

NLWJC- Kagan

Counsel - Box 010 - Folder 006

Timber - Legal Memos [3]



Assistant Attorney General

Washington, D.C. 20530

April 18, 1996

**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

TO: Katie McGinty  
Chair, Council on Environmental Quality

FROM: Lois J. Schiffer  
Assistant Attorney General  
and Committee

RE: Three Questions Regarding the Legal Implications of  
Timber Strategies.

Summary

This memorandum is intended to answer three questions: (1) whether there is any authority to suspend, terminate, or modify timber contracts released by § 2001(k)(1) of the Rescissions Act; (2) what is our authority, and subject to what laws, to provide replacement timber under § 2001(k)(1) or under § 2001(k)(3); (3) whether regular green timber sales developed under the President's Forest Plan can be used as a source of replacement timber required under § 2001(k)(3) or in exchange for section 318 timber already released by Judge Hogan's injunctions. (Ted's memo)

First, we conclude that unilateral contract termination or suspension would be difficult under § 2001(k)(1)'s mandate that section 318 timber sales be released and permitted to be completed, as well as under outstanding district court injunctions, absent a clarification. Nevertheless, the Sierra Club Legal Defense Fund, citing an ambiguity in the statute, has put forth an argument that the Secretaries retain authority to terminate the contracts under their original terms. We are pursuing ways to obtain clearance from Judge Hogan to assert this authority.

There is an additional argument that modification of timber contracts is authorized if we can show to the court that the contract would be permitted to be completed as modified and is otherwise in accordance with its "originally advertised terms, volumes, and bid prices." A contract modification theory is more

likely to succeed if it is presented to Judge Hogan as a legal basis for a settlement to which the parties agree. The timber industry may seek sanctions -- as they have in the past -- against government officials involved in any action to terminate contract rights unilaterally.

Because we may provide replacement timber under § 2001(k)(1) using contract modification, and replacement timber is mandated for timber sales that fall under § 2001(k)(3), the second question has two parts: first, what laws apply to modified timber sales under § 2001(k)(1) and to alternative timber required under § 2001(k)(3) and, second, what additional authority is there for providing replacement timber? For timber sales that have been released under § 2001(k)(1) and subsequently modified, we can argue that § 2001(k)(1) still requires that these sales must be permitted to be completed "notwithstanding any other provision of law." However, we can expect arguments that, once modified, these timber sales are no longer the sales released by Congress in § 2001(k), and are no longer subject to its protections. For § 2001(k)(3) alternative timber, those laws that conflict with the requirements of § 2001(k)(3) are arguably superseded. Established rules of statutory construction dictate that § 2001(k)(1)'s waiver of environmental laws be read narrowly and that § 2001(k)(3) be construed to supersede laws to the "minimum extent possible". Based on this rule and the structure of § 2001(k), we conclude that § 2001(k)(3) waives competitive bidding requirements, may also supersede administrative appeal rights, but does not clearly waive environmental laws. While an argument could be made that § 2001(k)(3) could be used as authority to provide replacement timber for "any reason," not limited to sales withheld under § 2001(k)(2), past rejection of this theory has been inconsistent with a broader construction of § 2001(k)(3).

The third question, whether Forest Plan timber can be used for modification of sales under 2001(k)(1) or as alternative sales under 2001(k)(3), must be answered by reconciling two distinct provisions ordering the award of timber sales in Section 2001. First, subsection 2001(k) of the Rescissions Act requires the release of timber contracts offered before the date of enactment of the Rescissions Act. Where threatened or endangered birds are "known to be nesting," the sale units must be withheld under 2001(k)(2) and replaced with an equal volume of "like kind and value" timber under § 2001(k)(3). Second, subsection 2001(d) requires the Administration to prepare, offer and award timber sales in the area covered by the Forest Plan, and waives environmental laws to allow these sales to be expedited.

Nowhere does the statute specifically address the interrelationship between these two provisions. Therefore, an argument could be made that these provisions allow the Administration to use Forest Plan timber sales covered in section

2001(d) to provide replacement volume under subsection 2001(k) if that timber is of "like kind and value." However, any such move by the Administration might be challenged by industry plaintiffs who will claim that these two provisions are intended to operate separately, and that replacement volume must be provided in addition to the Forest Plan's expedited timber sales. Even a mutually voluntary exchange with one timber purchaser may be challenged by other industry plaintiffs as a violation of competitive bidding requirements and section 2001(d).

## Analysis

Question 1: Whether we can suspend, terminate or modify the timber contracts released by § 2001(k).

### A. Suspension or Termination

Section 2001(k)(1) mandates that, "[n]otwithstanding any other provision of law," the Secretaries of Agriculture and the Interior "shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date . . . ." Pub. L. 104-19, § 2001(k)(1). Its legislative history makes clear that Congress intended Section 2001(k) to release suspended and cancelled timber sales that were offered and had willing high bidders or purchasers. The sponsors of Section 2001 stated that they intended to release timber contracts that had been "held up by subsequent environmental actions." Remarks of Senator Gorton, 141 Cong. Rec. S 4875 (March 30, 1995). This was to eliminate what the sponsors saw as unnecessary government delay and because "[r]elease of these sales will remove tens of millions of dollars of liability from the Government for contract cancellation." Senate Rept. 104-17 at 123; House Rept. 104-71 at 22.

The language of § 2001(k)(1) is contradictory; it requires the Secretaries to permit contracts to be completed "with no change in originally advertised terms" -- terms that provide for contract suspension and termination to avoid environmental harm. The district court has found that Congress clearly intended to release these timber sales to reduce government liability and supply timber to mills in the Pacific Northwest. NFRC v. Glickman, Jan. 10 Order at 20. The district court has held that, because Section 2001(k)(1) directs the award of timber sales "notwithstanding any other provision of law," the statute preempts any regulations that "give the agency discretion not to try to award an offered sale" because such regulations "would frustrate section 2001(k)(1)'s objectives." Id. (emphasis in original). The government is appealing this ruling, arguing that § 2001(k)(1) only requires the Secretaries to "act to award" timber sales and, where the high bidder cannot accept the award, Secretaries' discretion under contract law is not superseded. However, the government has admitted that Section 2001(k) requires the Secretaries to "act to award, release, and permit to be completed" timber sales offered prior to § 2001(k)'s enactment and preempts those laws that would prevent the Forest Service and BLM from acting to award suspended timber sales.

In a widely distributed paper, the Sierra Club Legal Defense Fund argues that contract termination provisions survive the enactment of § 2001(k), and, based on that paper, this analysis has been promoted by some in Congress. The argument focuses on

the fact that § 2001(k)(1)'s mandate to permit contracts to be completed is ambiguous because § 2001(k)(1) incorporates originally advertised terms. ( One could assert that the statute requires the Secretaries to act to resolve contract issues by releasing the contracts, but that it does not prohibit contract "completion" through exercise of the termination clause and payment of damages as provided in the contract. Under this construction, § 2001(k) only requires resolving the fate of the contracts one way or another, and protects the Secretaries' exercise of contract authority from challenge under other laws. ✓

It should be noted, however, that an argument for authority to suspend or cancel contracts that § 2001(k) is intended to release would be based on the very contract provisions that Forest Service used to suspend logging operations before enactment of § 2001(k). For example, Forest Service contract provisions C6.0, C6.25, B8.21, and C6.01 provide express contractual authority for the Forest Service to suspend timber sales in order to comply with the law, including court orders and National Forest standards and guidelines. Prior to the Rescissions Act, the Forest Service had required timber purchasers to suspend operations to comply with the ESA, based on the C6.01 provision that requires the purchaser "to interrupt or delay operations under this contract ... [t]o prevent serious environmental degradation or resource damage."<sup>1</sup> To interpret

---

<sup>1</sup> The provision provides:

C6.01 - INTERRUPTION OR DELAY OF OPERATIONS. (6/90)  
Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:

(a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;

(b) To comply with a court order, issued by a court of competent jurisdiction; or

(c) Upon determination of the appropriate Regional Forester, Forest Service, that conditions existing on this sale are the same as, or nearly the same as, conditions existing on sale(s) named in such an order as described in (b).

Purchaser agrees that in event of interruption or delay of operations under this provision, that its sole and exclusive remedy shall be (1) Contract Term Adjustment pursuant to B8.21, or (2) when such an interruption or delay exceeds 30 days during Normal Operating Season,

(continued...)

these contract provisions as surviving § 2001(k) arguably renders the mandate to "release and permit to be completed" a nullity, in violation of the cannon of statutory construction that a statute must be interpreted to give significance to all of its parts. Boise Cascade Corp. v. U.S.E.P.A., 942 F.2d 1427, 1432 (9th Cir. 1991). Also, because any of the released sales could have been suspended or terminated, we can expect arguments that this authority would have been used earlier.

An additional problem with asserting suspension or termination authority is that it would conflict with outstanding injunctions. For example, the Boulder Krab and Elk Fork timber sales are subject to the January 10, 1996, injunction issued in Northwest Forest Resource Council v. Glickman, No. 95-6244 (D. Ore.). That injunction requires USDA to "immediately award, release, and permit to be completed all sales subject to section 2001(k)(1)" as interpreted by that court. Indeed, the government did not object to the release of these sales because they had been cancelled before any ruling was made on whether they violated environmental laws. In connection with the Boulder Krab sale, the Forest Service affirmatively defended against a motion for temporary restraining order brought by environmental plaintiffs.

Failure to proceed with the these sales, without prior court approval, could also precipitate a motion by timber industry attorneys for civil contempt on the grounds that a failure to proceed would be a violation of an injunction requiring the government to proceed. Any finding of civil contempt could result in the imposition of a daily fine until the government complied with the injunction and, possibly, the incarceration of the government official responsible for action on the sales until the government complied. Moreover, past experience indicates that industry might seek sanctions against attorneys under Rule 11 of the Federal Rules of Civil Procedure for raising arguments to stop sales from going forward where the authority we assert for suspending or terminating these sales on environmental grounds is reliance on a contract clause that may be found to be in tension with the purpose, language, and legislative history of the Rescissions Act.

---

<sup>1</sup>(...continued)

Contract Term Adjustment pursuant to B8.21, plus out-of-pocket expenses incurred as a direct result of interruption or delay of operations under this provision. Out-of-pocket expenses do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

The injunction issued by the district court in Northwest Forest Resource Council does not interpret the statute's reference to contract terms. Instead, the injunction requires the government to immediately award, release, and permit to be completed all § 2001(k)(1) sales. Thus, in order to avoid a violation of the injunction, the government would be required to seek a clarification or modification of the injunction if it wished to terminate awarded sales on the basis of a contract clause which was included in the contracts pursuant to the original solicitation. At the request of CEQ, we have prepared a Motion to Modify or Clarify Judge Hogan's January 10, 1996, Order. Based on the substantial questions of jurisdiction that such a motion raises, we have also prepared a draft argument seeking a partial remand from the Ninth Circuit, in the alternative.

Finally, given the jurisdictional complexities of obtaining a modification of an injunction that is on appeal and the fact that the appellate court has already denied the government's motion to stay the injunction issued in Northwest Forest Resource Council, it would appear that the appellate court would not grant any interim relief if the district court denied a government motion to modify the injunction.

#### B. Modification

An argument may be made that § 2001(k)(1) requires the reinstatement and completion of timber sale contracts, but does not supersede agency authority to administer those contracts with contract modifications. Support for this argument may be found in § 2001(k)(1)'s incorporation of "originally advertised terms," contract provisions for modifications, and agency construction of the statute as allowing for modifications. This argument presents difficult issues for delineating those modifications that are so substantial that they do not permit the contract "to be completed" and the extent to which modifications may be based on "other law," including the ESA.

The original terms of the contracts allow for modification of the contracts based on environmental harm. For example, standard provision C6.25 authorizes the Forest Service unilaterally to modify the contracts to provide protection for species that are newly listed as threatened pursuant to the ESA. Pursuant to this authority, the Forest Service may unilaterally suspend or adjust contract terms for environmental reasons.<sup>2</sup>

---

<sup>2</sup> Provision C6.25 provides that:

Location of areas needing special measures for protection of plants or animals listed as threatened or  
(continued...)

Janicki Logging Co. v. Bruce Mateer, 42 F.3d 561, 562 (9th Cir. 1994) ("Section C6.25 of the contract expressly permitted the Forest Service to 'either cancel' or 'unilaterally modify [the] contract' in order to provide additional protection for animals that were listed either as threatened or endangered under the Endangered Species Act, or as sensitive by the Regional Forester.") (brackets in original). Similarly, contract provision 8.3 allows the Forest Service to make reasonable modifications to make the contract consistent with the standards and guidelines of the NFMA and the Forest Plan.<sup>3</sup>

The issue is whether § 2001(k) has impliedly repealed contract authorities of the Forest Service, under the National Forest Management Act, 16 U.S.C. 472a, or the BLM, under the Oregon & California Lands Act, 43 U.S.C. 1181a. We have argued that § 2001(k) does not supersede contract authorities that give the agencies discretion not to release contracts where the high bidder is otherwise unqualified. Our argument is based on the implied repeal doctrine, which requires that a repeal be based on

---

<sup>2</sup>(...continued)

endangered under the Endangered Species Act of 1973 and R-5 Sensitive Plant and Animal Species List are shown on Sale Area Map and identified on the ground. Measures needed to protect such areas have been included elsewhere in this contract as stipulated in the List of Controlled Areas on the Sale Area Map.

If protection measures prove inadequate, if other such areas are discovered, or if new species are listed on the Endangered Species List, Forest Service may either cancel under C8.2 or unilaterally modify this contract to provide additional protection regardless of when such facts become known. Discovery of such areas by either party shall be promptly reported to the other party.

<sup>3</sup> Provision C8.3 provides:

C8.3 - CONTRACT MODIFICATION. (1/93) Forest Service may make modifications in Timber Specifications in BT2.0, Transportation Facilities in BT5.0, or Operations in BT6.0, or in related Special Provisions, to the extent that such changes are reasonably necessary to make the contract consistent with guidelines and standards developed to implement Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended and with land management plans, developed and revised thereunder. Such modifications shall be limited to requirements with which Purchaser can reasonably comply. Resulting changes in the value of remaining Included timber shall be reflected in a rate redetermination conducted in accordance with CT3.321.

"irreconcilable conflict." Radzanower v. Touche Ross & Co., 426 U.S. at 154. Such an implied repeal must be based on "clear and manifest" legislative intent. Id. Moreover, if the "two statutes are partially in conflict, '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.'" In re Glacier Bay, 944 F.2d at 582 (9th Cir. 1991) (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)). We may be able to argue for contract modification authority, so long as we may show that the argument permits the contracts "to be completed." Under this line of argument, contract authority to make modifications may be retained even if authority to terminate has been superseded by § 2001(k).

Further support for this argument may be found in agency administration of § 2001(k). In their August 23, 1995, memorandum interpreting § 2001(k), the Under Secretary of Agriculture and the Director of the Bureau of Land Management announced that they would award sales with all mutually agreed changes to original contract terms. Throughout this litigation, the Forest Service and BLM have been working with contract holders to obtain modifications. Most recently, the Forest Service has issued a regulation to provide authority to make contract modifications that extend beyond the immediate sale area. However, in promulgating its "extraordinary conditions" regulation, the Forest Service did not assert authority to unilaterally modify contracts. 61 Fed. Reg. 14620 (April 3, 1996). In the field, the Forest Service or BLM may also have interpreted their authority as allowing only mutual modification. Agency acceptance of a mutuality limitation on what, in contract, is a unilateral authority may be used to argue against a new interpretation.

The most significant problem with asserting unilateral modification authority is the statute's mandate to release contracts that existed at the time of enactment "with no change in originally advertised terms, volumes, and bid prices," and its provision for alternative timber based on the nesting of threatened and endangered birds. The principle *expressio unius est exclusio alterius* -- an explicit exception excludes all other exceptions -- has already been used by the district court to rule that the exception for nesting threatened or endangered birds in § 2001(k)(2) precludes the finding of additional authority to prevent the release of timber mandated withdrawn or cancelled sales under 2001(k)(1). The legislative history speaks generally of the release of specific timber sales, not a mandate to the Secretaries to resolve contract claims through contract adjustment. See, e.g., Statement of Senator Gorton, 141 Cong. Rec. S 4875 (March 30, 1995) ("The proposal that the committee has made simply says that those sales would go ahead unless they

involved places in which endangered species are actually found, in which case, substitute lands will take their place.")<sup>4</sup>

Question 2: Whether Environmental Laws Apply to Modified or Alternative Timber.

Paragraph (1) of § 2001(k) provides that certain timber sale contracts must be immediately awarded by relevant agencies "notwithstanding any other provision of law." Paragraph 2001(k)(2) exempts sales on lands where threatened or endangered bird species are "known to be nesting." Paragraph 2001(k)(3) mandates that substitute timber be provided where a sale is not completed for any reason within 45 days of the Act's date of enactment. This third paragraph does not repeat the earlier "notwithstanding any other provision of law" phrase. The narrow issue presented is whether the phrase carries down to or can be read into paragraph (k)(3). Upon examination of the provisions' language, the legislative intent and interpretive canons, it appears that the phrase "notwithstanding any other provision of law" does not apply to paragraph (k)(3). However, an argument can be made that § 2001(k)(1)'s waiver of environmental laws continues to apply to timber contracts that are modified after their award through September 30, 1996.

#### Alternative Timber Required by § 2001(k)(3)

The language and structure of § 2001(k) indicate that Congress did not intend that the phrase "notwithstanding any other provision of law" applies to paragraph (3). Most obviously, the phrase itself, or any shorthand indication thereof, is entirely absent in that paragraph. Where Congress uses a particular phrase in one section of a statute but omits it in another, the difference in language is presumed to be intentional. Deberry v. Sherman Hospital Association, 769 F. Supp. 1030 (N.D.Ill. 1991) (citing Russellov. v. United States, 464 U.S. 16, 21 (1983)). "Where a form of conduct, the manner of its performance and operation and the person and things to which it refers are designated, there is an inference that omissions should be understood as exclusions." 2A Sutherland Statutory

---

<sup>4</sup> The Conference Report states:

For emergency timber salvage sales, Option 9 and sales in the section 318 area, the bill contains language which deems sufficient the documentation on which the sales are based and significantly expedites legal action . . . . Environmental documentation, analysis, testimony and studies concerning these areas are exhaustive and the sufficiency language is provided so that sales can proceed.

H.R. Conf. Rep. No. 5116, 104th Cong., 1st Sess. H. 3049.

Construction § 47.23; Spink v. Lockheed Corp., 60 F.3d 616, 621 (9th Cir. 1995).

The conclusion that the omission was intentional is bolstered by the fact that other provisions of paragraph (1) were addressed in paragraph (3). Specifically, paragraph (3) states that the substitute releases "shall be subject to the terms of the original contract," obviously referencing the first paragraph. Paragraph (3) applies to sales that "cannot be released and completed under the terms of this subsection," further indicating that alternative timber is not provided under the terms of paragraph (1)'s waiver of laws. Additionally, paragraph (1)'s 45-day period for the Secretary to release timber sales is repeated as a reference point. Congress therefore appears to have considered all of the terms in paragraph (1), and decided which to include, modify or omit in paragraph (3).

Moreover, the "notwithstanding" phrase is in the first sentence of paragraph (1), which consists of two sentences. Paragraphs (2) and (3) are separate entities, linked only by subject matter. Each consists of a complete sentence and has an independent heading. Grammatically, therefore, the "notwithstanding" phrase is separate and apart. See 2A Sutherland's Statutory Construction §47.15 (punctuation may be considered where intent is uncertain). Nor does paragraph (3) contain any other terms that would indicate congressional intent to exempt environmental laws. For example, had Congress restricted the Secretary's selection of substitute timber to some short time frame, compliance with other laws such as the National Environmental Policy Act may have been infeasible, and it would be logical to carry down the "notwithstanding" phrase. The absence of such limitations contrasts with the strict 45-day limit in paragraph (1). Subsection (1) also directs that transactions "be completed in fiscal years 1995 and 1996," while paragraph (3) has no such requirement. Finally, even if there were any doubt as to the phrase's application, standard rules of statutory interpretation teach that "where there is doubt concerning the extent of the application of [a] proviso on the scope of another provision's operation, the proviso is strictly construed." 2A Sutherland Statutory Construction § 47.08.

Were this waiver of all laws to apply to alternative timber, the "Secretary concerned" would have almost unfettered discretion to unilaterally declare which lands are exempted from the laws. There are no standards provided for the selection of the substitute timber and it seems unlikely that any selection could be subject to challenge because it would be deemed to automatically comply with all laws. This contrasts with other provisions in section 2001 allowing at a minimum for limited judicial review. Such an interpretation is not favored:

Since administrative agencies are purely creations of legislation, without inherent or common law powers, the

general rule applied to statutes granting powers to them is that only those powers are granted which are conferred either expressly or by necessary implication.

. . . The effect usually has been to accomplish a strict interpretation against the exercise of power claimed by the administrative body."

3 Sutherland Statutory Construction 65.02.<sup>5</sup> Indeed, even in the other provisions of § 2001, the Secretary cannot award a timber sales contract without an environmental assessment under NEPA and a biological evaluation under the ESA. § 2001(c)(1)(A).

Additionally, interpretations that yield a potentially unconstitutional result should be avoided. 2A Sutherland Statutory Construction § 45.10 ("A court should construe legislative enactments to avoid constitutional difficulties if possible"); Rotunda & Nowack, *Treatise on Constitutional Law* § 4.8 (2d Ed. 1992) (citing National Cable Television Assoc., Inc. v. United States, 415 U.S. 336, 94 S.Ct. 146, 39 L.Ed.2d (1974)). Here, the power to "repeal" statutes vested in an undesignated Secretary may violate Separation of Powers principles. 1 Sutherland Statutory Construction § 4.17; Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275, 111 S.Ct. 2298, 2314, 115 L.Ed.2d (1991) (review board consisting of nine members of Congress could not make legislative determinations not subject to the bicameralism and presentment requirements of Art. I § 7). Compounding this problem is that the Secretary would have absolute discretion to exercise this power. Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218-19, 109 S.Ct. 1726, 1731104 L.Ed.2d (1989) (delegation of authority to the executive branch must include sufficient standards to allow judicial review).

Finally, we would have to bear a heavy burden of proof to support an interpretation that effectively would exempt numerous timber sales from statutorily mandated environmental protections. The Ninth Circuit recently explicitly held that exemptions from the Endangered Species Act, 16 U.S.C. §§ 1531 et seq., and the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., must be strictly construed. Mount Graham Coalition v. Thomas, 53 F.3d 970, 975 (9th Cir. 1995). In ruling on a legislative exemption from the ESA and NEPA, the Ninth Circuit held that "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process." Id. (quoting A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945)).

---

<sup>5</sup> While there is authority for the opposite rule, it appears in the context of enabling the administration to administer public welfare statutes. Id. at § 65.02.

Based on the structure of § 2001(k) and these principles, we conclude that 2001(k)(3) waives competitive bidding requirements, which irreconcilably conflict with the purpose of the alternative timber provision, but does not clearly waive environmental laws.<sup>6</sup> The Office of General Counsel, USDA, has concluded that § 2001(d) provides an even broader waiver of environmental laws for any timber sales, including alternative timber, offered during the "emergency period" of Section 2001 in the area of the Northwest Forest Plan. While it is difficult to predict how the district court would interpret § 2001(d), this is a completely separate subsection that directs the Secretaries to "expeditiously prepare, offer, and award timber sale contracts" in the area of the Northwest Forest Plan. The use of the term "offer" indicates that § 2001(d) applies only to new contracts that will be competitively bid, not replacement contracts provided to existing contract holders.<sup>7</sup> Moreover, the judicial review provisions of § 2001(f) apply to all timber sales offered under § 2001(d), and requires any challenge to be filed within 15 days of the "advertisement" of such timber sales. These provisions are inconsistent with, and probably preclude, application of § 2001(d) to § 2001(k)(3) alternative timber.

#### Timber Contracts Released Under § 2001(k)(1) and Modified

These principles also argue against the application of the phrase "notwithstanding any other provision of law" to § 2001(k) timber sales once they have been modified. In an analogous situation, such sufficiency language was held to not protect a project that deviated from the plans incorporated by reference in

---

<sup>6</sup> The Office of General Counsel, USDA, advised in a memorandum dated February 26, 1996, that they "believe a court would be more likely than not to read Section 2001(k)(3) as importing the 'notwithstanding any other provision of law' provision of Section 2001(k)(1), thus extending the sufficiency language to the alternative timber sales." While this may be a reasonable prediction of the district court's response, we believe such a response would be reversible error based on the foregoing analysis.

<sup>7</sup> We have asserted in litigation that the advertisement of timber is not equivalent to an offer of the timber, but it is an integral part of the process leading to award of a sale. The Forest Service in its advertisement informs interested parties that the government is seeking to sell timber, but specifically reserves its right to enter into a contract that will confer the greatest advantage to the government. See, Cutler-Hammer v. United States, 194 Ct. Cl. 758, 441 F. 2d 1179 (1971). Thus, the stage at which a timber sale is "offered" is the point at which the Forest Service opens the bids of parties responding to the advertisement.

the statute. Mount Graham Coalition, 53 F.3d at 975. However, our argument in favor of contract authority to make modifications would also support an argument that Congress intended to exempt contracts, not specific timber sale sites, from environmental laws. As noted above, we can argue that § 2001(k)(1) releases timber sale contracts, not specific timber sales, and that the contracts may be administered according to their original terms so long as they are permitted to be completed.

Support for this interpretation may be found in paragraph (3)'s mandate that alternative timber "shall be subject to the terms of the original contract." This reference to the first paragraph of § 2001(k) indicates that Congress believed that the contract terms exempted from environmental laws in paragraph (1) may be applied to timber stands located outside the sale area. The agencies' interpretation is entitled to deference if it represents a permissible construction of the statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 822 (1984). It need not be the only possible interpretation in order to warrant deference. See Good Samaritan Hospital v. Shalala, 113 S.Ct. 2151, 2156 (1993) We have argued that some contract provisions apply. With the support of established agency interpretations, we may be able to advance an argument in favor of retention of contract authority to modify timber sales to avoid subsequently discovered environmental harm "notwithstanding any other provision of law."

Alternatively, we could argue that § 2001(k)(3) could be used as authority to provide replacement timber for "any reason," not limited to sales withheld under § 2001(k)(2). However, as noted above, this would require such modifications to comply with all environmental laws that are not clearly precluded by § 2001(k)(3). Moreover, in the face of a timber industry motion for the release of all timber sales that could not be withheld under § 2001(k)(2), the Forest Service and BLM decided not to assert that § 2001(k)(3) applies to more than timber sales withheld under § 2001(k)(2). Subsequent actions have also been inconsistent with a broader construction of § 2001(k)(3), including the Forest Service decision that it was necessary to adopt a new regulation to authorize the substitution of timber.

QUESTION 3: Whether Forest Plan timber sales can be used as a source of replacement timber required under § 2001(k)(3) or in exchange for timber already released by Judge Hogan's injunctions

This memorandum does not address the technical problems associated with providing an equivalent volume of "like kind and value" timber which would also have to be addressed should the Administration attempt to use Forest Plan timber as replacement timber under § 2001(k). We understand that most of the trees available to date for harvest under the President's Forest Plan

have been young "second growth" that is not comparable to the quality and value of most of the ancient forest timber sales affected by § 2001(k). Therefore, the quantity of immediately available "like kind and value" timber available under the Forest Plan may be negligible.

However, an argument can be made that § 2001(k) allows the use of Forest Plan timber as equivalent volume for the Section 318 timber sales, though this position may be found inconsistent with congressional intent. This argument for the availability of Forest Plan timber applies as well to already released Section 318 sales and sales ordered released by Judge Hogan, as long as those sales are not already cut, and assuming the purchaser -- at its sole option -- is willing to trade the sales to which it has a legal right for Forest Plan timber. Any reduction of Forest Plan timber volume to account for the release of § 2001(k) timber would probably be inconsistent with congressional intent, and would further expose the Forest Plan to attacks on its continuing validity.

The Rescissions Act does not indicate any relationship between two distinct provisions for the expeditious release of timber -- § 2001(k) for the release of previously offered timber sale contracts and § 2001(d) directing the expeditious award of timber contracts on lands covered by the President's Forest Plan (referred to by its designation in its environmental impact statement, Option 9). Subsection 2001(k) requires the Secretaries to provide replacement timber if a sale cannot be released and completed under the terms of the original contract, but does not explain what law applies to the location and operation of these replacement timber contracts except to say that they "shall not count against current allowable sale quantity." Subsection 2001(d) requires the Secretaries, notwithstanding any other law, to "expeditiously prepare, offer and award timber sale contracts on Federal lands described in" the President's Forest Plan. Subsection 2001(f) provides for limited judicial review of the record for any decision to prepare, offer, award or operate a timber sale under 2001(d), but does not address the judicial review of replacement timber decisions under paragraph (3) of § 2001(k).

We could argue that green timber sales developed under the President's Forest Plan can be used as replacement timber (assuming it meets the "like kind and value" criteria). The scope of § 2001(k) is defined by reference to timber sale contracts "in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" of the 1990 Interior and Related Agencies Appropriations Act, Public Law 101-121. § 2001(k)(1). Subsection 2001(d)'s scope, which is defined by reference to the President's Forest Plan, overlaps the

area of Section 318 under the government's interpretation.<sup>8</sup> Because the scope of § 2001(d) is defined by, and encompasses, the range of the threatened and endangered bird species that paragraph 2001(k)(2) is designed to protect, the replacement timber mandated by paragraph 2001(k)(3) falls within the area of § 2001(d).

As noted above, § 2001(k) does not indicate what law applies to the development of replacement contracts, except that the timber shall not count against the current allowable sale quantity. The term "allowable sale quantity" (ASQ) is a legal term of art under the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1603 et seq. The NFMA mandates that "the Secretary of Agriculture shall limit the sale of timber from each national forest to a quantity equal to or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis . . . ." 16 U.S.C. § 1611. Regulations further define ASQ as "[t]he quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3. Courts and the Forest Service have interpreted the ASQ as operating as a ceiling for timber production in the Land and Resource Management Plans for individual National Forests. See Resources Ltd v. Robertson, 8 F.3d 1394, 1399 (9th Cir. 1993); Sierra Club v. Cargill, 11 F.3d 1545 (10th Cir. 1993); Sierra Club v. Robertson, 845 F. Supp. 485 (S.D. Ohio 1994); 36 C.F.R. 219.3, 219.16.

Subsection 2001(k)'s provision that replacement timber contracts "shall not count against current allowable sale quantity" (ASQ) does not clearly prohibit the use of replacement timber as timber prepared under the President's Forest Plan. The timber output under the President's Forest Plan is described as "probable sale quantity" in order to "estimate sale levels likely to be achieved" under the President's Forest Plan "as opposed to estimating ceiling or upper-limit harvest levels (ASQ)." FSEIS, 3&4-263. Probable Sale Quantity ("PSQ") is defined as "the allowable harvest levels for the various alternatives that could be maintained without decline over the long term if the schedule of harvest and regeneration were followed." FSEIS Glossary at 13. Option 9, as adopted by the Secretaries on April 13, 1994,

---

<sup>8</sup> Section 318 applied ecological standards and procedures to timber sales in thirteen National Forests in Oregon and Washington known to contain northern spotted owls and to timber sales in the BLM districts of western Oregon, also within the range of the northern spotted owl. Fiscal Year 1990 Interior Appropriations, Pub. L. 101-121, 103 Stat. 745. The President's Forest Plan applies to all BLM districts and National Forests, or portions thereof, within the range of the northern spotted owl. ROD at 11-12.

contained an estimated PSQ of 1.1 bbf. ROD at 24.<sup>9</sup> It is logical to construe § 2001(k)(3)'s reference to ASQ as a waiver of ASQ limitations for particular National Forests, allowing replacement timber to be concentrated in a particular National Forest. However, if the language of § 2001(k) were interpreted as precluding the agencies from counting replacement timber value towards the ASQ for an individual National Forest Plan, rather than simply waiving ASQ limitations, then arguably it also precludes the agencies from "double counting" the replacement timber under the President's Forest Plan. Because ASQ has a specific and well-known meaning, we could argue that Congress only incorporated the Forest Service definition of ASQ by reference. 36 C.F.R. 219.3.

Subsection 2001(d), as noted above, is an entirely separate provision for the expeditious preparation, offer and award of timber sale contracts on Federal lands described in the Record of Decision for the President's Forest Plan. If the Administration tries to substitute Forest Plan timber for § 2001(k) timber, the timber industry could challenge this decision and argue that the intent of § 2001(d) is to supply timber on the open market, and use of the term "offer" would ordinarily implicate a competitive bidding process. Giving Forest Plan timber, which would otherwise be subject to § 2001(d), to those purchasers that the Secretary is obligated to "provide" replacement timber under subsection 2001(k)(3) may be found to be inconsistent with the intent of subsection 2001(d).

Characterizing replacement timber under § 2001(k) as Option 9 timber would appear to be inconsistent with the legislative intent to expedite timber sales under both subsection 2001(d) and subsection 2001(k). The intent of subsection 2001(k) is to foster the expedited sale of timber contracts to avoid government liability for their cancellation. The House Report stated, "Release of these sales will remove tens of millions of dollars of liability from the government for contract cancellation." 104 House Report 71, 104th Cong., 1st Sess. (1995). The Senate

---

<sup>9</sup> The PSQ was devised to assist FEMAT team members in evaluating the alternatives. In particular, the PSQ was used instead of the ASQ to provide an estimate, instead of a more defined ceiling. See FSEIS at 3&4 263-274. The PSQ does not set "minimum levels that must be met nor maximum levels that cannot be exceeded." ROD at 19. Further "it is unlikely that the annual PSQ estimates" will be achieved during the first several years. Id. The ROD acknowledges that the estimated level of 1.1 bbf is significantly lower than that obtained in the early 1980's but this was necessary due to the high level of timber harvested in the 1980s and current environmental laws. ROD at 41, FSEIS at 3&4 at 267.

Appropriations Committee, which added subsection 2001(d) and paragraphs 2001(k)(2) and (3), explained the intent of subsection 2001(d) as allowing the Administration to achieve current PSQ of the Forest Plan. S. Rep. 104-17 at 123. There is no indication of a linkage between subsection 2001(d) and subsection 2001(k), or any explanation of the standards applicable to replacement timber.

In debate, Senator Gorton, the author of these provisions, made numerous references to the Forest Plan's PSQ of 1.1 billion board feet of timber in describing the intent behind subsection 2001(d). He argued that subsection 2001(d)'s waiver of environmental laws is necessary to achieve this harvest level because "almost no single action taken pursuant to this option will escape an appeal within the Forest Service and a lawsuit being stretched out forever and ever." 141 Cong. Rec. S 4875 (daily ed. March 30, 1995). Similarly, Senator Hatfield emphasized that subsection 2001(d) was designed to "give the administration all possible tools to meet its promises to get wood to the mills of the Pacific Northwest in the next 18 months." Id. at 4882.

While there is some discussion of subsection 2001(k) in the legislative history, there is no thought given to the law applicable to replacement timber sales under paragraph 2001(k)(3). On this provision, the Senate report and the Conference report simply state that the Secretary must provide substitute volume for timber sales withheld for nesting birds. S. Rep. 104-17, at 123; H.R. Conf. Rep. No. 5116, 141 Cong. Rec. H 3049.

However, there is no indication in the legislative history that the replacement timber sales should proceed regardless of the standards and guidelines of the Forest Plan. Sen. Hatfield, the floor manager of the bill, stated that most of the sales being discussed had already been determined under President Clinton's Pacific Northwest Forest Plan "not to jeopardize the existence of any species." 141 Cong. Rec. S 4881 (daily ed. March 30, 1995). Rep. Taylor, the bill's House sponsor, similarly commented that "the preponderance of these sales were approved for harvest . . . as not jeopardizing the continued existence of any of the numerous species of wildlife . . . ." 141 Cong. Rec. H 3233 (daily ed. March 15, 1995).

On the day the President signed the Rescissions Act into law, Senator Gorton, Representative Taylor and chairmen of committees with jurisdiction over the Forest Service and Bureau of Land Management provided the Administration with a letter that serves as a road map for litigation issues in the implementation of subsection 2001(k). In it, they state that compliance with paragraph 2001(k)(3) "does not require compliance with environmental laws or other federal statutes in light of the

"notwithstanding any other provision of law" language in subsection (k)(1)." The letter reiterates the industry view that alternative timber must be provided quickly so that it may be harvested in fiscal years 1995 and 1996, and indicates that industry may bring suit for a declaration that paragraph 2001(k)(3) requires timber harvest on lands otherwise protected under the Forest Plan.

Finally, the injunction of the U.S. District Court for the District of Oregon has required the government to "award, release, and permit to be completed . . . all timber sale contracts offered or awarded between October 1, 1990, and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." October 17 Order at 2. Under past interpretations, any released timber sales would have to be replaced with the agreement of the contract holder, unless the outstanding injunctions were modified or agency interpretations of subsection 2001(k) were otherwise agreed with. We can expect that industry will use any policy announcement to challenge a decision to limit replacement timber by requiring that it be consistent with the Forest Plan. Indeed, if the government prevails in its interpretation of paragraph 2001(k)(2) as actually protecting the nesting sites of threatened and endangered birds, we can expect that an attempt will be made to use paragraph 2001(k)(3)'s mandate of replacement timber to force the waiver of the Forest Plan's standards and guidelines.



U.S. Department of Justice

Environment and Natural Resources Division

Policy, Legislation & Special Litigation

Washington, D.C. 20530

April 9, 1996

TO: Lois J. Schiffer  
Assistant Attorney General

Peter D. Coppelman  
Deputy Assistant Attorney General

FROM: Ted Boling   
Attorney-Advisor  
Policy, Legislation and  
Special Litigation Section

RE: Whether Forest Plan timber sales can be used as a source of alternative timber under § 2001(k)(3) or in exchange for timber already released by Judge Hogan's injunctions

Summary

Your question, whether Forest Plan timber can be used for modification of sales under 2001(k)(1) or as alternative sales under 2001(k)(3), must be answered by reconciling two distinct provisions ordering the award of timber sales in Section 2001. First, subsection 2001(k) of the Rescissions Act requires the release of timber contracts offered before the date of enactment of the Rescissions Act. Where threatened or endangered birds are "known to be nesting," the sale units must be withheld under 2001(k)(2) and replaced with an equal volume of "like kind and value" timber under § 2001(k)(3). Second, subsection 2001(d) requires the Administration to prepare, offer and award timber sales in the area covered by the Forest Plan, and waives environmental laws to allow these sales to be expedited.

Nowhere does the statute specifically address the interrelationship between these two provisions. Therefore, an argument could be made that these provisions allow the Administration to use Forest Plan timber sales covered in section 2001(d) to provide replacement volume under subsection 2001(k) if that timber is of "like kind and value." However, any such move by the Administration would certainly be challenged by industry plaintiffs who will claim that these two provisions are intended to operate separately, and that replacement volume must be

provided in addition to the Forest Plan's expedited timber sales. Even a mutually voluntary exchange with one timber purchaser may be challenged by other industry plaintiffs as a violation of competitive bidding requirements and section 2001(d).

This memorandum does not address the technical problems associated with providing an equivalent volume of "like kind and value" timber which would also have to be addressed should the Administration attempt to use Forest Plan timber as replacement timber under subsection 2001(k). We understand that most of the trees available to date for harvest under the President's Forest Plan have been young "second growth" that is not comparable to the quality and value of most of the ancient forest timber sales affected by subsection 2001(k). Therefore, the quantity of immediately available "like kind and value" timber available under the Forest Plan may be negligible.

However, an argument can be made that subsection 2001(k) allows the use of Forest Plan timber as equivalent volume for the Section 318 timber sales, though this position may be found inconsistent with congressional intent. This argument for the availability of Forest Plan timber applies as well to already released Section 318 sales and sales ordered released by Judge Hogan, as long as those sales are not already cut, and assuming the purchaser -- at its sole option -- is willing to trade the sales to which it has a legal right for Forest Plan timber. Any reduction of Forest Plan timber volume to account for the release of subsection 2001(k) timber would probably be inconsistent with congressional intent, and would further expose the Forest Plan to attacks on its continuing validity.

#### Analysis

The Rescissions Act does not indicate any relationship between two distinct provisions for the expeditious release of timber -- subsection 2001(k) for the release of previously offered timber sale contracts and subsection 2001(d) directing the expeditious award of timber contracts on lands covered by the President's Forest Plan (referred to by its designation in its environmental impact statement, Option 9). Subsection 2001(k) requires the Secretaries to provide replacement timber if a sale cannot be released and completed under the terms of the original contract, but does not explain what law applies to the location and operation of these replacement timber contracts except to say that they "shall not count against current allowable sale quantity." Subsection 2001(d) requires the Secretaries, notwithstanding any other law, to "expeditiously prepare, offer and award timber sale contracts on Federal lands described in" the President's Forest Plan. Subsection 2001(f) provides for limited judicial review of the record for any decision to prepare, offer, award or operate a timber sale under 2001(d), but

does not address the judicial review of replacement timber decisions under paragraph (3) of subsection 2001(k).

We could argue that green timber sales developed under the President's Forest Plan can be used as replacement timber (assuming it meets the "like kind and value" criteria). The scope of subsection 2001(k) is defined by reference to timber sale contracts "in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" of the 1990 Interior and Related Agencies Appropriations Act, Public Law 101-121, § 2001(k)(1). Subsection 2001(d)'s scope, which is defined by reference to the President's Forest Plan, overlaps the area of Section 318 under the government's interpretation.<sup>1</sup> Because the scope of subsection 2001(d) is defined by, and encompasses, the range of the threatened and endangered bird species that paragraph 2001(k)(2) is designed to protect, the replacement timber mandated by paragraph 2001(k)(3) falls within the area of subsection 2001(d).

As noted above, subsection 2001(k) does not indicate what law applies to the development of replacement contracts, except that the timber shall not count against the current allowable sale quantity. The term "allowable sale quantity" (ASQ) is a legal term of art under the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1603 et seq. The NFMA mandates that "the Secretary of Agriculture shall limit the sale of timber from each national forest to a quantity equal to or less than a quantity which can be removed from such forest annually in perpetuity on a sustained-yield basis . . . ." 16 U.S.C. § 1611. Regulations further define ASQ as "[t]he quantity of timber that may be sold from the area of suitable land covered by the forest plan for a time period specified by the plan." 36 C.F.R. 219.3. Courts and the Forest Service have interpreted the ASQ as operating as a ceiling for timber production in the Land and Resource Management Plans for individual National Forests. See Resources Ltd v. Robertson, 8 F.3d 1394, 1399 (9th Cir. 1993); Sierra Club v. Cargill, 11 F.3d 1545 (10th Cir. 1993); Sierra Club v. Robertson, 845 F. Supp. 485 (S.D. Ohio 1994); 36 C.F.R. 219.3, 219.16.

---

<sup>1</sup> Section 318 applied ecological standards and procedures to timber sales in thirteen National Forests in Oregon and Washington known to contain northern spotted owls and to timber sales in the BLM districts of western Oregon, also within the range of the northern spotted owl. Fiscal Year 1990 Interior Appropriations, Pub. L. 101-121, 103 Stat. 745. The President's Forest Plan applies to all BLM districts and National Forests, or portions thereof, within the range of the northern spotted owl. ROD at 11-12.

Subsection 2001(k)'s provision that replacement timber contracts "shall not count against current allowable sale quantity" (ASQ) does not clearly prohibit the use of replacement timber as timber prepared under the President's Forest Plan. The timber output under the President's Forest Plan is described as "probable sale quantity" in order to "estimate sale levels likely to be achieved" under the President's Forest Plan "as opposed to estimating ceiling or upper-limit harvest levels (ASQ)." FSEIS, 3&4-263. Probable Sale Quantity ("PSQ") is defined as "the allowable harvest levels for the various alternatives that could be maintained without decline over the long term if the schedule of harvest and regeneration were followed." FSEIS Glossary at 13. Option 9, as adopted by the Secretaries on April 13, 1994, contained an estimated PSQ of 1.1 bbf. ROD at 24.<sup>2</sup> It is logical to construe § 2001(k)(3)'s reference to ASQ as a waiver of ASQ limitations for particular National Forests, allowing replacement timber to be concentrated in a particular National Forest. However, if the language of subsection 2001(k) were interpreted as precluding the agencies from counting replacement timber value towards the ASQ for an individual National Forest Plan, rather than simply waiving ASQ limitations, then arguably it also precludes the agencies from "double counting" the replacement timber under the President's Forest Plan. Because ASQ has a specific and well-known meaning, we could argue that Congress only incorporated the Forest Service definition of ASQ by reference. 36 C.F.R. 219.3.

Subsection 2001(d), as noted above, is an entirely separate provision for the expeditious preparation, offer and award of timber sale contracts on Federal lands described in the Record of Decision for the President's Forest Plan. If the Administration tries to substitute Forest Plan timber for subsection 2001(k) timber, the timber industry could challenge this decision and argue that the intent of subsection 2001(d) is to supply timber on the open market, and use of the term "offer" would ordinarily implicate a competitive bidding process. Giving Forest Plan timber, which would otherwise be subject to subsection 2001(d),

---

<sup>2</sup> The PSQ was devised to assist FEMAT team members in evaluating the alternatives. In particular, the PSQ was used instead of the ASQ to provide an estimate, instead of a more defined ceiling. See FSEIS at 3&4 263-274. The PSQ does not set "minimum levels that must be met nor maximum levels that cannot be exceeded." ROD at 19. Further "it is unlikely that the annual PSQ estimates" will be achieved during the first several years. Id. The ROD acknowledges that the estimated level of 1.1 bbf is significantly lower than that obtained in the early 1980's but this was necessary due to the high level of timber harvested in the 1980s and current environmental laws. ROD at 41, FSEIS at 3&4 at 267.

to those purchasers that the Secretary is obligated to "provide" replacement timber under subsection 2001(k)(3) may be found to be inconsistent with the intent of subsection 2001(d).

Characterizing replacement timber under § 2001(k) as Option 9 timber would appear to be inconsistent with the legislative intent to expedite timber sales under both subsection 2001(d) and subsection 2001(k). The intent of subsection 2001(k) is to foster the expedited sale of timber contracts to avoid government liability for their cancellation. The House Report stated, "Release of these sales will remove tens of millions of dollars of liability from the government for contract cancellation." 104 House Report 71, 104th Cong., 1st Sess. (1995). The Senate Appropriations Committee, which added subsection 2001(d) and paragraphs 2001(k)(2) and (3), explained the intent of subsection 2001(d) as allowing the Administration to achieve current PSQ of the Forest Plan. S. Rep. 104-17 at 123. There is no indication of a linkage between subsection 2001(d) and subsection 2001(k), or any explanation of the standards applicable to replacement timber.

In debate, Senator Gorton, the author of these provisions, made numerous references to the Forest Plan's PSQ of 1.1 billion board feet of timber in describing the intent behind subsection 2001(d). He argued that subsection 2001(d)'s waiver of environmental laws is necessary to achieve this harvest level because "almost no single action taken pursuant to this option will escape an appeal within the Forest Service and a lawsuit being stretched out forever and ever." 141 Cong. Rec. S 4875 (daily ed. March 30, 1995). Similarly, Senator Hatfield emphasized that subsection 2001(d) was designed to "give the administration all possible tools to meet its promises to get wood to the mills of the Pacific Northwest in the next 18 months." Id. at 4882.

While there is some discussion of subsection 2001(k) in the legislative history, there is no thought given to the law applicable to replacement timber sales under paragraph 2001(k)(3). On this provision, the Senate report and the Conference report simply state that the Secretary must provide substitute volume for timber sales withheld for nesting birds. S. Rep. 104-17, at 123; H.R. Conf. Rep. No. 5116, 141 Cong. Rec. H 3049.

However, there is no indication in the legislative history that the replacement timber sales should proceed regardless of the standards and guidelines of the Forest Plan. Sen. Hatfield, the floor manager of the bill, stated that most of the sales being discussed had already been determined under President Clinton's Pacific Northwest Forest Plan "not to jeopardize the existence of any species." 141 Cong. Rec. S 4881 (daily ed. March 30, 1995). Rep. Taylor, the bill's House sponsor,

similarly commented that "the preponderance of these sales were approved for harvest . . . as not jeopardizing the continued existence of any of the numerous species of wildlife . . . ." 141 Cong. Rec. H 3233 (daily ed. March 15, 1995).

On the day the President signed the Rescissions Act into law, Senator Gorton, Representative Taylor and chairmen of committees with jurisdiction over the Forest Service and Bureau of Land Management provided the Administration with a letter that serves as a road map for litigation issues in the implementation of subsection 2001(k). In it, they state that compliance with paragraph 2001(k)(3) "does not require compliance with environmental laws or other federal statutes in light of the "notwithstanding any other provision of law" language in subsection (k)(1)." The letter reiterates the industry view that alternative timber must be provided quickly so that it may be harvested in fiscal years 1995 and 1996, and indicates that industry may bring suit for a declaration that paragraph 2001(k)(3) requires timber harvest on lands otherwise protected under the Forest Plan.

Finally, the injunction of the U.S. District Court for the District of Oregon has required the government to "award, release, and permit to be completed . . . all timber sale contracts offered or awarded between October 1, 1990, and July 27, 1995, in any national forest in Oregon and Washington or BLM district in western Oregon, except for sale units in which a threatened or endangered bird species is known to be nesting." October 17 Order at 2. Under past interpretations, any released timber sales would have to be replaced with the agreement of the contract holder, unless the outstanding injunctions were modified or agency interpretations of subsection 2001(k) were otherwise agreed with. We can expect that industry will use any policy announcement to challenge a decision to limit replacement timber by requiring that it be consistent with the Forest Plan. Indeed, if the government prevails in its interpretation of paragraph 2001(k)(2) as actually protecting the nesting sites of threatened and endangered birds, we can expect that an attempt will be made to use paragraph 2001(k)(3)'s mandate of replacement timber to force the waiver of the Forest Plan's standards and guidelines.

## MEMORANDUM

TO: The timber team

RE: Use of 2001(1) as alternative defense  
in the Kettle Range case (E.D. Wash.)

FROM: Ellen Athas, Sandi Zellmer, Michelle Gilbert

DATE: April 9, 1996

---

In the Kettle Range Conservation Group case, filed in the Eastern District of Washington, plaintiffs have raised two claims that implicate section 2001(1) of the Rescissions Act. First, they claim that the economic analysis supporting an SFEIS for a green sale project was insufficient as evidenced by the disparity between the estimated value of a salvage sale and its sale price. Second, they claim that the SFEIS failed to sufficiently consider the cumulative effects of, inter alia, salvage logging in the sale area.

We are contemplating using 2001(1) as an alternative defense to these claims, relying first and primarily on a defense of the merits of the FSEIS. While this defense has been discussed before, we are circulating the attached portion of a summary of the brief to provide an opportunity for review prior to filing. As you will see, the brief just refers to the subsection. Any further development of the meaning and implications of section 2001(1) will, if necessary, be left for the reply brief.

The brief is due to be filed on Tuesday, April 9. Accordingly, if you have any comments, please contact Sandi by 12:30.

**MEMORANDUM**

**TO:** Rescissions Act Analysis Group

**FROM:** Ellen Athas, Michelle Gilbert, Sandi Zellmer

**RE:** Challenge to Copper Butte Salvage Sale Analysis;  
Application of 2001(1) in Kettle Range v. Forest  
Service

**DATE:** April 8, 1996

**I. Factual Background**

The Forest Service prepared a Final Environmental Impact Statement ("FEIS") and issued a decision to proceed with green tree sales in the East Curlew Creek area of the Colville National Forest in 1994. Shortly after the decision issued, a fire swept through portions of the analysis area. The Forest Service then prepared an SEIS for the East Curlew Creek area to consider impacts of the fire, and added a proposal to offer the Copper Butte Fire Salvage Sale to that analysis. The decision to proceed with salvage logging and the original green sales, partially modified due to the fire, issued on April 20, 1995.

Plaintiffs, Kettle Range Conservation Group and other environmental interest groups represented by Patti Goldman, SCLDF, brought suit in September 1995, challenging the decision to proceed with green tree sales and the salvage sale on NEPA grounds.

In December, the Copper Butte Salvage Sale was advertised. Plaintiffs amended their complaint to omit direct challenges to the Copper Butte sale, but the amended complaint retains allegations regarding the inadequacy of the SEIS analysis as a whole. Specifically, plaintiffs allege that the SEIS failed to

consider cumulative impacts on old growth and roadless values, in light of the changed circumstances resulting from the fire and salvage logging activities. Plaintiffs also claim that the economic analysis for the project is misleading, in large part because the salvage component was advertised and awarded at a price which was lower than predicted.

Our opposition to their motion for summary judgment, and our cross-motion, is due April 9, 1996.

## II. Proposed Language Regarding the Application of Section 2001

### INTRODUCTION

Summary judgment for defendants and dismissal of plaintiffs' amended complaint are appropriate because the defendants' Final Environmental Impact Statement and Supplemental Environmental Impact Statement for the East Curlew Area/Copper Butte Fire Salvage Timber Sales provide thorough analysis of cumulative impacts of the sales proposals, as well as impacts on old growth values and roadless areas. Moreover, the impact statements and the administrative record provide complete analysis of the economic implications of the sales proposals. The impact statements fully satisfy the requirements of the National Environmental Policy Act, and the decisions to proceed with sales proposals are not arbitrary and capricious.

Alternatively, Plaintiffs' theory, which relies on alleged deficiencies in the analysis of the impacts of the salvage sale component of this project and challenges the decision to proceed with green sales in the post-fire, post-salvage environment is precluded by the Rescissions Act, Pub. L. 104-19 § 2001(1).

## ARGUMENT

\*\*\*\*\*

- D. The FEIS and FSEIS Provide an Adequate Economic Analysis of the Proposal to Proceed with the Sales (Count III)
1. The Economic Analyses for the Sales Fully Informed the Public and the Decisionmaker, and Guided the Forest Service's Comparison of the Alternatives, and Were Therefore Adequate under NEPA
  2. The FEIS and FSEIS Discussion of Economics is Based on Sound Analyses in the Record
    - a. Plaintiffs' Allegation that the Economic Analysis is Deficient Based on Appraisals of the Copper Butte Salvage Sale Must Fail.

Plaintiffs argue that the FSEIS's financial analysis is flawed because it "unrealistically inflates projected benefits and inexplicably understates the project's true costs." Pl. Mem. at 19. In support of this assertion, plaintiffs allege that the Forest Service was only able to sell the Copper Butte Salvage Sale at a fraction of the predicted selling price, and that this result shows the "arbitrary and highly speculative nature of the economic assessment." Pl. Mem. at 19. Plaintiffs' argument is without merit.

First, the record fully explains the changes in the relevant economic assumptions from the DSEIS to the FSEIS appraisal, A.R. 2792, and from the FSEIS to the appraisal prepared for the July and August advertisements of the Copper Butte Salvage Sale, A.R. 3049, 3068. Changes reflected, inter alia, the competition adjustment, which was greater in March than it was in July, perhaps due to the volatile nature of fire salvage bidding at that time. \* \* \* \*

Alternatively, plaintiffs' argument should be rejected for two reasons independent of the merits of the claim that the cost-benefit analysis of the project is deficient. First, plaintiffs' assertion regarding the salvage sale analysis is based on post-decisional events. \* \* \* \*

In addition, plaintiffs' arguments regarding the adequacy of the economic analysis for the salvage sale are precluded by the 1995 Rescissions Act, P.L. 109-14 § 2001(1), which states that no project decision shall be required to be halted or delayed because of salvage sale implementation or impacts, and provides that salvage sales shall not be the basis for administrative action limiting other multiple use activities. Indeed, plaintiffs amended their complaint in this case to omit any direct challenge to the Copper Butte salvage component of the project. Compare Pl. Cmpt. with Pl. Amd. Cmpt. Accordingly, the FSEIS analysis and appraisal of the Copper Butte Salvage Sale cannot be a basis for finding the Forest Service's decision arbitrary and capricious under NEPA, and plaintiffs are precluded from employing alleged defects in the analysis of that sale to bolster their NEPA arguments.

\*\*\*\*\*

E. The Forest Service's Consideration of Cumulative Environmental Effects of the East Curlew Sales is Adequate under NEPA

[2001(1) could be referenced under this section as well]

FROM: S C L D F

FAX NO.: 2026672356

03-04-96 07:42P P.02

## MEMORANDUM

FROM: Patti Goldman  
 DATE: February 29, 1996  
 RE: Enforceability of Contract Cancellation Clauses

## INTRODUCTION

Modern-day timber sale contracts contain clauses permitting termination, in whole or in part, upon a determination by the Chief of the Forest Service that continuation of all or part of the contract would:

- (a) Cause serious environmental degradation or resource damage;
- (b) Be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 Of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended;
- (c) Cause serious damage to cultural resources . . . ;
- (d) Jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.<sup>1</sup>

---

<sup>1</sup> The damages for contract terminations pursuant to these clauses are specified in the contract cancellation clauses. For most terminations, the purchaser receives unrecovered costs incurred under the contract, plus the difference between the current contract rates for the uncut volume and the average rates for comparable National Forest timber sold during the preceding six-month period. Forest Service Contract Clause C8.2 -- Termination (12/89); 36 C.F.R. § 223.116(a)(5). The unrecovered incurred costs are specifically described as the value of unused purchaser credit, expenditures for logging of timber that has not been removed from the sale area, and out-of-pocket expenses involved in acquiring and holding the contract, such as cash

Some Forest Service personnel have evidently taken the position that these clauses may be unenforceable under Section 2001(k) of the Fiscal Year 1995 Emergency Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19 ("Rescissions Act").

This memorandum concludes first that the Forest Service has the authority to modify or terminate a timber sale contract pursuant to these clauses and second that the Rescissions Act does not eliminate that authority.

I. THE FOREST SERVICE MAY MODIFY OR TERMINATE TIMBER SALE CONTRACTS PURSUANT TO THE ENVIRONMENTAL CONTRACT CANCELLATION CLAUSES.

Under ordinary contract principles, there can be no question that the government has the power to invoke the contract cancellation clauses. It has long been recognized that a contract to which the government is a party should not be construed to waive the government's power to legislate or regulate unless it says so in unmistakable terms.

As the Supreme Court has explained:

[W]e have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."

Bowen v. Public Agencies Opposed to Social Security, 477 U.S. 41, 52 (1986) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).

It is beyond question that the United States may abrogate contracts in the exercise of the federal police power or some other paramount power. Lynch v. United States, 292 U.S. 571 (1934). Preservation of public forest lands and threatened and endangered species constitutes such an exercise of a paramount power.

deposits and bond expenses. For terminations to protect threatened or endangered species, damages are limited to unrecovered costs incurred under the contract. Forest Service Contract Clause C9.5 -- Settlement (10/77) & Clause C9.52 -- Settlement for T & E Species (12/89). In no instance may the purchaser obtain lost profits, but the purchaser may recover the cost of replacement timber for those terminations that do not involve threatened and endangered species.

Where the government exercises its sovereign power in a public and a general manner, it may be excused from its contractual obligations altogether. Horowitz v. United States, 267 U.S. 458, 461 (1925); Winstar Corp. v. United States, 64 F.3d 1531, 1548-49 (Fed. Cir. 1995) (*en banc*), cert. granted, 64 U.S.L.W. 3417 (U.S. Jan. 19, 1996) (No. 95-865). This immunity from contract liability is limited to public, general acts.

Where the government abrogates a contract through a limited, focused action specific to obligations to a particular class of entities with which it has contracted, the government remains liable for breaching the contract. Sun Oil Co. v. United States, 572 F.2d 786, 817, 215 Ct. Cl. 716 (1978). Thus, when the federal government cancels a timber sale contract to avoid severe environmental damage, it is acting in a particularized context and is liable for breaching the contract. Everett Plywood Corp. v. United States, 651 F.2d 723, 731-32, 227 Ct. Cl. 415 (1981).

Regardless of whether the cancellation occurs in the public or particularized context, the government has the latitude to cancel contracts as a consequence of its other sovereign responsibilities. Here, the government has the obligation to protect public lands and both to protect and promote the recovery of threatened and endangered species. While the logging rider may limit the public's ability to enforce certain statutes that define these obligations, those statutes remain on the books, and federal officials, who are sworn to uphold the law, are still bound by these duties and others that derive from other sources.

Reflecting the government's need to be excused from contracts that impede its other sovereign acts, most government contracts contain termination for convenience clauses. Typically, these clauses provide that the government may terminate a contract in the best interests of the government, and limit damages in the event of such a termination. See 48 C.F.R. § 52.249-4. These clauses originated in wartime contracts to give the government flexibility as wartime needs changed, but the clauses have become commonplace in all government contracts. Torncello v. United States, 681 F.2d 756, 763-66 (Ct. Cl. 1982). Termination for convenience clauses generally allow the government to terminate a contract when there has been a substantial change from the parties' expectations. Where the government exercises such a clause, the decision to terminate is conclusive, unless the contracting party can show that it was made in bad faith or was an abuse of discretion. SMS Data Products Group, Inc. v. United States, 19 Ct. Cl. 612, 619 (1990); Embrey v. United States, 17 Ct. Cl. 617, 626 (1989); Salsbury v. United States, 17 Ct. Cl. 47, 55 (1989).

In the timber sale context, the environmental cancellation clauses may be invoked when, for example, government scientists conclude that a sale will harm threatened or endangered species;

FROM: S C L D F

FAX NO.: 2026672356

03-04-96 07:44P P.05

when a court has held that a sale is illegal; when the agency decides, as a result of an administrative appeal, that a sale is illegal, unwise, or environmentally harmful; or when the sale cannot be brought into compliance with new forest plan standards. Each of these situations marks a substantial change from the original expectation that the sale could be logged without severe environmental harm.

For many of the sales covered by Section 2001(k)(1), government scientists have concluded that logging the sales will cause extreme harm to forest resources and imperilled species. If the Forest Service cancelled these sales under the environmental cancellation clauses, it would clearly not be in bad faith or an abuse of discretion -- the only grounds on which invocation of the clauses ordinarily may be challenged.

II. BECAUSE SECTION 2001(K)(1) INCORPORATES THE ORIGINAL CONTRACT TERMS INTO ITS MANDATE, THE GOVERNMENT MAY STILL INVOKE ITS AUTHORITY UNDER THE CONTRACT CANCELLATION CLAUSES. ]

Section 2001(k)(1) directs the Secretaries of Agriculture and Interior to award, release, and permit logging in fiscal years 1995 and 1996 of certain previously offered timber sales. This subsection provides in full:

AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED  
TIMBER SALE CONTRACTS --

(1) AWARD AND RELEASE REQUIRED -- Notwithstanding any other provision of law, within 45 days after the date of enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745). The return of the bid bond of the high bidder shall not alter the responsibility of the Secretary concerned to comply with this paragraph.

Of particular importance here, the sales that are encompassed by this mandate must proceed under their originally advertised terms and prices. The originally advertised terms convey to the prospective purchasers the very real possibility that the agency will not enter into a contract for the sale if the sale will have adverse environmental effects, and the risk that a contract may be cancelled if such effects become apparent after a contract has been signed. These risks are conveyed in three ways.

First, the Forest Service and the Bureau of Land Management explicitly include in all timber sale advertisements and the standard instructions to bidders a statement informing the prospective bidders that the agency retains the right to cancel the sale after an auction. See Tenth Declaration of Jerry L. Hofer ¶ 3 (Dec. 8, 1995), in Northwest Forest Resource Council v. Glickman, No. 95-6244-HO (D. Or.); Instructions to Bidders Form FS 2400-14.

Second, specific contingencies that may prevent a sale from going forward, such as pending litigation, appeals, and consultations, are routinely made known to prospective bidders prior to the auction for the sale. For example, 11 timber sales on the Wallowa-Whitman National Forest were the subject of consultations with the National Marine Fisheries Service because of their serious adverse effects on the threatened snake River spring/summer chinook salmon. See Declaration of Jacqueline Wyland ¶¶ 21-22 (Oct. 13, 1995), in Northwest Forest Resource Council v. Glickman. The Forest Service informed prospective bidders of these consultations at the time of the auction. Thus, the timber sale prospectus for the Bugout timber sale cautioned:

[T]his sale will be auctioned, but NOT awarded until consultation has been completed. The result of consultation may require that changes be made before the timber sale can be awarded. The high bidder will have the opportunity to agree to the changes prior to executing the contract. If the high bidder does not agree to the changes, the Forest Service will reject all bids and may reoffer the sale. . . . If consultation indicates that the project cannot proceed, all bids will be rejected.

Bugout Timber Sale Prospectus at 4.

Third, the timber sale contract is also part of the originally advertised terms for a timber sale. Therefore, prospective purchasers are explicitly made aware of the timber sale contract provisions that permit contract modifications and cancellation if a sale will cause serious environmental degradation or harm to threatened or endangered species, and that limit the damages that may be recovered for such contract cancellations. See Tenth Declaration of Jerry L. Hofer ¶ 3 (Dec. 8, 1995); Instructions to Bidders Form FS 2400-14. In addition, the timber sale prospectuses often inform the prospective purchasers specifically of the inclusion in the contract of these contract cancellations clauses. See, e.g., Bugout Timber Sale Prospectus at 4.

In these ways, the originally advertised timber sale terms explicitly include the right to modify or cancel a timber sale to avoid harm to threatened or endangered species or the

environment. By mandating that there be no "change in originally advertised terms," Section 2001(k) incorporates the contract cancellation clauses.

The timber industry played a major role in drafting the standard contracts at issue. Throughout the 1980s and early 1990s, the Federal Timber Purchasers Committee's Contract Committee -- a component of the National Forest Products Association, a timber trade association -- obtained the Forest Service's proposed contract language and the opportunity to discuss this language with Forest Service decisionmakers and to propose revisions. The entire arrangement gave the industry an inside role in drafting the contract provisions and likely violated the Federal Advisory Committee Act, 5 U.S.C. App. 2, by operating behind closed doors and without any participation by environmental interests. Regardless of its legality, however, this process makes it impossible for the timber industry to claim that the contract cancellation clauses are in any way unfair or unknown to the industry. See Louisiana-Pacific Corp. v. United States, 656 F.2d 650 (Ct. Cl. 1981) (rejecting unconscionability claim by large timber corporation knowledgeable about government contracts and the timber business).

Any counter-argument may be based on the inclusion in Section 2001(k)(1) of the phrase "notwithstanding any other provision of law." However, the phrase "notwithstanding any other law" does not eradicate all laws with a single sweep of the pen. Instead, as Judge Hogan recognized in his January 10, 1996 decision in Northwest Forest Resource Council v. Glickman, this phrase it is limited to those laws that will obstruct the subsequent statute's objectives. See In re Glacier Bay, 944 F.2d 577 (9th Cir. 1991).

Because Section 2001(k)(1) incorporates and gives life to the originally advertised terms, adhering to the original contract terms will not obstruct Section 2001(k)(1)'s objectives. While the courts may conclude that the plain meaning of Section 2001(k)(1) eliminates legal challenges to the covered sales, it still leaves some standards in the form of the original contract terms in place. If the contract cancellation authority is read out of Section 2001(k)(1)'s reference to the original contract terms, the statute would leave no mechanism to prevent severe environmental damage. Section 2001(k)(1) should not be read to eviscerate all standards, including those deriving from the timber sale contract, because such a construction would likely run afoul of the undue delegation doctrine.

This construction is consistent with Section 2001(k)'s legislative history. Repeatedly throughout the legislative discussion of Section 2001(k), Congress stated its understanding that the sales that would be logged under Section 2001(k) had passed muster under current environmental standards, and that the

agencies would retain the authority and flexibility to comply with forest plans and environmental standards. H. Rep. No. 104-71, 104th Cong. 1st Sess. 22 (1995); S. Rep. No. 104-17, 104th Cong. 1st Sess. 123 (Mar. 24, 1995); H. Conf. Rep. No. 104-124, 104th Cong., 1st Sess. 137 (May 16, 1995); 141 Cong. Rec. at H5557-58, H5561 (May 24, 1995) (Rep. Taylor); 141 Cong. Rec. at S4875 (March 30, 1995) and at S10, 464 (July 21, 1995) (Sen. Gorton). There is no indication in Section 2001(k)'s legislative history that Congress intended to authorize the type of severe environmental harm that would occur if contract cancellation under the original contract terms were not available.

Accordingly, under Section 2001(k)(1), the federal agency retains the authority to exercise its rights under the contract, including its right to cancel a contract to avoid severe environmental degradation or harm to threatened or endangered species. As a matter of sovereign right, the government retains the power to protect our public forests. As a matter of statutory construction, Section 2001(k) leaves intact the contractual authority to cancel timber sale contracts to protect our forests.

MEMORANDUM

Introduction

Am interagency working group has been exploring legal options for offering purchasers of sales awarded pursuant to 2001(k) of the Rescissions Act alternative timber or monetary settlements. The focus has been primarily on the Forest Service's authority to offer alternative timber outside the sale areas. Because there is uncertainty that the Forest Service can make such offers consistent with applicable competitive bidding requirements, it has been exploring the option of undertaking an emergency rulemaking to change current Forest Service regulations at 36 C.F.R. § 223.80. This memorandum outlines issues associated with promulgation of such a rule and discusses the various benefits and risks associated with implementation of the rule. The memorandum also addresses monetary settlement options.

Discussion and Options

I. PROPOSED PROMULGATION OF RULE TO RELEASE  
AGENCY FROM COMPETITIVE BIDDING REQUIREMENTS  
FOR ALTERNATIVE TIMBER OFFERED FOR 2001(K) SALES

16 U.S.C. § 472a(d) requires the Secretary of Agriculture to:

advertise all sales unless he determines that extraordinary conditions exist, as defined by regulation, or that the appraised value of the sale is less than \$10,000.

Pursuant to this statute, the Forest Service has proposed to implement a regulation that would eliminate the requirement for competitive bidding as to sales offered as replacement timber for 2001(k)(1) sales only. To implement a regulation in the time required to ensure it can be utilized, the agency would have to: (1) establish that "extraordinary conditions" exist, and (2) find a mechanism for dispensing with notice and comment in promulgating the regulation. The issues relating to these two points are discussed below.

A. Do Extraordinary Conditions Exist?

Support

Forest Service review of legislative history has not uncovered any prohibition against using "extraordinary conditions" under these circumstances.

Need to protect resource and duty to not impair productivity may support finding of "extraordinary conditions."

May be able to argue that 2001(k) sales are more valuable in terms of overall resource value and that elimination of competitive bidding requirements is economically more valuable to government .

#### Contra

Reliance on uniqueness of overall situation and potential for environmental harm may be found by a court to be inconsistent with 2001(k)'s mandate to release sales "notwithstanding any other provisions of law."

More generally, promulgation of rule may be deemed contrary to intent of Congress given that 2001(k) did not contemplate providing alternative timber except in limited circumstance.

### **B. Dispensing With Notice And Comment**

#### **1. Use of "good cause" exception under A.P.A.**

The Administrative Procedure Act, 5 U.S.C. § 553, sets forth notice and comment requirements for proposed rules. The A.P.A. provides an exception to notice and comment when "good cause" exists. This exception is narrowly construed and operates where notice and comment are "impracticable, unnecessary or contrary to the public interest." It is frequently limited to situations where normal rulemaking procedure would interfere with agency's ability to perform its function within the time constraints imposed by Congress.

#### Support

Interpretation that 2001(k)(1) expires September 30, 1996 may support argument that expedited proceedings are necessary to ensure purchaser alternative remedy before the cut-off date.

Arguments that would support finding of "extraordinary conditions" could also be used to establish "good cause." See above.

#### Contra

Proposed rule arguably does not assist agency to perform function contemplated by Congress consistent with 2001(k).

Statement of 2001(k)'s applicability to First and Last sales in September 1995 may undercut ability to argue that expedited proceedings under good cause exception are now needed.

If rights to harvest 2001(k) sales do not expire on September 30, 1996, argument that expedited procedure is required is not as strong.

2. Use of 2001(h) to forego notice and comment

Section 2001(h), "Rulemaking," provides:

The Secretary concerned is not required to issue formal rules under section 553 of title 5, United States Code, to implement this section or carry out the authorities provided by this section.

The Forest Service is assessing the possibility of relying, at least in part, on this section to support promulgation of the proposed rule without notice and comment. The primary issue is whether section 2001(h) can be used given that the proposed offer of alternative timber sales was not contemplated by Congress in 2001(k). Thus, a rule to permit the offer of such sales does not appear necessary to "implement" the statute or "carry out the authorities" provided by the statute.

II. IMPLEMENTATION OF REGULATION TO PROVIDE ALTERNATIVE TIMBER VOLUME

Essentially, once a contract is awarded and the purchaser expresses a willingness to accept alternative timber, the agency would utilize the proposed new regulation to offer a timber sale outside of the original sale area. This procedure would be used to replace only 2001(k)(1) sales which would not otherwise be subject to replacement under 2001(k)(3). Sales withheld under 2001(k)(2) for known to be nesting determinations could be replaced under 2001(k)(3), without resorting to use of this new regulation. Because the alternative sales would be offered under a new regulation, and not pursuant to some interpretation of 2001(k) with its "notwithstanding any other provision of law" protections, the sales would have to be offered in accordance with environmental laws and standards and guidelines. The sales also would be subject to administrative appeals and judicial challenges.

PROS:

- Will guarantee the integrity of each sale.

- Will not create new, damaging sale information that could harm the Forest Plan.
- Is consistent with administration position emphasizing compliance with environmental protections.
- Provides timber to mills, rather than monetary damages.

**CONS:**

- Would delay release of alternative sales; delay could be too extensive to make offer attractive to purchaser.
- Sales subject to appeals and judicial challenges may not be acceptable to purchasers.
- May evoke challenges by companies who otherwise would have bid on sales or counties who face loss of revenue when alternative timber sales are offered outside their jurisdiction.
- Provision of alternative sales may be challenged as inconsistent with statute's requirement that 2001(k) sales be released and absence of exception for withholding and providing alternative timber for k(1) sales.
- Raises issues relating to contracting officer's authority and willingness to terminate 2001(k) (1) sale contract to provide alternative sale.

**III. MONETARY SETTLEMENT OPTIONS RELATING TO FIRST AND LAST TIMBER SALES**

Specifically in regard to the First and Last sales, the agency should explore the possibility of settling claims as to these sales with monies from the Judgment Fund. A prerequisite to use of the Judgment Fund is a bona fide legal dispute. In connection with NFRC's claims relating to the First and Last sales, the government has taken the position that it is not aware of any reason for not releasing the sales under 2001(k), but was awaiting Judge Dwyer's decision on the previously pending motion to clarify and enforce judgment. Accordingly, the government has not appealed any decision relating to these two sales. However, the Pilchuck plaintiffs initiated an action against the government (before Judge Hogan) seeking to prevent the release of the First and Last sales under a variety of theories. The Pilchuck plaintiffs have appealed Judge Hogan's dismissal of that

action, including his rejection of plaintiffs' claims as to the First and Last sales.<sup>1</sup>

We should consider the possibility of settling the Pilchuck claim as to First and Last. We may be able to fashion a settlement with the Pilchuck plaintiffs whereby the government would avoid a possible determination that 2001(k) does not apply to these two sales and that the agency is acting illegally allowing the sales to proceed, by making a payment to the purchasers to essentially "buy back" the sales. To pursue this course, the following steps should be taken.

- Determine approximate value of sales.
- Determine whether purchaser would be interested in a monetary settlement. [Note: Horngren has stated that he believed Scott Timber would be willing to explore this option.]
- Request GAO approval to use Judgment Fund.
- Discuss option with parties.

---

<sup>1</sup> Plaintiffs in SAS action before Judge Dwyer also have renoted their original summary judgment motions seeking to enjoin the First and Last sales.

**MEMORANDUM**

**TO: SECRETARY GLICKMAN**

**FROM: JIM LYONS**

**SUBJ: RESOLUTION OF "318" TIMBER SALES**

**DATE: March 4, 1996**

Per our conversation earlier today, I believe that a meeting with the key players involved in the debate over the fate of the Section 318 sales is essential if we are to come to some resolution any time soon

From meetings and conversations in the region, I believe that a solution is within grasp. I believe it could be based on the following approach:

1. Identify "critical" section 318 sales that the agencies (joint regional leadership team) agree should not be operated (e.g., Elk River sale units);
2. Direct the agencies, working through the Level I teams at the national forest level, to identify alternative volume in the following order of priority --
  - (1) from the matrix, on the same national forest;
  - (2) from the matrix, but on another national forest in the region;
  - (3) from other parts of the forest land base, including LSR or key watershed, provided that the level one team agrees that the sale is "more environmentally-benign" than the proposed "318" sale.
3. Ensure that the Regional Ecosystem Office (REO) reviews these sales to ensure that the alternative does not do harm to the integrity of the President's forest plan;
4. Work cooperatively with the contract holder to identify alternatives, but do not give the contract holder the right to arbitrarily reject an offer out of hand;
5. Invite the public to comment on sale alternatives identified by the Level I teams, or establish formal "citizen review teams" to aid in identifying alternatives;
6. Retain the ability to buy-out all or a portion of a given sale should a suitable alternative not be identified; and
7. Provide the contract holder some certainty that the sale can be operated sometime in the next two years (do not extend beyond three year normal contract term).

*WDA/Linda*  
*720-3076*

## SUMMARY OF "318" TIMBER SALE INFORMATION

Suspended or Not Awarded:

<u>Sale Name</u>	<u>Sell Volume (MBF)</u>	<u>Total Acres</u>	<u>Acres of Clearcut, Seed Tree</u>	<u>Miles of Road</u>		<u>Drainage within So. Umpqua Watershed</u>	<u>In Key Watershed?</u>	<u>In LSR?</u>	<u>In ESOG?</u>
				<u>Constr</u>	<u>Reconstr</u>				
Abes Wren*	5,100	144	127	completed		Boulder	yes	yes	yes
Cowboy	6,900	235	171	3.3	3.6	Boulder	yes	yes	yes
Nita	8,500	207	207	3.5	7.5	Dumont	yes	yes	yes
So.Nita	5,400	180	121	6.5	8.0	Dumont	yes	yes	yes
First	4,000	158	100	1.9	1.2	Boulder	yes	yes	yes
Last	5,800	141	129	1.2	0	Boulder	yes	yes	yes
TOTALS	35,700	1,065	855	16.4	20.3				

Awarded, Modified & Released:

<u>Sale Name</u>	<u>Sell Volume (MBF)</u>	<u>Total Acres</u>	<u>Acres of Clearcut, Seed Tree</u>	<u>Miles of Road</u>		<u>Drainage within So. Umpqua Watershed</u>	<u>In Key Watershed?</u>	<u>In LSR?</u>	<u>In ESOG?</u>
				<u>Constr</u>	<u>Reconstr</u>				
Honeytree*	7,200	167	167	completed		Hipower & Canton **	yes	yes	no
Jack*	6,800	192	145	completed		Jacques-Section & Elk	yes	46 ac.	no
Zanita*	10,600	451	381	completed		E. Deadman & Dumont	yes	yes	yes
Gage*	14,100	525	407	completed		Tallow, Two Mile, Jackson	yes	no	no
Redlick*	5,700	333	120	completed		Jackson	yes	no	no
TOTALS	44,400	1,668	1,220						

\* Varying proportions of these sales have already been logged.

\*\* Hipower & Canton Creeks are in the Steamboat drainage which is part of the North Umpqua watershed.

Tiller's PSQ is between 10 and 12 MBF/year.

LSR = Late Succession Reserve; ESOG = Ecologically Significant Old Growth

I M P L E M E N T I N G   T H E   P R O P O S E D   S O L U T I O N

--What we'll need--

To minimize the impacts on the resources, we propose to replace the volume on the 5 unawarded 318 sales on the Umpqua (Cowboy, Nita, South Nita, First and Last Timber Sales).

To do so, we need:

1. Authority to replace volume for reasons other than nesting T&E birds.
2. Exemption from NEPA on the replacement volume.      *(And EPA)*
3. Time to designate the replacement volume (3 years).
4. Authority to replace volume outside the Sale Area Boundaries.
5. Authority to replace the volume in both LSRs and Matrix.
6. Authority to vary from the Standards and Guidelines in the Northwest Forest Plan.
7. Protection for the Purchaser from appeal or injunction during the life of the Timber Sale Contract.
8. Authority to replace with similar value of timber (not similar kind).

DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

Comparison: Existing Sale vs Proposed Sale  
Umpqua National Forest  
March 7, 1996

Timber Sales:

First Last Abes Wren

Existing Sale:

- LSR actual acres	158	141	130**
- LSR actual volume	4.0 MMBF	5.8 MMBF	4.6 MMBF
- Matrix actual acres	0	0	0
- Matrix actual vol.	0	0	0
- Unfragmented OG ac.	158	141	0
- Road Construction	1.9 miles*	1.2 miles*	completed

Proposed Sale:

- LSR estimated acres	0	0	280***
- LSR estimated vol.	0	0	4.2 MMBF
- Matrix est. acres	270	390	0
- Matrix est. vol.	4.0 MMBF	5.8 MMBF	0
- Unfragmented OG ac.	0	0	0
- Road Construction	0	0	0

\*Acres and volume to be harvested as part of the road construction are included in the sale acres and volumes figures.

\*\*130 acres includes 14 acres and 0.4 mmbf in the LSR which were felled in 1993 and remain to be logged. An additional 14 acres and 0.5 mmbf in the LSR were logged when the road was constructed in 1991.

\*\*\*Shelterwoods and other areas previously roaded and partially logged that are not functioning as owl habitat or old growth. Cutting shelterwoods and other partially logged areas will not allow those areas to meet the NW Forest Plan requirement to leave 15% of the volume.

\* \* \* PRIVILEGED \* \* \*  
ATTORNEY-CLIENT DOCUMENT

MEMORANDUM

This memorandum addresses potential responses to industry's opposition to the government's request to continue the stay of the (k)(2) murrelet sales. Our reply needs to be filed on Wednesday, March 20.

In their oppositions filed on Friday, NFRC and Scott Timber have argued that section 2001(k)(1) gives contract holders the absolute right "notwithstanding any other provision of law" to complete covered sales by September 30, 1996, and that continuation of the stay will defeat the intent of Congress by making it impossible to complete the sales by that date. Scott Timber has further claimed that the Rescissions Act expires on September 30, 1996. Both parties have filed declarations allegedly supporting this "impossibility" claim and have made it clear that when the stay expires, the companies intend to commence operations. In addition, Scott Timber has requested that "defendants be ordered to identify replacement volume for any sale that remains stayed."

Discussion and Options

2001(k)(1), "Award and Release Required," provides in relevant part:

Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date . . . .

2001(k)(3), "Alternative Offer in Case of Delay," provides in relevant part:

If for any reason a sale cannot be released and completed under the terms of this subsection within 45 days after the date of enactment of this Act, the Secretary concerned shall provide the purchaser and equal volume of timber . . . .

Recommended option: Interpret 2001(k)(3), including the provision "if for any reason," to cover sales withheld by the agencies for 2001(k)(2) determinations. We could then argue that any right to harvest timber provided under 2001(k)(1) is not "absolute," but may be satisfied by the provision of alternative timber under 2001(k)(3), even if that timber is not made available for harvesting before September 30, 1996.

To make such an argument, we would have to submit evidence of the agencies' commitment to provide alternative timber, recognizing that in the majority of cases it probably will not be made available for harvesting until after September 30, 1996. Accordingly, the agencies would need to issue memoranda, which can be submitted with the government's reply brief, directing the appropriate field offices to contact purchasers to begin negotiating agreements to supply approximately 240 MMBF of alternative timber under k(3). The memoranda would have to address the issue of compliance with environmental laws and standards and guidelines. The agencies also could consider offering purchasers the option of later proceeding with the original k(1) sales in the event the Ninth Circuit rejects the government's position before September 30, with the understanding that after that date, the protections of k(1) no longer apply. If this is offered as an option, and further surveys are conducted during any continuation of the stay, the agencies would have to make it clear that the surveys will be conducted and that the k(1) sales ultimately may be withheld pursuant to Judge Hogan's Order.

**Pros:**

- Would help diffuse industry's claim that an extension should not be granted, because they would be getting replacement timber.
- Would give agencies more flexibility to avoid direct conflicts with protective provisions of the Forest Plan.
- If stay is granted, agencies would have opportunity to conduct further surveys.

**Cons:**

- Industry will challenge legal basis for applying 2001(k)(3) to sales that the district court has said were not k(2) sales, although position still ties k(3) to k(2) by limiting application to sales agencies withheld, rightly or wrongly, for nesting determinations.
- Industry will challenge decision to provide alternative timber that would not be available for harvesting until after September 30.
- Would require alternative timber for all sale units withheld under section 2001(k)(2) (approximately 240 MMBF) and immediate direction to commence negotiations to provide such timber.
- May provoke challenge by environmental groups for

failure to apply k(3) more broadly.

Other options:

As explained in previous memorandum, other potential options exist. However, after further review in light of all the filings on this issue, we believe the the option described above presents the best course. These options include: (1) solely arguing the equities, and taking the chance that the Ninth Circuit will continue the stay (as Judge Hogan has strongly suggested that he will deny our request); and (2) arguing that 2001(k)(1), including the protections provided by "notwithstanding any other laws," continues past September 30, 1996, thereby allowing the companies to complete harvesting after that date.

\* \* \* PRIVILEGED \* \* \*  
ATTORNEY-CLIENT DOCUMENT

MEMORANDUM

This memorandum addresses the issue of when 2001(k)(1) terminates. The discussion below is premised on our understanding that the agencies have interpreted Section 2001(k)(3) to mean that rights to alternative timber that accrue prior to September 30, 1996, can be exercised after September 30, 1996.

While to date we have not been required to take a position on this issue, we expect that it will have to be addressed in the context of our request to continue the 2001(k)(2) stay. Scott Timber has indicated that it will argue against a continuation of the stay of the 2001(k)(2) murrelet sales on the ground that such a continuation effectively could foreclose the parties from exercising their rights under 2001(k)(1). While Scott has not explained the basis for their argument in detail, we believe that it will unfold as follows. If the agencies were to lose on their appeal of Judge Hogan's January 19, 1996, order interpreting 2001(k)(2), the majority of the withheld sales would be required to be released pursuant to 2001(k)(1). However, if 2001(k)(1) is interpreted as terminating on September 30, 1996, and if the stay is continued and the Ninth Circuit were not to rule until late in the summer or later, Scott Timber would not have time to harvest the sales, because the environmental laws would become applicable and operating the sales would be illegal.

While NFRC has not yet raised this argument in the context of our motion to continue the k(2) stay, it has asserted similar claims in successfully contesting other requests for stays. Moreover, Judge Hogan also has made comments indicating that he has serious concerns regarding termination of the provision. He has made it clear that he is not inclined to continue the stay because he does not want to override Congress's intent by what would amount to a "pocket veto."

Discussion and Options

2001(k)(1), "Award and Release Required," provides in relevant part:

Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date . . . .

A strong argument exists that the rights and obligations under 2001(k) (1) terminate on September 30, 1996. First, the plain language of the statute states that the Secretary is to permit the sale contracts to be completed by the end of fiscal year 1996. Reading the statute as terminating at that time gives meaning to this phrase. Second, reading the statute as a whole supports this interpretation. Subsection 2001(j) provides that the authority provided by subsections (b) and (d) expires on December 31, 1996 and that the terms and conditions of the section "shall continue in effect with respect to" contracts offered under subsections (b) and (d) "until completion of the contracts." This is similar to the language that was in Section 318 as applicable to contracts offered pursuant to that statute. Subsection 2001(h) does not include 2001(k) contracts, and nothing in subsection 2001(k) provides for continued applicability of terms and conditions of the statute. Third, various parties have argued that the protections of 2001(k) (1) expire on September 30, 1996 to successfully defend against stays. And finally, Judge Hogan's comments may indicate that he could be receptive to such an argument.

On the other hand, the Forest Service has suggested that it may be possible to argue that the cut off date has been tolled, or otherwise continues, beyond September 30. This argument would be based on the facts that the parties agreed to extend the initial 45 day period for acting to release the sales and that litigation has delayed release and harvest. It also has been suggested that the absence of an express termination date as found in 2001(h) argues against the more restrictive interpretation.<sup>1</sup>

A possible third option would involve an interpretation that the cut off date is September 30 for 2001(k) (1), but sales which should have been harvested but were not because Section 2001(k) (2) was invoked and which cannot be harvested due to expiration of 2001(k) (1), can be replaced under 2001(k) (3).

---

<sup>1</sup> This difference can be explained by reviewing the different objectives of the relevant subsections. Subsection 2001(k) is limited to a subset of sales already offered before date of enactment. Accordingly, it makes sense to address "termination" in terms of completion of that subset of contracts. In contrast, subsections 2001(b) and (d) anticipate the preparation and offer of new sales. Thus, express termination of that authority to go forward with such sales on a date certain is more logically applied to those subsections.

**Option One:** Interpret 2001(k) (1) as terminating on September 30, 1996.

**PROS:**

- \* May allow for less subsection (k) (1) timber to be released.
- \* More likely to protect Forest Plan.
- \* Is consistent with Administration's position to read statute as restrictively as possible.
- \* Accords with the timber industry's position taken to successfully oppose government's requests for stays.

**CONS:**

- \* Probably will lead Judge Hogan (or Ninth Circuit) to deny request for continuation of stay of 2001(k) (2) sales.
- \* May encourage expedited harvesting.
- \* May result in contract claims.

**Option Two:** Interpret subsection 2001(k) (1) to allow the rights and obligations thereunder to continue for some period of time.

**PROS:**

- \* Would support a decision from the district court continuing the 2001(k) (2) stay.
- \* Allows more time for identifying and implementing options for providing alternative timber for 2001(k) (1) sales.

**CONS:**

- \* Implications of continuing statutory obligations beyond September 30, 1996, are as yet not fully quantified.
- \* Extension of protections from application of environmental laws would be perceived as shift in Administration position.
- \* Would provoke litigation from environmental groups.



- \* May impact argument for need for emergency rulemaking to exempt alternative timber sales from competitive bidding process.

**Option Three:** This option specifically addresses the argument we anticipate will be submitted by Scott Timber by interpreting "if for any reason" to mean that the agencies have authority to offer alternative timber for sales which were withheld under a 2001(k)(2) standard ultimately found to be legally invalid.

**PROS:**

- \* Would defuse industry's claim that an extension of the stay should not be granted, since industry would get replacement if the 9th Circuit affirms J. Hogan.
- \* Would give agencies more flexibility to avoid direct conflicts with protective provisions of the Forest Plan.

**CONS:**

- \* Legal basis for applying 2001(k)(3) to sales erroneously withheld under 2001(k)(2), as opposed to sales validly withheld under (k)(2), is not readily apparent, though would be consistent with intent of Congress to get timber to purchasers.
- \* Would require alternative timber for all sale units withheld under Section 2001(k)(2).
- \* Would provoke litigation from environmental groups and possibly from industry as well, which may desire to harvest the 2001(k)(2) sales due to apprehension that alternative timber is less desirable.

**Analysis of the Effect of Hogan's Order re: Marbled Murrelet Nesting  
on Section 318 Timber Sale Units  
Summary 3/15/96**

Forest	Total No. Sale Units	No. Sale Units Meeting Hogan's Criteria (%)	No. Sale Units not Meeting Hogan's Criteria (%)
Olympic	16	6 (37%)	10 (63%)
Siuslaw	81	18 (22%)	63 (78%)
Mt Baker/Snoqual.	23	8 (35%)	15 (65%)
Siskiyou	17	8 (47%)	9 (53%)
<b>TOTALS</b>	<b>137</b>	<b>40 (30%)</b>	<b>97 (70%)</b>

Tables listing of the Section 318 timber sales and sale units with associated information are attached. The term "Occupancy Determination" as used in the tables is equivalent to "known to be nesting" based on the declaration of Dr. C.J. Ralph. Sale units that I believe meet Judge Hogan's criteria are shaded.

*A. Grant Gunderson*

A. Grant Gunderson  
TES Program Manager

REC'D MAR 18 1996

Forest / BLM District OLYMPIC

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Deodar			
T-155	92/94	10/7	Y
You Who			
SO-116	92	7,8,10	Y
Not Bad			
SO-110	92/94/95	10/7,8,10/7,8,10	Y
SO-111	92/94/95	10/7,8,10/7,8,10	Y
Wynoochee Res.			
A-240	92	7	Y
A 240A	92	7	N
A-261	92	7	N
A-293	92	7	N
A-346	92	7	N
Camel			
Unit 1	92	7,10	N
Unit 4	93	7,8,10	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District OLYMPIC (Continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
West Boundary			
Unit 4	92	7	Y
Unit 4A	90/91/92	7,8,10	N
Unit 5A-D	93	7,8,10	N
Stevens			
Unit 3	92/93	7,8,10	N
Unit 4	92	10	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Beamer 712			
Unit 1	91	10	N
Unit 2	93	7	N
Benner Bunch			
Unit D3	93	7,10	Y
Unit G4	93	7	N
Unit L5	93	7	N
Berry Bushel			
Unit 1	93	7/8	N/Y
Unit 2	93	8	N
Canal 606			
Unit 1	92	10	N
Unit 2	94	7	N
Condon Carriag			
Unit 1	93	7,8,10	N
Fivemile Flume			
Unit 2	93	7/10	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Fivemile Flume			
Unit 3	93/94	10/7	N
Unit 4	93	1/7,10	N/Y
Foland Ridge			
Unit 3	94	7	Y
Formader 103			
Unit 1	92/94	10 / 7,10	N/Y
Unit 2	94	7	N
Unit 4	93	7	N
Unit 5	93	7/10	N
Formader 717			
Unit 1	93	10	Y
Franklin Ridge			
Unit 1	93	7,8,9,10	N
Unit 3	93	7,8,9,10	N
Unit4	93	7,8,9,10	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Gordy Bluff			
Unit 3	92	7	Y
Grass Hula			
Unit 1	90,91	7, 10	N
Unit 2	93	10	N
Unit 3	92	7	N
Unit 4	93	10	N
Unit 5	93	10	N
Green Apple			
Unit 1	92	10	Y
Unit 2	92	7	N
Unit 3	92	7,10	Y
Unit 4	92	7,10	N
Green Horn			
Unit 1	93	7,8	N
Unit 2	93	7,8	Y

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Indian Hook			
Unit 1	93	8/10	N
Unit 2	93	8,10	N
Unit 3	93	7	N
Unit 4	93	7	Y
Unit 5	93	7	Y
Lower Bailey			
Unit 4	93	7	Y
Maria Skyline			
Unit 3	92,94	7	N
Unit 4	93/94	10 / 7,8	N/N
Unit 5	93/94	10 / 7,8	N/N
Mister Rogers			
Unit 1	93	10	Y
Unit 2	92	10	Y
Unit 3	93	10	Y
Unit 4	92	10	Y

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
North Ball			
Unit C	93	7,8	N
Unit D	93	7,8	Y
Prong			
Unit 1	93	7,8	N
Randall Salado			
Unit 2	93	10	Y
Ryan Wapiti II			
Unit 1	93	7,8	N
Unit 2	93	7,8	N
Skywalker			
Unit 3	93,95	7,8,10	N
Unit 5	93	7,8,9,10	N
Unit 6	94	7	Y
South Paxton			
Unit 1	92	7,10	N
Unit 2	93	7	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
South Paxton			
Unit 3	93	7	N
Unit 5	94	7,8,10	N
Unit 6	92	7,8,10	N
Unit 8	94	7,8,10	Y
Square Clare			
Unit 3	93,94	7,10	N
Sugar Maple			
Unit 4	93	7	Y
Sulphur			
Unit 3	93,95	7,8,10	Y
Unit 4	93,94/94	5,7,8,10/7,8,10	N/Y
Uncle Condon			
Unit 1	93	7	N
Unit 2	93	7	N
Unit 3	93	7	N
Unit 4	93	7	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SIUSLAW (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Upper McLeod			
Unit 1	92	10	Y
Upperten 002			
Unit 1	90,93	7	Y
Unit 2	93	7,8	N
Unit 3	94	7	N
Unit 4	93	7,8	N
Wapiti 305			
Unit 3	93	7,8	N
Unit 5	93	7,8	N
Wheelock 403			
Unit 1	92	10	Y
Unit 2	92	10	N
Unit 3	92	10	N
Unit 4	92	7,10	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District Mount Baker/Snoqualmie

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Clear Creek			
Unit 1	92/93	7,8,10/8	Y
Median BB			
Unit 1	94	10	N
Unit 2	92,94	10	N
Unit 3	92/94	10/7	Y
Unit 4	94	7,8	N
Unit 5	92/93	10/8	Y
Scraps			
Unit 1	93/94	9/7,10	Y
Unit 2	95	10	N
Unit 4	94	7,10	Y
Unit 5	92	10	N
Unit 9	92/93	8,10 / 8	Y
Fish Story			
Unit 2	1994	7	Y

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District Mount Baker/Snoqualmie (continued)

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Stalwart			
Unit 3	92/93	8,10 / 10	Y
Unit 4	92	8,10	N
Unit 5	92	10	N
Boyd Creek			
Unit 2	94	7,10	N
Unit 3	94	7/10	N
Unit 4	94	7,10	N
Old Grade			
Unit 9	94	7	N
Unit 11	94	7	N
Unit 12	94	7	N
Unit 13	94	7	N
Unit 14	94	7	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

Forest / BLM District SISKIYOU

Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Spur Trigger			
Unit 3	93	7	Y
Unit 4	93	7	Y
Unit 5	93	7	Y
Sugar Cube			
Unit 3	94	7	N
Unit 7	94	7	Y
Winriver			
Unit 12	93,94	10	N
Unit 13*	93,94	10	N
Unit 14	93	10	Y
Lobster			
Unit 9	94	7	Y
Father Oak			
Unit 1	95	1	Y

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

\* Spotted Owl Activity Center is within unit

Forest / BLM District SISKIYOU (continued)

Unit 4	95	7	N
Unit 5	95	7	Y
Sale Name Unit Number	Year of Occupancy Determination	Occupancy Determination Type (See Below)	Occupancy Within the Sale Unit Boundary Y or N
Toastberry			
Unit 1	95	7	N
Unit 2	95	7	N
Taylor Ranch			
Unit 1	95	7,9	Y
Boulder Krab			
Unit 1	92	1	N
Elk Fork			
Unit 4	91	7	N

- Occupancy Types:
- 1) Nest located i.e., fecal ring, young in nest
  - 2) Egg shell fragments observed on the forest floor
  - 3) Young murrelets found on the forest floor
  - 4) Murrelets observed perching on branches
  - 5) Murrelets landing on branches
  - 6) Murrelets attempting to land on branches
  - 7) Visual observations of murrelets flying through, into, or out of forest
  - 8) Auditory detections of Murrelets flying through, into, or out of forest
  - 9) Murrelets calling from a stationary location
  - 10) Circling above the canopy

PRIVILEGED AND CONFIDENTIAL  
ATTORNEY/CLIENT DOCUMENT

LITIGATION UPDATE (3/19/96): 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 Co. v. Glickman and Pilchuck Audubon Society v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) "Known to be Nesting" and Appeal. Appeal consolidated with appeal of 1/10/96 High Bidder Order. On January 19, 1996 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. The Ninth Circuit hearing is scheduled for May 6, 1996. In response to our motion in the district court for an extension of the 60-day stay, the Court has scheduled a hearing for Friday, March 22, 1996. NFRC and Scott Timber are opposing this motion. A reply is due March 20, 1996. [Question regarding termination arises.]

(2) "High Bidder" and Appeal. The Ninth Circuit hearing is scheduled for the week of May 6, 1996. In this appeal the Ninth Circuit will also address the district court's dismissal of PAS' complaint (withdrawn or cancelled sales).

(3) Reporting Requirements. A compliance report was filed on March 15, 1996.

(4) First and Last Timber Sales. Negotiations continue to provide alternative timber to purchaser of these two sales. Current deadline is tomorrow, March 20. Forest Service has also drafted a regulation to address competitive bidding issues.

Pacific Crest Biodiversity v. Glickman, (W.D. Wash.) On March 18, 1996, environmental plaintiffs filed a motion for TRO and PI against the controversial Rocky timber sale located in the Olympic National Forest. The Rocky sale was originally offered under Section 318, and has been released pursuant to (k)(1). Plaintiffs contend the sale contains northern spotted owls and attach various affidavits to support this fact. The Forest Service contends there is no evidence of owls on the sale area. A hearing on the TRO is scheduled for 11:30 this morning.

← both probably

The Klamath Tribes v. United States, (D. Or.) Plaintiffs filed a Complaint this week, alleging that certain (k) (1) and salvage timber sales violate the United States' trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on former Klamath Tribe reservation lands now managed by the Forest Service.

Seattle Audubon Society v. Thomas, C89-160 (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 denied the relief requested by environmental plaintiffs as to the First and Last sales.

Environmental plaintiffs now renew their motions for summary judgment and permanent injunction as to the First and Last sales. Industry opposes citing the "notwithstanding" provision of 2001 and Judge Hogan's injunction. Our response, filed on March 11, articulates the difficult issues associated with this action. Award letters for the First and Last were sent on March 8, 1996. However, the purchaser has agreed to delay any harvesting activity until March 20th. **This motion was scheduled for consideration on March 15th; we await a decision.**

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) In November, the purchaser (Vaagen Bros) 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). The hearing on this motion was held January 23, 1996. The matter is under advisement.

#### DECISIONS/CLOSED ACTIONS:

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.

Native Americans for Enola v. USFS (D. Or.) The Enola Hill Timber Sale located on Mount Hood NF was originally offered under Section 318 and released pursuant to Section 2001(k). Plaintiffs challenged this sale on the basis of an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. On February 28, the court granted our motion to dismiss plaintiffs' complaint, finding that the Rescissions Act precludes plaintiffs substantive and procedural challenges.

*Just filed appeal 2*

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale) Pro se plaintiff challenges this timber sale pursuant to constitutional rights, the Civil Rights Act, the religious Freedom Restoration Act and the APA. We filed a motion to dismiss on October 16, based on res judicata and collateral estoppel. Briefing is complete and the court has dismissed the action.

**Section 2001(b) Sales** (Salvage Sales)

**PENDING DISTRICT COURT ACTIONS:**

The Armuchee Alliance v. King, District Ranger, (D. Georgia). In this action, filed in early February, plaintiffs challenge 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. Plaintiffs filed an amended complaint last week naming additional sales.

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). The Ozark Chapter filed a complaint on 2/1/96 challenging the actions of the Forest Service in awarding fire/drought salvage sales on the Mark Twain National Forest. In their motion for summary judgment, plaintiffs allege that the Forest Service's use of a categorical exclusion is arbitrary and capricious, the environmental documentation is insufficient, and the sales do not fall within the scope of the Rescissions Act. **The 45-day automatic statutory stay in this case expired on March 17. On March 13, the court extended the briefing schedule through April 12 and ordered the Forest Service not to sell or log the timber at issue until the court renders its final decision. The order directly contravenes Section 2001(f)(3), which disallows PI/TROs in salvage timber sale cases. The court did not explain its reasoning, except to say that it blamed any delay on the Forest Service.**

**PENDING CIRCUIT COURT ACTIONS:**

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 to appellants' brief is due 3/22/96.

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. **A hearing is scheduled for May 10, 1996. The argument will be consolidated with Thunderbolt II.**

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, in Spokane.**

Inland Empire Public Lands Council v. Glickman (Ninth Circuit) (Fire Salvage Sales) On March 13, 1996, a Ninth Circuit panel heard arguments on this environmental group's appeal of the district court's decision. In December, a district court in Montana granted summary judgment in favor of the Forest Service's actions to release fire salvage sales in the Kootenai National Forest. The panel focused on several areas including Congress' ability to pass the Emergency Timber Salvage Rider, the type of relief a court could grant under the Rider and the scope of challenges allowed by the Rider.

#### DECISIONS IN THE DISTRICT COURT:

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona) 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 also granted our motion to strike extra-record documents.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson) Negotiations have resulted in an agreement to dismiss this action. A formal notice of dismissal was be filed with the court

the week of March 11th. Plaintiffs have sent a letter to Judge Thompson claiming that trees have been harvested in violation of the settlement. We are currently exploring plaintiff's concerns.

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties in February of 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 timber sales located on the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). The court granted summary judgment on all claims to the federal defendants. Plaintiffs had challenged five related 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 that there is arbitrary and capricious review of agency decisions to proceed with the sales, yet the review is to be "extremely deferential."

\* \* \*

#### Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under subsection (d) and two not under the Rescissions Act -- on the Umpqua National Forest). On December 5, 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. Several questions were raised concerning 2001(k), but as a whole, the panel did not express concern over the lower court's actions. We await the court's decision.

# REGIONAL ECOSYSTEM OFFICE

333 SW 1st  
P.O. Box 3623  
Portland, Oregon 97208-3623  
Phone: 503-326-6265 FAX: 503-326-6282

## 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 re-initiate, 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".

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.

### NFMA

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 two 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.

## PART C8.0 - OTHER CONDITIONS

C8.2 - TERMINATION. (12/89) The Chief, Forest Service, by written notice, may terminate this contract, in whole or in part, (1) to comply with a court order, regardless of whether this sale is named in such an order, upon determination that the order would be applicable to the conditions existing on this sale; or (2) upon a determination that the continuation of all or part of this contract would:

- (a) Cause serious environmental degradation or resource damage.
- (b) Be significantly inconsistent with land management plans adopted or revised in accordance with Section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended.
- (c) Cause serious damage to cultural resources pursuant to C6.24#.
- (d) Jeopardize the continued existence of Federally listed threatened and endangered species or, cause unacceptable adverse impacts on sensitive species, identified by the appropriate Regional Forester.

Compensation for termination under this provision shall be calculated pursuant to C9.5, except; compensation for termination under (1) shall be calculated pursuant to C9.51 when included in this contract and compensation for termination under (2)(d) shall be calculated pursuant to C9.52 when included in this contract.

C8.21 - DELAY IN RECONSTRUCTION OF PROCESSING FACILITIES. (6/78) Notwithstanding the 12-month limitation in B8.21, if Purchaser demonstrates a diligent effort has been made to replace primary timber processing facilities and that delays in doing so have been beyond Purchaser's control, Forest Service may authorize Contract Term Adjustment up to a total of 24 months.

C8.21 (OPTION 2) - CONTRACT TERM ADJUSTMENT. (7/87) Partial shutdowns required under C7.22, Level II and III, which prevents Purchaser from loading and hauling Included Timber, will entitle Purchaser to Contract Term Adjustment pursuant to B8.21, item (c) (ii); except that only those partial shutdowns occurring after August 1 of any year and prior to end of Normal Operating Season will be recognized. For such shutdowns Purchaser will be given one (1) day of additional time for each two (2) calendar days lost.

C8.23 - CONTRACT TERM EXTENSION. (11/85) "Contract Term Extension" means an extension of the term of this contract at the request of Purchaser other than Contract Term Adjustment under B8.21. This Subsection shall not obligate Forest Service to grant a Contract Term Extension.

C9.5 - SETTLEMENT. (10/77) If this contract is terminated by Forest Service under C8.2, Purchaser agrees that the liability of the United States shall be limited to the sum of (1) the value of unused Purchaser Credit; (2) the estimated expenditures for felling, bucking, lopping, skidding, and decking any products so processed, but not removed from Sale Area because of the termination action; (3) out-of-pocket expenses involved in acquiring and holding the contract such as maintaining performance bonds and cash deposits, and (4) the difference between (a) Current Contract Rates for the remaining uncut volume, and (b) the rates paid for comparable timber on the same National Forest during the preceeding 6-month period multiplied times the remaining uncut volume. Comparable timber is timber of similar size and quality with similar topography and access. Cost estimates for items listed in (2) shall be based upon Forest Service appraisal methods in use on the date contract is terminated.

C9.52 - SETTLEMENT FOR T & E SPECIES. (12/89) In the event the Regional Forester determines that this contract may jeopardize the continued existence of a species presently, or subsequently, listed as threatened or endangered pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531-1536, 1538-1540), the Chief, Forest Service, may terminate this contract in whole or in part.

In the event of termination or partial termination, Purchaser agrees that its sole and exclusive remedy shall be the sum of (1) the value of unused Effective Purchaser Credit earned on this sale; (2) the estimated expenditures for felling, bucking, lopping, skidding, and decking any products so processed, but not removed from Sale Area; and (3) the out-of-pocket expenses involved in acquiring and holding this contract. Cost estimates for items listed in (2) shall be based upon Forest Service appraisal methods in use on the date contract is terminated. Out-of-pocket expenses in (3) do not include lost profits, replacement cost of timber, or any other anticipatory losses suffered by Purchaser. Purchaser agrees to provide receipts or other documentation to the Contracting Officer which clearly identify and verify actual expenditures.

In the event of termination of this contract, in whole or in part, by Forest Service, Purchaser agrees that the liability of the United States shall be limited to the express remedies contained within this provision.

When's 9.51

PRIVILEGED AND CONFIDENTIAL  
ATTORNEY/CLIENT DOCUMENT

LITIGATION UPDATE (3/5/96): 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 Co. v. Glickman and Pilchuck Audubon Society v. Glickman (challenge to temporal scope of Section 2001(k) and to intention to go forward with withdrawn and cancelled sales).

(1) "Known to be Nesting" and Appeal. Appeal consolidated with appeal of 1/10/96 High Bidder Order. On January 19, 1996 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. The Ninth Circuit hearing is scheduled for May 6, 1996. Today at 12:30 EST Judge Hogan will hold oral argument on the government's motion for extension of the 60-day stay and NFRC's motion to compel discovery relating to the marbled murrelet nesting determination. In requesting an extension of the stay pending a ruling in the Ninth Circuit, we argued irreparable harm.

(2) "High Bidder" and Appeal. The district court and Ninth Circuit have denied the government's motion for stay pending appeal as to the high bidder provisions. Opening briefs in the 9th Circuit are due 2/29, and a hearing is scheduled the week of May 6th before a new panel. In this appeal the Ninth Circuit will also address the district court's dismissal of PAS' complaint (withdrawn or cancelled sales). On the basis of possible conflicting orders, the government filed an emergency motion for a stay of the injunction re: First and Last timber sales (2/29/96). Judge Hogan denied this motion, without a hearing, on March 1, 1996.

(3) Reporting Requirements. We filed our 8th Compliance Report on February 29, 1996.

(4) Replacement Volume. The agencies continue to discuss possible interpretations and solutions to the replacement volume requirements of (k)(3).

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) (Applicability of Section 2001(k) to GATORSON sale).

On November 22, the purchaser (Vaagen Bros) of a timber sale that the Forest Service had suspended as the result of a Ninth Circuit

ruling finding the environmental analysis insufficient under NEPA, filed an order requesting that the sale be released under 2001(k). The court conducted a hearing on January 23, 1996 to consider the purchaser's motion to release the GATORSON sale. The matter is under advisement.

Seattle Audubon Society v. Thomas, C89-160 (W.D. Wash., Dwyer, J.). In October 1995, environmental plaintiffs filed a motion to clarify and enforce injunctions issued in 1990 by the Court on the COWBOY, NITA, SOUTH NITA and GARDEN timber sales and to clarify the ruling as to two other sales (FIRST and LAST) withdrawn as a result of litigation. 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 any action on the Nita, South Nita, Garden and Cowboy timber sales pending a decision on the Ninth Circuit's May 6, 1996 hearing before the Ninth Circuit. But the court denied the relief requested by environmental plaintiffs as to the First and Last sales.

**Environmental plaintiffs now move on an expedited schedule to renew their motions for summary judgment and permanent injunction as to the First and Last sales. Our response is being filed today, unless the court requests differently. Plaintiffs request that the court rule by Wednesday March 6, 1996, as the Forest Service is under an injunction from Judge Hogan to release these sales. Presently, the purchaser of the First and Last timber sales has agreed to withhold acceptance of the award until Friday March 8th.**

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.

Native Americans for Enola v. USFS (D. Or.) The Enola Hill Timber Sale located on Mount Hood NF was originally offered under Section 318 and released pursuant to Section 2001(k). Plaintiffs contend that this 2001(k) sale violates an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. **On February 28 the court granted our motion to dismiss plaintiffs' complaint, finding that the Rescissions Act precludes plaintiffs substantive and procedural challenges.**

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale) Pro se plaintiff challenges this timber sale pursuant to constitutional rights, the Civil Rights Act, the religious Freedom Restoration Act and the APA. We filed a motion to dismiss on October 16, based on res judicata and collateral estoppel. Briefing is complete and the court has dismissed the action.

Section 2001(d) Sales (Option 9 Sales)

ONRC v. Thomas (Ninth Circuit) (challenge to four timber sales -- two under subsection (d) and two not under the Rescissions Act -- on the Umpqua National Forest). On December 5, Judge Hogan issued a ruling, determining that all sales, including those that were not delayed, fall under subsection (k). The effects of this decision remain unsettled. On February 2, 1996 we filed our appellate brief. On Monday, March 4th a Ninth Circuit panel heard arguments on this appeal. Several questions were raised concerning 2001(k), but as a whole the panel did not express concern over the lower court's actions.

Section 2001(b) Sales (Salvage Sales)

**PENDING DISTRICT COURT ACTIONS:**

Ozark Chapter/Sierra Club v. Thomas, (E.D. Missouri). On 2/1/96 environmental plaintiffs filed a complaint challenging the actions of the Forest Service in awarding fire/drought salvage sales on the Mark Twain National Forest. The complaint alleges that the sales do not fall within the scope of the Rescissions Act, and the decision to offer the sales violates NEPA (categorical exclusion case), the ESA and the APA.

Alabama Wilderness v. Carter, (M.D. Ala. - Judge Thompson)  
In a second action involving salvage timber sales in the Alabama National Forests, plaintiffs challenge the release of salvage sales located in the Tuskegee National Forest. Plaintiffs challenge the constitutionality of the Timber Salvage Rider, the Forest Service's decision to proceed with this sale and the Forest Service's use of a categorical exclusion under NEPA. **Negotiations have resulted in an agreement to dismiss this action. A formal notice of dismissal will be filed with the court next week.**

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona) In this action, environmental plaintiffs challenge the adequacy of environmental documentation for a group of sales collectively referred to as the Rustler Fire Salvage Sale located in the Coronado National Forest, Arizona. Plaintiffs allege both NEPA and Rescissions Act grounds. The Forest Service, pursuant to a MOA, offered this sale under the categorical exclusion provision within CEQ's NEPA regulations. The briefing schedule extends beyond the 45-day decision. Our opposition to plaintiffs' motion for summary judgment was filed on 2/20/96, and the hearing is set for 3/13/96.

**PENDING CIRCUIT COURT ACTIONS:**

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 to appellants' brief is due 3/22/96.

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 in releasing the Thunderbolt sale. 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. Plaintiffs' now appeal this decision.

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. Plaintiffs have filed an appeal of this decision.

Inland Empire Public Lands Council v. Glickman (Ninth Circuit) (Fire Salvage Sales) The district court granted our motion for summary judgment and dismissed environmental groups' challenges to the decisions to proceed with fire salvage sales in the Kootenai National Forest in an opinion and order issued December 18, 1995. A central issue on appeal is the standard of review to be applied under Section 2001(f). Our appellate brief was filed February 9, 1996. The hearing is March 13, 1996.

#### **DECISIONS IN THE DISTRICT COURT:**

Alabama Wilderness v. Yancy, (M.D. Ala.). This action was dismissed by agreement of the parties. Prior to our filing of a brief on the merits, plaintiffs and the Forest Service negotiated a stipulation that released 13 of the 15 sales at issue in this action. Negotiations continued and the remaining two sales were released from this challenge. Environmental plaintiffs filed this action in December challenging the constitutionality of the Timber Salvage Rider, and in the alternative, the Forest Service's decision to proceed with 15 salvage timber sales located on the Conecuh National Forest.

Kentucky Heartwood v. USFS, 906 F. Supp. 410 (E.D. Ky. 1995). On November 27, 1995, the court granted summary judgment on all claims to the federal defendants. Plaintiffs had challenged five related 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 that there is arbitrary and capricious review of agency decisions to proceed with the sales, yet the review is to be "extremely deferential."

**PRIVILEGED AND CONFIDENTIAL**

Memorandum for Peter Coppelman

From Wells Burgess  
Michele Gilbert

March 4, 1996

Re: Proposed Response to Plaintiffs' Renoted Motion to Enjoin  
First and Last Timber Sales under Section 318

Attached hereto are two versions of a proposed response. Version 1 includes a reasoned discussion of the jurisdictional issues, and concludes that there are serious impediments to the Court entertaining plaintiffs' motion. Version 2 does not.

To assist the clients in deciding which version they wish us to submit, they should consider the following:

**1. Potential adverse impact on the Government's appeal of Judge Hogan's decision as to the four enjoined sales.**

The Government has appealed Judge Hogan's declaratory judgment that the four sales enjoined by Judge Dwyer are within the scope of Section 2001(k). Judge Dwyer continued the injunctions on these sales to allow the Ninth Circuit to decide this question.

The Government has argued and will argue to the Ninth Circuit that these sales were void ab initio and not within the coverage of Section 2001(k) by reason of the fact that they were withdrawn and canceled by the Forest Service. Plaintiffs have taken a similar position.

Plaintiffs' argument in the instant motion may contradict their own and the Government's previous litigation position in that it appears to be premised on the view that Section 318 continues to apply to the similarly situated First and Last sales because they are outstanding offers. **Acceding, even passively, to plaintiffs' arguments on the continued applicability of 318 to the First and Last sales may prejudice the Government's position on appeal before the Ninth Circuit that the four enjoined sales were void ab initio and/or not within the contemplation of Section 2001(k).**

**2. Potential impact on credibility before Judge Dwyer.**

The Government has a significant stake in presenting credible legal arguments to Judge Dwyer. The Department of Justice has labored successfully over the past two years to restore credibility to the Government's position before the Court. The Judge will likely hear any renewed challenge to the Plan as impacted by the release of 2001(k) sales. As the

attached Version 1 indicates, plaintiffs' motion has little chance of success. For the Government to remain silent on the issue of the Court's jurisdiction may raise questions regarding the credibility of the Government's legal position which could negatively affect the Court's perception of the Government's overall position.

### **3. Potential adverse impact on the President's Plan.**

In order to support plaintiffs we have been asked to supply declarations alleging that the First and Last Sales cause irreparable harm and/or are inconsistent with the Forest Plan. Notwithstanding our efforts to keep allegations regarding these matters to a factual minimum up to now, we are creating evidence that can be used against us to attack the Forest Plan. While this may have been justified where a large number of potentially damaging sales was at issue, and a credible legal position was presented, it may be unwise to entertain such a risk for two sales in the context of a motion with a highly questionable chance of success.

**PRIVILEGED/CONFIDENTIAL ATTORNEY CLIENT/WORK PRODUCT**

**Section 2001(k)(2) litigation status**

**I. Summary of analysis re: applicability of J. Hogan's Order on K2 to sale units previously withheld under K2**

TOTAL NUMBER OF UNITS: 137 Forest Service  
11 BLM

Tentative status as of 2/27/96 based on strict interpretation of court's order.

For Forest Service:

**38 units** have been determined to be within the Hogan order: i.e., subcanopy behavior or other observations within the sale unit boundaries;

**99 units** have been determined to be outside the parameters of court's order. **OF THESE, HOWEVER:**

**16 units** have detections so closely associated with the sale unit that the field biologist elevated to the district level; and

**10 units** have circling directly over the sale unit.

Of the 99 units, **approximately 70** have subcanopy behavior in the stand reflecting a distinct possibility that surveys this coming spring in the sale units would result in detection of subcanopy behavior in the sale unit.

For BLM:

**8 units** have been determined to be within the Hogan order;

**3 units** have been determined to be outside the order.

**ISSUES:**

1) Should the Forest Service seek clarification of the Court's Order regarding the 26 sale units with either circling directly over the sale unit or with detections closely associated with the sale unit?

**ANALYSIS:**

In both cases it is arguable that the court did not have these situations before it when it issued its Order. The court rejected "the protocol's circling standard," which refers to circling over a stand. With the detections on the 10 units noted above, the circling is over the sale unit -- arguably sufficient evidence that the observer can "know" that the circling murrelet's nest is within sale unit boundaries. Similarly, the court did not have before it the situation presented regarding the 16 units. These are primarily units where the detection outside the units was likely for travel into and out of the unit.

- 2) Should the agencies prepare to conduct surveys in the approximately 70 sale units where subcanopy behavior was detected in the stand, should the stay of J. Hogan's Order be continued through the spring?

**ANALYSIS:**

The court's order focuses on "current" knowledge regarding murrelet nesting in terms of surveys that have already been conducted. However, there appears to be no prohibition on updating that information base if the opportunity is presented. The protocol requires only one solid detection to determine occupancy so that a determination within the sale unit this spring to support a K2 determination would be consistent with the protocol. Additionally, it is likely that environmental groups will attempt to survey these units, and it may serve the agencies to conduct this review themselves.

**NEXT STEPS:**

1. Conduct site fidelity review per memorandum to field biologists to be provided this week following agency counsel review; and
2. Finalize documentation memoranda setting forth basis for determinations noted above, including discussion of the 26 units with circling or closely associated behavior.

**II. OTHER ISSUES**

1. **Motion for Extension of Stay:**

The current stay expires on March 25, 1996. We propose to file a motion to extend the stay with J. Hogan this week, relying on the previous declarations and noting the expedited briefing schedule. We need to file this motion shortly, so that, should J. Hogan deny the motion, we would have the opportunity to seek a stay in the court of appeals.

2. Rutzick motion to compel:

On February 23, 1996, we received a motion to compel from NFRC seeking documents identified as allegedly missing from Forest Service murrelet survey documentation for numerous sales. Copies of all murrelet survey information were provided to NFRC this past fall; agency counsel is reviewing whether any copies were apparently omitted. The core of the motion is likely to be requests for documents or data and information related to documents, particularly maps, that doesn't exist. We believe that a dialogue with NFRC regarding the existence or non-existence of certain data or documents will only create opportunities for interference with the deliberative process. Our recommendation is to provide NFRC the opportunity to inspect the records after the above process is complete. We have been tentatively advised that the Forest Service would be prepared to permit inspection on March 18, a week prior to the current expiration of the stay, and could propose such a course to NFRC this week. Our reponse on the motion to compel is due on March 4, 1996.

\* \* \* PRIVILEGED \* \* \*  
ATTORNEY-CLIENT DOCUMENT

MEMORANDUM

TO: Dinah Bear, CEQ  
Elena Kagan, WH  
Tom Jensen, CEQ  
Ruth Saunders, OMB

FROM: Peter Coppelman, DOJ  
Ellen Athas, DOJ  
Michelle Gilbert, DOJ

DATE: February 21, 1996

RE: Replacement Timber Issues

Introduction

The Rescissions Act interagency working group, after some internal agency meetings, addressed the issue of replacement timber on February 20, 1996. The issue of the agencies' obligations to provide replacement timber arises from subsection (k)(3) of the Rescissions Act. This subsection states:

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 current allowable sale quantities.

Before deciding how to proceed with replacement timber, the agencies need to decide certain policy questions. First, do the standards and guidelines of the Northwest Forest Plan apply to replacement timber? Second, should the legal requirements of the National Environmental Policy Act, National Forest Management Act and the Endangered Species Act apply to replacement timber? Third, how will the statutory provisions regarding allowable sale quantity be squared with the Northwest Forest Plan's probable sale quantity estimates? Fourth, how much time do the agencies have to provide such timber and how long do harvesting rights extend?

For one issue -- applicability of legal standards -- there was no disagreement. All the agencies wanted the sales to comply with the more protective standards and guidelines of the

Northwest Forest Plan. The remaining issues, therefore, involve applicability of environmental laws, potential use of PSQ timber to satisfy alternative timber obligations, and timing.<sup>1</sup>

We address the risks and advantages associated with the different options relating to each issue below. Legally, the different options are defensible.

### Discussion and Options

#### I. Applicability of Standards and Guidelines of Northwest Forest Plan to Replacement Timber

There was general agreement that the protection of the President's Plan was paramount. In that regard, all agreed that any and all sales should comport with the strict requirements of the Plan, including standards and guidelines. This will assist in upholding the Plan if challenged by the environmentalists based on the new information of the Rescissions Act sales. There really appear to be no differing options.

#### II. Applicability of Environmental Statutes to Replacement Timber

There was some disagreement as to whether the "notwithstanding any other provision of law" language of subsection (k)(1) could and should be imported to subsection (k)(3). The Forest Service and Assistant Secretary Lyons believed that exemption from the environmental laws may be necessary if replacement timber is provided for harvesting in future years. This wait for replacement timber -- which could be as long as 2-4 years -- would be necessary to accomplish the other goals of meeting the PSQ separately from replacement timber and applying the standards and guidelines.

On the other hand, several agencies voiced concerns over the suggestion of sufficiency language and some were opposed to extending such protection. Further, there were some who felt that approval of sufficiency language was contrary to all the representations made by the White House and others as to environmental laws and their importance.

---

<sup>1</sup> This discussion is confined to the provision of alternate volume pursuant to 2001(k)(3). The question of whether the agencies may negotiate alternate mitigating sales for (k)(1) sales which do not comply with the standards and guidelines is not addressed here. There is a difference of opinion regarding this issue.

Option One. Interpret (k) (3) as incorporating the "notwithstanding any other provision of law" language of (k) (1).

Pros: Will allow agencies to get sales out quickly, without challenge or delay.

Cons: Prohibits public scrutiny.  
Will anger environmental groups.  
Could encourage environmentalists to seek to overturn Forest Plan before Judge Dwyer.  
May negatively impact fish and wildlife resources.

Option Two. Interpret (k) (3) as not incorporating the "notwithstanding any other provision of law" language of (k) (1).

Pros: Will guarantee the integrity of each sale.  
Will not create new, damaging sale information that could harm the Forest Plan.

Cons: May frustrate industry in amount of time spent in court battles.

### III. Allowable Versus Probable Sale Quantity

There was general agreement that double counting should be avoided. There is not agreement, however, on whether PSQ timber can be used to satisfy any alternative timber obligations. The Forest Service feels strongly that providing alternative volume cannot reduce its ability to produce the PSQ. The BLM does not agree that the Act precludes use of this year's PSQ.

Option One. Interpret "shall not count against current allowable sale quantities" of (k) (3) as precluding use of this year's PSQ to provide alternative timber.

Pros: Demonstrates agencies' ability to meet this year's PSQ target, in affirmation of Forest Plan.  
Provides PSQ timber to smaller companies.

Cons: Requires agencies to look to future year PSQ to find alternative timber.  
May render compliance impossible, if statute expires on September 30 and compliance with S/Gs and all environmental laws is required.

Option Two: Interpret (k) (3) as allowing use of this year's PSQ timber for alternative timber (but not allowing double counting).

Pros: May provide more immediate access to alternative timber.

Cons: Requires agencies to report lower proposed offer.  
May impact Jackson litigation.  
Reduces timber provided this year to smaller companies.

#### IV. Timing of Replacement Timber and Expiration of (k)(3)

Here there are two distinct approaches. The Forest Service strongly favors extending the time for providing and harvesting replacement timber. Alternatively, an argument can certainly be made that any right to harvest replacement timber under (k)(3) expires at the same time that (k)(1) expires, i.e., September 30, 1996.

Option One. Extend the time for providing and harvesting replacement timber to allow the agencies to provide full volumes of replacement timber in an orderly and careful manner.

Pros: Will permit careful review for adherence to standards and guidelines.  
Will encourage a working relationship with timber industry.

Cons: Will extend the Rescissions Act Timber Rider beyond its legal life contrary to one of Congress's stated purpose of immediate relief to timber mills.  
Extension of protections from challenges could be necessary to permit harvesting in future years: perceived as shift in Administration position.  
Could provoke litigation from environmental groups: this would represent reversal of Administration position to oppose the Timber Rider in the courts.  
May necessitate additional funding (between \$4 million and \$20 million) to provide staffing to prepare these sales.

Option Two. Conclude the time for providing and harvesting replacement timber in accord with subsection (k)(1)'s termination at the conclusion of FY 1996.

Pros: Will conclude the Rescissions Act as quickly as possible.  
May allow for less subsection (k) timber to be released, particularly if we succeed before the Ninth Circuit on "known to be nesting" late in the fiscal year.

Accords with the timber industry's position taken to successfully oppose government's requests for stays.

- Cons:
- May invite more litigation by industry.
  - May encourage Judge Hogan (or other court) to require immediate release of replacement timber, even though such timber is not suitable for release.
  - May encourage expedited harvesting.
  - May result in contract claims, involving greater expenditure of government funds.

Conclusion

Thus, the biggest question facing the decisionmakers involves the timing of the sunset of the Rescissions Act timber rider. Clearly, there are risks on both sides. A continuation of the statute would provoke environmental groups to sue on October 1, 1996, to enjoin all Forest Service and BLM auction, award and harvesting. Conversely, concluding the statute on September 30, 1996, would prompt an industry suit on that day to demand timber, damages or both. Legally, both positions are defensible. If you have any questions or comments, please feel free to call us.