

NLWJC- Kagan

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Timber - Legal Memos [4]

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February 22, 1996

MEMORANDUM FOR ANNE KENNEDY

FROM: Michael J. Gippert *Michael J. Gippert*
Assistant General Counsel
Natural Resources Division

SUBJECT: Provision of Alternative Timber for other than "known to be nesting" sales

ISSUE

At the February 20, 1996, meeting at CEQ, the Forest Service made a presentation on alternative volume for sales currently suspended under section 2001(k)(2) of the Fiscal Year 1995 Rescissions Act. The Forest Service also discussed possibilities for replacing six sales that are not currently suspended because of "known to be nesting" issues.¹ These sales were either enjoined or withdrawn because of violations of section 318 of the Fiscal Year 1990 Interior and Related Agencies appropriation bill, and are now before Judge Dwyer in the SAS v. Thomas case to determine whether the sales must be released pursuant to the decision of Judge Hogan in NFRC V. Glickman. The Forest Service concluded in its presentation that under the Rescissions Act it would not be possible to offer alternative volume for these sales. In addition, our analysis indicates that it would also not be possible under current Forest Service authority to provide alternative volume for these sales.

*Even
voluntary??*

DISCUSSION

For the purposes of this memo, we are not addressing the applicability of existing environmental laws to alternative timber. In preliminary discussions on this issue it appears that the administration will argue that alternative volume will be subject to all applicable environmental laws. Industry has argued that the "Notwithstanding any other provision of law" language contained in section 2001(k)(1) also applies to alternative volume identified under 2001(k)(3).

Modification under the Rescissions Act

Under section 2001(k)(2) of the Rescissions Act, the Secretary of Agriculture must withhold units of timber sales where endangered or threatened bird species are "known to be nesting." Section 2001(k)(3) provides alternative timber for those units being withheld from release. It states:

¹ The sales are Cowboy, Nita, South Nita, Last, and First located on the Umpqua National Forest, and the Garden sale on the Siskiyou National Forest. These sales are referred to in Table C of the attached materials.

If for any reason a sale cannot be released and completed with 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.

Current information does not support a finding of "known to be nesting" on these sales. The six sales at issue do not fall under 2001(k)(2)'s "known to be nesting" provision, and thus do not qualify for alternative timber under section 2001(k)(3).

The government has also argued in NFRC v. Glickman, that in addition to "known to be nesting" there are additional bases for not releasing timber. We argued that certain sales did not even fall under section 2001(k), and therefore we did not have to release sales where 1) the sale has been the subject of a previous court's injunction, 2) the high bidder is no longer capable of accepting award, and 3) it is physically impossible to recreate the sale as originally offered. Judge Hogan, in his January 10, 1996, order rejected all but the last argument, and required the Forest Service to release all other sales. The government is currently appealing only Judge Hogan's decision on the high bidder issue. However, the six sales at issue here are currently before Judge Dwyer in the SAS v. Thomas case to determine if they must be released despite his earlier order enjoining the Forest Service from awarding them.² Absent an appeal, if Judge Dwyer rules that his injunctions are no longer valid, these six sales must be awarded.

Modification under Current Forest Service Authorities

An additional possibility that has been discussed is that the six sales could be modified or canceled under current Forest Service procedures. An initial impediment to this approach is that the sales are not yet awarded, and would have to be awarded before any modification to the sales could be accomplished.³ Cancellation of these sales would conflict with the Rescission Act's directive to the Secretary to "release and permit to be completed" sales falling under 2001(k).

Once awarded, any modification to the contracts would have to be mutually agreed to with the purchaser, and alternative volume would have to be from within the sale area as defined by the contract. The advertised sale area limitation relates back to the basic statutory authority for the disposal of timber under 16 U.S.C. § 472a, and applicable agency regulations.⁴ However, it is not

*why it
occurred
agreed?*

*Shut do
they
say?*

² The First and Last Sales were not enjoined by Judge Dwyer, however, they were withdrawn by the Forest Service in settlements reached with the plaintiffs in SAS v. Thomas. The government has contended that these sales should be released.

³ Modifications of the kind required here prior to award of the sales would substantially alter the characteristics of the sale, which under normal procedures would require the Forest Service to reject all bids and hold a new auction. This is contrary to section 2001(k)'s admonition to the Secretary to release contracts "with no change in originally advertised terms."

is this what he's talking about?

⁴ Current regulations at 36 C.F.R. Part 223.80 require advertisement of a sale for 30 days when its value is greater than \$10,000. Our office has advised the Forest Service that modifications to existing contracts involving timber

possible to provide alternative volume from the sales areas at issue in the amount required to mutually modify these sales. As discussed in the Forest Service presentation, some relief from current statutes and regulations would be required to modify these sales.

SUMMARY

At this time, there are statutory and regulatory barriers to providing alternative volume for the six sales at discussed at the CEQ meeting on February 20, 1996. Neither the Rescissions Act nor current Forest Service procedures allow for alternative volume for these sales. Additional statutory authority will likely be required to modify these sales. If we can provide you with further information on this subject, please feel free to contact me at 202-720-2063.

how? why? what?

outside the sale area are limited by the requirement that sales in excess of \$10,000 be sold competitively. The Agriculture Board of Contract Appeals has ruled on this issue in several cases. See, Appeal of Summit Contractors, AGBCA No. 81-252-1, AGBCA No. 83-312-1 (Jan 8, 1986), and Appeal of Jay Rucker, AGBCA No. 79-211A CDA (June 11, 1980). In addition, in a recent BLM case, the Court of Federal Claims stated that modifications to existing timber sales must conform with agency statutes and regulations, Croman Corporation v. United States, 31 Fed. Cl. 741, 746-47 (August 16, 1994).

Yes, OK

2/28/96

DRAFT**TECHNICAL COMMENTS****Title III--LAWFUL EXPEDITING OF SALVAGE TIMBER SALES**

p. 7, lines 18-24. Section 301(1). The definition of "collaborative decisionmaking process" is vague. As a result, it is not clear how this decisionmaking process would fit with the Forest Service's current notice and comment, and administrative appeals process under section 322 of the 1993 Interior Appropriations Act and implementing regulations at 36 CFR 215. The definition does not specify the public notice requirements for collaborative decisionmaking.

p. 8, lines 4-7. Section 301(3). The definition of "salvage timber sale" would appear to conflict with the applicability requirements in section 302(b). Do you intend to establish 2 new categories of salvage timber sales in Title III--one as defined in section 301(3) and the other as provided in section 302(b)?

p. 8, lines 18-24. Section 302(a)(1)(B)(i). Roadless areas are not administratively designated as such in forest plans. Forest plans allocate roadless areas for various multiple uses. For example, some roadless areas are designated for roadless recreation, and some are allocated as suitable for timber. Which roadless areas do you intend to make off limits to salvage sales--areas that are to be maintained as roadless or areas where non-wilderness multiple uses are permitted? Do you mean to preclude salvage in all former RARE II inventoried roadless areas? Do you really mean to include those areas in which the forest plans preclude timber sales and roads for timber?

p. 9, lines 1-3. Section 302(a)(1)(B)(ii). The words "under consideration" are subject to several interpretations. The term could be construed to mean areas that have been designated by Congress for wilderness study, areas designated in pending legislation for inclusion in the National Wilderness Preservation System, or areas recommended for designation in administration proposals pending before Congress. Furthermore, all roadless areas, even those that have been allocated as suitable for timber, would be under consideration for recommendation for wilderness designation when forest plan revision begins.

p. 9, lines 13-18. Section 302(a)(2)(A). Not all Forest Service units have the immediate capacity to use the Geographical Information System. Alternative methods for mapping should be considered.

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p. 10, lines 4-14. Section 302(b). This provision would appear to conflict with the definition of "salvage timber sale" in section 301(3).

p. 10, lines 15-19. Section 302(c). This provision does not specify the period of time within which the Secretaries have to develop criteria. It is likely that the Secretaries would be precluded from proceeding with salvage sales under this title until the criteria are developed. The process to develop the criteria may require rulemaking. The criteria would be subject to legal challenge that would delay implementation of the expedited procedures.

Does NEPA and ESA apply to criteria?

p. 10, lines 23-25; p. 11, lines 1-8. Section 303(a)(1). It is not necessary to enact the MOA into law. We are required to comply with all environmental laws by Title III. The MOA may conflict with the 36 CFR 215 regulations and NEPA.

p. 11, lines 9-17. Section 303(a)(2)(A). We question the workability of this provision. Notice would be required to apprise the public of the opportunity to attend the first and last interdisciplinary team meetings. The provision does not specify how much notice would be required--15 days? 30 days?--and where it should be published. If there are more than these 2 ID team meetings, do you intend to allow the public to attend these meetings?

The reference to the "notice inviting the public to comment on the proposed timber sale" is unclear. Do you mean the notice of the proposed action subject to notice and comment under the 36 CFR 215.5?

p. 11, lines 18-19. Section 303(a)(2)(B). The definition of "collaborative decisionmaking process" is vague. It is not clear whether this process is intended to override or supplement to Forest Service's section 215 notice and comment, and administrative appeal process.

p. 11, lines 24-25; p. 12, lines 1-2. Section 303(c). This provision would require the Forest Service to give notice and hold a public meeting to obtain advice from State fish and game officials. How much notice would be required?

p. 12, lines 3-9. Section 303(d). Section 322 of the 1993 Interior Appropriations Act requires a notice and comment before the administrative appeal period. This provision should also address notice and comment. Will the Forest Service have to go through rulemaking to revise the notice, comment and appeal process?

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p. 12, lines 10-12. Section 303(d)(1). The Forest Service's 215 regulations provide for a 45 day appeal period. This provision would shorten the appeal period by 24 days.

p. 12, lines 13-16. Section 303(d)(2). The 215 regulations provide for a 45 day appeal resolution period. Final decisions are stayed for 15 days. This bill would shorten the appeal resolution period by 31 days. However, it would eliminate the opportunity for informal disposition provided in the 36 CFR 215.16. The requirement to issue a final decision in 14 days will be very difficult to meet where the appellant has raised many issues in their notice of appeal. The courts have required the Forest Service to address in writing each issue raised in the administrative appeal.

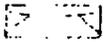
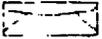
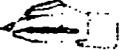
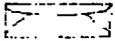
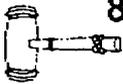
p. 12, lines 18-24; p. 13, lines 1-3. This provision requires that any challenge to a salvage sale under title III be filed not later than 30 days after the later of 2 dates. Subparagraph (A), lines 22-24, refers to the date on which an agency "announces a decision to proceed" with a salvage sale. It is not clear whether this language refers to the date that the decision notice is issued or if it refers to the date that the sale is advertised. If the former interpretation is correct, the date in subparagraph (A) will always come before the date in paragraph (B). If the latter interpretation is correct, the date in subparagraph (B) will always come before the date in paragraph (A).

p. 13, lines 5-7. This provision does not provide for a specific time period within which the court would be required to issue a decision.

p. 13, lines 13-18. The determination of whether a particular sale is consistent with the applicable forest plan standards and guidelines is both a factual and a legal inquiry. Under current law, the burden of proof is on the plaintiff as to NEPA, NFMA, ESA and other environmental law claims. We think the rebuttable presumption will likely further complicate litigation without any streamlining benefit.

p. 13, lines 9-22. Legal duties are defined by case law. The "Legal duty" provision conflicts with subparagraph (A) because the rebuttable presumption described in subparagraph (A) is not recognized in case law.

Project-Level Decision Steps

-  1. Schedule of Proposed Projects is sent to mailing list quarterly listing upcoming NEPA projects.
-  2. Scoping notice and comment on proposal.
-  3. Environmental Assessment (EA) is sent to mailing list and noticed in designated newspapers. *
-  4. Comment Period begins after notice published: 30 days for CE and EA, 60 days for EIS. *
-  5. Decision Notice sent to comments and notice published in designated newspapers. ESA, CWA, * NHPA and other compliance completed.
-   6. 45-Day Appeal Period with automatic stay begins * after notice of decision publication. Wait 5 business days after appeal period.
-  7. 45-Day Appeal Resolution Period if any appeals * are filed with continuation of automatic stay. May not implement for 15 days.
-  8. Judicial Review of Final Agency Action can occur after an appeal decision is rendered or the 45-day appeal resolution period elapses. 16 U.S.C. 1612 note, 36 CFR 215 *

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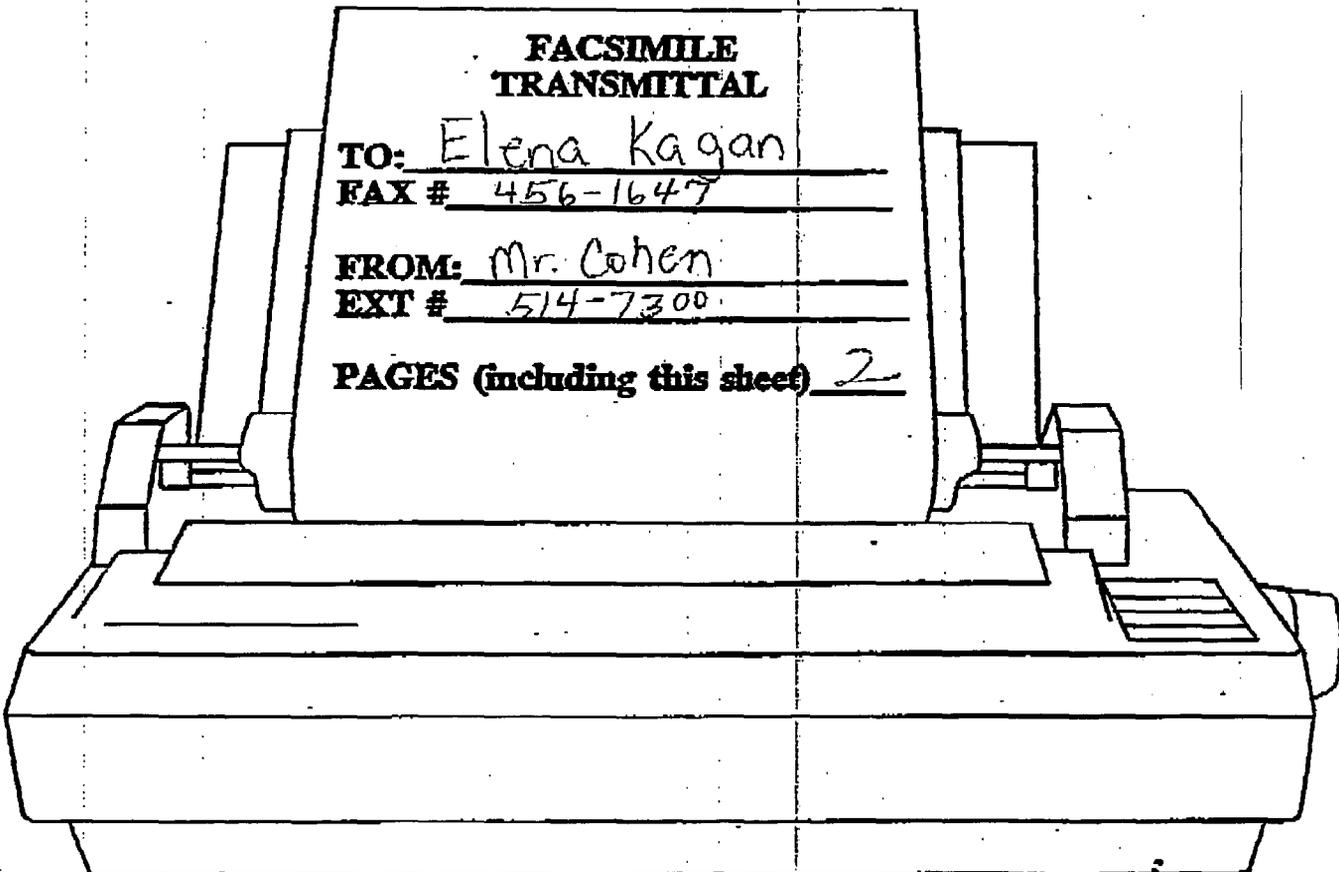
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Use of the Judgment Fund

The Anti-Deficiency Act, 31 U.S.C. 1341, provides that an officer of the United States may not involve the government in a contract or obligation for the payment of money before an authorization is made unless authorized by law. See also, 31 U.S.C. 1517. Any employee who violates this statute is subject to an adverse personnel action, 31 U.S.C. 1349; see also 31 U.S.C. 1518, and to criminal prosecution. 31 U.S.C. 1350. See also, 31 U.S.C. 1519.

Pursuant to this statute, a government employee may not enter into a contract or incur an obligation to pay money knowing that Congress has not appropriated money to pay the incurred obligation. To refuse to take an action mandated by statute knowing that the refusal to take the action will lead to a suit for damages and that Congress has not appropriated funds to pay those damages would violate the letter if not the spirit of the Anti-Deficiency Act. It might also violate Article I, section 9, cl. 6, of the Constitution which provides that no money shall be drawn from the treasury without an appropriation.

The fact that Congress has established the Judgment Fund, 31 U.S.C. 1304, to pay judgments against the United States or to pay settlements of existing or imminent litigation against the United States should not change this result. It is clear that the Judgment Fund was enacted to pay legitimate judgments and settlements of bona fide litigation or threats of bona fide litigation. The Judgment Fund was obviously not intended to provide agencies with a means to fund activities which, due to the absence of an appropriation, would otherwise violate the Anti-Deficiency Act.

If the Judgment Fund is misused as a means to circumvent the Anti-Deficiency Act, it is likely that Congress would repeal the Judgment Fund statute or limit its use. This would require a return to the status prior to the creation of the Fund when no judgment (or no judgment exceeding a specified amount) could be paid unless Congress enacted a special statute authorizing payment.

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Draft Briefing Paper regarding
Timber Sale Modifications, Settlements, Agency
and Judgment Fund.

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ATTORNEY-CLIENT PRIVILEGE: NOT SUBJECT TO RELEASE UNDER FOIA**Briefing Paper****Topic: Timber Sale Contract Modifications and Cancellations****I. Funding Sources for Contract Claim Settlements and Judgments****A. Mutual Agreement Scenario**

* After the contract change is executed and the contracting officer has determined the appropriate amount of compensation, the settlement amount of the contract claim is paid from:

1. Agency appropriated funds if available.

* Or, possibly, the Judgment Fund to be reimbursed pursuant to the Contract Disputes Act, 41 U.S.C. §612. (The "Historical and Statutory Notes" at 41 U.S.C.A. §612 states that all judgments and settlements must be paid from agency appropriations and could arguably be interpreted to allow for the initial payment of contracting officer's settlements from the Judgment Fund).

2. Supplemental appropriation if agency funds are not available.

* If there is no such money, the FS may not obligate itself to pay out funds it does not have, or it would risk violating the **Antideficiency Act**, 31 U.S.C. §1341 (a) (1) (A). This provision states: "[a]n officer or employee of the United States Government ... may not--make or authorize an expenditure exceeding an amount available in an appropriation or fund for the expenditure or obligation."

B. Dispute Scenario

* If an adverse judgment is rendered by the Agriculture Board of Contract Appeals or the Court of Federal Claims, the judgment is paid from:

1. The Judgment Fund pursuant to 31 U.S.C. §1304.

2. Payments from the Judgment Fund must be reimbursed "by the agency whose appropriations were used for the contract out of available funds or by obtaining additional appropriations for such purposes." 41 U.S.C. §612 (c). Reimbursement also includes interest on the claim which begins to run from the date of the contract change (i.e., the date upon which the claim arose).

II. How The Timber Sale Contract Is Changed In Order To Protect A Species After A Jeopardy Opinion Is Issued.

A. First, the contracting officer **suspends** operations on subject sales after a jeopardy opinion is issued.

B. Forest Service checks for any substitute volume within the sale area to avoid cancelling and paying for volume unavailable due to jeopardy opinion. Generally, finding substitute volume may be very unlikely given the circumstances.

C. A determination then needs to be made whether or not **sufficient agency funds** are available to pay the cost of the resultant deleted volume.

*If sufficient funds are not available, a modification or cancellation providing for deletion of volume cannot be executed because payment would most likely violate the **Anti-Deficiency Act**, 31 U.S.C. §1341. If funds are not available for settlement, Forest Service will probably be forced to ask for supplemental appropriations.

*A request for supplemental appropriations can potentially be delayed if contracting officer's settlements are paid out of the Department of Justice's Judgment fund (see Part I). However, as discussed below all monies paid out of the Judgment Fund will eventually have to be replaced by the Forest Service.

D. A timber sale contract can have volume deleted in one of two basic ways: through **modification** or **cancellation**.

E. A **modification** involves smaller amounts of volume and is considered a **minor change**. Like cancellation, a modification can be accomplished unilaterally (by the government) or mutually (by agreement of the government and the purchaser).

*First, the contracting officer tries to negotiate a mutual agreement with the purchaser to delete the volume from the sale.

*If mutual agreement is not possible, the contracting officer may, under the contract, unilaterally modify the contract to delete minor portions of volume with no damages incurred. (This will be a minority of the situations as contract changes necessary to protect species are generally significant changes in volume). Litigation on this contract language may well ensue.

F. If the volume to be deleted is significant (this determination must be made on a case by case basis), then the contracting officer must execute a cancellation (partial or total). In light of a 1992 Federal Circuit decision, however, the ability to divide the contract and partially cancel as opposed to cancelling the entire remainder of the contract is risky pending new regulations clarifying the government's position.

*Once again, first the contracting officer attempts to negotiate a mutual cancellation with the purchaser. In a mutual cancellation agreement, the contracting officer and the purchaser agree to an amount of compensation. (The proper measure of compensation is currently being reviewed in the USDA).

*Payment of compensation is made from agency funds. Additionally, an untested, but possible argument is that payment may be made from the Judgement Fund and later reimbursed by the Forest Service in order to prevent a situation where, in order to avoid violating the Antideficiency Act, the Forest Service opts to litigate contract claims.

*Additionally, a release statement is signed in which the purchaser releases the Forest Service from further liability under the contract and waives any appeals rights it may have. For this reason, a mutual agreement is far preferable than a unilateral cancellation.

F. If the contracting officer and the purchaser cannot agree on damages for cancellation, then the government must cancel unilaterally.

*The Forest Service contracting officer provides written notice of the cancellation, including rationale and compensation amount, to the purchaser.

*Pursuant to the Contract Disputes Act, the purchaser then may appeal the decision to the Agriculture Board of Contract Appeals or the Court of Federal Claims. If the Forest Service loses the appeal, then it is also liable for interest, which runs from the date the

purchaser filed its claim with the contracting officer.
41 U.S.C. §611.

*If judgment is rendered against the Forest Service, payment of damages and interest is made from the judgment fund. As discussed above, the contract Disputes Act directs that "the agency whose appropriations were used for the contract" must reimburse the judgment fund for the total amount from "available funds or by obtaining additional appropriations for such purposes." 41 U.S.C. §612 (c).

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LITIGATION UPDATE (2/27/96): 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 interpretation of Section 2001(k)(2)'s "known to be nesting" standard holding that (k)(2) requires evidence of nesting within sale unit boundaries. In the 1/25/96 hearing, the District Court granted a 60-day stay pending appeal of this order. Opening briefs in the Ninth Circuit are due 2/29, and a **hearing is scheduled for the week of May 6, 1996.**

(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 of the 1/10/96 Order. 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).

(3) Reporting Requirements. **Our next compliance report is scheduled to be filed on Thursday, February 29.**

(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 May 6, 1996 hearing before the Ninth Circuit. Dwyer indicated that he would rule in accordance with the decision of the Ninth Circuit. However, Dwyer noted that these four sales violate Section 318, and may "contravene and jeopardize" the President's Forest Plan. As to the First and Last timber sales, Dwyer held that the court could not grant the relief requested by the environmental plaintiffs.

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.) (challenge to the Enola Hill Timber sale on the Mount Hood National Forest). Plaintiffs contend that 2001(k) sale violates an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. A motion to dismiss was filed in November. Plaintiffs opposed and we filed a reply brief on January 11, 1996. We await a decision.

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale on the Forest). 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:

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. The court has encouraged the parties to settle this matter and we have entered into negotiations with the plaintiffs.

On 2/23/96, a magistrate judge issued an order limiting plaintiffs' discovery requests to those documents and information that plaintiffs allege are lacking in the administrative record. The federal defendants may formally object to all requests. This is the same magistrate judge, who in the first Alabama case, refused to limit discovery.

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 2/21/96.

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. An appeal notice has been filed along with a request for expedited Ninth Circuit review.

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 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 in this case was the appropriate standard of review to apply to Rescissions Act cases. Plaintiffs contended that the standard of review under Section 2001(f)(4) was exactly the same as that applied under cases involving ESA/APA claims, but we had argued that, because the scope of review is quite limited under Section 2001, the standard must be more narrow than that applied in other types of cases. 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."

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. A hearing is scheduled for March 4, 1996, in Portland.

SUMMARY OF JUDGE HOGAN'S JANUARY 10 ORDER

This memorandum summarizes Judge Hogan's January 10 order and its effect on various categories of sales at issue. As described below, the January 10 order requires the agencies to award and release approximately 29 additional sales as yet identified (the agencies are checking if the order covers additional sales). Judge Hogan dismissed the complaints of intervenors Western Timber (seeking release of one pre-318 sale) and Pilchuk Audubon Society (seeking to enjoin award and release of all pre-Section 318 sales and all sales cancelled or withdrawn prior to enactment of Section 2001(k)(1)).

1. Pre-Section 318 sales

The court ruled that Section 2001(k)(1) does not apply to timber sales offered prior to enactment of Section 318 on October 23, 1989. The MALT sale is the only sale for which release was sought before Judge Hogan, and the court denied Western Timber's motion to compel release of the sale. The agencies identified approximately 40 other pre-Section sales, none of which fall under Section 2001(k)(1) under the January 10 order. Presumably, our compliance reports no longer need to report on these sales.

2. Sales enjoined for violating Section 318.

The court rejected our argument that sales enjoined for violating Section 318 were void *ab initio* and therefore as good as if never offered. Thus, the **four** sales at issue -- the GARDEN, COWBOY, NITA and SOUTH NITA sales (all Forest Service)-- must be awarded under the January 10 order. However, Judge Hogan issued only a declaratory judgment as to these sales -- no injunction -- in order to allow the agencies to seek relief from judgment in the court issuing the injunction (here, Judge Dwyer). A threshold issue is whether we will seek to delay relief from the injunctions pending the 9th Circuit's ruling on the scope issue.

3. Sales enjoined for other reasons.

The court ruled that sales enjoined for violating environmental laws prior to enactment of Section 2001(k)(1) must be awarded and released under Section 2001(k)(1). **Three** sales were at issue: the GATORSON, TIP, and TIPTOP sales (all FS). The Forest Service has completed NEPA documentation for the TIP and TIPTOP sales and is prepared to release them in any event. We did not challenge award and release of these sales in this round of briefing. Again, Judge Hogan issued only a declaratory judgment as to these sales, and the purchasers are likely to seek a quick resolution as to these sales so they may be awarded.

4. Sales withdrawn by stipulation in legal proceedings.

The court ruled that sales that the Forest Service or BLM withdrew in the face of legal proceedings must be awarded and released under Section 2001(k)(1). These sales include **four** sales: the BOULDER KRAB, ELK FORK, FIRST and LAST sales (all FS). We did not challenge award and release of these sales. The court enjoined the Forest Service to immediately award, release and permit to be completed these sales. We will need to determine how this injunction squares with Judge Dwyer's expectations regarding the FIRST and LAST sales, which were challenged in his court and then withdrawn after Judge Dwyer enjoined similar sales for violating Section 318.

5. Sales on which high bidder is unwilling or unable to proceed.

The court rejected our argument that the agencies need not look past the high bidder in awarding and releasing sales. Thus, the court enjoined the agencies to immediately award, release and permit to be completed sales for which -- before or after enactment of Section 2001(k)(1) -- the high bidder either rejected the sale or was determined to be unqualified. The court did not require the agencies to award sales to unqualified bidders. However, the agencies must attempt to award these sales to other qualified bidders at the high bid price, in accordance with their regulations, where the high bidder is unqualified or rejects the sale. **Four** sales involving unqualified bidders were directly at issue: the HORN SALVAGE, EAGLE RIDGE HOUSELOG, ALLEN and PRONG SALVAGE sales (all FS). **Four** sales rejected by the high bidder were at issue: HIACK THIN (FS), HOLDAWAY II (FS),¹ OLALLA WILDCAT (BLM) and TWIN HORSE (BLM).

This part of the January 10 order covers additional sales that were not directly at issue and which the agencies must now award and release. The Forest Service has identified **eight** additional sales with high bidders unwilling or unable to proceed: the TOWER SALVAGE, CANTREL SPRINGS, FORKS, and OFF BROADWAY, JOHN LODGEPOLE, NELSON, HILTON, and JOHNSON SALVAGE sales. The BLM has identified **two** more such sales: the FROSTY JOHNSON and ROCKY GLADE sales.² The agencies are reviewing their records to determine if they have additional sales falling into this category of sales.

¹ There were actually two sales named HOLDAWAY II, and the one at issue before the court was a pre-Section 318 sale that would not have to go forward under the January 10 order. However, it is possible that the order does cover the other HOLDAWAY II sale.

² These sales have both been re-worked, and may fall into the "impossible" sales category which Judge Hogan ruled were not covered under Section 2001(k)(1).

6. Sales impossible to award on their original terms.

The court ruled that sales that are impossible to award on their original terms because their boundaries and individual trees were remarked do not fall under Section 2001(k)(1). **Three** such sales were directly at issue: the STAGECOACH, BUGOUT and BALD sales (all FS). The agencies will review their records to determine if any additional sales fall into this category.

1/16/96

LITIGATION UPDATE: RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan, J.) (industry challenge to Administration's interpretation of scope and known to be nesting provision of Resciissions Act) (consolidated with Scott Timber Co. v. Glickman and PAS v. Glickman). On January 10, 1996, Judge Hogan issued an order on the following issues:

- (1) Pre-Section 318 sales: The court ruled that Section 2001(k)(1) does not apply to timber sales offered prior to enactment of Section 318 on October 23, 1989. The MALT sale is the only sale for which release was sought before Judge Hogan, and the court denied Western Timber's motion to compel release of the sale. Presumably, our compliance reports no longer need to report on these sales.
- (2) Enjoined and Otherwise Withdrawn Sales: The court issued a declaratory judgment finding that Section 2001(k) applied to all offered sales, including those that were enjoined or cancelled. Thus, the order affects 11 sales that fall within the following categories: sales enjoined for Section 318 violations (**Cowboy, Nita, South Nita and Garden**); sales withdrawn by stipulation as a result of challenges under Section 318 (**First and Last**); sales withdrawn by stipulation for NEPA reasons (**Boulder Krab and Elk Fork**) and sales enjoined for violating other environmental laws (**Tip, Tiptop and Gatorson**). The Boulder Krab and Elk Fork sales were released prior to this Order. We are awaiting a decision as to the appropriate course of action for the remaining sales.
- (3) High Bidder Sales. As to the sales that the agencies had not released as a result of the high bidder rejecting the bid or failing to meet the requirements of a responsible bidder, the court enjoined the agencies to immediately award, release and permit to be completed these sales. The decision orders the release of 8 sales (**Horn, Eagle Ridge, Allen, Prong, Hiack Thin, Ollala Wildcat, Twin Horse and Holdaway II**) and the agencies are reviewing their records to determine if additional sales fall within this category.
- (4) Sales impossible to award on their original terms. The court ruled that sales that are impossible to award on their original terms because their boundaries and individual trees were remarked do not fall under Section 2001(k)(1). This affects the **Stagecoach, Bugout and Bald** sales.

There remains several outstanding issues:

- (1) "Known to be Nesting": We are still awaiting the district court's decision following the November 7, 1995 argument and preparing for a possible appeal.
- (2) Reporting Requirements: After an extension as a result of the furlough, the fifth progress report on FY 1991-1995 sales is due on January 19, 1996, and we must decide whether to include all sales that were going forward per ONRC decision. [A draft progress report is attached that includes a footnote referencing the Watchdog and Roughneck sales].
- (3) Motion to Contempt. Counsel for the purchasers of the First and Last Timber sales has transmitted a draft motion of contempt on the basis of failure to release these sales and has indicated an intent to file by tomorrow if no action is taken.

Pilchuck Audubon Society v. Glickman (D. Or., Hogan) (consolidated with NFRC v. Glickman) (challenge to temporal scope of section 2001(k) and to intention to go forward with withdrawn and cancelled sales under 2001(k)). By Order dated January 10, 1996, Judge Hogan dismissed plaintiffs' complaint. Plaintiffs have appealed this decision seeking expedited consideration and a motion for emergency stay pending appeal.

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) (Applicability of Section 2001(k) to enjoined timber sale). On November 22, the purchaser (Vaagen Bros) for the Gatorson timber sale filed a motion for an order releasing this sale. This sale was awarded in 1993 to the Vaagen Brothers, then subsequently challenged on various NEPA grounds by Smith, a recreational user. As the result of an opinion issued by the Ninth Circuit finding the environmental analysis insufficient on NEPA grounds, the Forest Service suspended this sale. On December 1 the court issued an order striking a hearing date pending a decision in the NFRC v. Glickman case and plaintiffs' response to Vaagen Bros' motion.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). This case is quiet now, given plaintiffs' agreement with the government's interpretation. If an adverse ruling issues from Judge Hogan, however, plaintiffs may renew their efforts before Judge Rothstein.

Native Americans for Enola v. USFS (D. Or.) (challenge to the Enola Hill Timber sale on the Mount Hood National Forest). Plaintiffs contend that 2001(k) sale violates an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and

treaty rights. A motion to dismiss was filed in November. Plaintiffs opposed and we filed a reply brief on January 11, 1996.

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale on the Forest). 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 matter is under advisement.**

Section 2001(b) Sales

Kentucky Heartwood v. USFS (E.D. Ky.) (challenge to Storm Salvage Project on Daniel Boone National Forest). On Monday, November 27, 1995, the court granted summary judgment on all claims to the federal defendants in this case, which represents the initial challenge to salvage timber sales under the Rescissions Act. 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."

Idaho Sporting Congress v. USFS (D. Id.) (Thunderbolt I) Plaintiffs challenge the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. This complaint alleges a violations of the Rescissions Act, the public trust doctrine and the APA. 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.

Idaho Conservation League v. USFS (D. Id.) (Thunderbolt II) Plaintiffs seek to permanently enjoin the Thunderbolt timber sale under the Rescissions Act. Thunderbolt was auctioned on November 9, and awarded to Boise Cascade on November 20, 1995. Plaintiffs have filed their motion for summary judgment, and our opposition and cross-motion for summary judgment was filed on Wednesday, November 22. On November 22, the court issued an order denying our motion to limit review to the administrative record and directing defendants to respond to discovery requests by November 28, 1995. On November 28, we filed a motion for reconsideration of the court's 11/22 order and attached the proposed discovery responses. A reply to plaintiffs' opposition was filed on December 1, 1995. On December 11, the court granted our motion for summary judgement, finding that the Forest Service did not proceed arbitrarily or capriciously in going forward with 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.

Kettle Range Conservation Group. v. USFS (E.D. Wash.) (challenge to timber sales on the Colville National Forest). Environmental groups have brought a NEPA challenge against three timber sales

in the Colville National Forest, one of which is a salvage sale in an area recently burned by wildfire. The other two sales are green sales adjacent to the fire-burned area. The salvage sale, Copper Butte, has been advertised twice, once before the enactment of the Rescissions Act and once after, with no bidders. The Forest Service has decided to advertise the Copper Butte sale again on December 20, which will start the 15-day limitations period for new challenges, which we certainly expect.

Inland Empire Public Lands Council v. Glickman (D. Mont.) (challenge to salvage logging on the Kootenai National Forest). The 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 in this case was the appropriate standard of review to apply to Rescissions Act cases. Plaintiffs contended that the standard of review under Section 2001(f)(4) was exactly the same as that applied under cases involving ESA/APA claims, but we had argued that, because the scope of review is quite limited under Section 2001, the standard must be more narrow than that applied in other types of cases.

Alabama Wilderness v. Yancy, (M. D. Ala.) Environmental plaintiffs challenge the constitutionality of the Timber Salvage Rider to the Rescissions Act, and, in the alternative, challenge the Forest Service's decision to proceed with 15 salvage timber sales ("the Hurricane Opal Timber Salvage Sales") located on the Conecuh National Forest in Alabama. Plaintiffs filed discovery requests and notices of depositions. The court, without defendants participation, granted plaintiffs expedited discovery requests. We have filed a motion for reconsideration and a protective order. Plaintiffs responded with a motion to compel. We intend to file a response today again arguing that discovery is inappropriate in a Rescissions Act challenge.

Southwest Center for Biological Diversity v. U.S. Forest Service, (D. Arizona) This is the newest challenge to salvage timber sales offered pursuant to the Emergency Timber Salvage Rider. 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 and also raise issues relating to the federally endangered Mexican Spotted Owl.

Section 2001(d) Sales

ONRC v. Thomas (D. Or., Hogan, J.) (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.

Other

Seattle Audubon Society v. Lyons (9th Cir.) (Appeal of Judge Dwyer's favorable December 1994 decision). Oral argument was held on December 4 in San Francisco. Our panel consisted of Goodwin, Pregerson, and Schroeder, the spotted owl panel. Following the argument, Sierra Club Legal Defense Fund sought permission of the court to brief the Rescissions Act question.

12/12/95

LITIGATION UPDATE: RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan, J.) (industry challenge to Administration's interpretation of scope and known to be nesting provision of Rescissions Act) (consolidated with Scott Timber Co. v. Glickman). This case now has five facets:

- (1) "Known to be Nesting": We are **still** awaiting the district court's decision following the November 7, 1995 argument and preparing for a possible appeal.
- (2) Reporting Requirements: A supplemental report for the BLM identifying 5 additional pre-FY 1991 sales was filed on November 22, 1995. Also filed on November 22 was a third compliance report describing the steps taken to award or release FY 1991-1995 sales. **The fifth progress report on FY 1991-1995 sales is due on December 20, 1995, and we must decide whether to include all sales that were going forward per ONRC decision.**
- (3) Enjoined and Otherwise Withdrawn Sales: Oral Argument is scheduled for December 12, 1995. On November 21, we filed our brief on the questions surrounding the eleven sales that were previously enjoined or made the subject of litigation. In its reply brief filed November 28, industry plaintiffs included allegations as to 10 new sales (8 Forest Service, 2 BLM) that have not been released under Section 2001(k). Industry attacks these sales on various grounds including the claim that sales must be awarded even if the high bidder is out of business or rejects the bid. On 12/1 we filed a motion seeking leave of court to file a response to NFRC's 11/28 reply, or in the alternative to strike issues relating to 10 new sales. (The subject of high bidders will also be addressed in response to the PI filed in PAS v. Glickman, discussed *infra*). **The hearing is scheduled to begin at 1:30 PST.**
- (4) Appeal of Geographic Scope Issue: Our opening brief was filed on Monday, November 13. Amicus Brief by members of Congress was also filed. NFRC's brief is due December 4th. Our reply is due on December 11. Oral argument is scheduled for Monday, January 8 in Portland. We will learn who our panel includes one week prior to the argument. **NFRC's brief was rejected by the Ninth Circuit for failing to follow the rules as to format and length of the brief. Therefore, our reply brief has not been filed yet. A motion by NFRC to cure the format problem is currently pending.**

- (5) Intervention Question: Western Timber Company filed a motion to intervene and a motion to clarify the September 13 and subsequent orders, claiming that the Malt timber sale, a non-section 318 pre-October 1989 sale, is required to be released. **Last week, Western Timber was granted intervention.**

Pilchuck Audubon Society v. Glickman (D. Or., Magistrate Judge Coffin) (challenge to temporal scope of section 2001(k) and to intention to go forward with withdrawn and cancelled sales under 2001(k)). The complaint was filed in this case on November 7, 1995. Consolidation is sought with NFRC v. Glickman. **Answers to plaintiffs' discovery requests were provided on December 11, 1995.**

On November 20, 1995 environmental plaintiffs filed a motion for preliminary injunction as to (1) all sales offered prior to October 23, 1989 and (2) timber sale contracts cancelled or withdrawn prior to July 27, 1995. The motion specifically names the Boulder Krab and Elk Fork timber sales -- two sales that were originally released under Section 318, but withdrawn due to subsequent NEPA challenges. Pursuant to the October 17, 1995 injunction, the Forest Service awarded these sales on November 3, 1995. A response to the PI is due December 5, 1995. The hearing is set before Judge Hogan on December 12, 1995. However, this case has not been consolidated with Glickman.

On December 4, plaintiffs filed a TRO as to the BOULDER KRAB timber sale. This sale has been awarded to Scott Timber, and plaintiffs believe that on-the-ground activities are scheduled to start December 5. **Judge Hogan denied the TRO, and will hear the preliminary injunction at 1:30 PST today.**

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) (Applicability of Section 2001(k) to enjoined timber sale). On November 22, the purchaser (Vaagen Bros) for the Gatorson timber sale filed a motion for an order releasing this sale. This sale was awarded in 1993 to the Vaagen Brothers, then subsequently challenged on various NEPA grounds by Smith, a recreational user. As the result of an opinion issued by the Ninth Circuit finding the environmental analysis insufficient on NEPA grounds, the Forest Service suspended this sale. This sale was identified in the Glickman litigation as within the geographic scope of Section 2001(k), but not subject to release due to previous court action. As part of representations made in Glickman, we provided notice to this court of the fact that Gatorson was subject to litigation and represented that we would inform the court of the ruling in Glickman.

Plaintiffs have requested a hearing on December 13, 1995, but the Court did not grant that request. Following a decision from Judge Hogan, we will be appearing before this Court.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). This case is quiet now, given plaintiffs' agreement with the government's interpretation. If an adverse ruling issues from Judge Hogan, however, plaintiffs may renew their efforts before Judge Rothstein.

Native Americans for Enola v. USFS (D. Or.) (challenge to the Enola Hill Timber sale on the Mount Hood National Forest). Plaintiffs contend that 2001(k) sale violates an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. We have filed a motion to dismiss the claim on November 13, and we are awaiting a response.

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale on the Forest). 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 case is submitted to Judge on November 20 without oral argument.

Section 2001(b) Sales

Kentucky Heartwood v. USFS (E.D. Ky.) (challenge to Storm Salvage Project on Daniel Boone National Forest). On Monday, November 27, 1995, the court granted summary judgment on all claims to the federal defendants in this case, which represents the initial challenge to salvage timber sales under the Rescissions Act. 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."

Idaho Sporting Congress v. USFS (D. Id.) (Thunderbolt I) Plaintiffs challenge the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. This complaint does not allege a violation of the Rescissions Act or any substantive environmental or land planning statute. Instead, plaintiffs claim there has been a violation of the "public trust" and the APA. However, because it is a challenge to a salvage sale, all the provisions of 2001(f) apply. **Briefing is going forward to be completed by December 22.**

Idaho Conservation League v. USFS (D. Id.) (Thunderbolt II) Plaintiffs seek to permanently enjoin the Thunderbolt timber sale under the Rescissions Act. Thunderbolt was auctioned on November 9, and awarded to Boise Cascade on November 20, 1995. Plaintiffs have filed their motion for summary judgment, and our opposition and cross-motion for summary judgment was filed on Wednesday, November 22. On November 22, the court issued an order denying our motion to limit review to the administrative record and directing defendants to respond to discovery requests by November 28, 1995. On November 28, we filed a motion for reconsideration of the court's 11/22 order and attached the proposed discovery responses. A reply to plaintiffs' opposition was filed on December 1, 1995. On December 11, the court granted our motion for summary judgement, finding that the Forest Service did not proceed arbitrarily or capriciously in going forward with 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. [Copies of this decision are here.]

Kettle Range Conservation Group v. USFS (E.D. Wash.) (challenge to timber sales on the Colville National Forest). Plaintiffs maintain that the Forest Service violated NEPA by failing to analyze cumulative impacts associated with the 1994 Copper Butte fire. This sale was advertised once prior to the enactment date of 2001(b) and once after that date. There have been no bidders,

but the Forest Service is considering a readvertisement with changes. We have filed our Answer with the Court on Monday, November 13, and raised jurisdiction as an affirmative defense. **A new initial advertisement will occur shortly.**

Inland Empire Public Lands Council v. Glickman (D. Mont.) (challenge to salvage logging on the Kootenai National Forest). Plaintiffs, represented by Sierra Club Legal Defense Fund, filed this action on November 8, challenging two fire salvage sales, the North Fork and South Fork Yaak. Plaintiffs maintain that these sales will harm the threatened Cabinet/Yaak Ecosystem grizzly bear population. Plaintiffs have noticed the depositions of F&WS officials, and we filed a motion for a protective order on Monday, November 20 to disallow these depositions and other discovery. On November 30, the Court granted our motion.

The court has ordered an expedited briefing schedule with plaintiffs' opening brief due on December 4; our brief was filed December 8, and the reply brief is scheduled to be filed on December 11. A hearing is set for December 14. In plaintiffs' brief, they raise the question of actions inconsistent with the MOA.

Section 2001(d) Sales

ONRC v. Thomas (D. Or., Hogan, J.) (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.**

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12/5/95

LITIGATION UPDATE: RESCISSIONS ACT CASES

Section 2001(k) Cases

NFRC v. Glickman (D. Or., Hogan, J.) (industry challenge to Administration's interpretation of scope and known to be nesting provision of Resciissions Act) (consolidated with Scott Timber Co. v. Glickman). This case now has five facets:

- (1) "Known to be Nesting": We are still awaiting the district court's decision following the November 7, 1995 argument and preparing for a possible appeal.
- (2) Reporting Requirements: A supplemental report for the BLM identifying 5 additional pre-FY 1991 sales was filed on November 22, 1995. Also filed on November 22 was a third compliance report describing the steps taken to award or release FY 1991-1995 sales. **The fourth progress report on FY 1991-1995 sales is due on December 6, 1995.**
- (3) Enjoined and Otherwise Withdrawn Sales: Oral Argument is schedule for December 12, 1995. On November 21, we filed our brief on the questions surrounding the eleven sales that were previously enjoined or made the subject of litigation. In its reply brief filed November 28, industry plaintiffs included allegations as to 10 new sales (8 Forest Service, 2 BLM) that have not been released under Section 2001(k). Industry attacks these sales on various grounds including the claim that sales must be awarded even if the high bidder is out of business or rejects the bid. On 12/1 we filed a motion seeking leave of court of file a response to NFRC's 11/28 reply, or in the alternative to strike issues relating to 10 new sales. (The subject of high bidders will also be addressed in response to the PI filed in PAS v. Glickman, discussed *infra*).
- (4) Appeal of Geographic Scope Issue: Our opening brief was filed on Monday, November 13. Amicus Brief by members of Congress was also filed. NFRC's brief is due December 4th. Our reply is due on December 11. Oral argument is scheduled for Monday, January 8 in Portland. We will learn who our panel includes one week prior to the argument.
- (5) Intervention Question: Western Timber Company filed a motion to intervene and a motion to clarify the September 13 and subsequent orders, claiming that the Malt timber sale, a non-section 318 pre-October 1989 sale, is required to be released. We have taken no position as to intervention, but have opposed the motion to clarify as not properly before

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the court unless and until the court grants intervention. However, it appears that at the December 12th hearing, Judge Hogan will address both the motion for intervention and the underlying motion to clarify.

Pilchuck Audubon Society v. Glickman (D. Or., Magistrate Judge Coffin) (challenge to temporal scope of section 2001(k) and to intention to go forward with withdrawn and cancelled sales under 2001(k)). The complaint was filed in this case on November 7, 1995. Consolidation is sought with NFRC v. Glickman. **Answers to plaintiffs' discovery requests are due on December 11, 1995.**

On November 20, 1995 environmental plaintiffs filed a motion for preliminary injunction as to (1) all sales offered prior to October 23, 1989 and (2) timber sale contracts cancelled or withdrawn prior to July 27, 1995. The motion specifically names the Boulder Krab and Elk Fork timber sales -- two sales that were originally released under Section 318, but withdrawn due to subsequent NEPA challenges. Pursuant to the October 17, 1995 injunction, the Forest Service awarded these sales on November 3, 1995. A response to the PI is due December 5, 1995. The hearing is set before Judge Hogan on December 12, 1995. However, this case has not been consolidated with Glickman.

On December 4, plaintiffs filed a TRO as to the BOULDER KRAB timber sale. This sale has been awarded to Scott Timber, and plaintiffs believe that on-the-ground activities are scheduled to start December 5. Judge Hogan set a schedule for the TRO, making all briefs due on Tuesday, December 5, and setting the hearing for Wednesday, December 6. The court also required the environmental plaintiffs to post a surety bond.

Smith v. U.S. Forest Service, (E.D. Wash. - Judge Quackenbush) (Applicability of Section 2001(k) to enjoined timber sale). On November 22, the purchaser (Vaagen Bros) for the Gatorson timber sale filed a motion for an order releasing this sale. This sale was awarded in 1993 to the Vaagen Brothers, then subsequently challenged on various NEPA grounds by Smith, a recreational user. As the result of an opinion issued by the Ninth Circuit finding the environmental analysis insufficient on NEPA grounds, the Forest Service suspended this sale. This sale was identified in the Glickman litigation as within the geographic scope of Section 2001(k), but not subject to release due to previous court action. As part of representations made in Glickman, we provided notice to this court of the fact that Gatorson was subject to litigation and represented that we would inform the court of the ruling in Glickman.

Plaintiffs have requested a hearing on December 13, 1995. However, this may not allow sufficient time for the Glickman court to issue a ruling. Thus, we are seeking a continuance of the hearing date. A response was filed with the court on 12/4. Reply briefs are due on 12/11.

Pilchuck Audubon Society v. Glickman (W.D. Wash., Rothstein, J.) (challenge to government's earlier interpretation of "known to be nesting"). This case is quiet now, given plaintiffs' agreement with the government's interpretation. If an adverse ruling issues from Judge Hogan, however, plaintiffs may renew their efforts before Judge Rothstein.

Native Americans for Enola v. USFS (D. Or.) (challenge to the Enola Hill Timber sale on the Mount Hood National Forest). Plaintiffs contend that 2001(k) sale violates an earlier court order, American Indian Religious Freedom Act, Archeological Resources Protection Act, National Historic Preservation Act, and treaty rights. We have filed a motion to dismiss the claim on November 13, and we are awaiting a response.

Oakhurst v. USFS (D. Or.) (challenge to the Sugarloaf Timber Sale on the Forest). 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 case is submitted to Judge on November 20 without oral argument.

Section 2001(b) Sales

Kentucky Heartwood v. USFS (E.D. Ky.) (challenge to Storm Salvage Project on Daniel Boone National Forest). On Monday, November 27, 1995, the court granted summary judgment on all claims to the federal defendants in this case, which represents the initial challenge to salvage timber sales under the Rescissions Act. 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."

Idaho Sporting Congress v. USFS (D. Id.) (Thunderbolt I) Plaintiffs challenge the Thunderbolt Wildfire Recovery Project, three other salvage projects, and all other salvage logging operations on the Boise and Payette National Forests. This complaint does not allege a violation of the Rescissions Act or any substantive environmental or land planning statute. Instead, plaintiffs claim there has been a violation of the "public trust" and the APA. However, because it is a challenge to a salvage sale, all the provisions of 2001(f) apply. **Plaintiffs filed a motion for summary judgment on November 30, 1995. Among their arguments, plaintiffs maintain that it was arbitrary and capricious for the Forest Service to act in contradiction of the Interagency Memorandum of Agreement.**

Next week we will file a brief opposing the motion for summary judgment and seeking to dismiss in part for failure to state a claim and ripeness as to certain sales that have yet to be advertised. [Discussion: Initial Advertisement]

Idaho Conservation League v. USFS (D. Id.) (Thunderbolt II) Plaintiffs seek to permanently enjoin the Thunderbolt timber sale under the Rescissions Act. Thunderbolt was auctioned on November 9, and awarded to Boise Cascade on November 20, 1995. Plaintiffs have filed their motion for summary judgment, and our opposition and cross-motion for summary judgment was filed on Wednesday, November 22. On November 22, the court issued an order denying our motion to limit review to the administrative record and directing defendants to respond to discovery requests by November 28, 1995. On November 28, we filed a motion for reconsideration of the court's 11/22 order and attach the proposed discovery responses. A reply to plaintiffs' opposition was filed on December 1, 1995. Oral argument was held on December 1. **The court asked some tough questions, including specific ones about salmon issues. Nonetheless, the argument went well for the federal defendants, and we await a decision by the court.**

Kettle Range Conservation Group. v. USFS (E.D. Wash.) (challenge to timber sales on the Colville National Forest). Plaintiffs

maintain that the Forest Service violated NEPA by failing to analyze cumulative impacts associated with the 1994 Copper Butte fire. This sale was advertised once prior to the enactment date of 2001(b) and once after that date. There have been no bidders, but the Forest Service is considering a readvertisement with changes. We have filed our Answer with the Court on Monday, November 13, and raised jurisdiction as an affirmative defense.

Inland Empire Public Lands Council v. Glickman (D. Mont.)
(challenge to salvage logging on the Kootenai National Forest). Plaintiffs, represented by Sierra Club Legal Defense Fund, filed this action on November 8, challenging two fire salvage sales, the North Fork and South Fork Yaak. Plaintiffs maintain that these sales will harm the threatened Cabinet/Yaak Ecosystem grizzly bear population. Plaintiffs have noticed the depositions of F&WS officials, and we filed a motion for a protective order on Monday, November 20 to disallow these depositions and other discovery. On November 30, the Court granted our motion.

The court has ordered an expedited briefing schedule with plaintiffs' opening brief due on December 4; our brief is due December 8, and the reply brief is scheduled to be filed on December 11. A hearing is set for December 14. In plaintiffs' brief, they raise the question of actions inconsistent with the MOA. [Decision: not proceeding even after 45 days.]

Section 2001(d) Sales

ONRC v. Thomas (D. Or., Hogan, J.) (challenge to four timber sales -- two under subsection (d) and two not under the Rescissions Act -- on the Umpqua National Forest). Oral argument was held on Tuesday, November 28 before Judge Hogan. At the hearing, Judge Hogan indicated that he would issue a written opinion. Judge Hogan was not particularly amenable to the environmentalists' arguments. Before the court is (1) our motion for summary judgment and plaintiffs' cross motions for summary judgment, (2) defendants' motion to strike extra-record documents, (3) plaintiffs' motion to enforce automatic stay under 2001(f)(2) and (4) plaintiffs' motion to clarify minute order relating to Douglas Timber Co's intervention.

Other

Seattle Audubon Society v. Lyons (9th Cir.) (Appeal of Judge Dwyer's favorable December 1994 decision). Oral argument was held on December 4 in San Francisco. Our panel consisted of Goodwin, Pregerson, and Schroeder, the spotted owl panel. Following the argument, Sierra Club Legal Defense Fund sought permission of the court to brief the Rescissions Act question.

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RE: Legal Implications of Using Option 9 green timber as
replacement timber pursuant to subsection 2001(k) and
for other purposes.

Executive Summary

This memorandum is provided to answer three questions: (1) whether regular green timber sales developed under the President's Forest Plan (the "Forest Plan") can be used as a source of replacement timber under subsection 2001(k) of the Rescissions Act; (2) whether such Forest Plan timber sales can be used in exchange for Section 318 timber already released or some of the additional timber sales released by Judge Hogan's injunction, and; (3) whether the Administration can or should announce that the annual timber volume projection for the Forest Plan will be reduced by an amount related to the volume released by subsection 2001(k).

The Rescissions Act contains two distinct provisions ordering the release of timber sales primarily in old growth forests in Washington and Oregon. First, subsection 2001(k) of the Rescissions Act requires the Administration to release timber contracts offered before the date of enactment of the Rescissions

Act in "any unit of the National Forest System or district of the Bureau of Land Management subject to section 318...." The only exception is for sale units where threatened or endangered birds are "known to be nesting." § 2001(k)(2). If sales are withheld, they must be replaced with an equal volume of "like kind and value" timber. § 2001(k)(3). Second, the Rescissions Act requires the Administration to expedite timber sales in the area covered by the Forest Plan, and waives environmental laws to allow these sales to be expedited. § 2001(d).

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. Of course, any exchange of already-released timber sales for timber sales developed under the Forest Plan would have to be mutually voluntary.

With regard to whether the Administration can or should announce that the timber projected for sale under the Forest Plan will be reduced by an amount related to the volume released by subsection 2001(k), we conclude that such an announcement would probably conflict with the Rescissions Act and further undermine our defense of the Forest Plan. No such modification of the Forest Plan is allowed at this time because the Rescissions Act does not permit any revisions or other administrative action "in or for any land management plan," including the President's Forest Plan, "because of implementation or impacts, site-specific or cumulative, of" timber sales authorized or required by the Act. § 2001(l). Moreover, an announcement regarding the impact of the Rescissions Act on the Forest Plan will further support claims that the Forest Plan must be revised to account for changed circumstances.

Analysis

Paragraph (1) of subsection 2001(k) requires the Forest Service and Bureau of Land Management to release certain timber contracts offered or awarded prior to the date of enactment, July 27, 1995. Under Judge Hogan's September 13 ruling, this release requirement includes timber contracts offered throughout Washington and Oregon. Paragraph 2001(k) (2) requires the Forest Service and the Bureau of Land Management to withhold from release those timber sale units that have threatened or endangered birds "known to be nesting within the acreage that is the subject of the sale unit." The Forest Service has withheld 55 timber sales, of approximately 228 million board feet (MMBF) of timber, and the BLM has withheld 14 timber sales, of approximately 20 MMBF, pursuant to paragraph 2001(k) (2). For each withheld timber sale, the Rescissions Act requires the agencies to "provide 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." § 2001(k) (3).

As we understand them, three questions have been raised regarding using President's Forest Plan timber as a source of replacement timber required by subsection 2001(k) or for other purposes: (1) whether regular green timber sales developed under the President's Forest Plan can be used as a source of equivalent timber under subsection 2001(k); (2) whether such Forest Plan timber sales can be used in exchange for Section 318 timber already released or some of the additional timber sales released by Judge Hogan's injunction, and; (3) whether the Administration can or should announce that the annual timber volume projection for the Forest Plan will be reduced by an amount related to the volume released by subsection 2001(k).

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 for harvest under the President's Forest Plan are 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 "like kind and value" timber available under the Forest Plan may be negligible.

Based on the following analysis, we conclude that:

(1) 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;

(2) 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.¹

(3) a reduction of Forest Plan timber volume to account for the release of subsection 2001(k) timber would probably be inconsistent with subsection 2001(l), congressional intent, and would further expose the Forest Plan to attacks on its continuing validity.

Questions 1 and 2 -- The Use of Forest Plan Timber as Replacement Timber Under subsection 2001(k).

1. The Rescissions Act.

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 subsection 2001(k), subject to 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).

¹ Only 4 of the BLM timber sale contracts covered by Judge Hogan's September 13 ruling on the scope of 2001(k) have been withheld under 2001(k) (2), and none of the affected Forest Service timber contracts have been so withheld. This brings the total to 55 timber sale contracts, of 228 million board feet, withheld under our interpretation of the provision for "known to be nesting" birds in 2001(k) (2). Any released timber sale contracts would be replaced at the election of the contract holder, as we have no authority to force their return.

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) and that subsection 2001(d) provides a vehicle for replacement timber sales under paragraph 2001(k) (3). 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.² 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) arguably falls within the scope 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.

Subsection 2001(k)'s provision that replacement timber contracts "shall not count against current allowable sale

² 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.

quantity" (ASQ) does not clearly prohibit the "double counting" of replacement timber as timber offered 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 24.³ It is logical to construe subsection 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 considering the replacement timber under the President's Forest Plan. Because ASQ has a specific and well-known meaning, the better argument would accord with the Forest Service definition of ASQ. 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 this provision is to supply timber on the open market, and use of the term "offer" would ordinarily implicate a competitive bidding process. Using subsection 2001(d) authority to "prepare, offer, and award" timber sale contracts 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).

³ 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.

Legislative History

Counting replacement timber under subsection 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).

3. Post-enactment Litigation

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 protected under the Forest Plan.

We can expect that industry will use a 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 paragraph 2001(k) (3)'s mandate of replacement timber will be used to force the waiver of the Forest Plan's standards and guidelines.

Finally, as noted in footnote 1, 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. Units of four BLM timber sales within the scope of this Order have been withheld under the "known to be nesting" provision. While a few timber sales are currently within the scope of conflicting injunctions in prior cases, other sales timber sale contracts within the scope of this Order are released. Any released timber sales would have to be replaced at the election of the contract holder, as we have no authority to force their return.

Question 3 -- Whether the Administration Can or Should Reduce the Annual Timber Volume Projection for the Forest Plan by an Amount Related to the Volume Released by Subsection 2001(k).

Any declaration of a reduction of Forest Plan timber volume to account for the release of subsection 2001(k) timber would

likely be inconsistent with subsection 2001(l), congressional intent to "achieve an annual harvest level of 1.1 billion board feet" through subsection 2001(d), and would probably further expose the Forest Plan to attacks on its continuing validity. While it is illogical to not account for the landscape changes caused by the release of a large quantity of poorly or critically configured timber harvests, that is the intent of subsection 2001(l). Subsection 2001(l) does not permit any revisions or other administrative action "in or for any land management plan," including the President's Forest Plan, "because of implementation or impacts, site-specific or cumulative, of activities authorized or required" by subsections 2001(d) or (k). Language negotiated by the Administration allows for revisions or other administrative action to the extent necessary "to reflect the effects of the salvage program." Senator Gorton explained, in the only post-negotiation legislative history, that this language "allows for modifications under extremely limited circumstances . . . to reflect the particular effect of the salvage sale program." 141 Cong. Rec. S 10464 (July 21, 1995). It would be difficult to argue that this language allows revision of the Forest Plan to account for unanticipated effects of the release of Section 318 and other timber sales.

Secondly, we invite challenge to the continuing validity of the Forest Plan by announcing that changes to the Forest Plan's green timber sale program are necessary to account for the release of the subsection 2001(k) timber contracts throughout Oregon and Washington. Such an announcement would emphasize existing questions regarding the impact of those subsection 2001(k) timber sales already released and the implications of that impact for the management strategy of the Forest Plan. The likely result would be a new lawsuit for supplementation of the Forest Plan and its environmental impact statement. Judge Dwyer has already questioned the impact of these timber sales on the Forest Plan. (This point will likely be moot if our interpretation of paragraph 2001(k)(2) is struck down, and the 55 "known to be nesting" timber sales are released.)

Supplementation is required when there is "significant new circumstances or information relevant to environmental concerns or bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c)(1)(ii); Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1858 (1989). While the timber sales released under Judge Hogan's ruling posed irreparable harm to salmon, their impact on the Forest Plan is at least debatable. The pending question of the scope of authority to protect the nesting sites of endangered and threatened birds is generally regarded as more critical. If the government announces that we will reduce the Forest Plan output to account for replacement timber impacts, we admit that replacement timber has an impact that is significant for the Forest Plan as a whole.

Litigation could be forestalled for a year or so on grounds that subsection 2001(1) states "[c]ompliance with [] Section [2001] shall not require or permit any administrative action, including revisions, amendment, consultation, supplementation, or other action, in or for any land management plan, standard, guideline, policy, regional guide, or multiforest plan..." However, subsection 2001(1) may be construed to still allow a wide variety of challenges to agency actions that are related to, or affected by, the environmental impact of timber sales, and could even allow timber sales to be enjoined. For example, subsection 2001(1) could allow challenges to all ongoing land management activities, including timber sales, through a claim that land management plans have not been updated to comply with new information regarding the status of threatened or endangered species under the Endangered Species Act. Thomas v. Pacific Rivers Council, 30 F.3d 1050 (9th Cir. 1994).



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ELENA-

TED BOLING SENT YOU THE REDRAFT BEFORE I HAD A CHANCE TO SEE IT. I'M NOT SURE HE FULLY APPRECIATES THE SCOPE OF THE PROPOSAL, SINCE HE WAS NOT AT ANY OF THE MEETINGS AT OEOB. ATTACHED IS MY REDRAFT WITH CHANGES INDICATED IN BOLD. IS MY DESCRIPTION OF THE PROPOSAL ACCURATE??

PETER

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November 6, 1995

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Lisa Holden
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RE: Legal Implications of Using Option 9 green timber as
replacement timber pursuant to 2001(k)(3) **and for other
purposes.**

Section 2001(k)(1) of Public Law 104-19 requires the Forest Service and Bureau of Land Management to release certain timber contracts offered or awarded prior to July 27, 1995. Under Judge Hogan's October 13 ruling, this release requirement includes timber contracts offered throughout Washington and Oregon. Section 2001(k)(2) requires the Forest Service and the Bureau of Land Management to withhold from release those timber sale units that have threatened or endangered birds "known to be nesting within the acreage that is the subject of the sale unit." The Forest Service has withheld 55 timber sales, of approximately 228 million board feet (MMBF) of timber, and the BLM has withheld 14 timber sales, of approximately 20 MMBF, pursuant to 2001(k)(2). For each withheld timber sale, the Rescissions Act requires the agencies to "provide 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." Section 2001(k)(3).

As we understand them, three questions have been raised regarding using President's Forest Plan timber as [the] a source

of [the] replacement timber required by 2001(k) (3) **or for other purposes:** (1) whether regular green timber sales developed under the President's Forest Plan can be used as a source of equivalent timber under 2001(k) (3); (2) whether such Forest Plan timber sales can be used in exchange for **section 318 timber already released** or some of the additional timber sales released by Judge Hogan's injunction, and; (3) whether the Administration can or should announce that the annual timber volume projection for the Forest Plan will be reduced by an amount related to the volume released by Section 2001(k). 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 Option 9 timber as replacement timber under 2001(k) (3).**

Based on the following analysis, we conclude that:

Just my in general - Caspash - 1 copy - by hist

(1) **while** [I]it may be possible to make an argument, based on the statutory language alone, that Section 2001 allows the use of Forest Plan timber as equivalent volume (for the Section 318 timber sales,) [but] this position would be inconsistent with congressional intent as expressed in legislative history;

what meant to include? - more specific

too strong

(2) any argument for the [use] **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.** [the few additional timber sales within the scope of Judge Hogan's injunction and 2001(k) (2),¹]

(3) a reduction of Forest Plan timber volume to account for the release of Section 2001(k) timber would [possibly] **probably** be inconsistent with Section 2001(l), congressional intent, and would expose the Forest Plan to attacks on its continuing validity.

Questions 1 and 2 -- The Use of Forest Plan Timber as Replacement Timber Under Paragraph 2001(k) (3) *in for other purposes*

1. The Rescissions Act.

The Rescissions Act does not indicate any relationship between two distinct provisions for the expeditious release of

¹ Only 4 of the BLM timber sale contracts covered by Judge Hogan's ruling can be withheld under 2001(k) (2), and none of the affected Forest Service timber contracts have been withheld under 2001(k) (2). Any other ~~sales~~ timber sale contracts would be replaced at the election of the contract holder, as we have no authority to force their return.

timber -- Section 2001(k) for the release of previously offered timber sale contracts and Section 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). Section 2001(k) (3) requires the Secretaries to provide replacement timber if a sale cannot be released and completed under 2001(k), subject to 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." Section 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. Section 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 2001(k) (3).

Consistent with our position in Northwest Forest Resource Council (NFERC) v. Glickman & Babbitt, we could argue that green timber sales developed under the President's Forest Plan can be used as replacement timber and that Section 2001(d) provides a vehicle for replacement timber sales (under 2001(k) (3)). The scope of Section 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). In NFERC we argued that Section 2001(k) is limited to the remaining timber sales offered under Section 318 of the 1990 Interior Appropriations Act, which applied ecological standards to National Forests and BLM lands within the range of the northern spotted owl. Section 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.² Because the scope of 2001(d) is defined by, and encompasses, the range of the threatened and endangered bird species that 2001(k) (2) is designed to protect, the replacement timber mandated by 2001(k) (3) arguably falls within the scope of 2001(d). Under Judge Hogan's interpretation of 2001(k) as applicable to all of Oregon and Washington this argument is

Might be so even if wrong in that case, no?

² 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.

weaker because the two provisions overlap, but are not congruent. However, the argument is still available because the species of concern, the marbled murrelet and the northern spotted owl, nest within the forests affected by either interpretation.

*I don't
come to
conclude
indistinctly
this argument*

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.

Section 2001(k) (3)'s provision that replacement timber contracts "shall not count against current allowable sale quantity" (ASQ) does not clearly prohibit the "double counting" of replacement timber as timber offered 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 24.³ It is logical to construe 2001(k) (3)'s

³ 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

(continued...)

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) (3) 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 considering the replacement timber under the President's Forest Plan. Because ASQ has a specific and well-known meaning, the better argument is for an interpretation limited to that meaning.

what meaning?

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 would challenge us by arguing that [T]he clear intent of this provision is to supply timber on the open market, and use of the term "offer" would ordinarily implicate a competitive bidding process. Using this authority to "prepare, offer, and award" timber sale contracts to those purchasers that the Secretary is obligated to "provide" replacement timber under 2001(k) (3) is inconsistent with the intent of 2001(d).**

Too strong - about is this land on.

Legislative History

Counting replacement timber under 2001(k) as Option 9 timber would appear to be [is] inconsistent with the legislative [drafters'] intent to expedite timber sales under both section 2001(d) and 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 2001(d) by reference to the current PSQ of the Forest Plan:

Too strong - just an arg. - no clear intent as to this. This is only the most part of starting intent.

The Committee has also included bill language to provide the Forest Service and the Bureau of Land Management the authority to expedite timber sales allowed under the President's forest plan The Committee is concerned that the administration has not taken the efforts necessary to fulfill the commitment it made to the people of the region to achieve an annual harvest level of 1.1 billion board feet and has

³(...continued)

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.

included bill language to assist the administration in this effort.

S. Rep. 104-17 at 123. There is no indication of a linkage between 2001(d) and 2001(k) (3), or any explanation of the standards applicable to replacement timber.

That's for us!

In debate, Senator Gorton, the author of these provisions, made numerous references to the Forest Plan's 1.1 billion board feet of timber in describing the intent behind 2001(d). He argued that 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). While 2001(d) requires that these Forest Plan be expedited, Senator Gorton stated that 2001(d) "simply says the President can keep the promises he made . . . under option 9 and not be subject to constant harassing lawsuits." Id. He made clear that 2001(d) "does not require him to get to the 1.1 billion board feet of harvest that he promised . . ." Id. Similarly, Senator Hatfield emphasized that 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.

reference?

While there is some discussion of 2001(k) in the legislative history, there is no thought given to the law applicable to replacement timber sales under 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.

so no clear specific intent!

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). The Conference Report states:

reference?

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, 141 Cong. Rec. H 3049.

I don't get how any of this is relevant, let alone harmful to our position. (That this is all used) possible

3. Post-enactment Litigation

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 2001(k). In it, they state that compliance with subsection 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)." As if to acknowledge the paucity of legislative history on this point, the letter states that if the agencies "were confused on this point, they should have raised it in our deliberations." 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.

I don't see how any of this is particularly relevant to them.

Given this statement, we can expect that industry will use any opportunity 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 2001(k)(2) as actually protecting the nesting sites of threatened and endangered birds, we can expect that 2001(k)(3)'s mandate of replacement timber will be used to force the waiver of the Forest Plan's standards and guidelines.

And any lawsuit should not be using this at all.

Finally, as noted in footnote 1, 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. Approximately 4 sales have been withheld under the "known to be nesting" provision. While a few timber sales are currently within the scope of conflicting injunctions, other sales timber sale contracts within the scope of this order are released. Any released timber sales would have to be replaced at the election of the contract holder, as we have no authority to force their return.

Question 3 -- Whether the Administration Can or Should Reduce the Annual Timber Volume Projection for the Forest Plan by an Amount Related to the Volume Released by Section 2001(k).

Any declaration of a reduction of Forest Plan timber volume to account for the release of Section 2001(k) timber would likely be inconsistent with Section 2001(l), congressional intent to "achieve an annual harvest level of 1.1 billion board feet" through 2001(d), and would probably expose the Forest Plan to

Why this? Still same total, no?

Jan

attacks on its continuing validity. While it is illogical to not account for the landscape changes caused by the release of a large quantity of poorly or critically configured timber harvests, that is the intent of Section 2001(l). Section 2001(l) does not permit any revisions or other administrative action "in or for any land management plan," including the President's Forest Plan, "because of implementation or impacts, site-specific or cumulative, of activities authorized or required" by 2001(d) or (k). Language negotiated by the Administration allows for revisions or other administrative action to the extent necessary "to reflect the effects of the salvage program." Senator Gorton explained, in the only post-negotiation legislative history, that this language "allows for modifications under extremely limited circumstances . . . to reflect the particular effect of the salvage sale program." 141 Cong. Rec. S 10464 (July 21, 1995). It would be difficult to argue that this language allows revision of the Forest Plan to account for unanticipated effects of the release of Section 318 and other timber sales.

} ✓
✓

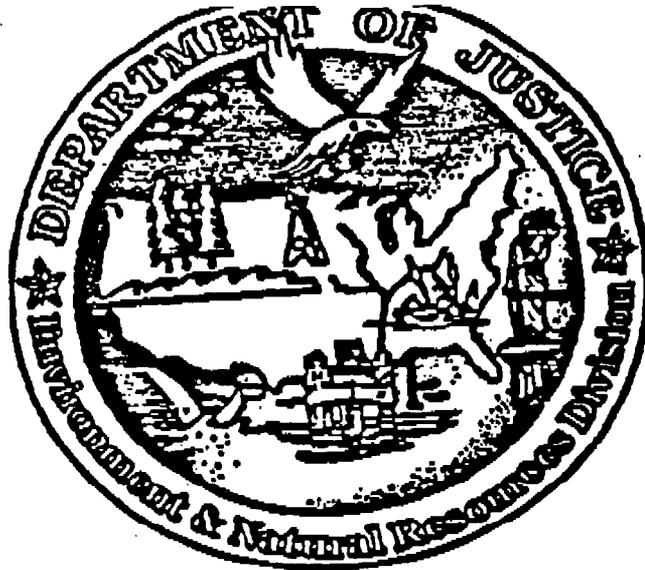
Secondly, we invite challenge to the continuing validity of the Forest Plan by announcing that changes to the Forest Plan's green timber sale program are necessary to account for the release of the Section 2001(k) timber contracts throughout Oregon and Washington. Such an announcement would emphasize existing questions regarding the impact of those 2001(k) timber sales already released and the implications of that impact for the management strategy of the Forest Plan. The likely result would be a new lawsuit for supplementation of the Forest Plan and its environmental impact statement.

Supplementation is required when there is "significant new circumstances or information relevant to environmental concerns or bearing on the proposed action or its impact." 40 C.F.R. § 1502.9(c)(1)(ii); Marsh v. Oregon Natural Resources Council, 109 S.Ct. 1851, 1858 (1989). While the timber sales released under Judge Hogan's ruling posed irreparable harm to salmon, their impact on the Forest Plan is at least debatable. The pending question of the scope of authority to protect the nesting sites of endangered and threatened birds is generally regarded as more critical. If the government announces that we will reduce the Forest Plan output to account for replacement timber impacts, we admit that replacement timber has an impact that is significant for the Forest Plan as a whole.

Litigation could be forestalled for a year or so on grounds that 2001(l) states "[c]ompliance with [] Section [2001] shall not require or permit any administrative action, including revisions, amendment, consultation, supplementation, or other action, in or for any land management plan, standard, guideline, policy, regional guide, of multiforest plan.." However, Section 2001(l) may be construed to still allow a wide variety of challenges to agency actions that are related to, or affected by, the environmental impact of timber sales, and could even allow timber sales to be enjoined. For example, Section 2001(l) could allow challenges to all ongoing land management activities,

What is he talking about here?

including timber sales, through a claim that land management plans have not been updated to comply with new information regarding the status of threatened or endangered species under the Endangered Species Act. Thomas v. Pacific Rivers Council, 30 F.3d 1050 (9th Cir. 1994).



U. S. DEPARTMENT OF JUSTICE
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GENERAL LITIGATION SECTION

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TO: Elena Kagan FAX #: 456-1647

FROM: Ellen Athao NO. OF PAGES INCLUDING COVER 3

MESSAGE: Attached is instruction memo.



U.S. Department of Justice

Environment and Natural Resources Division

WMC/EMAthas

General Litigation Section

Washington, D.C. 20530

November 7, 1995

MEMORANDUM

TO: Mike Gippert
Jay McWhirter
Tim Obst

Kris Clark
Karen Mouritsen

FR: Ellen Athas
Michelle Gilbert
John Watts

RE: Information For Reports to Judge Hogan

On October 17, Judge Hogan issued an Order, setting forth certain reporting requirements. First, the Court wanted to be informed in writing of the existence of any timber sale contract offered or awarded prior to fiscal year 1991, which is covered by the order of this court dated September 13, 1995. Second, the Court ordered the submission of bi-weekly "progress reports" beginning October 25, 1995, describing the action taken to award and release each of the sales offered or awarded between October 1, 1990 and July 27, 1995, that are covered by the court's September 13 Order.

First Category of Reports. At the October 17 hearing, the Court gave all counsel an opportunity to comment on the proposed order. We specifically stated that the first order went beyond the scope of the just-entered injunction. The Court indicated that he knew that, but wanted to clarify whether or not there were any sales. We explained to the judge that the request was also greatly open-ended. We asked whether, in fact, this covered sales in the early 1980's or even in the 1800's. The judge then stated that he wanted a "reasonable search" conducted. Finally, we simply requested more than the one week that the Court proposed. Judge Hogan granted an additional week.

This report was due to the Court on November 1. The Bureau of Land Management reviewed computer records back to 1986 and determined that four sales fell into that category. These sales were set forth in a declaration of William Bradley.

The Forest Service also prepared a declaration concerning the two new sales that fell into this category. However, at the time the report was being filed, mention was also made of other sales, some of which had been previously offered under section 318 and some of which were offered earlier in the 1980's. This led us to indicate to the Court that the Forest Service would be filing a supplemental report on or before November 15, 1995, outlining these additional sales.

Given the attention being placed on these reports, we would like to ask both the BLM and the Forest Service to prepare supplemental declarations. These declarations should explain that a search of the pre-October 1, 1990 offered or awarded sales has been conducted. The declarations should also explain what constituted the reasonable search, with details describing how the cutoff date for the search was selected. Then, the declarations should set forth a list of all sales that come within the terms of the Court's Order. Finally, if anyone is aware of a group of sales that exists from earlier years than those listed in the declaration, we should inform the Court of those sales as well.

To get our second report to the Court as soon as possible and to allow for adequate review of the draft declarations, we would appreciate getting these draft declarations by no later than Thursday, November 9, 1995. We could then begin circulating them by Friday, November 10, and integrate all comments by the filing date of November 15. We have been asked to provide copies of all timber information to Ruth Saunders and Chris Nolan, and they will be coordinating this information. In addition, given the Court's Order requiring this information by November 1, we would prefer filing the supplemental declarations as soon as possible. Therefore, if there is little comment, we might even be able to file these on November 10th.

Second Category of Reports. The second progress report in the second category of reports is next due on Wednesday, November 8. We would appreciate getting the draft declarations by Tuesday, November 7, for review and circulation. We will have to reconnoiter on Wednesday morning to see if the November 7th hearing alters any of the sales presented.

We'd like to thank you in advance for your help on these reports. We appreciate what a difficult time this has been.

cc: Chris Nolan
Ruth Saunders

Discussion Item: What Standard Of Judicial Review Should Apply To Option 9 Timber Sales Under The Rescissions Act

Section 2001(f) sets forth the provisions for judicial review of a challenged salvage timber sale (b), or an Option 9 sale (d), under the Act. All of the subsections of (f), except (f)(4), specifically refer to both (b) and (d) sales. For example, challenges to (b) and (d) sales can be filed under (f)(1); the procedures for such challenges are provided in (f)(2), (5), (6) and (7); and (f)(3) prevents the court from issuing a preliminary injunction for either a (b) or (d) sale. In contrast, subsection (f)(4), refers only to (b) sales as follows:

(4) STANDARD OF REVIEW.- The courts shall have the authority to enjoin permanently, order modification of, or void an individual salvage timber sale if it is determined by a review of the record that the . . . sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i)).

Question: Should the standard of review, set forth in 2001(f)(4), be interpreted to apply to (b) and (d) sales?

Available Options:

1. Apply section 2001(f)(4) to (d) sales.

Rationale: Since all subsections within (f) refer to (b) and (d), except (f)(4), it may be assumed that this omission was merely an oversight by Congress. See, contrary argument below.

2. Don't apply section 2001(f)(4) to (d) sales.

Rationale: The plain language in subsection (f)(4) fails to mention (d) sales. Since Congress specifically referred to (b) and (d) sales in all other subsections of (f) it should be assumed that Congress knew how to differentiate between the two sales and did so when it intended to.

- What standard of review would apply?

a. Apply APA § 706, arbitrary and capricious, standard. Although subsection (f)(3) prohibits application of § 705 it fails to mention § 706.

b. Do not afford any review.

Since subsection (f)(4) refers to (i), which mandates (b) and (d) sales comply with the "procedures required by this section", it is arguable that the only standard of review for (d) sales is procedural.

Decision Item: The Standard of Judicial Review for Salvage Timber Sales Under the Rescissions Act

- I. **Where we stand:** We have been unable to identify a workable compromise as to the appropriate standard for judicial review of the executive branch's decision to proceed with salvage timber sales under the Rescissions Act. We need to choose from the following two options, in order to answer the judge's questions at oral argument on Friday in the Kentucky Heartwood case. As you may recall, the Kentucky Heartwood case involves a challenge to several salvage sales' potential effects on the endangered Indiana bat.
- II. We have agreed that there is limited procedural review of whether agencies prepared an EA and a BE as required under section (c)(1)(A) of the Rescissions Act (all cites are to section 2001). The question is whether there is any review of the environmental basis for the Secretary's decision.
- III. **Option 1:** There is no law to apply to evaluate the environmental basis for the Secretary's decision. Ample caselaw says that "sole discretion" means no law to apply. Congress has placed both the environmental documents and the decision document, which include all possible bases for environmental review, at the Secretary's sole discretion. Sections (c)(1)(A) and (C). Thus, there is no law to apply to evaluate consideration of environmental effects. The Executive Branch usually argues for the lowest level of judicial review so as to preserve the discretion of the Executive Branch, thus the Judicial Branch will expect the Executive Branch to argue for Option 1.

Rebuttal to Option 1: Section (i) indicates that environmental statutes cannot be the basis to overturn the sales. Nevertheless, section (f)(4) provides for arbitrary and capricious review of the decision, which can proceed under the APA. Section (c)(1)(A) immunizes from review the contents of the decision document, not the decision itself. The decision can be evaluated in light of whatever is in the record, although the Secretary concerned has sole discretion to determine the contents of the record.

- IV. **Option 2:** Arbitrary and capricious review can include consideration of the environmental basis for the decision to proceed with the sales. Section (f)(4) explicitly authorizes judicial review under the arbitrary and capricious standard. This statutory provision cannot simply be ignored. Rules of statutory construction require that it be reconciled with the rest of the statute, if possible.

Rebuttal to Option 2: There is arbitrary and capricious review of the decision under section (f)(4). However, arbitrary and capricious review is generally gauged against underlying statutes that provide substantive standards, and no environmental laws apply here. Section (i). Furthermore, where the decision document is unreviewable, there is no feasible way to evaluate the decision. If substantive judicial review is allowed, then courts may look to the Act itself for the standard by which the Secretary's decisions are to be made. The Act does not direct the Secretary to consider environmental standards, but does set forth some direction for the Secretary's decision in (c)(4).

V. Key statutory passages: Section (c) (1) (A) states:

A document embodying decisions relating to salvage timber sales proposed under the authority of this section, shall, at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible, consider the environmental effects of the salvage timber sale and the effect if any on threatened or endangered species, and to the extent the Secretary concerned, at his sole discretion, considers appropriate and feasible, be consistent with any standards and guidelines from the management plans applicable to the National Forest or Bureau of Land Management District on which the salvage timber sale occurs.

Section (c) (1) (C) states:

The scope and content of the documentation and information prepared, considered, and relied on under this paragraph is at the sole discretion of the Secretary concerned.

Section (f) (4) states:

[Courts shall determine whether] by a review of the record that the decision to prepare, advertise, offer, award or operate such sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i)).

Section (i) indicates that compliance with the "documents and procedures" required by the Rescissions Act "shall be deemed to satisfy" all federal natural resources and environmental laws.

Section (c) (4) states:

The Secretary concerned shall design and select the specific salvage timber sales to be offered under subsection (b) on the basis of the analysis contained in the document or documents prepared pursuant to paragraph (1) to achieve, to the maximum extent feasible, a salvage timber sale volume above the program level.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

TO: Anne Kennedy, Mike Gippert USDA
Nancy Hayes, Don Barry & Bob Baum, DOI
Terry Garcia, DOC
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Dinah Bear, CEQ
Elena Kagan, WHC

FROM: Lois J. Schifffer
Assistant Attorney General

RE: Proposal for Scope of Review under Timber Salvage
Provisions of Rescission Act of 1995

Record Review Section (f)(4) provides for judicial review of the "decision to prepare, advertise, offer, award or operate such [timber] sale" (the Decision) based on the administrative record. Under normal principles of administrative law, the record is the information and documentation available to the decision-maker at the time of the decision.¹ Under the Rescissions Act, the reviewing court is to determine whether the decision was "arbitrary and capricious" on the record, a normal administrative law standard, or "not in accordance with applicable law (other than those laws specified in subsection (i))."

Under this standard, the agency designates those materials that were before the decision-maker as the administrative record. Those materials may include documents provided by the timber industry, environmental groups, or others, as well as documentation prepared by the Secretary. We note that Section (c)(1)(C) provides that "the scope and content of the documentation and information prepared, considered, and relied on under this paragraph is at the sole discretion of the Secretary concerned."

¹ The record of decision does not simply consist of those materials actually used by the decision-maker, but includes those materials in the agency record at the time the decision was made. Haynes v. United States, 891 F.2d 235, 238 (9th Cir. 1989). It is unclear whether the agency may exclude any material from the record.

Two aspects of this statute are worth noting in this interpretation: (a) It is our view that Section (c)(1)(C) applies to environmental documentation specified in Section (c)(1)(A) and (B), (it provides for documentation prepared by the Secretary) and does not prohibit the timber industry, environmental groups, or others from providing information for the decision-making record.

(b) Section (c)(4) provides that the Secretary shall design and select specific salvage sales on the basis of the analysis contained in the documents prepared under the sale documentation provision (Section (c)(1)). This Section as well does not appear to limit the record "solely" to the Secretary's document. Plainly, when Congress wanted to use the word "solely" it knew how to do so (since it did twice in this provision).

Thus, in conducting its review of whether the decision was arbitrary and capricious or not in accordance with law the court may examine any environmental materials in the Administrative record, including those prepared by the Secretary.

Scope of Review A second question is whether the Court may review the environmental documentation (the EA/BE) to determine whether it is adequate. The Rescissions Act precludes such review. In two places, the statute provides that "the document" shall, at the sole discretion of the Secretary, consider (i.e. include) certain environmental information. See Sections (c)(1)(A) and (c)(1)(C). Therefore, the Secretary may provide only a title page for the EA/BE, or may provide a full-blown environmental review. A court cannot review this documentation to determine whether it is complete or adequate; the scope of the documentation is left to the Secretary. Whatever environmental review developed by the Secretary becomes part of the record for the "arbitrary and capricious" review.

In Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983), the Supreme Court described the bases for arbitrary and capricious review. The Court stated:

Normally, an agency rule would be arbitrary and capricious if the agency
 [1] has relied on factors which Congress has not intended it to consider,
 [2] entirely failed to consider an important aspect of the problem,
 [3] offered an explanation for its decision that runs counter to the evidence before the agency, or
 [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. We would argue that the Rescissions Act emphasizes the third and fourth bases for arbitrary and capricious review. The first and second factors are more limited under the Act, for two reasons. First, Congress has explicitly removed all relevant legal standards under existing environmental statutes. Section 2001(i). Second, Congress has granted the Secretary sole

discretion over which environmental facts to consider in the sale documentation, though the record of decision may include additional information on the salvage sale. Section 2001(c)(1)(A).

The third and fourth factors, however, fully apply in relation to the evidence that the Secretary does consider. Based on these factors, we would like to present our interpretation of the applicable standard in an affirmative manner. We would suggest that where a decision is minimally consistent with the evidence before the agency, it satisfies (f)(4). In other words, "the agency must . . . articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1982)).

We do note that President Clinton has stated in a Directive to Secretaries Glickman, Babbitt, and Brown, and Administrator Browner, that he seeks to implement the law "in ways that, to the maximum extent allowed, follow our current environmental laws and programs." August 1, 1995, Memorandum at 1. Thus, these Secretaries are to develop documentation as fully as possible consistent with environmental standards established under existing laws (such as NEPA and the Endangered Species Act). The content of these documents, the procedures for their development, and a procedure for resolving interagency disagreements with regard to salvage sale decisions has been provided in the August 9 Memorandum of Agreement on Timber Salvage and associated agency implementation decisions.

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NUMBER OF PAGES: 11

DATE: November 17, 1995

FROM: Ellen Athas

MESSAGE: Attached are five documents for your review. Four of them set out policy questions on specific cases, and one presents a chart that will be filed with Judge Hogan on November 28. We hope to discuss some of these at today's 2pm meeting.

**ATTORNEY CLIENT
WORK PRODUCT
PRIVILEGED/CONFIDENTIAL**

NFRC has filed two motions seeking the release under subsection 2001(k)(1) of 11 timber sales that had been the subject of court injunctions or other orders. Our response is due November 21, 1995. The Court has set oral argument for December 12. The following is a description of the subject sales and possible responses to NFRC's motions.

DESCRIPTION OF THE RELEVANT SALES

The 11 sales are broken down into the following categories:

Four sales, COWBOY, NITA, SOUTH NITA and GARDEN, were enjoined by Judge Dwyer of the Western District of Washington who held that the sales had not complied with section 318, Congress's interim plan for sales offered in fiscal year 1990. Judge Dwyer found that the four sales violated section 318's requirements that sales offered under section 318 were to minimize fragmentation of ecologically sensitive old growth forests. Three of the sales, COWBOY, NITA and SOUTH NITA, are located on the Umpqua National Forest. The GARDEN sale is located on the Siskiyou National Forest.

Two sales, FIRST and LAST, also located on the Umpqua National Forest, had been challenged in an action before Judge Dwyer on similar grounds as those four noted above for failure to comply with the fragmentation requirements of section 318(b)(2). Based upon the Forest Service's withdrawal of the two sales, the court struck the pending motions for summary judgment and permanent injunctions as to these sales as moot.

Two other sales initially offered under section 318, BOULDER KRAB and ELK FORK, were the subject of NEPA challenges brought before Judge Panner of the United States District Court of Oregon, Civil No. 90-969-PA. The complaint involving those sales was dismissed without prejudice on March 25, 1991 on the basis of a stipulation of the parties.

The three remaining sales, TIP, TIPTOP and GATERSON, were not 318 sales, but were offered after fiscal year 1990.

The TIP and TIPTOP sales are located on the Wenatchee National Forest and were enjoined by Judge Coughenour of the Western District of Washington in Leavenworth Audubon v. Ferraro, 881 F. Supp. 1482 (W.D. Wash. 1995). The sales were

enjoined for NEPA violations, including the failure to consider the impact of the sales on the bull trout in the area and the impact of the proposed project on the sale area's streams' sediment quality and water temperature in light of the 1994 wildfires.

The GATERSON sale is located in the Colville National Forest in Washington. The sale was challenged by Mitchell Smith, a recreational user, who claimed: (1) the sale violated the Washington State Wilderness Act and NEPA for failure to consider uninventoried unroaded area for possible wilderness classification before development and (2) violated NEPA for failure to consider effect of the sale on a separate 5000 acre roadless area. The district court rejected the challenges, granting the defendant Forest Service's motion for summary judgment on both claims. However, the district court extended its preliminary injunction, enjoining most of the logging pending the appeal. The Ninth Circuit upheld the district court's decision as to the first claim, but reversed as to the second claim, finding that the NEPA documentation was insufficient. See Smith v. United States Forest Service, 33 F.3d 1072 (9th Cir. 1994). On March 30, 1995, the district court granted plaintiff judgment in part in accordance with the Ninth Circuit's opinion, and vacated the district court's December 13 judgment. The district court did not issue a specific permanent injunction, although the sale effectively was prohibited from proceeding.

POTENTIAL RESPONSES

1. General position as to the majority of sales

For the majority of the subject sales, consistent with the agencies' previous position taken before Judge Hogan, subsection 2001(k)(1) does not mandate their immediate release as they were not sales that were "subject to section 318."¹ However, given the Court's September 13

¹ The only sales whose release may not be dependent upon the issue currently on appeal to the Ninth Circuit are BOULDER KRAB, ELK FORK, FIRST and LAST sales. These sales initially had been offered under section 318. As no court ever rendered a judicial determination that the sales violated section 318 (which provides a possible argument for contesting the release of the enjoined sales, as further described above), they may fall within

decision and October 17 Order, such a position, while on appeal, does not currently provide a grounds for not releasing the subject sales. Absent an alternative argument not dependent upon the issue on appeal, it would appear that the sales must be released.

2. Section 318 sales that had not been enjoined

For the sales that had not been enjoined, defendants have represented that "such sales cannot be released without, at a minimum, alerting the interested parties and relevant court of the potential applicability of section 2001(k)" Defendants' Opposition at 11. Accordingly, for two sales, ELK FORK and BOULDER KRAB, the defendants provided notice of intent to release the sales following expiration of 15 days from the date of the notice. Consistent with that notice, the Forest Service has issued the relevant award letters. [NOTE: SIERRA CLUB, NOW REPRESENTING THE PARTIES WHO HAD SUED ORIGINALLY TO ENJOIN SAID SALES, HAVE INDICATED THAT IF THE SALES GO FORWARD, THEY MAY SEEK IMMEDIATE INJUNCTIVE RELIEF.]

The two other sales that had been the subject of prior court proceedings, but which were never enjoined, are the FIRST and LAST sales. As these sales were the subject of the pending motion before Judge Dwyer to clarify and enforce his prior orders, defendants provided notice of intent to release the sales upon resolution of pending legal issues. On November 7, Judge Dwyer stayed that motion pending further orders by Hogan. Accordingly, the FIRST and LAST sales are not scheduled to be released until Hogan rules and Dwyer authorizes the sales' release upon presentation of said ruling.

3. The four enjoined sales that had initially been offered under section 318

As to the four sales that had been enjoined by Judge Dwyer for violation of section 318, the COWBOY, NITA, SOUTH NITA, and GARDEN sales, an alternative argument may be made that the sales became null and void upon expiration of section 318, and accordingly do not fall within the scope of subsection 2001(k)(1), even under the Court's prior rulings. We presented this position in oral argument before Judge Dwyer in response to the motion to clarify and enforce that court's prior orders. This argument may be developed for inclusion in the brief to be filed on Tuesday, November 21 as follows.

the scope of subsection 2001(k)(1) as interpreted by the agencies. Indeed, it appears that Boulder Krab and Elk Fork were challenged on NEPA grounds. [CONFIRM NOT CHALLENGED FOR 318 VIOLATIONS]

Assuming, as the Hogan court has ruled, that section 2001(k)(1) applies to all of Washington and Oregon, there are still limits under the statute on what sales must proceed. The legislative history makes it clear that Congress was targeting sales that had been delayed or suspended, for a variety of reasons. These four previously offered but enjoined sales do not fall into that category.

First, they were no longer "sales" at the time section 2001(k)(1) was enacted. The Dwyer Court ruled that the enjoined sales did not meet the minimization of fragmentation requirements of section 318, the statute authorizing offering of the sales. The court enjoined the sales until the defects were cured; the defects were not cured during the life of section 318. Accordingly, when the statute expired, the sales became null and void, as if they had never been offered because the authority to offer them had disappeared.

Second, Congress made it clear that these were not the section 318 sales they were targeting for release. See Congressional Record for the House, May 25, 1995, statement by Representative Taylor:

For instance, the section 318 timber, it is in Washington and Oregon, this area already met all the environmental requirements. This is green timber but it has not yet been released. It has been waiting since 1990, over 5 years. And this meets all the environmental requirements, and it meets, it has already been approved to move, but it has been held up for over 5 years while people in Washington and Oregon are without jobs.

These four sales are not the 318 sales Congress was talking about, as they did not even meet section 318's environmental requirements. Moreover, they are not resurrected by the Hogan Court's determination that subsection 2001(k)(1) required the release of not just traditional 318 sales, but later-offered sales. These were not sales that were reoffered at some other time pursuant to the applicable land management plan in place at that time. These were sales that were never remedied to comply with the statute that authorized their existence, and as a result became null and void upon expiration of the statute. To allow these sales to go forward, would attribute to Congress an intent that any sale, even those prepared contrary to the statute that authorized the sales to be offered and which were never reoffered pursuant to an applicable management plan, to proceed. This is not supported by the language of the statute or the legislative history.²

² We cannot take this same position in connection with the FIRST and LAST sales because the court never reached the merits and rendered a judicial determination that the sales did not comply

5. The three post-fiscal year 1990 sales

The November 21 filing also will address three non-318 sales that were offered more recently, but which cannot be unilaterally released by the agencies, the TIP, TIPTOP, and GATORSON sales. Unless an argument exists which is not dependent upon the issue on appeal, it would appear that these sales fall within the scope of subsection 2001(k)(1) as interpreted by the Hogan court.³ Accordingly, the agencies should determine whether notice should be provided to the relevant courts regarding these sales.⁴ The notice could indicate the following: enactment of section 2001(k)(1); the Hogan Court's interpretation as applying to all of Washington and Oregon; the October 17 injunction ordering the release of covered sales; the current litigation before Hogan regarding these sales, including the new Pilchuck case; and defendants' intent to seek clarification of effect of court's orders upon issuance of a ruling by Judge Hogan on this matter and to proceed accordingly upon resolution of the legal issues.

with section 318.

³ We are not aware of any argument, other than the one on appeal, that these sales are not required to be released under subsection 2001(k).

⁴ While it does not appear that the district court issued a specific injunction permanently enjoining the Gatorson sale, the district court's judgment in accordance with the Ninth Circuit opinion finding that the underlying NEPA documentation inadequate and declaring that the sales should not proceed absent further NEPA analysis, effectively operated to prohibit the sale from proceeding.

Discussion Item: Interpretation of 2001(k)'s Applicability To Timber Sales Which Have Not Been Suspended Or Held Up.

I. **Background:** The Oregon Natural Resources Council ("ONRC") case involves challenges to four timber sales in the Umqua National Forest. These sales include two Option 9 sales and two sales, Roughneck and Watchdog, that were awarded prior to the enactment of 2001 and have not been suspended or held up. Mark Rutzick represents the defendants-intervenors, DTO, and argues that since the Roughneck and Watchdog sales lie within the geographic scope of 2001(k), as defined by Judge Hogan in NFRC, 2001(k)(1) applies to protect the sales from plaintiffs' challenges.

*margin -
refers to all
sales within
geo's area,
even but
rides*

II. **Where we stand:** A hearing on motions for summary judgment is set for November 21, 1995 before Judge Hogan. The position which we have taken in our briefs is as follows:

1. Given that the language in 2001(k)(1) compels the Secretary to "act to award, release, and permit to be completed, ...all timber sale contracts offered or awarded ..." it does not apply to sales which do not require further action by the Secretary to proceed.
2. The legislative history does not support DTO's interpretation that the application of 2001(k) includes sales which have not been suspended or held up.
3. DTO's reliance on the decision in NFRC is misplaced since the issue in that case involved an interpretation of the geographic scope of 2001(k) and not its application to sales in the process of being completed.

*implied -
refers to
all sales
in geo
area.*

III. **What remains to be worked out:** Application of our interpretation, which relies primarily on the plain language in 2001(k), could provide the basis for arguing that the interpretation leads to absurd results. For example, if 2001(k) does not apply to a previously awarded sale in the process of being operated and such a sale subsequently is successfully challenged and enjoined, then it could be argued that the sale could be considered held up such that the "notwithstanding any other provision of law" mandate in 2001(k)(1) would apply to lift the injunction. Rutzick has not presented this application to the court. However, we expect that he will do so during oral arguments. An answer to this argument, however, is that Congress had in mind a set of sales that had been suspended or delayed at the time the bill was enacted, and did not intend to address potential future problems with sales after enactment. We are proposing to submit a chart (which should be circulated at the Friday meeting) illustrating the absurd consequences of adopting Rutzick's latest interpretation.

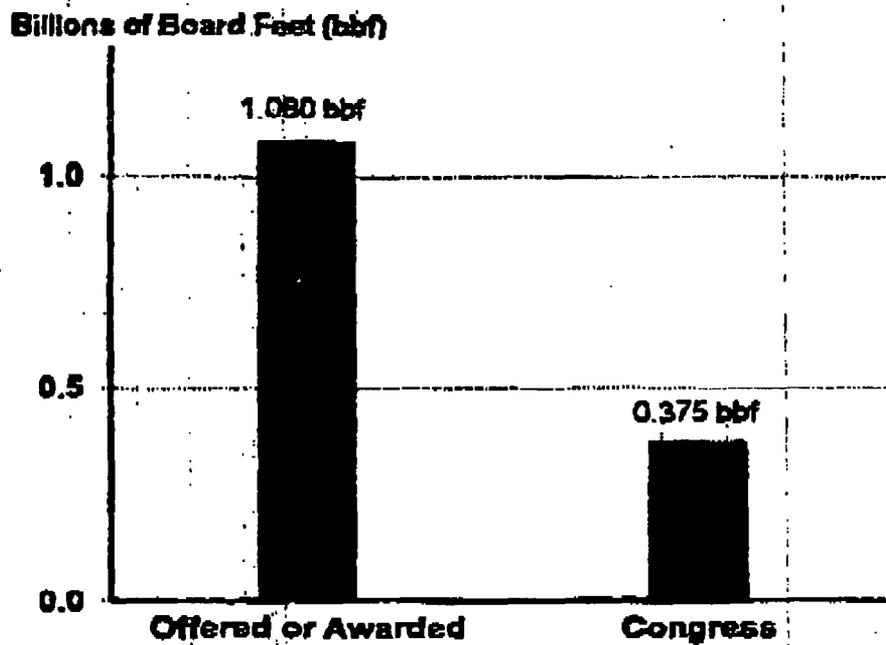
There are a plethora of statements in the legislative history which support our interpretation. Although resort to legislative history is generally warranted when the plain meaning of the statute yields "unreasonable results", in this instance, we need to be careful to ensure that any legislative history

arguments are consistent with our position on appeal in NFRC. In NFRC we consistently argued that individual statements of individual legislators do not evidence congressional intent, and that statements of any sponsors should not be attributed undue weight.

2001\discmem.k

EXHIBIT 1.

**Comparison of Timber Sales Contemplated
Under Various Interpretations of 2001 (k)
(USDA Forest Service Sales)**

**Offered or Awarded**

1,080 billion board feet is an estimate of the amount of all timber sale contracts offered or awarded by the Forest Service in the geographic area of Oregon and Washington during the time period from October 1, 1989 to July 27, 1995 and remaining uncut as of July 27, 1995. This number does not include sales that have already been completed and approximates the amount of timber encompassed under plaintiffs' interpretation of section 2001 (k) in QNR. (Source: USDA Forest Service).

Congress

375 million board feet is the amount discussed by Senator Hatfield in legislative history of section 2001 (k) (INER September 8, 1995 hearing, transcript at 7).

Discussion Item: What Standard Of Judicial Review Should Apply To Option 9 Timber Sales Under The Rescissions Act

Section 2001(f) sets forth the provisions for judicial review of a challenged salvage timber sale (b), or an Option 9 sale (d), under the Act. All of the subsections of (f), except (f)(4), specifically refer to both (b) and (d) sales. For example, challenges to (b) and (d) sales can be filed under (f)(1); the procedures for such challenges are provided in (f)(2), (5), (6) and (7); and (f)(3) prevents the court from issuing a preliminary injunction for either a (b) or (d) sale. In contrast, subsection (f)(4), refers only to (b) sales as follows:

(4) STANDARD OF REVIEW.- The courts shall have the authority to enjoin permanently, order modification of, or void an individual salvage timber sale if it is determined by a review of the record that the . . . sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i)).

Question: Should the standard of review, set forth in 2001(f)(4), be interpreted to apply to (b) and (d) sales?

Available Options:

1. **Apply** section 2001(f)(4) to (d) sales.
Rationale: Since all subsections within (f) refer to (b) and (d), except (f)(4), it may be assumed that this omission was merely an oversight by Congress. See, contrary argument below.
2. **Don't apply** section 2001(f)(4) to (d) sales.
Rationale: The plain language in subsection (f)(4) fails to mention (d) sales. Since Congress specifically referred to (b) and (d) sales in all other subsections of (f) it should be assumed that Congress knew how to differentiate between the two sales and did so when it intended to.
 - What standard of review would apply?
 - a. Apply APA § 706, arbitrary and capricious, standard. Although subsection (f)(3) prohibits application of § 705 it fails to mention § 706.
 - b. Do not afford any review. Since subsection (f)(4) refers to (i), which mandates (b) and (d) sales comply with the "procedures required by this section", it is arguable that the only standard of review for (d) sales is procedural.

LITIGATION CONSIDERATIONS WHEN NO BIDS ARE RECEIVED

Background The Thunderbolt sale is the subject of litigation. Nonetheless, when it was auctioned, it received no bids. Without any action by the Forest Service, we would continue litigation. In addition, the Big Flat sale, one of the salvage sales on the Payette National Forest, did not receive any bids. There, the Forest Service plans to readvertise and reoffer.

Options

1. Request the Court to stay the 45-day period during which a court should reach a decision on the sale based on the constitutional requirement of case or controversy. See § 2001(f)(5). (Benefit: saves litigation resources and potential losses.)

2. The Forest Service can withdraw a sale for which no bids are received and moot the lawsuit. If at a later date the Forest Service goes forward with the sale, a new Decision Notice should issue and advertisement would then set a new 15-day time period in which to bring challenges.

3. The Forest Service can modify a sale. The Forest Service's current policy in the Intermountain Region permits two types of sale modification:

a. If only change is to lower cost to attract a bidder, the Forest Service can readvertise and no new 15-day period begins because that limitation applies only to "initial" advertisement. Litigation, therefore, on the initial challenge would go forward.

b. If any other modification occurs, a new Decision Notice would be required, and that would trigger a new 15-day period. Initial litigation would be mooted.

4. The Forest Service can leave the sale open, we litigate the issue to a conclusion and await a future bidder. (Benefit: Encourages bidders following successful litigation.)

5. Other options?

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NUMBER OF PAGES: 4

DATE: November 28, 1995

FROM: Ellen Athas

MESSAGE: Attached is an options paper for today's 2:00 meeting.

*Important -
Ask Jim.*

PRIVILEGED -- ATTORNEY WORK PRODUCT -- ATTORNEY-CLIENT

TREATMENT OF "WITHDRAWN OR CANCELLED" SALES UNDER 2001(k)(1)

Background: The complaint and preliminary injunction motion in Pilchuk Audubon Society v. Glickman seek a ruling that sales cancelled or withdrawn prior to July 27, 1995 do not fall under Section 2001(k)(1). This issue is also raised in NFR's third motion for summary judgment and motion to clarify Judge Hogan's October 17 order. The Pilchuk plaintiffs and Western both seek oral argument on this issue on December 12, although a briefing schedule has not been set. NFR's motions partially addressing these issues are already scheduled for December 12.

Section 2001(k)(1) applies to "all timber sale contracts offered or awarded before [July 27, 1995]," including sales for which the bid bond of the high bidder was returned. The Pilchuk complaint raises the issue whether action other than return of the bid bond extinguishes a previously offered or awarded sale so that it does not fall under any of the provisions of 2001(k) -- including the replacement timber provision. For example, the Pilchuk plaintiffs appear to contend that the Boulder Krab sale was extinguished for purposes of 2001(k)(1) because the Forest Service allowed logging roads that would be needed for the sale to be obliterated, and reconstructed a hiking trail that would have been used for a logging road.

Options for treatment of "withdrawn" or "cancelled" sales:

1. Any significant action other than return of the bid bond showing that the sale was "out of the timber pipeline" as of July 27, 1995, extinguishes the sale so that 2001(k) does not apply. This could include (1) a bidder affirmatively repudiating the timber sale contract, (2) a former sale area becoming inconsistent with an intent to reactivate a sale, or (3) reconfiguration of a sale.

PROS: Sales for which the Forest Service had completely abandoned any intent to proceed will not be included.

CONS: There may have been some sales that have been released that could have been held back under this definition.

2. Action that makes proceeding with the sale on the original terms, volumes and bid prices impossible. For example, such action could include redesignation of the sale area as a national park, monument or wilderness area, or reconfiguration and sale of some or all of the sale area.

PROS: This appears to be consistent with what the Forest Service has reported to Judge Hogan to date.

CONS: This may not be consistent with BLM sale decisions.

ATTORNEY-CLIENT PRIVILEGED

TREATMENT OF PRE-318 SALES UNDER SECTION 2001

Background: The plaintiffs in Pilchuk Audubon Society v. Glickman and intervenor-applicant Western Timber's motion to clarify in NFERC v. Glickman seek a decision on whether Section 2001(k) applies to pre-Section 318 (i.e. pre-October 23, 1989) sales, including sales rejected under 318(f)(1). The Pilchuk plaintiffs and Western both seek oral argument on this issue on December 12, although a briefing schedule has not been set. NFERC's motions partially addressing these issues are already scheduled for December 12. As to the temporal scope issue, Judge Hogan's September 13 and October 17 orders leave open whether Section 2001(k) applies to pre-Section 318 sales.

Options for pre-Section 318 sales:

1. Stick to the position, which is on appeal, that section 2001(k) applies only to actual Section 318 sales. Thus, it clearly does not apply to pre-Section 318 sales.

PROS: Avoids any appearance of inconsistency.

CONS: Will not be well-received by Judge Hogan

2. Make the argument in Option 1, but include "even if" arguments. Possible "even if" arguments include the following:

-- The legislative history gives no indication that Congress intended to apply Section 2001(k) to pre-318 sales.

PROS: Maximizes number of arguments and allows us to rely on "favorable" legislative history.

CONS: Potential problem is that we will have to cite legislative history we don't particularly like.

-- Congress could not have intended to apply Section 2001(k) to pre-318 sales because it leads to so many absurd results. To make this argument, we have to attach declarations or other material to show that absurd results would result.

PROS: There is good case law stating that a court will avoid interpreting a statute that would reach an absurd result.

CONS: This could backfire.

ATTORNEY-CLIENT PRIVILEGED

WHEN IS A SALE "OFFERED" UNDER SECTION 2001(K)?

Plaintiffs in Pilchuk Audubon Society v. Glickman squarely raise the issue of when a sale is "offered".

Options

1. Advertisement equals offer. Under this option, a sale would be "offered" at the time of advertisement.

PROS: This would open up an enormous number of sales and could help demonstrate the absurdity of NFRC's position.

CONS: This may be inconsistent with the position taken before Judge Hogan by the Forest Service.

2. Auction equals offer.

PROS: This is consistent with implementation of section 318.

CONS: None.

DRAFT---DRAFT---DRAFT (6:00P.M.)

November 30, 1995

Final?

MEMORANDUM FOR KATIE McGINTY

T.J. GLAUTHIER
MARTHA FOLEY
JENNIFER O'CONNOR
ELENA KAGAN

FR: TOM JENSEN

SUBJECT: OPTIONS FOR ADMINISTRATIVE ACTIONS TO ENCOURAGE
ADOPTION OF AMENDMENTS TO LOGGING PROVISIONS OF
RESCISSIONS ACT

1. Introduction

The following is a brief description of the principal options the Administration may wish to consider using to encourage the timber industry and some in Congress to accept the Administration's proposed amendments to the rescissions act.

II. Discussion

These options are designed to increase our influence quickly during a brief period of pressured, largely private negotiations. They are based on what we know to be the concerns of the timber industry itself about the possible negative (for them) impacts of the rescissions act. These options are the best we can identify for this purpose, but they do carry risks.

Other actions would likely be more effective if we find ourselves in a long-term effort--if we have weeks, not the hours or days we now expect to work with. For example, given adequate time, a persuasive public campaign could be mounted to show that old-growth logging under the rescissions act as interpreted by Judge Hogan actually threatens more jobs and economic interests than it helps.

The best way to start to use the "tools" identified below would be to organize a meeting with senior White House representatives, Secretary Glickman and Secretary Babbitt to which senior leaders from the more responsible elements of the timber industry are invited.

We should state our very real concern that the environmental damages resulting from Judge Hogan's rulings will cause other courts once again to shut down Northwest forests. Rather than threaten to "do" things to them, we should explain to the timber industry representatives that, because of the environmental impacts of the rescissions act old-growth logging, the Administration legitimately finds itself forced to take steps that neither the industry nor we want to take (i.e., the actions listed below). We should lay out the actions we think we may have to take, explain that we want to change the law to avoid these results, and ask them to

help us work with Congress to change the law to our mutual benefit. Certainly we will want to emphasize the legislative changes we want that will directly benefit the industry, such as compensation for buy-outs and modifications.

III. Options

a. Suspension or reconsideration of Administration efforts to help timber land owners comply with the Endangered Species Act

The Administration has made significant efforts to use discretionary authorities available under the Endangered Species Act (ESA) to help non-federal Northwest timber land owners comply with ESA-mandated protections for the northern spotted owl and marbled murrelet. These initiatives have been based on the assumption that the habitat and species protection measures in the Northwest Forest Plan would stay in effect. Because of the possibility that the plan will be undone, and because some key environmental assumptions already have been undermined, we have a strong case for suspending or reconsidering these efforts. In fact, it is probable that, at some point, a court may order us to do so.

The Administration's initiatives, referred to generally as the "4(d) rule" and "habitat conservation plans," have benefitted or, if pending negotiations are completed, will benefit several of the largest private timber companies in the Northwest. State forests in Oregon and Washington (and the private companies who benefit from the forest products harvested from those lands) also have used or plan to take advantage of our ESA-related initiatives. Suspension of Administration efforts in these areas would be a source of great concern to those timber companies, some members of congress, and to the governors and legislatures of Oregon and Washington.

There is little risk of successful litigation against such administrative actions. On the negative side, these efforts are some of the most innovative and important pieces of the Administration's environmental policy. The companies and jurisdictions who have worked with us are, generally speaking, not the same interests who pressed for the rescissions act logging provisions.

b. Delay of timber sale program under Northwest Forest Plan

The Administration has some amount of discretion over the pace and scope of timber sales under the Northwest Forest Plan. As a matter of policy, the Administration has placed a high, often-stated priority on reaching an average annual sale quantity of 1.1 billion board feet, although specific sale or harvest levels are not established under the plan. The rescissions act requires the Administration to expedite release of Forest Plan sales, but does not set specific targets.

The Administration could change current policy and practices in ways that would slow or suspend release of sales under the Forest Plan. The increase in logging and additional administrative burdens created by the rescissions act could be argued to justify such a go-slow approach. But a court might interpret the rescissions act to preclude a slowdown (let

alone a suspension) of Forest Plan sales. Any such course, therefore, involves a ^{significant} litigation risk.

Delays in release of Forest Plan sales would be detrimental to many timber interests in the Northwest, particularly smaller mill and logging operators who do not own or have easy access to private forest lands. These smaller interests include virtually all of the principal beneficiaries of the sales released by 2001(k) as interpreted by Judge Hogan.

c. Suspension or delay in implementation of timber salvage program

The Administration has some discretion over the pace and scope of the timber salvage programs operated by the Forest Service and Bureau of Land Management. The Administration has, as a matter of policy, set a priority on moving aggressively to release salvage sales on forests around the country. The legislative history of the rescissions act includes numerous Administration statements supporting an aggressive salvage program and certain harvest targets.

The Administration's policy could be changed in ways that would slow the salvage program. For example, the sale preparation and interagency clearance process that is now delegated to regional and local offices could be changed to require DC level approval. There are, to be sure, many important environmental and economic issues associated with salvage sales that could benefit from strict, high level scrutiny. This is particularly so in those forest areas where old-growth logging is taking place pursuant to 2001(k) or the Forest Plan.

Depending on measures taken, this could affect the interests of timber companies and members of congress from around the country, most of whom do not benefit from the old-growth provisions of the rescissions act and may be open to new legislation.

Here, too, courts might interpret the rescissions act to preclude a slowdown (let alone a suspension) of the salvage program, especially given the Administration statements in the legislative history. Actions of this sort, especially in forest areas not affected by other logging provisions of the rescissions act, would involve a significant litigation risk.

d. Other measures

The federal government regulates the timber industry in a variety of ways, such as highway transportation, worker safety, helicopter logging (noise, aircraft safety), and import and export. These regulatory arenas have, generally speaking, an indirect relationship to rescissions act logging. Administration actions in these areas would require careful advance legal scrutiny to avoid charges of discriminatory or retaliatory prosecution.

attachment

Summary

1. **Actions directly based on actual or expected environmental effects of 2001(k) logging**
 - Suspend or delay Administration initiatives to help timber land owners comply with Endangered Species Act
 - Pro: Wide discretion; involves something the industry (esp. major players) wants
 - Con: Policy reversal; probably hurts "good guys" more than "bad"
 - Suspend or delay release of green timber sales under Forest Plan
 - Pro: Involves something the industry wants
 - Con: Litigation risk; policy reversal
 - Suspend or delay release of salvage sales in areas where 2001(k) logging will occur
 - Pro: Involves something the industry wants
 - Con: ~~Some~~ litigation risk; policy reversal
2. **Actions not directly based on actual or expected environmental effects of 2001(k) logging**
 - Suspend or delay release of salvage sales in forests without 2001(k) logging
 - Pro: Involves something the industry wants; increases pool of interested parties
 - Con: Litigation risk; policy reversal
3. **Other areas of possible actions**
 - Regulation of log imports and exports
 - Safety regulation of logging trucks and drivers, helicopters and pilots used in logging, and work-sites (harvest areas and mills)

THE WHITE HOUSE
WASHINGTON
November 20, 1995

MEMORANDUM FOR JACK QUINN

FROM: ELENA KAGAN
SUBJECT: TIMBER PROPOSALS

Attached are two memoranda from Harold to Leon regarding timber. The shorter memo details proposed legislation; the longer memo provides background information. The memos were prepared by a timber group headed by Harold and including T.J. Glauthier, Jennifer O'Connor, me, and several CEQ people (especially Tom Jensen). Harold is supposed to meet with Leon on this matter sometime today.

In a nutshell, the legislative proposal would amend the provisions of the Rescissions Act relating to old-growth timber and the President's Forest Plan. (The proposal leaves untouched the Act's salvage provisions.) Some of the amendments requested "correct" the language of the Act to bring it into line with what we thought we had agreed to (prior to judicial decisions to the contrary). Others go further, asking for things we asked for before and failed to achieve. I would characterize the package as falling just short of a request to repeal these provisions in their entirety.

I know Ron Klain and Katie McGinty have some questions as to whether the timber group has put the cart before the horse in developing a complete legislative package prior to determining what sort of proposals (if any) Congress will consider. I think they are absolutely right that we should not introduce this bill prior to having some serious discussions with Sen. Hatfield and others about what we might realistically hope to achieve. Once we get that information, we can determine what the real purpose of this legislative proposal is and make appropriate adjustments.

The best case for this particular package, given current information, goes something as follows. Congress may be willing to pass certain minor changes to the timber rider to mitigate the effect of an unanticipated judicial decision and to prevent other such decisions in the future. But if we limit our proposal to these minor matters, we will alienate environmental interests and give ourselves no negotiating room. At the same time, if we go so far as to ask for a total repeal of the old-growth and Forest Plan provisions (let alone the entire timber rider), we will make it impossible to get even minor changes and subject ourselves to the charge of flip-flopping. Hence this package, which provides a basis for discussion with Congress, sends a fairly strong statement to the environmental community, and gives us some (though perhaps not much) cover when we are accused of changing our minds.

DOJ, it should be said, hates this compromise. The environmental division there wants to go for a repeal of the entire timber rider (including the salvage provisions). DOJ believes this is a terrible bill, which as the months go by, will cause ever more problems. It argues that anything we can get from Congress won't be worth getting. It further argues that any request for specific changes will weaken our hand in litigation because opposing attorneys will argue that by asking Congress to fix particular provisions, we effectively are conceding that the provisions do not mean what we are saying they do. (I think this point is worth considering, but can be overstated. I'm sure we will see opposing attorneys make such an argument, but I doubt that it will alter the outcome of any case.) DOJ thus thinks we should make a sweeping statement against the whole timber rider.

DRAFT (6 P.M. November 19, 1995)

MEMORANDUM FOR LEON PANETTA

FROM: HAROLD ICKES

RE: A LEGISLATIVE REMEDY FOR THE TIMBER PROGRAM

I. Introduction and Summary

This memo requests your approval to seek specific legislation amending some of the old-growth logging provisions of the rescissions act signed earlier this year. The attached document provides background information and additional detail on the proposed legislation.

The rescissions act contains logging-related provisions that, for the most part, govern salvage timber sales. In general, those provisions were changed during negotiations on the bill in a way that makes it possible for us to manage the salvage sales in compliance with environmental laws.

Other provisions, however, are very troublesome. These apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and, in another section, address the President's Northwest Forest Plan. We are in litigation on most old-growth provisions of the rescissions act. Initial rulings have been adverse to our understandings of the act and have expanded the coverage of these old-growth provisions to force release of twice the timber volume we originally agreed to. Industry lawyers are pushing for still more. We face the prospect of very serious environmental problems, probable jeopardy to the Forest Plan, and possible injunctions against further sales under the Forest Plan.

The statement issued by the President on October 28th in response to an adverse court ruling states:

My Administration's agreement with the Congress on this issue was significantly different from the interpretation upheld this week by the courts. We agreed that the Administration would not have to violate our standards and guidelines for our Forest Plan and for forest management in general, but only speed up sales that met those standards. We do not believe that this extreme expansion of ancient timber sales was authorized by the 1995 Rescission (sic) Act. My Administration will actively pursue a legislative remedy to correct this extreme result.

II. Discussion

We recommend a legislative package, the specific provisions of which fall into three general categories relevant to possible negotiations with Congress. The categories and provisions are the following:

Amendments to restore our original agreement with Congress

- **Old-growth sales should be limited to "318 sales".** We understood the bill to require release only of sales issued pursuant to section 318 of the Fiscal Year 1990 Interior appropriations act. The court interpreted the provision to require release of all sales ever offered in the geographic area described in section 318 -- all of Oregon and Washington -- more than doubling the volume of harvest.

Our proposal would delete the language in 2001(k) that refers to geographic units and would provide for the release of "all timber sale contracts offered in Fiscal Years 1989 and 1990 under the authority of, and in compliance with, Section 318(b) of Public Law 101-121 (103 Stat. 745)."

- **The Northwest Forest Plan should be protected.** We understood that Congress intended that the Forest Plan itself would remain in force and that sales that met its criteria would be implemented expeditiously. The timber industry's lawyer is arguing that the rescissions act overrides the Forest Plan and directs us to offer sales without regard to environmental effects or other criteria in the Forest Plan. That would undermine the Forest Plan and could lead to new injunctions.

Our proposal will make changes in two sections in order to protect the Forest Plan. In 2001(d), we would delete the language that refers to geographic units (as we would also do in 2001(k) above) and provide that the Secretary shall expeditiously prepare timber sale contracts "allowed under and consistent with the standards and guidelines specified in" the Forest Plan. In 2001(l), we would strike language that prevents us from making changes to the Forest Plan to account for the old growth sales released under this law.

Amendments to give us tools to fix environmental problems created by the act

- **The Administration needs buyout and replacement authority and funding.** Unfortunately, due to recent court rulings, title to timber which we did not understand to be included in the act has already passed to timber companies. The Departments of the Interior and Agriculture need the authority to work with purchasers in order to modify or buy out problematic contracts, or provide replacement timber. This authorization would include the authority to reach a voluntary agreement with the holder of the contract, under which the holder accepts substitute timber or money, as well as the authority to unilaterally require a holder to accept substitute timber, or buy

back part or all of a sale that would have significant environmental effects. We expect that the Departments would offer voluntary settlements prior to taking unilateral action. We recommend seeking authority that is consistent with the standard contract provisions of the Forest Service's timber contracts.

Our proposal would authorize the Secretaries of Agriculture and the Interior to "replace, modify, suspend or terminate" any timber sale contract affected by or released under 2001(k) "where the Secretary concerned, in his discretion, finds that such replacement, modification, suspension or termination is authorized pursuant to originally advertised terms" of the sale contract or where proceeding with the original contract "would have an adverse effect on the environment or natural resources." The amendment would further provide for appropriate compensation not to exceed a cumulative total of \$100,000,000.

Amendments to resolve issues left in disagreement with Congress

- **The Administration should not be required to release old-growth sales where bird species listed under the Endangered Species Act are nesting or breeding.** We are in litigation with the timber industry about which standard to apply in determining whether bird species listed under the Endangered Species Act are "known to be nesting" in a particular forest area. In those areas, the act prohibits release of the old growth sales. We take a view of the restriction that is broader, more fully sustained by accepted science, and more protective than that supported by the timber industry and by some in Congress.
Our proposal would replace the phrase "known to be nesting" with the phrase "known to occupy for nesting or breeding purposes." The proposal would further state that "The Secretary concerned shall make this determination of occupancy in accordance with scientifically recognized principles, such as the Pacific Seabird Group Protocol."
- **The Government's obligation to provide replacement timber should be defined narrowly.** The current statute imposes an obligation on the government to provide alternative timber if an old growth ("318") sale cannot be released either because the sale would threaten a bird species or "for any reason." We may not have sufficient timber to meet this obligation, so we need the authority to buy the contracts out as a fallback. In addition, we want to limit our obligation to what we understand to be the main focus of the provision, namely to those sales that are withheld due to endangered or threatened birds. We want to eliminate the broader "for any reason" clause, which we fear could be alleged to cover other, theoretical sales such as those that were originally offered before 1990 but have subsequently been reconfigured and sold, and are now physically impossible to release.

Accordingly, our proposal would amend the language to limit the replacement requirement to sales that cannot be released due to murrelets, and add an option to buy out the sales at the Secretaries' discretion.

Initial contacts with key members of Congress who supported the logging provisions suggest some receptivity to new legislation, provided it is tailored narrowly. Other, pro-environment members would support broader changes. Our chances of success with respect to any of the amendments are unknown at present. The Department of Justice has raised concerns about potential adverse consequences for us in pending litigation if Congress rejects some of the legislative changes.

III. Legislative Vehicles

It is our recommendation that the funding authorization for buyouts and the associated legislation for the "administrative tools" should be sought on the reconciliation bill. That vehicle can authorize mandatory spending from the salvage fund, so the spending does not fall under the discretionary spending caps. That bill will also have the capacity to cover the paygo cost of \$100 million, although this would reduce the total deficit reduction of the bill by that amount.

The other legislative language changes, however, must go on some other bill because they would violate the Byrd rule, although it is questionable whether the Byrd rule would be invoked. We recommend the Interior Appropriations Bill because this problem arose on an appropriations bill (the rescissions bill) and because the Northwest Members are in significant leadership roles on the Committee.

IV. Recommendation

We recommend that you and/or other senior White House staff consult with appropriate Members of Congress and begin an effort to secure enactment of these changes on the most appropriate legislative vehicle(s). We also recommend that appropriate communications staff be directed to prepare materials explaining this effort.

V. Action

_____ AGREE

_____ DISAGREE

_____ DISCUSS

Attachments

November 20, 1995

MEMORANDUM FOR LEON PANETTA

FROM: HAROLD ICKES

RE: TIMBER LEGISLATION

I. Introduction and summary

This memo provides background information for the proposed legislative amendments to the old-growth logging provisions of the 1995 rescissions act signed earlier this year.

The memo first summarizes three serious disputes arising from the rescissions act and then details the adverse effects these disputes have generated or are expected to cause. The final section of this memo describes proposed legislation.

The rescissions act contains logging-related provisions that, for the most part, govern salvage timber sales. But some provisions apply to sales¹ of environmentally sensitive old-growth timber in Oregon and Washington, and others address the President's Northwest Forest Plan ("Forest Plan"), which is the Administration's plan for logging old-growth and other timber on federal forests within the range of the northern spotted owl--areas generally west of the crest of the Cascade mountains in Oregon, Washington and portions of northern California.

Negotiations with Congress over the bill focused largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. But the Administration faces two serious disputes with the timber industry concerning interpretations of the old-growth provisions, and we expect additional disagreements over the Forest Plan-related provisions because of genuine misunderstandings as to the scope and meaning of the legislation. In addition, we are disputing a key issue regarding endangered birds that was left in disagreement with Congress when negotiations on the bill concluded.

The Administration is in litigation brought by the timber industry on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to the Administration's understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which may result in an injunction barring further timber sales in the Forest Plan area);
- additional damage to the economic interests of the sport and commercial fishing sectors; and,

¹ The term "sale" is used throughout this memo to describe Forest Service and Bureau of Land Management offerings of particular quantities of timber under specific contract terms.

- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act (see footnote 8).

II. Issues in dispute and adverse effects

a. **Issues in dispute**

On September 13, 1995, Judge Michael Hogan of the federal district court in Eugene, Oregon, ruled against the Administration on a key issue related to logging of old-growth timber: the scope of "section 318" timber sales, described in section 1, below. The Court of Appeals for the Ninth Circuit denied the government's request for a stay of his ruling pending appeal. Argument before the Ninth Circuit on the merits of Judge Hogan's ruling is scheduled for mid-January. Meanwhile, in the absence of a stay, title to old-growth timber is being transferred to logging companies and trees are being cut.

Judge Hogan is expected to rule again soon, perhaps this week, against the Administration's position on an additional issue: the method of determining where endangered birds are nesting, discussed in section 2, below. Also, we expect a third dispute to arise soon on the question of whether specific rescission act provisions implicitly override the Forest Plan. This issue is discussed in section 3, below.²

1. **Geographic and temporal scope of the "318 sale" section**

The Administration's understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales that had been offered under the authority of section 318 of the FY1990 Interior appropriations act, but that had not yet been released for harvest, generally because of serious environmental problems. Because section 318 was a one-year

² The 318 sales we anticipated releasing and have released are 130 million board feet (mbf). The additional sales Judge Hogan ordered us to release and that we have released in post FY90 sales are 175mbf, for a total amount released of 305mbf. His next ruling may force us to release up to 291mbf in pre-FY90 sales. If we lose on the nesting issue, we may be forced to release 248mbf of timber in critical nesting habitat areas. (The rescissions act requires the Administration to identify "replacement" timber for timber withheld because of the presence of listed birds. Thus, the key issue here is not the volume, per se, but the location and habitat value of the timber to be cut.) Also, we are disputing whether Judge Hogan's ruling applies to approximately 56mbf in nine sales that were enjoined or delayed by other court actions, and 38mbf in 12 sales where the original purchaser is no longer in business.

To date, Judge Hogan's ruling has required the Administration to release 175mbf in excess of what we had intended when we agreed to the bill. Subsequent orders may require the Administration to release an additional 633mbf of old-growth timber in excess of what we intended, producing a total unanticipated release of 808mbf of old-growth timber. Finally, if we lose on the interpretation of the Forest Plan provisions, we may be forced to release untold volumes more, perhaps in excess of one billion board feet immediately, and additional billions in the coming year--all potentially without environmental restrictions.

rider on an appropriations bill, there were a limited number of readily identifiable sales that were offered under its authority. Based on this understanding, the Administration expected to and has in fact released 130 million board feet of timber, through approximately 28 sales.³

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law applied to not only the "pure 318" sales (130mbf) as we expected, but all timber sales in Oregon and Washington offered but not released prior to the date of the signing of the rescissions act. According to Judge Hogan, any previously offered timber sale in Oregon and Washington, whether offered under 318 or not, had to be released, because these states are areas covered by section 318.⁴

On the basis of this ruling, Judge Hogan has already required the Administration to release 46 additional sales offered after the passage of section 318, representing an additional 175 million board feet. Judge Hogan is now considering whether to require the release of approximately 291 million board feet more, representing timber sales offered before the passage of section 318 located in areas covered by section 318.⁵

2. "Known to be nesting"

Under the original provision of Section 318, the federal government released from 1989 to 1995 more than 4.4 billion board feet of old growth timber, but held back approximately 130 million board feet due to environmental concerns with the sales. Prior to the rescissions act, the Administration was working with buyers to modify those sales so they could be released. The Administration understood and agreed that the rescissions act mandated that we release those sales without the needed modifications, understanding that such releases could pose a risk to but probably would not fatally undermine the Forest Plan. The Administration has already complied with this provision of the act

⁴ Aside from all environmental issues, Judge Hogan's expansive interpretation of section 2001(k) will produce windfalls for some timber company owners, without necessarily producing jobs for workers. The law as enacted was intended to help the specific set of mill owners and logging companies who had contracted for timber under section 318, but had not yet been allowed to cut some or all of the expected volume because of environmental restrictions imposed after passage of 318 and awarding of the sale contracts. Under Judge Hogan's ruling, many businesses who, prior to passage of the act had no legal claims against the government, now are statutorily entitled to cut federally owned timber or receive financial compensation. It can be argued that, where timber is cut, the windfall is shared with loggers, mill workers, and communities. But where compensation is paid, only the company owners receive benefit. Overall, this situation raises real concerns of fairness and cost.

Most of this pre-FY 90 volume was offered, but never sold. The original "sale" no longer exists in any normal sense of the concept. However, the Forest Service, BLM and Justice Department understand the district court's order to require us to identify and report to the court all such "sales." It is not known whether the court will order us to release these "sales," many of which no longer have supporting paperwork or on-the-ground tree markings. It would be very problematic to do so for administrative and practical reasons, and because of the possible volume and environmental sensitivity of the timber in question. The Forest Service and, to a lesser degree, BLM estimates of timber volume involved in this issue change regularly, but unpredictably. We expect this number, now at 291mbf, to increase as additional records are reviewed.

The second major dispute before Judge Hogan involves the "known to be nesting" issue. This is about which standard to apply in determining whether bird species listed under the Endangered Species Act ("ESA"), particularly the marbled murrelet, are "known to be nesting" in a particular forest area. This dispute is important because, under the rescissions act, section 318 sales where birds are "known to be nesting" are exempted from the general mandate that they be released, although the Administration is obliged to find replacement timber. In the case of the marbled murrelet, the timber industry and some members of Congress would insist on physical evidence of nesting, such as discovery of a nest. In contrast, the Administration's position is broader, more fully sustained by accepted science, and more protective of the murrelet because it relies on evidence other than solely the presence of nests.⁶

If the court rules against the Administration, we would be required to release approximately 248 million board feet in 61 sales. Defeat on this issue and the resulting logging of key habitat areas would have a devastating effect on murrelet populations in Oregon, and harm murrelet populations elsewhere. In addition, it would likely result in an injunction nullifying the Forest Plan.

3. Override of the Forest Plan

The timber industry's principal attorney involved in rescissions act litigation recently stated in court his view that sections 2001(d) and (l) of the rescissions act override the standards and guidelines for wildlife protection and other resource management criteria in the Forest Plan and require expedited release of timber sales in areas covered by the Forest Plan. This issue is in the very early stages of litigation now,⁷ and an adverse decision could lead to significant environmental problems.

b. Adverse effects expected

The Administration position relies on use of a scientific protocol that infers marbled murrelet nesting activity from observation of other behavior. The industry argues that we should rely solely on physical evidence of nesting -- a virtual impossibility because of these birds' unusual behavior. The murrelet, a small seabird that comes ashore only to breed, has developed evasive characteristics and behavior to avoid predators while breeding in the forests. During the nesting season it is often secretive, has cryptic coloration, does not build a nest, lays its eggs and raises its young on tree limbs more than a hundred feet up in the forest canopy, and avoids activity during daylight hours. The marbled murrelet was the last North American bird to have its nesting habits identified, and since first discovered in the mid-1970's, only 70 nests have ever been sighted.

⁷ The Northwest Forest Resource Council intervened November 16, 1995, in an Oregon timber sale case arguing that the rescissions act eliminated judicial review and, it appears, environmental restrictions on even those sales which were not held up by environmental concerns at the time of signing of the rescissions act. Although we have only preliminary information, it appears that the timber industry is contending that the rescission act effectively freed all timber sales in Oregon, Washington, and northern California from judicial review and environmental rules.

The volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by 808 million board feet -- an amount roughly equivalent to 80 percent of one year's harvest under the President's Forest Plan. Moreover, a considerable amount of this old-growth harvest would apparently come from within "Late Successional Reserves," areas designated under the Forest Plan to be generally set aside from commercial harvest operations.

The environmental effects of the expanded interpretations sought by the timber industry (and thus far sustained by the courts) include adverse impacts on threatened and endangered Snake River salmon and coastal salmon and trout proposed for listing, and on two listed bird species, the northern spotted owl and marbled murrelet. Given these impacts, a federal district court judge in Seattle, William Dwyer, may well issue an injunction against further logging within the Forest Plan area -- derailing a major presidential initiative and returning the region to the court-imposed gridlock created during the Bush Administration. Several other Administrative initiatives to provide relief to private and state landowners under the ESA could also be at risk if these sales are released.⁸

III. Legislative remedy

The President has publicly announced that he will propose a legislative solution to these

⁸ Section 4(d) of the Endangered Species Act provides the Secretary of the Interior with broad regulatory authority to issue protective regulations for threatened species like the northern spotted owl. Current ESA regulations prohibit the harming of spotted owls across millions of acres of non-Federal forest land in the Pacific Northwest. Because of the protections in the Forest Plan, President Clinton was able to direct Secretary Babbitt to issue a section 4(d) rule to ease spotted owl incidental harming restrictions for over 4.5 million acres of non-federal lands in Washington and California. This rule is not yet final. Oregon is developing its own 4(d) rule, which is not yet submitted to Interior. If the Forest Plan is invalidated, the basis for providing relief to non-federal landowners would be eliminated.

The second major Administration ESA reform initiative in the Northwest involves negotiation of Habitat Conservation Plans (HCPs) with major timberland owners under Section 10(a) of the ESA. In exchange for a commitment to integrate endangered species preservation into land use practices, an HCP permittee will be authorized to take action harming certain endangered species (e.g., marbled murrelets, spotted owls) over the course of long-term land use activities. Because of the Forest Plan, the Administration has been able to take a very flexible approach to developing HCPs with large timberland owners. Four HCPs covering 740,000 acres of land are in place, 11 more are in negotiation, representing an additional 6.7 million acres. If the Forest Plan falters, or if the broad definition of 2001(k) prevails and [a large incremental volume of old-growth is cut,] Interior's authority to authorize further actions harming murrelets or owls through HCPs would be virtually eliminated. Existing HCPs, such as the Elliott State Forest HCP in Oregon, would be subject to challenge.

Because of the adverse impacts caused by rescissions act logging on endangered salmon and trout species that occur in Oregon, Washington, Idaho, and Montana, activities that cause additional harm to those species, such as logging, mining, grazing and other uses of forest land in Montana, Idaho, eastern Oregon, and eastern Washington, may be enjoined. Litigation has been filed by environmentalists to invalidate forest plans (and, thus, activities under those plans) in these areas because of the impacts of the rescissions act-authorized salvage and old-growth logging.

problems. He affirmed his intent to seek legislation when he met with the Green Group during the week of November 6.

The legislative approach we recommend was developed through extensive consultation with White House and agency representatives. The group considered six principal options, summarized and discussed in terms of Pros and Cons in Attachment A. The recommended course, Option 3, lies between the broadest possible course, favored by environmentalists, and the narrowest course, likely to be favored by Congress. Option 3 is targeted narrowly at the most problematic features of the rescissions act.

The prospect for success with Congress is not yet clear. The Administration has not begun negotiations, but staff have had informal contacts. Congressman Dicks, Senator Hatfield, and Senator Gorton are reported to be willing to discuss a "very narrow" approach. We received a largely negative letter from some key lawmakers, responding to the President's statement announcing his plan to seek legislation (Attachment B). Conversely, other members filed an amicus brief with the Ninth Circuit in support of the Administration's position on the "geographic and temporal scope" issue.

Much of Option 3 represents a restoration or clarification of what the Administration believes it agreed to with Congress when the rescissions act was negotiated. In this regard, the decision to seek new, amendatory legislation is less vulnerable to characterization as a "flip-flop." Other features of Option 3 reflect administrative measures that differ from or supplement the original understanding.

This approach is an appropriate effort to reverse or prevent judicial decisions based on misunderstanding of lawmakers' intent, and remedy on-the-ground environmental problems.

Option 3 does not apply to "salvage" logging, which would continue to be governed by the rescissions act, the President's directive of August 1, 1995, and the interagency agreement of August 9, 1995. The legislation recommended below can be divided into three general categories relevant to possible negotiations with Congress:

- Amendments to restore the Administration's original agreement with Congress;
- Amendments to give the Administration tools to fix environmental problems created by the Act; and
- Amendments to resolve issues left in disagreement with Congress.

a. Amendments to restore the Administration's original agreement with Congress

1. Old-growth sales should be limited to "318 sales": This amendment fixes the misunderstanding regarding section 2001(k) of the rescissions act. While the Administration understood section 2001(k) to require the release of specific old-growth sales that were offered under the provisions of section 318, a rider attached to the fiscal year 1990

Interior and Related Agencies appropriations bill, Judge Hogan ruled in *NFRC v. Glickman* on September 13, 1995, that all timber sales on Forest Service and BLM lands in the geographic area covered by section 318 (all of Oregon and Washington) must be released, regardless of whether the sales were originally offered under section 318.⁹ This interpretation more than doubled the number of board feet we believed we were required to release under 2001(k), threatening to cause environmental harm and to undermine the Northwest Forest Plan.

The proposed amendment would conform the legislation to the Administration's original understanding of the geographic and temporal scope of this provision. This amendment would have no effect on sales that have already been released (although another amendment, discussed below, would give us administrative tools to reduce or prevent damage from such sales). The principal practical effect of this change would be to prevent release of sales that were offered, then withdrawn (for environmental or other reasons) prior to the passage of section 318 (approximately 291mbf), and the other sales currently in dispute, such as those where the original purchasers are out of business (38mbf) or where the sales were enjoined by different court action (56mbf), effectively safeguarding 385mbf in total.

Our proposal would delete the language in 2001(k) that refers to geographic units and would provide for the release of "all timber sale contracts offered in Fiscal Years 1989 and 1990 under the authority of, and in compliance with, Section 318(b) of Public Law 101-121 (103 Stat. 745)."

2. **The Forest Plan should be protected:** The Forest Plan was discussed during negotiations with Congress. The Administration's understanding of Congress' intent (articulated by Senators Gorton and Hatfield) was that the logging provisions of the rescissions act would enable the Administration to release timber sales under the Forest Plan, consistent with environmental law and policy. The attorney representing industry plaintiffs in most of the litigation falling under section 2001(k), however, has signaled his belief that section 2001(d) of the rescissions act specifically overrode the criteria in the Forest Plan. Under the industry's apparent interpretation of the act, section 2001(d) may require expedited release--with no environmental or harvest volume standards whatsoever--of timber sales throughout Oregon, Washington, and Northern California. This could involve immense volumes of timber, perhaps 1 billion board feet in the first year, and additional billions thereafter. This issue is now in the very early stages of litigation.

For a different reason, section 2001(l) also may pose a threat to the Forest Plan. This section specifically prohibits the Administration from revising or amending the Plan prior to December 1996--even to take into the account changes in environmental conditions caused by logging of old-growth timber mandated by section 2001(k). Given the expansive way in which 2001(k) has been interpreted and the unexpectedly large quantities of old-growth

Judge Hogan already has required the release of all timber sales offered in the geographic area described in section 318 after the expiration of section 318 (175mbf). He is expected to require the release of all timber sales offered on these lands prior to the passage of section 318 (291mbf).

timber it releases, this prohibition puts the Forest Plan at serious risk of being overturned by the courts.¹⁰

Our proposal will make changes in two sections of the rescissions act. In 2001(d), we would delete the language that refers to geographic units (as we would also do to 2001(k) above) and provide that the Secretary shall expeditiously prepare timber sale contracts "allowed under and consistent with the standards and guidelines specified in" the Forest Plan. In 2001(l), we would strike language that prevents us from making changes to the Forest Plan to account for the old growth sales released under this law.

b. Amendment to give the Administration tools to fix environmental problems created by the act

Buy out and replacement authority and funding: The government has already released certain environmentally problematic timber sales under section 2001(k), and in the future may have to release more. Thus, in order to protect the environment and the Forest Plan, it is necessary to create tools that allow the Administration to mitigate some of that damage.

The Departments of the Interior and Agriculture need the authority to work with purchasers in order to modify or buy out problematic contracts, or provide replacement timber. This authorization would include the authority to reach a voluntary agreement with the holder of the contract, under which the holder accepts substitute timber or money, as well as the authority to unilaterally require a holder to accept substitute timber or permit the government to buy back part or all of a sale that would have significant environmental effects. We expect that the Departments would offer a voluntary settlement prior to taking unilateral action. We recommend seeking authority that is broadly consistent with the standard contract provisions of the Forest Service's timber contracts. Traditionally, under standard contract terms and regulations, the Forest Service and BLM have had authority to withhold or modify the terms of timber sale in order to address environmental problems.

Our proposal would authorize the Secretary of Interior or Agriculture to "replace, modify, suspend, or terminate" any timber sale contract released under 2001(k) "where the Secretary in his discretion finds that such replacement, modification, suspension, or termination is authorized pursuant to originally advertised terms" of the sale contract or where proceeding with the original contract "would have an adverse effect on the environment or natural resources." The proposal would further provide for appropriate compensation not to exceed a

The Forest Plan was found by Federal District Court Judge William Dwyer to be in compliance with environmental laws because it allowed harvest in certain areas pursuant to certain standards, and barred cutting in other areas, creating a sustainable balance of cutting and preservation. If the Administration is required to cut significant amounts of old-growth timber that was not originally anticipated in the Forest Plan, we need to be able to adjust the original Plan, taking these new sales into account, otherwise the court-approved balance will be upset.

cumulative total of \$100,000,000.

c. Amendments to resolve issues left in disagreement with Congress.

1. The Administration should not be required to release old-growth sales where bird species listed under the ESA are nesting or breeding: The only exception to the release of sales mandated in Section 2001(k) is for sale units in which threatened or endangered bird species are "known to be nesting." There are a few northern spotted owl nests in sale areas, but the controversy regarding this issue revolves around a number of sales that contain marbled murrelet breeding habitat.

While there was disagreement between Congress and the Administration about the definition of "known to be nesting" during the legislative debate, no statutory definition was ultimately adopted. Congress rejected the Administration's proposed definition, but was unable to include language endorsing the industry view, apparently because of opposition from members. Some in Congress will argue that the Administration's proposed amendment is an effort to win on an issue we lost during negotiations. It is more accurate, however, to say that neither side won, and both sides, in this sense, preserved their arguments.

Industry plaintiffs are suing the land management agencies to force the agencies to use a very narrow definition of "known to be nesting." The land management agencies are relying on the best scientific protocol for determining where murrelets are "known to be nesting." A court ruling for the industry interpretation would probably require the Administration to release all but one or two of the 61 sales that the Administration has withheld under our interpretation of the act.

Our proposal would replace the phrase "known to be nesting" with the phrase "known to occupy for nesting or breeding purposes." The proposal would further state that "The Secretary concerned shall make this determination of occupancy in accordance with scientifically recognized principles, such as the Pacific Seabird Group Protocol."

2. The government's obligation to provide replacement timber should be defined narrowly: Currently, section 2001(k)(3) requires the Secretary to provide replacement timber of like volume, kind and value "if for any reason" a sale cannot be released and completed[.] While the only affirmative defense to the release of a sale is the "known to be nesting" provision of Section 2001(k)(2), there are cases of physical impossibility and there may be other circumstances beyond the agencies' control which may require the agencies to offer replacement timber under this provision. We may not have sufficient timber to meet our obligations under this provision, given the number of sales that will threaten marbled murrelets and the number that have subsequently been reconfigured and are now physically impossible to release.

Accordingly, our proposal would amend the language to limit the replacement requirement to

sales that cannot be released due to murrelets, and add an option to buy out the sales, in the Secretary's discretion.

IV. Cost of the legislative package

We estimate that the cost of this legislation will fall within a range which may reasonably be capped at \$100 million. This figure reflects the Administration's best estimate of the buy back cost of the timber sales released under the rescissions act, approximately \$135 million, reduced by the fact that not all sales, or all parts of sales will need to be bought back.

V. Legislative vehicles

It is our recommendation that the funding authorization for buy outs and the associated legislation for the "administrative tools" should be sought on the reconciliation bill. That vehicle can authorize mandatory spending from the salvage fund, so the spending does not fall under the discretionary spending caps. That bill will also have the capacity to cover the paygo cost of \$100 million, although this would reduce the total deficit reduction of the bill by that amount.

The other legislative language changes, however, may need to go on some other bill because they might be found to violate the Byrd rule, although it is questionable whether the rule would be invoked in this situation. We recommend the Interior Appropriations Bill because this problem arose on an appropriations bill (the rescissions bill) and because the Northwest Members are in significant leadership roles on the Committee.

attachments

- A - Summary of Legislative Options with Pros and Cons
- B - November 6, 1995, Letter from Members of Congress

Name	Date
Steven Reich	6/4/99

Counsel