

NLWJC- Kagan

Counsel - Box 002 - Folder 001

Timber-memos, emails, etc. [7]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Phone No. (Partial) (1 page)	10/13/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8247

FOLDER TITLE:

Timber - Memos, Emails, Etc. [7]

2009-1006-F

kc137

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]



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

October 25, 1995

MEMORANDUM

TO: Jack Ward Thomas
Chief
Forest Service

FROM: James R. Lyons
Under Secretary
Natural Resources and Environment

SUBJ: Ninth Circuit Court of Appeals Ruling on "318" Timber Sales

In light of the ruling of the Ninth Circuit Court of Appeals regarding Northwest Forest Resource Council vs. Glickman, it is important that we proceed as quickly as possible to release those Section 318 sales that were subject to the court's ruling.

By COB Friday, please provide me with a report on the actions that the Forest Service has taken or will be taking to ensure full compliance with the court order. In addition, please let me know the outcome of your discussions with the contract holders regarding possible modifications to those sales where environmental effects remain a concern.

Although we may be disappointed with the court's ruling, we must and will comply as quickly as possible.

October 27, 1995

To: Jim Lyons, Under Secretary, NRE
Mark Gaede, Acting Deputy Under Secretary, NRE

Re: Your Letter on 318 Sales and Report Request

A report detailing the disposition of each of the timber sales falling under section 2001 (k) of the FY 1995 Rescissions Act and a discussion of released sale modifications is enclosed as you requested. We anticipate that DOJ will file the regions sale report with the court early next week.

Please call if you have questions.


Rick Prausa
205-1762

Telecon w/ D. Bear

1) Re antitrust issue -
What about P's written shut?

Talked to Lois/Peter

Lois - to shoot it over to AT Division

Q-P have in Hus of lge timber cos (not K holders - small)

ask to support ^{call} for by repealing provisions

[(diff - w/ actual ^K purchasers)
 (not this meeting)] } probably
 would need lawyer in ~~conf~~

2) Meeting this aft to talk abt scope of leg.

4 options -

- a) narrowest (TT) - addressing prog scop issue
- That + nesting
- repeal of all 2001k (all 318 issues)
- repeal of entire timber vider (Lois)

3:30? Conf Rm next to TT's (248)?

→ Alice Sheffield.

3) Rudzick - new letter;

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

28-Oct-1995 05:23pm

TO: Elena Kagan
TO: Mark A. Weatherly
TO: Ruth D. Saunders
TO: Kris Balderston
TO: Jennifer M. O'Connor

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: POTUS Statement on timber

EXECUTIVE OFFICE OF THE PRESIDENT

28-Oct-1995 02:53pm

TO: (See Below)
FROM: Brian J. Johnson
Council on Environmental Quality
SUBJECT: timber statement

Distribution:

TO: Kathleen A. McGinty
TO: Shelley N. Fidler
TO: Kathleen A. McGinty
TO: FAX (62710, Jane)
TO: Bradley M. Campbell
TO: Peter G. Umhofer
TO: Keith E. Laughlin
TO: David B. Sandalow
TO: Beth A. Viola
TO: Wesley P. Warren
TO: Dinah Bear
TO: Elisabeth Blaug
TO: Ray Clark
TO: Michelle Denton
TO: Carolyn Mosley
TO: Thomas C. Jensen
TO: Wendell M. Stills
TO: Stephen R. Seidel
TO: Robert C. Vandermark

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

October 28, 1995

STATEMENT BY THE PRESIDENT
ON THE NINTH CIRCUIT COURT OF APPEALS DECISION TO FORCE
ADDITIONAL SALES OF OLD GROWTH TIMBER

I am deeply disappointed in the court's decision to force the Forest Service and the Bureau of Land Management to release these sales of healthy ancient timber.

My Administration's agreement with the Congress on this issue was significantly different from the interpretation upheld this week by the courts. We agreed that the Administration would not have to violate our standards and guidelines for our Forest Plan and for forest management in general, but only speed up sales that met those standards. We do not believe that this extreme expansion of ancient timber sales was authorized by the 1995 Rescission Act.

My Administration will actively pursue a legislative remedy to correct this extreme result.

At this time, however, there is no choice but to comply with the court's decision. The decision forces the release of timber that may lead to grave environmental injury to chinook salmon and other wildlife, and damage our rivers and streams. This could jeopardize the livelihoods of thousands of people who depend on the Pacific Northwest's vibrant commercial and sport fisheries.

I have directed the Secretaries of Agriculture and the Interior to work with the companies awarded contracts to seek changes to mitigate any harm to salmon and other species and water quality.

In signing the rescission legislation and in subsequent directives to my cabinet, I pledged to uphold existing environmental laws and standards. I will continue to fight for those laws and standards.

E X E C U T I V E O F F I C E O F T H E P R E S I D E

27-Oct-1995 07:18pm

TO: (See Below)

FROM: Brian J. Johnson
Council on Environmental Quality

SUBJECT: Revised draft - timber statement

Folks,

The Chief of Staff's decision is a statement by the President, tomorrow.

This reflects changes by Martha, Barry, Shelley, Mr. Panetta.

Last, VP Press requests the final be sent to VPOTUS as soon as it's done. He's got an address to Society of Environmental Journalists tomorrow.

Brian

DRAFT STATEMENT ON THE NINTH CIRCUIT COURT OF APPEALS DECISION TO FORCE ADDITIONAL SALES OF OLD GROWTH TIMBER

I am deeply disappointed in the court's decision to force us to release these sales of healthy ancient timber.

I strongly believe that this expansion of ancient timber sales was not authorized by the rescission legislation. Our understanding of the amount of volume to be released was significantly different from the interpretation upheld this week by the courts.

I will pursue a legislative remedy to overturn this decision.

At this time, we have no choice but to comply with the court's decision. The court's decision forces us to release timber that may lead to grave environmental injury to chinook salmon and other wildlife, and damage our rivers and streams. This could jeopardize the livelihoods of tens of thousands of people who depend on the Pacific Northwest's vibrant commercial and sport fisheries.

I will ask each national forest supervisor to meet with the companies awarded contracts to seek mutually agreeable changes to mitigate any harm to salmon and other species and water quality.

I have begun a consultation with the Secretaries of the Interior and Agriculture as well as the professionals in the Forest Service and the Bureau of Land Management, the Governors of the affected states, and local elected representatives to see what options we may have to preserve forest and fishing jobs in the Pacific Northwest while also protecting the environment.

In signing the 1995 Rescission Act and in subsequent directives to my cabinet, I pledged to uphold existing environmental laws and standards except when forced to do otherwise. We will continue to do that and challenge those who interpret differently the language in that law.

Distribution:

TO: John C. Angell
TO: Martha Foley
TO: Kris Balderston
TO: T J Glauthier
TO: Jennifer M. O'Connor
TO: Shelley N. Fidler
TO: Kathleen A. McGinty
TO: Marcia L. Hale
TO: R. Lawton Jordan III
TO: Elena Kagan
TO: Virginia M. Terzano

EXECUTIVE OFFICE OF THE PRESIDENT

27-Oct-1995 07:12pm

TO: (See Below)

FROM: Dinah Bear
Council on Environmental Quality

SUBJECT: Pacific Northwest Timber Sales

Distribution:

TO: Abner J. Mikva
TO: Jack M. Quinn
TO: Patrick J. Griffin
TO: Marcia L. Hale
TO: Douglas B. Sosnik
TO: Martha Foley
TO: Kathryn Higgins
TO: T J Glauthier
TO: John C. Angell

CC: Jennifer M. O'Connor
CC: Kris Balderston
CC: Elena Kagan
CC: Mark A. Weatherly
CC: Shelley N. Fidler
CC: Thomas C. Jensen
CC: Brian J. Johnson
CC: Michelle Denton

October 27, 1995

MEMORANDUM FOR HAROLD ICKES

CC: ABNER MIKVA
JACK QUINN
PAT GRIFFIN
MARCIA HALE
DOUG SOSNIK
MARTHA FOLEY
KITTY HIGGINS
T. J. GLAUTHIER
JOHN ANGELL

FROM: KATIE MCGINTY

RE: TIMBER DECISION IN PACIFIC NORTHWEST

The Ninth Circuit's Decision: As you will recall, when we negotiated with Congress over the timber rider in the Rescission Act, the rationale articulated by proponents of the bill was to allow the land management agencies to salvage dead and dying trees quickly and without the threat of litigation. Part of the rider also dealt with the so-called "318 sales". Section 318 was a provision of a 1989 appropriations bill that mandated the release of timber sales on federal lands in Oregon and Washington without judicial review.

Specifically, the Act says that:

"Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745)." Section 2001(k)(1)

Our interpretation and that of several of the rider's early sponsors was that the language referred to the particular sales actually offered under Section 318. About 95% of these sales were awarded, but the remainder were withheld because they would cause significant adverse harm to the environment, including jeopardizing endangered species. This is one of the many aspects of the timber rider about which we expressed serious concerns throughout the course of the negotiations, and one of the reasons why the President expressed continuing

concern even as he signed the bill.

However, the day that the President signed the bill, six members of Congress (Senators Murkowski, Craig and Gorton and Congressmen Young, Taylor and Roberts) sent a letter to Secretaries Glickman and Babbitt stating the provision of the bill quoted above applies to all sales offered within the geographic range of Section 318 – not just the “real” 318 sales, but “all sales offered or awarded in other years” that fall within the range of that provision. In other words, their interpretation, adopted by industry plaintiffs who instantly sued us in federal district court, is that the bill mandates the release of any sales that were offered but not released for any reason by the Forest Service or BLM in Oregon and Washington from the late 1800s to the signing of the Rescissions Act. Clearly, this was never our understanding of the scope of this provision, and we immediately said so in writing to the agencies and in response to the industry brief. We did release the sales that we acknowledged fell under the Rescissions Act. The 45 day period for release of those sales expired on September 13th.

On September 13, Judge Hogan of the District Court of Oregon ruled that industry’s interpretation of the law was correct (based largely on the letter from the Congressional Members mentioned above). Industry plaintiffs adopted an extremely aggressive posture, filed a motion for contempt against Jim Lyons and Tom Tuchman, the head of our regional ecosystem office and threatened to file sanctions against Justice Department attorneys. After much debate, we came to the decision within the Administration to appeal Judge Hogan’s decision. We also asked Judge Hogan to stay his order until the 9th Circuit heard the appeal we were filing, and he declined to do so. We then filed our appeal with the Court of Appeals, as well as asking them to reverse Judge Hogan’s denial of our stay motion.

The 9th Circuit heard oral argument on that motion Wednesday night, and in an exchange that the Justice Department characterized as unusually hostile, denied it. They raised with the Justice lawyer the allegations at issue in the contempt motion, characterized the government’s position as having only negligible chance of success, and stated in the order denying our motion that “there is no serious legal issue” at stake. Justice advises that because of the procedural posture of this motion, there was no ability to ask for a rehearing without this panel’s blessing and because of the legal weaknesses in the case, no likelihood that a stay would be granted by the Supreme Court.

Our argument in front of the 9th Circuit is set for early January. However, under the injunction, all of the 1991–95 sales had to be released immediately, and they were. To disregard the injunction and delay releasing the sales would clearly have put federal officials at risk of contempt. Justice advises that a request for a rehearing of a motion has to be approved by the same panel that heard the argument and that clearly, this panel would not do that.

In short, a viable judicial remedy on this issue is moot. Even assuming the 9th Circuit determines that we are correct on the law next spring, the trees will likely be harvested.

What’s Next: There are yet more sale units subject to release under this provision of the Rescission Act. Next Wednesday, we must submit a list to Judge Hogan of all of the timber

sales offered but not released by the Forest Service or BLM prior to 1990. In other words, any old sales still on the books – no matter how old – are supposed to go out the door. The agencies are busy searching their records; we don't yet know what this list will look like.

The statute provides one way out of releasing sales. If the agency determines that there are threatened or endangered birds "known to be nesting" in a sale unit, that unit is not to be released. Using the best scientific standards available, our agencies have withheld 55 sale units under this provision. However, industry has also filed a lawsuit in front of Judge Hogan challenging our use of the current scientific protocol as inconsistent with the statutory language. They claim, backed by the same letter used by the same Judge to rule against us on the issue of geographic scope, that we have to produce actual eggshell fragments or fecal material before we have proven that birds are nesting. Those arguments will be heard on November 7th.

Implications for the President's Programs: There are serious repercussions from the release of all of these old growth sales, all of which were withheld in the first place because of serious environmental problems. For example, in our affidavits filed with the 9th Circuit, we explained that the 62 sales just released would cause:

- o adverse impact on threatened Snake River spring/summer chinook salmon, Snake River fall chinook salmon the Upper Grande River population of spring/summer chinook salmon;
- o will cause harm to the northern spotted owl and marbled murrelets;
- o will have an adverse impact on the bull trout.

The legal and policy implications of this are, of course, to some degree speculative. Obviously, the more of these sales we have to continue to release, the greater the probability of harm to our programs. However, there appears to be at least initial consensus that the President's Forest Plan will be highly vulnerable to legal challenge because the environmental baseline is changing. Judge Dwyer, in the opinion upholding the Plan, stated that if any further timber sales were released or any other significant changes were made that would affect the ecology of the areas under review, he would have to revisit the Plan's viability. While the Rescissions bill purports to shield individual sales from judicial review, the Plan as a whole is not shielded.

Further possible impacts on Administration initiatives include:

- o the proposed rule providing relief from the Endangered Species Act (ESA) to private landowners for the northern spotted owl may be put on hold (the "4-D rule) and other agreements with states and private landowners in Washington, Oregon and Northern California will have to be reexamined (Habitat Conservation Plans) (this is the heart of our reinventing of ESA and we had been receiving very positive marks on these initiatives);

What has gone in the door already?
Why are there in 2 separate categories?

get explanation of all them.

o because of the impacts on bull trout, the agreements reached not to list the bull trout under ESA may be challenged. If successful, this could result in injunctions shutting down activities on national forests in Montana and neighboring states;

o because of changes in the environmental baseline on a variety of fish, our PACFISH initiative and other actions in the Columbia River Basin ecosystem are more likely to be challenged. It was only because of PACFISH that we got a court to lift a massive injunction against any activities (logging, mining, grazing) in Idaho. Without PACFISH, these injunctions are likely to be reinstated.

Recommendations:

While we should continue vigorously to pursue remaining legal issues through the courts (principally, the "known to be nesting" case), there is no doubt that Wednesday night's decision is a blow to our overall Pacific Northwest strategy that cannot be remedied at this point through the judicial system. Thus, I have the following suggestions:

1) That the President issue a statement explaining that the court's decision does not comport with our understanding of the bill when we signed it; criticizing the Republican-led effort to savage our natural resources, and calling on the timber companies to act responsibly and voluntarily modify these sales to avoid environmental damage. We have sent you a draft of such a statement.

2) That major timber company CEOs be called to the White House for a meeting [with the Chief of Staff?] and be asked to support the Administration in fixing this problem so that the President's efforts to provide stability, certainty and regulatory flexibility along with environmental protection - efforts from which they are benefitting enormously and that they strongly support - can proceed. FYI: Many of these CEOs met confidentially this week with Gingrich to express their grave concern and to get him to call off the radical Rs off.

3) That the President meet with Senator Hatfield, recalling Senator Hatfield's clear statements during the negotiations on the Rescission Act that this rider would not make us move a single stick of timber in an environmentally unsatisfactory way;

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October 27, 1995

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RE: TIMBER DECISION IN PACIFIC NORTHWEST

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Recommendations:

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- 3) That the President meet with Senator Hatfield, recalling Senator Hatfield's clear statements during the negotiations on the Rescission Act that this rider would not make us move a single stick of timber in an environmentally unsatisfactory way;
- 4) That the President insist that the reconciliation bill (or some other vehicle) contain an emergency provision repealing the entire timber rider.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

27-Oct-1995 08:24pm

TO: (See Below)

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: ADMINISTRATION WON'T APPEAL COURT'S LOGGING RULING

Date: 10/27/95 Time: 13:55

Administration Won't Appeal Court's Logging Ruling

WASHINGTON (AP) Clinton administration officials said Friday they are disappointed an appellate court order forces them to release for logging centuries-old sections of national forests in the Pacific Northwest.

But an Oregon Democrat critical of President Clinton's forest policy says the president knew what he was doing when he signed legislation that included a provision exempting the logging from environmental laws.

"I don't know how they can say they got snookered," Rep. Peter DeFazio said.

The dispute involved a provision Sen. Slade Gorton, R-Wash., and others successfully attached to a budget rescission package this summer in an effort to expedite logging on national forests.

Clinton vetoed the bill once, saying the logging would harm the environment. But he later signed the legislation reluctantly in order to cut the 1995 fiscal year's budget and provide disaster relief for California and Oklahoma.

Agriculture Undersecretary Jim Lyons said Friday he had no choice but to release the timber sales after the 9th U.S. Circuit Court of Appeals in San Francisco this week refused to block the logging.

"I am directing Forest Service Chief Jack Ward Thomas to comply with the court's order and to move expeditiously to make these timber sales available to the contract holders," Lyons said.

"Although we are disappointed in the court's ruling, we must and will comply as quickly as possible," he said.

Assistant U.S. Attorney Peter Coppelman said, "What the court's decision forces us to do is release 230 million board feet in 62 sales of timber in the face of irreparable injury to wildlife."

But DeFazio, who is running in a Democratic primary for the special election to fill Bob Packwood's Senate seat, said administration officials understood the ramifications of the logging measure from the beginning.

"I was told in conversations with high administration officials they knew what it was, but the White House was desperate to get these budget cuts so they were going to accept this language," DeFazio said.

The appeals court refused late Wednesday to grant the government's request to block a lower court's order requiring the government to let the logging go forward.

The government had cited environmental concerns in opposing the logging in court.

APNP-10-27-95 1407EDT

Distribution:

TO: Abner J. Mikva
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CC: Kathleen A. McGinty

E X E C U T I V E O F F I C E O F T H E P R E S I D E

27-Oct-1995 05:52pm

TO: (See Below)

FROM: Brian J. Johnson
 Council on Environmental Quality

SUBJECT: Latest draft, with your changes

Attached is the latest draft, which Shelley and I hope reflects your changes.

Please note the word Republican in the last paragraph -- do we want to risk making Hatfield mad with that?

Brian & Shelley

DRAFT STATEMENT

ON THE NINTH CIRCUIT COURT OF APPEALS DECISION TO FORCE
ADDITIONAL SALES OF OLD GROWTH TIMBER

I am very concerned about the rush by special interests and their [Republican] friends in Congress to reignite the timber wars of the Pacific Northwest, and I am deeply disappointed in the court's decision to force us to release these sales of healthy ancient timber.

I had expressed my concerns about the environmental consequences of the logging legislation, but I received repeated assurances from Congress that we could implement the statute in an environmentally-responsible way. We strongly believed that these sales of ancient timber were not covered by that legislation.

I am sorry that the courts found differently. We fought this case to the bitter end and now the Justice Department has advised me that there is no viable appeal. Therefore, we have no choice but to comply with the court's decision. The court's decision forces us to release timber that may lead to grave environmental injury to chinook salmon and other wildlife, damage our rivers and streams, and hurt sport and commercial fishers.

Consequently, I call on the timber industry to work voluntarily to mitigate this harm or to restrict cutting to those areas less likely to harm salmon and other species. They tell the Forest Service they want to do the right thing. Now, they should do the right thing.

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[In signing the 1995 Rescission Act and in subsequent directives to my cabinet, I pledged to uphold existing environmental laws and standards except when forced to do otherwise. We will continue to do that and challenge those who interpret differently the language in that law.]

As displayed through their actions and rhetoric, it is clear that many congressional Republicans are more interested in

appeasing special interests than listening to scientists warning of environmental damage -- or to a public demanding environmental protection.

Distribution:

TO: John C. Angell
TO: Martha Foley
TO: Jennifer M. O'Connor
TO: Marcia L. Hale
TO: Kris Balderston
TO: T J Glauthier

CC: Elena Kagan

Telecom

PA Affs

Ray Martinez

W. states for D. Sosnick.

HI - concerned we've had no response from WH.

- administratively

- appeal.

2 to Sgt.

DOJ -

- if we can; we'd like to see
whether we can.

Telecon - David Bear

Nancy Hayes

208-3801

3679

Tuesday -

big gun mtg.

Petition - SOC - denial of stay

lost that opportunity
all released ~~down~~ - yesterday.
except for

- known to be risky

- under injunction

DOT felt - ~~is~~ no chance for good SCL acti-

- don't want to further ~~em~~ piss M.

Telecon - Peter Coppelman

1) Full on bare hearing
panel. revealed us
didn't make sense

2) SOC

But has to be certworthy

This isn't - it's a denial of a star notice!

And now, to do it after the sales are rebound -
we just look like buffoons.

Ray Martinez -

160 ~~130~~ 4:45

He wants to know whether we can appeal
ruling or stay.

For press release - to go out soon.

Need more language - will fight on merits

Voluntary action by timber companies

Protests are coming
Probably have 24 hrs to respond.

Pres-call Chairman Hatfield

-Fix in the Interior bill?

-(Hatfield - chairman of full committee)

or freestanding proposal?

Start

Then, letter to Hatfield - (next day)

(ask Hatfield - what to help?)

E X E C U T I V E O F F I C E O F T H E P R E S I D E

27-Oct-1995 05:52pm

TO: (See Below)

FROM: Brian J. Johnson
 Council on Environmental Quality

SUBJECT: Latest draft, with your changes

Attached is the latest draft, which Shelley and I hope reflects your changes.

Please note the word Republican in the last paragraph -- do we want to risk making Hatfield mad with that?

Brian & Shelley

DRAFT STATEMENT

ON THE NINTH CIRCUIT COURT OF APPEALS DECISION TO FORCE
ADDITIONAL SALES OF OLD GROWTH TIMBER

I am very concerned about the rush by special interests and their [Republican] friends in Congress to reignite the timber wars of the Pacific Northwest, and I am deeply disappointed in the court's decision to force us to release these sales of healthy ancient timber.

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TO: Martha Foley
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TO: Marcia L. Hale
TO: Kris Balderston
TO: T J Glauthier

CC: Elena Kagan

E X E C U T I V E O F F I C E O F T H E P R E S I D E

27-Oct-1995 03:17pm

TO: Kris Balderston
TO: Ray Martinez
TO: Shelley N. Fidler

FROM: Brian J. Johnson
 Council on Environmental Quality

SUBJECT: slight redraft

DRAFT STATEMENT

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Statement for President Clinton

The Ninth Circuit Court of Appeals has denied our attempt to stay the judicial order to release 59 sales of public timber in the Pacific Northwest. We have no choice but to comply with the ruling, and I am asking Secretaries Glickman and Babbitt to allow the sales to proceed.

When Congress passed -- and I signed -- the recission bill last July, I reluctantly supported the timber salvage provisions as a way to promote forest health across the country. While it was not the kind of forest health legislation I would like to have signed, I thought we could do more good than harm under the bill. And we are carrying these sales out in compliance with environmental laws, even though we are not required to do so.

When I signed the recission bill, however, I made it clear that I did not support the Section 318 sales. I do not support the cutting of trees that would further endanger salmon and murrelets. I do not support the process of attaching an important issue of policy to a budget bill, thereby avoiding full public debate. Finally, our understanding of the amount of volume to be released was significantly different than the interpretation upheld this week by the courts.

This interpretation by the courts makes our task of good stewardship of public forests more difficult, but we have not given up. Many of the sales have contract provisions that were written before we had the benefit of the scientific studies that accompanied the Northwest Forest Plan. In an effort to minimize damage that may be caused to the forest ecosystems, I will ask each national forest supervisor to meet with companies that are awarded the contracts to seek mutually agreeable changes.

My greatest concern is that these sales have proven to be extremely divisive, and may rekindled the timber wars in the Northwest. We all need to do what we can to diffuse this volatile situation, including timber purchasers, environmentalists, and agency personnel. We need to begin again to work together for the good of the nation's forests.

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**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT**

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages ▶ 6

**In Reply Refer to:
5400 (931)**

To <i>Elena Kagen</i>	From <i>Nancy Hayes - BLM</i>
Dept./Agency <i>WH</i>	Phone # <i>503-3501</i>
Fax # <i>456-1647</i>	Fax #

OCT 26 1995

NSN 7540-01-317-7368 / 5099-101 GENERAL SERVICES ADMINISTRATION

INCE COPY

**Instruction Memorandum No. OR-96-008
Expires 09/30/97**

To: District Managers: Salem, Eugene, Roseburg, Medford, Coos Bay, and Lakeview

From: State Director, Oregon/Washington

Subject: Award of Sales Pursuant to the Rescissions Act (Public Law 104-19)

On July 27, 1995, the Rescissions Act (Public Law 104-19) was enacted. On October 17, 1995, an order was issued by the U.S. District Court of Oregon which requires us to award certain timber sales pursuant to Public Law 104-19 on the basis that these sales are subject to that law. Initial guidance regarding implementation of the act was issued under Instruction Memorandum No. OR-95-148 dated August 30, 1995. This memorandum contains guidance regarding the award of certain sold, unawarded FY 1991-1994 sales.

1. Affected Sales:

a. Sales to be awarded are listed in the following table:

Sale Name	Apparent High Bidder	District
Cherry Tree Plum	Hull-Oakes	Salem
Park Ridge Basin	Hull-Oakes	Salem
Rocky Road	Thomas Creek	Salem
Tobe West	Hull-Oakes	Salem
Cat Tracks	Seneca	Eugene
Marten Power	Rosboro	Eugene
Another Fairview	Douglas Co FP	Roseburg
Battle Axe	Reservation Ranch	Roseburg
Dead Middleman	D R Johnson	Roseburg
Jeffers Revenge	Lone Rock	Roseburg
Pond View	D R Johnson	Roseburg
91 Miller's View	D R Johnson	Roseburg

10/26/95

OPTIONAL FORM 89 (7-90)

003

FAX TRANSMITTAL

of pages > 1

To: *Elena Kagen* From: *Nancy Hayes - BLM*
 Dept./Agency: *WH* Phone #: *208-3521*
 Fax #: *456-1647* Fax #:
 NSN 7540-01-317-7368 / 5099-101 GENERAL SERVICES ADMINISTRATION

2

Sale Name	Apparent High Bidder	District
Birdseye Rogue	Croman	Medford
Golden Sucker	Rough & Ready	Medford
Lick II	Western Timber	Medford
PP&J	Boise Cascade	Medford
91 Lower Dudley's Summit	Boise Cascade	Medford
Corner Sock	Lone Rock	Coos Bay
Crazy 8's	CLR	Coos Bay
Daffi Dora	Rogge	Coos Bay
Lobster Hill	Scott	Coos Bay
Lost Sock (Unit 3 only)	Lone Rock	Coos Bay
Nork Fork Chetco (Units 2, 3, 4, 5 & 6 only)	CLR	Coos Bay
Ugly Eckley	Lone Rock	Coos Bay
Wren 'n Doubt (Units 1, 4 & 6 only)	Scott	Coos Bay
Camp	Timber Products	Lakeview
Shady	Timber Products	Lakeview

b. Deep Creek Timber Sale (Coos Bay):

Due to the fact that a "known to be nesting" determination (based upon marbled murrelet occupancy) was made on both units of the Deep Creek timber sale, the sale will not be awarded. The district should send the attached letter to the purchaser.

2. Insert the following paragraphs at the beginning of all award letters:

"On July 27, 1995, Public Law 104-19 was enacted. An order issued by the U.S. District Court of Oregon requires us to award the (sale name) timber sale pursuant to Public Law 104-19, on the basis that the sale is subject to the provisions of the law. This law directs us to award certain timber sales with no change in originally advertised terms, volumes, or bid prices. Therefore, in accordance with Public Law 104-19, I am proceeding with the award of this sale under its original terms. However, the issue of whether or not this sale is subject to that law is currently in litigation. If a court rules that this sale is not subject to Public Law 104-19, this award and any contract executed as a result of this award is null and void; and the parties will return to the position they were in prior to the issuance of this award letter.

"Under contract law principles, in order for you to be bound to the bid of this contract, your offer must have been accepted within a reasonable amount of time. This amount of time has been defined in the Uniform Commercial Code as usually 90 days. Since this sale has been sold, unawarded for more than 90 days, you may withdraw your bid; and your bid deposit will be returned if you so desire."

In the award of the Lost Sock, Wren 'n Doubt, and North Fork Chetco sales, the following third paragraph should be added:

"Pursuant to Section 2001(k)(2) of Public Law 104-19, we have determined that marbled murrelets, a threatened bird species, are "known to be nesting" in Unit No(s). (unit numbers) and, therefore, these sale unit(s) will not be awarded. We will be contacting you regarding substitute volume at a later date. We are awarding Unit No(s). (unit numbers) at the original Exhibit B unit volume(s) and value(s)."

3. Contract Terms:

In accordance with Public Law 104-19, no changes should be made to the terms which were contained in the contract as originally offered. It is not necessary to include language regarding our new regulations dealing with contract extensions and mid-term payments. All contracts are covered by these regulations regardless of whether or not specific language is contained in the contract.

4. Protest Responses (excluding Cat Tracks, Lower Dudley's Summit, and Daffi Dora):

The Contracting Officer shall send a letter to the protestant of any sale with a pending protest. The letter should contain the following language:

"On July 27, 1995, Public Law 104-19 was enacted. An order issued by the U.S. District Court of Oregon requires us to award the (sale name) timber sale pursuant to Public Law 104-19, on the basis that the sale is subject to the provisions of the law. The law directs us to award all timber sale contracts offered prior to the date of enactment. Furthermore, this law directs us to award these sales with no change in originally advertised terms and volumes, and original bid prices.

"Therefore, in accordance with Public Law 104-19, I am dismissing your protest of the (sale name) sale which was received in this office on (date). I will proceed with my decision and award this sale to (high bidder) on (date)."

For any sale in this category for which a "known to be nesting" determination has been made (see No. 2 above), modify the last sentence to reflect which units of the sale are being awarded.

5. Cat Tracks Protest Response:

The Contracting Officer shall add the following paragraph to the letter shown under No. 4. above and send it to the protestants of the Cat Tracks timber sale:

"In our previous letter to you dated September 6, 1995, we stated that the riparian reserve boundaries of the Cat Tracks timber sale had been adjusted to bring them into compliance with the Record of Decision for the Northwest Forest Plan. However, the current court order precludes us from making these adjustments prior to contract award. Nevertheless, we intend to work with our purchaser, through our contract administration process, in an attempt to modify the riparian reserve widths. However, any change would have to be mutually agreed upon between the purchaser and the BLM."

6. Lower Dudley's Summit Protest Response:

The Contracting Officer shall replace the second paragraph of the letter shown under No. 4. above with the following paragraph and send it to the protestants of the Lower Dudley's Summit timber sale:

"At the request of the Medford District of the Bureau of Land Management (BLM), the Interior Board of Land Appeals remanded this case for reconsideration of its (BLM's) decision. However, the current court order precludes us from making any adjustments to this sale prior to contract award. We intend to work with our purchaser, through our contract administration process, in an attempt to modify the contract, but any change would have to be mutually agreed upon between the purchaser and the BLM. Therefore, in accordance with Public Law 104-19, I am dismissing your protest of the Lower Dudley's Summit timber sale which was received in this office on (date). I will proceed with my decision and award this sale to Boise Cascade on (date)."

7. Daffi Dora Protest Response:

The Contracting Officer shall replace the second paragraph of the letter shown under No. 4. above with the following paragraph and send it to the protestants of the Daffi Dora timber sale:

"On June 6, 1995, we responded to your protest and stated that the sale would be revised to reflect the requirements of the Record of Decision for the Northwest Forest Plan. However, the current court order precludes us from making these adjustments prior to contract award. Therefore, in accordance with Public Law 104-19, I am dismissing your protest of the Daffi Dora sale which was received in this office on (date) and will proceed with my decision to award this sale, as originally offered, to Rogge Forest Products."

8. Proposed Contract Modifications:

Districts should inform the affected purchasers that we will be proposing modifications to sales of concern in regard to fisheries issues. These proposed modifications should reflect the mitigation measures which were recommended during the aquatic screening process. In addition, the Eugene District should contact the purchaser of the Cat Tracks timber sale (see No. 5). All interaction with purchasers concerning this issue should be thoroughly

documented in the timber sale contract file. Modifications will be executed using our standard contract administration procedures.

9. Replacement Volume:

The law contains certain provisions for providing replacement volume for any sale or portion of a sale which is not awarded. All replacement volume shall be prepared in accordance with the Standards and Guidelines of the Northwest Forest Plan and District Resource Management Plans.

If you have any questions, contact Nancy Anderson (OR-931) at (503) 952-6072 or Lyndon Werner (OR-931) at (503) 952-6071.

Elaine Y. Zielinski

1 Attachment

1 - Sample letter for Deep Creek

Distribution

WO-330 (Room 204 LS) - 1

OR-930 - 1

OR-931 - 1

10/26/95

13:25

DIV. OF LANDS AND REN. RESOURCES

007

SAMPLE LETTER FOR DEEP CREEK**Dear Purchaser:**

On July 27, 1995, Public Law 104-19 was enacted. An order issued by the U.S. District Court of Oregon requires us to award the Deep Creek timber sale pursuant to Public Law 104-19, on the basis that the sale is subject to the provisions of the law. This law directs us to award certain timber sales with no change in originally advertised terms, volumes, or bid prices.

However, pursuant to Section 2001(k)(2) of Public Law 104-19, we have determined that marbled murrelets, a threatened bird species, are "known to be nesting" in both units of the Deep Creek timber sale. Therefore, this sale will not be awarded. We will be contacting you regarding substitute volume at a later date.

Your bid bond on the Deep Creek timber sale will be held and applied to the substitute volume timber sale contract. Under contract law principles, in order for you to be bound to the bid of this contract, your offer must have been accepted within a reasonable amount of time. This amount of time has been defined in the Uniform Commercial Code as usually 90 days. Since this sale has been sold, unawarded for more that 90 days, you may withdraw your bid and your bid deposit will be returned if you so desire.

Sincerely,**Contracting Officer****ATTACHMENT 1**



Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, OCTOBER 26, 1995

ENR
(202) 514-2008
TDD (202) 514-1888

NINTH CIRCUIT DENIES U.S. APPEAL

GOVERNMENT MUST RELEASE OLD-GROWTH TIMBER SALES IN NORTHWEST

WASHINGTON, D.C. -- A Ninth Circuit Court of Appeals panel has denied the United States' petition for an emergency stay and left standing a lower court order forcing the United States to release up to 62 timber sales primarily in old growth forests in the Pacific Northwest, the Department of Justice announced today. The sales comprise 230 million board feet of timber in areas vital to the protection of threatened and endangered fish and wildlife, including chinook salmon, the northern spotted owl and the marbled murrelet.

"We are disappointed, but of course will comply," said Lois J. Schiffer, Assistant Attorney General for the Environment and Natural Resources Division. "Protecting these sensitive environmental areas at the same time as we provide for a sustainable timber harvest is important. The Court's interpretation is that Congress had no regard for that balance."

The decision came in the case of Northwest Forest Resources Council v. Glickman. A timber industry group sued the government shortly after the President signed the 1995 Rescissions Act in July that included a "timber salvage" rider. Under the timber salvage rider, Congress included language which, having nothing to do with salvage, required the sale of healthy ancient forest timber as previously mandated by a 1990 appropriations bill.

On Tuesday, October 17, U.S. District Court Judge Michael Hogan granted an injunction to force the government to release the sales in question. On Thursday, October 19, the United States filed a motion for stay pending appeal and a motion requesting expedited appeal with the Ninth Circuit.

Federal agencies have interpreted the rescissions law to require the release of some sales that had importance for protecting the ecosystems in Oregon and Washington, but not these additional sales.

The Administration has worked hard to maintain a balance between protecting the

-MORE-

environment and getting out timber. However, affidavits filed in this case demonstrated that these timber sales would lead to the cutting of sensitive old growth forests, resulting in harm to these environments and species.

The government will urge the timber industry to work voluntarily to mitigate the harm that could be caused, or to restrict cutting to those areas that are less likely to harm salmon and other species.

###

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

26-Oct-1995 02:51pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: timber sales

As the result of last night's order, the Forest Service and BLM are in the process of releasing timber sales today.

I was just asked whether the President has any other authority under which he could order the agencies to refrain from going ahead with the sales. i don't think so, but that's more in your ball park. Does anything spring to mind? In defense of national salmon? I doubt it, but??

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

26-Oct-1995 09:09am

TO: Jennifer M. O'Connor

FROM: Elena Kagan
 Office of the Counsel

SUBJECT: fyi

In case you haven't heard, I'm forwarding you the news that the 9th Circuit denied a stay pending appeal of Judge Hogan's ruling against the government in NFRC v. Glickman. As noted, the denial of a stay means the government must immediately begin to release large volumes of old growth timber. It is unclear what will happen to all this timber if the government eventually wins its appeal (which I view as unlikely): that is, no one really knows whether the government then could rescind its releases.

On another subject entirely, I hear Harold talked with Secretary Pena. What's happening on your end?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

25-Oct-1995 09:18pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: Bad news - we lost.

The Ninth Circuit denied our motion for a stay of the district court's order. Oral argument was extremely harsh and very problematic; many of the questions directed towards the government attorney were irrelevant and argumentative (does that sound like an objection!) and directed towards the Senate's attack on Jim Lyons and issues already decided (in favor of the government) related to the contempt motion.

Argument on the appeal is set for the week of Jan. 8th.

The consensus of everyone at Justice is that there is no point in pursuing a rehearing request. Lois Schiffer is working on a statement for the press and I'll obviously fax it to you when I get it.

The consequences of this are that we will begin releasing nearly 230 million board feet of old growth tomorrow morning. There will be a dramatic increase in protests, press, criticism of the administration for signing the bill, etc.

Sorry I don't have better news!

Timber meeting 10/23/95

1. Litigation update -

9c issued a stay till 5:00 thru

oral argument then 27 until valing.

Beezer, Thompson, Nelson - motions panel - only will

think a ruling will be quick. curiously stay.

No decision on whether expedited review comments.

On motion
or
on merits??
↑
my guess

To 80C? Probably not - not certworthy.
DOJ polling agencies on this.

2. Salvage question - see handout

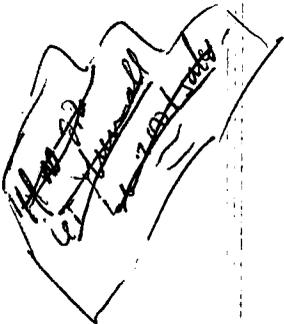
10:00 am phone call deadline to DOJ.

(Decision made to allow Thunder bolt)

Ellen 272-8236

3. See Decision sheet 2

Brief due Friday 9th Cir



K language (award 1hr) -
sales in litigation
reconsider it we win (sales should not
have been released)

PRIVILEGED AND CONFIDENTIAL

Appropriate Scope of Judicial Review of Salvage Sales under the Rescissions Act: Policy Options from Pending and Potential Cases.

I. Legal Options

A. **Option 1: Limited procedural review only** of the salvage sales' environmental analysis. A court's role is simply to confirm whether the required BE and EA have been prepared, and whether they have been internally processed and publicly circulated in compliance with NEPA and the ESA.

1. Section 2001(i) indicates that compliance with "the documents and procedures" required by the Rescissions Act "shall be deemed to satisfy the requirements" of all Federal environmental and natural resource laws.
2. Section 2001(c)(1) of the Rescissions Act repeatedly states that **the scope and content of the environmental documents, and the conclusions drawn from them, are "at the sole discretion of the Secretary concerned."**
3. Therefore the Rescissions Act immunizes the substance of the required environmental documents from any judicial review.

B. **Option 2:** In addition to the procedural review of Option 1, **minimal substantive review** of the salvage sales' environmental analysis under the arbitrary and capricious standard. Under this approach, a court could substantively scrutinize the EA and BE for the internal logic and consistency of their analysis.

1. Section 2001(f)(4) provides that **courts should determine whether the "decision" to prepare a salvage sale was arbitrary and capricious.**
2. The decision to proceed with a salvage sale necessarily has a substantive component, requiring consideration of the sales's environmental constraints.
3. Therefore the Rescissions Act requires substantive review of the sales' environmental documentation. Although the Secretary concerned has discretion regarding the scope and content of environmental documents, at a minimum the Secretary's decision must be reviewed for its internal consistency and logic.

C. Summary of Legal Analysis

1. **Option 1's limited procedural review only appears to be the stronger reading of the statute.** The placement of the scope and content of environmental

documents at the Secretary's "sole discretion" arguably leaves courts no law to apply to evaluate the substance of the documents.

2. Nevertheless, Option 2's minimal substantive review under the arbitrary and capricious standard appears to be a tenable reading of the Rescissions Act. The agencies could decide to argue for Option 2 based on the President's directive on the Rescissions Act and other policy considerations.

II. Thunderbolt Wildfire Recovery Project: Potential Litigation

A. Background

1. Project area has a history of sedimentation problems and is prime spawning and rearing habitat to listed Snake River salmon.
3. Relevant LRMPs closed the area to major ground-disturbing activity.
4. Wildfires have changed conditions in the project area.
5. Project allows salvage logging by helicopter on landslide-prone topography.

B. Issues

1. NMFS draft Biological Opinion finds jeopardy.
2. EPA rated DEIS environmentally unsatisfactory.
3. Decision amends LRMPs to allow entry to harvest salvage and is radical reversal of policy in this area of special concern.
4. Forest Service Science Panel determined the best information was used to determine potential risks and found no change to sedimentation problem due to salvage in landslide-prone areas.
5. NMFS and EPA deferred to Forest Service decision, but continue to disagree that the project should proceed.
6. Revenue from salvage marked for necessary sediment reduction projects; no other source of funding is apparent. Estimated revenues have dropped from \$2.8 million to \$1 million or less.

III. Kentucky Heartwood v. Glickman (E.D. Ky.): The Forest Service's environmental analysis and consultation regarding potential effects of salvage sales on the endangered Indiana Bat appears to have complied with the NFMA and the ESA, let alone the Rescissions Act.

OPTIONS PAPER

Re: Timber salvage operations involving sales advertised and awarded both prior to and after enactment of § 2001

We have on appeal to the Ninth Circuit a decision denying an injunction against a salvage project on the Boise National Forest that encompasses 20 sales. The ROD for the project was issued in March 1994, and sales were advertised in April, May, and June, and awarded in July. On July 21, the district court denied a motion for preliminary injunction of the project as a whole. Additional sales were advertised in August and September -- including sales advertised but not awarded prior to enactment because of a lack of bidders.

We are facing the same question in several other cases, and seek guidance on a consistent government-wide position to be taken on these cases.

The following positions are available to us:

- 1 -- § 2001 applies to none of these sales.
- 2 -- § 2001 applies to sales advertised and awarded after 7/27/95.
- 3 -- § 2001 applies to sales awarded after 7/27/95 -- *(larger group - even if advert before)*
 - a. Where advertisement occurred before enactment, arguably 15-day statute of limitations does not apply; standard of review applies.
- 4 -- §2001 applies to all sales. (Note that had we been enjoined, this argument would be likeliest.)

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Oct-1995 10:40am

TO: (See Below)

FROM: Thomas C. Jensen
 Council on Environmental Quality

SUBJECT: CHANGE IN MEETING TIME

The starting time for the meeting of the EOP/Agency timber working group scheduled for this coming Tuesday, October 24th, will be moved back from 2:00 p.m. to 5:00 p.m. Again, the meeting will start at 5:00, instead of 2:00.

The preliminary agenda is the following:

1. Litigation Update - Justice
2. Review of progress under salvage MOA - BLM/USDA
3. Substantive standard applicable to "arbitrary and capricious" language in section 2001(b) of rescissions act. |
 - a. Kentucky Heartwood v. USFS
 - b. Anticipated Thunderbolt salvage sale litigation
4. Other business - *Retrospectivity of 2001*

If you would like other items included in the agenda, please contact me at 395-7415 or by fax at 456-6546.

Congratulations to the Department of Justice for the positive outcome in the contempt proceedings and the very speedy appeal to the Ninth Circuit. Thanks, too, to the agency personnel who contributed to preparation of the declarations and related materials required (under a very short deadline) to support the government's pleadings. Great teamwork.

Distribution:

TO: Alice E. Shuffield
TO: FAX (9-720-5437, Greg Frazier)
TO: FAX (9-720-4732, Jim Lyons)
TO: FAX (9-208-6956, Ann Shields)
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TO: Remote Addressee
TO: Thomas C. Jensen
TO: Ruth D. Saunders
TO: Remote Addressee

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Oct-1995 12:37pm

TO: Elena Kagan

FROM: Thomas C. Jensen
 Council on Environmental Quality

CC: Dinah Bear
CC: Kathleen A. McGinty

SUBJECT: RE: yesterday's decision

Elena,

The political implications are minor and are not additive to the political implications or consequences we've already accepted by our previous actions.

Enviros will be pleased; sport and commercial fishery interests will be pleased; the timber industry plaintiffs will be displeased. On balance, I think we come out ahead.

Yesterday's decision was a small step in the overall exercise of responding to the rescissions bill. We have a VERY big decision to make next week, namely what position to take in the Kentucky district court litigation (and anticipated Idaho litigation) regarding the substantive standards we think we are applying to salvage timber sales under the bill. In other words, since the sale is being challenged as "arbitrary and capricious" we have to show it wasn't because we made the decision based on something..... What that something is isn't entirely clear. It's at least the President's directive and the MOA, but we probably do not have agreement among the agencies now whether other substantive laws apply. This will be fun.

I hope this is responsive to your question. Let me know if you'd like more penetrating analysis. I'm glad you're part of the team.

Tom



United States
Department of
Agriculture

Forest
Service

Washington
Office

14th & Independence SW
P.O. Box 96090
Washington, D.C. 20090-6090

INFORMATIONAL MEMORANDUM FOR JAMES R. LYONS, Under Secretary, NRE

FROM: Jack Ward Thomas
Chief

OCT 13 1995

SUBJECT: Emergency Salvage Program Planned Offer Levels
FY 1995 Rescission Act (Public Law 104-19)

ISSUE:

In the first report to Congress required by section 2001 (c) (2) of the fiscal year (FY) 1995 Rescissions Act, the Forest Service stated its intention to produce a total of 4.5 billion board feet (bbf) of salvage through the emergency salvage period. Since then, questions have surfaced regarding whether this objective is still feasible.

DISCUSSION:

First, we want to reaffirm our commitment to achieve the highest level of salvage possible as directed by the Act and the President's policy statement. The schedule presented on page C-1 of the initial report to Congress indicates a planned offer level of 1.7 bbf for FY 1995. Our preliminary figures indicate that we achieved at least 95 percent of that objective. More recent information indicates that the final tally may exceed the planned level. We will continue to press to achieve similar or better performance in FY 1996 and the first quarter of FY 1997.

Given the right set of circumstances, the 4.5 bbf is an achievable goal. The 4.5 bbf figure was developed by the regions as an assessment of the original Taylor amendment and does not reflect the volume available under the requirements of the Memorandum of Agreement (MOA) that implements Public Law 104-19. The degree of Forest Service control assumed under the Taylor amendment was different from that which exists under the MOA. Analysis subsequent to the issuance of the MOA indicates that approximately 4.0 bbf would be available under those provisions (see page B-2 of the September 1, 1995, report to Congress). This is within the range (plus or minus 25 percent of the 4.5 bbf) expressed in Secretary Glickman's June 29, 1995, letter to Speaker Newt Gingrich.

While fully committed to the principle of implementing the emergency salvage program in compliance with the substantive provisions of environmental laws, we continue to believe that procedural provisions can be further streamlined. As noted in some of our initial policy discussions last August, the MOA does not streamline the sale preparation process as much as we would like nor as much as the law allows. As an example, Forest Service employees are capable of



Caring for the Land and Serving People



completing the analysis and assessment of effects on species or critical habitat as required by section 7 of Endangered Species Act, thereby reducing the number of specialist who need to review the projects. The Rescissions Act provides the Secretary this discretion. Other processes, such as watershed analysis, could be streamlined as well. Instead of rigid requirements to apply specific standards and guidelines developed at broad regional scales (e.g., PACFISH) the analysis could be customized to fit the site in question and more efficiently achieve the same watershed protection objectives.

While it appears that the interagency process outlined in the MOA may reduce the time it takes to prepare salvage sales, it is too soon to assess the magnitude of any time savings. Our initial assessment of the MOA procedures indicated that the time savings would not be of the magnitude originally anticipated when the 4.5 bbf estimate was developed. However, the process should be given the chance to work. We are hopeful that the local interagency teams will find innovative ways to short cut the process and make it fit their individual situations. We will be asking the forests to assess the MOA procedures and any problems they encounter. If it becomes apparent that the process requirements of the MOA are overly burdensome, we will seek your help in getting them revised.

Along with streamlining the sale preparation process, the matter of issue resolution between the various agencies needs to be improved. At times, the regulatory agencies and land management agencies are working towards separate and sometimes conflicting objectives and their concepts about acceptable versus unacceptable environmental risk differ. Our objective has been to maximize salvage in a cost efficient manner where it is environmentally sound to do so (as defined by environmental law and standards and guidelines). It appears that the primary objective of the regulatory agencies is to minimize risk to the environment without regard for the amount of timber salvaged or the associated cost of the "risk-free" approach. These two approaches can and often do conflict. There needs to be a clearer description of the balanced objectives of the emergency salvage program and a strong and real commitment by all the concerned agencies toward achieving those objectives.

The Forest Service, Fish and Wildlife Service, Bureau of Land Management, National Marine Fisheries Service, and Environmental Protection Agency are currently working to establish a performance monitoring system to track progress in implementing the MOA. This system will provide information on a monthly basis about sale preparation activities and the performance of interagency teams. We anticipate that preliminary information will be available for some of the regions by the first week in November.

SUMMARY:

The 4.5 bbf planned salvage level is an attainable goal, given the right set of circumstances. It will not be an easy task under current conditions. As we proceed with implementation of the program, we may look to you for assistance in further streamlining the sale preparation process. In any contacts with the other concerned agencies, your continued emphasis on achieving planned offer levels would be helpful and appreciated.

10/23/95 DRAFT -- Some Permit Volume Not Included

Emergency Timber Salvage Sale Program

PRELIMINARY FY 1995 Year-End Report

Due to Database Corrections, Changes in Volumes are Likely
(all volumes in millions of board feet)

Region	FY 1995 Planned Offer		FY 1995 Timber Salvage		
	Program Budget	Under Emer Salvg Pgm	Offered	Sold	Harvested
1 -- Northern	255	215	170		
2 -- Rocky Mountain	44	31	34		
3 -- Southwestern	51	10	50		
4 -- Intermountain	369	343	305	Sold and Harvest Data Not Currently Available	
5 -- Pacific Southwest	350	341	345		
6 -- Pacific Northwest	338	475	533		
8 -- Southern	65	205	236		
9 -- Eastern	87	100	116		
10 -- Alaska	15	12	33		
Agency Totals	1,574	1,731	1,821		

105.2% of planned

Note: Some of these figures are affected by a database corruption problem.
These figures represent the best information available at this time.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

23-Oct-1995 03:33pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

CC: Thomas C. Jensen

SUBJECT: RE: NRFC Interrogatory

I have talked to DOJ about the wording for interrogatory #5. Peter Coppelman and Ellen, who argued last week's motions in front of Judge Hogan. They feel very strongly that while we are technically correct in our proposed modification to the response because Rutzick didn't phrase his question correctly, it is too cute by half to take advantage of that and that we need an explanation of why no WH, EOP or CEQ names appear in the response. DOJ believes Hogan will without an explanation, Hogan will consider it nonresponsive, with ill consequences towards the gov. I am not inclined to die over this, but if either of you are, now is the time - otherwise, it's out the door.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

23-Oct-1995 09:33am

TO: Dinah Bear

FROM: Elena Kagan
 Office of the Counsel

CC: Thomas C. Jensen

SUBJECT: RE: NRFC Interrogatory

I agree with you, although I suspect we'll get a second question anyway. I take it the best way to handle this is for you to call Justice and register all our views? Let me know if you want me to do anything else.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Oct-1995 07:08pm

TO: Thomas C. Jensen
TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: NRFC Interrogatory

DOJ proposes the following answer to the interrogatory asking the government to "Identify the highest ranking government officials in the Department of Agriculture, Department of Interior, the Executive Office of the President, and the Council on Environmental Quality, or anywhere else in the executive branch of the government, who are directly and personally responsible for the implementation of section 2001(k) of the Pub. L. 104-19, including compliance with Judge Hogan's order of September 13, 1995."

Justice's proposed response is as follows:

"Only the land management agencies can actually implement section 2001(k) of the Pub. L. 104-19. Therefore the highest ranking government officials who are directly and personally responsible for the implementation of Pub. L. 104-10, including compliance with Judge Hogan's order of September 13, 1995, are Secretary of Agriculture Dan Glickman and Secretary of the Interior Bruce Babbitt."

My reaction is to strike the first sentence and start the response by simply stating, "The highest ranking". It seems to me that the first sentence suggests the desirability of asking a second question. What do both of you think?

DOJ needs any comments by NOON on Monday.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-Oct-1995 11:58am

TO: Elena Kagan

FROM: Jennifer M. O'Connor
 Office of The Chief of Staff

SUBJECT: RE: Timber litigation

What are the political implications of this?

Telecon - Dino's Bear

→ Katy

Mtg - disc. of buying Puer in timber cases.

Somebody ^{from WTT} called J. Schmidt - said ags. were concerned -
DOT pushing too hard for answers.

DOT meeting re bottle neck law

10/19/25

seek to lift inj?

any legislated re previously other 318 sales
There are prev other 318 sales
Changed circumstances 2200k apply

keep inj?

These weren't included bec not in compliance
w/ terms 3 in any. by noted above.

1. oppose sep of powers argument -

either way, have to do that

litigated issue in SCT w/ 318

SCT - 318 not a viol of sep of P.

200k - less likely to be held a viol of sep of P
than 318

No mention of any public car.

on which side?

Start off by knowing where we're going to end up.

Forest Service - op to modify sales mutually
w/ purchaser - could get to point where
their sales are acceptable.
} minimize impact. to make consistent w/ Forest
plans - may not get all way.

FWS - don't release.

BCM - also don't release

Legally -

If released - then released under orig terms + conditions

Foster Service

Rutich - in reply -
isn't this set of rules
covered by 2001 d

These sales are swept up by Hogen's order -
won-318 sales covered by H. order ~~blank~~
in jeep area.

FS - OK not to release these sales.
Doesn't want all that much.

Koppelman - let's ODPOR release.

This is Judge Dwyer.

If we say "release" -

the next time when we try to buck up the FDP -
he's not going to listen to what we have to say.

Arg - then don't meet the stat lang bec they
violated 318 itself.

as as plottone w/ Dwyer to explain crummy situation
w/ in here?

Explain the setting - context

Law (statute) // Injunction - conflicting obligations.

Jeff = 0413 -
re timber

Diff btw enjoined sales + w/drawn sales?

No Ct injunction in place - the w/drawn b/c inj was
abt to be issued.

Try to cover (not release) them all!

Summary -

Agree w/ enviros - on btm line

→ Ask them to w/draw up of powers

→ "Subj to 318" - Their sales not w/in 2001

← b/c they viol frag. reg. (of 318)

Option enviro stop arg -

and option contention that their
sales were never struck

Also - as to First + Last w/drawn sales.

(not other w/drawn sales)

2 cases

Hearings on Tuesday - all-Republican fork here 11:30

2-SALVAGE

testify at all?

Did meet our targets for FY95 on salvage.

Op to say that.

Jack Thomas Memo OCT 13 -

NOT going to list our targets - because MOA
is getting in the way.

This will be used in their ~~TS~~ TS

United to him -

Mark Gady (Forest Service - Ar)

w/ Nancy Hager (BLM)

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

19-Oct-1995 12:10pm

TO: Jennifer M. O'Connor

FROM: Elena Kagan
 Office of the Counsel

SUBJECT: Seattle audobon v. thomas

I just received the brief filed by environmental groups in the above case, which we talked about the other day. The plaintiffs say that they need the injunction reaffirmed because the logging rider in the Rescissions Act places the continued force of the injunction in some doubt. More specifically, the plaintiffs note that in the wake of the Rescissions Act, a Forest Service memo listed sales covered by the injunction as among those slated to be released -- though the plaintiffs also concede that DOJ has informed the court handling the NFRC case that the Forest Service is not currently proceeding with these sales. In addition, the plaintiffs say that the timber industry in the NFRC case is asking the court to order the release of the enjoined sales -- in effect, asking one court to undo the injunction of another. So much for why the motion was filed. If you want to see the motion or have any other questions, let me know.

Are we still on for that call to Janno?

EXECUTIVE OFFICE OF THE PRESIDENT

18-Oct-1995 06:21pm

TO: (See Below)
FROM: Thomas C. Jensen
Council on Environmental Quality
SUBJECT: Meeting Notice

At the request of the Department of Justice, we have scheduled a meeting tomorrow, Thursday, October 19th at 5:00 p.m. to discuss an issue arising under the logging provisions of the rescissions act. NOTE: THE MEETING WILL BE HELD AT THE MAIN DEPARTMENT OF JUSTICE BUILDING, ROOM 2143.

The issue is one referenced briefly at yesterday's EOP/agency timber meeting, namely, the federal government's response to the Sierra Club Legal Defense Fund's motion to clarify and enforce judgment with respect to section 318 sales that had been previously enjoined. Our response is due in court on Friday. Justice needs to know the government's position. In releasing 318 sales, the government determined that we could not release sales that had been previously enjoined. Now we need to decide whether to support or oppose releasing those sales.

If you require additional information on the meeting or the issue to be discussed, please contact Peter Coppelman at 514-2701.

Thank you for your cooperation.

↓
"Primarily a policy -
don't know if you
have to be here."

Distribution:

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E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Oct-1995 07:19pm

TO: Elena Kagan
TO: Ruth D. Saunders
TO: Remote Addressee

FROM: Dinah Bear
Council on Environmental Quality

SUBJECT: Judge Hogan's decision

Judge Hogan just issued his rulings:

1. NO CONTEMPT - MOTION DENIED!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!
2. ISSUED INJUNCTION - gave government until October 25th to comply. Denied motion for stay, from which we will appeal to 9th Circuit.
3. Ordered the government to submit to the court by Nov. 1 a list of all timber sale contracts offered or awarded prior to fy 1991, which are covered by the court's decision of Sept. 13th.
4. Ordered the government to submit bi-weekly progress reports beginning Oct. 25th, describing the action taken to award and release each of the sales offered or awarded between Oct. 1, 1990 and July 27, 1995, that are covered in his Sept. 13th order. "After these reports, if the parties disagree whether a sale should be released, the court retains jurisdiction over that issue."

ck
|

amen
*Order yesterday
March 1995*

Forest Service Input on
BLM Questions re Section 318 Sales under Section 2001 (k)

CONFIDENTIAL -- ATTORNEY CLIENT PRIVILEGE
Prepared in Anticipation of Litigation

1. Does 2001(k) (3) allow the BLM to offer replacement volume if BLM needs to modify the contract to increase buffer zones to protect fish habitat?

The BLM indicates that, in their opinion, section 2001 (k) (3) would not allow replacement of 318 timber to protect fish species and that they would pursue mitigation of adverse effects to fish species through (mutual modification of the contracts.) Section 2001 (k) (3) includes the phrase "[i]f for any reason." It was our understanding, from earlier policy discussions, that this phrase would not be used to argue modification of sales to protect non-bird species. Given that, we agree with the BLM's interpretation of (k) (3) and the use of alternative volume. *fin*

2. What is the time limit for alternative volume? Does it have to be offered in time for the purchaser to complete harvest by the end of 96, or does it have to be offered by the end of 1996? *J*

Given the Forest Service position on the lack of alternative volume, we have not engaged in serious discussions about answers to this question. Section 2001 (k) (1) directs the Secretary to "award, release, and permit to be completed in fiscal years 1995 and 1996" the original timber sale contracts. We do not know if this same phrase applies to the alternative volume. If the alternative volume was subject to the normal sale preparation process, standards and guidelines, and environmental analysis under the forest plan, it would be nearly impossible to offer this volume by the end of FY 1996. The marbled murrelet survey protocol requires two years for completion.

3. What is like kind and value?

BLM offers a possible definition that uses comparability criteria (species, size, etc.) and harvest criteria that are based on factors that would affect price and the purchaser's ability to economically harvest the trees. This criteria appears to be reasonable and would provide a common definition with flexibility to adjust to site-specific situations.

4. BLM intends to follow the President's Forest Plan standards and guidelines in the design of replacement volume.

As noted in 3. above, this will make it difficult to impossible to offer the alternative volume by the end of FY 1996. Unless the murrelet survey protocol could be changed, those surveys alone would make the sale preparation process a 2-year effort. In addition, any substantial workload to find and prepare alternative volume would substantially detract from the preparation of programmed offer levels in the President's Forest Plan for FY 1996. In addition, program disruptions and the inefficiencies they create would continue, thereby delaying the achievement of stability in our program and workforce.

Comments on Additional Agenda Items for CEQ Meeting:

Issue Area 1, Problem 1

We may want to initially argue that the 318 sales (at least those released to date) will not have a significant effect on the environment. It would seem appropriate to preserve this as an argument in Dwyer's court to defend the President's Forest Plan.

Issue Area 1, Problem 2

As we've discussed in the past, we cannot produce an immediate increase in timber offer levels just by providing more money and resources. One primary factor influencing this relates to current information requirements (set up in the Forest Plan and broad regional guidance such as the eastside screens) that must be met prior to making project decisions. There are several surveys and analyses that must be completed to provide the required information. Without the information, much of the timber is "off limits" to harvest. To increase program levels, we would need additional resources and expertise, but would also need relief from the broad process standards--we would need to base more decisions on existing information and analyses that are customized to fit site specific situations. If the specific resource production and protection objectives are defined, the local managers could then figure out how to achieve them in the most expedient manner.

Other Issues, Second Problem

The Forest Service has developed talking points regarding the GAO study on timber sale receipts. A copy is enclosed.

TALKING POINTS

GAO Report on the Distribution of Forest Service Timber Sale Receipts During FY's 1992-94¹

- The report was prepared at the request of Congressman Sidney R. Yates, Ranking Minority Member, Subcommittee on Interior and Related Agencies, House Committee on Appropriations.
- The report does not attempt to assess the profitability of Forest Service timber sales. GAO states (p. 10) it is intended to provide information on:
 - "the receipts collected for the timber sales program in fiscal years 1992-94 and the amount of these receipts the Forest Service distributed for specific purposes and
 - the receipts deposited in the General Fund of the Treasury compared with the Forest Service's outlays for the preparation and administration of timber sales for that same period."
- The report shows (p. 2) that for the period in question, total receipts were \$2,995.0 million -- \$1,696.9 million more than the total cost to prepare and administer sales.
- Of the total receipts, \$302.7 million were returned to the General Fund of the Treasury (p. 2). The \$2,692.3 million difference between total receipts and returns to the General Fund represent:
 - the amounts deposited into various Congressionally authorized funds (e.g., the Knutson-Vandenberg Fund, the Salvage Sale Fund, and the Roads & Trails Fund) for subsequent reinvestment in management of the National Forests;
 - the amounts received as purchaser road credits (i.e., physical improvements) as opposed to cash; and

¹ GAO: 1995; FOREST SERVICE--Distribution of Timber Sales Receipts Fiscal Years 1992-94; GAO/RCED-95-237FS; 54 p.

- the amounts required to provide the states and counties with the 25 percent receipt-share payments that they are entitled to by law.
- The fact that returns to the General Fund were \$995.4 million less than the costs to prepare and administer timber sales during the years in question does not mean that sales lost almost \$1 billion dollars because returns to the General Fund were only 10 percent of total timber sale returns.
- Report 1 of TSPIRS, which was jointly developed by GAO and the Forest Service to gauge the profitability of National Forest timber sales, shows that for the nation as a whole total receipts exceeded total operating expenses by \$214 million in FY 1994 and by \$301 million in FY 1993. Indeed, TSPIRS shows that timber sale receipts have exceeded expenditures for every year since the accounting system was implemented in FY 1989.
- The cost figures reported in the GAO Report cannot be directly compared to those in TSPIRS because the former shows annual obligations while the latter reflects the use of accrual accounting.

For additional information contact:

Cliff Hickman
USDA Forest Service
Timber Management Staff
202/205-1162

ONLY FOR NON-NESTING w/ FISH PROBLEMS

OR/WA BUREAU OF LAND MANAGEMENT
ISSUES REGARDING REPLACEMENT VOLUME UNDER THE RESCISSIONS ACT

1. Does Section 2001(k)(3) allow the BLM to offer replacement volume if BLM needs to modify the contract to increase buffer zones to protect fish habitat? If we are taking the position that replacement volume only applies to nesting of threatened or endangered bird species, then we can't use Section 2001(k)(3) replacement volume for fish concerns, and a purchaser will have the right to hold us to the original contract. Since BLM will not be able to offer this replacement volume under 2001(k)(3), BLM would have to negotiate a bilateral modification of the contract, including deletion and addition of timber at current (higher than contract) value, with the purchaser to make desired changes, such as adding or widening stream buffers to mitigate fish impacts. Execution of a bilateral modification requires the cooperation of the purchaser. *We expect a number of purchasers will refuse to execute bilateral modifications.*

ONLY FOR NESTING

2. What is the time limit on awarding replacement volume? Does it have to be awarded in time for the purchaser to complete harvest (if they so choose) by the end of FY 96, or does it only have to be awarded by the end of FY 1996? The BLM needs this information to plan replacement sales and other sales, in order to meet the commitments under the President's Forest Plan.

3. What is "like kind and value"?

ONLY FOR NESTING

The Act specifies:

"equal volume of timber, of like kind and value, which shall be subject to the terms of the original contract."

BLM Proposal:

- Replacement volume must be comparable (the same or nearly the same) in terms of volume quantity by species, percentages of grades by species, and average diameter.
- Other harvest parameters, such as average volume per acre, yarding distance, required harvest system, transportation distance, etc, can be made comparable by an appropriate value adjustment in the contract. Certain purchasers with multiple processing facilities may have the flexibility to accept significantly different timber. They would still expect to benefit from value adjustment to achieve "like value." Other purchasers, notably Hull-Oakes Lumber Co., (purchaser of the Roman Dunn sale; old growth timber) have little flexibility and would expect the characteristics of the timber to be very comparable.

4. Does replacement volume awarded in accordance with Section 2001(k) have "sufficiency" by virtue of the phrase "Notwithstanding any other provision of law...." in Section 2001(k)(1)? Is replacement volume awarded in accordance with Section 2001(k) exempt from administrative and judicial review? What if the replacement volume is provided for reasons other than nesting of threatened bird species, e.g., adverse impacts to fish?

(?)

NOTE: Refer to the attached memorandum regarding the China Cr. timber sale. In this case, the purchaser is imposing a December 31, 1995, deadline for offering the replacement volume. BLM requires a swift resolution of the replacement volume issue.

NOTE: BLM intends to follow the President's Forest Plan Standards and Guidelines in the design of replacement volume.

PROGRAM CONTACT:

Bill Bradley, Deputy State Director, (OR 930), (503) 952-6056
Lyndon Werner, OR 931, (503) 952-6071

NESTING

The federal government on Friday returned to the United States District Court in Eugene, Oregon, by filing a motion to enter an appealable order regarding timber sales in the Northwest.

By way of background, in July, Congress enacted a broad-based spending bill ("1995 Rescissions Act") that included certain provisions related to green and salvage timber. The provisions required that timber be offered for sale by federal agencies without certain environmental safeguards traditionally provided by law. Because of other provisions in the bill, President Clinton signed it into law, but noted at the time his grave concerns about the timber provisions.

The President stressed in his statement at signing that federal agencies should implement the timber-related provisions of the Act fully, and should seek to do so as far as legally possible consistent with sound environmental protection.

Since enactment of the 1995 Rescissions Act, federal land management agencies and federal species protection agencies have been consulting in order to bring about quick implementation of the timber provisions of the new law consistent with the President's directives. The Secretaries of Agriculture and the Interior have been clear in their approaches:

According to Secretary of Agriculture Dan Glickman, "The Clinton Administration is moving aggressively to implement the logging provisions in the Rescissions Act. The Forest Service and Bureau of Land Management are on track to meet or exceed both salvage and green timber sale targets. In compliance with the Rescission Act, BLM and the Forest Service recently released 130 million board feet of sales, commonly known as the '318 sales,' that do not jeopardize marbled murrelets. Under the President's Northwest Forest Plan, the agencies have offered 610 million board feet of timber for sale in 1995--exceeding the plan's target. We expect to exceed targets again in 1996."

According to Glickman, "The President has directed his Administration to implement the logging provisions of the Rescissions Act in as environmentally sound a way as possible, and we will. We're going to move timber, but we want to do it right. The court's order could require us to release additional sales that do not comply with the environmental requirements. We will continue to work under existing environmental law to try to find ways to modify sales we have concerns about so they can be released. We intend to work with buyers and other stakeholders in this process."

--Secretary of the Interior Babbitt stated: "The President's Northwest Forest Plan is working. The last thing that the Pacific Northwest needs is something that would upset the fragile balance between forest use and protection achieved under the President's plan. We are deeply concerned that the Rescission Act waiver provisions, if broadly interpreted, will trigger environmental problems that would lead us backwards to the legal gridlock that former Administrations imposed on Northwest forests. Nobody wins in that situation."

--Timber industry representatives contend that the Rescission Act required release of additional sales in the geographic area of the 318 sales--these additional sales are old growth and other environmentally sensitive timber in Washington and Oregon, and a number had been archived some time ago. The Secretaries of Agriculture and the Interior, who have responsibility for implementing this law, think that the law is limited to the original 318 sales. The industry interpretation would require going back to the archives and resurrecting dozens of environmentally harmful timber sales proposed, but dropped, since fiscal year 1989. The volume of timber in dispute is approximately 250 million board feet.

--To press its view that these additional sales should be released, the timber industry filed a lawsuit in Oregon. The federal agencies disagreed with the interpretation that these additional sales were covered by the provisions of the Rescission Act that required release of timber sales without compliance with the environmental laws.

--On September 13, Judge Michael Hogan, in the case of Northwest Forest Resource Council v. Glickman, issued an opinion in the case. He ruled that Congress intended to have the Act's environmental waiver provisions extend to these additional sales. The district court has not yet entered a final judgment in the case, and other issues are still pending. As a result, the court's September 13 opinion was not in a form that could be appealed.

-- Last Friday the federal government filed a motion asking the Court to enter an order that would clear the way for an immediate appeal of the district court's September 13 decision, if that course is necessary, while the remainder of the case is still pending before the district court. In that way, it would be possible to obtain a final judicial resolution as to what timber is covered by the Rescission Act before the timber at issue is cut.

Case 2

*

*

*

1. DOJ - update.

9 cases.

a) NIFFE v Glickman / Scott v Glickman - Holm OR

that granted the motion to file

Also motion on known to be working - asked for draft

filed briefs - was for decision.

Not 7 - oral arg on which - on merits

Recent motion - to get appealable order (3 of 4)

If inquiry entered, will move for stay pending appeal.

b) Lawe - Attack on East Side Park Plan

injunction - sought

c) OPRE v Glickman

3rd order released - challenge to that release

their

Holm - responses due today

d) Pilech v Glickman (MSRP)

known to be working - Rostoker.

Hopefully - has face of

Also EPA challenge

e) Health Andrus v Thomas

Byers

Motion to enforce order -

We returned to release - heard on 8/28 order: "you can't release"

its say old et order should hold

MRTWA's crisis - should we say - list the injunction? or not?

order - increment w/ forest plan?

so we release

Knocking in door of West plan.

Gas briefs on
Scott v Andrus

ask for sheet

4) Kettle Range

Challenging 1 salvage + green timber sales

Rescission sale not directly implicated

5) ^{Warner Creek} Sierra v Forest Service - 9C

Challenges release - EIS insufficient

6) By Heartwood v Glickman KyED

1st challenge to salvage timber sale under Resc Act.

Impact on a kind of BAT

7) Alaska v Morrison - 9th Cir just ruled

503 of rescission Act

Tongass National Forest



Decision below - nullified 503 for all practical purposes.

Provision in 96 bill - related to this case.

Trying to hit 9th Cir ruling.

2.

3. Replacement Timber Policy

- a) RT to create buffers for fire.
- Car. do under resc. act
- b) Time limit
- c) Like land + value
- d) Forest plan

Decision made not to use Option 9 timber as alternative timber.

Methods for estimating value of K?

No certain answer, says DOJ

Auth to respond in damages under 2001?

Problem - no K to breach, bc Cury has rewritten the K.

Need to do analysis. LS - says do have K.

But true that statute doesn't give option of dams.

So - what to do if no alter timber?

↓

what happens?

DOJ - take a crack.

Draft.

↳ (when would this be?)

4. Review of CEA/OMB timber issues + policy paper.

From mtg in Fay Glickman's office.

Re violence - there is a coord. plan of action - which everyone.

LS - 3 other items

a) get polling data?

b) w/ mtg w/ enviros?

c) topic for disc - how introduce leg to repeal rescission statute

GAO study - see handout

2 of economics of timber sales - tough 2 - debated + debated.

4d rule? Part of implementing the forest plan
Problem 5??

Tom: Trumpet 4d rule vs grace offering - effort to win w/ landowners.

PC - events over the 4d rule -

the forest plan + its assumptions are getting changed.

Barry: An unfulfilled promise in Clinton.

Area 2, Problem 1 - not a problem

Mon - from resc. bill.

It is working

LS - tell good choices are more working.

- Future Meeting Schedule

Meet regularly to track timber - Tuesday 2:00 - 3:00

- DOS instructions on rulings today.

Think he'll enter an injunction / deny contempt

please immediately?
or - give us 45 days.

↓ perhaps today
then - stay pending appeal
next 2 - will SB authorize appeal?

Other 2 options - other side has it had a chance
will probably give some time.

If no stay - go to CJA vt away + such a stay.

Usually this happens.

Someone will call tonight - say what happened.

Refer press calls to POT

Also - if order says release immed - call Justice.

News release - ready to go - draft cleared by SB.

Use as explanatory material - talking points.

General back -

complying w/ Ct's order / doing it in responsible way.

Name	Date
<i>Peter Rundlet</i>	<i>9/9/99</i>

Counsel

EXECUTIVE OFFICE OF THE PRESIDENT

16-Oct-1995 11:23am

TO: (See Below)

FROM: Thomas C. Jensen
Council on Environmental Quality

SUBJECT: Timber Issues Meeting Agenda

The purpose of this memo is to transmit a draft agenda and other materials for Tuesday's timber meeting and to encourage those agencies with issues on the agenda to prepare appropriate briefing information.

Department of Justice - Please come prepared to brief the group on the status of the cases listed on the agenda. As always, the group will be interested in your perspective on how the various proceedings relate to implementation of the President's forest plan. In addition, we will want to discuss how the agencies should respond to different possible rulings from Judge Hogan.]

BLM and USDA - Please confer in advance of meeting to prepare a unified discussion of the "replacement timber" issue. BLM has suggested some policy approaches. USDA, do you agree or disagree with those options?

Following the agenda, you will find a document prepared by CEQ and OMB that outlines forthcoming timber issues and proposed Administration responses. Please review this document (which was distributed originally at the meeting just over a week ago in Secretary Glickman's conference room), and be prepared to comment on it.

Thank you for your cooperation. Please call me at 395-7415 with questions.

press release?

EOP/Agency Forest Issues Group

DRAFT MEETING AGENDA - SUBJECT TO CHANGE

October 17, 1995 - CEQ Conference Room 2:00-4:00 p.m.

1. Approval of Agenda - Chair
2. Litigation Update - DOJ (Information)
 - NFRC v. Glickman and Babbitt
 - Blue Mountain v. Lowe - *ck*
 - Other
3. Direction to REIC and REO regarding new information - Chair ?
(Action)
 - Report from ISC meeting
 - Tracking and assessing impacts of Rescission Act logging
4. Replacement Timber Policy - BLM & USDA (Action) *rw.*
5. Review of CEQ/OMB timber issues and policy paper - Chair
(Discussion)
6. Future meeting schedule - Chair (Action)
7. Other business - Chair

Name	Date
<i>Peter Rundlet</i>	<i>9/9/99</i>

Counsel

E X E C U T I V E O F F I C E O F T H E
P R E S I D E N T

COUNCIL ON ENVIRONMENTAL QUALITY
OFFICE OF MANAGEMENT AND BUDGET

October 6, 1995

MEMORANDUM FOR WHITE HOUSE/AGENCY TIMBER SUBGROUP

Who is this?

FROM KATIE MCGINTY AND T.J. GLAUTHIER

SUBJECT UPCOMING TIMBER ISSUES

What is this?

Following the western issues meeting earlier this week with the Chief of Staff, we polled EOP staff and agencies involved with implementation of the Administration's forest policy for their forecasts of the forest-related issues likely to arise over the next year or so. Those forecasts are summarized here, with our suggestions for approaches the Administration may wish to take in addressing the issues. This memo is for discussion purposes.

Issue Area 1. Implementing and Defending the President's Northwest Forest Plan

Problem 1: Adverse environmental impacts of old growth logging authorized by the 1995 Rescission Act may trigger district court (Dwyer) injunction against plan.

Response: Implement and interpret law so as to minimize adverse environmental impacts of old-growth sales

Move aggressively to implement salvage sales; move volume

Communicate to public that injunctions and related problems result from congressional action

Negotiate, if possible, consensual modifications to problematic sales

Defend/appeal litigation that threatens the Forest Plan, regardless whether the challenge is from pro-timber or pro-environment interests

Problem 2: USFS or BLM personnel resources may be inadequate to achieve timber targets in FY 97 and may be sorely stretched in FY 96. Fish and Wildlife and NMFS resources for consultation on sales may be inadequate.

Response: Poll agencies to determine resource requirements

Give priority to implementation of Northwest Forest Plan

Communicate to public that problems result from congressional action

Problem 3: The future of the regional forest plan office is unclear. The Office of Forestry and Economic Development is scheduled to close at the end of the year.

Response: Seek additional appropriations and removal of closure language

Reprogram funds from other sources

Restructure OFED

Problem 4: Public perception of the President's plan is mixed, with negative perceptions fueled by the timber industry and environmental community.

Response: Ensure that timber targets are met

Ensure that economic assistance funding is available and disbursed

Resist disruptive litigation or agency action

VIP message events in the region highlighting timber sales (achievement of target), economic assistance, watershed restoration, and fishery protection

Issue Area 2. Implementing the Timber Salvage Provisions of the Rescission Act

Problem 1: Interagency dispute resolution process did not work satisfactorily in its first application (Thunderbolt sale), creating perception that environmental laws were disregarded or that MOA is flawed.

Response: Review implementation of MOA, diagnose problems

Establish that, in the event of a disagreement that goes beyond 14-day time frame, that appropriate cabinet secretary (USDA or DOI, depending on forest at issue)

will make final decision

Create eastside RIEC

Problem 2: Resources required for preparation of salvage sales may detract from other program areas, including implementation of Northwest Forest Plan

Response: Poll agencies to determine resource requirements

Place priority on implementation of Northwest Forest Plan

Communicate to public that problems result from congressional action

Problem 3: Salvage sales in areas outside the Northwest may draw adverse attention to Administration policy

Response: Poll agencies ASAP to identify potential hot spots and develop localized strategies.

Issue Area 3. Implementing Ecosystem Management

Problem: Congress has eliminated or reduced funding for Columbia Basin and Sierra Nevada planning processes aimed at heading off future controversies. Tongass riders will undermine ecosystem management there.

Response: Vigorously oppose legislative attacks, highlight the crisis-avoidance role of these plans

Issue Area 4. Congressional Initiatives to Rewrite Forest Law

Problem: Senate Energy Committee and others are expected to begin legislative drive this year to rewrite National Forest Management Act in a way that promotes logging over other forest uses and reduces applicability of other environmental laws.

Response: Vigorously oppose legislative attacks; develop Administration package

Highlight diverse economic stakeholders (fishery, tourism, water quality and quantity) and environmental issues

Participate in upcoming American Forest Congress

Other Issues:

Problem: There are increasing instances of violence or potential for violence in the West. For example, civil disobedience has already been taking place over timber harvesting and there will be conflict. Other interests have made and carried out threats to USFS and BLM employees on grazing and other issues. We do not have a coordinated response to this problem.

Problem: The GAO released a study this week that pointed out that timber sales are a net drain on the treasury (of \$100 million per year, even after allowing for receipt-sharing). Should there be a response to this? Do we want to defend the economics of timber sales? Or should we use it to encourage Congressional (and public opinion?) moderation with respect to timber sales?

Distribution:

TO: Alice E. Shuffield
TO: FAX (9-720-5437, Greg Frazier) *envy Staff DOA*
TO: FAX (9-720-4732, Jim Lyons) *us for Nat Res/Env DOA*
TO: FAX (9-208-6956, Ann Shields) *Dep Solicitor-General*
TO: FAX (9-208-4684, George Frampton) *Inquiry - Asst Secy FWP*
TO: FAX (9-208-3144, Bob Armstrong) *Inquiry - Asst Secy Land*
TO: FAX (9-514-0557, Lois Schiffer)
TO: FAX (9-482-6318, Doug Hall) *Asst Secy - NOAA*
TO: FAX (9-260-0500, Steve Herman) *Asst Admin-Env - EPA*
TO: Kathleen A. McGinty
TO: Shelley N. Fidler
TO: T J Glauthier
TO: Ron Cogswell *PROD-OMB*
TO: Mark A. Weatherly *ch. 48-OMB*
TO: Christine L. Nolin *PE - OMB*
TO: Elena Kagan
TO: Martha Foley
TO: Kris Balderston
TO: Jennifer M. O'Connor
TO: Dinah Bear
TO: Remote Addressee
TO: FAX (92084684, Don Barry) *Counsel to Frampton*
TO: FAX (94821041, Bob Ziobro)
TO: Remote Addressee
TO: Remote Addressee
TO: FAX (92191792, Kris Clark)
TO: FAX (96902730, Mike Gippert)
TO: FAX (92085584, John Leshy) *Solicitor-General*
TO: FAX (95144240, Jim Kilbourne) *PTG - wildlife/marine*
TO: Remote Addressee
TO: Thomas C. Jensen

TO: Ruth D. Saunders *OMB-96*
TO: Remote Addressee

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Phone No. (Partial) (1 page)	10/13/1995	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 8247

FOLDER TITLE:

Timber - Memos, Emails, Etc. [7]

2009-1006-F
kc137

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

[001]

THE WHITE HOUSE
WASHINGTON

EXECUTIVE OFFICE OF THE PRESIDENT

13-Oct-1995 06:16pm

TO: Elena Kagan
FROM: Thomas C. Jensen
Council on Environmental Quality
SUBJECT: RE: More

Elena,

I've sent the most recent draft of the release over to Lois and Peter at Justice and told them that they have until Sunday morning to put it into a form that they could stand to see released on Monday. I made it clear that there was a real determination around here to get our side of the story out before the hearing.

If you need me, don't hesitate to call me at home over the weekend

or

Thanks for your help.

Tom

John Dwyer.

Kathryn

87415

456-5146

~~We believe -~~

Telecom
Jen O'Connor

~~Ronald Jones -
Lugar bill?
2~~

66350

big news?
tomorrow
OR

We have gone to
CT

Press release
wired

- Interpret'd the resc. bill differently
think will cause ev harm.
- But intend to comply
w/ the resc bill

hearing
Tuesday
Tuesday

Telecon w/ Chris Cuff

Tom Janson -

Dispute: inform our friends of our intent to appeal?

Proced status - Dis Ct - advis opin.

Bad guys - in contempt of that

DOJ - today filing - 1) not in contempt
2) issue an order!

DOJ - ~~we~~ we would appeal.

Can't tell the world of our intention to appeal.

↓
Can't tell our P. until next.

514-2701

Jan 6th 74

- Papers - don't announce
an intent to appeal

5-7415

Telecom - Lois Schiffer et al

Phone calls -

Can call our friends.

What wire filing

- motion for entry of appealable order

-

} }

kind of order to

that can be
appealed
from

take to Ct to
appeal.

no-auth. to appeal.

but Sec of Ag, Sec of Interior recommends
appeal.

Meaning

Getting an
"Appealable order" is 1st step^{that} in
order to ~~take~~_{get} auth. for an appeal.

Disagree w/ Ct's ruling.

Ct ordered us to release more sales than are
covered by the Act.

Lois Schiffrer —

Oct 13, 1995

Noting press release

Angu Ct.

Diffic to make clear what exactly we're doing.

So - no press release.

Can't emphasize enough - need to have
litigators there - when such
decisions are made.

ME - good to have people from
WH counsel's office there as well

E X E C U T I V E O F F I C E O F T H E P R E S I D E

13-Oct-1995 10:39am

TO: Elena Kagan

FROM: Thomas C. Jensen
 Council on Environmental Quality

SUBJECT: Draft statement on non-318 filing today

This is the second draft of a joint USDA-DOI press statement on the court filing planned for today. I've received and done what I can to incorporate specific comments from Anne Kennedy and George Frampton and a range of general strategic comments from Justice.

Please review as soon as you can and send your comments back to me.. My fax is 456-6546. Or call me at 395-7415.

Federal forest managers today asked a federal court to stay its ruling that could significantly expand harvest of old growth timber in Oregon and Washington.

Secretary of the Interior Bruce Babbitt explained that "The federal district court in Eugene, Oregon interpreted a provision of the 1995 Rescission Act very broadly, more broadly than we believe was intended or that the law requires. The court's ruling could mean that every old growth sale that 's been held up or sidelined for any reason over the last six years must be released on its original terms. This really amounts to going back to the archives and resurrecting dozens of environmentally harmful timber sales proposed, but dropped, since fiscal year 1989. We are going to ask the court to stay its ruling or issue an injunction from which we could appeal."

According to Secretary of Agriculture Dan Glickman, "The Clinton Administration is moving aggressively to implement the logging provisions in the Rescission Act. Despite claims otherwise, the Forest Service and the Bureau of Land Mangement are on track to meet or exceed both salvage and green timber sale targets. In compliance with the Rescission Act, BLM and the Forest Service recently released 130 million board feet of primarily old growth green timber sales, commonly known as the '318 sales' that do not jeopardize marbeled murrelets. Under the President's Northwest Forest Plan, the agencies have offered 610 million board feet of

timber for sale in 1995 -- exceeding the plan's target. We

expect to exceed targets again in 1996."

Babbitt added, "The President's Northwest Forest Plan is working. The last thing that the Pacific Northwest needs is something that would upset the fragile balance between forest use and protection achieved under the President's plan. We are deeply concerned that the court's ruling, if allowed to stand, will trigger environmental problems that would lead us backwards to the legal gridlock that former Administrations imposed on Northwest forests. Nobody wins in that situation."

According to Glickman, "The President has directed his

Administration to implement the logging provisions of the 1995 Rescission Act in an environmentally sound way. We're going to move timber, but we are going to do it right. We will continue to work under existing environmental law to try to find ways to reconfigure or modify the sales in question so that they can be released."

last quote -
sounds a bit like

"we're going to do it the way we want
to do it, notwithstanding what the CT says."

last quote -

sounds a bit like

"we're going to do it the way we want
to do it, notwithstanding what the CT says."

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

13-Oct-1995 04:19pm

TO: (See Below)

FROM: Thomas C. Jensen
Council on Environmental Quality

SUBJECT: Hold Up on Timber Statement

I just received a call from Lois Schiffer communicating a strong request from the Solicitor General that we not, repeat not, issue the timber statement we've been developing -- until the court rules, presumably on Tuesday. He wouldn't object to releasing this statement or something much like it at that time, but feels it will harm the government's position if released now.

Lois is calling White House counsel's office to communicate the request formally.

Katie, TJ -- you folks may wish to raise this with HI, given his views. I'll wait to hear back from you.

Sigh.

Distribution:

TO: Kathleen A. McGinty
TO: T J Glauthier
TO: Kris Balderston
TO: Jennifer M. O'Connor
TO: Elena Kagan
TO: Dinah Bear
TO: Shelley N. Fidler
TO: Remote Addressee
TO: Brian J. Johnson
TO: Remote Addressee
TO: Remote Addressee
TO: Martha Foley

EXECUTIVE OFFICE OF THE PRESIDENT

13-Oct-1995 04:21pm

TO: (See Below)

FROM: Kris Balderston
Office of Cabinet Affairs

SUBJECT: RE: Hold Up on Timber Statement

this doesn't help us a bit

Distribution:

TO: Thomas C. Jensen

CC: Kathleen A. McGinty
CC: T J Glauthier
CC: Jennifer M. O'Connor
CC: Elena Kagan
CC: Dinah Bear
CC: Shelley N. Fidler
CC: Remote Addressee
CC: Brian J. Johnson
CC: Remote Addressee
CC: Remote Addressee
CC: Martha Foley

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

13-Oct-1995 11:16am

TO: (See Below)

FROM: Thomas C. Jensen
 Council on Environmental Quality

SUBJECT: Justice Instructions RE: Calls

The Department of Justice has asked that, for the time being, NO CALLS be made to people today regarding the pleadings expected to be filed today.

The Solicitor General has instructed Justice attorneys to reframe the nature of the pleadings. From our perspective, this is largely a matter of terminology. Justice remains on exactly the same substantive course we discussed yesterday. But, from the perspective of the Solicitor General, the district court, and the Justice attorneys, this is a very important matter. We have been asked to ask you to make no public statements and to do what you can to make sure others make no public statements regarding these pleadings.

The Department of Justice is providing comments on the second draft of the proposed statement. When received, we will recirculate to all of you. We expect that this draft will be cleared for release later today. We simply do not have that clearance now.

Thank you for your cooperation.

Distribution:

TO: Kris Balderston
TO: Jennifer M. O'Connor
TO: Kathleen A. McGinty
TO: Remote Addressee
TO: Remote Addressee
TO: Remote Addressee
TO: Elena Kagan
TO: Remote Addressee
TO: FAX (95140557,Lois Schiffer)
TO: Daniel Tate
TO: T J Glauthier

TO: Mark A. Weatherly

TO: Bruce D. Beard
TO: Brian J. Johnson
CC: Dinah Bear

September 12, 1995

OGC List of Forest Service Rescission Cases

I. 2001(k) Issues1. NFRC v. Glickman (D.Ore, Judge Hogan)

Industry challenge to administration interpretation and implementation of the Rescission Act. On Friday, September 8, 1995, Judge Hogan decided a number of issues in this case. First, he granted Pilchuck Audubon Society's (see related case description) motion to intervene only on the issue of "known to be nesting." He did not allow their motion to intervene on the "subject to 318 issue." Judge Hogan also granted Scott Timber's (see related case descriptions) motion to consolidate on the "known to be nesting argument," and granted NFRC's motion to amend its complaint to include the same argument. Judge Hogan then held that the 45 day period in 2001(k) did not bar him from reaching a decision on the nesting issue at a future date, and he deferred deciding that issue. The first item to be briefed on the nesting issue will be whether to transfer that portion of the case to Judge Rothstein in Seattle where Pilchuck's case was filed. Finally, Judge Hogan stated that he would issue a written decision on the "subject to 318" issue imminently. We are expecting that decision this week.

2. Pilchuck Audubon Society v. Glickman (W.D.Wash, Judge Rothstein)

Challenge to government interpretation of "known to be nesting," and assertion that harvest of timber in units occupied by marbled murrelets would be arbitrary and capricious. Plaintiff's originally moved for preliminary injunctive relief, but then withdrew the request after the issuance of the August 23, 1995 memo from Under Secretary Lyons. Plaintiffs have moved for expedited discovery, and seek information from the Forest Service regarding sales to be released under section 2001(k) by September 15, 1995. Plaintiffs moved to intervene in the NFRC v. Glickman case. Motion was granted only on issue of what constitutes "known to be nesting." See description of NFRC v. Glickman regarding possible transfer of nesting issue to Judge Rothstein.

3. Scott Timber Company v. Glickman (D.Ore, Judge Hogan)

Timber company originally filed this suit separately from the NFRC litigation challenging the government's interpretation of "known to be nesting." Scott then moved to consolidate their case with the NFRC case. On Friday, September 8, 1995, Judge Hogan granted Scott's motion to consolidate. Scott has requested discovery in this case. Responses are due the first week of October.

4. ONRC v. Thomas (D.Ore) (Judge Hogan)

Challenge to two timber sales on the Umpqua National Forest. ONRC asserts that harvest of these sales would violate the Forest Service's duty to maintain viable populations of certain

aquatic species. These sales fall under section 2001(d) of the Rescission Act. Review should be under the expedited procedures of 2001(f). (DOJ: Robin Michael)

II. Timber Salvage Issues

1. **Mahler v. U.S. Forest Service**. The 50 acres of trees on the Hoosier NF to be salvaged are dead and dying due to insect damage and root rot, and the estimated volume is between 800,000 and 1 million board feet. This project was categorically excluded from NEPA documentation. The plaintiff claims that the Forest Service has violated NFMA, NEPA, and the Migratory Bird Treaty Act. All briefs have been filed in this case and awaiting the judge to render a decision. No TRO or PI was requested in this case because the logger has agreed to not begin cutting until the judge has ruled. (OGC: Lori Cooper, DOJ: Ruth Ann Story)

2. **Sierra Club v. USFS (Warner Creek TS) (D.Ore, Judge Hogan)**
Challenge to EIS/ROD for several post-burn salvage sales. Magistrate recommended upholding ROD except for NEPA disclosure of future arson fires. One sale was awarded but others not yet offered. Judge Hogan issued a bench order on September 7, 1995, dismissing the challenge as to sales not yet offered. The sale already awarded was held to fall under the terms of 2001 of the Rescission Act and allowed to go forward. Forest has sent award letter to purchaser, who has 30 days in which to sign and return the contract. Plaintiffs have appealed, and are seeking a stay of all actions pending appeal. (OGC: Tim Obst, DOJ: David Shilton).

3. **MEDC v. Garber (Hyalite Timber Sale, Gallatin NF) (Judge Hatfield)**

Approximately 1/2 of the sale is salvage of dead lodgepole pine, the other half of the sale was associated green timber that was included to make the sale attractive to buyers (this sale was originally proposed in 1991). District Court held that the EA was inadequate because of inadequate discussion of cumulative effects. We have asked for reconsideration of that ruling. (OGC: Alan Campbell)

4. **Inland Empire Public Lands Council v. U.S.F.S. (Upper Sunday TS, Kootenai NF)**

The Upper Sunday Timber sale on the Kootenai N.F. is approximately 14 MMBF which was approved after preparation of an EIS. There were two statements of purpose and need, the first being "to maintain an ecosystem with historic endemic levels of insect and disease populations minimizing the threat of epidemics by utilizing integrated pest management strategies and treatments." Approximately 1/2 of the acres to be harvested (685 acres) is intended to "reduce the future risk of a spruce bark beetle epidemic by harvesting some of the higher risk stands." In addition there is 231 acres of Sanitation/salvage harvest which is designed to salvage dead material and reduce the risk of wildfire. The current status of the case is that we prevailed in district court, plaintiffs have filed notice of appeal and request for injunction pending appeal with District court. The Kootenai N.F. thinks this sale is covered by sec. 2001. (OGC: Alan Campbell)

5. Kettle Range Conservation Group v. U.S. Forest Service (E.D. Wash.)

Challenge to timber sales on the Colville National Forest. Plaintiffs challenge adequacy of NEPA compliance alleging a failure to analyze cumulative impacts associated with the 1994 Copper Butte fire, and to evaluate logging impacts on roadless areas. (OGC Field: Val Black, WO Tim Obst, Jay McWhirter)

III. Alaska Issues

1. Alaska Forest Ass'n v. United States, No. J94-007CV (D. Alaska) Act prohibits spending FY95 funds to implement Habitat Conservation Areas (HCAs); plaintiff challenges HCAs on FACA grounds -- (OGC: Bob Maynard; DOJ: David Gehlert).

2. Alaska Wilderness Recreation & Tourism Ass'n v. Morrison, No. 95-35222 (9th Cir.) Act declares legal sufficiency of EISs plaintiffs challenge; federal defendants have moved to vacate adverse decision on appeal on basis of the Act -- (OGC: Bob Maynard; DOJ: David Shilton).

IV. Contract Issues

1. David Smerski d/b/a Smerski Logging v. USDA, No. 93-557C (Fed. Cl.) East-side green sale held up because of the east-side screens. Apparent high bidder seeks award of sale under original terms. (OGC: Lori Jones; DOJ: Lauren Moore).

2. Scott Timber Company v. U.S., No. 94-784C (Fed. Cl.) Contract holder seeks damages for section 318 timber sale suspended because of marbled murrelets. (OGC Attorney: Laurie Ristino; DOJ Attorney: Jack Groat)

Chris Boulderstone - Cabinet Affairs

↳ Slight heads up. to

Govs. - OK

MPs -

} FRIENDS

Is that OK?

Nancy McFadden says Yes.

I say yes too.

Curb call w/ 4:30 -

Will call afterward.

Have meeting?

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

11-Oct-1995 12:35pm

TO: (See Below)

FROM: Thomas C. Jensen
 Council on Environmental Quality

SUBJECT: Appeal of Timber Ruling

The Administration appears to have taken one more coordinated step in responding to the logging provisions of the rescissions act.

The departments of interior and agriculture, and NOAA each have agreed to recommend to the Department of Justice that the government should take an appeal from Judge Hogan's ruling regarding the geographic scope ("areas v. sales") of the green timber/section 318 sale provisions of the rescission bill. The agencies announced their decisions at an EOP/agency timber meeting yesterday afternoon. The decisions followed numerous meetings and, among other things, phone conversations yesterday between Secretary Glickman and Secretary Babbitt.

The Department of Justice is on track to file pleadings with Judge Hogan by the end of the week seeking a stay in those proceedings in order to allow an appeal. The agencies are focusing their efforts on development of biological information regarding the probable environmental impact of the "non-318" sales that Judge Hogan determined to be within the scope of the rescission bill. Some detailed information is available now. For those sales with respect to which solid information is not now available, the agencies are developing a time schedule and work plan to get the information--and a cumulative effects analysis--completed soon.

[Note: Katie asked me to pass on to you the gist of a phone conversation she had yesterday with Norm Dicks, who urged that the Administration in fact appeal the ruling, both to increase our negotiating leverage with the industry and, more important, to stay in step with our primary Northwest constituencies.]

The same group of EOP and agency personnel will meet next on Tuesday, October 17, at 2:00 p.m. in the CEQ conference room to discuss, primarily, the issue of replacement timber.

Please call if you have questions.

Distribution:

TO: Kathleen A. McGinty
TO: T J Glauthier
TO: John C. Angell
TO: Kathryn Higgins

CC: Shelley N. Fidler
CC: Ron Cogswell
CC: Mark A. Weatherly
CC: Bruce D. Beard
CC: Kris Balderston
CC: Elena Kagan
CC: Dinah Bear

AGENDA

1. Appeal Judge Hogan's Order?

2. Seek a stay pending appeal?

a. Stay for all sales? *in just ev of bio harm?*

b. Release any sales? If so, when?

c. *Re bio harm, also* Assert harm to candidate and proposed species?

d. What is needed? From whom? When?

e. Relation to President's Plan?

3. Discovery response

a. What say?

*Directly + personally respond for
implementation?*

b. When?

Just 2 secretaries.

4. Congressional hearings

a. Thursday in House Resources Committee

b. Friday in Senate Energy Committee

5. Replacement timber

Q - how to debate?

Mtg early next week on this subject

~~Monday~~ Tuesday at 2:00 Oct 17.

Timber litigation mtg 10/10

1. Appeal Hoyer's order?
NOAA(?)
DOA, DOI, want appeal
Can expect to do so.
2. Stay pending appeal?

How to answer re EOP
involvement

next interviews re

comp. testimony

US Honest

Maybe DOJ '07 -

don't get excited

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

08-Oct-1995 06:50pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: timber

Yet another legal issue that has arisen in the course of implementing the timber provisions of the rescissions bill is whether that legislation forces us to release sales that are the subject of prior injunctions. Justice has been notifying relevant courts and parties that Sc2001(k) may require the release of particular sales.

In response, Pilchuk Audubon Society and other environmental plaintiffs have filed a motion to clarify and enforce previous judgments for six sales in the Umpqua National Forest in Oregon. (Actually, only four of the six sales were enjoined; the Forest Service withdrew the other two sales allegedly because they would also be enjoined for similar reasons).

Plaintiffs ask that the court declare that Sc2001(k) is unconstitutional, in that it violates the separation of powers, or, alternatively, to declare that that sales at issue need not be resurrected and offered. They ask for expedited oral argument; to my knowledge, briefing and hearings dates have not yet been scheduled.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

06-Oct-1995 04:08pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: RE: Timber cases

This week was work in progress.

The hearing on the contempt motion has been scheduled for Oct. 17th.

We filed a motion yesterday for a protective order to shield Lyons and Tuchman from depositions.

We are not answering the interrogatories yet (I made note that we absolutely wanted to see any EOP references and that you did also).

The decision on whether to appeal the areas vs. sales issue is still in the works; next meeting Tuesday from 3 - 5, CEQ conference room (you're welcome to attend if you'd like).

No decision yet on which judge will hear the "known to be nesting" issue - briefs on transfer issue have been filed.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

26-Sep-1995 08:06pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: RE: 318 timber sales/status

FYI, industry plaintiffs have filed a (first, I'm sure) set of interrogatories which, among other things, ask for the identification of the "highest ranking officials" in the Executive Office the President who are personally and directly responsible for implementing the provisions of the rescission bill relating to the 318 sales.

There will be a general attempt to say the WH improperly or inappropriately directed the agencies in their compliance with the law. This is part of an overall strategy that ties into a corresponding pounding from Congress.

Oral argument for the contempt motion has been set for
Halloween!

Fun crowd!

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Sep-1995 12:50pm

TO: Elena Kagan

FROM: Dinah Bear
 Council on Environmental Quality

SUBJECT: 318 timber sales/status

I'm sorry I didn't get back to you right away. A lot was happening in real time re timber, as well as preparations for Katie's confirmation hearing, which is this coming Wednesday!

At any rate, here's a brief up-date on the 318 sales (salvage was relatively quiet during the past week):

- 1) The attorney for industry plaintiffs threatened to file a motion for contempt against Jim Lyons, Undersecretary for Agriculture, and Tom Tuchmann, in the Northwest Regional Office, for failure to execute what he alleged was an injunction from Judge Hogan. You will recall that Justice interprets Hogan's decision to NOT be an injunction and to be an unappeable, interlocutory decision. He also threatened to file Rule 11 sanctions against the Deputy Assist. A.G. and trial attorney for allegedly misrepresenting that certain Bureau of Land Management sales had been falsely portrayed as having been released.
- 2) In regard to the contempt motion, Justice continues to maintain that Judge Hogan's order is not an injunction. Industry plaintiffs did file the motion for contempt on Friday. Our brief is due a week from this coming Monday. Plaintiffs are asking for \$50,000 a day damages for the first week; trebled each week after that; compensatory damages and incarceration for the two federal officials.
- 3) In regards to the threatened Rule 11 sanctions, there did appear to be a bit of internal confusion about the release of certain sales; that was immediately cleared up and the sales have been released. Plaintiffs' attorney has acknowledged that fact in a letter sent on Friday and has proposed that he not file a Rule 11 sanction upon receipt of a factual statement by the government.
- 4) Briefs on transfer of the murrelet "known to be nesting" to Judge Rothstein were filed at the end of the week. Briefs on the merits will be filed this week.

must re all sales -
in all of properly?
(is - essentially
accepting of Hoyer's
meeting as
not?)

5) A decision was made, based upon Justice's legal analysis, to not withhold 318 sales for any reason other than "known to be nesting" endangered and threatened birds (and reasons such as physical impossibility). What this means is that we will be making clear in a brief filed this coming Thursday that we will be releasing 164 mbf of timber in sales that, among other things, are likely to jeopardize several salmon runs. We will get lots of negative press on this from the enviro side and probably civil disobedience on the ground. We tried very hard to find legal grounds to withhold these sales on, but it appears clear that Congress' intent was to release them. (This information is not being made public until the brief is filed on Thursday).

6) A decision was also made, based upon recommendations from the Department of Agriculture and the Administratin's goal of preserving the integrity of the President's Forest Plan, not to look for alternative timber in sales that are already planned for in the President's Forest Plan - unless and until that idea is blessed by key Members of Congress. The agencies are presently in the process of calculating how much alterantive timber will be needed to replace sales that are being withheld for birds or for any other reason.

7) EOP people involved in the above two decisions were T.J. Glauthier and Katie McGinty; T.J. also intended to brief Martha Foley on Friday afternoon.

I'll be out Monday morning. Hope this is helpful. It's definitely a tough issue!

Meeting w/ Dinah Bear, Tom Jensen
Briefing on Timber Cons

3 parts to timber-rel provisions of res. bill

1. Salvage sales - big to be over - sale by sale
orig bill - ^{prohibited} ~~mandated~~ admin from following all laws
stopped from bill

new discretion to follow env law

skill ^{env} was ^{negs}

NEPA - ESA - truncated version of compliance

claims admin appeals process

limits gov't rev - lots of litigation what this means.

Reporting req for yrs - 6 mos. - progress as to salvage sales

Aug 30 - 1st report

2. Old growth green timber - 318 sales

1989 - See 318 - mandated process for releasing sales

Seattle Audubon v ~~Federal~~ ^{Prohibition}

Released 46.

Some put on shelf - listing of "marble" etc
pres forest plan (upheld Dec 94 - Dwyer)

New provision - must release all remaining 318 sales w/in 45 days -

sale units w/ ^{shall} end. bird species not released
if can't be released, yrs have to offer alternate
timber

Sept 10

Much more concern than salvage sales -

no pretense re health of forest

6 mbrs of Cong - intercepts / adopted by ind

2 sub issues

1. govt area covered? Areas v sales
? < a) public sales offered by 318 (US)
b) all govt area covered under 318

Mixed record re log history

Need to protect integrity of Pres forest plan;
Interior initiatives re end species -
hampers abil to give relief to private owners

2 "known to be nesting"

may not usually build nests

Aggs - protect? Pac seaboard - criteria for determining
whether there be nesting.

Conyers want actual phys ev of nesting -
impractical; not sci supported; make provision
null + void.

Memo in file sent out to AT/WR Protect?

Result - then not releasing sales where nests
known to be.

Filed by Sierra Club / industry - Hogen
no real complaint anyone } 10 on nesting is one
transfer to Rostler? }
nesting issue } 6/11
10/11

Didn't rule on A v S

This week? written opin.

Add a rider on bill?

Other issues in this field - working on guidance

salmon-related

native Amer issues

other steps -

like land + vst -

replacement sales -

buy out / compensation - do we have auth?

CRS - how much \$ to buy out
all 318 sales?

3 fm. on #s
OMB - why 1nd - 400 m.

who are
relevant to?
7 est

Option 9

3. Sales under Pres' forest plan

Not litigated yet

Sales this week - released under Pres' forest plan.

Prob. sued right away.

Admin front -

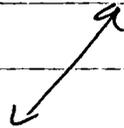
8/1 - Directive to ags - do in compliance w/ env law

except where can't

consistent msg
from WTA

Ag among of heads

Tech guidance out to field



DEPT of Ag - not wholly intent

thought that waiver of env regs
would take place.

Each sale buy appealed to WTA

Bill expires - end of Term.

Mark Gady - Spec Asst

Ag - Jim Lyons - Undersecy

OMB - Bob Glatzier

Greg Frazier - CofS

DOJ - Schitter / Koppelman / ^{Ted} Bolger
(5 both level)

Interim - George Fucamp ^{Bob} David
Don Barry Fish/wh/ht

wesley gene Williams

Av S - Michelle Gilbert

Tom - Nancy Hayes
Mike Tambach

Martha Foley / EP - wesley
Av S

WMFS - Kate Kimball.

our interest with from Gray's
everyone assumed we would just deny env laws.
Friends/enemies both.

Name	Date
Steven Reich	6/2/99
Kette Ryndlest	9/9/99
Rahim Kaland	12/7/99

Counsel (entire folder
 copied)
 (only parts stamped
 copied)
 only particular
 talking pts

Name	Date
<i>Steven Reich</i>	<i>6/2/99</i>

*Counsel
entire file*

**PHOTOCOPY
PRESERVATION**