

NLWJC- Kagan

Counsel - Box 004 - Folder 002

Timber: Alternative Timber  
Settlement Discussions



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 22, 1996

TO:	Anne Kennedy	720-4461
	Mark Gaede	720-4732
	Mike Gippert	690-2730
	Greg Frazier	720-5437
	Ruth Saunders/Chris Nolan	395-4941
	Scott Horngren	(503) 225-1257
	Dinah Bear	456-0753
		456-1647

FROM: Allison B. Rumsey

NO. OF PAGES:  
(INCLUDING THIS PAGE) 05

MESSAGE: Attached is the settlement in principle for alternative timber that we reached with NFRC and Scott Timber. Today we will notify the court.

PLEASE NOTIFY SHANEDDA LAWSON (202) 514-3743 IMMEDIATELY IF YOU HAVE ANY PROBLEMS RECEIVING THESE PAGES.

Office of the Assistant Attorney General

Washington, D.C. 20530

## AGREEMENT

Under Sec. 2001(k)(3) of the Rescissions Act of 1995, the Forest Service must provide alternative timber for certain timber sales where threatened or endangered bird species are "known to be nesting." Those sales ("Listed Sales") are set forth in Attachment 1.

By Amended Order of July 9, 1996, Judge Hogan has ordered the Forest Service to "identify and release" alternative timber within 60 days ("July Order"). In regard to the July Order, the Forest Service and NFRC on behalf of the purchasers of the Listed Sales, agree:

### A. Schedule and Approach for Alternative Timber

1. Meeting period. Within 30 days after this Agreement is effective, the Forest Service Contracting Officer for each Listed Sale will meet with the Purchaser-Designated Representative to discuss the purchaser's interest and expectations as to assessment of volume, areas where alternative timber would be acceptable to purchaser, timing of alternative volume, and related matters. The Forest Service will seek to take into account timing concerns expressed by purchasers.

2. Evaluation period. Within 90 days after this Agreement is effective, the Forest Service will evaluate information provided during the Meeting Period, available alternative timber, scheduling, and other information; will consult with the Level 1 teams; and based on that information and further informal consultation with purchasers, will develop a proposal for alternative timber for each purchaser of a Listed Sale. The proposals will seek to accommodate competing requests of different purchasers. The parties recognize that some flexibility by all parties is called for. By the end of the Evaluation Period, the Forest Service will report back to each purchaser of a Listed Sale a tentative plan for alternative timber that can form the basis for negotiations over an agreement with that

purchaser for alternative timber. The parties to a specific contract can extend these time limits by mutual agreement.

3. Tentative Agreement Period. Within 120 days after the effective date of this Agreement, the Forest Service will negotiate with each purchaser of a Listed Sale on the basis of the plans developed during the Evaluation Period to develop a Tentative Agreement regarding alternative timber. All parties will work diligently and in good faith to reach a tentative agreement for each sale. The parties to a specific contract can extend these time limits by mutual agreement. The Forest Service will identify alternative timber and start the process of complying with all environmental laws, including NEPA analysis, by June 1997, to the greatest extent practicable.

4. Agreement Period. As soon as a tentative agreement is reached for a sale under Par. A.3 above, the Forest Service will begin the process of preparing the tentative agreement area for sale, including laying out the sale (subject to weather and like seasonal constraints), NEPA compliance, and ESA consultation. The Forest Service will initiate field work to support environmental analysis, including Level 1 team review of units, gathering site specific information to support environmental analysis, and gathering information for consultation, where needed. The Forest Service will move expeditiously to complete this preparation process for each sale, and enter into an agreement for alternative timber for the sale. The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales. A typical schedule for such steps is Attachment 2 here.

#### B. Conditions for Replacement Timber

The following conditions apply to alternative timber the Forest Service will provide under this Agreement:

1. The Forest Service intends that all alternative timber will be provided in compliance with all applicable laws, including environmental laws. The purchasers agree not to challenge the Forest Service's determination to comply with all applicable laws, including environmental laws.

2. Timber will comply with Standards and Guidelines under the applicable Forest Plan, as they may be modified, and any other Standards and Guideline issued by the Forest Service or other Federal agency, subject to any independent rights of purchasers to challenge the Standard or Guidelines.

3. The Forest Service intends to seek agreement from Level 1 consultation teams as to alternative timber sales.

4. Alternative timber shall be in addition to the programmed volume for fiscal years 1997, 1998, and 1999. The Forest Service will segregate alternative timber in all programming documents, including annual work plans, and will account for alternative volume separately from program volume in all planning and programming.

5. After consulting with the purchaser, the Forest Service may offer alternative timber from a Forest other than that of the original purchase.

6. Alternative timber must be "an equal volume of timber, of like kind and value, which shall be subject to terms of the original contract...." (Rescissions Act, Sec. 2001(k)(3)).

#### C. Other terms

1. To assure that alternative timber is provided expeditiously, the Forest Service will evaluate if additional resources of personnel and money are necessary, and will request transfer, reprogramming or supplemental appropriation, where appropriate. The Forest Service will use its best efforts to provide resources and personnel necessary to comply with this Agreement.

2. Also to reduce the possibility that selected alternative timber becomes the subject of legal challenge, once timber is the subject of a tentative agreement (Par. A. 3 above), the Forest Service intends to consult with local environmental and local community groups about that alternative volume.

3. In the event that alternative timber is the subject of legal challenge by a third party, the Forest Service and the purchaser shall consult to determine whether to proceed with the proposed sale or whether volume acceptable to the purchaser and not likely to be challenged can promptly be made available instead.

4. The parties will file this Agreement with the District Court; will jointly move the court to vacate the July Order; and will request that the court retain continuing jurisdiction over the case of NFRC v. Glickman and Babbitt, No. 95-6244-HO and 95-6267-HO, to help assure compliance with this agreement.

5. To further assure compliance with this Agreement, the Forest Service will report to the parties and the Court every 30 days for the first 180 days after the effective date of this Agreement, and every 3 months thereafter, as to progress in providing alternative timber.

6. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other

than those specified here, without prejudicing their right to enforce compliance with this settlement or moving to reopen the case under Fed. R. Civ. P. 60(b), if appropriate. Nothing in this agreement shall be construed as being prejudicial to any claim or defense concerning the suspension of any affected contract prior to the date of this agreement. Purchasers agree that they will not assert any claim for delays in providing replacement timber that occur after the date of this agreement, provided that any delay claim unrelated to the delay in providing replacement timber is not foreclosed.

7. An independent recruise of a sale shall occur upon purchaser's request and purchaser's deposit of sufficient funds with the Forest Service to pay an independent cruiser to recruise the original sale units. The Forest Service will contract with an independent cruiser to recruise to the original cruising and quality standards. The result of the recruise will be binding on both parties and will be used to determine the amount of the volume to be substituted.

[signatures and effective date--date of last signature]



## U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

August 20, 1996

**VIA FACSIMILE AND U.S. MAIL**

Scott Horngren  
Haglund & Kirtley  
Attorneys at Law  
One Main Place  
101 S.W. Main, Suite 1800  
Portland, OR 97204

Mark C. Rutzick  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
KOIN Center, Suite 1600  
222 S.W. Columbia  
Portland, OR 97201

Dear Scott and Mark:

We have reviewed your August 15 revisions to the settlement proposal. Below are our comments and counterproposals. As we explained on August 9, we are quickly running out of time. While we know that you have been working diligently on this settlement, we are concerned about our compliance with the Court's July 2 Order. Therefore, if we have not reached agreement on this negotiation by 6 p.m. PDT August 21, we must focus our efforts on meeting the Court's deadline to provide replacement timber. The only timber available within the time frame established by the Court is Option 9 timber. Therefore, we will move forward to use this timber as replacement timber. We would be pleased to continue our negotiations with you or any individual timber company. We would like to have a conference call this afternoon with you to try to resolve these issues.

Section A(3): The Forest Service stated at our initial meeting that it could make replacement timber available over a three year period: 1997, 1998, and 1999. Your letter of August 15 states that all timber must be made available by June 1997. The Forest Service cannot have all timber available for harvest by June 1997, the deadline you propose. Instead, we propose the following language: "The Forest Service will have identified alternative timber and started the process of complying with all environmental laws, including NEPA analysis, by June 1997, to the greatest extent practicable."

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Section A(4): We propose the following language on performing field work before an agreement on replacement timber is reached: "The Forest Service will initiate field work to support environmental analysis, including Level 1 team review of units, gathering site specific information to support environmental analysis, and gathering information for consultation, where needed."

Section B(1): We do not agree to the purchasers retaining their right to raise the issue of whether environmental laws apply even in an action brought by a third party. Therefore, we have not added your proposed language.

Section B(2): As we previously stated, this is a very important issue for us. We must have a provision that discretionary standards and guidelines will apply to replacement timber.

Section B(4): The Forest Service stated in our initial meeting, that it could make replacement timber available over a three year period: 1997, 1998, and 1999. We are willing to accept most of your proposed language with the following changes: "Alternative timber shall be in addition to the programmed volume for fiscal years 1997, 1998, and 1999. The Forest Service will segregate alternative timber in all programming documents, including annual work plans, and will account for alternative volume separately from program volume in all planning and programming."

Section C(1): We agree to changing the "or" to "and" and the inclusion of the sentence, "The Forest Service will use its best efforts to provide resources and personnel necessary to comply with this Agreement."

Section C(6): Again, timber will be provided over a three year period. Further, as we previously explained, we want to settle this case or continue with litigation. If you enter into this settlement agreement, the timber purchasers can seek to enforce compliance with the settlement or can move to reopen the case under Fed. R. Civ. P. 60(b), if appropriate.

We would like to discuss these issues in a conference call this afternoon and will call you to set up a time.

Sincerely,

*Alli B. Rummy for Lois J. Schiffer*  
Lois J. Schiffer  
Assistant Attorney General

Office of the Assistant Attorney General

Washington, D.C. 20530

Working Draft - Agreement regarding replacement timber  
Draft, 8/20/96

### AGREEMENT

Under Sec.2001(k)(3) of the Rescissions Act of 1995, the Forest Service must provide alternative timber for certain timber sales where threatened or endangered bird species are "known to be nesting." Those sales ("Listed Sales") are set forth in Attachment 1.

By Amended Order of July 9, 1996, Judge Hogan has ordered the Forest Service to "identify and release" alternative timber within 60 days ("July Order"). In regard to the July Order, the Forest Service and NFRC on behalf of the purchasers of the Listed Sales, agree:

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1. Meeting period. Within 30 days after this Agreement is effective, the Forest Service Contracting Officer for each Listed Sale will meet with the Purchaser-Designated Representative to discuss the purchaser's interest and expectations as to assessment of volume, areas where alternative timber would be acceptable to purchaser, timing of alternative volume, and related matters.

2. Evaluation period. Within ~~420~~ 90 days after this Agreement is effective, the Forest Service will evaluate information provided during the Meeting Period, available alternative timber, scheduling, and other information; will consult with the Level 1 teams; and based on that information and further informal consultation with purchasers, will develop a proposal for alternative timber for each purchaser of a Listed Sale. The proposals will seek to accommodate competing requests of different purchasers. The parties recognize that some flexibility by all parties is called for. By the end of the Evaluation Period, the Forest Service will report back to each purchaser of a Listed Sale a tentative plan for alternative timber that can form the basis for negotiations over an agreement

with that purchaser for alternative timber. The parties to a specific contract can extend these time limits by mutual agreement.

3. Tentative Agreement Period. Within ~~180~~ 120 days after the effective date of this Agreement, the Forest Service will negotiate with each purchaser of a Listed Sale on the basis of the plans developed during the Evaluation Period to develop a Tentative Agreement regarding alternative timber. All parties will work diligently and in good faith to reach a tentative agreement for each sale. ~~The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales.~~ The parties to a specific contract can extend these time limits by mutual agreement. The Forest Service will have identified alternative timber and started the process of complying with all environmental laws, including NEPA analysis, by June 1997, to the greatest extent practicable.

4. Agreement Period. As soon as a tentative agreement is reached for a sale under Par. A.3 above, the Forest Service will begin the process of preparing the tentative agreement area for sale, including laying out the sale (subject to weather and like seasonal constraints), NEPA compliance, and ESA consultation. The Forest Service will initiate field work to support environmental analysis, including Level 1 team review of units, gathering site specific information to support environmental analysis, and gathering information for consultation, where needed. The Forest Service will move expeditiously to complete this preparation process for each sale, and enter into an agreement for alternative timber for the sale. The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales. A typical schedule for such steps is Attachment 2 here.

#### B. Conditions for Replacement Timber

The following conditions apply to alternative timber the Forest Service will provide under this Agreement:

1. ~~Timber will comply with all laws, including environmental laws.~~ The Forest Service intends that all alternative timber will be provided in compliance with all applicable laws, including environmental laws. The purchasers agree not to challenge the Forest Service's determination to comply with all applicable laws, including environmental laws.

2. Timber will comply with Standards and Guidelines under the President's applicable Forest Plan, as they may be modified,

and any other Standards and Guideline issued by the Forest Service or other Federal agency.

3. ~~The Forest Service will obtain~~ intends to seek agreement from Level 1 consultation teams as to alternative volume timber sales.

4. Alternative timber shall be in addition to the programmed volume for fiscal years 1997, 1998, and 1999. The Forest Service will segregate alternative timber in all programming documents, including annual work plans, and will account for alternative volume separately from program volume in all planning and programming. ~~Alternative timber will be beyond the program volumes for the year the timber is provided. The Forest Service will list alternative volume as a separate line in annual work plans for the years 1997, 1998, and 1999, and will track alternative volume separately as part of the work plans for these years.~~

5. After consulting with the purchaser, the Forest Service may offer ~~Alternative timber from~~ may be in a Forest other than that of the original purchase.

6. ~~Alternative timber must be "an equal volume of timber, of like kind and value, which shall be subject to terms of the original contract..." (Rescissions Act, Sec. 2001(k)(3)).~~

#### C. Other terms

1. To assure that alternative timber is provided expeditiously, the Forest Service will evaluate what if additional resources of personnel and money are necessary, and ~~or~~ will provide for transfer of resources from other projects or areas to meet the need, or will request additional resources from OMB request transfer, reprogramming or supplemental appropriation, where appropriate. The Forest Service will use its best efforts to provide resources and personnel necessary to comply with this Agreement.

2. ~~To reduce the possibility that selected alternative timber becomes the subject of legal challenge, the Forest Service will use alternative timber that has the approval of Level 1 teams, that complies with all laws, and that meets the President's Forest Plan and other applicable standards and guidelines.~~

3. Also to reduce the possibility that selected alternative timber becomes the subject of legal challenge, once timber is the subject of a tentative agreement (Par. A. 3 above), the Forest Service will intends to consult with local environmental and local community groups about that alternative volume.

43. In the event that alternative timber is the subject of legal challenge by a third party, the Forest Service will ~~immediately enter into further negotiations with the purchaser of any such sale to determine~~ and the purchaser shall consult to determine whether to proceed with the proposed sale or whether volume acceptable to the purchaser and not likely to be challenged can promptly be made available instead.

54. The parties will file this Agreement with the District Court; will jointly move the court to vacate the July Order; and will request that the court retain continuing jurisdiction over the case of NFRC v. Glickman and Babbitt, No. 95-6244-HO and 95-6267-HO, to help assure compliance with this agreement.

65. To further assure compliance with this Agreement, the Forest Service will report to the parties and the Court every 30 days for the first 180 days after the effective date of this Agreement, and every 3 months thereafter, as to progress in providing alternative timber.

76. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other than those specified here.

7. An independent recruise of a sale shall occur upon purchaser's request and purchaser's deposit of sufficient funds with the Forest Service to pay an independent cruiser to recruise the original sale units. The Forest Service will contract with an independent cruiser to recruise to the original cruising and quality standards. The result of the recruise will be binding on both parties and will be used to determine the amount of the volume to be substituted.

[signatures and effective date--date of last signature]

## Memorandum

<b>Subject</b>  Conversation Between Allison Rumsey and Scott Horngren, Re: Timber Counterproposal	<b>Date</b>  August 19, 1996
<b>To</b> Lois Schiffer Peter Coppelman	<b>From</b> Allison B. Rumsey Special Assistant to the Assistant Attorney General

Below is a brief synopsis of a telephone conversation that I had today with Scott Horngren about the timber companies' counterproposal of August 15, 1996.

(1) Throughout the timber companies' counterproposal of August 15, 1996, they repeatedly refer only to obligations being completed by 1997. I asked Scott Horngren if he understood that it was previously decided in this timber negotiation that timber would be made available over three years -- 1997, 1998, and 1999. He stated that he understood this but wanted all timber "identified" by June 1997 (or thereabouts). I asked what he meant by "identified" and while he was slightly vague, he eventually stated that "identified" means that the NEPA process is well underway for all of the approximately 50 sales. He was not willing to commit to whether that meant that scoping had to be completed or the EIS had to be near completion. Scott indicated that the timber companies want to know where they stand within a year. If they feel that the Forest Service is moving too slowly or that the Forest Service is not offering acceptable replacement timber, they want to be able to pursue other remedies, such as damages.

(2) This lead to a discussion of whether the timber companies would dismiss their claims with prejudice. I stated that it is our position that the timber companies must dismiss their claims. If they believe that the Forest Service is taking too long to provide replacement timber, their remedies are to enforce the settlement or move to reopen it under FRCP 60.

Scott stated that he thought this was a "deal killer." The timber companies do not want to give up any remedy that they currently possess. I asked why going to court to enforce the settlement was not a sufficient remedy. Scott stated that the companies believe that there may not be sufficient replacement timber of like kind and value available. The companies are afraid that the Forest Service will offer them replacement timber that they do not find acceptable, the parties will litigate whether the timber offered is of like kind and value, the court

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will state that it is not, and the Forest Service will reply that it does not have replacement timber of like kind and value. The timber companies believe that they then will have no remedy because they dismissed their claims with prejudice.

I told Scott that it appeared that a compromise on these issues might be very difficult. I also explained that we feel that we are quickly running out of time and flirting with contempt of court. He understood our problem and stated that we should have a telephone call between all the principals to try to hammer out a compromise on Tuesday, August 20 or Wednesday, August 21. I did not mention providing 1996 timber.

We will set up a conference call tomorrow between all of the federal participants to make a final decision on how to proceed.

AUG 15 '96 13:10 TO-12025140557

FROM-HAGLUND &amp; KIRTLEY

T-841 P.02/05 F-569

**HAGLUND & KIRTLEY LLP**  
ATTORNEYS AT LAWONE MAIN PLACE  
101 SW MAIN STREET, SUITE 1800  
PORTLAND, OREGON 97204-3226

TELEPHONE (503) 225-0777

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August 15, 1996

VIA FAX (202) 514-0557  
AND REGULAR MAIL

Ms. Lois J. Schiffer  
U.S. Department of Justice  
Env. & Nat. Res. Div.  
General Litigation Section  
601 Pennsylvania Avenue, N.W.  
Suite 5000  
Washington, D.C. 20004

Dear Lois:

We have reviewed the August 7 revisions to the settlement proposal regarding replacement volume. NFRC and Scott Timber will continue to work in good faith to try to bridge the differences between the parties. In the joint status report filed by the parties on August 13, defendant-intervenors stated that they will seek to be included in any future settlement discussions. NFRC vigorously opposes the involvement of defendant-intervenors in this settlement. Comments on the various sections are as follows:

1. Section A(3): If you cannot agree to a date certain by which replacement timber will be available, we want to include an approximate time as you suggest in your letter. This provides a benchmark for the purchasers and court to gauge whether the efforts to provide replacement timber are working. We suggest the following language: "Although the time for release of replacement timber is not an enforceable deadline, the parties will use best efforts to make alternative volume available for harvest by June 1, 1997."

2. Section A(4): We appreciate the offer to explore whether there is a pragmatic way to accommodate our concern about field work. You state that the Forest Service cannot begin work when the parties have not agreed upon replacement timber. However, field work needs to be done before parties can agree on replacement timber so that the purchaser knows where the volume is and what type of volume is available. We are concerned that field work that needs to be accomplished this fall will be deferred until next summer or fall and the universe of

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ATTORNEYS AT LAW

Ms. Lois J. Schiffer  
August 15, 1996  
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replacement timber will be restricted because field work and inventories have not been completed. Our understanding is that many of the purchasers have met with the Forest Service in the last week to provide the Forest Service with the type, quality, location, and potential replacement stands on the forest. With this information from the purchaser, the Forest Service should now be equipped to begin the field work to identify suitable replacement timber. Furthermore, conduct of field work certainly will not be wasted if the agency is preparing the volume in conformance with the President's Plan because the work can be used to offer other sales.

3. Section B(1): For purposes of this settlement agreement and for settlement discussion only, we do not object to the Forest Service following the environmental laws to prepare the sales. We do not intend to raise the argument that environmental laws are inapplicable to replacement volume as a plaintiff. We envision the only situation that the question would arise is if a third party environmental group challenges the sale. We do not want to waive a valid defense that may help the Forest Service defend a sale prepared pursuant to the settlement agreement that it believed complied with environmental laws. This is a defense that the current administration would not likely raise in subsequent litigation, but one which plaintiffs want to retain the right to raise in defense of release of the volume. We would prefer not to add the suggested language; however, it would be acceptable if at the end of the second sentence, the following phrase was added "except in defense of a suit by a third party challenging alternative timber."

4. Section B(2): The Rescissions Act was emergency legislation enacted to provide timber purchasers volume that they could harvest. It is of no help to provide purchasers with volume subject to delay and reduction by further Forest Service action. If the replacement volume is prepared pursuant to environmental laws, we do not believe that it is a significant concession to agree that new standards will not be imposed on this volume. Such an agreement does nothing to prevent the Forest Service from imposing the new standards on new timber sales offered after the standards are adopted. Only if the standards are significant and adopted through the preparation of a final EIS should they be imposed. We want to add at the beginning of the sentence "the Forest Service intends that" and

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add the phrase "significant standard and guidelines adopted by a final EIS amending a forest plan or regional guide."

5. Section B(4): Please rewrite the section as follows: "Alternative timber shall be in addition to the programmed volume for fiscal year 1997. The Forest Service will segregate alternative timber in all programming and budgeting documents, including annual work plans and will account for alternative volume separately from program volume in all planning, programming, and budgeting."

6. Section C(1): This section does not engender confidence that there is a commitment to carry out the agreement and actually replace volume. This section only requires the Forest Service to "evaluate" the additional resources that are necessary, but an evaluation provides no timber to cut. The word "or" should read "and." In addition, add the following sentence: "The Forest Service will use its best efforts to provide resources and personnel necessary to comply with this Agreement." Without these changes or something similar, the agreement is merely a vehicle to sweep the matter under the rug and ignore the issue.

7. Section C(6): A dismissal with prejudice is unacceptable. However, we do believe there is some language that should be able to address both parties' concerns. If we settle, we want the settlement implemented fully. If it is not, we want to be able to go back to court if the agency fails to perform. We suggest the following language:

"NFRC will stipulate to a stay of the Court's July 2, 1996 Order on release of replacement volume until June 1, 1997. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other than those specified here if all alternative volume is made available for harvest subject to the original contract terms by June 1, 1997. Nothing in this agreement shall be construed as being prejudicial to any contention or defense concerning any suspension imposed prior to the effective date of this Agreement, of any affected contracts such as those presently in litigation before the United States Court of

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Federal Claims in Scott Timber v. United States, Civ. Nos. 94-784-C and 96-204-C. The parties agree that as a condition to receiving alternative timber on a sale pursuant to the terms of this Agreement, that the holder of that sale must agree that if the alternative timber for that sale is made available for harvest pursuant to the original terms of the contract by June 1, 1997, it will waive any claim for damages for delay on that sale for the period from the effective date of this Agreement until June 1, 1997."

8. Appeal. The agency has eliminated administrative appeals in the past for certain categories of timber sales and we do not believe it is an unreasonable request for a rule for an accelerated administrative appeal timeline, particularly when it is arguable that the identification of replacement volume is a "subsequent implementing action" that is not even subject to appeal under the existing appeal regulations. The current appeal regulations at 36 C.F.R. § 217 provide a 45-day period in which to file a notice of appeal and a 100-day period in which to decide the appeal. We suggest the following language: "The Forest Service will use its best efforts to decide an administrative appeal of any replacement volume within sixty days."

While we now have received a clear copy of Attachment 1, the list of timber sales, we have not received Attachment 2 nor have we received an explanation about who comprises the level 1 team. Please provide this information in response to this letter.

Sincerely,

LeBoeuf, Lamb, Greene and McRae LLP

  
Mark C. Rutzick

Haglund & Kirtley, LLP

  
Scott W. Horngras

**U.S. Department of Justice****Environment and Natural Resources Division**

Office of the Assistant Attorney General

Washington, D.C. 20530

August 9, 1996

**VIA FACSIMILE AND U.S. MAIL**

Scott Horngren  
Haglund & Kirtley  
Attorneys at Law  
One Main Place  
101 S.W. Main, Suite 1800  
Portland, OR 97204

Mark C. Rutzick  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
KOIN Center, Suite 1600  
222 S.W. Columbia  
Portland, OR 97201

Dear Scott and Mark:

We are extremely concerned about the slow pace of the negotiation over the process of providing replacement timber. As you know, the Court has ordered us to complete the identification and release of replacement timber for sale units which meet the "known to be nesting" criteria within 60 days from its July 1996 Order. That deadline is fast approaching. Therefore, we would like to file a joint status report notifying the Court of these ongoing settlement negotiations so that we are not found out of compliance with the Court's Order. In the absence of a joint status report and some significant progress soon in concluding these negotiations, the Forest Service will move ahead to supply the Purchasers entitled to replacement timber with 1996 program timber.

Sincerely,

A handwritten signature in black ink, appearing to read "Lois J. Schiffer".

Lois J. Schiffer  
Assistant Attorney General



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

CONFIRMATION NUMBER: (202) 514-2701

FAX NUMBER: (202) 514-0557

NO. OF PAGES: 9 (INCLUDING COVER PAGE)

TO: Elena Kagan, Jim Gilliland, Mike Gippert, Mark Gaede, Chris Nolan, Ted Boling, Michelle Gilbert, Dinah Bear

TELEPHONE NO.:

FAX NO.:

FROM: Allison Rumsey

DATE: August 5, 1996

MESSAGE: Please call me with any comments you may have. I can be reached at 202-514-0750.

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS RECEIVING THESE PAGES.

Dear Mark and Scott:

Thank you for responding so promptly to our draft agreement of July 29, 1996. We have carefully considered your proposals and have revised the draft agreement accordingly. Many of your proposed changes are acceptable and have been incorporated into this next draft. However, in some instances we are offering alternative language or further clarification. We appear to be on the right track.

We understand that you will not seek approval of the other purchasers until we have a mutually-acceptable draft. That is fine. It is our understanding that you represent all 18 timber purchasers. If this is not the case, we would appreciate a list of the timber purchasers that you do represent. Furthermore, the United States will enter into this settlement only if we have the agreement of all 18 timber purchasers entitled to replacement timber.

A revised draft of the settlement is attached. Below are our comments on the revised settlement.

Sections A(2) and (3). [What is the Forest Service's opinion about shortening these times?] To address unforeseen problems such as weather which prevents the performance of field work, we have added a sentence declaring that the parties can extend these dates by mutual agreement .

Section A(3). While we can include an approximate time by which the replacement timber will be available, we cannot commit to a date certain.

Sections A(3) and (4). The sentence addressing the parties understanding of delays caused by appeal has been moved from A(3) to A(4). The discussion of appeals is more appropriate in the paragraph on Agreement because no appeal could occur until after there is a final decision.

Section A(4). Although the Forest Service will begin preparing the timber sale as expeditiously as possible, the Forest Service cannot begin field work and sale preparation when the parties have not agreed upon the replacement timber.

We have not added your proposed language explicitly stating that a purchaser may seek assistance of the court if the purchaser and Forest Service are unable to reach agreement on replacement timber. The Forest Service is obligated to offer purchasers replacement timber of like kind and value, not to seek their approval. While the Forest Service intends to work closely with purchasers to ensure that their needs are met, the Forest Service retains discretion to ultimately decide what replacement timber will be offered. [This is an important issue. We probably want to say that we will consult with the purchasers and not that we will seek their agreement. If we can't reach an

agreement on a particular offering of alternative timber, we want to be able to make our offer and then defend it as not being arbitrary and capricious. If in this settlement we state that we will obtain their agreement, then no matter how reasonable our offer of alternative timber, they can argue that we failed to meet the terms of the settlement.]

Section B(1). This is a very important clause to us. We have deleted the original sentence and replaced it with your proposed language. In addition, we have added a sentence stating that "the purchasers agree not to challenge the Forest Service's intention to comply with all applicable laws, including environmental laws." This clause, as written, should meet both our purposes. The purchasers do not endorse the applicability of all laws, including environmental laws but agree, for these 18 replacement timber sales, not to challenge the Forest Service's obligation to apply those laws. [Do we want to insist on this.]

We are not clear what you mean by suggesting that once a contract for alternative timber is signed, no new discretionary standards and guidelines will be applied to the alternative timber and that alternative timber will not be subject to survey and management requirements taking effect in 1997. At this juncture, we do not agree to the inclusion of this clause. The application of discretionary standards and guidelines are standard clauses are at the heart of how the Forest Service ensures for the protection of the environment. Moreover, we believe that a waiver of the application of discretionary standards and guidelines will serve as a red flag to the environmentalist-intervenors. [There was some discussion that we could not waive these even if we wished to do so. Is this correct?].

Section B(2). We have changed the term "President's Forest Plan" to "applicable Forest Plan."

Section B(3). The Level 1 Team analysis is an internal forest service evaluation of whether the proposed timber sale will meet all environmental laws. We agree to your language that the Forest Service "intends to seek." In addition, for clarity, we have replaced the term "alternative volume" with "alternative timber sales."

Section B(4). This is a very important clause for us as well. We cannot agree to your proposed language but have crafted new language that we hope will serve both our purposes. The clause now states: "All alternative timber under section 2001(k)(3) in any national forest shall not count against current allowable sale quantity." [The problem is that they want us to commit to not reducing the programmed volume on a national forest in order to supply the alternative timber from that forest. With the new

language I have attempted to recast this as an accounting method and not a timber target. I welcome any suggestions here.]

Section B(5). We have added the words "upon agreement with the purchaser" to the beginning of the sentence. [Would you rather say "upon consultation with the purchaser." The purchasers will not like this. However, it would clarify that the Forest Service has the obligation to offer replacement timber and that while the Forest Service is willing to consult with the purchasers, the final decision as to what alternative timber to offer is the Forest Service's].

Section B(6). Deleted, as you requested.

Section C(1). The Forest Service will make every effort to ensure that there are sufficient resources to ensure that alternative timber is provided expeditiously, including seeking additional resources. However, in advance of knowing what its other statutory obligations are, including other reprogramming obligations, the Forest Service cannot commit to shift resources. The proposed language states that the Forest Service will make every effort to ensure that the necessary resources are available by requesting transfer, reprogramming or supplemental appropriation.

Section C(2). Deleted, as you requested.

Section C(3). Renumbered as C(2). We have included your language that the Forest Service "intends to" consult with environmental groups etc.

Section C(4). Renumbered as C(3). The Forest Service agrees that it would be a waste of resources to abandon any sale too quickly and without evaluating the merits of any challenge brought against a sale. Therefore, we have changed the language to indicate that if a third party sues, the purchaser and the Forest Service will consult in order to determine whether to proceed with the current proposal or move on to a different proposal. Each determination will be made on a case by case basis.

Sections C(5), C(6) and (7). Renumbered as C(4), C(5), and C(6). We want to settle this case or continue with litigation. However, this clause appears to keep both tracks open. Either we settle the case and dismiss it with prejudice or we continue litigating the outstanding issues. If we settle this action and dismiss the case, a purchaser is not without remedy if it believes that the Forest Service has not acted in good faith in carrying out the terms of the agreement or if the purchaser does not like the alternative timber offered. However, we do not want to litigate every issue along the way. [The original offer to leave continuing jurisdiction and to request dismissal with

prejudice was ours. But if the case is dismissed with prejudice, what would the court have continuing jurisdiction of? We may want to alter our original position.]

Further, we object to any clause in which the purchasers retain the right to raise the issue, in the context of any of these replacement sales, of whether environmental laws apply. We do not want to enter into a settlement only to have a key provision of the settlement later voided.

Proposed Section C(7). The addition of this paragraph on recruising is fine. [Check with Forest Service].

Proposed Section C(8). You proposed the addition of a clause stating that "The Forest Service will adopt a rule requiring appeal decisions within 30 days of an administrative appeal." We have not included this clause as the Forest Service prefers not to create special processes for appeal.

Proposed Section C(9). "Nothing in this agreement shall prejudice any claim or defense concerning the government's suspension of any affected timber contract including the claims presently raised in Scott Timber Co. v. United States, Civ. No. 94-784-C and 96-2040C (Ct. Fed. Claims)."

This proposed clause is unacceptable to us. We do not want to be in a situation where we provide replacement timber and are sued for a taking or partial taking on the same contract. Instead, we propose the following language: "This settlement constitutes a full and complete settlement of all claims arising under these contracts." [This gets us back to the earlier problem of continuing jurisdiction].

Finally, enclosed are Attachments 1 and 2.

Office of the Assistant Attorney General

Washington, D.C. 20530

Working Draft - Agreement regarding replacement timber  
Draft, 8/5/96

#### AGREEMENT

Under Sec.2001(k)(3) of the Rescissions Act of 1995, the Forest Service must provide alternative timber for certain timber sales where threatened or endangered bird species are "known to be nesting." Those sales ("Listed Sales") are set forth in Attachment 1.

By Amended Order of July 9, 1996, Judge Hogan has ordered the Forest Service to "identify and release" alternative timber within 60 days ("July Order"). In regard to the July Order, the Forest Service and NFRC on behalf of the purchasers of the Listed Sales, agree:

#### A. Schedule and Approach for Alternative Timber

1. Meeting period. Within 30 days after this Agreement is effective, the Forest Service Contracting Officer for each Listed Sale will meet with the Purchaser-Designated Representative to discuss the purchaser's interest and expectations as to assessment of volume, areas where alternative timber would be acceptable to purchaser, timing of alternative volume, and related matters.

2. Evaluation period. Within ~~120~~ 90 days after this Agreement is effective, the Forest Service will evaluate information provided during the Meeting Period, available alternative timber, scheduling, and other information; will consult with the Level 1 teams; and based on that information and further informal consultation with purchasers, will develop a proposal for alternative timber for each purchaser of a Listed Sale. The proposals will seek to accommodate competing requests of different purchasers. The parties recognize that some flexibility by all parties is called for. By the end of the Evaluation Period, the Forest Service will report back to each purchaser of a Listed Sale a tentative plan for alternative timber that can form the basis for negotiations over an agreement

with that purchaser for alternative timber. The parties to a specific contract can extend these time limits by mutual agreement.

3. Tentative Agreement Period. Within ~~180~~ 120 days after the effective date of this Agreement, the Forest Service will negotiate with each purchaser of a Listed Sale on the basis of the plans developed during the Evaluation Period to develop a Tentative Agreement regarding alternative timber. All parties will work diligently and in good faith to reach a tentative agreement for each sale. ~~The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales.~~ The parties to a specific contract can extend these time limits by mutual agreement.

4. Agreement Period. As soon as a tentative agreement is reached for a sale under Par. A.3 above, the Forest Service will begin the process of preparing the tentative agreement area for sale, including laying out the sale (subject to weather and like seasonal constraints), NEPA compliance, and ESA consultation. The Forest Service will move expeditiously to complete this preparation process for each sale, and enter into an agreement for alternative timber for the sale. The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales. A typical schedule for such steps is Attachment 2 here.

#### B. Conditions for Replacement Timber

The following conditions apply to alternative timber the Forest Service will provide under this Agreement:

1. ~~Timber will comply with all laws, including environmental laws.~~ The Forest Service intends that all alternative timber will be provided in compliance with all applicable laws, including environmental laws. The purchasers agree not to challenge the Forest Service's intention to comply with all applicable laws, including environmental laws.

2. Timber will comply with Standards and Guidelines under the President's applicable Forest Plan, as they may be modified, and any other Standards and Guideline issued by the Forest Service or other Federal agency.

3. The Forest Service will ~~obtain~~ intends to seek agreement from Level 1 consultation teams as to alternative ~~volume~~ timber sales.

4. ~~Alternative timber will be beyond the program volumes for the year the timber is provided. Alternative timber under section 2001(k)(3) in any national forest shall not count against current allowable sale quantity.~~ The Forest Service will list alternative volume as a separate line in annual work plans for the years 1997, 1998, and 1999, and will track alternative volume separately as part of the work plans for those years.

5. Upon agreement of the purchaser, ~~A~~ alternative timber may be in a Forest other than that of the original purchase.

6. ~~Alternative timber must be "an equal volume of timber, of like kind and value, which shall be subject to terms of the original contract..." (Recessions Act, Sec. 2001(k)(3)).~~

### C. Other terms

1. To assure that alternative timber is provided expeditiously, the Forest Service will evaluate what additional resources of personnel and money are necessary, and will ~~provide for transfer of resources from other projects or areas to meet the need, or will request additional resources from OMB request transfer, reprogramming or supplemental appropriation, where appropriate.~~

~~2. To reduce the possibility that selected alternative timber becomes the subject of legal challenge, the Forest Service will use alternative timber that has the approval of Level 1 teams, that complies with all laws, and that meets the President's Forest Plan and other applicable standards and guidelines.~~

~~3. Also to reduce the possibility that selected alternative timber becomes the subject of legal challenge, once timber is the subject of a tentative agreement (Par. A. 3 above), the Forest Service will intends to consult with local environmental and local community groups about that alternative volume.~~

~~4. In the event that alternative timber is the subject of legal challenge by a third party, the Forest Service will ~~immediately enter into further negotiations with the purchaser of any such sale to determine and the purchaser shall consult to determine whether to proceed with the proposed sale or whether~~ volume acceptable to the purchaser and not likely to be challenged can promptly be made available instead.~~

5. The parties will file this Agreement with the District Court; will jointly move the court to vacate the July Order; and will request that the court retain continuing jurisdiction over the case of NERC v. Glickman and Babbitt, No. 95-6244-HO and 95-6267-HO, to help assure compliance with this agreement.

65. To further assure compliance with this Agreement, the Forest Service will report to the parties and the Court every 30 days for the first 180 days after the effective date of this Agreement, and every 3 months thereafter, as to progress in providing alternative timber.

76. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other than those specified here.

7. An independent recruise of a sale shall occur upon purchaser's request and purchaser's deposit of sufficient funds with the Forest Service to pay an independent cruiser to recruise the original sale units. The Forest Service will contract with an independent cruiser to recruise to the original cruising and quality standards. The result of the recruise will be binding on both parties and will be used to determine the amount of the volume to be substituted.

8. This settlement constitutes a full and complete settlement of all claims arising under this contract.

[signatures and effective date--date of last signature]



## U.S. Department of Justice

## Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

CONFIRMATION NUMBER: (202) 514-2701

FAX NUMBER: (202) 514-0557

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TELEPHONE NO.:

FAX NO.:

FROM: Allison Rumsey

DATE: August 7, 1996

MESSAGE:

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS RECEIVING THESE PAGES.

**U.S. Department of Justice****Environment and Natural Resources Division**

Office of the Assistant Attorney General

Washington, D.C. 20530

August 7, 1996

**VIA FACSIMILE AND U.S. MAIL**

Mark C. Rutzick  
LeBoeuf, Lamb, Greene & MacRae, L.L.P.  
KOIN Center, Suite 1600  
222 S.W. Columbia  
Portland, OR 97201

Dear Mark:

Thank you for responding so promptly to our draft agreement of July 29, 1996. We have carefully considered your proposals and have revised the draft agreement accordingly. Many of your proposed changes are acceptable and have been incorporated into this next draft. However, in some instances we are offering alternative language or further clarification. We appear to be on the right track.

We understand that you will not seek approval of the other purchasers until we have a mutually-acceptable draft. That is fine. It is our understanding that you represent all 18 timber purchasers. If this is not the case, we would appreciate a list of the timber purchasers that you do represent. Furthermore, the United States will enter into this settlement only if we have the agreement of all 18 timber purchasers entitled to replacement timber.

A revised draft of the settlement is attached. Below are our comments on the revised settlement.

Sections A(2) and (3). We agree to shorten the time from 120 days to 90 days for the Evaluation and from 180 days to 120 days for the Tentative Agreement. To address unforeseen problems such as weather which prevents the performance of field work, we have added a sentence declaring that the parties can extend these dates by mutual agreement.

Section A(3). While we can include an approximate time by which the replacement timber will be available, we cannot commit to a date certain.

Sections A(3) and (4). The sentence addressing the parties understanding of delays caused by appeal has been moved from A(3) to A(4). The discussion of appeals is more appropriate

in the paragraph on Agreement because no appeal could occur until after there is a final decision.

Section A(4). Although the Forest Service will begin preparing the timber sale as expeditiously as possible, the Forest Service cannot begin field work and sale preparation when the parties have not agreed upon the replacement timber. There should be some further discussion on this point so that we can better understand your concern and see if there is a pragmatic way to accomodate it.

We have not added your proposed language explicitly stating that a purchaser may seek assistance of the court if the purchaser and Forest Service are unable to reach agreement on replacement timber. The Forest Service is obligated to offer purchasers replacement timber of like kind and value, not to seek their approval. While the Forest Service intends to work closely with purchasers to ensure that their needs are met, the Forest Service retains discretion to ultimately decide what replacement timber will be offered. Moreover, the language is unnecessary as paragraphs C(4) and (5) state that the Court will keep jurisdiction to help ensure compliance with this settlement.

Section B(1). This is a very important clause to us. We have deleted the original sentence and replaced it with your proposed language. In addition, we have added a sentence stating that "the purchasers agree not to challenge the Forest Service's determination to comply with all applicable laws, including environmental laws." This clause, as written, should meet both our purposes. The purchasers do not endorse the applicability of all laws, including environmental laws but agree, for these replacement timber sales, not to challenge the Forest Service's determination to apply those laws.

We are not clear what you mean by suggesting that once a contract for alternative timber is signed, no new discretionary standards and guidelines will be applied to the alternative timber and that alternative timber will not be subject to survey and management requirements taking effect in 1997. At this juncture, we do not agree to the inclusion of this clause. The application of discretionary standards and guidelines are standard clauses are at the heart of how the Forest Service ensures for the protection of the environment. Moreover, we believe that a waiver of the application of discretionary standards and guidelines will serve as a red flag to the environmentalist-intervenors.

Section B(2). We have changed the term "President's Forest Plan" to "applicable Forest Plan."

Section B(3). The Level 1 Team analysis is an interagency team that evaluates whether the proposed timber sale will meet all environmental laws. We agree to your language that the Forest Service "intends to seek." In addition, for clarity, we have replaced the term "alternative volume" with "alternative timber sales." We are working to see if one Forest Service official can be designated as responsible for the overall process.

Section B(4). This is a very important clause for us as well. We cannot agree to your proposed language and prefer to keep the language of the original draft.

Section B(5). We have added the words "upon consultation with the purchaser" to the beginning of the sentence.

Section B(6). Deleted, as you requested.

Section C(1). The Forest Service will make every effort to ensure that there are sufficient resources to ensure that alternative timber is provided expeditiously, including seeking additional resources. However, in advance of knowing what its other statutory obligations will be, including other reprogramming obligations, the Forest Service cannot commit to shift resources. Moreover, the Forest Service's reprogramming responsibilities often include the need to obtain the approval of not only Administration entities, such as OMB, but also entities outside of the executive branch. The proposed language states that the Forest Service will make every effort to ensure that the necessary resources are available by requesting transfer, reprogramming or supplemental appropriation, if necessary.

Section C(2). Deleted, as you requested.

Section C(3). Renumbered as C(2). We have included your language that the Forest Service "intends to" consult with environmental groups etc.

Section C(4). Renumbered as C(3). The Forest Service agrees that it would be a waste of resources to abandon any sale too quickly and without evaluating the merits of any challenge brought against a sale. Therefore, we have changed the language to indicate that if a third party sues, the purchaser and the Forest Service will consult in order to determine whether to proceed with the current proposal or move on to a different proposal. Each determination will be made on a case by case basis.

Sections C(5), C(6) and (7). Renumbered as C(4), C(5), and C(6). We want to settle this case or continue with litigation. However, your proposed clause appears to keep both tracks open. The language in this draft clarifies that the Purchasers claims are dismissed with prejudice and the Court keeps jurisdiction of the case for only for the purpose of helping assure compliance with this agreement.

Further, we object to any clause in which the purchasers retain the right to raise the issue, in the context of any of these replacement sales, of whether environmental laws apply. We do not want to enter into a settlement only to have a key provision of the settlement later voided.

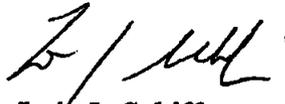
Proposed Section C(7). The addition of this paragraph on recruiting is fine.

Proposed Section C(8). You proposed the addition of a clause stating that "The Forest Service will adopt a rule requiring appeal decisions within 30 days of an administrative appeal." While we do not understand your comment completely, we have not included this clause as the Forest Service prefers not to engage in further rulemaking.

Proposed Section C(9). "Nothing in this agreement shall prejudice any claim or defense concerning the government's suspension of any affected timber contract including the claims presently raised in Scott Timber Co. v. United States, Civ. No. 94-784-C and 96-2040C (Ct. Fed. Claims)." This proposed clause is unacceptable to us.

Finally, enclosed are Attachments 1 and 2.

Sincerely,



Lois J. Schiffer  
Assistant Attorney General

Office of the Assistant Attorney General

Washington, D.C. 20530

Working Draft - Agreement regarding replacement timber  
Draft, 8/7/96

### AGREEMENT

Under Sec.2001(k)(3) of the Rescissions Act of 1995, the Forest Service must provide alternative timber for certain timber sales where threatened or endangered bird species are "known to be nesting." Those sales ("Listed Sales") are set forth in Attachment 1.

By Amended Order of July 9, 1996, Judge Hogan has ordered the Forest Service to "identify and release" alternative timber within 60 days ("July Order"). In regard to the July Order, the Forest Service and NFRC on behalf of the purchasers of the Listed Sales, agree:

#### A. Schedule and Approach for Alternative Timber

1. Meeting period. Within 30 days after this Agreement is effective, the Forest Service Contracting Officer for each Listed Sale will meet with the Purchaser-Designated Representative to discuss the purchaser's interest and expectations as to assessment of volume, areas where alternative timber would be acceptable to purchaser, timing of alternative volume, and related matters.

2. Evaluation period. Within ~~120~~ 90 days after this Agreement is effective, the Forest Service will evaluate information provided during the Meeting Period, available alternative timber, scheduling, and other information; will consult with the Level 1 teams; and based on that information and further informal consultation with purchasers, will develop a proposal for alternative timber for each purchaser of a Listed Sale. The proposals will seek to accommodate competing requests of different purchasers. The parties recognize that some flexibility by all parties is called for. By the end of the Evaluation Period, the Forest Service will report back to each purchaser of a Listed Sale a tentative plan for alternative timber that can form the basis for negotiations over an agreement

with that purchaser for alternative timber. The parties to a specific contract can extend these time limits by mutual agreement.

3. Tentative Agreement Period. Within ~~180~~ 120 days after the effective date of this Agreement, the Forest Service will negotiate with each purchaser of a Listed Sale on the basis of the plans developed during the Evaluation Period to develop a Tentative Agreement regarding alternative timber. All parties will work diligently and in good faith to reach a tentative agreement for each sale. ~~The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales.~~ The parties to a specific contract can extend these time limits by mutual agreement.

4. Agreement Period. As soon as a tentative agreement is reached for a sale under Par. A.3 above, the Forest Service will begin the process of preparing the tentative agreement area for sale, including laying out the sale (subject to weather and like seasonal constraints), NEPA compliance, and ESA consultation. The Forest Service will move expeditiously to complete this preparation process for each sale, and enter into an agreement for alternative timber for the sale. The parties understand that differences of view over adequacy of alternative volume or other issues may lead to appeals that could delay completion of a tentative agreement for particular sales. A typical schedule for such steps is Attachment 2 here.

#### B. Conditions for Replacement Timber

The following conditions apply to alternative timber the Forest Service will provide under this Agreement:

1. ~~Timber will comply with all laws, including environmental laws.~~ The Forest Service intends that all alternative timber will be provided in compliance with all applicable laws, including environmental laws. The purchasers agree not to challenge the Forest Service's determination to comply with all applicable laws, including environmental laws.

2. Timber will comply with Standards and Guidelines under the ~~President's~~ applicable Forest Plan, as they may be modified, and any other Standards and Guideline issued by the Forest Service or other Federal agency.

3. ~~The Forest Service will obtain~~ intends to seek agreement from Level 1 consultation teams as to alternative volume timber sales.

4. Alternative timber will be beyond the program volumes for the year the timber is provided. The Forest Service will list alternative volume as a separate line in annual work plans for the years 1997, 1998, and 1999, and will track alternative volume separately as part of the work plans for those years.

5. After consulting with the purchaser, the Forest Service may offer alternative timber from ~~may be in~~ a Forest other than that of the original purchase.

6. ~~Alternative timber must be "an equal volume of timber, of like kind and value, which shall be subject to terms of the original contract...." (Rescissions Act, Sec. 2001(k)(3)).~~

### C. Other terms

1. To assure that alternative timber is provided expeditiously, the Forest Service will evaluate ~~what if~~ additional resources of personnel and money are necessary, ~~and or~~ will provide for transfer of resources from other projects or areas to meet the need, ~~or will request additional resources from OMB request transfer, reprogramming or supplemental appropriation, where appropriate.~~

2. ~~To reduce the possibility that selected alternative timber becomes the subject of legal challenge, the Forest Service will use alternative timber that has the approval of Level 1 teams, that complies with all laws, and that meets the President's Forest Plan and other applicable standards and guidelines.~~

3. Also to reduce the possibility that selected alternative timber becomes the subject of legal challenge, once timber is the subject of a tentative agreement (Par. A. 3 above), the Forest Service will intends to consult with local environmental and local community groups about that alternative volume.

4. In the event that alternative timber is the subject of legal challenge by a third party, the Forest Service will ~~immediately enter into further negotiations with the purchaser of any such sale to determine and the purchaser shall consult to determine whether to proceed with the proposed sale or whether~~ volume acceptable to the purchaser and not likely to be challenged can promptly be made available instead.

5. The parties will file this Agreement with the District Court; will jointly move the court to vacate the July Order; and will request that the court retain continuing jurisdiction over the case of NFRC v. Glickman and Babbitt, No. 95-6244-HO and 95-6267-HO, to help assure compliance with this agreement.

65. To further assure compliance with this Agreement, the Forest Service will report to the parties and the Court every 30 days for the first 180 days after the effective date of this Agreement, and every 3 months thereafter, as to progress in providing alternative timber.

76. NFRC will dismiss with prejudice its claim that it is entitled to alternative volume under terms and conditions other than those specified here.

7. An independent recruise of a sale shall occur upon purchaser's request and purchaser's deposit of sufficient funds with the Forest Service to pay an independent cruiser to recruise the original sale units. The Forest Service will contract with an independent cruiser to recruise to the original cruising and quality standards. The result of the recruise will be binding on both parties and will be used to determine the amount of the volume to be substituted.

[signatures and effective date--date of last signature]

COMMERCIAL MILLING  
Forest Service, Region 6  
Sales  
Priority for Replacement Volume 2800(k) Sales: as of May 2, 1996  
A. T&E Sales (Marked Murrelet and Spotted Owl) with Units Suspended

Sale Name	Forest	Bid Date	Original Volume	Acres	Remaining Volume	Meets Contracting Criteria	High-Bidder	Sale Status	Priority for Replaces
ARGENT WREN	UMP	12/27/90	6500	17	689	Y	D.R. Johnson Company	Awarded; Contract Suspended; Scotted Owl	H
BEAVER 712	SU	08/28/90	6900				Scott Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			46	4108	N			H
	Unit 2			50	4493	N			H
BENNER BUNCH	SU	12/19/89	10300				Bugabo Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit D3			27	2530	Y			H
	Unit G4			39	1825	N			H
	Unit L5			17	1376	N			H
BERRY BUSH-EL	SU	07/28/90	5600				Scott Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			13	376	Y			H
	Unit 2			25	383	N			H
BOULDER KRAB	SIS	08/27/90	6070				Scott Timber	Awarded; Contract Suspended; Marked Murrelet occupied about all volume for unit suspended on 12/29/91. Plan of operations received for Unit 4, not suspended.	H
	Unit 1			32	1260	4			H
	Units 2A, B, C			30	1890	N			H
BOYD CREEK	WBS	08/28/90	3760				Turn Single	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 2			3	363	N			H
	Unit 3			6	265	N			H
	Unit 4			2	135	N			H
CAHNE	OLY	01/04/90	6550				May Brothers	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			11	678	N			H
	Unit 4			36	1681	N			H
CANAL GRO	SU	04/03/90	9400				Harmony Tree Farms	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			47	3006	N			H
	Unit 2			26	3817	N			H
CLEAN CREEK	WBS	06/21/90	3435				Bugabo Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			28	2970	Y			H
DEODAR	OLY	05/14/90	9900				Hub River Lumber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			23	800	Y			H
ELK FORK	SIS	08/27/90	2780				CLR Timber	Awarded; Contract Suspended; Marked Murrelet occupied and suspended.	H
	Unit 4			35	1225	Y			H
FATHER CAK	SIS	02/26/90	5730				Scott Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			49	573	Y			H
	Unit 4			33	700	N			H
	Unit 5			41	1000	Y			H
FISH STORY	WBS	12/2/89	6700				LB&N Logging	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 1			27	700	Y			H
FIREWALL FLUME	SU	09/27/90	7500				Scott Timber	Awarded; Contract Suspended; Marked Murrelet	H
	Unit 2			57	2330	N			H
	Unit 3			54	2514	N			H

COMPUTER SALES  
Forest Service, Region 6  
5-44  
Priority for Replacement Volume 2001(k) Sales: as of May 2, 1996  
A. T&E Sales (Marked Market and Spotted Owl) with Units Suspended

Sale Item	Forest Bid Date	Original Volume	Acres	Remaining Volume	Meets Court's Marking Criteria	High-potential	Sale Status	Priority for Repeals
FORLAND RIDGE Unit 4	SU 08/23/90	4300	51	1776	Y	Hamilton Tree Farms	Awarded; Contract Suspended; Marked Market	H
FORLAND RIDGE Unit 3	SU 08/23/90	4300	24	549	Y	Scott Timber	Awarded; Contract Suspended; Marked Market	H
FORLAND RIDGE Unit 1	SU 08/17/90	6300	39	2854	Y	Scott Timber	Awarded; Contract Suspended; Marked Market	H
FORLAND RIDGE Unit 2	SU 08/17/90	6300	28	1407	N			H
FORLAND RIDGE Unit 4	SU 08/17/90	6300	28	1687	N			H
FORLAND RIDGE Unit 6	SU 08/28/90	2400	23	2016	N	Scott Timber	Awarded; Contract Suspended; Marked Market	H
FORLAND RIDGE Unit 1	SU 08/28/90	2400	33	2357	N			H
GORDY BLUFF Unit 3	SU 05/29/90	7390	31	604	Y	Hampton Tree Farms	Awarded; Contract Suspended; Marked Market	H
GRASSHOPPER Unit 1	SU 07/31/90	8700	38	3750	N	Bugbee Timber	Awarded; Contract Suspended; Marked Market	H
GRASSHOPPER Unit 2	SU 07/31/90	8700	28	2048	N			H
GRASSHOPPER Unit 3	SU 07/31/90	8700	30	1488	N			H
GRASSHOPPER Unit 4	SU 07/31/90	8700	11	402	N			H
GRASSHOPPER Unit 6	SU 07/31/90	8700	23	1333	N			H
GREENAPPLE Unit 1	SU 07/24/90	10400	35	3150	N	Boies Coconuts	Awarded; Contract Suspended; Marked Market	H
GREENAPPLE Unit 2	SU 07/24/90	10400	33	2439	N			H
GREENAPPLE Unit 3	SU 07/24/90	10400	25	2421	Y			H
GREENAPPLE Unit 4	SU 07/24/90	10400	20	1680	N			H
INDIAN HOOK Unit 1	SU 09/17/90	15300	48	3279	N	Scott Timber	Awarded; Contract Suspended; Marked Market	H
INDIAN HOOK Unit 2	SU 09/17/90	15300	51	3044	N			H
INDIAN HOOK Unit 3	SU 09/17/90	15300	45	3249	N			H
INDIAN HOOK Unit 4	SU 09/17/90	15300	18	2309	Y			H
INDIAN HOOK Unit 5	SU 09/17/90	15300	31	2836	Y			H
LOBSTER Unit 9	SU 09/09/90	6589	23	1010	Y	CLR Timber	Awarded; Contract Suspended; Marked Market	H
LOMER BAILEY Unit 4	SU 09/27/90	3700	16	881	Y	Lane Rock Timber	Awarded; Contract Suspended; Marked Market	H
MAVIA SKYLINE Unit 3	SU 09/26/90	12700	64	3334	N	Scott Timber	Awarded; Contract Suspended; Marked Market	H
MAVIA SKYLINE Unit 4	SU 09/26/90	12700	25	1204	N			H
MAVIA SKYLINE Unit 5	SU 09/26/90	12700	52	4094	N			H
MILBURN BOYACK Unit 1	SU 08/27/90	7190	18	684	N	UBER Logging	Awarded; Contract Suspended; Marked Market	H
MILBURN BOYACK Unit 2	SU 08/27/90	7190	31	1384	N			H
MILBURN BOYACK Unit 3	SU 08/27/90	7190	30	1320	Y			H
MILBURN BOYACK Unit 4	SU 08/27/90	7190	35	1301	N			H

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NATURAL RESOURCE

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FOREST SERVICE, REGION 6

Priority for Replacement Volume 2001(k) Sales; as of May 2, 1996  
 A. T&E Sales (Marbled Murrelet and Spotted Owl) with Units Suspended

Sale Name	Forest	Bid Date	Original Volume	Acres	Remaining Volume	Meets Court's Nesting Criteria	High Bidder	Sale Status	Priority for Replace.
Unit 5				25	1110	Y			H
MIR ROBERS	SRU	09/23/90	10000				Seneca Sawmills	Not Awarded; Marbled Murrelet	
Unit 1				47	2444	N			H
Unit 2				50	2581	N			H
Unit 3				33	2012	N			H
Unit 4				49	2509	N			H
NORTH BALL	SIU	04/11/90	6700				Frampton Tree Farms	Awarded; Contract Suspended; Marbled Murrelet	
Unit C				14	561	N			H
Unit D				7	303	Y			H
NOT BAD	OLY	07/02/90	7290				High River Lumber	Awarded; Contract Suspended; Marbled Murrelet	
SO-110				12	800	Y			H
SO-111				11	800	Y			H
OLD GRADE	MBS	08/14/90	9900				Sunset Timber	Awarded; Contract Suspended; Marbled Murrelet	
Unit 9				7	317	N			H
Unit 11				14	951	N			H
Unit 12				10	220	N			H
Unit 13				9	387	N			H
Unit 14				11	401	N			H
PRONG	SIU	08/27/90	4800				Lone Rock Timber	Awarded; Contract Suspended; Marbled Murrelet	
Unit 1				58	4830	N			H
RANDALL SALADO	SIU	09/29/90	8600				Boise Cascade	Awarded; Contract Suspended; Marbled Murrelet	
Unit 2				32	1387	N			H
RYAN WAPITI	SIU	03/20/90	10700				Freres Lumber	Awarded; Contract Suspended; Marbled Murrelet	
Unit 1				51	3809	N			H
Unit 2				27	2762	N			H
SCRAPS	MBS	09/27/90	7550				Miller Shingle	Awarded; Contract Suspended; Marbled Murrelet	
Unit 1				91	672	Y			H
Unit 2				28	1237	N			H
Unit 4				10	480	Y			H
Unit 5				18	410	N			H
Unit 8				18	983	Y			H
SKYWALKER	SIU	09/04/90	7700				Scott Timber	Awarded; Contract Suspended; Marbled Murrelet	
Unit 3				13	774	N			H
Unit 5				25	873	N			H
Unit 6				46	3443	Y			H
SPUR TRIGGER	SIS	05/22/90	5420				CLR Timber	Awarded; Contract Suspended; Marbled Murrelet	
Unit 3				27	739	Y			H
Unit 4				38	1085	Y			H
Unit 5				34	202	Y			H
STALWART	MBS	09/08/90	2800				Miller Shingle	Awarded; Contract Suspended; Marbled Murrelet	
Unit 3				7	836	Y			H

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Forest Service, Region 6

25-24-96

Priority for Replacement Volume 2001(k) Sales; as of May 2, 1996

A. T&amp;E Sales (Marbled Murrelet and Spotted Owl) with Units Suspended

Sale Name	Forest	Bld Date	Original Volume	Acres	Remaining Volume	Meets Court's Nesting Criteria	High Bidder	Sale Status	Priority for Replac.
Unit 4				7	785	N			H
Unit 5				8	845	N			H
STEVENS	OLY	09/06/90	5600				Mayr Brothers	Awarded; Contract Suspended, Marbled Murrelet	
Unit 3				16	630	N			H
Unit 4				4	80	N			H
SUGAR CUBE	SIS	09/17/90	4830				CLR Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 3				30	1304	N			H
Unit 7				12	130	Y			H
SULPHUR	SIU	06/07/90	6400				Scott Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 3				35	1536	N			H
Unit 4				40	2785	Y			H
TAYLOR RANCH	SIS	12/27/89	5350				CLR Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 1				42	1770	Y			H
TOASTBERRY	SIS	06/08/90	4010				Scott Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 1				14	820	N			H
Unit 2				25	980	N			H
UPPER MCLEOD	SIU	09/11/90	5100				Seneca Sawmills	Awarded; Contract Suspended, Marbled Murrelet	
Unit 1				40	2382	N			H
UPPERTEN 002	SIU	05/03/90	14455				Bolse Cascade	Awarded; Contract Suspended, Marbled Murrelet	
Unit 1				50	3089	N			H
Unit 2				56	3250	N			H
Unit 3				53	3573	N			H
Unit 4				45	3578	N			H
WAPITI 305	SIU	09/20/90	2300				Scott Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 3				23	1198	N			H
Unit 5				26	1080	N			H
WEST BOUNDARY	OLY	09/20/90	4300				Mayr Brothers	Awarded; Contract Suspended, Marbled Murrelet	
Unit 3				2	47	N			H
Unit 4				27	1230	Y			H
Unit 4A				6	150	N			H
Unit 5A-D				45	1000	N			H
WHELOCK 403	SIU	06/19/90	6013				Hampton Tree Farms	Awarded; Contract Suspended, Marbled Murrelet	
Unit 1				32	1250	N			H
Unit 2				29	1242	N			H
Unit 3				25	2025	N			H
Unit 4				27	757	N			H
WINRIVER	SIS	01/08/90	3140				CLR Timber	Awarded; Contract Suspended, Marbled Murrelet	
Unit 12				24	239	N			H
Unit 13				29	664	N			H
Unit 14				33	794	Y			H
WYNOCHEE RES. A-240	OLY	09/24/90	16880				Mayr Brothers	Awarded; Contract Suspended, Marbled Murrelet	
				15	1230	Y			H

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CANADIAN FOREST SERVICE, Region 6

2-1-96

**Priority for Replacement Volume 2001(k) Sales; as of May 2, 1996  
A, T&E Sales (Marked Murrelet and Spotted Owl) with Units Suspended**

Sale Name	Forest Bid Date	Original Volume	Acres	Remaining Volume	Mark's Court's Meeting Criteria	High-Bidder	Sale Status	Priority for Replace.
A-240A			4	74	N			H
A-281			24	550	N			H
A-283			11	300	N			H
A-245			9	50	N			H
YOUWHO SO-116	OLY 08/14/90	12400	13	1750	Y	A/CALC Resources	Awarded, Suspended, Spotted Owl & Marked Murrelet	H
		<b>Total</b>	<b>3241</b>	<b>177896</b>				

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Chris Nolan, Dinah Bear, Ted Boling  
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*Counsel*