

NLWJC- Kagan

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Timber - Legal Memos [1]

PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT DOCUMENT

LITIGATION UPDATE 8/13/96: RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) CONSOLIDATED with Scott Timber v. Glickman and Pilchuck Audubon Soc'y v. Glickman.

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). On May 30, 1996, the Ninth Circuit denied our motion for a rehearing and issued an amended opinion clarifying that 2001(k)(1) applies to eastside, as well as westside sales.

(2) "Known to be Nesting" and Appeal. On 6/14/96, the Ninth Circuit upheld the agency's use of the Pacific Seabird Protocol for identifying marbled murrelet nesting areas. Thus, the Ninth Circuit reversed the district court's holding that required evidence of nesting within the sale unit boundaries to qualify for a (k)(2) exception.

(3) "High Bidder" and Appeal. On 6/14/96, the Ninth Circuit affirmed that 2001(k)(1) applied to timber sales that have been enjoined or cancelled prior to the effective date of 2001(k), but agreed that the Forest Service and BLM were not required to offer timber sales where the original high bidder was unwilling, unable or unqualified to accept the bid. A Motion for Stay Pending Issuance of the Mandate or, in the Alternative, for Vacatur of the District Court's January 10 Injunction was filed with the Ninth Circuit. This follows the Forest Service's decision not to offer timber sales where the original high bidder did not or could not accept the bid. On July 23, 1996, the Court of Appeals entered an order to issue the mandate and denied NFRC's motion for rehearing. The court also denied a motion for clarification filed by Sierra Club Legal Defense Fund.

(4) Reporting Requirements. **Two compliance reports were filed this week: (1) updating the status of sales offered between October 1, 1990 and July 27, 1996 and (2) a joint status report indicating that meetings and settlement negotiations were ongoing as to (k)(2) replacement timber volume.**

(5) Replacement Volume. On July 2, 1996, Judge Hogan issued an order that the Forest Service identify and release replacement timber within 60 days. A motion for clarification or, in the alternative, for a stay pending appeal was filed on August 1. The Forest Service provided a

Declaration setting forth how compliance will go forward, as well as copies of the memoranda instructing the Forest Service to identify and provide this replacement timber. Negotiations were held on July 26 between representatives of the Administration and timber industry. **The motion is scheduled for consideration, without argument, on August 26, 1996.**

(6) The timber industry filed a motion seeking an extension of the injunction beyond the expiration of the salvage sale provision on one Forest Service (the Horse Byars sale) and one Bureau of Land Management sale (the Shady sale). **On August 6, the denied this motion from the bench.**

Klamath Tribes v. United States, (D. Or.) This action by the Klamath Tribe seeks to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest Service are violating a trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. On May 6, the court heard arguments on plaintiffs PI motion, denied the government's motion to transfer the action to Judge Hogan and granted Boise Cascade's motion to intervene. Counsel for the Forest Service discovered that at least one sale represented as uncut was, in fact, over 20% harvested. The Department of Justice immediately apprised the court and all counsel of record of this misrepresentation. Counsel for the Tribes then requested that the Forest Service enter into a Court-approved Stipulation, whereby the parties would agree that there would be no timber harvesting on any of the remaining seven Klamath Tribes' disputed green sales and salvage sales without first providing the Tribes with seven days' notice. The Office of General Counsel provided a declaration explaining how the misrepresentation came about, how the situation has been remedied and how the information in the future will be accurate. Nonetheless, at a TRO hearing on July 22, Judge Haggerty granted a TRO as to the John Lodgepole, Blue Ford and Yoss Ridge sales. **We are currently exploring alternative dispute resolution as a way to address the underlying conflicts between the Tribes and the Forest Service.**

Seattle Audubon Society v. Thomas (W.D. Wash., Dwyer, J.). In October 1995, SAS filed a motion to clarify and enforce injunctions issued in 1990 on the Cowboy, Nita, South Nita and Garden timber sales, and to clarify the ruling as to the First and Last sales. Industry filed a subsequent motion to vacate the injunctions on the basis of the Glickman Court's orders. On 2/22/96, Judge Dwyer issued an order staying a decision on the four enjoined sales pending a ruling by the Ninth Circuit. The Ninth Circuit's opinion of 6/14/96 affirms that the four sales (Cowboy, Nita, South Nita and Garden) do not fall within

the scope of 2001(k)(1). We filed a notice of the Ninth Circuit opinion with the court.

Native Americans for Enola v. USFS (Ninth Circuit) The Enola Hill Sale located on Mount Hood NF was released pursuant to Section 2001(k)(1). The release was challenged on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. The district court granted our motion to dismiss ruling that the Rescissions Act precludes plaintiffs substantive and procedural challenges (2/28/96). An appeal followed. On Thursday April 25, Judge Marsh, finding plaintiffs have no likelihood of success on appeal, vacated his April 17 TRO and denied the plaintiffs' motion for stay and injunction pending appeal. **Plaintiffs filed a notice of appeal, but are not currently represented by counsel, and the Ninth Circuit has not yet set a briefing schedule. Meanwhile, the sale is being harvested. Once harvest is complete, we anticipate filing a motion for dismissal as moot with the Ninth Circuit.**

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser of a timber sale (GATORSON) that the Forest Service had suspended for NEPA issues, filed an order requesting that the sale be released under 2001(k). The court heard arguments in January of 1996 and took the matter under advisement. We continue to file notices to apprise the district court of activity in the Ninth Circuit that affects this sale. **The timber purchaser has requested that the Forest Service immediately release this sale. The request stated that the purchaser considers this continued refusal to release the sale to be in contempt of court.**

Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under 2001(d) and two not under the Rescissions Act). On 12/5/95, Judge Hogan issued a ruling, determining that all sales, including those that were not delayed, fall within the scope of 2001(k). On August 1st the Ninth Circuit affirmed the district court's ruling. On the applicability of Section 2001(k) (1) to the previously awarded and operating sales, the Ninth Circuit held that the decision in NFRC v. Glickman (NFRC I), 9th Cir. No. 95-36038 (May 30, 1996) controls. The court also rejected ONRC's claim that the Rescissions Act did not override review of the sales under the APA. The court held that the effect of the Section 2001(i) of the Rescissions Act "is to render sufficient under the environmental laws whatever documents and procedures, if any, the agency elects to use for an Option 9 sale." Thus, concluding that the decision to proceed with the sales, and "all documents and procedures connected with those sales, were entirely consistent with all environmental and natural resources laws."

DECISIONS/CLOSED ACTIONS FOR 2001(k):

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI as to the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and released pursuant to (k) (1). Plaintiffs contended the sale area contains northern spotted owls. On March 19, 1996 the court denied plaintiffs' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). On February 1, 1996 federal defendants and SCLDF entered into a joint stipulation to dismiss the complaint without prejudice.

Oakhurst v. USFS (D. Or.). In January of 1996, the court dismissed this action by a pro se plaintiff that challenged the Sugarloaf Timber Sale. Plaintiff raised constitutional issues, the Civil Rights Act, the religious Freedom Restoration Act and the APA.

Section 2001(b) Sales (Salvage Sales)

PENDING DISTRICT COURT ACTIONS:

Northwest Ecosystem Alliance v. Gehr (D. Wash.) (Athas, AUSA Kipnis) -- On Thursday, August 1, plaintiffs filed a complaint and a motion for a temporary restraining order to stop the logging of the Thunder Salvage Sale on the Okanogan National Forest. This sale had been bid upon by environmental groups, who were then disqualified as responsible bidders. Our opposition to the TRO was filed on August 5. The U.S. Attorney's Office is reviewing possible settlement options.

Kettle Range Conservation Group v. U.S. Forest Service, (E.D. Wash.) This is a NEPA challenge to timber sales in the Colville National Forest under NEPA. The Forest Service prepared an FEIS for two green sales, and then, after fire swept through the area, it did an SEIS to consider the changed circumstances and to add a salvage sale component. The salvage sale was awarded under the Rescissions Act, § 2001(b), and it has been substantially logged. Plaintiffs have not brought a direct challenge to the salvage sale, but they allege that the EISs fail to analyze cumulative effects of the fire and subsequent salvage logging, impacts on roadless areas, and economic effects of all sales. A hearing on cross-motions for summary judgment was held on July 25, 1996. The judge indicated that he would issue his ruling in approximately ten days.

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (Ninth Circuit). On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. **The case has been fully briefed, but no oral argument has been set.**

Sierra Club v. U.S. Forest Service (Ninth Circuit) ("Warner Creek" Timber Sale). The Forest Service originally offered this salvage sale prior to the enactment of the Rescissions Act after an unknown arsonist burned the area. In May of 1995, a magistrate judge issued an opinion finding that the Forest Service should have considered this factor in the EIS. After passage of the Rescissions Act, the district court judge ordered briefing on the effect of Section 2001 on the Warner Creek Sale, and after finding that Section 2001 was applicable, dismissed plaintiffs NEPA and NFMA claims. Plaintiffs appealed, claiming the district court improperly applied Section 2001 to a sale that was already "prepared" and requesting that the district court be

required to review the NEPA claims. Our response brief was filed on March 20, 1996, and oral argument was held on July 9, 1996. **If the Warner Creek sale does not go forward based on a possible settlement between the Forest Service and Thomas Creek Timber, we will notify the Ninth Circuit immediately.**

Idaho Sporting Congress v. USFS (Ninth Circuit) (Thunderbolt I) Plaintiffs challenged the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. On January 8, 1996 the court granted our motion for summary judgment and to dismiss finding that the Forest Service did not act in an arbitrary or capricious manner. The court rejected plaintiffs' public trust doctrine and APA arguments, and limited review to those sales that were advertised, thus holding that an unadvertised sale does not present a case or controversy under the Rescissions Act. Argument was given on May 10, 1996.

Idaho Conservation League v. USFS (Ninth Circuit) (Thunderbolt II) On December 11, the court granted our motion for summary judgement, finding that the Forest Service did not proceed in an arbitrary or capricious manner in making the determination to offer the sale, despite some contradictory positions by other agencies. Further, the court found that the Secretary could, in fact, delegate his responsibilities under the Rescissions Act, contrary to plaintiffs' arguments. Oral argument was held on May 10, 1996.

DECISIONS IN DISTRICT AND CIRCUIT COURTS:

Inland Empire Public Lands Council v. Glickman (9th Cir.) (Fire Salvage Sales) On May 8, 1996, the Ninth Circuit affirmed the district court's order that allowed fire salvage sales to go forward in the Kootenai National Forest. The court noted that the Rescissions Act provides for "extremely limited judicial review," and the Act does not require the Secretary to personally authorize each salvage sale. Further, the Ninth Circuit affirmed the district court's actions in dismissing the action against the FWS and striking extra-record materials. On June 5, the government, pursuant to a court order, submitted a letter on whether the Secretary can delegate his authority to proceed with salvage sales under the Rescissions Act. On July 15, the Ninth Circuit issued a second Order affirming that the Secretary is not required to authorize personally each salvage sale.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On May 3, 1996, Judge Limbaugh granted federal defendants motion for summary judgment in this challenge to a salvage timber sale located on the Mark Twain National Forest. The Forest Service had proceeded with this sale under the categorical exclusion provision of NEPA. Plaintiffs challenged that a categorical

exclusion did not comply with the Rescissions Act. The court rejected this argument. Notably, in this action, the court had contrary to express provisions of 2001, issued a TRO.

Idaho Sporting Congress v. USFS (D. Idaho) (Thunderbolt Sale) ("ISC 2). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.

Idaho Sporting Congress v. USFS, (D. Idaho) (Thunderbolt Sale). Plaintiffs ISC filed this action against two additional salvage timber sales that are offered as part of the Thunderbolt Recovery Fire Recovery Project. Plaintiffs alleged the same violations as in "ISC2." The court granted defendants' motion for summary judgment as to these two sales. Plaintiffs on 6/12 filed a motion to reconsider alleging the sales are not in compliance with state water quality standards, and the provisions of 2001(i) do not exempt the sales from compliance with state laws.

The Armuchee Alliance v. King, District Ranger, (D. Georgia). Plaintiffs challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to release Southern Pine Beetle (SPB) Salvage Sales in the Chattahoochee National Forest. By order dated April 18, 1996, the court granted our motion for summary judgment on all counts. Specifically, the court concluded that the Timber Salvage Rider was not unconstitutionally vague, did not violate the separate of powers doctrine or equal protection clause, and did not unconstitutionally infringe upon plaintiffs' substantive and procedural due rights. Further, the court affirmed the Forest Service's decision to invoke a categorical exclusion. We received notice from the court that this opinion, was submitted for publication.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations resulted in an agreement to dismiss this action, and on April 10, 1996 the court dismissed the action with prejudice. At issue in this second challenge to salvage timber sales in the Alabama National Forests, was the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with the sale and the use of a categorical exclusion.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February, 1996. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a settlement that released the 15 sales at issue. In this action, environmental groups challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage sales in the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted federal defendants' motion for summary judgment. Plaintiffs had challenged five salvage sales in the Daniel Boone National Forest and their impacts on the endangered Indiana bat. The court's decision was the first to address the applicable standard of review for salvage timber sales under the Rescissions Act. The court held an arbitrary and capricious review is the appropriate standard, yet the review is to be "extremely deferential."

Northwest Forest Plan.

Northwest Forest Resource Council v. Dombeck, O&C Counties v. Babbitt, Northwest Forest Resource Council v. Espy (D.D.C. - Judge Jackson) (Burgess) On May 22, Judge Jackson dismissed all pending challenges by the timber industry to the validity of the Northwest Forest Plan. Relying on the doctrine of stare decisis, the court found that all parties had a "full and fair" opportunity before Judge Dwyer to challenge the validity of the plan, and the opinion issued in December 1994 considered all such issues. Acknowledging the Ninth Circuit's opinion, the court stated that the validity of the Forest Plan had been "definitely decided, judicially."

ATTORNEY-CLIENT PRIVILEGED

A G E N D A
Monday, July 15, 1996
Rescissions Act

I. High Bidder Sales [Al Ferlo]

A. Background

1. Sales are: Eagle Ridge House Log - .17 mmbf (Umatilla NF), Allen - 3.8 mmbf, Horn - 1.34 mmbf, Banty -.61 mmbf (Wallowa-Whitman NF), John Lodgepole - 2.2 mmbf (Winema NF)
2. Eight other Forest Service sales had no bidders at all.

B. Decision Needed

C. Next Step:

1. Correct statements made to courts of Forest Service's decision not to go forward with these sales; OR
2. File a Motion for Stay Pending Issuance of the Mandate, or, in the Alternative, for Vacatur of the District Court's January 10 Injunction.

II. Response to Section 2001(k) (3) Replacement Timber Order [Michelle Gilbert]

A. Clarification Or, In The Alternative, A Stay

1. Lack of jurisdiction
2. Impossibility of compliance within 60 days with satisfaction of environmental laws
3. If court refuses to clarify that the only obligation imposed by order is to identify the replacement timber within 60 days, then we can seek a stay.

*Can we do
even this?*

B. If Clarification and/or Stay Are Denied, Appeal

1. Injunction was an abuse of discretion:
 - a. Ambiguous terms

- (1) what does "release" mean
 - (2) do environmental laws apply
- b. Impossibility of compliance
 - c. 2001(k)(3) leaves method "providing" replacement timber to Secretary's discretion
 - d. Ordering release within 60 days without deciding issue of compliance with environmental laws is abuse of discretion.
2. Court erred in imposing a 60 day deadline in the absence of any deadline in the statute.
 3. File a Motion to Clarify or, in the Alternative, for a Stay Pending Appeal
 - a. Express exactly how we will comply with order
 - b. Ask for stay if our interpretation is not correct.
- C. Needed:
1. Declaration from Forest Service on how order will be satisfied.
 2. Need Forest Service to provide details addressing the steps needed to put together a timber sale, e.g., marking trees, sale layout, timber cruise, OSHA compliance.
 2. Declaration from Forest Service must also include whether the Sterling Wilcox and Gray Reynolds Declarations are still correct and can apply to all (k)(3) replacement timber.

III. The Klamath Tribes v. US Situation [Geoff Garver]

- A. Background on Timber Harvesting Without Notification
- B. Response from Sierra Club Legal Defense Fund
- C. Decision Needed:
 1. Consent to Stipulation not to harvest until notice given to Klamath Tribes; OR
 2. Defend against Klamath Tribes' promised TRO on all sales

D. Declaration Needed:

1. Explaining who was responsible for logging without notice;
2. Setting forth what procedures have been put in place to prevent such an error in the future; AND
3. Describing current state of all sales.

E. Long Term Issue: ADR

IV. Other Issues

Warner Creek Sale

Telecon w/ Ellen Atlas 7-12-96

1. High bidder sale question -

At had papers ready to go.

Haven't heard.

One being cut.

to Hogan

2. K3 order - go back[^] + clarity?

clarity what?

3. Klamath Tribes question -

learned one of sales had been cut

after telling ct. the opposite.

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
GENERAL LITIGATION SECTION
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WASHINGTON, D.C. 20004
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	Bob Baum	208-3877
	David Gayer	
	Dinah Bear	456-0753
	Brian Burke	720-4732
	Mark Gaede	
	Ted Boling	514-4231
	Peter Coppelman	514-0557
	Lois Schiffer	
	Jim Simon	
	Al Ferlo	514-4240
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	Mike Gippert,	690-2730
	Jay McWhirter	
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DATE: July 8, 1996

FROM: Michelle Gilbert

JUL 8 '96 8:05 FROM US ATTY EUGENE ORE

PAGE.002

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U.S. ATTORNEY
EUGENE ORE.

96 JUL -2 PM 4:54
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY *[Signature]*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)
an Oregon Corporation,)

Plaintiff,)

and)

SCOTT TIMBER CO., VAAGEN BROS.)
LUMBER INC., and WESTERN TIMBER)
CO.,)

Plaintiff-intervenors)

vs.)

DAN GLICKMAN, in his capacity as)
Secretary of Agriculture; BRUCE)
BABBITT, in his capacity as)
Secretary of the Interior,)

Defendants,)

and)

OREGON NATURAL RESOURCE COUNCIL,)
et al.)

Defendant-intervenors)

Case No. 95-6244
Lead Case
Case No. 95-6267
Case No. 95-6384
Consolidated cases

ORDER

This is an action to compel defendants to comply with
section 2001(k) of the 1995 Emergency Supplemental

Appropriations and Rescissions Act. Pub. L. No. 104-19, 109 Stat. 240 (July 27, 1995). On January 10, 1996, this court ordered defendants to comply with section 2001(k) (1) by awarding all contracts for the sale of timber on land within the section 318 geographic region for which the relevant agency opened bids between October 23, 1989, and July 27, 1995, unless there is a threatened or endangered bird known to be nesting within the sale unit. On January 19, 1996, this court issued an order articulating the standards necessary to sustain a "known to be nesting" determination under section 2001(k) (2). With the appeals of these two orders pending, plaintiffs (#435) and plaintiff-intervenors (#429) moved the court to compel defendants to comply with section 2001(k) (3) by identifying and releasing replacement timber with regard to sale units that the parties agree meet the "known to be nesting" standard of section 2001(k) (2), and defendants moved (#439) to strike both motions to compel the identification and release of replacement timber. Subsequent to the filing of the above motions, the Court of Appeals for the Ninth Circuit issued a decision reversing this court's decision to the extent that the court of appeals upheld the government's use of the Pacific Seabird Group Protocol for the purpose of making "known to be nesting" determinations for murrelets under section 2001(k) (2).

DISCUSSION

2 - ORDER

1. Need for Amended Complaint

Defendants contend that the motions to compel identification and release of replacement timber are outside the scope of the pleadings and that plaintiff and plaintiff-intervenors should be required to file an amended complaint. Under the Federal Rules of Civil Procedure, the complaint serves as a notice device which, combined with liberal discovery and pretrial devices, is designed to eliminate surprise so that facts can be developed and legal theories formulated for trial. 2A J. Moore & J. Lucas, Moore's Federal Practice P. 8.14 at 8-90 (2d ed. 1983); see Fed. R. Civ. P. 1, 15, 16, 26; Conley v. Gibson, 355 U.S. 41, 46 (1957) ("Rules require . . . a short and plain statement of a claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"). Thus, within broad limits, the Federal Rules permit a party to shift his or her position before trial. Moore, supra; Entertainment Specialties, Inc. v. Thompson, 69 B.R. 556, 559 (C.D. Calif. 1987).

Plaintiff's amended complaint sought "to compel defendants . . . to perform the mandatory duty owed to plaintiff and its members under § 2001(k) . . ." Amended Complaint (#63) at 1. Plaintiff-intervenor's complaint sought release of timber sale units under sections 2001(k) and 2001(k)(2) as well as any "[o]ther relief as the court finds reasonable and necessary." Complaint (#1) at 1 and 6.

These complaints were sufficient to put defendants on notice that plaintiff and plaintiff-intervenor were seeking to compel defendants to comply with section 2001(k). Although litigation to date has focused on sections 2001(k)(1) and (2), the identification of timber under section 2001(k)(3) to replace timber excepted from section 2001(k)(1) is a matter directly connected to the preceding litigation. It is not necessary to file an amended complaint under these circumstances.

2. Jurisdiction Over (k)(3) Issue

Defendants also allege that the Court of Appeals for the Ninth Circuit has exclusive jurisdiction over this section 2001(k)(3) matter due to the pendency of the section 2001(k)(1) and (k)(2) appeals. Subsequent to defendants' motion, however, the Ninth Circuit Court of Appeals issued its ruling upholding the government's use of PSG Protocol standards for determining known murrelet nesting. Accordingly, there is no danger of duplicitous jurisdiction between this court and the Ninth Circuit Court of Appeals over the present issue.

3. The (k)(3) Issue

Section 2001(k)(3) provides:

(3) ALTERNATIVE OFFER IN CASE OF DELAY. -- If for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of the enactment of this Act, the Secretary concerned shall provide the purchaser an equal volume of timber, of like kind and value, which shall be subject to the terms of the original contract and shall not count against

allowable sale quantities.

Defendants do not deny that they have an obligation to award replacement timber for those sale units which meet section 2001(k)(2)'s "known to be nesting" standards. Defendants do argue that this court should not order the identification and release of replacement timber because to do so would result in a "piecemeal" process which would be inequitable to other timber companies and would prevent defendants from considering cumulative effects. Federal Defendants' Motion to Strike or, in the Alternative, Opposition to Scott Timber Co.'s Motion to Compel Timber (#439) at 11-12. Even taken at face value, these arguments are unavailing: neither administrative inconvenience nor customer inequity trumps Congress's directive to award replacement timber for units included under (k)(3).

It does not appear that the applicability of environmental or administrative laws is an issue that is ripe for decision. Defendants' briefing indicates that the Bureau of Land Management has been able to offer replacement timber pursuant to section 2001(k)(3) with regard to two sale units and that one of these replacement proposals has been accepted by the purchaser pending agreement on value determination. Federal Defendants' Opposition to NFRC's Motion to Compel Timber (#448) at 14-15. Defendants' briefing also indicates that the Forest Service has formulated some initial guidelines for identifying

replacement timber with respect to sale units meeting both the court and Pacific Seabird Group Protocol definitions of "known to be nesting" and has sent these guidelines to Forest Service, Fish and Wildlife, and National Marine Fisheries Service Supervisors. See Motion to Include (#443).

No decision can be made in a vacuum: some degree of administrative consideration of environmental impacts is inevitable in selecting replacement timber. The guidelines formulated by the Forest Service and Bureau of Land Management thus far are consistent with any constraints created by section 2001(k). Although the application of more formal, time-consuming requirements under the National Environmental Policy Act, the National Forest Management Act, or the Endangered Species Act may be inconsistent with, and thus explicitly or implicitly preempted by, section 2001(k), it does not appear that a case or controversy will necessarily develop regarding the applicability of such laws to the 2001(k)(3) process. Accordingly, the court does not decide this issue at this time.

Under the plain language of section 2001(k)(3), defendants have been under an obligation to provide purchasers with replacement timber since September 11, 1995, the forty-sixth day after the July 27, 1995 enactment of the Rescissions Act. Although section 2001(k)(3) does not provide a deadline for the Secretaries' compliance, its

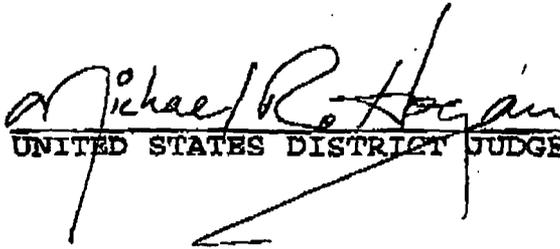
caption makes clear that the provision of replacement timber is an "alternative . . . in case of delay." The only explicit condition precedent to the Secretaries' obligation to release replacement timber is the running of the 45 day period following the Rescission Act's enactment.

Accordingly, this court orders defendants to proceed immediately to identify and release replacement timber with regard to those sale units which meet the "known to be nesting" standards of section 2001(k)(3). Defendants are ordered to complete the identification and release of replacement timber for these sale units within 60 days.

CONCLUSION

Defendants' motion to strike (#439) is denied. Plaintiff's (#435) and plaintiff-intervenor's (#429) motions to compel the identification and release of replacement timber are granted to the extent that defendants are ordered to proceed immediately to identify and release replacement timber with regard to those sale units which meet the "known to be nesting" standards in the government's Pacific Seabird Group Protocol. Defendants are further ordered to release such replacement timber within 45 days.

DATED this 2nd day of July, 1996.


UNITED STATES DISTRICT JUDGE



Sunrise, Mt. McKinley

Aronal Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

203 Hoge Building, 705 Second Avenue, Seattle, WA 98104-1711

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July 11, 1996

VIA FACSIMILE

Mr. Geoffrey Garver
U.S. Department of Justice
601 Pennsylvania Avenue N.W.
Washington, DC 20044

Re: **The Klamath Tribes v. U.S.A. et al. v. Boise Cascade**
Civ. No. 96-00381-MA

Dear Geoff:

The Klamath Tribes are deeply troubled by the logging of nearly 1/4 of the John Lodgepole sale in defiance of the representations made to the Tribes and the Court. Keeping this logging a secret violated federal defendants' commitment to provide the Tribes advance notice of any logging. It also deprived the Tribes of any opportunity to stop the logging.

There is no way this error can be corrected; tragically, the trees cannot be replaced. After seriously considering the available options, including sanctions, the Tribes have decided to proceed as follows. The Tribes ask that federal defendants enter into a stipulation, to be approved by the Court, requiring: (1) that one-week advance notice be provided to the Tribes of any logging within the former reservation; (2) that federal defendants file weekly reports with the Court describing the status of and any activity on the sales at issue in Count I; and (3) that the weekly reports provide updated information on the status of any salvage sales within the former reservation.

In addition, the Forest Service's failure to disclose pertinent information as promised regarding logging of the John Lodgepole timber sale has called into question your client's veracity and the completeness of the representations made by your client to the Court. Accordingly, we ask you to scrutinize closely the representations that your clients have made to the Court in declarations filed in the case. In particular, the Tribes have submitted declarations refuting many of the statements made in the Forest Service's declarations.

Mr. Geoffrey Garver

July 11, 1996

Page 2

We ask you, as an officer of the Court, to set the record straight. A more honest and forthcoming presentation of the past communications between our clients would be beneficial to them in the long run. Each misrepresentation or convenient omission creates greater rifts between our respective clients and engenders distrust that may impair their future working relationships.

Sincerely,



Patti A. Goldman

c:\wp51\cases\520\520garver.1t2

c: Ellen Athas
Ed Goodman



Sunrise, Mt. McKinley

Arnold Adams

SIERRA CLUB LEGAL DEFENSE FUND, INC.

The Law Firm for the Environmental Movement

203 Hoge Building, 709 Second Avenue, Seattle, WA 98104-1711

(206) 343-7340 FAX (206) 343-1526

July 11, 1996

VIA FACSIMILE - (202) 305-0506

Mr. Geoffrey Garver
U.S. Department of Justice
601 Pennsylvania Avenue N.W.
Washington, DC 20044

Re: **Pilchuck Audubon Society et al. v. Glickman, No. 95-6244-HO**
Status of "High Bidder" Sales

Dear Geoff:

I am writing to obtain clarification of the Forest Service and Bureau of Land Management's ("BLM's") plans to implement with the Ninth Circuit ruling on the "high bidder" sales. In Northwest Forest Resources Council v. Pilchuck Audubon Society, No. 96-35106 (9th Cir. June 14, 1996), the Ninth Circuit reversed the district court's ruling that Section 2001(k) of the Rescissions Act required the Forest Service and BLM to offer previously offered sales to bidders other than the high bidder if the high bidder was ineligible or disinterested in the award of the sale.

Prior to the district court's ruling (since reversed by the court of appeals), the Forest Service and BLM, pursuant to ordinary timber contracting procedures, had determined that 16 sales would not proceed because the high bidder was either ineligible or had indicated a lack of interest in the sale. The Forest Service had decided not to offer the sales to other bidders, and the BLM had decided not to give the high bidder a chance to reinstate the bid that it had revoked years earlier.

The record is clear that the agencies offered or re-offered the sales only after ordered to do so by the district court. Five Forest Service (John Lodgepole, Banty Salvage, Eagle Ridge Houselog, Allen, and Horn Salvage) and two BLM sales (Olalla Wildcat and Twin Horse) were awarded pursuant to the district court's order. The award letters inform the purchasers that the "the issue of whether or not this sale is subject to [Section 2001(k)] is in litigation" and that "[i]f a court rules that this

Mr. Geoffrey Garver
July 11, 1996
Page 2

sale is not subject to Public Law 104-19, this award and any contract executed as a result of this award, is null and void." See, e.g., Award Letter to Western Timber Company of John Lodgepole Sale from Jack Sheehan, Contracting Officer, U.S. Forest Service (March 12, 1996).

Under the Ninth Circuit decision, the agencies' timber contracting procedures remain intact. Under those procedures, these sales became a nullity and need not proceed under the Rescissions Act.

The agencies must now take immediate action to suspend all logging operations on these seven sales, and the timber sale contracts should be cancelled.] ✓

Please let us know promptly whether the agencies have taken these actions. If not, we will seriously consider asking the Court to order the agencies to do so.

Sincerely,



Patti A. Goldman

d:\wp51\cases\518\518garver.ltz
c: Al Ferlo
Michelle Gilbert

DRAFT

MEMORANDUM FROM THE SECRETARY

TO: Jack Ward Thomas, Chief
Forest Service

SUBJECT: Salvage Program Review

Under the salvage program authorized by P.L. 104-19, salvage sales are not subject to the public appeals processes normally available under the Forest Service's timber program. Additionally, unlike the normal timber program, sales offered under this act are substantially insulated from judicial review. These unique and unprecedented legal protections present an equally unprecedented responsibility for the Forest Service to offer salvage sales worthy of these legal protections.

Improving forest health and reducing wildfire risk are important goals of this program. However, as directed by the President, our salvage timber sales must meet the substantive requirements of our environmental laws. It must also instill public confidence in our stewardship of the national forests.

The Forest Service (FS), with concurrence from the under secretary and my office, should identify an interdisciplinary team to continue supporting the Interagency Salvage Program Review. Until we have had the opportunity to analyze the review and, as appropriate, implement its recommendations, the FS should continue its review all salvage sales. As a part of the review, the FS should inventory all sales that are included under P.L. 104-19 and include the rationale and objectives of each sale. However, I ask the FS to implement the following policy on proposed sales that have yet to be advertised:

1. No sales in inventoried roadless areas should be advertised using authorities in P.L. 104-19.
2. Sales previously prepared under the green program with completed decision notices which were subsequently withdrawn should not be advertised under the salvage program under P.L. 104-19.
3. In addition to seeking initial public comment on all proposed salvage activities, salvage timber sales that are greater than 2 million board feet that contain a significant portion of green timber should not be advertised until the Forest Service:

- 1) clearly documents the rationale for the salvage sale in accordance with P.L. 104-19, the President's directive, and the Interagency Memorandum of Agreement implementing the salvage program; and

*price (pre-idea)
categorical exclusion -
doesn't need EIS.*

500-600 sales

around 75% of volume.

*green
com
commented / small
#*

*not yet
advertised.*

??

2) provides opportunities, (such as conducting public meetings,) to explain the rationale for the sale(s) and carefully reviews comments from interested parties.

4) With regard to public involvement for all salvage sales, the FS should increase its efforts to explain proposed salvage sales to the public and encourage its comment on them. Improving the public's trust and involvement should be a key element of the Forest Service's salvage program.

FS implementation and compliance with this directive and participation in the interagency review will be standing agenda items for our weekly meetings.

DRAFT

Response to Salvage Sale Request
6/5/96 DRAFT--Subject to Verification

whole
universe

breakouts

Category	Sales	MMBF	
I. All Salvage Sales			
Sales Not Yet Advertised	3,300	1,200	1.2 b
Advertised Not Awarded	100	180	
Awarded, Not Fully Harvested /1	1,400	220	
II. Salvage In Inventoried Roadless /2			
Sales Not Yet Advertised	20	110	
Advertised Not Awarded	3	20	
Awarded, Not Fully Harvested /1	3	20	
Total Harvest in Roadless Since Enact.	6	40 (year)	
III. Salvage That Were Green Sales			
no data available--estimate that <u>less than 1%</u> of large sales were once green sales (these would have entered as green sales last July)			
IV. Green with Salvage /3			
Sales with > 25% Green (by volume) /4	70%		
Sales with > 50% Green (by volume)	55%		

700-800
Planned for
next fiscal
yr--into
next FY

- /1 harvest data not available--50% harvest of FY 1996 sales assumed
- /2 assumes 9% of sales fall in roadless areas based on total volume in roadless number of sales is estimated based on 6-7mmbf per sale in roadless areas
- /3 based on a forest-by-forest average (not sale-by-sale)
- /4 a significant portion of the <25% volume (nearly 900 mmbf) is in Region 8 where green trees are harvested to control southern pine beetle.

|||||

FOREST SERVICE 2001(K) VOLUME

I. 2001(K) VOLUME ASSUMING MAINTENANCE OF STATUS QUO

2001(K) (1) RELEASED VOLUME NOT YET HARVESTED¹

75 MMBF² plus

11 MMBF VOLUME OF RELEASED SALES IDENTIFIED AS ENVIRONMENTALLY SENSITIVE (ALLEN, BANTY SLVG, HORN SLVG, RD SLVG, TANHORSE, TANYA)

POTENTIAL (K) (1) VOLUME NOT RELEASED

11.86 MMBF³ (GATORSON)

AWAITING DECISION BY JUDGE QUACKENBUSH; MAY BE RELEASED UNDER 2001(K)(1) IN LIGHT OF NINTH CIRCUIT'S DENIAL OF PETITION FOR REHEARING

29.59 MMBF (COWBOY, NITA, SOUTH NITA, AND GARDEN; ENJOINED BY JUDGE DWYER)

APPEAL PENDING TO DETERMINE IF SALES FALL WITHIN SCOPE OF SECTION 2001(K)(1) AS HELD BY JUDGE HOGAN; NO ACTION REQUIRED AT THIS TIME; IF AGENCY PREVAILS ON APPEAL, THESE SALES WILL NOT BE RELEASED AND NO SUBSTITUTE TIMBER WILL BE REQUIRED

2001(K)(2) SALES FOR WHICH (K)(3) ALTERNATIVE TIMBER MAY BE REQUIRED

225 MMBF: FS VOLUME WITHHELD UNDER AGENCIES' INTERPRETATION OF 2001(K)(2); ASSUMES NINTH CIRCUIT AFFIRMS AGENCIES' RELIANCE ON PACIFIC SEABIRD PROTOCOL; INCLUDES APPROXIMATELY 2.4 MMBF WITHHELD FOR NSO

¹ This released (k)(1) volume includes approximately 5.5 MMBF of "high bidder" sales remaining to be harvested (of which 5.3 MMBF is included in the 11 MMBF of sales identified as environmentally sensitive). The Ninth Circuit is currently considering whether these sales properly fall within the scope of section 2001(k)(1) as held by Judge Hogan. If the agencies prevail on this issue, the Forest Service will have to evaluate cancellation remedies and obligations. The released (k)(1) volume also includes approximately 20.2 MMBF of sales subject to the Klamath Tribes litigation. Plaintiffs' motion for a preliminary injunction, which if granted would halt activity on these sales, is pending.

² This volume is changing as harvesting is occurring.

³ The Tip and Tiptop sales, 2.95 MMBF, Wenatchee National Forest, also fall within the geographic scope of section 2001(k)(1) as affirmed by the Ninth Circuit; however, these two sales were previously enjoined and absent affirmative action by the purchaser to seek their release, they are not proceeding.

169 avail this yr.
all in compliance
414 - 310 - full comp - any can be moved up?
104 - subst comp.

1 - Ags w/ (Elk Fork
purchaser - Boulder Creek
under new (Abe's Wren
ref. First + Last
Not in full compliance on a couple on both than original

II. 2001(K) VOLUME ASSUMING NINTH CIRCUIT AFFIRMS JUDGE HOGAN'S HOLDINGS ON 2001(K) (2), FOUR ENJOINED SALES, AND HIGH BIDDER, AND ASSUMING QUACKENBUSH RELEASES GATORSON SALE

2001(K) (1) VOLUME

86 MMBF: VOLUME REMAINING TO BE HARVESTED, INCLUDING 11 MMBF SALES IDENTIFIED AS ENVIRONMENTALLY SENSITIVE

165 MMBF: ADDITIONAL VOLUME FROM (K) (2) SALES NOT MEETING HOGAN'S PROTOCOL⁴

29.59 MMBF: VOLUME OF FOUR ENJOINED SALES

11.86 MMBF: GATORSON SALE

TOTAL 2001(K) (1) VOLUME: 292.45 MMBF

2001(K) (2) VOLUME WHICH MEETS JUDGE HOGAN'S PROTOCOL AND FOR WHICH 2001(K) (3) ALTERNATIVE TIMBER MUST BE PROVIDED

61 MMBF: VOLUME THAT IS BEING WITHHELD CONSISTENT WITH JUDGE HOGAN'S PROTOCOL

III. 2001(K) VOLUME ASSUMING NINTH CIRCUIT REJECTS AGENCIES' AND JUDGE HOGAN'S INTERPRETATIONS AND REQUIRES SPECIFIED PHYSICAL EVIDENCE TO WITHHOLD UNDER (K) (2), AND REJECTS AGENCY'S ARGUMENT ON FOUR ENJOINED SALES AND HIGH BIDDER

2001(K) (1) SALES, INCLUDING MAJORITY OF SALES PREVIOUSLY WITHHELD UNDER 2001(K) (2)

86 MMBF: VOLUME OF K(1) SALES REMAINING, INCLUDING HIGH BIDDER SALES

29.59 MMBF: VOLUME OF FOUR ENJOINED SALES

11.86 MMBF: GATORSON SALE

224.43 MMBF: ADDITIONAL VOLUME OF SALES WITHHELD UNDER 2001(K) (2) FOR WHICH NO RECORD OF SPECIFIED PHYSICAL EVIDENCE EXISTS

TOTAL 2001(K) (1) VOLUME: 351.88

2001(K) (2) SALES FOR WHICH DOCUMENTATION OF SPECIFIED PHYSICAL EVIDENCE EXISTS, SUCH AS EGGSHELLS
.570 MMBF

⁴ This volume could fluctuate as current surveys locate murrelets that allow withholding of sale units consistent with Judge Hogan's protocol.

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT DOCUMENT**

LITIGATION UPDATE (6/4/96): RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) (industry challenge to Administration's interpretation of scope and know to be nesting provisions) CONSOLIDATED with Scott Timber v. Glickman and Pilchuck Audubon Soc'y v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). The Court focused on the plain language of the statute, as well as the legislative history. On May 30, 1996, the Ninth Circuit denied our motion for a rehearing and issued an amended opinion clarifying that 2001(k)(1) applies to eastside, as well as westside sales.

(2) "Known to be Nesting" and Appeal. On 1\19\96, Judge Hogan issued an opinion on the "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. On 1/25/96 the District Court granted a 60-day stay of this order. On April 5, 1996, the Ninth Circuit continued the stay of all provisions of this order. Appellate arguments were held on May 7th.

(3) "High Bidder" and Appeal. The Ninth Circuit heard arguments on May 7, 1996.

(4) Reporting Requirements. We continue to file bi-monthly compliance reports.

(5) Replacement Volume, Termination of (k)(1) and Modification or Termination of Existing Sale Contracts. Scott Timber and NFRC filed motions to compel release of (k)(3) replacement volume. Scott Timber's motion to identify and release (k)(3) replacement timber volume was argued on May 14. We await a decision.

Klamath Tribes v. United States, (D. Or.) This action by the Klamath Tribe seeks to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest Service are violating a trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. On May 6, the court heard arguments on plaintiffs PI motion,

denied the government's motion to transfer the action to Judge Hogan and granted Boise Cascade's motion to intervene. Plaintiffs have now filed a motion for summary judgment on the salvage sale portion of the complaint. Our response is due June 14.

The purchaser for the Blue Ford sale has agreed to hold off on any timber harvesting until July 1, 1996, thus forestalling plaintiffs attempt to seek a TRO on this sale.

Seattle Audubon Society v. Thomas (W.D. Wash., Dwyer, J.). In October 1995, SAS filed a motion to clarify and enforce injunctions issued in 1990 on the Cowboy, Nita, South Nita and Garden timber sales, and to clarify the ruling as to the First and Last sales. Industry filed a subsequent motion to vacate the injunctions on the basis of the Glickman Court's orders. On 2/22/96, Judge Dwyer issued an order staying a decision on the four enjoined sales pending a ruling by the Ninth Circuit.

The court on March 27, 1996 issued a ruling declaring that no further relief could be afforded as to the First and Last timber sales. Subsequently, the Forest Service entered into an agreement with the purchaser whereby these environmentally damaging sales will be substituted for less damaging sales.

Native Americans for Enola v. USFS (Ninth Circuit) The Enola Hill Sale located on Mount Hood NF was released pursuant to Section 2001(k)(1). The release was challenged on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. The district court granted our motion to dismiss ruling that the Rescissions Act precludes plaintiffs substantive and procedural challenges (2/28/96). An appeal followed. On Thursday April 25, Judge Marsh, finding plaintiffs have no likelihood of success on appeal, vacated his April 17 TRO and denied the plaintiffs' motion for stay and injunction pending appeal.

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser of a timber sale that the Forest Service had suspended for NEPA issues, filed an order requesting that the sale be released under 2001(k). A hearing was held on January 23, 1996. The matter is under advisement. A decision on this matter will likely be forthcoming as a result of the Ninth Circuit's recent opinion affirming geographic scope. In order to apprise the court of the current status, on May 3, we filed a copy of the Ninth Circuit's opinion with the court and informed the court of our action in seeking a rehearing.

****SEE BELOW FOR FURTHER INFORMATION ON ACTIONS AFFECTING THE NORTHWEST FOREST PLAN.**

Northwest Forest Plan.

Northwest Forest Resource Council v. Dombeck, O&C Counties v. Babbitt, Northwest Forest Resource Council v. Espy (D.D.C. - Judge Jackson) (Burgess) On May 22, Judge Jackson dismissed all pending challenges by the timber industry to the validity of the Northwest Forest Plan. Relying on the doctrine of stare decisis, the court found that all parties had a "full and fair" opportunity before Judge Dwyer to challenge the validity of the plan, and the opinion issued in December 1994 considered all such issues. Acknowledging the Ninth Circuit's affirmance, the court stated that the validity of the Forest Plan had been "definitely decided, judicially."

Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under 2001(d) and two not under the Rescissions Act). On 12/5/95, U.S. District Court Judge Hogan issued a ruling, determining that all sales, including those that were not delayed, fall within the scope of 2001(k). The effects of this decision remain unsettled. On March 4, 1996, a Ninth Circuit panel heard arguments on the government's appeal of this decision.

DECISIONS/CLOSED ACTIONS FOR 2001(k):

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI as to the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and released pursuant to (k)(1). Plaintiffs contended the sale area contains northern spotted owls. On March 19, 1996 the court denied plaintiffs' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). On February 1, 1996 federal defendants and SCLDF entered into a joint stipulation to dismiss the complaint without prejudice.

Oakhurst v. USFS (D. Or.). In January of 1996, the court dismissed this action by a pro se plaintiff that challenged the Sugarloaf Timber Sale. Plaintiff raised constitutional issues, the Civil Rights Act, the religious Freedom Restoration Act and the APA.

Section 2001(b) Sales (Salvage Sales)

PENDING DISTRICT COURT ACTIONS:

Idaho Sporting Congress v. USFS, (D. Idaho). The same plaintiffs now bring a fourth action against two additional salvage timber sales that are offered as part of the Thunderbolt Recovery Fire Recovery Project. Plaintiffs allege the same violations as in "Thunderbolt III", (See "Decisions in District Court," below).

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona), on appeal. On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. The court indicated that this ruling will be submitted for publication. On April 3, 1996, plaintiffs filed a notice of appeal.

Sierra Club v. U.S. Forest Service (Ninth Circuit) ("Warner Creek" Timber Sale). The Forest Service originally offered this salvage sale prior to the enactment of the Rescissions Act after an unknown arsonist burned the area. In May of 1995, a magistrate judge issued an opinion finding that the Forest Service should have considered this factor in the EIS. After passage of the Rescissions Act, the district court judge ordered briefing on the effect of Section 2001 on the Warner Creek Sale, and after finding that Section 2001 was applicable, dismissed plaintiffs NEPA and NFMA claims. Plaintiffs appealed, claiming the district court improperly applied Section 2001 to a sale that was already "prepared" and requesting that the district court be required to review the NEPA claims. Our response brief was filed on March 20, 1996.

Idaho Sporting Congress v. USFS (Ninth Circuit) (Thunderbolt I) Plaintiffs challenged the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. On January 8, 1996 the court granted our motion for summary judgment and to dismiss finding that the Forest Service did not act in an arbitrary or capricious manner. The court rejected plaintiffs' public trust doctrine and APA arguments, and limited review to those sales that were advertised, thus holding that an unadvertised sale does not present a case or controversy under the Rescissions Act. Argument was given on May 10, 1996.

Idaho Conservation League v. USFS (Ninth Circuit) (Thunderbolt II) On December 11, the court granted our motion for summary judgment, finding that the Forest Service did not proceed in an arbitrary or capricious manner in making the determination to offer the sale, despite some contradictory positions by other agencies. Further, the court found that the Secretary could, in fact, delegate his responsibilities under the Rescissions Act, contrary to plaintiffs' arguments. A hearing is scheduled for May 10, 1996.

DECISIONS IN DISTRICT AND CIRCUIT COURTS:

Inland Empire Public Lands Council v. Glickman (9th Cir.) (Fire Salvage Sales) On May 8, 1996, the Ninth Circuit affirmed the district court's order that allowed fire salvage sales to go forward in the Kootenai National Forest. The court noted that the Rescissions Act provides for "extremely limited judicial review," and the Act does not require the Secretary to personally authorize each salvage sale. Further, the Ninth Circuit affirmed the district court's actions in dismissing the action against the FWS and striking extra-record materials. In an order issued May 21, the Court sua sponte ordered the government to submit a supplemental brief on whether the Secretary can delegate his authority to proceed with salvage sales under the Rescissions Act.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On May 3, 1996, Judge Limbaugh granted federal defendants motion for summary judgment in this challenge to a salvage timber sale located on the Mark Twain National Forest. The Forest Service had proceeded with this sale under the categorical exclusion provision of NEPA. Plaintiffs challenged that a categorical exclusion did not comply with the Rescissions Act. The court rejected this argument. Notably, in this action, the court had contrary to express provisions of 2001, issued a TRO.

Idaho Sporting Congress v. USFS (D. Idaho) ("Thunderbolt III"). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.

The Armuchee Alliance v. King, District Ranger, (D. Georgia). Plaintiffs challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to release Southern Pine Beetle (SPB) Salvage Sales in the Chattahoochee National Forest. By order dated April 18, 1996, the court granted our motion for summary judgment on all counts. Specifically, the court concluded that the Timber Salvage Rider

was not unconstitutionally vague, did not violate the separate of powers doctrine or equal protection clause, and did not unconstitutionally infringe upon plaintiffs' substantive and procedural due rights. Further, the court affirmed the Forest Service's decision to invoke a categorical exclusion. We received notice from the court that this opinion was submitted for publication.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations resulted in an agreement to dismiss this action, and on April 10, 1996 the court dismissed the action with prejudice. At issue in this second challenge to salvage timber sales in the Alabama National Forests, was the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with the sale and the use of a categorical exclusion.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February, 1996. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a settlement that released the 15 sales at issue. In this action, environmental groups challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage sales in the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted federal defendants' motion for summary judgment. Plaintiffs had challenged five salvage sales in the Daniel Boone National Forest and their impacts on the endangered Indiana bat. The court's decision was the first to address the applicable standard of review for salvage timber sales under the Rescissions Act. The court held an arbitrary and capricious review is the appropriate standard, yet the review is to be "extremely deferential."

United States
Department of Agriculture
Forest Service

United States
Department of the Interior
Bureau of Land Management

United States
Department of Commerce
National Marine
Fisheries Service

United States
Department of the Interior
Fish and Wildlife Service

United States
Environmental
Protection Agency

Date:

Subject: Interagency Salvage Program Review

To: Regional Foresters, USDA Forest Service
State Directors, USDI Bureau of Land Management
Regional Directors, USDI Fish and Wildlife Service
Regional Directors, USDC National Marine Fisheries Service
Regional Administrators, Environmental Protection Agency

REPLY DUE: JUNE 11, 1996

The interagency Memorandum of Agreement (MOA) on Timber Salvage Related Activities Under Public Law 104-19 commits us to a national salvage program review. A goal statement and objectives of this review (Enclosure 1) have been developed and agreed to by the five participating Federal agencies.

Completing this review is a high priority and your participation and involvement are essential to its success. To facilitate the review process, a series of draft questions specific to each MOA item and to the review objectives have been prepared. The draft questions are enclosed for your review and comment.
(Enclosure 2)

Along with your comments on the draft questions, we request that you provide a list of additional specific topics, issues, concerns, locations/situations and processes you believe should be addressed through the review, including any situations that need clarification. We further request that you provide information on those processes being implemented under the MOA that have been particularly effective.

An interagency working group will develop the final framework for the review based on your responses. We expect that field visits deemed necessary as part of the review will take place during July. We will work with you to ensure that any field trips are designed and implemented in a manner which minimizes disruption of field units while achieving the goal and objectives of the review.

Please provide your response by June 11, 1996. Send your response to your agency contact in the Washington Office, as listed on Enclosure 3.

JACK WARD THOMAS
Chief, Forest Service
Department of Agriculture

MIKE DOMBECK
Director, Bureau of
Land Management
Department of the Interior .

MOLLIE BEATTIE
Director, Fish and Wildlife Service
Department of the Interior

ROLLAND SCHMITTEN
Director, National Marine
Fisheries Service
Department of Commerce

STEVEN A. HERMAN
Assistant Administrator for
Enforcement and Compliance Assurance
Environmental Protection Agency

Enclosures

INTERAGENCY SALVAGE PROGRAM REVIEW
GOAL AND OBJECTIVES

GOAL: Conduct an objective review of compliance with the interagency Memorandum of Agreement (MOA) on timber salvage activities under Public Law 104-19.

OBJECTIVES:

1. Determine how the involved agencies are complying with the eleven items in the Memorandum of Agreement on Salvage Timber Sales and related guidance, and identify actions to enhance compliance.
2. Determine whether the MOA has been effective in establishing processes necessary for achieving environmentally sound timber salvage sales.
3. Evaluate the effectiveness and time/cost savings associated with the streamlined consultation process, which was developed prior to Public Law 104-19 and incorporated in the MOA, and determine the potential applicability of the streamlined consultation process for future use.
4. Identify any additional actions to further enhance interagency collaboration.
5. Produce an interagency report which will provide information for agency decisionmakers, the public, and the Congress regarding implementation of the MOA.

INTERAGENCY SALVAGE PROGRAM REVIEW QUESTIONS

The following questions are intended to provide a basis for meeting the goal and objectives of the interagency salvage timber sale program review. The questions are based on the eleven items in the interagency Memorandum of Agreement on Timber Salvage Related Activities Under Public Law 104-19 (referred to as the MOA), adopted on August 9, 1995, and related guidance issued as Enclosures 4 and 5 of the interagency letter of August 18, 1995. Responses from each of the five involved agencies will be compiled and analyzed to provide a national level perspective. Additional and more detailed information will be obtained through visits to selected field units.

1. COMPLIANCE WITH EXISTING ENVIRONMENTAL LAWS, EXCEPT AS EXPRESSLY PROHIBITED BY Public Law 104-19.

- A. Briefly describe how compliance with the following laws is being ensured:
- o National Environmental Policy Act (NEPA)
 - o Endangered Species Act (ESA)
 - o Clean Water Act (CWA)
 - o National Forest Management Act (NFMA)
 - o Federal Land Policy and Management Act (FLPMA)
- B. Are there any instances in which there has not been compliance with these or other environmental laws? If so, please explain.

2. ACHIEVEMENT OF MAXIMUM FEASIBLE SALVAGE VOLUME WITHIN THE FRAMEWORK OF APPLICABLE REQUIREMENTS, STANDARDS, AND GUIDELINES.

- A. What salvage volume level above the programmed level is being produced? (Field offices need not respond to this question; Washington Office staff will use existing information to prepare a response.)
- B. What process is being used to ensure that sales adhere to:
- o Standards and guidelines in applicable forest plans and land use plans and their amendments, and related conservation strategies such as the Western Forest Health Initiative?
 - o Any other applicable standards and guidelines, such as those adopted as part of the Northwest Forest Plan, PACFISH, INFISH, California Spotted Owl Habitat Interim Management Guidelines, and the Red Cockaded Woodpecker Long-term Strategy?
 - o Mandatory requirements contained in biological opinions?
- C. Are any sales not adhering to the requirements listed in 2.B, above? If so, please explain.

3. PUBLIC INVOLVEMENT IN SALE DEVELOPMENT

- A. How are opportunities being provided for agencies and other partners to be involved in salvage sale planning?

- B. How is input from the above involvement being used in the design of salvage sales? Are the combined EA/BE's being provided to the public for a review period? Are substantive comments being evaluated and a response provided in an appendix to the EA/BE, and reflected in the decision document (per MOA item 6, 2nd paragraph)?

4. IMPLEMENTATION AND EFFECTIVENESS OF THE STREAMLINED CONSULTATION PROCESS

- A. Is the "Level 1" interagency team process (as described in the April 6, 1995, and May 31, 1995, interagency letters) being followed, including early discussion and agreement (prior to completion of the BE) on effects determinations, and agreement on reasonable and prudent measures and terms and conditions?
- B. If the Level 1 team approach is not being used, what other process is being used to achieve the intent of the March 8, 1995, interagency direction to ensure early involvement by the FWS and/or NMFS in the sale planning process, and to streamline consultation timelines?
- C. Have all sales that involve habitat of listed or proposed species had early input by FWS and/or NMFS? If the answer is "No," list the sales initiated under the Rescissions Act which have not had early input and explain why.
- D. Was the streamlined consultation process incorporated into sales for which planning was already underway? Explain how this was done.
- E. Are the expected timelines for completing consultation being met? Explain any delays.
- F. Describe the effectiveness and time/cost savings associated with the streamlined consultation process, and its potential applicability for future use.

5. INTERAGENCY COLLABORATION AND RESOLUTION OF DISAGREEMENTS

- A. Briefly describe the processes being used to ensure that personnel from the various agencies are working in a collaborative and professional manner to implement the objectives of Public Law 104-19 and the MOA in a timely manner.
- B. Have the interagency collaboration procedures described by the MOA given personnel of each agency a better understanding of the mandates and processes of the other agencies and a common objective to work toward with regard to the salvage sale program? Has this resulted in improved working relationships? What could be done to further improve working relationships?
- C. Of the total sales offered to date, how many have involved differences that required elevation above the local staff level? Explain why difference(s) could not be resolved at the staff level. What can be changed to encourage more resolution of disagreements at that level?

6. COMBINED EA/BE PROCESS

- A. Are combined EA/BE's being prepared? In what sense are they "combined"? Has the "combined" process promoted efficiency as compared to the traditional approach of separate documents?
- B. To what extent are categorical exclusions (CE's) being used?
- C. To what extent, and how, have the MOA partner agencies been involved in developing combined EA/BE's? How has the involvement affected the combined EA/BE's? Is the level of MOA partner agency involvement adequate? If not, what can be changed to achieve an appropriate level of involvement?
- D. To what extent have EA's been used when an EIS normally would be required? Are they circulated for 30 days of public review and comment?

7. REGIONAL-SCALE INTERAGENCY ISSUE AND PRIORITY IDENTIFICATION

- A. Did Regional/State agency heads/representatives jointly develop and implement a process for interagency review of the proposed salvage sale program on a regional or state scale, so that involved Federal agencies could identify broad-scale issues and help set work load priorities? If the process was not developed and/or implemented, explain why.
- B. What was the outcome, and has it been satisfactory to all the involved agencies?

8. MITIGATION

- A. How are appropriate mitigation needs being considered and incorporated into salvage sale design and EA/BE's? Is there interagency involvement in the identification of mitigation measures? Do the EA/BE's and related decisions clearly indicate which mitigation measures are mandatory vs. recommended?
- B. Are mitigation needs being fully funded? If there is not full funding, what has been/will be the effect on the resources of concern?

9. MEASURES OF PERFORMANCE

What specific performance measures are being used to assess achievement of goals established in the MOA?

10. MONITORING AND EVALUATION

- A. How is existing direction on monitoring (from planning regulations, agency policies, and land management plan direction) being incorporated in the EA/BE process? Are monitoring requirements specifically described in the EA/BE and/or decision document for each sale? How are agency scientists and other experts involved in developing the monitoring plans?

- B. How is monitoring being conducted to ensure that activities are accomplished as stated in the EA/BE and decision document? ("Implementation monitoring")
- C. Do the monitoring plans identify measures to assess whether the predicted effects of a sale on various resources are occurring? (Effectiveness monitoring - does the sale have the effects predicted?)
- D. Are forests and BLM districts designing and conducting validation monitoring to ensure that the assumptions underlying salvage sale design are correct?
- E. What is the schedule (by Region/State) for project reviews to sample salvage sale activities and their effects? How are successes and problems being documented? How is monitoring information being used in an adaptive management process to ensure improved design and implementation of future sales?
- F. Are all aspects of monitoring being funded? If there is not full funding, what criteria are used to determine what will be monitored (i.e., what are the monitoring priorities)? What is the potential effect on the resources when monitoring is not fully funded?
- G. How is interagency involvement in monitoring and evaluation being done? Involvement of the states, Tribes, and the public?

11. DEFINITION OF A SALVAGE TIMBER SALE

- A. How is the definition for salvage, as defined in the Rescissions Act and the MOA, being interpreted and applied? Are there differences in interpretation among different administrative units or among the agencies involved in the MOA?
- B. Are any sales being offered as salvage sales under the Rescissions Act that were expected to be green sales prior to the Act? If so, explain why.

Washington Office Agency Contacts
Interagency Salvage Program Review

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Forest Service	Nancy Green	(202) 205-6206	(202) 205-1599
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**PRIVILEGED AND CONFIDENTIAL
ATTORNEY/CLIENT DOCUMENT**

LITIGATION UPDATE (5/28/96): RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan) (industry challenge to Administration's interpretation of scope and know to be nesting provisions) CONSOLIDATED with **Scott Timber v. Glickman** and **Pilchuck Audubon Soc'y v. Glickman** (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) Geographic Scope. On April 24, the Ninth Circuit issued an opinion affirming Judge Hogan's interpretation of the geographic scope of Section 2001(k). The Court focused on the plain language of the statute, as well as the legislative history. As a result of conflicting language in the opinion regarding 2001(k)'s application to Eastside vs. Westside sales, on May 3, we filed a motion for a rehearing. The Forest Service and BLM have both recommended against filing a petition for rehearing en banc. //

(2) "Known to be Nesting" and Appeal. On 1\19\96, Judge Hogan issued an opinion on the "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. On 1/25/96 the District Court granted a 60-day stay of this order. On April 5, 1996, the Ninth Circuit continued the stay of all provisions of this order. Appellate arguments were held on May 7th.

(3) "High Bidder" and Appeal. The Ninth Circuit heard arguments on May 7, 1996.

(4) Reporting Requirements. A thirteenth compliance report was filed last week.

(5) Replacement Volume, Termination of (k)(1) and Modification or Termination of Existing Sale Contracts. Scott Timber and NFRC filed motions to compel release of (k)(3) replacement volume, which were argued on May 14. On May 21 we filed a response to NFRC's motion seeking to compel release of alternative volume, arguing that the "notwithstanding" language of (k)(1) does not apply to (k)(3) and accordingly, that all such sales must comply with standards and guidelines and environmental laws. We further argued that contrary to NFRC's assertion, alternative sales cannot be deemed Option 9 sales subject to the protections of 2001(d). On May 24, Scott Timber and NFRC both filed replies, focusing on the facts that modifications to the First and Last sales (subsection 2001(k)(1) sales) did not

comply with environmental laws and the absence of a written agency position interpreting (k)(3).

Klamath Tribes v. United States, (D. Or.) The Klamath Tribe, represented by SCLDF, has filed an action seeking to enjoin the harvesting of eight timber sales on the Winema and Fremont National Forests in Oregon. The Tribe claims the U.S. and Forest Service are violating a trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on these forests. The Forest Service is currently under an injunction from Judge Hogan to release all eight sales. On May 6, the court denied the government's motion to transfer the action to Judge Hogan, and granted Boise Cascade's motion to intervene. We anticipate a ruling shortly on plaintiffs' motion for a PI.

Seattle Audubon Society v. Thomas (W.D. Wash., Dwyer, J.). In October 1995, SAS filed a motion to clarify and enforce injunctions issued in 1990 on the Cowboy, Nita, South Nita and Garden timber sales, and to clarify the ruling as to the First and Last sales. Industry filed a subsequent motion to vacate the injunctions on the basis of the Glickman Court's orders. On 2/22/96, Judge Dwyer issued an order staying a decision on the four enjoined sales pending a ruling by the Ninth Circuit.

The court on March 27, 1996 issued a ruling declaring that no further relief could be afforded as to the First and Last timber sales. Subsequently, the Forest Service entered into an agreement with the purchaser whereby these environmentally damaging sales will be substituted for less damaging sales.

Native Americans for Enola v. USFS (Ninth Circuit) The Enola Hill Sale located on Mount Hood NF was released pursuant to Section 2001(k)(1). The release was challenged on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. The district court granted our motion to dismiss ruling that the Rescissions Act precludes plaintiffs substantive and procedural challenges (2/28/96). An appeal followed. On Thursday April 25, Judge Marsh, finding plaintiffs have no likelihood of success on appeal, vacated his April 17 TRO and denied the plaintiffs' motion for stay and injunction pending appeal.

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser of a timber sale that the Forest Service had suspended for NEPA issues, filed an order requesting that the sale be released under 2001(k). A hearing was held on January 23, 1996. The matter is under advisement. A decision on this matter will likely be forthcoming as a result of the Ninth Circuit's recent opinion affirming geographic scope. In order to apprise the court of the current status, on May 3, we filed a copy of the Ninth Circuit's opinion with the court and informed the court of our action in seeking a rehearing.

ACTIONS AFFECTING THE NORTHWEST FOREST PLAN.

Northwest Forest Resource Council v. Dombeck, O&C Counties v. Babbitt, Northwest Forest Resource Council v. Espy (D.D.C. - Judge Jackson) (Burgess) These actions, challenges by the timber industry to the Northwest Forest Plan, were stayed in June of 1994 by the district court to allow the Ninth Circuit to decide similar issues. In early April, the Ninth Circuit affirmed the legality of the Northwest Forest Plan. At the status conference on May 22, 1996, Judge Jackson dismissed all pending challenges by the timber industry to the validity of the Northwest Forest Plan. Relying on the doctrine of stare decisis, the court found that all parties had had a "full and fair" opportunity before Judge Dwyer to address the validity of the plan and that Judge Dwyer's opinion considered all issues. Acknowledging the Ninth Circuit's affirmance, the court stated that the validity of the Forest Plan had been "definitely decided, judicially."

Prior to dismissing the actions, the court inquired if the industry group, Northwest Forest Resource Council ("NFRC"), intended to petition the U.S. Supreme Court for *certiorari* of the Ninth Circuit opinion. Counsel for defendant groups indicated the group did not. However, upon the dismissal of the actions by Judge Jackson, counsel for timber industry indicated that in light of the D.C. Court's decision, NFRC may reconsider its position.

Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under 2001(d) and two not under the Rescissions Act). On 12/5/95, U.S. District Court Judge Hogan issued a ruling, determining that all sales, including those that were not delayed, fall within the scope of 2001(k). The effects of this decision remain unsettled. On March 4, 1996, a Ninth Circuit panel heard arguments on the government's appeal of this decision.

DECISIONS/CLOSED ACTIONS FOR 2001(k):

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI as to the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and released pursuant to (k)(1). Plaintiffs contended the sale area contains northern spotted owls. On March 19, 1996 the court denied plaintiffs' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). On February 1, 1996 federal defendants and SCLDF

entered into a joint stipulation to dismiss the complaint without prejudice.

Oakhurst v. USFS (D. Or.). In January of 1996, the court dismissed this action by a pro se plaintiff that challenged the Sugarloaf Timber Sale. Plaintiff raised constitutional issues, the Civil Rights Act, the religious Freedom Restoration Act and the APA.

Section 2001(b) Sales (Salvage Sales)

PENDING DISTRICT COURT ACTIONS:

Idaho Sporting Congress v. USFS, (D. Idaho). The same plaintiffs now bring a fourth action against two additional salvage timber sales that are offered as part of the Thunderbolt Recovery Fire Recovery Project. Plaintiffs allege the same violations as in "Thunderbolt III", (See "Decisions in District Court," below).

PENDING CIRCUIT COURT ACTIONS:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona), *on appeal*. On March 14, the district court granted our motion for summary judgment and dismissed this challenge to the Rustler Fire Salvage Sale located on the Coronado National Forest, Arizona. Significantly, the court found that the Forest Service properly invoked a categorical exclusion (CE) for this sale, and the environmental documentation used by the Secretary was sufficient. The court indicated that this ruling will be submitted for publication. On April 3, 1996, plaintiffs filed a notice of appeal.

Sierra Club v. U.S. Forest Service (Ninth Circuit) ("Warner Creek" Timber Sale). The Forest Service originally offered this salvage sale prior to the enactment of the Rescissions Act after an unknown arsonist burned the area. In May of 1995, a magistrate judge issued an opinion finding that the Forest Service should have considered this factor in the EIS. After passage of the Rescissions Act, the district court judge ordered briefing on the effect of Section 2001 on the Warner Creek Sale, and after finding that Section 2001 was applicable, dismissed plaintiffs NEPA and NFMA claims. Plaintiffs appealed, claiming the district court improperly applied Section 2001 to a sale that was already "prepared" and requesting that the district court be required to review the NEPA claims. Our response brief was filed on March 20, 1996.

Idaho Sporting Congress v. USFS (Ninth Circuit) (Thunderbolt I) Plaintiffs challenged the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. On January 8, 1996 the court granted our motion for summary judgment and to

dismiss finding that the Forest Service did not act in an arbitrary or capricious manner. The court rejected plaintiffs' public trust doctrine and APA arguments, and limited review to those sales that were advertised, thus holding that an unadvertised sale does not present a case or controversy under the Rescissions Act. Argument was given on May 10, 1996.

Idaho Conservation League v. USFS (Ninth Circuit) (Thunderbolt II) On December 11, the court granted our motion for summary judgement, finding that the Forest Service did not proceed in an arbitrary or capricious manner in making the determination to offer the sale, despite some contradictory positions by other agencies. Further, the court found that the Secretary could, in fact, delegate his responsibilities under the Rescissions Act, contrary to plaintiffs' arguments. A hearing is scheduled for May 10, 1996.

DECISIONS IN DISTRICT AND CIRCUIT COURTS:

Inland Empire Public Lands Council v. Glickman (9th Cir.) (Fire Salvage Sales) In the first decision issued by a Court of Appeals on a Rescissions Act salvage sale, the Ninth Circuit affirmed the district court's ruling that allowed fire salvage sales to go forward in the Kootenai National Forest, noting that the Rescissions Act provides for "extremely limited judicial review." It also held that the Secretary was not required to authorize each salvage sale personally. However, in an order issued May 21, the Court sua sponte ordered the government to submit a supplemental brief on whether the Secretary can delegate his authority to proceed with salvage sales under the Rescissions Act.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On May 3, 1996, Judge Limbaugh granted federal defendants motion for summary judgment in this challenge to a salvage timber sale located on the Mark Twain National Forest. The Forest Service had proceeded with this sale under the categorical exclusion provision of NEPA. Plaintiffs challenged that a categorical exclusion did not comply with the Rescissions Act. The court rejected this argument. Notably, in this action, the court had contrary to express provisions of 2001, issued a TRO.

Idaho Sporting Congress v. USFS (D. Idaho) ("Thunderbolt III"). This represents the third challenge to a salvage sale offered as part of the Thunderbolt Fire Recovery Project. Plaintiffs allege violations of the public trust doctrine, the President's Directive for implementation of salvage sales and the APA. By order issued 4/19/96, the court granted summary judgment in favor of defendants on all counts.

The Armuchee Alliance v. King, District Ranger, (D. Georgia). Plaintiffs challenged the constitutionality of the Timber Salvage

Rider, and in the alternative, the Forest Service's decision to release Southern Pine Beetle (SPB) Salvage Sales in the Chattahoochee National Forest. By order dated April 18, 1996, the court granted our motion for summary judgment on all counts. Specifically, the court concluded that the Timber Salvage Rider was not unconstitutionally vague, did not violate the separate of powers doctrine or equal protection clause, and did not unconstitutionally infringe upon plaintiffs' substantive and procedural due rights. Further, the court affirmed the Forest Service's decision to invoke a categorical exclusion. We received notice from the court that this opinion was submitted for publication.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations resulted in an agreement to dismiss this action, and on April 10, 1996 the court dismissed the action with prejudice. At issue in this second challenge to salvage timber sales in the Alabama National Forests, was the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with the sale and the use of a categorical exclusion.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February, 1996. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a settlement that released the 15 sales at issue. In this action, environmental groups challenged the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage sales in the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted federal defendants' motion for summary judgment. Plaintiffs had challenged five salvage sales in the Daniel Boone National Forest and their impacts on the endangered Indiana bat. The court's decision was the first to address the applicable standard of review for salvage timber sales under the Rescissions Act. The court held an arbitrary and capricious review is the appropriate standard, yet the review is to be "extremely deferential."

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FAX COVER SHEET

DATE: May 21, 1996

TO: Dinah Bear FAX 202-456-0753

FROM: Tom Tuchmann

NUMBER OF PAGES FOLLOWING THIS COVER SHEET: 28

MESSAGE: See attached regarding P.L. 104-19.

Dinah--

Here is the note I sent to Ellen last week. I would appreciate the two of you discussing the appropriate next steps.

I'd suggest we put this memo in final form; ask BLM and the FS to track these sales in these categories as mutual modifications are discussed and agreed to and the sales are harvested; and that we begin immediately to develop a plan for answering the three key questions about effects: do we need NEPA supplementation, do we need to reinitiate ESA consultation, are we still in NFMA compliance. When and how we execute the plan would still be open for discussion.

It would be helpful to us if you folks in DC could spend some time in the next few weeks (before the May 7 argument) discussing how best to handle the transition period from litigation to post-litigation actions needed to ensure the continuing credibility of the forest plan. Now that the outcome of the murrelet sales will be determined after May 7, I expect that we will run out of time if our goal is to have an analysis completed and any plan adjustments that may be needed completed by the end of September.

I would also recommend that the Chair of the IAC, Elaine Zielinski, and I join in your Tuesday meeting by conference call when this topic is scheduled.

CC: Elaine Zielinski
Tom Tuchmann
Ellen Athas

Don Knowles 4/12

REGIONAL ECOSYSTEM OFFICE

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MEMORANDUM**DATE:** April 1, 1996**TO:** Ellen Athas**FROM:** Donald R. Knowles, Executive Director**SUBJECT:** Public Law 104-19

As promised, here is a draft of the product I want to distribute to the regional executives. Please disregard the dates--events have overtaken them. The attached describes in some detail the results of our fact finding to date, and alerts the executives to the need to begin developing a study plan for analyzing the impacts and effects of the sales.

As you know, the specific sales to be harvested is not yet finally determined, and the configuration of sales being harvested is also not yet finally known. This means we cannot yet determine impacts. However, we should be able to design the analysis at this point. I assume that after the protections of the Rescission Bill expire, we should expect challenges to the next set of agency actions, on the basis of cumulative effects and, I'm sure, others.

Elaine Zielinski sends her regards, and wanted to be sure that we considered your views before we proceeded.

cc: Elaine Zielinski

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**WORKING DOCUMENT
PREDECISIONAL****MEMORANDUM****DATE:** March 20, 1996

TO: Regional Interagency Executive Committee (RIEC)
Ken Feigner, Director, Forest & Salmon Group, Environmental Protection Agency
Robert W. Williams, Acting Regional Forester, R-6, Forest Service
Stan M. Speaks, Area Director, Bureau of Indian Affairs
Michael J. Spear, Regional Director, U.S. Fish & Wildlife Service
William Stelle, Jr., Regional Director, National Marine Fisheries Service
William C. Walters, Deputy Field Director, National Park Service
Elaine Y. Zielinski, State Director, Oregon/Washington, Bureau of Land Management

FROM: Donald R. Knowles, Executive Director**SUBJECT:** Draft Status Report on Regional Ecosystem Office Review of Timber Sales Released by Public Law 104-19**Reply Due Requested March 27**

The enclosed draft package of material reflects the current status of our baseline review effort. Before I officially transmit the status report to you, I want to give each of you an additional opportunity to review its accuracy and overall content.

In particular, please note the following:

- There may be some sales identified on Enclosure 2 that could be reclassified as "consistent with *ROD* direction for S&Gs, LSRs, and aquatic review." Agencies may have additional information we do not have. If so, please forward it to us by March 22, if possible.
- Enclosure 4 describes our methodology. In it, we describe how we compared these sales against the FSEIS baseline. Enclosure 8 (in preparation) will explain this in additional detail. Please provide us with your view as to whether these sales would require supplementation under NEPA.

As soon as your comments are received and addressed, I will be ready to sign and transmit our baseline review to you in final form.

We also need to begin developing the analyses required to determine if additional consideration of effects is needed. I want to stress that the agencies will need to help us define which analyses are required and then to help us carry out these analyses if needed. The Interagency Rescission Bill Team is scheduled to meet again on March 28 to consider comments on this memo and to begin developing a strategy to analyze these sales. I would appreciate your views as to how quickly we need to proceed with this next step.

Please let me know if I can answer any questions about the enclosed package. Your agency representative should also be able to provide additional information.

Thank you for your continued support.

Enclosures
cc: Interagency Rescission Bill Team (see list)

641/ly

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Distribution List

Interagency Rescission Bill Team

Harold Belisle, BLM
Barry Mulder, FWS
Steve Paulson, FS
Tom Hussey, FS
Jerry Hofer, FS
Sue Zike, FS
Jeff Handy, OGC
Ron Swan, SOL
Roger Nesbit, SOL
Dave Powers, EPA & NPS
Gary Sims, BIA
REO: Don, Reps, Chris, Dan, Linda

* AGENCY REVIEW DRAFT * * PLEASE LIMIT DISTRIBUTION TO ESSENTIAL AGENCY PERSONNEL *

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MEMORANDUM

DATE: []

TO: Regional Interagency Executive Committee (RIEC)
 Ken Feigner, Director, Forest & Salmon Group, Environmental Protection Agency
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 William Stelle, Jr., Regional Director, National Marine Fisheries Service
 William C. Walters, Deputy Field Director, National Park Service
 Elaine Y. Ziellinski, State Director, Oregon/Washington, Bureau of Land Management

FROM: Donald R. Knowles, Executive Director

SUBJECT: Status Report on Regional Ecosystem Office Baseline Review of Sales Released By Rescission Bill, Public Law 104-19

As requested by the Regional Interagency Executive Committee (RIEC), the Regional Ecosystem Office (REO) has reviewed the 122 timber sales subject to the Rescission Bill or Judge Hogan's orders (Enclosure 1). The sales are located within the geographic area of Forest Service and Bureau of Land Management Land and Resource Management Plans (LRMPs) that were amended by the Northwest Forest Plan (NFP). The purpose of this initial REO review was to determine which sales had previously been analyzed and considered as a part of the environmental baselines of the Final Supplemental Environmental Impact Statement (FSEIS) for the NFP and the biological opinion on the FSEIS, and which are consistent with implementation direction in the NFP *Record of Decision (ROD)* for timber sales in the pipeline. Our initial results are summarized in Enclosure 2, Summary of Results for the *ROD*; and Enclosure 3, Summary of Results for Endangered Species Act (ESA) Consultation. The methods we used to derive these results are summarized in Enclosure 4, Methodology Summary.

Summary

Using keys developed by the REO and existing records, we have reviewed the 122 timber sales to determine which have been included in the environmental baselines described above and which are consistent with *ROD* direction. The underlying assumption for our review was that sales whose effects had previously been considered in each of the baselines and the *ROD* do not affect the validity of land allocations or standards and guidelines of LRMPs amended by the NFP and therefore, require no further review or consideration. Sale effects not previously considered in one or more of the baselines or found inconsistent with *ROD* direction are assumed to need further analysis to determine their potential effects on regional-scale ecological and economic aspects of LRMPs amended by the NFP.

At this time, we have determined that all 122 sales are in the baseline for the FSEIS; 59 sales are consistent with *ROD* direction (Enclosure 2); and 32 sales meet all pertinent ESA requirements (included in biological opinion baselines for northern spotted owl, northern spotted owl critical habitat, and marbled murrelet) (Enclosure 3). Presently there are 2 sales that meet all three requirements (FSEIS, *ROD*, ESA) and thus require no additional review (Tip, and Tip Top). This leaves 120 sales with either *ROD*, ESA or both *ROD* and ESA issues to be considered for potential effects to the LRMPs as amended by the NFP.

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Regional Interagency Executive Committee

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Next Steps

In a recent memo to Tom Tuchmann (Enclosure 5), I provided an overview of actions that may be necessary to respond to timber sales eventually harvested as a result of Section 2001(k) of the Rescission Act. Actions may be needed to address National Environmental Policy Act (NEPA), ESA and/or National Forest Management Act (NFMA) issues. Now that we have identified which sales may need additional review for these issues, the next step is for the agencies to request that the REO perform further analysis on those sales. The purpose of the analysis would be to determine the significance of this new information and to identify potential effects in these three areas (NEPA, ESA, NFMA). Agreement will be needed on the type of analysis to be performed by REO. Once the significance of potential sale effects is determined, it will be possible to discuss alternative actions to address the conclusions.

The Interagency Rescission Bill Team has agreed to meet again on March 28 to formulate a strategy for analyzing the 120 timber sales. It is inevitable that additional information will be required for the 120 sales to complete our analysis. We understand that the field units (e.g., Level 1 teams) are compiling information for the subject sales and updating environmental baselines for evaluating new sales. Following the March 28 meeting, we should be able to identify specific information needed for the REO analysis. The REO will work with each agency's Team member to request this information from regional offices and field units, as needed.

Enclosures

641/ly

cc:

IAC

Jeff Handy, Office of General Counsel

Ron Swan, Office of the Solicitor

Roger Nesbit, Office of the Solicitor

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Enclosures
Table of Contents

WORKING DOCUMENT
PREDECISIONAL

- Enclosure 1 **Timber Sales Subject to Rescission Bill Analysis**
(122 sales, by sale categories described in the *Record of Decision*) (2 pages)
- Enclosure 2 **Summary of Results: Regional Ecosystem Office Sale Key for the *Record of Decision***
(3 pages)
- Enclosure 3 **Summary of Results: Regional Ecosystem Office Sale Key for Endangered Species Act**
(2 pages)
- Enclosure 4 **Methodology Summary for Initial REO Review of 122 Timber Sales Subject to the Rescission Bill** (3 pages)
- Enclosure 5 **February 16, 1996 memorandum from Don Knowles to Tom Tuchmann on Overview of the Actions to Respond to Timber Sales** (2 pages)
- Enclosure 6 ***Record of Decision* Key for Determining Which Timber Sales Released by the Rescission Bill should be Analyzed for Effects to the Northwest Forest Plan** (7 pages)
- Enclosure 7 **Key for Determining Status of 318 Timber Sales Endangered Species Consultations**
(2 pages)
- Enclosure 8 **Results of REO Analysis of Rescission Bill Timber Sale Effects to FSEIS Analyses**
(in preparation)

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Timber Sales Subject to Rescission Bill Analysis (122 Sales)
 (by sale categories described in the *Record of Decision*)

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60 Sales Sold

Awarded Prior to the Effective Date of the ROD

(* asterisk--denotes the 32 sales in a key watershed or roadless area)

Forest Service

Abes Wren*
 Anchovy*
 Beamer 712*
 Benner Bunch
 Berry Bushel
 Boyd Creek*
 Camel
 Canal 606
 Clear Creek*
 Condon Carriage
 Deodar
 Father Oak*
 Fish Story*
 Fivemile Flume
 Foland Ridge

Formader 103*
 Formader 717*
 Franklin Ridge*
 Gage*
 Gordy Bluff
 Grass Hula
 Green Apple
 Green Horn
 Honeytree*
 Indian Hook*
 Jack*
 Lobster
 Lower Bailey
 Maria Skyline*
 Median Buyback*

North Ball*
 Not Bad*
 Old Grade*
 Randallssalado*
 Redlick*
 Ryan Wapiti
 Scraps*
 Skywalker
 South Paxton*
 Spur Trigger
 Square Clare
 Stalwart*
 Stevens
 Sugar Maple
 Sugar Cube

Sulphur*
 Taylor Ranch
 Tip
 Tiptop
 Toastberry*
 Uncle Condon
 Upper McLeod
 Upperten 002*
 Wapiti 305
 West Boundary
 Wheelock 403*
 Winriver*
 Wynochee Res*
 You Who*
 Zanita*

BLM
 none

2 Sales

Offered after 19 May 94 ROD Effective Date

Forest Service
 Hiack Thin

BLM
 Cat Tracks

16 Sales Sold

Unawarded, Unenjoined on the ROD Effective Date

Forest Service

Enola

Head

Horse Byars

Red 90

BLM

88 Black Jack
 90 Pitcher Perfect Thin
 90 Roman Durn
 (units 1,2;3)

Bear Air (units 1;2)
 Big Winds
 Canton Creek II

Hoxie Griffin
 Summit Creek
 Swinglog Thin

Texas Gulch
 Upper Renhaven
 Yellow Cr. Mtn.

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27 Sales Sold
Unawarded. Enjoined on the ROD Effective Date

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Forest Service
none

BLM

91 L Dudley's Summit
91 Millers View
Another Fairview
Battle Axe
Birdseye Rogue
Camp
Cherry Tree Plum
Corner Sock

Crazy 8's
Daffi Dora
Dead Middleman
Deep Creek
Golden Sucker
Jeffers Revenge
Lick II

Lobster Hill
Lost Sock (units 3; 4)
Marten Power
North Fork Chetco
(units 1; 2,3,4,5,6)
Park Ridge Basin
Pond View

PP&J
Rocky Road
Shady
Tobe West
Ugly Eckley
Wren 'n Doubt
(units 1,4,6; 2,3,5,7)

17 Sales

"Resurrected" by the Rescission Bill
(bid bond returned or sale withdrawn from offer prior to the ROD effective date)

Forest Service

Boulder Krab
Caraco Cat
Cowboy
Elk Fork

First
Garden
Holdaway 2
Last

Mr Rogers
Nita
Prong

Rocky
South Nita

BLM

Chaney Road

Olalla Wildcat

Twin Horse

Whitt's End

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**Summary of Results
Regional Ecosystem Office Sale Key for the Record of Decision**

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59 sales

**Consistent with ROD direction for S&Gs, LSRs, and aquatic review
(From 6. D. of ROD key)**

Sold, awarded sales not subject to aquatic review, LSR review, or S &Gs

Forest Service

Benner Bunch
Berry Bushel
Camel
Canal 606
Condon Carriage
Deodar
Fivemile Flume

Foland Ridge
Gordy Bluff
Grass Hula
Green Apple
Green Horn
Lobster
Lower Bailey

Ryan Wapiti
Skywalker
Spur Trigger
Square Clare
Stevens
Sugar Maple
Sugar Cube

Taylor Ranch
Tip
Tiptop
Uncle Condon
Upper McLeod
Wapiti 305
West Boundary

BLM
none

**Sold, awarded sales that passed original aquatic review with no modifications needed
(not subsequently modified in response to Rescission Bill)**

Forest Service

Abas Wren
Anchovy
Boyd Creek
Clear Creek
Father Oak

Formador 103
Formador 717
Indian Hook
Maria Skyline
North Ball

Not Bad
Old Grade
Scraps
Stalwart

Sulphur
Winriver
Wynochee Res
You Who

BLM
none

**Sales that had additional aquatic review that are still consistent with the aquatic screens
(following Rescission Bill modification)**

Forest Service
none

BLM

88 Black Jack
90 Pitcher Perfect Thin
90 Roman Dunn
(units 1,2; 3)

Bear Air (units 1; 2)
Canton Creek II
Hoxic Griffin
Olalla Wildcat

Swinglog Thin
Texas Gulch
Twin Horse

Upper Renhaven
Whitt's End
Yellow Cr. Mtn.

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**Summary of Results
Regional Ecosystem Office Sale Key for the *Record of Decision***

34 sales

Not consistent with ROD direction for aquatic
(from 6. C. L. of ROD Key)

Sold, unawarded, unenjoined sales that have not had aquatic review

Forest Service
Enola

Head

Sold, awarded sales with remaining units
(need verification aquatic adjustments are intact)

Forest Service

Beamer 712
Fish Story
Franklin Ridge
Gage

Honeytree
Jack
Median Buyback
Randallsalado

Redlick
South Paxton
Toastberry
Upperton 002

Wheelock 403
Zanita

BLM
none

Sold, unawarded unenjoined sales modified by the Rescission Bill that
no longer are consistent with the aquatic review

Forest Service

Horse Byars

Red 90

BLM

Big Winds

Summit Creek

Unawarded, sales "resurrected" by Rescission Bill that
are not consistent with ROD direction for aquatic review

Forest Service

Boulder Krab
Caraco Cat
Cowboy
Elk Fork

First
Garden
Holdaway 2
Last

Mr Rogers
Nita
Prong

Rocky
South Nita

BLM
Chancy Road

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**Summary of Results
Regional Ecosystem Office Sale Key for the Record of Decision**

**29 sales
Not consistent with ROD direction for S&Gs
(from 6. C. III of ROD key).**

Sales Offered after ROD Effective Date

Forest Service
Hiack Thin

BLM
Cat Tracks

Sold, Unawarded, Enjoined Sales

Forest Service
none

BLM

91 L Dudley's Summit
91 Millers View
Another Fairview
Battle Axe
Birdseye Rogue
Camp
Cherry Tree Plum
Corner Sock

Crazy 8's
Daffi Dora
Dead Middleman
Deep Creek
Golden Sucker
Jeffers Revenge
Lick II
Lobster Hill

Lost Sock (units 3; 4)
Marton Power
North Fork Chetco
(units 1; 2, 3, 4, 5, 6)
Park Ridge Basin
Pond View
PP&J
Rocky Road

Shady
Tobe West
Ugly Eckley
Wren 'n Doubt (units
1, 4, 6; 2, 3, 5, 7)

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**Summary of Results
Regional Ecosystem Office Sale Key for Endangered Species Act Consultation
March 5, 1996**

32 Sales

Consistent with ROD Direction (from A.1. of the ROD Key)

Corner Sock	Wren'n Doubt	Dead Middleman	Enola	Red 90
Crazy 8's	Cat Tracks	Cherry Tree Plum	Zanita	Horse Byars
Daffi Dora	Marten Power	Rocky Road	Jack	Abes Wren
Lobster Hill	Birdseye Rogue	91 Lower Dudley	Redlick	Anchovy
Lost Sock	Golden Sucker	Deep Creek	Honey Tree	Tip
North Fork Chetco	Lick II	Holdaway 2	Gage	Tip Top
Ugly Eckley	Battle Axe			

16 Sales

**Consistent with ROD Direction but modified under the Rescission Bill
(from A.1.b. of the ROD Key)**

7 Sales

**Modified under the Rescission Bill and
no longer consistent with ESA for owls and owl critical habitat.**

90 Pitcher Perfect Thin	Camp Shady	Hoxie Griffen PP&J	Canton Creek II Texas Gulch
-------------------------	------------	--------------------	-----------------------------

9 Sales

**Modified under the Rescission Bill and no longer consistent with
ESA for owls, owl critical habitat and marbled murrelet.**

Bear Air	Big Winds	Upper Ranhaven	Park Ridge Basin
88 Black Jack	Summit Creek	Yellow Creek Mountain	Tobe West
90 Roman Dunn			

51 Sales

**Jeopardy determined for the Marbled Murrelet and not consistent with ESA
(from A.2. of the ROD Key)**

Fish Story	West Boundary	Foland Ridge	Maria Skyline	Green Horn
Old Grade	Wynochec Res	Gordy Bluff	Skywalker	Randallsalado
Median Buyback	Stevens	North Ball	South Paxton	Ryan Wapiti
Stalwart	Sugar Cube	Square Clare	Sugar Maple	Beamer 712
Scraps	Winriver	Berry Bushel	Sulphur	Canal 606
Boyd Creek	Spur Trigger	Condon Carr.	Uncle Condon	Formader 103
Clear Creek	Lobster	Fivemile Flume	Upper McLeod	Formader 717
Camel	Father Oak	Franklin Ridge	Benner Bunch	Upperten 002
Not Bad	Taylor Ranch	Indian Hook	Grass Hula	Wapiti 305
Deodar	Toastberry	Lower Bailey	Green Apple	Wheelock 403
You Who				

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23 Sales

Not Evaluated for NSO and/or Marbled Murrelet under the ESA

6 Sales

Not Evaluated for NSO Critical Habitat and Marbled Murrelet

Twin Horse

Olalla Wildcat Chancy Road Caraco Cat BoulderKrab Garden

6 Sales

Not Evaluated for NSO Critical Habitat

Head

Cowboy Nita South Nita Last First

4 Sales

Not Evaluated for Marbled Murrelet

Swinglong Thinning
(Modified under the
Rescission Bill)

Hiack Thin Elk Fork Rocky

3 Sales

Not Evaluated for NSO, NSO Critical Habitat and Marbled Murrelet

Whitt's End

Mr. Rogers Prong

4 Sales

Not Evaluated for NSO and NSO Critical Habitat

Another Fairview

Jeffer's Revenge Pond View 91 Miller's View

141

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Methodology Summary for Initial REO Review of 122 Timber Sales Subject to the Rescission Bill

Overview

The initial task given the REO was to determine which sales need subsequent review to assess the potential for impacts to LRMPs amended by the NFP. Through the efforts of the Interagency Rescission Bill Analysis Team, 120 timber sales were identified that are both released by the Rescission Bill (as interpreted by Judge Hogan) and within the geographic area covered by the NFP. Two additional sales (Twin Horse, Olalla Wildcat) were added to this list on January 10, 1996, as a result of Judge Hogan's "high bidder" ruling, bringing to 122 the total list of sales considered in the REO review.

Using the categories of timber sales described in the *ROD* (pages 13-15) these sales fall generally into five groups (Enclosure 1). Recognizing that a number of timber sales were in various stages of design, advertisement, offer, and award as of the May 19, 1994 (effective date), the *ROD* specified which NFP Standards and Guidelines (S&Gs) or other environmental requirements (e.g., "aquatic screens") would apply to sales currently in the timber sale pipeline. As a result of Judge Hogan's (October 17, 1995) ruling on the scope of the Rescission Bill, a number of sales offered but not awarded between October 23, 1989, and July 25, 1995, were "resurrected." In most cases, these "resurrected" sales had been sold prior to the *ROD* effective date but had subsequently been canceled or withdrawn for various reasons and, thus, had not been modified to make them consistent with the S&Gs or other pertinent requirements (e.g., "aquatic screens") described in the *ROD*.

Our review of the 122 consisted of three steps. First, we considered whether effects from any or all 122 sales, had they been known at the time, would have changed the analysis of alternatives in the Final Supplemental Environmental Impact Statement (FSEIS). This approach is described below. Second, we applied two "keys" to determine which sales were consistent with *ROD* direction for timber sales in the pipeline (Enclosure 6) and which sales met pertinent ESA requirements, including biological opinion environmental baselines (Enclosure 7). Sales would need to pass each of these three steps before we could determine that their effects were previously considered in the environmental baselines and consistent with *ROD* direction.

This REO review recognizes the uncertainty of current sale status of as a result of the Rescission Bill requirement to release sales "with no change in originally advertised terms, volumes, and bid prices." Most unawarded sales that had previously been modified based on S&Gs, aquatic reviews, or biological opinions are being awarded in accordance with the original sale terms, not as they were modified. At the same time, the agencies are pursuing bilateral negotiations with timber purchasers to seek mitigation measures and/or alternative volume that would reduce sale impacts to listed species and aquatic resources, but not necessarily return the sale to the originally modified condition or make it consistent with the *ROD* S&Gs. In cases where we had no current information on the status of particular sale modifications, we assumed that the sales are not consistent with the *ROD* and/or are not in the biological opinion baseline. The agencies will need to review the enclosed sale results and determine the current status of each sale as of ~~March 15, 1996~~ ^{March 22, 1996}, using the best available information to help us further refine our conclusions (i.e., determine which sales will be harvested as originally modified or otherwise modified to be consistent with the *ROD* and biological opinions).

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FSEIS

The FSEIS was initiated to address the human and environmental needs served by Federal Forests of the Pacific Northwest and northern California. A strategy was developed to provide land management direction to the BLM and the FS that comprises a comprehensive ecosystem management plan. One driving focus for the analysis was the need to comply with the regulations implementing the National Forest Management Act requirements for species viability.

The analysis conducted by REO was intended to address the basic question of whether the harvest of the 122 sales would affect the analyses and conclusions presented in the FSEIS.

The FSEIS analysis compared differing levels of late-successional habitat protection across the landscape in a regional analysis encompassing over 24 million acres of Federal ownership. Management direction was incorporated into the FSEIS to ensure adequate protection for species' habitats as the landscape was manipulated to satisfy other multiple-use requirements of Federal Forest lands. In the FEMAT species analysis there was a direct correlation between amounts of late-successional habitat protected and the likely outcomes for species viability. More late-successional habitat equated to a better likelihood of maintaining adequate populations of species associated with late-successional forests.

The majority of species assessed were judged adequately provided for in Alternative 9 based on the data and analysis at the regional scale. Because the analysis was intended to weigh very quickly the relative differences between the alternatives across a large bioregion, the analyses necessarily had a general level of precision. As a result, the resolution of the data used in the general FSEIS analysis would not be able to discern differences in the potential effects of the acreage of the 122 sales (refer to Enclosure 8 discussion of GIS data).

However, a number of species addressed in the FSEIS (presented in detail in Appendix J2 and summarized in Chapter 3&4) required additional analysis and treatment at a more site-specific scale to achieve acceptable assurances of species persistence under Alternative 9. The ratings of these species would not change as a result of these sales, except for those species whose final determination was influenced by immediate site-specific mitigation in the form of protection of known sites (see Survey and Manage discussion in Enclosure 8).

Between the DSEIS and the FSEIS the size of the Late-Successional Reserves (LSR) and Riparian Reserves were increased by a total of 775,000 acres (378,000 and 397,000 acres respectively; *ROD* page 29). The amount of late-successional habitat in reserves (LSR, riparian, known owl activity centers) was increased by 240,900 acres between the DSEIS and FSEIS for a total of 6,864,000 acres. The *ROD* expressly recognized that these increases more than offset the approximately 26,000 acres previously sold and awarded or sold and unawarded timber sales located in LSRs (*ROD* page 13). This estimate of sale acres in LSRs assumed in the *ROD* is less than the acreage of the 122 sales reviewed by REO (approximately 8,000 acres). We should note that additional sales, not within the REO review, have also occurred within LSRs since the signing of the *ROD*. The acreage and impacts of these sales is also within the acreage estimates for the *ROD* sold sales discussion. These other sales have not been included in the REO review because they were not Rescission Bill sales.

For these reasons, described in more detail in Enclosure 8 (not yet written), we concluded that the results of regional analysis of the type represented by the FSEIS would not vary in most cases given the potential release of all 122 sales. The remaining exception, for species which are not covered by the Endangered Species Act, are the known sites of Strategy 1 Survey and Manage species. The ratings for these species was contingent upon the immediate protection of these sites. If such a site occurs within a harvest unit of these timber sales, additional analysis would be appropriate.

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Based on this determination for the majority of species analyzed in the FSEIS, the remainder of the REO review was focused on determining whether each of the 122 sales have previously been included in the environmental baseline for the *ROD* biological opinion and whether they were consistent with the *ROD* implementation direction for timber sales in the pipeline.

Record of Decision

The *ROD* amended, or was later incorporated into, management plans for 17 National Forests and 6 Bureau of Land Management Districts. The NFP S&Gs are substantially different from those in prior plans. Moreover, the NFP calls for a number of analyses prior to certain other subsequent decisions. The *ROD* provides that timber sales offered and awarded after the *ROD* effective date must meet all S&Gs, but allows sales previously offered though unawarded to proceed without fully complying with all NFP S&Gs, as long as they met other specified requirements. For example, certain categories of sales were required to be reviewed and adjusted, in accordance with criteria (referred to as "aquatic screens") developed by Forest Ecosystem Management Assessment Team (FEMAT) scientists to eliminate or mitigate long-term, unacceptable adverse effects to riparian and aquatic ecosystems.

The REO developed a key (Enclosure 6) to sort the 122 sales and determine which *ROD* requirements (S&Gs or "aquatic screens"), if any, each sale must meet. Sales that were (or will be) harvested in accordance with the *ROD* requirements were assumed to be consistent with the *ROD* implementation direction for timber sales in the pipeline. Based on available information, the REO determined that 59 sales are consistent with *ROD* direction, and therefore require no further review regarding *ROD* compliance. Because of the uncertainty regarding current sale modification status as described above, the REO was unable to clearly determine whether 34 sales are in compliance with the requirement for aquatic screen review and adjustment and whether 29 sales are in compliance with the *ROD* S&Gs. These 63 sales need further agency review to verify their current status as it relates to compliance with *ROD* direction.

Biological Opinion

The biological opinion on the FSEIS addressed effects of the NFP on listed species. The biological opinion specified as one of its assumptions that sales still in Endangered Species Act (ESA) Section 7 consultation on the date of the biological opinion were not part of the environmental baseline. The biological opinion addressed three items of particular interest to us: 1) the effects of the NFP on the northern spotted owl (NSO), 2) the effects of the NFP on critical habitat for the NSO, and 3) the effects of the NFP on the marbled murrelet. Critical habitat has not been finally designated for the marbled murrelet. None of the coastal salmonid species within the NFP area had been proposed for listing on the *ROD* effective date and, therefore, were not addressed in the biological opinion. It was determined that the NFP did not affect any of the currently listed Snake River and Sacramento River salmon species.

In order to determine whether each of the 122 sales had met all pertinent ESA requirements and were included in the environmental baseline for the biological opinion, the REO developed a key to sort the sales (Enclosure 7). Using the best available information, we determined that 32 sales fully meet all ESA requirements and are included in the biological opinion baseline for the NSO, NSO critical habitat, and marbled murrelet. The remaining sales either need to be added to the biological opinion baseline for the NSO, NSO critical habitat, and/or marbled murrelet or have remaining units with know to be nesting owls or murrelets and were considered to jeopardize the continued existence of the species if harvested.

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MEMORANDUM

DATE: February 16, 1996

TO: Tom Tuchmann, Office of Forestry and Economic Development

FROM: Donald R. Knowles, Executive Director *Don Knowles*

SUBJECT: Overview of the Actions to Respond to Timber Sales

Per our discussion, below is an overview of the actions that may be necessary to respond to timber sales eventually harvested as a result of section 2001(k) of the Rescission Act.

I want to stress that we are not able at this time to propose how to respond to an action whose dimensions are not yet clear. The following, therefore, should be thought of as an opening set of issues and topics for discussion purposes.

At the appropriate time (i.e., when the litigation has run its course, and all possible legislative or administrative actions to reduce the effects of the Rescission Act have been taken), we will be able to determine if the following actions are needed and, if so, how to proceed and subject to what schedule:

- Do we need to supplement our prior NEPA documentation, or are the effects within the range of previously considered alternatives?
- Do we need to initiate, or reinstate, consultation under the ESA, or is the original biological opinion still valid?
- Do we need to take any actions to ensure continued consistency with NFMA, including viability if appropriate?

For each of the above issues, the following provides a brief discussion of ways to determine if there is a need for additional analyses, and if so, what time and resources are likely to be needed to complete such an effort.

NEPA

According to the National Environmental Policy Act (NEPA) regulations at 40 CFR 1502.9(c)(1) agencies shall prepare supplements to environmental impact statements (EISs) when there are "substantial changes in the proposed action," or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

Tom Tuchmann

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When encountering changes or new information, the first step is to analyze that information or changed circumstances or action to determine if it is substantial or significant. As an example, the Forest Service NEPA procedures at FSH 1909.15, section 18.1, require the responsible official, after a review by an interdisciplinary team, to determine if a supplement or revision to the EIS is necessary. If the responsible official determines that a supplement or revision is not necessary, the results of the review are documented and filed. The other agencies involved with the Northwest Forest Plan have similar procedures.

A decision to revise or supplement the EIS typically launches a minimum of a year's work, and usually more. Experience has shown that once a revision or supplement is initiated, it is difficult to restrict the issue to the concern that initiated the revision or supplement.

NEMA

A principal concern behind the Northwest Forest Plan was compliance with the National Forest Management Act (NFMA) and specifically the requirement in its planning regulations at 36 CFR 219.19 to maintain viable populations of native vertebrates.

With new information or changed circumstances, there is the possibility that NFMA's requirement to provide for a diversity of plant and animal communities would foreseeably be at risk. The degree of risk would be evaluated using the review process used to determine the need to revise or supplement the EIS. If it is determined by the responsible official that the changes are significant, an amendment or revision to the Forest Plan is begun.

Our experience to date is that a revision of a Forest Plan for a National Forest requires a minimum of 2 years, including the preparation of an EIS.

ESA

Section 7 regulations of the Endangered Species Act outline four general conditions for reinitiating formal consultation:

- (a) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered,
- (b) the action is modified in a manner causing adverse effects to listed species or critical habitat not previously considered,
- (c) a new species is listed or critical habitat designated that may be affected by the action, or
- (d) the amount or extent of incidental take is exceeded.

619/ly

Enclosure 5-2

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Record of Decision Key for Determining Which Timber Sales Released by the Rescission Bill should be Analyzed for Effects to the Northwest Forest Plan

1. Is the sale within the Rescission bill language?
 No - Go to 6. A. (sales not subject to NFP - Rescission Bill analysis)
 Yes - Go to 2. (range of the northern spotted owl review)
2. Is the sale in the range of the Northern Spotted Owl?
 No - Go to 6. B. ("Eastside" sales do not affect NFP; not subject to REO review)
 Yes - Go to 3. A. (categories of timber sales and assumptions for each category in NFP ROD, pp 13-14 - 3.A. to 3. D.).

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NFP sales (NSQ range) in Rescission Bill Analysis

Forest Service- 78 sales Bureau of Land Management- 44 sales

3. A. **Sold and Awarded Sales:** Was sale sold and awarded prior to the effective date of the ROD, 19 May 94?
 No - Go to 3. B. (review for sales offered after ROD effective date)
 Yes - Go to 3. A. 1. (key watershed and/or roadless area review)

Sales sold and awarded prior to the effective date of the ROD

Forest Service

Abes Wren
 Anchovy
 Beamer 712
 Benner Bunch
 Berry Bushel
 Boyd Creek
 Camel
 Canal 606
 Clear Creek
 Condon Carriage
 Deodar
 Father Oak

Fish Story
 Fivemile Flume
 Foland Ridge
 Formader 103
 Formader 717
 Franklin Ridge
 Gage
 Gordy Bluff
 Grass Hula
 Green Apple
 Green Horn
 Honeytree

Indian Hook
 Jack
 Lobster
 Lower Bailey
 Maria Skyline
 Median Buyback
 North Ball
 Not Bad
 Old Grade
 Randallsalado
 Redlick
 Ryan Wapiti

Scraps
 Skywalker
 South Paxton
 Spur Trigger
 Square Clare
 Stalwart
 Stevens
 Sugar Maple
 Sugar Cube
 Sulphur
 Taylor Ranch
 Tip

Tiptop
 Toastberry
 Uncle Condon
 Upper McLeod
 Upperten 002
 Wapiti 305
 West Boundary
 Wheelock 403
 Winriver
 Wynochoe Res
 You Who
 Zanita

BLM

none

3. A. 1. Was sale awarded prior to September 1993 and in a key watershed and/or roadless area?
 No - Go to 3. A. 2. (LSR review)
 Yes - Go to 4. A. (aquatic review)

Sales awarded prior to September 1993 and in a key watershed and/or roadless area

Forest Service

Abes Wren
 Anchovy
 Beamer 712
 Boyd Creek
 Clear Creek
 Father Oak
 Fish Story

Formader 103
 Formador 717
 Franklin Ridge
 Gage
 Honeytree
 Indian Hook
 Jack

Maria Skyline
 Median Buyback
 North Ball
 Not Bad
 Old Grade
 Randallsalado

Redlick
 Scraps
 South Paxton
 Stalwart
 Sulphur
 Toastberry

Upperten 002
 Wheelock 403
 Winriver
 Wynochoe Res
 You Who
 Zanita

BLM

none

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3. A. 2. Was sale awarded between September 1993 and 19 May 94 and in a LSR?
 No - Go to 6. D. (sales consistent with ROD direction)
 Yes - Go to 4. B. (LSR review)

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Sales awarded between September 1993 and 19 May 94 and in a LSR

Forest Service
 none

BLM
 none

3. B. Sales Offered after ROD Effective Date: Was sale offered (offered means "sold") after 19 May 94, the ROD effective date?

No - Go to 3. C. (unawarded sale review)
 Yes - Go to 5. (ROD standards and guidelines (S&Gs) review)

Sales offered after 19 May 94 ROD effective date

Forest Service
 Hiack Thin

BLM
 Cat Tracks

3. C. Unawarded Sales: Into which of the following categories does the unawarded sale fall?

3. C. Sales sold, unawarded, unenjoined on ROD effective date - Go to 4. A. (aquatic review)

Forest Service
 Enola

Head

Horse Byars

Red 90

BLM
 88 Black Jack
 90 Pitcher Perfect Thin
 90 Roman Dunn (units 1,2,3)

Bear Air (units 1;2)
 Big Winds
 Canton Creek II

Hoxie Griffin
 Summit Creek
 Swinglog Thin

Texas Gulch
 Upper Renhaven
 Yellow Cr. Mtn.

3. C. 1. Sales sold, unawarded, enjoined on ROD effective date - Go to 5. (ROD S&Gs review)
 (shaded sales were "resurrected" by Rescission Bill)

Forest Service
 none

Bureau of Land Management

91 L Dudley's Summit
 91 Miller's View
 Another Fairview
 Battle Axe
 Birdseye Rogue
 Camp

Cherry Tree Plum
 Corner Sock
 Crazy 8's
 Daffi Dora
 Dead Middleman
 Deep Creek

Golden Sucker
 Jeffer's Revenge
 Lick II
 Lobster Hill
 Lost Sock (units 3; 4)
 Marten Power

North Fork Chetco
 (units 1; 2,3,4,5,6)
 Park Ridge Basin
 Pond View
 PP&J
 Rocky Road

Shady
 Tobe West
 Ugly Eckley
 Wren 'n Doubt
 (units 1,4,6; 2,3,5,7)

3. D. Sales subject to the Seattle Audubon Society v. Lyons settlement

Forest Service
 none

BLM
 none

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*** AGENCY REVIEW DRAFT * * PLEASE LIMIT DISTRIBUTION TO ESSENTIAL AGENCY PERSONNEL ***

3. E. Sales for which the bid bond was returned or sales that were withdrawn from offer prior to the ROD effective date (sales "resurrected" by the Rescission Bill) - Go to 4. A. (aquatic review)

Forest Service

Boulder Krab
Caraco Cat
Cowboy

Elk Fork
First
Garden

Holdaway 2
Last

Mr. Rogers
Nita

Prong
Rocky
South Nita

BLM

Chaney Road

Olalla Wildcat

Twin Horse

Whitt's End

4. A. Aquatic Review: Was the sale evaluated using the FEMAT "aquatic screens"?
 No - Go to 4. A. 3. (Rescission Bill modification review)
 Yes - Go to 4. A. 1. (review aquatic screen results)

Sales reviewed with original "aquatic screens"

Forest Service

Abes Wren
Anchovy
Beamer 712
Boyd Creek
Clear Creek
Father Oak
Fish Story

Formador 103
Formador 717
Franklin Ridge
Gage
Honeytree
Horse Byars
Indian Hook

Jack
Maria Skyline
Median Buyback
North Ball
Not Bad
Old Grade
Randallsalado

Red 90
Redlick
Scraps
South Paxton
Stalwart
Sulphur

Toastberry
Upperten 002
Wheelock 403
Winriver
Wynochee Res
You Who
Zanita

Bureau of Land Management

88 Black Jack
90 Pitcher Perfect Thin
90 Roman Dunn
(units 1,2;3)

Bear Air (units 1;2)
Big Winds
Canton Creek II

Hoxie Griffin
Summit Creek
Swinglog Thin

Texas Gulch
Upper Renhaven
Yellow Cr. Mtn.

4. A. 1. Did the sale "pass" the aquatic screens with no adjustments required?
 No - Go to 4. A. 2. (verify adjustments to sales)
 Yes - Into which of the following categories does the sale fall?

Sold, awarded sales that passed original aquatic review with no adjustments needed and have not been subsequently modified as a result of the Rescission Bill

Go to 6. D. (sales consistent with ROD direction)

Forest Service

Abes Wren
Anchovy
Boyd Creek
Clear Creek

Father Oak
Formador 103
Formador 717
Indian Hook

Maria Skyline
North Ball
Not Bad
Old Grade

Scraps
Stalwart
Sulphur

Winriver
Wynochee Res
You Who

BLM
none

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PREDECISIONAL

Unawarded sales that passed original aquatic review with no adjustments needed, but were subsequently modified as a result of the Rescission Bill
Go to 4. A. 3. (Rescission Bill modification review)

Forest Service
none

BLM

88 Black Jack
90 Pitcher Perfect

Thin

90 Roman Dunn
(units 1,2;3)

Swinglog Thin
Bear Air (units 1;2)

Canton Creek II
Hoxie Griffin

Upper Renhaven
Yellow Cr. Mtn.

4. A. 2. Was the sale adjusted by the aquatic screens to eliminate or mitigate adverse effects on riparian and aquatic habitats?
No - Go to 6. C. I. (sale not consistent with *ROD* direction for aquatics)
Yes - Into which of the following categories does the sale fall?

Sold, awarded sales with remaining units (need verification that aquatic adjustments are intact)
Go to 4. A. 2. I. (aquatic adjustment verification)

Forest Service

Beamer 712
Fish Story
Franklin Ridge

Gage
Honeytree
Jack

Median Buyback
Randallsalado
Redlick

South Paxton
Toastberry

Upperten 002
Wheelock 403
Zanita

BLM
none

Sold, unawarded sales with aquatic adjustments that reverted to the original contract terms in response to the Rescission Bill
Go to 4. A. 3. (Rescission Bill modification review)

Forest Service
Home Byars

Red 90

BLM
Big Winds

Summit Creek

Texas Gulch

4. A. 2. I. Was the sale (or will the sale be) harvested as modified by the aquatic screens?
No - Go to 6. C. I. (sale not consistent with *ROD* direction for aquatics)
Yes - Go to 6. D. (sale consistent with *ROD* direction)
4. A. 3. Has additional aquatic review of the sale as modified in response to the Rescission Bill determined that the sale is still in compliance with the intent of the aquatic screens?
No - Go to 6. C. I. (sale not consistent with *ROD* direction for aquatics)
Yes - Go to 6. D. (sale consistent with *ROD* direction for aquatics)

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PREDECISIONAL**

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Sales where subsequent aquatic review determined the sale consistent with ROD direction for aquatics

(* asterisk--denotes sales that required additional modification to meet aquatic requirements)

Forest Service
none

BLM

88 Black Jack
90 Pitcher Perfect Thin
90 Roman Dunn

Bear Air (units 1; 2)
Canton Creek II
Hoxie Griffin

Olalla Wildcat
Swinglog Thin
Texas Gulch

Twin Horse
Upper Renhaven
Whitt's End

Yellow Cr. Mtn.

4. B. Late Successional Reserve Terrestrial Review: If the sale is inside an LSR, was it a thinning and/or salvage sale in accordance with the SAG review criteria??

- No - Go to 6. C. ii. (sale not consistent with ROD direction for LSRs)
- Yes - Go to 6. D. (sale consistent with ROD direction)

Thinning and or Salvage Sales in LSRs

Forest Service
none

BLM
none

5. ROD Standards and Guidelines: Is the sale (as it was or will be awarded) consistent with the ROD standards and guidelines?

- No - Go to 6. C. iii. (sale not consistent with ROD direction for S&Gs)
- Yes -Go to 6. D. (sale consistent with ROD direction)

Sales offered after ROD effective date (need verification that sales comply with S&Gs)

Forest Service
Hiack Thin

BLM
Cat Tracks

Enjoined sales (need verification that sales comply with S&Gs)

Forest Service
none

BLM

91 L Dudley's Summit
91 Miller's View
Another Fairview
Battle Axe
Birdseye Rogue
Camp

Cherry Tree Plum
Corner Sock
Crazy 8's
Daffi Dora
Dead Middleman
Deep Creek

Golden Sucker
Jeffers Revenge
Lick II
Lobster Hill
Lost Sock (units 3; 4)
Marten Power

North Fork Chetco
(units 1; 2,3,4,5,6)
Park Ridge Basin
Pond View
PP&J
Rocky Road

Shady
Tobe West
Ugly Eckley
Wren 'n Doubt
(units 1,4,6; 2,3,5,7)

74

**WORKING DOCUMENT
PRELIMINARY**

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Summary of Key Results for the ROD

6. A. Sales not subject to NFP - Recession Bill analysis.

6. B. Sales do not affect NFP; not subject to REO review.
"Eastside" sales

6. C. i. Sales not consistent with ROD direction for aquatics (34 sales).

Sold, unawarded, unenjoined sales that have not had aquatic review

Forest Service
Enola

Head

Sold, awarded sales with remaining units
(need verification aquatic adjustments are intact)

Forest Service
Beamer 712
Fish Story
Franklin Ridge

Gage
Honeytroc
Jack

Median Buyback
Randallsalado
Redlick

South Paxton
Toastberry

Upperten 002
Wheelock 403
Zanita

BLM
none

Sold, unawarded unenjoined sales modified by the Rescission Bill that no longer are consistent with the aquatic review

Forest Service
Horse Byars

Red 90

BLM
Big Winds

Summit Creek

Unawarded sales "resurrected" by Rescission Bill that are not consistent with ROD direction for aquatic review

Forest Service
Boulder Krab
Caraco Cat
Cowboy

Elk Fork
First
Garden

Holdaway 2
Last

Mr. Rogers
Nita

Prong
Rocky
South Nita

BLM
Chancy Road

6. C. ii. Sales not consistent with ROD direction for LSRs (0 sales).

Forest Service
none

BLM
none

6. C. iii. Sales not consistent with ROD direction for S&Gs (29 sales).

Sales Offered after ROD Effective Date
(need verification that sales comply with S&Gs)

Forest Service
Hiack Thin

BLM
Cat Tracks

Enclosure

6-6

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6. C. III Sales not consistent with ROD direction for S&Gs (cont.).

WORKING DOCUMENT
PREDECISIONAL

Enjoined Sales (need verification that sales comply with S&Gs)

Forest Service
none

BLM

91 L Dudley's Summit	Cherry Tree Plum	Golden Sucker	North Fork Cherokee	Shady
91 Miller's View	Corner Sock	Jeffers Revenge	(units 1;2,3,4,5,6)	Tobe West
Another Fairview	Crazy 8's	Lick II	Park Ridge Basin	Ugly Eckley
Battle Axe	Daffi Dora	Lobster Hill	Pond View	Wren 'n Doubt (units
Birdseye Rogue	Dead Middleman	Lost Sock (units 3; 4)	PP&J	1,4,6; 2,3,5,7)
Camp	Deep Creek	Marien Power	Rocky Road	

6. D. Sales consistent with ROD direction for S&Gs, LSRs, and aquatic review (59 sales)

Sold, awarded sales not subject to aquatic review, LSR review, or S &Gs

Forest Service

Benner Bunch	Fivemile Flume	Lobster	Square Clare	Tip
Berry Bushel	Foland Ridge	Lower Bailey	Stevens	Tiptop
Camel	Gordy Bluff	Ryan Wapiti	Sugar Maple	Uncle Condon
Canal 606	Grass Hula	Skywalker	Sugar Cube	Upper McLeod
Condon Carriage	Green Apple	Spur Trigger	Taylor Ranch	Wapiti 305
Deodar	Green Horn			West Boundary

BLM
none

Sold, awarded sales that passed original aquatic review with no modifications needed (not subsequently modified in response to Rescission Bill)

Forest Service

Abes Wren	Father Oak	Maria Skyline	Old Grade	Sulphur
Anchovy	Formader 103	North Ball	Scraps	Winriver
Boyd Creek	Formador 717	Not Bad	Stalwart	Wynochec Res
Clear Creek	Indian Hook			You Who

BLM
none

Sales that had additional aquatic review (following Rescission Bill modification) that are still consistent with the aquatic screens.

Forest Service
none

BLM

88 Black Jack	Bear Air (units 1; 2)	Swinglog Thin	Upper Rcnhaven
90 Pitcher Perfect Thin	Canton Creek II	Texas Gulch	Whitt's End
90 Roman Dunn	Hoxie Griffin	Twin Horse	Yellow Cr. Mtn.
(units 1,2; 3)	Olalla Wildcat		

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**Key for Determining Status of 318 Timber Sales Endangered Species Consultations:
March 6, 1996**

**WORKING DOCUMENT
PREDECISIONAL**

A. Northern Spotted Owl and Marbled Murrelet Biological Opinions: The sale was included in the biological opinion for the NFP ROD, or consultation, including critical habitat if required, has been completed for the northern spotted owl and the marbled murrelet, pursuant to Section 7 of the Endangered Species Act. If A.1.a. not subject to REO review and if A.1.b or A.2 (and harvested) subject to REO review.

A.1. Jeopardy was not determined for the marbled murrelet.

A.1.a. The sale was not modified under the Rescission Bill.

Comer Sock	Wren'n Doubt	Battle Axe	Holdaway 2	Gage
Crazy 8's	Cat Tracks	Dead Middleman	Enola	Red 90
Daffi Dora	Marten Power	Cherry Tree Plum	Zanita	Horse Byars
Lobster Hill	Birdseye Rogue	Rocky Road	Jack	Abes Wren
Lost Sock	Golden Sucker	91 Lower Dudley	Radlick	Anchovy
North Fork Chetco	Lick II	Deep Creek	Honey Tree	Tip
Ugly Eckley				Tip Top

A.1.b. The sale was modified under the Rescission Bill, and no longer consistent with ESA .

A.1.b.1. The sale was modified under the Rescission Bill for owls and owl critical habitat.

90 Pitcher Perfect Camp	Thin	Shady	Hoxie Griffen	PP&J	Canton Creek II Texas Gulch
----------------------------	------	-------	---------------	------	--------------------------------

A.1.b. The sale was modified under the Rescission Bill for owls, owl critical habitat and marbled murrelet, and no longer consistent with ESA.

Bear Air	90 Roman Dunn	Summit Creek	Yellow Creek Mountain	Tobe West
88 Black Jack	Big Winds	Upper Renhaven	Park Ridge Basin	

A.2. Jeopardy was determined for the marbled murrelet (51 sales) and not consistent with ESA.

Fish Story	West Boundary	Gordy Bluff	Skywalker	Randallsalado
Old Grade	Wynochee Res.	North Ball	South Paxton	Ryan Wapiti
Median Buyback	Stevens	Square Clare	Sugar Maple	Beamer 712
Stalwart	Sugar Cube	Berry Bushel	Sulphur	Canal 606
Scraps	Winriver	Condon Carr.	Uncle Condon	Formader 103
Boyd Creek	Spur Trigger	Fivemile Flume	Upper McLeod	Formader 717
Clear Creek	Lobster	Franklin Ridge	Benner Bunch	Upperten 002
Camel	Father Oak	Indian Hook	Grass Hula	Wapiti 305
Not Bad	Taylor Ranch	Lower Bailey	Green Apple	Wheelock 403
Deodar	Toastberry Foland	Maria Skyline	Green Horn	
You Who	Ridge			

Information is not available from the Forest Service to determine in any of their sales were modified after the biological opinion was completed by the Fish and Wildlife Service.

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B. Northern Spotted Owl and Marbled Murrelet Biological Opinions: The sale was not included in the biological opinion for the NFP *ROD*, or consultation, including critical habitat if required, for the northern spotted owl or the marbled murrelet pursuant to Section 7 of the Endangered Species Act, has not been completed for the sale. All sales subject to RFO review.

B.1. The sale was included in the biological opinion for the NFP *ROD*, or consultation completed for the northern spotted owl, pursuant to Section 7 of the Endangered Species Act.

B.1.a. The sale was not evaluated for northern spotted owl critical habitat and not evaluated for the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

Twin Horse Chaney Road Caraco Cat BoulderKrab Garden
Olalla Wildcat

B1.b. The sale was not evaluated for northern spotted owl critical habitat or the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

B.1.b.1. The sale was not evaluated for northern spotted owl critical habitat, pursuant to Section 7 of the Endangered Species Act.

Head Cowboy Nita South Nita First Last

B.1.b.2. The sale was not evaluated for the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

B.1.b.2.a. The sale was not modified under the Rescission Bill.

Hiack Thin Elk Fork Rocky

B.1.b.2.b. The sale was modified under the Rescission Bill.

Swinglong Thinning

B.2. The sale was not included in the biological opinion for the NFP *ROD*, or consultation completed for the northern spotted owl, pursuant to Section 7 of the Endangered Species Act.

B.2.a. The sale was not evaluated for northern spotted owl critical habitat and not evaluated for the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

Whitt's End Mr. Rogers Prong

B2.b. The sale was not evaluated for northern spotted owl critical habitat or the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

B.2.b.1. The sale was not evaluated for northern spotted owl critical habitat, pursuant to Section 7 of the Endangered Species Act.

Another Fairview Jeffer's Revenge Pond View. 91 Miller's View

B.2.b.2. The sale was not evaluated for the marbled murrelet, pursuant to Section 7 of the Endangered Species Act.

DRAFT ----- DRAFT

To: Chief, Forest Service

DRAFT

From: Under Secretary, NRE

Subject: Alternative Timber Pursuant to P.L. 104-19, Section 2001 (k) (3)

You are hereby directed to begin preparing alternative timber pursuant to P.L. 104-19, section 2001 (k) (3), for those timber sales or sale units that meet the District Court's definition of section 2001 (k) (2)'s "known to be nesting" standard.

To ensure the harvest of substitute timber may continue without interruption beyond the expiration of section 2001 (k) (1), you should provide alternative timber in accordance with applicable environmental and natural resource laws, except for competitive bidding requirements, ~~and other requirements~~. Use the process outlined in the May 10, 1996, declaration to the Court by Sterling Wilcox (copy enclosed). Any timber sales, or portions thereof, that are offered as alternative timber pursuant to section 2001 (k) (3) will meet the standards and guidelines of the applicable forest plan (i.e. the Northwest Forest Plan). [Optional Sentence: As needed, you may consider and use some volume from those sales currently prepared, or in preparation, under the Northwest Forest Plan.]

All timber offered as alternative timber under section 2001 (k) (3) will be clearly differentiated from sales made under the probable sale quantity objective of the Northwest Forest Plan, and will not count against current allowable sale quantities.

Please immediately issue any necessary direction to the Regional Forester to begin the process of preparing alternative timber.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST FOREST RESOURCE COUNCIL,)	
)	
Plaintiff,)	
)	Civil No. 95-6244-HO
v.)	
)	DECLARATION OF
DAN GLICKMAN, in his capacity as)	STERLING WILCOX
Secretary of Agriculture,)	
BRUCE BABBITT, in his capacity as)	
Secretary of the Interior)	
)	
Defendants.)	

I, Sterling Wilcox, do hereby depose and say that:

1. I am the Acting Deputy Chief of the National Forest System in the Washington office of the Forest Service.

2. I understand that plaintiffs in this matter have requested that the Court order the Forest Service to identify alternative volume by June 1, 1996, for Father Oak (unit 1), Fivemile Flume (unit 4), Formader 103 (unit 1), Indian Hook (Units 4 & 5), Skywalker (unit 6), Sulpher (unit 4) sale units in which marbled murrelets are "known to be nesting" under Section 2001(k)(2) of the 1995 Rescissions Act and the Court's order of January 19, 1996.

3. As stated in the Declaration of Gray F. Reynolds, March 28, 1996, within 60 days from such time as the Court may grant plaintiffs' request to release alternative timber for the 40 units subject to the Court's order of January 19, 1996, the Forest Service would:

a. identify and map the general locations of alternative timber, of like kind and value, on the National Forests in the Pacific Northwest Region of the Forest Service, outside suitable marbled murrelet nesting habitat and consistent with the standards and guidelines of the National Forest Plans, as amended by the NW Forest Plan;

b. request the assistance of purchasers of suspended units to identify locations of alternative timber of like kind and value; and

c. compare the availability of alternative timber to the kind and

value of timber currently suspended due to nesting of threatened and endangered birds.

4. In order for the alternative timber to comply with NEPA, ESA, NFMA and all other laws, the Forest Service will need to prepare environmental documents, a process that will take a minimum of six months assuming that adequate resources are available and unanticipated extensive analyses are not necessary. Where complex circumstances are encountered, preparation of environmental documents has in the past taken over two years.

5. After the NEPA document is prepared, a 30-day comment period is required by 16 U.S.C. 1612 (note) and 36 C.F.R. 215.6(a), and another 30 to 60 days is usually needed to respond to comments and prepare a decision document. If consultation or conferencing for proposed, endangered or threatened species is required, it can occur during this period, but delays in consultation or conferencing would delay preparation of the decision document.

6. After the environmental and decision documents are prepared, the decision document would be subject to administrative appeal under 36 C.F.R. 215, a process that can require 105 days to complete. An automatic stay of implementation applies from the publication of a notice of decision for appeal until the conclusion of the appeal under 36 C.F.R. 215.10. Simultaneous with the appeal process period, the Forest Service can work on tree marking, appraisal and sale preparation activities, which would require an estimated 60 to 90 days.

7. After the appeal process is completed, the final contract modification for alternative volume can be executed, unless delayed by judicial review.

8. If the sales in plaintiff's motion are given preferential treatment for alternative volume, the identification of the general location of potential alternative timber for the units they have requested could be assessed by June 1, 1996. The procedures in paragraphs four through seven would then need to be completed before the timber could be available for harvesting.

9. Preparation and implementation of the FY 1996, FY 1997 and FY 1998 timber programs are utilizing all currently available personnel and resources. Unless additional personnel and resources are made available, preparation of alternative volume would divert personnel and resources from preparation and implementation of the FY 1996, FY 1997, and FY 1998 timber programs.

I declare under penalty of perjury that the foregoing is true and correct.
Executed in Washington, D.C. on May 10, 1996.


Sterling Wilcox