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NFRC [Northwest Forest Resource Council] Litigation - Motion to Dismiss [1]

Stack:	Row:	Section:	Shelf:	Position:
S	61	6	1	3

8/19 US Dist Ct

Jackson - presiding

Plaintiff: Wm. Shaffer & Mark Rutzick

Justice: Whitman

1. TRO:

- gov't agrees to preserve all documents
- MR: • steps gov't taken aren't adequate
- JWS request to

* denied and moot

2. Motion to dismiss

- ~~Jackson~~
- persuaded by gov't case • Now MOOT
 - relief to be granted not available
 - challenge to the report is premature
 - has to await RDT/FSEIS to challenge that
 - intends to stay all discovery

Rutzick:

- ~~Rutzick~~ favors Admin ignoring FEMAT
- wants documents to pursue participation in admin process
- FEMAT doesn't present basis for making conclusion
- Doesn't agree that FEMAT no longer exists
- Agreed not to go to court because Clinton asked to stay out of court room

Jackson
potential relief: ① reconvene
② Admin. ignore

* file response by 8/30

Whitman:

- Not conceding it wasn't an adv. cte

STAY DISCOVERY

—
David,
Todd had to go
to the Justice Dept.
So therefore, you
won't be able
to ride w/ him
to the Federal Court.

— Angeline

Office of the Vice President

Legal Counsel
Old Executive Office Building
Washington, DC 20500
(202) 456-7022

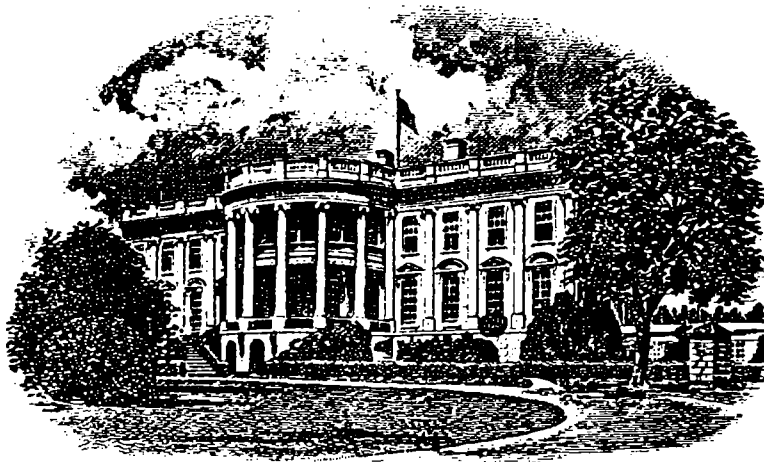
TO: David Anderson
Robert S. Whitman

FROM: Todd J. Campbell

DATE: 08/19/93

number of pages: 20 (including
cover)

COMMENTS: Please make sure that
Mr. Anderson AND Mr. Whitman
get a copy of this fax.
Thanks.





OFFICE OF THE VICE PRESIDENT
WASHINGTON

David & Rob

The brief is improved, but our two primary points are still submerged.

- (1) FACA provides for document production only until the committee "ceases to exist"; and
- (2) FACA does not provide for the remedy requested.

See my following comments. I will be reviewing the draft further.

Thanks,

Todd

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

NORTHWEST FOREST RESOURCE COUNCIL,
Plaintiff,

v.

MIKE ESPY, in his official capacity
as Secretary of Agriculture, U.S.
Department of Agriculture, BRUCE
BABBITT, in his official capacity
as Secretary of Interior, U.S. Depart-
ment of the Interior, DR. JACK WARD
THOMAS, in his official capacity as
Chairman, Forest Ecosystem Management
Assessment Team, and FOREST ECOSYSTEM
MANAGEMENT ASSESSMENT TEAM,
Defendants.

Civil Action No.
93-1621 (TPJ)

FEMAT has issued its
final report and no
longer exists.

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

Plaintiff alleges that the work of the Forest Ecosystem Management Assessment Team ("FEMAT"), one of three teams formed to aid the President and his advisors in resolving the longstanding controversy surrounding federal management of the "old growth" forests of the Pacific Northwest, operated in violation of the operational and procedural requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

~~Plaintiff's action is a belated attempt to erase months of work by a group that has ceased to exist and has already issued its final report.~~ While defendants deny that FEMAT was an "advisory committee" subject to the strictures of the FACA at all,¹ this

¹ discuss how courts rarely find the existence of an advisory committee if the government does not believe a group to be one -- quote from Hillary's case

Finish
→

nov 10 00 11:00 AM '93
The two primary points are NOT stated:

(1) FACA provides records are available only "until ceases to exist"; and (2) the relief sought is not available under FACA. See Steve's

Court need not reach the merits of plaintiff's claims to resolve suggestion this action. Even assuming FEMAT was an "advisory committee," plaintiff's claims are moot or otherwise nonjusticiable. (attached which should be added)

→ The mootness of plaintiff's effort here is highlighted by plaintiff's own delay in bringing this action. Plaintiff sought and was denied access to FEMAT's meetings and documents in May 1993, while the team was still in existence. Although that is the event that plaintiff alleges is its "injury," see Complaint ¶ 21, plaintiff failed to take action ^{under FACA} to remedy the ^{alleged} "injury" until it filed the instant suit on August 6 -- more than two months ^{and after FEMAT issued its report and terminated} later. Disregarding its delay, plaintiff would have the government somehow erase the FEMAT's efforts and start over. No court has ever imposed so drastic a remedy for an alleged FACA violation. The remedy is similarly unavailable here.

Accordingly, this Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b) ____.

STATUTORY BACKGROUND

Congress enacted the FACA in 1972 to control the growth and operation of the "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C. App. 2, § 2(a); see generally Public Citizen v. Department of Justice, 491 U.S. 440, 446 (1989).

To achieve these objectives, the FACA places a number of procedural restrictions on advisory committees during their period of operation. Every committee must file a charter, 5 U.S.C. App. 2 §§ 9(c), 10(a)(2), its meetings must be open to the public, id. § 10(a)(1), it must keep "[d]etailed minutes" of its meetings, id. § 10(c), and it generally must permit "[i]nterested persons . . . to attend, appear before, or file statements" with it, id. § 10(a)(3), unless a determination is made to close the meeting, id. § 10(d). In addition to the requirements governing how the group functions, FACA also requires an advisory committee to make publicly available "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the] advisory committee." Id. § 10(b). This obligation exists only "until the advisory committee ceases to exist." Id.

The FACA also imposes a number of requirements on federal officials regarding the creation and use of advisory committees. At issue here are the requirements that a committee be specifically authorized either by statute or by the President, or be determined by an agency head to be in the public interest, id. § 9(a); that it be "fairly balanced in terms of the points of view represented and the functions to be performed," id. § 5(b)(2); and that precautions be taken to assure that an advisory committee is not "inappropriately influenced by . . . any special interest," id. § 5(b)(3).

The two main points again are (1) cease to exist and (2) remedy not available. The first is weakened by all the cites and the second is missing.

FACTUAL BACKGROUND²

A. The Forest Ecosystem Management Assessment Team

In order to facilitate a resolution of the controversy over federal forest management policy, President Clinton, Vice President Gore and other government officials convened a "Forest Conference" in Portland, Oregon, on April 2, 1993. Complaint ¶¶ 9, 13. After this conference, a group of government officials ^{known} as the Forest Conference Executive Committee³ formed the FEMAT, one of three teams charged with identifying management options for resolving the controversy. FEMAT's mission was to take an "ecosystem" approach to forest management and to "identify management alternatives that attain the greatest economic and social contribution from the forests of the [Northwest] and meet the requirements of the applicable laws and regulations" Complaint ¶¶ 14, 15.

On July 1, 1993, President Clinton announced his Forest Plan for a Sustainable Economy and a Sustainable Environment, identifying as its "foundation" the work of FEMAT and the two other teams. Complaint ¶ 16. On July 16, 1993, the Forest Service, an agency within the Department of Agriculture, released

² For the purposes of this motion, the factual allegations of the complaint which are germane to this motion are taken as true.

³ The Executive Committee included representatives from the Departments of Agriculture, Interior, Labor, and Commerce, the Office of Environmental Policy, the Office of Science and Technology, the National Economic Council, the Council of Economic Advisors and the Office of Management and Budget. Complaint ¶ 15.

a Draft Supplemental Environmental Impact Statement ("DSEIS"),⁴ which analyzed the various forest-management options developed by FEMAT and identified its preferred alternative. Complaint ¶ 17. FEMAT's report, entitled Forest Ecosystem Management: An Ecological, Economic and Social Assessment and comprising more than 1,000 pages, was released to the public along with the DSEIS. Complaint ¶ 18.

In a letter to the FEMAT leader, defendant Dr. Jack Ward Thomas, plaintiff requested on May 20 that it be granted access to FEMAT's meetings and its documents, drafts, minutes and/or transcripts. Complaint ¶ 21. Dr. Thomas responded by letter dated May 24, 1993, stating that plaintiff would not be allowed "to observe [FEMAT's] day to day operations" or to see any FEMAT records. Complaint ¶ 21.

FEMAT ceased to exist upon the issuance of its report. As the report states:

We have done our best to fulfill the charge given to us in the time allotted. We believe the assessments of the current situation, the previous assessments of the situation, and the options presented herein are adequate to support an informed decision as to a course of action. Our work as scientists, economists, analysts, and technicians is complete. Whatever decisions that may emerge from this work are now, most appropriately, in the hands of elected leaders.

FEMAT report at I-3 (emphasis added).⁵

⁴ The full name of the DSEIS is the "Draft Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Related Species Within the Range of the Northern Spotted Owl." Complaint ¶ 17.

⁵ A copy of the Executive Summary of the report is attached hereto at Tab ____.

B. This Litigation

On August 6, more than two months after receiving the letter from Dr. Thomas, and after FEMAT had ceased to exist and the government had already relied on its report in the DSEIS, plaintiff filed this action. Plaintiff seeks a declaration that FEMAT was an advisory committee subject to FACA and that FACA was violated in all the ways alleged. Complaint, Request for Relief, ¶¶ 1-3. In addition, plaintiff seeks an order enjoining FEMAT from conducting any meeting in violation of the FACA, id. ¶ 4; an order requiring defendants to produce all its records within five working days "irrespective of whether any such document otherwise is or could be exempt from disclosure under [certain provisions of the Freedom of Information Act]," id. ¶ 5; and an order requiring FEMAT to prepare and deliver "detailed minutes" of every meeting FEMAT held, id. ¶ 6. Finally, plaintiff seeks an order enjoining the Departments of Agriculture and Interior from "utilizing, evaluating or considering" the FEMAT Report as the basis for any federal program until FEMAT reconvenes and holds meetings in compliance with the FACA. Id. ¶ 7.

Plaintiff also has moved to expedite discovery and has sought a temporary restraining order to preserve FEMAT documents. Defendants have opposed those motions in separate papers.

ARGUMENT

Plaintiff failed to bring this action until more than two months after it was denied access to FEMAT's meetings and

documents, and after FEMAT had ceased its operations. Its FACA claims accordingly must be dismissed. The statute affords no right of relief once an advisory committee no longer exists. Moreover, even if plaintiff could state a viable FACA claim, it seeks a form of relief that the statute does not provide.

I. PLAINTIFF'S CLAIMS ARE MOOT NOW THAT FEMAT HAS COMPLETED ITS WORK AND NO LONGER EXISTS

This action does not present a live controversy over whether FEMAT is required to follow FACA's procedural requirements. Any FACA violations that may have occurred cannot now be remedied. Because FEMAT has issued its final report and no longer exists, plaintiff's claims are moot and must be dismissed.

→ Federal courts lack jurisdiction over cases that are or have become moot. Defunis v. Odegaard, 416 U.S. 312, 316 (1974); Powell v. McCormack, 395 U.S. 486, 496 n.7 (1969). A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell, 395 U.S. at 496. Stated differently, "[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Transwestern Pipeline Co. v. Federal Energy Regulatory Comm'n., 897 F.2d 570, 575 (D.C. Cir. 1990). See also Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906, 909 (D.C. Cir. 1989); Conyers v. Reagan, 765 F.2d 1124, 1127 (D.C. Cir. 1985).

A decision on plaintiff's claims would not "presently affect" its rights or have "a more-than-speculative chance of affecting them in the future." Unlike a challenge to a committee created or used by the government to provide continuing advice, see, e.g., Public Citizen, 491 U.S. 490 (challenge to ABA Standing Committee on the Federal Judiciary), here plaintiff challenges a group that was established for a limited purpose and, having fulfilled its mission, has ceased its operations.⁶ This Court simply cannot order meetings to be opened to the public because no more meetings by FEMAT are contemplated; nor can it order FEMAT's membership to be reconstituted, or a charter to be filed, because there is no longer a functioning entity to have members or a charter. See Keane v. National Democratic Committee, 475 F.2d 1287, 1288 (D.C. Cir. 1973) (challenge to refusal to seat delegate to convention became moot once convention was over).

Likewise, this court cannot order a now non-existent group to prepare minutes of events that have already taken place. See National Nutritional Ass'n. v. Califano, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), aff'd on other grounds, 603 F.2d 327 (2d Cir. 1979) (in a FACA action "court cannot order into existence

⁶ In Food Chemical News v. Department of Health and Human Services, 980 F.2d 1468 (D.C. Cir. 1992), the D.C. Circuit acknowledged the problem of mootness in a FACA action when the advisory committee in question has completed its work and ceased to exist. Id. at ____, n.3. Although the court declined to dismiss that action as moot, it did so only because there was an alleged agency policy governing access to advisory committee materials that continued to present a live controversy. Id.

documents which in fact did not exist at the relevant times"). Even if FEMAT did not keep "detailed minutes," as alleged, it is highly unrealistic to expect the team's members now to prepare minutes based on their memory of what transpired at and who attended every meeting they ever had.

Nor can this Court order FEMAT to release its records pursuant to the FACA after the team no longer exists. With regard to such records, the FACA provides:

Subject to section 552 of Title 5, United States Code [the Freedom of Information Act], the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

5 U.S.C. App. 2, § 10(b) (emphasis added). Thus, once an advisory committee ceases to exist, its obligation under the FACA to make its records publicly available also ceases. Cf. Food Chem. News, 980 F.2d at 1472 (FACA requires an advisory committee to make materials available "before or at the meeting for which they were prepared"). Any request for documents under the FACA after an advisory committee completes its work must be made to the appropriate agency under the Freedom of Information Act, 5 U.S.C. § 552.⁷

⁷ Plaintiff has already filed FOIA requests for the very documents it seeks in this action. See Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order at 2 n.1.

Had plaintiff sought relief during the FEMAT's existence, when it had full notice and opportunity to do so, this Court might have been in a position to afford some measure of relief. Plaintiff's choice to wait until the group's disbandment, however, has deprived this Court of the ability to provide plaintiff with any meaningful remedy. The complaint accordingly should be dismissed as moot.

FACA does not provide such remedy

II. PLAINTIFF'S REQUEST TO INVALIDATE THE ONGOING ADMINISTRATIVE PROCEEDINGS ~~ABORTED~~ IS PATENTLY UNREASONABLE AND ENTIRELY WITHOUT FOUNDATION

In addition to the relief discussed supra, plaintiff seeks an order "[p]ermanently enjoining defendants Espy and Babbitt, and their agents and employees, from utilizing, evaluating or considering the FEMAT Report or any recommendation by FEMAT as the basis for any federal program, policy, regulation or decision until FEMAT initiates and completes a new advisory process, in full compliance with FACA" Complaint, Request for Relief ¶7. Plaintiff will no doubt contend that this action presents a "live" controversy because of the government's reliance on the FEMAT Report as a basis for the DSEIS and allege that its injury can be remedied by an order barring such reliance. Such a contention would be baseless.

Nothing in FACA supports plaintiff's request for such extraordinary relief. Though the statute is silent on what relief is appropriate for a violation of its provisions, the Government in the Sunshine Act expressly provides that "[n]othing

in this section authorizes any Federal court having jurisdiction solely on the basis of [5 U.S.C. §552b(h)(1)] to set aside, enjoin, or invalidate any action (other than an action to close a meeting or to without information under this section) taken or discussed at any agency meeting out of which the violation of this section arose." 5 U.S.C. § 552b(h)(2). There is no reason to believe Congress intended for FACA violations to result in harsher consequences than Sunshine Act violations.

Courts in FACA cases have recognized the unreasonableness of requiring a group to begin its work anew after it has ceased operations. In National Nutritional Foods Ass'n. v. Califano, 603 F.2d 327, 336 (2d Cir. 1979), for example, the plaintiffs sought an order enjoining an agency from taking final action based on the work of an advisory committee that had allegedly been convened without complying with FACA. The court rejected that claim, stating:

The question of remedy remains. So far as we are aware, no court has held that a violation of FACA would invalidate a regulation adopted under otherwise appropriate procedures, simply because it stemmed from the advisory committee's recommendations, or even that pending rulemaking must be aborted and a fresh start made. We perceive no sound basis for doing so. Applicable rulemaking procedures afford amply opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.

603 F.2d at 336 (emphasis added) (citing Center for Auto Safety v. Tiemann, 414 F. Supp. 215, 226 (D.D.C. 1976), remanded on other grounds, 580 F.2d 689 (D.C. Cir. 1978)).

Similarly, in Kaibab Indus., v. Lujan, No. 91-1155 PHX WPC, slip op. at 5-6 (D. Ariz. Jan. 29, 1992) (opinion attached), [describe].

The same analysis applies here. Plaintiff would effectively require defendants to place the "toothpaste back in the tube." [more].

Moreover, plaintiff's requested relief would significantly interfere with the ongoing administrative and judicial processes through which the government is attempting to comply with injunctions in pending litigation. As noted, one of the FEMAT's purposes was to assist in the development of a comprehensive approach to management of "old growth" forests on federal lands in the Pacific Northwest. This approach was necessary, in part, because of litigation challenging the government's compliance with a variety of environmental statutes and regulations with respect to the northern spotted owl, a denizen of those forests.

As a result of this litigation, the government is currently subject to the following injunctions:

* Portland Audubon Society v. Babbitt: the district court enjoined the Bureau of Land Management (BLM) from offering or awarding any post-1991 timber sale that would log suitable owl habitat or that "may affect" the owl [16 U.S.C. 1536(a)(2)] until the agency prepares certain documentation pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. See Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1510 (D. Or. 1992), aff'd sub nom. Portland Audubon Soc'y v. Babbitt, Nos. 92-36616, 92-36617, & 92-36666, 1993 WL 243982 (9th Cir. July 8, 1993).

* Lane County Audubon Society v. Baca: the court has enjoined BLM from announcing, awarding or conducting any commercial timber sales on the land it administers in western Oregon pending completion of consultation with the

Fish & Wildlife Service on an owl conservation strategy in accordance with the Endangered Species Act. 16 U.S.C. 1536(a)(2). See Lane County Audubon Soc'y v. Jamison, Nos. 91-36019 & 91-36340, slip op. (9th Cir. May 14, 1992); see also Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294-95 (9th Cir. 1992).

* Seattle Audubon Society v. Lyons: the court has enjoined the Forest Service from auctioning or awarding any timber sale that would log suitable owl habitat on any of 17 national forests within the range of the northern spotted owl until the agency revises its regional standards and guidelines for management of owl habitat in accordance with the process required by NEPA and National Forest Management Act ("NFMA") regulations. 16 U.S.C. 1604; 36 CFR Part 219. See Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1484, 1493-94 (W.D. Wash. 1992), aff'd sub nom. Seattle Audubon Soc'y v. Espy, Nos. 92-36529 & 36564, 1993 WL 243976 (9th Cir. July 8, 1993).

The Seattle Audubon Society litigation contains immediate time pressures. The injunction in that case orders the Forest Service to prepare a supplemental Environmental Impact Statement (SEIS) addressing defects identified in an earlier Environmental Impact Statement (EIS) pertaining to management guidelines for the northern spotted owl. See 798 F. Supp. at 1493. Because the Court determined that the swift completion of this task was "important to the public", it set an extremely stringent time schedule for completion of the National Environmental Policy Act process and the issuance of revised guidelines. Seattle Audubon Society v. Moseley, 798 F. Supp. 1494, 1499 (W.D. Wash. 1992).

As noted, the DSEIS was released in July 1993. Complaint ¶ 17. According to the Seattle Audubon court's current schedule, the public comment period on the DSEIS will end on October 28; the final SEIS is to be released by November 29; and a Record of Decision documenting adoption of revised owl habitat management

standards and guidelines is to be issued by December 31, 1993. See Order on Motion for Modification of Injunction or Extension of Schedule entered May 14, 1993 and Order on Defendants' Motion for Extension of Injunction Compliance Schedule (copy attached).⁸

NO basis in FACA

The options analyzed and presented by FEMAT are integral to that strategy. The July DSEIS expressly analyzes the environmental impacts of the FEMAT's ten options, and incorporates by reference the team's final report. By asking this Court to invalidate FEMAT post hoc and to enjoin the Secretaries of Agriculture and of the Interior from relying in any way on the team's analysis, plaintiff would derail the government's efforts to comply with these court orders. Plaintiff is free to comment on the DSEIS before a final decision is made and, in addition, may be entitled to substantive judicial review after the final EIS is issued.⁹

⁸ Copies of these orders are attached hereto. Although the government normally has discretion as to the timing of the issuance of an EIS, its decision to pursue a unified strategy for the management of all old growth forests within the range of the northern spotted owl on federal lands in the Northwest means that the Seattle Audubon Society schedule governs its compliance with all of these injunctions.

⁹ It is fundamental that agency action is not subject to judicial review until it is "final." See 5 U.S.C. § 704; Franklin v. Massachusetts, ___ S. Ct. ___ (1992) (where a report carries no direct consequences, it is not a final and binding determination subject to judicial review under the APA). Because there is no right of private enforcement under the FACA, see Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year, 549 F.2d 1115, 1120 n.15 (7th Cir. 1977), plaintiff would be entitled to relief, if at all, only through the APA.

Under these circumstances, equity dictates that plaintiff be required to pursue the opportunities in the ongoing administrative process to challenge any deficiencies it perceives in the FEMAT Report. It is utterly unreasonable for plaintiff to have stood by while FEMAT's work was underway and then, after the fact, to come into court to invalidate work that the government has already relied upon in good faith.

II. COUNTS SIX, SEVEN, EIGHT AND NINE ARE NONJUSTICIABLE

While all of plaintiff's claims are patently moot, there are alternative bases for dismissing several of plaintiff's claims. Plaintiff lacks standing to bring Counts Six, Seven, Eight and Nine and, in addition, Counts Eight and Nine are not justiciable because there is no meaningful judicial standard to apply in enforcing the FACA provisions on which they are based.

A. Plaintiff Lacks Standing To Bring Counts Six, Seven, Eight and Nine

The doctrine of standing under Article III of the Constitution encompasses a requirement that there be an "injury in fact." See, e.g., Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 and 41 (1976). A plaintiff must show that his injury is "distinct and palpable," Allen v. Wright, 468 U.S. at 751, rather than a "generalized grievance[] about the conduct of government or the

allocation of power in the Federal System.'" United States v. Richardson, 418 U.S. 166, 173 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

Plaintiff's complaints about the establishment and general operation of FEMAT -- that is, the absence of specific authorization (Count Six), the failure to operate with a detailed charter (Count Seven), and the failure to establish a "balanced" committee free of "inappropriate" influence from special interests (Counts Eight and Nine) -- are far too generalized to confer standing. The injury alleged would be "held in common by all members of the public." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974). Counts Six, Seven, Eight and Nine must be dismissed accordingly.

B. There Are No Standards Susceptible To Judicial Application To Enforce The "Balanced" Representation And The "Special Interest" Provisions Upon Which Counts Eight and Nine Are Based

Plaintiff's allegation that FEMAT was not "fairly balanced" and "inappropriately influenced" by a "special interest" (Counts Eight and Nine) are not justiciable because Congress has failed to provided any meaningful standards for this Court to apply in construing them. See Public Citizen v. National Advisory Comm., 885 F.2d 419, 426-30 (D.C. Cir. 1989) (Silberman, J., concurring); Public Citizen v. Department of Health and Human Serv., No. 92-0326, slip op. at 20 (D.D.C. May 28, 1992) (Hogan,

J.);¹⁰ Association of American Physicians and Surgeons, Inc. v. Clinton, No. 93-5086, slip op. at 8 n.2 (D.C. Cir. June 22, 1993).

CONCLUSION

For the foregoing reasons, this Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(_____).

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

J. RAMSEY JOHNSON
United States Attorney

DAVID J. ANDERSON

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202-514-1494

Attorneys for Defendants

August 19, 1993

¹⁰ A copy of this opinion is attached hereto.

Preliminary Statement

FEMAT -- the Forest Ecosystem Management Assessment Team -- was one of three teams of ~~scientific experts~~ ~~formed~~ ~~commissioned~~ in ~~April~~ 1993 to aid the President and his advisors in resolving the longstanding controversy surrounding federal management of the "old growth" forests of the Pacific Northwest, home of the ~~spotted owl~~ and other endangered species. FEMAT issued its final report in July 1993 and no longer exists.

In June 1993, while FEMAT was still in existence, plaintiff sought and was denied access to FEMAT's meetings and records. Plaintiff never took legal action at that time to gain such access under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § App. 2.

Rather, plaintiffs did not commence this action under FACA until August 6 -- more than two months after being advised that FEMAT's records and meetings would be closed; after FEMAT had ceased to exist; after the government had already relied on FEMAT's report; and significantly, after plaintiff had already commenced other related litigation in which they were not entitled to discovery concerning the substance of FEMAT's report.

Although defendants would deny that FEMAT was even an "advisory committee" subject to the FACA, the Court need not decide that issue at this time. Because FEMAT no longer exists, plaintiffs are not entitled to any relief under the FACA. FACA expressly states that an advisory committee is only obligated to make its records publicly available "until [it] ceases to exist." 5 U.S.C. § App. 2, § 10(b). Moreover, the D.C. Circuit has recognized that claims under the FACA become moot once an advisory committee has completed its work and ceased to exist. See Point I(A), *infra*.

Furthermore, even if plaintiff were entitled to raise a claim under the FACA, the complaint must be dismissed because plaintiffs have sought a form of relief -- prohibiting the government from using the recommendations and information provided by FEMAT -- that the FACA does not make available. Indeed, no court has ever restricted the use of the work product of a FACA committee on grounds that the committee somehow violated FACA. See Point II(A), *infra*.

Plaintiff's complaint should be dismissed at the outset. The issues compelling dismissal are issues of law as to which no discovery is necessary. Plaintiff's request for expedited discovery on its claims should be denied until the Court has resolved the threshold issue of whether plaintiff has stated a valid claim for relief.

has

Preliminary Statement

FEMAT -- the Forest Ecosystem Management Assessment Team -- was one of three teams ~~of scientific experts~~ commissioned in April 1993 to aid the President and his advisors in resolving the longstanding controversy surrounding federal management of the "old growth" forests of the Pacific Northwest, home of the spotted owl and other endangered species. FEMAT issued its final report in July 1993 and no longer exists.

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Although defendants would deny that FEMAT was even an "advisory committee" subject to the FACA, the Court need not decide that issue at this time. Because FEMAT no longer exists, plaintiffs are not entitled to any relief under the FACA. FACA expressly states that an advisory committee is only obligated to make its records publicly available "until [it] ceases to exist." 5 U.S.C. § App. 2, § 10(b). Moreover, the D.C. Circuit has recognized that claims under the FACA become moot once an advisory committee has completed its work and ceased to exist. See Point I(A), *infra*.

Furthermore, even if plaintiff were entitled to raise a claim under the FACA, the complaint must be dismissed because plaintiffs have sought a form of relief -- prohibiting the government from using the recommendations and information provided by FEMAT -- that the FACA does not make available. Indeed, no court has ever restricted the use of the work product of a FACA committee on grounds that the committee somehow violated FACA. See Point II(A), *infra*.

Plaintiff's complaint should be dismissed at the outset. The issues compelling dismissal are issues of law as to which no discovery is necessary. Plaintiff's request for expedited discovery on its claims should be denied until the Court has resolved the threshold issue of whether plaintiff ~~has~~ stated a valid claim for relief.

Statutory Background

This section should make only two points. First, that FACA is, by its terms only supposed to apply while the committee is still in existence. Second, that FACA includes no provisions contemplating the type of relief that plaintiffs seek. That is, we should list that types of relief that the statute offers, and point out that the statute does not include any provision giving the court authority to restrict the Executive Branch's use of the committee's work product.

Factual Background

The section on "this litigation" should be used to emphasize that plaintiffs brought other litigation concerning the substance of government policy on the spotted owl forests; that plaintiffs were not entitled to discovery in those cases of the documents that gave rise to that policy; and that plaintiffs appear to be using this litigation as a means to obtain discovery to which they were not otherwise entitled. How else explain the timing of this suit?

They are intervenors

?

ARGUMENT

Plaintiff waited until over two months after they were denied access to FEMAT's meetings and records -- and until after FEMAT had ceased to operate or exist -- to commence this litigation. Plaintiff's claims under the FACA must be dismissed because the FACA provides no right to relief once an advisory committee has ceased to exist.

Moreover, even if plaintiff were entitled to relief under the FACA, the FACA claims must still be denied because plaintiff has sought a form of relief -- restricting the use of FEMAT's report -- that FACA does not provide.

- A. Plaintiff cannot state a claim under FACA because FEMAT no longer exists.

The FACA by its terms provides access to records of an advisory committee only while the committee is in operation. Section 10(b) of the act expressly sets forth that an advisory committee is only obligated to make its records publicly available "until [it] ceases to exist. 5 U.S.C. App. 2 § 10(b).

Here, where FEMAT no longer exists -- and where plaintiff waited to commence this action until over two months after it had originally sought access to FEMAT's meetings and records -- FACA affords no relief.

Indeed, the D.C. Circuit has recognized that in these circumstances, plaintiff's claims are properly considered moot. In Food Chemical News v. Department of Health and Human Services, 980 F.2d 1468 (D.C. Cir. 1993), the Court of Appeals noted that the mootness problems arise whenever an advisory committee has completed its work and ceased to exist. As the Court stated:

[block quote footnote 3].*

The mootness of plaintiff's FACA claim eliminates this Court's jurisdiction over plaintiff's claims. [String cites]. FEMAT was established for a limited purposes and, having fulfilled its mission, has ceased its operations. The court cannot order FEMAT to open meetings that have already occurred; the Court cannot order FEMAT to prepare minutes of meetings after the fact; and the Court, by FACA's own terms, cannot require FEMAT, which no longer is in operation or existence, to produce documents it used at an earlier time.

For this reason alone, plaintiff's complaint should be dismissed.

B. Plaintiff's are not entitled to the type of relief they seek.

Plaintiff, purportedly relying on FACA, has asked this Court to interfere with ongoing rulemaking proceedings and to enjoin the Departments of Agriculture and the Interior from "utilizing, evaluating or considering" the FEMAT Report as the basis for any federal program until FEMAT reconvenes and holds meetings in compliance with the FACA." Complaint § 7.

There ^{are} is simply no grounds in the FACA for enjoining use of an advisory committee's report even if FACA violations occurred when the committee was in existence. The decision of the Second Circuit in National Nutritional Foods Association v. Califano, 603 F.2d 327 (2d Cir. 1979) is precisely on point. In that case, the plaintiff sought an order enjoining an agency from taking final agency action based on the work of a group which had convened without complying with the FACA. The Second Circuit dismissed the claim, explaining:

The question of remedy remains. So far as we are aware, no court has held that a violation of FACA would invalidate a regulation adopted under otherwise appropriate procedures, simply

* The court in Food Chemical News did not dismiss that particular action as moot because in that case, unlike here, a live controversy continued to exist with respect to an agency policy governing access to advisory committee materials. No such live controversy continues to exist in this action.

because it stemmed from the advisory committee's recommendations, or even that pending rulemaking must be aborted and a fresh start made.. We perceive no sound basis for doing so. Applicable rulemaking procedures afford ample opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.

603 F.2d at 336. The decision of the District Court in Kaibab Industries v. Lujan, C.A. No. 91-1155 PHX WPC, slip op. at 5-6 (D. Ariz. Jan. 29, 1992) (opinion attached), reached the same conclusion.

Here, as in National Nutritional Foods Assoc. and Kaibab, plaintiff is free to comment on the DSEIS before a final decision is made and, in addition, will be entitled to substantive review after the final EIS is issued. FACA, however, affords plaintiff no right to interfere with the rulemaking process. And plaintiff should not be accorded the opportunity to circumvent that process or the relevant public comment procedures simply by commencing litigation under the FACA -- particularly when plaintiff has commenced its FACA litigation only after failing to obtain discovery in litigation commenced to challenge the rulemaking itself. ^{affate}

[I would leave out the discussion on pages 13-15 concerning the pending litigation in Washington], ~~it would seem to support plaintiff's motion to transfer.]~~

Conclusion

For the forwgoing reasons, defendants respectfully request that the Court dismiss plaintiff's claims.

* There is, moreover, no right of private enforcement under the FACA. See Mulqueeny v. National Commission on the Observance of International Women's Year, 549 F.2d 1115, 1120 n. 15 (7th Cir. 1977).



U.S. Department of Justice

David
Cottingham

Washington, D.C. 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER SHEET

DATE: August 17, 1993TO: Todd CampbellFAX NUMBER: 456-6429FROM: Robert Whitman
Fax: (202) 616-8202
Direct Dial: (202) 514-1494THERE ARE A TOTAL OF 7 PAGES INCLUDING THIS COVER PAGE IN THIS TRANSMISSION.

The plaintiff in NERC filed a motion for a TRO this afternoon on the issue of document preservation. The papers are attached. Judge Jackson's chambers said the judge will discuss it with us Thursday afternoon. Please give me a call to discuss.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

vs.)

MIKE ESPY, in his official
capacity as Secretary of
Agriculture; et al.,)

Defendants.)

Civil No. 93-1621 TPJ

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

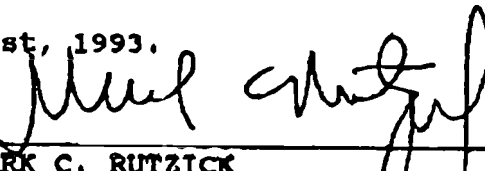
Pursuant to Rules 65(b) and 34 of the Federal Rules of Civil Procedure, plaintiff Northwest Forest Resource Council moves for a temporary restraining order directing defendants to preserve, and to assure the availability in this litigation of, all documents prepared by, used by or relied upon by defendant Forest Ecosystem Management Assessment Team ("FEMAT") or any member thereof or any expert or consultant working with or for FEMAT, including all electronic mail communications generated, received or read by any such person.

This motion is based upon the record herein and the Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order

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filed herewith.

Dated this 17th day of August, 1993.



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K:\pcr\21019-00-038\INVESTIG.JOB

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

vs.)

MIKE ESPY, in his official
capacity as Secretary of
Agriculture, et al.,)

Defendants.)

Civil No. 93-1621 TPJ

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING ORDERIntroduction

Plaintiff Northwest Forest Resource Council seeks a temporary restraining order directing defendants to preserve, and to assure the availability in this litigation of, all documents prepared by, used by or relied upon by defendant Forest Ecosystem Management Assessment Team ("FEMAT") or any member thereof or any expert or consultant working with or for FEMAT, including all electronic mail communications generated, received or read by any such person. A temporary restraining order is essential to preserve critical documents, and to maintain the status quo until this lawsuit is resolved.

Argument

THE COURT SHOULD ISSUE A TEMPORARY RESTRAINING ORDER TO ASSURE THAT IMPORTANT GOVERNMENT RECORDS SOUGHT BY PLAINTIFF IN THIS CASE ARE PRESERVED WHILE THE LITIGATION IS PENDING

Unless the court issues a temporary restraining order, the

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documents plaintiff seeks in this action may be destroyed by defendants inadvertently if not intentionally. The D.C. Circuit's decision in *Armstrong v. Executive Office of the President*, __ F.2d __, 1993 U.S. App. Lexis 20527 (August 13, 1993) highlights that the Administration has no effective policy in place for the preservation of essential federal records including electronic mail communications. Unless the court issues an immediate order to the defendants, particularly defendant Espy, who apparently has custody of at least some FEMAT records at the present time, to preserve all such records including electronic mail communications, and to assure that they will be available to plaintiffs as required by law at or before the conclusion of this litigation, plaintiff will be permanently and irreparably damaged by the loss of these invaluable records.¹

The *Armstrong* decision by the D.C. Circuit clearly highlights glaring legal deficiencies in current Administration recordkeeping

¹ The Administration has been no more forthcoming in complying with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, than it has with PACA. On July 21 plaintiff transmitted FOIA requests for FEMAT documents to defendants Espy, Babbitt, Thomas and FEMAT as well as the U.S. Forest Service and Bureau of Land Management ("BLM") offices in Portland. See Exhibit AA (request to Thomas). Defendant Babbitt maintained he has no such documents in Washington, D.C. (Exhibit BB), and referred the request to the BLM office in Oregon. That office reported that it had no such documents and referred the request to the Forest Service. (Exhibit CC). The Forest Service in Washington, D.C. maintained that it had no such documents (Exhibit DD) and referred the request to the Forest Service in Portland. That office referred the request for response by someone at an "Interagency Supplemental Environmental Impact Statement (SEIS) Team," (Exhibit EE), without acknowledging whether that group has any FEMAT documents. The person identified as the contact for that group was unavailable on vacation. FEMAT itself never responded to the FOIA request. No substantive response to the FOIA request has yet been given, and no documents provided.

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practices for electronic mail communications. This Court has the power to assure that the defendants' recordkeeping practices in this case do not suffer from the same inadequacies as in *Armstrong*.

Obtaining FEMAT's records, as permitted by the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2, is one of the major objects of this action. See Complaint, Prayer For Relief, §§ 2(d), 5, 6. As the court held in *Armstrong*, "electronic communications systems can create, and have created, documents that constitute federal records" *Id.*, 1993 LEXIS 20527 *23. Electronic mail communications among members of FEMAT may be among the most important and illuminating documents in revealing factual errors, flaws in scientific analysis or bias among FEMAT members. As the court observed of the electronic mail communications at issue in *Armstrong*, "We note that the substantive importance of these documents is demonstrated by the frequency with which they have been used in recent years [for investigations and prosecutions]." *Id.* at *27 n.7. The loss of FEMAT's documents, including electronic mail communications, through inadvertence or otherwise, would irreparably deprive plaintiff of its rights under FACA to obtain and review these important materials.

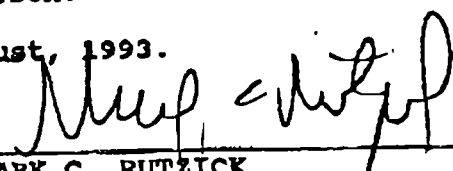
Conclusion

The court should grant plaintiff's motion for a temporary

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restraining order and should order defendants to preserve, and to assure the availability in this litigation of, all documents prepared by, used by or relied upon by defendant FEMAT or any member thereof or any expert or consultant working with or for FEMAT, including all electronic mail communications generated, received or read by any such person.

Dated this 17th day of August, 1993.



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil No. 93-1621 TAJ
	)	
MIKE ESPY, in his official	)	
capacity as Secretary of	)	
Agriculture, et al.,	)	
	)	
Defendants,	)	

ORDER GRANTING TEMPORARY RESTRAINING ORDER [PROPOSED]

Plaintiff Northwest Forest Resource Council having moved for a temporary restraining order, and defendants having responded thereto, and upon consideration by the court, it is hereby

ORDERED that:

Defendants shall preserve, and assure the availability in this litigation of, all documents prepared by, used by or relied upon by defendant Forest Ecosystem Management Assessment Team ("FEMAT") or any member thereof or any expert or consultant working with or for FEMAT, including all electronic mail communications generated, received or read by any such person.

Dated this ____ day of August, 1993.

Thomas Penfield Jackson
U.S. District Judge



U.S. Department of Justice

David
Cottingham

Washington DC 20530

CIVIL DIVISION
FEDERAL PROGRAMS BRANCH
FAX TRANSMITTAL COVER SHEET

DATE: August 18, 1993TO: Todd CampbellFAX NUMBER: 456-6429FROM: Robert Whitman

Fax: (202) 616-8202

Direct Dial: (202) 514-1494

THERE ARE A TOTAL OF 23 PAGES INCLUDING THIS COVER PAGE IN THIS
TRANSMISSION.

→ Todd wants to seek dismissal now. Whitman wants to delay.

To: Todd Campbell
From: Dave Anderson

Attached are drafts of a motion to dismiss and opposition to plaintiff's motion for expedited discovery. An opposition to their TRO motion is in the works and will be transmitted shortly. We have some concerns that there has not been adequate time to fully develop our dismissal arguments. In our discussions of the past few days among ourselves and with our Appellate counterparts, we've reframed some of the points we had discussed and others have been dropped out. A major reservation about filing this now is that we cannot really include what may be our best argument; that FEMAT was set up merely to provide technical support by making scientific assessments of the available options. That will require factual development, and possibly some limited discovery down the road. If time were not an issue, we would wait a bit and file in the alternative for dismissal and summary judgment, with the latter supported by declarations. Our bottom line is that we may want to revisit the question of whether to file the naked motion to dismiss before the hearing tomorrow or simply tell the judge at that time that we think the case is subject to a dispositive motion and that we will be filing one within a week or ten days. Please let us have your thoughts after you have looked over the drafts and have had a chance to consult with Steve, et al. Thanks.

DRAFT 8/18

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)
Plaintiff,)
)
v.)
)
MIKE ESPY, in his official capacity)
as Secretary of Agriculture, U.S.)
Department of Agriculture, BRUCE)
BABBITT, in his official capacity)
as Secretary of Interior, U.S. Depart-)
ment of the Interior, DR. JACK WARD)
THOMAS, in his official capacity as)
Chairman, Forest Ecosystem Management)
Assessment Team, and FOREST ECOSYSTEM)
MANAGEMENT ASSESSMENT TEAM,)
Defendants.)

Civil Action No.
93-1621 (TPJ)

MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

PRELIMINARY STATEMENT

Plaintiff brings this action under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § App. 2, belatedly alleging that the work of the Forest Ecosystem Management Assessment Team ("FEMAT") was done in violation of the operational and procedural requirements of that Act. FEMAT, which issued its final report in July 1993 and no longer exists, was one of three teams of scientific experts commissioned to aid the President and his advisors in resolving the longstanding controversy surrounding federal management of the "old growth" forests of the Pacific Northwest, home of the ^{northern} spotted owl and other endangered species.

Defendants deny that FEMAT was an "advisory committee" subject to the strictures of the FACA.¹ However, the court need not decide this issue to resolve this action. Even assuming FEMAT was an "advisory committee," plaintiff's claims must be dismissed as moot or otherwise nonjusticiable. FEMAT is no longer in existence and there is no relief available to plaintiffs at this point in the proceedings. [elaborate]²

* ROADMAP

STATUTORY BACKGROUND

Congress enacted the FACA in 1972 to control the growth and operation of the "numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government." 5 U.S.C. App. 2, § 2(a). In particular Congress wanted "to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public remain apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature." Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 446 (1989). See also 5 U.S.C. App. 2, § 2(b)((1)-(6);

¹ discuss how courts rarely find the existence of an advisory committee if the government does not believe a group to be one -- quote from Hillary's case

² mention TRO and motion to expedite discovery

Association of American Physicians and Surgeons, Inc. v. Clinton, C.A. No. 93-5086 (D.C. Cir. June 22, 1993) (copy attached).

To obtain these objectives, the FACA places a number of restrictions on advisory committees. Every committee must file a charter setting forth specified information on its objectives, duration, expected costs, and other matters before it meets or takes any action and give advance notice of its meetings in the Federal Register. Id. at §§ 9(c), 10(a)(2). An advisory committee's meetings must be open to the public, id. at § 10(a)(1), and "[i]nterested persons shall be permitted to attend, appear before, or file statements . . . subject to . . . reasonable rules or regulations, id. at § 10(a)(3), unless a determination is made to close the meeting in accordance with the Government in the Sunshine Act, 5 U.S.C. § 552b(c). Id. at § 10(d). In addition, an advisory committee is required to keep "[d]etailed minutes" of each meeting, § 10(c) and, until the committee ceases to exist and subject to the Freedom of Information Act, make available for public inspection and copying "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by [the] advisory committee" § 10(b).

The FACA also imposes a number of requirements on federal officials regarding the creation and use of advisory committees. Of these requirements, the ones at issue here are the requirement that an advisory committee be specifically authorized either by

statute or the President, or be determined, as a matter of formal record, by an agency head to be in the public interest, 5 U.S.C. App. 2, § 9(a); the requirement that an advisory committee be "fairly balanced in terms of the points of view represented and the functions to be performed," id. at § 5(b)(2); and the requirement that precautions be taken to assure that an advisory committee is not "inappropriately influenced by . . . any special interest," id. at § 5(b)(3).

For the purposes of the FACA, an "advisory committee" is defined as:

[a]ny committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is --

(A) established by statute or reorganization plan, or

(B) established or utilized by the President, or

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

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government

Id. at § 3(2). Explicitly excepted from this definition is "any committee which is composed wholly of full-time officers or employees of the Federal Government." Id. at § 3(2)(C)(iii).

FACTUAL BACKGROUND³

A. The Forest Ecosystem Management Assessment Team

In order to end the "litigation gridlock" and facilitate a resolution of the controversy over federal forest management policy, President Clinton, Vice President Gore, Secretary Espy, Secretary Babbitt and other government officials held a Forest Conference in Portland, Oregon, on April 2, 1993. Complaint, ¶¶ 9, 13. After this conference, FEMAT was one of ~~two~~^{three} "teams" established by the Forest Conference Executive Committee to identify management options for resolving the controversy;⁴ its mission was to take an "ecosystem" approach to forest management and "identify management alternatives that attain the greatest economic and social contribution from the forests of the [Northwest] and meet the requirements of the applicable laws and regulations" Complaint, ¶¶ 14, 15.

On July 1, 1993, President Clinton announced his Forest Plan for a Sustainable Economy and a Sustainable Environment based on the work of FEMAT. Complaint, ¶ 16. On July 16, 1993, the Forest Service released a Draft Supplemental Environmental Impact

and Bureau of LM

³ For the purposes of this motion, the factual allegations of the complaint which are germane to this motion are taken as true.

⁴ The Forest Conference Executive Committee was comprised of representatives from the Departments of Agriculture, Interior, Labor and Commerce, the Office Environmental Policy, the Office of Science and Technology, the National Economic Council, the Council of Economic Advisors and the Office of Management and Budget. Complaint, ¶ 15.

* Provided opportunity for plaintiff
to provide input

Statement ("DSEIS")⁵ which presented the forest management options developed by FEMAT as alternatives. Complaint, ¶ 17. The Report prepared by FEMAT, entitled Forest Ecosystem Management: An Ecological, Economic and Social Assessment and comprising over 1,000 pages, was released to the public along with the DSEIS. Complaint, ¶ 18.

Plaintiff was not allowed to observe any of FEMAT's meetings or to see any documents, drafts, minutes or transcripts of FEMAT other than the final FEMAT Report. Complaint, ¶ 21. Responding to an inquiry from plaintiff, the Chairman of FEMAT, defendant Dr. Jack Ward Thomas, notified plaintiff by letter dated May 24, 1993, that its members would not be allowed "to observe [FEMAT's] day to day operations" or to see any FEMAT records. Complaint, ¶ 21.

B. This Litigation

On August 6, more than two months after being advised that FEMAT's meetings and records would not be open to it, and only after FEMAT had ceased to exist and the government had already relied on the FEMAT Report in drafting the DSEIS, plaintiff filed the instant action complaining of various FACA violations.

Specifically, plaintiff complains that FEMAT did not make its meetings open to the public (Count One); that FEMAT did not publish notice of its meetings in the Federal Register (Count

⁵ The full name of the DSEIS was the "Draft Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Related Species Within the Range of the Northern Spotted Owl." Complaint, ¶ 17.

x we did allow that

Two); that FEMAT did not allow plaintiff to attend, appear, before, or file statements with it (Count Three); that FEMAT did not make its records available for public inspection (Count Four); that FEMAT did not keep detailed minutes (Count Five); that FEMAT was established without specific authorization or determination that its establishment was in the public interest (Count Six); that FEMAT failed to file a detailed charter (Count Seven); that FEMAT was not "fairly balanced" (Count Eight); and, finally, that FEMAT was "inappropriately influenced" by a special interest group, namely wildlife biologists and ecologists (Count Nine).

As relief, plaintiff first seeks a declaration that FEMAT was an advisory committee subject to FACA requirements and that FACA was violated in all the ways alleged. Complaint, Prayer for Relief, ¶¶ 1-3. In addition, plaintiff seeks an order enjoining FEMAT from conducting any meeting in violation of the FACA, id. at ¶ 4; an order requiring defendants to produce all its records within five working days "irrespective of whether any such document otherwise is or could be exempt from disclosure under [certain provisions of the Freedom of Information Act]," id. at ¶ 5; and an order requiring FEMAT to prepare and deliver "detailed minutes" of every meeting FEMAT held, id. at ¶ 6. Finally, plaintiff seeks an order enjoining the Departments of Agriculture and Interior from "utilizing, evaluating or considering" the FEMAT Report as the basis for any federal program until FEMAT

reconvenes and holds meetings in compliance with the FACA. Id. at ¶ 7.

ARGUMENT

*Need summary -
"moot for following
reasons"*

Federal courts lack jurisdiction over a case that is or has become moot. Defunis v. Odegaard, 416 U.S. 312, 316-17 (1974); Powell v. McCormack, 395 U.S. 486, 896 n.7 (1969). A case is moot if "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Stated differently, "[a] case is moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Transwestern Pipeline Co. v. F.E.R.C., 897 F.2d 750, 575 (D.C. Cir. 1990). See also Association of Flight Attendants v. Delta Air Lines, 879 F.2d 906, 909 (D.C. Cir. 1989); Conyers v. Reagan, 765 F.2d 1124, 1127 (D.C. Cir. 1985).

Because FEMAT has issued its final report and no longer exists, plaintiff's claims are moot because any FACA violations that may have occurred have already taken place and cannot be remedied at this stage of proceedings; a decision on those claims would not "presently affect" plaintiff's rights or have "a more-than-speculative chance of affecting them in the future." There is no live controversy over whether FEMAT is required to follow FACA's operational and procedural requirements because that group no longer exists. Unlike a committee created or used by the government to provide continuing advice, see, e.g., [ABA

-- to provide technical

committee case], FEMAT was established for a limited purpose and, having fulfilled its mission, has ceased its operations. The court simply cannot order meetings to be opened to the public because no more meetings are contemplated, nor can it order FEMAT's membership to be reconstituted, or a charter to be filed, because there is no longer a team. Likewise, the court cannot order a non-existent group to prepare minutes of events that have already taken place.⁶ Cf. Keane v. Democratic National Committee, 473 F.2d 213, ___ (D.C. Cir. 1972) (challenge to refusal to seat delegate to convention became moot once convention was over).

technical working group

Nor can the Court order an advisory committee to release its records pursuant to the FACA after it no longer exists. Under the FACA, an advisory committee is only obligated to make its records publicly available "until [it] ceases to exist." 5 U.S.C. App. 2, § 10(b). Cf. Food Chemical News v. Department of Health and Human Services, 980 F.2d 1468, 1472 (D.C. Cir. 1993) (FACA requires an advisory committee to make available all materials it does not in good faith believe are exempt from

⁶ If, as alleged, FEMAT did not keep "detailed minutes," it is highly unrealistic to expect FEMAT's members to now prepare minutes based on their memory of what transpired at every meeting they ever had. FEMAT prepared a comprehensive and detailed report of more than 1,000 pages within a very short period of time (approximately three months from the date it was established) in order for the Clinton Administration to comply with a court deadline in another case to which plaintiff is already a party, see discussion supra; it is highly unlikely that FEMAT's members, in hindsight, could recall when every meeting occurred, who was present at each meeting, or the precise topics and materials that were considered at each meeting.

drafts of reports

disclosure, regardless of whether a FOIA request has been filed, "before or at the meeting for which they were prepared"). Once a committee ceases to exist, a claim under the FACA for documents becomes moot and a request to the appropriate agency under the Freedom of Information Act, 5 U.S.C. 552, is the only way to gain access to those records. [cite GSA regs about docs maintained by agency]

In Food Chemical News v. Department of Health and Human Services, supra, the D.C. Circuit acknowledged the problem of mootness in an action under the FACA when the advisory committee in question has completed its work and ceased to exist. 980 F.2d at n. 3. The court declined to dismiss that particular action as moot, but only because there was an alleged agency policy governing access to advisory committee materials which continued to present a live controversy. Id.

That the government has preliminarily relied on the FEMAT Report in pending administrative procedures does not create a "live" controversy. That preliminary reliance does not constitute "final" agency action subject to this Court's review. 5 U.S.C. § 704.⁷ See Franklin v. Massachusetts, ___ U.S. ___, ___ (1992) [slip op at 9] (where a report carries no direct

⁷ There is no right of private enforcement directly under the FACA. See Mulqueeny v. National Commission on the Observance of International Women's Year, 549 F.2d 1115, 1120 n. 15 (7th Cir. 1977). If plaintiff has any remedy in this case, it can be based only on the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq.

* we aren't involved in a rulemaking

consequences, it is not a final and binding determination subject to judicial review under the APA).

Moreover, even if it did, there is no "sound basis" under the FACA for a court to interfere with ongoing rulemaking even if FACA violations have in fact occurred.⁸ National Nutritional Foods Assoc. v. Califano, 603 F.2d 327 (2d Cir. 1979); Kaibab Industries, v. Lujan, C.A. No. 91-1155 PHX WPC, slip op. at 5-6 (D. Ariz. Jan. 29, 1992) (opinion attached). On this point, National Nutritional Foods Assoc. and Kaibab are remarkably similar to the instant action in that the plaintiff in both cases sought an order enjoining an agency from taking final agency action in reliance upon the work of a group which had convened without complying with the FACA. See National Nutritional Foods Assoc. 603 F.2d at 336; Kaibab, slip op. at 5-6. Both courts found the requested relief unwarranted. Id. The Second Circuit explained:

The question of remedy remains. So far as we are aware, no court has held that a violation of FACA would invalidate a regulation adopted under otherwise appropriate procedures, simply because it stemmed from the advisory committee's recommendations, or even that pending rulemaking must be aborted and a fresh start made. We perceive no sound basis for doing so. Applicable rulemaking procedures afford amply

⁸ Though the FACA is silent on what relief is appropriate for a violation of its provisions, the Sunshine Act expressly provides that "[n]othing in this section authorizes any Federal court having jurisdiction solely on the basis of [5 U.S.C. §552b(h)(1)] to set aside, enjoin, or invalidate any action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose." 5 U.S.C. § 552b(h)(2). There is no reason to believe Congress intended for the FACA to be treated any differently.

opportunity to correct infirmities resulting from improper advisory committee action prior to the proposal.

603 F.2d at 336 (emphasis added) (citing Center of Auto Safety v. Tiemann, 414 F. Supp. 215, 226 (D.D.C. 1976), remanded on other grounds, 580 F.2d 689 (D.C. Cir. 1978)). As in National Nutritional Foods Assoc. and Kaibab, plaintiff is free to comment on the DSEIS before a final decision is made and, in addition, will be entitled to substantive review after the final EIS is issued. Plaintiff's effort to circumvent that process by requiring pending rulemaking to be aborted is entirely *without basis in law* unreasonable.

A disruption of the administrative process in question here would be particularly unreasonable given the absence of any FACA challenge to FEMAT by plaintiff while FEMAT was in existence. Plaintiff was put on notice by the May 24 letter from FEMAT's Chairman that FEMAT's meetings would be closed and that its minutes, working papers, and other documents would not be made available. Although this is the event that allegedly "injured" plaintiff, see Complaint at ¶ ___, plaintiff took no action until it filed the instant suit on August 6 -- more than two months later. Having taken a "wait and see" approach, it is only reasonable to require plaintiff to resort to his opportunities in the ongoing administrative process to point out any fallacies it perceives in FEMAT's Report.

Plaintiff's delay is all the more troubling because the relief it seeks -- nothing less than the invalidation of FEMAT

and all of its efforts -- would significantly interfere with the government's ability to comply with court orders in pending litigation in the Western District of Washington and the District of Oregon. As noted, one of the FEMAT's purposes was to assist in the development of a ^{common} ~~single~~ approach to management of federal forest lands in the Pacific Northwest. This approach was necessary, in part, because of litigation challenging the government's compliance with a variety of environmental statutes and regulations. ✓

As a result of this litigation, the government is currently subject to the following injunctions:

* Portland Audubon Society v. Babbitt: the district court enjoined the Bureau of Land Management (BLM) from offering or awarding any post-1991 timber sale [that would log suitable owl habitat or may affect the owl ???] until the agency prepares certain documentation pursuant to the National Environmental Policy Act, [cite]. See Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1510 (D. Or. 1992), aff'd sub nom. Portland Audubon Soc'y v. Babbitt, Nos. 92-36616, 92-36617, & 92-36666, 1993 WL 243982 (9th Cir. July 8, 1993).

* Lane County Audubon Society v. Baca: the court has enjoined BLM from announcing, awarding or conducting any commercial timber sales on the land it administers in western Oregon pending completion of consultation with the Fish & Wildlife Service on an owl conservation strategy in accordance with the Endangered Species Act, [cite]. See Lane County Audubon Soc'y v. Jamison, Nos. 91-36019 & 91-36340, slip op. (9th Cir. May 14, 1992); see also Lane County Audubon Soc'y v. Jamison, 958 F.2d 290, 294-95 (9th Cir. 1992).

* Seattle Audubon Society v. Lyons: the court has enjoined the Forest Service from auctioning or awarding any timber sale [that would log suitable owl habitat ???] on any of 17 national forests within the range of the northern spotted owl until the agency revises its regional standards and guidelines for management of owl habitat in accordance with the process required by NEPA and National Forest Management Act ("NFMA") regulations. See Seattle Audubon

Soc'y v. Moseley, 798 F. Supp. 1484, 1493-94 (W.D. Wash. 1992), aff'd sub nom. Seattle Audubon Soc'y v. Espy, Nos. 92-36529 & 36564, 1993 WL 243976 (9th Cir. July 8, 1993).

The Seattle Audubon Society litigation contains the most immediate time pressures. Although, in accordance with the injunction, the Forest Service completed an Environmental Impact Statement (EIS) in January 1992, the court also ordered the agency to prepare a supplemental EIS (SEIS) addressing issues pertaining to the northern spotted owl. See 798 F. Supp. at 1493. A draft SEIS (DSEIS) was released in July 1993. [cite complaint]. According to the court's current schedule, there is a public comment period on the DSEIS ends on October 28; the final SEIS is to be released by November 29; and a Record of Decision documenting adoption of revised owl habitat management standards and guidelines is to be issued by December 31, 1993.

Although the government normally has discretion as to the timing of the issuance of an EIS, its decision to pursue a unified strategy for the management of all federal lands means that the rigid Seattle Audubon Society schedule governs its compliance with all of these injunctions. Moreover, that particular litigation affect^s the majority of federal lands in the region, which total nearly 25 million acres. [cite].

The options analyzed and presented by the FEMAT are integral to that strategy. The DSEIS released in July expressly analyzes the environmental impacts of the FEMAT's ten options, and incorporates by reference the team's final report. By asking this Court to invalidate FEMAT post hoc and to enjoin the

Secretaries of Agriculture and of the Interior from relying in any way on the team's analysis, plaintiff seeks to derail the government's efforts to comply with these court orders. The effect would be to invalidate the entire SEIS process and require the government to start anew.

For all these reasons, plaintiff's asserted right to injunctive relief with regard to the DEIS process is *show the standing* unreasonable and provides no basis for judicial review of its FACA allegations. Accordingly, plaintiff's claims should be dismissed as moot.

* * *

Confusing? relevant? While defendants believe the doctrine of mootness is the most applicable doctrine to resolve the jurisdictional issues presented by this action, other justiciability concepts could be invoked. For example, plaintiff's claims could also be dismissed for lack of standing. Since plaintiff is not entitled to the relief which it requests, for the reasons stated above, it is impossible for plaintiff to show a substantial likelihood that its injuries will be redressed by the requested relief.

Plaintiff, therefore, cannot satisfy the "redressability" component of the standing doctrine. See Allen v. Wright, 468 U.S. 737, 751 (1984); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

In addition, it would be appropriate to dismiss this action on the ground that there is no private right of enforcement of ?

alleged FACA violations once an advisory committee ceases to exist. Because the problems of mootness (and standing) at issue here would recur any time someone asserts FACA challenges after a committee no longer exists, there is no basis for even recognizing a right of action.

CONCLUSION

For the reasons stated above, defendants respectfully request that the Court dismiss plaintiff's claims.

Respectfully submitted,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

NORTHWEST FOREST RESOURCE
COUNCIL,
Plaintiff,

v.

MIKE ESPY,
Secretary of Agriculture,
et al.,
Defendants.

Case No. 93-1621
(TPJ)

Add : 1) FEMAT doesn't exist --
non-existent entity can't
respond.

**DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY**

Plaintiff's request for expedited discovery should be denied because plaintiff's own dilatory behavior belies the alleged need for expedition. Although plaintiff had ample time in which to file this action and proceed according to normal time limits, it waited to do so until more than four months after the formation of the group whose operations it challenges, more than ten weeks after suffering its alleged "injury," and more than a month after the group issued its final report. Because the need for expedition is almost entirely of plaintiff's own making, plaintiff's motion should be denied.

Plaintiff's complaint is based on the Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2, and contains allegations that the Forest Ecosystem Management Assessment Team (FEMAT) is an "advisory committee" under the Act and failed to comply with a number of the Act's procedural requirements. See Complaint ¶¶ 25-42. Together with its complaint, plaintiff propounded seventeen interrogatories, nine requests for the

production of documents, and thirteen requests for admission. Plaintiff also intends to take the depositions "of some members of FEMAT" and perhaps "of a small number of administration officials." Memorandum in Support of Plaintiff's Motion for Expedited Discovery at 10.¹ Although the Federal Rules of Civil Procedure permit defendants forty-five days to respond to this extensive discovery, see Fed. R. Civ. P. 33, 34 & 35 (permitting discovery responses within 45 days of service of complaint), plaintiff would require defendants to respond in just 17 days, by August 24. See Pl. Mem. (proposed order).

Plaintiff's delay warrants rejection of its request. The FEMAT was formed just after the April 2, 1993 Forest Conference. Complaint ¶¶ 14-15. Plaintiff did not seek access to its meetings and documents until May 20, almost seven weeks after the Conference, when it wrote to the FEMAT's leader requesting that it be granted access to the group's remaining meetings "beginning at once" and be permitted to review the group's documents "as soon as possible." See Pl. Mem. (exhibit A thereto); Complaint ¶ 20. Although plaintiff's request was denied only four days later, on May 24, see Pl. Mem. (exhibit B thereto); Complaint ¶ 21 -- an event that, by plaintiff's analysis, conferred the "injury" underlying this action, see Complaint ¶¶ 20-21 -- plaintiff then waited almost two months more, until August 6, to file its complaint. A number of other events also occurred during the period of plaintiff's delay, including the issuance of

¹ Hereinafter "Pl. Mem."

the FEMAT's final report, see Complaint ¶ 15 at 9, the announcement by President Clinton on July 1 that he accepted one of the FEMAT's proposed options, see id. ¶ 16, and the release of a Draft Supplemental Environmental Impact Statement on July 16, see id. ¶ 17.

In light of these delays, plaintiff's contention that it "requires expedited discovery at the outset of the case" in order "to have any chance at obtaining a timely and meaningful remedy," Pl. Mem. at 7, rings hollow. Plaintiff was fully able to attempt to seek a "timely and meaningful remedy" long before it actually took the steps to do so. It cannot now, at this relatively late date, burden defendants and this Court with expedited proceedings because of its own delay.

In an analogous context, one court denied a motion for a preliminary injunction in part because of the plaintiff's "considerable delay in seeking injunctive relief." Costello v. McEnergy, 767 F. Supp. 72, 78 (S.D.N.Y. 1991). The court observed that preliminary relief is "generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." Id. (quoting Citibank, N.A. v. Citytrust, 756 F.2d 273, 276 (2d Cir. 1985)). The same reasoning applies here, where plaintiff alleges an urgent need for expedition but has largely caused that need by its own actions. "[E]quity aids the vigilant and not those who slumber on their

rights." N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educational Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985).

CONCLUSION

For the foregoing reasons, this Court should deny plaintiff's Motion for Expedited Discovery.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

J. RAMSEY JOHNSON
United States Attorney

DAVID J. ANDERSON

ELIZABETH A. PUGH

ROBERT S. WHITMAN
C. GAIL WALKER

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(202) 514-1494

Attorneys for Defendants

Date: August 19, 1993

CERTIFICATE OF SERVICE

I hereby certify that the foregoing _____ was served this
____ day of August 1993, by hand, to:

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William Gray Schaffer
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Washington, D.C. 20006-4759

ROBERT S. WHITMAN

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COTTINGHAM NOTES FOR TODD CAMPBELL
REGARDING NFRC v. ESPY et al

Interrogatory No. 1

Identify the name and primary professional affiliation of every person who served as a member of FEMAT. If your answer is different than the list of names and affiliations appearing on pages v-x of the FEMAT Report, please explain the reason for the difference.

Response to Interrogatory No. 1

WH/OEP has no information other than what is listed in the FEMAT report list. Attachment 1. Person to verify the list is Jack Thomas or Nancy DeLong.

Interrogatory No. 2

Identify the name and primary professional affiliation of every person who worked with or for FEMAT as an expert or consultant whom you do not consider to be a member of the Team. Please describe in full the criteria you applied or utilized in determining whether a person who worked with the Team was a member of the Team both for the purposes of answering Interrogatory No. 1 and for preparing the list appearing on pages v-x of the FEMAT Report.

Response to Interrogatory No. 2

1. WH/OEP has no knowledge of individuals who worked with the team other than those listed in FEMAT Report.

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2. FEMAT team used experts who were not on the "team" as members of "viability panels". WH/OEP does not have a list of who those people were. Jack Thomas, Nancy DeLong, or other FEMAT leaders would have to identify those individuals.

Interrogatory No. 3

Describe the employment status (e.g., permanent full-time federal employee, part-time federal employee, contract employee, paid consultant, etc.) of every member of FEMAT and every person who served as an expert or consultant to FEMAT; and for each such person whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, identify all documents describing or relating to the employment status of each person.

Response to Interrogatory No. 3

WH/OEP does not have records containing this information. It should be available from Jack Thomas and Nancy DeLong.

Interrogatory No. 4

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, state (1) the date that person commenced full-time federal employment, (2) the date that person ended full-time federal employment (if the employment has ended), (3) the terms of employment of that person (including wage, salary, hourly

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payment or GS level; medical insurance and other benefits; vacation and sick leave), (4) the total amount paid to that person in compensation for his or her federal employment to the later of the date of termination of such employment or the date you respond to this interrogatory, (5) the hiring official of that person, (6) the supervisor of that person and (7) the agency for whom that person works or worked.

Response to Interrogatory No. 4

WH/OEP does not have this information. Nancy DeLong will have to provide it.

Interrogatory No. 5

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, state the date and duration in hours of every occasion on which that person participated in FEMAT meeting, deliberations or discussions, and identify and describe in detail every other professional activity engaged in by that person (e.g., teaching, research, field work) during the period that person is claimed to have been a full-time federal employee, as identified in response to Interrogatory No. 4.

Response to Interrogatory No. 5

WH/OEP does not have this information. Nancy DeLong will have to provide it.

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Interrogatory No. 6

For every person named in response to Interrogatory No. 2, state the date and duration in hours of every occasion on which that person participated in FEMAT meetings, deliberations or discussions, and identify and describe in detail the duties and functions performed by that person for FEMAT.

Response to Interrogatory No. 6

WH/OEP does not have this information. Nancy DeLong will have to provide it.

Interrogatory No. 7

State who established FEMAT, on what date, under what authority and for what purpose, describe the structure of FEMAT and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 7

Prior to the Forest Conference (April 2, 1993), Katie McGinty, Director of the White House Office on Environmental Policy, called together an interagency working group to coordinate the forest conference and its aftermath. My notes show the first group meeting occurred on February 16, 1993. This group became the "Forest Conference Executive Committee." Representatives of the Departments of the Interior, Labor, Agriculture, and Commerce, as well as the Environmental Protection Agency, and several White House offices including the Office of the Vice President, White House Communications Office, Office of Science

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and Technology Policy, and the National Economic Council served on the Executive Committee. The Executive Committee continued to function through June and into early July.

At the conclusion of the Forest Conference, President Clinton said,

"I intend to direct the Cabinet and the entire Administration to begin work immediately to craft a balanced, a comprehensive, a long-term policy; and I will direct the Cabinet to report back to me within 60 days to have a plan to end this stalemate."

To my knowledge, that was all the direction the President provided to the Cabinet members and White House staff. No formal memo establishing the Executive Committee was prepared.

Interrogatory No. 8

State who appointed Dr. Jack Ward Thomas Team Leader of FEMAT, when that appointment occurred, what authority Dr. Thomas was given as Team Leader of FEMAT, to whom he reported as Team Leader and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 8

Katie McGinty established an informal subset of the Executive Committee which made day-to-day decisions. This group selected Dr. Thomas upon the suggestion of Jim Lyons in the days following the Forest Conference. We provided Dr. Thomas wide authority to select members whom he knew to be highly qualified natural and social scientists.

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On May 7, 1993, the Executive Committee formally transmitted a "Statement of Mission" (ATTACHMENTS) to FEMAT and the two other working groups (1. Labor and community Assistance and 2. Agency Coordination). This memo formed the instructions to the teams. I have several draft iterations of the statement of mission before the final document was finalized.

Interrogatory No. 9

State who selected the Deputy Team Leader, the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the Economic Assessment Group, the Social Analysis Group and the Spacial Analysis Group and the members of FEMAT, identify each person who participated in, reviewed or approved the selection of those persons, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 9

Jack Thomas selected most of the FEMAT members and Team Leaders. The Executive Committee made every effort to have the scientific assessment be as free from political interference as possible. The Executive Committee didn't inquire about day-to-day functioning of FEMAT.

Interrogatory No. 10

Describe in full the duties of the Deputy Team Leader and the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the

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Economic Assessment Group, the Social Analysis Group and the Spacial Analysis Group of FEMAT, describe who assigned them these duties, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 10

WH/OEP does not have that information. Must obtain from Jack Thomas, Marty Rafael, and team leaders.

Interrogatory No. 11

Describe all efforts by you or any other person to select the membership of FEMAT so that it would be fairly balanced in terms of the points of view represented and the functions to be performed by it, and identify all documents relating to such efforts.

Response to Interrogatory No. 11

WH/OEP does not have that information. Must obtain from Jack Thomas, Marty Rafael, and team leaders.

Interrogatory No. 12

Describe in full the purpose, function and composition of the Forest Conference Executive Committee, including a description of who established the committee, when it was established, when if ever it was terminated, its relationship to FEMAT and its role in reviewing, analyzing or considering the options or recommendations set forth by FEMAT in its July 1993 Report, and

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produce all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 12

1. Purpose and Function: The primary purpose was to coordinate interagency activities, assure that agencies provided adequate support to the FEMAT. The full Executive Committee met on the following dates:

The following people were official members of the Executive Committee:

Katie McGinty	Director, White House Office on Environmental Policy
Tom Collier	Chief of Staff, DOI
Jim Lyons	Assistant Secretary, USDA [need to be sensitive throughout this as to when Jim was confirmed.]
Jonathon Sallat	Counselor to Secretary, Commerce
Robert Portman	Counselor to Secretary, Labor [check title]
Chuck Fox	Special Assistant to the Administrator, EPA
Robert Rubin	National Economic Council
Alice Rivlin	Deputy Director, OMB

The following people were key staff to the Executive Committee:

White House:	Mark Gearan and Dwight Holton (COS), David Cottingham (OEP), Marla Romash (OVP), Peter Yu (NEC), Rahm Emanuel and Tom Epstein (Political Affairs), Susan
--------------	--

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Brophy (Congressional Liaison), Jeff
Watson (Public Liason), Ricki Seidman
(Communications)

Interior: Jim Pipkin, Stephanie Solien, Will
Stelle, Tom Tuchmann, Kevin Sweeney,
Peter Hamm

Agriculture: Marc Gaede,

Labor: Chuck Richards

EPA: David Gardiner, Rob Wolcott, Tom
Peterson

Commerce: Doug Hall (NOAA), Felicity Gillette
(EDA)

2. Establishment/termination: the Executive committee was established at the mutual agreement of the parties. Katie McGinty served as the Chair of the Committee. No formal charter specifying members or function for the Executive Committee exists. The final Executive Committee occurred on June , 1993, when the Executive Committee approved sending the decision memorandum to the President to a higher level committee composed of the Deputy Secretaries of participating agencies.

3. A core group of the Executive Committee met more regularly to discuss various issues. The following people regularly participated in those discussions/meetings:

Katie McGinty, Tom Collier, Jim Lyons, Dwight Holden, David Cottingham, Marla Romash, Peter Yu, Tom Epstein, Susan

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Brophy, Jim Pipkin, Stephanie Solien, Will Stelle, Tom Tuchmann, and Marc Gaede.

Interrogatory No. 13

Describe in detail all contacts, discussions, meetings and conversations between the President of the United States or the Vice President of the United States and FEMAT or any person acting as a representative of FEMAT.

Response to Interrogatory No. 13

To my knowledge, no member of the FEMAT team ever spoke directly with the President or Vice President. They briefed Secretaries Espy and Babbitt as well as members of the Executive Committee, who in turn, briefed the President and Vice President in memoranda as well as oral presentations.

Interrogatory No. 14

Describe in detail all contacts, discussions, meetings and conversations between any employees of the Executive Office of the President (or "the White House") and FEMAT or any person acting as a representative of FEMAT.

Interrogatory No. 14

Katie McGinty and David Cottingham were the primary White House contacts between the White House and FEMAT team. My notes indicate that, as of April 8, some members of the Executive Committee had agreed that Jack Ward Thomas would head the team.

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We had the first conference call with Jack and members of the FEMAT on April 8.

Cottingham went to Portland on April 20 and 21 where he met with several members of FEMAT, including: Jack Thomas, Marty Raphael, Jerry Franklin, Jim Sedell, Brian Greber, Norm Johnson, and Elizabeth Garr. He has no detailed notes from those meetings. Cottingham went to Portland again on May 26 to meet with team members. He has notes from a meeting with Jack Ward Thomas and Joe Lint (BLM staff biologist) regarding imposition of "viability standard" on BLM lands.

Beginning in mid-March, representatives of the core group of the Executive Committee began having conference calls three times a week. At first, we discussed preparations for the Forest Conference. We later shifted our discussions to include activities of (including problems being encountered by) the FEMAT. Jim Pipkin (DOI), stationed nearly full-time in Portland as the Administration liaison with FEMAT, regularly participated. Jack Thomas frequently participated in the conference calls. No one maintained official notes of those conference calls to my knowledge.

Jack Ward Thomas presented a preliminary briefing of the options FEMAT was analyzing in Katie McGinty's office on ? A number of White House staff and core groups of the Executive Committee attended. I cannot find notes from the meeting indicating who participated or specific discussions.

Peter Yu of the NEC is the only other White House employee who was probably in contact with FEMAT members. I have not alerted him to this litigation as of 8/15, but will on 8/16. I

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expect that he discussed economic trends and programs with economists on FEMAT.

Interrogatory No. 15

State whether the President or Vice President ever received and reviewed the FEMAT Report or any other document prepared by or for FEMAT.

Response to Interrogatory No. 15

To my knowledge, neither the President nor Vice President has, to this day, seen the entire FEMAT report. We provided the almost final draft of the summary and overview as well as other selected quotations and figures/charts in briefings.

Interrogatory No. 16

State whether the Forestry Plan announced by the President on July 1, 1993 was based on a recommendation to the President by the Forest Conference Executive Committee, defendant Espy, defendant Babbitt, any other member of the Cabinet or any other person, committee or entity other than FEMAT; identify all documents relating to any such recommendation.

Response to Interrogatory No. 16

To my knowledge, the President based his decision on conversations he had with Cabinet members, White House staff, and other interested parties, including Members of Congress. The Forest Conference Executive Committee provided the President a comprehensive Decision Memorandum (Katie McGinty to President and

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Vice President, June 18) containing its recommendation. Neither the Executive Committee nor FEMAT representatives conducted a comprehensive oral briefing for the President or Vice President prior to the President announcing his decision on July 1.

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

Facsimile Transmission Cover

From: Tim Obst
Attorney

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• Jack Gipsman, Bob Simmons	415-744-3170
• Jeff Handy, Bob Jacobs	503-326-7630
Sue Zike	503-326-7742
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Message:

Attached is the complaint for declaratory and injunctive relief, and request for admissions and interrogatories, for a recently filed case NFRC v. Espy alleging that the procedures of FEMAT violated the Federal Advisory Committee Act.

K:\MCR\21810-00.032\18P00947.1NT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

vs.)

MIKE ESPY, in his official)
capacity as Secretary of)
Agriculture, et al.,)

Defendants.)

Civil No.

INTERROGATORIES AND REQUESTS FOR PRODUCTION
OF DOCUMENTS

To: Defendants MIKE ESPY, BRUCE BABBITT, DR. JACK WARD THOMAS
and FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, plaintiff Northwest Forest Resource Council hereby requests that you answer the following interrogatories within 45 days of service of the complaint herein, or such shorter time as the court may set, and produce for inspection and copying documents identified herein at the offices of Preston Thorgrimson Shidler Gates & Ellis, 111 S.W. Fifth Avenue, Suite 3200, Portland, Oregon 97204, Preston Gates Ellis & Rouvelas Meeds Suite 500, 1735 New York Avenue N.W., Washington, D.C. 20006-4759, or another mutually agreeable location at 9:00 a.m. on the same date you answer the interrogatories.

DEFINITIONS AND INSTRUCTIONS

The following definitions apply to these Interrogatories and Requests for Production of Documents:

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1. The term "document" or "documents" is used in the broadest possible sense, and means any kind of printed, recorded, written, graphic or photographic matter (including tape recordings), however printed, produced, reproduced, coded or stored, of any kind or description, whether sent or received or not, including originals, copies, reproductions, facsimiles, drafts and both sides thereof, and including, without limitation: papers, books, accounts, letters, models, photographs, drawings, sketches, objects, tangible things, correspondence, telegrams, memoranda, work papers, interoffice communications, transcripts, minutes, reports and recordings of telephone or other conversations, or of committee meetings or of other meetings, statements, summaries, court pleadings, reports, indexes, contracts, licenses, agreements, ledgers, journals, books or records of account, summaries of account, balance sheets, income statements, appointment books, diaries, telephone logs and expense accounts, regardless of their author or origin, however denominated by you, which are now or which were formerly in your actual or constructive possession, custody or control. The term "document" or "documents" shall also mean exact copies or reproductions of any of the foregoing items upon which notations in writing, print or otherwise have been made or which do not appear in the originals.

2. The term "you" or "your" as used herein shall mean defendants Mike Espy, Bruce Babbitt, Dr. Jack Ward Thomas and Forest Ecosystem Management Assessment Team ("FEMAT" or "Team"), and any person or persons acting or purporting to act on their behalf or at their direction, including their attorneys. If

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different defendants answer individual interrogatories or requests for production differently, state each defendant's answer or response separately.

3. The term "relate" or "relating to" as used herein, includes from, to, referring to, concerning, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, reflecting, analyzing, constituting, evidencing or pertaining to.

4. The term "FEMAT Report" means the report issued by FEMAT entitled *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment* (July 1993).

5. If any document responsive to these requests is withheld from production under a claim of privilege, each such document must be identified by furnishing the following information: (a) the nature of the document (e.g., memorandum, letter, computer tape, etc.); (b) date; (c) author or preparer; (d) sender; (e) addressee(s) (if any); (f) copyees (persons to whom a copy is indicated as having been sent); (g) the present custodian of the document; (h) the identity of each person who has been shown such document; and (i) each and every basis in fact and law relied upon for withholding the identity or production of such document.

6. These requests for production are continuing. If after the date of production specified herein, you come into the possession of any document responsive to any of the requests herein, you must give notice to plaintiffs's counsel specified below and produce such document within thirty days of the date upon which such document comes into your possession.

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Interrogatory No. 1

Identify the name and primary professional affiliation of every person who served as a member of FEMAT. If your answer is different than the list of names and affiliations appearing on pages v-x of the FEMAT Report, please explain the reason for the difference.

Response to Interrogatory No. 1**Interrogatory No. 2**

Identify the name and primary professional affiliation of every person who worked with or for FEMAT as an expert or consultant whom you do not consider to be a member of the Team. Please describe in full the criteria you applied or utilized in determining whether a person who worked with the Team was a member of the Team both for the purposes of answering Interrogatory No. 1 and for preparing the list appearing on pages v-x of the FEMAT Report.

Response to Interrogatory No. 2

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Interrogatory No. 3

Describe the employment status (e.g., permanent full-time federal employee, part-time federal employee, contract employee, paid consultant, etc.) of every member of FEMAT and every person who served as an expert or consultant to FEMAT; and for each such person whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, identify all documents describing or relating to the employment status of each such person.

Response to Interrogatory No. 3**Request For Production No. 1**

Please produce all documents described in response to Interrogatory No. 3.

Response to Request For Production No. 1**Interrogatory No. 4**

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in

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response to Interrogatory No. 1, as appropriate) is not with a federal agency, state (1) the date that person commenced full-time federal employment, (2) the date that person ended full-time federal employment (if the employment has ended), (3) the terms of employment of that person (including wage, salary, hourly payment or GS level; medical insurance and other benefits; vacation and sick leave), (4) the total amount paid to that person in compensation for his or her federal employment to the later of the date of termination of such employment or the date you respond to this interrogatory, (5) the hiring official of that person, (6) the supervisor of that person and (7) the agency for whom that person works or worked.

Response to Interrogatory No. 4

Interrogatory No. 5

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, state the date and duration in hours of every occasion on which that person participated in FEMAT meetings, deliberations or discussions, and identify and describe in detail every other professional activity engaged in by that person (e.g., teaching, research, field work) during the period that person is

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claimed to have been a full-time federal employee, as identified in response to Interrogatory No. 4.

Response to Interrogatory No. 5

Interrogatory No. 6

For every person named in response to Interrogatory No. 2, state the date and duration in hours of every occasion on which that person participated in FEMAT meetings, deliberations or discussions, and identify and describe in detail the duties and functions performed by that person for FEMAT.

Response to Interrogatory No. 6 -

Interrogatory No. 7

State who established FEMAT, on what date, under what authority and for what purpose, describe the structure of FEMAT and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 7

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Request For Production No. 2

Produce all documents described in response to Interrogatory No. 7.

Response to Request For Production No. 2

Interrogatory No. 8

State who appointed Dr. Jack Ward Thomas Team Leader of FEMAT, when that appointment occurred, what authority Dr. Thomas was given as Team Leader of FEMAT, to whom he reported as Team Leader and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 8

Request For Production No. 3

Produce all documents described in response to Interrogatory No. 8.

Response to Request For Production No. 3

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Interrogatory No. 9

State who selected the Deputy Team Leader, the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the Economic Assessment Group, the Social Analysis Group and the Spacial Analysis Group and the members of FEMAT, identify each person who participated in, reviewed or approved the selection of those persons, describe what criteria were used to select those persons, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 9

Request For Production No. 4

Produce all documents identified in response to Interrogatory No. 9.

Response to Request For Production No. 4

Interrogatory No. 10

Describe in full the duties of the Deputy Team Leader and the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the Economic Assessment Group, the Social Analysis Group and the Spacial

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Analysis Group of FEMAT, describe who assigned them these duties, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 10

Request For Production No. 5

Produce all documents identified in response to Interrogatory No. 10.

Response to Request For Production No. 5

Interrogatory No. 11

Describe all efforts by you or any other person to select the membership of FEMAT so that it would be fairly balanced in terms of the points of view represented and the functions to be performed by it, and identify all documents relating to such efforts.

Response to Interrogatory No. 11

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Request For Production No. 6

Produce all documents identified in response to Interrogatory No. 11.

Response to Request For Production No. 6

Interrogatory No. 12

Describe in full the purpose, function and composition of the Forest Conference Executive Committee, including a description of who established the committee, when it was established, when if ever it was terminated, its relationship to FEMAT and its role in reviewing, analyzing or considering the options or recommendations set forth by FEMAT in its July 1993 Report, and produce all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 12

Request For Production No. 7

Produce all documents described in response to Interrogatory No. 12.

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Response to Request For Production No. 7**Interrogatory No. 13**

Describe in detail all contacts, discussions, meetings and conversations between the President of the United States or the Vice President of the United States and FEMAT or any person acting as a representative of FEMAT.

Response to Interrogatory No. 13**Interrogatory No. 14**

4/30 Describe in detail all contacts, discussions, meetings and conversations between any employee of the Executive Office of the President (or "the White House") and FEMAT or any person acting as a representative of FEMAT.

Response to Interrogatory No. 14**Interrogatory No. 15**

State whether the President or Vice President ever received

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and reviewed the FEMAT Report or any other document prepared by or for FEMAT.

Response to Interrogatory No. 15

Interrogatory No. 16

State whether the Forestry Plan announced by the President on July 1, 1993 was based on a recommendation to the President by the Forest Conference Executive Committee, defendant Espy, defendant Babbitt, any other member of the Cabinet or any other person, committee or entity other than FEMAT; identify all documents relating to any such recommendation.

Response to Interrogatory No. 16

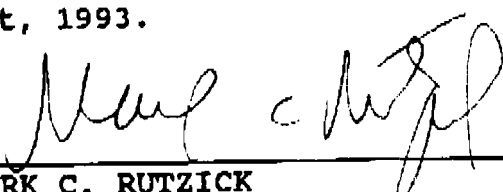
Request For Production No. 8

Produce all documents identified in response to Interrogatory No. 16.

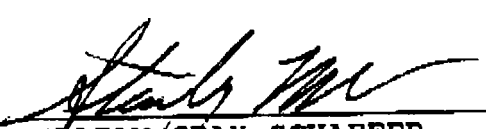
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Response to Request For Production No. 8

Dated this 6th day of August, 1993.



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(202) 628-1700

Attorneys for Plaintiff NORTHWEST
FOREST RESOURCE COUNCIL



United States Department of State

*Bureau of Oceans and International
Environmental and Scientific Affairs*

Washington, D.C. 20520

August 13, 1993

MEMORANDUM

TO: OEP - David Cottingham
FROM: OES/E - Paul Blackburn, Acting *PB*
SUBJECT: Ecosystem Management Initiative

We believe the Ecosystem Management Initiative is precisely what is needed to demonstrate both domestically and internationally the Administration's firm commitment to ecosystem scale sustainable management of the spectrum of natural and human resources. We want to be involved in its planning and implementation, and will seek ways to support the effort.

We think the draft outline for the initiative is good, but could be improved by adding two elements:

1. Implementation of the pilot/demonstration projects can support U.S. international initiatives and responsibilities on a wide range of environmental issues, by

demonstrating policy leadership to the rest of the world, or

concrete action which can be directly related to implementation of such international agreements as the Framework Convention on Climate Change and the Biological Diversity Convention, or

promoting better international cooperation (e.g., by establishing "sister project" relationships with efforts to manage similar ecosystems abroad.)

- o For this reason, domestic policy and project criteria should include a requirement that decision-makers seek where possible to maximize international impact. We would be pleased to assist in defining or creating links between domestic and international policies, programs and projects.

- 2 -

2. While the outline properly envisions seeking input from all stakeholders in a region, and emphasizes collaboration among federal agencies, state, local and tribal governments, the public and Congress, it would be worthwhile to include specifically the NGO community whose support can be crucial to effective implementation of initiatives. It would be particularly useful to include organizations, such as The Nature Conservancy, which have already demonstrated the capability to foster integrated management.

We are not in a position to provide a comprehensive assessment of the domestic desirability of the candidate ecosystems, but offer some thoughts on how selected candidates could contribute to our international interests.

Thus, we suggest the following amendments to the outline, and offer some thoughts on candidate ecosystems:

National Performance Review
Ecosystem Management Initiative

1. Ecosystem Management Initiative:

... (no change)

2. Ecosystem Management Process:

...

- * Use monitoring and assessment to **establish baselines, define desired ecological endpoints, and respond to** changing conditions.

...

- * Encourage collaboration among federal agencies, state, local and tribal governments, **pertinent NGO's, the** public and Congress,
- * **Seek opportunities to use domestic projects to demonstrate to the world U.S. leadership on environmental issues, support our international environmental initiatives, or contribute to meeting our agreed international environmental obligations.**

- 3 -

3. Criteria for Selecting Ecosystem Management Projects:

...

- * degree to which project can benefit from collaborative research and management efforts already in operation or thoroughly planned (e.g., Man and the Biosphere Reserves, NSF LTER sites, wetlands designated under the Ramsar Convention);
- * potential for international impact (e.g., possible cooperation with Canada or Mexico, or contribution to such global initiatives as conservation of forests or biodiversity);

4. Candidate Ecosystems

We believe it would be useful to prepare an evaluative matrix for the candidate ecosystems, using as headings the criteria set out in 3. above.

As elements for such a matrix, we would include the following elements for the following ecosystems which would argue for their selection.

New York City water supply watershed & Adirondacks

- This proposal seems to be similar in coverage to the Champlain Basin - Adirondack Massif area designated as a Man and the Biosphere Reserve in 1989. The Reserve program is the nation's largest (about 6 million acres), substantially populated, and could offer a good starting point.

Southern Appalachian Highlands

- The Southern Appalachian Man and the Biosphere Program (SAMAB) is up and running, integrating a large number of actors. This area offers excellent biodiversity (the mixed mesophytic forest areas are considered by some to be the "mother" of all Eastern forests), and the opportunity to address a wide range of issues including forest management on private lands, mine drainage and water quality, effects of pollutants on forests, etc.

- 4 -

Hawaii

- The site, with Puerto Rico, of our only remaining tropical forest areas. Better management would support our interest in sustainable use of tropical forests elsewhere. Hawaii is, of course, a prime area of interest for biodiversity conservation, and substantial programs are already underway.

Southeast Alaska

- As the site of temperate rainforest and boreal forest, ecosystem management could enhance our standing to press others to negotiate some form of Northern Forest convention. Offers opportunities for cooperation with Canada, perhaps partly in recognition of British Columbia's recent favorable action on the Windy Craggy mine issue. MAB reserve area. Enhances our effort to gain World Heritage Site status for Glacier Bay National Park.

Sonoran/Arizona SW Desert

- MAB reserves still in formation, but Secretary Rabbitt recently attended dedication of reserves on Mexican side of border. Choice could benefit NAFTA relationship.

South Florida/Everglades

- Crucial ecosystem in which many agencies are already cooperating. MAB core research project area.

WELLS BURGESS
272-6958

AO 440 (Rev. 5/85) Summons in a Civil Action

United States District Court

DISTRICT OF Columbia

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

93 1621

MIKE ESPY, BRUCE BABBITT, DR. JACK WARD THOMAS,
and FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM.

Defendants.

*Ans. due:
Oct. 5, 1993*

JACKSON, J. TH

TO: (Name and Address of Defendant) RAMSEY JOHNSON, Acting U.S. Attorney for the
District of Columbia, 555 4th Street, N.W., Washington, D.C. 20001

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

~~MARK C. RUTZOR
PRESTON THORGRIMSON SHIDLER GATES & ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204-3688
(503) 228-3200~~WILLIAM GRAY SCHAFFER, D.C. Bar #64261
STANLEY M. GORINSON, D.C. Bar #381642
PRESTON GATES ELLIS & ROUVELAS MEEDS
Suite 500
1735 New York Avenue, N.W.
Washington, D.C. 20006-4759
(202) 628-1700an answer to the complaint which is herewith served upon you, within 60 days after service of
this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken
against you for the relief demanded in the complaint.SERVICE ACKNOWLEDGED DATE: 8/6/93BY: *Jale H. Jenkins*
FOR THE U.S. ATTORNEY, WASH., D.C.

NANCY MAYER-WHITTINGTON

AUG 6 1993

CLERK

DATE

BY DEPUTY CLERK *M. Higgins*

United States District Court
For the District of Columbia
Office of the Clerk
3rd and Constitution Avenue, N.W.
Washington, DC 20001

Nancy M. Mayer-Whittington
Clerk

**NOTICE OF RIGHT TO CONSENT TO TRIAL
BEFORE A UNITED STATES MAGISTRATE JUDGE**

In accordance with the provisions of Title 28, U.S.C. Section 636(c), you are hereby notified that the United States Magistrate Judges of this District Court, in addition to their other duties, upon the consent of all parties in a civil case, may conduct any or all proceedings in a civil case, including a jury or nonjury trial, and order the entry of a final judgment.

You should be aware that your decision to consent, or not to consent, to the referral of your case to a United States Magistrate Judge must be entirely voluntary. Only if all the parties to the case consent to the reference to a Magistrate Judge will either the Judge or the Magistrate Judge to whom the case has been assigned be informed of your decision.

An appeal from a judgment entered by a Magistrate Judge may be taken directly to the United States Court of Appeals for this judicial circuit in the same manner as an appeal from any other judgment of a District Court. Alternatively, upon consent of all parties, an appeal from a judgment entered by a Magistrate Judge may be taken directly to a District Judge. Cases in which an appeal is taken to a District Judge may be reviewed by the United States Court of Appeals for this judicial circuit only by way of petition for leave to appeal.

NANCY MAYER-WHITTINGTON
Clerk of Court

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,
1500 S.W. First Avenue
Suite 770
Portland, Oregon 97201

Plaintiff,

Civil No.

vs.

MIKE ESPY, in his official
capacity as Secretary of
Agriculture
U.S. Department of Agriculture
14th Street and Independence Ave.,
S.W.
Washington, D.C. 20250

BRUCE RABBITT, in his official
capacity as Secretary of Interior
U.S. Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240

DR. JACK WARD THOMAS, in his
official capacity as Chairman,
Forest Ecosystem Management
Assessment Team
Post Office Box 3890
Portland, Oregon 97208-3890

FOREST ECOSYSTEM MANAGEMENT
ASSESSMENT TEAM,
Post Office Box 3890
Portland, Oregon 97208-3890

Defendants.

AUG 6 1993

93 1621

JACKSON, J. TPJ

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Violations of Federal Advisory Committee Act,
5 U.S.C. Appendix 2)

Plaintiff Northwest Forest Resource Council, by its attorneys,
alleges as follows:

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I. INTRODUCTION

1. This is an action for declaratory and injunctive relief against Mike Espy as Secretary of Agriculture and Bruce Babbitt as Secretary of Interior to remedy violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2, by the body known as the Forest Ecosystem Management Assessment Team, chaired by defendant Dr. Jack Ward Thomas.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus) and 5 U.S.C. §§ 701-06 (judicial review of agency action). Venue in this district is proper under 28 U.S.C. § 1391(e) because a defendant resides in this district and a substantial part of the events or omissions giving rise to the claim here occurred in this district.

III. PARTIES

3. Plaintiff Northwest Forest Resource Council ("NFRC") is a not-for-profit corporation organized under the laws of the state of Oregon, located in Portland, Oregon. NFRC is comprised of associations, businesses and individuals in the forest products industry in Oregon and Washington. The NFRC and its members actively participate in federal agency land management decisions that involve the allocation and use of forest resources in Oregon and Washington, including wildlife, recreation and commodity production. NFRC and its members utilize all the resources of the National Forest System in Oregon and Washington and of lands managed by the Bureau of Land Management ("BLM") in Oregon. NFRC

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includes among its members the following forest products industry trade associations:

- a. Associated Oregon Loggers ("AOL"), whose members are individuals and companies engaged in the business of logging timber from public and private lands in the state of Oregon.
- b. Columbia River Plywood Cooperatives ("CRPC"), an association of worker-owned cooperative businesses operating plywood manufacturing facilities along the Columbia River in Oregon and Washington.
- c. Douglas Timber Operators ("DTO"), comprised of individuals and businesses involved in the forest products business in Douglas County and Coos County, Oregon.
- d. Helicopter Logging Association ("HLA"), comprised of companies involved in helicopter logging in Oregon, Washington and elsewhere in the western states.
- e. Northwest Forestry Association ("NFA"), comprised of companies involved in the manufacture of lumber and plywood products in Oregon and Washington. The NFA is made up of both large, publicly-held companies and small, family-owned businesses.
- f. Northwest Independent Forest Manufacturers ("NIFM"), comprised of companies principally located in western Washington which harvest timber and manufacture forest products.
- g. Oregon Forest Industries Council ("OFIC"), comprised of individuals and companies that own timberland and are involved in the forest products industry throughout the state of Oregon.
- h. Southern Oregon Timber Industries Association ("SOTIA"), comprised of individuals and companies involved in the

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forest products industry in Jackson, Josephine, and Curry Counties, Oregon.

i. Washington Citizens for World Trade ("WCWT"), an association of companies engaged in the manufacturing or export of wood and wood products in Washington.

j. Washington Contract Loggers Association ("WCLA"), comprised of over 600 individuals and companies engaged in the business of logging timber from public and private land in Washington.

k. Western Wood Products Association ("WWPA"), comprised of individuals and companies involved in the forest products industry throughout the western United States.

l. Western Forest Industries Association ("WFIA"), comprised of individuals and companies involved in the forest products industry throughout the western United States.

m. Willamette Forestry Council ("WFC"), is an association of companies in the forest products industry that conduct business in Lane County Oregon and purchase timber from the Willamette National Forest in Oregon.

4. NFRC has served as the representative for the forest products industry on major federal land management decisions in Oregon and Washington since 1986, including decisions relating to wildlife management such as management for the northern spotted owl and the marbled murrelet, and decisions relating to Forest Service and Bureau of Land Management planning actions for federal lands under the respective management of the two agencies. NFRC collects information about the environmental, economic and social impacts of

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these major federal land management decisions, and disseminates this information to its members and participants, to public officials and to thousands of members of the public that are directly affected by these decisions.

5. Defendant Mike Espy, sued in his official capacity as Secretary of Agriculture, is the official in charge of the Forest Service, which manages 19 national forests, encompassing some 24 million acres of land, in Oregon and Washington, and four national forests in northern California.

6. Defendant Bruce Babbitt, sued in his official capacity as Secretary of Interior, is the official in charge of the Bureau of Land Management, which manages some 2.7 million acres of forestland in western Oregon.

7. Defendant Dr. Jack Ward Thomas, sued in his official capacity as Chairman, Forest Ecosystem Management Assessment Team ("FEMAT"), is the official in charge of FEMAT, the body which is charged in this action with violations of the Federal Advisory Committee Act.

8. The Forest Ecosystem Management Assessment Team is, as set out in more detail below, an advisory group of natural and social scientists and others established following the Forest Conference conducted by the President and Vice President in Portland, Oregon on April 2, 1993.

IV. BACKGROUND

The Northwest Forest Controversy

9. On April 2, 1993 President Clinton, Vice President Gore, defendants Espy and Babbitt and other government officials

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conducted a day-long Forest Conference in Portland, Oregon for the purpose of soliciting information, ideas and recommendations for resolving the longstanding controversy over management of Forest Service and BLM land in Washington, Oregon and northern California that provide, among other things, habitat for the northern spotted owl, a species listed as threatened under the Endangered Species Act of 1973, 16 U.S.C. §§ 1531, et seq. These productive forests have also traditionally provided a large volume of timber for the production of lumber, plywood and other forest products manufactured and sold throughout the United States and the world. For the past three decades (until 1989) these federal forests supplied approximately five billion board feet of timber per year, some 15-20% of all domestic timber production in the United States.

10. Most of the federal land in question is managed by the Forest Service under a series of federal statutes, including the National Forest Management Act, 16 U.S.C. §§ 1600, et seq., the Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528, et seq., and the Organic Act of 1897, 16 U.S.C. § 475, that give the Secretary of Agriculture the duty to manage these lands according to the "multiple use" doctrine under comprehensive land and resource management plans developed through a complex series of public involvement and environmental review procedures.

11. Most of the remaining federal land in question is managed by the BLM under the specific terms of the Oregon & California Railroad Lands Act, 43 U.S.C. §§ 1181a, et seq., which applies to lands in western Oregon revested to the United States in the early 20th century after being previously ceded to railroads in the 19th

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century. The Secretary of Interior is charged with managing these lands under resource management plans developed through the public involvement and environmental review procedures set out in the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, et seq.

12. Since 1989 litigation, administrative actions and other related factors have reduced the supply of timber from these federal lands to almost zero, causing severe dislocations within the forest products industry and in many small timber-dependent communities throughout the spotted owl region. The litigation had as its aim the protection of the northern spotted owl and other species as well as protection of certain forests known variously known as "old growth," "late-successional" or "ancient."

13. President Clinton convened the Forest Conference for the purpose of developing proposals for resolving this controversy and ending the litigation gridlock now existing in the region. At the Forest Conference representatives of communities, environmental groups, the timber industry, Indian tribes and others provided information and suggestions for the President and his Administration.

The Forest Ecosystem Management Assessment Team

14. Following the Forest Conference three working groups were created to develop recommendations for action to resolve the forest controversy: the Forest Ecosystem Management Assessment Team, the Labor and Community Assessment Team, and the Agency Coordination Team. Dr. Jack Ward Thomas was appointed as chair of FEMAT.

15. On May 7, 1993 a body known as the Forest Conference Executive Committee ("FCEC"), consisting of the Departments of

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Agriculture, Interior, Labor and Commerce, the Environmental Protection Agency, the Office of Environmental Policy, the Office of Science and Technology, the National Economic Council, the Council of Economic Advisors and the Office of Management and Budget, issued a "Statement of Mission" to "focus and coordinate" the efforts of the three working groups. The FCEC described FEMAT's task as follows:

Our objectives based on the President's mandate and principles are to identify management alternatives that attain the greatest economic and social contribution from the forests of the region and meet the requirements of the applicable laws and regulations

Your assessment should take an ecosystem approach to forest management and should particularly address maintenance and restoration of biological diversity, particularly that of the late-successional and old-growth forest ecosystems; maintenance of long-term site productivity of forest ecosystems; maintenance of sustainable levels of renewable natural resources, including timber, other forest products, and other facets of forest values; and maintenance of rural economies and communities.

. . . .

You should address a range of alternatives in a way that allows us to distinguish the different costs and benefits of various approaches (including marginal cost/benefit assessments), and in doing so, at least the following should be considered:

- timber sales, short and long term;
- production of other commodities;
- effects on public uses and values, including scenic quality, recreation, subsistence, and tourism;
- effect on environmental and ecological

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values, including air and water quality, habitat conservation, sustainability, threatened and endangered species, biodiversity and long-term productivity;

- jobs attributable to timber harvest and timber processing; and, to the extent feasible, jobs attributable to other commodity production, fish habitat protection, and public uses of forests; as well as jobs attributable to investment and restoration associated with each alternative;
- economic and social effects on local communities, and effects on revenues to counties and the national treasury;
- economic and social policies associated with the protection and use of forest resources that might aid in the transitions of the region's industries and communities;
- economic and social benefits from the ecological services you consider;
- regional, national and international effects as they relate to timber supply, wood product prices, and other key economic and social variables.

See Forest Ecosystem Management Assessment Team, *Forest Ecosystem Management: An Ecological, Economic and Social Assessment* (July 1993) (hereafter "FEMAT Report") at ii-iii.

16. On July 1, 1993 President Clinton held a press conference to announce a proposal he called a Forest Plan for a Sustainable Economy and a Sustainable Environment. The proposal describes the establishment of FEMAT and the other two working groups, and states: "It is their work, and the ideas and opinions of the scores of people they consulted that provides the foundation for the President's Forest Plan for a Sustainable Economy and a Sustainable Environment." July 1, 1993 Statement at 2-3.

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17. On July 16, 1993 the Forest Service released a Draft Supplemental Environmental Impact Statement ("DSEIS") on Management of Habitat for Late-Successional and Old-Growth Related Species Within the Range of the Northern Spotted Owl. The responsible officials for the document are defendants Espy and Babbitt. The DSEIS states:

The Forest Service and the Bureau of Land Management propose to adopt coordinated ecosystem management direction for the lands they administer within the range of the northern spotted owl. The Supplemental Environmental Impact Statement (SEIS) presents as alternatives the options developed by the Forest Ecosystem Management Assessment Team and presented in their report *Forest Ecosystem Management: An Ecological, Economic and Social Assessment*. Each alternative identifies land allocations and management direction that provides for a range of protection of old-growth forests on land administered by the Forest Service and Bureau of Land Management. . . .

Readers should note that the Secretaries of Agriculture and the Interior are the responsible officials for this proposed action. . . .

Id., third unnumbered page (emphasis supplied).

18. Along with the DSEIS the Forest Service released the FEMAT Report, comprising over 1000 pages. The FEMAT report states:

Timber cutting and other operations on lands managed by the Forest Service and the Bureau of Land Management within the range of the northern spotted owl have been brought virtually to a halt by federal court orders. As a result, the Administration commissioned the Forest Ecosystem Management Assessment Team to formulate and assess the consequences of an array of management options that might form the basis of a solution to the crisis. The Team was told that the objectives were to produce management alternatives that would comply with existing laws and produce the

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highest contribution to economic and social well being.

FEMAT Report at I-1 (emphasis supplied).

19. The FEMAT Report lists among the members of the Team the following individuals, and describes their professional affiliations as follows:

Jerry F. Franklin	Professor of Ecosystem Analysis, College of Forest Resources, University of Washington, Seattle, Washington
John C. Tappeiner	Senior Research Forester and Professor, Bureau of Land management Cooperative Unit, Department of Forest Resources, Oregon State University, Corvallis, Oregon
Lisa Brown	Research Assistant, Unclassified, Department of Fish and Wildlife, Oregon State University, Corvallis, Oregon
David R. Montgomery	Research Assistant Professor, Quaternary Research Center, University of Washington, Seattle, Washington
K. Norman Johnson	Professor, Department of Forest Resources, Oregon State University, Corvallis, Oregon
Brian Greber	Associate Professor, Forest Resources Economics, College of Forestry, Oregon State University, Corvallis, Oregon
Matt Carroll	Assistant Professor, Washington State University, Pullman, Washington
Steven Daniels	Associate Professor, Oregon State University, Corvallis, Oregon
Sam C. Doak	Research Policy Analyst, Portland, Oregon
Jonathan Kusel	Post-Doctoral Fellow, University of California, Berkeley, California

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Margaret Shannon

Professor of Forest Resources,
College of Forest Resources,
University of Washington, Seattle,
Washington

George H. Stankey

Senior Research Professor, Oregon
State University, Corvallis, Oregon

Victoria Sturtevant

Professor of Sociology, Southern
Oregon State College, Ashland,
Oregon

Ann C. Werner

Social Science Analyst, Oregon State
University, Corvallis, Oregon

Margo Blosser

GIS Analyst, Bureau of Land
Management, Oregon State Office,
Planning, ARD/GIS, on contract from
Infotec Development, Portland,
Oregon

Loc Hoang

Database Analyst, Bureau of Land
Management, Oregon State Office, GIS
Section, on contract from Infotec
Development, Portland, Oregon

Terry Locke

Database Analyst, Bureau of Land
Management Oregon State Office, GIS
Section, on contract from Infotec
Development, Portland, Oregon

Janet L. McCormick

GIS Analyst and GIS Specialist,
Forest Service, Pacific Northwest
Region, Geometronics, GIS Analysis
Group, on contract from Infotec
Development, Portland, Oregon

Arthur Miller

Database Analyst, Bureau of Land
Management, Oregon State Office, GIS
Section, on contract from Infotec
Development, Portland, Oregon

A. Paul Newman

GIS Analyst and GIS/Remote Sensing
Specialist, Forest Service, Pacific
Northwest Region, Geometronics, GIS
Analysis Group, on contract from
Pacific Meridian Resources,
Portland, Oregon

Plaintiff's Injury

20. On May 20, 1993 the Chairman of NFRC, John C. Hampton,

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wrote to Dr. Thomas requesting the opportunity to observe FEMAT meetings, to review FEMAT documents and otherwise to monitor the operations of the working group:

We would like to develop a better understanding of what your group is doing, what issues you are discussing, how you are operating and what process you are following in developing your recommendations. We would like to attend the meetings of your group to observe the group in operation. We would also like the opportunity to appear before the group or to file written materials with the group providing information we believe would be directly helpful to your deliberations.

In addition, to better understand how the group has operated, we would like to look at all working papers, drafts, studies and other materials prepared by any member of the group for use in your deliberations. We would also like to see the minutes of each meeting of the group, which should reflect the persons present at each meeting, the matters discussed and the conclusions reached. Finally, we would like a copy of all transcripts of the proceedings of the working group.

Letter from John C. Hampton to Dr. Jack Ward Thomas (May 20, 1993).

21. On May 24, 1993 Dr. Thomas responded to Mr. Hampton denying his request:

Our rules of operation and our facilities do not allow for observers from various interest groups to observe our day to day operations. The records that you requested will not be forthcoming.

Letter from Dr. Jack Ward Thomas to John C. Hampton (May 24, 1993).
Plaintiff was never allowed to observe any meetings or to see any documents, drafts, minutes or transcripts of FEMAT.

VI. CLAIM FOR RELIEF

22. Defendant FEMAT was established or utilized by the President or one or more agencies in the interest of obtaining

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advice or recommendations for the President or one or more agencies or officers of the federal government.

23. Defendant FEMAT is not composed wholly of full-time officers or employees of the federal government. The individuals listed in paragraph 19 are members of FEMAT who are not full-time officers or employees of the federal government. In addition, FEMAT also included numerous other experts or consultants, including Terrence J. Frest and Edward Johannes among others, who, upon information and belief, served functionally as members of the team and are not full-time officers or employees of the federal government.

24. Despite the deliberate and repeated violations of FACA described in this complaint, defendants Espy and Babbitt have relied upon the recommendations of FEMAT to propose changes in federal forest management policy for the Forest Service and the BLM. The proposed new policies have injured and will further injure plaintiff.

VII. FIRST COUNT

(Violation of FACA § 10(a)(1))

25. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

26. Defendants violated § 10 (a)(1) of FACA by failing to open each meeting of FEMAT to the public. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

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VIII. SECOND COUNT**(Violation of FACA § 10(a)(2))**

27. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

28. Defendants violated § 10(a)(2) of FACA by failing to publish timely notice of each meeting of FEMAT in the Federal Register. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

IX. THIRD COUNT**(Violation of FACA § 10(a)(3))**

29. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

30. Defendants violated § 10(a)(3) of FACA by failing to allow plaintiff and other interested persons to attend, appear before, or file statements with FEMAT. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

X. FOURTH COUNT**(Violation of FACA § 10(b))**

31. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

32. Defendants violated § 10(b) of FACA by failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared

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for or by FEMAT. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

XI. FIFTH COUNT

(Violation of FACA § 10(c))

33. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

34. Defendants violated § 10(c) of FACA by failing to keep detailed minutes of each meeting of FEMAT, certified as accurate by defendant Thomas, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by FEMAT. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

XII. SIXTH COUNT

(Violation of FACA § 9(a))

35. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

36. Defendants violated § 9(a) of FACA by establishing FEMAT without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing FEMAT is in the public interest. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

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XIII. SEVENTH COUNT**(Violation of FACA § 9(c))**

37. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

38. Defendants violated § 9(c) of FACA by allowing FEMAT to meet and take action without filing an advisory committee charter containing the information required by § 9(c) of FACA. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

XIV. EIGHTH COUNT**(Violation of FACA § 5(b)(2))**

39. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

40. Defendants violated § 5(b)(2) of FACA by failing to require that the membership of FEMAT be fairly balanced in terms of the points of view represented and the functions to be performed by it. FEMAT was composed entirely of biologists, ecologists, economists and other scientists drawn from government and academia, although its function was "to produce management alternatives that would comply with existing laws and produce the highest contribution to economic and social well being." FEMAT Report at I-1. FEMAT had no member representing the views of forest products manufacturers, logging businesses, forest products employees, residents of timber-dependent communities, or local governments in timber-dependent areas although FEMAT was charged with developing legal, economic and social policies directly and adversely

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affecting each of these interests. While many members of FEMAT directly or indirectly represented the views of environmental organizations active in the forest controversy, no scientist who served on FEMAT had sufficient background or experience with forest products manufacturers, logging businesses, forest products employees, residents of timber-dependent communities, or local governments in timber-dependent areas to be able to give fair consideration to these interests in the development of alternative legal, economic and social policies. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

XV. NINTH COUNT

(violation of FACA § 5(b)(3))

41. Plaintiff repeats and realleges the allegations in paragraphs 1-23 as if fully set forth herein.

42. Defendants violated § 5(b)(3) of FACA by failing to assure that the advice and recommendations of FEMAT would not be inappropriately influenced by wildlife biologists and ecologists who constitute a special interest. This violation of FACA is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

XVI. REQUEST FOR RELIEF

WHEREFORE, plaintiff prays for judgment as follows:

1. Declaring that FEMAT is an advisory committee under FACA and must comply with all requirements of FACA and other applicable

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laws.

2. Declaring that defendants have violated FACA in the following ways:

a. Defendants violated § 10 (a)(1) of FACA by failing to open each meeting of FEMAT to the public.

b. Defendants violated § 10(a)(2) of FACA by failing to publish timely notice of each meeting of FEMAT in the Federal Register.

c. Defendants violated § 10(a)(3) of FACA by failing to allow plaintiff and other interested persons to attend, appear before, or file statements with FEMAT.

d. Defendants violated § 10(b) of FACA by failing to make available for public inspection and copying the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by FEMAT.

e. Defendants violated § 10(c) of FACA by failing to keep detailed minutes of each meeting of FEMAT, certified as accurate by defendant Thomas, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by FEMAT.

f. Defendants violated § 9(a) of FACA by establishing FEMAT without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing FEMAT is in the public interest.

g. Defendants violated § 9(c) of FACA by allowing FEMAT

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to meet and take action without filing an advisory committee charter containing the information required by § 9(c) of FACA.

h. Defendants violated § 5(b)(2) of FACA by failing to require that the membership of FEMAT be fairly balanced in terms of the points of view represented and the functions to be performed by it.

i. Defendants violated § 5(b)(3) of FACA by failing to assure that the advice and recommendations of FEMAT would not be inappropriately influenced by wildlife biologists and ecologists who constitute a special interest.

3. Declaring that each violation of FACA described in paragraph 2 herein is arbitrary and capricious, an abuse of discretion and without observance of procedure required by law, in violation of 5 U.S.C. § 706(2).

4. Permanently enjoining defendants Thomas, FEMAT and any member of FEMAT from convening, conducting or holding any meeting of FEMAT that is not in full compliance with §§ 5, 9 and 10(a)-(c) of FACA.

5. Permanently enjoining defendants Thomas and FEMAT to provide to plaintiff, within five working days and at no cost to plaintiff, a full and complete copy of all records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by FEMAT, irrespective of whether any such document otherwise is or could be exempt from disclosure under 5 U.S.C. § 552(b)(2), (5) or (7)-(9).

6. Permanently enjoining defendant Thomas to prepare and

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deliver to plaintiff, within 10 working days, detailed minutes of each meeting of FEMAT, certified as accurate by defendant Thomas, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by FEMAT.

7. Permanently enjoining defendants Espy and Babbitt, and their agents and employees, from utilizing, evaluating or considering the FEMAT Report or any recommendation by FEMAT as the basis for any federal program, policy, regulation or decision until FEMAT initiates and completes a new advisory process, in full compliance with FACA, to develop recommendations that might form the basis for any such federal program, policy, regulation or decision.

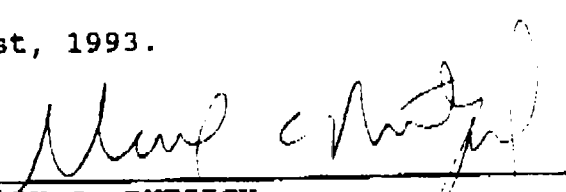
8. Awarding plaintiff its costs and disbursements, including reasonable attorney fees under the Equal Access To Justice Act, 28 U.S.C. § 2412.

9. Awarding plaintiff such other and further relief as the

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court may deem just and proper.

Dated this 6th day of August, 1993.



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Attorneys for Plaintiff NORTHWEST
FOREST RESOURCE COUNCIL.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL,)

Plaintiff,)

Civil No.)

vs.)

MIKE ESPY, in his official)
capacity as Secretary of)
Agriculture, et al.,)

Defendants.)

INTERROGATORIES AND REQUESTS FOR PRODUCTION
OF DOCUMENTS

To: Defendants MIKE ESPY, BRUCE BABBITT, DR. JACK WARD THOMAS
and FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM

Pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, plaintiff Northwest Forest Resource Council hereby requests that you answer the following interrogatories within 45 days of service of the complaint herein, or such shorter time as the court may set, and produce for inspection and copying documents identified herein at the offices of Preston Thorgrimson Shidler Gates & Ellis, 111 S.W. Fifth Avenue, Suite 3200, Portland, Oregon 97204, Preston Gates Ellis & Rouvelas Meeds Suite 500, 1735 New York Avenue N.W., Washington, D.C. 20006-4759, or another mutually agreeable location at 9:00 a.m. on the same date you answer the interrogatories.

DEFINITIONS AND INSTRUCTIONS

The following definitions apply to these Interrogatories and Requests for Production of Documents:

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different defendants answer individual interrogatories or requests for production differently, state each defendant's answer or response separately.

3. The term "relate" or "relating to" as used herein, includes from, to, referring to, concerning, alluding to, responding to, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, reflecting, analyzing, constituting, evidencing or pertaining to.

4. The term "FEMAT Report" means the report issued by FEMAT entitled *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment* (July 1993).

5. If any document responsive to these requests is withheld from production under a claim of privilege, each such document must be identified by furnishing the following information: (a) the nature of the document (e.g., memorandum, letter, computer tape, etc.); (b) date; (c) author or preparer; (d) sender; (e) addressee(s) (if any); (f) copyees (persons to whom a copy is indicated as having been sent); (g) the present custodian of the document; (h) the identity of each person who has been shown such document; and (i) each and every basis in fact and law relied upon for withholding the identity or production of such document.

6. These requests for production are continuing. If after the date of production specified herein, you come into the possession of any document responsive to any of the requests herein, you must give notice to plaintiffs's counsel specified below and produce such document within thirty days of the date upon which such document comes into your possession.

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1. The term "document" or "documents" is used in the broadest possible sense, and means any kind of printed, recorded, written, graphic or photographic matter (including tape recordings), however printed, produced, reproduced, coded or stored, of any kind or description, whether sent or received or not, including originals, copies, reproductions, facsimiles, drafts and both sides thereof, and including, without limitation: papers, books, accounts, letters, models, photographs, drawings, sketches, objects, tangible things, correspondence, telegrams, memoranda, work papers, interoffice communications, transcripts, minutes, reports and recordings of telephone or other conversations, or of committee meetings or of other meetings, statements, summaries, court pleadings, reports, indexes, contracts, licenses, agreements, ledgers, journals, books or records of account, summaries of account, balance sheets, income statements, appointment books, diaries, telephone logs and expense accounts, regardless of their author or origin, however denominated by you, which are now or which were formerly in your actual or constructive possession, custody or control. The term "document" or "documents" shall also mean exact copies or reproductions of any of the foregoing items upon which notations in writing, print or otherwise have been made or which do not appear in the originals.

2. The term "you" or "your" as used herein shall mean defendants Mike Espy, Bruce Babbitt, Dr. Jack Ward Thomas and Forest Ecosystem Management Assessment Team ("FEMAT" or "Team"), and any person or persons acting or purporting to act on their behalf or at their direction, including their attorneys. If

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response to Interrogatory No. 1, as appropriate) is not with a federal agency, state (1) the date that person commenced full-time federal employment, (2) the date that person ended full-time federal employment (if the employment has ended), (3) the terms of employment of that person (including wage, salary, hourly payment or GS level; medical insurance and other benefits; vacation and sick leave), (4) the total amount paid to that person in compensation for his or her federal employment to the later of the date of termination of such employment or the date you respond to this interrogatory, (5) the hiring official of that person, (6) the supervisor of that person and (7) the agency for whom that person works or worked.

Response to Interrogatory No. 4

Interrogatory No. 5

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, state the date and duration in hours of every occasion on which that person participated in FEMAT meetings, deliberations or discussions, and identify and describe in detail every other professional activity engaged in by that person (e.g., teaching, research, field work) during the period that person is

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Interrogatory No. 3

Describe the employment status (e.g., permanent full-time federal employee, part-time federal employee, contract employee, paid consultant, etc.) of every member of FEMAT and every person who served as an expert or consultant to FEMAT; and for each such person whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in response to Interrogatory No. 1, as appropriate) is not with a federal agency, identify all documents describing or relating to the employment status of each such person.

Response to Interrogatory No. 3

Request For Production No. 1

Please produce all documents described in response to Interrogatory No. 3.

Response to Request For Production No. 1

Interrogatory No. 4

For each person described in response to Interrogatory No. 3 as a full-time federal employee whose primary professional affiliation (as described on pages v-x of the FEMAT Report or in

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Interrogatory No. 1

Identify the name and primary professional affiliation of every person who served as a member of FEMAT. If your answer is different than the list of names and affiliations appearing on pages v-x of the FEMAT Report, please explain the reason for the difference.

Response to Interrogatory No. 1**Interrogatory No. 2**

Identify the name and primary professional affiliation of every person who worked with or for FEMAT as an expert or consultant whom you do not consider to be a member of the Team. Please describe in full the criteria you applied or utilized in determining whether a person who worked with the Team was a member of the Team both for the purposes of answering Interrogatory No. 1 and for preparing the list appearing on pages v-x of the FEMAT Report.

Response to Interrogatory No. 2

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claimed to have been a full-time federal employee, as identified in response to Interrogatory No. 4.

Response to Interrogatory No. 5

Interrogatory No. 6

For every person named in response to Interrogatory No. 2, state the date and duration in hours of every occasion on which that person participated in FEMAT meetings, deliberations or discussions, and identify and describe in detail the duties and functions performed by that person for FEMAT.

Response to Interrogatory No. 6

Interrogatory No. 7

State who established FEMAT, on what date, under what authority and for what purpose, describe the structure of FEMAT and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 7

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Request For Production No. 2

Produce all documents described in response to Interrogatory No. 7.

Response to Request For Production No. 2

Interrogatory No. 8

State who appointed Dr. Jack Ward Thomas Team Leader of FEMAT, when that appointment occurred, what authority Dr. Thomas was given as Team Leader of FEMAT, to whom he reported as Team Leader and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 8

Request For Production No. 3

Produce all documents described in response to Interrogatory No. 8.

Response to Request For Production No. 3

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Interrogatory No. 9

State who selected the Deputy Team Leader, the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the Economic Assessment Group, the Social Analysis Group and the Spacial Analysis Group and the members of FEMAT, identify each person who participated in, reviewed or approved the selection of those persons, describe what criteria were used to select those persons, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 9

Request For Production No. 4

Produce all documents identified in response to Interrogatory No. 9.

Response to Request For Production No. 4

Interrogatory No. 10

Describe in full the duties of the Deputy Team Leader and the leaders or co-leaders of the Terrestrial Ecology Group, the Aquatic/Watershed Group, the Resource Analysis Group, the Economic Assessment Group, the Social Analysis Group and the Spacial

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Analysis Group of FEMAT, describe who assigned them these duties, and identify all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 10

Request For Production No. 5

Produce all documents identified in response to Interrogatory No. 10.

Response to Request For Production No. 5

Interrogatory No. 11

Describe all efforts by you or any other person to select the membership of FEMAT so that it would be fairly balanced in terms of the points of view represented and the functions to be performed by it, and identify all documents relating to such efforts.

Response to Interrogatory No. 11

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Request For Production No. 6

Produce all documents identified in response to Interrogatory No. 11.

Response to Request For Production No. 6

Interrogatory No. 12

Describe in full the purpose, function and composition of the Forest Conference Executive Committee, including a description of who established the committee, when it was established, when if ever it was terminated, its relationship to FEMAT and its role in reviewing, analyzing or considering the options or recommendations set forth by FEMAT in its July 1993 Report, and produce all documents relating to your answer to this interrogatory.

Response to Interrogatory No. 12

Request For Production No. 7

Produce all documents described in response to Interrogatory No. 12.

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Response to Request For Production No. 7**Interrogatory No. 13**

Describe in detail all contacts, discussions, meetings and conversations between the President of the United States or the Vice President of the United States and FEMAT or any person acting as a representative of FEMAT.

Response to Interrogatory No. 13**Interrogatory No. 14**

Describe in detail all contacts, discussions, meetings and conversations between any employee of the Executive Office of the President (or "the White House") and FEMAT or any person acting as a representative of FEMAT.

Response to Interrogatory No. 14**Interrogatory No. 15**

State whether the President or Vice President ever received

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and reviewed the FEMAT Report or any other document prepared by or for FEMAT.

Response to Interrogatory No. 15

Interrogatory No. 16

State whether the Forestry Plan announced by the President on July 1, 1993 was based on a recommendation to the President by the Forest Conference Executive Committee, defendant Espy, defendant Babbitt, any other member of the Cabinet or any other person, committee or entity other than FEMAT; identify all documents relating to any such recommendation.

Response to Interrogatory No. 16

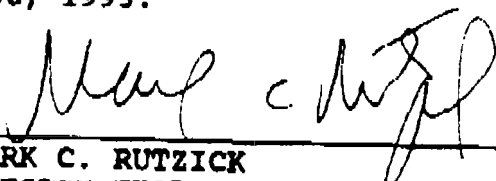
Request For Production No. 8

Produce all documents identified in response to Interrogatory No. 16.

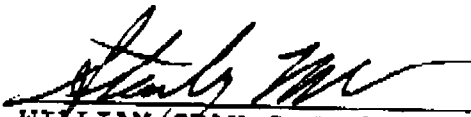
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Response to Request For Production No. 8

Dated this 6th day of August, 1993.



MARK C. RUTZICK
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WILLIAM GRAY SCHAFFER,
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Washington, D.C. 20006-4759
(202) 628-1700

Attorneys for Plaintiff NORTHWEST
FOREST RESOURCE COUNCIL

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

vs.

MIKE ESPY, in his official
capacity as Secretary of
Agriculture, et al.,

Defendants.

Civil No.

REQUESTS FOR ADMISSIONS

To: Defendants MIKE ESPY, BRUCE BABBITT, DR. JACK WARD THOMAS
and FOREST ECOSYSTEM MANAGEMENT ASSESSMENT TEAM

Pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, plaintiff requests that defendants, within 45 days after service of the complaint herein, or such shorter time as the court may set, admit in the manner prescribed by Fed. R. Civ. P. 36, the truth of each of the matters set forth below.

Each matter for which an admission is requested shall be admitted unless, within 45 days after service of the complaint herein, or such shorter time as the court may set, you serve upon plaintiff a written answer or objection addressed to the matter. If an objection is made, the reasons therefor shall be stated.

The answers shall specifically admit or deny the matter, or set forth in detail the reasons why you cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that you qualify an answer or deny only a part of the matter of which an

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admission is requested, you shall specify so much of it as is true and qualify or deny the remainder.

You may not give lack of information or knowledge as a reason for failure to admit or deny unless you state that you have made reasonable inquiry and that the information known or readily obtainable by you is insufficient to enable you to admit or deny the request.

Request For Admission No. 1

Defendant FEMAT was established or utilized by the President or one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the federal government.

Response to Request For Admission No. 1

Request For Admission No. 2

Defendant FEMAT is not composed wholly of full-time officers or employees of the federal government.

Response to Request For Admission No. 2

Request For Admission No. 3

Defendants Espy and Babbitt have relied upon the recommendations of FEMAT to propose changes in federal forest

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management policy for the Forest Service and the Bureau of Land Management.

Response to Request For Admission No. 3

Request For Admission No. 4

Meetings of FEMAT were not open to plaintiff or the public.

Response to Request For Admission No. 4

Request For Admission No. 5

Timely notice of each meeting of FEMAT was not published in the Federal Register.

Response to Request For Admission No. 5

Request For Admission No. 6

Defendants did not allow plaintiff and other interested persons to attend, appear before, or file statements with FEMAT.

Response to Request For Admission No. 6

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Request For Admission No. 7

Defendants did not make available for public inspection and copying the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by FEMAT.

Response to Request For Admission No. 7

Request For Admission No. 8

Defendants did not keep detailed minutes of each meeting of FEMAT, certified as accurate, that contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached and copies of all reports received, issued, or approved by FEMAT.

Response to Request For Admission No. 8

Request For Admission No. 9

FEMAT was established without specific authorization by statute or by the President and without a determination, published in the Federal Register, that establishing FEMAT is in the public interest.

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Response to Request For Admission No. 9

Request For Admission No. 10

Defendants never filed an advisory committee charter for FEMAT.

Response to Request For Admission No. 10

Request For Admission No. 11

Defendants did not select members of FEMAT with the intention of complying with the requirement of section 5(b)(2) of the Federal Advisory Committee Act that FEMAT's members be "fairly balanced in terms of the points of view represented and the functions to be performed by it."

Response to Request For Admission No. 11

Request For Admission No. 12

FEMAT had no member representing the views of forest products manufacturers, logging businesses, forest products employees, residents of timber-dependent communities, or local governments in timber-dependent areas.

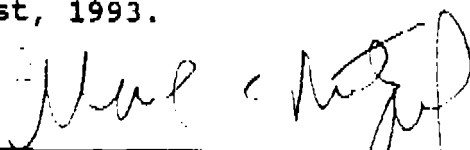
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Response to Request For Admission No. 12Request For Admission No. 13

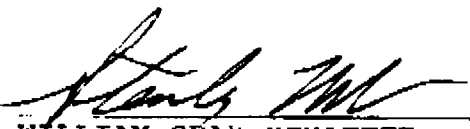
FEMAT was composed entirely of biologists, ecologists, economists and other scientists drawn from government and academia.

Response to Request For Admission No. 13

Dated this 6th day of August, 1993.



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Attorneys for Plaintiff NORTHWEST
FOREST RESOURCE COUNCIL

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 1993, a copy of the foregoing
Requests for Admissions and Interrogatories and Requests for Production of Documents
was served:

by hand delivery upon

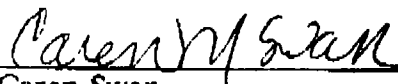
Ramsey Johnson, Acting
U.S. Attorney for the District of Columbia
555 4th Street, N.W.
Washington, D.C. 20001

by hand delivery and certified mail upon

U.S. Attorney General
10th & Constitution Ave., N.W.
Washington, D.C.

Mike Espy, Secretary of Agriculture
U.S. Department of Agriculture
14th Street and Independence Ave., S.W.
Washington, D.C. 20250

Bruce Babbitt, Secretary of the Interior
U.S. Department of the Interior
18th and C Streets, N.W.
Washington, D.C. 20240


Caren Swan

August 26, 1993

MEMORANDUM FOR DAVID COTTINGHAM

FROM: Todd J. Campbell 
Counsel to the Vice President

SUBJECT: Northwest Forest Resource Council v. Espy, et al.

As you know, we have argued in this FACA case that the Plaintiff should get the documents in question through FOIA. Accordingly, we must release the FOIA documents as soon as possible so that we do not undermine the FACA argument. In that regard I need your help.

The documents are being sent to Tim Obtes, attorney for the Department of Agriculture. He is going to review them prior to production for FOIA exceptions. However, we also need someone who understands the issues to review the documents. Please let me know if you can do this. Thanks for your help

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NR003

THE WHITE HOUSE

WASHINGTON

C O P
from ORM

April 30, 1993

John C. Hampton
Northwest Forest Resource Council
Suite 770
1500 S.W. First Avenue
Portland, Oregon 97201

Dear John:

Thank you for your letter. Your kind words of encouragement and support mean a great deal to me.

I want you to know how much I appreciate your participation in the Forest Conference. It was an important first step toward the resolution of the problems facing the Pacific Northwest. The success of the conference was a result an understanding by all parties that a viable solution can be found through discussion.

I have noted your concerns about the U.S. Fish and Wildlife Service. Be assured that the Vice President and I will give every consideration to your concerns. I appreciate your not filing a lawsuit during the 60 days allotted for the planning team to draft recommendations for solving the problems raised at the conference. I believe it is time to provide legislative leadership to address these issues, rather than through litigation.

Thank you for writing. I look forward to working with you in the future.

Sincerely,

Bill Clinton

060503



**NORTHWEST FOREST
RESOURCE COUNCIL***

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

Chairman
John C. Hampton

Vice Chairman/Legal
Committee Chairman
Bob Ragon

Finance Committee
Chairman
Bud Johnson

Public Relations/
Political Action
Committee Chairman
Cathy Baldwin

Technical Committee
Chairman
Charles H. Burley

Wildlife Committee
Chairman
R. Kirk Ewart

April 6, 1993

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. President:

I would like to thank you for calling the Northwest Forest Conference. As a participant representing the forest products industry, and on behalf of all of my colleagues in the industry, your personal commitment to resolve this crisis is both warmly received and greatly appreciated.

Our industry does not believe in policy-making through litigation. We believe that Congress and the land management agencies have the responsibility to make and implement policy. The courts, on the other hand, should do no more than review specific agency decisions to determine their consistency with the laws and regulations written.

We do believe, however, that in recent months, the U.S. Fish and Wildlife Service (FWS) has taken unlawful actions which have caused injury to companies and families in the forest products industry, and that under existing laws, the courts are the proper vehicle to redress those injuries. In deference to your request to take policy out of the courtroom and into the conference room, we have decided not to file these lawsuits during the time your Administration is developing a proposal to break the legal gridlock in the federal forests of the Northwest. We do want to take this opportunity to describe to you the events that have forced us to contemplate litigation.

In September of 1992, the FWS issued a decision to list the marbled murrelet as a threatened species in Washington, Oregon and California, even though as many as a million of these seabirds live in Alaska. This listing decision put hundreds of workers out of work immediately by forcing the Forest Service to abruptly halt logging on over 120 awarded timber sales, containing millions of board feet of valuable timber, until it had initiated and completed "Section 7 consultation" with the FWS under the Endangered Species Act (ESA) on each sale. This listing decision was in our

Re memo -

*Kate McBeatty
to draft
reply*

cc NH

*Representing

Associated Oregon Loggers
Columbia River Plywood Cooperatives
Douglas Timber Operators
Helicopter Logging Association
Northwest Forest Association

Northwest Independent Forest
Manufacturers Association
North West Timber Association
Oregon Forest Industries Council
Southern Oregon Timber Industries Association

Washington Citizens for World Trade
Washington Contract Loggers Association
Western Wood Products Association
Western Forest Industries Association
Willamette Forestry Council

The Honorable William J. Clinton
President of the United States
April 6, 1993
Page 2

*Cottingham -
is this true?*

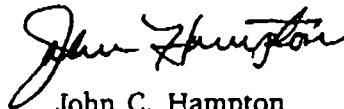
view completely unlawful because the murrelet population in these three states is not a species, a subspecies or a distinct population segment of a species, and is therefore not a listable unit under the ESA.

The FWS has also flagrantly and repeatedly violated the ESA by failing to complete the required consultations on these sales, and many others, within the 90-day deadline set by the ESA. The Forest Service submitted the 120 murrelet sales for consultation on October 1, 1992, yet today -- more than six months later -- no consultation on these sales have been completed. The FWS has failed to complete consultations on other federal timber sales originally submitted in 1990.

Although we believe the courts can, and if necessary will, remedy these statutory violations by the U.S. Fish and Wildlife Department, we hope we will not have to call upon them to do so. We believe constructive and long lasting solutions to put our people back to work in the federal forests of the Northwest can best be accomplished by a collaborative, legislative effort. We look forward to working with you and your Administration to achieve this end.

Sincerely,

NORTHWEST FOREST RESOURCE
COUNCIL



John C. Hampton
Chairman

JCH:sar