

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORTHWEST FOREST RESOURCE COUNCIL;)
DOUGLAS COUNTY, OREGON; HOOD RIVER)
COUNTY, OREGON; SUTHERLIN SCHOOL)
DISTRICT; WESTERN COUNCIL OF IN-)
DUSTRIAL WORKERS; PEGGY JOHNSON;)
BRAD FOWLER; CHARLEAN SMITH; ROD)
KLAWITTER; MICKEY BELLMAN; ROUGH &)
READY LUMBER CO.; ALAN JOHNSON;)
RUSTY J. SCHMICK; and GALLIHER &)
HUGUELY ASSOCIATES, INC.,)

Plaintiffs,)

vs.)

DR. JACK WARD THOMAS, Chief,)
U.S.D.A. Forest Service; MIKE)
ESPY, Secretary of Agriculture,)

Defendants.)

Civil No. 94-1032

COMPLAINT

*NFRC Suit
NFS lands*

EXCEPTS

SEE ESP. page 48-49

For their complaint herein, plaintiffs allege as follows:

Introduction

1. This is an action for declaratory and injunctive relief against Dr. Jack Ward Thomas, Chief of the U.S.D.A. Forest Service, and Mike Espy, Secretary of Agriculture, to remedy violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. Appendix 2 the Multiple-Use Sustained-Yield Act ("MUSY"), 16 U.S.C. §§ 528-31, the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600, et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., and the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701, et seq. Review is sought under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06.

PAGE SKIP BACKGROUND

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and roads to its residents. In recent years Forest Service timber receipts have constituted 40% of the county's budget. Regionally, the 13 owl forests have generated between over one hundred million dollars per year in county timber receipts.

30. In 1988 the Forest Service adopted a plan under the viability rule to maintain the viability of the northern spotted owl. Its plan was challenged in the United States District Court for the Western District of Washington, which in early 1989 issued a preliminary injunction blocking new timber sales in spotted owl "habitat." Congress responded to this injunction by enacting a statute known as "Section 318," Pub. L. 101-121, § 318, 104 Stat. 701, 745 (1989). This statute legislatively overruled the preliminary injunction, mandated the Forest Service to sell 5.8 billion board feet of timber in Oregon and Washington in fiscal years 1989-90, enacted temporary standards for new timber sales and endorsed a further effort by the Forest Service to adopt a new spotted owl management plan. Although a panel of the Ninth Circuit Court of Appeals held this law unconstitutional, the Supreme Court unanimously reversed and declared the law valid. *Robertson v. Seattle Audubon Society*, __ U.S. __, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992).

31. In 1990 the Forest Service released its new spotted owl plan and announced its intention to follow it temporarily until further planning efforts were completed. Its decision was once again challenged in the Western District of Washington, which again issued an injunction against new timber sales in spotted owl habitat and ordered the agency to prepare an environmental impact

statement on the new plan. *Seattle Audubon Society v. Evans*, 771 F. Supp. 1081 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir. 1991).

32. In 1992 the Forest Service completed its environmental impact statement on the spotted owl plan. The impact statement was once again challenged in the Western District of Washington and for a third time the court issued an injunction against new timber sales in spotted owl habitat, and ordered the agency to supplement the impact statement in three respects and to adopt a new plan by August 1993. *Seattle Audubon Society v. Moseley*, 798 F. Supp. 1484 (W.D. Wash. 1992), *aff'd sub nom.*, *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993).

33. In March 1993 the Forest Service had completed the three areas of additional analysis required by the court, and was on schedule to meet the court's August 1993 deadline. At that point the effort to comply with the injunction was halted at the direction of the newly-elected Clinton Administration. On April 2, 1993 the President and other administration officials conducted a one-day "Forest Conference" in Portland to address the controversy over management of Forest Service lands in the owl region and the separate and legally-distinct controversy (raised in litigation in Oregon) over management of certain timberlands in Oregon (the "O & C timberlands") administered by the BLM.

34. In conjunction with the Forest Conference the Administration established an advisory committee called the Forest Ecosystem Management Assessment Team ("FEMAT") to develop alternatives for resolving these controversies. The Administration created an inter-agency Forest Conference Executive Committee ("FCEC"),

chaired by Katie McGinty, director of the White House Office of Environmental Policy, to supervise the work of FEMAT.

* 35. On May 7, 1993 the FCEC issued instructions to FEMAT, in a document called "Statement of Mission," which substantially limited the range of alternatives FEMAT could develop:

a. It required all the alternatives to take an "ecosystem approach to forest management."

b. It required all the alternatives to have a medium to very high probability of supporting viable populations of all species known or reasonably expected to be associated with old-growth forest conditions.

c. It required all the alternatives to have a medium to very high probability of supporting recovery and maintenance of viable populations of anadromous fish stocks and other fish species and stocks.

d. It required all the alternatives to maintain or create a connected or interactive old-growth forest ecosystem on the federal lands under consideration.

e. It required all the alternatives to give priority to these biological criteria over other management factors including timber harvesting, and to limit the amount of timber harvesting to meet these biological criteria.

f. It prohibited FEMAT from developing any alternative that could not be analyzed and presented to the Administration by June 1, 1993.

g. It prohibited FEMAT from developing any alternative requiring a change in law or regulation.

36. In addition to the constraints placed on it by FCEC, FEMAT adopted additional constraints that further limited the range of alternatives it could consider:

a. FEMAT decided that all its alternatives should be based on the concept of large unmanaged natural reserves, and that no alternative should be based on the scientifically-recognized concept of landscape management or any other scientific or land management concept.

b. FEMAT decided to evaluate all the alternatives' ability to maintain or restore the viability of species and of old-growth forest ecosystems on the basis of how closely the alternative recreates long-past "presettlement conditions" assumed to exist centuries ago before European settlers arrived in the Pacific Northwest.

c. FEMAT decided that all the alternatives must be designed with the goal of returning every species to the historical range it occupied prior to European settlement even if the current range of the species is smaller.

37. FEMAT was convened and did its work in violation of FACA. In *Northwest Forest Resource Council v. Espy*, Civil Action No. 93-1621 TPJ (D.D.C. Memorandum and Order March 21, 1994) this court held that the defendants violated FACA in the establishment and operation of FEMAT by refusing to open its meetings, failing to publish notice of its meetings in the Federal Register, failing to allow the public to attend meetings or otherwise participate in

FEMAT activities, failing to make its records and other documents available for public inspection, failing to keep detailed minutes of meetings, operating without proper authorization, failing to file an advisory committee charter, failing to fairly balance its membership, failing to assure that its advice and recommendations were not inappropriately influenced by special interests, and failing to comply with the termination provisions of the statute. *Id.* at 11-12.

38. On July 1, 1993 the President announced his "Forest Plan For a Sustainable Economy and a Sustainable Environment." His plan is Option 9 developed and analyzed by FEMAT.

39. In July 1993 FEMAT issued its report "Forest Ecosystem Management: An Ecological, Economic and Social Assessment." The report ("FEMAT Report") describes 10 alternative management policies, including the alternative announced by the President on July 1. All 10 of the options complied with the instructions it had received from the FCEC as described above in paragraph 35 and with the limitations it placed on its own work as described above in paragraph 36.

40. Later in July 1993 the Departments of Agriculture and Interior released a 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 ("DSEIS"). The DSEIS presented the 10 FEMAT options as the only alternatives presented for consideration. No other alternatives were presented or analyzed. The analysis of alternatives presented in the DSEIS is the analysis in the FEMAT Report.

The DSEIS identified FEMAT's option 9 (the option announced by the President on July 1) as the preferred alternative.

* 41. In October 1993 plaintiffs submitted comments on the DSEIS. The comments included a report by Dr. Thomas M. Bonnicksen, Ph.D., a forestry expert who teaches at Texas A & M University, entitled "An Analysis of a Plan to Maintain Old-Growth Forest Ecosystems." Dr. Bonnicksen identified four options not described or analyzed by FEMAT that would maintain healthy and functioning old-growth forests:

a. **Long-Rotation Timber Harvest Option**, which involves management of the entire forest, without large set-asides, on a 250-300 year harvest rotation that would leave a substantial part of the forest as old-growth at any time.

b. **Managed Old-Growth Islands Option**, which involves an interconnected network of forest islands composed of small old-growth reserves of above 130 acres each. This option is based on the widely-accepted principles in the acclaimed book by Dr. Larry Harris called *The Fragmented Forest*.

c. **Floating Habitat Center Option**, developed by the California Department of Forestry and Fire Protection in 1992, which involves maintaining a continuous supply of centers of managed old-growth habitat on the landscape that support 20 pairs of northern spotted owls.

d. **Sustainable Old-Growth Option**, which mimics natural or presettlement forest conditions through a

combination of carefully managed timber harvesting and prescribed fire to assure that there is a steady supply of young trees that can grow into old-growth, and which maintains the same proportion of old-growth that existed in the presettlement forest.

42. Plaintiffs' comments also included a report by Dr. Chadwick Dearing Oliver, a distinguished ecologist who teaches at the University of Washington and was invited to participate in the President's Forest Conference. Dr. Oliver described in detail an option that would utilize the landscape management approach to produce more old-growth forest, more wildlife habitat, more timber harvest, more jobs and more government revenue than any of the natural reserve options adopted by FEMAT.

43. In February 1994 the Departments of Agriculture and Interior released the Final 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 ("FSEIS"). The FSEIS presented the 10 FEMAT options, with a few very minor changes, as the only alternatives for consideration. No other alternatives were presented or analyzed. The FSEIS did not present or analyze any of the alternatives described by Dr. Bonnicksen or Dr. Oliver in their comments. Once again FEMAT's option 9, the plan announced by the President on July 1, 1993, was identified as the preferred alternative. Once again, the analysis of alternatives presented in the FSEIS is, with very minor changes, the analysis presented in the FEMAT Report.

44. The FSEIS reveals that the only alternative submitted for consultation with the U.S. Fish and Wildlife Service under section 7 of the Endangered Species Act was alternative 9; as a result the Secretaries could not lawfully select or implement any of the other alternatives.

45. On April 13, 1994 the Secretaries of Agriculture and Interior issued the Record of Decision ("ROD") adopting alternative 9 -- FEMAT's option 9 -- with very minor changes as the Administration's new Forest Plan for the 17 national forests in the spotted owl region (including northern California) and the O & C timberlands. For the 13 owl forests, the plan has the following key features:

a. It creates approximately eight million acres of late-successional reserves and riparian reserves on the national forests, where no scheduled timber harvest will ever occur, virtually no new roads will be built, and many existing roads will be closed, and it creates over one million acres of adaptive management areas on national forest land, where little or no timber harvesting will ever occur, few new roads will be built, and many existing roads will be closed.

b. It imposes severe timber harvesting restrictions on remaining areas outside the reserves.

c. It eliminates the sustained yield production of timber. It replaces the current sustained yield harvest level of more than three billion board feet per year on the 13 owl forests of Oregon and Washington, established

under the existing forest plans, with a "probable sale quantity" of less than 533 million board feet of timber per year, subject to various administrative and biological constraints which, the plan admits, could result in less than the probable sale quantity being sold each year.

d. It reduces the expected annual level of national forest timber receipt payments to counties to \$55.2 million, a reduction of more than 60% from recent levels.

Plaintiffs' Injury

46. Plaintiffs have been injured by the defendants' adoption of the forest plan for the 13 owl forests in Oregon and Washington. Plaintiffs are intended beneficiaries of the Organic Administration Act, the MUSY Act and NFMA. They will be harmed by (1) the reduction in timber harvest, which will lead to mill closures, shift reductions, job losses, unemployment and resulting adverse impacts on families and communities, (2) the reduction in road construction and closure of existing roads, which will reduce recreational opportunities including camping, hunting and opportunities to view wildlife (both species associated with late-successional forests and species associated with early-successional forests), (3) the reduction in county receipts, which will adversely affect schools, social services, road maintenance and other county services, (4) the increased risk of fire which threatens the personal safety of visitors and residents of nearby communities as well as resident wildlife, (5) reduction in right-

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capricious, an abuse of discretion and otherwise not in accordance with law under 5 U.S.C. § 706(2).

EIGHTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action;
Violation of MUSY, NFMA and 36 C.F.R. § 219.19 --
Returning National Forests to Pre-Settlement Conditions
Exceeds Statutory Authority)

67. Plaintiffs repeat and reallege the allegations in paragraphs 1-46 as if fully set forth herein.

68. If 36 C.F.R. § 219.19 is valid, it defines a viable population as one with sufficient numbers and distribution to insure its continued existence is well distributed in the planning area. It does not authorize the Forest Service to manage the national forests for the purpose of restoring those forests to the conditions that existed before European settlement occurred in the Pacific Northwest, and it does not allow the Forest Service to use pre-settlement conditions to define the viability of species. No other statute or regulation allows the Forest Service to manage the national forests for these purposes.

69. The Forest Plan adopted by defendants on April 13, 1994 sets as its goal the return of the national forests in the spotted owl region to pre-settlement conditions, and it uses pre-settlement conditions to define the effectiveness of the plan in achieving viability of species. The decision to adopt a plan with this goal violates MUSY, 16 U.S.C. §§ 529-31, NFMA, 16 U.S.C. §§ 1604(e) and (g), 36 C.F.R. § 219.19 (if it is valid) and is arbitrary and capricious, an abuse of discretion and otherwise not in accordance with law under 5 U.S.C. § 706(2).

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36 C.F.R. § 219.12(f)(7). The FSEIS does not contain the "no action" alternative required by this regulation, or any "no action" alternative.

91. Defendants violated NEPA, 42 U.S.C. § 4332, the CEQ regulations, 40 C.F.R. § 1502.14(d), and 36 C.F.R. § 219.12(f)(7) by refusing to present and analyze a no action alternative, and by failing thereby to disclose the true environmental impacts of their forest plan. The FSEIS conceals the massive economic, social, community and environmental impacts of the Forest Plan by comparing the Plan to 1990-92 outputs, which were severely limited by extraneous factors such as litigation and administrative delay, rather than comparing the Plan to current forest plan outputs. Such a comparison would have shown vastly greater economic, social, community and environmental impacts than are disclosed in the FSEIS. This violation of NEPA, the CEQ regulations and the Forest Service regulations is arbitrary and capricious, an abuse of discretion and not in accordance with law under 5 U.S.C. § 706(2).



FIFTEENTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action;
Violation of NEPA and NFMA --

No Independent Confirmation of Information
And Conclusions Provided by the Unlawful FEMAT Team)

92. Plaintiffs repeat and reallege the allegations in paragraphs 1-46 as if fully set forth herein.

93. Defendants have the primary and nondelegable duty under 42 U.S.C. § 4332 and 40 C.F.R. § 1506.5 to prepare the environmental analysis in support of their decision. Defendants abdicated their duty by delegating almost all of the environmental analysis to the unlawful FEMAT Team, and by failing to independently confirm

the accuracy of the environmental analysis in the unlawful FEMAT Report. The FSEIS adopts with no independent confirmation the biological, economic and social analysis in the FEMAT Report. The alternatives presented in the FSEIS are limited to the 10 options in the FEMAT Report, with no independent determination whether other reasonable alternatives were available. The biological assessment of alternatives in the FSEIS -- the centerpiece of the environmental analysis -- lifts literally paragraph after paragraph, page after page verbatim from the FEMAT Report, including the conclusions of the assessment. The tables in the FSEIS that purport to summarize the biological impacts of the alternatives on 1,120 wildlife species -- the proclaimed key to the entire Forest Plan -- are copied verbatim from the FEMAT Report as demonstrated in the following table:

<u>FSEIS Table</u>	<u>Identical FEMAT Report Table</u>
3&4-22	IV-19
3&4-23	IV-17
3&4-24	IV-18
3&4-25	IV-20
3&4-26	IV-23
3&4-27	IV-22
3&4-28	IV-24
3&4-29	IV-37
3&4-30	IV-38
3&4-31	IV-39
3&4-34	V-11

Defendants similarly relied on the FEMAT Report for the social and economic analysis in the FSEIS.

* 94. Defendants never verified, and could not verify, the factual, logical or scientific accuracy of any of FEMAT's conclusions because FEMAT's meetings were conducted in secret and no minutes were kept of its meetings or deliberations. Defendants

accepted FEMAT's conclusions blindly, with no investigation, analysis or evaluation to determine if FEMAT's conclusions were correct. The unquestioned, unverified reliance on key biological, social and economic conclusions in the FEMAT Report violates defendants' duties under 42 U.S.C. § 4332 and 40 C.F.R. § 1506.5.

95. Forest Service regulations require the environmental evaluation of alternatives in forest planning environmental impact statements to be prepared by an interdisciplinary team of Forest Service employees. 36 C.F.R. § 219.12(h). Defendants violated this regulation by relying on the unlawful FEMAT analysis rather than independently evaluating the alternatives.

96. Defendants' decision to adopt the Forest Plan in reliance on the unlawfully-prepared FSEIS is arbitrary and capricious, an abuse of discretion, not in accordance with law and without observance of procedure required by law under 5 U.S.C. § 706(2).

SIXTEENTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action;
Violation of NEPA --


Failure To Respond to Opposing Scientific Views)

97. Plaintiffs repeat and reallege the allegations in paragraphs 1-46 as if fully set forth herein.

98. Defendants learned during the FEMAT process that respected scientists such as Dr. Oliver disagreed with their assumptions, analysis and approach to ecosystem management. Defendants learned from the public comments on the DSEIS that other respected scientists such as Dr. Bonnicksen and Dr. John Palmisano also disagreed with defendants' assumptions, analysis and approach to ecosystem management. Nonetheless, defendants ignored the views

of these respected scientists, failed to explain, analyze or respond to their views and did not modify the FSEIS in any significant way to address or respond to their views. Defendants' failure to analyze or respond to the opposing views of respected scientists violates NEPA and the CEQ regulations. This violation of NEPA and the CEQ regulations is arbitrary and capricious, an abuse of discretion and not in accordance with law under 5 U.S.C. § 706(2).

SEVENTEENTH CLAIM FOR RELIEF

 (Arbitrary and Capricious Agency Action;
Violation of NEPA -- Failure To Consider Or Respond To
Scientific Information and Opposing Scientific Opinion)

99. Plaintiffs repeat and reallege the allegations in paragraphs 1-46 as if fully set forth herein.

100. The FEMAT Report and the DSEIS relied heavily on the assumption that in the centuries before European settlement of the Pacific Northwest the forests of the region averaged 65% old-growth forest. Both the FEMAT Report and the DSEIS acknowledged that they had no facts to support this assumption, and that the assumption was the product of the subjective judgment of unidentified "experts" on the FEMAT team.

101. Plaintiffs' comments to defendants on the DSEIS included a detailed scientific report from Robert Zybach, a forestry expert presently studying at Oregon State University, which factually refuted this key assumption. Mr. Zybach's 101 page report is based on objective historical evidence, including early documents and photographs from the initial stages of European settlement of the region and reliable accounts of 11,000 years of Native American

burning practices. Mr. Zybach established that there was not an average of 65% old growth forest in the pre-settlement era, and that the average amount of old-growth was in fact between five and thirty eight percent.

102. The FSEIS ignores Mr. Zybach's report and conclusions. It adheres to the subjective 65% old-growth assumption of the FEMAT team, and fails to acknowledge, explain or respond to Mr. Zybach's opposing opinion, or to the objective scientific evidence upon which his opinion is based. Defendants' failure to acknowledge, explain or respond to Mr. Zybach's opposing opinion, or to the objective scientific evidence upon which his opinion is based, violates NEPA and the CEQ regulations. This violation of NEPA and the CEQ regulations is arbitrary and capricious, an abuse of discretion and not in accordance with law under 5 U.S.C. § 706(2).

EIGHTEENTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action;
Violation of NEPA -- Failure To Disclose Environmental Impacts
Of Inadequate Congressional Appropriations)

103. Plaintiffs repeat and reallege the allegations in paragraphs 1-46 as if fully set forth herein.

104. The Forest Plan requires an unprecedented level of Congressional appropriations to complete the environmental analysis, including "watershed analysis," "survey and manage" requirements for wildlife species and species monitoring, that will be required before the "probable sale quantity" of timber could be offered for sale, and before the restorative components of the plan can be implemented. Before defendants adopted the Forest Plan on April 13, 1994 defendant Thomas testified to Congress that the