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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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- (2) Arguing to wrong at.

NORTHWEST FOREST RESOURCE COUNCIL,

Plaintiff,

Civil No. 93-1621 TPJ

VS.

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

Defendants.

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Defendants have moved to dismiss the complaint for mootness, laches, lack of standing and non-justiciability. None of these procedural defenses has merit, and plaintiff should be allowed to proceed with expedited discovery as quickly as possible to obtain the available, timely remedies for the injuries caused to it by defendants' violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. 2.

The case is not moot by any stretch of the imagination. The Forest Ecosystem Management Assessment Team ("FEMAT") has not been lawfully terminated; its purported self-termination is yet another violation of FACA, which plaintiff has amended its complaint to assert. Only the federal official creating an advisory committee can terminate the committee, and the termination can occur only after the committee files a public report not yet issued by FEMAT.

Since FEMAT still lawfully exists, plaintiff's rights to examine FEMAT's records still clearly exist. Even if FEMAT had been lawfully terminated, plaintiff's rights to examine its documents survive indefinitely under applicable Department of Interior regulations.

The case is not moot because plaintiff's injuries have not been remedied, and remedies are readily available to the court. The D.C. Circuit in *Association of Am. Physicians and Surgeons v. Clinton* ("AAPS"), __ F.2d __, 1993 WL 213920 (D.C. Cir. June 22, 1993) held, and the government agreed, that a FACA case survives

the termination of an advisory committee, and is not moot, where there is a dispute over the availability of the committee's records.

Other remedies are also available to the court. Defendants are now inflicting millions of dollars of financial harm on plaintiff and its members by unlawfully pre-implementing FEMAT's Option 9 through the immediate cancellation or modification of some 72 existing timber sale contracts before Option 9 is formally adopted. The court can grant meaningful and timely relief by enjoining the implementation of the unlawful FEMAT plan. It also has the authority to enjoin consideration or utilization of the unlawful plan for future decisions. The availability of these remedies, and the complete lack of relief afforded plaintiff to date, makes this case far from moot.

Laches does not bar plaintiff's claims, which were filed less than one month after some of them were uncovered and less than three months after all of them arose. The sole reason for the brief delay in filing this case was to honor the President's request "to stay out of the courtroom" while his Administration developed a proposal. Defendants claim no detrimental reliance on the short delay in filing this case, and could not since they must obey the FACA whether or not a citizen files suit to enforce the law.

Plaintiff has standing to assert all its claims. Defendants concede standing on Counts One, Two, Three, Four and Five.

Standing on the other claims also exists. Defendants' argument that plaintiff's injuries are too generalized to confer standing is simply wrong: plaintiff's injuries are particularized, concrete, actual and unique to plaintiff and others in the forest products industry and related interests. These injuries are clearly caused by defendants' unlawful actions, and are easily remediable by this court.

Plaintiff's Counts Eight and Nine are justiciable. In this case, the court is not called upon to second-guess a good faith effort to achieve fair balance and avoid undue influence under FACA. Plaintiff's claim is that the defendants did not even try to follow those legal requirements in this case; they ignored all the requirements of FACA including the need for fair balance and avoiding undue influence. The court can easily determine that defendants committed these violations.

The Court should deny defendants' motion to dismiss and should allow plaintiff to proceed at once with the expedited discovery it needs to obtain the timely and meaningful relief this court can and should grant it.

STATEMENT OF FACTS

At the conclusion of the Forest Conference in Portland, OR on April 2, 1993 President Clinton made a personal request to the parties to the Northwest forest controversy -- including plaintiff Northwest Forest Resource Council ("NFRC") -- to "stay out of the courtroom" while his Administration developed a proposal for

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 resolving the controversy over a 60-90 day period. Declaration of John C. Hampton, ¶ 4. NFRC decided to honor the President's request, and wrote him on April 6 to express NFRC's acceptance of "your request to take policy out of the courtroom and into the conference room" *Id.*, ¶ 5. To that end, NFRC deferred all litigation initiatives, including this case, until the President revealed the Administration's proposal. *Id.*, ¶¶ 6, 12. "The only reason the NFRC waited from May until August to file this case was to honor the President's request" *Id.*, ¶ 13. Filing the suit earlier "would have violated our pledge to the President." *Id.*, ¶ 7.

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 After the FEMAT Report was released in mid-July, NFRC began to hear reports that the team had been predisposed from the beginning to propose radical changes in forest management, and that it had allowed its political or ideological motivations to distort its scientific analysis. *Id.*, ¶ 9. NFRC also heard that documents disagreeing with its conclusions were suppressed or even shredded, and that all the scientific information that failed to support the views of team members was left out so that the Report would misleadingly create an appearance of scientific unanimity that does not in fact exist. *Id.* NFRC did not know who the members of FEMAT were until its report was released, and had no way of knowing until then that there was no member of the group that had any knowledge, understanding or affinity for the forest products industry, logging businesses or timber-dependent families and communities. *Id.* Only

upon reading the FEMAT Report could NFRC learn that FEMAT had deliberately crafted such a narrow range of alternatives for consideration by the President that any option he chose would fulfill the pre-disposed views of FEMAT members; and that, in effect, FEMAT had misled the President into a very flawed understanding of what options exist, and where a balanced solution might lie for the forest controversy. *Id.*

While the FEMAT process remains largely shrouded in the secrecy intended by its creators, some recent revelations by scientists involved in the process (although not on the Team) have confirmed NFRC's fears. Dr. Robert G. Lee, a noted forest sociologist at the University of Washington who attended the Forest Conference at the invitation of the President, was approached to serve as a consultant to FEMAT. Declaration of Robert G. Lee, ¶¶ 1, 3. To participate, he had to agree not to communicate FEMAT options or issues under discussion to any outside party until the report was made public. *Id.*, ¶ 3. After a futile month attempting to advise the group, he declined further participation because he became convinced FEMAT "was highly selective about both who would be involved and which factual claims were to be considered acceptable for formulating forest management options." *Id.*, ¶ 4. Believing "that the exclusion of unwanted personalities, issues and facts was not just bad science, but a disservice to both President Clinton and the American people," he withdrew from FEMAT "because I did not want my name associated with a report biased by

never participated?

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unprofessional exclusionary practices." *Id.* He wrote the President in May to warn Mr. Clinton that FEMAT was "apparently unbalanced and quasi-scientific." *Id.*, Exhibit A1. He alerted the President to the fact that "the scientists preparing this report appear to have assumed a policy-making role that goes well beyond delegated authorities for federal land management and protection of threatened and endangered species." *Id.*

Id.

Dr. Chadwick Dearing Oliver, a highly-respected forest ecologist, also participated in the Forest Conference, but was excluded from FEMAT. Declaration of Chadwick Dearing Oliver, ¶ 17. Among forest ecologists, there are two general schools, those who favor "natural preserves" as a means of maintaining diversity and those who favor "landscape management." Dr. Oliver, who favors landscape management, notes that not one of the 75 scientists on FEMAT supports landscape management; all of them were supporters of the natural preserves approach. *Id.*, ¶¶ 17-20. He believes FEMAT was therefore biased toward the natural preserves approach, a conclusion supported by the fact that all the options developed by FEMAT are based on the natural preserves approach. *Id.*, ¶ 22. He concludes:

As a result of the bias I have described, the FEMAT report is a document funded by the public which does not objectively reflect the full range of options publicly available from credible scientists familiar with the problem.

Id., ¶ 26.

Further, two of the mollusk scientists who worked as

consultants to FEMAT have publicly termed the FEMAT Report "'hastily prepared' and 'politically expedient,'" Exhibit 1 hereto, revealing that they were given just two days to assess the viability of some 80 species of mollusks under seven FEMAT alternatives.

Despite the unscientific and unbalanced nature of FEMAT and its Report, NFRC has no choice but to actively participate in the current public comment period on the draft supplemental environmental impact statement that is based on the FEMAT Report. Hampton Dec., ¶ 11. It has put together an interdisciplinary team of scientific experts to attempt to review the report. *Id.*

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The experts' effort has been frustrated in large part by their lack of access to the backup records, data, information and analysis used by the FEMAT Team. Dr. John F. Palmisano, a consulting fisheries biologist with a specialty in anadromous fish such as salmon and steelhead trout, states:

I have found that I cannot conduct a thorough and meaningful review of the report in its current form because I do not have access to the backup data, information and analysis on which the report relies. Virtually none of the backup data, information and analysis are set forth in the report itself.

Declaration of John F. Palmisano, ¶ 5. He notes that the "aquatic ecosystem assessment" of the Report, which he is reviewing, "is just 79 pages long, and is quite conclusory." *Id.* He believes the lack of backup documents is "substantially reducing the quality of review of the FEMAT Report I am able to prepare during the current

public comment period." *Id.*, ¶ 6.

Dr. James M. Sweeney, a terrestrial wildlife biologist, is reviewing the terrestrial ecosystem chapter in the FEMAT Report, which assesses the viability of over 1000 species. Declaration of James M. Sweeney, ¶¶ 1, 3. Because the biological analysis is "rather sketchy," he cannot complete a "satisfactory review" of the report without the underlying reports from dozens of consultants and other backup data that is currently unavailable. *Id.*, ¶ 4. The lack of these documents "makes it impossible for me to perform a thorough or exhaustive review of the biological analysis in the FEMAT Report." *Id.*, ¶ 5.

Similarly, Dr. Con H Schallau, a natural resource economist, has found that his review of the 43 page "rather superficial economic analysis" in the FEMAT Report has been frustrated by the absence of backup documents. Declaration of Con H Schallau, ¶¶ 1, 4. He states: "My inability to review backup economic information, data and reports used by FEMAT is substantially impairing my ability to conduct a comprehensive review of the economic analysis in the FEMAT Report during the current public comment period." *Id.*, ¶ 5.

Even though the Administration is nominally going through the motions of a public comment period on the President's plan, it has already begun aggressively to implement the President's plan throughout Oregon and Washington. On August 20, 1993 the Forest Service's Regional Forester for Oregon and Washington directed his

staff to proceed to modify or cancel 72 existing timber sale contracts -- with a combined value of tens of millions of dollars - - because of "impacts on riparian and aquatic systems based on the administrations [sic] proposed Alternative 9." Exhibit 2 (August 25, 1993 Letter from Dale A. Rettman, Siuslaw National Forest, to Seneca Sawmill Co., attaching August 20, 1993 memorandum from Regional Forester John E. Lowe).

Further, on July 30, 1993 five federal agencies joined together to create an "Interagency Implementation Team for the President's Forest Ecosystem Plan" with "full authority" to implement the plan. Exhibit 3. The harm caused by the illegality of FEMAT's operation, process and product is now being felt by NFRC and its members, and will continue to do so unless this court intervenes.

ARGUMENT

Standard for Motion to Dismiss

For purposes of defendants' motion to dismiss, plaintiff's allegations that FEMAT violated virtually every requirement of FACA must be taken as true, as must its allegations of injury.¹ *Lujan v. Defenders Of Wildlife*, ___ U.S. ___, 112 S. Ct. 2130, 2137 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990). By violating section 10 of FACA, which requires open meetings and

¹Government counsel's admission at the August 19, 1993 hearing that the government "still hasn't decided" if FEMAT is subject to FACA is a tacit admission that FEMAT did not follow FACA procedures in its establishment, operation or termination.

dissemination of documents, FEMAT has injured plaintiff by frustrating one of Congress' primary goals in enacting FACA: "assuring openness in the operations of advisory committees," which was "a strong safeguard of the public interest." H.R. REP. 92-1017, 92d Cong. 2d Sess (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3500; see also *Association of Am. Physicians and Surgeons v. Clinton*, 813 F. Supp. 82, 85 (D.D.C. 1993), rev'd on other grounds, ___ F.2d ___, 1993 WL 213920 (D.C. Cir., June 22, 1993).

Defendants' violation of the balanced representation requirement in section 5 frustrates Congress' goal of "prevent[ing] the surreptitious use of advisory committees to further the interest of any special interest group," which was also a "strong safeguard of the public interest." H.R. REP. 92-1017.

I. PLAINTIFF'S CLAIMS ARE NOT MOOT BECAUSE FEMAT HAS NOT BEEN LEGALLY TERMINATED, PLAINTIFF'S RIGHTS WOULD SURVIVE ANY TERMINATION, THE EFFECTS OF DEFENDANTS' PAST VIOLATIONS HAVE NOT BEEN REMEDIED, AND A DECISION ON THE MERITS WILL PROVIDE PLAINTIFF EFFECTIVE RELIEF.

"The burden of demonstrating mootness is a heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979), quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953). That burden rests with the party that claims mootness. *Id.* A case is moot only when "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.*

(citations omitted) (emphasis added); *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991).

The linchpin of defendants' mootness argument is that plaintiff's rights under § 10 of FACA end when a FACA committee "ceases to exist," that FEMAT terminated itself when it issued its report in July 1993 and, therefore, there is nothing for the court to decide. Defendants are wrong on all three counts: 1) FEMAT has not legally "ceased to exist," 2) even if it had, plaintiff's rights under § 10 survive, and 3) even if they did not survive, the case is not moot because the injuries caused by FEMAT's FACA violations still exist and have not been remedied, and plaintiff's requested remedies will redress many of those injuries.

A. *FEMAT Has Not Been Legally Terminated And Plaintiff's Rights Under § 10 of FACA Remain Intact.*

Defendants argue that despite FEMAT's wholesale disregard of FACA, plaintiffs' claims are moot because FEMAT has declared that "[its] work . . . is complete."² Defendants thus argue that FEMAT can meet and operate in secret, evading all public accountability, and can then deprive plaintiff of its rights simply by declaring at the end of the secret process that it no longer exists.

Far from proving mootness, defendants have simply confessed yet one more violation of FACA by FEMAT: an advisory committee lacks the power under the Advisory Committee Act to terminate itself; only the federal official creating the agency can terminate

²FEMAT Report at I-3.

an advisory committee. Defendants have yet to identify who created FEMAT, and they do not claim that any federal official terminated FEMAT.

Integral to FACA's purposes was to give the federal government control over advisory committees so that private citizens could not control federal funds and personnel. See H.R. REP. 92-1017, 92d Cong. 2d Sess (1972), *supra*, at 3498. An advisory committee meeting can only be called or adjourned by a federal official serving as the committee's chair. § 10(e), (f).

Central to the federal control of advisory committees is the power to terminate a committee. The charter for an advisory committee (which was never filed in this case) must specify a termination date, § 9(c)(F), or else the committee automatically exists for the statutory two-year period prescribed in § 14. Once the charter is filed, the only permissible shortening of a committee's term is if "the President or agency head terminates it before that time by revoking or abolishing its establishment authority." 41 C.F.R. § 101-6.1027(a)(3) (GSA regulations implementing FACA).

These provisions are important to assuring that funds spent on advisory committees are not wasted. If an advisory committee could put itself out of business at any time, it could negate all the money and effort put into the committee by deliberating for years (consuming large amounts of federal funds for travel and support) and then disbanding before fulfilling its mission or issuing a required report. Or it could issue an inflammatory report

exceeding its jurisdiction and then disband to prevent the withdrawal of the report. Or it could write a biased, unscientific report and then disband to prevent the public from gaining access to its files to discredit the report -- exactly what happened here. Congress prevented all these abuses by granting federal officials the exclusive power to terminate an advisory committee.

Defendants of course make no claim that any federal official has ever revoked or abolished FEMAT's authority.³ They rely instead on a single passage of the FEMAT Report which does not in fact claim that FEMAT has been terminated or cease to exist, but merely asserts that "our work . . . is complete." FEMAT Report at I-3. This passage is at best ambiguous, since it leaves open the entirely reasonable possibility that the President or whoever created FEMAT might well ask it to do more "work" in the future.

The declaration by defendant Jack Ward Thomas, chairman of FEMAT, dated August 27, 1993 does not help the government's position at all. He simply repeats the self-termination announcement in the FEMAT Report. Dr. Thomas, a Forest Service employee, did not appoint FEMAT, and does not (and could not) claim the power to create or terminate an advisory committee. He has no way of knowing whether the still-unidentified federal official that

³Indeed, FEMAT's chairman, Dr. Jack Ward Thomas, apparently viewed FEMAT as in existence on July 29, 1993 when he directed a memorandum regarding the preservation of documents to "FEMAT." See Defendants' Memorandum In Opposition To Plaintiff's Motion For a Temporary Restraining Order, second attachment (August 19, 1993). Defendants relied on this memorandum to avoid a temporary restraining order for the preservation of FEMAT documents.

created FEMAT may ask it to perform additional duties in the future, and does not claim that the appointing official terminated the committee.

Even if the FEMAT Report and Dr. Thomas' declaration were deemed to be an attempt by FEMAT to terminate itself, they could not be legally effective under FACA since they did not emanate from the establishing official. Even if an advisory committee had the power to terminate itself at some point, the termination could not be legal under FACA at this time for this committee. Since FEMAT concededly closed all of its meetings to the public, it has a duty under § 10(d) of FACA before it terminates to issue a report summarizing its activities at these closed meetings "and such related matters as would be informative to the public consistent with the policy of [the Government in the Sunshine Act]," § 10(d); see also 41 C.F.R. § 101-6.1035(c) and (d) (reports summarizing closed meetings must also be filed with the Library of Congress). FEMAT has not issued this report. Plaintiff has amended its complaint to allege that any attempted self-termination by FEMAT violates § 14 of FACA, and that any termination of FEMAT before it complies with § 10(d) violates that provision. See Amended Complaint, Tenth Count For Relief.

Because defendants now rely on the Thomas declaration and because plaintiff has already filed a motion seeking expedited discovery relevant to the Thomas declaration (Interrogatories 7-12; Requests For Production 2-7), the court cannot grant dismissal

until it permits plaintiff to conduct necessary discovery to controvert Dr. Thomas' apparent claim that FEMAT has been terminated. AAPS, 1993 WL 213920 at *29 n. 11; Fed. R. Civ. P. 56(f).

However, since as a matter of law FEMAT continues to exist, and will do so until the federal official who created the group issues an order terminating it, the court can deny the motion to dismiss without discovery on the ground that plaintiff plainly continues to be entitled to documents under § 10(b) of FACA.

B. Plaintiff's Rights to Documents Under FACA Survive The Termination of the Committee.

Even if FEMAT were in fact terminated, plaintiff's rights to documents under § 10(b) of FACA survive and can be judicially enforced. The Department of Interior has issued binding regulations under FACA applicable to "advisory committees to advise the Secretary of the Interior and Bureau of Land Management on matters relating to public lands and resources under the administrative jurisdiction of the Bureau of Land Management." 43 C.F.R. § 1784.0-1.; see generally 43 C.F.R. Subpart 1784. FEMAT is such an advisory committee and, therefore, is governed by these regulations.⁴

The regulations direct that all advisory committee records "shall be available for public inspection and copying in the Bureau

⁴The DSEIS notes that the Secretary of Interior is the decision-maker for BLM lands, and that he is relying on the FEMAT Report. DSEIS, unnumbered second page and S-1-2.

of Land Management office responsible for support of that committee." 43 C.F.R. § 1784.5-3(b). Unlike § 10(b) of FACA as defendants view it, this right does not expire upon the termination of the committee. It continues indefinitely. Thus, the termination of the committee, even if it had occurred, does not extinguish plaintiffs' rights to examine FEMAT documents. Nor does the regulation allow the withholding of some documents under FOIA exemptions; "[a]ll records" are to be available. *Id.* (emphasis supplied).

C. *Even if FEMAT No Longer Exists, This Case is Not Moot Because A Live Controversy Remains Over the Availability of FEMAT's Documents And the Current Pre-Implementation of Option 9.*

1. *Continuing denial of records.*

Even if FEMAT had been properly terminated, the D.C. Circuit has held that if the availability of committee documents remains at issue the case "still presents a live controversy" and the advisory committee's termination "does not render [the] case moot." *AAPS*, ___ F.2d ___, 1993 WL 213920 at n.1. "A case is not moot as long any single claim for relief remains viable" *Ramer v. Saxbe*, 522 F. 2d 695, 704 (D.C. Cir. 1975).

In *AAPS*, the Department of Justice acknowledged to the D.C. Circuit that the FACA controversy over the health care task force remained live after the (legal) termination of the task force: "Accordingly, the appeal will continue to present a live controversy so long as any dispute exists regarding document disclosure under section 10(b) and the district court's order." Appellants' /

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Cross-Appellees' Response Regarding Mootness (April 12, 1993) at 3 (Exhibit 4 hereto). The government cannot reverse itself here in identical circumstances. In any event the D.C. Circuit's ruling that the AAPS case was not moot is binding on the government here; the circuit court's finding of subject matter jurisdiction to rule on whether the health care task force was subject to FACA was a holding necessary to the court's ruling on the merits.

The defendants here continue, in violation of FACA, to withhold all of the documents prepared by and for FEMAT. As Drs. Palmisano, Sweeney and Schallau have testified, these documents are critical to plaintiff's ability to analyze and critique the FEMAT Report. This court has the power to order FEMAT or its members to make available all of these documents that still exist. AAPS, 1993 WL 213920 at *29 n.1. Compare *National Nutritional Foods Assoc. v. Califano*, 457 F. Supp. 275, 281 (S.D.N.Y. 1978), *aff'd*, 603 F.2d 327 (2d Cir. 1979) (claims alleging violations of FACA deemed moot only because government had already made available for public inspection all existing relevant and material documents relied on by the FACA advisory group). Since the government has pledged to this court on the record that it will preserve "all" FEMAT documents, there is a large body of available records that should have been made available to plaintiff and can be made available at the direction of the court.

The power of a court to grant relief after a statutory right has expired is well established, and follows from the fundamental

equitable rule that "it is a well-established prerogative of the Court to treat as done that which should have been done." *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 57 (D.C. Cir. 1977), quoting *Commonwealth of Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1387 (D.D.C. 1973); accord, *Niagara Mohawk Power Corp. v. Federal Power Comm'n*, 379 F.2d 153, 160 (D.C. Cir. 1967). Thus, even where a statute prohibits an agency action after a certain date, when the agency has acted unlawfully before the date, a reviewing court may order it to take proper remedial action after the statutory deadline. *Houston Lighting & Power Co. v. United States*, 606 F. 2d 1131, 1144 (D.C. Cir. 1979); *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 650 (D.C. Cir. 1973).

2. Unlawful pre-implementation of FEMAT recommendation.

In addition, and far more importantly, the case is not moot because the defendants are currently implementing the unlawful FEMAT Report as Administration policy -- even before any decision by defendants Espy or Babbitt adopting it, as shown by the Forest Service's plan to modify or cancel 72 timber sale contracts now based on "proposed Alternative 9." Exhibit 2, page 1. All the harmful effects of defendants' violations of FACA are still being felt by plaintiff and its members (who hold the majority of all outstanding Forest Service timber sale contracts). Thus, there is plainly "some tangible, concrete effect, traceable to" the FACA violation still in existence, and the case is not moot. *Penthouse*, 939 F. 2d at 1019.

D. The Court Has Equitable Power to Grant Other Forms of Relief as Necessary and Appropriate to Remedy Proven Violations of FACA.

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This court has broad inherent equitable power to fashion appropriate declaratory and injunctive relief to remedy the harms which will be proven. See *Sierra Pacific v. Lyng*, 866 F.2d 1099, 1111 (9th Cir. 1989) (upholding district court's authority to order broad equitable relief for logging and timber firms by modifying their Forest Service contracts; explaining that district court "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action"); *Ramos v. Lamm*, 639 F.2d 559, 586 (10th Cir. 1980) (confirming that district court has "broad" equitable powers, including power to shut down an entire state prison facility; court remanded case to district court for reconsideration of prison officials' own attempts to remedy the violations); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 227 (1969) (affirming and reiterating district court's power to retain jurisdiction over and enjoin county school Board of Education from continuing its segregated school system, noting district court's "traditional equitable flexibility to shape remedies in order to adjust and reconcile public and private needs"). Accordingly, where tangible harm from a FACA violation still exists, this court has the authority and discretion to fashion the appropriate remedy, including enjoining defendants from implementing or relying upon the unlawful FEMAT Report until FEMAT complies with FACA.

Plaintiff has requested various forms of relief including an order enjoining the defendants from utilizing, evaluating or considering the FEMAT Report for any federal decision. Amended Complaint, Prayer For Relief, ¶ 8. Defendants openly concede that this relief would be effective to remedy the FACA violations alleged in this case. They argue that although effective, this relief is "unreasonable and without foundation." Memorandum In Support of Defendants' Motion to Dismiss ("Defendants' Memorandum") at 11. Far from proving mootness, this argument clearly highlights the vitality of the dispute between the parties. If the case were really moot, there would be no relief available to the court. Defendants' strenuous efforts to protect the FEMAT Report shows that the injuries alleged in the complaint are real and are caused by that Report.

The court's power to fashion appropriate equitable relief for FACA violations even after the termination of the committee (even if such a lawful termination had in fact occurred) is confirmed by the D.C. Circuit's interpretation of the analogous open meetings provisions of the Government in the Sunshine Act, 5 U.S.C. § 552b. That statute requires most multi-headed agency meetings to be open to the public, like advisory committee meetings must be open to the public. The statute authorizes suit for any violation up to 60 days after an unlawful closed meeting is held. 5 U.S.C. § 552b(h)(1).

The D.C. Circuit has confirmed on three occasions that a

reviewing court has the power to set aside an otherwise lawful agency action taken at a meeting closed in violation of the Sunshine Act "where the violation was intentional, prejudicial and of a serious nature." *Railroad Comm'n of Texas v. United States*, 765 F. 2d 221, 231 (D.C. Cir. 1985); *Braniff Master Executive Council v. C.A.B.*, 693 F. 2d 220, 226 (D.C. Cir. 1982); *Pan American World Airways, Inc. v. C.A.B.*, 684 F. 2d 31, 36 (D.C. Cir. 1982). Defendants' violations of FACA in this case were "intentional, prejudicial and of a serious nature" by any measure.

The equitable power of a reviewing court was also made clear in *Hunt v. Nuclear Regulatory Comm'n*, 468 F. Supp. 817 (N.D. Okla.), *aff'd*. 611 F.2d 332 (10th Cir. 1979). There, plaintiffs sought a preliminary and permanent injunction under the Sunshine Act, prohibiting the Nuclear Regulatory Commission from closing its hearings regarding the Black Fox nuclear power station, and from restricting public access to a sensitive report presented and discussed at those hearings.

The court ruled that the case was not moot notwithstanding the fact that the hearings had been concluded and the injunction was thus no longer necessary. The court explained that "the cessation of allegedly illegal acts may determine the appropriateness of injunctive relief from those acts, but it will not make the case moot." 468 F. Supp. at 819 (citing *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953)). The *Hunt* court held that it had the power to "grant such equitable relief as it deems proper,"

including "ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld" under the Sunshine Act. *Id.*⁵

That this court has the authority and discretion to enjoin defendants from utilizing, evaluating or considering the FEMAT Report until FEMAT complies with FACA is illustrated by cases decided under FACA as well. In *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215 (D.D.C. 1976), remanded on other grounds, 580 F.2d 689 (D.C. Cir. 1979), the court implicitly held that it had jurisdiction under FACA to grant the sort of relief that plaintiffs seek here. The court entertained plaintiffs' request that it enjoin the Secretary of Transportation from implementing certain highway safety standards promulgated after closed meetings with a FACA advisory committee. *Id.* at 226.

The *Tiemann* court employed a balancing test to determine whether to overturn the regulations, taking note of the facts that the tainted regulations were no longer in effect, and that plaintiffs had been able to participate in at least some aspects of the proceedings. *Id.* Although the court ultimately declined to grant the requested relief, this ruling did not alter the court's implicit holding that it had the jurisdiction and power to grant such relief. The *Tiemann* court's analysis would favor broad relief

⁵The court noted that its decision regarding non-mootness was reinforced by the fact that the Sunshine Act specifically authorizes the bringing of an action to enforce its open meeting requirements up to sixty days after the meeting occurred. 5 U.S.C. § 552b(h)(1). *Id.* at 820.

for plaintiff here since the FEMAT Report remains in effect as Administration policy, and plaintiff was completely shut out of the process of its development. Compare *Playboy Enterprises, Inc. v. Meese*, 746 F. Supp. 154, 156-57 (D.D.C. 1990), *aff'd by Penthouse International, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991) (plaintiff's claims for permanent injunctive relief moot only because Court had already previously granted equivalent relief by issuing a preliminary injunction against the FACA group, which injunction had eradicated the harms alleged).

This court's equitable power to issue such relief has also been demonstrated in cases decided under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. In *Shell Oil Co. v. Environmental Protection Agency*, 950 F.2d 741, 745 (D.C. Cir. 1991), plaintiffs challenged certain of the EPA's hazardous waste rules, alleging that the EPA had promulgated these rules in violation of the APA's notice and comment requirements. Despite the fact that the EPA had spent months conducting hearings and years conducting negotiations on the rules, the court vacated the rules and ordered the EPA to reopen public comment. *Id.* at 765.

Similarly, in *State of Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441, 445 (D.C. Cir. 1989), the court invalidated two orders issued by the Department of Transportation regulating airline advertising, because the agency had failed to follow the notice and comment requirements of the APA. The court noted the well-established principle of administrative law that a rule

designed to implement, interpret, or prescribe law or policy "cannot be given effect unless promulgated through notice-comment procedures." *Id.* See also *American Lithotripsy Soc'y v. Sullivan*, 785 F. Supp. 1034, 1036-1037 (D.D.C. 1992) (court stayed enforcement and implementation of a Medicare classification due to violation of notice and comment requirement; court ordered agency to make publicly available all data, studies, and material information relevant to the classification, and to receive public comment and discussion).

These cases demonstrate that this court has the authority as well as the discretion to order the relief requested by plaintiffs. Moreover, the possible lack of *appropriateness* of specific injunctive relief does not render the case moot, it simply affects the *remedy* the court ultimately orders. The fact that the court might ultimately exercise its discretion and not grant one form of injunctive relief does not alter the fact that a live controversy exists between the parties. Because the court *can* order relief that will presently affect plaintiff's rights, this case is not moot.

Defendants are asking the court to put the remedial cart before the litigation horse. The time for the court to determine how to exercise its remedial powers is *after* the court rules on the merits, with a complete record -- not on a motion to dismiss a complaint. The court cannot make an informed judgment as to how to exercise its remedial powers before it hears the case and learns for itself defendants' deliberate scheme to knowingly evade FACA in

order to conduct the kind of secret government that should have disappeared long ago. At the conclusion of the case, plaintiff believes the court will determine that equity and fairness require the eradication of the FEMAT Report from all federal decisions. Since the court has the power to grant that relief, and cannot decide whether to exercise that power on a motion to dismiss, the court must find that the case is not moot, and should allow the litigation to proceed as promptly as possible.

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E. This Case Is Not Moot Because FEMAT's FACA Violations Are Capable of Repetition Yet Evading Review.

Where the "underlying dispute between the parties is one 'capable of repetition, yet evading review,'" a case is deemed justiciable and not moot, even if the violation complained of has ended. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 546 (1976), citing *So. Pac. Terminal Co. v. ICC*, 219 U.S. 498 (1911); *In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1328 (D.C. Cir. 1985). The doctrine applies if "(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Meyer v. Grant*, 486 U.S. 414, 417 n.2 (1988), citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

Plaintiffs here will continue to be subjected to and greatly affected by the FEMAT recommendations, which the government admits will form the basis for its new forest management strategy. In addition, defendants may well use another FEMAT-like group for

future forest management decisions in the Northwest. Thus, the "capable of repetition" prong of the doctrine is satisfied here. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-78 (1979).

The fact that FEMAT's meetings were of short enough duration to be said to "evade review" is supported by the Supreme Court's decision in *Meyer v. Grant*. There, the Court found that Colorado's initiative law, which granted proponents of an initiative "only six months" in which to obtain the necessary signatures, was too short a time to fully litigate the legality of Colorado's prohibition against paying initiative circulators. *Id.* at 417 n.2. The Court noted that "[t]he likelihood that a proponent could obtain a favorable ruling within that time, much less act upon such a ruling in time to obtain the needed signatures, is slim at best." *Id.*

Here, plaintiffs had an even shorter time in which to challenge FEMAT's FACA violations. If FEMAT's purported self-termination was effective, it existed for just two months. Moreover, because part of FEMAT's illegal conduct was its failure to notify the public of the time and place of its meetings, plaintiffs were put at the additional disadvantage of not knowing when or where FEMAT's FACA violations were occurring. Defendants' conduct is clearly the sort described by the Supreme Court in *Meyer v. Grant* as being "too short to be fully litigated prior to its cessation or expiration." *Id.*

Accordingly, this case is not moot because the controversy between plaintiffs and defendants is capable of repetition, yet

evading review.

F. The Availability of NEPA Public Comment Procedures Or FOIA Rights Does Not Cure FEMAT's FACA Violations Nor Invalidate Plaintiff's FACA Rights.

Defendants argue that because the FEMAT Report has been incorporated into the DSEIS, plaintiffs' rights under FACA are somehow mooted. The fact that plaintiffs can comment on the DSEIS under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., is small comfort to plaintiffs, and defendants have cited no caselaw holding that the availability of NEPA procedures moots rights under FACA.⁶ The DSEIS, which might normally be expected to disclose the basis for its conclusions, contains no such information, since apparently FEMAT did not disclose this information to the Forest Service or the BLM.

In any event, the scope of comment on the DSEIS is limited to the environmental impacts of the proposal, a narrower range of issues than the broad economic and social policy concerns with which FEMAT was concerned. It is questionable if the current comment period on the DSEIS offers plaintiff as broad an opportunity to comment as it would have had if FEMAT had operated according to FACA, as it should have. See *Association of American Physicians v. Clinton*, 813 F. Supp. at 94 (despite other

⁶The unreported case of *Kaibab Industries v. Lujan*, No. 91-1155 PHX WPC (D. Ariz. Jan. 29, 1992), upon which defendants rely, does not support their claim that this case should be dismissed for mootness. Although the Kaibab court declined to grant the requested remedy, the court heard and decided on the merits plaintiffs' claims that defendants had violated FACA. See Slip Op. at 3-4.

opportunities to comment, FACA's purpose is "to open contemporaneously to the light of public scrutiny the workings of advisory committees subject to FACA.")

Nor does the fact that plaintiffs have made FOIA requests for FEMAT's documents moot their FACA claims. In *American Lithotripsy Soc'y v. Sullivan*, 785 F. Supp. 1034, the court rejected a similar argument made by an agency that had violated the APA's notice-and-comment requirements. The court rejected the defendants' suggestion that the availability of documents through FOIA after the fact was equivalent to participating contemporaneously during the notice and comment period. *Id.* at 1036.

Similarly, plaintiffs here were entitled to have the opportunity to observe and participate in the crafting of federal forest management policy options while they were being developed by FEMAT, rather than later after the issues and options have already been defined and narrowed.

II. THE ACTION IS NOT BARRED BY THE DOCTRINE OF LACHES.

Defendants argue that this action, filed less than three months after plaintiffs were denied access to FEMAT meetings and documents, and less than one month after the release of the FEMAT Report, is barred by the doctrine of laches. There is no legal support for this argument, and it must be rejected.

Plaintiff's claim is well within the applicable six-year statute of limitations under 28 U.S.C. § 2401 for actions against the government. It is far from clear that the equitable doctrine

of laches applies to bar suits against the government filed within the relevant statute of limitations. The D.C. Circuit has specifically stated that "[t]he law of this circuit is clear: the words "every civil action" mean what they say. . . . [T]his court's . . . opinions clarify beyond dispute that § 2401(a) applies to all civil actions whether legal, equitable or mixed." *Spannaus v. United States Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) (citations omitted) (applying six year limitations period to FOIA claims).⁷ Defendants cite no case where a timely claim against the government was barred by laches.

Assuming that laches is a valid affirmative defense to a timely action against the government, whether laches bars an action in a particular case depends on the specific facts of that case. *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). The government carries the burden of proving all the elements of laches. *National Wildlife Fed'n v. Burford*, 835 F.2d 305, 318, (D.C. Cir. 1987); *Rozen v. District of Columbia*, 702 F.2d 1202, 1203 (D.C. Cir. 1983); *Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966). The government clearly has not met this burden of proof. They cite no case where laches has been invoked to dismiss an action filed less than one month after some injury

⁷In *Spannaus*, the issue before the court was whether 28 U.S.C. § 2401(a) applied to statutory rights created by the Freedom of Information Act, which is silent as to a limitations period. See 5 U.S.C. § 552. The court concluded that the six-year limitations period applied. *Spannaus*, 824 F.2d at 55-56. Like FOIA, FACA contains no specific limitations period for bringing actions under it. The standard six-year limitations period therefore applies.

occurred, and less than three months after all the injury occurred.

In *N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Educational Fund, Inc.*, 753 F.2d 131, 137-38 (D.C. Cir.), cert. denied, 472 U.S. 1031 (1985), the court outlined the common law elements of laches. These include (1) a substantial unexcused delay by plaintiff prior to filing suit; (2) plaintiff's awareness of its injury; and (3) defendant's justifiable detrimental reliance on plaintiff's actions or inaction during this period. *Id.* Defendants cannot meet their burden of proof on any of these three elements.

A. No Substantial Unexcused Delay.

Plaintiff's delay was not substantial. The action was filed just three weeks after the FEMAT Report revealed some of the statutory violations (e.g., no balanced membership, inappropriate influence) and less than three months after plaintiffs were excluded from FEMAT meetings.

Nor was the delay unexcused. As NFRC's chairman John Hampton has testified, "The only reason the NFRC waited from May until August to file this case was to honor the President's request to 'stay out of the courtroom' while his Administration developed a proposal for resolving the forest controversy." Hampton Dec., ¶ 13. See *Mogavero v. McLucas*, 543 F.2d 1081 (4th Cir. 1976) (periods in which settlement negotiations take place should not be counted for determining laches). Deferring the filing of a legal action at the request of the defendant is surely the most excusable reason for delay; any contrary rule would force parties to file

suit prematurely or unnecessarily, burdening the courts with needless cases.

B. No Awareness of Injury.

Not until the FEMAT Report was issued did plaintiff learn who its members were, what its mission was, and how badly biased its approach to that mission was. FEMAT kept its membership secret during its deliberations; there was literally no way for plaintiff to find out whether its membership was balanced, or whether its report was influenced by a special interest, until the report was issued. This action was filed three weeks after the report was released.

C. No Reliance on Plaintiff's Inaction.

Defendants woefully misinterpret the "reliance interest" required for a laches defense; they claim they satisfy the test because "the government has substantially relied on the FEMAT's work." Defendants' Memorandum at 18. This is not the reliance interest required for laches. In *N.A.A.C.P.*, the court held that the defendant must have justifiably relied on the *plaintiff's* actions. *N.A.A.C.P.*, 753 F.2d at 138. See also *U.S. Express, Inc. v. U.S. Express, Inc.*, 799 F. Supp. 1241, 1247 (D.D.C. 1992) (requiring a finding that the defendant's prejudice was the result of justifiable reliance on the plaintiff's actions); *Concerned About Trident v. Schlesinger*, 400 F. Supp. 454, 478 (D.D.C. 1975) (injurious reliance on action of plaintiff required).

Defendants do not claim, and could not claim, that they relied

on plaintiff's failure to file suit between late May and early August, or on any other action or inaction by plaintiff. The government is supposed to obey the law whether or not a private party chooses to file suit. When government action is involved, members of the public are entitled to assume that public officials will act in accordance with the law. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982). "It is difficult to say a government agency can be prejudiced by forcing it to comply with the law." *Environmental Defense Fund v. Alexander*, 614 F.2d 474, 479 (5th Cir.), cert. denied, 449 U.S. 919 (1981).

One of the principal elements of reliance is a change in position. See, e.g. *N.A.A.C.P.*, 753 F.2d at 137; *Concerned About Trident v. Schlesinger*, 400 F. Supp. at 478. The government does not claim, and could not claim, that it has changed its position in reliance on NFRC action or inaction.

III. PLAINTIFFS HAVE STANDING TO ASSERT COUNTS SIX, SEVEN, EIGHT AND NINE.

Defendants assert that plaintiff lacks standing to assert counts Six (no legal authorization for FEMAT), Seven (no charter filed), Eight (membership not fairly balanced) and Nine (failure to assure report not inappropriately influenced by a special interest) on the ground that plaintiff's complaints "are far too generalized to confer standing." Defendants' Memorandum at 19. This argument has no merit.

Defendants do not contest plaintiff's standing on its first five claims, a position dictated by the Supreme Court's holding in

Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 109 S. Ct. 2558, 2563-64 (1989); see *Assoc. of Am. Physicians and Surgeons*, 813 F. Supp at 84 n.2. They do not dispute the existence of an injury suffered by plaintiff (as they cannot on a motion to dismiss). They do not dispute that the injury is caused by defendants' actions, and they do not dispute that the injury is redressable by this court.

Defendants' sole standing argument is that plaintiff's injuries are too generalized to confer standing because they are "held in common by all members of the public." Defendants' Memorandum at 19, quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974) (no standing to challenge member of Congress serving in armed forces reserves).

The simple answer to this argument is that the Amended Complaint (like the original complaint) shows that it is obviously not true. The Eighth Count, for example, alleges:

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 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.

Amended Complaint, ¶ 40. This very precise allegation of injury is specific to "forest products manufacturers, logging businesses, forest products employees, residents of timber-dependent communities, or local governments in timber-dependent areas," and could not be held in common by all members of the public since not all members of the public are included in those groups. Members of environmental organizations, for example, would presumably be quite happy with the membership of FEMAT. The fact that many members of the public share plaintiff's injuries (which is certainly true in many parts of the affected region) does not mean plaintiff can not establish standing where the jurisdictional prerequisites exist. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973).

Plaintiff has presented specific proof of the lack of balance of FEMAT. Dr. Oliver has described in detail how he and every other scientist who favors landscape management (an approach that produces a higher level of commodity production than the natural preserve approach and would in general be more favorable to plaintiff) were systematically excluded from FEMAT. Oliver Dec., ¶¶ 10-23. Dr. Lee found FEMAT to be "biased by unprofessional exclusionary practices." Lee Dec., ¶ 4.

The harm caused by FEMAT's biased, unbalanced membership is concrete, particularized and actual. See *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2136. The Forest Service and the BLM are

currently implementing FEMAT's Option 9 today, even before the agencies officially adopt it. The Forest Service plans immediately to modify or cancel 72 existing timber sale contracts worth tens of millions of dollars -- contracts belonging to members of plaintiff NFRC -- based on "proposed Alternative 9." Exhibit 2 hereto; Exhibit 3; Memorandum In Support of Plaintiff's Motion For Expedited Discovery, Exhibit C (Forest Service Decision Notice based on Option 9). The DSEIS admits that Option 9 will cause "unemployment, increased poverty and social disruption" in rural timber-dependent communities. DSEIS at S-17. *The biased, unscientific FEMAT Report could not have been written if FEMAT had been fairly balanced as required by FACA.*

In *National Anti-Hunger Coalition v. Executive Committee*, 711 F.2d 1071 (D.C. Cir. 1983), the court stated: "When the [fair balance] requirement is ignored, therefore, persons having a direct interest in the committee's purpose suffer injury-in-fact sufficient to confer standing to sue." *Id.* at 1074 n.2. Plaintiff has alleged a direct interest in FEMAT's purpose, and has standing under this rule. Accord, *National Anti-Hunger Coalition v. Executive Comm.*, 557 F. Supp. 524, 527 (D.D.C. 1983). In *Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419 (D.C. Cir. 1989), two members of the court explicitly or implicitly found standing on a FACA fair balance claim, while one found no standing. *Id.* at 419-20.

In *Public Citizen v. Department of Health and Human Services*

(DHHS), 795 F. Supp. 1212 (D.D.C. 1992), the court found no standing on a FACA fair balance claim, but on facts markedly different than here. In that case, plaintiff sued 10 months after a committee issued a recommendation to Congress to enact legislation. (Interestingly, the Department of Justice did not claim the case was moot. See *id.* at 1213.) The court found that enjoining the report would have no effect on Congress, and therefore the injury was not redressable. *Id.* at 1222. Here, the injury is clearly redressable; an order enjoining defendants from implementing Option 9, or considering it as the basis of any future federal decision, will completely and effectively remedy the harm caused by the biased report.

Plaintiff also has standing on the other challenged counts. The Ninth Count complains that FEMAT was inappropriately influenced by a special interest -- wildlife biologists and ecologists. Not every member of the public shares this complaint; some members of the public no doubt favor decisions made by wildlife biologists and ecologists. Likewise, the injuries underlying the Sixth and Seventh Counts, relating to the lack of legal authorization and charter for FEMAT, are causally related to all of plaintiff's injuries. The point of these two claims is that FEMAT could not have lawfully been established as it was in fact constituted. Had defendants complied with the establishment and charter requirements, FEMAT as appointed could not exist, and all the injuries that have occurred to plaintiff would not have occurred.

These injuries are specific to forest products manufacturers, logging businesses and related interests -- they are not even remotely "held in common by all members of the public."

Each of the challenged counts (Six, Seven, Eight and Nine) is based on a distinct, particularized injury in fact to plaintiff, the injury is caused by defendants' violations of FACA, and the injury is redressable by an order prohibiting defendants from implementing the unlawful FEMAT Report or utilizing it as a basis for their decisions. Nothing more is required for standing. *Lujan v. Defenders of Wildlife*, 112 S.Ct at 2136.

IV. COUNTS EIGHT AND NINE ARE JUSTICIABLE.

Defendants assert that counts Eight (membership not fairly balanced) and Nine (failure to assure report not inappropriately influenced by a special interest) are not justiciable. Defendants misunderstand these claims, and their argument is wrong.

In *National Anti-Hunger Coalition v. Executive Comm.*, 711 F. 2d 1071, the D.C. Circuit reached the merits of a FACA fair balance claim, implicitly rejecting any claim of non-justiciability. *Id.* The district court did likewise. *National Anti-Hunger Coalition v. Executive Comm.*, 557 F. Supp. 524. While Judge Silberman's opinion in *Public Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, found such a claim non-justiciable, the two other members of the court disagreed, reaching the merits or remanding for the district court to reach the merits. In *AAPS*, 1993 WL 213920, the court simply acknowledged Judge

Silberman's argument without deciding it. *Id.* at *29 n.2. In *Public Citizen v. DHHS*, the court adopted the Silberman position. 795 F. Supp. at 1220-22.

The fair balance claim in this case is different -- and far more clearly justiciable -- than the claims in the two *Public Citizen* cases. Here the claim is that the defendants did not even try to comply with the fair balance requirement of FACA. In each of the two *Public Citizen* cases the groups in question were acknowledged advisory committees, and the defendants claimed they had achieved fair balance on the committee; plaintiffs disagreed with the result of the effort. In this case defendants have not even acknowledged FEMAT was an advisory committee (they "still haven't decided," according to their counsel at the August 19 hearing), and they cannot claim they even attempted to comply with the fair balance requirement of FACA. It will take no probing of administrative balance standards (there weren't any), and no second guessing of discretionary judgments (there weren't any of those, either), for this court to determine that defendants violated FACA by failing to follow the fair balance requirement. Likewise, plaintiff claims that defendants did not even try to avoid improper influence on FEMAT, since they simply ignored all FACA requirements completely.

Thus, counts Eight and Nine of the Complaint are justiciable under *National Anti-Hunger Coalition v. Executive Comm.*, 711 F.2d 1071. The reasons for the non-justiciability arguments advanced in

the two *Public Citizen* cases are inapplicable here since the court need only perform the traditional judicial function of determining that a government agency did not even try to follow the law -- a task the Administrative Procedure Act plainly assigns to the courts.

CONCLUSION

The motion to dismiss should be denied. Plaintiff should be permitted to proceed with expedited discovery as quickly as possible.

DATED this 30 day of August, 1993.



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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,

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 BABBITT, 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.

Civil No. 93-1621 TPJ

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(Violations of Federal Advisory Committee Act,
5 U.S.C. Appendix 2, and 43 C.F.R. § 1784.5-3)

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

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

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

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

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

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

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

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

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.

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

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

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
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Terry Locke

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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,

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

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).

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) and 43 C.F.R. § 1784.5-3)

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

32. Defendants violated § 10(b) of FACA and 43 C.F.R. § 1784.5-3 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. 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).

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).

IV. 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

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. TENTH COUNT

(Violation of FACA §§ 10(d) and 14)

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

44. Defendants assert that FEMAT terminated itself upon the issuance of the FEMAT Report. This asserted self-termination by FEMAT violates § 14 of FACA which, along with § 9 of FACA, gives federal officials the exclusive authority to terminate a federal advisory committee, and prohibits a federal advisory committee from terminating itself. In addition, FEMAT may not lawfully be terminated until it has issued the report required by § 10(d) of FACA describing its activities at meetings closed to the public, which report has not been issued to date. The purported self-termination of FEMAT in violation of §§ 10(d) and 14 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).

XVII. 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 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 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.

j. The purported self-termination of FEMAT is null and void and of no force and effect because such purported self-termination violates §§ 10(d) and 14 of FACA.

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 defendants Thomas and FEMAT to issue the report required by § 10(d) of FACA summarizing its activities at meetings of FEMAT which were closed to the public.

7. Permanently enjoining defendant Thomas to prepare and 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.

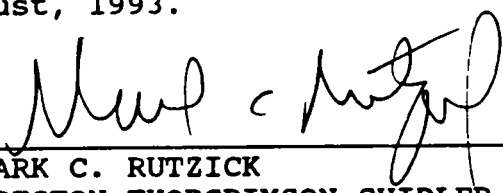
8. Permanently enjoining defendants Espy and Babbitt, and their agents and employees, from utilizing, evaluating or considering the FEMAT Report or any recommendation by FEMAT as the basis for any federal program, policy, regulation or decision until FEMAT initiates and completes a new advisory process,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

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

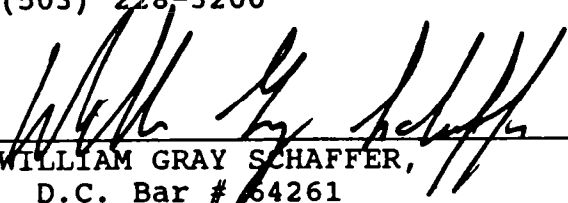
10. Awarding plaintiff such other and further relief as the

court may deem just and proper.

Dated this 30th day of August, 1993.



MARK C. RUTZICK
PRESTON THORGRIMSON SHIDLER GATES
& ELLIS
3200 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204-3688
(503) 228-3200



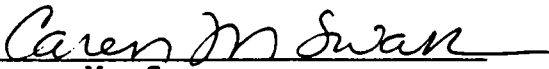
WILLIAM GRAY SCHAFFER,
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ROUVELAS MEEDS
Suite 500
1735 New York Avenue N.W.
Washington, D.C. 20006-4759
(202) 628-1700

Attorneys for Plaintiff NORTHWEST
FOREST RESOURCE COUNCIL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Complaint for Declaratory and Injunctive Relief was served on August 30, 1993 by hand delivery upon the following:

Elizabeth Pugh, Esq.
Gail Walker, Esq.
Robert Whitman, Esq.
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530


Caren M. Swan

Petition to protect 83 types of mollusks criticizes Clinton plan

■ The Oregon Natural Resources Council wants the species that live in old-growth forests under the wing of the Endangered Species Act

By KATHIE DURBIN
of The Oregonian staff

More than 80 species of mollusks — snails, freshwater clams and slugs — face possible extinction under President Clinton's forest plan and require protection under the Endangered Species Act, the Oregon Natural Resources Council said Monday.

The council, drawing on a strongly worded critique by scientists, petitioned the government to protect 83 species of mollusks that live in the Northwest's old-growth forests.

The petition represents the first legal salvo fired by environmentalists against the president's plan, released July 1. Already, a timber industry group has sued the administration over the process scientists used in developing forest management options for the president's consideration.

Clinton promised at an April 2 Forest Conference to find a balanced solution to the long-running Northwest forest conflict.

"Our goal in filing the petition is not only to protect the species, but to highlight the significant weaknesses of the Clinton plan," council spokesman Jim Middaugh said Monday. "It is definitely intended to show it is not an ecosystem plan, it is a political plan. If the administration's own scientists say it will not take care of a minimum of 83 species that live in ancient forests, you know there are some problems."

The petition is based on a report by Seattle scientists Terrence J. Frest and Edward J. Johannes of Deixis Consultants. The government asked the two malacologists, or mollusk experts, to evaluate nine of 10 proposals developed by the scientific panel.

In July, the scientists made their report public and sent a letter to U.S. Forest Service Chief F. Dale Robertson saying they had "serious reservations" about whether the Clinton plan would protect old-growth forest biodiversity, even if it were fully implemented.

"This is the first group of scientists who participated in the plan who are willing to speak out," Middaugh said.

The scientists called the process the scientists followed "hastily prepared" and "politically expedient." Frest said they were given only two days in June to determine how seven of the options — including Option 9, Clinton's choice — would affect the mollusks' survival. Moreover, he said, Clinton's team switched methods for rating the species' survival chances between May and June, creating a confusing process.

"They basically said they had deadlines to meet in getting their report done," he said.

Frest and Johannes identified 108 sensitive mollusk species or subspecies whose ranges overlap with the northern spotted owl's range in old-growth forests of Washington, Oregon and Northern California.

They gave many of the mollusks only a 20 percent to 40 percent chance of maintaining stable populations across the range of national forests covered by the owl plan.

Frest said he felt that many mollusks could be provided for with just a small change in the administration's plans. Mollusks are routinely wiped out in areas that are clearcut or even thinned with heavy machinery, and can't move to a new part of the forest, he said.

Clinton's preferred Option 9 threatens mollusks more than other options scientists developed because "it does allow thinning and salvage logging in the old-growth reserves," Frest said. "The salvage and the cutting will wipe out most of the forest floor species."

Mollusks, though not glamorous, are important to the forest ecosystem because they feed on decaying material, producing humus, an important nutrient in forest soil, said Joy Belsky, staff ecologist for the Natural Resources Council. Logging trees killed by fire or insects removes their food and damages their habitat by increasing the amount of sunlight and reducing the amount of moisture on the forest floor. Mollusks in turn provide food for a variety of birds and animals, she said.

The U.S. Fish and Wildlife Service has 90 days to evaluate the endangered species petition.

The Associated Press contributed to this report



EXHIBIT



United States
Department of
Agriculture

Forest
Service

Siuslaw
National
Forest

4077 S.W. Research Way
P.O. Box 1148
Corvallis, OR 97339-1148

Reply To: 2450

Date: August 25, 1993

RECEIVED

AUG 27 1993

SENECA SAWMILL CO.

Seneca Sawmill Co.
P. O. Box 8
Eugene, OR 97440

Dear Siuslaw Timber Sale Purchaser:

The Regional Forester requested that we analyze our sold and awarded timber sale contracts in relation to impacts on riparian and aquatic systems based on the administrations proposed Alternative 9. The Region has completed a review of our analysis and advised us to proceed with the necessary changes we identified. A copy of the Regional Forester's August 20, 1992 memo with a list of the affected contracts is enclosed for your information.

The Forest Service Representative will contact your representative concerning these proposed changes. Our first priority will be contracts that have completed marbled murrelet surveys and no finding of occupied behavior. If you have any questions please contact me at 503-750-7018, Robert Schulz at (503-750-7102), or the designated Forest Service Representative.

Sincerely,

Dale A. RETTMANN
Contracting Officer

Enclosure

cc: 01, 02, 03, 05

EXHIBIT

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Caring for the Land and Serving People



United States
Department of
Agriculture

Forest
Service

RO

Reply to: 2450

Date: August 20, 1993

Subject: Sold and Awarded Sale Analysis

To: Forest Supervisors

We have completed the review of your analysis of sold and awarded timber sales in relation to impacts on riparian and aquatic systems. A total of 72 units were identified as requiring some form of adjustment. Forests have indicated that modification to 55 of these units can be accomplished within the framework of the contract. Seventeen units were identified as requiring changes which may require an environmental modification to either change or delete the unit.

You should proceed to modify or delete those units where you have determined a change is needed. Contracting Officers will pursue these modifications through mutual modification whenever possible. If this cannot be done, you should pursue environmental modification under the terms of the contract.

/s/ John E. Lowe

JOHN E. LOWE
Regional Forester

Author: S. Paulson, DG, 08/20/93
I Concur: S. Paulson 08/20/93
I concur: S. Burk, 08/20/93

EXHIBIT

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CATEGORY 1: SALES INSIDE KEY WATERSHEDS (I F) OR H
(SALES NOT LIKELY TO RESULT IN SIGNIFICANT ADVERSE IMPACT)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
SALE NAME	GROSS SALE VOLUME MBSP	ACRES	POTENTIAL SIGNIFICANT LONG TERM ADVER AQ/RIP IMPACT	CAN IT BE MODIFIED/ MITIGATED Y/N	NET VOLUME IN COL. 4	COMMENTS
CRAZY 25	5.154	156				All volume has been cut.
NORTH BALL	1.037	21	No			
INDIAN HOOK	15.136	191	No			
WARIA SKYLINE	12.894	189	No			
SULPHUR	9.500	117	No			
TRIN MANN	0.315	33	No			
FORWARDER 103	8.458	122	No			
FORWARDER 717	2.424	34	No			

R-97%

5033425492

06-27-93 10:58AM P004 #43

EXHIBIT

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(SALES HIGHLY LIKELY TO RESULT IN SIGNIFICANT ADVERSE IMPACTS)

(1)	(2)	(3)	(4)	(5)	(6)	(7)
SALE NAME	CROSS SALE VOLUME HRS	ACRES	POTENTIAL SIGNIFICANT LONG TERM ADVER AQ/RIP IMPACT	CAN IT BE MODIFIED/ MITIGATED Y/N	VOLUME IN COL. 4	COMMENTS
CHAZY POWDER	1.736	28	Yes	Yes	.003	Trees within problem area of unit 4 buffer will be designated as wildlife leave trees. Purchaser will be compensated with equal volume by trading for other reserve timber through agreement.
FRANKLIN RIDGE	6.640	117	Yes	Yes	.015	Buffer upper headwall area (large leaning old growth fir etc.) in southwest edge of unit 1.
HADSBALL 79 BB	2.029	39	Yes	Yes	.090	Unit 3: buffer three Class III streams. Class I buffer is good.
LOWER SWERT	1.762	44	Yes	Yes	.030	Enlarge interior buffers of Class III streams for unit 2.
SOUTH FANTON	9.867	151	Yes	Yes	.020	Enlarge buffer in northwest portion of unit 1 and buffer interior Class III stream in Unit 3. Units 2, 5, 6, and 8 have no significant long term impact.
RANDALL SALADO	6.641	302	Yes	Yes	.100	Unit 2 would need the a buffer in the SW corner expanded (it is also an occupied Barrelet site). The remaining units have no significant long term impact.
BEAMER 712	8.626	96	Yes	Yes	.500	Class III streams unbuffered in units 1 & 2, and headwalls unbuffered in unit 1.
KILLER GRASS 719	5.511	47	Yes	Yes	.350	Class III streams and headwalls unbuffered in unit 3.
UPPENTEN 002	14.354	204	Yes	Yes	.950	Class III stream and headwall unbuffered in units 1, 2, & 3. Extension of buffer for Class III stream in unit 4.
WHEELLOCK 403	5.731	113	Yes	Yes	.175	Class III stream and headwall unbuffered in unit 1, extension of buffer for Class III stream in Unit 4. Units 2 & 3 have no significant long term impact..

EXHIBIT

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Page 4 of 4

Environmental Protection
Agency, Region 10
500 Sixth Avenue
Seattle, WA 98101

USDI Fish & Wildlife
Service, Region 1
911 N.W. 11th Avenue
Portland, OR 97232

USDI Bureau of Land
Management, Oregon/
Washington State Office
1300 N.E. 44th
P.O. Box 2965
Portland, OR 97208

USDO/NOAA National
Marine Fisheries Service
7600 Sand Point Way, N.E.
Bin C-15700, Bldg. 1
Seattle, WA 98115

USDA Forest Service
Region 6
P.O. Box 3623
Portland, OR 97208
333 S.W. First Avenue
Portland, OR 97204

Reply to: 1200

Date: July 30, 1993

Subject: Interagency Implementation Team

To: Dale Hall (USFWS); Elaine Zielinski (BLM); Nancy Graybeal (USFS)
Elizabeth Garr (NMFS), Bob Courson (EPA)

Effective immediately, you are assigned to the Interagency Implementation Team for the President's Forest Ecosystem Plan. Your team will be chaired by a representative from the White House. Your current duties will be reassigned while you accomplish this task.

You are assigned full authority to carry out the following duties:

1. Coordinate and facilitate interagency implementation decisions, ensuring timely process flow and issue resolution.
2. Prepare implementation action plans.
3. Establish necessary working teams.
4. Set goals, objectives, and timeframes for working teams.
5. Make recommendations to Regional and WO Interagency Executive Teams on issues of strategic importance.
6. Take whatever actions are needed to implement policy and decisions flowing from Regional and WO Interagency Executive Teams.

You are asked to assemble the Regional and/or Washington Interagency Executive Teams when strategic decisions are needed; when policy changes are needed; or when allocation of resources is being decided.

The exact extent of this assignment is unknown, but we do not anticipate it lasting longer than December 31, 1993.

/s/Rolland Schmitten

Rolland Schmitten
Regional Director
National Marine
Fisheries Service

/s/Gerald A. Emison

Gerald A. Emison
Acting Regional
Administrator
Environmental Protection
Agency

/s/Marvin L. Plenert

Marvin L. Plenert
Regional Director
U.S. Fish & Wildlife
Service

/s/John E. Lowe

John E. Lowe
Regional Forester
USDA Forest Service
Pacific Northwest Region

/s/Dean Bibles

D. Dean Bibles
State Director
Bureau of Land Management

EXHIBIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF AMERICAN
PHYSICIANS AND SURGEONS, INC.,
AMERICAN COUNCIL FOR HEALTH CARE
REFORM, AND NATIONAL LEGAL &
POLICY CENTER,

Plaintiffs-Appellees/
Cross-Appellants,

v.

HILLARY RODHAM CLINTON, DONNA
E. SHALALA, Secretary of Health
& Human Services, LLOYD E.
BENTSEN, Secretary of the
Treasury, LES ASPIN, Secretary of
Defense, JESSE BROWN, Secretary
of Veterans Affairs, RONALD H.
BROWN, Secretary of Commerce,
ROBERT B. REICH, Secretary of
Labor, LEON E. PANETTA, Director
of the Office of Management and
Budget, ALICE RIVLIN, Deputy
Director of the Office of
Management and Budget, CAROL
RASCO, IRA MAGAZINER, and JUDITH
FEDER, White House Advisors, and
THE PRESIDENT'S TASK FORCE ON
NATIONAL HEALTH CARE REFORM,

Defendants-Appellants/
Cross-Appellees.

Nos. 93-5086, 93-5092

[D.D.C. No. 93-399]

APPELLANTS'/CROSS-APPELLEES'
RESPONSE REGARDING MOOTNESS

Appellants-cross/appellees heraby respond to the Court's
order directing the parties to address the issue of impending
mootness.

1. In our responsive brief, we indicated that the Task
Force would likely exceed the time frame originally anticipated
by the President, but that it still planned to present its
recommendations in May, 1993. When the work of the Task Force is

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completed, some of the issues presented by this appeal, such as right of access to Task Force meetings, will cease to present a live controversy.

However, as the government explained in its briefs, the district court's order imposes a broad range of requirements on the Task Force, including compliance with the document disclosure provisions contained at section 10(b) of the Federal Advisory Committee Act. Plaintiffs have filed document requests pursuant to this provision which seek all documents, records, reports, transcripts, minutes, and other papers "which have been or will be made available to or have been prepared by the [Task Force]." (A copy of those requests is appended as Attachment 1.) The government responded to those requests on April 1, 1993. (A copy of the government's responses is appended as Attachment 2.) Further documents which plaintiffs may assert are covered by their section 10(b) requests and encompassed by the district court's order will likely continue to come into existence until the Task Force completes its work.

Availability of relief under section 10(b), like all other relief sought by plaintiffs and awarded by the district court, turns on the district court's determination that the Task Force is an "advisory committee" within the meaning of the FACA and, if so, that the statute may constitutionally be applied to its workings. Absent such a determination, the FACA disclosure provisions do not apply; the Freedom of Information Act does not

apply independently to the Task Force in any event. See Meyer v. Bush, 981 F.2d 1288 (D.C. Cir. 1993). Accordingly, the appeal will continue to present a live controversy so long as any dispute exists regarding document disclosure under section 10(b) and the district court's order. Cf. Ellis v. Brotherhood of Ry., Airline & Steamship Clerks, 466 U.S. 435, 442 (1984) (appeal is not moot where one aspect of claim remains to be resolved).

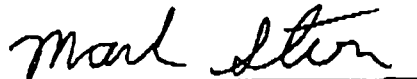
We note that in a filing today, April 12, 1993, plaintiffs assert that the government's response to their document request is insufficient, and seek additional injunctive relief. (Plaintiffs' amended complaint is appended as Attachment 3.)

2. If, prior to issuing its decision, this Court determines that the appeal has become moot, the Court should vacate the District Court's order and dismiss the case. See University of Texas v. Camenisch, 451 U.S. 390 (1981) (if a preliminary injunction becomes moot during the pendency of an appeal, the appeal should be dismissed and the lower court decision vacated whether or not the case as a whole may continue to be live); Honig v. Students of California School for the Blind, 471 U.S. 148 (1984) (per curiam); West Virginia Ass'n of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1577 (D.C. Cir. 1984) (dismissing appeal as moot and vacating district court order denying preliminary injunction); National Kidney Patients Assn' v. Sullivan, 902 F.2d 51 (D.C. Cir. 1990) (dismissing appeal from preliminary injunction and vacating judgment of district court).

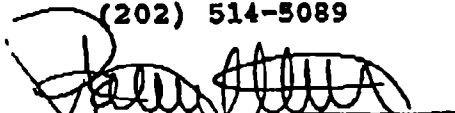
These decisions reflect the well-established doctrine that where an appeal ceases to present a live controversy, "it is the duty of the appellate court to set aside the decree below * * *." Great Western Sugar Co. v. Nelson, 442 U.S. 92, 93 (1979), quoting Duke Power Co. v. Greenwood County, 299 U.S. 259, 267 (1936); see United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950).

In sum, issues pertaining to document disclosure may continue to present a live controversy even after the Task Force completes its work at an anticipated date of mid to late May. However, if the Court determines that the appeal is moot before issuing its decision, it should vacate the decision below and dismiss the appeal.

Respectfully submitted,



MARK B. STERN
(202) 514-5089


PATRICIA A. MILLETT
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Attorneys, Appellate Staff
Civil Division, Room 7124
Department of Justice
Washington, D.C. 20530-0001

APRIL 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOHN C. HAMPTON

John C. Hampton, with full knowledge of the penalty of perjury, declares as follows:

1. My name is John C. Hampton. I am the Chairman of the Northwest Forest Resource Council ("NFR"), the plaintiff in this action. NFR represents 13 trade associations of businesses in the forest products industry in Oregon and Washington, including several hundred lumber and plywood manufacturers and hundreds of logging companies, which collectively employ over 100,000 people in the two-state region. I am also the president and chief executive officer of Hampton Affiliates, a small independent lumber manufacturer and wholesaler in northwestern Oregon. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. I have served as Chairman of NFR since 1989. NFR has represented the forest products industry on major regional timber supply issues relating to the federal forests managed by the Forest Service and the Bureau of Land Management ("BLM"). NFR has served

as the focal point for the views of the forest products industry on issues relating to the northern spotted owl, old growth forest and the maintenance of a stable and adequate timber supply, including litigation, administrative proceedings and legislative contacts.

3. I attended the President's Forest Conference in Portland, Oregon, on April 2, 1993 as a representative of the forest products industry, and in particular on behalf of NFRC. During the morning session I made a presentation to the President and Vice President on the forest controversy, and had discussion on with those officials and other panelists on the key issues.

4. At the conclusion of the Conference the President made a personal request to the parties to the forest controversy:

I want everyone to examine his or her approach to existing legal and administrative proceedings to see if inadvertently any of us are hampering the march toward a solution of the larger issues, or even toward the particular ones now in litigation.

. . . .

So when you leave here today, I ask you to keep working for a balanced policy that promotes the economy, preserves jobs and protects the environment even as you may disagree, as Mr. Thomas said, over how the word "balance" should be defined. When you hit an impasse, I plead with you not to give up, and don't turn against your neighbors. You don't have to fight in a court of law anymore. You can work with us to try to have a long-term solution.

If you feel frustrated -- at times, all of us will -- I ask you to stay at the table and to keep talking and keep trying to find common ground. I don't want this situation to go back to posturing, to positioning, to the politics of division that has characterized this difficult issue in the past.

5. Following the President's request, the board of directors of the NFRC met to consider the request. After consideration, the board voted to accept the President's request, and to "stay out of the courtroom" until the President announced his Administration's proposal. On April 6, 1993 I wrote a letter to the President conveying the NFRC's acceptance of his request (Exhibit BBB).

6. The NFRC honored its pledge to the President. We initiated no new litigation while the President's plan was under development. Instead, we waited to learn what the President's plan would be. When we heard that a group called the Forest Ecosystem Management Assessment Team ("FEMAT") was meeting in secret to develop options for the President, and apparently included a number of non-federal members, we were advised that the group's activities appeared to violate the Federal Advisory Committee Act ("FACA"). On May 20 I wrote a letter to the chairman of the Team, Dr. Jack Ward Thomas, asking him to grant NFRC the rights to which we appeared to be entitled under FACA. On May 24 Dr. Thomas responded denying our request.

7. Although we realized at that time that we could have pursued our legal rights immediately by filing a lawsuit against FEMAT, that would have violated our pledge to the President. We decided that we would continue to honor our commitment to the President, as he had requested, and that we would refrain from filing such a lawsuit until the President revealed his proposal.

8. On July 1, 1993 the President announced a proposal, but only in the most general of terms. While he announced that he was proposing one of the options developed by FEMAT, the FEMAT Report

was not yet released, and we did not know, and could not find out, what the proposal actually was. The first time the FEMAT report was made available to us was when a copy was given to our attorney on July 16, 1993.

9. Upon reviewing the FEMAT Report, we learned, for the first time, who its members were. We learned that there was no member of the group that had any knowledge, understanding or affinity for the forest products industry, logging businesses or timber-dependent families and communities. We began to hear reports that the team had been predisposed from the beginning to propose radical changes in forest management, and that it had allowed its political or ideological motivations to distort its scientific analysis. We heard reports that documents disagreeing with its conclusions were suppressed or even shredded, and that all the scientific information that failed to support the radical views of team members was left out so that the Report would misleadingly create an appearance of scientific unanimity that simply does not exist. It began to appear that FEMAT had deliberately crafted such a narrow range of alternatives for consideration by the President that any option he chose would fulfill the radical mission of FEMAT members; in effect, FEMAT mislead the President into a very flawed understanding of what options exist, and where a balanced solution might lie. Until reading the Report, we had no way of verifying that such charges could even possibly be true. Upon reviewing the Report, we found that such charges could easily be true; the Report simply omits all information that contradicts its assumptions and conclusions. Every one of its options is a radical departure from

a century of multiple-use management of the national forests of this country, and an even more radical departure from a half-century of statutorily timber-dominated management of BLM lands.

10. The President's proposal, based on the biased and flawed FEMAT Report, was a bitter disappointment to the forest products industry, to its employees and their families, to their communities and their local governments. Far from balanced, it is more extreme than any proposal ever made to resolve this controversy. It was and is, in short, entirely unacceptable. It will cause dozens of forest products manufacturing facilities in Oregon and Washington to close, will cause the unemployment of thousands of workers, and will literally cause several dozen small timber-dependent towns to cease to exist.

11. Faced with an unprecedented economic disaster, the NFRC has no choice but to pursue every avenue to alter or influence the impending decision by the Secretaries of Agriculture and Interior to adopt, modify or reject the President's proposal. We are actively participating in the current public comment period on the draft supplemental environmental impact statement released with the FEMAT Report; an inter-disciplinary team of experts is reviewing the FEMAT Report for NFRC, as best it can, to submit comments by October 28, 1993.

12. The President's announcement of his proposal, and the actual release of the FEMAT Report describing the proposal, brought to an end the NFRC's commitment to Mr. Clinton to refrain from new litigation initiatives. Since that announcement, NFRC has filed two other legal actions which, like this case, it had refrained

from filing based on its decision to honor the President's request to withhold litigation. One case is *Lone Rock Timber Co. v. United States Department of Interior*, Civil No. 93-927AS (D. Or.) (filed July 23, 1993) (challenge to Fish and Wildlife Service violation of mandatory time limits for consultation under Section 7 of the Endangered Species Act). The other case is *Northwest Forest Resource Council v. Babbitt*, Civil No. 93-1579 JHG (D.D.C.) (filed August 2, 1993) (challenge to Fish and Wildlife Service decision to list an arbitrary three-state population of marbled murrelets as threatened under the Endangered Species Act). On August 6, 1993 we filed this case.

13. The only reason the NFRC waited from May until August to file this case was to honor the President's request to "stay out of the courtroom" while his Administration developed a proposal for resolving the forest controversy. The only reason NFRC filed this action is that we are so deeply disappointed with the President's proposal, and for this we in large part blame FEMAT for crafting an intellectually and scientifically dishonest plan, motivated by ulterior political interests, in secrecy -- none of which was legal under FACA. These violations of FACA -- the secrecy, the suppression of contrary data, the imbalance on the panel -- are not trivial procedural flaws. They allowed a fundamentally dishonest report to improperly influence a major Administration decision. We filed this action to remedy these violations of law.

I declare under penalty of perjury that the foregoing is true

and correct.

Executed on August 26, 1993.



John C. Hampton



National Press Building
Suite 1272
Washington, D.C. 20045

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202-347-2770
800-544-8995

Office Fax
202-347-2767
800-942-1150

U.S. Newsweek Fax
800-945-8845

1939# U.S. NEWSWIRE GENERAL DIRECTORY

Text of Closing Remarks by Clinton at Forest Conference
To: National Desk, Environment Writer
Contact: The White House, Office of the Press Secretary,
202-456-2100

PORTLAND, Ore., April 2 /U.S. Newsweek/ -- The following is the text of closing remarks by President Clinton at the Forest Conference.

Oregon Convention Center
Portland, Ore.

6:10 p.m. PST

THE PRESIDENT: I want to thank all of you for being here and for sitting through this long day, and all of the participants for everything you've done. I'd like to thank the Cabinet for coming and participating, and the Vice President and our staff for all the work they did to put this meeting together.

One of the things that has come out of this meeting to me loud and clear is that you want us to try to break the paralysis that presently controls the situation, to move and to act. I hope that as we leave here we are more committed to working together to move forward than perhaps we were when we came.

I tell you; I'll never forget what I've heard today -- the stories, the pictures, the passion from all of you. In a funny way, even when you were disagreeing, everyone of you was a voice for change; everyone of you was saying we can't possibly do any worse than to stay within the framework which has now undermined our ability to work together and to build a sense of common community.

Too many people are being hurt and too many resources are being threatened. And we're going to do our best to turn this away from at least the short-term politics of just trying to avoid the tough decisions.

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. (Applause.)

Meanwhile, I want each of our Cabinet to look within the departments to determine which policies are at odds with each other. It is true, as I've said many times, that I was mortified when I began to review the legal documents surrounding this controversy to see how often the departments were at odds with each other, so that

there was no voice of the United States. I want the Cabinet members to talk with each other to try to bring these conflicts to an end, which at their extreme, have had our own agencies suing one another in courts, often over issues which are hard to characterize as monumental.

I want everyone to examine his or her approach to existing legal and administrative proceedings to see if inadvertently any of us are hampering the march toward a solution of the larger issues, or even toward the particular ones now in litigation.

Regardless of what we are doing, our efforts must be guided, it seems to me, by five fundamental principles.

First, we must never forget the human and the economic dimensions of these problems. Where sound management policies can preserve the health of forest lands, sales should go forward. Where this requirement cannot be met, we need to do our best to offer new economic opportunities for year-round, high-wage, high-skill jobs.

Second, as we craft a plan, we need to protect the long-term health of our forests, our wildlife and our waterways. They are, as the last speaker said, a gift from God, and we hold them in trust for future generations.

Third, our efforts must be, insofar as we are wise enough to know it, scientifically sound, ecologically credible, and legally responsible.

Fourth, the plan should produce a predictable and sustainable level of timber sales and non-timber resources that will not degrade or destroy our forest environment.

And, fifth, to achieve these goals, we will do our best, as I said, to make the federal government work together and work for you. We may make mistakes, but we will try to end the gridlock within the federal government. And we will insist on collaboration, not confrontation. We will do our best to do our part. We will act with a single purpose and a single agenda, once we have a chance to get all these departments working on their respective responsibilities.

But I want to say, too, that all of you have demonstrated to me today your willingness to do your part. I ask you not to let this be the end of it. This conference has established a dialogue. Even when it was somewhat funny between Mr. Kerr and Miss Mater, it was still a dialogue. And it's got to continue between us and you and among yourselves. You have got to be a part of this solution. Even if we make the most enlightened possible decisions under the circumstances, they will be all the more resented if they seem to be imposed without a continuing mechanism for people whose lives will be affected here to be involved.

So when you leave here today, I ask you to keep working for a balanced policy that promotes the economy, preserves jobs and protects the environment even as you may disagree, as Mr. Thomas said, over how the word "balance" should be defined. When you hit an impasse, I plead with you not to give up, and don't turn against your neighbors. You don't have to fight in a court of law anymore. You can work with us to try to have a long-term solution.

If you feel frustrated -- at times, all of us will -- I ask you to stay at the table and to keep talking and keep trying to find common ground. I don't want this situation to go back to posturing, to positioning, to the politics of division that has characterized this difficult issue in the past. I hope we can stay in the conference room and stay out of the courtroom. If we don't give up or give in to deadlock or divisiveness or despair, I think we can build a more prosperous and a more secure future for our communities and for our

children. And I think we'll be proud years from now that we were here today.

I thank you for caring and for coming, for speaking out and for reaching out. And I ask you to continue to work with us, so that this Forest Conference is the beginning, not the end of a solution.

But we will move. We will move. And I will do my best to assume the responsibility the American people have given me to try to break this deadlock in a responsible way. I just ask you to remember that this listening cannot be a one-shot deal. We've got to continue to work together. And I think, if we do, we'll all be pleased with the results.

Thank you very much. (Applause.)

End 6:19 P.M. PST



**NORTHWEST FOREST
RESOURCE COUNCIL***

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

April 6, 1993

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. Surley

Wildlife Committee
Chairman
R. Kirk Ewart

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

DECLARATION OF JOHN C. HAMPTON
EXHIBIT BBB - Page 1

*Representing

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

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

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

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

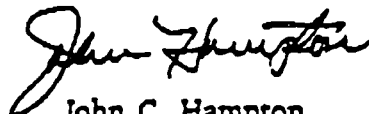
view completely unlawful because the murrelet population in these three states is not a species, a subspecies or a distinct population segment of a species, and is therefore not a listable unit under the ESA.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF ROBERT GODFREY LEE

Robert Godfrey Lee, with full knowledge of the penalty of perjury, declares as follows:

1. My name is Robert Godfrey Lee. I currently occupy the position of Professor in the College of Forest Resources at the University of Washington. I joined the faculty at the University of Washington as an Associate Professor in 1978 and developed a teaching and research program in the sociology of natural resources, with special emphasis on forest-based communities. I served as Chair for the Division of Forest Resources Management from 1983 to 1988. I was awarded a Ph.D. in Wildland Resource Science by the University of California at Berkeley, and taught outdoor recreation and resource sociology there before moving to the University of Washington. I hold a Masters degree from Yale University and a Bachelors of Science in Forestry from the University of California at Berkeley. I have also been employed as a forester by the U.S. Forest Service and two private timber companies. While working for my doctorate I held a two-year

appointment as a research sociologist for the U.S. National Park Service and studied ethnic diversity in the use of open spaces. The statements made herein are based on personal knowledge, and if called to testify I would testify as set forth herein.

2. Over the last four years I have acquired substantial knowledge about the social and cultural impacts of sudden reductions in timber harvesting on federal lands in the Pacific Northwest and written over twelve reports on specific studies and the nature of the conflict. This research interest was a natural extension of ten years of previous work on forest-based communities in the United States, Japan, and British Columbia. Much of this earlier work is summarized in a book for which I served as senior editor: *Community and Forestry: Continuities in the Sociology of Natural Resources*.

3. President Clinton invited me to participate as one of the two sociologists who sat at the table during his Forest Conference on April 2, 1993. Because of my extensive experience, I expected to be involved in or consulted by the Forest Ecosystem Management Assessment Team ("FEMAT") established by the President following the Conference. On April 13, 1993 I was asked by Dr. Margaret Shannon (one of the three social scientists appointed to the FEMAT) if I would help advise the FEMAT on community issues. I discussed this assignment with Dr. Roger N. Clark, leader of the sociological sub-team, and later agreed to the standard \$35/hour consulting fee and the restriction on communicating FEMAT options or issues to any outside parties until the report was made public. I met twice in Portland with other social scientists retained by FEMAT, prepared

two draft reports (one on a risk assessment methodology and one on measurement of local knowledge), and participated in a two-hour conference call. After spending a month attempting to advise the FEMAT, I declined further involvement because the FEMAT did not want to consider a scientifically balanced framework for risk analysis and was systematically excluding facts indicating possible negative consequences of federal timber harvest reductions (See attached letters to President Clinton and Dr. Roger Clark). I maintained the confidentiality of FEMAT options and issues until I returned from Europe on July 19.

4. As a scholar, I am committed to the pursuit of truth and advocate open communication processes and honest exchange of all factual claims and viewpoints. I believe all factual claims must be considered when scientists are informing public policy choices. My experience with the closed communication of the FEMAT process convinced me it was highly selective about both who was to be involved, how centrally they were to be involved, and which factual claims were to be considered acceptable for formulating forest management options. I protested this selectivity during my involvement by stating that exclusion of unwanted personalities, issues, and facts was not just bad science, but a disservice to both President Clinton and the American people. I withdrew from the FEMAT process because I did not want my name associated with a report biased by unprofessional exclusionary practices.

I declare under penalty of perjury that the foregoing is true

and correct.

Executed on August 27, 1993.


Robert Godfrey Lee

COLLEGE OF
**FOREST
RESOURCES**

May 21, 1993

Mr. Bill Clinton
President of the United States
The White House
Washington, D.C.

Dear Mr. President:

**Forest Resources
Management Division**

Anderson Hall, AR-10

Seattle, Washington 98185

(206) 543-8210

I was honored to participate in the the Forest Conference you held in Portland on April 2.

Your presence and sincere attention raised hopes for a balanced solution to this apparently irresolvable issue.

I am writing to share my concern that the Inter-agency Ecosystem Management Assessment is unlikely to yield recommendations identifying the "balanced solution" to which you committed your administration.

My role in helping with some of the sociological analysis (attending two subcommittee meetings, attending a briefing by Secretary Babbitt, providing written suggestions, and participating in telephone conferences) made me concerned about both the Inter-agency Team's framework for analysis and its attempts to assess environmental, social, and economic risks.

I worry about an apparently unbalanced and quasi-scientific assessment of risk. Given limited data of high uncertainty, scientists appear to be making conservative judgments that minimize risk to the environment and underestimate risk to human communities and local and regional economies. Overestimates of the elasticity of human adaptability could cause an enormous, and perhaps unnecessary, amount of human suffering--especially given expectations heightened by your personal attention to this issue.

Moreover, the scientists preparing this report appear to have assumed a policy-making role that goes well beyond delegated authorities for federal land management and protection of threatened and endangered species. Development of an "ecosystem management" approach to a "bio-region" defined by the range of the northern spotted owl requires participants to make political and ethical judgments in addition to scientific judgments. These additional judgments involve the rights of private landowners, the status of citizens and

President Clinton, Page 2

species (deciding which people or native species will enjoy rights to federal lands), a presumption of social engineering authority for rural communities and dislocated workers, production and selection of knowledge, and many other actions--all representing the exercise of comprehensive federal land use and economic planning responsibilities Congress has not delegated to administrative agencies.

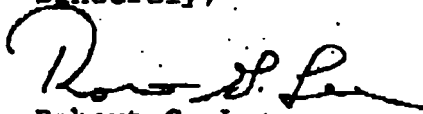
Scientists are not fully considering available options for managing federal lands by protecting the environment while also producing commodities useful to society--activities well within the reach of existing authorities and supported by what other scientists believe are reasonable biological/silvicultural possibilities. The closed planning process and hierarchical structure of federal science inhibits the open and free-wheeling criticism and debate so essential to successful planning and scientific assessment.

To assist you in eliciting a quality report clearly identifying all scientific, political and ethical judgments, I respectfully suggest you consider seeking independent peer review beyond that sought by the agency scientists. Reviewers would best be drawn from scientists familiar with risk assessment but who hold different professional commitments and for whom a shared mind-set would be less likely to distort scientific judgment and introduce political and ethical biases. A good choice would be experts in risk assessment drawn from such fields as engineering, the health sciences, and transportation planning.

Mr. President, I have been candid with you because I trust you will welcome all available information and continue to inspire us with the belief we can work together and find means for protecting the environment (both locally and globally) while also meeting the needs of all the American people for commodities, jobs, and human dignity.

I commend your efforts to resolve this explosive issue and am committed to making sure you are informed by the best possible scientific information.

Sincerely,



Robert G. Lee
Professor

CC: Senator Slade Gorton
Congressman Norm Dicks
Congressman Al Swift
Dean David B. Thorud

**FOREST
RESOURCES**

May 21, 1993

ATTN: Roger N. Clark, Ph.D.
USDA, Forest Service
Region 6
P.O. Box 3623
Portland, Oregon 97208

Forest Resources
Management Division

Dear Roger:

I respectfully decline your invitation to join a panel of social scientists in Portland to help the Inter-agency Ecosystem Management Assessment Team judge how communities may succeed or adapt under alternative ecosystem management plans.

I will explain why I made this decision, since I want to continue to play a constructive role in future scientific cooperation.

As you know, I have wondered why I was not asked to be more centrally involved in an effort to assess the social, cultural, and fiscal consequences of planned federal timber harvest reductions. My peripheral involvement is also surprising to others, since I am well known and respected for my research, writing, and knowledge of this topic. As the principal expert on social and cultural impacts of timber harvest reductions in the Pacific Northwest, I obviously have a rich stock of knowledge upon which to draw for helping to answer questions raised by this assessment.

I offered to share all of my reports, publications, and professional knowledge at the April 19-20 Portland meeting with the subcommittee of social scientists asked to prepare input for the ecosystem management assessment. In addition, I prepared written suggestions for how these and other findings could be integrated through a risk analysis approach that would consider both risks to the forest environment and risks to communities and economies (thereby providing the best available scientific judgments on risk functions, but leaving all ethical and political consideration of balancing risks to political decision-makers).

I suggested that (1) risks defined as limits to acceptable change at the individual, family, community, and local government levels of analysis be stated as hypotheses linking risks to variation in reduction of wood supply, (2) all available information be assembled to challenge these

Clark, p. 2

hypotheses (including the hypotheses I have examined in various studies), (3) given high uncertainty, levels of confidence in hypothesized relationships be stated either statistically or through qualitative ratings, (4) existing data be evaluated, and required data be specified to evaluate future work, and (5) risks associated with Type I and Type II error be stated for each hypothesis.

Frankly, I am shocked that the Inter-agency Team could work for seven weeks on this problem without at least reviewing and critiquing my work, requesting my response to reviews of my research, or responding to my suggestions for risk analysis. The lack of a response to the risk analysis framework I submitted on April 28, together with our failure to reach agreement on inclusion of risk ratings for communities during meetings on April 19 and 20, April 28, and a 2-hour conference call on May 18, suggested the Inter-agency Team is ambivalent about clearly identifying risks to local communities and economies.

After talking with another social scientist on the Inter-agency Team, I came to understand why my research and expertise are of only marginal significance for the assessment. There appears to be far greater interest in making policy than in gathering information to predict consequences of alternative policy options. I see this policy-making emphasis reflected in the Inter-agency Team's (1) confusion about the analytic problem to be addressed, (2) lack of a clear analytical framework for tracking from planned actions to consequences, (3) confusion about what constitutes an appropriate baseline for measuring change resulting from planned actions, (4) focus on all possible causal variables affecting social and economic conditions rather than on planned wood supply reductions and their immediate additional effects, (5) concern with community adaptability in both the short- and long-run, (6) ambivalence about the significance of immediate, adverse impacts on individuals, families, communities and local governments, and (7) establishment of scientific agreement through seeking consensus rather than through hypothesis testing.

My research and expertise indeed do not fit well with an emphasis on policy-making for central economic and environmental planning. I have instead used Walter Firey's well-tested theories to emphasize the importance of voluntary consent for achieving and sustaining resource conservation programs. Following from Firey, I have focused on the need to falsify hypotheses linking actions to consequences rather than to design plans for engineering community and economic transitions.

Clark, p. 3

I also realize many have perceived my work as "politically incorrect" because it (1) implicitly affirms the human dignity of loggers and other wood products workers by describing their cultural values and social organization (people referred to as "timber junkies" by several participants at your May 4-5 local experts workshop), (2) described how wood products workers and communities would likely be adversely affected by timber harvest reductions, and (3) was used by government-dependant sectors of the wood products industry. Regardless of social pressure to conform to popular stereotypes and anti-industry bias, I have done my best to maintain an even-handed approach and assure my findings are factually correct.

The Inter-agency Team is starting from such different assumptions that I find it unproductive to work together on this assessment. The fact that my research findings and suggestions have been ignored gives me no confidence that further involvement will contribute anything more than use of my name and professional reputation.

I regret our different ways of framing the problem stand in the way of cooperation. Should you at some time in the future find a use for my research (see attached summary), I want you to know that scientific review is the best forum for sharing this work--not science by consensus. We would all still be members of the Flat Earth Society if scientists had relied on consensus rather than the cultivation of doubt, courage of convictions, and falsification of hypotheses.

I look forward to working with you on future research projects, and know that you will not take personally my decision to decline your invitation.

Sincerely,


Robert G. Lee
Professor

CC: Dr. Jack Ward Thomas
Dr. Jerry Franklin
Dean David B. Thorud
Participants in Community Assessment Workshop

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

DECLARATION OF CHADWICK DEARING OLIVER

Chadwick Dearing Oliver, with full knowledge of the penalty of perjury, declares as follows:

1. My name is Chadwick Dearing Oliver. I am a Professor at the College of Forest Resources, University of Washington, Seattle, Washington. My specialties are silviculture and forest ecology. I have a Ph.D. from the Yale University Graduate School (1975; through the School of Forestry and Environmental Studies). I have taught ecology at Harvard University (1974-1975; Cambridge, Massachusetts) through their Biology Department, at the University of Washington, College of Forest Resources (since 1975); and at Middle East Technical University (1982-1983; Ankara, Turkey) through their Biology Department. I have taught Silviculture at the University of Washington since 1975. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. I have been on the editorial board of four scientific and technical journals, have written over 50 scientific and technical

papers, and have reviewed articles for ecological and forestry journals for over 15 years.

3. I have published original research and reviews in refereed ecological and forestry journals.

4. I was the senior author of a scientific and technical book on how forests grow (*Forest Stand Dynamics*, 1990, McGraw-Hill). This book was favorably reviewed as an ecological book in the *Quarterly Review of Biology* (Volume 66, September 1991).

5. To my knowledge, my biological background or scientific ability has not been disputed by other scientists.

6. I am concerned that the process used by the Forest Ecosystem Management Assessment Team (referred to as FEMAT in this document) following the Forest Conference of April 2 (1993) was biased. I shall describe the reasons for my concerns in the following:

The Scientific Process

7. A scientific solution attempts to be objective (unbiased). Recognizing that all humans are biased, certain general patterns are followed in scientific analysis:

- A problem is identified;
- Objective criteria for evaluating alternative solutions are developed;
- A wide range of scientifically credible solutions are developed;
- The various solutions are rigorously examined;

8. To avoid bias, credible scientists with as many differing perspectives as possible are solicited at each step.

9. The FEMAT did not follow a scientifically credible process, since credible scientists who were known to have a differing opinion were consciously excluded from the process or only peripherally and belatedly involved, as I shall describe below:

Contrasting Scientific Views

10. There are at least two scientifically credible approaches to managing forests for biodiversity, old growth dependent species (e.g., spotted owl), and other values. Although there is a gradient between them, the two approaches can be contrasted as the "natural reserves" approach and the "landscape management" approach. (Other names have also been used to describe these approaches).

11. At its extreme, the "natural reserves" approach sets aside large areas where management is to be avoided and natural processes are allowed -- presumably a development of more "old growth" habitat or a balance of habitats. The "landscape management" approach uses active management to protect existing "old growth" (or other habitats in short supply) and to create "old growth" or other structures where these are in short supply. Both approaches can be modified with elements of the other; "old growth" reserves can have some active management and "landscape management" can have some "natural reserves." Consequently, there is a gradient between the "reserves and the "active management" approach.

12. Both approaches have been studied for many years and papers exist in the scientific and technical literature on both

subjects.

"Natural Reserves" Approach

13. Two previous studies since 1990 of the "Spotted Owl" and other "Old Growth"-dependent species have generally favored large "natural reserves" rather than a "landscape management" approach:

Thomas, J.W., E.D. Forsman, J.B. Lint, E.C. Meslow, B.R. Noon, and J. Verner. 1990. A conservation strategy for the northern spotted owl: a report of the Interagency Scientific Committee to addresses the conservation of the northern spotted owl. Portland, Oregon. U.S. Department of Agriculture, Forest Service; U.S. Department of Interior, Bureau of Land Management, Fish and Wildlife Service, National Park Service. 427 pp.

Thomas, J.W., Raphael M.G., Anthony, R.G., Forsman, E.D., Gunderson, A.G., Holthausen, R.S., Marcot, B.G., Reeves, G.H., Sedell, J.R., Solis, D.M. 1993. Viability assessments and management considerations for species associated with late-successional and old-growth forests of the Pacific Northwest. Portland, Oregon. U.S. Department of Agriculture, Forest Service. 523 pp.

14. Another report showed a broad range of management alternatives but showed the "natural reserves" approach being much more favorable for old growth species:

Johnson, K.N., Franklin, J.F., Thomas, J.W., and Gordon, J. 1991. Alternatives for management of late-successional forests of the Pacific Northwest. A report to the Agriculture Committee and the Merchant Marine Committee of the U.S. House of Representatives. 59 pp.

15. All three reports had Dr. Jack Ward Thomas as chair or (in the case of the last report cited) co-chair. This last report cited had Dr. Jerry Franklin, Dr. Norm Johnson, and Dr. John Gordon as co-chairs. Dr. Franklin has also favored such reserves in an article in the journal *Ecological Applications* (1993, Vol. 3, pg. 202-205).

"Landscape Management" Approach

16. The "landscape management" approach has been discussed specifically in relation to the Pacific Northwest issues in conferences, symposia, and scientific and technical papers since at least 1991:

Scientific and technical papers were given at Symposia in Seattle, Washington, and Victoria, British Columbia.

Scientific and technical papers were published as follows (among others on the subject):

Oliver, C.D. et all. 1992 In (R.J. Naiman, editor) *Watershed Management: Balancing Sustainability and Environmental Change*. Spring-Verlag, New York. pp.361-382.

O'Hara, K.L. and C.D. Oliver. 1991. *Western Wildlands* 17: 28-33.

Oliver, C.D. 1992 *The Silviculture Conference*. Forestry Canada, Ottawa, Ontario. pp. 287-293.

Oliver, C.D. 1992. *Journal of Forestry* 90: pp. 20-25.

A statement was given and followup questions answered at a Congressional Subcommittee Hearing: (March 11, 1992. Statement of C.D. Oliver, "A hearing to review 'High Quality Forestry'" and extended timber harvest rotations" before the Subcommittee on Forests, Family Farms, and Energy; Committee on Agriculture; U.S. House of Representatives.)

A presentation was also given on the concept to the U.S. Forest Service Headquarters in Washington, D.C., in March, 1992.

Two Workshops (with attendances of 200 and 100 people, respectively) were given to explore the subject further in September, 1992 and April, 1993. (Dr. Marty Raphael and Dr. Jerry Franklin had actually been invited to speak at the April 6 & 7, 1993, workshop but declined. There were both members of FEMAT.)

The concepts are being incorporated into a Congressionally-requested report on Forestry Health and Ecosystems in Eastern Washington and Oregon.

17. Both perspectives were represented to President Clinton at the Forest Conference in Portland, Oregon, April 2, 1993. I was invited to give input as part of the Scientific Panel on the issue. I subsequently submitted the "landscape management" perspective in a letter to President Clinton (attached, April 19) with copies to Mr. Tom Tuchman and Mr. Jeffrey Rogers. (I understood these people were to receive written comments and convey them to FEMAT).

The FEMAT composition and process

18. The FEMAT, which was convened in Portland after the Forest Conference, was to develop a scientifically credible plan to resolve the conflict. Dr. Jack Thomas was Team Leader; prominent among the members were Dr. Jerry Franklin and Dr. Norm Johnson--all of who had been chair or co-chair of one or more reports which had favored the "natural reserves" approach.

19. The FEMAT consisted of over 75 scientists. Although I was among the 13 scientists invited to speak at the Scientific Panel during the Forest Conference, I was not asked to be a part of the FEMAT.

20. I was available and had arranged with my Dean to be available to serve on the FEMAT if asked. There are other scientists in the region who could also have given a "landscape management" perspective similar to mine; however, I do not feel anyone who could have represented this perspective was on the 75-member team.

21. Because I or others representing the "landscape management" perspective were not on the FEMAT while those representing the "natural reserves" perspective were in charge of

it, I feel the FEMAT team was biased toward the "natural reserves" approach.

22. I was later asked to meet with FEMAT, however, I do not feel this meeting allowed the "landscape management" perspective to get a fair hearing for the following reasons:

a. I was not directly contacted until the 43rd day of a 60-day process and did not meet with the FEMAT until the 50th day. (See attached correspondence in Appendix A; also, the 60-day period was extended, although I was not included during that time.) Consequently, there was relatively little time left to incorporate my "landscape management" perspective.

b. Dr. Jack Ward Thomas, Leader of the FEMAT was so unfamiliar with my approach that he referred to it as "long rotation forestry" (See letters of May 14 and May 19.)

c. Although I met with Dr. Thomas and gave a presentation to members of FEMAT on day May 21, there was no rigorous dialogue of:

(1) the criteria for evaluating the various alternatives;

(2) the alternative developed to date by the group;

(3) the approach I suggested.

I offered my input during the presentation and in followup letters (see letters beginning May 14); however, I was not part of the analysis and judgment. The analyses and judgment of all three were left to members of the FEMAT, who represented the "natural reserves" approach.

d. None of the published (or unpublished) papers I have

written on the "landscape management" approach are referred to in the FEMAT report, although there are over 700 references in the report.

e. All nine alternatives presented in the FEMAT report are strongly biased towards "natural reserves." Although some alternatives have various, slight incorporations of the "landscape management" approach, none of them reflect the perspective I gave President Clinton at the Forestry Conference.

23. I expressed my concern about the bias of the process in letters to Dr. Thomas and letters to Mr. Tuchman (Department of the Interior), Mr. Lyons (Department of Agriculture), and Ms. McGinty (Deputy Assistant to the President). Those who responded (letters attached) supported the FEMAT process.

24. Just before the President announced his plan, I sent another letter, suggesting a way to make the process more objective, with copies to various people in the Administration (See attached letters and responses.) I feel such a process would have been more objective.

Summary

25. In summary, I feel that the FEMAT was biased in favor of alternatives other than the one I and others feel will be most effective in saving the spotted owl as well as providing other values because:

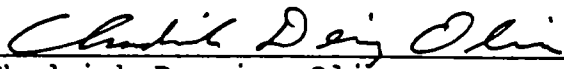
- I was not a member of the FEMAT, even though I participated as a scientist at the Forest Conference; and, no one else was on the FEMAT team who could adequately represent the perspective I have proposed;

- Many people who were already known to favor the alternative approach were on the FEMAT team, including Dr. Jack Ward Thomas, FEMAT Team leader;
- The perspective I feel is most effective has been made available in the scientific, technical, and political literature; however, the approach was not referenced^{to} or_^ strongly considered in the FEMAT report;
- There is an obvious contrast between the approach to the solution that I suggest and those of both the Team Leader (Dr. Jack Thomas) and other members of the FEMAT team.

26. As a result of the bias I have described, the FEMAT report is a document funded by the public which does not objectively reflect the full range of options publicly available from credible scientists familiar with the problem. Any input of other options after the report is accepted, as well as critiquing the given options, will be done without the federal support provided to FEMAT and will necessarily use the FEMAT report as the "prevailing hypothesis."

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

Executed on August 27, 1993.


Chadwick Dearing Oliver

FOREST
RESOURCES



April 19, 1993

President Clinton
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Clinton:

Thank you for inviting me to participate in the Forestry Conference. I hope my contribution was constructive. Enclosed is an elaboration of the ideas I tried to convey to you at that time.

There is a robust solution to the problem which can be applicable to the Pacific Northwest, the southeastern U.S. (red cockaded woodpecker), and eastern Washington and Oregon. The solution can also set an example for elsewhere in the world.

Like the health care issue, the solution must look at the combination of risks and tradeoffs among biology, socioeconomic concerns, and existing conditions. Attempts to find separate solutions for the biology and socioeconomics will simply continue the problem. Many solutions can be biologically valid; the objective is to find the most creative approach to minimize tradeoffs and risks to the local and global environment.

I will outline such a solution in this letter. The solution views the local people and economy as part of the solution, not the problem. Such a solution is not an incremental change to past approaches; rather, it is a more proactive approach.

The letter is divided into three parts: the problems; the scientific background; the suggested solution. I have various documents, reports, and analyses describing my statements in detail. Please contact me if you would like this material.

THE PROBLEMS

INSUFFICIENT "OLD GROWTH" FORESTS AND THE SPOTTED OWL:

There are apparently insufficient amounts of "old growth" forests to provide places for certain species to live. This problem is common to the

Pacific Northwest (the spotted owl) and the Southeast (red cockaded woodpecker). (Definitions of "old growth" will be discussed later.)

RURAL ECONOMIES:

Present "old growth solutions" for endangered species of stopping harvesting of public and private forest lands has a present value cost of about 50 billion dollars, largely focussed on the economies of the Pacific Northwest. If such "solutions" spread to the Southeast, other rural economies and the whole U. S. economy will suffer, and there may be a backlash against any protection of species.

GLOBAL ENVIRONMENT:

Large-scale stopping of timber harvesting in the Pacific Northwest is increasing wood prices and causing substitution by harvesting more acres of less productive forests elsewhere and by increasing use of far more polluting steel, aluminum, concrete, and brick. This harvesting elsewhere and use of nonwood substitutes is exporting the environmental problems and creating an "environmental imperialism" (NIMBY approach), not protection of the environment.

PROBLEMS WITH OTHER ENDANGERED SPECIES, "FOREST HEALTH"/STREAM HABITAT/BIODIVERSITY:

In many additional forest areas (eastern Oregon and Washington, Idaho, Montana), the forests are apparently in insufficient condition to provide health, fish habitat, and biodiversity. (The "old growth" problem is actually a subset of the forest health problem, as will be discussed.)

THE SCIENTIFIC BACKGROUND

THE CHANGED PARADIGM OF FOREST DEVELOPMENT:

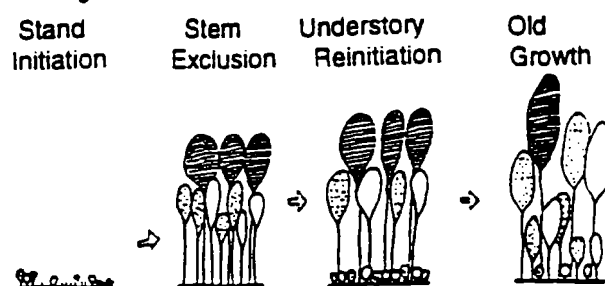
The scientific paradigm that pre-European forests existed in a pristine, steady-state forest which was "ideal" for all creatures (a.k.a. "ancient forest", "old growth", or "climax") is no longer valid. Scientific evidence suggests forests (in the Pacific Northwest and elsewhere in the world) were constantly changing because of very large (often over hundreds of thousands of acres) natural disturbances. (See attached New York Times article.)

Following the disturbances, forests regrew through a variety of structures (Figure 1). Each structure is beneficial to some species, but not others. All species were maintained by the somewhat random nature of the disturbances and regrowth. Human attempts to preserve species by "preserving" a desirable structure in a small area are problematic when a large disturbance destroys the structure (e.g., Hurricane Hugo destroying red cockaded woodpecker habitat near Charleston, South Carolina). In addition, species which require the "stand initiation" or "stem exclusion" habitat can not be maintained through

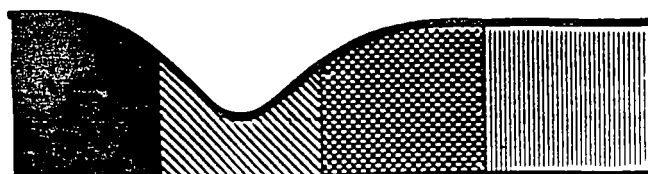
preservation, since forests regrow (e.g., the Kirtland's warbler nearly went extinct because we did not create enough "stem exclusion" habitat; species using the "stand initiation" stage have also become threatened when this structure becomes limited).

Figure 1. A. Forest structures change after natural and human disturbances, as shown here simplistically. B. Different plant and animal species are found in each structure, but all structures are necessary within a forest to maintain biodiversity.

A. Changes in Stand Structures Following Disturbances



B. Mammal Species Utilizing Each Structure



The different structures fluctuated in amount across the landscape. There never was an extremely large amount of "old growth" structure. The fluctuations appear to have been necessary to avoid genetic isolation of species using different structures.

To maintain all species in our more confined forested areas, we need to ensure that minimal amounts of all structures are present. Active management both to protect existing structures and to enhance or create missing structures will ensure these minimal amounts more than a "hands-off" preservation approach.

This changed scientific paradigm has only recently become the accepted one (after decades of research; see attachment to letter). It has not yet been incorporated into the perspectives of many environmental or timber groups, politicians, or older scientists.

Where different structures do not presently exist in an area, many of their attributes can be created through active management. For example, "stand initiation" attributes can be created through harvesting ("clearcutting" and "new forestry"); "stem exclusion" attributes can be created by rapid regrowth; "understory reinitiation" attributes can be created by thinning and pruning; "old growth" attributes

can be created through thinning, creating snags, and uneven-aged management. Without such active management, the various structures often take many decades or centuries to be achieved--provided a disturbance does not destroy the stand first. Such proactive creation of structures has been successful for many species--the spotted owl lives in previously thinned stands in eastern Washington; the wood duck has responded well to wood duck boxes where natural structures were not available; the red cockaded woodpecker has responded to creation of structures where they did not exist.

DEFINITIONS OF OLD GROWTH:

There are several definitions of "old growth," and these definitions keep changing.

The Wilderness Society defines "old growth" as forests with vertically complex structures, downed logs, and other attributes--thus showing there is relatively little "old growth" left.

The U. S. Forest Service defines "old growth" as forests over 180 years old with trees over 21 inches diameter--showing there is much "old growth" left. (We can grow trees over 21 inches diameter in less than 50 years in much of western Washington.)

The Wilderness Society "old growth", I believe, best reflects the structures most limiting and scientifically unique. Wildlife biologists will need to decide in each landscape area if there is a sufficient amount of the Wilderness Society's "old growth", the U. S. Forest Service's "old growth", or any other stand structure to maintain viable populations of all species.

WOOD QUALITY, VOLUME, AND GLOBAL ENVIRONMENT:

Wood of high quality is beneficial to the global environment by providing a high standard of living and by substituting for more polluting products such as steel, aluminum, brick, and concrete. High quality wood from areas of high productivity (e.g., the Pacific Northwest and the Southeast) reduce excessive harvesting from areas with fewer environmental restrictions (e.g., tropics and Siberia; for example, 15 acres must be harvested in Siberia to achieve the same wood product volume as one acre in the Pacific Northwest, given their lower biological productivity and greater waste).

Wood of much higher quality is created by growing trees to moderately old ages in conjunction with thinning (to remove excess trees) and pruning than by harvesting trees when young.

Greater wood volume can be obtained by growing trees to moderately old ages (in conjunction with thinning and pruning) than by harvesting them at younger ages (e.g., ages 35 to 55 years).

THE SOLUTION

The suggested solution will resolve all four parts of the problem described above. Effects of the present "hands-off" preservation approach are described in the boxes.

SOLUTION TO INSUFFICIENT "OLD GROWTH" FORESTS AND THE SPOTTED OWL:

1. Where "old growth" forest structures exist, we should try to preserve them from fire, wind, etc. (Most such structures are on U. S. Forest Service land.) This is not quite the same as "hands off" preservation, which would be more at risk to large disturbances.

There is insufficient "old growth" structures because there is too much forest in other structures; therefore, we should "get" more "old growth" structures by creative management of structures which are overly abundant.

2. Where "old growth" structures do not presently exist in sufficient amounts within a landscape area, we should obtain more "old growth" structures.

The historically suggested approach is to set aside other forest structures and wait for them to grow to old growth. This approach is based on the anachronistic "steady state" scientific paradigm.

Simply setting aside other forest structures, expecting them to grow to "old growth", will not increase the amount of "old growth" for many decades or centuries--if at all. Forest growth models show we will not obtain the "old growth" structure for MANY decades by waiting. Meanwhile, the present "old growth" and much of this developing "old growth" will probably blow down, burn up, or both before more "old growth" develops.

Other forest structures and associated species will be lost while waiting for more "old growth" to develop.

Private landowners are harvesting their forests at young ages, preventing any "old growth" characteristics in these stands for fear of being unable to harvest them if endangered species move there.

A more creative solution is to manipulate the forest structures which are in excess within an landscape area to create missing "old growth" structures as rapidly as possible. The "new forestry" techniques of Dr. Franklin are sometimes appropriate where "stand initiation" structures are presently in short supply. In other areas, thinning, pruning, and creation of snags and down logs (by not removing all cut trees when thinning) will more rapidly create the needed "old growth" structure. (We have examples of these.)

There is no risk of losing "old growth" by this technique, since it will not be used as an excuse to "harvest" old growth--unless the old growth is in such large amount that other structures and species--are in danger of being lost (discussed later).

The probability that many old growth species populations will increase by using these created "old growth" structures is much greater than if the structures are not created.

Creating these structures will also alleviate the problems of rural economies, since employment and high quality wood products will be by-products of creation and maintenance of the structures. (This will be discussed in more detail.)

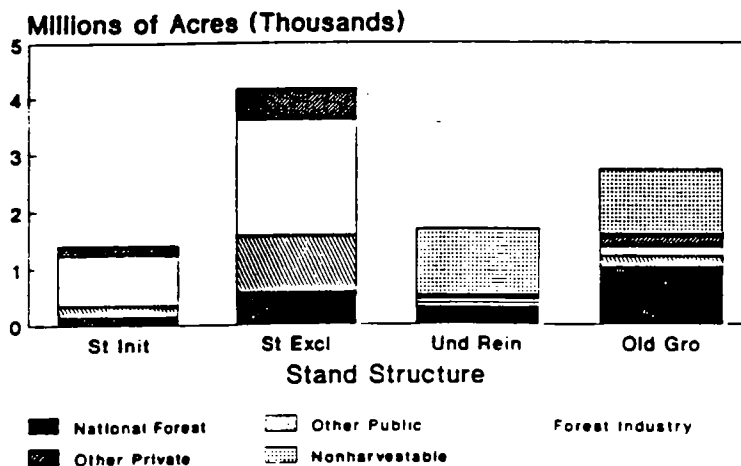
Opportunities for creating Old Growth Structures.

There are two opportunities for creating old growth structures in western Washington, Oregon, and California: opportunities on non-federal lands, and opportunities on federal lands. These can be considered independently or together.

Opportunities to increase old growth structures on non-federal lands: By far, the greatest amount of forest structure in western Washington is in the "stem exclusion" stage (Figure 2). Most of these are on non-federal lands. Some are in owl conservation areas.

Figure 2. Most forest lands in western Washington are in the "stem exclusion" structure (Figure 1) and on non-federal lands. Thinning and pruning these "stem exclusion" stands can rapidly create "understory reinitiation" and "old growth" structural features as well as high quality wood. Without thinning, etc., "old growth" structures do not develop from the other structures for many decades or centuries. ("Old growth" here uses the U. S. Forest Service definition; "Nonharvestable" includes National Parks and Wilderness Areas; from C.D.Oliver, statement to U.S.Congressional Subcommittee March 11, 1992).

Western Washington Forest Area By Stand Structure And Ownership, 1990



The greatest opportunity to increase the amount of "old growth" structures is by thinning and pruning, creating snags, waiting longer to harvest trees, and other manipulations to these stands.

Presently, non-federal landowners are harvesting stands when very young and NOT thinning or doing other operations for fear that spotted owls (and red cockaded woodpeckers in the Southeast) and other "old growth" species will enter their stands; then, the landowner will lose any value of the stand since they can not harvest it. Instead, these landowners are harvesting the stands at young ages to avoid losing their stands to "endangered species" confiscations.

Thinning and pruning is often not quite economically feasible for the landowner, although it would create the public values of higher quality wood, greater volumes of wood, more employment (in woods operations and secondary manufacture from high quality wood), and "old growth" structures for endangered species. Regulatory approaches of trying to "make" landowners create the structures is actually driving landowners to clearcut their forests and seek forest management investments elsewhere in the world (literally).

These landowners could be encouraged to create "old growth" structures by thinning and pruning through incentives. The incentives would not cost much, since these structures could be created on a "rotating" basis--after which the landowner could harvest the higher quality, greater volume of timber.

A variety of creative incentives have been developed. They can be made most efficient by:

- encouraging the landowner to produce as many values as possible--employment, "old growth" structures, high quality timber, and others (in this way, the creation of each value will only be the "marginal" cost of altering management);
- forming partnerships among county, state, and federal governments where all three coordinate taxes and other incentives to encourage long rotations;
- creating guarantees to landowners that they will be allowed to harvest (or receive market value from) their timberland at the end of the "old growth" rotation;
- creating an economic climate which encourages investment in forest management, partly by reducing fear of further confiscatory regulations;
- contracting for creation of public values such as snag patches, "old growth" structures, and others as a "commodity" which can be competitively bid on by landowners within a landscape unit. This bidding is similar to the Nature Conservancy's approach to conservation. It would require development of

something like a "biodiversity trust fund." The advantages would be its ability to achieve the different values as efficiently as possible through competitive bidding and the avoidance of anti-trust action if landowners were to cooperate in maintaining "old growth" structures across the landscape.

Professor Bruce Lippke of the College of Forest Resources (University of Washington) has developed these incentives in more detail.

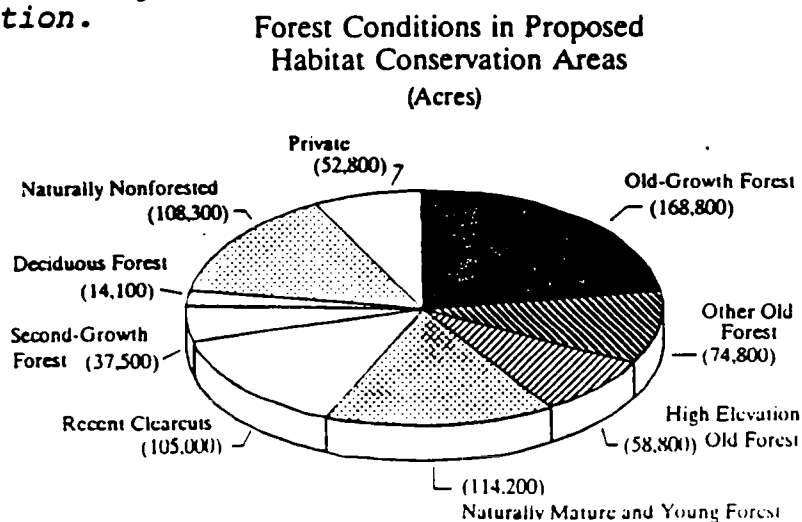
The objective of incentives is to channel the landowners' and woods labors' creativity into achieving the same objectives as the general public, rather than having their creativity focussed on avoiding punitive regulations. Certain minimal regulations may be appropriate to ensure that unforeseen loopholes are not exploited.

Such incentives for private landowners have proven to be EXTREMELY effective. For example, when the "soil bank" program of the 1950's gave incentives for marginal farmers in the Southeast to quit farming and restore the soil's productivity by growing trees, millions of acres of poor farmland were converted back to forests--with a dramatic increase in wildlife populations. In the present case, the incentives would keep hard working people from leaving the rural communities--by giving them productive jobs in managing the stands for the variety of structures--and manufacturing high quality timber products.

The costs of such incentives--including a "biodiversity trust fund"--would not be high compared to the increased cost (both real and foregone) of unemployment, displaced workers, imported timber, and lower tax revenue from the reduced economy of other alternatives.

Opportunities to increase old growth structures on National Forests: Only a small part of the Forest Service area in designated spotted owl habitat conservation areas is in old growth structures (Figure 3 for an example).

Figure 3. Distribution of stand structures in proposed Northern Spotted Owl Habitat Conservation Areas, Mt. Baker-Snoqualmie National Forest. (from The Wilderness Society 1990). "Old growth" refers to Wilderness Society definition.



If the designated National Forest areas are simply preserved, the amount of "old growth" structures will not increase for very many decades. It is highly likely that the present "old growth" will be destroyed by wind and/or fires first.

There are hundreds of thousands of acres of "stand initiation" structure (Figure 3) in the proposed preserved spotted owl habitat conservation areas which will be lost through tree growth within two decades. Animal species using this non-"old growth" structure will probably become universally endangered and locally extinct.

The preservation approach to saving species will become discredited because:

- it is impossible to "preserve" "stand initiation" structures without active manipulations (or random, uncontrolled disturbances);
- it is impossible to have an entire landscape of both of two, mutually exclusive structures (to save mutually exclusive species);

When these "stand initiation" species become endangered, there may not be enough "good will" left in the endangered species act to modify it.

The solution is to create more "old growth" structures on National Forests where needed by thinning (and other silvicultural manipulations) of non-"old growth" structures which are presently overly abundant.

In addition, harvest (through clearcutting, "new forestry" cutting, and others) some non old growth structures to maintain "stand initiation" structures used by other species. The harvested areas which grow to the "stem exclusion" structure can be thinned and pruned to create more "pre-old growth" structures which can be either thinned, etc. to replace old growth as it is destroyed through natural disturbances or harvested to create new "stand initiation" structures as the old ones disappear through tree growth.

SOLUTION TO RURAL ECONOMIES:

The spotted owl is estimated to eliminate several billion dollars per year with a net present value of 50 billion dollars from the economy under the present "preservation" approach. Already signs of rural poverty are beginning in rural Washington and Oregon--with many sociological behaviors (violence, despair, youth gangs) similar to urban ghettos. Similar measures may spread to the Southeast with "hands-off" preservation efforts to save the red cockaded woodpecker. At some point, the public may decide that trying to save species is just too costly.

The proactive approach described above on non-federal lands, federal lands, or both will actually increase jobs by increasing woods jobs (short term and long term) and increasing value added jobs through manufacturing products from high quality wood (long term).

A basic question is whether the intensive forest activities can actually create the needed "old growth" structural features more rapidly than they would develop naturally (if not destroyed by natural disturbances first). There is risk in both approaches; however, our models show the old growth structures will be achieved much more rapidly through active management than setting non-"old growth" aside and waiting.

It then becomes a political decision of risks and tradeoffs to the local and global environments and economies.

The final judgement is whether we have faith in the creativity and skills of the local people to be able to create the needed structures. Or, do we mistrust them and feel that species can only be saved by keeping people out of the forests.

The changed scientific understanding of "constant change" (described earlier) suggests all species existing today have been versatile enough to live with dramatically fluctuating conditions. My professional opinion is that the conditions we create through active manipulations will be close enough to the old growth structures to enable nearly all "old growth" species to survive in them. (Keep in mind that I am NOT advocating harvesting of "old growth" to be replaced by these created structures. These created structures would be a supplement to existing "old growth.")

One problem for the Pacific Northwest will be the timber shortage until forests on private lands become mature enough to harvest. The timber shortage created by locking up National Forest lands is accelerating harvesting young stands on private lands, further reducing the ability to create "old growth" structures or high quality wood there.

The above-suggested solution on Federal lands could alleviate the temporary timber shortage.

SOLUTION TO GLOBAL ENVIRONMENT:

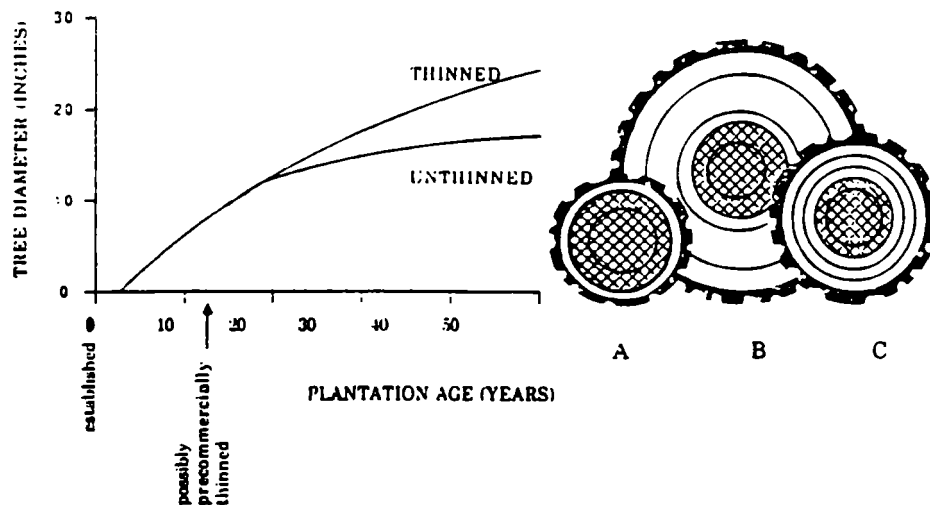
As more forests in the Pacific Northwest are preserved, global wood prices increase and more wood is harvested from areas with fewer environmental restrictions--or more steel, concrete, etc., is used. The effect is simply to export environmental problems--endangering other species to save the spotted owl. This approach makes the U.S. "environmental imperialists" (the "NIMBY" approach) and does not set a good example for the world.

The present "preservation" approach is also encouraging landowners to harvest trees when young (short rotations), yielding less wood per acre and products of lower quality (Figure 4) which do NOT provide as good substitutions for aluminum, steel, concrete, and brick.

Products made from high quality timber from regions which grow trees rapidly (e.g., the Pacific Northwest and Southeast) can be made into products which substitute for steel, aluminum, concrete, brick, and plastic--but with much less use of fossil fuels and contribution to global pollution.

Thinning and pruning forests and growing them to slightly longer rotations will lead to high quality wood--an environmentally sound product--as well as more "old growth" forest structures and more employment than the "preservation approach."

Figure 4. If young stands (stem exclusion structure, Figure 2) are thinned before they grow old, small logs with wide rings and primarily juvenile (low strength, hatched area) wood (A) will be removed and remaining trees will grow large (B) to produce wood of high quality and "understory reinitiation" and "old growth" stand structures. If not thinned (C) trees of small sizes and little high quality will result and the stand will remain in the "stem exclusion" structure until about age 80 years. Thinning also creates jobs.



SOLUTION TO PROBLEMS WITH OTHER ENDANGERED SPECIES, "FOREST HEALTH"/STREAM HABITAT/BIODIVERSITY:

The "old growth" problem in the Pacific Northwest and Southeast are special cases of the general issue of maintaining a balance of forest structures across the landscape. For example, "stand initiation" areas are in

very short supply in many parts of eastern Washington, Oregon, Idaho, and Montana. Species found in these structures are declining. Unless the forests are actively managed through thinning, pruning, harvesting, etc., to create a balance of structures, large fires (e.g., hundreds of thousands of acres) will create excesses of this "stand initiation" structure--but with a loss of property and loss of critical amounts of the other structures.

The solution is twofold:

- 1. Encourage a fluctuating balance of all structures across the landscape, using the incentives and the reasoning described for old growth structures earlier.**

The present approach is to wait until a species becomes endangered and then stop all activities, expecting the species to recover by "doing nothing" (the anachronistic "steady-state" paradigm). In fact, other species can become endangered which need conflicting forest structures long before one species becomes free of danger using this approach.

- 2. Where individual species become endangered, have a special fund become activated which enables active management to improve habitat, otherwise increase populations, and compensate landowners for loss of property.**

The present approach again assumes nature will "heal itself"--the anachronistic "steady state" paradigm. In fact, stopping all activities will not necessarily lead to the species' return; however, it assumes the public is willing to lose an infinite amount of money to protect each species (e.g., 50 billion dollars for the spotted owl alone). At some point, the public will react violently against these costs and abandon hopes of saving species.

Putting active, public funds both to maintain all habitats and to save endangered species allows the landowners, woods workers, and other environmentalists to work actively toward the same goals--protecting all species and achieving other forest values. The controversy then becomes one of how much money will be allocated to the funds to protect habitats and save species--a concern which should be left to the public in a democracy.

President Kennedy is said to have carried Barbara Tuchman's book *The Guns of August* during the Cuban Missile Crisis as a reminder of mistakes which lead to wars. Ms. Tuchman's later life was spent studying "folly" (*A Distant Mirror, The March of Folly*). She described "folly" as decisions made by leader which were against the long-term best interests of their country and themselves when they had knowledge of the consequences of their present course of action, and knowledge and power to choose an alternative

which was in the long-term self interest of their country and themselves. She never resolved WHY leaders commit folly, but did note they sometimes did. She regarded such choices as the Marshall Plan an example of avoiding "folly"-the age-old practice of exploiting losers in war.

I urge you to consider the alternative approach suggested above. Continuation of the anachronistic biological preservation and polarization approach used before you became President will, I believe, prove to be folly. You do have the opportunity to try scientifically credible new approaches.

You could give this proactive approach visibility by you (or Vice President Gore or others) visiting several areas in Washington where active management has created positive effects. (Many of the visits to date seem to highlight the negative effects of timber harvesting while ignoring the benefits of management or the costs and consequences of natural disturbances.)

I could suggest/arrange stops on a tour for you which would show a wide range of results of thinning and pruning young stands, selective harvesting, and thinning and extending time before timber harvesting to create old growth features in younger stands.

Feel free to contact me if I can be of any help.

Yours truly,



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cc. Vice President Gore
Director Katie McGinty
Congressman Norm Dicks

New Eye on Nature: The Real Constant Is Eternal Turmoil

The 'balance' theory may be more poetry than science.

By WILLIAM K. STEVENS

In a revision that has far-reaching implications for the way humans see the natural world and their role in it, many scientists are forsaking one of the most deeply embedded concepts of ecology: the balance of nature.

Ecologists have traditionally operated on the assumption that the normal condition of nature is a state of equilibrium, in which organisms compete and coexist in an ecological system whose workings are essentially stable. Predators and prey — moose and wolves or cheetahs and gazelles, for instance — are supposed to remain in essentially static balance. Anchovies and salmon reach a maximum population that can be sustained by their oceanic environment and remain at that level. A forest grows to a beautiful, mature climax stage that becomes its naturally permanent condition.

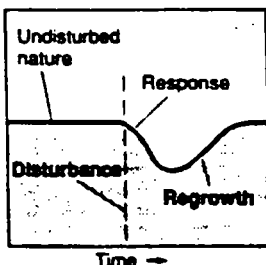
This concept of natural equilibrium long ruled ecological research and governed the management of such natural resources as forests and fisheries. It led to the doctrine, popular among conservationists, that nature knows best and that human intervention in it is bad by definition.

Now an accumulation of evidence has gradually led many ecologists to abandon the concept or declare it irrelevant, and others to alter it drastically. They say that nature is actually in a continuing state of disturbance and fluctuation. Change and turmoil, more than constancy and balance, is the rule. As a consequence, say many leaders in the field, textbooks will have to be rewritten and strategies of conservation and resource management will have to be rethought.

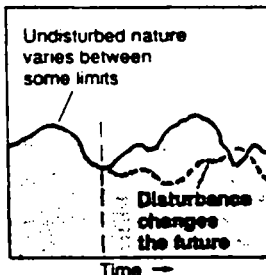
The balance-of-nature concept "makes nice poetry, but it's not such great science," said Dr. Steward T. A. Pickett, a plant ecologist at the Institute of Ecosystem Studies of the New York Botanical Garden at Millbrook, N.Y. He was a co-organizer of a symposium that explored the matter yesterday in Snowbird, Utah, at the annual meeting of the Ecological Society of America, the nation's premier organization of ecological scientists.

While the shift in thinking has not yet produced a coherent new theory to replace the old one, Dr. Pickett

Changing View Of Nature



In the past, ecologists assumed that nature undisturbed was a constant state to which ecosystems and populations of animals would return after disturbances like fires.



Many scientists now believe this model to be incorrect. Populations and ecosystems, they say, always vary within some boundaries and there is no "perfect" state to which their numbers and growth will return if they are disturbed.

Source: Daniel B. Botkin

The New York Times

characterizes what is going on as "a major revision of one of our basic assumptions of how the natural world works." The developing conviction that nature is ruled more by flux and disturbance is "becoming the dominant idea," he said.

"There will always be people who will cling to old ideas," said Dr. Simon A. Levin, a Cornell University ecologist who is the incoming president of the Ecological Society. "But certainly the center of mass of thinking" among ecologists, he said, has shifted away from equilibrium and "toward the fluctuating nature of natural systems. Some scientists now

Continued on Page B6

New View of the Balance of Nature Finds the Real Constant Is Turmoil

Continued From Page B5

say that ecological communities of plants and animals are inherently unstable largely because of idiosyncratic differences in behavior among communities and individuals in them. A super-aggressive wolfpack leader, for example, can greatly increase the pack's hunting efficiency and destabilize the ecosystem — just as the death of a pack leader can promote instability by causing the pack to disperse.

But even if ecological communities do display some sort of internal equilibrium, many scientists believe, external disturbances like climatic change, year-to-year variations in weather patterns, fires, windstorms, hurricanes and disease seldom, if ever, give the communities a chance to settle into a stable state. In this view, the climax forest, the neatly symmetrical predator-prey relationship and the bumper fish population become transient conditions at best, even in the absence of human intervention.

Scientists are finding this to be true on many scales of time and space, from the glacial and global to the seasonal and local, and in parts of the world long considered the most pristine and stable like the tropical rain forests of South and Central America, for instance, or the north woods of Canada and the northern United States.

In the natural landscape, "there is almost no circumstance one can find where something isn't changing the system," said Dr. George L. Jacobson Jr., who as a paleoecologist at the University of Maine, studies ecological change as it is revealed in ancient sediments and rocks. And while there may be a tendency toward a stable equilibrium, he said, "it's never allowed to get there, so we might as well not expect it to exist."

In this developing new perspective, humans are emerging as just one of many sources of ecological disturbance that keep nature in a perpetual state of upheaval. The question of whether humans should intervene in natural processes is more, ecologists say, since humans and their near-human ancestors have been doing so for eons, and ecological systems around the world bear their indelible imprint.

The supposedly pristine rain forests of Latin America, for instance, owe some of their character to the intervention of humans who planted and transplanted trees and other plants throughout the jungle. And the supposedly unspoiled Serengeti plain of Africa, some ecologists are convinced, owes its tremendous abundance of grazing animals at least partly to human-set fires that created savanna habitats.

The real question, ecologists say, is which sort of human interventions should be promoted and which opposed.

One of the biggest human interventions, some say, is taking place now as people pour heat-trapping chemicals, mainly carbon dioxide, into the atmosphere. Many climatologists expect that this will cause the Earth's climate to warm significantly, causing especially widespread ecological disruption.

The temperature of the earth has shifted up and down many times in past eons, ecologists point out, and ecosystems have always adjusted. But this human intervention, scientists say, threatens to force, in a century or less, vast climatic and ecological changes that have usually taken millennia. Ecologists fear that this time, ecosystems will not adjust rapidly enough to stave off catastrophe for many species.

Morover, some ecologists say, people are eliminating some of the diversity of habitat — and therefore of species — that other natural disruptions create and promote. "We threaten that variability because we want to manage everything like cornfields," said Dr. Julie Denstow, a tropical ecologist at Tulane University. There is, she said, "a whole camp of us" opposed to this "horrible homogenizing."

A Difficulty

Posing a Question: What Is Natural?

The new view of nature poses difficulties for conservationists and environmentalists who want to preserve things in their natural condition. sci-

entists say, since the question now becomes: If change is constant, what is the natural state?

A hot, for instance, is the natural condition of the Adirondacks, where a spirited argument is going on about whether "rough" fish like suckers, shiners and chubs should be killed and removed from some ponds to make way for trout. People on one side of the argument, citing a state policy that aims to "perpetuate natural aquatic ecosystems" in the area, say that the rough fish represent the natural condition and that the ponds should be preserved in that condition. Others say that at least some rough fish are descendants of baitfish brought in by humans and that they have crowded out trout that flourished there earlier.

Is either of these alternative conditions "the" natural state? Or is the natural state the way the Adirondacks were when Europeans first arrived? Or, for that matter, the way they were in the millennia when the region was buried under an ice-age glacier. Or in the succession of different forests, animals and ecosystems that followed?

"Nature can be in many conditions," said Dr. Daniel B. Botkin, an ecologist at the University of California at Santa Barbara who is a leader of the reassessment effort. Because of that, he said, conservationists and resource managers will be required to analyze a given situation more carefully than in the past and then choose which natural condition to promote rather than simply insist that humans should not upset a supposed balance of nature.

"I think he's right," said Rupert Cutler, the president of the Defenders of Wildlife, a major conservation organization. He said that the shift in thinking "suggests that the responsibility for protecting nature will require a much higher level of intense application of science than it was ever assumed to require in the past."

Empty Theory

Observations Find No Neat Balance

In its classic formulation, the balance-of-nature concept holds that an ecosystem maintains a constant equilibrium and when disturbed, it returns to its former status when the cause of the disturbance is removed.

Many scientists now say it is clear that this is not the way things work.

"We can say that's dead for most people in the scientific community," said Dr. Peter L. Chesson, a theoretical ecologist at Ohio State University who took part in yesterday's symposium along with Dr. Pickett, Dr. Jacobson, Dr. Botkin and Dr. Denstow. The other participants were Dr. Margaret B. Davis, a paleoecologist at the University of Minnesota who helped organize the symposium and Dr. Judy L. Meyer, a stream ecologist at the University of Georgia.

Many observations of the behavior of animal populations in the wild, says Dr. Botkin, do not support the assumption of neat balance predicted by traditional ecological theory. One aspect of the theory says that when a population of animals moves into an area, it grows gradually to a level of abundance at which its environment will allow it to be sustained indefinitely, and then remains at that level. Another says that predator and prey populations in a given ecosystem oscillate in numbers, with one population at a peak while the other is at a low point and vice versa, thereby creating an equilibrium over time.

But in real life, says Dr. Botkin, "when you introduce a population to a new area it goes up and then crashes, and then it doesn't remain constant. The long-term numbers vary and are much lower" than predicted by the theory. Similarly, he said, a number of studies and observations, in the laboratory as well as the wild, show that predator-prey populations do not oscillate stably and predictably. Instead, they either fluctuate wildly and unpredictably or the prey species is eliminated and the predator species dies of starvation. In one famous experiment, paramecium microbes increased rapidly. When predator microbes were introduced, they increased, too. But in the end, the paramecia were exterminated and the predators died of starvation.

Attempts to apply the classical equilibrium principle to the management of marine fisheries led to disas-

ter, according to Dr. Botkin. For years, he said, international regulations of commercial fishing determined allowable annual catches by calculating maximum sustainable yields according to equilibrium theory. The theory was such a poor guide, Dr. Botkin said, that population after population of commercial fish suffered catastrophic declines in the 1950's and 1960's and some have not yet recovered.

Managers of fisheries are trying to move away from that strategy now, he said, by analyzing the more complicated factors that actually determine fish populations. Among these, for example, are the environmental disturbances that largely determine the size of a given year's hatching of young fish. By estimating and keeping track of these varying "year classes," managers hope to adjust catch quotas year-by-year and avoid wiping out an entire class.

Some scientists are not quite ready to abandon entirely the concept of an inherent tendency toward equilibrium in ecosystems. A kind of equilibrium, they say, may exist on some scales of time and space.

Scale, in fact, may be very important. While there may be enormous, unbalancing disturbances and fluctuations among small populations in small ecosystems, says Dr. Pickett, the fluctuations may be dampened when the larger picture is considered, where a sort of medium-scale equilibrium might apply. An animal population that fails in one environment might not do so if allowed to range over a wider area. Dr. Botkin also said it is quite possible that while a given locality's ecology would change markedly over thousands of years, there could be recurring similarities — and thus a kind of floating equilibrium — at medium-range time scales.

That, in fact, is what Dr. Chesson, the theoretician, postulates. There may, for instance, be a limited range in which an animal population fluctuates over several hundred years. An equilibrium could be calculated by taking the average of the fluctuations. But it would be a "real mistake," said Dr. Chesson, to equate this with anything "remotely like" the classical idea of the balance of nature.

Constant Change

Outside Factors Shape Ecosystems

Perhaps the most outstanding evidence favoring an ecology of constant change and disruption over one of static balance comes from studies of naturally occurring external factors that dislocate ecosystems.

For a long time, says Dr. Meyer of the University of Georgia, these outside influences were insufficiently considered. The emphasis, she said, was "on processes going on within [the] system," even though "what's happening is driven by what's happened outside." Ecologists, she said, "have blinders on in thinking about external controlling factors."

Climate and weather appear foremost among these factors. By studying the record laid down in ocean and lake sediments, scientists know that climate, in the words of Dr. Davis of the University of Minnesota, has been "wildly fluctuating" over the last two million years, and the shape of ecosystems with it. The fluctuations take place not only from eon to eon, but also from year to year and at every scale in between. "So you can't visualize a time in equilibrium," said Dr. Davis.

Dr. Jacobson said there is virtually no time when the overall environment stays constant for very long. "That means that the configuration of the ecosystems is always changing."

THE WHITE HOUSE
WASHINGTON

April 26, 1993

Mr. Chadwick Dearing Oliver
College of Forest Resources, AR-10
University of Washington
Seattle, WA 98195

Dear Chadwick:

I would like to thank you for your participation in the Forest Conference in Portland, Oregon, on April 2. The Vice President and I believe it was a significant first step toward the resolution of the problems facing the Pacific Northwest.

As you know, I have asked the Forest Conference Planning Team to develop within 60 days a plan to consider the economic and environmental issues involved in managing federal forests. I certainly appreciated hearing the concerns you shared with me and look forward to working together in the future.

Thank you again for your efforts in making the Forest Conference a success.

Sincerely,

Bill Clinton

THE WHITE HOUSE
WASHINGTON

May 13, 1993

Mr. Chadwick Dearing Oliver
College of Forest Resources, AR-10
University of Washington
Seattle, WA 98195

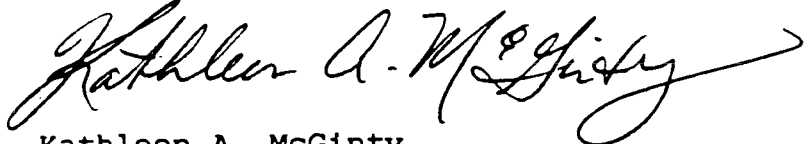
Dear Mr. Oliver:

Let me join many others in thanking you for your contribution to the April 2 Forest Conference. Your participation and support have provided strength to the process initiated by the President and will help ensure a sound resolution.

Enclosed you will find a full transcript of the Conference, the April 14 press release describing follow-up activities, and the recently released Statement of Mission to the three working groups which are working long hours to provide the President with the information he has requested.

Once again, I thank you for your continued interest in and support for this process and look forward to further interaction with you.

Sincerely,

A handwritten signature in cursive script, reading "Kathleen A. McGinty". The signature is fluid and extends to the right with a long, sweeping tail.

Kathleen A. McGinty
Director, White House Office on
Environmental Policy

KAM/avl

ECOSYSTEM MANAGEMENT ASSESSMENT TEAM
P.O. Box 3623
Portland, Oregon 97208

May 14, 1993

Dr. Chadwick Dearing Oliver
College of Forest Resources AR-10
University of Washington
Seattle, Washington 98195

Dear Dr. Oliver:

We very much regretted that you were unable to accept our invitation (extended through Mr. John Henshaw of the Pacific Northwest Experiment Stations) to make a presentation to the Ecosystem Management Assessment Team at the learning session on long-rotation approaches to forest management that was held in Portland on May 4th. Many of our team members, including me, attended that session in anticipation of hearing the details of the ideas that you presented to the President at the Forest Summit.

The presentations that did occur at that session included the concept of high quality forestry by Mr. Gus Kuehne and Dr. Jan Henderson's ecological guidelines that he considered appropriate for multiple rotations. These presentations gave us information that has proven quite helpful as we have prepared and analyzed potential management options using such approaches.

Our work continues and we would, again, invite you to consult with us on the concepts of long-rotation forestry that you have often spoken about. We are particularly interested in being able to document from either empirical data or carefully reasoned professional opinion the ecological, economic, and social benefits that would arise from the widespread application of such silvicultural practices. Also of intense interest are concepts of how harvest scheduling effects can be addressed - particularly in the short term.

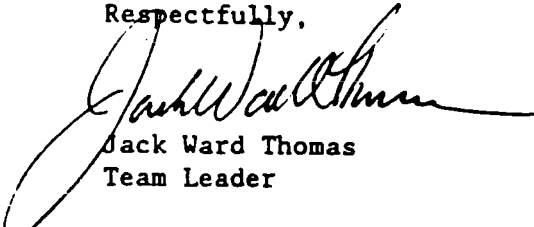
Would it be possible for you to meet with members of our team for about a half-day sometime during the week of May 17-21? Either May 20 or 21 would be most convenient for us. However, knowing the problems of scheduling a Professor must contend with, we can adjust to your schedule. We can cover your travel costs at Government per diem and mileage rates and pay you a consultant's fee of \$35/hour for your time. If you chose to fly to Portland, please be in contact with Ms. Nancy DeLong at 505-326-7620 who will arrange and pay for the flight. If you do fly, please feel free to take a cab from the airport. Please obtain a receipt. If you chose to stay overnight please inform Ms. DeLong who will arrange accommodations for you.

I hope you are able to find time to share your expertise and experience with us. Please give us a call if you can and chose to accept our invitation. This can be done with a phone call to me or to Dr. Martin Raphael at 503-326-7620.

If you cannot accept our invitation to make a personal appearance (which we would much prefer), could you provide us with any printed materials that we might consider?

We have been considering long-rotation forestry as a component of several options under development. However, as we are just now moving to detailed consideration of long-rotation forestry across the landscape; any insights or help you can provide would be helpful and appreciated.

Respectfully,

A handwritten signature in black ink, appearing to read "Jack Ward Thomas", written over a large, loopy flourish that extends to the left.

Jack Ward Thomas
Team Leader

cc: Dr. Martin Raphael
Ms. Nancy DeLong
bc: Mr. Jim Lyons (via FAX)
Mr. Jim Pipkin
Dr. Jerry Franklin

May 19, 1993

Dr. Jack Ward Thomas
Ecosystem Management Assessment Team
P.O.Box 3623
Portland, Oregon 97208

Dear Dr. Thomas:

Thank you for your letter of May 14 (I received it May 18, P.M.).

I am disappointed that you waited until the 43rd day of the the 60-day preparation period to consider the approach I have suggested. I had arranged contingency plans with the Dean (of the College of Forest Resources) to be available to help during any (or all) of the 60-day period. The earlier invitation referred to in your letter was a message from John Henshaw on my answering machine to attend a pre-workshop meeting (on May 4) on a 5-day notice. Had I realized this meeting was to help the Ecosystem Management Assessment Team, I would have cancelled my meeting in Montana and attended.

I am also disappointed that you refer to my approach as "long-rotation forestry." I have described my approach in reports, symposia, journal articles, and Congressional testimony. I also described many aspects of it in a letter to President Clinton on April 17. Copies were sent to Mr. Jeffrey Rogers and to Mr. Tom Tuchmann. While the approach may produce some longer rotations, it is a misrepresentation to consider that the fundamental proposal. I will bring to you copies of this and other reports and papers when we meet.

I will be happy to meet with you at any time, although this Friday (May 21) would be better than next week. I will readily cancel my plans for next week if that time is needed for the Ecosystem Management Assessment Team. I shall contact Dr. Raphael and Ms. Nancy DeLong about arrangements.

With so little time left, I would like to be assured that my effort will be worth the time spent and that this is not just an exercise to say you considered my suggestions--as I am sure you understand; therefore, I would appreciate your providing me the following information. Then, we can discuss the alternatives efficiently. (If you can FAX me the information before we meet on Friday, it would make the meeting more efficient. Otherwise, you can inform me at the meeting.) Please inform me of the following:

1. Who are the "judges" who assess the strengths and weaknesses of the different proposals; i.e., what are their backgrounds?
2. On what criteria are the different proposals being assessed?
3. Who decided the criteria (in #2, above)?
4. How is the risk and certainty of knowledge being assessed for #2 and #3, above?
5. Who are making the proposals (other than mine) and what are those presently being considered?
6. How long have the other proposals being considered been available to the Ecosystem Management Assessment Team and what has been done with them?
7. Also, please give me assurance that a complete assessment of the alternative I suggest will be included in the final report. I am sure you can understand the concern that my approach not be dismissed out of expediency at this late date.

Because I do not know the criteria for your assessment, it may take some time to develop the approach I am suggesting into the format you are considering. For this reason, I will be prepared to work with you as long as necessary.



May 25, 1993

Dr. Jack Ward Thomas
Ecosystem Management Assessment Team
P.O.Box 3623
Portland, OR 97208 FAX (503) 326-7624

Dear Dr. Thomas:

I hope the meeting Friday, May 21, was helpful for you and your associates in the challenging task. As always, I learned a lot when talking with you.

Many solutions to the issue can be scientifically sound. The real challenge is to be creative in finding a scientifically sound solution which will be most efficient. (As an example, both the sundial and the quartz watch are scientifically sound; the main difference is that the quartz watch is more creative.)

I am following up our meeting with this letter containing suggestions. We discussed some of these suggestions. Please contact me if you want me to work with you further on these. The suggestions are divided into four areas:

- the process you are involved in,
- suggesting and analyzing an alternative,
- presenting the information, and
- further considerations.

THE PROCESS YOU ARE INVOLVED IN

The scientific process needs impartiality at each step; I urge you to separate the various tasks of:

1. developing criteria for basing decisions;
2. developing a broad range of scientifically credible alternatives;
3. analyzing the various alternatives;
4. judging (ranking) the strengths of each alternative relative to each criteria;
5. reviewing the above scientific process;
6. choosing a preferred alternative.

Having not interacted with your team before last Friday, I do not know its organization, etc.: however, one major problem is a perception that you and several members of your team are biased toward your previously developed approaches--that you can not be viewed as objective for all tasks. Somehow, you will need to show that:

- you do not have any biases toward your previous approaches;
- you received objective reviews of your and other alternatives;
- as many other alternatives and approaches as possible were openly solicited and fairly analyzed and considered;
- the presentation and decision of alternatives (both which to present and which to choose) were done objectively.

Another major problem will be any review process. Reviews are often misconstrued if the reviewer is asked: "Is the report to be reviewed scientifically sound?" In reviewing the product of your efforts, additional questions need to be asked: "Are there other scientifically sound alternatives which should be considered?" and "What was the process of developing the report so that creativity, objectivity, and scientific rigor were maximized?"

In terms of criteria for basing the decision, I suggest the following broad criteria be included to avoid negative impacts here and to other regions:

1. Protection of spotted owls and other old growth species habitats;
2. Protection of other species including fish (or the structures in which they live);
3. Global environmental protection (avoid increasing harvesting elsewhere)
4. Employment (especially in timber dependent communities where unemployment is now high)
5. Cost/revenue to the government
6. Cost/return to the economy

I and others have described these in papers and letters I gave you.

SUGGESTING AND ANALYZING AN ALTERNATIVE

I urge you to consider a wide range of alternatives using the scientific technique of "bounding" any range of alternatives by taking it to an unexpected extreme. (As we discussed, we are not lawyers, so the "legality" of some of them may need to be resolved by others.)

Attached is an example of "proactive" VS "preservation" management on one piece of land. It is similar to some of

the scenarios we discussed; this example fleshes out the analysis of one of them. The example both suggests a possible pro-active approach on both public and private lands and suggests a way of comparing the results. You have the resources to compare these with more accurate numbers. I urge you to compare these and other creative scenarios.

The example compares two options. "Proactive" management seems to be better for the spotted owl and other criteria; however, this analysis was done VERY roughly. I encourage you to analyze this "proactive" approach as well as more and less "proactive" ones using analytical methods such as I have described here.

One approach may be to have a mixture of various degrees of "proactive" management across the states, depending on the risk (e.g., fires) and relative hardships of the communities.

PRESENTING THE INFORMATION

You had suggested that the information would be presented at two times and in two parts: the initial biological alternatives, and the suggestions for mitigation and improvement. I strongly urge you NOT to present these separately or to find a way to avoid my concern below.

Separate presentations will leave the impression that the mitigation is a "compromise" from the only scientifically sound solution. There are many scientifically sound solutions. If creatively considered, the mitigation should be an integral part of the scientific sound solution.

Presenting them separately may lead to political "jockeying" for positions.

FURTHER CONSIDERATIONS

Wood Flow:

We agree that we need to be concerned about the wood flow to the timber-dependent communities during the possible "bottleneck" of the next few decades. One possible way to resolve the bottleneck is through creative alternatives such as the one I've suggested above (see attached example).

If this flow of timber is insufficient, it may be possible to arrange incentives to harvest wood in eastern Washington and Oregon and transport them west of the mountains. (In the eastern Oregon and Washington forest ecosystems health report, much thinning and other harvesting was suggested in these areas to maintain a healthy, balanced ecosystem. These thinnings and harvests may not be economically feasible in themselves; however, they may be

feasible through a joint production of timber, jobs, and sound ecosystems.)

Community stability:

We agree that we need to maintain the creativity of the rural people during the decades of shortages of timber flow. These people and their skills are necessary to enhance, protect, and maintain stable ecosystems and to manufacture ecologically sound timber products.

If there is insufficient employment in the "spotted owl" management scenario developed, it may be appropriate to utilize the skill and creativity of the local people for thinning, pruning, stream restoration, and otherwise enhancing the many values of the forest.

For their creativity to be utilized, they must accept (or choose) and be an integral part of any solution. Otherwise, their creativity may be channelled to confound any externally imposed solution.

A lag time for Forest Plans and for Watershed Analysis Plans:

We discussed that other areas may become available for active management after Forest Plans (U.S. Forest Service lands) and Watershed Analysis Plans (other lands) are developed. As you suggested, these projects may take several years.

During these several years, there may be many mills which close permanently--and communities and people will suffer.

I strongly urge that the planning process be streamlined by getting the local people involved in the actual planning. Recent technologies in G.I.S. and satellite systems are allowing efficient understanding of the issues. One of my graduate students helped a local community develop a very balanced plan for an area by providing them with the information.

The advantages of getting local people actively involved are: they will actively defend and support the plan; they know the area and can develop the plan efficiently; and they will develop it rapidly and efficiently so they can proceed with the management.

I also urge that private landowners be given incentives (a free market approach) to encourage them to create the needed structures. This will allow rapid, independent initiatives to create the structures. (It's what has driven the U.S. so far.)

EXAMPLE COMPARING "PROACTIVE" VS "PRESERVATION" MANAGEMENT FOR SPOTTED OWLS AND OTHER VALUES.

Chad Oliver, Professor of Silviculture, College of Forest Resources, University of Washington, Seattle, Washington.
98195. (May 25, 1993)

(More intensive analysis should be done; however, the example shows that a "proactive" management approach may be more effective than large "preservation" areas. These are just two examples among many which should be considered.)

This example compares a "preservation" and an active "landscape management" scenario. These are just two of a wide range of scenarios which could be developed. The "landscape management scenario" includes preservation of "old growth", creation of more "old growth" structures, and active involvement of private landowners through incentives. The "preservation scenario" creates an "old growth reserve" which locks up all National Forest lands for no management. The example looks at solutions which would provide that flow for 20 years since a major problem is wood flow for the next two decades until some balance of harvestable age classes is reached. More detailed analyses would need to be done to develop a long-range scenario.

The example covers 895,000 acres. "Operational falldown" could reduce the numbers considerably and still show positive results. Different levels of proactive "landscape management" could be done in different areas. The mixture of alternatives would have several positive effects:

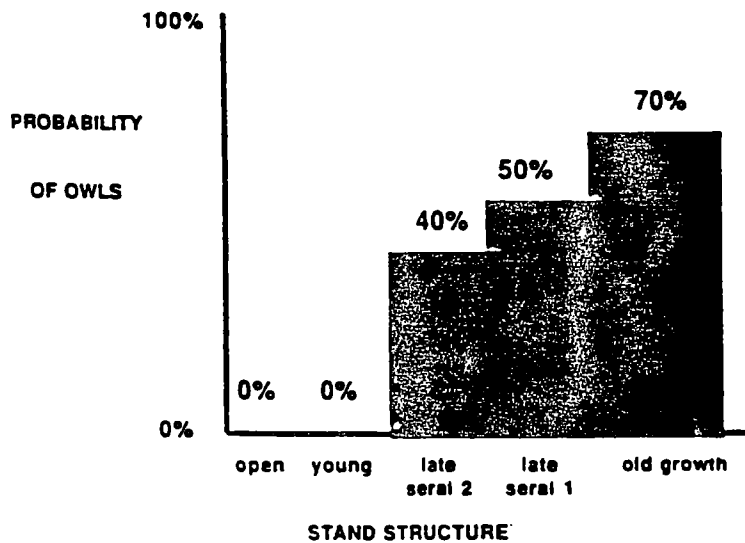
- it would allow a mixture of conservation and other social values, risk, and certainty to be matched to each specific location;
 - it would allow the different alternatives to be tested in application, to determine which is most effective.
- (This testing of different scenarios is a major part of the "adaptive management" approach.)

The example will be described in terms of "Scientific Background", "Area of the Example", "Alternative Management Regimes", "Criteria for Decisions", "The Analysis", and "Tradeoffs and Results."

THE SCIENTIFIC BACKGROUND:

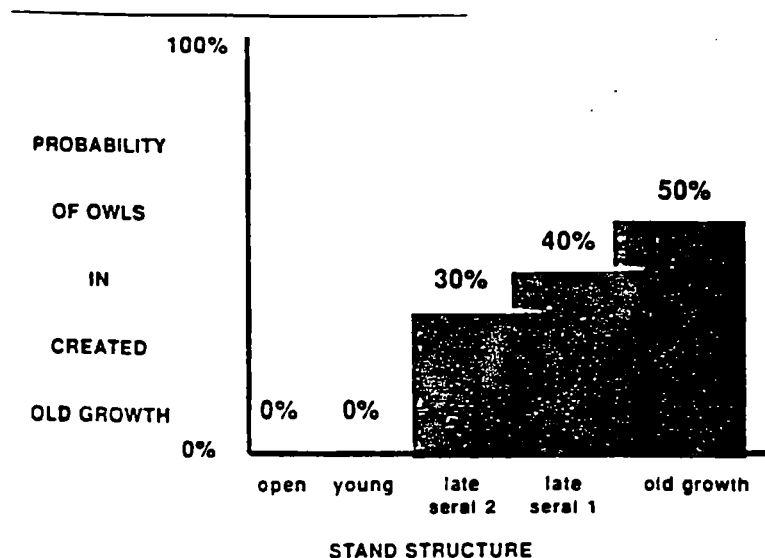
Suitability of forests for spotted owls is based on the forest structure. Although there is limited information, the probability of finding owls in various forest structures probably increases with increasing "old growth" structure (See Figure 1).

Figure 1. Probability of owls living successfully in various forest structures probably increases with "old growth" structure.



Where "old growth" structures do not exist, it is possible to create them more rapidly with proactive thinning of younger stands than by leaving such young stands to "grow naturally." The probability of finding owls in such "created" old growth and "late seral" structures is probably less than in undisturbed structures (Figure 2). There is evidence that owls inhabit these "created" structures in many areas; the "uniformity of process" concept leads us to believe it would happen in other places.

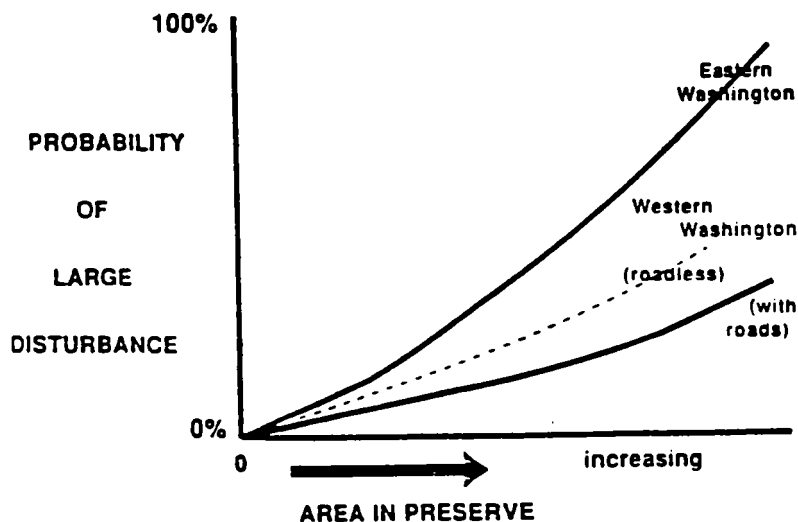
Figure 2. Probability of owls living successfully in various forest structures probably increases with artificially created "old growth" structures, although it is possible that the probability is lower.



The "confidence" of our probabilities in Figures 1 and 2 are both low. Questioning our confidence in one figure without also questioning our confidence in the other would be a selective (biased) assessment and not scientifically correct.

The risk of a very large disturbance destroying a forest increases with the area of contiguous, unmanaged forest (Figure 3). Where forest management has interrupted the contiguousness of stand structures, fires and windstorms are less likely to occur. Where roads make "cleanup" after windstorms and fire fighting feasible, the risks of fires is even less--especially where road access can be blocked if necessary. Lack of interest (and even enmity) of local people toward the forest increases the risk of fires. Fires are also more likely in old forests in certain areas than others because of local climatic differences.

Figure 3. Probability of a large disturbance occurring is directly related to the size of contiguous unmanaged forests.



AREA OF THE EXAMPLE:

Assume an area of National Forest land with the following:

Old growth forests.....	170,000 acres
Late seral ("late seral 1").....	75,000 acres
Moderately old ("late seral 2").....	100,000 acres
"Stem exclusion" ("young").....	50,000 acres
Recently clearcut ("open").....	100,000 acres

Nearby is private land with the following attributes:

"Stem exclusion" ("young").....	200,000 acres
Recently clearcut ("open").....	200,000 acres

(This example is similar to the Mt. Baker-Snoqualmie National Forest Spotted Owl Habitat Conservation Area, 1990.)

ALTERNATIVE MANAGEMENT REGIMES:

Two scenarios are suggested for managing the National Forest and related area:

Landscape management alternative (#1): By this scenario, the "old growth" is not harvested, "late seral" and "moderately old" stands are thinned to create "old growth (ST)" and "late seral 1 (ST)" structures respectively. 150,000 acres of the "young" stands on private lands are thinned to create "late seral 2 (ST)" structures (using government incentives). Thinned stands jointly produce wildlife structures (snags and downed logs) and timber for processing.

Preservation Alternative (#2): By this scenario, the entire National Forest HCA area described above is set aside as an "old growth preserve", and no management is allowed. Private lands are harvested (at about 50 years rotation age).

CRITERIA FOR DECISIONS:

Several criteria are used for comparing the merits of the alternatives. The criteria are generally relative (other scenarios would actually produce lower values for certain criteria):

1. **Spotted owl suitability:** Relative suitability is the sum of all acres in a structure multiplied by the probability of it being suitable for owls (Figures 1 and 2) and then reduced for risk of destruction (Figure 3).
2. **"Open" species suitability:** Just as we "myopically" discounted the importance of "old growth" structures and habitats in the past, we do not want to discount the importance of "open" structures in the future. "Open" species suitability is the sum of the open acres multiplied by a probability of a species being found in it (here assumed simplistically to be 80%).
3. **Fish management:** Ability to enhance and manage riparian zones is directly related to both access to the zones and funds to give incentives to manage. For this reason, the "landscape management" alternative was listed as more suitable than the "preservation" alternative.
4. **Global environment:** If wood is not harvested from the Pacific Northwest, more polluting steel, aluminum, brick, concrete, and plastic are used OR wood is harvested from elsewhere--e.g., Siberia.

Board foot volume produced by each scenario indicates the amount of non-wood products (and associated pollution) not used. Board feet produced were assumed as follows:

Thinning "late seral 1" yields 15 thous. Bd. ft./acre
 Thinning "late seral 2" yields 15 Bd. ft./acre
 Thinning "young" yields 10 thous. Bd. ft./acre
 Clearcutting "young" yields 40 thous. Bd. ft./acre

Added clearcutting in Siberia indicates impact of harvesting wood in othe areas to substitute for Pacific Northwest wood. Fifteen acres must be harvested in Siberia to obtain the wood from harvesting one acre in the Pacific Northwest.

5. **Employment:** One million board feet harvested is assumed to produce 9 person-years of employment.
6. **Return to the government:** Net revenue from timber sales less expenditures in incentives.

Revenue to the government: Revenue is assumed at the rate of \$ 400 per thousand board feet harvested.

Cost to the government: Incentives for private landowners to maintain "late seral 2" structures for 20 years through thinning, creating snags, etc. is assumed to cost \$ 2,000/acre (assuming joint production with timber--to be harvested at the end of 20 years, when other stands would be manipulated this way).

8. **Cost to economy:** Revenue from harvest of timber is assumed to have a multiplier of 4. Numbers are differences in returns.

THE ANALYSIS:

The area in each structure after 20 years is shown in Figure 4. The probability of containing an owl multiplied by the area in that structure gives the "total" value. The "spotted owl suitability" of the alternative is this total less the risk of destruction (by fires, winds, or both). Risk with the "preservation" alternative would be much higher in such places as eastern Washington (Figure 3).

TRADEOFFS AND RESULTS (FIGURE 5):

Results of the analysis shows more of all values are generated by "proactive" management. The complete "preservation" alternative provides even less "owl growth" habitat as well as other structures.

Other scenarios intermediate to (and more extreme than) these could also be done. Where the confidence in estimates is low, sensitivity analyses could be done to determine the importance of being conservative with an estimate.

(The conversion factors used were very crude because of limited time and resources. These factors could be improved dramatically.)

More "proactive management" scenarios could be done in areas where risk of habitat destruction with "hands-off" preservation is high (e.g., eastern Washington and Oregon) and where rural communities are in most need of relief.

This and other alternative "landscape management scenarios" with different levels of "proactiveness" done at different places across the states could provide a steady flow of stand structures, timber products, and other factors and would allow examination of a variety of ways to produce desired values.

Figure 4. Area in each structure after 20 years, and total suitability for each structure with the landscape management Alternative (Figure 4A) and preservation alternative (Figure 4B). (Note both alternatives preserve existing "old growth.")

Figure 4A. Alternative # 1: Landscape Management Alternative.			
Structure	Prob. of Sp. owl suitability	Acres	Total Spotted Owl suitability: (Acres X Prob.)
<u>Unmanaged structures:</u>			
Old Growth:	70%	170,000	119,000
Late Seral 1:	50%	0	0
Late Seral 2:	40%	0	0
Young:	0%	200,000	0
Open:	0%	200,000	0
<u>Created structures:</u>			
Old GrowthST:	50%	75,000	37,500
Late SeralST 1:	40%	100,000	40,000
Late SeralST 2:	30%	150,000	45,000
TOTAL		895,000	241,500
Risk of destruction (Fig.3)			5%
SPOTTED OWL SUITABILITY:			
(Total - risk):			229,425

Figure 4B. Alternative # 2: Complete Preservation Alternative.

Structure	Prob. of Sp. owl suitability	Acres	Total Spotted Owl suitability: (Acres X Prob.)
<u>Unmanaged structures:</u>			
Old Growth:	70%	170,000	119,000
Late Seral 1:	50%	75,000	37,500
Late Seral 2:	40%	100,000	40,000
Young:	0%	500,000	0
Open:	0%	50,000	0
<u>Created structures:</u>			
Old GrowthST:	50%	0	0
Late SeralST 1:	40%	0	0
Late SeralST 2:	30%	0	0
TOTAL		895,000	196,500
Risk of destruction (Fig.3)			15%
SPOTTED OWL SUITABILITY:			
(Total - risk):			167 025

Figure 5. Relative tradeoffs for a variety of values with "landscape management" and "preservation" alternatives. Higher values indicate more positive benefits. (These values are crude, but show trends. Sensitivity analyses could be used to determine changes caused by inaccuracies of data.)

Criteria	Alt. #1 Landscape & Preserve Old Growth	Alt. # 2 Old Growth Preserves
-----	-----	-----
Spotted Owl suitability:	229,425	167,025
"Open" spp. suit.: 80%	160,000	40,000
Fish Management	+	0
Global Environment:		
Hvst/yr (mill.bd.ft.)	610	100
Added Siberia hvst.(acres/yr)	0	150,000
Employment (person-yrs.)	5,456	900
Gov't. cash flow (20 yr)		
Revenue to Gov't.	\$ 1,900,000,000	\$ 0
Cost (incentives)	\$ 300,000,000	\$ 0
Net:	\$ 1,600,000,000	\$ 0
<i>Return</i> Cost to economy (20 yr)	\$ 970,000,000	\$ 160,000,000

May 27, 1993

FOREST
RESOURCES



Mr. Tom Tuchmann
Office of the Secretary
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Dear Mr. Tuchmann:

I wish to share the following concerns with you, realizing an ill chosen outcome of the Forestry Conference could hurt very many people, species, and ecosystems of the Pacific Northwest and elsewhere.

Forest Resources
Management Division

I was a participant at President Clinton's Forestry Conference of April 2. I sent a followup letter to President Clinton of April 17. I was not directly contacted to contribute to the Ecosystem Management Assessment Team until May 18 (when I received a letter). I met with the Ecosystem Management Assessment Team on May 21 (for one day) and sent Dr. Thomas the attached followup letter (of May 25). I expressed suggestions for overcoming the concerns I shall share with you here.

I am concerned that the report will be unfairly biased toward a "hands-off" (preservation of non-old growth) approach of forested areas and biased against more "proactive" approaches (which could include preservation of old growth). I am not sure enough creative, proactive approaches are being considered and thoroughly analyzed.

Both the "hands-off" and "proactive" approaches are based on specific areas of uncertainty. (e.g., Figures 1, 2, and 3 in "example", attached to Dr. Thomas's letter). This uncertainty needs to be specifically acknowledged; then, it can be accounted for in the analysis.

In a limited example (attached to Dr. Thomas's letter), I show that a "proactive" management approach can lead to more spotted owl habitat, more employment, a better global environment, and other values. The uncertain assumptions made here (Figures 1, 2, and 3) are probably more explicit and conservative than those used to justify the "hands-off" approach.

An initial response to the large uncertainty permeating the whole issue is to adopt a "hands-off" approach until more is known. This approach would be based on the now-outdated "steady state" concept of nature. (See New York Times article at end of President Clinton's letter.) Proactive management to protect and increase old growth while more is learned could actually be more conservative.

Bias by scientists always occurs (especially where uncertainty is involved), although we are trained to avoid bias as much as possible. Much of the scientific process is specifically designed to recognize and avoid bias. Objective, analytical processes are commonly and rigorously instituted to reduce bias. I suggested several ways to Dr. Thomas for reducing bias. I am concerned that sufficient objective processes have not been instituted to avoid an unconscious bias by the Ecosystem Management Assessment Team.

If many people are hurt and the spotted owl is not made safer because of unacknowledged bias and uncertainty in the present process, it will be a tragedy which could have been avoided.

In the face of the high degree of uncertainty in both the "hands-off" and the "proactive" approaches, there should be careful, objective analysis and explicit acknowledgement of the degree of uncertainty. Much of the issue then becomes a policy decision of whether or not to err in favor of the "proactive" approach and human values in the light of the uncertainty--recognizing that the "proactive" approach may be more conservative.

I hope these comments are helpful. No one has all of the answers; however, an objective, analytical process which detects and exposes bias and uncertainty (usually unconsciously committed by the offender) needs to be ensured. I have described some of the unconscious biases and uncertainties I am concerned will occur unacknowledged in the report.

I hope this is helpful to you.

Yours truly,



Chadwick Dearing Oliver,
Professor of Silviculture,
w (206) 685-0875
h (206) 523-5801
FAX (206) 685-0790

FOREST
RESOURCES



May 27, 1993

Dr. Jack Ward Thomas
Ecosystem Management Assessment Team
P.O.Box 3623
Portland, OR 97208 FAX (503) 326-7624

Dear Dr. Thomas:

This letter is a followup to our meeting last Friday (May 21) and to the letter I sent on Tuesday, May 25. This letter covers a specific concern we discussed.

Forest Resources
Management Division

Under some scenarios and in many places, there appears to be a high reduction in timber harvest for the next one to few decades, followed by an increase in harvest--but not at the same levels as before.

An important issue is to maintain industrious people and their woods-oriented work ethic in the rural communities during this period of low timber flow. Maintaining these energetic people and way of life is not primarily out of compassion (although we should not lose this); rather, these people are and will be needed to protect the forest (from fires), to promote recovery of the forest where unavoidable disturbances occur, and to manage the forest for a wide variety of uses--including timber--in the future.

Much important silvicultural work can be done in the forests during the next few decades which will lead to long-term economic, social, and ecological stability in the communities. These are not "make-work" projects; rather, they are investments in thinning, pruning, streamside restoration projects (e.g., planting conifers to create future woody debris and shade for streams) which would lead to future economic returns from high quality timber (more value added and contribution to the global environment) and enhanced fish production.

Ironically, even if there were no reduction in timber harvest, these management activities would probably be a good investment for the individual, the community, and the global environment.

Cooperation, agreement, and participation of the local people will be necessary for the success of any proposed solution of the spotted owl issue. You and I are both familiar with rural communities; their attitude and subtle behaviors can "make or break" any attempted solution. If the energetic people feel no "ownership" in the solution, they will leave (as is already beginning to occur) and

relatively negative, violent attitudes will probably emerge (which is apparently already occurring). If everyone moves away and the communities disappear, there will be no one to do the proactive management and future timber harvest necessary for a stable local and global environment.

Places (in this country and elsewhere in the world) where there is no rural woods labor have to rely on little silviculture and on machinery-intensive management operations. The ecological results are not very positive. The importance of these rural people--and their activities to invest in the future--needs to be recognized by themselves and others.

It is necessary that the local people realize that the work to be done is not a "charity." Rather, it is an investment in building a stable future in the rural communities for the good of themselves and the country. The work could actually be analyzed in an economic investment perspective. I had given you an example of the investment and employment potential from thinning and pruning. (See my report to the Governor's Timber Team.) Enclosed is an example of joint production of timber and ecological health which Professor Lippke and I did for the Eastern Washington and Oregon Forest Health Study (Richard Everett's study).

Many creative projects could be developed which would be economical and would enhance the local and global future. The projects could include involving the people in the design and management of future U.S. Forest Service plans, in stewardship contracts, and in similar activities. Many of these rural people are motivated, independent, and accustomed to the huge responsibility and risk of managing people, equipment, and the environment. They are accustomed to managing large investments of money and time.

I will be glad to discuss this with you more as you would like.

Yours truly,



Chadwick Dearing Oliver,
Professor of Silviculture
w (206) 685-0875
h (206) 523-5801
FAX (206) 685-0790



June 1, 1993

Mr. Peter M. Yu
Director to the National Economic Council
The White House

FAX (202) 456-2223

Dear Mr. Yu:

Enclosed is a set of specific suggestions for employment/community stability to the "timber communities" as a followup to our meeting in Olympia last Friday afternoon (May 28),

As I mentioned at the meeting, Professor Bruce Lippke and I have been developing these. We summarized them hastily in the attached paper over this past weekend, and the paper is necessarily rough. You will notice the estimated costs of some programs were left unfinished. These would take more time to estimate (although they could be estimated).

Please feel free to contact me or Professor Bruce Lippke ([206] 543-8684) if you would like to discuss any of this further.

I hope this is helpful.

Yours truly,

Chadwick Dearing Oliver,
Professor of Silviculture
w (206) 685-0875
FAX (206) 685-0790

cc. Congressman Norm Dicks
Ms. Ruth Dyk
Ass. Secretary Jim Lyons
Mr. Will Stelle
Mr. Mike Bagley
Prof. Bruce Lippke

THE WHITE HOUSE

WASHINGTON

June 10, 1993

Dr. Chadwick D. Oliver
Professor of Silviculture
University of Washington
College of Forest Resources
Anderson Hall, AR-10
Seattle, WA 98195

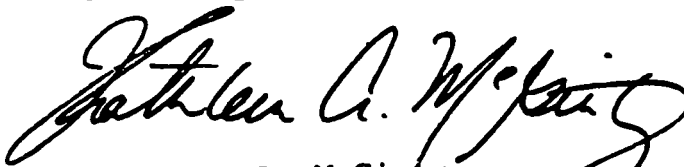
Dear Dr. Oliver:

On behalf of President Clinton and Vice President Gore, I would like to thank you for contacting me with your concerns about the Forest Management Plan.

The President and I believe that the Forest Conference held in Portland on April 2 was a significant step toward the resolution of the problems facing the the Pacific Northwest. As you know, at the conclusion of the conference, President Clinton directed his Cabinet to develop a Forest Management Plan within 60 days. I certainly appreciate your time and energy to help make the Forest Conference and the Forest Management Plan a success.

Be assured that this Administration will continue to work toward the resolution of this very important matter. Again, thank you for sharing your views with me.

Sincerely,



Kathleen A. McGinty
Director, White House Office on
Environmental Policy

KAM/avl

THE WHITE HOUSE

WASHINGTON

June 14, 1993

Dr. Chadwick Dearing Oliver
Forest Resources Management Division
College of Forest Resources
Anderson Hall, AR-10
University of Washington
Seattle, Washington 98195

Dear Chad:

Thanks for writing. I appreciate your thoughtful analysis of the problems facing the Pacific Northwest forests and am grateful for your participation in the Forest Conference.

I share your concerns regarding our nation's precious timber resources. We must bring all involved parties together to craft a comprehensive policy that balances job creation with the protection of America's old growth forests. The Forest Conference was a first step in resolving this issue. Please stay involved.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Clinton". The signature is fluid and cursive, with a long horizontal stroke at the end.

June 27, 1993

FOREST
RESOURCES



President Clinton
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20500

Dear President Clinton:

I was part of the scientific panel at your Forestry Conference in Portland on April 2; however, I have not been asked to be intensively involved in the process since then. Also, I have not seen a copy of the subsequent report.

I understand that the "spotted owl/forestry" resolution has become somewhat bogged down. The following is a suggested way to resolve the issue.

The suggested solution is to follow the scientific process in public view, very much in keeping with and in support of your approach to other issues to date.

The present problem is described in the following box, after which is a suggested solution.

The present problem is:

Very few people trust the "scientific" effort which transpired since the April 2 meeting. Unlike your conference where everyone felt part of the solution, the subsequent scientific team has not engendered similar ownership, openness, or trust.

Few people feel a full array of creative options for management were considered and fairly analyzed by the scientific committee.

Few people feel the scientific committee has developed and analyzed a fair solution.

I share these concerns. I do not feel the process they followed was very scientific.

The solution:

Both short-term and long-term solutions need to be addressed.

Short term solution: In the short term (about 4 months), it may be necessary to initiate some timber harvesting to forestall further human suffering. This may be done through temporary adoption of one of the proposed options--BUT ONLY TEMPORARILY.

Long term solution: The long term solution is to initiate a new, more open scientific process with a time horizon of 2 or 3 months.

The process could be very scientific by following a scientific process (described below); however, it could be televised to keep the public informed of all considerations (e.g., C-SPAN).

FOREST
RESOURCES



Because much scientific process is simply people reading, writing, and analyzing, the televised portions could be one to three hours on occasional evenings, as the alternatives are being described and their merits discussed and analyzed.

The process would have the dual advantages of:

1. Educating the public to the alternatives and their consequences; (Such public awareness was very important in the McCarthy-Army hearings, the Watergate hearings, etc.)
2. Educating the public to the scientific process of suggesting alternatives, analyzing them, adjusting them, and determining tradeoffs. (This process is **DISTINCTLY** different from the legal, adversarial process.)

Forest Resources
Management Division

Organizing the new scientific process:

The process would be organized to be objective, creative, and **NOT** adversarial. Independent groups would be needed for various functions to ensure that no one became adversarial (advocating) instead of analytical.

The process would be composed of the following **INDEPENDENT** groups, with the following tasks. (No person would belong to more than one group.)

Group 1: Policymakers: List the values to be considered (e.g., spotted owl, fish, local employment, global environment, risk, costs, certainty of outcome, etc.). This group should be the executive and/or legislative branches.

Group 2: Chair (acting similar to a judge to ensure the orderly, fair process): An independent, objective, analytical person of disinterested but scientific credentials should be in this position to ensure the integrity and objectivity of the process.

Group 3: Groups of scientists to propose creative alternatives to be considered: The previous group (e.g., Dr. Thomas, Dr. Franklin, etc.) should be **ONE** group to propose these alternatives; however, other groups of legitimate scientists (such as myself) should also propose independent alternatives to ensure as many creative alternatives as possible are developed.

These groups should also critique their own and other groups' alternatives to ensure all facets of each alternative are considered. (This critiquing of ideas is essential to the scientific process.) It will be **VERY** critical that the chair ensure the scientists remain objective rather than adversarial in this process.

Group 4: Analytical assistance: A non-biased analytical team should help all groups assess the consequences of the alternatives. **GREAT** care should be taken to ensure there is no bias in this group.



Group 5: The chair and possibly another group (with the aid, discussion, and consensus of Groups 3 and analyzed by Group 4) should list the tradeoffs of the different alternatives according to the values listed by Group 1, as well as the risk and certainty of the judgements. This listing would be a matrix to provide a wide range of options for the policymakers.

By keeping the process open to the public, the public will become educated about the alternatives and consequences of the various actions--as well as the behavior of scientists.

At the same time, the public will become aware that the scientific process is based on analysis, not charisma, and that scientists can change their minds in the face of arguments of logic.

Forest Resources
Management Division

The process will expose the public to the choices and a way of developing policy consistent with your administration--a process by which a goal is established, a way to get there is proposed, and the way is then changed and refined as more information becomes available.

I hope this is helpful. I shall be away from my desk (in the field) for much of the summer; however, I can be reached through the numbers listed below.

Yours truly,

Chadwick Dearing Oliver,
Professor of Silviculture
work (206) 685-0875
secretary (206) 543-8684
home (206) 523-5801
FAX (206) 685-0790

cc. Vice President Gore
Director Katie McGinty
Secretary Bruce Babbitt
Secretary Mike Espy
Assistant Secretary Tom Tuchmann
Assistant Secretary Jim Lyons
Dr. Jack Gibbons
Senator Slade Gorton
Senator Patty Murray
Speaker Tom Foley
Representative Norm Dicks
Representative Maria Cantwell
Representative Jennifer Dunn
Representative Jay Inslee
Representative Mike Kreidler
Representative Jim McDermott
Representative Al Swift
Representative Jolene Unsoeld

THE WHITE HOUSE
WASHINGTON

June 28, 1993

Dr. Chad Oliver
Professor of Silviculture
and Forest Ecology
University of Washington
College of Forest Resources
Seattle, WA 98195

Dear Dr. Oliver:

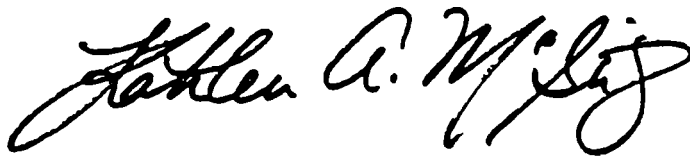
On behalf of the President and Vice President, I would like to thank you for your participation in the White House Conference on Global Climate Change held recently in Washington.

As you know, this Administration is committed to the preservation of our global environment in a way that leads to strong and sustainable economic growth. I appreciate the time you took out of your busy schedule to attend the conference and provide your input on global climate change.

I believe that the conference was a successful first step toward finding creative and innovative solutions to this challenge. I would like to thank you for providing your thoughtful insights in this regard. I look forward to working with you in the future on this very important issue.

Again, thank you for your participation in our conference.

Sincerely,

A handwritten signature in dark ink, appearing to read "Kathleen A. McGinty". The signature is fluid and cursive, with the first name "Kathleen" being more prominent and the last name "McGinty" following in a similar style.

Kathleen A. McGinty
Director, White House Office on
Environmental Policy

KAM/avl

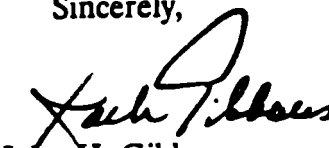
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF SCIENCE AND TECHNOLOGY POLICY
WASHINGTON, D.C. 20506

July 6, 1993

Dear Dr. Oliver:

Thank you for your letter expressing your concerns over the outcome of the Forest Conference. I believe that the Interagency Ecosystem Management Team carefully considered the available information and produced a creative approach to forest management that meets the objectives set by the President. In particular, the proposed adaptive management areas should be an ideal setting to explore the proactive management approach you stressed in your letter.

Sincerely,


John H. Gibbons
Director

Dr. Chadwick Dearing Oliver
Professor of Silviculture
Forest Resources Management Division
University of Washington
123 Anderson Hall, AR-10
Seattle, WA 98195

SECRETARY OF LABOR
WASHINGTON

JUL 21 1983

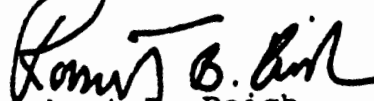
Mr. Chadwick Dearing Oliver
Professor of Silviculture
College of Forest Resources
University of Washington
Anderson Hall, AR-10
Seattle, Washington 98195

Dear Professor Oliver:

Thank you for your recent letter regarding an alternative, "proactive" approach to managing old growth forests in the Pacific Northwest. As you may know, we have proposed a forest management policy that will comply with existing laws, while balancing the need to preserve old growth forests against the desire to minimize the reduction in timber-related jobs.

Your input in this matter is greatly appreciated.

Sincerely,


Robert B. Reich



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

Mr. Chadwick Dearing Oliver
Professor of Silviculture
College of Forest Resources, AR-10
University of Washington
Seattle, Washington 98195

Dear Mr. Oliver:

Thank you for sending Secretary Espy a copy of your letter to President Clinton regarding the spotted owl situation. The Secretary has asked me to respond to the points you have raised.

As you know, President Clinton recently released a comprehensive forest management proposal. He has proposed an innovative approach to forest management based on sound science and a commitment to existing law. The plan is built around the protection of key watersheds, old-growth forests, and the various species that are dependent on old-growth ecosystems. Under the President's plan, nearly 80 percent of the remaining old-growth forests will be protected. The President has also made a firm commitment to provide economic assistance to communities that may be affected by this action.

Please note that this plan has been proposed as a draft for public comment. I certainly hope that you will review the draft and give me the benefit of your expertise.

I appreciate hearing your concerns and will keep them in mind. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in dark ink, appearing to read "J. Lyons", with a long horizontal flourish extending to the right.

James R. Lyons
Assistant Secretary
Natural Resources
and Environment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF JOHN F. PALMISANO, Ph.D.

John F. Palmisano, with full knowledge of the penalty of perjury, declares as follows:

1. My name is John F. Palmisano. I am a consulting fisheries biologist with a specialty in anadromous fish such as salmon and steelhead trout. I reside in Beaverton, Oregon. I received Bachelor's degrees in Biology and Conservation from the University of Wisconsin in 1967, a Master's degree in Fisheries Biology from Utah State University in 1972, and a Ph.D. in Fisheries Ecology from the University of Washington in 1975. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. My experience with anadromous fish includes almost 20 years of research, teaching, and consulting in the Pacific Northwest (see Summary Table below). I was a marine biologist for the National Marine Fisheries Service in Juneau, Alaska (1975-77); taught courses in fisheries and ecology at Western Washington State University in Bellingham (1975 & 1977) and at the University of

Table I - SUMMARY TABLE OF SELECTED SALMONID AND RELATED EXPERIENCE

- Testified as an expert witness on Pacific Northwest salmonids before the U.S. House of Representatives Committee on Natural Resources, Subcommittee on National Parks, Forests, and Public Lands
 - Testified as an expert witness on Washington State salmonids before the Washington State Senate Natural Resources Committee
 - Testified as an expert witness on Washington State salmonids before the Washington State House of Representatives Fisheries and Wildlife Committee
 - Reviewed winter steelhead trout issues and visited stream sites in the Illinois River Valley of southwestern Oregon
 - Prepared technical comments to the National Marine Fisheries Service regarding notice of status review of Illinois River winter steelhead trout populations
 - Prepared technical comments to the Northwest Power Planning Council on Phase Three of the Columbia River Basin Fish and Wildlife Program
 - Reviewed salmonid fisheries issues and visited stream sites in the Wallowa-Whitman Forest including Umatilla and Upper Grande Ronde rivers
 - Senior author of technical report on impacts to salmonids in Washington
 - Coauthored two technical reports on decline of salmonids in Oregon
 - Reviewed Lower Columbia River environmental factors and their effect on salmonid populations for area Public Utilities
 - Led forebay trap study of downstream migrant salmon and steelhead trout smolts at Rocky Reach Dam, Columbia River
 - Conducted salmonid fingerling bypass study at Rock Island Dam, Columbia River
 - Prepared fisheries section for Columbia Basin Draft Environmental Impact Statement
 - In charge of fish husbandry and rearing technology for the Tulalip Tribes' salmon hatchery near Marysville, Washington
 - Managed testing program for bioassays with juvenile salmon for ARCO's Ferndale, Washington, Plant
 - Wrote operational manual for the McCall, Idaho, summer chinook salmon hatchery for the Idaho Fish and Game Department
 - Reviewed fishery resources of the Snake River and evaluated effects of proposed increased flows for salmon
 - Designed and conducted salmonid population survey of over 30 streams in the Flathead Indian Reservation in Montana
 - Senior reviewer of technical reports on the impact of the Exxon Valdez oil spill on Prince William Sound salmon
 - Biological Liaison to the Alaskan Southern Southeast Regional Aquaculture Association for design of Ketchikan salmon hatchery
 - Prepared Master's degree on the food habits of anadromous Dolly Varden char of Amchitka Island, Aleutian Islands Alaska
-

Washington in Seattle (1977); and was a fisheries scientist with the consulting firm of CH2M Hill in Bellevue, Washington (1978-88).

Since 1988 I have been sole proprietor of my own biological consulting firm in Beaverton, Oregon, where I have concentrated on factors affecting Pacific Northwest salmonid populations.

3. I prepared a report in 1992 entitled *A Review of Management and Environment Factors Responsible for the Decline and Lack of Recovery of Oregon's Wild Anadromous Salmonids* (292 pages); a revised edition of this report in 1993 entitled *Oregon's Wild Salmon and Steelhead Trout: A Review of the Impact of Management and Environmental Factors* (328 pages); and also in 1993 I prepared a report entitled *The Impact of Environmental and Management Factors on Washington's Wild Anadromous Salmon and Trout* (371 pages).

4. I have been retained by the Northwest Forest Resource Council to review the recently-released Draft Supplemental Environmental Impact Statement for areas within the range of the northern spotted owl during the current public comment period that ends October 28, 1993. This draft EIS relies almost entirely on the scientific analysis in the report issued by the Forest Ecosystem Management Assessment Team ("FEMAT Report"); it freely admits that it contains no scientific analysis independent of the FEMAT Report. Accordingly, I have begun to review the FEMAT Report and to attempt to conduct an analysis of the fisheries science upon which its recommendations are in large part based.

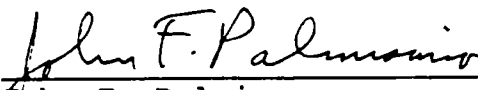
5. Although the FEMAT Report is lengthy, the "aquatic ecosystem assessment" is just 79 pages long, and is quite conclusory. I have found that I cannot conduct a thorough and meaningful review of the report in its current form because I do

not have access to the backup data, information and analysis on which the report relies. Virtually none of the backup data, information and analysis are set forth in the report itself. For example, the FEMAT Report omits -- without explanation -- any reference to a large quantities of information about the causes of decline of certain runs of anadromous fish. Without access to the backup documents, I have no way of determining if these omissions were the result of a conclusion that this information is inaccurate or unreliable, were the result of carelessness or inadvertence or reflected some bias by the authors of the report. Without the backup information, I have no way of knowing how to frame my comments on this issue, and I cannot do a thoughtful and complete review of the FEMAT Report.

6. My inability to review backup data, reports and minutes of FEMAT deliberations is substantially reducing the quality of review of the FEMAT Report I am able to prepare during the current public comment period. If I had access to these materials, I would be able to provide better, most thorough, more comprehensive and more meaningful comments on the FEMAT Report.

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

Executed on August 26, 1993.



John F. Palmisano

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF CON H SCHALLAU, Ph.D

Con H Schallau, with full knowledge of the penalty of perjury,
declares as follows:

1. My name is Con H Schallau. I am the Chief Economist for the Forest Resources Group of the American Forest & Paper Association ("AFPA") in Washington, D.C. I have held that position for AFPA and predecessor associations since 1989. Prior to that date I served as an economist for the Forest Service, U.S. Department of Agriculture, for 34 years. I have a B.S. degree from Iowa State University, and M.S. and Ph.D degrees from Michigan State University. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. As Chief economist for the Forest Resources Group at AFPA, my duties are mainly focused on the economics of forest resources use with special emphasis on timber supply problems. I consider myself an expert in natural resource economics,

particularly cost-benefit techniques, economic impact analysis, and forest products marketing. In the course of executing my responsibilities I routinely review economic analyses that influence the viability of the forest products industry.

3. AFPA is helping its members, including the Northwest Forest Resource Council, review the recently released Draft Supplemental Environmental Impact Statement for areas within the range of the northern spotted owl during the current public comment period that ends October 28, 1993. I have been assigned the responsibility of critiquing the economic analysis contained in the FEMAT report. This draft EIS appears to rely almost completely on the economic analysis in the report issued by the Forest Ecosystem Management Assessment Team. The DSEIS report acknowledges that it contains no independent economic analysis apart from what is in the FEMAT Report. Accordingly, I have begun to review the FEMAT Report and to attempt to conduct an analysis of the economic conclusions in the report.

4. While the FEMAT Report is quite lengthy, the economic analysis of the Report's options (Chapter VI) is just 43 pages long. I have found that I cannot conduct a satisfactory review of the rather superficial economic analysis in the report because I do not have access to the backup data, information and analysis on which the report relies. Virtually none of the backup data information and analysis are set forth in the report itself. For example, I cannot possibly evaluate harvest levels for each national forest without access to the analysis by Johnson, K.N.,

S. Crim, K. Barber, and M. Howell. Likewise, I cannot evaluate the role of nontraditional or "special" forest products without seeing a copy of a report prepared by Schlosser and Blatner.

5. My inability to review backup economic information, data, and reports used by FEMAT is substantially impairing my ability to conduct a comprehensive review of the economic analysis in the FEMAT Report during the current public comment period. If I were able to review these materials, I would be able to provide more thoughtful, more persuasive, and more knowledgeable comments on the FEMAT Report.

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

Executed on August 25, 1993.


Con H Schallau

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

DECLARATION OF JAMES M. SWEENEY, Ph.D.

James M. Sweeney, with full knowledge of the penalty of perjury, declares
as follows:

1. My name is James M. Sweeney. I am the Director of Wildlife Ecology for the American Forest & Paper Association ("AFPA") in Washington, D.C. I have held that position for AFPA and predecessor associations since 1989. Prior to that date I served as International Research Coordinator and Principle Wildlife Research Biologist for the Forest Service, U.S. Department of Agriculture, for 6 years. And, previous to federal employment, I was Associate Professor of forestry and wildlife at the University of Arkansas for 7 years. I have a B.S. degree in Forestry and an M.S. degree in Wildlife Management from the University of Georgia, and a Ph.D. degree in Wildlife Biology from Colorado State University. I make this declaration on personal knowledge, and if called to testify as a witness herein would testify as set forth below.

2. As Director of Wildlife Ecology for AFPA, I routinely review and provide

professional interpretation and analysis of biological data, research, manuscripts, management plans, environmental impact statements, and other similar documents that might affect forest management. I consider myself an expert on forest-wildlife habitat relationships (forest ecology, wildlife ecology, and species specific habitat requirements). I am often asked to serve as an expert reviewer/referee in this area for professional journals such as The Journal of Wildlife Management, The Wildlife Society Bulletin, and the Journal of Forestry.

3. Consistent with my duties, I have begun a review of the recently released "Draft Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl" to assist the members of AFPA and other trade associations, such as the Northwest Forest Resource Council, in meaningful response during the public comment period that ends October 28, 1993. As this draft EIS appears to rely almost completely on the biological analyses in the report issued by the Forest Ecosystem Management Assessment Team ("FEMAT Report"), I have begun a review of the biological assumptions, analyses, and conclusions in that report.

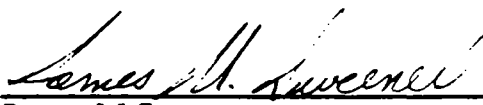
4. While the FEMAT Report is quite lengthy, the terrestrial ecosystem analysis (Chapter IV) examines the viability of over 1000 separate wildlife species. I have determined that I cannot complete an satisfactory in-depth review of the biological analyses in the FEMAT report because I do not have access to the backup data, information, and reports (including reports from expert scientists used as consultants), on which the analysis apparently relies. While there is considerable summarized information

available in the FEMAT report, and some other background information is available in previous public documents and professional literature, virtually none of the detailed backup data and information for the majority of the numerous other late successional and old-growth associated species are set forth in the report itself, nor are they available in public literature. For example, what are the individual expert evaluations of alternatives for the various species? The report provides only an average result from each panel. What is the range of values (variation in expert opinion) associated with the averages presented? What was the most common (mode) evaluation (the weight of scientific opinion)? How many and to what extent were the panel ratings adjusted? As noted in the FEMAT report (Page IV-48) "Panel leaders, in conjunction with other [FEMAT] team members, could make a final assessment different from the panel results if they determined that errors or misinterpretations had occurred."

5. The unavailability of such backup reports, information and data used by FEMAT makes it impossible for me to perform a thorough review of the biological analyses in the FEMAT Report during the current public comment period. If I were able to review these materials, I should be able to provide more detailed, more insightful and better supported comments on the FEMAT Report.

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

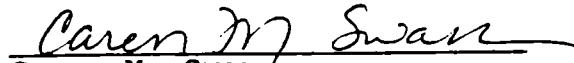
Executed on August 27, 1993.


James M Sweeney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Defendants' Motion to Dismiss was served on August 30, 1993 by hand delivery upon the following:

Elizabeth Pugh, Esq.
Gail Walker, Esq.
Robert Whitman, Esq.
U.S. Department of Justice
Civil Division
Federal Programs Branch
901 E Street, N.W.
Washington, D.C. 20530


Caren M. Swan



OFFICE OF THE VICE PRESIDENT

WASHINGTON

August 20, 1993

MEMORANDUM FOR THE VICE PRESIDENT

FROM: Todd Campbell *TSC*

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

There is good news in the Forest Conference FACA litigation. Yesterday, the Court denied the Plaintiff's Motion For Expedited Discovery. Instead, the Court stayed all discovery pending a ruling on the Motion to Dismiss which we filed. The basis for the Motion to Dismiss is that since FEMAT has been terminated, FACA no longer applies. The Court also denied the Plaintiff's Motion for a Temporary Restraining Order regarding the preservation of certain FEMAT documents.

The Motion to Dismiss will likely be heard in the middle of September. I will keep you advised.

cc: Jack Quinn
Katie McGinty

TJC:aw