

NLWJC- Kagan

Counsel - Box 005 - Folder 011

Columbia River Basin

**THE CONFEREES' LANGUAGE ON THE COLUMBIA BASIN ECOSYSTEM PROJECT:
MAJOR PROBLEMS AND NEGOTIATION STRATEGIES**

The major problems with the Conference Report language on the Columbia Basin Ecosystem Project can be succinctly summarized as follows:

- * It is a direct challenge to the Administration's ecosystem planning efforts, barring us from finalizing the Columbia Basin Ecosystem EISs as useful management information tools (e.g. no preferred alternatives, management recommendations, or Records of Decision).
- * It limits the application of NEPA as applied to the subsequent amendment of each individual forest plan.
- * It overrides the ESA by barring Section 7 consultation on the Columbia Basin Ecosystem EISs and most subsequent plan amendments for policies which flow out of the Columbia Basin Ecosystem Project.
- * It overrides the ESA by barring Section 7 consultation for any site-specific "project or activity" within the entire Columbia Basin which was "consistent" with any individual plan amendment.

Given the policy significance of the above restrictions, the Department of the Interior strongly recommends that the following negotiating strategy be adopted for talks with Hill conferees:

- * The Administration should insist on the deletion of language that bars us from finalizing the Columbia Basin EISs with preferred alternatives and management recommendations (let them be objective scientific documents that speak for themselves).
- * The Administration could agree to the bill's limitations on NEPA as applied to the individual plan amendment process. The Administration could also agree to some sort of sufficiency language preventing the Columbia Basin EISs from subsequently being used to measure the legal adequacy (or inadequacy) of individual existing forest plans and their associated NEPA documents.

- * The Administration should strongly oppose any language overriding the application of the ESA in this bill, either as applied to the Columbia Basin EISs themselves, subsequent forest plan amendments, or site-specific projects or activities. Our position should be that all ESA related forest planning issues should be dealt with in the context of the on-going ESA reauthorization, a process which is rapidly picking up speed. When added cumulatively to the ESA sufficiency language in the timber salvage act, as well to the ESA sufficiency language being sought by Senator Hatfield in BPA cost cap legislation, the planning and site-specific ESA override language in the Conference bill would leave little of the ESA left standing within the entire Columbia River Basin drainage area.

Du - is undated, but the comp
unlabeled drafts, but the
computer lists a date of _____

Du # _____ is
a draft & was
printed out from
the computer

Council on Environmental Quality

Executive Office of the President

722 Jackson Place, NW
Washington, DC 20503
Phone: (202) 395-7421
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FAX TRANSMISSION COVER SHEET

Date: 1/20/96
To: Elena Kagan
Fax: 456-1643
Re: Murrelet Interior approx.
language
Sender: DINAH BEAR
224-4423

YOU SHOULD RECEIVE 2 PAGE(S), INCLUDING THIS COVER SHEET.

The most faxable version
I have of the
current language.

DKB -
change in
from her
idea

Amended order
our differences?

FRIDAY
JANUARY 19, 1996

P. 02

San Francisco Chronicle

THE VOICE OF THE WEST

EDITORIALS

Hold Firm on the Mojave

PRESIDENT CLINTON'S determination to find a compromise with the Republican Congress on the budget reconciliation bill constitutes both good politics and good policy — assuming that the eagerness to compromise does not become a willingness to capitulate on key issues that are of concern to most Americans: the welfare of children, education, federally guaranteed health care

for the poor and elderly, and environmental protections.

*Preserve
the Mojave
National
Park under
Park Service
management*

As the budget showdown approaches the do-or-die phase, the temptation is no doubt strong to give ground on issues with local or

regional impacts in order to pass spending bills for entire government departments. That could mean important concessions on environmental disputes, including the fate of California's Mojave National Park, which the Republicans want to strip away from the National Park Service and hand over to

the Bureau of Land Management.

Numerous other environmental issues, attached as "riders" to the appropriations bills for the Interior Department and the Environmental Protection Agency, could also become bargaining pawns in the budget battle, even though they have virtually nothing to do with balancing the budget.

As Californians, we take a direct interest in preserving the new Mojave National Park under Park Service management, and we would view with alarm any compromise language that papers over the differences. But we would view with the same alarm any agreement that permitted increased logging in Alaska's Tongass National Forest or oil development in the Arctic National Wildlife Refuge.

Many environmental, public health and safety laws are by nature local issues. But that does not mean that the public support for those laws is only local. Poll after poll demonstrates overwhelming public support for broad environmental protections.

There is no way to put a positive spin on bad environmental policies. The president has shown courage and steadfastness so far in opposing the environmental rollbacks. We trust he will continue to do so.

202 291-7273

Environmental (Inclusion Approvs Bill)

1/17/94

Wentons/Sethomers - who should be in room?

AWETA sent. - any problem w/ political types?
who's doing this for Justice?

This is on Monday.

Knewler also says - do whole. By date certain
Arbitration / Mediation - comment.

2. Mojave

3. Columbia Basin

Lesly - any fundamental concerns w/ our language?

Other drafts - of / Inclusion

Intervenor - Popped.

lots of consultation

Katie: changing the case. lay in this vehicle??

Asking for Lesly to comment?

Taking too much out? Substance problem? optics problem??

finish scientific analysis,
have it out there

preferred alternative -
won't use for decision making.

rather than make
each auto. in comments;
have to go thru on each
of 74 + for them

Foley - sets whole process on
its head in terms of how
then things are usually done.

MF: Any way to aggregate at all?

Not 74 indivs.

One alternative - This has to come out
litigation risk ← (what is this? ER)

normal process - can continue unless indiv amendments are done.

Gov't - if EIS is out there,
we'll get sued on each one
before we amend it.

3 levels of litigation risk

Regional assessment

Forest plan level

Indiv projects

MF- Interest gr views on This issue?

BB- Compromise retreats from ecosystem report

East Side should be like West

Must pressure env. law

Maybe if we do this, OK.

Interview Mtg 1/22/96
Katie mtg w/ Pegula tomorrow

- 1. Tempass - TIS - env. gov. / fishermen
Poss of using some sales under injunctive
inherent services
Personal settlement discussions - tomorrow
Range of opinions on chances.
Some uncertainty about factual issues
To be seen by tomorrow eve.
AI Finest Assoc - IVs -
bring in lot of?

Janeh(?)
letter(?)

WHAT?

MF- Resolution has to be in certain kind to help in legislative

310?
280
140? mbf : > Ask Dumb

what mtg targets has
of litigation

suit carries its of this
30 in litigation from 96

a 1-page - litigation risks on Tempass Rider -
whole thing.

Ask Dumb 5th Circuit?

2. Mojave

3. Columbia Basin

Leshy letter -

Also need to work back up w/ DOT
Are non-legislative solutions -

try to do things in areas that shouldn't be subject to
1 size fits all -

litigation risks are same of this stuff - e.g. ← i.e. do administrative things.
(can't have legislative waivers)

dropping the
GIS? ← Lyons - will do options paper on admin solutions

Mtg tomorrow - 5:00

Need language
Likely risks

310 - goal - how much to harvest

Suit - 9th Circuit's -
Significant new info on env concerns -
SUPP EIS nec.

Brief on remand - we should be able to move 140 mbf
abt 1/2 of the whole
IT's won't agree

Settlement - what would "look good" -

50 mbf

smaller # but much more rapid.

enviros;
commercial fish

they want some timber
released / shift to small business operators
reconfigure timber sales -
release some that are env OK

FS - doesn't want the reconfiguration

- 1) more administrative costs - resource intensive

- 2) too small, etc.

• 2) some sales opened to KPC

Lois - comment

Tempass³ P

3. AWRTA P - overturns 9th Cir.

2.

TP 1 - FS can't rein current land management plan until 1997

now in process of revising it.

They want Pres Done to this

During this time, FS must maintain timber base + APQ for
future in Alternative P (great record of decision 1992)

P is terrible - much too little timber harvest sales

even FS doesn't like it.

quantity problem

maintain
in such a way
as to allow easy
harvest.

Habitat cons. areas.

Possible: use P1 to challenge failure to harvest in these areas.

92 - Doesn't req that trees be cut
Also - can version plan for good science

WHAT THEY GET -

prohibiting us to revise amend.

bc then we can lower timber base / ASQ

goal

not legally binding

but we get beat up for not meeting.

Letter → - setting forth what we're willing to do.

Here's the problem w/ this version - MEMO.

NEW

1/22/96

TONGASS TIMBER RIDER

- O** The Tongass rider would restrict the Forest Service from completing the revision of the Tongass Land Management Plan until October 1, 1997. There is no justification for waiting until then. The draft EIS is in the final stages of preparation and will be published shortly; the final EIS is expected to be out in late summer or fall of this year. We would anticipate signing a Record of Decision to revise the land management plan by the end of the year. The only possible rationale for this provision to prevent the Administration from making the critical decision on the revised land management plan in this term.
- O** The Tongass rider would require the Secretary of Agriculture to "maintain" at least the number of acres of suitable available and suitable scheduled timber lands, and Allowable Sale Quantity as identified in the Alternative P of an EIS and draft Record of Decision that the Forest Service chose not to adopt. Alternative P mandates an level of allowable timber harvest that is 44% higher than the average annual cut over the last decade. The Forest Service believes Alternative P is not supported by sound science, and it and was overwhelmingly rejected by residents of Southeast Alaska at public hearings in 1991.
- O** There is no commonly accepted legal definition of the term "maintain" in this context; this mandate would be certain to lead to litigation. One possible target would be the Habitat Conservation Areas (HCAs) developed by the Forest Service to protect various species at risk in Southeast Alaska. The development of these HCAs was one factor in the U.S. Fish and Wildlife Service's determination last year not to list either the Charlotte Goshawk or the Alexander archipelago wolf under the Endangered Species Act. The HCAs, measures designed to protect salmon runs and other present and future management measures potentially would be vulnerable to challenge under the language in this rider.
- O** The latest version of the Tongass rider carries language permitting the Secretary's consideration of new information for future revision, amendment or modification of the Tongass Land Management Plan, but that authority is caveated by the phrase "based upon sound, verifiable scientific data". While agencies should also strive to use the best scientific information available, the Forest Service must be free to manage the forest even while new information is being collected and analyzed. Presumably, plaintiffs could and would use that phrase to challenge any management decision made on the Tongass with which they disagreed.
- O** Finally, the last paragraph of the Tongass rider retains the sufficiency language intended to overturn a recent decision by the Court of Appeals for the Ninth Circuit, exempting the proposed timber sales that were the subject of that decision from "any other provision of law", and precludes further judicial review of Forest Service decisions regarding a number of particular timber sales offered on the Tongass.

DRAFT 1/17/96

STATUS REPORT
REVISION OF THE TONGASS LAND MANAGEMENT PLAN (TLMP)

Status:

Key science assessments and research reports have been completed. Basic scientific information has been provided to managers and incorporated into alternatives.

Work on the plan was suspended during the closure of government, but has been resumed. Target weeks for key remaining tasks are:

February 19	Washington area briefings
March 18	Draft plan and EIS released to public
April 8	Begin public meetings and hearings
July 31	Record of Decision on final plan and EIS

The July 31 target is the earliest feasible date, and assumes no major obstacles.

Potential Obstacles

-Future furloughs or other restrictions of operations based on budget, such as travel restrictions or acquisition limitations, during the remainder of the fiscal year.

-Timely scheduling of Washington area briefings for the Washington Office, the Department, and other Federal agencies involved.

-Maintenance of the normal 90-day comment period despite overlap with fishing season and likely demands for extension of comment period.

Alternatives

-Nine alternatives are being considered, including Alternative P from the last draft and new alternatives that use varying strategies for wildlife viability and anadromous fish protection.

-The ASQ's associated with these alternatives have not been finalized but are expected to range from less than 100 MMBF to about 500 MMBF.

-The EIS will include, among other things:

-wildlife viability assessment ratings associated with each alternative.

-how the alternatives respond to the Tongass Timber Reform Act requirements to seek to provide a supply of timber to meet market demand.

-a comprehensive analysis of socio-economic effects that will be community specific to the extent feasible.

1/18/96

SUMMARY
RECENT AWRTA SETTLEMENT DISCUSSIONS
BETWEEN PLAINTIFFS AND FOREST SUPERVISORS

- * One formal meeting was held on December 5, 1995 between Forest Supervisors Gary Morrison and Gail Kimbell, Bart Kohler of SEACC, and Steve Behnke of AWRTA. At that meeting, general expectations of a settlement were outlined by both parties and questions were answered. The outcome of the meeting was a decision to continue to talk and that AWRTA would provide the FS with settlement proposal for consideration.
- * On 12/19/95, Gary Morrison received a copy of a written settlement proposal from Bart Kohler. That settlement offer was unchanged from a proposal made earlier at a meeting with the Regional Forester and other Forest Service representatives by plaintiffs representative and attorney. Morrison talked with Bart and committed to provide the proposal to Gail Kimbell, discuss how the FS would proceed, and get back to AWRTA as soon as we had a counter-proposal or concluded that we could not proceed.
- * Holidays and the federal employee furlough precluded further discussions or actions by the government until 1/8/96.
- * On 1/8/96, Morrison and Kimbell discussed opportunities to engage in further discussion with AWRTA, both in light of their initial proposal, as well as the current status of legal actions, i.e. OGC/Justice Dept's submission of briefs to the District Court. It was concluded that AWRTA's initial proposal was totally unacceptable, but that it would be worth consulting with OGC and likely getting back to AWRTA with a reasonable counter-offer. The feeling was that a reasonable counter-offer would be the same as proposed in the Government's brief on injunctive relief filed on 12/22/95 in the U. S. District Court, District of Alaska.
- * The next discussion with plaintiff representatives is planned for early next week as schedules permit.
- * Recent (1/18/96) communications with a representative of the Governor's Office indicates that plaintiff would permit the release on one entire offering of about 15.5 MMBF which could be available for harvesting this operating season and would also release specifically specified units totalling approximately 40 MMBf from 5 other offerings contingent on the requirement that these units be offered as independent, SBA sales.
- * We are very earnest in our desire to reach a settlement of the issues raised in the AWRTA lawsuit, but the documented offers made by plaintiff that we have received to date have not been viable in terms of prompt release of any significant volume of timber.
- * The offering to be released in its' entirety is the Hanus ATC offering, which is also included in the Government's list of offerings for injunctive relief. The sale is fully prepared and could be re-advertised for bidding prior to the 1996 operating season.

* The 41 specific units making up the additional 40 MMBF would consist of the following:

6 units from the Saginaw sale which has been sold to Raynoier Corporation and is under contract. The Saginaw sale as sold contains a total of 12 units. Incorporation of the proposal would require contract cancellation because Raynoier is not a small business.

Plaintiffs would release 15 units from the Rowan I and Rowan II offerings. These two offerings of 20 and 22 MMBF respectively, were originally planned for offer in FY 1996 and FY 1997. Sale preparation work has not been completed for these offerings and they were not included in the Government's request for injunctive relief. Any harvest of these units is dependent on completion of road construction to be done under the Saginaw offering.

The 13 units to be released by plaintiffs from the Crab Bay I offering which is under contract to Ketchikan Pulp Company would come from the total of 33 units included in the offering. Since Crab Bay II has been released to KPC, incorporation of the plaintiffs proposal would require cancellation of the offering contract both because KPC is a large business and the offering was made under the terms of KPC's long-term contract.

A similar situation exists with the 7 units plaintiffs propose to release from the 19 unit Inbetween offering which is also under contract to KPC. Implementation of plaintiffs proposal would require the cancellation of the offering contract.

Cancellation of the Saginaw, Crab Bay I, and Inbetween contracts would expose the Government to damage claims by Raynoier and KPC.

Implementation of plaintiffs proposal would require as much as two years of additional field sale preparation work recruiting, redesignating harvest units, and otherwise repackaging the offerings into a configuration that would meet plaintiffs requirement that they be offered in small sales suitable for independent SBA purchasers. In many instances the volume contained in the individual units identified for release by plaintiffs will not be adequate to support the mobilization costs necessary for harvesting and will be economically attractive to the small business industry.

Further, the offering the 40 MMBF as proposed by plaintiffs will not result in additional volume being made available for harvest quickly because many of the units depend on access being completed by other sales or conflicting usage of common facilities, such as logging camps, log transfer facilities, and haul roads.

Other conditions attached to Plaintiffs settlement proposal received on 12/18/95 were:

1. At least 50 % of the total volume permitted in the units released would be offered in sales smaller than 4 MMBF.

2. That the Forest Service would agree to heightened protection in the other areas. This could include some combination of the following or other proposals that guarantee the plaintiffs some protection, probably with different requirements for different sales, subject to negotiation with the Forest Service:

- * No sales until completion of Tongass Land Management Plan revision.

- * Consideration for LUD II equivalent or Wilderness protection in TLMP revision prior to sales.

- * Island-specific analysis, like the Mitkoff Island process, prior to any further sales on the island.

- * Supplemental EIS prior to sales.

- * Remove areas from timber sale schedules for at least a specified number of years.

* We are uncertain that the conditions included in 2 above were included in plaintiffs recent discussion with the State.

Prepared By: Fred O. Walk
1/18/96

draft rmaynard 12-11-95

current estimated volumes for timber offerings in awrta v morrison suit:

all volumes include saw + utility. rounded to nearest tenth.

these are
the offerings
enjoined

fy 94:

- saginaw (n&e kuiu) 24.0 mmbf
- saook bay I (kelp bay) 29.8 mmbf
- crab bay I (se chich) 31.0 mmbf
- inbetween (se chich) 9.9 mmbf

95 mmbf
Total

fy 95

- e.kuiu (n&e kuiu) 57.8 mmbf
- broad creek (se chich) 18.9 mmbf
- hanus atc (kelp bay) 15.5 mmbf
- neka-humpback (89 seis) 33.3 mmbf

govt brief asks for these
to be released from
the injunctions - total 144 mmbf

this leaves 138 mmbf
enjoined

fy 96

- crab bay II (se chich) 3.5 mmbf
- saook bay II (kelp bay) 8.0 mmbf
- rowan I (n&e kuiu) 20.0 mmbf

fy 97

- rowan II (n&e kuiu) 22.0 mmbf

as yet unscheduled (road r.o.w. over sealaska land still in negotiation)
gallagher (89 seis) 8.0 mmbf

SETTLEMENT PROPOSAL OUTLINE
AWRTA v. Morrison

Confidential
For Settlement Purposes Only

The plaintiffs propose the following terms to settle the AWRTA v. Morrison case. This is intended as a general description of the terms of a possible settlement, not as proposed language for a settlement agreement.

1. The Forest Service may proceed with the following timber sales without modification and without further NEPA or ANILCA process, except as noted:

Sale	Comments
Manus ATC Appleton Corner Bay Helicopter Corner Bay Salvage	Advertise as SBA sale

15.5 mmbf

never asked for inspection

2. The Forest Service may offer specified units in the following sales if offered as independent, SBA sales, with no further NEPA or ANILCA process:

Sale	VCH	Units
Saginaw	399	20, 22
	402	17, 18
	420	45
	421	53
Rowan I & II	400	11, 12, 15, 21
	402	36, 37, 41, 42, 45, 46, 47
	421	46, 49, 50, 51
Crab Bay I	233	1973, 1976, 1977, 1980, 1981, 1992
	234	1810, 1811, 1820, 1830, 1850, 1852, 1853
Inbetween	230	1550, 1552, 1590, 1593, 1650, 1660, 1670

about 40 mmbf

3. At least 50% of the total timber volume permitted in paragraph 2 above will be offered in sales smaller than 4 mmbf.

DEC 19 '95 08:36AM CHATHAM AREA SITKA

4. In return for the plaintiffs' agreement to forego the NEPA and ANILCA process otherwise required by law in the sales listed above, the Forest Service will agree to heightened protections in the other sales. This could include some combination of the following or other proposals that guarantee the plaintiffs some protection, probably with different requirements for different sales, subject to negotiation with the Forest Service:
- No sales until after completion of TLMP Revision,
 - Consideration for LUD II equivalent or Wilderness protection in TLMP Revision prior to sales,
 - Island-specific analysis, like the Mithof Island process, prior to any further sales on the island,
 - Supplemental SIS prior to sales,
 - Remove areas from timber sale schedules for at least a specified number of years.

To: Phil Ganik - 586-7840
 Fr: Marilyn Keenan

1. Proceed with the Hanus ATC sale (15.5 mmbf), offered as an independent SBA sale, without modification and without further NEPA or ANILCA process.
2. Offer specified units in the following sales if offered as independent, SBA sales, with no further NEPA or ANILCA process. The estimated volume in these units is about 40 mmbf, all of which is on existing roads. They should be offered in small sales suitable for independent SBA purchasers.

<u>Sale</u>	<u>VCU</u>	<u>Units</u>	
Saginaw	399	20, 22	6
	402	17, 18	
	420	45	
	421	53	
Rowan I & II	400	11, 12, 15, 21	5
	402	36, 37, 41, 42, 45, 46, 47	
	421	46, 49, 50, 51	
Crab Bay I	233	1973, 1976, 1977, 1980, 1981, 1992	13
	234	1810, 1811, 1820, 1830, 1850, 1852, 1853	
Inbetween	230	1550, 1552, 1590, 1593, 1650, 1660, 1670	7

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EXECUTIVE OFFICE OF THE PRESIDENT

21-Sep-1995 05:44pm

TO: Thomas C. Jensen

FROM: Christine L. Nolin
Office of Mgmt and Budget, NRD

CC: Ruth D. Saunders
CC: Mark A. Weatherly

SUBJECT: Murrelets

Sorry you didn't get this answer sooner. Please copy me on all e-mails to Ruth, as I am now back from maternity leave and Ruth is not in on Thursdays anymore.

As far as we know, the Senate language on murrelets was retained. The language reads:

No part of any appropriation contained in the Act or any other Act shall be expended or obligated to: (a) redefine the definition of an area in which a marbled merrelet is "known to be nesting"; or (b) to modify the protocol for surveying the marbled murrelets in effect on July 21, 1995.

DRAFT**Section 314, Interior Columbia Basin Ecosystem Management Project.**

Section 314 provides \$4 million for the completion of the Interior Columbia Basin Ecosystem Management Project with specific requirements and prohibitions for its development and implementation that make the effect of this section difficult to predict. For the Project itself, Section 314 requires that its assessment be completed by April 30, 1996, accompanied by a draft EISs "that are not decisional and not subject to judicial review, contain a range of alternatives, without the identification of a preferred alternative or management recommendations, and provide a methodology for conducting any cumulative effects analysis" required by NEPA for land management plan amendments. This assessment must contain an analysis of forest and rangeland health conditions and management implications, but cannot include any material other than as provided by Section 314 and cannot be "the subject of" consultation or conferencing under the ESA.

For implementation, Section 314(c) requires the Forest Supervisors and BLM District Managers in the area to review the Project's report, their own resource management plans and "any policy" applicable to the plans, including PACFISH. Based on that review, they are required to modify, or develop an alternative to, the policy to meet the specific conditions of their forest.¹ "For each plan reviewed," the Forest Supervisor or District Manager must amend the land management plan to adopt the "policy" in a way that is "directed solely to and affects only such plan" and addresses the specific conditions of the forest. This amendment must establish site-specific standards "to the maximum extent practicable" and major changes must follow procedures for a significant amendment under NFMA or FLPMA. However, the application of NEPA is limited by requiring that cumulative effects analysis be conducted in accordance with the methodology used in the Project assessment. ESA consultation is circumscribed in a convoluted combination of paragraphs 314(c)(1)(A), (5) and (6) that may prevent consultation on amendments. No further consultation is required for projects and activities that are "consistent with an applicable amendment" or policy. Section 314(c)(6)(C). Amendments must be adopted by October 31, 1996, and significant amendments must be adopted by March 31, 1997, when the existing "policy" shall become ineffective.

¹ Section 314(c)(1)(B). This policy revision is an entirely new decision in the land management process, and may be subject to NEPA and ESA consultation. Note that subsection (c) only refers to planning on individual "forests," though the Interior Columbia Basin Ecosystem Project addresses management on all federal forest and rangeland in the area, creating possible coordination problems and confusion for cumulative effects analysis.

Section 314 may have some impact on Blue Mountain Native Forest Alliance v. Lowe, D. Ore., CV 95-1519-AS, and will probably create new suits. Pending the development of the Eastside Ecosystem Management Strategy to address the scientific findings that riparian and old growth protection in the existing eastside forest plans were inadequate, the Regional Forester adopted in May of 1994 an interim amendment supported by an EA and FONSI, which permitted continued harvesting in old growth, riparian and roadless areas only if amended standards and guidelines (the "screens") were met. The interim standards and guidelines were explicitly designed to "preserve options" pending the development of the ecosystem strategy. The FONSI was expressly predicated on the assertion that the standards were interim, and would be replaced by the permanent strategy within 18 months. Plaintiffs in Blue Mountain, a large number of local and national environmental groups and two salmon fishing groups, contend that the screens do not preserve options; they argued administratively for a moratorium on sales within roadless and old growth areas. NEPA and NFMA [viability] claims are asserted. The plaintiffs issued a press release stating that they would not have brought suit but for the Section 314 proposal. Plaintiffs seek an injunction against timber sales in old growth and roadless areas pending the development of a scientifically credible ecosystem strategy. Plaintiffs are planning to shortly file a motion for summary judgment in this action.

Assuming that each of the Eastside National Forests could effectively amend their Land and Resource Management Plans within the period indicated in Section 314 with standards which would substitute for the interim standards via "insignificant amendments" (10/31/96), the legislation may very well have little effect on the lawsuit, since we have yet to produce a Draft EIS for the Ecosystem Strategy. However, the Eastside Ecosystem Management Strategy contemplates that it will be utilized to amend multiple National Forest Plans as did the President's Plan for the Westside Forests. In upholding the President's Plan Judge Dwyer effectively permitted the Forest Service to defer some regulatory requirements for Forest by Forest planning in the interests of permitting an ecosystem approach. Section 314 is intended to prevent this from happening again by effectively requiring that the amendments be treated as significant amendments on a Forest by Forest basis. See 314(c)(3). It is highly unlikely that significant amendments of each LRMP on a Forest by Forest basis - and we assume that this is true for BLM as well - could be done within the time period allowed by the legislation (3/31/97), with the result that the interim standards "shall [not] be effective," see 314(c)(8), after that date. The Forests would be remitted to the original admittedly defective earlier standards of the Eastside LRMPs, with the result that a the agencies would become vulnerable to a suit seeking an injunction against timber sales.

DETERMINED TO BE AN
ADMINISTRATIVE MARKING
INITIALS: JGP DATE: 5/24/10

BOME Cohen
Anne Shields

~~CONFIDENTIAL~~ 2009-1006-F

January 22, 1996

To: T.J. Glauthier, OMB

CC: Katie McGinty, Jim Gilliland, Lois Schiffer, George Frampton,
Peter Coppelman, Bruce Beard, Dinah Bear, Don Barry

From: John Leshy *JL*

Re: Proposal for § 314 of Interior Appropriations Bill (Columbia
Basin Ecosystem Management)

In a nutshell, § 314 has two purposes:

- to prevent regional species-protection planning efforts in the Columbia Basin from laying the basis for regionwide injunctions that shut down all activity on national forests and BLM lands; and
- to exempt activities from ESA consultation at all levels of the federal process, from regionwide assessments down through forest plans and even reaching to individual timber sales and other on-the-ground projects.¹

Purpose # 1. The Administration has previously told the Supreme Court that the core of purpose #1 is existing law. We staked out this position when we asked the Court to review the Ninth Circuit decision in the so-called Pacific Rivers case. Environmentalists who wanted to preserve full opportunity for regionwide injunctions were, to be sure, not happy with this position, but we have already crossed that particular Rubicon.

The Court did not take the case, so the Ninth Circuit decision to the contrary stands for now in the Pacific Northwest. For the moment, in other words, the environmentalists have won, over our objection. If we acquiesce in this first purpose of § 314, we would be in effect overturning or limiting the Pacific Rivers decision in the Columbia basin (but not elsewhere). That would be a far less sweeping result than the one we sought in the Supreme Court, where we advocated applying this approach nationwide.

Purpose # 2. The second purpose goes beyond anything we have advocated, and should be resisted.

Core of possible compromise counteroffer: Accept the first purpose

¹Section 314(c) (2) (B) essentially says, as I read it, that if consultation had ever occurred on a policy in the past, any change in that policy, and any project or activity undertaken consistent with the change, or related to the policy or the species, is exempt from section 7 consultation.

and reject the second. That is, agree to shelter our land planning process and management in the Columbia Basin from region-wide injunctions, while leaving decisions on projects and activities at the local level subject to the ESA, and to judicial review. While in one sense this is a limited form of "sufficiency" (because it deprives environmentalists of the opportunity for region-wide injunctions in the Columbia Basin), it preserves judicial review of federal decisions, and allows for injunctions against individual projects on the basis of inadequate compliance with the ESA.

In textual terms, the proposal would go like this:

1. Strike everything in § 314(c)(2)(B) after "amendments" in the Proviso. This would limit the exemption for ESA consultation to plan amendments, consistent with our position in Pacific Rivers. It would still require consultation (and allow for judicial review) on site-specific actions (timber sales, rights-of-way, etc.).

2. Change the places in (c)(2)(B) where it says there shall be no consultation on plan amendments to provide that consultation "shall not be required, and if it does take place, shall not be subject to judicial review" on plan amendments. This would permit plan level consultation on a voluntary basis. Presumably this is more meaningful and efficient, making consultation on individual projects (i.e., timber sales) easier and simpler. We could still be sued at the individual project level for inadequate consultation.

Other issues: Beyond this core idea, other adjustments in the text of § 314 might be advisable or appropriate. I am told, for example, that the dates for completing the regionwide assessment and the forest plan amendments are unrealistic and ought to be adjusted. On the regionwide assessment, the August 1, 1996 deadline in subsection (b) apparently includes the ninety day public comment period - so the assessment has to be done no later than sometime in April in order to allow 90 days of public comment and time to summarize them for submission to Congress. That's too short.

The March 31, 1997 deadline for completing forest plan amendments is likewise too short, and this is particularly important because § 314(c)(3) seems to say that if the plans aren't amended by 3/31/97, all species protection in the plans disappears. (That's the result if the ambiguous reference to "policy referred to in paragraph (1)" means an existing protective policy.)

We should also think about how § 314 as written, or as changed in line with the above, might affect ongoing activities (e.g., harvesting of timber under existing sales contracts) that are or could become vulnerable to attack for inadequate ESA and NEPA compliance. Specifically, is there any approach better than silence - the current approach of § 314?

1/2/96

Columbia Basin Ecosystem Project:

The proposed framework would allow the Administration to proceed with region-wide information gathering and analysis to a point, but then meet the concern about a "one size fits all" solution by reverting back to individual forest plans amendments tailored to the specific needs and characteristics of each forest.

Specifically, the framework would allow: 1) going to completion with the Draft EIS and public comments, but not selecting a preferred alternative, preparing a final EIS or executing a Record of Decision; 2) holding PACFISH, Infish and the Eastside screens in place until the individual Forest Plans are amended, and 3) getting rid of changes in environmental laws regarding the individual Forest Plans.

To accomplish that framework, the proposal would:

a) retain Sections 314(a), (b)(1)(2) and (3); (c)(1); (c)(2), except delete the phrase, "is directed solely to and affects only such plan," which restricts the Forest Service's ability to look at impacts that might occur on a neighboring forest;

b) delete Sections 314(c)(3)(4)(5) and (6) - all of these modify the normal NEPA, ESA or forest planning process for amending individual Forest Plans; and,

c) retain Sections 314(c)(7) and (8) with modified dates. The dates are taken from the Forest Service's calculations in October, with added time to account for delays in passage of the bill.

d) delete Section (9), which provides sufficiency language for Clearwater National Forest management direction.

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grams at the Pennsylvania Avenue National Historic Site or may establish a nonprofit foundation to solicit funds for such activities.

(e) Notwithstanding any other provision of law, the responsibility for ensuring that development or redevelopment in the Pennsylvania Avenue area is carried out in accordance with the Pennsylvania Avenue Development Corporation Plan—1974, as amended, is transferred to the National Capital Planning Commission or its successor commencing April 1, 1996.

(f) SAVINGS PROVISIONS.—

(1) REGULATIONS.—Any regulations prescribed by the Corporation in connection with the Pennsylvania Avenue Development Corporation Act of 1972 (40 U.S.C. 871-885) and the Federal Triangle Development Act (40 U.S.C. 1101-1109) shall continue in effect until suspended by regulations prescribed by the Administrator of the General Services Administration.

(2) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.—Subsection (a) shall not be construed as affecting the validity of any right, duty, or obligation of the United States or any other person arising under or pursuant to any contract, loan, or other instrument or agreement which was in effect on the day before the date of the transfers under subsection (a).

(3) CONTINUATION OF SUITS.—No action or other proceeding commenced by or against the Corporation in connection with administration of the Pennsylvania Avenue Development Corporation Act of 1972 (40 U.S.C. 871-885) and the Federal Triangle Development Act (40 U.S.C. 1101-1109) shall abate by reason of enactment and implementation of this Act, except that the General Services Administration shall be substituted for the Corporation as a party to any such action or proceeding.

(g) Section 3(b) of the Pennsylvania Avenue Development Corporation Act of 1972 (40 U.S.C. 872(b)) is amended as follows:

"(b) The Corporation shall be dissolved on or before April 1, 1996. Upon dissolution, assets, obligations, indebtedness, and all unobligated and unexpended balances of the Corporation shall be transferred in accordance with the Department of the Interior and Related Agencies Appropriations Act, 1996."

SEC. 314. (a) Except as provided in subsection (b), no part of any appropriation contained in this Act or any other Act shall be obligated or expended for the operation or implementation of the Interior Columbia Basin Ecosystem Management Project (hereinafter "Project").

(b)(1) From the funds appropriated to the Forest Service and Bureau of Land Management, a sum of \$4,000,000 is made available for the Executive Steering Committee of the Project to publish, and submit to the Committees on Agriculture, Nutrition, and Forestry, Appropriations, and Energy and Natural Resources of the Senate and Committees on Agriculture, Appropriations, and Resources of the House of Representatives, by April 30, 1996, an assessment on the National Forest System lands and lands administered by the Bureau of Land Management (hereinafter "Federal lands") within the area encompassed by the Project. The assessment shall be accompanied by draft Environmental Impact Statements that are not decisional and not subject to judicial review, contain a range of alternatives, without the identification of a preferred alternative or management recommendations, and provide a methodology for conducting any cumulative effects analysis required

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by section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)) in the preparation of each amendment to a resource management plan pursuant to subsection (c)(2). The Executive Steering Committee shall release the required draft Environmental Impact Statements for a ninety day public comment period. A summary of the public comments received must accompany these documents upon its submission to Congress.

(2) The assessment required by paragraph (1) shall contain the scientific information collected and analysis undertaken by the Project on landscape dynamics and forest and rangeland health conditions and the implications of such dynamics and conditions for forest and rangeland management, specifically the management of forest and rangeland vegetation structure, composition, density, and related social and economic effects.

impacts on fisheries and watersheds,

(3) The assessment and draft Environmental Impact Statements required by paragraph (1) shall not: contain any material other than that required in paragraphs (1) and (2); be the subject of consultation or conferencing pursuant to section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536); or be accompanied by any record of decision or documentation pursuant to section 102(2) of the National Environmental Policy Act, except as specified in paragraph (1).

(c)(1) From the funds appropriated to the Forest Service and the Bureau of Land Management, each Forest Supervisor of the Forest Service and District Manager of the Bureau of Land Management with responsibility for a national forest or unit of land administered by the Bureau of Land Management (hereinafter "forest") within the area encompassed by the Project shall—

(A) review the resource management plan (hereinafter "plan") for such forest, the scientific information and analysis in the report prepared pursuant to subsection (b) which are applicable to such plan, and any policy which is applicable to such plan upon the date of enactment of this section (whether or not such policy has been added to such plan by amendment), including any which is, or is intended to be, of limited duration, and which the Project addresses; and

(B) based on such review, develop a modification of such policy, or an alternative policy which serves the basic purpose of such policy, to meet the specific conditions of such forest.

(2) For each plan reviewed pursuant to paragraph (1), the Forest Supervisor or District Manager concerned shall prepare and adopt an amendment which: contains the modified or alternative policy developed pursuant to paragraph (1)(B); ~~is directed solely to and affects only such plan;~~ and addresses the specific conditions of the forest to which the plan applies and the relationship of the modified or alternative policy to such conditions. The Forest Supervisor or District Manager concerned shall consult at a minimum, with the Governor of the State, and the Commissioners of the county or counties, and affected tribal governments in which the forest to which the plan applies is situated during the review of the plan required by paragraph (1) and the preparation of an amendment to the plan required by this paragraph.

delete

(3) To the maximum extent practicable, each amendment prepared pursuant to paragraph (2) shall establish site-specific standards in lieu of imposing general standards applicable to multiple sites. Any amendment which would result in any major change in land use allocations within the plan or would reduce the likeli-

delete

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hood of achievement of the goals and objectives of the plan (prior to any previous amendment incorporating in the plan any policy referred to in paragraph (1)(A)) shall be deemed a significant change, pursuant to section 6(f)(4) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604(f)(4)) or section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712), requiring a significant plan amendment or equivalent.

(4) Each amendment prepared pursuant to paragraph (2) shall comply with any applicable requirements of section 102(2) of the National Environmental Policy Act, except that any cumulative effects analysis conducted in accordance with the methodology provided pursuant to subsection (b)(1) shall be deemed to meet any requirement of such Act for such analysis and the scoping conducted by the Project prior to the date of enactment of this section shall substitute for any scoping otherwise required by such Act for such amendment, unless at the sole discretion of the Forest Supervisor or District Manager additional scoping is deemed necessary.

(5) The review of each plan required by paragraph (1) shall be conducted, and the preparation and decision to approve an amendment to each plan pursuant to paragraph (2) shall be made, by the Forest Supervisor or District Manager, as the case may be, solely on: the basis of the review conducted pursuant to paragraph (1)(A), any consultation or conferencing pursuant to section 7 of the Endangered Species Act of 1973 required by paragraph (6), any documentation required by section 102(2) of the National Environmental Policy Act, and any applicable guidance or other policy issued prior to the date of enactment of this Act.

(6)(A) Any policy adopted in an amendment prepared pursuant to paragraph (2) which is a modification of or alternative to a policy referred to in paragraph (1)(A) and upon which consultation or conferencing has occurred pursuant to section 7 of the Endangered Species Act of 1973, shall not again be subject to the consultation or conferencing provisions of such section 7.

(B) If required by such section 7, and not subject to subparagraph (A), the Forest Supervisor or District Manager concerned shall consult or conference separately on each amendment prepared pursuant to paragraph (2).

(C) No further consultation, other than the consultation specified in subparagraph (B), shall be undertaken on the amendments prepared pursuant to paragraph (2), on any project or activity which is consistent with an applicable amendment, on any policy referred to in paragraph (1)(A), or on any portion of any plan related to such policy or the species to which such policy applies.

(7) Each amendment prepared pursuant to paragraph (2) shall be adopted on or before October 31, 1996: *Provided*, That any amendment deemed a significant plan amendment, or equivalent, pursuant to paragraph (3) shall be adopted on or before March 31, 1997: *g*.

(8) No policy referred to in paragraph (1)(A), or any provision of a plan or other planning document incorporating such policy, shall be effective in any forest subject to the Project on or after March 31, 1997, or after an amendment to the plan which applies to such forest is adopted pursuant to the provisions of this subsection, whichever occurs first.

(9) On the signing of a record of decision or equivalent document making an amendment for the Clearwater National Forest pursuant

delete these provisions, refer or STRICT SMALL AMOUNT AMENDMENT PROCESS

December

delete

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to paragraph (2), the requirement for revision referred to in the Stipulation of Dismissal dated September 13, 1993, applicable to the Clearwater National Forest is deemed to be satisfied, and the interim management direction provisions contained in the Stipulation of Dismissal shall be of no further effect with respect to the Clearwater National Forest.

(d) The documents prepared under the authority of this section shall not be applied or used to regulate non-Federal lands.

SEC. 316. RECREATIONAL FEE DEMONSTRATION PROGRAM.—(a) The Secretary of the Interior (acting through the Bureau of Land Management, the National Park Service and the United States Fish and Wildlife Service) and the Secretary of Agriculture (acting through the Forest Service) shall each implement a fee program to demonstrate the feasibility of user-generated cost recovery for the operation and maintenance of recreation areas or sites and habitat enhancement projects on Federal lands.

(b) In carrying out the pilot program established pursuant to this section, the appropriate Secretary shall select from areas under the jurisdiction of each of the four agencies referred to in subsection (a) no fewer than 10, but as many as 50, areas, sites or projects for fee demonstration. For each such demonstration, the Secretary, notwithstanding any other provision of law—

(1) shall charge and collect fees for admission to the area or for the use of outdoor recreation sites, facilities, visitor centers, equipment, and services by individuals and groups, or any combination thereof;

(2) shall establish fees under this section based upon a variety of cost recovery and fair market valuation methods to provide a broad basis for feasibility testing;

(3) may contract, including provisions for reasonable commissions, with any public or private entity to provide visitor services, including reservations and information, and may accept services of volunteers to collect fees charged pursuant to paragraph (1);

(4) may encourage private investment and partnerships to enhance the delivery of quality customer services and resource enhancement, and provide appropriate recognition to such partners or investors; and

(5) may assess a fine of not more than \$100 for any violation of the authority to collect fees for admission to the area or for the use of outdoor recreation sites, facilities, visitor centers, equipment, and services.

(c)(1) Amounts collected at each fee demonstration area, site or project shall be distributed as follows:

(A) Of the amount in excess of 104% of the amount collected in fiscal year 1995, and thereafter annually adjusted upward by 4%, eighty percent to a special account in the Treasury for use without further appropriation, by the agency which administers the site, to remain available for expenditures in accordance with paragraph (2)(A).

(B) Of the amount in excess of 104% of the amount collected in fiscal year 1995, and thereafter annually adjusted upward by 4%, twenty percent to a special account in the Treasury for use without further appropriation, by the agency which administers the site, to remain available for expenditure in accordance with paragraph (2)(B).

Telecon - Dinah 1/17

Columbia Basin

Current version of rules.

Comes up w/ tough compromise

Forest Conference 1993 -

CB Ecosystem Project is process in East hole

3x as much land mass as Forest Plan

Two big EIS's - very controversial

Pac River can-actives shut down b/c no end. sp. consultation
Concern - let's not recreate this

Nethercutt - CB rules - stop the 2 big proj. EIS's
go thru amend process (battered) - Forest Plan
Attack on ecosystem mgmt policy of this Admin.

Compromise - policy compromise.

We'd agree to not take EIS's to decision by
stop process after comment period.

extend _____ until 1995 or FP's are amended.
gets rid of fiddling w/ env law

↳ Martha - let's do one step harder.

One step - same structure but we incl a
prebanned altern in proj EIS's.

[Babbitt to Gorton - I can cut a deal.
Not supposed to happen.

As supposed to have language too. Probably more to
Hill's liking.

Martha - nervous. Take a look from a litigation
perspective.

↓ Casby - concerns?

No on the way for FP amendments!!

Don't want to open selves for further injunctives

S: 00-0001 v.1 WRT TO TJ's.