

NLWJC- Kagan

Counsel - Box 004 - Folder 006

Timber-Tongass

Tom Steyer Kagan

Timber-Tongues

Biomaterials bill

Travel Office letter

Cameras in courtroom

UC Regents

Career Transition Assistance

Utah Wilderness

Civil Justice Reform EO

Wardlaw matter

Columbia River Basin

Whitewater

Camp time

World Christian Church

Crime Act

Worker Right to Know

Consumer act

Administrative stuff

Debate prep

Alaska North Slope oil

Dry Testing Dioxin

Amendments

Edwards Aquifer

Amtrak

E-mail para

Amtrak liability provisions

Encryption bill

Appropriatic waivers

English Only

Ariatic Disaster

Executive Accountability bill

Family Divorce initiation

FBI Files Amendments

FLRA Report

Debt ceiling document request

Dingell firearms issue

Disaster insurance

Environmental - miscellaneous

Environmental Crime Initiative

ENCLOSURES FILED OVERSIZE ATTACHMENTS

8248

NARA 5902

From Elena Kagan

Timbu-Tompas

Travel Office letter

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Worker Right to Know

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Environmental - miscellaneous

Environmental Crime Initiative

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

21-Apr-1996 08:47pm

TO: Kathleen A. McGinty
FROM: Dinah Bear
Council on Environmental Quality
CC: Elena Kagan
SUBJECT: Tongass settlement

The district court judge in Alaska denied most of the industry intervenor's requests, but has scheduled an evidentiary hearing this Tuesday and Wednesday to hear "fairness" arguments on the economic viability of the offer. He has ruled that the burden of proof is on the industry to show that the settlement is not economic.

We are in the process of negotiating two more modifications to sales in the package for initial release that would increase the economic viability of the offer.

EXECUTIVE OFFICE OF THE PRESIDENT

15-Apr-1996 02:09pm

TO: Elena Kagan
FROM: Martha Foley
Office of the Chief of Staff
SUBJECT: FYI -- on Tongass...

Is a judicial rejection (which is what it appears to be) of a settlement proposal appealable? (I can't recall from civ pro or wherever I should have learned this.) This is certainly highly unusual, isn't it?

accede to a
parties joint

I'd like to know more facts. But
in general, a court's refusal to
enter a ^{final} court decree, ^{agreed to}
by the parties,

is immediately appealable ^{when} ~~as~~
as the decree contains injunctive
relief.

~~containing injunctive~~
relief

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-Apr-1996 01:10pm

TO: Martha Foley
TO: Ron Klain
TO: T J Glauthier

FROM: Kathleen A. McGinty
 Council on Environmental Quality

CC: Dinah Bear
CC: Shelley N. Fidler

SUBJECT: tongass

murkowski has a hearing scheduled on the ttmp on the 18th. i think overall, this is an opportunity for us to proclaim our pro-timber, -fish, -tourism, -recreation message against the loud cries of these old timber beasts.....we're on the right side of this issue.

but, want to alert you to some curveballs:

1. on our tongass settlement, the judge has basically declined to even consider our settlement proposal that we reached with envtl plaintiffs and (instead has simply ordered us back to the table with all parties -- including timber companies.) he even has directed that we must meet for at least 5 hours a day! curiously enough, he has decided that we should continue this just up til april 17th--one day before murkowski's hearing. now, i am of course confident of the independence of the judiciary. but, this judge is a r and has political ambitions. i smell a rat. i think we are being set up to fail in settlement discussions just the day before murkowski can then beat the hell out of us in his hearing.

2. our dear forest service---we have not seen what the ttmp looks like. but we are starting to hear loud howls from the enviros that it is awful and calls for a god-awful level of timber harvest. we are trying to arrange a briefing. but, i have a crummy feeling about this.....

obviously, all of this is a major problem when we are beating back all of the free world in the budget process in opposing the tongass rider.

happy days.

2ND CASE of Level 1 printed in FULL format.

CARSON ET AL. v. AMERICAN BRANDS, INC., T/A AMERICAN TOBACCO
CO., ET AL.

No. 79-1236

SUPREME COURT OF THE UNITED STATES

450 U.S. 79; 101 S. Ct. 993; 1981 U.S. LEXIS 69; 67 L. Ed.
2d 59; 49 U.S.L.W. 4171; 25 Fair Empl. Prac. Cas. (BNA) 1;
25 Empl. Prac. Dec. (CCH) P31,524; 31 Fed. R. Serv. 2d
(Callaghan) 1

December 10, 1980, Argued
February 25, 1981, Decided

PRIOR HISTORY: [***1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

DISPOSITION: 606 F.2d 420, reversed.

SYLLABUS: Petitioners, representing a class of present and former black employees and job applicants, sought injunctive and declaratory relief and damages in an action under 42 U. S. C. @ 1981 and Title VII of the Civil Rights Act of 1964, alleging that respondent employer and unions had engaged in racially discriminatory employment practices. The parties negotiated a settlement and jointly moved the District Court to enter a proposed consent decree which would permanently enjoin respondents from discriminating against black employees and would require them to give hiring and seniority preferences to black employees and to fill one-third of certain supervisory positions with qualified blacks. The court denied the motion, holding that since there was no showing of present or past discrimination, the proposed decree illegally granted racial preferences to the petitioner class, and that in any event the decree would be illegal as extending relief to all present and future black employees, not just to actual victims of the alleged discrimination. The Court of Appeals dismissed [***2] petitioners' appeal for want of jurisdiction, holding that the District Court's order was not appealable under 28 U. S. C. @ 1292 (a)(1), which permits appeals as of right to the courts of appeals from interlocutory orders of district courts "refusing . . . injunctions."

Held: The District Court's interlocutory order refusing to enter the consent decree was an order "refusing" an "injunction" and was therefore appealable under @ 1292 (a)(1). Pp. 83-90.

(a) The order, although not in terms refusing an injunction, had the practical effect of doing so. However, for such an interlocutory order to be immediately appealable under @ 1292 (a)(1), a litigant must also show that the order might have "serious, perhaps irreparable, consequence" and that the order can be "effectually challenged" only by immediate appeal. *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181. Pp. 83-86.

(b) Here, petitioners meet such test. First, they might lose their opportunity to settle their case on the negotiated terms, because a party to a pending settlement might be legally justified in withdrawing its consent to

450 U.S. 79, *; 101 S. Ct. 993, **;
1981 U.S. LEXIS 69, ***2; 67 L. Ed. 2d 59

the agreement once trial is held and final judgment [***3] entered. And a second "serious, perhaps irreparable, consequence" of the District Court's order justifying an immediate appeal is that, because petitioners cannot obtain the injunctive relief of an immediate restructuring of respondents' transfer and promotional policies until the proposed consent decree is entered, any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm. Pp. 86-89.

COUNSEL: Napoleon B. Williams, Jr., argued the cause for petitioners. With him on the briefs were Henry L. Marsh III, Jack Greenberg, James M. Nabrit III, and Barry L. Goldstein.

Henry T. Wickham argued the cause for respondent American Brands, Inc. With him on the brief were Paul G. Pennoyer, Jr., Bernard W. McCarthy, and D. Eugene Webb, Jr. Jay J. Levit argued the cause for respondent unions. With him on the brief was James F. Carroll.

Harlon L. Dalton argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Brian K. Landsberg, Marie E. Klimesz, and Leroy D. Clark. *

* Robert E. Williams and Douglas S. McDowell filed a brief for the Equal Employment Advisory Council as amicus curiae urging reversal. [***4]

JUDGES: BRENNAN, J., delivered the opinion for a unanimous Court.

OPINIONBY: BRENNAN

OPINION: [*80] [**994] JUSTICE BRENNAN delivered the opinion of the Court.

The question presented in this Title VII class action is whether an interlocutory order [**995] of the District Court denying a joint motion of the parties to enter a consent decree containing injunctive relief is an appealable order.

I

Petitioners, representing a class of present and former black seasonal employees and applicants for employment at the [*81] Richmond Leaf Department of the American Tobacco Co., brought this suit in the United States District Court for the Eastern District of Virginia under 42 U. S. C. @ 1981 and Title VII of the Civil Rights Act of 1964, 42 U. S. C. @ 2000e et seq. Alleging that respondents n1 had discriminated against them in hiring, promotion, transfer, and training opportunities, petitioners sought a declaratory judgment, preliminary and permanent injunctive relief, and money damages.

- - - - -Footnotes- - - - -

n1 Respondents in this case are: American Brands, Inc., which operates the Richmond Leaf Department of the American Tobacco Co.; Local 182 of the Tobacco Workers International Union, the exclusive bargaining agent for all hourly paid production unit employees of the Richmond Leaf Department; and the

450 U.S. 79, *81; 101 S. Ct. 993, **995;
1981 U.S. LEXIS 69, ***4; 67 L. Ed. 2d 59

International Union.

- - - - -End Footnotes- - - - -
[***5]

After extensive discovery had been conducted and the plaintiff class had been certified, n2 the parties negotiated a settlement and jointly moved the District Court to approve and enter their proposed consent decree. See Fed. Rule Civ. Proc. 23 (e). n3 The decree would have required respondents to give hiring and seniority preferences to black employees and to fill one-third of all supervisory positions in the Richmond Leaf Department with qualified blacks. While agreeing to the terms of the decree, respondents "expressly [denied] any violation of . . . any . . . equal employment law, regulation, or order." App. 25a.

- - - - -Footnotes- - - - -

n2 The class was certified pursuant to Federal Rule of Civil Procedure 23 (b)(2). It consisted of black persons who were employed as seasonal employees at the Richmond Leaf Department on or after September 9, 1972, and black persons who applied for seasonal employment at the Department on or after that date.

n3 Rule 23 (e) provides:

"A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

- - - - -End Footnotes- - - - -
[***6]

The District Court denied the motion to enter the proposed decree. 446 F.Supp. 780 (1977). Concluding that preferential treatment on the basis of race violated Title VII and [*82] the Constitution absent a showing of past or present discrimination, and that the facts submitted in support of the decree demonstrated no "vestiges of racial discrimination," id., at 790, the court held that the proposed decree illegally granted racial preferences to the petitioner class. It further declared that even if present or past discrimination had been shown, the decree would be illegal in that it would extend relief to all present and future black employees of the Richmond Leaf Department, not just to actual victims of the alleged discrimination. Id., at 789.

The United States Court of Appeals for the Fourth Circuit, sitting en banc, dismissed petitioners' appeal for want of jurisdiction. 606 F.2d 420 (1979). It held that the District Court's refusal to enter the consent decree was neither a "collateral order" under 28 U. S. C. @ 1291, n4 nor an interlocutory order "refusing" an "[injunction]" under [***7] 28 U. S. C. @ 1292 (a)(1). n5 Three judges [**996] dissented, concluding that the order refusing to approve the consent decree was appealable under 28 U. S. C. @ 1292 (a)(1).

- - - - -Footnotes- - - - -

n4 Although the Court of Appeals did not expressly mention the collateral-order doctrine, petitioners argued that the District Court order

450 U.S. 79, *82; 101 S. Ct. 993, **996;
1981 U.S. LEXIS 69, ***7; 67 L. Ed. 2d 59

was appealable under that doctrine, and the Court of Appeals cited cases decided under that doctrine. 606 F.2d, at 423-424, citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); and *Seigal v. Merrick*, 590 F.2d 35 (CA2 1978).

n5 Title 28 U. S. C. @ 1292 (a)(1) provides:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court"

- - - - -End Footnotes- - - - -
[***8]

Noting a conflict in the Circuits, n6 we granted certiorari. [*83] 447 U.S. 920 (1980). We hold that the order is appealable under 28 U. S. C. @ 1292 (a)(1), and accordingly reverse the Court of Appeals. n7

- - - - -Footnotes- - - - -

n6 Compare *Norman v. McKee*, 431 F.2d 769 (CA9 1970) (refusal to enter consent decree appealable under @ 1291), cert. denied sub nom. *Security Pacific National Bank v. Myers*, 401 U.S. 912 (1971), and *United States v. City of Alexandria*, 614 F.2d 1358 (CA5 1980) (refusal to enter consent decree appealable under @ 1292 (a)(1)), with *Seigal v. Merrick*, supra (not appealable under @ 1291), and 606 F.2d 420 (CA4 1979) (case below) (not appealable under @ 1291 or @ 1292 (a)(1)). See also *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (CA8 1973) (refusal to enter proposed settlement agreement appealable; no discussion of jurisdictional question).

n7 We therefore need not decide whether the order is also appealable under 28 U. S. C. @ 1291.

- - - - -End Footnotes- - - - -
[***9]

II

The first Judiciary Act of 1789, 1 Stat. 73, established the general principle that only final decisions of the federal district courts would be reviewable on appeal. 28 U. S. C. @ 1291. See *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178-179 (1955); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940). Because rigid application of this principle was found to create undue hardship in some cases, however, Congress created certain exceptions to it. See *Baltimore Contractors, Inc. v. Bodinger*, supra, at 180-181. One of these exceptions, 28 U. S. C. @ 1292 (a)(1), permits appeal as of right from "[interlocutory] orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions" (Emphasis added.) n8

- - - - -Footnotes- - - - -

450 U.S. 79, *83; 101 S. Ct. 993, **996;
1981 U.S. LEXIS 69, ***9; 67 L. Ed. 2d 59

n8 This statutory exception was first established by the Evarts Act of 1891, @ 7, 26 Stat. 828, which authorized interlocutory appeals "where . . . an injunction shall be granted or continued by interlocutory order or decree." In 1895, that Act was amended to extend the right of appeal to orders of the district courts refusing requests for injunctions. 28 Stat. 666. Although the reference to orders refusing injunctions was dropped from the statute in 1900 for reasons not relevant here, 31 Stat. 660, the reference was reinstated in @ 129 of the Judicial Code of 1911, 36 Stat. 1134, and has since remained part of the statute.

- - - - -End Footnotes- - - - -
[***10]

Although the District Court's order declining to enter the proposed consent decree did not in terms "[refuse]" an "[injunction]," it nonetheless had the practical effect of doing so. Cf. General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433 (1932). This is because the proposed decree [*84] would have permanently enjoined respondents from discriminating against black employees at the Richmond Leaf Department, and would have directed changes in seniority and benefit systems, established hiring goals for qualified blacks in certain supervisory positions, and granted job-bidding preferences for seasonal employees. Indeed, prospective relief was at the very core of the disapproved settlement. n9

- - - - -Footnotes- - - - -

n9 Neither the parties nor the Court of Appeals dispute that the predominant effect of the proposed decree would have been injunctive. The parties entitled the major part of the decree, "Injunctive Relief for the Class," and expressly agreed that respondents would be "permanently enjoined from discriminating against black employees at the facilities of the Richmond Leaf Department." App. 26a, 27a (emphasis added). The Court of Appeals, in construing the effect of the District Court's action, similarly characterized the relief contained in the proposed decree as "injunctive." 606 F.2d., at 423.

- - - - -End Footnotes- - - - -
[***11]

For an interlocutory order to be immediately appealable under @ 1292 (a)(1), however, a litigant must show more than that the order has the practical effect of refusing an injunction. Because @ 1292 (a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under @ 1292 (a)(1) will be available only in circumstances where an appeal will further the statutory purpose of "[permitting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors, Inc. v. Bodinger, [*997] supra, at 181. Unless a litigant can show that an interlocutory order of the district court might have a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal, the general congressional policy against piecemeal review will preclude interlocutory appeal.

450 U.S. 79, *84; 101 S. Ct. 993, **997;
1981 U.S. LEXIS 69, ***11; 67 L. Ed. 2d 59

In Switzerland Cheese Assn., Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966), for example, petitioners contended that the District Court's denial of their motion for summary judgment was appealable [***12] under @ 1292 (a)(1) simply because [*85] its practical effect was to deny them the permanent injunction sought in their summary-judgment motion. Although the District Court order seemed to fit within the statutory language of @ 1292 (a)(1), petitioners' contention was rejected because they did not show that the order might cause them irreparable consequences if not immediately reviewed. The motion for summary judgment sought permanent and not preliminary injunctive relief and petitioners did not argue that a denial of summary judgment would cause them irreparable harm pendente lite. Since permanent injunctive relief might have been obtained after trial, n10 the interlocutory order lacked the "serious, perhaps irreparable, consequence" that is a prerequisite to appealability under @ 1292 (a)(1).

- - - - -Footnotes- - - - -

n10 The District Court denied petitioners' motion for summary judgment because it found disputed issues of material fact, not because it disagreed with petitioners' legal arguments. Thus, not only was the court free to grant the requested injunctive relief in full after conducting a trial on the merits, but it was also not precluded from granting a motion for preliminary injunction during the pendency of the litigation if petitioners were to allege that further delay would cause them irreparable harm.

- - - - -End Footnotes- - - - -

[***13]

Similarly, in Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978), petitioner in a Title VII sex discrimination suit sought a permanent injunction against her prospective employer on behalf of herself and her putative class. After the District Court denied petitioner's motion for class certification, petitioner filed an appeal under @ 1292 (a)(1). She contended that since her complaint had requested injunctive relief, the court's order denying class certification had the effect of limiting the breadth of the available relief, and therefore of "[refusing] a substantial portion of the injunctive relief requested in the complaint." 437 U.S., at 480.

As in Switzerland Cheese, petitioner in Gardner had not filed a motion for a preliminary injunction and had not alleged that a denial of her motion would cause irreparable harm. The District Court order thus had "no direct or irreparable impact on the merits of the controversy." 437 U.S., at 482.

[*86] Because the denial of class certification was conditional, Fed. Rule Civ. Proc. 23 (c)(1), and because it could be effectively reviewed on appeal from final judgment, [***14] petitioner could still obtain the full permanent injunctive relief she requested and a delayed review of the District Court order would therefore cause no serious or irreparable harm. As Gardner stated:

"The order denying class certification in this case did not have any such 'irreparable' effect. It could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did

450 U.S. 79, *86; 101 S. Ct. 993, **997;
1981 U.S. LEXIS 69, ***14; 67 L. Ed. 2d 59

not pass on the legal sufficiency of any claims for injunctive relief." 437 U.S., at 480-481 (footnotes omitted). n11

- - - - -Footnotes- - - - -

n11 By contrast, General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932), a case in which respondents sought to appeal the District Court's dismissal of their counterclaim for injunctive relief on jurisdictional grounds, concluded that the District Court's order did have a serious, perhaps irreparable, consequence and that it could not be effectually challenged unless an appeal were immediately taken. The Court noted that the District Court "necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction," id., at 433, and that this decision resolved "the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction." Ibid.

- - - - -End Footnotes- - - - -

[***15]

III

[**998] In the instant case, unless the District Court order denying the motion to enter the consent decree is immediately appealable, petitioners will lose their opportunity to "effectually challenge" an interlocutory order that denies them injunctive relief and that plainly has a "serious, perhaps irreparable, consequence." First, petitioners might lose their opportunity to settle their case on the negotiated terms. As United States v. Armour & Co., 402 U.S. 673, 681 (1971), stated:

"Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves [*87] the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation."

Settlement agreements may thus be predicated on an express or implied condition that the parties would, by their agreement, be able to avoid the costs [*88] and uncertainties of litigation. In this case, that condition of settlement has been radically affected by the District Court. By refusing to enter the proposed consent decree, the District Court effectively ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court. n12 Because a party to a pending settlement might be legally justified in withdrawing its consent to the agreement once trial is held and final judgment entered, n13 [*88] the District Court's order might thus have the "serious, perhaps irreparable, consequence" of denying the parties their right to compromise their dispute on mutually agreeable terms. n14

- - - - -Footnotes- - - - -

450 U.S. 79, *88; 101 S. Ct. 993, **998;
1981 U.S. LEXIS 69, ***16; 67 L. Ed. 2d 59

n12 By refusing to enter the proposed consent decree, the District Court made clear that it would not enter any decree containing remedial relief provisions that did not rest solidly on evidence of discrimination and that were not expressly limited to actual victims of discrimination. 446 F.Supp., at 788-790. In ruling so broadly, the court did more than postpone consideration of the merits of petitioners' injunctive claim. It effectively foreclosed such consideration. Having stated that it could perceive no "vestiges of racial discrimination" on the facts presented, *id.*, at 790, and that even if it could, no relief could be granted to future employees and others who were not "actual victims" of discrimination, *id.*, at 789, the court made clear that nothing short of an admission of discrimination by respondents plus a complete restructuring of the class relief would induce it to approve remedial injunctive provisions. [***17]

n13 Indeed, although there has yet been no trial, respondents are even now claiming a right to withdraw their consent to the settlement agreement. After the Court of Appeals dismissed petitioners' appeal and returned jurisdiction to the District Court, respondents filed a motion for a pretrial conference in which they stated: "In support of this motion the defendants assert that they do not now consent to the entry of the proposed Decree" App. 67a. Neither the District Court nor the Court of Appeals has yet considered whether respondents' statement constitutes a formal motion to withdraw consent or whether such a withdrawal would be legally permissible at this point in the litigation, and we therefore do not decide those issues.

n14 Furthermore, such an order would also undermine one of the policies underlying Title VII. In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims. As explained in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974):

"Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal."

Moreover, postjudgment review of a district court's refusal to enter a proposed consent decree raises additional problems. Not only might review come after the prevailing party has sought to withdraw its consent to the agreement, but even if the parties continued to support their decree, the court of appeals might be placed in the difficult position of having to choose between ordering the agreed-upon relief or affirming the relief granted by the trial court even when such relief rested on different facts or different judgments with respect to the parties' ultimate liability.

In addition, delaying appellate review until after final judgment would adversely affect the court of appeals' ability fairly to evaluate the propriety of the district court's order. Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. See *Protective Comm. for Independent Stockholders v. Anderson*, 390 U.S. 414, 424-425 (1968). They do not decide the merits of the case or resolve unsettled legal questions. Since the likely outcome of a trial is best evaluated in light of

450 U.S. 79, *88; 101 S. Ct. 993, **998;
1981 U.S. LEXIS 69, ***17; 67 L. Ed. 2d 59

the state of facts and perceptions that existed when the proposed consent decree was considered, appellate review would be more effective if held prior to the trial court's factfinding rather than after final judgment when the rights and liabilities of the parties have been established.

- - - - -End Footnotes- - - - -
[***18]

[**999] There is a second "serious, perhaps irreparable, consequence" of the District Court order that justifies our conclusion that the order is immediately appealable under @ 1292 (a)(1). [*89] In seeking entry of the proposed consent decree, petitioners sought an immediate restructuring of respondents' transfer and promotional policies. They asserted in their complaint that they would suffer irreparable injury unless they obtained that injunctive relief at the earliest opportunity. n15 Because petitioners cannot obtain that relief until the proposed consent decree is entered, any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause them serious or irreparable harm. n16

- - - - -Footnotes- - - - -

n15 In the "Relief" section of their complaint, petitioners alleged:

"Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by the policies, practices, customs and usages of the defendants complained of herein until the same are enjoined by this Court. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction and declaratory judgment is their only means of securing adequate relief.

"WHEREFORE, plaintiffs pray that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing, to:

"1. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants and their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing to maintain policies, practices, customs or usages of limiting plaintiffs and members of their class to the lower-paying and less desirable jobs, denying them on-the-job training opportunities, denying them the opportunity to advance to supervisory positions, denying them fringe benefits afforded other employees of the Company, and denying them adequate and effective union representation because of their race and color." App. 9a-10a.

This is essentially the relief that petitioners would have obtained under the proposed consent decree. [***19]

n16 For example, petitioners might be denied specific job opportunities and the training and competitive advantages that would come with those opportunities.

- - - - -End Footnotes- - - - -

450 U.S. 79, *89; 101 S. Ct. 993, **999;
1981 U.S. LEXIS 69, ***19; 67 L. Ed. 2d 59

In sum, in refusing to approve the parties' negotiated consent decree, the District Court denied petitioners the opportunity to compromise their claim and to obtain the injunctive benefits of the settlement agreement they negotiated. [*90] These constitute "serious, perhaps irreparable, consequences" that petitioners can "effectually challenge" only by an immediate appeal. It follows that the order is an order "refusing" an "[injunction]" and is therefore appealable under @ 1292 (a)(1).

Reversed.

Lois Schiffen

State wants an agreement.

LS dispatched to see euros/F.S. come to terms
Also-industry.

where it is
what ends are
who gets it (KPe)

280 m.b.f.

us - 140 - out turn under injure.

euros - 15 " imed.

w/ some other pieces

State-Thinks 50 is a good #

Friday at 5:00 is
the deadline

THE WHITE HOUSE
WASHINGTON

1.

FS atty → timber ind atty.



he has copy of the
E. Torgensen
to Lois



if we move to exped,
he'll oppose
change of medical
conduct.

2.

Ray - Murkowski's aide.

Also - copy of letter.

Can Lois come up here tomorrow?

Lois - 2 wk too long.

not likely to get it.

offer to slice time off

our deadlines

(Discovery deadlines)

problem - ind has same deadlines

THE WHITE HOUSE

WASHINGTON

Stevens/Murkowski will say it
was done in response to improper
conduct.

lots of hearings

KATIE -

THE WHITE HOUSE
WASHINGTON

Nothing peculiar
abt carrying
go forward
pending injecti-

will be perceived as
being influenced by
envisios-

-why want of/ing
pertrayed as just
not keeping its wd.

NOT ft. chances of getting estewin.

1456-1647

THE WHITE HOUSE
WASHINGTON

Peter Koppelman

Horrible
headline - Letters
cool

entered to do

EIS =
F.S. wants to release timber.

inconsistent w/ legislation
were pushing on the Payass?

Telecon - Katie, Dinah, me, Tim Lyons.

Re Targass litigation.

AWRTA - 9th Cir remand to Dist Ct: what should permitting look like?

Brief: move forward to release ^{many} sales!

?? < 1st sp: haven't done full anal (that 9th cir advised - add'l NEPA)
2nd sp?

Koppelman - at least drop
2nd set of sales.

Katie: clash btw this + Congressional position

↳ 2nd sp: override 9th Cir decision.

We're saying this is horrible.

Tim Lyons:

1st sp of sales consistent w/ what enviros ~~are~~ want?

Katie - NO. SCARDEF: there are diff sales - not same as they
agreed to. ↵

This brief is hurtful to our former discussions.

File for extension.

Then - if we release some, it can be a negotiating chip.

Then, find out what
enviros wouldn't object
to + seek to release
those.

← [what if rejected?
how much time?
↳ 2 wks.

For fiscal years 1996 and 1997, the Secretary shall continue the current Tongass Land Management Plan (TLMP) and may accommodate commercial tourism (if an agreement is signed between the Forest Service and the Alaska Visitors' Association) except that during this period, the Secretary shall maintain at least the number of acres of suitable available and suitable scheduled timber lands, and Allowable Sale Quantity as identified in the Preferred Alternative (Alternative P) in the Tongass Land and Resources Management Plan and Final Environmental Impact Statement (dated October 1992) as selected in the Record of Decision Review Draft #3-2/93. Nothing in this section, including the ASQ identified in Alternative P, shall be construed to limit the Secretary's consideration of new information or to prejudice future revision, amendment or modification of TLMP based upon sound, verifiable scientific data.

Provided further, That if the Forest Service determines in a Supplemental Evaluation to an Environmental Impact Statement that no additional analysis under the National Environmental Policy Act or section 810 of the Alaska National Interest Lands Conservation Act is necessary for any timber sale or offering which has been prepared for acceptance by, or award to, a purchaser after December 31, 1988, that has been subsequently determined by the Forest Service to be available for sale or offering to one or more other purchaser, the change of purchasers for whatever reason shall not be considered a significant new circumstance, and the Forest Service may offer or award such timber sale or offering to a different purchaser or offeree, notwithstanding any other provision of law. A determination by the Forest Service pursuant to this proviso shall not be subject to judicial review.

Amendment 108: Modifies Senate provision requiring the implementation of the Tongass Land Management Plan (TLMP), Alternative P by deleting this requirement and replacing it with a requirement that the Tongass Land Management Plan in effect on December 7, 1995 remain in effect through Fiscal Year 1997. During Fiscal years 1996 and 1997, the managers require the Secretary to maintain at least the number of acres of suitable available and suitable scheduled timber lands, and Allowable Sale Quantity as in Alternative P. The Secretary may continue the TLMP revision process, including preparation of the final EIS and Record of Decision, but is not authorized to implement the Record of Decision before October 1, 1997.

The Conference Agreement also includes language which allows a change in the offerors or purchasers of one or more timber sales that have already complied with the National Environmental Protection Act (NEPA) and the Alaska National Interest Lands Conservation Act (ANILCA). This language intends that when the Forest Service determines that additional analysis under NEPA and ANILCA is not necessary, the change of offerors or purchasers for whatever reason (including termination of a long term timber sale contract) shall not be considered a "significant new circumstance" under NEPA or ANILCA and shall not be a reason under other law for the sale or sales not to proceed.

The House had no similar provision.



U.S. Department of Justice

Environment and Natural Resources Division

*Potential
complaint
has a do
w/ this case
Section involved*

A

Office of the Assistant Attorney General

Washington, D.C. 20530

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TO:

Elena Kagan

TELEPHONE NO.:

FAX NO.:

456-1647

FROM:

Lois Schiffer

DATE:

20 december 95

MESSAGE:

per our conversation

*row 79 Tagas
were apt. rider*

*it to go to
with overhanging FT!*

*Divide Bear
202-291-7273
9:45*

*Upd issue
appropriate*

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

Kate?

456-0753

Balancing

Injunction Motion in Alaska Wilderness Recreation And Tourism Association v. Morrison, 9th. Cir. No. 95-35222.

Agency Litigation Position This case arises out of four EIS's which together authorized the great majority of timber harvesting occurring in two out of three of the administrative areas of the Tongass National Forest. The Forest Service had determined that it did not need to prepare supplemental EISS or ANILCA evaluations before offering timber that had been subject to a long-term timber contract to other companies after the long-term contract was terminated. On July 24, 1995, a Ninth Circuit panel consisting of Judges T.G. Nelson, Wright, Browning, reversed the district court's grant of summary judgment for the Forest Service. The court of appeals found that cancellation of the 50-year contract was significant, in that it broadened the range of alternatives available to the agency. Hence, the decision not to reconsider alternatives in new NEPA and ANILCA proceedings was found to be unreasonable. The court remanded to the district court for "a balancing of the equities to determine whether and in what form [an] injunction should continue pending the Forest Service's compliance with NEPA and ANILCA."

In cross-motions on this injunction, Forest Service makes a cursory argument that a decision to issue no injunction is reasonable, because completion of the necessary documents and procedures for compliance with NEPA and ANILCA is expected to take two years. If no timber activity is allowed, there will be an approximately 3-year period during which the injunction will keep the timber at issue in this case unavailable.

Arguing for a limited injunction, our brief notes that Section 101 of the Tongass Timber Reform Act (TTRA), Pub. L. No. 101-626, 104 Stat. 4426, which directs the Forest Service to "seek to meet" annual market demand for timber. The Ninth Circuit stated that the section gave the Forest Service "more flexibility than it had under ANILCA", but nonetheless requires a "balancing of the market, the law, and other uses, including preservation." AWRTA, 67 F.3d at 731. Thus, without a change in law, substantial timber harvest will continue in the central Tongass upon completion of the supplementation process. That being the case, the brief argues that the court should "preserve the option to consider a range of alternatives without causing a drastic disruption of the timber industry and its dependent communities in the central Tongass." Br. at 11.

Timber land and demand on the Tongass is as follows:

- National Forest Land: nearly 17 million acres
- 41% or 7 million acres has been withdrawn for wilderness areas, research natural areas, experimental forests, municipal watersheds, and other areas not available for timber harvest.
- 3.46 million acres of productive forest lands remain available for harvest: 2.56 million acres, comprising only 44% of the total productive lands

and only 25% of the total forested lands in the Tongass.

- KPC's facilities' average annual consumption over the past ten years has been 222 mmbf per year. The current amount of timber under contract to KPC is only 146 mmbf.

- The average annual consumption over the last 10 years for independent mills has been 115 mmbf. Volume currently under contract in the independent sales is only 74 mmbf.

Forest service strives to maintain a healthy timber industry, by seeking to keep a three year supply of timber under contract for both long term and independent contracts. The three year supply allows contractors to respond quickly to changes in market demand in a volatile industry. Second, and perhaps more importantly, the three year supply goal takes into account the fact that timber does not appear immediately at the mills upon contract. There is a time lag between contract and the construction or reconstruction of roads and log transfer facilities. Many harvest units can not be harvested during various times of the year because they are at relatively high elevations where the snow is present longer or because fishery protection measures limit the timing of operations in an area.

Tongass provision of DOI Approps.

The first paragraph of this provision applies to the entire Tongass, requiring the Forest Service to "continue" with Alternative P in a 1991 Tongass Land Management Plan Revision. It now provides that the Forest Service shall continue the current Tongass Land Management Plan in fiscal years 1996 and 1997. The Secretary may act to "accommodate" any agreement with the Alaska Visitor's Association so long as it does not result in a reduction of the acreage of timber land and the allowable sale quantity identified in the 1992 Tongass Forest Plan. The second paragraph of this provision is designed to override the Ninth Circuit's decision in Alaska Wilderness Recreation And Tourism Association v. Morrison.

Though the second paragraph bears directly on this litigation, it is the first paragraph that is the core of the Administration's objection. The President's statement objects that it would "allow harmful clear-cutting, require the sale of timber at unsustainable levels, and dictate the use of an outdated forest plan for the next 2 fiscal years." SCLDF claims that "there is plenty of timber available to supply the industry at normal levels without releasing the injunction." As shown above, we contend that there is less than a year supply. Moreover, the SCLDF letter indicates no opposition to the Forest Service position that timber management should be allowed at "normal levels."



Mount McKinley

Mount Adams

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December 18, 1995

SENT VIA FACSIMILE

Ms. Lois J. Schiffer
Assistant Attorney General
Department of Justice
Environment & Natural Resources Div.
10th Street & Constitution Ave., N.W.
Washington, D.C. 20530

Dear Ms. Schiffer:

Thank you for meeting with me last week in Washington regarding the AWRTA v. Morrison litigation. I am writing to follow up on the litigation deadline we are facing this week and the position the government will take.

This Friday, December 22, the Justice Department is scheduled to file a motion in the district court on behalf of the Forest Service addressing relief. Based on our conversations with the Forest Service's OGC lawyer Bob Maynard, it appears that the Forest Service wants to seek broad relief from the injunction, asking the court to let many if not all of the enjoined sales go forward without complying with NEPA and ANILCA.

This litigation position is completely inconsistent with the White House's strong position against the AWRTA rider in Interior Appropriations. If the government takes this position in its brief on Friday, the Alaska senators will use it as proof of their claim that they are trying to support the Forest Service, directly undercutting the White House's position.

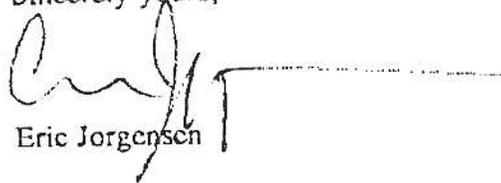
Weakening or vacating the injunction is both unnecessary and at odds with broader goals. As shown in the attached timber supply fact sheet, there is plenty of timber available to supply the industry at normal levels without releasing the injunction. Dumping excessive volume on the market in large sale offerings at this time will only undercut the ongoing attempt to reform management of the Tongass through the TLMP revision.

December 18, 1995
Page 2

I hope that the Justice Department will step in to ensure that the government's position in the litigation this Friday is consistent with White House policy, both with regard to the Interior Appropriations bill and to the broader effort to reform the Tongass.

Thank you again for taking the time to address these issues.

Sincerely yours,



Eric Jorgensen

EJ:ld
attachment

TIMBER SUPPLY STATUS
TONGASS NATIONAL FOREST
Updated December 12, 1995

On December 1, 1995, the Forest Service released a draft Timber Supply and Demand Report for fiscal year 1995. The draft report shows that logging both by independent operators and by Ketchikan Pulp Company increased in FY 1995 over 1994 levels, notwithstanding the injunction in AWRTA v. Morrison. The report also shows stable employment in the timber sector and abundant timber in the "pipeline" to increase logging levels even further in 1996 and beyond.

Independent timber sale purchasers in the Tongass cut 59 million board-feet (mmbf) in FY 1995, up from 48 mmbf in 1994 and 55 mmbf in 1993. Since the passage of the Tongass Timber Reform Act, the average annual cut from independent sales has been 65 mmbf. Thus, the 1995 cut was well within the normal range and on an upward trend.

The "pipeline" for independent sales in 1996 and beyond is well stocked. There are already 46.5 mmbf of uncut timber under contract and available for logging, with an additional 100 mmbf in unenjoined new offerings planned for FY 1996.

Ketchikan Pulp Company cut 147 mmbf under its long-term contract in FY 1995, up from 136 mmbf in 1994. This cut was consistent with the company's average annual cut of 160 mmbf over the last 16 years and 156 mmbf in the five years since the passage of the Tongass Timber Reform Act. Like the independent purchasers, KPC is logging at normal levels and is on an upward trend.

KPC also has abundant timber in the pipeline. KPC currently has 180 mmbf (more than a year's supply) in released, uncut, unenjoined timber ready for logging in FY 1996 and beyond. The Forest Service plans to offer KPC an additional 210 mmbf in FY 1996, more than enough to continue to meet contract volumes.

The draft Timber Supply and Demand Report shows that employment in logging and in pulp mills remained at the same level in FY 1995 as 1994. Employment in sawmills declined as a result of the closure of the APC Wrangell sawmill, which preceded the filing of the AWRTA v. Morrison litigation. Employment in other sawmills remained constant.

The draft Report also discloses that there are 1,277 mmbf of uncut timber for which the NEPA process has been completed. This is over four times the volume logged in FY 1995. A vast amount of additional timber is at various stages of preparation in the NEPA process. The Forest Service has prepared enough timber in the Tongass for many years of logging at current levels.

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8 Attorneys for Federal Defendants

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE DISTRICT OF ALASKA

12 ALASKA WILDERNESS RECREATION)
 AND TOURISM ASSOCIATION, et al.,)

13 Plaintiffs,)

Case No. J94-033-CV (JWS)

14 v.)

15 GARY MORRISON, Forest Super-)
 16 visor Chatham Area, Tongass)
 National Forest; et al.,)

FEDERAL DEFENDANTS'
BRIEF ON THE PROPRIETY
OF INJUNCTIVE RELIEF

17 Defendants)

18 ALASKA FOREST ASSOCIATION,)

19 Intervenor-Defendant.)

20 _____)
 21 The Ninth Circuit has "remand[ed] to the district court
 22 to conduct a balancing of the equities to determine whether the
 23 preliminary injunction now in force should continue pending the
 24 Forest Service's compliance with NEPA and ANILCA, or to fashion
 25 an injunction as it deems appropriate." Alaska Wilderness Rec-
 26 reation & Tourism Ass'n v. Morrison, 67 F.3d 723, 732 (9th Cir.

1 1995) ("AWRTA"). The Ninth Circuit agreed with federal defen-
2 dants position that "[q]uestions as to whether an injunction
3 would be appropriate during the remand, and the scope of any such
4 injunction, raise intensely factual issues, and for that reason
5 should be decided in the first instance by the district court."
6 Id. (emphasis added).

7 Because the remand is for the balancing of the equities
8 and because the factual and statutory background of this case is
9 set out both in the Ninth Circuit's opinion and in prior brief-
10 ing, we will not repeat that background here.

11 In this brief, federal defendants will show that a
12 balancing of the equities in this case could support the denial
13 of any injunction in this case. However, given the practice of
14 this court in issuing partial injunctions in cases such as this,
15 we also propose a narrowly tailored injunction which we believe
16 reasonably reflects the balance of the equities and the public
17 interest.

18 I. THIS COURT IS TO DECIDE THE
19 INJUNCTION IN THE FIRST INSTANCE
20 AND THE BURDEN IS ON THE PLAINTIFFS.

21 A. The propriety of the injunction has not
22 been previously adjudicated

23 The Ninth Circuit, in remanding this case, stated:

24 [W]e agree with the Forest Service that
25 "[q]uestions as to whether an injunction
26 would be appropriate during the remand, and
27 the scope of any such injunction, raise in-
28 tensely factual issues, and for that reason
should be decided in the first instance by
the district court." We therefore extend the
temporary injunction, vacate the district
court's order denying an injunction and re-

1 mand to the district court for a balancing of
2 the equities to determine whether and in what
3 form the injunction should continue pending
4 the Forest Service's compliance with NEPA and
5 ANILCA. On remand, the district court is
6 authorized to amend, vacate or replace the
7 injunction entered by this court as it deter-
8 mines necessary.

9 This court, therefore, has been directed to perform "in the first
10 instance" a balancing of the equities to determine whether and in
11 what form the temporary injunction should be continued as a per-
12 manent injunction. Because the issuance of a permanent injunc-
13 tion, and the balancing of the equities has not been previously
14 adjudicated, this court retains its full equitable discretion.

15 The rules limiting the modification of permanent
16 injunctions to instances where the enjoined party can demonstrate
17 changes in fact or law have no application here since those rules
18 are based upon the principle that parties should not be subjected
19 to the burden of reestablishing what has once been decided. See,
20 System Federation No. 91, Railway Employee's [sic] Dept. AFL-CIO
21 v. Wright, 364 U.S. 642, 647 (1961). The rigorous test for
22 modification of a permanent injunction is not applicable to
23 preliminary injunctions. In re Dore & Associates Contracting,
24 Inc. v. American Druggists Ins. Co., 54 B.R. 353, 360 (Bankr.
25 W.D. Wis. 1985). Where the issue is whether to continue a
26 temporary injunction, the burden of proof is on the party seeking
27 the injunction. Id. at 361.

28 B. The Court Must Take Into Account The Amount,
Of Time Necessary To Comply With NEPA And ANILCA. When the Ninth
Circuit issued and then extended the injunction pending appeal,

1 it performed at most a perfunctory balancing of the equities.
2 Moreover the equities the Ninth Circuit was balancing involved
3 the harm to the plaintiffs against the harm to the timber indus-
4 try and the public from a temporary injunction which was designed
5 to last only during the short period needed to resolve an expe-
6 dited appeal and for this court to act upon remand.

7 This court, on the other hand, must balance the harm to
8 third parties and the public from an injunction starting with the
9 Ninth Circuit's injunction pending appeal and lasting until the
10 completion of the necessary documents and procedures for compli-
11 ance with NEPA and ANILCA. That process is expected to take two
12 years. Declaration of Steven A. Brink (attached hereto). Thus,
13 in balancing the equities, the court must contemplate that there
14 will be an approximately 3-year period during which the injunc-
15 tion will keep the timber at issue in this case unavailable.

16 Consequently, the scope of the Ninth Circuit's injunc-
17 tion provides little guidance on the scope of the proper balanc-
18 ing of the equities in this court. The fact that the Ninth
19 Circuit's injunction was intended to last only a short period of
20 time, suggests that an injunction intended for a longer period
21 should be more narrowly tailored.

22 II. DENIAL OR LIMITATION OF INJUNCTIVE RELIEF IS
23 PARTICULARLY APPROPRIATE IN SITUATIONS IN WHICH A
VIOLATION AFFECTS NUMEROUS PROJECTS.

24 As the Ninth Circuit recognized in AWRTA at 731, even
25 in instances where a court finds a violation of an environmental
26 statute, there is a "fundamental principle that an injunction is

1 an equitable remedy that does not issue as of course." Amoco
2 Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987),
3 citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982).

4 Instead,

5 In each case, a court must balance the com-
6 peting claims of injury and consider the
7 effect on each party of the granting or with-
8 holding of the requested relief.

9 AWRTA at 732. In addition, the court must consider and make
10 specific findings on the record of the public interest. Northern
11 Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1995).

12 The essence of equity jurisdiction is to mold each
13 decree to the necessity of the particular case. Flexibility
14 rather than rigidity has distinguished it. Sierra Club v. Car-
15 gill, 732 F. Supp. 1095, 1102 (D. Colo. 1990), rev'd and remanded
16 on other grounds, 11 F.3d 1545 (10th Cir. 1993), citing Hecht v.
17 Bowles, 321 U.S. 321, 329 (1944). The goal is to arrive at a
18 "'nice adjustment and reconciliation' between the competing
19 claims...." Weinberger v. Romero Barcelo, 456 U.S. at 312 (1982).

20 By its nature, environmental injury can seldom be ade-
21 quately remedied by money damages and is often permanent, or at
22 least of long duration and may be considered irreparable. Amoco
23 Production Co. v. Village of Gambell, 480 U.S. at 542. If such
24 injury is sufficiently likely, then the balance of harm will
25 usually favor the issuance of an injunction. Id.

26 This is not to say that a total injunction of activi-
27 ties is appropriate. The Ninth Circuit has long recognized the
28 existence of circumstances in NEPA cases where "an application of

1 traditional equitable principles may justify denial or limitation
2 of injunctive relief." Cady v. Morton, 527 F.2d 786, 798 n.12
3 (9th Cir. 1975). Accord Enos v. Marsh, 616 F. Supp. 32, 36 (D.
4 Haw. 1984), aff'd, 769 F.2d 1363 (9th Cir. 1985). In balancing
5 the equities, "the environmental concerns of the movants must be
6 weighed against the societal interests which will be adversely
7 affected by the realities of the situation." Warm Springs Dam
8 Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977).

9 Limiting the scope of an injunction is particularly
10 appropriate where the inadequate NEPA document or ANILCA proce-
11 dures support a large number of projects. In Hanlon v. Barton,
12 740 F. Supp. 1446 (D. Alaska 1988), this court found NEPA and
13 ANILCA violations with regard to the Alaska Pulp Corporation
14 (APC) 5-year operating plan. That plan (like the EISs at issue
15 in this case) involved almost all of the timber harvest in the
16 central part of the Tongass. Judge von der Heydt stated that in
17 such cases "it is likely that neither complete suspension of
18 harvesting nor unrestricted continuation of such activity would
19 be appropriate pending the Forest Service's compliance with its
20 obligations under NEPA and ANILCA." Id. at 1459. He suggested
21 that an appropriate injunction should be fashioned "in such a way
22 as to 1) keep APC and the principle southeastern mills in busi-
23 ness; 2) minimize environmental harm pending completion of
24 supplemental environmental studies; and 3) keep as many options
25 open as possible with respect to later road building and har-
26 vests, so that the supplemental studies can consider a broad

1 range of alternatives." Id. See also City of Tenakee Springs v.
2 Courtright, No. J86-024-CV (D. Alaska, Memorandum and Order July
3 31, 1987 at 2-3), copy attached hereto.

4 Judge von der Heydt's approach is consistent with
5 numerous other cases. Thus, in State ex rel Guste v. Lee, 635 F.
6 Supp. 1107, 1127-29 (E.D. La. 1986), the court, after finding
7 NEPA violations in the renewal of shell dredging permits in
8 Louisiana, declined to enjoin such dredging pending compliance
9 with NEPA. The court noted that "continued dredging means con-
10 tinued degradation in the affected areas." Id. at 1127. Against
11 this environmental degradation the court weighed the irreparable
12 damage to the shell dredging industry as well as revenue losses
13 to the state and to secondary and consumer industries.

14 The Companies represent an industry that has
15 been in existence for more than 50 years
16 under the auspices of state law, and which
has major economic impacts upon the state's
economy and other secondary industries.

17 Id. at 1128. The court also reasoned that given the long and
18 ongoing activities of the industry, impacts from the activities
19 which would occur pending compliance with NEPA would not be
20 striking. Id. at 1128.

21 Similarly, in Citizens for Environmental Quality v.
22 United States, 731 F. Supp. 970 (D. Colo. 1989), the court found
23 that the forest plan for the Rio Grande National Forest consid-
24 ered an inadequate range of alternatives, but enjoined timber
25 harvest only to the extent that the plan would allow increases
26 over the current level of harvest.

1 In Sierra Club v. Cargill, the court found environmen-
 2 tal violations, but decided "[c]onsidering the totality of the
 3 circumstances", 732 F. Supp. at 1102, not to issue an injunction
 4 against all harvest. Instead, the court enjoined the Forest
 5 Service from offering new contracts on lands not restockable
 6 within five years, but refused to apply the injunction to exist-
 7 ing contracts.

8 III. THIS CASE DOES NOT INVOLVE AN AGENCY WHICH IS NOT
 9 FULLY INFORMED ABOUT THE IMPACTS OF THE PROPOSED
 ACTIONS

10 This case does not involve the normal case where an
 11 agency has either never prepared an EIS or has prepared a defec-
 12 tive EIS. This case arises out of four EIS's which together
 13 authorized the great majority of timber harvesting occurring in
 14 two out of three of the administrative areas of the Tongass
 15 National Forest. Plaintiffs did not seek judicial review of
 16 those EIS on grounds that the EIS's were inadequate when issued
 17 or that the environmental impacts of the project have changed.
 18 Rather, they claimed that the subsequent termination of the APC
 19 contract required a supplement to the EIS to consider a broader
 20 range of alternatives. The Ninth Circuit agreed, but recognized
 21 that the issue was a close one when it denied attorney fees
 22 because the government's position was substantially justified.

*concludes
 unopposed
 in 1991 later?*

23 An injunction in environmental cases is less likely in
 24 cases, such as here, where the agency is fully informed about the
 25 environmental impacts of the proposed action.

26 Thus, although there may be a technical vio-
 27 lation of procedural requirements, an injunc-

tion will not necessarily issue if the decisionmaker is otherwise fully informed as to the environmental consequences of the proposed action.

Enos v. Marsh, 616 F. Supp. at 37.

IV. THE SUPPLEMENTATION PROCESS WILL OCCUR AGAINST THE BACKDROP OF SECTION 101 OF THE TTRA WHICH DIRECTS THE FOREST SERVICE TO SEEK TO MEET MARKET DEMAND

Even though the Forest Service must and will consider a broader range of alternatives in the supplementation process, it will do so against the backdrop of Section 101 of the Tongass Timber Reform Act (TTRA), Pub. L. No. 101-626, 104 Stat. 4426, which directs the Forest Service to "seek to meet" annual market demand for timber. The Ninth Circuit stated that the section gave the Forest Service "more flexibility than it had under ANILCA", but nonetheless requires a "balancing of the market, the law, and other uses, including preservation." AWRTA, 67 F.3d at 731. Whatever added discretion the Forest Service has by virtue of the termination of the APC contract, it is difficult to see how the Forest Service could choose a no-action alternative or even a drastically reduced alternative and still fulfill the reasonable balancing sought in Section 101 of the TTRA. Given this context, the reality is that substantial timber harvest will continue in the central Tongass upon completion of the supplementation process. That being the case, the goal of the court should be to preserve the option to consider a range of alternatives without causing a drastic disruption of the timber industry and its dependent communities in the central Tongass.

Divide - over the line? How clear

1 The court should also take into account that in seeking
2 to meet market demand, the options of the Forest Service are
3 constrained by the fact that so little of the Tongass is avail-
4 able for timber harvest. Of the total national forest land area
5 (nearly 17 million acres) 41% or 7 million acres has been with-
6 drawn for wilderness areas, research natural areas, experimental
7 forests, municipal watersheds, and other areas not available for
8 timber harvest. TLMP SDEIS 3-341 and 343 (SR 550, 552 ^{1/}).
9 Prior to the passage of the TTRA, 28% of the forest land base
10 capable of growing commercial wood products was withdrawn from
11 timber production. Id. at 341 (SR 550). Congress with the TTRA
12 added and additional 12% (over 1.3 million acres) to the area
13 withdrawn from timber production. Id. at 342 (SR 551). Approxi-
14 mately 3.46 million acres of productive forest lands remain
15 available for harvest: 2.56 million acres, comprising only 44%
16 of the total productive lands and only 25% of the total forested
17 lands in the Tongass. Id. at 342 (SR 551).

18 V. SUGGESTED PRIORITY OF PARTIAL RELIEF.

19 The Ninth Circuit authorized this court to vacate the
20 temporary injunction in its entirety and we shall show below that
21 a weighing of the equities does not justify the issuance of any
22 injunction in this case. We are, nonetheless, mindful of Judge
23

24 ^{1/} The designation SR refers to the consecutive pagination of the
25 short record filed by the parties during the merits portion of
26 this case. The short record materials are for the most part
27 taken from the administrative record, but also include non-record
28 declarations submitted by the parties to assist the court in
balancing the equities.

1 von der Heydt's admonition that neither a total injunction nor
2 the total denial of an injunction is likely to be appropriate in
3 cases such as these.

4 We are also mindful of Judge von der Heydt's admonition
5 that it is difficult for the court to tailor the precise terms of
6 an injunction in cases like this. Should the court believe that
7 a partial injunction is appropriate in this case, we have devel-
8 oped a suggested partial injunction which represents a careful
9 weighing of the equities and the public interest and establishes
10 a priority for the release of sales in accordance with principles
11 which we believe further the goals of NEPA and ANILCA while
12 limiting harm to the public interest. This suggested priority is
13 based upon the following principles:

14 1. In areas where timber harvest and road con-
15 struction have already occurred, additional harvest
16 represented by the enjoined projects would have rela-
17 tively minor, incremental impacts. Conversely, in
18 areas where no previous roading or harvesting have
19 occurred, the changes wrought by harvest are more dra-
20 matic.

21 2. If a disruption of the timber industry and depen-
22 dent communities of the central Tongass is to be avoided, it
23 makes sense to release for harvest those sales and offerings
24 which are fully prepared for harvest. Consequently, sales
25 which have already been awarded or offerings already made
26 are the best candidates for release from the temporary

1 injunction. Next in line would be offerings or sales which
2 have already been laid out. Sales and offerings which have
3 not been laid out are less suited to filling the immediate
4 need for timber. Conversely, if the Forest Service ulti-
5 mately wished to reduce the harvest level by deferring
6 certain sales or offerings within the project area, it would
7 be easier to defer sales or offerings for which layout costs
8 have not yet been incurred. Finally, in some areas two
9 sales or offerings are planned. Where the second sale or
10 offering would extend the roads of the first, the second
11 sale generally cannot go forward until the first is largely
12 complete.

13 Applying these principles results in a designation of
14 the following sales and offerings as having priority for release
15 from the temporary injunction:

- 16 1. Saginaw (N. & E. Kuiu) 24mmbf (laid out, indepen-
17 dent contract already awarded)
- 18 2. Saook Bay I (Kelp Bay) 29.8mmbf (laid out, indepen-
19 dent contract already awarded)
- 20 3. Hanus ATC (Kelp Bay) 15.5mmbf (laid out, intended
21 for independent sale)
- 22 4. Neka-Humpback (89 SEIS) 33.3mmbf (laid out, intend-
23 ed for independent sale)
- 24 5. Crab Bay I (S.E. Chichagof) 31mmbf (laid out,
25 offered to and accepted by KPC)

1 6. Inbetween (S.E. Chichagof) 9.9mmbf (laid out,
2 offered to and accepted by KPC).

3 If the court concludes that a balancing of the equities
4 favors releasing additional volume, we recommend that additional
5 harvest be released in the order of priority set forth in the
6 Declaration of Steven Brink. The sales and offerings in this
7 lower tier of priority are:

8 1. East Kuiu^{2/} (N&E Kuiu) 58mmbf (not previously
9 roaded, but fully laid out, has been the subject of three EISs
10 already and is in an area with minimal subsistence use.)

11 2. Broad Creek^{3/} (S.E. Chichagof) 19mmbf (not previ-
12 ously roaded or harvested, but laid out and advertised)

13 3. Rowan I (N. & E. Kuiu) 20mmbf(not laid out)

14 4. Rowan II (N. & E. Kuiu) 22mmbf (not laid out)

15 5. Saook Bay II (Kelp Bay) 8mmbf (not laid out)

16 6. Crab Bay II (S.E. Chichagof) 3.5mmbf (not laid out)

17
18
19 ^{2/} Although the East Kuiu offering does not meet the first of
20 our criteria for high priority for release in that it is not in a
21 roaded area, the court should be aware of a number of factors
22 which could cause the court to allow East Kuiu to go foward or to
23 substitute East Kuiu for the Crab Bay and Inbetween offerings.
24 The East Kuiu offering has already been considered in four EISs -
- the 81-86 APC 5 year operating plan EIS, the 86-89 APC operat-
ing plan EIS, the 89 SEIS and the N&E Kuiu EIS. Declaration of
Steven Brink. Congress in the TTRA considered but rejected a
proposal to place East Kuiu into wilderness or LUD II status.
Id. As set forth in the discussion of the Saginaw Bay sale
infra, subsistence use of this area is de minimus.

25 ^{3/} Congress considered but rejected designating the VCU's in this
26 sale and the Crab Creek II sale for designation as wilderness or
LUD II when it enacted the TTRA. Declaration of Steven Brink.

1 7. Gallagher (89 SEIS) 8mmbf (not laid out, access
2 problems

3 If the court were to allow the higher priority sales
4 and offerings to go forward and enjoin the lower priority sales
5 and offerings, the injunction would attach to 138mmbf while 143
6 mmbf would go forward. Declaration of Steven Brink. Thus the
7 injunction would continue on 49% of the volume currently en-
8 joined. For a point of comparison we note that in the Hanlon
9 case Judge von der Heydt approved the settlement of the parties
10 which provided that 320 mmbf out of 549 mmbf could go forward
11 pending compliance with NEPA and ANILCA. 89 SEIS at iii.

12 To ease the court's consideration of the details of the
13 specific sales and offerings, federal defendants have attached
14 maps taken from the Record of Decision (ROD) of each of the EISs
15 at issue in this case.^{4/} As each individual sale or offering
16 constitutes only a portion of the acreage cleared by an EIS, we
17 have circled the individual sale and offering areas. The maps
18 show not only the location of proposed harvest units and roads,
19 but also the location of previous harvest and roading. The maps
20 also include elevation lines and other features.

21 Under the Tongass Land Management Plan (TIMP) the
22 Tongass has been divided into small units called value comparison
23 units or VCUs which generally coincide with a small watershed.
24 CITE The VCUs are clearly indicated on the maps and the text of

25 _____
26 ^{4/} The map of the 89 SEIS area is exhibit 17. SE Chichagof is
27 exhibit 22. Kelp Bay is exhibit 28 and N&E Kuiu is exhibit 33.
28 All are attached hereto.

1 this brief frequently refers to VCU numbers when referring to the
2 location of a sale or offering.

3 This brief will also refer to wildlife analysis areas
4 (WAA). These are the units for which the State of Alaska main-
5 tains hunting records. In general WAAs would include several
6 VCUs. A map of the WAAs or a chart indicating which of the VCUs
7 are located in which WAA may be found at SE Chichagof EIS 3-39,
8 at Kelp Bay EIS 3-26, and for N&E Kuiu EIS at vol. II App. B-1.

9 We have also attached the Declaration of Steven Brink
10 which contains additional detail relating to individual sales and
11 offerings as well as the current state of timber harvest in the
12 Tongass. With these clarifications we pass to the analysis of
13 the balancing of the equities in this case.

14 VI. PLAINTIFFS WILL NOT SUFFER ANY
15 SERIOUS HARM IF AN INJUNCTION IS DENIED.

16 A. Timber Harvest Per Se Does Not Constitute
17 Irreparable Harm. Before the Ninth Circuit, plaintiffs suggested
18 generally that all of the logging approved by the Forest Service
19 causes irreparable harm because this logging will convert old-
20 growth stands to second-growth timber. Plnts' Memo in Support of
21 Mot for Inj. Pending Appeal at 34. Accepting the argument that
22 timber harvest per se constitutes irreparable harm contravenes
23 both the clear intent of Congress and established case law.

24 In the TTRA, Congress expressed its intention that the
25 Forest Service continue to manage the Tongass National Forest to
26 provide timber. Section 101 directs the Forest Service to "seek
27 to provide a supply of timber from the Tongass National Forest

1 | which meets the annual market demand for timber." Congress is
2 | presumably aware that there is virtually no harvestable timber in
3 | the Tongass National Forest that is not old-growth. We recognize
4 | that the Ninth Circuit held that Section 101 "clearly gives the
5 | Forest Service more flexibility than it had under ANILCA, when it
6 | was required to harvest a minimum number of board feet. TTRA
7 | envisions not an inflexible harvest level, but a balancing of the
8 | market, the law, and other uses including preservation." AWRTA
9 | 67 F.3d at 731. This balancing, however, does not detract from
10 | the fact that market demand for timber is something the agency
11 | should seek to meet rather than something which per se consti-
12 | tutes irreparable harm.

13 | The case law is to the same effect. The courts have
14 | required plaintiffs to demonstrate not only an alteration of the
15 | environment but also specifically how and where that alteration
16 | irreparably harms the plaintiffs. Thus, in Essex County Preser-
17 | vation v. Campell, 399 F. Supp. 208, 218-19 (D. Mass. 1975),
18 | aff'd 536 F.2d 956 (1st Cir. 1976), the court recognized that
19 | construction of a highway would involve the cutting of trees and
20 | the paving over of natural areas, but refused to find irreparable
21 | harm without a showing of precisely where and how such cutting
22 | and paving affected plaintiffs' interests.

23 | Similarly, Judge von der Heydt consistently required a
24 | detailed showing of the impacts of harvest in specific areas on
25 | plaintiffs. Hanlon v. Barton, 740 F. Supp. at 1458-59; Tenakee
26 |
27 |

1 Springs v. Courtright, No. J86-024-CV (D. Alaska, Memorandum and
2 Order of July 31, 1987), copy attached hereto.

3 B. The Proposed Harvest Will Not Have A Serious
4 Impact Upon Plaintiffs' Tourism And Recreational Interests. The
5 plain fact of the matter is that none of the projects which
6 federal defendants propose to have go forward in the list of high
7 priority sales and offerings during the supplementation period
8 consists of unentered wilderness. Examination of the maps in
9 Exh. 18, 22, 28 and 33 reveals that other than the East Kuiu and
10 Broad Creek areas (which we have given a lower priority) all of
11 the sales and offerings are in VCU's which have experienced
12 previous harvest and have a preexisting road system.^{5/} These
13 projects, therefore, build upon the existing infrastructure and
14 the altered nature of the VCU involved.

15 To the extent that the clients of the plaintiffs
16 representing tourism interests prefer to avoid areas from which
17 harvest units are visible, they are presumably already avoiding
18 the project areas where harvest and roading have already oc-
19 curred.

20 A number of the plaintiffs representing tourist inter-
21 ests concede that they are using areas which have been previously
22 harvested, but allege that they will avoid such areas while

23 _____
24 ^{5/} The Crab Bay II offering could also possibly be considered to
25 fit into this category. It is located on an extension of the
26 Crab Bay I road system but would involve harvest in an adjacent
27 VCU. See Exh. 22. The Crab Bay II offering is given low priori-
28 ty on our list because it cannot go forward until after the Crab
29 Bay I offering.

1 timber activities are ongoing because of noise and logger activi-
2 ty. However, the noise and other activities are temporary and
3 will cease with the completion of the sale. They therefore
4 cannot constitute irreparable harm. Churchwell v. Robertson, 748
5 F. Supp. 768 (D. Idaho 1990) (noise discomfort did not constitute
6 irreparable harm). Incremental continued harvest, therefore,
7 does not constitute irreparable injury to plaintiffs' tourism
8 interests.

9 Even in the two areas which have not had previous
10 harvest and roading, it is difficult to see how plaintiffs could
11 be seriously harmed. Some of the units on East Kuiu would be
12 visible from the salt water, but there are numerous extensive
13 areas on Kuiu Island which will remain in land use designations
14 which preclude timber harvest. Such areas include the Kuiu
15 Wilderness, Tebenkof Bay Wilderness, and the Bay of Pillars and
16 Rocky Pass LUD II areas not to mention nearby Admiralty Island
17 National Monument Wilderness. See Exh. 33. Quite obviously,
18 ample opportunities for wilderness recreation will remain on Kuiu
19 Island. The Broad Creek most units are located quite far inland.

20 C. The Proposed Injunction Will Not Irreparably Harm
21 Plaintiffs' Subsistence Interests. Some of the plaintiffs allege
22 that timber harvest will impair their subsistence interests. Yet
23 their assertions fall far short of the showing required for the
24 broad injunction they seek. The record establishes that there is
25 no significant possibility of a significant restriction for these
26 projects with respect to brown bear, furbearers, marine mammals,

1 waterfowl, salmon, other finfish, shellfish or other foods such
2 as berries and roots. SR 58, 83 and 118. The significant
3 possibility of significant deer restrictions is present even
4 under the no-action alternative for all three projects. Id. ^{5/}

5 The possibility of a significant restriction on deer
6 arises in two manners. First, for a large portion of the re-
7 growth period, second-growth forest has a lower deer habitat
8 capability than old-growth forest. This lower habitat capability
9 results in part from increased winter snow accumulation due to
10 removal of the old growth canopy and other factors, limiting food
11 and mobility in the winter. See N&E Kuiu EIS 3-186.

12 Reduction in deer habitat capability constitute no
13 serious irreparable harm to plaintiffs. Although the four EIS's
14 all found a significant possibility of a significant restriction
15 on subsistence deer hunting, that possibility was based upon
16 past, present and reasonably foreseeable harvests. Indeed, each
17 of the EIS's concluded that there was a significant possibility
18 of a significant restriction on subsistence deer hunting even if
19 the no-action alternative were chosen. The discrete contribution
20 of the projects supported by the EIS's to that possibility of a
21 significant restriction is minor. The decrease in deer habitat
22 capability in the project area from all the harvest which has
23 already occurred pursuant to the EIS plus all of the harvest left
24 to occur is only 2% for N&E Kuiu and SE Chichagof, and 5% for

25 _____
26 ^{5/} The 89 SEIS found a possibility of a restriction on brown
27 bear and marten, 89 SEIS 4-87, but no plaintiff has alleged a
28 subsistence use of brown bear or marten.

1 Kelp Bay and the 89 SEIS Analysis Area 2. Declaration of Steven
2 Brink. As federal defendants propose going forward with half of
3 the sales and offerings, the impact on deer habitat capability
4 would presumably be much less.

5 The second manner in which timber harvest can present
6 the possibility of a significant restriction on subsistence deer
7 take is when the development of the logging road system results
8 in increased participation in the deer hunt by non-Alaska or
9 Alaska urban hunters. This competition from non-rural hunters is
10 not the inevitable consequence of timber harvest. Existence of
11 roads cannot be expected to lead to competition from non-rural
12 hunters unless there is a ready means to access that road system-
13 i.e., a state car ferry stop on that road system. Declaration
14 of Steven Brink.

15 Other than the logging camp on Rowan Bay, there are no
16 settlements or ferry stops on Kuiu Island. Declaration of Steven
17 Brink. The only car ferry stop on Chichagof Island is Hoonah.
18 Id. However, none of the roads for the projects which federal
19 defendants propose allowing to go forward do not connect to the
20 Hoonah road system. Id. Consequently, competition is not a
21 concern in these projects. Id.

22 D. Specific Advantages Of Allowing Harvest To Go
23 Forward In Areas Proposed By Federal Defendants. In addition to
24 complying with the two primary criteria enunciated above for dis-
25 tinguishing between projects to go forward and those to be
26

1 enjoined, the ones we propose to have go forward display the
2 following advantages:

3 Neka-Humpback - The only two remaining projected sales
4 for the '89 SEIS are the Neka-Humpback and Gallagher sales. The
5 Gallagher sale has not been scheduled because the Forest Service
6 has been unable to negotiate a right-of-way for required access
7 over land owned by Sealaska Regional Corporation. Declaration of
8 Steven A. Brink.

9 Consequently, Neka-Humpback may represent the final
10 33mmbf (1073 acres) of the timber harvest authorized by the '89
11 SEIS. CITE. It does not appear practical to divide the project
12 into smaller sales because of sizable road construction mileage,
13 cost and difficult stream crossing installation. Declaration of
14 Steven Brink. There is an existing temporary log transfer
15 facility (LTF). Id. Road construction from the LTF to the
16 boundary of the Neka-Humpback area was completed by APC in 1993.
17 Id.

18 Under these circumstances, it is clear that the '89
19 SEIS as a whole and preparations for the Neka-Humpback sale in
20 particular have progressed to such a point that little would be
21 gained by preparation of a supplemental EIS. Allowing Neka-
22 Humpback to go forward could reduce the number of supplements
23 from four to three, allowing the Forest Service to focus efforts
24 on the other three EISs in issue. Each EIS supplement is costly
25 and takes personnel away from other ongoing NEPA work for other
26 projects. Declaration of Steven Brink.

27
28 FEDERAL DEFENDANTS' BRIEF ON
THE PROPRIETY OF INJUNCTIVE RELIEF

1 Against these advantages is an absolute absence of harm
2 to plaintiffs. No affiant in the prior proceedings in this case
3 alleged use of Neka-Humpback for subsistence purposes. This is
4 not surprising. As can be seen on the 89 SEIS map in Exhibit 33
5 to the Declaration of Steven Brink, the project is located
6 relatively far inland and is not connected by road to any settle-
7 ment. Consequently, use of that area either by subsistence users
8 or non-rural competitors is not an issue. Likewise, the decla-
9 rants in prior proceedings in this case did not allege use of the
10 Neka-Humpback for tourism purposes. Because the sale is rela-
11 tively far inland and in an area which has already been entered
12 and because harvested land owned by Sealaska Corp. lies between
13 Neka Humpback and Hoonah, tourism potential is low. Two decla-
14 rants stated that they used the Neka Bay area for recreation, but
15 did not allege that they had ever been to the Neka-Humpback area,
16 though they expressed an interest in hiking to it in the future.
17 Declaration of Ben McLuckie and Stephanie Harold, SR 1648-49.

18 Another declarant in the prior proceedings argued that
19 the Neka-Humpback sale should not go forward. Declaration of
20 Bruce Baker, S.R. 248. Mr. Baker suggests that the Neka-Humpback
21 area should be preserved as a refugia for brown bear because
22 allegedly there are "no remaining unlogged watersheds on North-
23 east Chichagof." In this he is mistaken. Examination of the 89
24 SEIS map (Exh. 18) indicates that VCU's 196, 195, 194, 193, 192
25 and 191 all remain unroaded. In addition, no declarant alleged
26 subsistence or tourism use of brown bear in this area.

1 Saginaw Bay - This sale is for 24.041mmbf on 1100
2 acres in 18 units. Declaration of Steven A. Brink. It is
3 located in VCU's 399, 400, 402 and 421. Id. These four VCU's
4 have had 17,934 acres of previous harvest and there are 147 miles
5 of existing roads. Id. Even upon completion of this sale, above
6 80% of the commercial forest land in these VCU's will remain
7 unharvested. Id.

8 Completion of this project will have no or minor
9 impacts on plaintiffs' subsistence or tourism interests. Deer
10 hunting on Kuiu Island was prohibited from 1975 until 1993
11 because of low deer population. CITE. The low deer population
12 on Kuiu Island is not the result of insufficient deer habitat
13 capability, but rather by a population crash in the early 70's
14 occasioned by unusually severe winters and a very slow recovery
15 because of wolf depredation. CITE.^{2/}

16 Although a number of the plaintiff affiants from Kake
17 indicated a strong desire to resume deer hunting on Kuiu Island,
18 State of Alaska records of deer hunting on Kuiu Island since the
19 reopening in 1993 do not bear such claims out. The Saginaw Bay
20 sale is located in WAA 5012. See NE Kuiu EIS vol. II App. B-1.
21 In the 1993-94 season, State records show only six deer taken in
22

23 ^{2/} Plaintiffs suggest that since the closure occurred while
24 timber harvest was going on on Kuiu Island that the closure was
25 caused by the harvest. I moment's reflection reveals the flaw in
26 the argument. The entire island had to be closed to hunting
27 because of the deer population crash due to the severe winters.
28 If the crash were caused by the logging it would have been
limited to the small part of the island were logging was occur-
ring.

1 that WAA, all of them by residents of Rowan Bay. CITE In 1994-
2 95 season, seventeen hunters hunted the WAA and took twenty-two
3 deer. CITE. Of those hunters, two were from outside Alaska,
4 eight were from Rowan Bay, and seven from Sitka. CITE. In the
5 adjoining WAA 5013, which encompasses the Port Camden area, no
6 deer were taken in 1993-94 or 1994-95. CITE. Further east in
7 the Rocky Pass/3-Mile WMA 5018, three deer were taken in 1993-94-
8 -all by Rowen bay residents; two were taken in 1994-95--both by
9 Point Baker residents. CITE In WAA 5014, encompassing the East
10 Kuiu offering only two deer were taken in 1993-94 and none in
11 1994-95. Only residents of Point Baker and Port Protection
12 attempted to hunt in the East Kuiu area. CITE.

13 If we look to the plaintiff affiants from Kake who
14 alleged close ancestral ties to Kuiu Island, we find a glaring
15 absence of references to deer hunting a Saginaw Bay. Henrich
16 Kadake, S.R. pages 200-205, alleged that prior to the closure of
17 Kuiu Island to deer hunting in the 1970's he hunted deer from
18 Kadake Bay to No Name Bay. That area is significantly to the
19 east of Saginaw Bay. In fact he states that many Kake residents
20 have not returned to Kuiu Island to hunt deer since hunting was
21 reopened.

22 Ken Jackson (SR 206-209) mentions Saginaw Bay only in
23 relation to extracting the juice of the red cedar near Dean's
24 Creek many year's ago. Finally, Edna Jackson (SR 210-13 and SR
25 1505-06) does not allege that she hunted deer in Saginaw Bay.
26 Rather, she used the Bay for marine resources. The FEIS for N&E

1 Kuiu found that the effects of the entire N&E Kuiu project would
2 be negligible on salmon and shellfish. N&E Kuiu FEIS 3-115
3 through 115.

4 The declarations included with plaintiffs' reply brief
5 in the prior proceedings likewise allege that the declarant of a
6 relative of the declarant had hunted deer somewhere on Kuiu
7 Island prior to the closing of the Island to hunting in the
8 1970's. Declarations of Michael Jackson, SR 1503-04 and Frank
9 Gordon, SR 1507-08.

10 In sum, plaintiffs cannot show that allowing the
11 Saginaw Bay sale will have any substantial impact on plaintiffs'
12 subsistence interests. Indeed, it is difficult to see how an
13 injunction anywhere on Kuiu Island could be justified on grounds
14 of irreparable harm to plaintiffs' subsistence interests.

15
16 Given the harvest and roading which have already
17 occurred in the Saginaw Bay sale area VCU's, the additional
18 harvest units will not alter the present conditions in any way
19 relevant to those seeking wilderness recreation.

20 The only plaintiff declarant alleging current tourism
21 use of Saginaw Bay is Michael McIntosh of West Palm Beach,
22 Florida. SR 189-193. The trips he describes, however, take in
23 much of the central Tongass including many already logged areas.
24 With regard to Saginaw Bay he states that "[t]he boats also
25 frequent Saginaw Bay at the northern tip of Kuiu Island. There,
26 the crew will often load guests into smaller skiffs at dusk and

1 take them close to shore where they turn off the outboards and
2 float quietly, watching for bears and other wildlife in the
3 nearshore areas." SR 191 ¶6. Since this part of Kuiu Island has
4 witnessed extensive logging and has an existing log transfer
5 facility, it is evident that logging activities are not incompat-
6 ible with Mr. McIntosh's activities. Indeed, if one examines the
7 N&E Kuiu map (Exh. 33) it is immediately clear that all but one
8 clear-cut harvest unit is more than a mile from salt water and
9 most of the units are five miles to over ten miles from Saginaw
10 Bay.

11 The Saginaw Sale also has three helicopter non-evenaged
12 management areas (unit 19). See Exh. 33. Since plaintiffs have
13 urged the broader use of this technique, they can hardly claim
14 irreparable harm from its use.

15 Saook Bay I - This sale of almost 30mmbf (834 acres) is
16 one of
17 two projects scheduled for the Saook Bay area on Baranof Island
18 in VCU 294 on the south side of Peril Strait. The sale does not
19 present any possible irreparable harm to subsistence. Although
20 deer habitat capability will decline about 5% in the EIS project
21 area, sufficient deer habitat capability will remain in the WAA
22 to meet subsistence uses in the foreseeable future. Declaration
23 of Steven A. Brink. There are no ferry connections, so increased
24 competition from non-rural hunters is not an issue. Id. No
25 declarant in prior proceedings alleged use of the area for deer
26 hunting.

1 Almost 700 acres have already been harvested (Declara-
2 tion of Steven A. Brink) in the area and a short road system
3 already exists. Consequently, additional harvest will not cause
4 a dramatic decrease in the tourism potential of the area.
5 Indeed, an examination of the declarations of Robert Ellis and
6 Michael McIntosh indicate use of the bay for anchorage and of
7 beach, grassland and adjacent woods. An examination of the SE
8 Chichagof map (Exh. 22) confirms that while harvest has already
9 occurred in nearshore areas in the past, the Saook I sale units
10 are well inland.

11 Although it is not practical to divide the Saook Bay I
12 area into smaller sales (Declaration of Steven A. Brink), the
13 Kelp Bay EIS includes two sales in the Saook Bay area. By per-
14 mitting Saook Bay I, but not Saook Bay II to go forward pending
15 compliance with NEPA and ANILCA, the court will preserve the
16 agency's ability to consider a range of intensity of harvest in
17 the Saook Bay area.

18 The Saook Bay I sale was advertised and awarded to
19 Silver Bay Logging, a small business. In fashioning an injunc-
20 tion where an environmental violation affects numerous projects,
21 it is permissible to distinguish between projects based upon
22 whether contractual rights have attached. Sierra Club v. Car-
23 gill, 732 F. Supp at 1102.

24 Hanus ATC - This sale of 15.5mmbf (669 acres) is locat
25 ed on North Baranof Island near Catherine Island in VCU's 296 and
26 297. Declaration of Steven A. Brink. Over 2200 acres have al-

1 ready been harvested in the area and APC had already harvested
2 over 19mmbf of this project prior to the termination of the APC
3 contract. Id. There are already 6.5 miles of usable road in the
4 sale area. Id.

5 The WMA's in the sale area will continue to have suffi-
6 cient deer habitat capability to meet subsistence uses for the
7 foreseeable future even after completion of the sale. Id. As
8 there are no ferry connections, increased competition by non-
9 rural hunters is not an issue. Id. By virtue of the existing
10 harvest and roads, there will be no dramatic change from existing
11 conditions which would harm plaintiffs tourism interests. The
12 LTF is already in place. Id.

13 The ATC in this sale stands for "alternatives to clear-
14 cutting". The sale includes eight experimental harvest units
15 (out of 11) to study alternatives to clearcutting. Id. As plain-
16 tiffs have urged the Forest Service to adopt alternatives to
17 clearcutting allowing this sale to proceed would serve plain-
18 tiffs' interest. The sale could be divided into two sales, but
19 to do so would jeopardize the opportunity to complete the experi-
20 ment on alternatives to clear-cutting.

21 Crab Bay I

22 This project is located in Tenakee Inlet in VCUs 231,
23 232, 233 and 234. It is completely laid out and has been offered
24 to and accepted by KPC. Declaration of Steven Brink. The offer-
25 ing consists of 31 mmbf from 1159 acres. Declaration of Steven
26 Brink. Approximately 1,452 acres have already been harvested in
27

1 the area and the project includes the reconstruction of 11.2
2 miles of road from the previous entry. Id. The offering is one
3 of two offerings scheduled in the Crab Bay area. Consequently,
4 allowing Crab Bay I, but not Crab Bay II to go forward will
5 maintain the agency's ability to consider a less intensive
6 harvest alternative in the Crab Bay area. The area is not
7 accessible by ferry and therefore increased competition by non-
8 rural hunters is not an issue.

9 Inbetween

10 This offering for 10 mmbf from 453 acres is located in
11 VCU 230 in the Tenakee Inlet Management Area to the west of the
12 Crab Bay I offering. Declaration of Steven Brink. It was
13 offered to and accepted by KPC in 1994. Id. Of the 4268 acres
14 of suitable timber land in the VCU, 295 acres have already been
15 harvested. Id. The area is not accessible by car ferry so
16 increased competition by non-rural hunters is not an issue. Id.
17 It is not practical to divide the offering into smaller sales.
18 Id.

19 Declarants make three basic allegations regarding the
20 Crab Bay I and Inbetween offerings. A number of declarants
21 allege that their fishing or crabbing will be irreparably harmed.
22 The SE Chichagof EIS found that the impacts upon salmon from the
23 project would be insignificant. SE Chichagof EIS 4-146. As to
24 crab and other shellfish the EIS stated:

25 The marine Environment and Log transfer fa-
26 cilities section of Chapter 4 indicates that
27 less than 1 percent of the marine and estuar-
ine habitat in the project area would be

1 affected by the construction of LTFs under
2 any of the alternatives. Anticipated reuse
3 of the LTF in Crab Bay would affect an esti-
4 mated 0.5 acres of the total 129 acres in
5 Crab Bay. . . . The project's effects for the
6 foreseeable future would be insignificant.

7 Id.

8 Other declarants state that they use the area (WAA
9 3629) for subsistence deer hunting. Even after all the SE
10 Chichagof EIS harvest is complete, WAA 3629 will still have
11 sufficient deer habitat capability to meet subsistence demand.
12 SE Chichagof EIS 4-126. One declarant (John Symons SR 231)
13 alleged that the vistas from his retirement home in Tenakee
14 Springs are already marred by clear cuts. From an examination of
15 the SE Chichagof map (Exh. 22), and its elevation lines, it is
16 difficult to see how the harvest units in these two offerings
17 could be visible from Tenakee Springs which is located across the
18 Inlet northeast of the mouth of the Kadashan River.

19 It should be noted that among the projects covered by
20 the four EISS, only four offerings are intended for KPC -- Crab
21 Bay I and Inbetween which we propose to have go foward and Crab
22 Bay II and East Kuiu which we have given lower priority. Crab
23 Bay I and Inbetween total only 41 mmbf while East Kuiu and Crab
24 Bay II total approximately 61 mmbf. If the court determines that
25 Crab Bay I and Inbetween should not go foward, the court should
26 then give greater consideration to East Kuiu going foward.

27 VII. THE PUBLIC INTEREST WOULD BE HARMED BY
28 THE CONTINUATION OF THE TOTAL INJUNCTION.

1 A. The Public Interest Is Not Limited To The
2 Policies Underlying NEPA and ANILCA. There is a temptation to
3 equate the strict compliance with an environmental statute with
4 "the" public interest or at least a public interest which trumps
5 all others. The Supreme Court clearly rejected such a narrow
6 view in Amoco Production Co. v. Village of Gambell, 480 U.S. at
7 545, (production of subsistence is a public interest but does not
8 supersede other public interests). The Supreme Court upheld this
9 court's decision in that case that the public interest in oil and
10 gas exploration expressed in the Outer Continental Shelf Lands
11 Act (OCSLA), 43 U.S.C. §1331 et seq., militated against issuance
12 of an injunction even if Section 810 of ANILCA had been violated.
13 Both this court and the Supreme Court took into account that the
14 oil company intervenors had committed large sums of money to
15 exploration which would have been lost without the chance of
16 recovery had exploration been enjoined. Id.

17 In this case, Congress has designated a healthy timber
18 industry in the Tongass to be a public interest when it directed
19 the Forest Service in Section 101 of the TTRA to seek to meet
20 market demand for Tongass timber. True, that public interest is
21 subject to other applicable law and multiple use and sustained
22 yield considerations, but OCSLA is similarly "subject to environ-
23 mental safeguards ... and other national needs." 43 U.S.C. §
24 1332(3). Just as the Supreme Court held that OCSLA expresses a
25 public interest in oil and gas exploration and development of the
26 outer continental shelf (OCS), so Section 101 of the TTRA expres-

1 ses a public interest in meeting market demand for Tongass
2 timber.

3 More recently, Congress made an attempt in section 503
4 of the Rescission Act to remove legal obstacles to implementation
5 of the various projects at issue in this suit. That section
6 provides:

7 Sec. 503. (a) As provided in subsection (b),
8 an environmental impact statement prepared
9 pursuant to the National Environmental Policy
10 Act or a subsistence evaluation prepared pur-
11 suant to the Alaska National Interest Lands
Conservation Act for a timber sale or offer-
ing to one party shall be deemed sufficient
if the Forest Service sells the timber to an
alternative buyer.

12 (b) The provision of this section shall
13 apply to the timber specified in the Final
14 Supplement to 1981-86 and 1986-90 Operating
15 Period EIS ("1989" SEIS); in the North and
16 East Kuiu Final Environmental Statement, Jan-
17 uary 1993; in the Southeast Chichagof Project
Area Final Environmental Impact Statement,
September 1992; and in the Kelp Bay Environ-
mental Impact Statement, February 1992, and
supplemental evaluations related thereto.

18 The Ninth Circuit in AWRTA at 732, 733 held that
19 Section ~~503~~^{N.} did not cure the violations of NEPA and ANILCA.
20 Congress may have been unsuccessful in curing the NEPA and ANILCA
21 violations, but the fact that Congress attempted to cure the
22 impediments to the implementation of these projects and specifi-
23 cally mentioned each of the EISS by name is a strong indication
24 that Congress perceives a strong public interest in the implemen-
25 tation of these projects.

1 It is not necessary that a facet of the public interest
 2 be enshrined in a federal statute in order for the court to take
 3 that interest into account. Thus, in State ex rel Guste v. Lee,
 4 635 F. Supp. at 1127-29, the court denied a broad injunction on
 5 shell dredging because of the crippling effects such an injunc-
 6 tion would have upon the dredging industry and portions of the
 7 south Louisiana economy dependent upon that industry. The court
 8 described the shell dredging industry as "an industry that has
 9 been in existence for more than 50 years under the auspices of
 10 state law, and which has major economic impacts upon the state's
 11 economy and other secondary industries."

12 The timber industry plays an analogous role in the
 13 Alaska economy. It is the leading year-round industry in South-
 14 cast Alaska. Declaration of Philip J. Janik, attached hereto. 
 15 It contributes to the state not only by virtue of direct and
 16 indirect employment, but also by virtue of the revenue sharing
 17 provisions of 16 U.S.C. § 500. That section provides that 25% of
 18 all monies received from a national forest shall be paid to the
 19 state for schools and roads in the area in which the National
 20 forest is located. A broad-based injunction, therefore, deprives
 21 localities of federal revenues just at a time when layoffs make
 22 such revenues particularly important to the overall tax base.
 23 The courts are particularly loath to impose injunctions which
 24 result in loss of tax and similar public monies. Florida Wild-
 25 life Federation v. Goldschmidt, 506 F. Supp. 350, 374 (S.D. Fla.
 26 1981).

1 Intervenor Alaska Forest Association (AFA) is in the
2 best position to set forth the detail the harm that would occur
3 to the timber industry and dependent communities. We would make
4 a number of observations however. The timber industry remains
5 the primary year-round industrial and manufacturing base for
6 Southeast Alaska. Declaration of Philip J. Janik. The timber
7 supply and economic situation is much different in Southeast
8 Alaska than in the Pacific Northwest or other areas where there
9 are large private or non-federal sources of timber for domestic
10 mills and where there is a more highly developed and broader
11 based economy. Id. Because most timber harvested from Native
12 corporation lands in Southeast Alaska is exported without primary
13 manufacture, there is generally no substantial source of competi-
14 tively priced timber to supply processing facilities in Southeast
15 Alaska other than the Tongass National Forest. Id.

16 Despite its key role in the economy of Southeast
17 Alaska, the timber industry is in a difficult position. The
18 closing of the APC mill in Sitka leaves only one pulp mill (Ket-
19 chikan Pulp Company [KPC]) in the entire state. Declaration of
20 Steven Brink. The Wrangell lumber mill has also closed.

21 As explained in the Declaration of Steven Brink, the
22 Forest service strives to maintain a healthy timber industry, by
23 seeking to keep a three year supply of timber under contract for
24 both long term and independent contracts. The three year supply
25 serves a number of purposes. First, the three year supply allows
26 contractors to respond quickly to changes in market demand in a

1 | volatile industry. Id. Second, and perhaps more importantly, the
2 | three year supply goal takes into account the fact that timber
3 | does not appear immediately at the mills upon contract. Id. To
4 | the contrary, there is a time lag between contract and the
5 | construction or reconstruction of roads and log transfer facili-
6 | ties. Id. Many harvest units can not be harvested during
7 | various times of the year because they are at relatively high
8 | elevations where the snow is present longer or because fishery
9 | protection measures limit the timing of operations in an area.
10 | Id.

11 | At present, despite historically high timber prices and
12 | a recovering pulp market, the forest service has under contract
13 | less than one year's supply under contract for both KPC and the
14 | independent sale program. Id. KPC's facilities' average annual
15 | consumption over the past ten years has been 222 mmbf per year.
16 | Id. ¶25. The current amount of timber under contract to KPC is
17 | only 146 mmbf. Id. The average annual consumption over the last
18 | 10 years for independent mills has been 115 mmbf. Id. Volume
19 | currently under contract in the independent sales is only 74
20 | mmbf. Id. Thus the request for an injunction in this case comes
21 | at a time when timber supply is significantly below target while
22 | timber demand is very high.

23 | In considering the gap between the amount currently
24 | under contract and the average consumption over the last ten
25 | years it is important to note that the average timber harvest
26 | over the last fifteen years has itself been significantly lower

1 | than the allowable timber sale quantity (ASQ) permitted by the
2 | 1979 Tongass Land Management Plan (TLMP). Average harvest (both
3 | by long term and independent contractors) has been 340 mmbf
4 | during the period 1980-1995 which is one third less than the TLMP
5 | would permit. Id. Since the enactment of the TTRA in 1990
6 | average consumption has been 311 mmbf per year. Thus the present
7 | amount of timber under contract is not only lower than average
8 | yearly consumption, it is very much lower than the forest plan
9 | for the Tongass would permit.

10 | The declaration of Steven Brink also explains that even
11 | if the EISS for other timber sale projects currently in process
12 | are completed and go forward without litigation, the supply
13 | situation will continue to be below target until approximately
14 | the year 2000 at least.

15 | Given the difficult state of the timber industry in the
16 | Tongass, the public interest favors either no injunction or at
17 | most a narrowly tailored injunction.

18 | VIII. THE COURT SHOULD RETAIN JURISDIC-
19 | TION TO MODIFY THIS INJUNCTION IF
20 | TIMBER IS ENJOINED OR OTHERWISE
 BECOMES UNAVAILABLE ELSEWHERE IN THE
 TONGASS.

21 | The four EIS's at issue in this case cannot be viewed
22 | in isolation. The balance of equities presented in this case
23 | assumes the availability of timber scheduled elsewhere on the
24 | Tongass. Should some of that other timber become enjoined, the
25 | balance of the equities could shift substantially, requiring a
26 | new balancing. Given the frequency of challenges to timber

1 harvest in the Tongass, we believe it would be appropriate for
2 the court to retain jurisdiction to review the injunction should
3 other timber be enjoined.

4 We would point out two specific projects which might
5 necessitate reopening the injunction in this case. The Ushk Bay
6 EIS for a timber sale project within the former APC contract
7 area, cleared approximately 67mmbf. Declaration of Steven A.
8 Brink. The record of decision (ROD) and final environmental
9 impact statement (FEIS) on that EIS was issued in August 1994,
10 after the termination of the APC contract. Plaintiffs in this
11 case filed an administrative appeal of the Ushk Bay ROD arguing
12 that the agency should have prepared a supplemental draft EIS for
13 Ushk Bay because the draft was issued prior to the APC contract
14 termination. Declaration of Steven Brink.

15 In SEACC v. Powell, No. J94-021-CV (JWS), pending
16 before this court, the plaintiffs have challenged the treatment
17 of the issues of falldown and sustainability in the FEIS of the
18 Central Prince of Wales Project (CPOW). The agency agreed to
19 prepare a supplemental EIS on those issues and to refrain from
20 offering 107mmbf of timber in the CPOW project pending completion
21 of the supplemental EIS. The notice of the availability of the
22 final supplement to the EIS was published on December 22, 1995.
23 Declaration of Steven Brink. If plaintiffs challenge the supple-
24 mental EIS and obtain an injunction in that case, much of the
25 timber we have assumed would be available to KPC would become
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28 FEDERAL DEFENDANTS' BRIEF ON
THE PROPRIETY OF INJUNCTIVE RELIEF

1 unavailable. Should that happen, the court would have to recon-
2 sider whether to enjoin the KPC offering on East Kuiu.^{8/}

3 CONCLUSION

4 For the foregoing reasons, the court should either deny
5 permanent injunctive relief or issue a narrowly tailored injunc-
6 tion as outlined in this memorandum.

7 RESPECTFULLY SUBMITTED this ___ day of December, 1994
8 from Anchorage, Alaska.

9

10 KEITH SAXE
11 BRUCE M. LANDON

12 Attorneys for Federal Defendants
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^{8/} As the CPOW case is also before Judge Sedwick, it may at some point be desirable to consolidate them for injunction proceedings.

Name	Date
Steven Reich	6/4/99
Peter Kundt	9/8/99

Counsel
Counsel