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*File of Forest Plan
Litigation*

**U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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WASHINGTON, D.C. 20004**

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MEMORANDUM

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DATE: September 13, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 20

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

MESSAGE: Attached is NFRC's Reply Memorandum in Support of Plaintiffs' Motion to Modify Stay and For Preliminary and Permanent Injunction filed in the Dombeck case.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,
et al.,

Plaintiffs,

vs.

MICHAEL DOMBECK, Acting Director,
Bureau of Land Management, et
ano.,Defendants.

Civil No. 94-1031 TPJ

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS'
MOTION TO MODIFY STAY AND FOR
PRELIMINARY AND PERMANENT INJUNCTION

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INTRODUCTION

The Government has offered no valid reason why the first-filed rule should not bar the Government from prosecuting the declaratory judgment cross-claims in the Western District of Washington that are compulsory counterclaims in this case. In essence, the Government suggests just two reasons why this court should not enjoin the Western Washington cross-claims in deference to this earlier-filed case: it prefers to litigate these issues in Western Washington along with other cases involving the Forest Plan, and so does the judge in that district.

Neither reason can defeat the equitable application of the first-filed rule here. A defendant's wish to litigate in the forum of its choice -- rather than the forum of the injured party's choice -- carries no equitable weight under the first-filed rule. Nor does the D.C. Circuit assign any importance to the willingness of a judge in a competing forum to indulge the defendant's preferences.

Beyond merely reaffirming its wish to litigate in Western Washington, and showing the willingness of the judge in that district to let it do so, the Government ignores or concedes the key equitable factors supporting an injunction from this court: (1) 14 of the plaintiffs in this case are not and cannot be joined in Western Washington, (2) the Western Washington cross-claims were filed three months after this case, (3) the injured parties prefer to litigate in this forum, (4) the cross-claims are a blatant

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attempt to circumvent this court's denial of the transfer motion in this case, (5) NFRC will be irreparably prejudiced by the schedule proposed by the Government -- which has now been imposed by the Western Washington court, and (6) the unprecedented and impermissible nature of the cross-claims vastly complicates the proceedings in that district and guarantees ancillary litigation that is ultimately likely to nullify any decision on the "merits" of the cross-claims.

The Government's expressed interest in judicial "efficiency" is not real. Its forum selection strategy from the beginning has been fueled entirely by its belief that the court in Western Washington will bless the Forest Plan, while this court may not.

Allowing the cross-claims to proceed in Western Washington will confuse and expand the litigation over the Forest Plan, not expedite it. The result of forcing plaintiffs' commodity-oriented claims to be decided with the dissimilar preservation-oriented claims in Western Washington is to separate into different districts and circuits the two most similar cases challenging the Forest Plan: this case and the Association of O & C Counties case, thereby requiring two districts and two circuits to decide virtually identical issues under the Oregon & California Lands Act.

The Government does not dispute that due to the pendency of the Association of O & C Counties case in this court, all the litigation concerning the Forest Plan will not occur in Western Washington even if the Government succeeds in blocking this case.

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Its interest in "efficiency" ignores this basic point. This case should be decided together with the Association of O & C Counties case since the claims under the Oregon & California Lands Act, 43 U.S.C. 1181a, et seq., in the two cases so closely overlap. There are no claims under the Oregon & California Lands Act raised by any of the Western Washington plaintiffs.

For these reasons, the court should enjoin defendants Dombeck and Babbitt from prosecuting or pursuing in any manner the cross-claims filed by these defendants on August 12, 1994 in the Western District of Washington, and should order them to dismiss the cross-claims promptly.

STATEMENT OF ADDITIONAL FACTS

1. Since NFRC filed its motion on August 23, 1994 the court in Western Washington has adopted the extremely abbreviated briefing schedule proposed by the Government. The court closed discovery on September 9, 1994 (despite the fact that it was not completed) and ordered all summary judgment motions filed by September 21, 1994. *Seattle Audubon Society v. Lyons*, Order Amending Schedule (August 23, 1994) (Second Declaration of Mark C. Rutzick, Exhibit A).

2. Although NFRC moved for a stay of proceedings in Western Washington pending this court's ruling on the injunction motion, the court in Western Washington denied the motion. Second Rutzick Declaration, Exhibit B, Exhibit C. The court extended NFRC's time to answer the cross-claims by two days, and left the rest of the

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schedule intact. *Id.*

3. On September 8, 1994, NFRC moved to dismiss the cross-claims, Second Rutzick Declaration, Exhibits D (motion) and E (memorandum), and moved for a stay of proceedings pending the ruling on the motion. *Id.*, Exhibit F. The motion raises at least 11 procedural issues relating to the legal sufficiency of the cross-claims as pleaded by the Government. The motion to dismiss is noted for submission to the court on September 30, 1994.

Thus, at this point NFRC has no further discovery rights in the Western Washington case and all summary judgment motions are due September 21, yet its motion challenging the sufficiency of the cross-claims will not be decided until sometime after September 30. If the Washington court denies its motion to dismiss at that point, even if NFRC wanted to answer and file a counterclaim it could not move for summary judgment on the counterclaim under the schedule set by the Washington court.

ARGUMENT

THE COURT SHOULD ENJOIN THE WESTERN WASHINGTON CROSS-CLAIMS UNDER THE FIRST-FILED RULE TO AVOID IRREPARABLE INJURY TO PLAINTIFFS' RIGHT TO LITIGATE FAIRLY IN THE FORUM OF ITS CHOICE.

- A. The Government admits the court has the power to grant the requested injunction.

The Government's opposition to the injunction motion does not question the legal basis of the motion: that the first-filed rule allows a court to enjoin a later-filed action, that courts frequently enjoin a defendant from asserting a compulsory coun-

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terclaim in an independent declaratory judgment action in another forum, that the declaratory judgment procedure is not intended to allow a wrong-doer to race to the courthouse of its choice to select the forum in which to defend itself, that the first-filed rule applies unless there are compelling reasons why it should not, that the courts have recognized such compelling reasons in only a few extremely unusual cases, and that the court hearing the first-filed case should decide whether the later case can proceed. See Memorandum In Support Of Plaintiffs' Motion To Modify Stay And For Preliminary And Permanent Injunction at 6-12.

Nor does the Government seriously question that the injunctive power provided under the first-filed rule is available in this case. While it offers a technical defense that the first-filed rule does not apply in this case since the defendants' time to answer the complaint has not yet arisen, Opposition at 6 n. 3, that argument was expressly rejected by this court in *Timberland Co. v. Sanchez*, 129 F.R.D. 382, 384 n.3 (D.D.C. 1990).

Without otherwise disputing that the injunctive power exists, and without denying that it has done precisely what the first-filed rule was designed to avoid, the Government rests its entire argument on the assertion of equitable factors it believes weigh against an injunction in this case. Its argument is incomplete, one-sided and largely assumes the result it seeks. In reality, this is a classic case for the exercise of the court's injunctive powers under the first-filed rule.

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B. Plaintiffs' choice of forum is entitled to considerable weight, while the Government's choice of forum is entitled to no weight.

The Government paints NFRC and its 14 co-plaintiffs as disrespectful troublemakers because they have not chosen to acquiesce in the Government's desire -- and the desire of the court in Western Washington -- to force them to litigate in Western Washington. Opposition at 11. Its premise is certainly true: plaintiffs selected the District of Columbia as the forum in which to litigate their challenges to the Forest Plan, and they do not wish to litigate any of those challenges in the Western District of Washington. This position is so firm that NFRC and its co-plaintiffs in *NFRC v. Thomas*, No. 94-1032 (D.D.C.), chose to dismiss that case rather than litigate it in Western Washington. Voluntary dismissal of a case is expressly allowed under Fed. R. Civ. P. 41 (a)(1); an initial voluntary dismissal of a case is automatically without prejudice. *Id.*

Yet the Government treats the dismissal of the *NFRC v. Thomas* case as an insult to the judicial system. The Western Washington court, which expressed its wish to decide the *Thomas* case even before it was filed (see *Seattle Audubon Society v. Lyons*, Status Conference Transcript, April 20, 1994 (three weeks before *NFRC v. Thomas* was filed)), appears to agree. *Seattle Audubon Society v. Lyons*, Order, August 5, 1994. The cross-claim strategy devised by the Western Washington court and adopted by the Government has as its aim to punish the *Thomas* plaintiffs for their dismissal of the

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case by forcing them to litigate the case in Western Washington whether they like it or not -- and to litigate this case as well.

Thus, the Government objects to the requested injunction in this court precisely because the injunction would deny it the forum that, with the help of the Western Washington court, it has maneuvered itself into up to this point. Opposition at 3. In doing so, the Government assumes its choice of forum is proper and plaintiffs' is not.

This assumption by the Government is contrary to two controlling factors: (1) a plaintiffs' choice of forum is presumptively correct, and (2) this court has already decided that this case cannot be transferred to Western Washington. The Government's wish to the contrary is not a reason for this court to deny plaintiffs' their selected forum in this case, or to undo the court's decision on the transfer motion in this case through the backdoor approach used by the Government here.

While there are many equitable factors the court may consider in deciding whether to apply the first-filed rule, the defendants' choice of forum is not among them. See Memorandum In Support Of Plaintiffs' Motion To Modify Stay And For Preliminary And Permanent Injunction at 7-11. This court has held that a declaratory judgment action by a defendant is improper "when the purpose of the suit is to deprive a plaintiff of his choice of forum." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 670 F. Supp. 424, 432 n.10 (D.D.C. 1987).

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- C. The views of the Western Washington court are also not relevant to this court's exercise of equitable discretion under the first-filed rule.

The Government's other argument is that the court in Western Washington has endorsed (indeed, masterminded) the declaratory judgment cross-claims in that district, and this court should not, Opposition at 1-2, 4, or even may not, Opposition at 8, give any independent consideration to reaching a different conclusion as to whether those cross-claims should proceed.

The Government's argument is contrary to controlling authority in this circuit and elsewhere that the court in the earlier-filed action has the responsibility to apply the first-filed rule, and that the views of the competing court are not entitled to weight in applying the rule. Indeed, it appears that the injunctive power under the first-filed rule arose in large measure to protect a plaintiff from unfair treatment in the alternate forum of the defendant's choice. The views of the Western Washington court may well support the Government's preferences (though not all its arguments in this court), but those views should not influence this court's exercise of its equitable powers.

In *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975) the D.C. defendant had filed a later case in New York. The D.C. plaintiff moved to stay, transfer or dismiss the New York case, but the New York federal judge denied all the motions, allowing the New York case to proceed. *Id.* at 623. The D.C. Circuit held that "principles of comity and estoppel do not

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preclude a grant of injunctive relief . . . after an unsuccessful motion for a stay." *Id.* at 623 n.13. The court then affirmed an injunction against the New York case even though the New York judge had decided it should proceed. *Id.* at 627-29.

Other courts have uniformly reached the same result. In *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002 (8th Cir. 1993), the federal district court in the later-filed case in Texas had refused to stay or transfer the Texas case; the Eighth Circuit nonetheless affirmed an injunction against the Texas action, giving no weight to the views of the Texas judge. *Id.* at 1004-07; accord, *Warshawsky & Co. v. Arcata National Corp.*, 552 F.2d 1257 (7th Cir. 1977) (affirming injunction by Illinois court against later-filed California action after California federal judge refused to stay case, giving no weight to views of the California judge); *Telephonics Corp. and Fabrionics Corp. v. Lindly & Co.*, 291 F.2d 445, 447 (2d Cir. 1961) (affirming New York injunction against North Carolina federal case after North Carolina federal judge refused to stay case); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 45 and n.1 (2d Cir. 1961) (affirming New York injunction against Alabama federal court case after Alabama federal judge refused to stay case; New York judge "not required" to defer to Alabama judge's prior refusal to stay Alabama case, and decision not to do so "was a wise one indeed"); see *Asset Allocation & Management v. Western Employers Insurance Company*, 892 F.2d 566 (7th Cir. 1989) (affirming Illinois injunction against

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California federal court case while stay motion pending in California court, giving no weight to views of California federal judge).

The courts have held consistently that it is not appropriate for the second court to tell the first court how to apply the first-filed rule. *Texas Instruments v. Micron Semiconductor*, 815 F. Supp. 994, 999 (E.D. Tex. 1993) (second court may not "usurp" first court's role in applying first-filed rule); *Donaldson, Lufkin & Jenrette v. Los Angeles County*, 542 F. Supp. 1317, 1321 (S.D.N.Y. 1982).

In any event, despite its own clear preferences, the Western Washington court has acknowledged that this court has the power to decide whether to enjoin the cross-claims. Exhibit C at 3, 6 ("NFRG is entitled to seek another forum"; opining that discovery in that court "will be usable in the District of Columbia if that court grants the requested injunction.") The Western Washington court has never expressed an intention to limit this court's exercise of equitable discretion; under *Columbia Plaza Corp.* and the other cases cited above it could not do so.

D. **All the relevant equitable factors favor an injunction against the Western Washington cross-claims.**

The Government's discussion of equitable factors ends with its views and the views of the Western Washington court. It does not deny or even acknowledge any of the equitable factors that, under relevant precedent, favor an injunction: (1) 14 of the parties in this case are not and cannot be joined in Western Washington,

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Columbia Plaza Corp., 525 F.2d at 628, (2) the Western Washington cross-claims were filed three months after this case, *id.*, (3) the injured parties prefer to litigate in this forum, *Lewis v. National Football League*, 813 F. Supp. 1, 3-5 (D.D.C. 1992), (4) the cross-claims are a blatant attempt to circumvent this court's denial of the transfer motion in this case, *Yoder v. Herrold Commodities Inc.*, 630 F. Supp. 756, 761 (E.D. Pa. 1986).

Three other equitable factors also compel injunctive relief in this case.

1. The cross-claims will produce more duplicative litigation than they will avoid. Allowing the cross-claims to proceed will divide into different districts and circuits the two most similar cases challenging the Forest Plan: this case and *Association of O & C Counties*. This will guarantee that two districts and two circuits will have to decide virtually identical issues under the Oregon & California Lands Act. This duplication would not occur if the cross-claims are enjoined because none of the environmental plaintiffs in *Western Washington* asserts any claims under the Oregon & California Lands Act. The division of these virtually identical claims between different districts and circuits creates far more duplication, uncertainty and inefficiency than would be avoided if the cross-claims are forced into the otherwise adverse cases in *Western Washington*.

2. Irreparable prejudice to NFRC. NFRC will be irreparably prejudiced by the schedule proposed by the Government -- which has

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now been imposed by the Western Washington court.

a. The August 23 scheduling order in Western Washington was entered by the Western Washington court before NFRC had a fair opportunity to review the cross-claims and advise the court how it thought the cross-claims should be resolved, and before NFRC had any chance to test the legal sufficiency of the cross-claims in that court or this court.

b. The schedule deprives NFRC of any reasonable opportunity to defend against the cross-claims. Discovery was closed before NFRC could even review the Government's initial responses to the requests it served in this case (by agreement, notwithstanding the stay), or schedule any depositions as to the adequacy of the so-called "administrative record," even though FEMAT leader Jack Ward Thomas has now revealed that he verbally directed FEMAT team members to shred FEMAT documents to prevent their review by the public. In addition, in this case, a much broader range of depositions should have been appropriate since the case was brought by the Government and the court is not restricted to an administrative record. The discovery cutoff in Western Washington was not driven by any external constraint; it arose entirely from the Washington court's general desire to decide the case "quickly," and its desire to decide the newly-filed cross-claims at the same time as the plaintiffs' claims filed last May.¹

¹ Thus, (the Native Forest Council's proposed amicus brief (to which plaintiffs do not object) blames the wrong party for any (continued...))

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c. The scheduling order thus unfairly imposes unique and harsh discovery restrictions on NFRC that the environmental plaintiffs did not have to bear. Those groups were all given four months to pursue discovery from the Government, and completed all the discovery they wanted. NFRC alone was prejudiced by the scheduling order which denied it -- and no other party -- the right to pursue discovery for a reasonable period.

d. NFRC's summary judgment motion is due September 21 although its motion to dismiss -- raising at least 11 legal issues as to the sufficiency of the cross-claims -- will not be decided until sometime in October at the earliest. NFRC must address the merits of the cross-claims before their legal sufficiency has been determined, and even before it answers them. The schedule also fails to give NFRC adequate time to assemble material relevant to the merits of the cross-claims.

3. The unprecedented and impermissible nature of the cross-claims. These cross-claims are unprecedented in the history of the

¹ (...continued)
delay in resolution of its claims. Neither NFRC nor its co-plaintiffs have ever sought to link the decision on their claims to a decision on the Native Forest Council's challenges to the Forest Plan. Indeed, they have repeatedly urged separation of those claims. If anyone is at fault for any delay on the Native Forest Council's claims, it is the Government and the Western Washington court for insisting that all challenges to the Forest Plan be handled in a single mass summary judgment briefing schedule irrespective of the timing or nature of the parties' claims. Indeed, the result of the Government's protracted efforts to consolidate these cases in the forum of its choice has been to delay all the cases in both courts, which has benefited no one but the Government.

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American legal system. Neither the Government nor the Western Washington court has identified any prior case where a federal agency or officer has filed a claim (let alone a cross-claim) for a declaratory judgment that agency action does not violate the judicial review standards of the Administrative Procedures Act. As NFRC's recently-filed motion to dismiss shows, there does not appear to be any legal basis for the Government to proceed in this unprecedented manner, or for the court to rule on the cross-claims. (Even *amicus* Native Forest Council, no friend of NFRC, "does not generally approve" of the Government's approach, and notes that NFRC's motion raises "interesting procedural and substantive questions." Native Forest Council, *amicus curiae* brief at 8.) Thus, in addition to addressing the merits of the claims, the district court litigation in Western Washington, and ensuing appellate review, are certain to involve extensive briefing and argument on the 11 procedural issues raised in the motion to dismiss, vastly complicating the proceedings in that district and on appeal. Ultimately, appellate review is likely, in plaintiffs' view, to uphold one or more of these procedural defenses against the unprecedented cross-claims, nullifying the entire proceeding as to NFRC and returning everyone to square one with no resolution of the merits of the case.

CONCLUSION

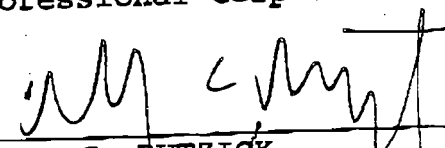
This court can bring this wasteful, counterproductive and ultimately fruitless exercise to an end with an injunction against

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further prosecution of the cross-claims. Plaintiffs' motion for a preliminary and permanent injunction prohibiting defendants Michael Dombeck, Acting Director of the Bureau of Land Management, and Bruce Babbitt, Secretary of Interior and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, from prosecuting or pursuing in any manner the cross-claims filed by these defendants on August 12, 1994 in the case captioned *Seattle Audubon Society v. Lyons et al.*, No. C92-479WD (W.D. Wash.) should be granted. The defendants should further be ordered to dismiss the cross-claims promptly.

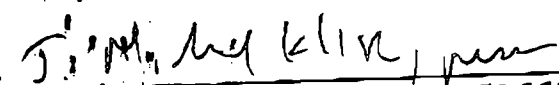
Dated this 12th day of September, 1994.

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MEMORANDUM

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DATE: September 12, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 6

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

MESSAGE: Attached are two orders from Judge Dwyer ruling on the motion for a protective order and SAS' motion to compel production of the privilege documents.

SEP 12 1994

AT SEATTLE
U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

NO. C92-479WD

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

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-
Intervenors.

SAVE THE WEST,

Plaintiff,

v.

NO. C94-758WD

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

NO. C94-803WD

BRUCE BABBITT, et al.,

Defendants.

579

THE SIERRA CLUB,
Plaintiff,
v.
MICHAEL ESPY, et al.,
Defendants.

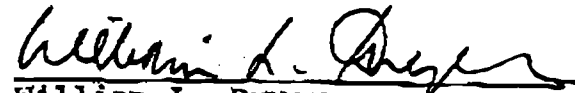
NO. C94-820WD

ORDER ON SAS'S MOTION
TO COMPEL PRODUCTION OF
DOCUMENTS WITHHELD ON
CLAIM OF PRIVILEGE

Plaintiffs Seattle Audubon Society, et al. ("SAS") have moved for an order compelling the federal defendants to produce 177 documents withheld on a claim of privilege. Of these, the attorney-client privilege or work product rule is claimed as to 84 documents, and the deliberative process privilege is claimed as to 176. It is not possible on the present record for the court to decide which of the 177 documents, if any, should be produced. The federal defendants are therefore directed to deliver numbered copies of them, not later than September 16, 1994, for in camera inspection. Any documents which the federal defendants elect to produce to the other parties need not be delivered for in camera inspection.

The clerk is directed to send copies of this order to all counsel of record.

Dated: September 12, 1994.


William L. Dwyer
United States District Judge

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SEP 12 1994

AT SEATTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

NO. C92-479WD

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

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-~~1~~
Intervenors.

SAVE THE WEST,

Plaintiff,

v.

NO. C94-758WD

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

NO. C94-803WD

BRUCE HABBITT, et al.,

Defendants.

ORD ON FED DEFTS' MTN
FOR PROTECTIVE ORD - 1

1 THE SIERRA CLUB,

2 Plaintiff,

3 v.

4 MICHAEL ESPY, et al.,

5 Defendants.

NO. C94-820WD

ORDER ON FEDERAL
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER RE
DISCOVERY SOUGHT BY SAS

7 The federal defendants have moved under Fed. R. Civ. P. 26(c)
8 for a protective order as to certain discovery sought by plain-
9 tiffs Seattle Audubon Society, et al. ("SAS"). The motion asks
10 that the federal defendants not be required to respond to three
11 interrogatories in SAS's first set, nor to two interrogatories and
12 two requests for production of documents in SAS's first supplemen-
13 tal set. The motion is now granted in part and denied in part as
14 follows:

15 Interrogatories 4, 5, and 6 of SAS's first set ask the
16 federal defendants to "identify all persons known to you who
17 disagree with" certain statements in the Record of Decision
18 ("ROD"). These interrogatories are unduly burdensome, and need
19 not be answered.

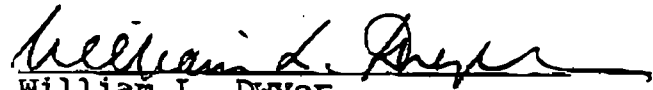
20 Interrogatories 1 and 2 and Requests for Production of
21 Documents 1 and 2 of SAS's first supplemental set call for the re-
22 trieval of surviving records of electronic communications from or
23 to members of the FEMAT or SEIS teams between March 1, 1993, and
24 April 14, 1994. The federal defendants point to practical diffi-
25 culties in accomplishing this. It appears, however, that these
26 electronic records include communications that would now be parts

ORD ON FED DEFTS' MTN
FOR PROTECTIVE ORD - 2

1 of the administrative record had they been retained in paper form.
2 The motion for a protective order in this regard is denied, and
3 the discovery will be provided. The federal defendants' right to
4 claim privilege as to any communication is not affected by this
5 order.

6 The clerk is directed to send copies of this order to all
7 counsel of record.

8 Dated: September 12, 1994.

9
10 
11 William L. Dwyer
12 United States District Judge
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U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
601 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

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

MEMORANDUM

To: Ellen Athas
Andrea Benlowe
Ted Boling (202) 514-4231
Wells Burgess
Todd Campbell (202) 456-6429
Kristina Clark (202) 219-1792
Ana Cobian (202) 514-7971
William Cohen
Peter Conzelman (202) 514-0557
Michael Davis (202) 456-2710
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Lois Schiffer (202) 514-0557
David Shilton (202) 514-4240
Robert Simmons (415) 744-3170
Tom Tuchman (503) 326-6254
Jean Williams

DATE: September 13, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 4

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

MESSAGE: Attached is a letter from several of the SAS plaintiffs discussing the
Mather Memorial Parkway Highway Project.

*file
w/ Forest Plan
Litigation*

09/13/94 15:31

09-13-94 11:33AM

FROM SIERRA CLUB LEGAL NW

TO 912022720015/7400

STELLE

002/004

002/004



Sunrise, Mt. McKinley

Angel Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

203 Hoge Building, 705 Second Avenue, Seattle, WA 98104-1711 (206) 341-7340 FAX (206) 341-1626

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New Orleans, Louisiana

Tallahassee, Florida

Washington, D.C.

September 13, 1994

VIA TELEFAX

Wells Burgess
Department of Justice
Environment and Natural Resources Division
General Litigation Section, Room 863
601 Pennsylvania Ave., N.W.
Washington, D.C. 20004
FAX: (202) 272-6815

Re: Compliance Of Mather Memorial Parkway Highway
Project With ROD Standards and Guidelines.

Dear Mr. Burgess:

Pilchuck Audubon Society and several other plaintiff organizations in Seattle Audubon Society et al. v. Lyons et al., No. C92-479WD (W.D. Wash.), are concerned that the Mather Memorial Parkway Highway Project ("Parkway Project") does not comply with the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("ROD"), and the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl ("Standards and Guidelines").

The Parkway Project involves widening and straightening an existing ten-mile stretch of parkway. This particular ten-mile section passes through Mt. Baker-Snoqualmie National Forest, ends at the northern border of Mount Rainier National Park, and lies close to the White River. These ten miles of parkway lie in a Late-Successional Reserve and a Tier 1 Key Watershed, as indicated in the February 1994 FSEIS.

On July 20, 1994, the Forest Service issued a Forest Products Sale Permit to the Federal Highway Administration ("FHWA"), approving the harvest of 1,576 MBF for the Parkway Project. An estimated 714 MBF of this harvest would be old-growth Douglas Fir that

Wells Burgess
September 13, 1994
Page 2

averages 36.4" DBH. Some of the approximately 4,713 trees to be cut also stand within 300' of the White River. The Parkway Project fails to comply with the ROD and the Standards and Guidelines in at least the following ways:

1. Watershed analysis is required prior to management activities in Key Watersheds. See ROD at E-6. No watershed analysis has yet been performed.
2. Although no net increase in roads is allowed in Key Watersheds, no elimination of roads has been proposed to compensate for the increase in roaded area under the Parkway Project. See ROD at E-6.
3. Key Watershed Riparian Reserves extend at least 300' from each fish-bearing stream or river bank, yet timber harvest is contemplated within this zone. See ROD at C-30.
4. A management assessment for Late-Successional Reserves is required prior to "habitat manipulation activities." See ROD at C-11. A management assessment has not yet been prepared.

The FHWA's issuance of a FONSI for the Parkway Project on January 31, 1994, does not exempt the Project from the ROD's Standards and Guidelines. First, the FHWA does not have the authority to make decisions about national forest management independent of the Forest Service. Second, the Forest Service did not approve and issue the Forest Products Sale Permit for the Project until almost three months after the ROD was signed. Federal regulation, 36 C.F.R. § 223.30, requires such timber permits to be "consistent with applicable land and resource management plans and environmental quality standards," in this instance, the ROD and the Standards and Guidelines.

The Regional Ecosystem Office reviewed this Project in March, 1994 and found that it did not comply with the then-proposed Standard and Guidelines. See Memorandum from George Smith, Acting Dir., Regional Ecosystem Office, Portland, Or., to John Lowe, Regional Forester, March 28, 1994. The Regional Ecosystem Office incorrectly assumed that because the Parkway Project involved issues of "public safety" it "would not fall under the same Standards and Guidelines as more normal projects." Id. The ROD and the Standards and Guidelines have no blanket exception for public safety projects in Late-successional Reserves. Rather, they allow for "new development proposals that address public needs" that "may be approved when adverse effects

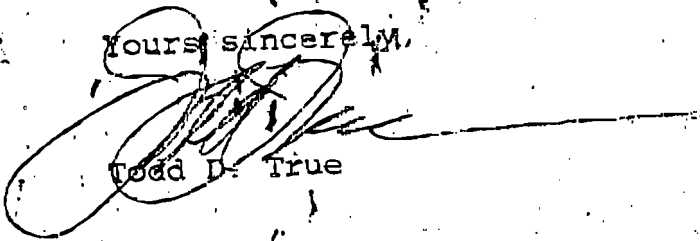
Wells Burgess
September 13, 1994
Page 3

can be minimized and mitigated." See ROD at C-17. All planning requirements under the Standards and Guidelines must be completed prior to the approval of such a project. The Forest Service has neither completed the required planning processes nor made findings that the Parkway Project's adverse effects have been "minimized and mitigated."

The Pilchuck Audubon Society and other plaintiff organizations seek to ensure that the Mathet Memorial Parkway Highway Project complies with the ROD and the Standards and Guidelines. Since the Project does not appear to comply at this time, we request your immediate assistance in ensuring that this Project does not proceed until it does. Please confirm to us in writing by the end of this week that the Parkway Project will not proceed until it complies with the ROD and the Standards and Guidelines. Because we understand that contracts may be awarded at any time, if you cannot provide such assurance, we will take the matter up with the Court on an expedited basis.

Thank you in advance for securing this Project's compliance with the ROD and the Standards and Guidelines prior to any ground-disturbing actions.

Yours sincerely,


Todd D. True

cc: Dennis E. Bschor, Forest Supervisor
Mt. Baker-Snoqualmie National Forest

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

*filed in
Forest
litigation*

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

MEMORANDUM

To: Ellen Athas
Andrea Berlowe
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Jean Williams

DATE: September 6, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 7

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

MESSAGE: Attached is Judge Dwyer's Memorandum Decision on NFRC's Motion to Stay Proceedings or Extend Time to Answer.

FILED
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ENTERED
RECEIVED

SEP - 6 1994

AT SEATTLE
U.S. DISTRICT COURT

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, et al.,

Defendants,

and

WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

Defendant-
Intervenors.

SAVE THE WEST,

Plaintiff,

v.

JAMES LYONS, et al.,

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

NO. C92-479WD

NO. C94-758WD

NO. C94-803WD

Ct. and, W-10

1 THE SIERRA CLUB,

2 Plaintiff,

3 v.

4 MICHAEL ESPY, et al.,

5 Defendants.
6

NO. C94-820WD

MEMORANDUM DECISION ON
NFRF'S MOTION TO STAY
PROCEEDINGS OR EXTEND
TIME TO ANSWER

7 Northwest Forest Resource Council ("NFRF") has moved for a
8 stay of all proceedings relating to the federal defendants' cross-
9 claims against it. By minute order entered September 1, 1994
10 (Dkt. # 560), the court denied the motion for a stay and granted
11 in part NFRF's alternative motion to enlarge time by extending to
12 September 8, 1994, the time to answer the cross-claims. This
13 memorandum decision gives the reasons for the rulings made by
14 minute order.

15 NFRF has filed, in the United States District Court for the
16 District of Columbia, a motion for an injunction prohibiting the
17 federal parties in Northwest Forest Resource Council v. Dombeck,
18 No. 94-1031 TPJ (D.D.C.), "and those persons in active concert or
19 participation with them," from proceeding with their cross-claims
20 for declaratory judgment in this court. In the present motion
21 NFRF seeks a stay of all proceedings relating to the declaratory
22 judgment claims until the District of Columbia court decides the
23 motion for an injunction. Whether a stay should issue is a matter
24 within the court's discretion. Sheet Metal Workers Internat'l
25 Ass'n, Local No. 162 v. Jason Mfg. Inc., 900 F.2d 1392, 1400 (9th
26 Cir. 1990).

1 These consolidated cases need to be decided, and sent on for
2 appellate review, as promptly and efficiently as possible consis-
3 tent with fairness to all parties. Over the next few days, two
4 activities would normally go forward: completion of discovery and
5 the filing of NFRC's answer or motions in response to the federal
6 defendants' cross-claims. There is no need to suspend these
7 activities as to NFRC, whose claims (the subject of the federal
8 defendants' prayer for declaratory judgment) are interrelated with
9 those of the other parties challenging the new forest plan.

10 NFRC is represented by highly experienced and expert counsel
11 who have litigated over forest management statutes and plans in
12 this district and the district of Oregon, sometimes with success,
13 for several years. The discovery which NFRC has begun should be
14 completed without interruption and will be usable in the District
15 of Columbia if that court grants the requested injunction, or in
16 this district if it does not. As for answering or moving against
17 the declaratory judgment claims, the record shows that NFRC is
18 well-equipped to proceed; however, in deference to the Labor Day
19 weekend and a September 6 religious holiday, the time to answer
20 was extended by the minute order from September 6 to September 8,
21 1994.

22 Any concerns NFRC may have over the schedule for completion
23 of these cases can be fairly resolved. The original schedule
24 would have culminated in a hearing on cross-motions for summary
25 judgment on September 12, 1994. At the request of several parties
26 (not including NFRC) the dates were put over by two weeks, with

1 all motions for summary judgment to be due August 18 and oral
2 argument to be held on September 26, 1994. The Order Granting
3 Leave to Federal Defendants to Amend Answer to Assert Cross-
4 Claims, Denying Motion to Join Additional Parties, and Making
5 Other Provisions entered August 5, 1994 (Dkt. # 526) included the
6 following provision at page 10:

7 Counsel for all parties are directed to confer and
8 submit by August 17, 1994, a joint report proposing a
9 revised schedule for the prompt completion of these
10 cases. Any differing views should be set forth in
11 separate paragraphs; separate reports are not to be
12 filed.

13 The purpose of the joint report was to permit the court to
14 arrive at a new schedule which would fairly accommodate NFRC's
15 issues as well as the others. The report was filed on August 18,
16 but NFRC declined to comment on the schedule or to say how much
17 time it would need. It stated:

18 Cross-claim defendant Northwest Forest Resource
19 Council ("NFRC") respectfully reports that it is unable
20 at this time to propose any schedule for disposition of
21 the cross-claims asserted against it by defendants James
22 Lyons et al. on August 12, 1994, or any other aspect of
23 this litigation.

24 Joint Status Report (Aug. 18, 1994) (Dkt. # 541), at p. 4.

25 The amended schedule thus had to be adopted without the
26 benefit of NFRC's views. The Order Amending Schedule entered
27 August 23, 1994 (Dkt. # 542), extended all deadlines by several
28 weeks, calling for completion of discovery by September 9, filing
29 of summary judgment motions on September 21, responses on Octo-

ber 19, replies on November 4, and oral argument on November 10, 1994.

NFRC now contends that this schedule is too short. Of course if NFRC, or any other party, seeks more time, full consideration will be given to that request. Any such request should be made promptly, however, to give the other parties as much notice as possible of any potential change.

The history of this matter is summed up in the August 5 order, and will not be repeated, but the context of the present stay motion should be kept in mind. For the past few months NFRC has consumed large amounts of time and effort in trying to shift the latest chapter of this long-running litigation, or at least NFRC's part of it, from this district and Oregon, and from the Ninth Circuit, to the district and circuit courts of the District of Columbia. When the District of Columbia court transferred NFRC v. Thomas, and stayed NFRC v. Dombeck and Association of O&C Counties v. Babbitt, so that the issues could be decided here, NFRC and its co-plaintiffs responded by dismissing NFRC v. Thomas. When the federal defendants moved to join the Thomas plaintiffs as parties herein, NFRC said it could not brief that motion on an expedited schedule because its counsel no longer represented the thirteen co-plaintiffs and an early response "could only come from NFRC." (Dkt. # 496, at 5). When that problem was solved by an order limiting the briefing to the question whether the federal defendants should be granted leave to assert declaratory judgment cross-claims against NFRC itself (already a party herein), NFRC

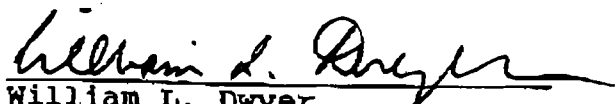
1 responded by moving for the entry of partial judgment as to it and
2 the other industry parties under Fed. R. Civ. P. 54(b), which
3 motion was denied by minute order on August 12, 1994 (Dkt. # 534).

4 NFRC is entitled to seek a different forum, but not to have
5 its efforts subject the other parties and the public to delay and
6 expense. The "enormous procedural complexities" and "endless
7 procedural wrangling" that it predicts in asking for a stay
8 (Attachment to Motion at 2 and 21) will not materialize if the
9 cross-claims go forward. Declaratory judgment practice is well
10 established and is available to federal agencies. If the federal
11 parties lose, they will be bound by res judicata in every court,
12 and injunctive relief can readily be ordered. Whatever the
13 outcome, the judgment will be reviewed de novo by the court of
14 appeals with the usual precedential effect.

15 For the reasons stated, the motion for a stay is denied. The
16 alternative motion for an extension of time is granted to the
17 extent that NFRC's answer or other response to the cross-claims
18 will be due on September 8, 1994. All parties have leave to seek
19 a further change in the schedule, but are requested to file any
20 such motion promptly.

21 The clerk is directed to send copies of this memorandum
22 decision to all counsel of record.

23 Dated: September 6, 1994.

24
25 
26 William L. Dwyer
United States District Judge

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

*file w/ formal pl
litigation*

FAX NUMBER (202) 272-6815, 5775
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MEMORANDUM

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Jean Williams

DATE: September 7, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 17

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

MESSAGE: Attached is Defendants' Memorandum in Opposition to Plaintiffs' Motion to Modify Stay and For Preliminary and Permanent Injunction filed yesterday in DC.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCES COUNCIL,
et al.,

Plaintiffs,

v.

MICHAEL DOMBECK, in his official
capacity as Acting Director of the
Bureau of Land Management, and
BRUCE BABBITT, in his official
capacity as Secretary of the Interior,

Defendants.

Civ. Nos. 94-1031 TPJ

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DISTRICT OF COLUMBIA

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION TO MODIFY STAY AND FOR
PRELIMINARY AND PERMANENT INJUNCTION

INTRODUCTION

Plaintiffs in this stayed action, Northwest Forest
Resources Council ("NFR"), et al. (collectively, "plaintiffs"),
now come before this Court and seek to relitigate matters on
which both this Court and the Western District of Washington
("the Seattle Court") have already opined. Specifically, they
seek to have this Court re-weigh the equitable factors relevant

1 to the interests of justice¹, and to enjoin the consolidated case
2 in Seattle, as it relates to them, despite this Court's prior
3 holding that: (1) the challenges to the FSEIS and the ROD
4 contained in NFRC v. Thomas should be decided in the Seattle
5 Court, and (2) the instant case should be stayed, pending
6 resolution of the Seattle actions. See This Court's Orders of
7 June 30, 1994 (granting transfer of NFRC v. Thomas and staying
8 remaining actions).

9 The request for an injunction is addressed to the
10 discretion of the Court. Among the matters the Court is to
11 consider are judicial efficiency, identity of parties and issues,
12 the weight to be given to Plaintiffs' choice of forum, and the
13 likelihood of prompt resolution. See Memorandum in Support of
14 Plaintiffs' Motion to Modify Stay and for Preliminary and
15 Permanent Injunction ("NFRC Memorandum") passim. NFRC's
16 Memorandum makes it clear that it seeks an injunction
17 not only as to the cross-claims which go to the claims asserted
18 in this action, but also as to those which go to the claims
19 asserted in NFRC v. Thomas, No. 94-1032 TPJ (dismissed after
20 transfer). NFRC Memorandum at 13, n.3.

21 By its Order of August 5, 1994, the Seattle Court
22 granted Federal Defendants leave to file an amended answer
23 asserting cross-claims for declaratory judgment against
24 Defendant-Intervenor NFRC. See The Seattle Court's Order
25 Granting Leave to Federal Defendants to Amend Answer to Assert
26 Cross-Claims, Etc. ("The Seattle Court's Order Re: Cross-Claims")

¹ This Court examined the interests of justice in ruling on
Defendants' Motion to Transfer or Stay, filed June 3, 1994.

(August 5, 1994) (attached as Exhibit A). Per granting leave, the Seattle Court ruled, after briefing by the parties, on the propriety of the use of the declaratory judgment procedure. Id. at 7.² On August 23, 1994, the Seattle Court, after requesting input from all the parties, including NFRC, entered the briefing schedule noted in the attached order. The Seattle Court's Order Amending Schedule (attached as Exhibit C). If granted, Plaintiffs' current motion would vitiate Federal Defendants' relief obtained by virtue of the Seattle Court's Order Re: Cross-Claims, and interfere with the schedule adopted by the Seattle Court. Such a scenario would also frustrate the clear intent of this Court, the Seattle Court, and the other parties to the consolidated litigation, to foster the efficient and expeditious resolution of all challenges to the federal old-growth forest ecosystem management strategy in a unified proceeding.

On the same day that it filed the present motion, NFRC sought to stay proceedings on the cross-claims through a motion in Seattle. Alternatively, NFRC sought an adjournment of its time to answer until thirty days after this Court rules on the instant Motion. See Motion to Stay Cross-Claims (attached as Exhibit D). The Seattle Court denied that motion by minute order on September 1, 1994, but extended NFRC's time to answer until September 8, 1994. Memorandum Decision on NFRC's Motion to Stay at 2. On September 6, the Seattle Court issued a memorandum

² Moreover, the Seattle Court utilized cross claims to resolve a problem raised by NFRC. See The Seattle Court's Memorandum Decision on NFRC's Motion to Stay Proceedings or Extend Time to Answer (Memorandum Decision on NFRC's Motion to Stay) at 5. (attached as Exhibit B).

1 decision providing the rationale for the ruling made by the
2 September 1 Minuter Order and reiterating the Court's decision to
3 decide the consolidated cases "as promptly and efficiently as
4 possible consistent with fairness to all parties." Id.

5 Plaintiffs now ask this Court to issue an extraordinary
6 injunction which will preclude Federal Defendants from asserting
7 cross-claims against NFRC in the consolidated Seattle actions.
8 They seek such relief despite the fact that the Seattle Court has
9 already ruled on the propriety of the federal defendants' filing
10 cross-claims for declaratory judgment. NFRC's latest attempt to
11 avoid the jurisdiction of the Seattle Court, and thereby thwart
12 the efforts of two federal district courts and the other parties,
13 is without merit and should be denied.

14 ARGUMENT

15 I. ASSUMING, ARGUENDO, THAT THIS COURT HAS THE AUTHORITY TO
16 ENJOIN THE SEATTLE CROSS-CLAIMS, THE APPLICABLE EQUITABLE
17 FACTORS, WHICH HAVE ALREADY BEEN BRIEFED AND DECIDED IN BOTH
18 SEATTLE AND THIS COURT, WEIGH STRONGLY AGAINST SUCH AN
19 INJUNCTION.

20 The District of Columbia Circuit does not apply the
21 "first to file" rule mechanically when deciding whether to enjoin
22 a compulsory counterclaim or a declaratory judgment action in
23 another forum. Columbia Plaza Corp. v. Security National Bank,
24 525 F.2d 620, 627 & 628 (D.C. Cir. 1975); Lewis v. National
25 Football League, 813 F. Supp. 1, 4 (D. D.C. 1992); see also
26 Northwest Airlines v. American Airlines, 989 F.2d 1002, 1006 (8th
Cir. 1993). Rather, an examination of the equitable factors
"genuinely relevant to the ends of justice" is required.
Columbia Plaza, 525 F.2d at 628 (citation omitted); see also
Ellicott Machine Corp. v. Modern Welding Co., 502 F.2d 178 (4th

1 Cir. 1974) ("first to file" rule "yields to the interests of
2 justice").

3 This Court has already engaged in a balance of relevant
4 equitable considerations and determined that the interests of
5 justice required transfer of NERC v. Thomas, No. 94-1932 TPJ
6 (dismissed after transfer) to Seattle, and stay of the instant
7 case, and Assoc. of O. & C. Counties v. Dombeck, No. 94-1044 TPJ
8 (D. D.C.), pending resolution of the consolidated litigation in
9 Seattle. See, e.g., This Court's Order of June 30, 1994 ("a stay
10 in this case would prevent a duplicative waste of judicial
11 resources and prevent the award of potentially inconsistent
12 relief by separate courts"). In addition, the Seattle Court has
13 consistently recognized the need to adjudicate all challenges to
14 the old-growth forest ecosystem strategy in a single forum. See
15 The Seattle Court's Order Setting Schedule of April 21, 1994
16 (attached as Exhibit E) ("all legal challenges to the ROD should
17 be decided in the same district and reviewed by the same court of
18 appeals"); Seattle Order Re: Cross-Claims at 6 ("To adjudicate
19 one set of challenges in the Ninth Circuit, and the other set in
20 the District of Columbia Circuit, would inflict intolerable
21 delay, expense, and confusion on the public.").

22 As a result, it is unnecessary for this Court to engage
23 in yet another examination of the interests of justice implicated
24 by the instant case. Even if such an analysis were deemed
25 necessary, those interests militate against the injunction which
26 Plaintiffs now seek.

A. In Either the Compulsory Counterclaim or the Declaratory
Judgment Context, Application of the "First to File" Rule
Militates Against an Injunction.

Regardless of whether a party seeks an injunction against alleged compulsory counterclaims or claims for declaratory judgment, the court's analysis is virtually the same. When considering a motion to enjoin claims in a second federal district court, regarded as compulsory counterclaims³ in the court which is considering the motion, the latter court must engage in "a balancing of equitable considerations genuinely relevant to the ends of justice." Columbia Plaza, 525 F.2d at 628 (citation omitted). Similarly, when deciding whether to enjoin an action for declaratory judgment in another forum, the court must examine factors relevant to "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Kerotest Mfg. Co. v. C-O-Two Co., 342 U.S. 180, 183 (1952). An examination of equitable factors ensures that a decision on whether to grant such an injunction comports with the underlying purposes of each procedure.

In the instant case, the equitable considerations weigh strongly in favor of consolidating all current challenges to the FSEIS and the ROD in a single forum. Indeed, both this Court and

³ Federal Defendants do not concede that the cross-claims in the Seattle litigation are compulsory counterclaims in this action. Cf. 3 Moore's Federal Practice ¶ 13.12[2] (plaintiff may not claim a waiver of an alleged compulsory counterclaim until time for defendant's answer has arisen) (citing Potter v. Carvel Stores of New York, Inc., 203 F. Supp. 462 (D. Md. 1962), aff'd on other grounds, 314 F.2d 45 (4th Cir 1963)). Because the instant case has been stayed, the time for Defendants to answer has not yet arisen. However, a determination of whether or not the cross-claims should be enjoined is dependent upon equitable considerations, regardless of how the cross-claims are characterized.

1 the Seattle Court have already spoken to this matter and are in
2 agreement. See This Court's Orders of June 30, 1994 (granting
3 transfer of NFRC v. Thomas and staying the instant case); Seattle
4 Order Re: Cross-Claims (August 5, 1994). As a result, the
5 extraordinary injunctive relief which Plaintiffs seek would
6 plainly contradict previous efforts of both courts to conduct
7 this complex litigation in as efficient a manner as possible.

1. The goals of Rule 13(a) will be achieved by
resolution of the cross-claims in Seattle.

8 The Supreme Court has stated that the primary purpose
9 of Rule 13(a) is "to prevent multiplicity of actions and to
10 achieve resolution in a single lawsuit of all disputes arising
11 out of common matters." Southern Construction Co. v. Pickard,
12 371 U.S. 57, 60 (1962) (per curiam). The District of Columbia
13 Circuit has been mindful of that purpose in its application of
14 the "first to file" rule where a party moves to enjoin claims
15 brought in another forum, which are purportedly compulsory
16 counterclaims in a D.C. action. Columbia Plaza, 525 F.2d at
17 625-28.

18 In its decisions regarding transfer and stay, this
19 Court considered the interests of justice and found that they
20 weighed heavily against the "waste of limited judicial resources"
21 and "duplicative review of the same complex administrative
22 decision and a potentially inconsistent award of relief." This
23 Court's Order of June 30, 1994 (granting transfer); see also This
24 Court's Orders of June 30, 1994 (granting stays). Further, after
25 balancing similar equitable considerations, the Seattle Court
26 granted Federal Defendants leave to amend their answers to assert
cross-claims against their co-party, NFRC, with full awareness of

1 the stayed actions before this Court. See Seattle Order Re:
2 Cross-Claims, passim. As a result, there is no need for this
3 Court to engage in a duplicative use of scarce judicial resources
4 by re-examining the interests of justice here.

5 However, even if such an examination were deemed
6 necessary, the interests of justice would still preclude the
7 extraordinary relief which Plaintiffs request. As discussed,
8 infra, Plaintiffs will not be prejudiced by participating in the
9 consolidated litigation in Seattle. On the contrary, those
10 actions will provide the most expeditious determination of their
11 rights and interests, which was a key concern expressed by
12 Plaintiffs in their opposition to transfer or stay of the D.C.
13 actions. See Plaintiffs' Memorandum in Opposition to Defendants'
14 Motion to Transfer or Stay at 30 (June 13, 1994). In contrast,
15 the injunction which Plaintiffs seek will uselessly interfere
16 with the overall interests of the parties, the expressed views of
17 both this and the Seattle Court and the public at large in the
18 prompt and efficient adjudication of challenges to the FSEIS and
19 the ROD. See, e.g., Seattle Order Re: Cross-Claims at 6.

20 2. The propriety of cross-claims for declaratory
21 judgment has already been decided by the Seattle Court,
22 which considered, among other things, the purpose of
23 declaratory judgments.
24
25
26

1 In a determination of whether to enjoin a later-filed⁴
2 action for declaratory judgment, the courts are again cognizant
3 of the interests of justice, and the purposes underlying the
4 Declaratory Judgment Act. Kerotest, 342 U.S. at 183; Lewis v.
5 NFL, 813 F. Supp. at 4. One of the primary objectives of the
6 Declaratory Judgment Act, 28 U.S.C. § 2201, is "to avoid a
7 multiplicity of actions by affording an adequate, expedient, and
8 inexpensive means for declaring in one action the rights and
9 obligations of the litigants." 10A Charles Wright, Arthur Miller
10 and Mary Kay Kane, Federal Practice and Procedure, § 2751 (2d ed.
11 1983 & Supp. 1994). As this Court has already decided, NFRC's
12 challenges to the FSEIS and the ROD will involve "review of the
13 same complex administrative decision" as those currently pending
14 in the Seattle Court. See This Court's Order of June 30, 1994
15 (granting transfer). As a result, enjoining that litigation as
16 it relates to NFRC will surely impede the efficient use of
17 judicial resources and the determination of rights and
18 obligations which both the Federal Rules of Civil Procedure, and
19 the statutes affecting the operation of the federal courts, seek
20 to avoid. See, e.g., Fed. R. Civ. P. 1.

21 Moreover, if the other court has previously ruled on an
22 issue raised by the motion to enjoin, the court entertaining that
23

24 ⁴ Federal Defendants do not concede that the actions in
25 this Court were filed before the cross-claims in Seattle, as the
26 cross-claims were filed in an action which has been ongoing for
several years, and their amended answer relates back to earlier
pleadings in that action pursuant to Rule 15(c)(2). Again,
because of the requisite balancing of equitable factors, such a
characterization is not relevant to the determination of whether
the cross-claims should be enjoined.

1 motion should not re-examine the same issue. See, e.g., Tempco
2 Elec. Heater Corp. v. Omega Engineering, 819 F.2d 746, 750-764
3 n.6 (7th Cir. 1987); see also Memorandum in Support of
4 Defendants' Motion to Transfer or Stay at 39-40 (filed June 3,
5 1994). Here, NFRC seeks to re-litigate the propriety of cross-
6 claims for declaratory judgment in the consolidated Seattle
7 litigation; an issue to which the Seattle Court has decisively
8 spoken. This Court should refrain from such a review, based on
9 notions of comity between federal district courts.

10 3. NFRC will not be prejudiced by proceeding with the
11 cross-claims in Seattle.

12 NFRC bases its allegations of prejudice on the
13 following contentions: that the cross-claims raise novel issues
14 that it will have insufficient time to research in order to file
15 its answer; that the September 21, 1994 filing date for motions
16 for summary judgment is prejudicial to its preparation of its
17 defense on these issues; that it cannot prepare its defense on
18 the merits to meet the briefing schedule; and, that it cannot
19 conduct adequate discovery within the time frames established by
20 the schedule. NFRC Memorandum at 19-20; Memorandum in Support of
21 Motion to Stay or for Enlargement of Time at 4-5 (filed in
22 Seattle on August 23, 1994) (attached as Exhibit F). Such
23 allegations of prejudice are wholly without merit. Further, if
24 NFRC were to suffer any prejudice at all, it would be as a direct
25 consequence of its own repeated attempts to frustrate the actions
26 taken by this Court and the Seattle Court to achieve the
efficient and expeditious resolution of all challenges to the
FSEIS and the ROD. See Memorandum Decision on NFRC's Motion to
Stay at 5-6.

1 From the beginning, NFRC has sought to foil the clear
2 intent of both courts, and the other parties to the Seattle
3 litigation, at every turn. First, NFRC voluntarily dismissed the
4 action entitled NFRC v. Thomas, without prejudice, the day after
5 this Court agreed that the interests of justice strongly favored
6 transfer of that case for purposes of consolidation. Notice of
7 Voluntary Dismissal (July 1, 1994) (attached as Exhibit G).

8 In addition, NFRC could have moved for dismissal in
9 Seattle at any time, if it indeed wanted to remove itself from
10 the ongoing litigation there. However, NFRC neglected to do so
11 after the new ROD was issued on April 14, 1994, and even after it
12 filed its own challenges to the ROD in this Court on May 11,
13 1994. Rather, NFRC first attempted to renounce its status as a
14 party in the Seattle litigation through an ambiguous document
15 entitled "Notice of Non-participatory Status," filed in Seattle
16 on May 24, 1994 (attached as Exhibit H). Two months later, NFRC
17 filed a motion for entry of final judgment on the challenges to
18 the previous FSEIS and ROD pursuant to Rule 54, or to sever those
19 claims pursuant to Rule 21. That motion was only filed after it
20 was clear that NFRC remained a party to the Seattle litigation,
21 by virtue of its status as Defendant-Intervenor. On August 12,
22 1994, the Seattle Court issued a Minute Order (Dkt. #534) denying
23 NFRC's motion. Memorandum Decision on NFRC's Motion to Stay at
24 6.

25 Moreover, counsel for NFRC had the opportunity to
26 participate in all negotiations regarding the current schedule in
Seattle, but refused to do so. See, e.g., Joint Status Report
Re: Discovery at 5-6 (July 8, 1994) (filed with this Court on
July 18, 1994); Joint Status Report filed in the Seattle Court on

1 August 18, 1994 at 4 (attached as Exhibit I). Indeed, when the
2 Seattle Court granted Federal Defendants leave to assert cross-
3 claims, it requested that the parties file a joint status report
4 proposing a revised schedule. It did so to allow the Court to
5 arrive at a new schedule which would fairly accommodate NFRC.
6 Memorandum Decision on NFRC's Motion to Stay at 4. However, NFRC
7 declined to participate and the Seattle Court had to set the
8 revised schedule without the benefit of NFRC's views. Id. Now,
9 NFRC maintains that it will suffer great prejudice at the hands
10 of the other parties and the Seattle Court. NFRC asserts several
11 bases for these allegations of prejudice.

12 First, in its Memorandum, NFRC claims that it will be
13 unable to identify and raise the procedural issues associate with
14 the cross-claims for declaratory judgment in time to file a
15 dispositive motion "less than one month from now." NFRC
16 Memorandum at 19. However, NFRC has succeeded in identifying
17 those issues sufficiently to advance them as a basis for arguing
18 that this Court should take the extraordinary step of enjoining
19 the cross-claims in Seattle on their account. See NFRC
20 Memorandum at 17-18. Moreover, NFRC has known that such cross-
21 claims were a distinct possibility since the middle of July, when
22 the Seattle Court requested further briefing on that particular
23 subject.⁵ See The Seattle Court's Order on Motion to Shorten
24 Time (July 19, 1994) (attached as Exhibit J).

25 Second, NFRC claims that it lacks ample time to prepare
26 its brief on the merits. NFRC Memorandum at 19. However, as

⁵ NFRC also has the option of requesting additional time
from the Seattle Court. See The Seattle Court's Memorandum
Decision on NFRC's Motion to Stay at 5.

1 Second, NFRC claims that it lacks ample time to prepare
2 its brief on the merits. NFRC Memorandum at 19. However, as
3 NFRC points out, NFRC Memorandum at 1, the cross-claims are
4 merely the same claims which NFRC asserted in the instant action
5 and the Thomas action on May 11, 1994. Indeed, NFRC's comments
6 regarding the preparation of its case for this action and the
7 Thomas action at a status conference before this Court are
instructive:

8 I guess what I -- if I could take a moment just to talk
9 about what these cases are going to look like if they are
10 here or even if they aren't here, just to tell you what's
11 likely to happen, these are summary judgment cases. We will
12 not have a trial on these cases. The government will need
13 to assemble an administrative record but it's -- these cases
14 are not particularly fact intensive. We primarily raise
15 legal issues that we can address primarily in briefs. It is
conceivable there might be a tiny bit of discovery but it is
also conceivable we won't need any discovery. What we plan
to do is to file a motion for summary judgment in both cases
in about sixty days, hopefully here, and we anticipate the
government will need some time to respond.

*

*

*

16 Our hope is that we can complete the briefing by about
17 the end of September and have the case ready for oral
18 argument at your Honor's convenience and then handle the
case as you can assuming that we are here.

19 Northwest Forest Resources Council v. Espy, Civ. No. 93-162,

20 Transcript of Proceedings before the Honorable Thomas Penfield
21 Jackson, United States District Judge, May 23, 1994, pp.11-12.

22 With respect to discovery, Federal Defendants entered
23 into an agreement under which NFRC could serve its discovery in
24 this action, notwithstanding the stay, through an exchange of
25 letters. NFRC then served interrogatories and document requests
26 on July 18, 1994; these were responded to on August 26, 1994.

Contrary to NFRC's assertions, NFRC Memorandum at 20, the administrative record was made available to all parties to all actions challenging the strategy on June 23, 1994. See Letter from Federal Defendants to All Counsel (attached as Exhibit K). Indeed, on July 11, 1994, counsel for NFRC indicated that he had reviewed the record. See Letter from Mark C. Rutzick to Wells D. Burgess at 3 (attached as Exhibit L). Under that agreement, Federal Defendants made clear that they would make available to NFRC all discovery made available to the Seattle plaintiffs. See Letter from Wells Burgess to Mark Rutzick dated July 14, 1994 (attached as Exhibit M). Thus, there is no prejudice to NFRC from the current discovery schedule.

Finally, NFRC alleges that adequate relief is unavailable to them in Seattle because "the declaratory judgment cross-claims offer no opportunity to Plaintiffs for injunctive relief, the linchpin of their requested relief herein." NFRC Memorandum at 14. Such a claim is simply erroneous. As a cross-defendant, NFRC could assert counterclaims for injunctive relief in its answer, pursuant to Rule 13. Moreover, NFRC and the other Thomas plaintiffs could have easily sought the injunctive relief they desire had they not voluntarily dismissed their action the day after it was transferred to Seattle.

In sum, NFRC's has made every effort to thwart the clear intent of both this Court and the Seattle Court. This Court should not reward such tactics by granting the requested relief because, as both Courts have already opined, NFRC will not be prejudiced by presenting its claims against the federal old-growth forest ecosystem strategy in the context of the consolidated actions in Seattle. Rather, such procedural

maneuvering will only succeed in obstructing the efficient and
expeditious resolution of all present challenges to the FSEIS and
the ROD.

CONCLUSION

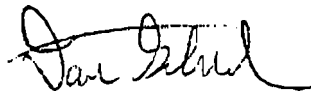
For the foregoing reasons, Plaintiffs' motion to enjoin
the cross-claims against its co-party NFRC, which were filed
pursuant to a grant of leave by the Seattle Court, should be
denied.

Dated this 6th day of September, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 6, 1994, she deposited one copy each of the foregoing, DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY STAY AND FOR PRELIMINARY AND PERMANENT INJUNCTION, to be served via telefacsimile machine and first-class United States mail, postage prepaid, upon the counsel of record herinafter named:

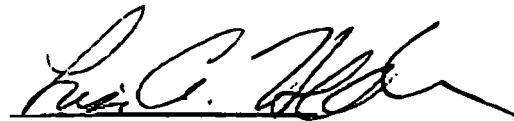
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DATE: September 12, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover) 18

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

MESSAGE: Attached is a motion, supporting memorandum and brief amicus curiae of Native Forest Council filed in the Dornbeck case.

*DeWitt, et al*UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIADEPARTMENT OF JUSTICE
GENERAL INVESTIGATIVE
SECTION

94 SEP -9 AM 10:26

NORTHWEST FOREST RESOURCE
COUNCIL, et al.,

Plaintiffs,

v.

MICHAEL DOMBECK, et al.,

Defendants.

Civil No. 94-1031 (TPJ)

MOTION OF NATIVE FOREST COUNCIL FOR LEAVE
TO FILE BRIEF AMICUS CURIAE

The Native Forest Council ("NFC") hereby moves for leave to file a brief amicus curiae in the above-captioned case. NFC files herewith a memorandum in support of this motion, a proposed form of Order, and the brief amicus curiae.

Respectfully submitted,

*Stephen M. Truitt*Stephen M. Truitt (#13235)
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September 6, 1994

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

Plaintiffs,

v.

MICHAEL DOMBECK, et al.,

Defendants.

Civil No. 94-1031 (TPJ)

MEMORANDUM IN SUPPORT OF
MOTION OF NATIVE FOREST COUNCIL FOR LEAVE
TO FILE BRIEF AMICUS CURIAE

The Native Forest Council ("NFC") was founded in 1988 as a non-profit, tax-exempt organization by a group of business, academic and professional people concerned about the extensive logging of the country's public forests and convinced that very little was being done to bring the wanton destruction of our forests to the public's attention. The NFC's exclusive focus is the preservation, protection and restoration of our national forests. The NFC has committed itself to (1) educating the public about the crisis in our publicly owned forests; (2) protecting and preserving all national forests; (3) restoring the native biodiversity of our logged national forests; (4) advocating economic assistance for timber communities and workers; and (5) stopping unfair government competition with private timber growers. Beginning with fifteen members, the NFC has grown today to include 1500 dues-paying members in 47 states. More germane to the present motion, however, is the fact that NFC is a party to a consolidated case currently pending in the United

States District Court for the Western District of Washington, Seattle Audubon v. Lyons, No. C92-479 WD (W.D. Wash.).

NFC has taken the position in Seattle Audubon that defendants' new Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (the "Clinton Forest Plan") does not comply with applicable federal statutes, including the NEPA and NFMA. Consequently, NFC is seeking to enjoin implementation of the Clinton Forest Plan. However, our position differs significantly from that of plaintiffs in this action -- while plaintiffs here contend that the Clinton Forest Plan is flawed because it unduly restricts logging, we contend that the Plan allows far too much logging.

The issue currently before this Court is whether to enjoin Seattle Audubon defendants from asserting cross-claims against the industry plaintiffs. In this regard, NFC supports the federal defendants and agrees that all challenges to the Clinton Forest Plan should be heard in a single forum and that the interests of justice are best served when the possibility of inconsistent adjudication is minimized. However, while we agree with the federal defendants concerning the current stay of proceedings in this action, our interests and those of the government diverge on an important point.

For the last four months, while the federal defendants and industry plaintiffs have argued about who is and who is not forum shopping, resolution of Seattle Audubon has been delayed. Only two weeks ago, the court hearing that case granted yet

another extension to allow the federal defendants and industry plaintiffs additional time to brief their positions. However, because the injunction that for two years had prohibited logging in spotted owl habitat has been lifted, timber sales have been going forward. Thus, the delay caused by the procedural skirmishing, of which the current motion is but the latest round, has redounded to the benefit of both industry plaintiffs and the federal defendants and to the detriment of NFC and, more importantly, the ancient forests that are now threatened with renewed cutting.

NFC's interest in the current issue before the Court is not shared by any other party: an end to industry's blatant forum shopping so that Seattle Audubon can be resolved and the ancient forests protected. As the only entity before this Court that puts the long-term preservation of forest ecosystems above short-term economic or political goals, we respectfully request that our Motion be granted.

CONCLUSION

For the foregoing reasons, NFC respectfully requests that the Court grant leave to file the accompanying brief amicus curiae.

Respectfully submitted,


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September 6, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE
COUNCIL, et al.,

Plaintiffs,

v.

MICHAEL DOMBECK, et al.,

Defendants

Civil No. 94-1031 (TPJ)

BRIEF AMICUS CURIAE OF THE NATIVE FOREST COUNCIL IN
OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY STAY AND FOR
A PRELIMINARY AND PERMANENT INJUNCTION PROHIBITING
PROSECUTION OF COMPULSORY COUNTERCLAIMS IN ANOTHER COURT

As part of their continuing effort to have their arguments against the government's new timber plan heard by someone other than Judge Dwyer of the United States District Court for the Western District of Washington (the "Western District"), plaintiffs in this action, who are companies and individuals engaged in the timber industry ("industry plaintiffs"), have moved this Court to restrain defendants from bringing industry plaintiffs' claims before the Western District. The Native Forest Council ("NFC"), a plaintiff in the consolidated action entitled Seattle Audubon v. Lyons, No. C92-479 WD (W.D. Wash.), opposes this motion.

FACTUAL AND PROCEDURAL BACKGROUND

The dispute underlying this lawsuit began more than four years ago, when the Seattle Audubon Society ("SAS") and a number of other environmental groups sought new standards and guidelines for the management of the ancient forests of the Pacific Northwest to implement the listing of the northern spotted owl as an endangered species. When the government failed

to comply adequately, SAS and others filed suits in both Washington and Oregon. Portland Audubon Society v. Lujan, C87-1160-FR (D. Or.); Seattle Audubon Society v. Robertson, C89-160-WD (W.D. Wash.) ("Seattle Audubon I"). Timber industry groups intervened in these suits. Seattle Audubon I resulted in an injunction compelling the government to produce a plan for implementation. 771 F. Supp. 1081 (W.D. Wash.), aff'd, 952 F.2d 297 (9th Cir. 1991). The Oregon court similarly found the federal defendants' actions improper, but, however, concluded that it could not consider claims in Portland Audubon. 712 F. Supp. 1456 (D. Or. 1989) (rider to budget bill precluded review).

The plan that was prepared in response to these suits, however, did not comply with either NFMA or NEPA, and a new lawsuit was filed on March 25, 1992 in the Western District of Washington. Seattle Audubon Society v. Moseley, C92-479-WD (W.D. Wash.) ("Seattle Audubon II"). Timber industry groups, including the Northwest Forest Resource Council, a plaintiff here, intervened without reservation as defendants in Seattle Audubon II. After finding that the government had not yet complied with either NEPA or NFMA, Judge Dwyer of the Western District enjoined timber sales pending the preparation of yet another new plan and the correction of certain specific flaws in the previous plan. Seattle Audubon II, 798 F. Supp. 1473 (W.D. Wash. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993). Further, now that the claims in Portland Audubon were subject to judicial review, Judge Frye found the Bureau of Land Management's timber plan similarly

deficient, and also enjoined logging. Portland Audubon, 795 F. Supp. 1489 (D. Or. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993).

In response to these injunctions, defendants developed their new Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (the "Clinton Forest Plan"). A Record of Decision ("ROD") approving the new plan was issued on April 14, 1994, and the federal defendants moved for the dissolution of the Western District's injunction. The Western District held a status conference on April 20, 1994, to discuss future proceedings in Seattle Audubon II. Although the Western District declined the request of the government to enjoin challenges to the ROD in other districts, it expressed its belief that all related claims should be resolved in a single forum. Order Setting Schedule 2 (April 21, 1994 W.D.Wash.). In addition, based on representations from all plaintiffs that in their view the Clinton Forest Plan was still flawed, the Western District set a May 19, 1994, deadline for supplemental or amended complaints asserting claims against the ROD. Id.

Beginning on May 19, 1994, a number of plaintiffs, including NFC, filed supplemental or new complaints, which subsequently were consolidated into a single action: Seattle Audubon II. Each of the complaints in the consolidated case includes claims arising from Bureau of Land Management forest policies.¹ Thus, the combination of plaintiffs and claims now

1. The federal defendants have answered each of the complaints in the consolidated action. Department of the Interior
(continued...)

in the consolidated case represents the combining of Seattle Audubon II with Portland Audubon. None of the defendant-intervenors in Seattle Audubon II (or Portland Audubon) filed supplemental or amended pleadings in the consolidated case, however. Rather, Northwest Forest Resource Council, and some other timber industry plaintiffs, filed two complaints in this Court on May 11, 1994. NFRC v. Thomas, No. 94-1032 (D.D.C.) and NFRC v. Dombeck, No. 94-1031 (D.D.C.).

At this point, the latest round of procedural maneuvering began in earnest. First, the federal defendants moved to transfer both Thomas and Dombeck to the Western District. This Court granted the motion to transfer Thomas. Because industry plaintiffs had carefully crafted Dombeck so that it arguably could not have been brought in the Western District, the Court was constrained to deny the motion to transfer Dombeck. However, in recognition of the pending consolidated case in the Western District and the need to "prevent a duplicative waste of judicial resources and prevent the award of potentially inconsistent relief by separate courts," this Court stayed Dombeck. Order (June 30, 1994 D.D.C.). Having lost their attempt to have this Court decide their claims, industry plaintiffs dismissed Thomas rather than allow it to be adjudicated in the Western District.

1. (...continued)
defendants have not asserted any defenses based on venue or personal jurisdiction, which can be deemed waived. Fed. R. Civ. P. 12(b). Thus, as of June 30, 1994, when federal defendants answered SAS's supplemental complaint, the BLM has been present before the Western District for claims arising from the Clinton Forest Plan.

During the same time, the Western District has been trying to set a schedule for prompt resolution of Seattle Audubon II. The first scheduling order was set at the same time the injunction was dissolved² -- dispositive motions were to be filed on August 4, 1994, and a hearing to be held on September 12, 1994.³ Order Dissolving Injunction & Setting Schedule for Summary Judgment Motions (June 6, 1994 W.D. Wash.). Upon learning that the industry plaintiffs had dismissed Thomas, the federal defendants moved on July 14, 1994, for an order joining industry plaintiffs into Seattle Audubon II. In response, industry plaintiffs moved for a Rule 54(b) judgment on their claims on July 22, 1994. Because of these procedural motions, the schedule for determination of the merits was revised, extending the dispositive motion deadline to August 18, 1994, and the hearing to September 26, 1994. Minute Order (July 28, 1994 W.D. Wash.).

After the Western District ruled that industry plaintiffs' claims would be made part of the consolidated suit, the schedule for disposition on the merits was extended yet again

2. The Western District granted the federal defendants' motion to dissolve the injunction on June 6, 1994, with the condition that the government provide counsel with 30 days notice of all timber sales in spotted owl habitat. Since that time, the government has provided notice of timber sales amounting to over 33 million board feet.

3. This schedule was set with the participation of industry plaintiffs considered as given. Indeed, the Western District expressly inquired of Mr. Rutzick, counsel for industry plaintiffs, whether the proposed schedule would accommodate his clients. Transcript of May 31, 1994 Hearing 42 ("Mr. Rutzick, do you wish to make any comment in regard to that proposed schedule or any of the proposed schedules that have been offered?"). Mr. Rutzick refused to comment on the schedules. Id.

to allow the parties additional time to brief these claims.⁴ Order Granting Leave to Federal Defendants to Amend Answer (Aug. 5, 1994 W.D. Wash.) (allowing claims against industry plaintiffs and vacating prior schedule); Order Amending Schedule (Aug. 23, 1994 W.D. Wash.) (setting Sept. 21, 1994 date for summary judgment motions, November 10, 1994 hearing date). Now, industry plaintiffs are seeking to have this Court impose still further delay by enjoining proceedings on their Dombeck claims in the Western District. In the meantime, of course, with no injunction in place prohibiting logging in the old-growth forests of the Northwest, the threat to both timber and protected wildlife becomes more real with each passing day.

ARGUMENT

A. THE INTERESTS OF JUSTICE STILL FAVOR RESOLUTION OF ALL CLAIMS IN A SINGLE FORUM, WHICH CAN ONLY BE THE WESTERN DISTRICT

Both this Court and the Western District have repeatedly held that ~~the~~ claims for APA review of the Clinton Forest Plan should be resolved in a single court. Industry plaintiffs' protestations notwithstanding, no new developments require that either court revisit that determination. Further, each of industry plaintiffs' arguments in favor of their motion is without merit.

4. Again, the Western District set this schedule with input from all parties. This time, the Western District had ordered that all parties file a joint report on scheduling, with dissenting views set forth separately. Order Granting Leave to Federal Defendants to Amend Answer (Aug. 5, 1994 W.D. Wash.). NFC argued that any further extension should be accompanied by a stay of logging in spotted owl habitat. Joint Status Report at 5-6. Industry plaintiffs declined to commit to or propose any schedule. Id. at 4-5.

This Court should not enjoin the consolidated case from entertaining claims that could have been filed in Dombeck simply because of the dates in which the various complaints were filed. While this case may have technically been filed before any Department of the Interior defendants were added to the consolidated case, in reality the consolidated case is the continuation of a number of cases commenced in both the Western District and the District of Oregon several years ago. Thus, in the most equitable sense, the consolidated case should be regarded as the "first filed" for purposes of determining which case should be allowed to proceed.

Moreover, regardless of what cases could have been brought when this case was first filed, the Secretary of the Interior and the Bureau of Land Management are now present before the Western District as defendants in the consolidated case. Any claims industry has against them may be asserted in the consolidated lawsuit. Thus, there is no real prejudice to industry plaintiffs in forcing them to bring their claim in the Western District.

Nor should industry plaintiffs' assertions about the expedited schedule change the result. To the extent that the current schedule in Seattle Audubon II presents a problem for industry plaintiffs, this is a problem of their own making. From the beginning of the latest round of the consolidated cases, their counsel has been consulted about scheduling. However, rather than commit to a reasonable schedule in the Western

District, they have preferred to engage in procedural posturing in the hope of evading the Western District.

Finally, the alleged novelty of the federal defendants' approach should not be allowed to hinder full resolution of this dispute in a single forum. Although NFC does not generally approve of the federal defendants' use of the Declaratory Judgment Act in the manner they have asserted it in Seattle Audubon II, we nonetheless recognize that industry plaintiffs' blatant attempt to forum shop with the hope of getting an inconsistent result has left the federal defendants with little choice. The interesting procedural and substantive questions raised by industry plaintiffs can and should be resolved by the Western District. To the extent that industry plaintiffs believe that the Western District resolves those, or any other issues, in error, they will, of course, have recourse to the Ninth Circuit.

B. THE INTERESTS OF NATIVE FORESTS AND THE SPECIES
DEPENDENT UPON THEM FAVOR PROMPT RESOLUTION OF THE
CONSOLIDATED CASE

When the Western District found that an earlier management plan for spotted owl habitat was inadequate, it enjoined all logging in the affected area. Specifically, the Western District found that logging these ancient forests "in the absence of a legally adopted conservation plan, would risk pushing the [northern spotted owl] past a population threshold from which it could not recover, would foreclose options that might later prove to have been necessary, and would constitute irreparable harm." Moreover, the court continued, "'Old growth forests are lost for generations.'" Seattle Audubon II, 798 F.

Supp. at 1491 (emphasis added) (quoting Seattle Audubon I, 771 F. Supp. 1081, 1091-94 (W.D. Wash. 1991), aff'd, 952 F.2d 297 (9th Cir. 1991)).

In addition, the Court also found that

there were public interests both in preserving forests and in having government officials act in accordance with law; that while the loss of old growth is permanent, the economic effects of an injunction can be minimized in many ways; that to bypass the environmental laws, either briefly or permanently, would not fend off the changes transforming the timber industry; and that the public interest and the balance of equities required the issuance of an injunction.

Id. at 1491 (citing and quoting Seattle Audubon I, 771 F. Supp. at 1095-96) (quotation marks omitted).

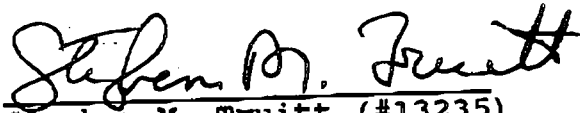
The Western District's findings are no less true today. However, in the interest of allowing a prompt and thorough resolution of all claimed deficiencies, the plaintiffs in Seattle Audubon II have refrained from seeking preliminary relief while defendants' have worked with the plaintiffs, and with the Western District towards an expedited resolution of this dispute.

By contrast, the industry plaintiffs have refused to participate in this schedule, intentionally causing one delay after another while they resist resolution of their claims by the Western District. Inasmuch as they are the ones who are now free to log and thus are the beneficiaries of this delay, industry plaintiffs should not be allowed further gain from their gamesmanship.

CONCLUSION

For the foregoing reasons, and those presented by the federal defendants in their opposition to the motion, industry plaintiffs' motion to lift the stay should be denied.

Respectfully submitted,



Stephen M. Truitt (#13235)
Bruce R. Stewart (#358909)
Charles H. Carpenter (#432004)
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street N.W.
Washington, D.C. 20036

John S. Karpinski
2612 E. Twentieth Street
Vancouver WA 98661

Attorneys for Native Forest
Council

September 6, 1994

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

Plaintiffs,

v.

MICHAEL DOMBECK, et al.,

Defendants.

Civil No. 94-1031 (TPJ)

ORDER

Upon consideration of the Motion of Native Forest Council for Leave to File Brief Amicus Curiae, the memoranda in support thereof, and the record in this case, it is, by the Court, this ___ day of September 1994

ORDERED that the Motion shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the Brief Amicus Curiae of the Native Forest Council in Opposition to Plaintiffs' Motion to Modify Stay and for a Preliminary and Permanent Injunction Prohibiting Prosecution of Compulsory Counterclaims in Another Court shall be, and hereby is, accepted into the record in this case.

Entered: _____

THOMAS PENFIELD JACKSON
UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that on this 6th day of September, copies of the foregoing Motion of Native Forest Council for Leave to File Brief Amicus Curiae, the Memorandum in support thereof, and the Brief Amicus Curiae of the Native Forest Council in Opposition to Plaintiffs' Motion to Modify Stay and for a Preliminary and Permanent Injunction Prohibiting Prosecution of Compulsory Counterclaims in Another Court were served, by first class mail, postage prepaid, upon

Steven P. Quarles
J. Michael Klise
Crowell & Moring
1001 Pennsylvania Avenue NW
Washington DC 20004

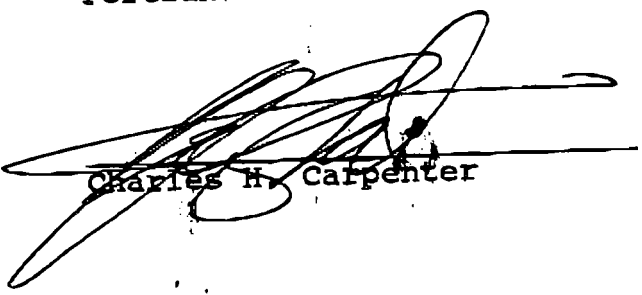
Wells D. Burgess
Stephen J. Odell
United States Dep't of Justice
PO Box 663
Washington DC 20044-0663

Mark Rutzick
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Smith & Leary
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William H. Holmes
Stoel Rives Boley Jones & Grey
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Charles H. Carpenter

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

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

MEMORANDUM

To:

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Jean Williams	

DATE: September 21, 1994

NUMBER OF PAGES TO BE TRANSMITTED: 13

FROM: Paula Clinedinst, Legal Assistant (202) 272-8019

MESSAGE: Please see attached Motion for Leave to File Oversized Brief, which was granted by Judge Dwyer.

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.

Civ. No. 92-479WD

SAVE THE WEST,

Plaintiff,

v.

JAMES LYONS, et al.,

Defendants.

Civ. No. C94-758WD

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

Civ. No. C94-803WD

MOTION FOR LEAVE TO FILE
OVERSIZED BRIEF - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

THE SIERRA CLUB

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

Civ. No. C94-820WD

FEDERAL DEFENDANTS'
MOTION FOR LEAVE TO
FILE AN OVERSIZED
BRIEF

NOTE ON MOTION
CALENDAR Sept. 16,
1994 (pursuant to
Federal Defendants'
Motion to Shorten
Time)

Defendants hereby move for leave of the Court to file a memorandum in support of their motion for summary judgment that exceeds the 24 page limitation set forth in Local Rule CR 7(c). Specifically, defendants ask for leave to file a memorandum of up to 150 pages in length. This motion is supported in the attached Memorandum in Support of Defendants' Motion for Leave to File Oversized Brief.

Respectfully submitted this 14th day of September, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney

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WELLS D. BURGESS
STEPHEN J. ODELL
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ANDREA BERLOWE
U.S. Department of Justice
Environment and Natural Resources
Division
General Litigation Section
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MOTION FOR LEAVE TO FILE
OVERSIZED BRIEF - 2

United States Department of Justice
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Attorneys for Federal Defendants

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MOTION FOR LEAVE TO FILE
OVERSIZED BRIEF - 3

United States Department of Justice
Environmental & Natural Resources Division
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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.

Civ. No. 92-479WD

SAVE THE WEST,

Plaintiff,

v.

JAMES LYONS, et al.,

Defendants.

Civ. No. C94-758WD

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

Civ. No. C94-803WD

MEMORANDUM IN SUPPORT OF MOTION TO
FILE OVERSIZED BRIEF - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
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Telephone: (202) 272-8056

THE SIERRA CLUB

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

Civ. No. C94-820WD

MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION
FOR LEAVE TO FILE
OVERSIZED BRIEF

By the motion to which this memorandum is attached, federal defendants seek leave of the Court to file a memorandum of up to 150 pages in support of their Motion for Summary Judgment. The proposed memorandum would thus exceed the normal 24-page limitation set forth in Local Rule CR 7(c). The motion for leave should be granted for the following reasons:

1. Federal Defendants are addressing in one brief, the claims of four sets of environmental plaintiffs and the industry cross-claim defendants.

2. Plaintiff Seattle Audubon Society has already requested leave to file a brief of up to 60 pages in length. Federal defendants anticipate the other parties will be filing similar motions.

3. The motion turns in part on the explanation of the process utilized in developing the challenged strategy, the proper understanding of which requires defendants to provide substantial elucidation. This factual background section itself requires more than the 24 pages provided under Local Rule CR 7(c) and will make up the bulk of federal defendants opening brief.

MEMORANDUM IN SUPPORT OF MOTION TO
FILE OVERSIZED BRIEF - 2United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

4. The importance of the issues raised in this litigation to the public at large requires that the issues be addressed at length.

Respectfully submitted this 14th day of September, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney

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MEMORANDUM IN SUPPORT OF MOTION TO
FILE OVERSIZED BRIEF - 3

United States Department of Justice
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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
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WASHINGTON CONTRACT LOGGERS
ASSOCIATION, et al.,

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Civ. No. 92-479WD

SAVE THE WEST,

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v.

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Civ. No. C94-758WD

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

Civ. No. C94-803WD

MOTION TO SHORTEN TIME - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

THE SIERRA CLUB

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

Civ. No. C94-820WD

FEDERAL DEFENDANTS'
MOTION TO SHORTEN TIME

NOTE ON MOTION
CALENDAR: Sept. 16,
1994

EXPEDITED
CONSIDERATION REQUESTED

Title of Underlying Motion: Federal Defendants' Motion for Leave to File Oversized Brief

Moving parties: Federal Defendants

If Motion to Shorten Time is not granted,
underlying motion would be noted for the
Court's calendar for:

September 30, 1994

Date and time when movants seek to have
Court rule on motion to shorten time:

September 16, 1994

Date and time when movants seek to have
Court consider merits of underlying motion: September 18, 1994

Federal defendants certify that this motion to shorten time has
been served on all other parties prior to or shortly after filing
with the Court.

This motion to shorten time is supported in the attached
Memorandum in Support of Federal Defendants' Motion to Shorten
Time.

Respectfully submitted this 14th day of September, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney

MOTION TO SHORTEN TIME - 2

United States Department of Justice
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151

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Attorneys for Federal Defendants

MOTION TO SHORTEN TIME - 3

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THE HONORABLE WILLIAM L. DWYER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
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Civ. No. C94-758WD

NATIVE FOREST COUNCIL,

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Civ. No. C94-803WD

MEMORANDUM IN SUPPORT OF MOTION
TO SHORTEN TIME - 1

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

THE SIERRA CLUB

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

Civ. No. C94-820WD

MEMORANDUM IN SUPPORT
OF FEDERAL DEFENDANTS'
MOTION TO SHORTEN TIME

Federal defendants are filing this same day a motion for leave to file an oversize brief in which they ask the Court to allow federal defendants to file a memorandum in support of their motion for summary judgment of 150 pages in length. The Court should grant the motion to shorten time because, otherwise, federal defendants' motion would not be noted under Local Rule CR 7(d) until September 30, 1994, beyond the date for which the motion for summary judgment and memorandum in support thereof are due. Thus, if the Court denies the motion to shorten time, defendants' motion to file an oversize brief effectively would be rendered moot.

The Court should grant Federal Defendants' Motion to Shorten Time for the foregoing reasons.

Respectfully submitted this 14th day of September, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney

MEMORANDUM IN SUPPORT OF MOTION
TO SHORTEN TIME - 2

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Attorneys for Federal Defendants

MEMORANDUM IN SUPPORT OF MOTION
TO SHORTEN TIME - 3

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

*file w/
Forest Plan
Litigation*

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

MEMORANDUM

To: Ellen Athas
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David Shilton (202) 514-4240
Robert Simmons (415) 744-3170
Tom Tuchmann (503) 326-6254
Jean Williams

DATE: August 26, 1994

NUMBER OF PAGES TO BE TRANSMITTED: 57

FROM: Paula Clinedinst, Legal Assistant (202) 272-8019

MESSAGE: Please see attached.

JUDGE DWYER

TODD D. TRUE (WSB# 12864)
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Sierra Club Legal Defense Fund
705 Second Ave., Suite 203
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(206) 343-7340

Attorneys for Plaintiffs
Seattle Audubon Society, et al.

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Western Environmental Law Center
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(503) 485-2471

Attorneys for Plaintiffs Lane County Audubon Society
Oregon Natural Resources Council

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.,)
)
Defendant-Intervenors.)

No. C92-479WD

SAVE THE WEST,)
)
Plaintiff,)
)
v.)
)
JAMES LYONS, et al.,)

No. C94-758WD

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

No. C94-820WD

SAS' MOTION TO COMPEL
PRODUCTION OF DOCUMENTS

Note on Motion Calendar:
September 9, 1994

NOW COME plaintiffs Seattle Audubon Society, et al., ("SAS")
and move this Court pursuant to Federal Rule of Civil Procedure
37 to compel federal defendants to produce the documents that
have been withheld in response to SAS' Request For Production
No. 1 in SAS' Second Supplemental Requests For Production Of
Documents.

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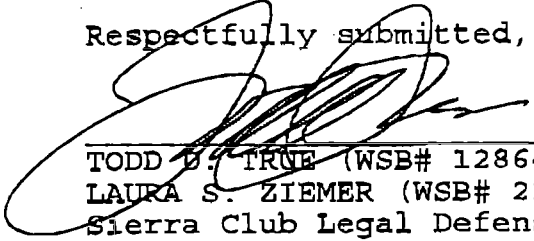
SAS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

- 2 -

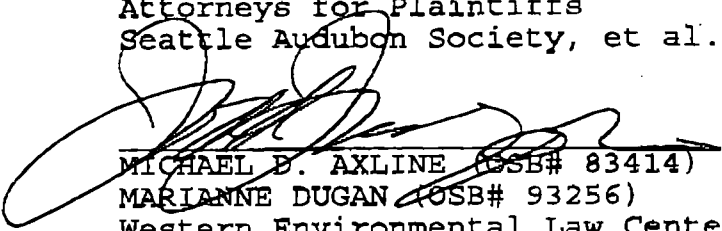
1 As required under Local Rule 37(g), counsel have conferred
2 but have been unable to reach agreement to avoid the necessity
3 for this motion. See Declaration of Todd D. True, submitted
4 herewith.

5 DATED: This ^{25th} day of August, 1994.

6 Respectfully submitted,

7 
8 TODD D. TRUE (WSB# 12864)
9 LAURA S. ZIEMER (WSB# 21352)
10 Sierra Club Legal Defense Fund
705 Second Ave., Suite 203
Seattle, WA 98104

11 Attorneys for Plaintiffs
12 Seattle Audubon Society, et al.

13 
14 MICHAEL D. AXLINE (OSB# 83414)
15 MARIANNE DUGAN (OSB# 93256)
16 Western Environmental Law Center
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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.,)

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

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

No. C94-820WD

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

INTRODUCTION

Plaintiffs, Seattle Audubon Society, et al., ("SAS"), seek to compel the federal defendants, United States Forest Service and Bureau of Land Management, to produce all documents requested by SAS but withheld from the Administrative Record in this case on claims of privilege. A list of these documents is attached as Exh. A to the Declaration of Todd D. True submitted herewith (documents requested by SAS are marked by a circle around the document number). The government asserts that these Administrative Record documents are privileged on one or more of the following grounds: (1) deliberative process; (2) deliberative process/White House communication; (3) attorney-client; and/or (4) attorney work-product.

The government's claims of privilege should be rejected for three reasons. First, this Court has rejected the government's claim of a deliberative process privilege for indistinguishable documents in an earlier phase of this case. See Seattle Audubon Society v. Moseley, No. C92-479WD, Order On Motion To Compel Discovery (W.D. Wash. May 13, 1992) (copy attached as Exh. B to True Decl.) (hereinafter, "Order On Motion To Compel Discovery"). Second, all of the requested documents are part of the Administrative Record in this case, on which this Court's review of the agencies' decision is based. Third, the federal defendants have failed to meet the minimal requirements for asserting any of the claimed privileges. For these reasons, SAS' motion to compel should be granted.

BACKGROUND

On June 29, 1994, SAS requested a list of all Administrative Record documents withheld from the Record on claims of privilege.^{1/} In response, on August 3, 1994, the federal defendants provided a list of 275 Administrative Record documents that had been withheld.^{2/} This list identifies each document by a number (PR 1 to PR 275), author's name, author's organization, receiver's name, receiver's organization, date, short description of the document, and the privileges asserted.

The next week, on August 11, SAS requested that the federal defendants produce 179 of the withheld Administrative Record documents.^{3/} On Monday, August 22, 1994, the federal defendants produced 2 of the documents that SAS had requested, Nos. PR 95 and PR 122, because these 2 documents had been inadvertently identified as privileged. "As to the remaining requests for production, federal defendants continue to assert that these documents are privileged and thus will not be produced." Answer To SAS's Second Supplemental Requests For Production Of Documents, at 8, dated Aug. 22, 1994 (Exh. F to True Decl.). The number of documents that the federal defendants' assert are covered under each particular privilege or combination of

^{1/} See Exh. C to True Decl., Interrogatory No. 12 of Plaintiffs' First Set Of Interrogatories And Requests For Production Of Documents.

^{2/} See Exh. D to True Decl., Federal Defendants' response to SAS' Interrogatory No. 12; the "List Of Privileged Documents" referenced in the response is Exh. A to True Decl.

^{3/} See Exh. E to True Decl., SAS' Request for Production No. 1 in SAS' Second Supplemental Requests For Production Of Documents.

1 privileges is described in Exh. G to True Decl.

2 Other than their index of documents, federal defendants
3 offer nothing to justify the privilege(s) listed and claimed for
4 each of the 177 Administrative Record documents that SAS
5 requested. There is no basis for these claims of privilege. The
6 Court should order the federal defendants to produce the
7 requested documents forthwith.

8 ARGUMENT

9 I. THIS COURT'S PRIOR DETERMINATION REGARDING FEDERAL
10 DEFENDANTS' CLAIMS OF PRIVILEGE REQUIRES PRODUCTION OF THE
11 REQUESTED DOCUMENTS

12 These parties have been before this Court on this issue in
13 this situation once before. Apparently, the government has
14 learned nothing from this experience because it again asserts the
15 same privileges for the same kinds of documents in the same
16 manner as before. See Order On Motion To Compel Discovery.

17 In 1992, under these circumstances, this Court found that
18 the government had not established that the deliberative process
19 privilege applied to the documents withheld from the
20 administrative record. The Court ordered the government to
21 produce them. Id. at 2. The Court also ordered the government
22 to either produce, or provide to the Court for in camera
23 inspection, all documents withheld under the assertion of
24 attorney-client privilege. Id. This 1992 ruling applies with
25 equal force to the federal defendants' assertions of privilege
26 now.

27 Under the law of the case doctrine, "a court is generally
precluded from reconsidering an issue previously decided by the

1 same court, or a higher court, in the identical case."
2 Herrington v. County of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993)
3 (quoting Milgard Tempering, Inc. v. Seals Corp. of America, 902
4 F.2d 703, 715 (9th Cir. 1990)). Courts have only limited
5 discretion to determine that the law of the case is inapplicable.
6 See Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 834 (9th Cir.
7 1982) ("the discretion of a court to review earlier decisions
8 should be exercised sparingly so as not to undermine the salutary
9 policy of finality that underlies the rule").

10 In Thomas v. Bible, 983 F.2d 152, 155 (9th Cir. 1993), cert.
11 denied 113 S. Ct. 2443 (1994), the court held:

12 a court may have discretion to reopen a previously
13 resolved question under one or more of the following
14 circumstances: (1) the first decision was clearly
15 erroneous; (2) an intervening change in the law has
16 occurred; (3) the evidence on remand is substantially
17 different; (4) other changed circumstances exist; (5) a
18 manifest injustice would otherwise result.

19 None of these exceptions apply here. In 1992, the Forest Service
20 claimed deliberative process and attorney-client privileges for
21 Administrative Record documents in the same way that the federal
22 defendants are claiming these privileges now. The law of the
23 case shows that the government's assertion of privilege in this
24 manner is insufficient to establish privilege for documents
25 withheld from the Administrative Record.

26 Under this Court's Order On Motion To Compel Discovery, at a
27 minimum, federal defendants should be compelled to produce the 70
28 Administrative Record documents^{4/} subject only to the claim of

29 4/ Of the 172 requested documents subject to the federal
30 defendants' claim of deliberative process privilege, 70 documents

1 deliberative process privilege.

2 II. A COMPLETE ADMINISTRATIVE RECORD IS ESSENTIAL FOR PROPER
3 JUDICIAL REVIEW

4 SAS seeks to compel the federal defendants to produce
5 documents from the Administrative Record on which decision-makers
6 relied in adopting the April 13, 1994 Record of Decision for
7 Amendments to Forest Service and BLM Planning Documents Within
8 the Range of the Northern Spotted Owl ("ROD"). A complete
9 administrative record is essential for proper judicial review of
10 the agencies' decision. See Citizens to Preserve Overton Park v.
11 Volpe, 401 U.S. 402, 420 (1971). The Administrative Record to
12 which SAS has access does not -- by the federal defendants' own
13 identification of the Administrative Record in this case --
14 include all documents considered and relied on by the agencies in
15 adopting the ROD.

16 This means that the Administrative Record before this Court
17 is not the Record on which the decision-makers relied. Through
18 assertions of various privileges, the federal defendants hide
19 parts of the Record in this case. See Coastal States Gas Corp.
20 v. Department of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980) ("an
21 agency will not be permitted to develop a body of 'secret law'
22 ... hidden behind a veil of [deliberative process] privilege
23 because it is not designated as 'formal,' 'binding,' or
24 'final'"). Presented with only a partial Record, neither SAS nor
25 this Court can make the "thorough, probing, in-depth review" of

26
27 are withheld subject only to that privilege. See Exh. G to True
Decl.

1 the Administrative Record that is required. Citizens to Preserve
2 Overton Park, 401 U.S. at 415. The federal defendants should not
3 be permitted to hide the grounds for the agencies' decision
4 through inappropriate claims of privilege.

5 III. THE FEDERAL DEFENDANTS HAVE NOT PROPERLY INVOKED ANY CLAIMS
6 OF PRIVILEGE

7 A. The Federal Defendants Have Not Properly Invoked The
8 Deliberative Process Privilege.

9 The federal defendants have withheld 172 of the 177
10 requested but unproduced documents on the basis, in whole or in
11 part, of the asserted "predecisional and deliberative" nature of
12 the documents. Even if the deliberative process privilege could
13 apply to these documents -- which it should not -- the federal
14 defendants must properly assert the privilege in order to
15 establish that the withheld Administrative Record documents are
16 in fact privileged. The federal defendants have not done so.

17 First, only Messrs. Babbitt and Espy, Secretaries of the
18 Department of Interior and Agriculture, respectively, have the
19 authority to invoke the deliberative process privilege in this
20 case. See, e.g., Mobil Oil Corp. v. Department of Energy, 102
21 F.R.D. 1, 5 (N.D.N.Y. 1983) ("the claim of privilege must be
22 lodged by the head of the agency which has control over the
23 matter, after personal consideration of the allegedly privileged
24 nature of the information"); Resolution Trust Corp. v. Diamond,
25 137 F.R.D. 634, 641-42 (S.D.N.Y. 1991). While this authority may
26 be delegated, it can only be delegated to "a subordinate with
27 high authority . . . [and the head of the agency] must issue
guidelines on the use of the privilege." Mobil Oil, 102 F.R.D.

1 at 5-6. The deliberative process privilege cannot be invoked by
2 the attorneys assigned to this case. See Thill Securities Corp.
3 v. New York Stock Exchange, 57 F.R.D. 133, 138 (E.D. Wis. 1972).

4 Second, any claim of the deliberative process privilege must
5 identify with particularity the reason why a withheld document
6 falls within the exemption. Coastal States, 617 F.2d at 861.
7 Conclusory assertions of privilege in the form of federal
8 defendants' index of documents does not meet this requirement.
9 Id.; Mobil Oil, 102 F.R.D. at 7.

10 Third, the deliberative process privilege is narrowly
11 construed. J.R. Norton Co. v. Arizmendi, 108 F.R.D. 647, 649
12 (S.D. Cal. 1985). In order to be privileged, the documents "must
13 be both 'predecisional' and 'deliberative.'" Assembly of
14 California v. United States Department of Commerce, 968 F.2d 916,
15 920, (9th Cir. 1992). To satisfy both of these criteria, the
16 document must be "prepared in order to assist an agency decision-
17 maker in arriving at his decision," and "play a meaningful role
18 in that process," as well as "reveal the mental processes of the
19 decision-makers." Id. at 921.^{5/}

20 The sentence-fragment descriptions of each of the 172
21 Administrative Record Documents withheld under the deliberative
22 process privilege do not make this showing. See, e.g., PR 43-50
23 ("ROD Outline with handwritten comments"); PR 69-75 ("Draft ROD
24

25 ^{5/} Portions of drafts of agency documents, such as parts of a
26 draft EIS or draft forest plan, fall within the scope of the
27 privilege only if they are shown to "identify and assign priority
to the issues deemed relevant to the formulation of policy."
National Wildlife Fed'n v. United States Forest Service, 861 F.2d
1114, 1121 (9th Cir. 1988).

1 with handwritten comments"); PR 52-63 ("Draft Standards and
2 Guidelines with handwritten comments"). Because the federal
3 defendants have not properly invoked the deliberative process
4 privilege, they should be ordered to produce the 70
5 Administrative Record documents withheld solely under a claim of
6 this privilege forthwith.

7 B. The Federal Defendants Have Not Established That The
8 Withheld Documents Are Privileged As "Deliberative
9 Process/White House Communications."

10 The federal defendants provide no explanation for the kind
11 of privilege they describe as "Deliberative Process/White House
12 Communication," and indicate as "WH" on the List of Privileged
13 Documents.^{5/} Federal Defendants' Answer To SAS Interrogatory
14 No. 12, at 2 (Aug. 3, 1994). SAS has found no support for
15 extending the deliberative process privilege to communications
16 with the executive branch without satisfying all conditions of
17 the deliberative process privilege. Moreover, if the federal
18 defendants intend to invoke the "executive privilege" by their
19 "WH" designation, they have not properly invoked that privilege
20 for the same reasons that they have failed to invoke the
21 deliberative process privilege.

22 Even personal communications with the President of the
23 United States do not enjoy an absolute privilege. United States

24 ^{5/} 18 documents have been designated as "WH" privileged in
25 conjunction with other claimed privileges: 8 documents are
26 claimed under "WH" and deliberative process; 3 documents are
27 claimed under "WH," deliberative process, and attorney-client;
and 7 documents are claimed under "WH," deliberative process,
attorney-client, and attorney work-product. See Exh. G to True
Decl.

1 v. Nixon, 418 U.S. 683, 706 (1974). Rather, executive privilege
2 is a qualified privilege and may be outweighed by "the legitimate
3 needs of the judicial process." Id. at 707. Communications with
4 White House officials, other than the President, are protected by
5 the executive privilege primarily when the officials' roles are
6 "'solely to advise and assist' the President." Meyer v. Bush,
7 981 F.2d 1288, 1293 (D.C. Cir. 1993) (quoting Soucie v. David,
8 448 F.2d 1067 (D.C. Cir. 1971)).

9 Before the executive privilege can be invoked, the federal
10 defendants must show with particularity the nature of the
11 privilege asserted and the reasons for preserving the document's
12 confidentiality. Federal defendants' bald assertion that, for
13 example, a memo originating from Katie McGinty, the Director of
14 the White House Office of Environmental Policy, is subject to a
15 "WH" privilege fails to satisfy this test. See, e.g., PR 4
16 ("Draft Memo Re: Forest Conference"); PR 7 ("Memo Re: Decision
17 Memo"); PR 201 ("Memo re: Review of draft ROD"); PR 260 ("Memo
18 re: Draft ROD").

19 The federal defendants have failed to establish that any of
20 the 18 documents labelled "WH" may be withheld from the
21 Administrative Record on the basis of this nebulous privilege.
22 At a minimum, the federal defendants should be compelled to
23 produce the 8 documents for which they claim White House
24 communication and deliberative process privileges only.

25 C. The Federal Defendants Have Failed To Establish The
26 Attorney-Client or Attorney Work-Product Privileges.

27 The purpose of the attorney-client privilege "is to assure

1 that a client's confidences to his or her attorney will be
2 protected." Coastal States, 671 F.2d at 862. Similarly, the
3 attorney work-product privilege "is designed to 'shelter the
4 mental processes of the attorney.'" Resolution Trust, 137 F.R.D.
5 at 644. "Like all privileges, however, the attorney-client
6 privilege is narrowly construed and is limited to those
7 situations in which its purposes will be served." Coastal
8 States, 671 F.2d at 862.

9 The nature of the attorney-client and attorney work-product
10 privileges and their application in litigation involving the
11 government in Resolution Trust, 137 F.R.D. at 643-644, are fully
12 applicable to this case:

13 On the basis of the skeletal information provided in
14 the index, it appears that the RTC has claimed the
15 attorney-client privilege whenever an attorney was one
16 of the persons who wrote or received the document.

17 With respect to most, if not all, of the documents for which
18 the RTC claims the attorney-client privilege, it is
19 impossible to discern whether they actually contain
20 communications relating to the subject matter upon which an
21 attorney's legal advice is sought, or merely contain
22 discoverable information that happens to be addressed to or
23 by counsel.

24 Thus, it is abundantly clear that the RTC must furnish more
25 details before the court can determine whether the RTC has
26 established each of the elements of the attorney-client
27 privilege . . . as to each of the documents that it has
28 refused to disclose on the basis of that privilege.

29 Id.; see also Admiral Ins. Co. v. United States District Court,
30 881 F.2d 1486, 1492 (9th Cir. 1989) (listing "the essential
31 elements of the attorney-client privilege").

32 The federal defendants' notation that the withheld
33 Administrative Record documents are "legal issues," or

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

- 10 -

MEMORANDUM IN SUPPORT OF SAS' MOTION
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- 11 -

1 claims of privilege inadequate and order the documents produced.

2 CONCLUSION

3 The federal defendants have not explained how they can
4 include documents within the Administrative Record to the
5 decision challenged in this case and yet refuse to produce them.
6 Because this Court has previously compelled the federal
7 defendants to produce such Administrative Record documents, and
8 because the federal defendants have failed to establish any of
9 the privileges that they claim, the Court should grant SAS'
10 motion to compel and direct federal defendants to produce the 70
11 documents improperly withheld under a claim of deliberative
12 process privilege forthwith, as well as the 8 documents
13 improperly withheld under claims of "White House communication"
14 and deliberative process privileges. For the remaining
15 documents, the Court should find that the government has failed
16 to show application of the privileges asserted and order the
17 documents produced. Alternatively, the Court may require
18 federal defendants to establish each element of the attorney-
19 client and attorney work-product privileges for these 99
20 documents and if the government cannot do so, order the documents
21 produced.

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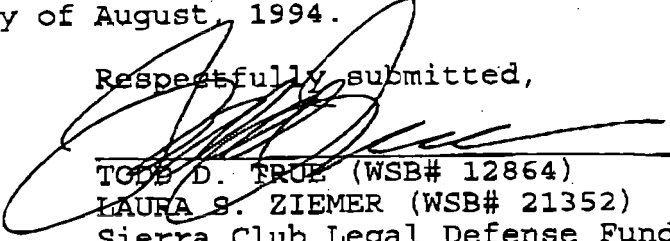
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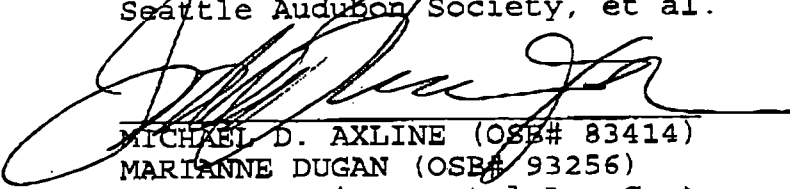
27 ///

1 DATED: This ^{7th} 25 day of August, 1994.

2 Respectfully submitted,

3 
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19 Oregon Natural Resources Council

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JUDGE DWYER

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IN THE UNITED STATES DISTRICT COURT
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DECLARATION OF TODD D. TRUE IN SUPPORT OF SAS' MOTION
 TO COMPEL PRODUCTION OF DOCUMENTS

Defendants.

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Plaintiff,

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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

DECLARATION OF TODD D. TRUE
IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION
OF DOCUMENTS

I, TODD D. TRUE, declare and state as follows:

1. My name is Todd D. True. I am one of the attorneys for plaintiffs Seattle Audubon Society, et al. ("SAS") in this case. I make this statement on the basis of personal knowledge.

2. On August 22, 1994, I received the federal defendants' Answer To SAS's Second Supplemental Requests For Production Of Documents, in which the federal defendants refused to produce the Administrative Record documents withheld under claims of privilege and requested by SAS.

3. On August 25, 1994, I spoke by telephone with Mr. Steven O'Dell, a Justice Department attorney representing the federal defendants. Pursuant to Local Rule 37(g), we attempted to confer and resolve our dispute concerning production of the

DECLARATION OF TODD D. TRUE IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS

1 documents withheld under claims of privilege.

2 4. Mr. O'Dell and I were not able to resolve our
3 differences.

4 5. Attached hereto as Exhibit A is a true and correct copy
5 of the federal defendants' index of privileged documents with the
6 document number of documents requested by SAS circled.

7 6. Attached hereto as Exhibit B is a true and correct copy
8 of this Court's Order On Motion To Compel Discovery, dated May
9 13, 1992.

10 7. Attached hereto as Exhibit C is a true and correct copy
11 of Interrogatory No. 12 of Plaintiffs' First Set Of
12 Interrogatories And Requests For Production Of Documents, dated
13 June 29, 1994.

14 8. Attached hereto as Exhibit D is a true and correct copy
15 of Federal Defendants' response to SAS' Interrogatory No. 12,
16 dated August 3, 1994.

17 9. Attached hereto as Exhibit E is a true and correct copy
18 of SAS' Request For Production No. 1 in SAS' Second Supplemental
19 Requests For Production Of Documents, dated August 11, 1994.

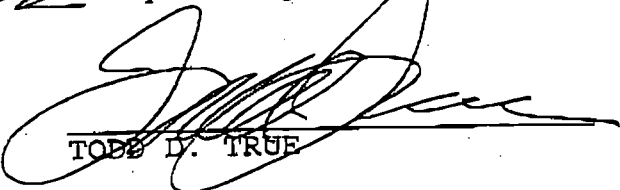
20 10. Attached hereto as Exhibit F is a true and correct copy
21 of federal defendants' response to Request for Production No. 1
22 in SAS's Second Supplemental Requests For Production Of
23 Documents, dated August 22, 1994.

24 11. Attached hereto as Exhibit G is a table of privileges
25 claimed by federal defendants for the 177 Administrative Record
26 documents requested by SAS.

27
DECLARATION OF TODD D. TRUE IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS

1 I declare under penalty of perjury that the foregoing is
2 true and correct. Executed this 24 day of August, 1993, in
3 Seattle, Washington.

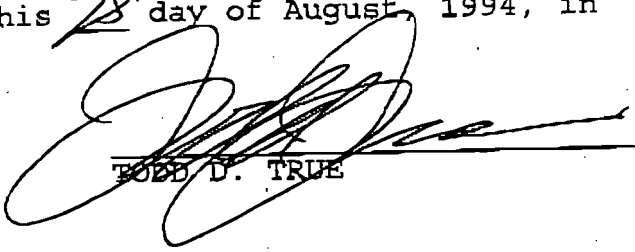
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TODD D. TRUE

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DECLARATION OF TODD D. TRUE IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS

1 I declare under penalty of perjury that the foregoing is
2 true and correct. Executed this 28th day of August, 1994, in
3 Seattle, Washington.

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TODD D. TRUE

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DECLARATION OF TODD D. TRUE IN SUPPORT OF SAS' MOTION
TO COMPEL PRODUCTION OF DOCUMENTS

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→→→ STELLE

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EXHIBIT A

LIST OF PRIVILEGED DOCUMENTS

Doc. No.	Author Name	Author Org	Receiver Name	Receiver Org	Date	Subject	Privilege
1	Laura Brown	DOI	Roger Nesbit	DOI	3/18/93	Management of BLM Land	AWP/AC/DP
2	Laura Brown	DOI	Roger Nesbit	DOI	3/18/93	Management of BLM land	AC/DP/AMP
3	Roger Nesbit	DOI	Lori Monroe	DOI	5/17/93	Time Summary for Approval, Revision or Significant Amendment of BLM's Resource Management Plans	DP/AC/AMP
4	Katie McGinty	OEP			5/21/93	Draft Memo Re: Forest Conference	WH/DP
5	James Perry	USDA, OGC	Jim Pipkin	Agency Coordination	5/26/93	Comments on Draft Interagency Working Group report with handwritten notes by John Leshy	AC/DP/AMP
6	Pete Raynor	DOI	Jim Pipkin	DOI	5/27/93	SEIS issues attaching handwritten comments on #3	AC/DP/AMP
7	Katie McGinty	OEP	DOI, USDA receivers, OMB, NEC		6/8/93	Memo Re: Decision Memo	DP/WH
8	John Leshy	DOI	Katie McGinty	OEP	6/10/93	Memo re: O & C Lands Act	DP/WH/AC/AMP
9	Forest Conference WHeccutive Committee (via Katie McGinty)				6/12/93	Draft Memo Re: Forest Conference	DP/WH
10	Forest Conference WHeccutive Committee (via Katie McGinty)				6/16/93	Draft Memo Re: Forest Conference	DP/WH
11	SEIS Team	SEIS Team	Wells Burgess	DOJ	7/1/93	pre-publication Draft SEIS with handwritten notes	AC/DP/AMP
12	SEIS Team	SEIS Team	Don Lawton	DOI	7/1/93	pre-publication Draft SEIS with handwritten notes	AC/DP/AMP
13	SEIS Team	SEIS Team	Ron Swan	DOI	7/1/93	pre-publication Draft SEIS with handwritten notes	AC/DP/AMP
14	Mike Gippert		Marc Gaede		7/9/93	Proposed SEIS TWRt	AC/AMP/DP
15	Tim Obst				8/27/93	Legal Issues List Re: Forest Plan	AC/AMP/DP
16	Mike Gippert	USDA-OGC	Kristina Clark	DOI-Sol	9/8/93	Public Availability of Final Draft of the Recovery Plan for the Northern Spotted Owl	AC/DP/AMP
17	Mike Gippert	USDA-OGC	Dave Gayer	DOI-Sol			
			Roger Nesbit	DOI-RSol			
			Diane Hoobler	DOI-RSol			
			Owen Schmidt	OGC-Port			
			Jim Lyons		9/10/93	Transmittal and update on recent developments Re: Forest Plan	AWP/DP/AC
			Marc Gaede				
			& DOJ, DOI and				
			USDA counsel				

025/057

STELLE

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LIST OF PRIVILEGED DOCUMENTS

2

Line	Name	Agency	Subject	Date	Notes	Privilege
18	Roger Nesbit	DOI/SOL	Erik Watkins	9/15/93	Agenda for 9/16/93 conference call	AWP/AC/DP
19	Roger Nesbit	DOI/SOL	Kris Clark	9/15/93	O & C Act	AC/AMP/DP
20	Mike Gippert	USDA-OGC	Jim Lyons	9/16/93	Agenda for 9/16/93 conference call	AWP/DP/AC
			Marc Gaede & other			
			DOJ, DOI & USDA counsel			
21	Roger Nesbit	DOI/SOL	Tim Obst	9/17/93	Section 318 timber sales	AC/AMP/DP
22	Amy Shogan	DOI	Roger Nesbit, Ron Swan	10/1/93	Agenda for 10/5-6 meeting, purpose:	
			Diane Moobler		brief counsel on issues with	AWP/AC
					handwritten notes	
23	----		---	10/19/93	Summary of telephone conversation	AC/AMP
24	Mike Gippert	USDA/OGC	Marc Gaede, DOJ, DOI	10/22/93	Draft Briefing for Whelcutive Group	AWP/DP/AC
25	Mike Gippert	USDA, OGC	Jim Lyons, Marc Gaede	11/5/93	FSEIS and ROD	AC/AMP/DP
			John Leshy		Briefing for Whelcutive Group	
			Other DOJ, USDA, DOI,		on Legal Issues	
			EPA, NOAA receivers			
26	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede	11/5/93	Cover sheet transmitting draft memo	AC/AMP/DP
			& other USDA, DOJ, DOI		outlining issues re: FSEIS development	
27	Roger Nesbit	DOI/SOL	Interagency Legal Team	11/9/93	Viability issue with attachment re: same	AWP/DP/AC
28	Roger Nesbit	DOI/SOL	Interagency Legal Team	11/10/93	Draft cover sheet requesting comments	AC/AMP/DP
					on viability issues	
29	Roger Nesbit	DOI	Interagency Legal	11/10/93	Legal Issues Raised by Litigation	AC/AMP
			Team Members		Parties in SEIS Comments	
30	Mike Gippert	USDA-OGC	Wells Burgess	11/10/93	Cover sheet transmitting Draft Agenda for	AC/AMP
	Tim Obst	USDA-OGC	Bill Cohen		Litigation Meeting	
			& other DOI/DOJ receivers			
31	Tim Obst	USDA-OGC	DOJ	11/11/93	Viability Provision	AC/AMP DP
32	Arnie Holden	USDA	SOL/OGC/DOJ	11/19/93	Discussion on viable populations	DP/AC
33	Lori Houck	EPA	Roger Nesbit	11/22/93	Legal Issues Raised by O & C Counties	AC/AMP/DP
			Interagency SEIS		in SEIS Comments	
			Legal Team			
34	Roger Nesbit	DOI	Kris Clark	11/30/93	Briefing Regarding O & C Act Issues	AC/AMP/DP
					in Forest Plan SEIS with handwritten notes	
35	Mike Gippert	USDA-OGC	Wells Burgess, Ellen Athas	11/30/93	ESA issues	AWP/DP/AC
			& other DOJ, DOI & USDA counsel			
36	Ken Denton			12/1/93	Transmitting 11/30/93 memo from Nesbit	AC/DP
					to Clark with response	

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Doc ID	Author	Agency	Subject	Date	Topic	Category
37	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede & DOI, DOJ, & USDA counsel	12/1/93	ESA Issues	AC/AWP/DP
38	Wells Burgess	DOJ	John Singlaub	12/1/93	Transmittal and comments on FSEIS	AC/AWP
39	Wells Burgess	DOJ	John Singlaub	12/1/93	Transmittal and comments on FSEIS	AC/AWP
40	Roger Wesbit	DOI	Kris Clark	12/2/93	Briefing Regarding O & C Act Issues in Forest Plan SEIS	AC/AWP/DP
41	Tim Obst	USDA-OGC	Steve Odell	12/6/93	Notes re: ROD & sale issues	AC/AWP/DP
42	DOJ			12/6/93	Agenda for NSD Litigation Hearing with handwritten notes	DP/AWP/AC
43	---		---	12/9/93	ROD Requirements	DP
44	Sharon Heywood			12/10/93	Record of Decision Outline	DP
45	Bob Deibel		---	12/10/93	ROD Outline with handwritten comments	DP
46	Jim Benson		---	12/10/93	ROD Outline with handwritten comments	DP
47	John Singlaub		---	12/10/93	ROD Outline with handwritten comments	DP
48	Arnie Holden		---	12/10/93	ROD Outline with handwritten comments	DP
49	Tom Tuchmann		---	12/10/93	ROD Outline with handwritten comments	DP
50	SEIS Team		---	12/12/93	Draft - Standards and Guidelines	DP
51	Wells Burgess	DOJ	Tim Obst	12/15/93	Draft agenda for meeting	AC/AWP
52	Mike Gippert	USDA-OGC	Ellen Athas, Wells Burgess	12/20/93	Transmitting 12/20/93 letter regarding viability	AC/AWP/DP
53	SEIS Team			12/20/93	DRAFT - Standards and Guidelines	DP
54	SEIS Team		---	12/20/93	Draft - Standards and Guidelines with handwritten comments	DP
55	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
56	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
57	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
58	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
59	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
60	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
61	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP
62	SEIS Team		---	12/20/93	Draft Standards and Guidelines with handwritten comments	DP

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Doc ID	Author	Agency	Reviewer	Team	Date	Description	Comments
63	SEIS Team		---		12/20/93	Draft Standards and Guidelines with handwritten comments	DP
64	Wayne Elson	EPA	Owen Schmidt	Interagency Team	12/21/93	Suggested Inserts for ROD	DP/AC
65	Mike Gippert	USDA-OGC	James Lyons		12/22/93	Draft Outline for FSEIS issue	AC/AWP/DP
66	SEIS Team		---		12/23/93	Draft Record of Decision with handwritten comments	DP
67	SEIS Team		---		12/23/93	DRAFT - Record of Decision with handwritten comments	DP
68	Diane Hoobler	DOI-Sol	Dave Powers		12/27/93	Language for SEIS on 4(d) Rule	AC/AWP
69	ROD Drafting Team		---		12/28/93	Draft Record of Decision	DP
70	ROD Drafting Team		---		12/28/93	DRAFT - Record of Decision with handwritten comments	DP
71	ROD Drafting Team		---		12/28/93	DRAFT - Record of Decision with handwritten comments	DP
72	ROD Drafting Team		---		12/28/93	DRAFT - Record of Decision with handwritten comments	DP
73	ROD Drafting Team		---		12/28/93	DRAFT - Record of Decision with handwritten comments	DP
74	ROD Drafting Team		---		12/28/93	DRAFT - Record of Decision with handwritten comments	DP
75	Owen Schmidt	Interagency Team	Mike Gippert	USDA-OGC	12/30/93	Option Paper re: Implementation	AC/AWP/DI
76	ROD drafting team		---		1/3/94	Draft ROD with handwritten comments by Roger Nesbit	AC/AWP/DP
77	Roger Nesbit		SEIS Team		1/5/94	O&C Act	AC/AWP/DP
78	Mike Gippert		Marc Gaede & DOI, DOJ receivers		1/6/94	Draft Checklist for Legal Issues for Final EIS and ROD	AC/AWP/DP
79	K. Denton	BLM			1/8/94	Summary of changes to Standards & Guidelines	DP
80	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede Will Stelle Mike Penfold	USDA	1/14/94	Transmittal sheet and suggested changes to Draft ROD outline	DP/AC/AWP/DI
81	Roger Nesbit				1/20/94	Options Regarding O&C Act Issues and memo from Nesbit	AC/AWP/DP
82	Roger Nesbit	DOI	Kris Clark		1/21/94	Briefing Regarding O&C Act Issues	AC/AWP/DP
83	---		---		1/21/94	Draft FSEIS with handwritten notes by Stephen Odell	AC/AWP/DP
84	Kristina Clark	DOI	Roger Nesbit		1/25/94	O&C Lands issues	AC/AWP/DI
85	Tim Obst	USDA-OGC	SEIS Team		1/25/94	Draft ROD Language	AC/AWP/DI
86	Kris Clark	DOI	ISC		1/25/94	Memo re: O & C Lands Act with handwritten notes	AC/AWP/DI

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Doc ID	Author	Agency	Topic	Date	Description	Category
87	Mike Gippert	USDA-OGC	SEIS Team	1/26/94	Draft response to a comment on the Draft SEIS	AC/AWP/DP
88	Tom Tuchmann	Office of Forestry & Economic Development	ISC Regional WHEcutives	1/28/94	Draft memo re: Proposed Steps for Review and Approval of ROD	DP
89	Kristina Clark	DOI	Roger Nesbit, Ron Swan	1/31/94	O&C Lands Issues	AC/AWP/DP
90	Roger Nesbit	DOI	John Leshy	1/31/94	O&C Lands Issues	AC/AWP/DP
91	Kristina Clark	DOI	Peter Coppelman	1/31/94	Transmittal and memo re: O & C Lands Act	AC/AWP/DP
92	OGC	USDA	---	2/2/94	Major ROD Issues	AWP/DP/AC
93	Steve Odell	DOJ	Ellen Athas Mike Gippert	2/4/94	Use of McKelvey Model	AC/AWP
94	ROD Drafting Team	---	---	2/8/94	DRAFT - ROD with handwritten notes by Steve Odell	AWP/DP
95	Will Stelle	White House	Jim Lyons, DOI, DOJ	2/16/94	Transmittal and List of Items on Option 9 from Ancient Forest Alliance	AC/DP/WH*
96	---	Forest Service	---	2/16/94	Draft regulation revision with handwritten notes by Gippert	AC/AWP/DP
97	Kristina Clark	DOI	Ellen Athas	2/16/94	Memo re: 2/15/94 meeting	AC/AWP/DP
98	ROD Drafting Team	---	---	2/21/94	DRAFT - Record of Decision	DP
99	Roger Nesbit	---	Files	2/23/94	Public Comment on Final SEIS	DP/AWP/AC
100	Will Stelle	OEP	Bob Baum Patricia Boneke Peter Coppelman Marc Gaede	2/24/94	Response to memo re: ROD	AC/DP/AWP/WH
101	---	---	---	2/27/94	DRAFT - ROD with handwritten notes by Mike Gippert	DP/AC/AWP
102	---	---	---	2/27/94	DRAFT - Record of Decision and Standards and Guidelines	DP
103	---	---	---	2/27/94	Draft - ROD	DP
104	Elaine Zielinski	BLM	---	2/28/94	Issues on the ROD	DP
105	---	---	---	2/28/94	ROD working schedule as of 2/25/94	DP
106	---	---	---	2/28/94	5th DRAFT - Standards and Guidelines with handwritten notes by Gippert	DP/AWP/AC
107	Mike Gippert	USDA-OGC	---	2/28/94	Draft language - ROD	AC/DP/AWP

* WH: Cover Memo Only

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Document ID	Author	Agency	Subject	Date	Topic	Classification
108	Mike Gippert	USDA-OGC	Jim Gilliland, Jim Lyons, Will Stelle, DOI, USDA, DOJ receivers	2/28/94	36 CFR 219.19	AC/AWP/DP/WH
109	Peter Coppelman	DOJ	Will Stelle Bill Back	3/1/94	Record of Decision issues	AC/AWP/DP/WH
110	Mike Gippert	DOJ	---	3/1/94	Agenda for ROD Meeting	AC/AWP/DP
111	Mike Gippert	USDA-OGC	Marc Gaede & other DOI/DOJ receivers	3/1/94	Draft Checklist for Legal Issues for ROD	AC/AWP/DP
112	---	---	---	3/1/94	Forest Service Briefing Paper Re: Draft ROD	DP
113	Tim Obst	USDA-OGC	Jim Gilliland, Bonnie Luken & USDA, DOI, DOJ receivers	3/2/94	Transmittal sheet and draft revised outline of ROD	AC/AWP/DP
114	Karen Mouritsen	DOI	Roger Nesbit	3/2/94	Checklist of Legal Issues for ROD	AC/AWP/DP
115	Tim Obst	USDA-OGC	Jim Gilliland and other USDA, DOI, and DOJ receivers	3/2/94	Revised Draft Outline of the ROD	AC/AWP/DP
116	Karen Mouritsen Tim Obst Steve Odell	DOI USDA-OGC DOJ	ROD drafting Team	3/2/94	Major Rod Issues	AC/AWP/DP
117	Mike Gippert	USDA-OGC	Ellen Athas Jim Lyons, Marc Gaede Susan Yonts-Shepard Kris Clark	3/2/94	Timber sale auction and award	AC/AWP/DP
118	ROD Drafting Team	---	---	3/2/94	DRAFT - Outline for Record of Decision	DP
119	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede & other DOJ, DOI receivers	3/2/94	Transmittal and draft list of Policy Issues	AC/AWP/DP
120	Jim Sanders	---	Mike Gippert, Marc Gaede	3/2/94	Transmitting proposed ROD outline	AC/DP
121	ROD Drafting Team	---	---	3/2/94	DRAFT - ROD outline	DP
122	K. Denton	---	---	3/2/94	Draft ROD language	DP
123	ROD Drafting Team	---	---	3/2/94	DRAFT - Outline for ROD	DP
124	Chief, Div. Forestry	BLM	Asst. Dir., Lands & Renewable Resources	3/2/94	Comments on Draft ROD	DP
125	Mike Gippert	USDA-OGC	---	3/3/94	ROD issues	AC/AWP/DP
126	---	---	---	3/4/94	DRAFT - Timber Sale Analysis	DP
127	John Leshy	DOI	Kristina Clark, Bob Baum Dave Gayer, Karen Mouritsen, Pete Raynor	3/4/94	Owl Litigation Strategy	AC/AWP/DP
128	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede & DOJ & DOI receivers	3/7/94	Outline of ROD issues	AC/AWP/DP

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Document ID	Author	Agency	Reviewer	Agency	Date	Description	Classification
129	ROD Drafting Team		---		3/7/94	Draft ROD with handwritten notes	DP/AWP/AC
130	ROD Drafting Team		---		3/7/94	DRAFT - Record of Decision	DP
131	Gippert/Obst		---		3/7/94	NFMA Issues	AC/AWP/DP
132	USDA-OGC		DOJ		3/7/94	Draft ROD language	AC/AWP/DP
133	ROD Drafting Team		---		3/7/94	Draft ROD with handwritten comments by Roger Nesbit	AC/AWP/DP
134	BLM				3/9/94	Comments on 3/7/94 draft ROD	DP
135	Phil Stanbro	BLM	Bob Bierer, Mike Penfold	BLM	3/9/94	ROD issues	DP/AC
136	Steve Odell	DOJ	Dave Gayer		3/9/94	Recommended changes to draft ROD	DP
137	N. Graybeal				3/9/94	Draft memos re: ROD	AC/AWP
138	Steve Odell	DOJ	ISC		3/10/94	Draft ROD language Re: Transition to Forest Plan (Versions 1 & 2)	DP
139	N. Graybeal				3/9/94	ROD language with handwritten notes	AC/AWP/DP
140	Hike Gippert	USDA-OGC	Jim Lyons, Mark Gaede and DOJ and DOJ receivers	USDA	3/10/94	Same as 135, but with Mouritsen handwritten notes	DP/AC
141	Hike Gippert	USDA-OGC	Susan Shepard		3/10/94	Memo re: draft ROD and Forest Planning	AC/AWP/DP
142	Hike Gippert	USDA-OGC	Arnie Holden	Forest Service	3/10/94	Transmittal memo with opinion of SAS v. Moseley	AC/AWP/DP
143	ROD Drafting Team		---		3/10/94	DRAFT - Record of Decision	DP
144	Phil Stanbro	BLM	Bob Bierer, Mike Penfold	BLM	3/11/94	Recommended changes for draft ROD	DP
145	Phil Stanbro	BLM	Bob Bierer, Mike Penfold	BLM	3/11/94	Recommended changes for draft ROD with handwritten notes	DP
146	Bob Bierer	BLM	Mike Penfold	BLM	3/11/94	Briefing re: Draft ROD	DP/AC
147	Gippert/Gaede	USDA-OGC	Will Stelle, DOJ		3/13/94	DRAFT ROD Language	AC/AWP/DP/WH
148	Oregon State Office	BLM	Mike Penfold		3/14/94	Comments on draft Survey & Manage Standards & Guidelines for ROD with attachments	DP
149	Dave Gayer		Reviewers of ROD		3/14/94	ESA consultation	AC/AWP
150	---	White House	---		3/14/94	Agenda for ISC Meeting	DP/WH
151	Jim Pipkin		Will Stelle	OEP	3/14/94	Comments on Draft ROD	DP/WH
152	OEP		Marc Gaede	USDA			
153	Denise Meridith	BLM	David Cottingham	DOI			
154			ISC		3/14/94	Timeline for review of ROD	DP
155			David Cottingham	DOI	3/15/94	Comments on draft ROD	DP

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Document ID	Author	Agency	Reviewer	Date	Comments	Privilege
154	ROD Drafting Team		---	3/15/94	DRAFT - ROD with handwritten notes by Mike Gippert	DP/AWP/AC
155	Kristine Walsh	REO	DOI	3/16/94	FACA Issues	DP
156	Will Stelle		John Leshy Jim Gilliland	3/16/94	FACA and Forest Plan Implementation	DP/WH/AC
157	Mike Gippert	USDA-OGC	ROD drafting team	3/16/94	Suggested language for ROD	AC/AWP/DP
158	Mike Gippert		ROD drafting team	3/16/94	Draft ROD Language	AC/DP/AWP
159	Mike Gippert	USDA-OGC	Marc Gaede	3/16/94	Draft ROD language	AC/AWP/DP
160	Tim Obst		Jeff Handy, Owen Schmidt	3/16/94	FACA Issues	AC/AWP/DP
161	Roger Nesbit		John Leshy	3/16/94	Comments on the O&C Act	AC/AWP/DP
162	Roger Nesbit		Karen Mouritsen	3/16/94	ROD Issues	AC/AWP/DP
163	John Leshy	DOI	Roger Nesbit, Mari Thomas Patricia Beneke Kristina Clark Karen Mouritsen Roger Nesbit	3/16/94	O&C Act issue	AC/AWP/DP
164	Karen Mouritsen	DOI-SOL		3/17/94	Handwritten note Re: Planning Section of ROD	DP/AC/AWP
165	Mike Gippert	USDA-OGC	Jim Pipkin Dave Cottingham Ellen Athas Karen Mouritsen	3/17/94	Draft ROD Language	AC/AWP/DP
166	Roger Nesbit			3/17/94	Comment Re: Draft Implementation section of ROD	AC/AWP/DP
167	Roger Nesbit	DOI	---	3/17/94	Nesbit Edits Re: Draft ROD	AC/AWP/DP
168	ROD Drafting Team		---	3/18/94	DRAFT - Record of Decision	DP
169	ROD Drafting Team		---	3/18/94	Draft of ROD with handwritten comments	DP
170	ROD Drafting Team		---	3/18/94	Draft - ROD section 318	DP
171	Roger Nesbit		Karen Mouritsen Debra Hecox Roger Nesbit Debra Hecox	3/18/94	Transmitting documents on FACA & structure to implement plan	AMP/DP AC
172	Debra Hecox		Roger Nesbit	3/18/94	Comments on FACA	AC/AWP/DP
173	Roger Nesbit		Debra Hecox	3/18/94	Attaching comments to FACA memo	DP/AWP/AC
174	Roger Nesbit	DOI	Karen Mouritsen	3/20/94	Comments on draft ROD	AC/AWP/DP
175	Mike Crouse	BLM	Jim Pipkin	3/21/94	BLN comments on draft ROD	DP
176	BLM Chief	BLM	Jim Pipkin	3/21/94	Comments on 3/18/94 draft ROD	DP
177	Div. of Forestry			3/21/94	Comments on draft ROD	AC/AWP/DP
178	Ellen Athas	DOJ	Jim Pipkin	3/21/94	OGC's Comments on draft ROD	AC/AWP/DP
	Tim Obst	USDA-OGC	Mark Gaede David Cottingham other DOJ/DOI receivers			

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Document Number	Author	Agency	Date	Subject	Privilege Code
179	Mike Gippert	USDA-OGC	3/21/94	Suggested language for ROD	DP/AMP/AC
180	Owen Schmidt		3/21/94	FACA Issues	AC/AMP/DP
181	Tim Obst		3/21/94	Comments on Draft FACA memo	AC/AMP/DP
182	Tim Obst		3/21/94	Transmittal and draft memo re: FACA	AC/AMP/DP
183	Roger Nesbit		3/22/94	Draft memo re: FACA	AC/AMP/DP
184	---		3/23/94	Projected Implementation Schedule for Alt. 9 DP	
185	Don Knowles		3/23/94	Proposed language in ROD: "survey & manage" DP	
186	Tim Obst		3/23/94	FACA litigation	AC/AMP/DP
187	Jim Pipkin	DOI	3/23/94	Draft ROD Language	AC/DP
188	Jeff Handy	OGC	3/23/94	Draft memo re FACA	AC/AMP/UP
189	Mike Gippert	USDA-OGC	3/24/94	Draft ROD Language with cover memo re: same	AC/AMP/DP
190	Ogden	DOI	3/24/94	Transmittal with Draft ROD with handwritten comments	DP
191	Owen Schmidt		3/25/94	Retention of documents for Administrative Record	DP/AC/AM
192	Steve Odell	DOJ	3/28/94	Transmittal sheet with draft ROD language	AC/AM
193	Ellen Athas	DOJ	3/28/94	Transmittal and Draft Rod memo from Jim Pipkin re: comments received on the ROD	AC/AMP
194	ROD Drafting Team		3/28/94	Draft ROD with handwritten comments	DP
195	ROD Drafting Team		3/28/94	Sections of Draft ROD with NM comments	DP
196	ROD Drafting Team		3/28/94	Draft ROD with handwritten comments	DP
197	ROD Drafting Team		3/30/94	Draft ROD with handwritten comments	DP
198	Jim Pipkin		3/28/94	Hemorandum with draft ROD	AC/D
199	Robin B.	FS	3/30/94	Draft Standards & Guidelines language for Green Tree Retention	DP
200	ROD Drafting Team		3/30/94	DRAFT - Record of Decision with handwritten notes	DP
201	Katie McGinty	OEP	3/30/94	Memo re: Review of draft ROD	DP/WH
202	Director, BLM	BLM	3/31/94	Comments on draft ROD re: Retention Policy	DP
203	Bill Bradley	BLM	3/31/94	OR/HA BLM comments on draft ROD	DP

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204	Bill Bradley	BLM	Jim Pipkin	DOI	4/1/94	Comments on draft ROD with cover sheet	DP
205	Tim Obst	USDA-OGC	Jim Pipkin	DOI	4/1/94	Proposed language for draft ROD	AC/AWP/DP
			Marc Gaede and	USDA			
			DOI/DOJ receivers				
206	Roger Nesbit		Jim Pipkin	DOI-SOL	4/1/94	Proposed draft ROD edits	AC/AWP/DP
207	Jean Williams	DOJ	Cay Ogden		4/1/94	New info and B.O on Alternative 9	AC/AWP/DP
	Steve Odell						
208	Bill Bradley	BLM	Jim Pipkin	DOI	4/4/94	Comments on draft ROD with cover sheet	DP
209	Steve Odell	DOJ	Will Stelle	OEP	4/4/94	Memo re: Draft ROD language	AC/AWP/DP/WH
			James Pipkin	DOI			
			Tim Obst	USDA-OGC			
210	Jim Pipkin	DOI	Will Stelle	OEP	4/4/94	Memo re: viability language of ROD	AC/DP/WH
			Tim Obst				
			Steve Odell				
211	Jim Pipkin	DOI	Steve Odell	DOJ	4/5/94	Memo re: Draft ROD language with handwritten comments	AC/DP
212	James Lyons	USDA	Lois Schiffer	DOJ	4/5/94	Draft ROD language with cover memo	AC/AWP/DP
213	Kristina Clark		Peter Coppelman				
214	Kristina Clark		Roger Nesbit		4/5/94	Sales issue	DP/AWP/AC
215	Kristina Clark		Roger Nesbit		4/5/94	Sales issue	DP/AWP/AC
			John Leshy		4/5/94	Timber sales	DP/AWP/AC
			Patricia Bencke				
216	Steve Odell	DOJ	Will Stelle	OEP	4/5/94	Memo re: draft ROD language	AWP/AC/DP/WH
			James Pipkin	DOI			
			Tim Obst	USDA-OGC			
217	Bill Bradley	BLM	Mel Berg		4/5/94	Transmittal and Draft language for ROD	DP
218	Jim Pipkin	DOI	Will Stelle	OEP	4/5/94	Memo re: viability	AC/DP/WH
			Tim Obst	USDA-OGC			
			Steve Odell	DOJ			
219	ROD drafting team		Jim Pipkin, Don Knowles	DOI	4/5/94	Draft responses to comments on FSEIS for ROD	DP
			David Cottingham				
220	Ellen Athas	DOJ	Lois Schiffer		4/6/94	Transmittal and 6th DRAFT of Standards and Guidelines	DP/AC/AWP
			Peter Coppelman				
			Ignacia Moreno				
			Jim Simon				
			Bill Cohen				
			Jim Kilbourne				
221	ROD Drafting Team		---		4/6/94	DRAFT - Record of Decision	DP

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222	Jim Pipkin		Will Stelle Tim Obst Steve Odell		4/6/94	Transmittal and portions of DRAFT ROD	AC/DP/WH
223	Peter Coppelman	DOJ	Will Stelle	OEP	4/6/94	Comments on draft ROD w/handwritten notes	AC/AWP/DP/WH*
224	ROD Drafting Team		James Pipkin	DOI		Draft Sections of Stds and Guidelines	DP
225	ROD Drafting Team		Tim Obst	USDA-OGC		Draft ROD with handwritten comments	DP
226	Peter Coppelman	DOJ	Will Stelle	OEP	4/6/94	Comments on Draft ROD w/handwritten notes	AC/AWP/DP/WH*
227	Steve Odell	DOJ	James Pipkin	DOI	4/6/94	Memo re: draft ROD language	AC/AWP/DP
228	Don Knowles	DOI	Ellen Athas, Steve Odell Jean Williams	DOJ	4/7/94	Draft ROD language comments	AC/DP
229	---		---		4/7/94	Unredacted version of 00 577	DP
230	Mike Gippert	USDA	Gilliland, Coppelman Gaede, Odell		4/7/94	Memo re: viability section of draft ROD	AC/AWP/DP
231	Mike Gippert	USDA-OGC	Jim Lyons, Marc Gaede James Gilliland Jack Ward Thomas	USDA	4/7/94	Transmittal sheet and memo to Stelle, Pipkin, and DOJ re: ROD	AC/AWP/DP/WH**
232	Debra Hecox	DOI	Tim Obst	USDA-OGC	4/7/94	Transmittal with note and memo re: FACA	AC/AWP/DP
233	---		---		4/7/94	Draft portion of ROD	DP
234	Debra Hecox		Roger Nesbit		4/7/94	FACA compliance	AC/AWP/DP
235	James Gilliland James Lyons	USDA	Jim Lyons, Mark Gaede Lois Schiffer, Will Stelle Jack Ward Thomas	USDA	4/7/94	Transmittal and memo re: ROD	AC/AWP/DP
236	Lisa Freedman	Office of Forestry & Econ. Development	Peter Coppelman	DOJ	4/8/94	Draft ROD language	AC
237	Lisa Freedman	Office of Forestry & Econ. Development	Jim Lyons Marc Gaede		4/8/94	Proposed ROD language, summary of FWS comments & listing of 318 sales in LSR	DP/AC
238	Gippert/Obst	USDA-OGC	ROD Reviewers		4/8/94	DRAFT ROD Language	AC/AWP/DP
239	Mike Gippert	USDA-OGC	Mark Gaede		4/8/94	Draft sections of ROD	AC/AWP/DP
240	Mike Espy	USDA	Janet Reno Bruce Babbitt	DOI	4/8/94	Draft ROD with attached draft ROD language	DP/AC

* E: for document only

**E: for memo only

035/057

STELLE
-->>>

19:39

08/26/94

LIST OF PRIVILEGED DOCUMENTS

12

Document Number	Author	Agency	Subject	Date	Comments	Approval
241	James Lyons	USDA-OGC	Secretary	4/8/94	ROD issues for decision	AC/AWP/DP
242	James Gilliland	USDA-OGC	Tom Collier	4/8/94	Transmittal and DRAFT ROD for review and clearance	DP/AC
243	Jim Pipkin	DOI	& other DOI personnel	4/8/94	Memorandum requesting ROD comments	DP/AC
244	Jim Pipkin	---	Tom Collier	4/8/94		
245	Jean Williams	DOJ	John Lesby	4/8/94		
246	Steve Odell	DOJ	other USDA, DOJ, and DOI receivers	4/8/94		
247	Cay Ogden	DOJ		4/8/94	Memo re: new info and BO on Alt. 9	AWP/DP/AC
248	Dick Holthausen	DOJ		4/11/94	Transmittal and draft language for ROD	DP
249	Don Knowles	DOI		4/11/94	Draft memo re: sales	AC/AWP/DP
250	Roger Nesbit	DOI		4/11/94	Draft memo re: sales	AC/AW
251	Roger Nesbit	DOI		4/11/94	Draft ROD language	AC/AWP/DP
252	Jean Williams	DOJ		4/12/94	DRAFT - Record of Decision	DP
253	ROD Drafting Team	---		4/12/94	Draft letter Re: info on spotted owls with handwritten comments by R. Swan	DP/AMP/AC
254	Bob Jacobs	SEIS Team	M. Plenert	4/12/94	Draft letter Re: info on spotted owls with handwritten comments by R. Swan	DP/AMP/AC
255	Bob Jacobs	SEIS Team	M. Plenert	4/12/94	Draft memo re: FACA compliance	AWP/AC/DP
256	Roger Nesbit	---	Debra Necox	4/12/94	Timber sales	DP/AMP/AC
257	Roger Nesbit	---	Kristina Clark	4/12/94	Timber sales	DP/AMP/AC
258	Kris Clark	---	Mike Dombeck	4/12/94	318 sales	DP/ AWP/AC
259	Roger Nesbit	---	Kristina Clark	4/12/94	Draft ROD	DP/NH
260	Mark Gaede	USDA	Will Stelle	4/12/94	Draft ROD language	AC/AMP/DP
261	Steve Odell	DOJ	Cay Ogden	4/12/94		
262	Jean Williams	DOJ		4/13/94	Draft ROD language re: timber sales	DP
263	Tom State	BLM	Ed Shepard	4/13/94	memo re: ROD	AC/AWP/DP/WH
264	James Gilliland	USDA	Katie McGinty	4/13/94		
265	Katie McGinty	OEP	John Lesby	4/13/94		
266	Mike Gippert	USDA-OGC	Lois Schiffer	4/13/94		
267	Mike Gippert	USDA-OGC	Mark Gaede	4/19/94		
268	Mike Gippert	USDA-OGC	Jim Pipkin	4/25/94	Fax sheet with note re: viability	AC/AWP
269	Mike Gippert	USDA-OGC	Ellen Athas	4/25/94	ROD issues Forest Planning	AC/AWP/DP
270	Mike Gippert	USDA-OGC	Jim Lyons, Mark Gaede			
271	Mike Gippert	USDA-OGC	Lois Schiffer			
272	Mike Gippert	USDA-OGC	other USDA, DOJ, and DOI receivers			

LIST OF PRIVILEGED DOCUMENTS

263	Don Knowles		ROD drafting team	
264	Jean Williams	DOJ	ROD reviewers	
265	Steve Odell	DOJ	ROD Drafting Team	
266	Owen Schmidt	USDA	Bob Jacobs, Arnold Holden	
267	Don Knowles		Ellen Athas	DOJ
268	Steve Odell	DOJ	---	
269	Dave Powers	EPA	---	
270	SEIS Team		---	
271	SEIS Team		---	
272	SEIS Team		---	
273	Jim Kilbourne	DOJ	---	
274	Steve Odell	DOJ	Dick Holthausen	
275	Steve Odell	DOJ	Tom Tuchmann	OFED
			Mike Gippert	USDA/OGC
			Tim Obst	USDA/OGC

13

00/00/00	Memo re: sawtimber sales with handwritten notes by Mouritsen	DP/AC
00/00/00	DOJ Comments on draft ROD	AC/AWP
00/00/00	Draft ROD language	DP/AWP/AC
00/00/00	Checklist for the contents of a ROD	AWP/DP/AC
00/00/00	Handwritten cover sheet (for timber sale estimates - attachment is included in the Record)	DP/AC
00/00/00	Outline of draft ROD Section	AC/AWP/DP
00/00/00	Draft ROD Outline with handwritten comments	DP
00/00/00	Draft - Standards & Guidelines with handwritten notes	DP
00/00/00	Draft Standards and Guidelines	DP
00/00/00	Draft Response to comments on DSEIS	DP/AC/AWP
00/00/00	Draft Response to comments on DSEIS with handwritten notes	DP/AC/AWP
00/00/00	Draft Response to comments on DSEIS	DP/AC/AWP
00/00/00	Proposed changes to memo re: Model runs	AC/AWP/DP
00/00/00	Draft Outline of ROD section	AC/AWP/DP

08/26/94 19:39



→→→ STELLE

038/057

EXHIBIT B

SIERRA
LEGAL DEPT. JB
FUND

MAY 15 1992

RECEIVED

FILED ENTERED
LOGGED RECEIVED

MAY 12 1992

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BYUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,)
 Plaintiffs,)
 v.)
 JAMES R. MOSELEY, et al.,)
 Defendants.)
 and)
 WASHINGTON CONTRACT LOGGERS)
 ASSOCIATION, et al.,)
 Intervenor.)

NO. C92-479WD

ORDER ON MOTION TO
COMPEL DISCOVERY

Plaintiffs Seattle Audubon Society, et al. (collectively "SAS"), have moved under Fed. R. Civ. P. 37 for an order compelling defendants James R. Moseley, et al. (collectively "Forest Service"), to produce twenty-seven Forest Service documents. Time has been shortened, and all materials filed in support of or opposition to the motion have been fully considered.

The documents in question are part of the administrative record in this case. They fall within the scope of SAS's Request for Production No. 4. While producing some documents within the

78

1 scope of that request, the Forest Service has withheld twenty-
2 seven on four different grounds. As to ten of the documents the
3 agency asserts the deliberative process privilege; as to five it
4 invokes the attorney-client privilege; as to three it claims both
5 the deliberative process and attorney-client privilege; and as to
6 nine it claims confidentiality by reason of agreements between
7 defendants and those who wrote the documents.

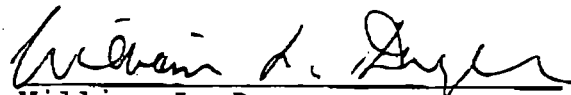
8 It is important to note that all of these documents form part
9 of the administrative record. The court finds that the delibera-
10 tive process privilege has not been established as to any of the
11 documents. As to the claims of attorney-client privilege, the
12 Forest Service should have the option of either producing them or
13 providing them to the court for in camera inspection. The docu-
14 ments withheld because of confidentiality agreements between
15 defendants and the authors (draft reports of studies being con-
16 ducted by scientists) should be produced pursuant to confidential-
17 ity agreement limiting access to those documents to SAS, its
18 counsel, and experts, and prohibiting any person from using the
19 materials except as may be necessary in this litigation.

20 Accordingly, the motion to compel is granted to the following
21 extent: The Forest Service is directed to produce the documents
22 withheld solely on a claim of deliberative process privilege; to
23 produce, or at its option to provide to the court for in camera
24 inspection, documents withheld on a claim of attorney-client
25 privilege; and to produce, subject to an appropriate confidential-
26 ity agreement as outlined above, the documents withheld because of

1 agreements between defendants and the authors. The production of
2 documents, and any delivery to the court for in camera review, are
3 to be completed by the close of business on May 15, 1992.

4 The clerk is directed to send copies of this order to all
5 counsel of record.

6 Dated: May 13, 1992.

7
8 
9 William L. Dwyer
United States District Judge

08/26/94 19:40



→→→ STELLE

042/057

EXHIBIT C

1 INTERROGATORY NO. 12: Please provide a list of all
2 documents withheld from the administrative record on a claim of
3 privilege. For each such document identify the document's date,
4 author, all known recipients, the subject matter of the document,
5 a brief description of the document's contents, and the basis for
6 the claim of privilege.

7
8
9
10
11
12
13 INTERROGATORY NO. 13: In paragraphs 2 and 3 of his
14 declaration of June 20, 1994, Forest Service Chief Thomas
15 identifies those categories of documents that the FEMAT team
16 retained as the "record" of its deliberations and states that he
17 arranged for the FEMAT team to "have all of its discarded
18 materials shredded before sending them off for recycling."
19 Please identify any records, indexes or other documents that in
20 any way identify, by date, author, content or otherwise, the
21 documents that were destroyed pursuant to Chief Thomas's
22 instructions.

08/26/94 19:41



---> STELLE

044/057

EXHIBIT D

1 THE SIERRA CLUB

2 Plaintiff,

3 v.

4 MICHAEL ESPY, et al.,

5 Defendants.

) Civ. No. C94-820WD

) FEDERAL DEFENDANTS'

) ANSWER TO

) SAS INTERROGATORY

) NUMBER 12

6
7 COME NOW Federal Defendants and, pursuant to previous
8 agreement of the parties, submit below their answer to
9 Interrogatory No. 12 of the Seattle Audubon Society plaintiffs
10 (SAS).

11 INTERROGATORY NO. 12: Please provide a list of all documents
12 withheld from the administrative record on a claim of privilege.
13 For each such document identify the document's date, author, all
14 known recipients, the subject matter of the document, a brief
15 description of the document's contents, and the basis for the
16 claim of privilege.

17 In response to Interrogatory No. 12, Federal Defendants
18 provide the attached index. The documents listed on the attached
19 index were not set forth on the index to the Administrative
20 Record for the April 13, 1994 Record of Decision (ROD, p. 74).
21 Federal Defendants filed that index with the Court on June 20,
22 1994. Should plaintiffs file a motion to compel production of
23 any documents on the attached index, on the ground that such
24 documents should be part of the record on which judicial review
25 shall be conducted or any other ground, Federal Defendants
26 reserve the right to object and to formally assert any or all of
the privileges indicated on the index or any other applicable
privilege. The privileges indicated are:

23 AC - Attorney-Client

24 AWP - Attorney Work-Product

25 DP - Deliberative Process

26 WH - Deliberative Process/White House Communication

Federal Defendants will request that the Court reviewing any
motion to compel rule on the issue of the "WH" privilege only if

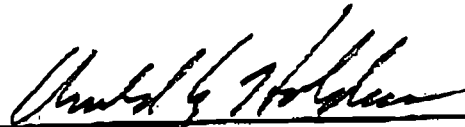
FED DEFS' ANSWER TO
INTERROGATORY NO. 12

WELLS D. BURGESS
JEAN E. WILLIAMS
US DEPT. OF JUSTICE
PO BOX 663

WASHINGTON, D.C. 20044-0663
(202) 272-6958/9884

1 the Court determines that no other privilege applies to any
2 individual document.

3 Dated this 3rd day of August 1994.

4
5 
6 ARNOLD G. HOLDEN
7 Interagency Plan Support Group
8 Leader
9 Portland, OR 97208
10 (503) 326-7472

11 LOIS J. SCHIFFER
12 Acting Assistant Attorney General

13 PETER D. COPPELMAN
14 Deputy Assistant Attorney General

15 KATRINA C. PFLAUMER
16 United States Attorney

17 
18 WELLS D. BURGESS
19 STEPHEN J. ODELL
20 JEAN E. WILLIAMS
21 U.S. Department of Justice
22 Environment and Natural Resources
23 Division
24 General Litigation Section
25 Wildlife & Marine Resources
26 Section
27 P.O. Box 663
28 Washington, D.C. 20044-0663
(202) 272-6958/6213/9884

Attorneys for Federal Defendants

26 FED DEFS' ANSWERS TO
27 INTERROGATORY NO. 12 - 3

26 WELLS D. BURGESS
27 JEAN E. WILLIAMS
28 US DEPT OF JUSTICE
PO BOX 663
WASHINGTON, D.C. 20044-0663
(202) 272-6958/9884

08/26/94 19:41



→→→ STELLE

047/057

EXHIBIT E

1 4. The term "person" includes natural persons, government
2 agencies, partnerships, corporations, and every other form of
3 legally recognized entity.

4 5. All terms include the past, present and future; the
5 singular includes the plural, and the plural includes the
6 singular.

7 6. "Or" shall mean and/or.

8
9 REQUESTS FOR PRODUCTION OF DOCUMENTS

10 REQUEST FOR PRODUCTION NO. 1: Please provide copies of
11 those documents and withheld from the Administrative Record in
12 this case on a claim of privilege identified in response to SAS'
13 Interrogatory No. 12 that are marked by a circle around the
14 document number on the attached index of documents provided with
15 the government's response to SAS' Interrogatory No. 12.

08/26/94 19:42



--- STELLE

049/057

EXHIBIT F

different from the original because of notes made on the copy
1 of otherwise), together with all worksheets, back-up documents
2 and other relevant materials. The terms "record" and
3 "document" include any written reports, letters, books,
4 telegrams, memoranda, tape recordings, drawings, graphs,
5 charts, photographs, and other written or graphic material or
6 communication however denominated from which information may be
7 obtained.
8

9
10 4. The term "person" includes natural persons,
11 government agencies, partnerships, corporations, and every
12 other form of legally recognized entity.

13 5. All terms include the past, present and future; the
14 singular includes the plural, and the plural includes the
15 singular.

16
17 6. "Or" shall mean and/or.

18 REQUESTS FOR PRODUCTION OF DOCUMENTS

19 REQUEST FOR PRODUCTION NO 1.: Please provide copies of
20 those documents and [sic] withheld from the Administrative
21 Record in this case on a claim of privilege identified in
22 response to SAS' Interrogatory No. 12 that are marked by a
23 circle around the document number on the attached index of
24

25
26 ANSWER TO SAS'S SECOND SUPPLEMENTAL
REQUESTS FOR PRODUCTION OF DOCUMENTS -7

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

08/22/84 18:56

documents provided with the government's response to SAS'

Interrogatory No. 12.

In response to plaintiffs Seattle Audubon Society's request for production of the circled documents, federal defendants hereby produce the attachment to PR-95 which was inadvertently included on the privileged index list. As to document number PR-122, this document is already part of the Administrative Record Index and is referenced as document number E0046. A copy of that document is produced herein.

Although document numbers PR-237, PR-245 and PR-267 were not requested by plaintiffs Seattle Audubon Society, they are being produced on a limited basis. Federal defendants hereby produce the first three pages of document number PR-245 and continue to assert the deliberative process privilege as to the final page. As to document number PR-237, nine pages of this document are referenced in the Administrative Record Index as E0032. In addition, the attachment to document number PR-267 is included in the Administrative Record Index as E0024. Federal defendants continue to assert the attorney-client and deliberative process privileges as to the cover letter for PR-267 and the remaining four pages of PR-237. Copies of these referenced documents are produced herein. As to the remaining requests for productions, federal defendants continue to assert that these documents are privileged and thus will not be produced.

ANSWER TO SAS'S SECOND SUPPLEMENTAL
REQUESTS FOR PRODUCTION OF DOCUMENTS -8

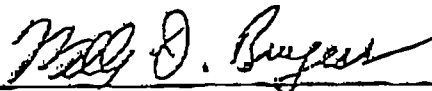
United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-2036

Dated this 22nd day of August, 1994.

LOIS J. SCHIFFER
Acting Assistant Attorney General

PETER D. COPPELMAN
Deputy Assistant Attorney General

KATRINA C. PFLAUMER
United States Attorney



WELLS D. BURGESS
STEPHEN J. ODELL
JEAN E. WILLIAMS
U.S. Department of Justice
Environment and Natural Resources
Division
General Litigation Section
P.O. Box 663
Washington, DC 20044-0663
(202) 272-6958/6213

Attorneys for Defendants

ANSWER TO SAS'S SECOND SUPPLEMENTAL
REQUESTS FOR PRODUCTION OF DOCUMENTS -9

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056



EXHIBIT G

TABLE OF PRIVILEGES CLAIMED

The federal defendants assert the following privileges for the 177 Administrative Record documents requested by SAS as follows:

DP	70
DP/WH	8
AC/DP	12
AC/AWP	4
AC/AWP/DP	73
AC/DP/WH	3
AC/DP/WH/AWP	7

The privileges indicated are:

- AC - Attorney-Client
- AWP - Attorney Work-Product
- DP - Deliberative Process
- WH - Deliberative Process/White House Communication

JUDGE DWYER

TODD D. TRUE (WSB# 12864)
 LAURA S. ZIEMER (WSB# 21352)
 Sierra Club Legal Defense Fund
 705 Second Ave., Suite 203
 Seattle, WA 98104
 (206) 343-7340

Attorneys for Plaintiffs
 Seattle Audubon Society, et al.

MICHAEL D. AXLINE (OSB# 83414)
 MARIANNE DUGAN (OSB# 93256)
 Western Environmental Law Center
 44 W. Broadway, #200
 Eugene, OR 97401
 (503) 485-2471

Attorneys for Plaintiffs Lane County Audubon Society
 Oregon Natural Resources Council

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.,)

CERTIFICATE OF SERVICE

Defendants.

NATIVE FOREST COUNCIL,

Plaintiff,

v.

BRUCE BABBITT, et al.,

Defendants.

No. C94-803WD

THE SIERRA CLUB,

Plaintiff,

v.

MICHAEL ESPY, et al.,

Defendants.

No. C94-820WD

CERTIFICATE OF SERVICE

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 August 25, 1994, I served a true copy of SAS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS, MEMORANDUM IN SUPPORT OF SAS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS, and DECLARATION OF TODD D. TRUE on the persons listed below by 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

CERTIFICATE OF SERVICE

1 Mark C. Rutzick
2 888 SW Fifth Ave., 500 Pioneer Tower
3 Portland, OR 97204-2089

4 Peggy Hennessey
5 Gary Kahn
6 610 S.W. Alder, Suite 910
7 Portland, OR 97205

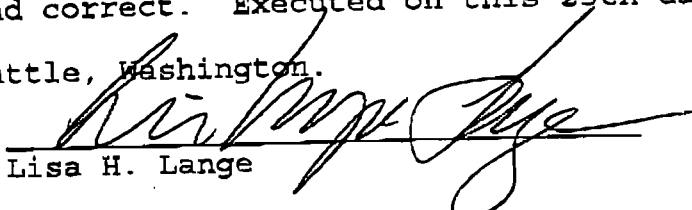
8 John S. Karpinski
9 2612 E. 20th St.
10 Vancouver, WA 98661

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

13 J.J. Leary, Jr.
14 James R. Hennessey
15 Smith & Leary
16 316 Occidental Ave. S., Suite 500
17 Seattle, WA 98104-2840

18 Gregory T. Costello
19 Riddell Williams Bullitt & Walkinshaw
20 1001 Fourth Ave. Plaza, Suite 4400
21 Seattle, WA 98154

22 I, Lisa H. Lange, declare under penalty of perjury that the
23 foregoing is true and correct. Executed on this 25th day of
24 August, 1994, at Seattle, Washington.

25 
26 Lisa H. Lange
27

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

*file w/
Forest Plan
litigation*

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

MEMORANDUM

To: Ellen Athas
Andrea Berlowe
Ted Boling (202) 514-4231
Wells Burgess
Todd Campbell (202) 456-6429
Kristina Clark (202) 219-1792
Ana Cobian (202) 514-7971
William Cohen
Peter Coppelman (202) 514-0557
Lisa Freedman (503) 326-6254
Mark Gaede (202) 720-4732
David Gayer (202) 208-3877
David Gehlert
Michael Gippert (202) 690-2730
Maria Iizuka (916) 551-3372
Jim Kilbourne
Thomas Lee (503) 727-1161
Karen Mouritsen (202) 219-1792
Roger Nesbit (503) 231-2166
Tim Obst (202) 690-2730
Steve Odell
Jim Pipkin (202) 219-1220
Planned Support Grp. (503) 326-6590
Ruth Saunders (202) 395-4941
Lois Schiffer (202) 514-0557
David Shilton (202) 514-4240
Robert Simmons (415) 744-3170
Michael Davis (202) 456-2710
Tom Tuchmann (503) 326-6254
Jean Williams

DATE: August 18, 1994

NUMBER OF PAGES TO BE TRANSMITTED: 14

FROM: Paula Clinedinst, Legal Assistant (202) 272-8019

MESSAGE: Attached is the **JOINT STATUS REPORT**, filed in Seattle Thursday, August 18, 1994.

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 his official
capacity as Assistant Secretary of
Agriculture for Natural Resources and
Environment, and the United States
Forest Service, an agency of the United
States; Michael Espy, in his
official capacity as Secretary of
Agriculture; Bruce Babbitt, in his
official capacity as Secretary of
Interior; and Bureau of Land Management,
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,

1 Plaintiff,

2 v.

3 BRUCE BABBITT, et al.,

4 Defendants.

Civ. No. C94-803WD

5 THE SIERRA CLUB

6 v.

7 MICHAEL ESPY, et al.,

8 Defendants.

Civ. No. C94-820WD

9 JOINT STATUS REPORT

10 INTRODUCTION

11
12 This Court's order of August 5, 1994 gave leave to the
13 federal defendants to amend their answers to assert cross-claims
14 against intervenor-defendant NFRC for declaratory judgment as to
15 each claim asserted by NFRC in NFRC v. Thomas, Civ. 94-1032-TPJ
16 (D.D.C.) (dismissed), and NFRC v. Dombeck, Civ. 94-1031-TPJ
17 (D.D.C.) (stayed). On August 12, 1994, federal defendants served
18 and filed their consolidated amended answer asserting cross-
19 claims against NFRC as permitted by the Court. NFRC's answer to
20 the cross-claims is due September 6, 1994 pursuant to Fed. R.
21 Civ. Pro. 12(a)(2).

22 The Court's order further gave leave to the co-plaintiffs of
23 NFRC in the Thomas and Dombeck cases to file answers and cross-
24 claims as defendant-intervenors by August 17, 1994. As of the
25 date of this report, no such answers and cross-claims have been
26 filed to the parties' knowledge.

- 2 -

United States Department of Justice
Environmental & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663
Telephone: (202) 272-8056

The Court further vacated the briefing schedule then in effect and ordered the parties to confer and submit a joint report by August 17, 1994 setting forth a revised schedule for the prompt completion of these cases, with differing views to be noted separately.

The parties have conferred and report the following:

PROPOSED SCHEDULE FOR THE BRIEFING
OF CROSS-MOTIONS FOR SUMMARY JUDGMENT

1. Agreed views:

Federal defendants and all plaintiffs except Native Forest Council hereby jointly propose the following briefing schedule for cross motions for summary judgment to dispose of all claims asserted in these consolidated actions, including federal defendants' cross-claims against cross-claim defendant Northwest Forest Resource Council:

9/21/94	Cross-motions for summary judgment and supporting memoranda due
10/19/94	Responses to cross-motions for summary judgment due
11/04/94	Replies due
11/10/94	Oral argument

Plaintiffs reserve their right to seek preliminary injunctive relief as to any timber sale or sales and defendants reserve their right to oppose such relief. The Court's direction to federal defendants to provide the parties 30 days notice of timber sales, as set forth in its order of June 6, 1994, remains in effect.

2. Differing views:1 Cross-Claim Defendant Northwest Forest Resource Council:

2 Cross-claim defendant Northwest Forest Resource Council
3 ("NFRC") respectfully reports that it is unable at this time to
4 propose any schedule for disposition of the cross-claims asserted
5 against it by defendants James Lyons et al. on August 12, 1994,
6 or any other aspect of this litigation. NFRC therefore cannot
7 support the schedule suggested by other parties insofar as it
8 contemplates participation by NFRC, nor can it even endorse the
9 principle of a briefing schedule insofar as that schedule implies
10 any views as to the procedural means by which the cross-claims
11 may be resolved.

12 NFRC is reviewing the newly-filed cross-claims in an effort
13 to determine how best to proceed. To the best of NFRC's
14 knowledge, the declaratory judgment cross-claims filed by these
15 federal officials, seeking a declaration that agency action was
16 not taken in violation of Administrative Procedures Act judicial
17 review standards, are unprecedented in the history of the
18 American judicial system. In the very brief period since August
19 12, 1994, NFRC has not had sufficient time to complete its review
20 of the cross-claims, and therefore is unable to offer any views
21 concerning a schedule for disposing of the cross-claims.

22 In addition, on July 18, 1994, NFRC served discovery
23 requests on the Government in NFRC v. Dornbeck, No. 94-1031-TPJ-
24 (D.D.C.). The Government has not answered the discovery requests
25 (despite apparently answering all the discovery requests by the
26

plaintiffs in these cases), and now indicates that it does not intend to do so until at least August 26, 1994. This is an additional reason why no schedule can be proposed at this time.

3 Plaintiffs Forest Conservation Council and Save the West:

4 Plaintiffs Forest Conservation Council and Save the West
5 believe there should be a moratorium on timber sales pending a
6 final decision on the merits of the cross-motions for summary
7 judgment. The award of the timber sales constitutes an
8 irretrievable commitment of resources which might otherwise be
9 protected.

10 Plaintiff Native Forest Council:

11 Native Forest Council ("NFC") believes that any extension of
12 the original Court ordered timeframe for resolution of the
13 (in)adequacy of the ROD and the FSEIS should be conditioned upon
14 a stay of further timber sales. The U.S. government and the
15 timber industry are both able and sophisticated advocates, with
16 copious resources. Both the government and the timber industry
17 should have reasonably foreseen this Court's ruling and should be
18 ready to proceed immediately in resolving these issues.

19 Our request for Stay is based on the staggering level of
20 increase in timber sales while the government and the timber
21 industry's legal machinations go on. There were 7 timber sales
22 offered in the month of July, but 13 for the first half of
23 August, a per month increase rate of 281%. At that rate of
24 increase, we can expect 96 timber sales to be offered in
25 September, 358 in October, and 1,328 in November.

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The increase in amount of board footage being proposed to be cut in these timber sales is even more alarming. Board footage has increased from 4.2 million board feet in July to 23.8 million board feet for the first half of August, a 1,044% increase in board feet proposed to be cut per month. Projecting this 1,044% rate of increase over the next three months, we project board footages proposed to be cut for September - 544 million board feet, October - 6.22 billion board feet and November - 71.2 billion board feet.

In drafting these figures, we do not mean to imply that this amount of footage will actually be cut or even proposed to be cut, but we do mean to call to the Court's attention the extreme acceleration of the irreparable loss of our ancient forests while resolution of this lawsuit drags on. We need a stay on further timber sales in suitable spotted owl habitat as a condition of any Defendants requested time extensions.

It is not unprecedented that the U.S. government could push large amounts of timber sales in a small period of time. for example, under the infamous Section 318 Rider, the U.S. government was able to prepare and push through thousands of timber sales netting approximately 9.7 billion board feet of timber. We have reason to believe the U.S. government is planning to do the same here. For these reasons, we cannot agree to the time schedules as proposed.

RESOLUTION OF OUTSTANDING DISCOVERY

1 A. Discovery served by plaintiffs:2 1. Agreed views:

3 On June 29, plaintiffs SAS et al. ("SAS") served their first
4 set of interrogatories and requests for documents. A first
5 supplemental interrogatories and requests for documents was
6 served on June 30, 1994.

7 On July 21, federal defendants filed a motion for protective
8 order as to interrogatories 4, 5 and 6 of the first set and 1 and
9 2 of the first supplemental set. On August 8, SAS filed its
10 opposition to federal defendants' motion for a protective order.
11 By stipulation for extension of time, federal defendants' reply
12 to plaintiffs' opposition to defendants' motion for a protective
13 order is due to be filed by August 22, 1994. Plaintiffs have
14 reserved the right in the stipulation to file a surreply and
15 federal defendants have reserved the right to request oral
16 argument on their motion.

17 Federal defendants served answers and responses to SAS's
18 remaining interrogatories and requests for documents on July 22,
19 subject to supplementation if necessary. A supplemental index of
20 deliberative documents was filed on August 4 in response to SAS's
21 Interrogatory No. 12.

22 Also on August 4, federal defendants served an index of
23 privileged documents on all parties of record. SAS filed a
24 second supplemental request for production of documents on August
25 11 requesting production of specific privileged documents. By
26

agreement of the parties federal defendants will provide their
1 response to SAS's et al.'s request to produce privileged
2 documents by August 22, 1994. In the event that plaintiffs serve
3 a motion to compel production of any withheld documents, such
4 motion will be filed promptly in an effort to avoid the need for
5 an expedited schedule.

6 Plaintiff Native Forest Council ("NFC") served its first set
7 of requests for admissions and interrogatories on July 5. On
8 July 22, federal defendants filed a response to NFC's requests
9 for admissions and interrogatories.

10 B. Discovery served by NFRC:

11 1. Agreed views:

12 By an exchange of letters, federal defendants entered into
13 an informal arrangement with NFRC to respond to discovery
14 submitted by them in the stayed action NFRC v. Dombek in order
15 to coordinate discovery in all litigation challenging the ROD and
16 FSEIS. On July 18, NFRC served interrogatories and document
17 requests on the federal defendants. Responses have not been
18 provided by the federal defendants.

19 2. Differing views:

20 Cross-Claim Defendant Northwest Forest Resource
21 Council:

21 See above

22 Federal Defendants:

23 Federal defendants have diligently worked to prepare
24 responses to NFRC's discovery; draft responses have been prepared
25 and are being reviewed for completeness and with respect to the

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assertion of privilege. Any delay in response is due primarily
1 to the difficulty of coordinating review of the responses in the
2 absence of various personnel during the last two weeks of August.
3 Responses will be served on NFRC no later than August 26, 1994,
4 and every attempt will made to submit them earlier.

5 Dated: August 18, 1994

6 Respectfully submitted,

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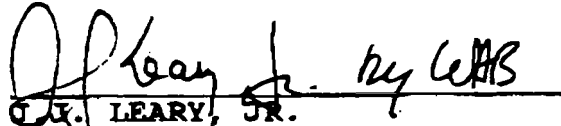
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18
19 Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

1

2 The undersigned hereby certifies that on August 18, 1994, she
3 caused one non-conformed copy of each of the foregoing JOINT
4 STATUS REPORT, to be served by telefacsimile machine
5 transmission upon the counsel of record hereinafter named:

6

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1

The undersigned hereby certifies that on August 18, 1994, she
2 caused one copy of the foregoing JOINT STATUS REPORT, to be
served by first-class mail, postage prepaid, upon the counsel of
3 record named above.

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Donna Morris

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