federal defendants have fully established the applicable
privileges in the attached Declarations; the documents protected
by the attorney-client privilege are of course absolutely
insulated from disclosure and SAS has not met the difficult
burden of demonstrating that they have a substantial need for the
documents protected by the other privileges. SAS only contends
that these privileged documents must be produced because "a
complete administrative record is essential for proper judicial
review." SAS Mem., p. 5.¹⁰

SAS ignores the issue before the Court, which is whether the
documents are privileged. Where, as here, privilege has been
properly invoked, the documents shall not be disclosed

10 SAS's reliance on Coastal States, 617 F.2d at 867 is
inapposite. The documents at issue in Coastal States, were
"neutral, objective analyses [that] resemble . . . question and
answer guidelines which might be found in an agency manual."
Coastal States, 617 F.2d at 863. The Court in Coastal States
further found that, unlike the case before this Court, the
documents contained no suggestions or recommendations on agency
policy, advice or opinion to supervisors, and in general did not
reflect the agency's "give-and-take." As is demonstrated in the
Unger/Meridith and Varney Declarations, the documents at issue
are exactly what the documents in Coastal States were not.

FED DEFS' OPPOSITION TO
SAS'S MOTION TO COMPEL
PRODUCTION OF PRIVILEGED
DOCUMENTS - 17

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(regardless of whether they were relied on by decisionmakers)

1 unless, as to those documents protected by only a qualified
2 privilege, SAS can demonstrate substantial need. FTC v. Warner
3 Communications, Inc., 742 F.2d 1156, 1161 (9th Cir. 1984).

4 Further, federal defendants submit that SAS cannot meet this
5 burden; the administrative record made available to SAS and all
6 parties is complete; the focus of this case is the Record of
7 Decision, the FSEIS and the DSEIS. See, Federal Defendants'
8 Reply In Support of Motion for Protective Order, pp. 9-13.

9 F. The "law of the case" doctrine does not require
10 production of the deliberative materials now before the
11 Court.

12 SAS contends that the "law of the case" doctrine restricts
13 this Court's review of the pending motion to compel and requires
14 production of those documents protected by the deliberative
15 process privilege. This argument is premised on this Court's May
16 12, 1992, Order in SAS v. Moseley regarding documents withheld as
17 privileged from the record for judicial review for the Forest
18 Service decision challenged by SAS in Moseley.

19 Now before the Court is SAS's motion to compel concerning
20 documents which were not even in existence at the time of the
21 1992 ruling. Further, and unlike the situation in 1992, federal
22 defendants have submitted the Unger/Meridith Declaration and the
23 Varney Declaration which are more than adequate to meet every
24 requirement for assertion of all privileges invoked.

25 Clearly, under these circumstances, the law of the case is
26 inapplicable. This doctrine generally precludes reconsideration

FED DEFS' OPPOSITION TO
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of issues already decided. SAS's current motion to compel raises
1 issues that have not been decided, i.e., whether the agencies
2 have properly withheld documents from the administrative record
3 for the 1994 ROD, and have properly asserted privilege with
4 regard to those documents. These issues obviously have not been
5 previously decided;

6 SAS relies on a line of cases which concern the impact of
7 appellate decisions on proceedings on remand. See, Thomas v.
8 Bible, 983 F.2d 152, 154 (9th Cir. 1993) (Appellate court's
9 determination that attorney's fees should not be awarded
10 implicitly determined that action itself was not frivolous, thus
11 binding district court on remand). The pending motion does not
12 involve issues previously decided by the Court of Appeals for the
13 Ninth Circuit, either. It involves new issues of law and fact,
14 and must be considered anew.¹¹

15 IV. CONCLUSION

16 Federal defendants have proffered the Unger/Meridith
17 Declaration and Assertion of Privilege and the Varney Declaration
18 and Assertion of Privilege in support of this opposition to SAS's
19 motion to compel. On the basis of these Declarations, federal
20

21 11 SAS also sets forth various exceptions to the law of the
22 case doctrine, arguing that none are applicable here. SAS Mem.,
23 p. 4. Since the doctrine itself is not applicable, the Court
24 need address this issue no further, but federal defendants note
25 that several of the enumerated exceptions would clearly apply
here, such as "changed circumstances" and new "evidence." In
addition, it would cause manifest injustice to preclude federal
defendants from properly and fully asserting privilege as to
these documents which were not previously before the Court.

26 FED DEFS' OPPOSITION TO
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defendants submit that the motion should be denied.¹² The

Declarations meet all the requirements for assertion of each of the three privileges invoked, and federal defendants should not be compelled to produce the protected documents.

Respectfully submitted this 6th day of September, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

¹² Federal defendants agree with SAS that in camera review should not be conducted in the ordinary course. Pollard v. FBI, 705 F.2d 1151, 1153 (9th Cir. 1983) (Courts proceed with caution in endorsing in camera review.) Where, as here, the attached Declarations adequately describe the documents and otherwise properly assert privilege, SAS's motion should be denied without in camera review. See, e.g., SCM Corp. v. United States, 473 F. Supp. 791, 798 (Ct. Cust. 1979) (In camera review not warranted since, inter alia, descriptive materials, coupled with agency head's affidavit, demonstrated that the documents were advisory opinions, deliberations, and advice and recommendations prepared by agency staff.) Federal defendants further submit that, should the Court find to be inadequate any descriptions of the documents addressed on the Unger/Meridith or Varney Declarations, the proper course would be to seek further explanation concerning the content of such documents from the agencies. See, e.g., Resolution Trust Corp., 773 F. Supp. at 599 (in interest of fairness, court had granted RTC leave to reassert claims of privilege where previous assertions not adequate for judicial review.)

FED DEFS' OPPOSITION TO
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PRODUCTION OF PRIVILEGED
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Attorneys for Federal Defendants

FED DEFS' OPPOSITION TO
SAS'S MOTION TO COMPEL
PRODUCTION OF PRIVILEGED
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CERTIFICATE OF SERVICE

1 The undersigned hereby certifies that on September 6, 1994,
2 she caused one non-conformed copy of the foregoing **FEDERAL**
3 **DEFENDANTS' OPPOSITION TO SAS' MOTION TO COMPEL** to be served via
4 Federal Express and telefacsimile transmission upon the counsel
5 of record hereinafter named:

6 **TODD D. TRUE**
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7 705 Second Avenue
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9 Fax : (206) 343-1526

10 **By Federal Express:**

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12 Bullitt & Walkinshaw
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22 **By messenger:**

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25


Paula Clinedinst

26 **CERTIFICATE OF SERVICE -1-**

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1 The undersigned hereby certifies that on September 6, 1994,
2 she caused one copy of the foregoing FEDERAL DEFENDANTS'
3 OPPOSITION TO SAS' MOTION TO COMPEL to be served via U.S mail,
4 postage prepaid, upon the counsel of record named above.
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/s/
Donna Morris

26 CERTIFICATE OF SERVICE -2-

United States Department of Justice
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THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

Civ. No. C92-479WD

JAMES LYONS, in this official
capacity as Assistant Secretary of
Agriculture, and the UNITED STATES
FOREST SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

Civ. No. C94-758WD

DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 1

GOVERNMENT
EXHIBIT

United States Department of Justice
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1 v.
2 JAMES LYONS, et al.
3 Defendants.

4
5 NATIVE FOREST COUNCIL,
6 Plaintiff,

Civ. No. C94-803WD

7 v.
8 BRUCE BABBITT, et al.
9 Defendants.

10
11 THE SIERRA CLUB,
12 Plaintiff,

Civ. No. C94-820WD

13 v.
14
15 MICHAEL ESPY, et al.,
16 Defendants.

18 DECLARATION OF DAVID G. UNGER AND DENISE MERIDITH
19
20 AND FORMAL ASSERTION OF PRIVILEGE

21 1. I, Denise Meridith, am the acting Director of the Bureau of Land Management, and in his
22 absence have been delegated all power of this office by Michael Dombeck, the Acting Director
23 of the Bureau of Land Management. As acting Director, I have all rights and authority pertinent
24 to the office of the Director, including the authority to assert privilege on behalf of BLM.

25
26 DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 2

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1 2. I, David G. Unger, am the Associate Chief of the U.S. Forest Service. Under Forest
2 Service Manual 1235.2, I have been delegated authority to make this decision.

3 3. This joint declaration represents the formal assertion of privilege for documents
4 pertaining to the interagency strategy for land management of seven Districts administered by the
5 Bureau of Land Management (BLM) of the Department of the Interior and nineteen National
6 Forests administered by the United States Forest Service (FS) of the Department of Agriculture.
7 The privileged documents withheld were all generated during the development of the Final
8 Supplemental Impact Statement on Management of Habitat for Late-Successional and Old-
9 Growth Forest Related Species Within the Range of the Northern Spotted Owl (FSEIS) on the
10 Record of Decision for Amendments to Forest Service and Bureau of Land Management
11 Planning Documents Within the Range of the Northern Spotted Owl (ROD) signed on April 13,
12 1994. Many of the documents are from interagency teams, including the Supplemental
13 Environmental Impact Statement Team (SEIS Team) and the interagency team which drafted the
14 Record of Decision (ROD drafting team), which included various staff from the Forest Service
15 and the Bureau of Land Management. Thus, this joint Declaration and Assertion of Privilege is
16 made as to both inter-agency and intra-agency documents.
17

18 4. The below described index of privileged documents reference agency officials, counsel
19 and staff for the Departments of the Interior, Agriculture, Justice and other related agencies, and
20 White House senior staff. On the index of privileged documents previously provided, each
21 document's author and receiver, as known, was indicated. The position or title and Department
22 for each person listed as a receiver or author on the Index of Privileged Documents is described
23
24
25
26

DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 3

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1 as follows. The individuals listed below will not be identified by title in later portions of this
2 declaration and may be referenced collectively. Members of the Department of the Interior,
3 Office of the Solicitor include: John Lesby, Solicitor; Anne Shields, Deputy Solicitor; and
4 attorneys Kristina Clark, Roger Nesbit, Laura Brown, Dave Gayer, Bob Baum, Patricia Beneke,
5 Karen Mouritsen, Ron Swan, Debra Hecox, Mari Thomas, Pete Raynor, Diane Hoobler, Don
6 Lawton and Lori Monroe. The following individuals noted on the Index of Privileged documents
7 are senior officials in the Department of the Interior: Bruce Babbitt, Secretary of the Interior;
8 Jim Pipkin, Counselor to the Secretary; Don Knowles, Special Assistant to the Secretary; David
9 Cottingham, Counselor to the Assistant Secretary for Water and Science; and Tom Collier, Chief
10 of Staff. Staff and officials for the Bureau of Land Management include: Michael P. Dombeck,
11 Acting Director; Denise Meridith, Deputy Director; Mike Penfold, Assistant Director; Elaine
12 Zielinski, Oregon State Director (present); Bill Bradley, Oregon State Office, Chief, Branch of
13 Forestry; Phil Stanbro, Oregon State Office, Chief, Branch of Land, Recreational Planning; Mel
14 Berg, Washington State Office, Chief, Division of Forestry; Dean Bibles, Oregon State Director
15 (former); and staff members Ed Shepard, Tom State, Mike Crouse and Bob Bierer. Attorneys
16 and support staff for the U.S. Department of Justice are: Janet Reno, Attorney General; Lois
17 Schiffer, Acting Assistant Attorney General; Peter Coppelman, Deputy Assistant Attorney
18 General; William Cohen, Chief, General Litigation Section; Ellen Athas, Assistant Chief,
19 General Litigation Section; James Kilbourne, Chief, Wildlife and Marine Resources Section;
20 attorneys Steve Odell, Wells Burgess, Jean Williams, Ignacia Moreno and Jim Simon; and
21 paralegal Amy Shogan. SEIS Team members that appear on the Index of Privileged Documents
22
23
24
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DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 4

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1 include: Robert T. Jacobs, Interagency Team Leader, Arnold G. Holden, Assistant Team Leader,
2 John Singlaub, Assistant Team Leader; and SEIS team members Dick Holthausen, Dave Powers,
3 J. Randal Hickenbottom, Catherine (Cay) Ogden, Kenneth E. Denton, J. Sharon Heywood,
4 Robert H. Deibel and James H. Benson. Attorneys for the Department of Agriculture, Office of
5 the General Counsel are: Jim Gilliland, General Counsel; Bonnie Luken, Deputy General
6 Counsel; and attorneys James Perry, Michael Gippert, Tim Obst, Owen Schmidt, Charles
7 Lennahan and Jeff Handy. Senior Officials for the Department of Agriculture include Mike
8 Espy, Secretary of Agriculture, James Lyons, Assistant Secretary and Mark Gaede, Confidential
9 Assistant to the Assistant Secretary. The U.S. Forest Service employees and officials include
10 Jack Ward Thomas, Chief, and Forest Service staff members Nancy Graybeal, Jim Sanders,
11 Susan Yonts-Shepard and Ray Solomon. White House senior staff identified on the index
12 include: Katie McGinty, Deputy Assistant to the President, and Director, Office on
13 Environmental Policy and Will Stelle, Associate Director, Office on Environmental Policy. Tom
14 Tuchmann is head of the Office of Forestry and Economic Development and Lisa Friedman is a
15 staff member. Wayne Elson and Lori Houch are employees of the Environmental Protection
16 Agency. Kristine Walsh is an employee of the Regional Ecosystem Office.

17 5. These privileged documents were prepared pursuant to administrative initiatives set in
18 motion in large measure by court injunctions and in anticipation of future litigation regarding the
19 BLM and FS land management plans. From the period of July 2, 1992 through June 6, 1994, the
20 agencies were under court injunctions that generally prohibited offer or award of new timber
21 sales that would harvest suitable spotted owl habitat. As a term of the injunction imposed by
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DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 5

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1 Judge Dwyer of the U.S. District Court for the Western District of Washington, the agencies
2 were ordered to prepare a supplemental Environmental Impact Statement in compliance with
3 NEPA. Plaintiffs and potential litigants issued public comments demonstrating an intent to
4 challenge the new plan, thus creating a reasonable expectation of future litigation on the plan.

5 6. Further, our agencies' decision, as set forth in the ROD, to adopt an interagency strategy
6 for management of FS and BLM lands with the range of the northern spotted owl was, in the
7 words of our agencies, "an unprecedented effort in public land management." The strategy by
8 the ROD is the first interagency effort to develop and adopt a common management approach to
9 over 24 million acres of public lands the FS and BLM administer throughout an entire ecological
10 region.
11

12 7. Thus, this effort generated a significant need for intensive and critical intra and
13 interagency predecisional analysis and discussion on a myriad of issues regarding development
14 and implementation of such a comprehensive interagency approach. Due to the nature of the
15 effort, it of necessity also required substantial and detailed legal advice, opinion,
16 recommendations and work-product.
17

18 8. As a function of their responsibilities as agency counsel, the above mentioned
19 Department of the Interior and Department of Agriculture attorneys communicate on a regular
20 basis with agency personnel in order to render legal advice, opinions and recommendations. This
21 is done on an informal day to day basis as an essential element of their responsibilities to the
22 Departments, their staff and officials, as well as on a more formal basis, with exchange of
23 confidential information, and the writing of legal memoranda. The nature of our confidential
24
25
26

DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 6

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1 communications to our attorneys takes many forms, from the exchange of draft documents for
2 their legal input, often in the form of edits and comments on redrafts, to more formal memoranda
3 on proposed courses of action regarding various aspects of the proposed agency action.

4 9. As noted, we have previously provided an index of the documents discussed below,
5 which, in chronological order, notes the document's author(s) and receiver(s), with the date of the
6 document and a short subject matter description. Because the process of developing the
7 interagency strategy was so unprecedented, the agencies generated a high volume of deliberative
8 and legal documents -- 275 in total -- thus making individual description extremely burdensome.

10 Instead, where possible, the documents have been grouped according to their description, by
11 number. Thus, the document descriptions below should be reviewed in conjunction with the
12 index previously provided.

13 10. We are both familiar with the documents identified in this declaration for which the
14 Federal Defendants assert a privilege, and have concluded that these claims of privilege are
15 warranted.

17 11. To the best of our knowledge, these documents were not circulated or released outside the
18 Departments of Agriculture and Interior, except to attorneys within the Department of Justice and
19 other agency attorneys and executive branch officials as essential to the development of this
20 interagency land management plan.

22 DOCUMENT DESCRIPTIONS:

23 12. Documents: 1, 2, 3, 142
24 Privilege: Attorney-Client Communication
25 Attorney Work Product
26 Deliberative Process

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1 Documents 1, 2 and 3 are memoranda prepared by attorneys in the Office of the Solicitor for
2 other attorneys in the Office of the Solicitor. The three memoranda all discuss issues and pose
3 questions related to the Bureau of Land Management's planning processes and regulations and
4 how these planning processes relate to the preparation of the inter-agency scheme. Factual
5 information obtained from the BLM concerning the land use planning process is contained in
6 document 3 and is intermingled with the legal advice. These memoranda are protected by the
7 attorney-client privilege because they were prepared by attorneys, at the request of the client
8 agency and based on confidential communications with the client agency, in order to provide the
9 client with legal advice on issues relating to the application of relevant legal authority and
10 preparation of this interagency scheme. The memoranda are protected from disclosure by the
11 attorney work product privilege because they were prepared by attorneys, at a time when the
12 BLM land use plans were involved in litigation, and at a time when additional litigation was
13 anticipated. In addition, the memoranda are properly withheld under the deliberative process
14 privilege because the documents discuss various options and recommendations prepared by the
15 Office of the Solicitor in order to advise the Bureau of Land Management. The documents do
16 not reflect the final position of the Department, and as a result, illustrate the development of the
17 attorney's legal advice, opinion and recommendations. Memoranda that show the development
18 of advice such as these are properly withheld under the deliberative process privilege because
19 these preliminary opinions do not accurately reflect the final advice, and release will inhibit the
20 frank discussion of options. Document 142 is a note from Mike Gippert to Arnie Holden and
21 Susan Yonts-Shepard concerning similar issues for the amendment of Forest Service land use
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1 plans. The note was based upon a confidential communication and request for advice from the
2 Forest Service.

3 13. Documents: 11, 12, 13, 38, 39, 83, 87, 272, 273
4 Privilege: Attorney-Client Communication
5 Attorney Work Product
6 Deliberative Process

7 Documents 11, 12, 13, 38, 39, 83, 87, 272, and 273 are various drafts of the SEIS with
8 handwritten notes by various attorneys from the Office of the Solicitor, the Office of General
9 Counsel, and the Department of Justice. The handwritten notes reflect comments upon the legal
10 theories, suggestions for legal strategies, evaluations of litigation risks of the various versions
11 under consideration, and other comments. Document 87 is a draft of an attorney's advice on a
12 response to a comment the agencies received on the DSEIS regarding compliance with NFMA.
13 Documents 272 and 273 contain handwritten notes on the draft section of the SEIS that
14 addressed comments received on the DSEIS. These documents are protected by the attorney-
15 client privilege, as they provide legal advice and opinions to the client based on confidential
16 communications from the client. The documents are withheld as attorney work product
17 privileges also because they were prepared by attorneys at a time when the agencies anticipated
18 litigation over the SEIS. These documents are also a classic example of deliberative documents
19 because they are drafts, and thus do not reflect the agency's final position.
20

21 14. Documents: 5, 6
22 Privilege: Attorney-Client Communication
23 Attorney Work Product
24 Deliberative Process

25 Documents 5 and 6 are memoranda prepared by James Perry and Pete Raynor, respectively for
26

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1 Jim Pipkin presenting comments on a confidential draft interagency report that discusses various
2 options for implementing land use plans in the context of the interagency planning effort. The
3 memoranda contain comments upon the report, legal advice, and litigation options and risks of
4 the various options. The draft report referenced in these documents appears in the administrative
5 record in final form as Appendix E to the Draft SEIS, and as an uncirculated part of the three-part
6 Appendix E to the Final SEIS (copies available upon request of the Plan Support Group.) These
7 memoranda are protected by the attorney-client communication privilege because they were
8 prepared by attorneys, at the request of the client agency and based on confidential
9 communications with the client agency, in order to provide the client with legal advice. The
10 memoranda are protected by the attorney work product privilege because they were prepared by
11 attorneys, at a time when the Forest Service and BLM land use plans were involved in litigation,
12 and at a time when additional litigation was anticipated. In addition, the memoranda are
13 protected by the deliberative process privilege because the documents discuss various options
14 and recommendations prepared by the attorneys but do not reflect the final position of the
15 Department, and as a result, illustrate the development of the legal advice and recommendations
16 of the attorneys. Memoranda that show the development of advice such as these are protected by
17 the deliberative process privilege because these preliminary opinions do not accurately reflect the
18 final advice, and release will inhibit the frank discussion of options.

22 15. Documents: 19, 34, 40, 77, 82, 84, 86, 89, 90, 91, 161, and 163

23 Privilege: Attorney-Client Communication

24 ~~Attorney Work Product~~

25 Deliberative Process

26 Documents 19, 34, 40, 77, 82, 84, 86, 89, 90, 91, 161, and 163 are memoranda from attorneys in

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1 the Department of the Interior, Office of the Solicitor prepared for other attorneys in the Office of
2 the Solicitor. Document 91 was prepared by Kristina Clark for other attorneys at the
3 Departments of the Interior and Justice. All the above referenced memoranda discuss legal
4 issues and pose legal questions related to the management of the BLM lands in Western Oregon
5 that are governed by the O & C Lands Act vis a vis a proposed land management approach based
6 on an ecosystem management regime. The memoranda discuss application of various land use
7 planning statutes and the Endangered Species Act to this land. These memoranda are protected
8 by the attorney-client privilege because they were prepared by attorneys, at the request of the
9 client and based on confidential communications with the client in order to provide the client
10 with legal advice and opinions on issues relating to the management of the O & C Lands Act
11 lands in Western Oregon. The memoranda are protected by the attorney work product privilege
12 because they were prepared by attorneys, at a time when the Department of the Interior
13 anticipated litigation over these issues. The memoranda are also protected by the deliberative
14 process privilege because the documents discuss opinions and recommendations prepared by the
15 Office of the Solicitor in order to advise the Bureau of Land Management. These documents do
16 not reflect the final advice given by the Office of the Solicitor, and as a result, illustrate the
17 development of the advice and recommendations of the attorneys. Document 34 contains
18 handwritten comments, and documents 84 and 86 contain an analysis of the benefits and risks of
19 three options regarding management of BLM lands. Other documents discuss one or more of the
20 options outlined in documents 84 and 86, or other options. Memoranda that show the
21 development of advice such as these are protected by the deliberative process privilege because
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1 these preliminary opinions do not accurately reflect the final advice of the Office of the Solicitor,
2 and release will inhibit the frank discussion of options and opinions among the staff.

3 16. Document: 36
4 Privilege: Attorney-Client Communication
5 Deliberative Process

6 Document 36 is a memorandum prepared by Ken Denton for Roger Nesbit. The memorandum
7 presents Mr. Denton's comments on the legal options paper prepared by Roger Nesbit, which is
8 withheld as document 34. Document 36 was prepared at the request of Roger Nesbit. The
9 document presents confidential communications discussing the O & C Lands Act in the FSEIS.

10 and as such is protected by the attorney-client privilege. The document is also protected by the
11 deliberative process privilege because it is predecisional and represents preliminary comments on
12 the various options that the BLM had under consideration at the time.

13 17. Document: 81
14 Privilege: Attorney-Client Communication
15 Attorney Work Product
16 Deliberative Process

17 Document 81 is an options paper and four attachments from Roger Nesbit to Mike Penfold with
18 an analysis of various options relating to the management of the O & C Lands under a proposed
19 interagency land management scheme. Attachment one is a handwritten message from Nesbit to
20 Penfold discussing the various options. Attachments two and three are copies of documents
21 number 34 and 40, respectively. Attachment four is a briefing paper from Roger Nesbit to Dean
22 Bibles outlining an analysis of options similar to the options in the other attachments and the
23 cover memorandum. The analysis in attachment four includes an analysis of the litigation risks.

24 The cover memorandum and the four attachments are protected by the attorney-client privilege
25

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1 because they were prepared by Roger Nesbit for Mike Penfold and Dean Bibbes based on
2 confidential communications, in order to provide the BLM with legal advice and opinions on
3 issues relating to the management of the O & C Lands Act lands in Western Oregon. The
4 memorandum and attachments are protected by the attorney work product privilege because they
5 were prepared by an attorney, at a time when the Department of the Interior anticipated litigation
6 over these issues. The memorandum and attachments are also protected by the deliberative
7 process privilege because the documents discuss opinions and recommendations prepared by
8 Roger Nesbit and the Office of the Solicitor, in order to advise the Bureau of Land Management.
9 but do not present the Solicitor's final recommendation on which option the BLM should choose.
10 Rather, the memorandum and the attachments attempt to point out the risks and benefits of the
11 various options in order to fully inform the decisionmakers.
12

13 18. Document: 21
14 Privilege: Attorney-Client Communication
15 Attorney Work Product
16 Deliberative Process

17 Document 21 is a memorandum from Roger Nesbit to Tim Obst concerning timber sales covered
18 by Section 318 of the Department of the Interior and Related Agencies Appropriations Act,
19 Fiscal Year 1990, and Endangered Species Act issues, such as consultation that relate to the
20 timber sales. This document contains a discussion between attorneys in the Office of the
21 Solicitor and the Office of the General Counsel of legal issues that were of concern to both the
22 Department of the Interior and the Department of Agriculture, and reflects the development of
23 advice that was based on confidential communications from the client agencies. The document
24 is protected by the attorney work product privilege because it was prepared by an attorney at a
25

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1 time when challenges to timber sales were ongoing, and when the agencies had a reasonable
2 expectation of future litigation concerning these issues. The document is also protected by the
3 deliberative process privilege because it reflects the preliminary opinion of the Office of the
4 Solicitor. Release of these types of memoranda would discourage agency staff and attorneys
5 from preparing these preliminary type memoranda.

6 19. Document: 14
7 Privilege: Attorney-Client Communication
8 Attorney Work Product
9 Deliberative Process

10 Document 14 is proposed text for the Draft SEIS prepared by Mike Gippert and Tim Obst for
11 Mark Gaede. The document suggests language to address issues of the relation of timber already
12 under contract to the proposed options in the DSEIS, and NEPA requirements. This document is
13 a privileged attorney-client communication providing legal advice and opinion to the client,
14 based on confidential communications between the client and the legal staff. The document is
15 protected by the attorney work product privilege because it reflects advice prepared by attorneys
16 at a time when the government was involved in litigation over these issues, and at a time when
17 the government anticipated additional litigation over these and similar issues. The document is
18 also protected by the deliberative process privilege due to the preliminary nature of the
19 recommendations.
20

21 20. Documents: 126, 146, 148, 184, 258
22 Privilege: Deliberative Process

23 Documents 126, 148, 184, and 258 are deliberative documents prepared by staff members in the
24 BLM and the Forest Service. Document 126 and 184 were prepared by an unidentified staff
25

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1 member, and are estimates of the time frames needed for developing new timber sales under the
2 Forest Service and BLM regulations and the alternatives under consideration for the ROD. The
3 two documents contain risk assessments for various options considered and include an estimated
4 time line as it relates to future timber sale volumes. These documents are protected by the
5 deliberative process privilege because the estimates are based on assumptions about options that
6 had not yet been finalized. The assumptions made in estimating timber volumes for current and
7 future years could reflect an inaccurate basis for the decision. Document 258 was prepared by
8 Tom State for Ed Shepard and contains proposed language for the ROD concerning timber sales.
9
10 This document represents a predecisional discussion between two staff members. Document 148
11 is an internal BLM memorandum discussing the survey and manage guidelines in the ROD. The
12 document represents a discussion between staff members and not a final decision by the agency.
13 It attaches suggested language for the survey and manage section of the ROD. Document 146 is
14 a briefing paper from Bob Bierer to Mike Penfold with Mr. Bierer's comments on a draft of the
15 ROD; with his opinions on the following issues: short term timber supply and options for
16 increasing short term timber supply; two options for ESA consultation language for the ROD; a
17 discussion and critique of proposed policy options for the proposed Survey and Manage
18 standards and guidelines; and a discussion and critique of interim watershed analysis standard
19 and guidelines. Release of any of these documents will discourage staff members from a healthy
20 debate on various options and could reflect inaccurate reasons for the decision.
21
22

23 21. Documents: 117, 213, 214, 215, 246, 247, 253, 254, 255
24 Privilege: Attorney-Client Communication
25 Attorney Work Product
26 Deliberative Process

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1 Documents 117, 213, 214, 215, 246, 247, 253 and 255 are discussions between attorneys in the
2 Office of the Solicitor concerning certain timber sale contracts vis a vis NEPA analysis and ESA
3 consultation, and document 254 is a communication from Kris Clark to Mike Dombeck
4 discussing confidential information and requesting additional information on these issues. The
5 documents contain a preliminary analysis of how Alternative Nine of the FSEIS applies to
6 existing timber sale contracts and how they would be treated under the ROD. Documents 213,
7 214, and 215 are copies of notes between various attorneys in the Office of the Solicitor
8 discussing these issues. Documents 246 and 247 are two drafts of a memorandum prepared by
9 Karen Mouritsen concerning twenty-three 1992 BLM timber contracts. Documents 253 and 255
10 are notes from Roger Nesbit to Kris Clark about § 318 timber sales and Endangered Species Act
11 requirements for these sales. Each of the documents are protected by the attorney-client privilege
12 because they contain confidential communications from the client, and address the development
13 of the legal advice requested by the client. The documents are protected by the attorney work
14 privilege because they reflect the advice prepared by attorneys at a time when the government
15 was involved in litigation over these issues, and at a time when the government anticipated
16 additional litigation over these and similar issues. The documents protected by the deliberative
17 process privilege due to the preliminary nature of the recommendations and the fact that
18 documents 246 and 247 are drafts.

22 22. Documents: 236, 237, 263, 267
23 Privilege: Attorney-Client Communication
24 Deliberative Process

25 Documents 236, 237, 263, and 267 are memoranda containing proposals for language for the

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1 ROD. The documents all contain the author's personal, preliminary recommendations
2 concerning timber sale issues and the relation of the existing timber contracts to the alternatives
3 under consideration at that time. The documents request legal advice on those preliminary
4 recommendations. Document 267 also discusses issues raised by the Biological Opinion for
5 Alternative Nine. Document 236 is from Lisa Friedman to Peter Coppelman. Document 237 is
6 from Lisa Friedman to Peter Coppelman, Jim Lyons and Mark Gaede. Nine pages of document
7 237, containing charts summarizing timber volumes, are referenced in the Administrative Record
8 Index as E0032. Federal defendants continue to assert the attorney-client and deliberative
9 process privileges as to the remaining four pages of document 237, which contain suggestions for
10 language in the ROD. Document 263 was prepared by Don Knowles for the Rod Drafting Team,
11 and contains handwritten notes by Karen Mouritsen. Document 267 is from Don Knowles to
12 Peter Coppelman and Ellen Athas. The attachment to document 267 is a handwritten version of
13 the information included in the Administrative Record Index as E0024. Federal defendants
14 continue to assert the attorney-client and deliberative process privileges as to the cover letter to
15 document 267. All of these documents are protected by the attorney-client privilege because
16 they represent confidential communications from the client agencies to attorneys. The
17 documents are also protected by the deliberative process privilege because they present
18 preliminary positions and are not representative of final positions.

22 23. Documents: 43, 44, 45, 46, 47, 48, 49, 118, 120, 123, 269

23 Privilege: Deliberative Process

24 Documents 43, 44, 45, 46, 47, 48, and 49 are preliminary drafts of the ROD, in outline form. The
25 outlines were sent to various persons on the ROD drafting team for comments. Documents 44,

26
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45, 46, 47, 48, and 49 are all copies of the same document, with handwritten comments by

different reviewers on each document. (Sharon Heywood, Bob Deibel, Jim Benson, John Singlaub, Arnie Holden, and Tom Tuchmann respectively for documents 44, 45, 46, 47, 48, 49.)

Documents 118 and 269 are different versions of an outline of the ROD. Document 123 is document 118 with handwritten comments. Document 120 is a handwritten version of an outline of the ROD prepared by Jim Sanders for Mike Gippert and Mark Gaede.¹ These documents are protected by the deliberative process privilege due to the fact that the documents are drafts that do not reflect the final position of the government. Release of these types of preliminary

comments and deliberations would discourage agency staff from making frank comments about matters under discussion.

24. Documents: 113, 115, 121
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Document 113 and 115 are outlines of the ROD with an emphasis on the legal issues to be addressed prepared by Tim Obst and sent to Jim Gilliland, Bonnie Luken, Mark Gaede, Bob Baum, Patricia Beneke, Kris Clark, Peter Coppelman, Ellen Athas, Steve Odell, Susan Shepard, Jim Sanders, and Ray Solomon. Document 115 contains handwritten notes by Karen Mouritsen. Document 121 was also prepared by Tim Obst, and is an updated version of documents 113 and 115. Federal defendants claim the attorney-client privilege for these documents because they are based on confidential communications from the client agencies requesting advice on various

¹Document 120 is also protected by the attorney client privilege because it contains confidential communications seeking legal advice.

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1 legal issues to be addressed in the ROD. In addition, the documents are protected by the attorney
2 work product and the deliberative process privileges. The documents were prepared by attorneys
3 in anticipation of litigation over the legal issues addressed by the ROD, and represent
4 preliminary legal opinions and policies and are therefore deliberative.

5 25. Document: 64, 75, 85, 94, 97, 98, 101, 106, 107, 125, 129, 132 133, 140, 154, 157,
6 158, 159, 162, 164, 165, 166, 167, 174, 177, 178, 179, 193, 198, 200, 205,
7 206, 220, 239, 243, 265, 274
8 Privilege: Attorney-Client Communication
9 Attorney Work Product
10 Deliberative Process

11 The documents discussed in paragraph 25 contain comments upon the various drafts of the ROD
12 or proposed language for the various drafts. The documents were prepared by attorneys in the
13 legal offices of the federal agencies that participated in the preparation of the Final SEIS or by
14 attorneys at the Department of Justice. All of these documents represent discussions of legal
15 issues and preliminary legal advice and opinions on certain issues, based upon confidential
16 communications from the federal agencies and requests for advice from the agencies and are
17 protected by the attorney-client privilege. In addition, the documents described in this section
18 are protected by the attorney work product privilege because they were prepared by attorneys in
19 anticipation of further litigation over these issues, and are protected by the deliberative process
20 privilege because they are drafts or comments upon drafts or proposed language. None of the
21 documents represent final recommendations or positions.

22 A. Document 64 contains proposed language for the legal findings section of the
23 ROD addressing the Clean Water Act, the Coastal Zone Management Act and the Clean
24 Air Act.
25

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1 B. Documents 75, 85, 97, 125, 157, 165, 164, 167 and 265 concern
2 interagency land use planning issues in relation to management and implementation of
3 the decisions to be made in the ROD and how the land use planning statutes (NFMA,
4 FLPMA, and the O & C Lands Act) can be integrated into an interagency land use
5 planning effort. Document 75 presents various legal options relating to the life span of
6 the ROD and represent a preliminary analysis by Owen Schmidt based upon confidential
7 communications from the SEIS Team on which the Team sought legal advice. Document
8 85 is a legal analysis by Tim Obst of various planning issues with preliminary language
9 for the ROD. Document 97 is a memorandum from Kristina Clark to Ellen Athas
10 concerning how the BLM land use planning regulation requirements will be satisfied in
11 this situation, and various issues relating to the litigation strategy in the Portland
12 Audubon Society v. Babbitt and the Lane County Audubon Society v. Babbitt cases.
13 Document 125, prepared by Mike Gippert, presents a legal analysis of the Forest Service
14 planning regulations concerning amendments of land use plans, and how these
15 regulations apply to this situation. Documents 157 and 165 are two different versions of
16 draft proposed language for the ROD addressing this issue, both by Mike Gippert.
17 Document 157 also contains draft language for the section of the ROD relating to
18 National Environmental Policy Act compliance. Document 164 is a note from Karen
19 Mouritsen to Roger Nesbit concerning BLM planning regulation issues to be addressed in
20 the ROD. Document 166 is a note from Roger Nesbit to Karen Mouritsen concerning a
21 legal review of the proposed attachment to the ROD. Document 167 is proposed
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1 language by Roger Nesbit for several different sections of the ROD, addressing legal
2 issues regarding (1) compliance with past court decisions on the amount of habitat
3 available for harvest; (2) new scientific studies on the "constant change" theory of
4 ecology; (3) timber volumes under contract but enjoined; and (4) watershed analysis.
5 Document 265 is draft language prepared by Steve Odell for the section of the ROD that
6 addresses compliance with the National Environmental Policy Act.

7
8 C. Documents 140, 158 and 159 concern the initial implementation of the Forest
9 Plan. Document 140 presents an analysis by a member of the SEIS team, Nancy
10 Graybeal, of options for the initial implementation of the management strategy as it was
11 outlined in the then current version of the Standards and Guidelines. The document is a
12 draft and presented the author's opinion on these issues. The document also contains
13 handwritten notes by Karen Mouritsen. Documents 158 and 159, drafted by Mike
14 Gippert, contain draft language for the ROD discussing NEPA and NFMA planning
15 issues and transition phasing, respectively.

16
17 D. Document 98 is the February 21, 1994, version of the ROD with handwritten
18 notes by Mike Gippert. Document 106 is an early draft of the Standards and Guidelines
19 section of the ROD (Attachment A to the ROD) with handwritten notes by Mike Gippert.
20 Document 107 is language for the ROD proposed by Mike Gippert. Document 132 is
21 proposed language for the ROD concerning the Forest Service viability provision.
22 Document 162 is a note from Roger Nesbit concerning various issues relevant to the
23 ROD, including a discussion of recent court decisions. Document 205 is draft language
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1 for the section of the ROD addressing the Federal Advisory Committee Act prepared by
2 Tim Obst and circulated to Jim Pipkin, David Cottingham, Mark Gaede and various
3 attorneys in the Office of the Solicitor and the Department of Justice. Document 274 was
4 prepared by Steve Odell and presents his preliminary opinion on how to address the
5 issues raised by computer models predicting owl demographics.

6 E. Documents 174, 177, 178 and 179 contain comments on legal issues raised by the
7 March 18, 1994 version of the ROD. Document 174 contains portions of the March 18,
8 1994 ROD with handwritten notes by Roger Nesbit. Document 177 is a memorandum
9 from Ellen Athas to Jim Pipkin containing comments on various ROD legal issues, as
10 requested by Jim Pipkin. Document 178 contains comments by Tim Obst. Document
11 179 contains Mike Gippert's edits and comments for a section of the ROD discussing the
12 1992 court injunction.

13 F. Documents 94, 101, 129, 133, and 154 are drafts of the ROD, and contain
14 handwritten comments on legal issues and legal implications of the various statements in
15 the ROD. Documents 94 and 101 are the February 8, 1994 version of the draft ROD with
16 handwritten comments by Steve Odell and Mike Gippert, respectively. Documents 129
17 and 133 are the March 7, 1994 versions with handwritten notes by Mike Gippert and
18 Roger Nesbit, respectively. Document 154 is the March 15, 1994 version of the draft
19 ROD with comments by Mike Gippert.

20 G. Document 200 is a draft ROD dated March 30, 1994, containing handwritten
21 comments on legal issues by Mike Gippert. Document 206 is a memorandum from
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1 Roger Nesbit to Jim Pipkin suggesting revisions on the March 30, 1994 version of the
2 draft ROD as it relates to the old-growth retention standard. Documents 193 and 198 are
3 comments and legal opinions on the March 25, 1994 version of the ROD. Document 239
4 is Mike Gipfert's handwritten comments of legal issues raised by the April 7, 1994
5 version of the ROD. Document 193 is a draft ROD with one note to reviewers from Jim
6 Pipkin and one memorandum to reviewers from Ellen Athas. The note from Jim Pipkin
7 relayed confidential information and a request for legal advice. Document 198 is a
8 version of document 193, without the memorandum from Ellen Athas.

9
10 H. Document 220 is the April 6, 1994 Draft of Attachment A to the ROD. Standards
11 and Guidelines, with a note from Ellen Athas relaying a request for legal advice from
12 David Cottingham. Document 242 and 243 are transmittal memos from Jim Pipkin
13 relaying a version of the ROD along with a request for advice.

14 26. Document: 127
15 Privilege: Attorney-Client Communication
16 Attorney Work Product
17 Deliberative Process

18 Document 127 is a message from John Leshy to Kristina Clark. This document contains Leshy's
19 comments on a draft option paper on litigation strategy as requested by Kristina Clark. This
20 document presents confidential communications concerning the issues in the option paper, and as
21 such is protected by the attorney-client privilege. The document is protected by the attorney
22 work product privilege because it was prepared by an attorney, at a time when BLM anticipated
23 litigation over these issues. It is also protected by the deliberative process privilege because it is
24 predecisional and represents preliminary comments on the various options that the BLM had
25

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under consideration at the time.

27. Document: 17
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Document 17 is a cover letter and memorandum prepared by Michael Gippert to various USDA, DOI, EPA, DOJ, NOAA and OEP receivers attaching a discussion on recent litigation developments and summarizing the declarations submitted by NFRC in NFRC v. Espy. This document is protected by the attorney client privilege because it was prepared by an attorney, at the request of the client agency and based on confidential communications with the client agency. The document is protected by attorney work product because it was prepared by an attorney at a time when the Department of Agriculture anticipated further litigation on these matters. In addition, the cover letter and attachment are protected by the deliberative process privilege because they present preliminary positions on these matters.

28. Documents: 191, 99
Privilege: Attorney-Client Communications
Attorney Work Product
Deliberative Process

Document 191 is a memorandum prepared by Owen Schmidt for Arnie Holden. It discusses record keeping requirements under the Federal Records Act. This document is protected by the attorney-client privilege because it was prepared by an attorney in order to provide legal advice on issues relating to the application of the Federal Records Act. It is protected by the attorney work product because it was prepared by an attorney, at a time when records were being compiled for litigation, and at a time when additional litigation was anticipated. In addition,

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document 191 is protected by the deliberative process privilege because it demonstrates the development of advice and recommendations of the attorney. Document 99 is a memo prepared by Roger Nesbit concerning public comment on the final SEIS. This document is protected by the attorney work product, attorney-client and deliberative process privilege because the document was prepared by an attorney at the request of a client, on a matter on which litigation was expected, and based on confidential communications from the client. The advice was in preliminary form and so is deliberative.

29. Documents: 16, 35, 37, 68, 149, 207, 228, 244, 248, 250, 251, 257, 264
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Documents 16, 35, 37, 68, 149, 207, 228, 244, 248, 250, 251, 257, and 264 all contain legal advice and recommendations concerning Endangered Species Act issues. Documents 16, 35, and 37 are memoranda from Mike Gippert to attorneys in the Office of General Counsel and the Office of the Solicitor concerning ESA issues, including recovery plans and 4(d) rule issues. The three memoranda include analysis of legal issues, and possible litigation options. Document 68 is a memorandum from Diane Hoobler to Dave Powers with advice on ESA § 4(d). Document 149 is a memorandum from Dave Gayer to reviewers of the draft ROD concerning ESA consultation on the actions that will implement the direction in the ROD. The memorandum relays legal advice and opinion about addressing this issue. Documents 207, 244, 248, 250, 251, and 257 are memoranda from attorneys at the Department of Justice (documents 207, 244, 248, and 257) and the Office of the Solicitor (documents 250 and 251) to staff members of the Fish

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1 and Wildlife Service with legal advice regarding consultation on Alternative 9. Document 264
2 contains comments from an unnamed Department of Justice attorney with advice about
3 addressing ESA issues in the draft ROD. These documents are all covered by the attorney-client
4 privilege, because they are based on confidential communications from the client agencies
5 requesting legal advice on possible agency actions or positions. The documents are covered by
6 the attorney work product privilege because they were prepared by attorneys in anticipation of
7 litigation of these issues. The deliberative process privilege covers these documents also because
8 the documents all discuss tentative agency positions and various options that were under
9 consideration by the agencies, or are comments on drafts of various documents. None of the
10 documents represent final agency positions on these issues. Document 228 is a note from Don
11 Knowles to Department of Justice attorneys concerning ESA issues that could arise in the
12 implementation of the interagency land management plan, along with draft language for the
13 ROD. This document is covered by the deliberative process privilege because the document
14 does not represent final agency positions, and the attorney-client privilege because it is a
15 confidential communication with a request for legal advice.

18 30. Documents: 15, 24, 25, 26, 29, 30, 33, 78, 92, 111, 114, 116, 119, 135, 141,
19 142, 262, 266

20 Privilege: Attorney-Client Communications
21 Attorney Work Product
22 Deliberative Process

23 Documents 15, 24, 25, 26, 29, 33, 78, 92, 111, 114, 116, 119, 135, and 266 are summaries of
24 legal issues and checklists of legal issues to be addressed in the ROD or SEIS concerning
25 compliance with an array of statutory requirements, such as the ESA, the O & C Lands Act, the

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1 NFMA, the FS viability regulation, the FACA, land use planning regulations and NEPA, and
2 other issues such as the proposed watershed analysis procedures, and the application of
3 alternative nine to existing timber contracts. In addition to the above legal issues documents 119
4 addresses policy issues crucial to the initial implementation of the plan, and policy issues relating
5 to the choice of alternative nine. These documents provide candid assessments of issues and
6 discussions of legal risks. Document 30 discusses and evaluates alternative litigation strategies.
7 Documents 141, 142, and 262 focus largely on the application of Forest Service and BLM
8 planning regulations to the decision to be implemented in the ROD. All of these documents
9 were prepared by government attorneys to advise government clients on a variety of legal issues
10 that needed to be addressed in the ROD and SEIS. The documents provide the attorney's legal
11 opinion on legal vulnerabilities of various stages of the SEIS and ROD process, suggest and
12 evaluate alternative legal interpretations, and describe or suggest litigation strategies. Release of
13 these documents would seriously impair the attorney-client relationship by inhibiting the
14 identification of difficult legal issues and open discussion of litigation strategy. The documents
15 are also protected by the attorney work product privilege because they were prepared by
16 government attorneys when litigation was anticipated. The documents are deliberative because
17 they are drafts that do not indicate the final agency position.

20
21 31. Documents: 160, 171, 172, 173, 181, 182, 183, 188, 232, 234, 252
22 Privilege: Attorney-Client Communications
23 Attorney Work Product
24 Deliberative Process

25 Documents 160, 172, 173, 181, 182, 183, 188, 232, 234, and 252 are draft memoranda and
26 comments written by government attorneys in the process of preparing a formal legal

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1 memorandum on how the Federal Advisory Committee Act applies to the operation of various
2 groups discussed in the SEIS and ROD. The final memorandum was signed by DOI Solicitor
3 John Leschy and USDA Deputy General Counsel Bonnie Luken on April 14, 1994. Document
4 160 references document 156, which is addressed elsewhere in this declaration and in the
5 Declaration of Leon Panetta. The documents are protected by the attorney-client privilege
6 because they are based on confidential communications from the client. The attorney-work
7 product privilege applies to these documents because they were prepared by attorneys at a time
8 when related issues were in litigation, and litigation was expected for these issues. The drafts are
9 protected by the deliberative process privilege because they are preliminary drafts not reflecting
10 the final agency position or final legal opinion, and would show the development of advice on
11 difficult legal issues. Document 171 is a fax cover sheet from Roger Nesbit to Karen Mouritsen
12 and Debra Hecox, relaying an options paper prepared by Kristine Walsh. The options paper
13 presents recommendations, policy options, and public policy risk of various implementation
14 options. The options include various ways to structure committees and involve the public. The
15 paper presents the preliminary recommendations of staff members, and therefore the federal
16 defendants assert the deliberative process privilege. The paper communicates the agency's
17 request for a legal opinion on the feasibility and legal risks of the options, and therefore the
18 federal defendants claim the attorney client communication privilege.

22 32. Documents: 180, 155
23 Privilege: Attorney-Client Communications
24 Deliberative Process

25 Document 180 transmits from one government attorney to another government attorney a series

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of notes between government attorneys and the author of document 155, discussing issues reflected in Document 155. These documents are protected by the deliberative process and attorney work product privileges and their release would inhibit the preparation of legal memorandum providing frank and open legal advice between government attorneys and government officials. Document 155 is a briefing paper prepared by an unidentified Forest Service employee assigned to the REO discussing the implications of the Federal Advisory Committee Act in implementation of the ROD, not limited to ROD language. The document assesses legal risks, presents advantages and disadvantages of alternative approaches, and recommends a course of action. The preparer of the document participated in numerous meetings and discussions with government attorneys on the topics discussed in the document. Document 171 is a copy of Document 155 with a cover transmittal note from a government attorney. Release of the document would inhibit the frank discussion of legal issues in options papers presented to decisionmakers and inhibit the communication between agency staff and agency legal counsel.

33. Documents: 23, 27, 28, 32, 52, 65, 80, 93, 108, 128, 131, 137, 139, 187, 189, 192, 209, 216, 223, 226, 227, 230, 231, 235, 238, 259, 261, 268, and 275
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Documents 23, 27, 28, 32, 52, 65, 80, 93, 108, 128, 131, 137, 139, 187, 189, 192, 209, 216, 223, 226, 227, 230, 231, 235, 238, 259, 261, 268, and 275 are memoranda, notes and draft ROD language written by government attorneys and convey legal opinions to government clients or government attorneys commenting on approaches to SEIS and ROD language and litigation

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1 strategies regarding the interpretation and application of 36 CFR 219.19. These documents are
2 protected by the attorney-client privilege because they are based on confidential communications
3 from the client. The attorney-work product privilege applies to these documents because they
4 were prepared by attorneys at a time when these and related issues were in litigation, and
5 additional litigation was expected concerning these issues. The drafts are protected by the
6 deliberative process privilege because they are preliminary drafts not reflecting the final agency
7 position, and would show the development of advice on difficult legal issues. Release of these
8 documents would seriously inhibit frank interagency discussion of legal issues that are vital to
9 the preparation of interagency decisions.
10

11 34. Document: 31
12 Privilege: Attorney Work Product

13 Document 31 was prepared by Tim Obst and is a summary of legislative, administrative and
14 judicial interpretations of 36 CFR 219.19, along with his legal comments, analysis and opinion
15 regarding the interpretations. Release of these documents would inhibit the preparation and
16 distribution of legal advice and commentary to decisionmakers. These documents are protected
17 by the attorney work product privilege because they were prepared in anticipation of litigation of
18 this interagency strategy and other ongoing litigation on Forest Service land use strategies.
19

20 35. Documents: 147, 211, 212, 218, 222
21 Privilege: Attorney-Client Communication
22 Deliberative Process

23 Documents 147, 211, 212, 218, and 222 are cover memoranda attaching draft ROD language
24 from a government policy official to a government attorney seeking a legal opinion and advice
25 on proposed language regarding the interpretation and application of 36 CFR 219.19. These
26

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documents are protected by the attorney client privilege and release of these documents would inhibit government decisionmakers from free obtaining free and candid legal advice from their government attorneys. The documents are also protected by the deliberative process privilege due to their draft nature.

36. Documents: 210, 256
Privilege: Attorney-Client Communication
Deliberative Process

Documents 210 and 256 are comments and draft language concerning ROD issues transmitted from senior agency officials to senior White House staff. The documents are protected by the attorney-client communication because they relay legal advice and opinion, as requested by the client agency, and are based on confidential communications concerning preliminary agency policies. These documents are also protected by the deliberative process privilege and release of these documents would inhibit the deliberative process necessary for interagency decision making.

37. Document: 240
Privilege: Attorney-Client Communication
Deliberative Process

Document 240 is a memorandum from Secretary of Agriculture Mike Espy to Attorney General Janet Reno and Secretary of the Interior Bruce Babbitt commenting on the ROD, transmitting proposed language for the ROD and seeking legal advice regarding the proposed language. This document is protected by the attorney client privilege and release of this document would inhibit the frank deliberation of legal matters between cabinet level decisionmakers and is also protected by the deliberative process privilege.

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38. Document: 241
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Document 241 is a memorandum for Secretary of Agriculture Mike Espy from Assistant Secretary James R. Lyons and General Counsel James S. Gilliland transmitting Document 240 and providing legal and policy advice regarding the contents of Document 240. The document is therefore protected by the attorney client privilege and release would seriously inhibit the frank and open presentation of legal advice and opinions. Further the document was prepared in anticipation of litigation, thus protected by the attorney work product privilege because the document also addresses deliberative and policy recommendations protected by the deliberative process privilege.

39. Documents: 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66, 67, 69, 70
71, 72, 73, 74, 76, 79, 102, 103, 104, 112, 124, 130, 134,
136, 138, 140, 143, 144, 145, 153, 168, 170, 175, 176, 185,
195, 196, 197, 199, 202, 203, 204, 208, 217, 219, 221, 224, 225, 229, 233,
245, 249, 270, and 271.
Privilege: Deliberative Process

The documents discussed in paragraph 39 are draft versions of the ROD with edits and/or comments. These represent classic deliberative process materials as they are all either draft language and therefore not reflective of the agency's final decision and are therefore deliberative, or are edits or comments on draft language reflecting the agency's preliminary analysis and recommendations for final decision. For instance, the draft RODs contain language addressing the policy issues under consideration by the agencies. The positions taken in the drafts on these issues did not reflect the agencies final decision on how to address the issues, but instead

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1 reflected the drafter's suggestions. Comments on these drafts, reflected both in the handwritten
2 comments and in the memoranda described in other portions of this declaration, focused on the
3 options the agencies were considering for addressing the issues. Policy issues addressed in these
4 draft RODs in a preliminary fashion include the following: 1) the watershed analysis
5 requirement, and whether the provisions of the BLM and FS land use planning regulations and
6 the National Environmental Policy Act apply to the watershed analysis; 2) the survey and
7 management standard, and how the standard will be implemented in the initial phase in period
8 after the decision is made; 3) the green tree retention standard; 4) adoption of mitigation
9 measures; 5) existing timber sale contracts and their relation to the decision; 6) issues concerning
10 land allocations; 7) interagency coordination in the implementation of the plan, and various
11 options for informing and involving the public in the implementation; and other issues. The
12 documents are specifically described below.
13
14

15 A. Document 50 is a December 12, 1993 version of the Standards and Guidelines
16 that consist of the attachment to the ROD, by Ken Denton. Documents 53, 54, 55, 56, 57,
17 58, 59, 60, 61, 62 and 63 are copies of the December 28, 1993 draft of the Standards and
18 Guidelines that are part of Attachment A to the ROD, and contain handwritten notes in
19 the margins from members of the SEIS Team. Documents 66 and 67 are copies of the
20 December 23, 1993 draft ROD with handwritten notes from members of the SEIS Team.
21 Documents 69, 70, 71, 72, 73, 74, and 76 are copies of the December 28, 1993 draft ROD
22 with handwritten notes from members of the SEIS Team. Document 170 is a copy of a
23 portion of the March 18, 1994 draft ROD with handwritten comments. Document 194 is
24
25
26

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1 a copy of the March 28, 1994 draft ROD with handwritten comments. Document 224 is a
2 copy of a page of the April 6, 1994 draft Standards and Guidelines with handwritten
3 notes. Document 233 is a copy of one page from the April 7, 1994 ROD with
4 handwritten notes. Document 270 is draft language for an unspecified draft of the ROD
5 with handwritten notes. Release of these would inhibit the frank criticism of draft
6 decision documents necessary for complex, interagency decisions. Because these
7 documents are only individual staff comments and do not reflect any official position,
8 release of these documents could reflect inaccurate reasons for the decision.
9

10 B. Documents 102 and 103 are copies of the February 27, 1994 draft ROD.
11 Document 130 is a copy of the March 7, 1994 draft ROD. Document 143 is a copy of the
12 March 10, 1994 draft ROD with printed editing marks. Document 168 is a copy of the
13 March 18, 1994 draft ROD. Document 197 is a copy of the March 30, 1994 draft ROD.
14 Document 221 is a copy of the April 7, 1994 draft ROD. Document 225 is a copy of the
15 April 6, 1994 ROD with a handwritten transmittal to SEIS Team members. Document
16 229 is a copy of the April 7, 1994 draft Responses to Comments, and is the unredacted
17 version of number 577 on the FSEIS index. Document 249 is a copy of the 4/12/94 draft
18 ROD. Document 271 is a copy of two pages of an unspecified draft Standards and
19 Guidelines.
20
21

22 C. Documents 195 and 196 are recommendations for specific language changes to
23 the March 28, 1994 draft ROD by SEIS Team members and identification of issues
24 remaining to be resolved. Document 79 is a summary of changes and clarifications to the
25
26

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Standards and Guidelines between the Draft SEIS and the draft Final SEIS and identification and deliberation of policy issues related to those changes.

D. Document 104 describes deliberation on major issues discussed at an unspecified meeting on the ROD.

E. Document 112 is a Forest Service briefing paper that discusses and evaluates various parts of the Standards and Guidelines and its expected impact on agency management of personnel, time and budgets.

F. Document 124 is a briefing memorandum from the Chief, BLM Division of Forestry, to the Assistant Director, Lands and Renewable Resources on a review of the ROD. The memorandum evaluates the risks of the various options still under consideration for inclusion in the ROD, comments on how the ROD affects other agency programs, raises questions about ROD language, and provides recommendations.

G. Document 134 is comments on the March 7, 1994 draft ROD recommending specific language changes, evaluating the risks of the various options still under consideration for inclusion in the ROD, and raising questions of legal compliance for the Department of the Interior Solicitor's Office.

H. Document 136 is from a BLM employee in the Oregon State Office to the Assistant Director of Lands and Renewable Resources that recommends changes to language in the ROD, evaluates the affect of the ROD on BLM programs, and evaluates the risks of the various options still under consideration for inclusion in the ROD.

I. Document 138 sets forth two alternatives for a transition period after the ROD,

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1 evaluates the strengths and weaknesses of the alternatives on a variety of programs,
2 analyzes possible public reaction to the alternatives, and makes recommendations.

3 Document 140 is a copy of document 138 with handwritten notes. The release of these
4 documents would inhibit the presentation of alternatives to decisionmakers in the future.

5 J. Document 190 contains recommendations for specific language changes to the
6 March 24, 1994 draft ROD by a SEIS Team member, identification of weaknesses, and
7 evaluation of the effects on agency policies. Document 185 is a memorandum from Don
8 Knowles to Jim Alegeria attaching comments on the draft ROD section discussing survey
9 and management.
10

11 K. Document 199 is recommended language for the ROD on clumped green
12 tree retention.

13 L. Document 217 is a briefing paper resulting from meetings between government
14 personnel on the SEIS team, Fish and Wildlife Service and BLM on several issues to be
15 addressed in the ROD. The paper identifies weaknesses in the ROD and evaluates
16 alternative approaches to the issues. The release of this document would inhibit the
17 presentation of internal deliberative processes to decisionmakers in the future.
18

19 M. Document 245 is comments and clarifications of various facts in the ROD. The
20 first three pages of this document have been released. The federal defendants continue to
21 assert the deliberative process privilege as to the last page, as it contains draft ROD
22 language.
23

24 N. Document 144 is a memorandum recommending language changes in the ROD
25
26

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1 regarding watershed analysis. Document 145 is a copy of document 144 with
2 handwritten notes.

3 O. Document 153 is a briefing memorandum from the Deputy Director of BLM to
4 David Cottingham on issues discussed at an ISC meeting. The memorandum
5 recommends specific changes to a draft ROD, advising on policy issues under
6 deliberation.

7 P. Document 175 is comments on the March 18, 1994 draft ROD from BLM Oregon
8 and Washington offices recommending specific language changes, identifying litigation
9 risks of options currently under consideration, and raising policy issues.

10 Q. Document 176 is comments on the March 18, 1994 draft ROD recommending
11 specific language changes, raising policy concerns and identifying litigation risks.

12 R. Document 202 is a memorandum from the BLM Director, through the Acting
13 Assistant Secretary, suggesting changes to language in the March 30, 1994 draft ROD
14 and evaluating the effect of the ROD on BLM programs. Documents 203 and 204 are
15 attachments to Document 202 written by BLM employees providing their suggested
16 changes to language in the ROD, evaluating the effect on BLM programs and analyzing
17 possible public reaction to ROD language.

18 S. Document 208 is a fax message suggesting specific language changes in the ROD
19 from BLM.

20 T. Document 219 is a draft of the section of the ROD addressing the public
21 comments received after the publication of the FSEIS.

22
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40. Documents: 96, 186
Privilege: Attorney Client Communications
Attorney Work Product
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Document 96 is a draft of a possible future federal register notice that is not related to the SEIS or ROD, and contains handwritten notes by a government attorney. This document was inadvertently collected and given a privileged document number. The document is protected because it is not related to the litigation and is otherwise privileged. Document 186 was also inadvertently collected. It is a fax message from a government attorney informing recipients of the scheduling of the March 25, 1994 status conference in the NFRC v. Espy (D.D.C.) litigation and includes brief comments on that action. Release of this document would inhibit frank legal interpretation of court actions by government attorneys. This document is not related to the litigation and is otherwise privileged.

41. Documents: 8, 109, 150, 151, 209
Privilege: Attorney-Client Communication
Attorney Work Product
Deliberative Process

Document 8 is a memorandum from the Solicitor of USDOJ to a senior White House staff member containing legal advice and opinion regarding the impact of the O & C Lands Act on the development of SEIS alternatives and the application of the ESA and statutes to the O & C lands.

Document 109 is a memorandum from the Department of Justice to a senior White House staff member regarding the draft ROD and containing legal advice and opinion on the ROD analysis and structure. Document 151 is a memorandum from a senior DOI official to senior DOI officials and USDA officials and a White House senior staff member containing summaries of

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1 the ROD with analysis, recommendations and opinions regarding the draft ROD. Document 150
2 is an agenda for the Interagency Steering Committee summarizing outstanding legal and policy
3 issues. Document 209 is a memorandum prepared by Steve Odell and sent to Will Stelle and
4 Jim Pipkin discussing the viability provision of the ROD. These documents all concern the
5 agencies deliberative process and senior White House staff interaction in and coordination of that
6 process. Documents 8 and 109 are protected by the attorney-client privilege because they were
7 prepared by attorneys, at the request of the client agency and based on confidential
8 communications with the client agency, in order to provide the client with legal advice.
9

10 Documents 8 and 109 are also protected by the attorney work product privilege because they
11 were prepared by attorneys in anticipation of litigation. Document 151 is protected by the
12 attorney client privilege because it is a confidential communication from the agency to the
13 attorneys, on which legal advice was sought.
14

15 42. Documents: 4, 7, 9, 10, 95, 100, 156, 201, 260
16 Privilege: Attorney Client Communication
17 Attorney Work Product
18 Deliberative Process

18 Documents 4, 7, 9, 10, 95, 100, 156, 201, 260 are documents generated by senior White House
19 staff. They provide White House advice, direction and opinion regarding the agencies future
20 management of Forest Service lands in the Pacific Northwest; executive input is obviously an
21 important part of the agency's deliberative process particularly in an inter-agency process such as
22 this. Documents 4, 7, 9 and 10 are memoranda providing opinions, recommendations and
23 options for White House interaction with the agencies on issues raised by the Conference held by
24 the President and the Vice-President in the Spring of 1993. Documents 4, 9, and 10 are draft
25

26
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1 memoranda for the President or Vice-President, which were provided to the agency for its
2 consideration in conducting its deliberations. Document 7 is a cover memorandum for a draft
3 Presidential Decision Memorandum concerning related policy (not attached); the cover
4 memorandum summarizes the nature of the Decision Memorandum. Document 95 is a
5 memorandum from a White House senior staff member to the agencies requesting their review of
6 various items relating to the ROD and providing recommendations regarding assumptions in the
7 DSEIS. Federal Defendants have produced the attachment to Document 95, which was
8 inadvertently included on the privileged index list. Document 100 is a memorandum from a
9 White House senior staff member to the agencies attaching Document 109 and containing
10 opinion and advise to the agencies regarding the content of Document 109. Document 156 is a
11 memorandum concerning implementation and seeking legal advice regarding implementation.
12 Documents 201 and 260 are memoranda containing direction to the agencies regarding the
13 finalization of the ROD and coordination of the agencies' final review.
14

15
16 43. Documents: 18, 20, 22, 41, 42, 51, 88, 105, 110, 152
17 Privilege: Attorney Client Communication
18 Attorney Work Product
19 Deliberative Process

20 Documents 18, 20, 22, 41, 42, 51, 88, 105, 110, and 152 are meeting agendas and time lines for
21 completion of the ROD. Documents 18, 20, 22, 41, 51, and 110 are agendas for meetings. The
22 agendas spell out legal issues, opinions, policy recommendations, advice, and various options
23 with risks for each option. The items were discussed in detail in the agendas and were
24 distributed to meeting participants in advance in order to facilitate discussions on these issues.
25 Examples of issues are application of NFMA provisions to BLM lands, interpretation of the
26

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1 viability regulation, comparison of § 318 sales to Alternative Nine and ESA consultation issues.
2 Document 18 was prepared by Roger Nesbit and Document 20 was prepared by Mike Gippert.
3 Document 22 was transmitted by Amy Shogun. The author of the agenda and the handwritten
4 notes is unknown but both address legal issues listed above. Document 41 is by Tim Obst,
5 Document 51 is by Wells Burgess, and Document 100 is by an unidentified Department of
6 Justice staff member. The federal defendants' assert the attorney client, attorney work product,
7 and deliberative process privilege for these documents. All were prepared by attorneys, in
8 anticipation of litigation, and are documents as they were prepared for discussion purposes only,
9 and contain preliminary recommendations. The agendas all represent discussions of confidential
10 matters upon which clients requested advice. Documents 88, 105, and 152 are schedules for
11 completion of the ROD. The federal defendants assert the deliberative process privilege for these
12 documents as they reveal the decision making process.
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DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 41

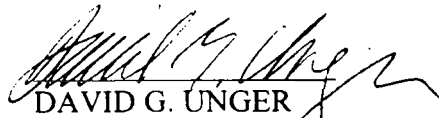
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Environmental & Natural Resources Division
General Litigation Section
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1 I declare under penalty of perjury that the foregoing is true and correct.

2 Executed in Washington, D.C. this 2nd day of September, 1994.

3
4
5 

6 DENISE MERIDITH
7 acting Director
8 Bureau of Land Management
9 Department of the Interior

10 

11 DAVID G. UNGER
12 Associate Chief
13 U.S. Forest Service
14 Department of Agriculture

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26
DECLARATION OF DENISE MERIDITH
AND DAVID G. UNGER - 42

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Defendants.

Civ. No. 92-479WD

Civ. No. C94-758WD



Department of the Interior (USDOI) to adopt Alternative 9, as modified, of the Final Supplemental Environmental Impact Statement (FSEIS) for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl. This decision was adopted in a Record of Decision (ROD) signed on April 13, 1994, by the Secretaries, and reflects this Administration's policy for management of over 24 million acres of USDA Forest Service and USDOI Bureau of Land Management lands. The Administration's policy represents a commitment to full compliance with all environmental laws, while considering the human and economic needs of the Pacific Northwest. This policy is a high priority of this Administration. The ultimate decisionmakers on this policy were the Secretaries of Agriculture and the Interior. Throughout the process, however, the White House was involved in coordinating and providing guidance on this important inter-agency effort.

3. To begin this effort, in 1993, the Administration undertook to develop a balanced, comprehensive and long-term approach that would focus on the ecosystem within the range of the northern spotted owl. On April 2, 1993, President Clinton convened the Forest Conference in Portland, Oregon to address the human and environmental needs served by the federal forests of the Pacific Northwest and northern California. Following the Forest Conference, an inter-agency group established by the White House began work to develop draft strategies and recommendations on how best to achieve the Administration's goals. On July 1,

1993, the President announced his proposed "Forest Plan for a Sustainable Economy and a Sustainable Environment," consisting of strategies for forest management, economic development, and agency coordination. A White House coordinated inter-agency process then developed a Draft Supplemental Environmental Impact Statement (DSEIS) and a Final Supplemental Environmental Impact Statement to analyze alternatives for the forest management strategy. Based on those and other documents, the Secretaries of Agriculture and the Interior issued their Record of Decision jointly amending the planning documents of nineteen National Forests and seven Bureau of Land Management Districts.

4. The documents that are the subject of the assertion of the deliberative process privilege and the attorney-client privilege were all generated during the development of the President's policy statement or the FSEIS and the ROD. They are predecisional and deliberative in nature, containing candid and informal exchanges of analyses, opinions, recommendations, preliminary views and proposals, and both policy and legal advice, to and from the White House and the agencies.

5. Documents 4, 7, 9, and 10¹ reflect the deliberative process regarding development of the President's July 1, 1993 policy direction following the Forest Conference led by the President, the Vice-President and Cabinet members in the Spring of 1993. Document 4 is a draft memorandum from the Director of

¹ The numbers utilized are from the master index for all privileged documents provided to plaintiffs in this matter and are therefore not consecutive herein.

the Office on Environmental Policy to the President and Vice-President. Documents 9 and 10 are draft memoranda from the Forest Conference Executive Committee to the President. All three documents provide opinions, options and recommendations for White House interaction with Congress and the agencies on the issues raised by the Forest Conference and the environmental and timber crisis in the Pacific Northwest. Document 7 is a cover memorandum from a senior White House staff member to the agencies and departments involved in the Forest Conference follow-up for a draft Presidential Decision Memorandum concerning related policy (not attached); the cover memorandum summarizes the nature of the Decision Memorandum.

6. Document 201 is a memorandum from a senior White House staff member to members and alternates of the Interagency Steering Committee, which is comprised of the Director of the White House Office on Environmental Policy, the Secretary of the Interior, the Secretary of Agriculture, the Administrator of the Environmental Protection Agency, and the Under Secretary of Commerce for Oceans and Atmosphere. Document 260 is a memorandum from a senior White House staff member to USDA and USDOl officials. Documents 201 and 260 address the process for the finalization of the ROD and coordination of the agencies' final review.

7. Document 150 is an agenda of a meeting of the Interagency Steering Committee. It summarizes outstanding legal and policy issues.

8. Documents 80, 108, 147, 209, 210, 216, 218, 222, 223, 226, 231, 256, and 259 are communications among various participants in the inter-agency deliberations, including senior White House personnel, on the Forest Service's interpretation and application of the "viability" provision of the National Forest Management Act fish-and-wildlife resource regulation, 36 CFR 219.19, and draft language for the ROD regarding same. These documents contain candid comments, edits, recommendations, options and advice, both policy and legal. The documents also include various draft versions of language for the ROD consistent with the advice and analysis contained in the memoranda.

9. Document 95 is a memorandum from a senior White House staff member to USDA, USDOl, DOJ and the Interagency Implementation Team requesting their review of various items relating to the ROD and providing recommendations regarding assumptions in the DSEIS. Document 100 is a memorandum from a senior White House staff member to officials of USDA, USDOl and DOJ, containing opinion and advice to the agencies regarding the content of Document 109. It also appends Document 109.

10. Document 8 is a memorandum from the Solicitor of USDOl to a senior White House staff member containing advice and opinion regarding the impact of the O & C Lands Act on development of the SEIS alternatives. Document 109 is a memorandum from a DOJ official to a senior White House staff member regarding the draft ROD. It contains legal advice and opinion on the draft ROD analysis and structure. Document 151

is a memorandum from a senior USDOl official to senior USDOl and USDA officials and a senior White House staff member containing draft statements from the proposed ROD with analysis, recommendations and opinions regarding the draft ROD.

11. Document 156 is a memorandum from a senior White House staff member to USDA and USDOl attorneys regarding legal questions surrounding implementation of the proposed ROD.

12. All of the documents described above are predecisional to the President's July 1, 1993 policy statement or the issuance of the FSEIS or the ROD. These documents, which were generated by various participants in the inter-agency process established and coordinated by the White House, reflect the advice, opinions, recommendations and deliberations that were part of the process by which these governmental decisions and policies were formulated. The documents do not contain any factual material that may be disclosed without impinging upon the policy-making decisional process.

13. The various policy development processes administered under the auspices of the White House and Cabinet concern important national interests. To ensure the effective operation of these processes, deliberative analysis, recommendations, and other communications by and among participants must be conducted in confidence. The disclosure of the documents addressed in this Declaration would not only compromise the necessary confidential and candid relationship among participants in these processes, but create an inhibited atmosphere not conducive to the

formulation of sound decisions, thereby significantly reducing the White House and Cabinet's ability to develop policy. If the content of these candid exchanges of views is subjected to public scrutiny, during or after the policy development process, the vigor and effectiveness of the exchange of views necessary to these deliberative processes would be seriously impaired and their utility and value greatly reduced.

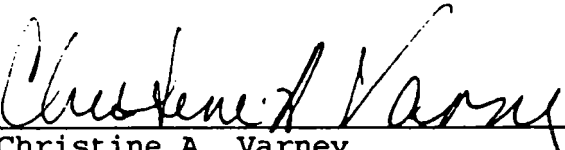
14. Based on the predecisional deliberative nature of the documents described in this Declaration and my personal judgment that disclosure of these documents would be injurious to the effective discharge of the White House and Cabinet's responsibilities, and ultimately to the public interest in effective decision-making and formulation of policies by the President and his or her Administration, I hereby assert a formal claim of the deliberative process privilege and respectfully request that none of the documents be ordered to be disclosed in response to the requests of the plaintiffs or otherwise in connection with this case.

15. Several of the documents also involve confidential attorney-client communications, wherein legal advice on specific issues was sought and received from counsel during the course of litigation and in anticipation of future litigation. Document 8 is a memorandum from the Solicitor of the Department of the Interior to a senior White House staff member providing legal advice on the impact of the O & C Lands Act on development of the SEIS alternatives. Document 109 and the attachment to Document

100 are a copy of memo from the Deputy Assistant Attorney General Designate of the Environment and Natural Resources Division of the Department of Justice to a senior White House staff member containing legal advice and opinion on the draft ROD analysis and structure. Document 156 is a memorandum from a senior White House staff member to the Solicitor, USDOJ, and the General Counsel, USDA, seeking legal advice on implementation of the proposed ROD. As to each of these documents, I hereby assert a formal claim of attorney-client privilege and respectfully request that none of the documents be ordered to be disclosed in response to the requests of the plaintiffs or otherwise in connection with this case.

In accordance with 28 U.S.C. 1746, I hereby declare and affirm under penalty of perjury that the above statements are true and correct to the best of my knowledge, information and belief.

Executed in Martha's Vineyard this 1 day of September 1994.
Massachusetts


Christine A. Varney
Deputy Assistant to the President
and Cabinet Secretary

*Forest Plan
litigation*

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NUMBER OF PAGES TO BE TRANSMITTED (including cover) 44

FROM: Lisa Holden, paralegal (202) 272-8051

MESSAGE: Attached are the memoranda filed by NFRC in Seattle. They include the memorandum in support of a motion to dismiss the cross-claims, memorandum in support of motion to transfer the cross-claims to DC, memorandum in support of motion for change in briefing schedule and memorandum in support of motion to shorten time for consideration for motion to change briefing schedule. The actual motions are available upon request.

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 Northwest Forest Resource Council

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)
 Plaintiffs,)

No. C92-479WD

vs.

JAMES LYONS, in his official capacity as)
 Assistant Secretary of Agriculture, et al.,)

Defendants,)

CROSS-CLAIM DEFENDANT
 NORTHWEST FOREST RESOURCE
 COUNCIL'S MEMORANDUM IN
 SUPPORT OF MOTION TO DISMISS
 CROSS-CLAIMS PURSUANT TO
 FEDERAL RULE OF CIVIL
 PROCEDURE 12(b)(1), 12(b)(3),
 12(b)(6), AND 12(b)(7); MOTION
 FOR MORE DEFINITE
 STATEMENT PURSUANT TO RULE
 12(e); AND MOTION TO STRIKE
 PURSUANT TO RULE 12(f)

vs.

NORTHWEST FOREST RESOURCE
 COUNCIL,

Cross-Claim Defendant.

N01-9406\5JP01073.001

1 SAVE THE WEST,

2)
3 Plaintiff,)

No. 94-758WD

4 vs.)

5 JAMES LYONS, et al.,)

6 Defendants.)

7 NATIVE FOREST COUNCIL,

8)
9 Plaintiff,)

No. C94-803WD

10 vs.)

11 BRUCE BABBITT, et al.,)

12 Defendants.)

13 THE SIERRA CLUB,

14)
15 Plaintiff,)

No. C94-820WD

16 vs.)

17 MICHAEL ESPY, et al.,)

18 Defendants.)
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20
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22
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CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT TO RULE 12(f) - i

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CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION
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12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATE-
MENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT
TO RULE 12(f) - ii

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INTRODUCTION

The procedural flaws fatal to the Government's cross-claims it filed against Northwest Forest Resource Council ("NFRC") underscore the unprecedented nature of the Government's attempt to compel certain private citizens into court as defendants to test the legality of Government action that affects millions of citizens.

The Government's "Consolidated Amended Answer Asserting Cross-Claims" ("Amended Answer"), which does not actually assert cross-claims but instead merely references claims made in pending and dismissed complaints originally filed by NFRC and others, fails on numerous procedural grounds. The court lacks jurisdiction over these claims for a number of reasons: the Government has no standing to assert these "cross-claims" for declaratory relief, having alleged insufficient and hypothetical injury as the basis for these claims; NFRC is not the Government's co-party in these actions challenging the 1994 Forest Plan and thus the court may not entertain cross-claims asserted by the Government against NFRC regarding that Plan; the court lacks jurisdiction over the plaintiff's underlying claims against the Government which is the alleged predicate for the court's jurisdiction over the cross-claims; and the "cross-claims" are hypothetical and thus request an advisory opinion, in that the Government has alleged no facts nor claims for relief upon which the court could base a declaratory judgment.

The Government's "cross-claims" also fail to state claims upon which relief can be granted: neither the federal agencies nor their officers have statutory authority to sue in their own names, and even if the claims were made in the name of the United States, the Government has no independent statutory authorization to make the specific claims alleged. Moreover, the Government's "cross-claims" are improper subjects for declaratory relief: the cross-claims are in reality defenses that should properly be asserted as compulsory counterclaims in the actions pending in the District of Columbia, and have been asserted here only as a forum-evading tactic; there is no threatened liability to support the finding of an

CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT TO RULE 12(f) - 1

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1 actual controversy needed for declaratory relief; and the declaratory relief requested will not
2 be conclusive against all parties, some of whom have not been and cannot be joined herein.

3 The absence of parties needed for a just adjudication of the "cross-claims" is also
4 grounds for dismissal of these claims. The Government has previously admitted that the
5 plaintiffs in the *NFRC v. Dombeck* litigation pending in the District of Columbia and the
6 former plaintiffs in *NFRC v. Thomas* are necessary parties for adjudication of issues regarding
7 the 1994 Forest Plan. Personal jurisdiction cannot be maintained in the Western District of
8 Washington over these individuals and entities and their absence from this litigation
9 necessitates dismissal of the cross-claims.

10 Dismissal is also appropriate because venue is improper here, as Judge Jackson has
11 already ruled. The Government is bound by Judge Jackson's denial of their request to transfer
12 the *Dombeck* claims to the Western District of Washington, and the Government's attempt to
13 evade that ruling by filing "cross-claims" that simply append the *Dombeck* and *Thomas*
14 complaints should be rejected.

15 The cross-claims are also flawed because they are so vague and ambiguous that NFRC
16 cannot reasonably be required to frame a responsive pleading, in that the cross-claims do not
17 assert facts or claims against NFRC but instead merely reference facts and claims asserted in
18 pending and dismissed complaints originally filed by NFRC, which the Government has
19 previously denied. The cross-claims must also be stricken to the extent that they are asserted
20 against NFRC in cases other than the *Seattle Audubon Society* lawsuit, which is the only case
21 before the court in which NFRC ever intervened.¹

22
23 ¹ While NFRC recognizes that the Court has already addressed some of the issues raised
24 herein in its August 5, 1994 Order Granting Leave to Federal Defendants to Amend Answer,
25 that Order was issued before any cross-claims were actually pending against NFRC. Federal
26 Rule of Civil Procedure 12 authorizes, and to some extent requires, that these issues be raised
in a motion to dismiss. Moreover it is only now after the cross-claims have actually been
asserted by the Government against NFRC that NFRC can test the legal sufficiency of those
allegations and claims actually made in that pleading.

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ARGUMENT

I. THE GOVERNMENT'S CROSS-CLAIMS SHOULD BE DISMISSED AS THIS COURT LACKS JURISDICTION OVER THE DECLARATORY JUDGMENT CLAIMS MADE THEREIN; THE GOVERNMENT HAS FAILED TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED; THE GOVERNMENT HAS FAILED TO JOIN INDISPENSABLE PARTIES; AND VENUE IS IMPROPER IN THIS DISTRICT.

A. This Court lacks jurisdiction over the Government's cross-claims for declaratory relief and thus the cross-claims should be dismissed pursuant to Rule 12(b)(1).

1. The Government lacks standing to assert these cross-claims for declaratory relief.

Declaratory judgments may be issued only in "case[s] of actual controversy." 28 U.S.C. § 2201. "The 'actual controversy' requirement of the [Declaratory Judgment] Act is the same as the 'case or controversy' requirement of the United States Constitution," *Societe de Conditionnement v. Hunter Eng'g*, 655 F.2d 938, 942 (9th Cir. 1981), and the "case or controversy" constitutional requirement demands that the party seeking declaratory judgment have standing to assert its claims. *Western Mining Council v. Watt*, 643 F.2d 618, 623 (9th Cir. 1981); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

To have standing under Article III of the Constitution the party bringing suit

[first] must have suffered an 'injury in fact' -- an invasion of a legally-protected interest which is (a) **concrete and particularized**, and (b) **'actual or imminent, not 'conjectural' or 'hypothetical.'** Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Resources Ltd., Inc. v. Robertson, 8 F.3d 1394, 1397 (9th Cir. 1994), (emphasis supplied) (quoting *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136 (1992)), *amended on other grounds* ___ F.3d ___, 1994 WL 315780 (9th Cir. 1994). "A threatened injury must be certainly impending to constitute injury in fact." *Whitmore v. Arkansas*, 495

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1 U.S. 149, 158 (1990).

2 The Government has not alleged the requisite injury-in-fact to confer standing to bring
3 these declaratory judgment cross-claims. The Government seeks a declaratory judgment "that
4 the ROD and the FSEIS meet the standard of review set forth in 5 U.S.C. § 706(2) (A), (C)
5 and (D) in respect of each claim asserted in the complaints annexed as Exhibits A and B."
6 Amended Answer, ¶ 25, attaching as Exhibit A the *Thomas* complaint dismissed by NFRC
7 and as Exhibit B the *Dombeck* complaint pending in the District Court for the District of
8 Columbia.

9 The Government has not alleged that litigation is impending or has even been
10 threatened against it by NFRC on the *Thomas* claims; the Government alleges merely that after
11 voluntarily dismissing the *Thomas* lawsuit, "NFRC remains free to file the *Thomas* lawsuit at
12 a later date in another Court . . ." Amended Answer, ¶ 19. Any citizen aggrieved by the 1994
13 Forest Plan "remains free to file" a lawsuit against the Plan; the Government has alleged
14 absolutely no facts suggesting that the NFRC has threatened further action. Indeed, the
15 outcome of the pending *Dombeck* lawsuit in the District of Columbia, which has eight claims
16 in common with the former *Thomas* suit, may make it unnecessary to assert the other former
17 *Thomas* claims. Nor does the Government's Amended Answer contain any allegations
18 regarding the injury in fact it faces if the *Dombeck* claims are not decided by this court via
19 a declaratory judgment, and thus the Court lacks jurisdiction over those claims as well.

20 Moreover, even if the Government could plead that it had been threatened with
21 impending litigation, "threatened litigation" in and of itself is not injury-in-fact sufficient to
22 support standing to bring a declaratory judgment action. It is the fact of incurring increasing
23 damages while the threat of litigation looms that provides the injury-in-fact sufficient to
24 support jurisdiction over a declaratory judgment action. *Societe de Conditionnement v. Hunter*
25 *Eng'g*, 655 F.2d 938, 943 (noting that the declaratory judgment procedure relieves the
26 "Damoclean threat of impending litigation" when it serves to "forestall the accrual of potential

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1 damages"); *see also Koch Eng'g Co., Inc. v. Monsanto Co.*, 621 F. Supp. 1204, 1206 (E.D.
2 Mo. 1985) ("[T]he [Declaratory Judgment] Act was intended to provide a remedy which
3 would minimize the danger of avoidable loss and the unnecessary accrual of damages . . .").

4 The Government does not face mounting damages if NFRC does not sue; indeed, both
5 the *Thomas* and *Dombeck* complaints sought only injunctive and declaratory relief, and not
6 money damages. Thus the Government's pleading entirely fails to allege sufficient "injury in
7 fact" to confer standing to bring these declaratory judgment cross-claims.

8 The Government has also failed to satisfy the redressability prong of the standing
9 analysis. If litigation of the *Dombeck* and *Thomas* claims is the "threatened injury" the
10 Government claims as its injury-in-fact, then litigation of those claims in this court does not
11 avoid that threatened injury, but instead merely hastens it.

12 **2. *The plaintiffs lack standing to challenge the 1994 Forest Plan, and the***
13 ***plaintiffs' complaint is the jurisdictional predicate upon which the Govern-***
ment bases its cross-claims.

14 The environmental plaintiffs' Supplemental Complaints challenge the 1994 Forest Plan
15 adopted by the Record of Decision on April 13, 1994. It is on the basis of the court's alleged
16 jurisdiction over these claims that the Government alleges the court has jurisdiction over its
17 cross-claims against NFRC. *See* Amended Answer ¶ 5.

18 The plaintiffs lack standing to challenge the 1994 Forest Plan and thus the Govern-
19 ment's alleged jurisdictional basis for the cross-claims fails. The recent case of *Sierra Club*
20 *v. Robertson*, 28 F.3d 753 (8th Cir. 1994) establishes that environmental plaintiffs do not have
21 standing to challenge a forest plan except in the context of its application to a particular
22 proposed timber sale. In holding that the *Sierra Club* lacked standing to challenge the
23 Ouachita Forest Plan because it suffered no injury-in-fact from the Plan, the court stated that

24 The mere existence of the Ouachita Forest Plan does not
25 produce an imminent injury in fact. . . . Nor does it dictate that
26 any particular site-specific action causing environmental injury
must occur. Indeed, before an environmental change can come
about, several events must transpire. First, a site-specific action

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(e.g., a timber sale) must be proposed and found to be consistent with the Plan. Next, the action is subject to NEPA and NFMA analysis and public comment. Finally, the Forest Service must adopt the action. Finding an environmental injury based on the Plan alone, without reference to a particular site-specific action, would 'take us into the area of speculation and conjecture.'

28 F.3d at ____ (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974)). The Court declined to follow the line of cases in the Ninth Circuit which have entertained challenges to forest plans, stating that "we have difficulty in discerning that a 'concrete and particularized' injury in fact was alleged in any of these cases." 28 F.3d at ____.

3. ***This Court lacks jurisdiction to issue an advisory ruling, which is what the Government has requested by seeking a declaratory judgment on a hypothetical set of facts that it has previously denied.***

In the Government's "claim for relief" asserted against NFRC, they state that they "are entitled to declaratory judgment declaring, upon the administrative record, that the ROD and the FSEIS meet the standard of review set forth in 5 U.S.C. § 706(2) (A), (C) and (D) in respect of each claim asserted in the complaints annexed as Exhibits A and B." Amended Answer, ¶ 25. Yet the claims the Government apparently incorporates and on which it seeks declaratory relief include and are dependent on factual and legal assertions **that the Government has previously denied.**

The Government's "cross-claims" are an improper attempt to have this Court make an advisory ruling on the allegations made in NFRC's former and pending complaints, which were never filed with this court by NFRC. "Federal courts may not render advisory opinions on abstract or hypothetical propositions of law. . . . A federal court may not, consistent with the Constitution, entertain a proceeding . . . that merely seeks validation of a statutory scheme and allows for the adjudication of potential issues that have not actually arisen. The case must consist of a 'real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Dixie Elec. Co-Op. v. Citizens of State of Ala.*, 789 F.2d 852,

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857-58 (11th Cir. 1986) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)).

The Government's "cross-claims" improperly request advice on what the law would be based on a hypothetical set of facts. For example, all of the Claims for Relief in the *Thomas* Complaint, which the Government attaches as Exhibit A and apparently incorporates as the claims for which declaratory relief is requested, reallege and incorporate all of the factual allegations made in the first 46 paragraphs of the *Thomas* Complaint. See *Thomas* Complaint Claims for Relief, ¶¶ 47, 51, 54, 57, 60, 63, 65, 67, 70, 73, 79, 83, 86, 89, 92, 97, 99, 103, and 105.

Yet in the Government's Amended Answer to Complaint of *NFRC v. Thomas* (which the Government attempted to file with the District of Columbia district court in July, 1994), the Government denied or claimed to be "without sufficient knowledge or information to form a belief as to the truth of the allegations" with respect to most of the allegations upon which each claim for relief relies. See Government's Amended Answer to Complaint of *NFRC v. Thomas*, attached as Exhibit A to Campbell Declaration filed herewith. These factual allegations which the Government has denied or has claimed to lack information about are intertwined with and support the Claims for Relief about which the Government seeks declaratory judgment: each claim includes factual allegations regarding the *Thomas* plaintiffs' status as parties; the facts regarding the historical management of the federal forests culminating in the 1993 assembly of the FEMAT Team and the instructions and constraints placed on or by the Team regarding the forest management alternatives that could be considered; a description of the alternatives ultimately presented by the FEMAT Team and adopted in the draft supplemental environmental impact statement (DSEIS); a description of the comments submitted on the DSEIS by the plaintiffs and on the options not considered by the DSEIS team; and a description of the key features of the Forest Plan adopted by the Secretaries (FEMAT's Option 9) and the plaintiffs' injuries from that Plan, including the Plan's elimination of the sustained yield production of timber and the reduction of \$55.2

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1 million, or more than 60%, of the expected annual level of national forest timber receipt
2 payments to counties, and the accompanying reduction of jobs, road closures, reduction in
3 school receipts, and environmental impacts on adjoining private land caused by the Forest
4 Plan. *Id.* at ¶¶ 3-46.

5 In addition to denying or claiming lack of information to deny many of these key facts
6 underlying the claims for relief, the Government has also previously denied many of the key
7 allegations in each claim itself. For example, the First Claim for Relief in both the *Thomas*
8 and *Dombeck* complaints alleges that the FEMAT Report, which Judge Jackson found illegal
9 in *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) "substantial-
10 ly and irreparably tainted, distorted and influenced the structure, analysis and conclusions of
11 the FEMAT Report," making the "entire public comment process on the DSEIS and thereafter
12 devoid of meaning." *Thomas* Complaint, ¶¶ 48-50.

13 Although the Government seeks a declaratory judgment regarding this claim, in its
14 Amended Answer to the *Thomas* Complaint the Government denied one of the claim's basic
15 premises:

16 the Forest Plan adopted by defendants on April 13, 1994 is
17 based on the FEMAT Report, which as determined by this court
18 in *NFRC v. Espy*, Civil Action No. 93-1621 TPJ (D.D.C.
Memorandum and Order March 21, 1994), was prepared in
violation of FACA.

19 *Thomas* Complaint, ¶ 48, first sentence; see Government's Amended Answer to Complaint
20 of *NFRC v. Thomas*, ¶ 48 ("Defendants deny the allegations of the first sentence of Paragraph
21 48").

22 Thus the Government's "cross-claims" for declaratory relief are based on a series of
23 factual and legal allegations that the Government has denied, yet which are integral to the
24 claims about which the Government supposedly seeks declaratory relief. These "cross-claims"
25 are in reality not claims at all, and instead improperly seek an advisory ruling.

26 In addition, the *Dombeck* complaint seeks, and the *Thomas* complaint sought, a

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1 declaration of the law applicable to the court in the District of Columbia. Neither complaint
2 sought a declaration under Ninth Circuit precedent. If the Government truly wants a
3 declaration as to the validity of those claims, it must ask this court to rule as if it were sitting
4 in the District of Columbia. Yet the Government has not done so. The ruling it seeks from
5 this court, under Ninth Circuit precedent, is abstract, hypothetical and advisory, and is
6 impermissible under the Constitution.

7 **4. This Court lacks jurisdiction over the Government's "cross-claims" because**
8 **these "cross-claims" do not meet the requirements of Rule 13(g).**

9 The Government's "cross-claims" do not satisfy the legal or factual requirements of
10 Federal Rule of Civil Procedure 13(g), and therefore this court lacks jurisdiction to entertain
11 these "cross-claims" against NFRC in this action.

12 Rule 13(g) states in pertinent part:

13 (g) **Cross-Claim Against Co-party.** A pleading may state as a
14 cross-claim any claim by one party against a co-party arising out
15 of the transaction or occurrence that is the subject matter either
16 of the original action or of a counterclaim therein or relating to
17 any property that is the subject matter of the original action.

18 Fed. R. Civ. P. 13(g). The NFRC is not the Government's "co-party" in this litigation. In
19 1992 the NFRC intervened as a defendant in the Seattle Audubon Society's challenge to the
20 1992 Forest Plan, as set forth in their 1992 Complaint. Although NFRC was granted leave
21 to intervene without limitation, NFRC's intervention was implicitly limited by the scope of
22 the complaint on which intervention was based. Rule 24 intervention is permissive, not
23 compulsory, *see Martin v. Wilks*, 490 U.S. 755, 763 (1989), and had the original action
24 included claims in which NFRC did not wish to participate, NFRC would have limited its
25 intervention petition to only those claims in which it sought to participate.²

26 ² The Ninth Circuit has made clear that intervention on one set of claims does not
automatically allow a party to litigate every other claim asserted in a case. *See Portland
Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied* 492 U.S. 911 (1990)
(motion to intervene on a claim denied even though the party (NFRC) had already been
granted the right to intervene on three other claims in the same case).

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1 Cross-claims may not be asserted if the underlying action has been resolved, although
2 "previously-interposed" cross-claims can remain viable if the underlying action is later
3 dismissed. See 6 Wright, Miller, & Kane, *Federal Practice and Procedure: Civil 2d* (2d Ed.
4 1990), § 1431, at 233-34; *Molett v. Penrod Drilling Co.*, 919 F.2d 1000, 1004 (5th Cir. 1990)
5 (court would maintain cross-claim between co-defendants which was filed prior to the
6 settlement of plaintiffs' underlying claims). Nor may cross-claims be brought against a person
7 who has been eliminated from a lawsuit prior to the time the cross-claim was filed, since that
8 person is no longer a party. *Impex Agric. Commodities v. Leonard Parness Trucking*, 582 F.
9 Supp. 260, 262 (D.N.J. 1984). Cross-claims are also improper against one who has
10 withdrawn from an action. 6 Wright, Miller, & Kane, *Federal Practice and Procedure: Civil*
11 *2d* (2d Ed. 1990), § 1431, at 233-34.

12 Prior to the Government's filing of its cross-claims against NFRC, this court declared
13 that the complaint on which NFRC's intervention was based was "moot", and dissolved the
14 injunction against which NFRC defended. See June 6, 1994 Order Dissolving Injunction and
15 Setting Schedule for Summary Judgment Motions, at 4-5. Thus, NFRC's previous status as
16 an intervening defendant on the Government's behalf has been functionally terminated, as the
17 claims on which NFRC intervened have been finally resolved, and NFRC is no longer a party
18 to this action and is thus not the Government's "co-party."

19 The cross-claims asserted by the Government also violate Rule 13(g)'s requirement that
20 they must arise out of the "transaction or occurrence that is the subject matter either of the
21 original action or of a counterclaim therein." Fed. R. Civ. P. 13(g). Rule 13(g)'s transaction
22 or occurrence test is not satisfied where the cross-claim deals with facts or issues arising after
23 the subject matter of the original claims in the underlying complaint. See *Caton Ridge*
24 *Nursing Home Inc. v. Califano*, 447 F. Supp. 1222, 1228 (D. Md. 1978), *aff'd on other*
25 *grounds* 596 F.2d 608 (4th Cir. 1979) (cross-claim dismissed which involved legal and factual
26 issues relating to claims arising after event had occurred that underlying complaint had sought

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1 to enjoin); *American Nat'l Bank & Trust Co. of Chicago v. Bailey*, 750 F.2d 577, 581 (7th
2 Cir. 1984) (test not satisfied when "immediate source of cross-claim was a contract made *after*
3 the original suit") (emphasis in original).

4 The Government's "cross-claims" against NFRC all deal with challenges specific to
5 the 1994 Forest Plan, and therefore do not arise out of the "transaction or occurrence that is
6 the subject matter of the original action" for which NFRC sought, and was granted, the right
7 to intervene, which concerned the 1992 ROD and Forest Plan. Moreover, the cross-claims
8 all deal with legal and factual issues arising after the issues regarding the 1992 Forest Plan
9 had been ruled moot, further illustrating that these cross-claims do not arise out of the subject
10 matter of the original action.

11 **B. *The Government has failed to state claims upon which relief can be granted and thus***
12 ***the cross-claims should be dismissed pursuant to Rule 12(b)(6).***

13 **I. *Neither federal agencies such as the Department of Agriculture and the***
14 ***Department of the Interior nor their officials have authority to sue.***

15 Federal agencies and their officers may bring suit only pursuant to specific statutory
16 authority. *Federal Sav. and Loan Ins. Corp. v. Tickin*, 490 U.S. 82, 85 (1989); *cf.* 28
17 U.S.C. § 1345 ("Except as otherwise provided by Act of Congress, the district courts shall
18 have original jurisdiction of all civil actions, suits or proceedings commenced by the United
19 States, or by any agency or officer thereof expressly authorized to sue by Act of
20 Congress") (emphasis added).

21 In *FSLIC v. Tickin*, the Supreme Court found that the Federal Savings and Loan
22 Insurance Corporation ("FSLIC") was a federal agency, and had been given specific statutory
23 authority to sue and be sued pursuant to 12 U.S.C. § 1725(c), which provides that FSLIC
24 "shall have power . . . [t]o sue and be sued, complain and defend, in any court of competent
25 jurisdiction." 490 U.S. at 85 n.3. Where such express statutory authority to sue is lacking,
26 actions brought by agencies or their officers have been dismissed. *See Marshall v. Gibson's*
Products, Inc. of Plano, 584 F.2d 668 (5th Cir. 1978).

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1 In *Marshall v. Gibson's Products*, the court dismissed a suit seeking an injunction
2 brought by the Secretary of Labor, who sought to compel an employer to submit to a search
3 of its premises pursuant to section 8(a) of the Occupational Safety and Health Act ("OSHA"),
4 which section authorized searches by the Secretary. The court pointed out that although
5 "under specific sections of OSHA Congress did authorize the Secretary to bring suit,"
6 authorization to sue pursuant to section 8(a) was not provided. 588 F.2d at 673. Because
7 "[n]o provision of OSHA grants the Secretary general authority to bring suit" the court
8 dismissed the Secretary's petition for an injunction, noting that "Congress is cognizant of the
9 need to set forth explicitly the authority of an administrator or agency to seek enforcement
10 relief in federal court." *Id.* at 676, 675.

11 Neither the Department of Agriculture nor the Department of the Interior, nor their
12 officials, have specific statutory authority to bring the claims alleged here. Indeed, these
13 federal officers and agencies have alleged no statutory authorization for bringing these claims
14 against NFRC. Although the Administrative Procedures Act authorizes an affected or
15 aggrieved individual to sue a federal official in his official capacity, that Act provides no
16 authorization for an agency or official to sue an individual. See 5 U.S.C. § 702. "While
17 cases may be found in which a department or bureau of the Government has been suffered to
18 assert rights, the Department of Agriculture . . . is an agency of the Government, not
19 empowered to sue or be sued in evasion of sovereign immunity." *United States Dep't of*
20 *Agriculture v. Hunter*, 171 F.2d 793, 795 (5th Cir. 1949); cf. *Cumberland Village Housing*
21 *Assocs. v. Inhabitants of Town of Cumberland*, 609 F. Supp. 1481 (D. Me. 1985) (Secretary
22 of Agriculture specifically authorized pursuant to 7 U.S.C. § 1981(e) to bring suit to pursue
23 government claims for loans or obligations administered under the Consolidated Farm and
24 Rural Development Act).

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26
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- 1 2. *Even if the requested relief were made in the name of the United States the*
2 *Government lacks statutory authority to bring these specific claims; moreover*
3 *the United States is not a party to this lawsuit and is thus not NFRC's "co-*
 party."

4 The specific claims alleged in these cases against NFRC would be improper even if
5 they had been brought in the name of the United States rather than in the names of federal
6 agencies and their officers. The United States cannot sue without independent statutory
7 authorization. See *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979); *United*
8 *States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980).

9 The Government has cited no statutory or other authorization for its unprecedented
10 effort to force private citizens into court as defendants in a declaratory judgment action testing
11 the legality of government action. Moreover, even if the United States could show some
12 statutory authority to bring these particular claims, the United States is not currently a party
13 to this lawsuit and therefore is not NFRC's "co-party," and cannot assert cross-claims against
14 it pursuant to Rule 13(g).

- 15 3. *The Government's cross-claims are not proper subjects for declaratory*
16 *judgment since the cross-claims are compulsory counterclaims to the claims*
 NFRC filed first against the Government in the District of Columbia action,
 and should be decided in that forum.

17 Rule 13(a) requires a defendant in a case to assert as a compulsory counterclaim any
18 claim that

19 arises out of the transaction or occurrence that is the subject
20 matter of the opposing party's claim and does not require for its
21 adjudication the presence of third parties of whom the court
 cannot acquire jurisdiction.

22 Fed. R. Civ. P. 13(a). This rule applies to counterclaims by the United States and its
23 agencies and officials. *In re FTC Corporate Patterns Report Litigation*, 432 F. Supp. 274,
24 283 n.15 (D.D.C. 1977). The Rule "bars a party who failed to assert a compulsory
25 counterclaim in one action from instituting a second action in which that counterclaim is the
26 basis of the complaint." *Seattle Totems, Etc. v. National Hockey League*, 652 F.2d 852, 854

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(9th Cir. 1981).

The Ninth Circuit has made clear that such tactics are contrary to the central purposes of the Declaratory Judgment Act:

[T]he fact that another action, involving substantially the same issue, is pending in a state or federal court is a potent factor in discretionary refusal to assume jurisdiction. This conclusion follows from the central purpose of the Declaratory Judgment Act, which is to provide the opportunity to clarify rights and legal relationships without waiting for an adversary to file suit.

Fireman's Fund Ins. Co. v. Ignacio, 860 F.2d 353, 354 (9th Cir. 1988). Asserting compulsory counterclaims in a new action by requesting declaratory judgment on those claims has been firmly disapproved as a misuse of the declaratory judgment procedure:

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

Hanes Corp. v. Milard, 531 F.2d 585, 593 (D.C. Cir. 1976); *see also Continental Cas. Co. v. Robsac Industries*, 947 F.2d 1367, 1371 (9th Cir. 1991) ("[I]f a declaratory judgment suit is defensive or reactive, that would justify a court's decision not to exercise jurisdiction").

Whether to entertain a request for declaratory relief is within the sound discretion of the district court. *Public Affairs Assoc. Inc. v. Rickover*, 369 U.S. 111, 112 (1962). "[C]ourts have disallowed declaratory judgment when the purpose of the suit is to deprive a plaintiff of his choice of forum." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 670 F. Supp. 424, 432 (D.D.C. 1987). Courts have recognized the "interest in avoiding use by litigants of declaratory judgment actions as a means of forum shopping." *Continental Cas. Co.*, 947 F.2d at 1371. "The declaratory remedy is *not a tactical device* whereby a party who would be a defendant in a coercive action may choose to be plaintiff if he can beat the other party to the courthouse." *State Farm Fire and Casualty Co. v. Taylor*, 118 F.R.D. 426, 431 (M.D.N.C. 1988) (emphasis in original).

There can be no doubt that the policy against defensive declaratory judgments calls for

CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT TO RULE 12(f) - 14.

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1 dismissing the Government's "cross-claims" against NFRC. It is difficult to imagine a more
2 obvious example of claims that merely anticipate defenses that should properly be asserted as
3 compulsory counterclaims in the first-filed suit than the Government's "cross-claims," which
4 merely attach the plaintiffs' complaint and ask the court to declare that none of the claims in
5 the complaint has merit.³

6 Another factor weighing in favor of dismissing the Government's request for
7 declaratory relief and allowing the claims to be heard by the court in which the claims were
8 first filed, is the fact that all of the parties are before that court and not before this one. See
9 *Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620, 628 (D.C. Cir. 1975). Fourteen
10 of the 15 plaintiffs in the D.C. action are not parties to this case and cannot be joined since
11 they are not subject to personal jurisdiction in the Western District of Washington. A decision
12 against NFRC in this court would exclude the other 14 plaintiffs and could severely prejudice
13 them.

14 C. *The Government has failed to join indispensable parties under Rule 19 and thus the*
15 *cross-claims should be dismissed pursuant to Rule 12(b)(7).*

16 Federal Rule of Civil Procedure 19(a) provides in pertinent part that:

17 (a) **Persons to Be Joined if Feasible.** A person who is subject
18 to service of process and whose joinder will not deprive the
19 court of jurisdiction over the subject matter of the action shall
20 be joined as a party in the action if (1) in the person's absence
21 complete relief cannot be accorded among those already parties,
22 or (2) the person claims an interest relating to the subject of the
23 action and is so situated that the disposition of the action in the
24 person's absence may (i) as a practical matter impair or impede
25 the person's ability to protect that interest or (ii) leave any of the
26 persons already parties subject to a substantial risk of incurring
double, multiple, or otherwise inconsistent obligations by reason
of the claimed interest.

23 Fed. R. Civ. P. 19(a).

24
25 ³ This is true for all the requests for declaratory judgment made here, including requests
26 regarding claims formerly asserted in the *Thomas* case, as those declaratory judgment claims
are also compulsory counterclaims under Rule 13(a) and must be asserted in the pending
District of Columbia action or not at all.

CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION
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12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATE-
MENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT
TO RULE 12(f) - 15

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1 An absent party who qualifies as a person "to be joined if feasible" under Rule 19(a)
2 is known as a "necessary" party. *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th
3 Cir. 1991). If a necessary party cannot be joined due to jurisdictional or other limitations,
4 a determination is made under Rule 19(b) whether the party is "indispensable." If it is the
5 action must be dismissed due to the party's absence. *Id.*; *Makah Indian Tribe v. Verity*, 910
6 F.2d 555, 558 (9th Cir. 1990).

7 The Government has already admitted that the former plaintiffs in the dismissed
8 *Thomas* action, as well as the plaintiffs in *Dombeck* and the *Association of O & C Counties*
9 cases, satisfy the "necessary parties" requirement of Rule 19(a). In their Memorandum in
10 Support of Federal Defendants' Motion to Join NFRC et al., filed with this court on July 14,
11 1994, the Government argued that "the former plaintiffs in *NFRC v. Thomas* should be joined
12 in these actions under Rule 19(a)(2)." *See* Govt's. Memo. at 4; *see also id.* at 21 n.11 ("The
13 reasoning in this brief is in most, if not all, respects equally applicable to support joinder in
14 these actions of the parties to the actions stayed in the District Court for the District of
15 Columbia, *NFRC v. Dombeck*, No. 94-1031 TPJ (D.D.C.), and *AO&CC v. Babbitt*, No. 94-
16 1044 TPJ (D.D.C.)").

17 Indeed, the Government asserted that "multiple and inconsistent obligations might arise
18 should *Thomas* plaintiffs not be joined under Rule 19(a)(2)(ii);" that "the *Thomas* plaintiffs
19 have asserted interests at issue in this litigation that, if valid, would be prejudiced without the
20 parties' joinder under Rule 19(a)(2)(i);" that "absent joinder, there is a strong likelihood that
21 the interests of the *Thomas* plaintiffs in litigating Claims against SEIS and Alternative 9 will
22 be impaired;" and that "the interest *Thomas* plaintiffs have asserted in securing relief in form
23 of additional timber sales is at issue in this litigation." *Id.* at 7, 9, 10, and 13.

24 Yet these entities and individuals whom the Government has admitted are necessary
25 to this litigation and whom the Government has also admitted will be prejudiced by being
26 absent from this litigation, are not subject to the personal jurisdiction of this court, and their

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1 absence requires dismissal of this action or at least dismissal of the cross-claims asserted
2 against NFRC. The non-NFRC plaintiffs in the former *Thomas* case are all residents of
3 Oregon or Washington, D.C., and are not subject to personal jurisdiction in the Western
4 District of Washington. Similarly, the plaintiff in the *Association of O & C Counties* case is
5 a group of Oregon counties that is also not amenable to personal jurisdiction in this forum.

6 Rule 19(b) provides that the following factors must be considered in determining
7 whether to dismiss an action when necessary parties cannot be made a party to the action:

8 [F]irst, to what extent a judgment rendered in the person's
9 absence might be prejudicial to the person or those already
10 parties; second, the extent to which, by protective provisions in
11 the judgment, by the shaping of relief, or other measures, the
12 prejudice can be lessened or avoided; third, whether a judgment
13 rendered in the person's absence will be adequate; fourth,
14 whether the plaintiff will have an adequate remedy if the action
15 is dismissed for nonjoinder.

16 Fed. R. Civ. P. 19(b); *Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992).

17 Each of these factors weighs in favor of dismissal.⁴ The Government has already
18 admitted that the first factor is satisfied, having argued in its joinder brief that "absent joinder,
19 there is a strong likelihood that the interests of the *Thomas* plaintiffs in litigating claims
20 against the SEIS and Alternative 9 will be impaired." Memo. in Support of Federal
21 Defendants' Motion to Join, at 10. The second factor is also satisfied: there can be no
22 "shaping of relief" to "lessen prejudice" here since the Government has consistently claimed
23 that the driving motive behind bringing the cross-claims against NFRC is to "bar claims in
24 potential subsequent litigation by the *NFRC v. Thomas* plaintiffs". *Id.* at 9. If the judgment
25 or relief here is "shaped" to avoid the inevitable prejudice that the *Thomas*, *Dombeck*, and
26

⁴ These factors are all relevant to determining whether the absent parties in this case are indispensable, since the claims of the absent parties are not severable from the public rights at issue in this action, and the Government has claimed that the absent parties' claims may not survive this litigation. See Memo. In Support of Federal Defendants' Motion to Join, at 10-13; *Shermoen v. U.S.*, 982 F.2d 1312, 1319 (9th Cir. 1992); compare *National Licorice Co. v. National Labor Relations Bd.*, 309 U.S. 350 (1940).

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1 *Association of O & C Counties* plaintiffs would otherwise face, then the alleged basis for
2 granting leave to assert cross-claims against NFRC evaporates.⁵

3 The Government has also admitted that the third factor for dismissal is satisfied here:
4 it has consistently argued that any judgment rendered without these absent plaintiffs will be
5 inadequate. Finally, the fourth factor is also satisfied: the Government will have an adequate
6 remedy if the action is dismissed for nonjoinder, because all the "cross-claims" for declaratory
7 relief can and should be asserted in the pending *Dombeck* and *Association of O & C Counties*
8 cases as they are compulsory counterclaims to the claims made in those pending cases.

9 ***D. Venue over the cross-claims is improper in the Western District of Washington and***
10 ***the cross-claims should be dismissed pursuant to Rule 12(b)(3).***

11 By attaching the *NFRC v. Dombeck* complaint pending in the District Court for the
12 District of Columbia and requesting declaratory relief on the claims alleged therein, the
13 Government is improperly attempting to circumvent the D.C. District Court's ruling that
14 venue for those claims is not proper in the Western District of Washington.

15 On June 30, 1994 Judge Jackson denied the Government's motion to transfer the
16 *Dombeck* case, holding that "transfer of this case to the Western District of Washington . .
17 . is not permitted under 28 U.S.C. § 1404(a) because venue does not lie in that district." The
18 Government is bound by that ruling, and its filing of the declaratory judgment cross-claims
19 is simply an attempt to circumvent that decision and to achieve a *de facto* transfer, to the
20 forum of the Government's choice, through the declaratory judgment device. This should not
21 be permitted.

22 Moreover, the statutory basis for venue the Government cites, 28 U.S.C. § 1391(e),
23 does not support venue in this district. See Amended Answer ¶ 5. Section 1391(e) governs

24
25 ⁵ The Ninth Circuit has also held that the availability of amicus status or the absent
26 party's ability to voluntarily intervene does not minimize the potential prejudice facing an
absent party. *Confederated Tribes*, 928 F.2d at 1500; *Makah Indian Tribe v. Verity*, 910 F.2d
555, 560 (9th Cir. 1990).

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"civil action[s] in which a defendant is an officer or employee of the United States or any agency thereof . . ." Yet the cross-claim defendant, NFRC, is not an officer or employee of the United States. For this additional reason venue is improper in this district.

II. THE GOVERNMENT SHOULD BE ORDERED TO AMEND ITS CROSS-CLAIMS PURSUANT TO RULE 12(e) TO MAKE THEM MORE DEFINITE AND CERTAIN, IN THAT THE CROSS-CLAIMS ARE VAGUE AND AMBIGUOUS AS THEY REQUIRE NFRC TO PLEAD IN RESPONSE TO ALLEGATIONS MADE IN ITS OWN COMPLAINTS AND THE CROSS-CLAIMS INCORPORATE ALLEGATIONS THAT THE GOVERNMENT HAS PREVIOUSLY DENIED.

Federal Rule of Civil Procedure 12(e) states in pertinent part:

If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

Fed. R. Civ. P. 12(e). A Rule 12(e) motion should be granted when the pleading at issue "fail[s] to set forth a short and plain statement of the claim showing that the pleader is entitled to relief," or when the claims for relief are not set out in separate counts as required by Rule 10(b). *Resolution Trust Corp. v. Hess*, 820 F. Supp. 1359, 1370-71 (D.Utah 1993). Additionally, "if an opposing party cannot formulate a response because the factual allegations are so sparse, it is entitled to a more definite statement" under Rule 12(e). *Venta, Inc. v. Frontier Oil & Refining Co.*, 827 F. Supp. 1526, 1530 (D. Colo. 1993).

As described in Part I.A.3 above, the Government's "cross-claims" do not separately set forth factual allegations or claims for relief, but instead simply append the complaints NFRC has filed in the District of Columbia litigation and seek a declaration that "the ROD and the FSEIS meet the standard of review set forth in 5 U.S.C. § 706(2)(A) (C) and (D) in respect of each claim asserted in the complaints annexed as Exhibits A and B." See Amended Answer at ¶ 25. As discussed previously, these claims the Government apparently incorporates include and are dependent on factual and legal assertions that the Government has previously denied.

CROSS-CLAIM DEFENDANT NFRC'S MEMO. IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIMS PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(3), 12(b)(6), AND 12(b)(7); MOTION FOR MORE DEFINITE STATEMENT PURSUANT TO RULE 12(e); AND MOTION TO STRIKE PURSUANT TO RULE 12(f) - 19

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1 The Government's cross-claims are vague and ambiguous in that it is entirely unclear
2 what allegations, if any, the Government is making with regard to each claim asserted in
3 NFRC's complaints and incorporated in the cross-claims. All of the factual allegations made
4 in the complaints are incorporated in each claim for relief, and many of these allegations are
5 inseparable from the claims themselves. The Government must be required to clearly plead
6 the factual and legal allegations it is asserting in support of its cross-claims for declaratory
7 relief.

8 **III. THE GOVERNMENT'S CROSS-CLAIMS SHOULD BE STRICKEN**
9 **PURSUANT TO RULE 12(f) IN THAT THE CROSS-CLAIMS ARE**
10 **IMPROPERLY ASSERTED AGAINST NFRC IN CASES IN WHICH**
11 **NFRC NEVER INTERVENED.**

12 The Government's cross-claims are asserted against NFRC as a pleading in the
13 consolidated cases *Seattle Audubon Society, et al. v. Lyons, et al.*, Civ. No. C92-479WD;
14 *Save the West v. Lyons, et al.*, Civ. No. C94-758WD; *Native Forest Council v. Babbitt, et*
15 *al.*, Civ. No. C94-803WD; and *Sierra Club v. Espy, et al.*, Civ. No. C94-820WD. These
16 cases were consolidated in 1994 after the complaints challenging the 1994 ROD and Forest
17 Plan were filed.

18 The only one of these lawsuits in which NFRC ever intervened is *Seattle Audubon*
19 *Society, et al. v. Lyons, et al.*, Civ. No. C92-479WD. Accordingly, assuming *arguendo* that
20 NFRC is still the Government's "co-party" in the SAS case despite the fact that this court has
21 held that the issues on which NFRC intervened are "moot," NFRC is only the Government's
22 co-party in the SAS case and not in the other cases later consolidated with SAS. The
23 Government's Amended Answer Asserting Cross-Claims should be stricken pursuant to Rule
24 12(f) to the extent that the cross-claims are pleaded in the non-SAS cases.

25 **CONCLUSION**

26 For the foregoing reasons NFRC respectfully requests that this Court grant its motion
to Dismiss the Cross-Claims pursuant to Federal Rule of Civil Procedure 12, subparts

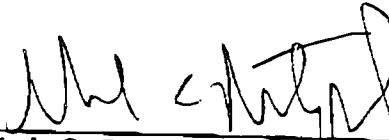
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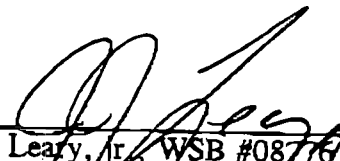
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1 12(b)(1), 12(b)(3), 12(b)(6) and 12(b)(7); or in the alternative that the court grant NFRC's
2 Rule 12(e) motion for more definite statement and its Rule 12(f) motion to strike.

3 Dated this 8th day of September, 1994.

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11 J. J. Leary, Jr., WSB #08716
12 James R. Hennessey, WSB #19363
13 Smith & Leary

14 Of Attorneys for Cross-Claim
15 Defendant Northwest Forest
16 Resource Council
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)
Plaintiffs,)

vs.

JAMES LYONS, in his official capacity as)
Assistant Secretary of Agriculture, et al.,)
Defendants,)

vs.

NORTHWEST FOREST RESOURCE)
COUNCIL,)
Cross-Claim Defendant.)

No. C92-479WD

CROSS-CLAIM DEFENDANT
NORTHWEST FOREST RESOURCE
COUNCIL'S MEMORANDUM IN
SUPPORT OF MOTION TO
TRANSFER

CROSS-CLAIM DEFENDANT NORTHWEST FOREST
RESOURCE COUNCIL'S MEMORANDUM IN SUPPORT OF
MOTION TO TRANSFER - 1

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1
2 SAVE THE WEST,

3 Plaintiff,

No. 94-758WD

4 vs.

5 JAMES LYONS, et al.,

6 Defendants.

7
8 NATIVE FOREST COUNCIL,

9 Plaintiff,

No. C94-803WD

10 vs.

11 BRUCE BABBITT, et al.,

12 Defendants.

13
14 THE SIERRA CLUB,

15 Plaintiff,

No. C94-820WD

16 vs.

17 MICHAEL ESPY, et al.,

18 Defendants.

19
20 **INTRODUCTION**

21 On June 30, 1994 the Honorable Thomas P. Jackson, federal district court judge for
 22 the District of Columbia, denied the Government's motion to transfer the claims alleged in
 23 *Northwest Forest Resource Council v. Dombeck*, Civ. No. 94-1031-TPJ to the Western District
 24 of Washington for consolidation with these cases. By filing "cross-claims" that simply attach
 25 NFRC's *Dombeck* and *Thomas* complaints and seeking a declaration that judgment should be
 26 awarded in its favor the Government has circumvented Judge Jackson's ruling. The "cross-
 claims" seeking declaratory judgment on the *Dombeck* claims should be transferred back to
 the District Court for the District of Columbia, and because the *Thomas* claims are related to

CROSS-CLAIM DEFENDANT NORTHWEST FOREST
 RESOURCE COUNCIL'S MEMORANDUM IN SUPPORT OF
 MOTION TO TRANSFER - 2

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the claims asserted in *Dombeck* those "cross-claims" should be transferred to the D.C. District Court as well.

ARGUMENT

I. THE INTERESTS OF JUSTICE AND THE CONVENIENCE OF PARTIES FAVOR TRANSFER OF THESE CROSS-CLAIMS.

Transfer of the Government's cross-claims against NFRC is appropriate under 28 U.S.C. § 1404(a), which provides that:

For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Both the interests of justice and the convenience of parties favor transfer of the cross-claims asserted against NFRC.

A. The threshold test for transfer is satisfied because the cross-claims were originally brought in the District of Columbia.

Section 1404(a)'s threshold requirement for transfer is that transfer may only be ordered to a district in which the action "might have been brought." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964).

The cross-claims, which merely incorporate NFRC's complaints alleging claims against the Government, clearly "might have been brought" in the District of Columbia because they were indeed initially brought in that district by NFRC. Transfer to that district is thus appropriate under this portion of section 1404(a).

B. Transfer will further the interests of justice.

1. The Government should not be permitted to relitigate Judge Jackson's ruling.

The Government tried once to have the claims alleged by NFRC in the *Dombeck* action transferred to this forum, and its request was denied by Judge Jackson in his June 30, 1994 order denying the Government's motion to transfer. In direct contravention of that order the Government has effected a *de facto* transfer of those claims, by filing "cross-claims" for

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1 declaratory relief that simply append the *Dombeck* and *Thomas* complaints and request a ruling
2 on the claims made by NFRC in those complaints.

3 The interests of justice require that the Government's evasion of Judge Jackson's order
4 be rejected and these "cross-claims" be transferred back to that forum. The Ninth Circuit has
5 held that where a party has already litigated a motion to transfer in one court and then seeks
6 to have a second court rule again on the issue, the first court's ruling on transfer should be
7 binding. "The better rule is to bar reconsideration of these matters unless there is some
8 indication that appellants were not afforded a full and fair opportunity to litigate these matters
9 before the [first] court." *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 413 (9th Cir. 1985).

10 2. *The "cross-claims" should be asserted as compulsory counterclaims in the*
11 *first-filed D.C. litigation.*

12 The interests of justice also favor transferring these cross-claims for declaratory
13 judgment back to the District of Columbia, because the cross-claims are in reality compulsory
14 counterclaims to NFRC's claims pending in the *Dombeck* lawsuit in the District of Columbia.
15 The Ninth Circuit has disapproved asserting jurisdiction over claims for declaratory judgment
16 such as these:

17 [T]he fact that another action, involving substantially the same
18 issue, is pending in a state or federal court is a potent factor in
19 discretionary refusal to assume jurisdiction. This conclusion
follows from the central purpose of the Declaratory Judgment
Act, which is to provide the opportunity to clarify rights and
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1 *Hanes Corp. v. Milard*, 531 F.2d 585, 593 (D.C. Cir. 1976); *see also Continental Cas. Co.*
2 *v. Robsac Industries*, 947 F.2d 1367, 1371 (9th Cir. 1991) ("[I]f a declaratory judgment suit
3 is defensive or reactive, that would justify a court's decision not to exercise jurisdiction").

4 3. *The D.C. Court has unique familiarity with NFRC's FACA claims, and no*
5 *FACA claims are asserted by the plaintiffs in these cases.*

6 Another important factor weighing heavily in the interest of justice, and in favor of
7 transferring these cross-claims back to the District of Columbia, is that court's familiarity with
8 the Federal Advisory Committee Act ("FACA"), and the specific FACA issues raised in the
9 *Dombeck* and *Thomas* complaints relating to the Forest Ecosystem Management Assessment
10 Team ("FEMAT"), arising out of *NFRC v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994) (Jackson,
11 J.).

12 The FACA claims in the *Dombeck* and *Thomas* complaints challenging the Forest
13 Plan's reliance on the FEMAT Report arise directly from the illegality found in *NFRC v.*
14 *Espy*. If these claims are not transferred back to the District of Columbia many of the issues
15 in the *Espy* case might have to be relitigated, although collateral estoppel would apply to the
16 judgment in that case, in order to demonstrate that the illegality of the FEMAT process
17 unlawfully tainted the resulting Plan. Such relitigation would be wasteful, duplicative and
18 contrary to "the interest of justice."

19 C. *The balance of conveniences weighs in favor of transfer.*

20 To determine whether the "balance of conveniences" favors transfer under Section
21 1404(a), courts "must balance the preference accorded plaintiff's choice of forum with the
22 burden of litigating in an inconvenient forum." *Decker Coal Co. v. Commonwealth Edison*
23 *Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In this case, this consideration weighs in favor of
24 *NFRC's* choice of forum, because *NFRC* is the true plaintiff with respect to the Government's
25 cross-claims, which seek a declaratory judgment on the claims *NFRC* raised in the District
26 of Columbia.

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1 The Ninth Circuit also considers both "private and public interest factors": (1) relative
2 ease of access to source of proof; (2) availability of compulsory process for attendance of
3 unwilling witnesses and cost of attendance of willing witnesses; (3) possibility of view of
4 premises, if view appropriate; (4) court congestion; (5) local interest in having localized
5 controversies decided at home, particularly with respect to diversity cases; (6) the avoidance
6 of unnecessary problems in conflict of laws; and (7) unfairness of burdening citizens in an
7 unrelated forum with jury duty. *Id.* (citations omitted). The balance of these factors relevant
8 to this case weighs in favor of transferring the cross-claims to the District Court for the
9 District of Columbia.

10 Access to sources of proof will be eased by transferring venue to Washington D.C.,
11 as the decision-makers who adopted the ROD reside there. Moreover, the administrative
12 record on these claims is located in Washington, D.C. and Portland. None of the records is
13 in Seattle. Additionally, documentary evidence has for the most part already been made
14 available to the parties.

15 The availability of compulsory process for unwilling witnesses also favors transfer.
16 The Government has previously claimed that the plaintiffs and former plaintiffs in the
17 *Dombeck, Thomas*, and *O & C Counties* cases are necessary parties to this litigation. To the
18 extent that that is true, personal jurisdiction cannot be asserted over these individuals and
19 entities in the Western District of Washington, whereas most of them are present in the
20 pending District of Columbia litigation.

21 The other relevant factor listed by the Ninth Circuit also favors transfer: if the cross-
22 claims are transferred to the District of Columbia, unnecessary problems with conflicts of laws
23 can be avoided. By presenting NFRC's complaints which were filed in the District of
24 Columbia to this court and seeking a declaration that the Government is entitled to judgment
25 on the claims therein, the Government has created a question regarding which law should
26 govern those claims -- D.C. Circuit or 9th Circuit? This unnecessary problem would be

CROSS-CLAIM DEFENDANT NORTHWEST FOREST
RESOURCE COUNCIL'S MEMORANDUM IN SUPPORT OF
MOTION TO TRANSFER - 6

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1 avoided by transfer of these claims back to the District of Columbia, where the affirmative
2 requests for relief are pending.

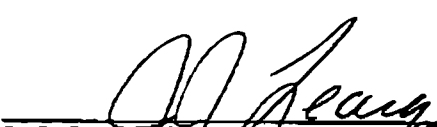
3 The other factors cited in *Decker Coal* are not relevant here: there is no need to view
4 any premises; all parties agree that these issues will be decided by motion and that there will
5 be no trial and thus no concern for potential jurors; and the subject of these claims is not a
6 "localized controversy" but instead deals with the President's forest plan, an issue of national
7 import. Transfer to the District Court for the District of Columbia is appropriate.

8 CONCLUSION

9 The Government's cross-claims, which merely seek declaratory relief on the claims
10 filed in the District of Columbia by NFRC, should be transferred to the District of Columbia,
11 if this court denies NFRC's pending Motion to Dismiss Cross-Claims. The claims could have
12 been brought in that district, that district was plaintiff NFRC's chosen forum, the balance of
13 conveniences weighs in favor of transfer, and transfer would be in the interest of justice.

14 Dated this 8th day of September, 1994.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

JAMES LYONS, in his official capacity as
Assistant Secretary of Agriculture, et al.,

Defendants,

vs.

NORTHWEST FOREST RESOURCE
COUNCIL,

Cross-Claim Defendant.

No. C92-479WD

MEMORANDUM IN SUPPORT OF
MOTION FOR CHANGE IN
BRIEFING SCHEDULE

MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE IN
BRIEFING SCHEDULE - 1

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SAVE THE WEST,

Plaintiff,

No. 94-758WD

vs.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

No. C94-803WD

vs.

BRUCE BABBITT, et al.,

Defendants.

THE SIERRA CLUB,

Plaintiff,

No. C94-820WD

vs.

MICHAEL ESPY, et al.,

Defendants.

ARGUMENT

THE COURT SHOULD CHANGE THE SUMMARY JUDGMENT BRIEFING SCHEDULE ON THE CROSS-CLAIMS, AND ORDER THAT OPENING BRIEFS BE FILED THIRTY DAYS AFTER THIS COURT'S DECISION ON NFRC'S PENDING MOTION TO DISMISS CROSS-CLAIMS.

Cross-claim defendant Northwest Forest Resource Council ("NFRC") has this day filed with the court a Motion to Dismiss Cross-Claims pursuant to Federal Rule of Civil Procedure 12(b)(1), 12(b)(3), 12(b)(6), and 12(b)(7).

That motion and supporting memoranda show that the Government's cross-claims should be dismissed because this court lacks jurisdiction over the declaratory judgment claims

MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE IN
BRIEFING SCHEDULE - 2

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made therein; the Government has failed to state claims upon which relief can be granted; the Government has failed to join indispensable parties; and venue is improper in this district.

As discussed in the memoranda filed in support of the Motion to Dismiss Cross-Claims, the Government lacks standing to assert the cross-claims for declaratory relief; the plaintiffs lack standing to challenge the 1994 Forest Plan; the cross-claims improperly request an advisory opinion from this court; and the cross-claims fail to satisfy the requirements of Rule 13(g). The memoranda also shows that the federal agencies and their officers who filed the cross-claims lack statutory authority to do so; and that the cross-claims are improper subjects for declaratory relief since they are compulsory counterclaims to claims filed first by NFRC in a pending case in the District of Columbia. Moreover, the Government has previously admitted that certain individuals and entities who are not subject to personal jurisdiction in this court are necessary parties to these cross-claims, and their absence necessitates dismissal of the cross-claims.

NFRC's Motion to Dismiss Cross-Claims is noted for the motion calendar for September 30, 1994. This is more than a week after summary judgment opening memoranda are due, and well into the time set for opposing memoranda. Because NFRC's Motion to Dismiss Cross-Claims could moot any need for summary judgment briefing on these cross-claims, and because NFRC wishes to avoid the time and expense necessary to begin briefing issues that may not need to be briefed in this court, NFRC requests that the summary judgment briefing schedule for the cross-claims be changed.

NFRC requests that summary judgment motions on the cross-claims and supporting memoranda be due thirty (30) days after this court rules on NFRC's Motion to Dismiss Cross-Claims (if the court denies the motion); opposition briefs be due twenty-eight (28) days later; and reply briefs be due sixteen (16) days after the opposition briefs.

This request for a change in the summary judgment briefing schedule would affect only the Government's pending cross-claims, and would not upset the briefing schedule set by the

MEMORANDUM IN SUPPORT OF MOTION FOR CHANGE IN
BRIEFING SCHEDULE - 3

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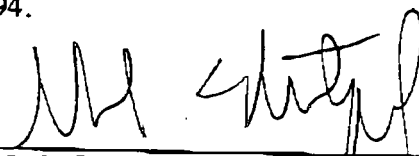
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1 court with the concurrence of the other parties on their pending claims. Moreover, the
2 changed briefing schedule would avoid needless and costly effort being spent on claims that
3 are the subject of a pending motion to dismiss, which motion raises serious questions as to the
4 propriety of the Government's cross-claims.

CONCLUSION

6 NFRC's motion for a change in the summary judgment briefing schedule on the cross-
7 claims filed by the Government until 30 days after this court rules on NFRC's pending Motion
8 to Dismiss Cross-Claims should be granted.

9 Dated this 8th day of September, 1994.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)

Plaintiffs,)

vs.)

JAMES LYONS, in his official capacity as
 Assistant Secretary of Agriculture, et al.,)

Defendants,)

vs.)

NORTHWEST FOREST RESOURCE
 COUNCIL,)

Cross-Claim Defendant.)

No. C92-479WD

MEMORANDUM IN SUPPORT OF
 MOTION TO SHORTEN TIME ON
 MOTION FOR CHANGE IN
 BRIEFING SCHEDULE

MEMORANDUM IN SUPPORT OF MOTION TO SHORTEN
 TIME ON MOTION FOR CHANGE IN BRIEFING SCHEDULE

- 1

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N01-9406\5JP01080.00P

1
2 SAVE THE WEST,

3 Plaintiff,

No. 94-758WD

4 vs.

5 JAMES LYONS, et al.,

6 Defendants.

7
8 NATIVE FOREST COUNCIL,

9 Plaintiff,

No. C94-803WD

10 vs.

11 BRUCE BABBITT, et al.,

12 Defendants.

13
14 THE SIERRA CLUB,

15 Plaintiff,

No. C94-820WD

16 vs.

17 MICHAEL ESPY et al.,

18 Defendants.

19 Cross-claim defendant Northwest Forest Resource Council ("NFRC") has this day filed
 20 a Motion for Change in Briefing Schedule. The motion seeks to avoid briefing on cross-
 21 claims that may be made moot, depending on the outcome of NFRC's Motion To Dismiss
 22 Pursuant to Federal Rule of Civil Procedure 12, subparts 12(b)(1), 12(b)(3), 12(b)(6), and
 23 12(b)(7), also filed with this court today.

24 Currently, summary judgment motions and supporting memoranda are due on
 25 September 21, 1994, opposing briefs are due October 19, 1994, and reply briefs are due
 26 November 4, 1994. The motion for a change in briefing schedule would not under the normal

MEMORANDUM IN SUPPORT OF MOTION TO SHORTEN
 TIME ON MOTION FOR CHANGE IN BRIEFING SCHEDULE

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1 motion calendar be noted until September 23, 1994 -- after the summary judgment briefing
2 schedule begins.

3 Cross-claim defendant NFRC therefore seeks to shorten the time on its motion to
4 September 16, 1994, so that NFRC can obtain a ruling on the motion before it must begin
5 preparing briefs regarding summary judgment on the cross-claims filed against it.

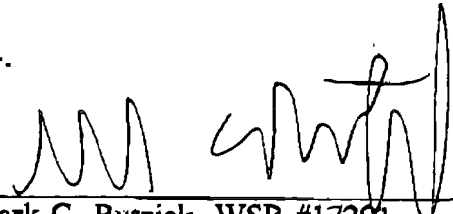
6 For these reasons the Court should grant NFRC's MOTION TO SHORTEN TIME
7 FOR CONSIDERATION OF MOTION FOR CHANGE IN BRIEFING SCHEDULE. The
8 Court should order the following schedule on the motion for a change in briefing schedule:

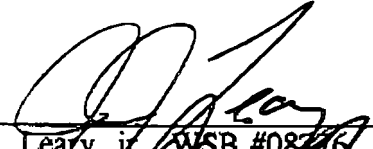
9 Any opposition: By September 13, 1994 (service by telefax).

10 Reply: By September 15, 1994 (service by telefax).

11 Motion Submitted: September 16, 1994.

12 Dated this 8th day of September, 1994.

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MEMORANDUM IN SUPPORT OF MOTION TO SHORTEN
TIME ON MOTION FOR CHANGE IN BRIEFING SCHEDULE

- 3

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*file w/
forest plan
litigation*

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MEMORANDUM

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DATE: September 13, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 14

FROM: Lisa Holden, Paralegal (202) 272-8051

MESSAGE: Attached are the Oppositions filed by federal defendants, SAS and Native Forest Council in response to NFRC's motion to change the briefing schedule.

THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

Civ. No. C92-479WD

JAMES LYONS, in this official
capacity as Assistant Secretary of
Agriculture, and the United States
Forest Service, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendants-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

Civ. No. C94-758WD

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

Civ. No. C94-803WD

BRUCE BABBITT, et al.,

Defendants.

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Environmental & Natural Resources Division
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1 THE SIERRA CLUB

2 v.

3 MICHAEL ESPY, et al.,

4 Defendants.

Civ. No. C94-820WD

CROSS-CLAIMANTS'
MEMORANDUM IN
OPPOSITION TO NFRC'S
MOTION TO CHANGE THE
BRIEFING SCHEDULE5
6 INTRODUCTION

7 Cross-Defendant, Northwest Forest Resources Council
8 ("NFRC") now seeks to change the briefing schedule established by
9 the other parties to this consolidated litigation, and approved
10 by this Court. See Order Amending Schedule (August 23, 1994).
11 In essence, NFRC requests that this Court bifurcate these
12 proceedings for purposes of summary judgment briefing, because it
13 wishes "to avoid the time and expense necessary" to brief the
14 merits before this Court. See Memorandum in Support of Motion
15 for Change in Briefing Schedule ("NFRC Memorandum") at 3. Such a
16 request is without merit. Instead, the briefing schedule for
17 NFRC's motion to dismiss should be consolidated with the schedule
18 already established for briefing on the merits in order to avoid
19 further unnecessary delay. See Order Amending Schedule at 3.
20 Id. Such consolidation of a motion to dismiss with a motion for
21 summary judgment is permitted by Rule 12. See Fed. R. Civ. P.
22 12(b). In support of its request that NFRC's proposed
23 bifurcation be denied, and that its consolidated schedule be
24 approved, Defendants argue as follows.

25
26 CROSS-CLAIMANTS' OPPOSITION TO
CROSS-DEFENDANTS' MOTION FOR
CHANGE IN BRIEFING SCHEDULE

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ARGUMENT

1 First, a consolidated schedule would comport with the
2 need for an efficient and expeditious resolution of challenges to
3 the federal old-growth ecosystem management strategy in a unified
4 proceeding, which all other parties and two federal district
5 courts have repeatedly acknowledged. See, e.g., Memorandum
6 Decision on NFRC's Motion to Stay Proceedings or Extend Time to
7 Answer ("Memorandum Decision") at 3 (Sept. 6, 1994).

8 Second, the bifurcated schedule which NFRC now seeks
9 would severely prejudice the Federal Defendants by requiring them
10 to divert time from the merits briefing, which must be filed on
11 September 21, 1994, in order to litigate this motion. Cf.
12 Memorandum Decision at 5 ("NFRC is entitled to seek another
13 forum, but not to have its efforts subject the other parties and
14 the public to delay and expense.") In addition, the prejudice to
15 the interests of judicial administration that such piecemeal
16 litigation would cause, is great. To require the parties and the
17 Court to address these interrelated claims separately and
18 successively will waste scarce judicial resources.

19 Third, NFRC's request for an extended schedule ignores
20 the importance of maintaining the approved schedule and the view
21 expressed by this Court that "[t]hese cases need to be decided,
22 and sent on for appellate review, as promptly and efficiently as
23 possible consistent with fairness to all parties." Memorandum
24 Decision at 3. In addition, NFRC removed itself from any
25 negotiations regarding a briefing schedule, despite repeated

26
CROSS-CLAIMANTS' OPPOSITION TO
CROSS-DEFENDANTS' MOTION FOR
CHANGE IN BRIEFING SCHEDULE

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efforts by the other parties to seek its input. See, e.g., Joint Status Report Re: Discovery at 5-6 (July 8, 1994). As the Court noted, "[t]he purpose of the [August 18, 1994] joint report was to permit the court to arrive at a new schedule which would fairly accommodate NFRC's issues as well as the others. The report was filed on August 18, but NFRC declined to comment on the schedule or to say how much time it would need." Memorandum Decision at 4. Thus, NFRC's voluntary lack of participation should not be rewarded here by needlessly extending a schedule which has previously been extended twice. See Memorandum Decision at 3-4.

NFRC will not be prejudiced by litigating the merits of the cross-claims simultaneously with its motion to dismiss. Those cross-claims seek adjudication of claims made by NFRC in the Dombeck and Thomas D.C. actions.

Even if NFRC were successful on its motion to dismiss, it would ultimately have to brief many of the cross-claims on summary judgment in the stayed Dombeck action, and, if it were to attempt to revive the Thomas action, those claims as well. Thus, NFRC's claims of prejudice only go to the contention that it should not have to brief the merits in this Court, a contention which has already been rejected.

In sum, NFRC will not be prejudiced by complying with the approved briefing schedule for summary judgment simultaneously with a schedule for briefing its motion to dismiss the cross-claims. Moreover, NFRC has shown no compelling reason

CROSS-CLAIMANTS' OPPOSITION TO
CROSS-DEFENDANTS' MOTION FOR
CHANGE IN BRIEFING SCHEDULE

- 4

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why it cannot comply with the current schedule, which has already
1 been extended twice. In contrast, the Court, the other parties,
2 and the public will surely be prejudiced by the piecemeal
3 litigation of the claims against the ROD and the FSEIS, which
4 allowance of the cross-claims was intended to prevent. As a
5 result, the interests of wise judicial administration and
6 fairness to all parties strongly favor consolidation of briefing
7 for NFRC's motion to dismiss with the approved summary judgment
8 briefing schedule.

CONCLUSION

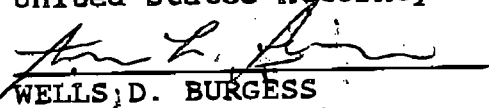
10 For the foregoing reasons NFRC's motion to change
11 the summary judgment briefing schedule is without merit and
12 should be denied, and the Court should order that briefing on
13 NFRC's motion to dismiss go forward upon the schedule for merits
14 briefing previously ordered. A proposed order is attached.
15 DATED this 12th day of September, 1994.

16 Respectfully submitted,

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Acting Assistant Attorney General

18 PETER D. COPPELMAN
19 Deputy Assistant Attorney General

20 KATRINA C. PFLAUMER
United States Attorney

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25 ANDREA L. BERLOWE
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CROSS-CLAIMANTS' OPPOSITION TO
CROSS-DEFENDANTS' MOTION FOR
CHANGE IN BRIEFING SCHEDULE

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CROSS-CLAIMANTS' OPPOSITION TO
CROSS-DEFENDANTS' MOTION FOR
CHANGE IN BRIEFING SCHEDULE

- 6

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

JAMES LYONS, et al.,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

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SAVE THE WEST,

Plaintiff,

v.

JAMES LYONS, et al.,

No. C94-758WD

Defendants.

NATIVE FOREST COUNCIL,

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BRUCE BABBITT, et al.,

Defendants.

No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

No. C94-820WD

SAS' RESPONSE TO NERC'S
MOTION TO SHORTEN TIME AND
TO MODIFY BRIEFING SCHEDULE

NERC has moved the Court to shorten time on its motion to amend the briefing schedule in this case so that briefing on the government's cross-claims for declaratory relief against NERC would proceed on a separate schedule from briefing on the plaintiffs' claims and would not commence until after the Court rules on NERC's pending motion to dismiss the government's cross-claims.

SAS does not oppose NERC's motion to shorten time on its motion to modify the briefing schedule.

SAS does, however, oppose NERC's underlying motion to modify the briefing schedule. There is no reason briefing of NERC's motion to dismiss cannot proceed concurrently with briefing on a motion by the government for summary judgment on its cross-claims under the current briefing schedule. To the extent NERC wishes

SAS' RESPONSE TO NERC'S MOTION TO SHORTEN TIME

1 to supplement its motion to dismiss with a motion for summary
2 judgment, that too can be accommodated within the current
3 schedule. Accordingly, the only schedule that should be adjusted
4 is the schedule for NFRC's motion to dismiss, which should be
5 coordinated with the overall schedule on motions for summary
6 judgment. Such an adjustment would produce the most compact and
7 comprehensive schedule for all of the parties.

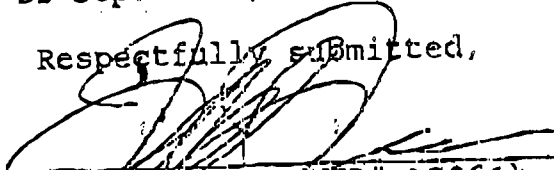
8 In the alternative, if the Court determines that some
9 adjustment of the briefing schedule is appropriate in light of
10 NFRC's motion, such an adjustment should be limited to the
11 schedule for the government's cross-claims for declaratory relief
12 and should not change the existing schedule for cross-motions for
13 summary judgment on the plaintiffs' claims. Such an alternative,
14 while less efficient for the Court and the parties, could be
15 workable because: (1) it would avoid any further delay in
16 briefing and resolving the plaintiffs' claims against the ROD and
17 FSEIS; and, (2) it would still allow this Court to hear all of
18 the claims against the ROD and FSEIS, albeit piecemeal. So long
19 as this piecemeal resolution of the case occurs as expeditiously
20 as possible, the overall goal of a comprehensive determination of
21 the claims against the ROD and FSEIS by one Court could still be
22 accomplished, although it is likely to require multiple hearings
23 and decisions by the Court.

24 For these reasons, SAS opposes NFRC's motion to adjust the
25 briefing schedule on the government's cross-claims for
26 declaratory relief and instead proposes that the schedule on
27

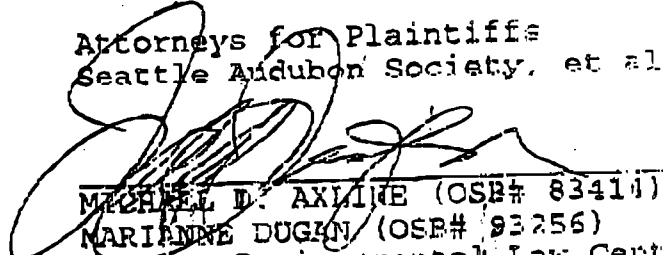
1 NERC's motion to dismiss should be adjusted to meet the existing
2 briefing and hearing schedule.

3 DATED: This 12th day of September, 1994.

4 Respectfully submitted,

5 
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9 705 Second Ave., Suite 203
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11 Attorneys for Plaintiffs
12 Seattle Audubon Society, et al.

13 
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19 Attorneys for Plaintiffs Lane
20 County Audubon Society and
21 Oregon Natural Resources Council

22 456NERC.912
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26
27

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY,
et al.,

Plaintiffs,

v.

JAMES LYONS, in his official
capacity as Assistant
Secretary of Agriculture,
and the UNITED STATES FOREST
SERVICE, an agency of the
United States,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-Intervenors.

SAVE THE WEST,

Plaintiff,

v.

NFC'S MEMORANDUM IN OPPOSITION
TO CHANGE IN BRIEFING SCHEDULE - 1

CIV. NO. 92-479 WD

NFC'S MEMORANDUM IN OPPOSITION
TO CHANGE IN BRIEFING SCHEDULE

(Served by FAX pursuant to
Court Order)

Civ. No. 94-758 WD

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1 JAMES LYONS, et al.,

2 Defendants.

3 NATIVE FOREST COUNCIL,

4 Plaintiff,

5 v.

6 BRUCE BABBITT, et al.,

7 Defendants.

8
9 THE SIERRA CLUB,

10 Plaintiff,

11 v.

12 MICHAEL ESPY, et al.,

13 Defendants.

Civ. No. C94-803WD

Civ. No. C94-820WD

14
15 Native Forest Council ("NFC") vehemently objects to any
16 further changes in the Briefing Schedule. This case has already
17 been delayed twice due to timber industry legal machinations, and
18 their continued attempts to obfuscate should not delay this case
19 one additional second. We believe the timber industry's request
20 for a delay is based on Motions that have previously been denied
21 and therefore their Motion is frivolous.

22
23 The basis for NFRC's request for a change in briefing schedule
24 is based on their FRCP 12(b) Motion to Dismiss. We do not believe
25 this Motion is a proper basis for a change in the briefing

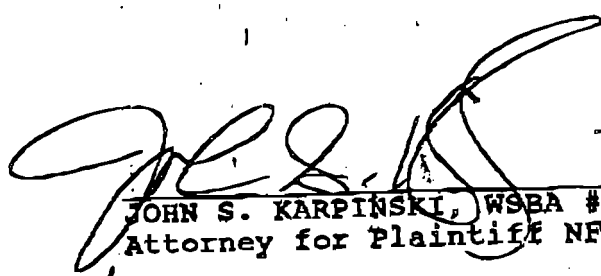
26
27
28 NFC'S MEMORANDUM IN OPPOSITION
TO CHANGE IN BRIEFING SCHEDULE - 2

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1 schedule. The vast majority of the claims raised are essentially
2 procedural claims as to whether the government can bring cross-
3 claims against the timber industry in this forum, issues that this
4 Court has already ruled on and the timber industry has not
5 requested reconsideration or appealed. The only other remaining
6 claim is NFRC's assertion that all Plaintiffs lack standing, which
7 could and should be required to be part of the Summary Judgment
8 briefing, not in an independent FRCP 12(b) Motion.

9
10 Besides the obvious delay, delay, delay, it appears the timber
11 industry's strategy is to continue to bring frivolous motions
12 before this Court to distract the other parties from preparing for
13 the upcoming Summary Judgment Motions. Please take whatever
14 actions are necessary to stop this NFRC abuse of process.

15 DATED this 12 day of September, 1994.

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22 JOHN S. KARPINSKI, WSBA #13142
23 Attorney for Plaintiff NFC
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27
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NFC'S MEMORANDUM IN OPPOSITION
TO CHANGE IN BRIEFING SCHEDULE - 3

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