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U.S. DEPARTMENT OF JUSTICE

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

MESSAGE: Attached is NFRC's Reply Memo in Support of Motion to Dismiss, Motion for More Definate Statement, and Motion to Strike.

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Northwest Forest Resource Council

Honorable William L. Dwyer

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

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, vs. JAMES LYONS, in his official capacity as Assistant Secretary of Agriculture, et al., Defendants, vs. NORTHWEST FOREST RESOURCE COUNCIL, Cross-Claim Defendant.	No. C92-479WD CROSS-CLAIM DEFENDANT NORTHWEST FOREST RESOURCE COUNCIL'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR MORE DEFINITE STATEMENT, AND MOTION TO STRIKE

N01-9406\5JPREP.00J

SAVE THE WEST,
Plaintiff,
vs.
JAMES LYONS, et al.,
Defendants.

No. 94-758WD

NATIVE FOREST COUNCIL,
Plaintiff,
vs.
BRUCE BABBITT, et al.,
Defendants.

No. C94-803WD

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

No. C94-820WD

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INTRODUCTION

NFRC showed in its opening brief that the Government's cross-claims against NFRC fail on numerous procedural grounds and must be dismissed for lack of jurisdiction, failure to state a claim, improper venue, and failure to join indispensable parties. The Government's response fails to identify sufficient facts showing "actual or imminent" and "certainly impending" injury to support standing to bring these cross-claims for declaratory judgment; fails to even allege that plaintiffs have standing, although the court's jurisdiction over plaintiffs' claims is the ground upon which the Government states it is entitled to declaratory relief in this forum; and fails to clarify the facts upon which its claims for relief are based and thus seeks an advisory ruling to validate its administrative scheme. The Government has also failed to identify any explicit or implicit statutory authority for the Secretaries to bring these cross-claims against NFRC, and instead makes the unsupported and legally irrelevant argument that the United States could have brought these claims because the court's rulings have an effect on the United States. Nor is the Government right that the cross-claims are not compulsory counterclaims in the D.C. litigation because the time for filing counterclaims in that litigation has not yet ended; clear authority holds that the compulsory counterclaim requirement arises from the moment the complaint is filed. The Government has not taken issue with NFRC's showing that the remaining plaintiffs in the D.C. litigation are "necessary parties" to the cross-claims, and has also failed to adequately respond to NFRC's arguments under Rule 19(b) proving that these individuals and entities are indispensable.

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ARGUMENT

A. *This Court lacks jurisdiction over the Government's cross-claims for declaratory relief.*

1. *The Government has failed to allege "actual or imminent" and "certainly impending" injury to support standing.*

Despite clear Ninth Circuit precedent stating that "impending litigation" supports standing to bring a declaratory judgment action when it serves to "forestall the accrual of potential damages," *Societe de Conditionnement v. Hunter Eng'g*, 655 F.2d 938, 943 (9th Cir. 1981), the Government argues that it need not show that it is threatened with actually incurring damages. Instead, the Government claims that its perception that it may face "adverse consequences" due to the "possibility of subsequent litigation by NFRC" is sufficient "injury in fact" to support its standing to bring these declaratory judgment cross-claims. Government's Response to NFRC's Motion to Dismiss, etc. ("Govt's Brief"), at 4.

The Government's position on standing is inconsistent with the Supreme Court's and the Ninth Circuit's requirements that the alleged injury in fact be "actual or imminent" and "*certainly* impending." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2136, 2139 n.2 (1992) (emphasis in original); *Resources Ltd., Inc. v. Robertson*, 8 F.3d 1394, 1397 (9th Cir. 1994). The fact that NFRC, like any other citizen, is entitled to file suit against the 1994 Forest Plan certainly does not rise to the sort of "actual or imminent" and "certainly impending" injury required by the Supreme Court to support standing.

Moreover, the Government's claimed "apprehension" that "inconsistent obligations" will be imposed upon it is particularly unfounded in light of the District Court for the District of Columbia's stated intent to avoid "potentially inconsistent relief." *See* June 30, 1994 Order in *Northwest Forest Resource Council v. Dombeck* denying Government's motion to transfer.

2. *The Government does not deny that plaintiffs lack standing and the Government has consistently based its right to bring these cross-claims on the pendency and validity of plaintiffs' suit.*

Despite the Government's current protestations to the contrary, it has repeatedly and

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consistently argued that this court's jurisdiction over plaintiffs' challenge to the Forest Plan is the predicate for this court's determination of NFRC's District of Columbia claims against the 1994 Forest Plan. *See* Government's Motion to Transfer, *passim;* Government's Motion for Joinder, *passim;* Amended Answer, ¶ 5 ("[t]he court already has jurisdiction and the cross-claims need no new ground of jurisdiction to support them"); Government's Brief, at 5, 8, 13, 15-17 (arguments *re* "multiple proceedings and multiple forums," and potentially "inconsistent obligations"). However, if this court lacks subject matter jurisdiction over plaintiffs' claims and cannot reach the merits then there is no "threat of inconsistent obligations" between this court and the District Court for the District of Columbia, and the entire basis upon which the Government claims entitlement to declaratory relief by this court vanishes.

Despite the Government's failure to challenge the plaintiffs' standing in this case, the Government's position as argued in recent cases is that environmental plaintiffs lack standing to challenge Forest Plans prior to the approval of a specific action because they "allege[] no concrete actual or imminent injury from the mere issuance of the [ ] Plan." *See* Government's Brief filed on August 22, 1994 with the Seventh Circuit in *Sierra Club v. Marita*, Appeal No. 94-1736, at 17, Campbell Decl. Ex. A.

In *Marita* the Government relied on the recent *Sierra Club v. Robertson* case cited in NFRC's opening memorandum in support of its argument that the environmental plaintiffs lacked standing to challenge the Chequamegon Forest Plan at issue there. The Government stated in its *Marita* brief that:

> As the Eighth Circuit recently explained, a Forest Plan . . . is a general planning tool. *See Sierra Club v. Robertson,* No. 92-3701 slip op. at 10-11 (8th Cir. June 23, 1994) ("*Ouachita*") [28 F.3d 753 (8th Cir. 1994)]. . . . [A]n 'attack on the Plan *per se,* * * * devoid of any reference to the particularities of any proposed site-specific actions' does not allege injury in fact. *Ouachita*, slip op. at 12. . . . The Chequamegon Plan does not itself authorize any specific forest fragmenting actions. . . . Prior to the approval of a specific action with potentially fragmenting effects, Sierra Club lacks the requisite injury.

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Id. at 16-17, 20, 22. The Government went on to argue that Ninth Circuit precedents allowing environmental plaintiffs to challenge a Plan have "been undermined by the more recent Supreme Court standing jurisprudence, which requires that injury be 'actual or imminent,' and that an imminent injury be '*certainly* impending.'" *Id.* at 23 (citing *Defenders*, 112 S. Ct. at 2139 n.2) (emphasis in Government's brief).

The plaintiffs' lack of standing deprives this court of jurisdiction over their claims, and deprives the Government of the basis for its arguments that this court must decide NFRC's claims "to avoid inconsistent obligations."

3. The Government seeks an advisory ruling on claims that are dependent on factual and legal allegations the Government has previously denied.

In response to NFRC's argument that the Government has failed to set forth the facts, if any, upon which its cross-claims rely, the Government responds that "the facts at issue . . . are easily adduced from the review of the administrative record." Govt's Brief at 5. Yet the Government's cross-claims do not cite specific facts in the administrative record entitling it to declaratory relief; instead the cross-claims wholly incorporate NFRC's District of Columbia pleadings as the only basis for the Government's request for declaratory relief, which pleadings include hundreds of factual and legal allegations that the Government has previously denied.

The Government has failed to address the main argument NFRC made in its opening memoranda on this point: the Government cannot "merely seek validation of a statutory scheme;" *Dixie Elec. Co-Op. v. Citizens of State of Ala.*, 789 F.2d 852, 857-58 (11th Cir. 1986), it must advise the court and its opponent of the material facts upon which it relies as the basis for its requested relief, and may not seek a ruling on a hypothetical set of facts. *Id.* NFRC demonstrated in its opening memorandum that all of the claims in its pending and former *Dombeck* and *Thomas* complaints, on which the Government's cross-claims seek declaratory judgment, are dependent on the factual and legal assertions made in those

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complaints. The Government's "cross-claims" necessarily incorporate these assertions, and are not limited to facts that can be "adduced from the administrative record."

The Government has already demonstrated that it views the facts it has incorporated in its cross-claims as merely hypothetical. In its Motion for Summary Judgment (filed September 28, 1994) the Government denies many of the allegations it has incorporated in its cross-claims: the Government claims that "NFRC misstates the use of presettlement conditions;" that the principle of "sustained yield" is "best satisfied by implementing the strategy's protective measures for watersheds and regulation of streamflow;" that "on the basis of current biological understanding some system of reserves was required for all options;" and that the agencies "considered a broad range of alternative actions within the parameters imposed by relevant statutes, regulations and agency policy." Federal Defendants' Memo. in Support of Motion for Summary Judgment, at 115 n.39, 121, 122, 133. Yet allegations contrary to these statements by the Government in its summary judgment brief are integral to the cross-claims about which the Government seeks declaratory judgment. *See* Dombeck Complaint, ¶¶ 48 (FEMAT's goal was to return forests to "presettlement conditions"); ¶¶ 40-41 (scientifically acceptable options presented, some without reserve systems); ¶ 44 (sustained yield principle eliminated in Option 9); ¶¶ 34-35 (only narrow range of options considered due to constraints placed on FEMAT in "Statement of Mission" and by FEMAT itself). *See also* Government's Amended Answer at ¶ 25 (incorporating these factual allegations into cross-claims). Thus it is apparent that the Government is improperly asking the Court to issue an advisory opinion that validates the Government's administrative record and administrative decision based on changing or hypothetical facts.

B. The Government has failed to state claims upon which relief can be granted.

1. The Government has neither express nor implied authority to seek declaratory relief under the Administrative Procedures Act, and may not assert its cross-claims without such authority.

The Government's response to NFRC's challenge to these agencies' and officers'

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authority to sue is that (1) this court's jurisdiction over federal questions authorizes this suit, and (2) the United States is a real party in interest. Neither argument provides the requisite authority for bringing these claims against NFRC.

The Government fails to cite any express or implied authority to seek declaratory relief under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551, *et seq.* Government Opposition at 12-13. Although it is of course true that federal courts have jurisdiction over federal questions pursuant to 28 U.S.C. § 1331,[1] the fact remains that federal agencies and their officers may not bring suit without specific statutory authority, *Federal Sav. and Loan Ins. Corp. v. Ticktin*, 490 U.S. 82, 85 (1989); *Marshall v. Gibson's Products, Inc. of Plano*, 584 F.2d 668, 673 (5th Cir. 1978); and that in the absence of specific statutory authority the United States must prove implicit authority or face dismissal of their claims. *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979); *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980).

The Government dismisses the Secretaries' lack of statutory authority by simply claiming that section 1345 is inapplicable. Govt's Brief at 10. To the contrary, section 1345 merely makes clear the rule that agencies or their officers may bring suit only if "expressly authorized to sue by Act of Congress". 28 U.S.C. section 1345.

As NFRC showed in its opening memorandum, the case of *Marshall v. Gibson's Products*, which the Government failed to distinguish in its opposition brief,[2] illustrates that

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[1] Section 1331 provides that "the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[2] The Government avoids discussing *Marshall* by incorrectly claiming that that case was decided under § 1345. Govt's Brief at 11 n.7. To the contrary, that court specifically stated that "our interpretation of OSHA is dispositive of the jurisdictional issue in this case." 584 F.2d at 676.

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federal agencies and their officers must have specific statutory authority to sue. In holding that the Secretary of Labor lacked statutory authority to seek an injunction under § 8(a) of OSHA, the court in *Marshall* stated that "OSHA, on its face, does not authorize the Secretary to petition the district court for an injunction . . . . [I]n enacting section 8(a) Congress clearly did not contemplate the injunctive relief sought by the Secretary in the district court below." 584 F.2d at 672.

Similarly in this case the APA does not authorize administrative agencies nor their officers to seek declaratory relief. Indeed, both the text of the APA and its legislative history convincingly show Congress' intent to **deny** the Government any judicial rights in the APA. Section 10 of the APA, 5 U.S.C. § 702, expressly confers a right of judicial review on "a person." The term "person" in that section is defined in 5 U.S.C. § 551 (see 5 U.S.C. § 701 incorporating definitions from § 551), which defines "person" to mean "an individual, partnership, corporation, association, or public or private organization of any character **other than an agency**." § 551 (3) (emphasis added). An agency in turn is defined to mean any authority of the United States Government. § 551 (1).

The APA thus expressly excludes agencies from seeking judicial review under the statute. The exclusion was not accidental: Congress considered and rejected several bills that would have allowed any "party," including an agency, to seek judicial review, see, e.g., App. of Bills to Hearing Before the Committee on the Judiciary (proposed H.R. 1117 and H.R. 1206), 79th Cong., 1st Sess. (1945); Campbell Decl. Exs. B and C. In approving the competing bill (S. 7), which limited review to "persons" and excluded agencies, the Senate explained that "[t]he definition of person includes both individuals and any form of organization **but advisedly excludes Federal agencies**." S. Rep. No. 752 at 10, 79th Cong., 1st Sess. (1945) (S. Doc. No. 248 at 196) (emphasis added); Campbell Decl. Ex. D. This advised exclusion was consistent with the overall intent of Congress in the APA: "Except in a few respects, this is not a measure conferring administrative powers, but is one laying down

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power to bring claims under the APA.

Also untenable is the Government's secondary argument that "as the United States is a real party in interest Federal Defendants have authority" to bring these cross-claims under the APA. Govt's Brief at 11. The Government claims this is so because "this Court's decrees can have a profound effect on the United States." *Id.* at 12 n.9.[3] Of course, if this were the test, agencies and their officers would have authority to bring claims in every case on every statute; to some extent if an agency has an interest in a suit then by definition so does the United States. Under the Government's logic the Secretary of Labor should have been found to have authority to sue in *Marshall v. Gibson's Products;* certainly the United States has an interest in enforcing OSHA. Indeed, the *Marshall* court rejected an almost identical argument urged by the Secretary in that case, holding that "[t]his suit was brought not by the United States but by the Secretary of Labor. Therefore, the issue is not whether the United States could initiate such a suit in the district court but whether the Secretary can." 584 F.2d at 676.

Moreover, even if the United States were a party here rather than the agencies and their officers, the Government claims no express authorization to sue in the APA, Gov't Brief at 12-13, and offers no claim of any implied authorization **in the APA or any other statute.** Courts use the same implied right of action analysis for the Government as for a private party to determine if the Government has authority to sue. *United States v. FMC Corp*, 717 F.2d 775, 782-83 (3d Cir. 1983). The primary focus is on Congressional intent. *Id.*

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[3] The cases the Government cites on this point are inapposite: *United States Dept. of Agriculture v. Remund,* 330 U.S. 539, 540, 542 (1946) simply holds that in state probate proceedings a claim asserted by an agency "for and on behalf of the United states"is entitled to priority as a "claim by the United States Government" under 31 U.S.C. § 191 [now § 3713], due to the purposes behind that priority of claim statute. *Louisiana v. McAdoo,* 234 U.S. 627, 629 (1914) analyzes whether the United States is required to have consented to be sued in order for a suit to be maintained against the Secretary of Treasury for imposing illegal tariffs. These cases do not stand for the proposition that simply because the United States is in some cases authorized to sue that agencies or their officers automatically have authority to sue.

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to determine if the Government has authority to sue. *United States v. FMC Corp*, 717 F.2d 775, 782-83 (3d Cir. 1983). The primary focus is on Congressional intent. *Id.*

In *U.S. v. Mattson* the Ninth Circuit dismissed a claim by the United States, finding neither express nor implied authority to bring suit. *Mattson*, 600 F.2d at 1298-1301. The court found that without express authority, the Government had been allowed to sue under implied authority in only a few limited situations: "assertion of a property interest, interference with national security or a burden on interstate commerce." *Id.* at 1298-99; *accord, Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1851). Because the Government had not asserted any of these interests, and despite the fact that "protecting the constitutional rights of the mentally retarded has become a concern of national importance," the court held that the United States could not maintain a suit for medical care for the mentally ill. *Id.* at 1297, 1301.

The Government does not claim that it is seeking to enforce property rights, protect national security or avoid a burden on interstate commerce. The only authority the Government cites to support its claim that the United States has implied authority to bring these claims is *Island Airlines v. C.A.B.*, 352 F.2d 735 (9th Cir. 1965), a case which is plainly inapplicable here. In that case the Civil Aeronautics Act expressly authorized the Government to file suit to enforce the act against violators. *Id.* at 744. The Government used its express statutory authority to enjoin an airline from violating the act. *Id.* The case does not remotely approve a declaratory judgment claim by the Government under the APA seeking a ruling that the Government has not violated the law.

The absence of any express or implied statutory authority thus commands dismissal of the Government's cross-claims. *Mattson*, 600 F.2d at 1297-1301.

2. ***The Government's cross-claims are compulsory counterclaims and must be asserted if at all in the first-filed lawsuit pending in the District of Columbia.***

The Government argues that because the deadline for filing its compulsory counter-

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claims in the D.C. litigation has not yet passed and it has not yet waived those claims, the claims are somehow not compulsory counterclaims subject to the "first-filed" rule. Govt's Brief at 13. Wright & Miller dispositively refute this argument, stating that Rule 13(a) "was rewritten to eliminate the possibility that defendant could avoid the obligation to assert a compulsory counterclaim by bringing it as an independent action in another court after the commencement of plaintiff's suit and before he had answered in that action." Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 1402 (footnote omitted).

Similarly, in *Timberland Co. v. Sanchez,* 129 F.R.D. 382 (D.D.C. 1990), the court agreed, making it clear that Rule 13, barring a party from asserting a compulsory counterclaim in a different action, applies from the moment the complaint is filed, before the defendant is obligated to answer and assert any compulsory counterclaims. *Id.* at 384. The court noted that any other interpretation would allow "a party having a claim which would be the subject of a compulsory counterclaim [to] avoid stating it as such by bringing an independent action in another court after the commencement of the [first] action but before serving his pleading in [that] action." *Id.* at n.3.

Accordingly, the fact that *Dombeck* has been stayed at the Government's request does not alter the requirement that the Government's claims, if they can be filed at all, must only be filed as compulsory counterclaims in the pending action when the time to file arrives.

The Government's brief ignores the overwhelming authority requiring its compulsory counterclaims to be filed in the D.C. litigation and urges this court to do likewise in order to "consolidat[e] all current challenges to the FSEIS and the ROD in a single forum." Govt's Brief at 14. The Government again fails to acknowledge that even if its claims against NFRC are decided here "all current challenges" will not be "consolidated": the *Association of O & C Counties* case remains pending in the District of Columbia and will be decided by that court when this litigation ends or the stay is lifted. The Government's attempt to have this court overlook the clear precedent for dismissing declaratory judgment claims that should properly

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C. ***The remaining plaintiffs in the Dombeck and former Thomas cases are indispensable parties.***

NFRC showed in its opening memorandum that the remaining plaintiffs in the pending *Dombeck* and former *Thomas* cases are necessary and indispensable parties to the Government's cross-claims and that the cross-claims must therefore be dismissed pursuant to Rule 19. The Government has not taken issue with NFRC's arguments that these other plaintiffs are necessary parties to its cross-claims, and although the Government urges this court to discretionally find that those entities and individuals are not indispensable to these cross-claims, the Government has failed to address the fact that *all* of Rule 19(b)'s requirements for indispensable parties are met in this case.

As NFRC showed in its opening memorandum, each of the four "indispensable party" factors listed in Rule 19 are satisfied here. *See* NFRC Memo. in Support of Motion to Dismiss, etc., at 17-18. The Government fails to address these arguments although these factors are primary in the indispensable party analysis. *See Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992). Instead the Government urges this court to hold those parties not indispensable due to (1) the Government's interest in *this* forum; (2) the alleged lack of harm to the absent parties due to NFRC's presence here; and (3) the alleged public interest in having the Government's cross-claims against NFRC decided by this court. Govt's Brief at 16-18.

The Government's claimed interest in having NFRC's claims decided in this forum is not a factor weighing in favor of a finding that the parties at issue are not indispensable. As the Government argues elsewhere in its brief, "no litigant has a right to have the interpretation of one federal court rather than that of another determine his case." Govt's Brief at 6 (quoting *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962)). Moreover, in *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-111 (1968), on which the Government relies, the Court held that a plaintiffs' interest in a forum should be considered

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Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-111 (1968), on which the Government relies, the Court held that a plaintiffs' interest in a forum should be considered in the Rule 19(b) determination to the extent that a dismissal for failure to join indispensable parties would result in the plaintiffs' inability to have his claims heard anywhere. *Id.* at 110. This factor is certainly inapplicable to this case; the Government will not be left without a forum if the cross-claims are dismissed, it can assert them in the pending District of Columbia litigation and indeed is required to as these claims are properly compulsory counterclaims in that case.

Nor does the NFRC's presence in this case erase the potential prejudice facing the absent parties, prejudice the Government has previously acknowledged. *See* Memo. in Support of Federal Defendants' Motion to Join, at 7, 9, and 10. NFRC and the absent parties have many interests that may differ, as NFRC is a not-for-profit corporation involved in federal agency land management decisions, and the absent parties are comprised of counties, school districts, parents, and other private citizens, among others, all having different perspectives on the claims asserted in the D.C. litigation.[4] The fact that the other parties used the same counsel as NFRC does not imply identical interests -- only an absence of conflict.

D. If NFRC's motion to dismiss is not granted the Court should require the Government to amend its cross-claims to state the allegations on which it bases those claims.

The Government argues that it has satisfied its obligation under the rules to "set forth

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[4] The Government implies that the absent parties are "virtually represented" by NFRC here because they allegedly "share an identical interest in increasing timber sale offerings" and they "share the same counsel." Govt's Brief at 17-18. As NFRC points out above its interests may differ in many respects from the absent parties; in any event, "parallel interests" are insufficient to support a finding of virtual representation. *Freeman v. Lester Coggins Trucking Inc.*, 771 F.2d 860, 864-65 (5th Cir. 1985). The party claiming virtual representation bears the burden of proving that the absent party is in privity with the party present in the litigation. *Mertens v. Black,* 948 F.2d 1105, 1106 (9th Cir. 1991). Nor does the fact of common counsel support a finding of virtual representation. *Benson & Ford Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-75 (5th Cir. 1987).

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a short and plain statement of the claim showing that the pleader is entitled to relief." *See Resolution Trust Corp. v. Hess*, 820 F. Supp. 1359, 1370-71 (D. Utah 1993). The Government suggests that NFRC can "simply deny" the cross-claims "or even assert that they call for a legal conclusion." Govt's Brief at 22.

The Government again misses the point of NFRC's motion. Pleadings have legal consequences; if NFRC "simply denies" the cross-claims, which incorporate all the allegations NFRC made in its pending and former complaints in the District of Columbia, NFRC can be said to have denied the truth or materiality of those factual allegations. Moreover, the Government's failure to allege the factual bases for its cross-claims makes it impossible for NFRC to ascertain the facts upon which the Government relies to support its cross-claim that the ROD and FSEIS are lawful. Because NFRC's right to discovery in this case of the facts underlying the Government's cross-claims has been foreclosed even prior to the time NFRC's Answer is due, the Government must be required to comply with Rule 12(e) and Rule 10 and set forth the bases for its cross-claims.

CONCLUSION

For the reasons stated herein and in NFRC's opening memorandum, this Court should grant NFRC's motion to Dismiss the Cross-Claims pursuant to Federal Rule of Civil Procedure 12; or in the alternative should grant NFRC's Rule 12(e) motion for more definite

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statement and its Rule 12(f) motion to strike.

Dated this 29th day of September, 1994.

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Northwest Forest Resource Council

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

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

vs.

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

Defendants,

vs.

NORTHWEST FOREST RESOURCE COUNCIL,

Cross-Claim Defendant.

No. C92-479WD

DECLARATION OF ALISON KEAN CAMPBELL

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SAVE THE WEST, Plaintiff, vs. JAMES LYONS, et al., Defendants.	No. 94-758WD
NATIVE FOREST COUNCIL, Plaintiff, vs. BRUCE BABBITT, et al., Defendants.	No. C94-803WD
THE SIERRA CLUB, Plaintiff, vs. MICHAEL ESPY, et al., Defendants.	No. C94-820WD

Alison Kean Campbell, with full knowledge of the penalty of perjury, declares as follows:

1. I am one of the attorneys for Cross-Claim Defendant Northwest Forest Resource Council in the above-captioned matter. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. Attached hereto as Exhibit A is a true and correct copy of the Government's opening brief filed August 22, 1994 with the Seventh Circuit in *Sierra Club v. Marita*, Appeal No. 94-1736.

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3. Attached hereto as Exhibit B is a true and correct copy of an excerpt from the App. of Bills to Hearings Before the Committee on the Judiciary (proposed H.R. 1117), 79th Cong., 1st Sess. (1945).

4. Attached hereto as Exhibit C is a true and correct copy of an excerpt from the App. of Bills to Hearings Before the Committee on the Judiciary (proposed H.R. 1206), 79th Cong., 1st Sess. (1945).

5. Attached hereto as Exhibit D are true and correct copies of excerpts from S. Rep. No. 752, 79th Cong., 1st Sess. (1945) at 10 (S. Doc. No. 248 at 196).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29th 1994.

Alison Kean Campbell

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No. 94-[illegible]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SIERRA CLUB; WISCONSIN FOREST CONSERVATION TASK FORCE; AND WISCONSIN AUDUBON COUNCIL, INC.,

Plaintiffs-Appellants,

v.

FLOYD J. MARITA, as Regional Forester of the Eastern Region of the Forest Service, United States Department of Agriculture, JACK WARD THOMAS, as Chief of the Forest Service, and JACK G. TROYER, as Forest Supervisor of the CHEQUAMEGON NATIONAL FOREST,*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF FOR THE FEDERAL APPELLEES

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Acting Assistant Attorney General

OF COUNSEL:	ALBERT M. FERLO, JR.
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* Pursuant to Federal Rule of Appellate Procedure 43(c), the names of the public officers now holding the positions of ... of the Forest Service and Forest Supervisor have been su[bstituted] for those who occupied those offices at the time the com[plaint] was filed.

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and that the agency's method of doing so was not arbitrary or capricious. Sierra Club now appeals.

STANDARD OF REVIEW

This Court exercises plenary review over questions of district court jurisdiction, see, e.g., Kanzelberger v. Kanzelberger, 782 F.2d 774 (7th Cir. 1986), and summary judgment, see e.g., Lawshe v. Simpson, 16 F.3d 1475, 1478 (7th Cir. 1994).

In reviewing the adequacy of an EIS under NEPA and the sufficiency of a plan under NFMA, the Court applies the arbitrary and capricious standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), (C). Central States Enterprises, Inc. v. ICC, 780 F.2d 664, 673 (7th Cir. 1985); Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 442 (7th Cir. 1990). Pursuant to the APA, the Forest Service's adoption of the plan may only be overturned if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

ARGUMENT

I

THE SIERRA CLUB'S CLAIM THAT THE CHEQUAMEGON FOREST PLAN INADEQUATELY ADDRESSED ISSUES OF FOREST FRAGMENTATION IS NOT JUSTICIABLE IN THE ABSENCE OF ANY ACTION TO APPROVE A SPECIFIC FRAGMENTING EVENT

The district court ruled that Sierra Club's challenge presented a justiciable controversy, based on an incorrect conclusion that adoption of the Forest Plan poses an imminent threat of fragmentation because "while the Plan does not itself spell out the numerous site-specific projects necessary to its implementation, it clearly does require that such projects be undertaken" (845 F. Supp. at 1321). This conclusion reflects a significant misapprehension regarding the nature and function of Forest Plans. As the Eighth Circuit recently explained, a Forest Plan, such as the Chequamegon Plan, is a general planning tool. See

Sierra Club v. Robertson, No. 92-3701 slip op. at 10-11 (8th Cir. June 23, 1994) ("Ouachita") ("Adoption of the Plan does not effectuate any on-the-ground environmental changes. Nor does it dictate that any particular site-specific action causing environmental injury must occur."). While NFMA requires that management actions taken on the forest be consistent with the Plan, it does not force the agency to approve timber sales or road projects.[8] Indeed, in the instant case, since the adoption of the Plan in 1986, the Forest Service has not undertaken any new timber sales or road construction in any of the areas proposed for preservation by Sierra Club -- even though the Plan allc timber sales in those areas.[9] See SA 33-34 (Wayne Declaration).

A. Sierra Club has alleged no concrete actual or imminent injury from the mere issuance of the Chequamegon Plan. Article III of the United States Constitution restricts the "judicial power" of the United States to the resolution of "cases" and "controversies" U.S. Const. Art. III § 2, cl. 1. Drawing on Article III limitations as well as prudential limitations, the courts have developed the doctrines of standing and

---

[8] The situation presented by a challenge to a Forest Plan is very similar to that of the plaintiffs in National Wildlife Federation v. Lujan, 497 U.S. 871 (1990). In National Wildlife Federation, 497 U.S. at 892, n.3, the Court addressed the situation in which the agency would need to approve a specific mining plan and issue a permit before any mining could occur despite having opened the land generally for mining. In the event that such a permit were to be granted, the Court observed, the agency approval would provide the basis for a concrete challenge in which the plaintiffs would be able to call into question the validity of the classification order authorizing the permit. Id. The district court incorrectly distinguished the instant case from National Wildlife Federation on the ground that the Plan is "formally treated as a single agency action." 845 F. Supp. at 1321. While the district court correctly observed that the decision to adopt the Plan is subject to administrative challenge, this fact does not confer Article III standing.

[9] Nor has the Sierra Club sought to challenge in court any site-specific decision on the Forest since the approval of the Plan.

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ripeness, both of which require that a plaintiff establish that its challenge seeks redress of actual or imminent, concrete harm.

As the Supreme Court has applied these doctrines in the context of judicial review pursuant to the Administrative Procedure Act, both would dictate that Sierra Club's challenge is not justiciable at the present time. In the APA context, the ripeness doctrine requires that the agency action challenged "be felt in a concrete way by the challenging parties." Abbott Laboratories v. Gardner, 387 U.S. 1136, 148-49 (1967); see Lujan v. National Wildlife Federation, 497 U.S. 871, 894 (1990) ("we intervene in the administration only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect"). Similarly, one of the three elements of standing is "an injury in fact -- an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) "actual and imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defenders of Wildlife, 112 S.Ct.2130, 2136 (1992) (citations omitted). Injury under either standard is lacking here.

As it has been articulated in the standing context, injury giving rise to a justiciable controversy must be "distinct and palpable;" mere harm to an ideological interest will not suffice. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972). And the injury must be "actual or imminent." Defenders, 112 S. Ct. at 2138-2139 & n.2. Although "imminence" is a "somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes--that the injury is 'certainly impending.'" Id. (emphasis in original).[16]

[16] See also Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) ("A threatened injury must be certainly impending to constitute injury in fact.").

The defect in the justiciability of Sierra Club's claims is that there is no imminent, concrete injury. Sierra Club alleges that its recreational enjoyment of the forest will be adversely affected by the loss of biodiversity "resulting from the Forest Service's actions complained of," i.e., approval of the Plan. SA 9-11 at ¶ 5-7.[11] Sierra Club asserts that a loss of biological diversity is inevitable unless the Forest Service gives further consideration to the potential effects of forest fragmentation. But the adoption of the Plan and the Environmental Impact Statement creates no "certainly impending" injury, because the Plan does not approve concrete actions. Unless and until the Forest Service approves a project that will have a fragmenting effect, there is no certainly impending injury.

As described above, a Forest Plan is a general planning tool. Quachita, slip op. at **. It provides standards and guidelines according to which forest management decisions are to be made for a period of ten to fifteen years. There are circumstances, however, in which a Forest

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[11] The Complaint states, in relevant part, that Wisconsin Forest Conservation Task Force members "engage in recreational use of the Forest, have in the past studied and inventoried the flora of the Forest, and maintain a keen interest in the preservation of the structure and function of indigenous forest plant and animal communities and the individual species that make up those communities. The Forest Service's actions complained of adversely affect the biological diversity of the Forest, and therefore adversely affect the use and enjoyment of the Forest by the Task Force." SA 9-10 at ¶ 5. As to the Wisconsin Audubon Council, Inc., the Complaint states that its members "utilize the Forest for recreation of all types (including birding and other nature study, camping, fishing, hunting and skiing), and maintain a significant interest in the preservation of native biological diversity. The Forest Service's actions complained of adversely affect the organizational interests of Wisconsin Audubon, as well as the individual use and enjoyment of the members of the local Audubon chapters." Id. ¶ 6. As to the Sierra Club, the Complaint states that the members "use the Nicolet National Forest for outdoor recreation of all kinds, including nature study, camping, fishing, hunting and skiing. The Forest Service's actions complained of adversely affect the organizational interests of the Club, as well as the individual use and enjoyment of the individual members of the Club." Id. ¶ 7.

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Plans could have immediate impacts. For example, a plan might close an area to off-road vehicles. In that instance, the plan itself could result in imminent concrete injury to a party with interests in the use of off-road vehicles. See Northwest Motorcycle Association v. USDA, 18 F.3d 1468 (9th Cir. 1994).

But an "attack on the Plan per se, * * * devoid of any reference to the particularities of any proposed site-specific actions" does not allege injury in fact. Quachita, slip op. at 12. There, the court concluded that "[f]inding an environmental injury based on the Plan alone, without reference to particular site-specific action, would 'take[] us into the area of speculation and conjecture.'" Id. at 11 (quoting O'Shea v. Littleton, 414 U.S. 488, 497 (1974)). Thus, it held that the plaintiffs had failed to "make an adequate showing that the injury is actual or certain to ensue." Quachita, slip. op. at 10.[12]

The Chequamegon Plan does not itself authorize any specific forest fragmenting actions. The management decisions with on-the-ground impacts

[12] The relief sought by the Sierra Club further exemplifies the lack of justiciability of their challenge to the Plan because there is no specific project pending which the Sierra Club seeks to have enjoined. The Sierra Club seeks: (1) a declaratory judgment that the Plan, EIS and Record of Decision constitute agency action that is arbitrary, capricious and contrary to law; (2) an order "setting aside" the Nicolet National Forest Plan, EIS and Record of Decision, and remanding the Plan and EIS to the Forest Service with instructions to revise those documents; (3) an injunction ordering the Forest Service "to provide for Diversity Maintenance Areas of the size and location identified by the plaintiffs, in which no timber harvesting, road construction or reconstruction or wildlife openings may be carried out" for the remainder of the effective period of the Plan; and (4) an injunction against any further timber harvesting, road construction or reconstruction or wildlife openings in the Forest until the EIS and Plan have been revised. Complaint at 25-26.

Similarly, in its brief to this Court, the Sierra Club requests a remand to the Forest Service for revision of the EIS and "consideration whether the Plan should be revised or amended" and an "injunction barring further Plan implementation until the district court may hear argument and, if necessary, evidence on the scope of any necessary injunctive relief until the new, or Supplemental[,] EIS is completed." Br. 49-50.

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are made at a later stage of the planning process, and are subject to their own procedural requirements, including NEPA requirements. Before any particular action to undertake road construction, timber sales, or creation of wildlife openings can occur, numerous other events must transpire. Quachita, slip op. at 10-11. First, a site-specific action (e.g. a timber sale) must be proposed and found to be consistent with the Plan. Each proposed site-specific project is subject to environmental analysis and public participation. See 36 C.F.R. 219; 40 C.F.R. 1502.14(d), 1508.9(b); Forest Service NEPA procedures, FSH 1901.15 sec. 07, 57 Fed. Reg. 43180, 43193 (Sept. 18, 1992). The environmental analysis disclosing the environmental impacts of such proposals will be based on the scientific evidence available at the time the action is proposed (including results of studies being conducted now by the Forest Service), and will include consideration of the incremental and cumulative effects of the action in conjunction with other related actions. Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 891 (9th Cir. 1992). At the time of the agency's decision on such a proposal, the Plan -- as it relates to the issues of fragmentation and biodiversity -- could be challenged. But at the time of the adoption of the Plan, there is no concrete harm or certainly impending threat of loss of diversity from a fragmenting event.

Thus, before any action that might result in the forest fragmentation that the plaintiffs allege will lead to loss of diversity, both the agency and the public, including Sierra Club, will have an opportunity to review the specifics of that proposal and its potential for adverse effects on forest ecology, and to challenge the project proposal and any portion of the Plan and accompanying EIS that relates to fragmentation. As the Eighth Circuit explained in Quachita:

> [w]hen a site-specific action * * *, such as a timber sale, is proposed, and all administrative appeals are exhausted, persons threatened by an imminent injury in fact may seek judicial review of the proposed action. At that time, such persons may assert that the proposed site-specific action is not consistent with the Plan, or that the Plan as it relates to the proposed site-specific action is inconsistent with the governing statutes, or both.

Ouachita, slip op. at 12.

Because of the profusion in recent years of "standing" cases involving challenges to federal actions by environmental organizations, the government wishes to make very clear what it is not asserting here. The government is not claiming that the type of injury alleged (loss of recreational enjoyment because of diminishment of biodiversity) is insufficient to establish injury.[13] Nor is the government claiming that Sierra Club has not shown injury because of a failure to establish use of the geographic area,[14] or that it is too uncertain that Sierra Club's members will return to the site.[15] Rather, the Forest Service's concern is that there is no certainty that it will take actions that might "fragment" the Chequamegon. Prior to the approval of a specific action with potentially fragmenting effects, Sierra Club lacks the requisite injury.

In other words, the NFMA process does not insulate the Plan from judicial scrutiny. It merely defers judicial intervention in the forest

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[13] See, e.g., Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (concluding that environmental and aesthetic harms are sufficient to lay the basis for standing).

[14] See e.g., National Wildlife Federation, 497 U.S. at 889; Sierra Club v. Morton, 405 U.S. at 735; People for the Ethical Treatment of Animals v. Department of Health & Human Services, 917 F.2d 15, 17 (9th Cir. 1990).

[15] See, e.g., Defenders, 112 S. Ct. at 2138 ("'some day' intentions * * * do not support a finding of 'actual or imminent' injury"); Portland Audubon Society v. Babbitt, 998 F.2d 705, 708 (9th Cir. 1993).

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management process until such time as a project decision gives rise to an actual case or controversy, at which juncture that decision and the relevant portions of the Plan are equally subject to judicial review.

The district court's reliance on Idaho Conservation League v. Mumma, 956 F.2d 1508 (9th Cir. 1992) -- to conclude that plaintiffs had standing -- is misplaced. Although the Ninth Circuit continues to apply Mumma, that decision has been undermined by the more recent Supreme Court standing jurisprudence, which requires that injury be "actual or imminent," and that an imminent injury be "certainly impending." Defenders, 112 S. Ct. at 2139 n.2. Mumma depends upon a holding that "contingent" injury is sufficient for standing purposes, 956 F.2d at 1515, and to that extent, does not survive the subsequently decided Defenders case.

The Ninth Circuit has reaffirmed the holding in Mumma since the Supreme Court's decision in Defenders, concluding in Seattle Audubon Society v. Espy, 998 F.2d 699 (9th Cir. 1993) that "[s]peculation that logging might not occur because of as yet unknown intervening circumstances is not relevant to standing." 998 F.2d at 703 (9th Cir. 1993). The Eighth Circuit has explicitly concluded that Mumma is no longer viable and that an action that might "eventually culminate" in a particular sale does not present a certainly impending threat of injury. Ouachita, slip op. at 14. That view is more consonant with the factual circumstances of forest management and the Supreme Court decisions on justiciability.[16]

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[16] The district court also cited Rockford League of Women Voters v. United States Nuclear Regulatory Comm'n, 697 F.2d 1218, 1221-22 (7th Cir. 1982) in support of its conclusion that "contingent" injury was sufficient to support standing. Order at 7, App.7. Even if Rockford remains viable after the Defenders decision, however, it turns on facts that are clearly distinguishable here.

(continued...)

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The party invoking the federal jurisdiction bears the burden of establishing with specificity that the injury exists or will actually occur.[17] Thus, by the summary judgment stage in this case, plaintiffs had to make a factual showing of a certainly impending threat of injury. They failed to do so. Sierra Club has failed to establish any "certainly impending" threat to biological diversity or threat of forest fragmentation. Indeed, it cannot establish such a threat because the approval of

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[16](...continued)

In Rockford, the plaintiffs sought to revoke the construction permit for a nuclear facility whose construction was half completed at the time of the challenge. The plaintiffs alleged that design defects in the plant would result in safety hazards if the facility were to go into operation. The plaintiffs further alleged that the defects would never be corrected if construction were permitted to proceed to completion. Although the nuclear facility at issue could not operate without an additional permit, the court found that the threat that correction would become impossible if construction were continued was sufficient to confer standing. 697 F.2d at 1222.

Correction at the plan level here is not comparable to correction at the pre-completion stage in construction of the nuclear plant in Rockford. The approval of the Plan does not constitute the irretrievable commitment of resources that completion of the nuclear facility in Rockford would implicate. Completion of the construction in Rockford would involve massive investments by the private parties holding the construction permit, while no investment by private parties is implicated by forest planning until a contract is let -- after the site-specific analysis discussed above. Therefore, in contrast to Rockford, no concrete injury could fairly be traced to the decision to approve the Plan, and no injury-in-fact can be demonstrated.

[17] Defenders, 112 S. Ct. at 2136; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990); United States v. SCRAP, 412 U.S. 669, 688 (1973). Because the standing requirements "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Defenders, 112 S. Ct. 2136-2137 (citations omitted). Thus, at the summary judgment stage the plaintiff cannot rest on "'mere allegations' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" Id.

the Plan, without more, does not effect concrete actions. The uncontroverted evidence before the district court was that there have been no decisions to undertake timber sales, road construction or creation of wildlife openings in the areas which Sierra Club seeks to have "set aside" as "diversity management areas." SA 33-35 (Wayne Declaration). Because there is no actual or imminent injury arising from issuance of the Plan, Sierra Club's challenge to the Plan is not justiciable at this time.

B. Sierra Club's challenge to the EIS is also not justiciable at this time. The justiciability of the Sierra Club's challenge to the EIS succeeds or fails based on the justiciability of its challenge of the Plan. A party that is accorded a procedural right to protect its concrete interests, such as the requirements of environmental analysis under NEPA, "can assert that right without meeting all the normal standards for redressability and immediacy." Defenders, 112 S. Ct. at 2142 n.7. The Court explained that "under our case-law one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years." Id. In other words, the party asserting standing does not need to show that redressing the alleged procedural infirmity will result in a change in the outcome.

But the party seeking to assert procedural rights under NEPA must have concrete interests affected by the proposed federal action. See Banks v. Secretary of Indiana Family & Social Services Admin., 997 F.2d 231, 238 (7th Cir. 1993) (An individual may enforce procedural rights

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"'so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'"); cf. Defenders, 112 S.Ct. at 2142-43 & n.7. "In order to make out constitutionally cognizable injury, plaintiffs must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied." Freedom Republicans v. Federal Election Commission, 13 F.3d 412, 416 (D.C. Cir. 1994). Because Sierra Club has not demonstrated that it will suffer a concrete injury from the mere issuance of the Plan, its challenge to the EIS is not justiciable -- at this time -- in the absence of a "fragmenting event," a specific project decision.

Even if the Court concludes that Sierra Club's claims are justiciable at this time, its claims must, as the district court concluded, fail on the merits. Sierra Club contends that the Forest Service, in issuing the Land and Resource Management Plan for the Chequamegon National Forest and in preparing the Final Environmental Impact Statement for that Plan, failed to comply with the National Forest Management Act and the National Environmental Policy Act in several respects. We first address the claims that the Forest Service issuance of the Plan violated the requirements of the NFMA and the regulations promulgated thereunder and then turn to the contentions that the EIS was inadequate.

II

SIERRA CLUB HAS FAILED TO ESTABLISH THAT THE FOREST SERVICE'S METHODS OF PROVIDING FOR DIVERSITY OF PLANT AND ANIMAL COMMUNITIES WERE ARBITRARY AND CAPRICIOUS AND THEREFORE VIOLATED NFMA

Sierra Club claims that the Forest Service violated the requirements of the National Forest Management Act in several respects. The parties agree that NFMA, in relevant part, required the Secretary to promulgate

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used by the Forest Service in the future. Those means of addressing the issue are consonant with the requirements of NEPA.

CONCLUSION

For the foregoing reasons, the Court should find this case not justiciable because Sierra Club lacks an imminent injury. Alternatively, if the Court finds the Sierra Club's claims justiciable, the district court's judgment on the merits should be affirmed.

Respectfully submitted,

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AUGUST 1994
90-1-4-3642

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief for the Federal Appellees and one copy of the Federal Appellees' Supplemental Excerpts of Record have been served on counsel by placing same in the United States mail, postage prepaid and properly addressed, this 22nd day of August, 1994, to:

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trative license (including permit, certificate, approval, registration, charter, membership, or other form of permission) is required by law and due request is made therefor such license shall be deemed granted in full to the extent of the authority of the agency unless the agency shall within not more than sixty days of such application have made its decision or set the matter for formal proceedings required to be conducted pursuant to sections 6 and 7 of this Act; (2) except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety require otherwise, no withdrawal, suspension, revocation, or annulment of any such license shall be lawful unless, prior to the institution of administrative proceedings therefor, any facts or conduct of which the agency has notice and which may warrant such action shall have been called to the attention of the licensee in writing and such person shall have been accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements; (3) no such license with reference to any business, occupation, or activity of a continuing nature shall expire, in any case in which the holder thereof has made due and timely application for a renewal or a new license, until such application shall have been finally determined by the agency concerned.

(c) PUBLICITY.—Except as expressly authorized by law, no agency shall, directly or indirectly, issue publicity reflecting adversely upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction.

JUDICIAL REVIEW

SEC. 9. In connection with any Act, rule, order, process, or proceeding of any agency—

(a) RIGHT OF REVIEW.—Any party adversely affected shall be entitled to judicial review of any issue of law in accordance with this section; and every reviewing court shall have plenary authority to render such decision and grant such relief as right and justice may demand in conformity with law and this Act.

(b) FORM OF ACTION.—In addition to judicial review incident to proceedings for any form of criminal or civil enforcement of administrative rules, orders, or process, the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter or, in the absence or inadequacy thereof, any applicable form of legal action including actions for declaratory judgments or writs of injunction or habeas corpus. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure with or without prior resort to the issuing agency, secure a judicial declaration of rights respecting the validity or application of any administrative act, rule, or order. Except as otherwise provided in connection with special statutory review proceedings, any action for judicial review may be brought against one or more of the following: (1) The agency in its official title at the time of the filing of the proceeding; (2) the officer who is the head of, or one or more of the officers comprising the highest authority in, the agency; or (3) any one or more officers acting in the manner challenged or enforcing or authorized to enforce the rule or order involved.

(c) COURTS AND VENUE.—The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district, and division where the party seeking court review or any one of them resides or has his principal place of business or in case such party is a corporation then where it has its principal place of business or engages in business. Whenever a court s[illegible]hold that it is without jurisdiction on the ground that application should [illegible]en made to some other court, it shall transmit the pleadings and othe[illegible] to a court having jurisdiction which shall, after permitting any necess[illegible]mendments, thereupon proceed as in other cases and as though the proceeding had originally been filed therein. In any case in which application for such review is filed, timely amendments shall be permitted to state additional or subsequent facts and seek additional remedies or relief. Any court having jurisdiction of any part of any controversy regarding any administrative action, rule, or order shall have full jurisdiction over all issues in such controversy, with authority to grant all pertinent relief, notwithstanding that [illegible]

EXHIBIT B

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the consequences of any unwarranted or avoidable administrative delay in determining any such matter. In all cases in which an administrative hearing is required by law and the parties are not in default, matters not susceptible of informal disposition in whole or in part shall be promptly heard and decided, except that in fixing the times and places for formal or informal proceedings due regard shall be had for the convenience and necessity of the parties or their representatives.

JUDICIAL REVIEW

SEC. 4. In order that every reviewing court shall have plenary authority to render such decision and grant such relief as right and justice may demand in full conformity with this Act and all other applicable law—

RIGHT OF REVIEW

(a) Notwithstanding any contract, agreement, or undertaking to the contrary, any party subject to, or adversely affected by, any administrative action, rule, or order within the purview of this Act or otherwise presenting any issue of law shall be entitled to judicial review thereof—

(1) as an incident to proceedings for any form of criminal or civil enforcement;

(2) through any special statutory review proceeding relevant to the subject matter; or

(3) in the absence or inadequacy of any relevant statutory review procedure, through any applicable form of legal action, including actions for declaratory judgment or for writs of injunction, mandamus, or habeas corpus: *Provided, however,* That any final administrative order (including those upon applications for declaratory rulings or the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof within the time prescribed by law or within a reasonable time) directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, licenses, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land shall be subject to review pursuant to this section. Any preliminary or intermediate order shall be directly reviewable in any case in which no other judicial remedy is fully adequate. All orders not directly reviewable shall be subject to review upon the review of final acts, rules, or orders. Any action, rule, or order shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening, or declaratory ruling has been presented to or ruled upon by the agency involved.

INTERIM RELIEF

(c) Unless the agency of its own motion or on request shall postpone the effective date of any action, rule, or order pending judicial review, every reviewing court, and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court, shall—

(1) have full authority to issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review and determination as provided in this section;

(2) postpone the effective date of any administrative action, rule, or order to the extent necessary to accord the parties a fair opportunity for judicial review of any substantial question of law; and

(3) grant such affirmative relief, notwithstanding statutory or other administrative authority in the premises, in any case in which any legal right, privilege, immunity, permission, relief, or benefit expires or is denied, withdrawn, or withheld, in whole or in part, to the extent necessary to preserve the status of the parties pending the review guaranteed by this section.

SCOPE OF REVIEW

(d) The reviewing court shall consider and decide all relevant questions of law arising upon the whole record; and the court shall hold unlawful any act or set aside any application, rule, order, or administrative finding or conclu-

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79th Cong 1st Sess

TITLE I—GENERAL PROVISIONS

Sec. 101. Declaration of General Policy.—The exercise of all powers of government through administrative officers and agencies, so far as such exercise affects rights or withholds or confers benefits or privileges, shall be conducted according to established and published procedures and practices which shall assure the adequate protection of such rights, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress, and shall be adapted to the reasonable necessities and differences of legislation and subject matter involved.

Sec. 102. Definitions.—Except as otherwise expressly stated or required by the context—

(a) "Agency" means each office, board, commission, independent establishment, authority, corporation, department, bureau, division, or other subdivision or unit of the executive branch of the Federal Government, and means the highest or ultimate authority therein.

(b) "Persons" means individuals or organized groups of any character, including partnerships, and other forms of agricultural, labor, business, commercial, or industrial organization or association, as well as Federal, State, or local agencies, subdivisions, municipal corporations, or officers.

(c) "Rules" means rules, regulations, standards, statements of policy, and all other types of statements issued by any agency, of general application and designed to implement, interpret, or make specific the legislation administered by, and the organization and procedure of, any agency; and includes rate making, price fixing, or the fixing of standards.

(d) "Adjudication" means the final disposition by any agency of particular cases (without distinction between licensing and other forms of proceeding).

(e) "Publication," whenever required by this Act and unless otherwise provided, means publication in the Federal Register, except that agencies may adopt such other and additional means of publication as they may deem appropriate and advisable.

Sec. 103. Delegation and Decentralization of Authority Within Agencies.—For the expedition and sound disposition of business, agencies may delegate authority in the following respects and subject to the following conditions, except that each agency shall in every case be responsible for all acts done pursuant to such delegated authority:

(a) Certain types of duties.—Subject to its own supervision, direction, review, reconsideration, or initial consideration in unusually important cases, every

agency is a... mittees, or ... tine and the ... and other ... ancillary fo... adjudication ...
(b) Boar... of which is ... reconsidera... to any one ... to the furth... agency is ... review or ... duties, or ...
(c) Firm... field offices ... there is ne... will be faci...
(d) Pub... tralization. ... internal m... published ...
Sec. 104. ... may appear ... authorized ... facilities ... termination ... persons or ... vidually in ... be accompa...
Sec. 105. ... practice be ... be exercise...
(a) Sus... of practiti... preclude a... the reason... upon any ... tion for ...
(b) Am... or agents ... or agents, ... Procedure ... tain a ... to practice ...
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Sec. 106. ... manner ... hearing ... reports ...

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hold further discussions with interested agencies and to correlate further agency views, some of which were submitted in writing and some orally. Private parties and representatives of private organizations also participated.

Following these discussions the committee drafted the bill as reported, which is set forth in full in appendix A. The Attorney General's favorable report on the bill, as revised, is set forth in appendix B.

II. APPROACH OF THE COMMITTEE

In undertaking the foregoing very lengthy process of consideration, the committee has attempted to make sure that no operation of the Government is unduly restricted. The committee has also taken the position that the bill must reasonably protect private parties even at the risk of some incidental or possible inconvenience to or change in present administrative operations. The committee is convinced, however, that no administrative function is improperly affected by the present bill.

THE PRINCIPAL PROBLEMS.—The principal problems of the committee have been: *First*, to distinguish between different types of administrative operations. *Second*, to frame general requirements applicable to each such type of operation. *Third*, to set forth those requirements in clear and simple terms. *Fourth*, to make sure that the bill is complete enough to cover the whole field.

The committee feels that it has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted, but not the War or Navy Departments in the performance of their other functions. Manifestly, it would be folly to assume to distinguish between "good" agencies and others, and no such distinction is made in the bill. The legitimate needs of the Interstate Commerce Commission, for example, have been fully considered but it has not been placed in a favored position by exemption from the bill.

from Report of the Committee on the Judiciary on S.7.

~~No. 11~~ Report No. 752 79th Cong 1st Sess

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the third parallel column of the print issued by ... June 1945.

III. STRUCTURE OF THE BILL

The bill, as reported, is not a specification of the details of administrative procedure, nor is it a codification of administrative law. Instead, out of long consideration and in the light of the studies heretofore mentioned, there has been framed an outline of minimum basic essentials. Figure 2 on page 9 diagrams the bill.

The bill is designed to afford parties affected by administrative powers a means of knowing what their rights are and how they may be protected. By the same token, administrators are provided with a simple course to follow in making administrative determinations. The jurisdiction of the courts is clearly stated. The bill thus provides for public information, administrative operation, and judicial review.

SUBSTANCE OF THE BILL.—What the bill does in substance may be summarized under four headings:

1. It provides that agencies must issue as rules certain specified information as to their organization and procedure, and also make available other materials of administrative law (sec. 3).
2. It states the essentials of the several forms of administrative proceedings (secs. 4, 5, and 6) and the limitations on administrative powers (sec. 9).
3. It provides in more detail the requirements for administrative hearings and decisions in cases in which statutes require such hearings (secs. 7 and 8).
4. It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10).

The first of these is basic, because it requires agencies to take the initiative in informing the public. In stating the essentials of the different forms of administrative proceedings, it carefully distinguishes between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases).

The bill provides quite different procedures for the "legislative" and "judicial" functions of administrative agencies. In the "rule making" (that is, "legislative") function it provides that, with certain exceptions, agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before issuing general regulations (sec. 4). No hearings are required by the bill unless statutes already do so in a particular case. Similarly, in "adjudications" (that is, the "judicial" function) no agency hearings are required unless statutes already do so, but in the latter case *authorities ... or named statutes operative during "present hostilities."*

The word "authority" is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization. In conferring administrative powers, statutes customarily do not refer to formal agencies (such as the Department of Agriculture) but to specified persons (such as the Secretary of Agriculture). Boards or commissions usually possess authority which does not extend to individual members or to their subordinates.

The bill does not repeal delegations of authority which are duly authorized by existing law. This does not mean, however, that delegations are effective where other provisions of the bill require otherwise. For example, the requirement that examiners in certain instances hear cases would supersede any existing delegations to prosecuting officers to hear such cases.

Agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them are exempted because such agencies as presently operated do not lend themselves to the adjudicative procedures set out in the remaining sections of the bill. They tend to be arbitral or mediating agencies rather than tribunals.

The exclusion of war functions and agencies, whether exercised by civil or military personnel, affords all necessary freedom of action for the exercise of such functions in the period of reconversion. It has been deemed wise to exempt such functions in view of the fact that they are rarely required to be exercised upon statutory hearing, with which much of the bill is concerned, and the fact that they are rapidly liquidating. It should be noted, however, that even war functions are not exempted from the public information requirement of section 3. "Present hostilities" means those connected with the war brought on at Pearl Harbor in December 1941.

(*b*) PERSON AND PARTY.—*"Person" is defined to include specified forms of organizations other than agencies. "Party" is defined to include anyone named, or admitted or seeking and entitled to be admitted, as a party in any agency proceeding except that nothing in the subsection is to be construed to prevent an agency from admitting anyone as a party for limited purposes.*

The definition of person includes both individuals and any form of organization but advisedly excludes Federal agencies. The practice of agencies to admit persons as parties in proceedings "for limited purposes" is expressly preserved, but that exception does not authorize

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any agency to ignore or prejudice the rights of the true or full parties in any proceeding.

(c) Rule and Rule Making.—*"Rule" is defined as any agency statement of general applicability designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements. "Rule making" means agency process for the formulation, amendment, or repeal of a rule and includes any prescription for the future of rates, wages, financial structures, etc., etc.*

The definition of "rule" is important because it prescribes the kind of operation that is subject to section 4 rather than section 5. The specification of the activities that are involved in rule making is included in order to comprehend them beyond any possible question. They are defined as rules to the extent that, whether of general or particular applicability, they formally prescribe a course of conduct for the future rather than merely pronounce existing rights or liabilities. It should be noted that rule making is exempted from some of the general requirements of sections 7 and 8 relating to the details of hearings and decisions.

(d) Order and Adjudication.—*"Order" means the final disposition of any matter, other than rule making but including licensing, whether or not affirmative, negative, or declaratory in form. "Adjudication" means the agency process for the formulation of an order.*

The term "order" is defined to exclude rules. "Licensing" is specifically included to remove any possible question at the outset. Licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance. It should be noted, however, that licensing is exempted from some of the provisions of sections 5, 7, and 8 relating to hearings and decisions.

(e) License and Licensing.—*"License" is defined to include any form of required official permission such as certificate, charter, etc. "Licensing" is defined to include agency process respecting the grant, renewal, modification, denial, revocation, etc., of a license.*

This definition supplements subsection (d). Later provisions of the bill distinguish between initial licenses and renewals or other licensing proceedings. A further distinction might have been drawn between licenses for a term, such as radio licenses, and those of indefinite duration, such as certificates of convenience and necessity.

(f) Sanction and Relief.—*"Sanction" is defined to include any agency prohibition, withholding of relief, penalty, seizure, assessment, requirement, restriction, etc. "Relief" is defined to include any agency grant, recognition, or other beneficial action.*

These definitions are mainly relevant to section 9 on sanctions and powers and to section 10 on judicial review. The purpose of the subsection is to define exhaustively every possible form of legitimate administrative power or authority.

(g) Agency Proceeding and Action.—*"Agency proceeding" is*

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agencies an arbitrary discretion to ... and an opportunity to demonstrate compliance. However, this limitation does not apply to temporary permits or temporary licenses.

SEC. 10. JUDICIAL REVIEW.—*Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.*

Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review. That situation cannot be remedied by an administrative procedure act but must be treated by the revision of statutes conferring administrative powers. However, where statutory standards, definitions, or other grants of power deny or require action in given situations or confine an agency within limits as required by the Constitution, then the determination of the facts does not lie in agency discretion but must be supported by either the administrative or judicial record.

(a) RIGHT OF REVIEW.—*Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.*

This subsection confers a right of review upon any person adversely affected in fact by agency action or aggrieved within the meaning of any statute. The phrase "legal wrong" means such a wrong as is specified in subsection (e) of this section. It means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect. The law so made relevant is not just constitutional law but any and all applicable law.

(b) FORM AND VENUE OF ACTION.—*The technical form of proceeding for judicial review is any special proceeding provided by statute or, in the absence or inadequacy thereof, any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction. Moreover, agency action is also made subject to judicial review in any civil or criminal proceeding for enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.*

The first sentence of this subsection is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special forms of judicial review are lacking or insufficient. The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action. The expression "special statutory review" means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by statute as the appropriate mode of

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proper performance ... careful and dispassionate manner. ... this inquiry in a careful and dispassionate manner. ... objectives of the bill as worded fail, supplemental legislation will be required.

The foregoing are by no means all the provisions which will require vigilant attention to assure their proper operation. Almost any provision of the bill, if wrongly interpreted or minimized, may present occasion for supplemental legislation. On the other hand, should it appear at any time that the requirements result in some undue impairment of a particular administrative function, appropriate amendments or exceptions may be in order.

INTERPRETATION AND ENFORCEMENT.—Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.

It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. For example, in several provisions the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found and the purpose of the entire section and bill. Cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record, the cause will appear there; otherwise it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill. As has been said, these findings must in the first instance be made by the agency concerned but, in the final analysis, their propriety in law and on the facts must be sustainable upon inquiry by a reviewing court.

Nevertheless, in the nature of things, for most practical purposes it is to the agencies that the Congress and the people must look for fair administration of the laws and compliance with this bill. Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is indispensable since its mere existence generally precludes the arbitrary exercise of powers or assumption of powers not granted. Yet, in the vast majority of cases the agency concerned usually speaks the first and last word. For that reason the agencies must make the first, primary, and most far-reaching effort to comply with the terms and the spirit of this bill.

It is the view of the committee that this bill is not an indictment of administrative agencies or administrative processes. The committee takes no position one way or the other on these questions. By enacting this bill, the Congress—expressing the will of the people—will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure.

The committee recommends that the bill as reported be enacted.

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

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, vs. JAMES LYONS, in his official capacity as Assistant Secretary of Agriculture, et al., Defendants, vs. NORTHWEST FOREST RESOURCE COUNCIL, Cross-Claim Defendant.	No. C92-479WD DECLARATION REGARDING FACSIMILE DECLARATION OF ALISON KEAN CAMPBELL

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SAVE THE WEST, Plaintiff, vs. JAMES LYONS, et al., Defendants.	No. 94-758WD
NATIVE FOREST COUNCIL, Plaintiff, vs. BRUCE BABBITT, et al., Defendants.	No. C94-803WD
THE SIERRA CLUB, Plaintiff, vs. MICHAEL ESPY, et al., Defendants.	No. C94-820WD

I, Connie K. Haslam, hereby certify that the facsimile Declaration of Alison Kean Campbell, which has been filed with CROSS-CLAIM DEFENDANT NORTHWEST FOREST RESOURCE COUNCIL'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR MORE DEFINITE STATEMENT, AND MOTION TO STRIKE,

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will be replaced with the original declaration as soon as possible following my receipt of the original declaration.

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SAVE THE WEST, Plaintiff, vs. JAMES LYONS, et al., Defendants.	)	No. 94-758WD
NATIVE FOREST COUNCIL, Plaintiff, vs. BRUCE BABBITT, et al., Defendants.	)	No. C94-803WD
THE SIERRA CLUB, Plaintiff, vs. MICHAEL ESPY, et al., Defendants.	)	No. C94-820WD

The undersigned hereby certifies that on September 29, 1994, copies of the following documents:

1. Cross-Claim Defendant Northwest Forest Resource Council's Reply Memorandum in Support of Motion to Dismiss, Motion for More Definite Statement, and Motion to Strike;

2. Declaration of Alison Kean Campbell; and

3. Declaration Regarding Facsimile Declaration of Alison Kean Campbell

were served on the following persons in the manner designated:

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Dated this 29th day of September, 1994.

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Litigation

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DATE: December 7, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 6

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

MESSAGE: Attached is NFC's Response to NFRC's Additional Briefing.

The Honorable William L. Dwyer

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AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al., Plaintiffs, v. JAMES LYONS, in his official capacity as Assistant Secretary of Agriculture, and the UNITED STATES FOREST SERVICE, an agency of the United States, Defendants, and WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al., Defendant-Intervenors.	CIV. NO. 92-479 WD NFC'S RESPONSE TO NFRC'S ADDITIONAL BRIEFING
SAVE THE WEST, Plaintiff, v.	Civ. No. 94-758 WD

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JAMES LYONS, et al., Defendants.	
NATIVE FOREST COUNCIL, Plaintiff, v. BRUCE BABBITT, *et al.*, Defendants.	Civ. No. C94-803WD
THE SIERRA CLUB, Plaintiff, v. MICHAEL ESPY, *et al.*, Defendants.	Civ. No. C94-820WD

The Native Forest Council ("NFC") agrees with the Northwest Forest Resource Council's position that the failure to prepare and certify a complete administrative record precludes granting Defendants' Motion for Summary Judgment. NFC further agrees that the ROD should be vacated. By this action, the procedural posture of this case should revert to, or rather repeat, that of July 3,

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1992; no acceptable forest plan in effect, and all further habitat loss enjoined pending preparation and approval of an acceptable plan.

DATED this 6 day of December, 1994.

JOHN S. KARPINSKI, WSBA #13142
Attorney for Plaintiff NFC

rspbref.nfc

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CERTIFICATION

I hereby certify that I served the NFC's Response to NFRC;'s Additional Briefing on:

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by the following indicated method or methods:

☒ by mailing a full, true and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Vancouver, Washington, on the date set forth below.

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☐ See Notations on each at right hand margin

DATED this 6th day of December, 1994.

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MEMORANDUM

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DATE: December 8, 1994

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 11

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

MESSAGE: Attached is a Federal Defendants' Response to NFRC's Motion for Leave to File Second Supplemental Memorandum.

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 FEDERAL DEFENDANTS' RESPONSE TO NFRC'S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL MEMORANDUM
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

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

Civ. No. C94-820WD

Introduction

On November 28, 1994, cross-claim defendant Northwest Forest Resource Council ("NFRC") filed a Motion for Leave to File a Second Supplemental Memorandum In Opposition to Government's Motion for Summary Judgment on Cross-Claims in these consolidated actions, along with the proposed memorandum it seeks leave to file. The proposed memorandum argues that the federal late-successional and old-growth forest management strategy challenged in these actions should be invalidated on the basis of NFRC's allegation that federal defendants have not "certified" a complete administrative record. Federal defendants file this consolidated response (1) to NFRC's motion for leave to file the second supplemental memorandum and, (2) in the event the Court should grant the motion for leave, to NFRC's proposed second supplemental memorandum itself. As explained below, neither the arguments NFRC presents in support of its motion for leave, nor those set forth in the proposed second supplemental memorandum, are well-taken. The relief sought in both must be denied.

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I. <u>FURTHER BRIEFING ON THE ADMINISTRATIVE RECORD IS UNNECESSARY.</u>

For the most part, the supplemental memorandum NFRC seeks leave to file constitutes simply another rehash of its earlier arguments that the administrative record is inadequate, along with some citations to previously uncited (but not newly issued or apposite) judicial opinions. These arguments have been fully briefed and argued, and federal defendants have thoroughly debunked NFRC's position. <u>See</u> Fed. Def. SJ Rep. at 14-19.

More particularly, the premise underlying the motion for leave is NFRC's allegation that a "new fact" concerning the administrative record was revealed during the November 17 oral argument on summary judgment. In reality, however, the judicial record surrounding composition, compilation, and authentication of the administrative record has been established for some time, and well prior to the recent argument.[1] In June 1994, federal defendants submitted declarations that describe the instructions

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[1] Moreover, contrary to the contention of NFRC, counsel for federal defendants made no attempt to introduce new evidence concerning the administrative record during oral argument. <u>See</u> NFRC Memo in Support of Motion for Leave at 2. The gravamen of the statement to which NFRC apparently refers is the unremarkable notion that federal defendants cannot attest to the precise contents of documents that were <u>not</u> retained for inclusion in the administrative record. But even NFRC does not explicitly argue that the administrative record must contain every piece of paper generated during the administrative process. At no time did counsel indicate that federal defendants have failed to provide adequate evidentiary support to authenticate the contents of the materials in the administrative record, and the index thereto before this Court. (Counsel for federal defendants wish to reserve the right to supplement their position on this point, if necessary, upon receipt of the transcript of the argument.)

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provided to FEMAT and the SEIS team concerning retention of materials for the administrative record and the logistics of how such materials were made a part of the record. See generally Declaration of Jack Ward Thomas (June 20, 1994); Declaration of Arnold G. Holden (June 17, 1994); Declaration of John Gant (June 17, 1994). In August, federal defendants served answers on NFRC to its second set of interrogatories and requests for documents, which principally addresses administrative record issues, including the manner in which documents generated during preparation of the Record of Decision were compiled. See generally Federal Defendants' Answers and Responses to NFRC's Second Set of Interrogatories and Requests for Documents (Aug. 26, 1994)(attached as Exhibit 1). Finally, prior to filing its brief in opposition to federal defendants' summary judgment motion, NFRC took depositions of all persons who submitted declarations in behalf of federal defendants on issues related to compilation, composition, and authentication of the record.

In sum then, NFRC has presented no new facts or law to justify filing a second supplemental memorandum. As a result, its motion for leave to file the memorandum must fail.

II. FEDERAL DEFENDANTS HAVE SATISFACTORILY EXPLAINED COMPILATION OF THE ADMINISTRATIVE RECORD AND AUTHENTICATED ITS CONTENTS, AND IT REMAINS AMPLY ADEQUATE FOR JUDICIAL REVIEW.

Even were the Court to consider NFRC's proposed second supplemental memorandum, it contains nothing that would undermine the means by which federal defendants compiled and authenticated

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the administrative record, or the adequacy of the record to support the Court's exercise of judicial review. First, federal defendants have provided ample evidentiary support to explain the manner in which they compiled the administrative record. Second, they have submitted the declaration of the person they employed specifically for the purpose of compiling the administrative record, who has attested to the accuracy and completeness of that record as reflected in the index that has been filed with the Court. Finally, as federal defendants previously have explained, the record is more then adequate to allow the Court to review the challenged strategy under the applicable standards of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06.

A. FEDERAL DEFENDANTS HAVE SUBMITTED SWORN DECLARATIONS DESCRIBING MANNER IN WHICH RECORD WAS COMPILED AND ATTESTING TO AUTHENTICITY AND ACCURACY OF ITS CONTENTS.

NFRC suggests that the administrative record is not properly before the Court because federal defendants allegedly have not properly "certified" the "whole record" to the Court. NFRC's 2d Supp. Memo at 1-2. This argument misses the mark insofar as it suggests that proper authentication would require federal defendants to attest to the precise contents of every piece of paper <u>not</u> retained for inclusion in the administrative record. The relevant inquiry is whether the agencies have adequately explained the methods they used to compile the record and properly authenticated its <u>contents</u> for the Court's review. Federal defendants clearly have accomplished both these tasks.

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Authentication of governmental public records for use in court is not governed by rigid requirements. Indeed, there are numerous ways by which it may be accomplished. 9 C. Wright & A. Miller, Federal Practice & Procedure § 2437, at 396 (1971)("the methods of authentication provided by [Federal Rule of Civil Procedure 44] are not exclusive but are additional and supplementary to any other method authorized by law"); Fed. R. Civ. P. 44(c); Fed. R. Evid. 904[2] & 1005; cf. 28 U.S.C. § 1733(a) & (b)("Properly authenticated copies or transcripts" of "[b]ooks or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept"). In particular, the use of an affidavit to authenticate a government record has been explicitly

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[2] Although Federal Rule of Civil Procedure 44(a)(1) and Federal Rule of Evidence 902(4) refer to use of an official "seal" to "certify" public records submitted to a court, as the text notes, these methods are not exclusive. Moreover, it would not have been appropriate to have used an official departmental seal (see 7 U.S.C. § 2203; 43 U.S.C. §§ 1460 & 1462) where, as here, the custodian of the record is not an official of either department. See Declaration of John Gant at ¶ 1 (explaining that he was serving under contract to federal government).

In addition, any error intimated by NFRC in this regard can only be construed as harmless in light of the vastness of the record and the extent to which NFRC has relied on documents in the record in making arguments. See 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error" in performing judicial review on basis of administrative record). Finally, as the applicable federal rules indicate, the major purpose to be served by use of a seal is to ensure that the agency official with custody of the record has attested to its authenticity. See Fed. R. Civ. P. 44(a)(1). Here, that purpose was well served by federal defendants' declarations, especially that of John Gant, all of which were made under penalty of perjury.

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recognized as proper. United States v. Stone, 604 F.2d 922, 925 (5th Cir. 1979); see also 9 C. Wright & A. Miller, § 2437, at 396 (noting that it is quite common for custodian to provide oral testimony authenticating an official record). "Substantial compliance" with applicable rules is sufficient to support admission of a public record in court. See AMFAC Distribution Corp. v. Harrelson, 842 F.2d 304, 306 (11th Cir. 1988).

Here, federal defendants have submitted declarations describing the standards used in compiling the administrative record associated with the FEMAT Report and Final SEIS. See Declaration of Jack Ward Thomas & Arnold G. Holden. In the ROD the Secretaries stated that "[p]lanning records documenting the preparation and review" of the strategy had been compiled and were available for public review. ROD at 74. The designated custodian of the administrative record states in his declaration that he had responsibility for keeping the administrative record and attests to the accuracy "[i]n all material respects" of the index to the administrative record that has been submitted to the Court and served on all parties. Declaration of John Gant at ¶¶ 1 & 3. At the very least, this is sufficient to constitute "substantial compliance" with rules concerning authentication of the record.[3]

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[3] Finally, it is to be noted that, in this context, "certified" is synonymous with "attested to" or "authenticated." See BLACK'S LAW DICTIONARY 207 (5th ed. 1979)(definition of "certify" is "[t]o authenticate or vouch for a thing in writing" or "[t]o attest as being true or as represented").

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B. AS PREVIOUSLY ESTABLISHED, THE ADMINISTRATIVE RECORD IS MORE THAN SUFFICIENT TO SERVE AS A BASIS UPON WHICH THE COURT CAN PERFORM JUDICIAL REVIEW.

Federal defendants previously have demonstrated that the key inquiry concerning the adequacy of an administrative record in support of informal agency decision-making is whether the record will permit the Court to perform judicial review under applicable APA standards. Fed. Def. SJ Rep. at 15-16. We have further shown that, given the comprehensive nature of the record here and the pervasiveness of contrary agency opinion expressed within it, it clearly is adequate for such a purpose. Id. at 16-18; Yong v. Regional Manpower Administrator, 509 F.2d 243, 246 (9th Cir. 1975). Indeed, even the cases to which NFRC cites demonstrate that adequacy for the purposes of judicial review is the relevant standard for the Court's consideration. See NFRC 2d Supp. Memo at 3-4 (and opinions cited therein). Moreover, NFRC has been provided with substantial discovery, in the form of both answers to interrogatories and depositions of federal defendants' declarants, on issues related to composition and compilation of the administrative record. Fed. Def. SJ Rep. at 18-19. Federal defendants will not revisit such arguments here, for their earlier pronouncements suffice to dispose of NFRC's arguments.

Federal defendants do note, however, that, to the extent NFRC refers to previously uncited cases in its proposed second supplemental memorandum, each fits into one or more categories that are readily distinguishable from the factual

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scenario before the Court here. Such categories are as follows: (1) administrative record consisted solely of the primary decision-making documents challenged on judicial review, see Appalachian Power Co. v. EPA, 477 F.2d 495, 505 (4th Cir. 1973)(rejecting argument of agency that, "in the exercise of judicial review of [its] action in approving the state plans, the Court shall look simply to [its] order of approval and the state plan itself"); (2) agency conceded that certain key documents explicitly relied upon by the final decision-maker were not produced during litigation before district court, see Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 342 (D.C. Cir. 1989), Walter O. Boswell Mem. Hosp. v. Heckler, 749 F.2d 788, 793 (D.C. Cir. 1984), Natural Resources Defense Council v. Train, 519 F.2d 287, 292 (D.C. Cir. 1975), & We Who Care, Inc. v. Sullivan, 756 F. Supp. 42, 47 (D. Me. 1991); (3) agency failed to comply with a stipulation under which it had specifically agreed to provide plaintiffs with certain record materials, see Monongahela Power Co. v. Marsh, 699 F. Supp. 324, 326 (D.D.C. 1988); (4) agency failed to provide any explanation for its decision or create any administrative record at all, see Sears Sav. Bank v. FSLIC, 775 F.2d 1028, 1030 (9th Cir. 1985) & Wisher v. Coverdell, 782 F. Supp. 703, 711-12 (D. Mass. 1992); and (5) the existence of substantial record gaps in official agency files or hearing transcripts associated with formal administrative adjudications, see Higgins v. Kelley, 574 F.2d 789, 793 (3d Cir. 1978), Koning

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v. Bowen, 675 F. Supp. 452, 457-58 (N.D. Ind. 1987), Osaghae v. INS, 942 F.2d 1160, 1162 (7th Cir. 1991), & Highfill v. Bowen, 832 F.2d 112, 115 (8th Cir. 1987).

Conclusion

For the foregoing reasons, and relevant portions of earlier of federal defendants' papers, the Court should deny NFRC's Motion for Leave to File Second Supplemental Memorandum in Opposition to Summary Judgment on Cross-Claims. Even if the Court should grant the motion for leave, it should deny the request NFRC makes in the second supplemental memorandum to remand the challenged strategy to the agencies.

Dated this 7th day of December, 1994.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 7, 1994, ~~she~~ he caused one non-conformed copy of the foregoing **FEDERAL DEFENDANTS' RESPONSE TO NFRC'S MOTION FOR LEAVE TO FILE SECOND SUPPLEMENTAL MEMORANDUM** to be served via telefacsimile machine without attachments, and by U.S. mail with attachments, upon the counsel of record hereinafter named:

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