NLWJC- Kagan

Counsel - Box 010 - Folder 009

Timber - Drafts [2]

DRAFT (1:30 P.M. November 17, 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 serious environmental problems 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 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 FY 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 Year 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. 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.** 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 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 is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, suspend, or terminate timber sale contracts released under this section in cases where the Secretary in his discretion finds that the action: (1) is authorized under original contract terms, or (2) is ~~necessary to avoid~~ substantial damage to the environment or public resources." The amendment would further provide for appropriate compensation not to exceed a cumulative total of $100,000,000.

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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 replaces the phrase "known to be nesting" with "known to be occupying a forest unit, for nesting or breeding purposes, as determined by scientifically recognized principles, including in the case of the marbled murrelet, 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 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 limit the government's obligation to provide alternative timber. There are two options: a) limit the replacement requirement to sales that cannot be released due to murrelets; or b) change it from a requirement to an authority, at the Secretary's discretion, to offer replacement timber.

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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. 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 16, 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 produce. 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, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others address the President's Northwest 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 focussed largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. But, we now face two serious disputes with the timber industry concerning the old-growth provisions and we expect additional disagreements over the Forest Plan-related provisions because of genuine misunderstandings, as well as some disagreements that we did not resolve during negotiations.

We are in litigation on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to our understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which could likely 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
- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act (see footnote 5).

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. Judge Hogan is expected to rule again soon, perhaps this week, against our position on an additional issue: the method of determining where endangered birds are nesting, discussed in section 2, below. In addition, we expect a third dispute to arise soon on the question whether specific rescission act provisions implicitly override the Forest Plan. This issue is discussed in section 3, below.[1]

1. Geographic and Temporal Scope of Section 318 Sales

Our understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, but held up from release for harvest (generally because of serious environmental problems). Because section 318 was a one-year rider on an appropriations bill, there were a limited number of readily identifiable sales that were offered under its authority. Based on this understanding; we expected to and have in fact released 130 million board feet of timber, through approximately 28 sales.[2]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales as we expected, but <u>all</u> 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 sale in Oregon and Washington, whether offered under 318 or not, had to be released, because these states are <u>areas covered by</u> section 318.[3]

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[1] The 318 sales we anticipated releasing and have released are 130 million board feet (mbft). The additional sales Judge Hogan ordered us to release and that we have released in post FY'90 sales are 175 mbft. His next ruling may force us to release up to 265 mbft in pre-FY'90 sales. If we lose on the nesting issue, we may be forced to release 248 mbft more. And if we lose on the interpretation of the Forest Plan provisions, we could have to release untold volumes more. In total, we could have to release between 423 and 688 mbft more, not including any volume we are forced to release due to an adverse interpretation of the rescission act provisions pertaining to the Forest Plan.

[2] Under the original provision of Section 318, the federal government released 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, we were working with buyers to modify those 130 sales so they could be released. We understood the rescissions act to mandate 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. We have already complied with this provision of the act

[3] Aside from all environmental issues, Judge Hogan's expansive interpretation of section 2001(k) will produce windfalls for some timber companies that raise concerns of both cost and equity.

This ruling, on the so-called "geographic and temporal scope" issue, has already required us to release 46 additional sales offered after the passage of section 318, representing an additional 175 million board feet. It has the potential to require us to release approximately 265 million board feet more, if Judge Hogan decides, as is expected, that timber sales offered before the passage of section 318 in 1989 located in areas covered by section 318, also must be released.[4]

2. **"Known to be Nesting"**

The second major dispute is also before Judge Hogan and involves the "known to be nesting" issue. This dispute is 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. This dispute is important because section 318 sales where birds are "known to be nesting" are exempted from the general mandate that they be released, although we are obliged to find replacement timber.The timber industry and some members of Congress would insist on physical evidence of nesting, such as discovery of a nest. In contrast, we take a view that is broader, more fully sustained by accepted science, and more protective of endangered birds because it relies on evidence other than solely the presence of nests.[5]

If we lose this dispute we would be required to release for harvest approximately 248 million board feet in 56 sales.[6] 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.

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[4] 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." 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.

[5] The Administration position on this issue relies on use of a scientific protocol that infers 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 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 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.

[6] 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.

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 environmental, harvest volume, and other criteria in the Forest Plan and require expedited release of sales from forests in areas covered by the Forest Plan. Although this issue is not squarely in litigation now, it may soon be, and could lead to significant adverse environmental consequences.

b. **Adverse Effects Expected**

The volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by 423-688 million board feet -- an amount roughly equivalent to one-half year's harvest under the President's Forest Plan. Moreover, approximately half of this 423-688 million board foot 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 second Northwest federal district court judge, 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 Reagan and Bush administration. Several other Administrative initiatives to provide relief to private and state landowners under the Endangered Species Act could be at risk if these sales are released.[7]

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[7] 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

II. Legislative Remedy

The President has publicly announced that he will propose a legislative solution to these problems. He affirmed his intent to seek legislation when he met with the Green Group representatives last week.

The legislative approach we recommend was developed through extensive consultation with White House, EOP, 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, most favored by the environmental community, and the narrowest course, likely to be favored by Congress. It 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 the "deal" we believed we attained with Congress when the rescissions act was negotiated. In this regard, the decision to seek new, amendatory legislation is less vulnerable to denunciation as a "flip-flop." Some other features of Option 3, however, reflect administrative measures that differ from or supplement the original "deal."

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.

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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 logging. In Ninth Circuit and Supreme Court rulings earlier this year, similar litigation was turned back only because, at that time, the Forest Plan and other protective measures were in effect.

Option 3 does not apply to "salvage" logging, which would continue to be governed by the rescissions act, the President's directive, and the interagency agreement. The legislation we recommend can be broken into three general categories relevant to possible negotiations with Congress:

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

a. **Amendments to Restore our Original Agreement with Congress**

1. **Old Growth Sales Should Be Limited to "318 Sales":** This amendment fixes the misunderstanding embedded in section 2001(k) of the rescissions act. While we 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* that all timber sales on Forest Service and BLM lands in the geographic area covered by section 318 (essentially all of Oregon and Washington) must be released, regardless of whether the sales were originally offered under section 318.[8] 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 our original understanding of the geographic and temporal scope of this provision. This amendment would have no effect on sales that we have already 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 had been withdrawn (for environmental or other reasons) prior to the passage of section 318.

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 Year 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 President's Forest Plan was discussed during negotiations with Congress. Our understanding of Congress' intent (articulated by Senators Gorton and Hatfield) was that the logging provisions of the rescissions act would enable us to release timber sales while upholding environmental law and policy. The attorney representing industry plaintiffs in most of the litigation falling under

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[8] 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. He is further expected to require the release of all timber sales offered on these lands prior to the passage of section 318.

section 2001(k), however, has signaled his belief that Congress specifically overrode the Forest Plan in section 2001(d) of the rescissions act. 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. We expect the industry to litigate this issue soon.

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 timber it releases, this prohibition puts the Forest Plan at serious risk of being overturned by the courts.[9]

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 Us Tools to Fix Environmental Problems Created by the Act

Buyout, 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 President's Forest Plan, it is necessary to create some tools that allow us 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 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 consistent with the standard contract provisions of the Forest Service's timber contracts.

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[9] The Forest Plan was found by the court 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 we are required to cut nearly one-half billion board feet that was not 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.

Our proposal is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, suspend or terminate timber sale contracts released under this section in cases where the Secretary in his discretion finds that the action is necessary to avoid substantial damage to the environment or public resources." The proposed amendment would further provide for appropriate compensation from the timber salvage fund not to exceed a 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 Endangered Species Act 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 our proposed definition, but was unable to include language endorsing the industry view, apparently because of opposition from members. Some in Congress will argue that our 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 at present 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 56 sales that the Administration has withheld under our interpretation of the act.

Our proposal replaces the phrase "known to be nesting" with "known to be occupying a forest unit, for nesting or breeding purposes, as determined by scientifically recognized principles, including in the case of the marbled murrelet, 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 could arguably require the agencies to offer replacement timber under this provision. We man 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 limit the government's obligation to provide alternative timber. There are two options: a) limit the replacement requirement to sales that cannot be released due to murrelets; or b) change it from a requirement to an authority, at the Secretary's discretion, to offer replacement timber. The first option is arguably consistent with our original understanding of the legislation. The second is not.

III. Cost of the Legislative Package

We estimate that the cost of this legislation will fall within a range, not exceeding $[100] million.

IV. 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. 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

ATTACHMENT A

SUMMARY OF LEGISLATIVE OPTIONS
(With staff recommendation - November 17, 1995)

Option 1.

- Repeal entire timber rider (salvage, 318, and Forest Plan provisions [2001])
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Sends strongest, most favorable message to environmentalists*
Restores legal status quo ante
Forestalls salvage-related controversies around country and eastside litigation
Consistent with POTUS broad message on environment
Most protective of state and private timber land interests
Useful if congressional fix unlikely

Con: *Conflicts with agreement with congress on salvage and some 318 sales*
Appears to be a flip-flop
Extremely unlikely to gain congressional support
Costly

Option 2.

- Repeal all green timber sale provisions [2001(k)]
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Sends strong, favorable message to environmentalists*
Prevents release of additional problematic sales (nesting & non-318)
Prevents judicial interpretation that Forest Plan was overridden
Provides authorities to address released, unharvested problem sales
Consistent with POTUS broad message on environment
Protective of private/state timber land interests
Reduces risk of eastside litigation

Con: *Conflicts with agreement with congress on some 318 sales*
Could appear to be a flip-flop
Difficult to gain congressional support
Does not eliminate all risk of new adverse interpretations
Costly

ATTACHMENT A

Option 3. (Staff Recommended Option)

- Amend provisions applicable to listed birds and non-318/Hogan sales to match our interpretations of "occupancy," and temporal/geographic scope
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to modify/terminate (with compensation) timber harvest rights under 2001(k)

Pro: *Sends largely favorable message to environmentalists*
Prevents release of additional problematic sales (occupancy and pre-FY90)
Prevents judicial interpretation that Forest Plan was overriden
Provides authorities to address released, unharvested problem sales
Reduces risk of eastside litigation
Protective of private/state timber land interests
Most consistent with Administration view of agreement with congress

Con: *Difficult to gain congressional support*
Narrower "fix" than may be desired by environmentalists
Does not eliminate all risk of unforeseen adverse interpretations
Could appear to be a flip-flop regarding listed birds
Costly

Option 4.

- Amend provisions applicable to listed birds to match our interpretation
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Prevents release of some additional problematic sales*
Prevents judicial interpretation that Forest Plan was overridden
Provides authorities to address released, unharvested problem sales

Con: *Does not resolve problems with pre-FY90 Hogan sales*
Appears tepid to environmentalists
Little or no help reducing risk of eastside litigation or protecting private/state timber land interests
Difficult to gain congressional support
Costly

ATTACHMENT A

Option 5.

- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Prevents judicial interpretation that Forest Plan was overridden*
Provides authorities to address released, unharvested problem sales

Con: *Does not resolve problems with non-318 or listed bird sales*
Environmentalists would condemn as inadequate
Little or no help reducing risk of eastside litigation or unforeseen adverse interpretations
Difficult to gain congressional support
Costly

Option 6.

- Secure discretionary authority to buy-back vested harvest rights
- Secure discretionary authority to exchange timber harvest rights
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Possible to win congressional support*
Provides authorities to address released, unharvested problem sales

Con: *Environmentalists would condemn as inadequate*
Speculative protection for Forest Plan, private/state timber land interests
Little or no help reducing risk of eastside litigation/unforeseen adverse interpretations
Does not eliminate controversy over non-318 and listed bird sales
Costly

ATTACHMENT A

Summary of Legislative Options (November 17, 1995)			
#	Major Features	Strengths	Weaknesses
1	• Repeal entire timber rider • Secure buy back, exchange and modification authorities	▸ Strongest, most favorable message to environmentalists ▸ Useful if congressional fix unlikely	■ Appears to be a flip-flop ■ Extremely unlikely to gain congressional support
2	• Repeal all green timber and Forest Plan provisions • Secure buy back, exchange and modification authorities	▸ Strong message to environmentalists ▸ Prevents release of problematic sales and interpretation that Forest Plan overridden	■ Conflicts with agreement with congress on some 318 sales ■ Could appear to be a flip-flop ■ Difficult to gain congressional support
3	• Amend provisions applicable to listed birds and non-318 sales to match our interpretations • Repeal Forest Plan provisions • Secure buy back, exchange and modification authorities	▸ Favorable message to environmentalists ▸ Prevents release of problematic sales and interpretation that Forest Plan overridden ☞ **STAFF RECOMMENDATION**	■ Difficult to gain congressional support ■ Narrower "fix" than may be desired by environmentalists
4	• Amend provisions applicable to listed birds to match our interpretation • Repeal Forest Plan provisions • Secure buy back, exchange and modification authorities	▸ Prevents release of some problematic sales and interpretation that Forest Plan overridden	■ Appears tepid to environmentalists ■ Difficult to gain congressional support
5	• Repeal Forest Plan provisions • Secure buy back, exchange and modification authorities	▸ Prevents judicial interpretation that Forest Plan was overridden	■ Environmentalists would condemn as inadequate ■ Difficult to gain congressional support
6	• Secure buy back, exchange and modification authorities	▸ Possible to win congressional support	■ Environmentalists would condemn as inadequate

TIMBFX.TCJ/tcj November 17, 1995

Congress of the United States
Washington, DC 20515

November 6, 1995

President William J. Clinton
The White House
Washington, D.C.

Dear President Clinton:

We read your statement of Saturday, October 28, concerning the implementation of Section 2001 of the FY 1995 funding rescission bill (PL 104-19) with a mixture of bewilderment and surprise. Section 2001 is the section of the bill that deals with forest health activities and directs the Secretaries of Interior and Agriculture to expedite some timber sales, as well as release others that have already been sold, and for which the government has outstanding contract liability.

Your Saturday statement bewilders us for at least four reasons. First, you assert that the release of these sales does not comport with the agreement that the Administration and Congress laboriously negotiated concerning the implementation of this measure. Certainly, the direction in Section 2001 (k) to release these sales "notwithstanding any other provision of law" is not difficult to translate into executive action. Moreover, during negotiations your negotiators asked for, and were given, a list of the kinds of sales that we intended to be covered. It is rather late after (1) concluding negotiations, (2) signing the bill, (3) developing your own interpretation of the statutory language, and (4) having it rejected by two courts to say you misunderstood what we and your negotiators agreed to.

Second, your predictions of dire environmental and economic consequences from the release of these sales do not square with the facts. These sales involve less than 10,000 acres out of the 30 million acres (fewer than 1 in every 3,000 acres) of federal forest land in Oregon and Washington. They come at a time when, thanks to the zeal of extreme preservationists who want to take us back to pre-settlement conditions, Pacific Northwest timber harvesting is at an all-time low. The statute and existing law provide you the flexibility to set-aside additional acreage to protect species in places where the government has not already incurred financial liability associated with cancelling already-sold timber sales. Perhaps your advisors have not shared the availability of this flexibility with you.

Third, and in a related vein, is the apparent lack of concern for the government's financial liability. Since these sales have already been sold they are no longer the government's possession strictly speaking. Cancelling them will involve the assumption of liability for damages claims from the purchasers. Current estimates suggest liabilities in excess of $150 million. Together with foregone timber sale receipts, the Treasury would lose in excess of $400 million. That loss would have to be reflected in agency budget cuts in FY 1997 or in out years.

Finally, we are bewildered because until October 28, Administration representatives and witnesses at congressional hearings were urging us to forebear from any changes to Section 2001 of PL 104-19. As you may know, we are not pleased with the slow rate of progress your Administration has made in implementing the provision. Nevertheless, we were inclined to agree that -- as one Administration witness entreated -- "it is a bit premature" to consider changes. Perhaps broader legislative changes should now be considered.

In addition to bewildering us, your intention to introduce legislation in this area leaves us surprised. So far, the only piece of legislation in the natural resources and environmental area that your Administration has introduced was the Superfund proposal brought forward in the 103rd Congress. Even that measure was not reintroduced in this Congress. Thus, your forthcoming forestry proposal will be only the second environmental initiative advanced under your leadership. Given the pressing problems in other areas of environmental concern (eg, the Endangered Species Act, Clean Water Act, the Farm bill) we are surprised at the selection of this issue as a top priority, but we nevertheless agree that a legislative proposal may be superior to the Administration's current approach which violates the law. We believe that the courts that have reviewed the Administration's performance to date would concur.

Therefore, we stand ready to entertain your legislative proposal and are willing to discuss an early hearing date in the relevant Committee or Committees of jurisdiction. We do request, however, that your proposal be accompanied by an accurate estimate of financial damages to the government associated with cancelling any contracts. Your proposal should also include provisions for determining which agency budgets should be reduced to offset the damage claims. We would also appreciate your thoughts on whether the federal government has any obligations to the affected counties to make up for lost revenues to schools.

At the end of the day, we will likely not agree on the outcome of this dispute. But even as an initial matter, we would not recommend contract cancellations and federal revenue losses as a viable proposal.

Sincerely,

Wes Cooley

Helen Chenoweth

Wally Herger

Frank Riggs

Charles H. Taylor

Walter B. Jones, Jr.

Jack Metcalf

Richard Pombo

Jim Longley

The President
November 6, 1995
Page Three

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Sincerely,

Wes Cooley R/OR
Cooley

Charles H. Taylor R/NC
Taylor

Helen Chenoweth R/ID
Chenoweth

Walter B. Jones, Jr. R/NC
Jones

Wally Herger R/Ca
Herger

Jack Metcalf R/WA
Metcalf

Frank Riggs R/Ca
Riggs

Richard Pombo R/Ca
Pombo

Tillie Radanovich R/Ca
Radanovich

Jim Longley R/Me
Longley

Larry Craig R/ID
Craig

Conrad Burns R/Mt
Burns

Slade Gorton R/WA
Gorton

Frank H. Murkowski R/AK
Murkowski

DRAFT (5 P.M. November 18, 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~~s 1989 and~~ 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 Year~~s 1989~~ 1989r ~~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

broadly

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.~~

would authorize the ies

Our proposal ~~is to add legislative language such as: "~~The Secretaries of Agriculture and the Interior ~~are authorized~~ to suspend, terminate, replace or modify any timber sale contract ~~affected by or~~ released ~~pursuant to this subsection~~ where the Secretary ~~concerned~~ in his discretion finds that such suspension, termination, replacement or modification is authorized pursuant to originally advertised terms" or where proceeding with the original contract "would have an adverse effect on the envirnoment or natural resources." The amendment would further provide for appropriate compensation not to exceed a cumulative total of $100,000,000.

STE

clarify order.

of the sale contract

under 2001(k) subsection

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 sale unit~~." 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.

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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 buyout the sales ~~if adequate replacement timber is unavailable~~ at the Secretary's 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~~ must need to go on some other bill because they would violate the Byrd rule. 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. FV

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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 19, 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 sales 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 focus~~s~~ed largely on issues related to salvage sales, and most, though not all, of the major problems with those portions were resolved. But we fa~~c~~ce 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 that was left in disagreement with Congress when negotiations on the bill concluded.

We are in litigation on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to our understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which could ~~likely~~ would likely 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
- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act (see footnote 7).

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 our 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.[1]

1. Geographic and temporal scope of section 318 Sales

The Administration's understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, ~~but~~ which had not yet been released for harvest, ~~generally~~ because of serious environmental problems. Because section 318 was a one-year rider on an appropriations bill, there were a limited number of readily identifiable sales that were offered under its authority. Based on this understanding, we expected to and have in fact released 130 million board feet of timber, through approximately 28 sales.[2]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales (130mbf) as we expected, but <u>all</u> timber sales in Oregon and Washington offered but not released prior to the date of the

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[1] 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 more (see footnote 6). 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. Thus, we may be required to release 633mbf of old-growth timber in excess of what we intended when we agreed to the provisions of the rescissions act. 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 without environmental restrictions.

[2] Under the original provision of Section 318, the federal government released 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, we were working with buyers to modify those sales so they could be released. We 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. We have already complied with this provision of the act.

signing of the rescissions act (approximately 175mbf more). 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.[3]

This ruling, on the so-called "geographic and temporal scope" issue, has already required release of 46 additional sales offered after the passage of section 318, representing an additional 175 million board feet. It has the potential to require release of approximately 291 million board feet more, if Judge Hogan decides, as is expected, that timber sales offered before the passage of section 318 in 1989 located in areas covered by section 318, also must be released.[4]

2. **"Known to be nesting"**

The second major dispute ~~also~~ 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") 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 we are obliged to find replacement timber. The timber industry and some members of Congress would insist on physical evidence of nesting, such as discovery of a nest. In contrast, our position is broader, more fully sustained by accepted science, and more protective of endangered birds because it relies on evidence other than solely the presence of nests.[5]

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[3] Aside from all environmental issues, Judge Hogan's expansive interpretation of section 2001(k) will produce windfalls for some timber companies. 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 ~~(including some who had 318 contracts, as well as others who did not)~~ 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.

[4] 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." 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.

[5] The Administration position relies on use of a scientific protocol that infers 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 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 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.

If the court rules against the Administration, we would be required to release approximately 248 million board feet in 61 sales.[6] 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, and an adverse decision could lead to significant environmental problems. ?

b. Adverse effects expected

The volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by 423-688 million board feet -- an amount roughly equivalent to one-half year's harvest under the President's Forest Plan. Moreover, approximately half of this 423-688 million board foot 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 Reagan and 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.[7]

Even if we win on this issue, the

[6] ~~The rescissions act requires the~~ Administration ~~to identify~~ "replacement" timber for the timber withheld because of the presence of listed birds. Thus, the key issue here is the timber not the volume, ~~per se,~~ but the location and habitat value of the timber ~~to be cut.~~ will have to provide

Number to FN1

[7] 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

III. Legislative remedy

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

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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.

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 _____, and the interagency agreement of _____. 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.[8] 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).

Our proposal would delete the language in 2001(k) that refers to geographic units and would

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[8] 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. He is expected to require the release of all timber sales offered on these lands prior to the passage of section 318. The Forest Service and BLM estimate that at least 291mbf would have to be released under that order.

expeditiously

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 timber it releases, this prohibition puts the Forest Plan at serious risk of being overturned by the courts.[9]

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.

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[9] The Forest Plan was found by the court 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 we are 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.

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 consistent with the standard contract provisions of the Forest Service's timber contracts.~~

broadly

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" 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 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 sale unit~~." 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.

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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 ~~if adequate replacement timber is unavailable~~ at the Sec'y'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.

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, must go on some other bill because they would violate the Byrd rule. 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

DRAFT -- DRAFT -- DRAFT (8:30 November 16, 1995)

November 16, 1995

MEMORANDUM FOR LEON PANETTA

FROM HAROLD ICKES

RE TIMBER LEGISLATION

I. Introduction and Summary

This memo requests your approval to seek legislation amending some of the old-growth logging provisions of the rescissions act signed earlier this year.

The memo first summarizes three serious disputes arising from the rescissions act, then details the adverse effects these disputes have generated or are expected to produce, and finally outlines a legislative response to the disputes.

The rescissions act contains logging-related provisions that, for the most part, govern salvage timber sales. But, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others address the President's Northwest Forest Plan.

Negotiations with Congress over the bill focussed largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. Far less progress was made in improving those provisions related to harvest of old-growth timber or the Forest Plan. Because of genuine misunderstandings, as well as some disagreements that we did not resolve during negotiations, we now are facing a number of serious disputes with the timber industry concerning the old-growth provisions and we expect additional disagreements over the Forest Plan-related provisions.

We are in litigation on most old-growth logging related provisions of the rescissions act. Initial rulings have been adverse to our interpretations. We face the prospect of serious environmental problems, possible invalidation of the Forest Plan (which could produce 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 derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act.

a. **Issues in Dispute**

The federal district court in Eugene, Oregon, ruled against the Administration on one key issue related to logging of old-growth timber and is expected to rule again against our position on an additional issue. These existing and expected rulings will have the effect of significantly expanding the number of old-growth timber sales required to be released under

the rescissions act. This expanded universe includes sales with severe environmental problems such that the sales would otherwise be precluded under the standards and guidelines of the President's Forest Plan. [These interpretive issues are summarized below and detailed in Attachment B.]

1. Geographic and Temporal Scope of Section 318 Sales

Our initial view of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, but held up from release for harvest (generally because of serious environmental problems). Because section 318 was a one-year rider on an appropriations bill, there was a limited number of readily identifiable sales that were offered under its authority. Our interpretation of this provision resulted in the Administration releasing 130 million board feet of timber, through approximately 28 sales.[1]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales, but all timber sales in Oregon and Washington offered but not released prior to the date of the signing of the rescissions act. Any sale in Oregon and Washington, whether offered under 318 or not, west side or east side, had to be released.

This ruling, on the so-called "geographic and temporal scope" issue, has already required us to release 46 additional sales, representing an additional 175 million board feet. It has the potential to require us to release still more sales, namely, those offered before FY 1990 (before enactment of section 318), but not yet released for harvest. We are currently estimating the volume of timber represented by these pre-FY90 sales to exceed 265 million board feet.[2]

2. Known to be Nesting

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[1] Over 4.4 billion board feet of section 318 old-growth sales had been released prior to enactment of the rescissions act. The remaining sales that had not been released generally had serious environmental problems. The BLM and Forest Service were working with the buyers to modify, place new conditions on, or find mitigation for these problematic sales. Section 2001(k), even under our interpretation, required release of the remaining "offered-but-not-released" sales on their original problematic terms, without modifications required to meet the standards of the Forest Plan. Administration negotiators understood that release of these sales posed a risk to the Forest Plan, but most believed that the Plan would not be fatally undermined.

[2] 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." Clearly, 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 second major dispute is also before the district court in Eugene and involves the "known to be nesting" issue. This dispute is 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. We take a view that is broader, more fully sustained by accepted science, and more protective than that supported by the timber industry and some in Congress.[3]

Section 318 sales where birds are "known to be nesting" are excepted for the general mandate that they be released, although we are obliged to find replacement timber. If we lose this dispute we would be required to release for harvest approximately 238 [248] million board feet in 57 [56] sales.[4] Defeat on this issue and the resulting logging of key habitat areas would have a devastating effect on murrelet populations in Oregon, and harm populations elsewhere.

3. Override of the Forest Plan

In addition to these problems, 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 substantive and procedural requirements of the Forest Plan and require expedited release of sales from forests in areas covered by the Forest Plan (Oregon, Washington, and California) free of any environmental requirements. Although this issue is not squarely in litigation now, it may soon be, and could lead to very significant adverse environmental consequences.

b. Adverse Effects Expected

All told, the volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by over 440 million board feet -- an amount roughly equivalent to one-half year's harvest under the President's Forest Plan. Moreover, approximately half of this old-growth harvest would come from within "Late Successional Reserves," areas designated under the Forest Plan to be generally set aside from commercial harvest operations.

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[3] The Administration position on this issue relies on use of a scientific protocol that infers 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. As the leading murrelet biologist explained in a recent Administration court filing, the murrelet "has evolved complex morphological and behavioral characteristics to avoid predators while breeding in the forests. During the nesting season it is often secretive, it has cryptic coloration, does not build a nest, laying its eggs and raising its young on a tree limb, and avoids activity during daylight hours. [T]hese traits, combined with usually nesting on tree branches in excess of a hundred feet up in the canopy of old forests, make this an extremely difficult nest ... to find."

[4] 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.

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 Columbia River and coastal salmon and trout, and on two listed bird species, the northern spotted owl and marbled murrelet. By causing additional harm to these animals, and expanding the areas of old-growth forest logged, the rescissions act exposes the Forest Plan to court challenge from environmental interests, although there is language in the rescissions act which was designed to bar suits against individual timber sales under the Forest Plan (but not the Plan itself) until December 1996. The industry's override interpretation opens the plan to challenge from that quarter. In either event, the result could potentially be a court injunction against further logging under the Forest Plan -- derailing a major presidential initiative and returning the region to the court-imposed gridlock created during the Reagan and Bush administration.[5]

II. Legislative Remedy

The President has publicly announced that he will propose a legislative solution to these problems. He affirmed his intent to seek legislation when he met with the Green Group representatives last week.

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

The prospect for success with Congress is not yet clear. Congressman Dicks, Senator Hatfield, and Senator Gorton are reported to be willing to discuss a "very narrow" approach. The Administration has not begun negotiations. We received a largely negative letter from

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[5] Other adverse results are also possible. Because of the adverse impacts on protected habitats throughout Oregon and Washington, listed bird species in those two states, and listed salmon and trout species that occur in Oregon, Washington, Idaho, and Montana:

- The proposed 4-D rule providing relief from current spotted owl restrictions affecting private and state government land owners may be scaled back or abandoned;
- Other ESA-related agreements (HCP's) with states and private landowners in Washington, Oregon, and Northern California may be reopened, and new agreements may be forbidden; and,
- Logging, mining, grazing and other uses of forest land in Montana, Idaho, eastern Oregon, and eastern Washington may be enjoined.

The 4(d) rule and HCP issues are discussed in Attachment B.

some key lawmakers, responding to the President's statement announcing his plan to seek legislation (Attachment C). 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.

Option 3 can, in part, be fairly characterized as representing a restoration or clarification of the "deal" we believed we attained with Congress when the rescissions act was negotiated. In this regard, the decision to seek new, amendatory legislation is less vulnerable to denunciation as a "flip-flop." Some other features of Option 3, however, reflect measures that differ from or supplement the original "deal."

On balance, we believe we can reasonably defend this approach as an effort to reverse or prevent judicial and industry misinterpretations, remedy on-the-ground environmental problems, and to limit a major windfall in damage payments or other compensation to unintended and unwarranted beneficiaries.

Option 3 does not apply to "salvage" logging, which would continue to be governed by the rescissions act, the President's directive, and the interagency agreement. The legislation we recommend would have three major aspects. It would:

- Prevent release of additional environmentally problematic old-growth timber sales by amending section 2001(k)(1) to clarify that the sales subject to release are those "subject to and consistent with" section 318 of Public Law 101-121, and amending section 2001(k)(2) to change the exclusionary standard from "known to be nesting" to "occupy for nesting or breeding purposes."

- Forestall a judicial interpretation that the rescissions act overrode the President's Forest Plan by modifying section 2001(d) to clarify that the provisions of this section apply only to timber sales that conform with the substantive requirements of the President's Forest Plan and deleting the prohibition in section 2001(l) that constrains needed modification to the Plan.

- Authorize a mix of administrative tools (e.g., cash compensation, timber exchanges, consensual or mandatory modification) to prevent or reduce damage from the harvest of environmentally problematic old-growth timber sales that have already been released or that may be released if future court decisions go against our interpretations of the act.

We estimate that the cost of this legislation will fall within a range, not exceeding $[100] million. Legislative language regarding the administrative tools (buy-back authority, timber exchanges, sale modification and termination) could be added to the reconciliation bill as mandatory spending. Legislative language amending or repealing the substantive provisions of the rescissions act would most likely need to be added to a different vehicle, such as the Interior appropriations bill.

III. Recommendation

We recommend that you direct staff to develop final legislative language to implement Option 3, as described in Attachment A, and that staff be directed to attempt to secure enactment of that language on the most appropriate vehicle(s). We recommend also that appropriate communications staff be directed to prepare materials explaining this effort.

IV. Action

AGREE

DISAGREE

WISH TO DISCUSS

ATTACHMENT B

Description of Proposed Legislation

A legislative package developed under Option 3 would contain the following elements:

1. **Geographic and temporal scope of "318" sales**: At the time of signing, the Administration understood the provisions of 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. Those old-growth sales were defined by both specific geographic and temporal boundaries and were subject to environmental requirements provided for in Section 318. [1]

Judge Hogan's recent decision in *NFRC v. Glickman* dramatically changes those boundaries by requiring the release of all timber sales on Forest Service and BLM lands in the geographic area covered by section 318 (essentially all of Oregon and Washington), regardless whether the sales were originally offered under section 318.[2]

This interpretation more than doubles the number of board feet we believed we were required to release under 2001(k). The additional logging threatens to cause environmental harm, that is itself problematic for many reasons, but also threatens to undermine the Northwest Forest Plan.

The proposed amendment would conform the legislation to our original understanding of the geographic and temporal scope of this provision. This amendment would have no effect on sales that we have already released (although amendment number 4, discussed below, would give us administrative tools to reduce or prevent damage from such sales). The practical effect of this change would be to prevent release of sales that had been withdrawn (for environmental or other reasons) prior to the passage of section 318, as well as clarifying that

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[1] Section 318, or the "Northwest Timber Compromise," was enacted as part of the Fiscal Year 1990 Interior and Related Agencies Appropriations Act, Pub. L. 101-121. It mandated a minimum level of timber sales from Forest Service and Bureau of Land Mangement lands in Washington and Oregon, which would be subject to minimal environmental standards and judicial review. While section 318 established targets for all of Washington and Oregon, the bulk of its provisions applied only to forests and BLM districts "known to contain northern spotted owls." Section 318 expired at the end of Fiscal Year 1990.

[2] The injunction issued by Judge Hogan requires the release of all timber sales in the geographic area after the expiration of section 318 to the date of the signing of the rescissions act. By contrast, Judge Hogan's declaratory judgment covers all timber sales offered by the Forest Service and BLM on these lands prior to enactment of the rescissions act, whether offered prior to the passage of section 318, offered pursuant to section 318, or offered past the date of section 318's effectiveness. Purchasers of sales that did not proceed for environmental or other reasons prior to the passage of section 318 are now coming forward to claim rights to such sales.

certain other sales currently in dispute do not fall within the parameters of this legislation unless they were truly section 318 sales.

The proposed amendment would amend Section 2001(k)(1) to clarify that the sales subject to release are those "subject to and consistent with" Section 318 of Public Law 101-121.

2. **"Known to be nesting"**: 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 containing marbled murrelet breeding habitat.

Marbled murrelets are seabirds which come ashore to breed in coastal forests and have extremely elusive nesting habits. Several Administrative initiatives, including the Forest Plan and proposals to provide relief to private landowners under the Endangered Species Act (HCP's and 4(d) rule) could be at risk if these sales are released.[1]

While there was clearly 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 our proposed definition, but was unable to include language endorsing the industry view, apparently because of opposition from members. Some in Congress will argue that our 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 at present to force the agencies to

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[1] 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 "take" 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 direct Secretarty Babbitt to issue a section 4(d) rule to ease spotted owl incidental take 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 listed species conservation into land use practices, an HCP permittee will be authorized to incidentally take certain listed 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 incidental take of 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.

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 57 [56] sales that the Administration has withheld under our interpretation of the act.

Our proposed amendment to section 2001(k)(2) would change the standard from "known to be nesting" to "occupy for nesting or breeding purposes."

3. **Protecting the President's Forest Plan**: The President's Forest Plan was discussed during negotiations with Congress. Our understanding of Congress' intent (articulated by Senators Gorton and Hatfield) was that the logging provisions of the rescissions act shielded the President's Forest Plan, enabling us to release timber sales while upholding environmental law and policy. We believed that the "sufficiency" language in the bill worked to prevent legal challenges to the plan from industry, environmentalists, or others.

However, the attorney representing industry plaintiffs in most of the litigation falling under section 2001(k) has signaled his belief that Congress specifically overrode the Forest Plan in sections 2001(d) and (l) of the rescission act. We expect the industry to litigate this issue soon.

Under the industry's apparent interpretation of the act, section 2001(d) may require expedited release--with no environmental standards whatsoever--of timber sales throughout Oregon, Washington, and Northern California (including areas not covered by the Forest Plan). Section 2001(l) specifically prohibits the Administration from revising or amending the Plan prior to December 1996 to take into the account changes in the environmental baseline caused by logging of old-growth timber mandated by section 2001(k). This prohibition puts the Forest Plan at serious risk of being overturned by the courts.[1]

Our proposed amendment would modify Section 2001(d) to clarify that the provisions of this section apply only to timber sales that conform with the substantive requirements of the President's Forest Plan. The amendment would also delete the prohibition in Section 2001(l) that constrains needed modification to the Plan.

4. **Securing Necessary Administrative Tools**: The government has already released certain environmentally problematic timber sales under section 2001(k), and in the future may

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[1] In other words, it requires the land management agencies to make the absurd assumption that (and operate the Forest Plan as if) trees that have been cut are still standing. The Forest Plan was found by the court 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 we are required to cut nearly one-half billion board feet that was not 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.

have to release more. Currently, the only sure legal basis for withholding 318 sales within the scope of section 2001(k) is the "known to be nesting" bird provision. In those instances, the government is obligated to offer replacement timber of equal volume, kind and value. The Forest Service in particular believes it is extremely constrained in the amount of alternative timber it has available to fulfill this mandate.

We have developed several administrative tools which, if authorized, would give the agencies flexibility to address both of the above problems by modifying sales, exchanging other kinds of timber configurations for harvest rights under Section 2001(k) or buying back through either negotiation or unilateral termination vested harvest rights.

Our proposed amendment would authorize the Secretaries to modify, suspend, or terminate any of the timber contracts falling within the scope of section 2001(k) where the Secretary finds that such action is necessary pursuant to the original contract terms (Forest Service contracts already carry modification and termination language for environmental issues) or to otherwise avoid damage to the environment or public resources. It would also authorize the Secretary to settle any claim by a contractor through compensation or exchange of timber sale contracts. (This authority could extend to sales under the Forest Plan, if so desired.)

5. **"If for any other reason"**: 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 could arguably require the agencies to offer replacement timber under this provision. This creates a further unanticipated burden on the agencies to provide scarce replacement timber (particularly under the district court's interpretation covering pre-FY90 sales.)

Under our proposed amendment, the "for any reasons" language in Section 2001(k)(3) would be deleted and the requirement to offer replacement timber would apply only in instances in which the agencies invoked Section 2001(k)(2).

November 17, 1995

MEMORANDUM FOR LEON PANETTA

FROM HAROLD ICKES

RE TIMBER LEGISLATION

I. Introduction and Summary

This memo provides background information pertaining to 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 produce.

The rescissions act contains logging-related provisions that, for the most part, govern salvage timber sales. But, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others address the President's Northwest 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 focussed largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. Far less progress was made in improving those provisions related to harvest of old-growth timber or the Forest Plan. Because of genuine misunderstandings, as well as some disagreements that we did not resolve during negotiations, we now face two serious disputes with the timber industry concerning the old-growth provisions and we expect additional disagreements over the Forest Plan-related provisions.

We are in litigation on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to our understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which could likely 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
- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act (see footnote ___).

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. Judge Hogan is expected to rule again soon, perhaps this week, against our position on an additional issue: the method of determining where endangered birds are nesting, discussed in section 2, below.

Not in the right place - repeat

~~These existing and expected rulings will have the effect of significantly expanding the volume of old-growth timber required to be released for logging under the rescissions act. This expanded universe includes areas with significant environmental concerns such that logging in the areas would otherwise be precluded under the standards and guidelines of the President's Forest Plan. Environmental damages resulting from the logging are likely to impel a court to nullify the plan.~~ may!

Is this right?

In addition, we expect a third dispute to arise soon on the question whether specific rescission act provisons implicitly override the Forest Plan. This issue is discussed in section 3, below.

1. Geographic and Temporal Scope of Section 318 Sales

Our understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, but held up from release for harvest (generally because of serious environmental problems). Because section 318 was a one-year rider on an appropriations bill, there was a limited number of readily identifiable sales that were offered under its authority. Based on this understanding, we expected to and have in fact released 130 million board feet of timber, through approximately 28 sales.[1]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales as we expected, but <u>all</u> 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 sale in Oregon and Washington, whether offered under 318 or not, west side or east side, had to be released, because these states are <u>areas covered by</u> section 318.

This ruling, on the so-called "geographic and temporal scope" issue, has already required us to release 46 additional sales, representing an additional 175 million board feet. It has the potential to require us to release approximately 265 million board feet more, if Judge Hogan decides, as is expected, that timber sales offered before the passage of section 318 in 1989

Again, where does this # come from?

[1] Over 4.4 billion board feet of section 318 old-growth sales had been released prior to enactment of the rescissions act. The remaining sales that had not been released generally had serious environmental problems. The BLM and Forest Service were working with the buyers to modify, place new conditions on, or find mitigation for these problematic sales. Section 2001(k), even under our interpretation, required release of the remaining "offered-but-not-released" sales on their original problematic terms, without modifications required to meet the standards of the Forest Plan. Administration negotiators understood that release of these sales posed a risk to the Forest Plan, but most believed that the Plan would not be fatally undermined.

located in areas covered by section 318, also must be released.[2]

2. "Known to be Nesting"

The second major dispute is also before Judge Hogan and involves the "known to be nesting" issue. This dispute is 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. The timber industry and some members of Congress would insist on physical evidence of nesting, such as discovery of a nest. In contrast, we take a view that is broader, more fully sustained by accepted science, and more protective of endangered birds because it relies on evidence other than solely the presence of nests.[3]

Section 318 sales where birds are "known to be nesting" are exempted from the general mandate that they be released, although we are obliged to find replacement timber. If we lose this dispute we would be required to release for harvest approximately 248 million board feet in 56 sales.[4] Defeat on this issue and the resulting logging of key habitat areas would have a devastating effect on murrelet populations in Oregon, and harm populations elsewhere. In addition, it would likely result in an injunction nullifying the Forest Plan.

3. Override of the Forest Plan

In addition to these issues, 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 environmental, harvest volume, and other criteria in the Forest Plan and require expedited release of sales from forests in areas covered by the Forest Plan. Although this issue is not squarely in litigation now, it may soon be, and could lead to significant adverse environmental consequences.

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[2] 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." Clearly, 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.

[3] The Administration position on this issue relies on use of a scientific protocol that infers 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 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 limb more than a hundred feet up in the forest canopy, and avoids activity during daylight hours. The 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.

[4] 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.

1 pt 690.

b. **Adverse Effects Expected**

The volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by over 440 million board feet -- an amount roughly equivalent to one-half year's harvest under the President's Forest Plan. Moreover, approximately half of this 440 million board foot old-growth harvest would 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 Columbia River and coastal salmon and trout, and on two listed bird species, the northern spotted owl and marbled murrelet. Given these impacts, it is likely that a second Northwest federal district court judge, William Dwyer, will issue and injunction against further logging under the Forest Plan -- derailing a major presidential initiative and returning the region to the court-imposed gridlock created during the Reagan and Bush administration. Several other Administrative initiatives to provide relief to private and state landowners under the Endangered Species Act could be at risk if these sales are released.[5]

II. Legislative Remedy

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

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[5] 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 "take" 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 direct Secretarty Babbitt to issue a section 4(d) rule to ease spotted owl incidental take 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 listed species conservation into land use practices, an HCP permittee will be authorized to incidentally take certain listed 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 incidental take of 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 on listed 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.

problems. He affirmed his intent to seek legislation when he met with the Green Group representatives last week.

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

The prospect for success with Congress is not yet clear. Congressman Dicks, Senator Hatfield, and Senator Gorton are reported to be willing to discuss a "very narrow" approach. The Administration has not begun negotiations. 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/ ~~Most~~ of Option 3 represens a restoration or clarification of the "deal" we believed we attained with Congress when the rescissions act was negotiated. In this regard, the decision to seek new, amendatory legislation is less vulnerable to denunciation as a "flip-flop." Some other features of Option 3, however, reflect administrative measures that differ from or supplement the original "deal."

On balance, we believe we can reasonably defend this approach as an effort to reverse or prevent judicial decisions based on misunderstanding of lawmakers' intent, remedy on-the-ground environmental problems, and to limit a major windfall in damage payments or other compensation to unintended and unwarranted beneficiaries. (?)

Option 3 does not apply to "salvage" logging, which would continue to be governed by the rescissions act, the President's directive, and the interagency agreement. The legislation we recommend can be broken into two major sections: clarifications of misunderstantings, and new proposals to mitigate the effects of the act. The legislation would have the following sections: change

1. Clarifications of Misunderstandings

a. **Geographic and temporal scope of "318" sales**: This amendment fixes the misunderstanding embedded in section 2001(k) of the rescissions act. While we 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* that all timber sales on Forest Service and BLM lands in the geographic area covered by section 318 (essentially all of Oregon and Washington) must be released, regardless whether the sales were originally

offered under section 318.[6] 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 our original understanding of the geographic and temporal scope of this provision. This amendment would have no effect on sales that we have already released (although amendment c., discussed below, would give us administrative tools to reduce or prevent damage from such sales). The practical effect of this change would be to prevent release of sales that had been withdrawn (for environmental or other reasons) prior to the passage of section 318, as well as clarifying that certain other sales currently in dispute do not fall within the parameters of this legislation unless they were truly section 318 sales.

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 Year 1990 under the authority of, and in compliance with, Section 318 of Public Law 101-121 (103 Stat. 745)."

b. **Protecting the President's Forest Plan:** The President's Forest Plan was discussed during negotiations with Congress. Our understanding of Congress' intent (articulated by Senators Gorton and Hatfield) was that the logging provisions of the rescissions act would enable us to release timber sales while upholding 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 Congress specifically overrode the Forest Plan in sections 2001(d) ~~and (l)~~ of the rescission act. We expect the industry to litigate this issue soon.

Under the industry's apparent interpretation of the act, section 2001(d) may require expedited release--with no environmental standards ~~whatsoever--of timber sales~~ throughout Oregon, Washington, and Northern California (including areas not covered by the Forest Plan). NO!
Section 2001(l) specifically prohibits the Administration from revising or amending the Plan prior to December 1996 to take into the account changes in the environmental baseline caused by logging of old-growth timber mandated by section 2001(k). This prohibition puts the Forest Plan at serious risk ~~of being overturned by the courts~~.[7]

Given the expansive way in which 2001(k) has been interpreted and the unexpectedly large quantities of old-growth timber is ~~required to be~~ released,

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[6] The injunction issued by Judge Hogan requires the release of all timber sales in the geographic area after the expiration of section 318 to the date of the signing of the rescissions act. By contrast, Judge Hogan's declaratory judgment covers all timber sales offered by the Forest Service and BLM on these lands prior to enactment of the rescissions act, whether offered prior to the passage of section 318, offered pursuant to section 318, or offered past the date of section 318's effectiveness. Purchasers of sales that did not proceed for environmental or other reasons prior to the passage of section 318 are now coming forward to claim rights to such sales.

[7] The Forest Plan was found by the court 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 we are required to cut nearly one-half billion board feet that

For a different reason, section 2001(l) also may pose a threat to the Forest Plan.

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.

c. **Securing Necessary Administrative Tools**: 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 President's Forest Plan, it is necessary to create some tools that allow us to mitigate some of that damage. In addition, currently, the only sure legal basis for withholding 318 sales within the scope of section 2001(k) is the "known to be nesting" bird provision. In those instances, the government is obligated to offer replacement timber of equal volume, kind and value. The Forest Service in particular believes it is extremely constrained in the amount of alternative timber it has available to fulfill this mandate.

This should be in the next section, no?

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 buy back part or all of a sale that would have significant environmental effects. We recommend seeking authority that is consistent with the standard contract provisions of the Forest Service's timber contracts.

Our proposal is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, or terminate timber sale contracts released under this section, and to provide compensation [need proper phrasing] from the timber salvage fund not to exceed a cumulative total of $100,000,000, in cases where the Secretary in his discretion finds that the action: (1) is authorized under original contract terms, or (2) is necessary to avoid substantial damage to the environment or public resources."

See changes I proposed to TJ

d. **"If for any reason"**: 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 could arguably require the agencies to offer replacement timber under this provision. This creates a further unanticipated burden on the agencies to provide scarce replacement timber (particularly under the district court's possible interpretation covering pre-FY90 sales.)

confusing

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was not 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.

Accordingly, our proposal would limit the government's obligation to provide alternative timber. There are two options: a) limit the replacement requirement to sales that cannot be released due to murrelets; or b) change it from a requirement to an authority, at the Secretary's discretion, to offer replacement timber.

2. Mitigation of Damage Caused By the Act

"Known to be nesting": 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 our proposed definition, but was unable to include language endorsing the industry view, apparently because of opposition from members. Some in Congress will argue that our 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 at present 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 56 sales that the Administration has withheld under our interpretation of the act.

Our proposal replaces the phrase "known to be nesting" with "known to be occupying a forest unit, for nesting or breeding purposes, as determined by scientifically recognized principles, including in the case of the marbled murralet, the Pacific Seabird Group Protocol."

We estimate that the cost of this legislation will fall within a range, not exceeding $[100] million. Legislative language regarding the administrative tools (buy-back authority, timber exchanges, sale modification and termination) could be added to the reconciliation bill as mandatory spending. Legislative language amending or repealing the substantive provisions of the rescissions act would most likely need to be added to a different vehicle, such as the Interior appropriations bill.

separate section

DRAFT (8:30 P.M. November 17, 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 serious environmental problems 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 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 FY 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 Year 1990 under the authority of, and in compliance with, Section 318(b) of Public Law 101-121 (103 Stat. 745)."

  Very important

- **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. 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.** 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 buy back part or all of a sale that would have significant environmental effects. We recommend seeking authority that is ~~consistent~~ with the standard contract provisions of the Forest Service's timber contracts.

  STET

  a) ~~[illegible]~~

from the timber salvage fund not to exceed a cumulative total of $1m.

Our proposal is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, suspend or terminate timber sale contracts released under this section, ~~and to provide compensation [need proper phrasing] from the timber salvage fund not to exceed a cumulative total of $100,000,000~~ in cases where the Secretary in his discretion finds that the action: (1) is authorized under original contract terms or agency regulations, or (2) is necessary to avoid substantial damage to the environment or ~~public~~ natural resources."

The amendment would further provide for appropriate compensation

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 replaces the phrase "known to be nesting" with "known to ~~be~~ occupy~~ing~~ a forest unit, for nesting or breeding purposes, as determined by scientifically recognized principles, including in the case of the marbled murralet, the Pacific Seabird Group Protocol." NET

- **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 our obligations under this provision, given the number of sales that will threaten marbled murralets and the number that have subsequently been reconfigured and are now physically impossible to release.

  Accordingly, our proposal would limit the government's obligation to provide alternative timber. There are two options: a) limit the replacement requirement to sales that cannot be released due to murralets; or b) change it from a requirement to an authority, at the Secretary's discretion, to offer replacement timber.

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. 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

DRAFT--DRAFT(3:30P.M. November 16, 1995)
November 16, 1995

MEMORANDUM FOR LEON PANETTA

FROM: HAROLD ICKES

RE: TIMBER LEGISLATION

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. But, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others 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 interpretations and have expanded the coverage of these old-growth provisions (the "section 318 sales") to force release of twice the timber volume we originally agreed to. Industry lawyers are pushing for still more. We face the prospect of serious environmental problems and possible invalidation of the Forest Plan which would produce an injunction barring any further timber sales in the Forest Plan area.

The statement issued by the President on October 28th in response to a adverse court ruling reads, in relevant part:

> *"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 generaly, 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 Act. My Administration will actively pursue a legislative remedy to correct this extreme result."*

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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 "pure-318" sales**. We understood section 2001(k) to require release only of sales issued pursuant to section 318 of the FY 1990

in the area described in 318 — all of

Interior appropriations act. The court interpreted the provision to require release of all sales ever offered ~~but not released in~~ Oregon and Washington, which more than doubled 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 Year [~~1989 and~~ 1990] under the authority of, and in compliance with, Section 318[] of Public Law 101-121 (103 Stat. 745)."

- **The Northwest Forest Plan should remain in force and be shielded from litigation.** We understood that Congress intended to ensure that no party could challenge the legality of individual timber sales under the Forest Plan, and that the Forest Plan itself would remain in force. The timber industry is arguing that the rescissions act overrides the Forest Plan. Sales released under the court's interpretation threaten to cause environmental damage that undermines the Plan. Joc change

  Our proposal will make changes in both 2001(d) and 2001(l) in order to protect the Forest Plan. In 2001(d), we will delete the language that refers to geographic units (as we are also doing in 2001(k) -- see 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 will strike language that prevents us from making changes to the Forest Plan to account for other sales required to be released.

wrong section

- **The Government's obligation to provide replacement timber should be defined narrowly.** [Not yet agreed internally]

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

- **The Administration should have authority and funding to work with purchasers of sales released under the rescissions act in order to modify or buy out problematic contracts, or provide replacement timber where available.** We recommend ~~seeking the standard authority traditionally in all Forest Service sale contracts by~~ empowering the Secretary, in certain circumstances, to terminate, modify, or exchange timber sale contracts. This authority carries with it the authority to reach a voluntary agreement with the holder of the contract, under which the holder accepts substitute timber or money. The circumstances under which such ~~condemnation or settlement~~ authority exists ~~are~~ two: where the Secretary, "in his discretion" finds that the action (1) is authroized under original contract terms or (2) is "necessary to avoid [substantial] damage to the environment or public resources." ~~DOJ would prefer not to include the bracketed word ("substantial"), on the ground that it may involve us in extensive litigation; the phrase "in his discretion" (or perhaps "in his sole discretion") is designed to mitigate this problem.~~

  necessarily would

  would be

The exact amount of funding needed for buyouts is uncertain at this time, but would be less than [$100] million.

; our proposal could be written to require the government to ~~compute~~ offer a voluntary solution, ~~to~~ before proceeding to ~~a~~ unilateral buyback.

Amendments to resolve in our favor an issue left in disagreement with Congress

- **The Administration should not be required to release for harvest 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. We take a view that is broader, more fully sustained by accepted science, and more protective than that supported by the timber industry and some in Congress. Our proposal will prohibit release when a threatened bird species is known to be occupying a unit, for nesting or breeding purposes, as determined by "scientifically recognized principles, including in the case of the marbled murrolet, the Pacific Seabird Group Protocol." ~~It may be that we will put this language at the end of the sentence preceded by the words "as determined by" (as above). It may be that we will add a second sentence stating that "The Secretary shall make this determination of occupancy in accordance with scientifically recognized principles, including in the case of the marbled murrolet, the Pacific Seabird Group Protocol."~~

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, and the Department of Justice has raised concerns about adverse consequences for us in pending litigation if Congress rejects some of the legislative changes. STET

III. Recommendation

We recommend that you direct staff to attempt to secure enactment of the foregoing amendatory language on the most appropriate legislative vehicle(s). We recommend also that appropriate communications staff be directed to prepare materials explaining this effort.

IV. Action

_____AGREE

_____DISAGREE

_____DISCUSS

attachments

November 17, 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 produce. 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, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others address the President's Northwest 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 focussed largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. Far less progress was made in improving those provisions related to harvest of old-growth timber or the Forest Plan. Because of genuine misunderstandings, as well as some disagreements that we did not resolve during negotiations, we now face two serious disputes with the timber industry concerning the old-growth provisions and we expect additional disagreements over the Forest Plan-related provisions.

We are in litigation on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to our understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which could likely 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
- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act.

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

1. Geographic and Temporal Scope of Section 318 Sales

Our understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, but held up from release for harvest (generally because of serious environmental problems). Because section 318 was a one-year rider on an appropriations bill, there was a limited number of readily identifiable sales that were offered under its authority. Based on this understanding, we expected to and have in fact released 130 million board feet of timber, through approximately 28 sales.[1]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales as we expected, but <u>all</u> 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 sale in Oregon and Washington, whether offered under 318 or not, west side or east side, had to be released, because these states are <u>areas covered by</u> section 318.

This ruling, on the so-called "geographic and temporal scope" issue, has already required us to release 46 additional sales, representing an additional 175 million board feet. It has the potential to require us to release approximately 265 million board feet more, if Judge Hogan decides, as is expected, that timber sales offered before the passage of section 318 in 1989 located in areas covered by section 318, also must be released.[2]

2. "Known to be Nesting"

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[1] Over 4.4 billion board feet of section 318 old-growth sales had been released prior to enactment of the rescissions act. The remaining sales that had not been released generally had serious environmental problems. The BLM and Forest Service were working with the buyers to modify, place new conditions on, or find mitigation for these problematic sales. Section 2001(k), even under our interpretation, required release of the remaining "offered-but-not-released" sales on their original problematic terms, without modifications required to meet the standards of the Forest Plan. Administration negotiators understood that release of these sales posed a risk to the Forest Plan, but most believed that the Plan would not be fatally undermined.

[2] 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." Clearly, 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 second major dispute is also before Judge Hogan and involves the "known to be nesting" issue. This dispute is 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. The timber industry and some members of Congress would insist on physical evidence of nesting, such as discovery of a nest. In contrast, we take a view that is broader, more fully sustained by accepted science, and more protective of endangered birds because it relies on evidence other than solely the presence of nests.[3]

Section 318 sales where birds are "known to be nesting" are exempted from the general mandate that they be released, although we are obliged to find replacement timber. If we lose this dispute we would be required to release for harvest approximately 248 million board feet in 56 sales.[4] Defeat on this issue and the resulting logging of key habitat areas would have a devastating effect on murrelet populations in Oregon, and harm populations elsewhere. In addition, it would likely result in an injunction nullifying the Forest Plan.

3. Override of the Forest Plan

In addition to these issues, 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 environmental, harvest volume, and other criteria in the Forest Plan and require expedited release of sales from forests in areas covered by the Forest Plan. Although this issue is not squarely in litigation now, it may soon be, and could lead to significant adverse environmental consequences.

b. Adverse Effects Expected

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The volume of old-growth timber required to be cut under the rescissions act may exceed our expectations by 440-690 million board feet -- an amount roughly equivalent to one-half year's harvest under the President's Forest Plan. Moreover, approximately half of this 440-690 million board foot 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.

still not enough — need a FN setting it all out.

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[3] The Administration position on this issue relies on use of a scientific protocol that infers 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 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 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.

[4] 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.

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, it is likely that a second Northwest federal district court judge, William Dwyer, will issue an injunction against further logging under the Forest Plan -- derailing a major presidential initiative and returning the region to the court-imposed gridlock created during the Reagan and Bush administration. Several other Administrative initiatives to provide relief to private and state landowners under the Endangered Species Act could be at risk if these sales are released.[5]

II. Legislative Remedy

The President has publicly announced that he will propose a legislative solution to these problems. He affirmed his intent to seek legislation when he met with the Green Group representatives last week.

The legislative approach we recommend was developed through extensive consultation with White House, EOP, and agency representatives. The group considered six principal options, summarized and discussed in terms of Pros and Cons in Attachment A. The recommended

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[5] 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 "take" 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 take 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 listed species conservation into land use practices, an HCP permittee will be authorized to incidentally take certain listed 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 incidental take of 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 listed 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 logging. In Ninth Circuit and Supreme Court rulings earlier this year, similar litigation was turned back only because, at that time, the Forest Plan and other protective measures were in effect.

course, Option 3, lies between the broadest possible course, most favored by the environmental community, and the narrowest course, likely to be favored by Congress. It 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 the "deal" we believed we attained with Congress when the rescissions act was negotiated. In this regard, the decision to seek new, amendatory legislation is less vulnerable to denunciation as a "flip-flop." Some other features of Option 3, however, reflect administrative measures that differ from or supplement the original "deal."

On balance, we believe we can reasonably defend this approach as an effort to reverse or prevent judicial decisions based on misunderstanding of lawmakers' intent, remedy on-the-ground environmental problems, and limit major windfalls in the form of damage payments or other compensation to unintended and unwarranted beneficiaries.

Option 3 does not apply to "salvage" logging, which would continue to be governed by the rescissions act, the President's directive, and the interagency agreement. The legislation we recommend can be broken into three general categories relevant to possible negotiations with Congress:

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

a. **Amendments to Restore our Original Agreement with Congress**

1. **Geographic and temporal scope of "318" sales**: This amendment fixes the misunderstanding embedded in section 2001(k) of the rescissions act; While we 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* that all timber sales on Forest Service and BLM lands in the geographic area covered by section 318 (essentially all of Oregon and Washington) must be released, regardless whether the sales

were originally offered under section 318.[6] 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 our original understanding of the geographic and temporal scope of this provision. This amendment would have no effect on sales that we have already released (although another amendment, discussed below, would give us administrative tools to reduce or prevent damage from such sales). The practical effect of this change would be to prevent release of sales that had been withdrawn (for environmental or other reasons) prior to the passage of section 318, as well as clarifying that certain other sales currently in dispute do not fall within the parameters of this legislation unless they were truly section 318 sales.

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 Year 1990 under the authority of, and in compliance with, Section 318 of Public Law 101-121 (103 Stat. 745)." (b)

2. **Protecting the President's Forest Plan**: The President's Forest Plan was discussed during negotiations with Congress. Our understanding of Congress' intent (articulated by Senators Gorton and Hatfield) was that the logging provisions of the rescissions act would enable us to release timber sales while upholding 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 Congress specifically overrode the Forest Plan in sections 2001(d) of the rescissions act. Under the industry's apparent interpretation of the act, section 2001(d) may require expedited release--with no environmental standards whatsoever--of timber sales throughout Oregon, Washington, and Northern California (including areas not covered by the Forest Plan). We expect the industry to litigate this issue soon.

Again how could this be?

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

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[6] The injunction issued by Judge Hogan requires the release of all timber sales in the geographic area after the expiration of section 318 to the date of the signing of the rescissions act. By contrast, Judge Hogan's declaratory judgment covers all timber sales offered by the Forest Service and BLM on these lands prior to enactment of the rescissions act, whether offered prior to the passage of section 318, offered pursuant to section 318, or offered past the date of section 318's effectiveness. Purchasers of sales that did not proceed for environmental or other reasons prior to the passage of section 318 are now coming forward to claim rights to such sales. These and other claimants appear to be in a position to receive significant and unwarranted windfall benefits under the district court's expansive interpretation of the rescissions act, rasining both cost and public interest concerns.

the courts.[7]

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.

b. Amendments to Give Us Tools to Fix Environmental Problems Created by the Act

1. **Buyout, Modification, Termination 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 President's Forest Plan, it is necessary to create some tools that allow us 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 buy back part or all of a sale that would have significant environmental effects. We recommend seeking authority that is consistent with the standard contract provisions of the Forest Service's timber contracts.

Our proposal is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, or terminate timber sale contracts released under this section, and to provide compensation [need proper phrasing] from the timber salvage fund not to exceed a cumulative total of $100,000,000, in cases where the Secretary in his discretion finds that the action: (1) is authorized under original contract terms, or (2) is necessary to avoid substantial damage to the environment or public resources."

see examples to D

2. **"If for any reason"**: 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 could

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[7] The Forest Plan was found by the court 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 we are required to cut nearly one-half billion board feet that was not 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.

The FS in particular believes it is extremely constrained in the amt of altern timber it has available to fulfill this mandate

arguably require the agencies to offer replacement timber under this provision. This creates a further unanticipated burden on the agencies to provide scarce replacement timber (particularly under the district court's possible interpretation covering pre-FY90 sales.)

Accordingly, our proposal would limit the government's obligation to provide alternative timber. There are two options: a) limit the replacement requirement to sales that cannot be released due to murrelets; or b) change it from a requirement to an authority, at the Secretary's discretion, to offer replacement timber.

c. Amendments to Resolve Issues Left in Disagreement with Congress.

"Known to be nesting": 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 our proposed definition, but was unable to include language endorsing the industry view, apparently because of opposition from members. Some in Congress will argue that our 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 at present 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 56 sales that the Administration has withheld under our interpretation of the act.

Our proposal replaces the phrase "known to be nesting" with "known to be occupying a forest unit, for nesting or breeding purposes, as determined by scientifically recognized principles, including in the case of the marbled murrelet, the Pacific Seabird Group Protocol."

III. Cost of the Legislative Package

We estimate that the cost of this legislation will fall within a range, not exceeding $[100] million.

IV. 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. 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

November 17, 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 produce. 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, in addition, some provisions apply to sales of environmentally sensitive old-growth timber in Oregon and Washington and others address the President's Northwest 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 focussed largely on issues related to salvage sales and most, though not all, of the major problems with those portions were resolved. ~~Partless progress was made in improving those provisions~~ related to harvest of old-growth timber or the Forest Plan. Because of genuine misunderstandings, as well as some disagreements that we did not resolve during negotiations, we now face two serious disputes with the timber industry concerning the old-growth provisions and we expect additional disagreements over the Forest Plan-related provisions.

never closed

We are in litigation on most old-growth logging provisions of the rescissions act. Initial rulings have been adverse to our understanding of the legislation. We face the prospect of:

- serious environmental problems;
- possible invalidation of the Forest Plan (which could likely 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
- derailment of major Administration initiatives aimed at helping private and state landowners in the Northwest comply with the Endangered Species Act.

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

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1. Geographic and Temporal Scope of Section 318 Sales

Our understanding of section 2001(k) of the rescissions act was that it required release of old-growth sales offered under the authority of section 318 of the FY1990 Interior appropriations act, but held up from release for harvest (generally because of serious environmental problems). Because section 318 was a one-year rider on an appropriations bill, there was a limited number of readily identifiable sales that were offered under its authority. Based on this understanding, we expected to and have in fact released 130 million board feet of timber, through approximately 28 sales.[1]

The industry challenged this interpretation as too narrow. The district court agreed, and found that the new law required us to release not only the "pure 318" sales 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 sale in Oregon and Washington, whether offered under 318 or not, ~~west side or east side~~ had to be released, because these states are areas covered by section 318.

offered after the passage of S.318

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3. **Override of the Forest Plan**

In addition to these issues, the timber industry's principal attorney involved in rescissions act litigation recently stated in court his view that sections 2001(d) and of the rescissions act override the environmental, harvest volume, and other criteria in the Forest Plan and require expedited release of sales from forests in areas covered by the Forest Plan. Although this issue is not squarely in litigation now, it may soon be, and could lead to significant adverse environmental consequences.

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1. **Buyout, Modification, Termination 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 President's Forest Plan, it is necessary to create some tools that allow us 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 buy back part or all of a sale that would have significant environmental effects. We recommend seeking authority that is consistent with the standard contract provisions of the Forest Service's timber contracts.

Our proposal is to add legislative language such as: "The Secretaries of Agriculture and the Interior are authorized to exchange, modify, or terminate timber sale contracts released under this section, ~~and to provide compensation [need proper phrasing] from the timber salvage fund not to exceed a cumulative total of $100,000,000~~, in cases where the Secretary in his discretion finds that the action: (1) is authorized under original contract terms, or (2) is necessary to avoid substantial damage to the environment or public resources."

2. **"If for any reason"**: 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

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[7] The Forest Plan was found by the court 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 we are required to cut nearly one-half billion board feet that was not 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.

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. 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

ATTACHMENT A

SUMMARY OF LEGISLATIVE OPTIONS
(With staff recommendation - November 17, 1995)

Option 1.

- Repeal entire timber rider (salvage, 318, and Forest Plan provisions [2001])
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Sends strongest, most favorable message to environmentalists*
Restores legal status quo ante
Forestalls salvage-related controversies around country and eastside litigation
Consistent with POTUS broad message on environment
Most protective of state and private timber land interests
Useful if congressional fix unlikely

Con: *Conflicts with agreement with congress on salvage and some 318 sales*
Appears to be a flip-flop
Extremely unlikely to gain congressional support
Costly

Option 2.

- Repeal all green timber sale provisions [2001(k)]
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Sends strong, favorable message to environmentalists*
Prevents release of additional problematic sales (nesting & non-318)
Prevents judicial interpretation that Forest Plan was overridden
Provides authorities to address released, unharvested problem sales
Consistent with POTUS broad message on environment
Protective of private/state timber land interests
Reduces risk of eastside litigation

Con: *Conflicts with agreement with congress on some 318 sales*
Could appear to be a flip-flop
Difficult to gain congressional support
Does not eliminate all risk of new adverse interpretations
Costly

ATTACHMENT A

Option 3. (Staff Recommended Option)

- Amend provisions applicable to listed birds and non-318/Hogan sales to match our interpretations of "occupancy," and temporal/geographic scope
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to modify/terminate (with compensation) timber harvest rights under 2001(k)

Pro: *Sends largely favorable message to environmentalists*
Prevents release of additional problematic sales (occupancy and pre-FY90)
Prevents judicial interpretation that Forest Plan was overriden
Provides authorities to address released, unharvested problem sales
Reduces risk of eastside litigation
Protective of private/state timber land interests
Most consistent with Administration view of agreement with congress

Con: *Difficult to gain congressional support*
Narrower "fix" than may be desired by environmentalists
Does not eliminate all risk of unforeseen adverse interpretations
Could appear to be a flip-flop regarding listed birds
Costly

Option 4.

- Amend provisions applicable to listed birds to match our interpretation
- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Prevents release of some additional problematic sales*
Prevents judicial interpretation that Forest Plan was overridden
Provides authorities to address released, unharvested problem sales

Con: *Does not resolve problems with pre-FY90 Hogan sales*
Appears tepid to environmentalists
Little or no help reducing risk of eastside litigation or protecting private/state timber land interests
Difficult to gain congressional support
Costly

ATTACHMENT A

Option 5.

- Repeal provisions applicable to Forest Plan to eliminate override interpretation [2001(d)&(l)]
- Secure discretionary authority to buy-back vested harvest rights under 2001(k)
- Secure discretionary authority to exchange timber for harvest rights under 2001(k)
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Prevents judicial interpretation that Forest Plan was overridden*
Provides authorities to address released, unharvested problem sales

Con: *Does not resolve problems with non-318 or listed bird sales*
Environmentalists would condemn as inadequate
Little or no help reducing risk of eastside litigation or unforeseen adverse interpretations
Difficult to gain congressional support
Costly

Option 6.

- Secure discretionary authority to buy-back vested harvest rights
- Secure discretionary authority to exchange timber harvest rights
- Secure discretionary authority to terminate/modify (with compensation) timber harvest rights under 2001(k)

Pro: *Possible to win congressional support*
Provides authorities to address released, unharvested problem sales

Con: *Environmentalists would condemn as inadequate*
Speculative protection for Forest Plan, private/state timber land interests
Little or no help reducing risk of eastside litigation/unforeseen adverse interpretations
Does not eliminate controversy over non-318 and listed bird sales
Costly

ATTACHMENT A

Summary of Legislative Options (November 17, 1995)			
#	Major Features	Strengths	Weaknesses
1	● Repeal entire timber rider ● Secure buy back, exchange and modification authorities	▸ Strongest, most favorable message to environmentalists ▸ Useful if congressional fix unlikely	■ Appears to be a flip-flop ■ Extremely unlikely to gain congressional support
2	● Repeal all green timber and Forest Plan provisions ● Secure buy back, exchange and modification authorities	▸ Strong message to environmentalists ▸ Prevents release of problematic sales and interpretation that Forest Plan overridden	■ Conflicts with agreement with congress on some 318 sales ■ Could appear to be a flip-flop ■ Difficult to gain congressional support
3	● Amend provisions applicable to listed birds and non-318 sales to match our interpretations ● Repeal Forest Plan provisions ● Secure buy back, exchange and modification authorities	▸ Favorable message to environmentalists ▸ Prevents release of problematic sales and interpretation that Forest Plan overridden ☞ **STAFF RECOMMENDATION**	■ Difficult to gain congressional support ■ Narrower "fix" than may be desired by environmentalists
4	● Amend provisions applicable to listed birds to match our interpretation ● Repeal Forest Plan provisions ● Secure buy back, exchange and modification authorities	▸ Prevents release of some problematic sales and interpretation that Forest Plan overridden	■ Appears tepid to environmentalists ■ Difficult to gain congressional support
5	● Repeal Forest Plan provisions ● Secure buy back, exchange and modification authorities	▸ Prevents judicial interpretation that Forest Plan was overridden	■ Environmentalists would condemn as inadequate ■ Difficult to gain congressional support
6	● Secure buy back, exchange and modification authorities	▸ Possible to win congressional support	■ Environmentalists would condemn as inadequate

TIMBFX.TCJ/tcj November 17, 1995

Congress of the United States
Washington, DC 20515

November 6, 1995

President William J. Clinton
The White House
Washington, D.C.

Dear President Clinton:

We read your statement of Saturday, October 28, concerning the implementation of Section 2001 of the FY 1995 funding rescission bill (PL 104-19) with a mixture of bewilderment and surprise. Section 2001 is the section of the bill that deals with forest health activities and directs the Secretaries of Interior and Agriculture to expedite some timber sales, as well as release others that have already been sold, and for which the government has outstanding contract liability.

Your Saturday statement bewilders us for at least four reasons. First, you assert that the release of these sales does not comport with the agreement that the Administration and Congress laboriously negotiated concerning the implementation of this measure. Certainly, the direction in Section 2001 (k) to release these sales "notwithstanding any other provision of law" is not difficult to translate into executive action. Moreover, during negotiations your negotiators asked for, and were given, a list of the kinds of sales that we intended to be covered. It is rather late after (1) concluding negotiations, (2) signing the bill, (3) developing your own interpretation of the statutory language, and (4) having it rejected by two courts to say you misunderstood what we and your negotiators agreed to.

Second, your predictions of dire environmental and economic consequences from the release of these sales do not square with the facts. These sales involve less than 10,000 acres out of the 30 million acres (fewer than 1 in every 3,000 acres) of federal forest land in Oregon and Washington. They come at a time when, thanks to the zeal of extreme preservationists who want to take us back to pre-settlement conditions, Pacific Northwest timber harvesting is at an all-time low. The statute and existing law provide you the flexibility to set-aside additional acreage to protect species in places where the government has not already incurred financial liability associated with cancelling already-sold timber sales. Perhaps your advisors have not shared the availability of this flexibility with you.

Third, and in a related vein, is the apparent lack of concern for the government's financial liability. Since these sales have already been sold they are no longer the government's possession strictly speaking. Cancelling them will involve the assumption of liability for damages claims from the purchasers. Current estimates suggest liabilities in excess of $150 million. Together with foregone timber sale receipts, the Treasury would lose in excess of $400 million. That loss would have to be reflected in agency budget cuts in FY 1997 or in out years.

Finally, we are bewildered because until October 28, Administration representatives and witnesses at congressional hearings were urging us to forebear from any changes to Section 2001 of PL 104-19. As you may know, we are not pleased with the slow rate of progress your Administration has made in implementing the provision. Nevertheless, we were inclined to agree that -- as one Administration witness entreated -- "it is a bit premature" to consider changes. Perhaps broader legislative changes should now be considered.

In addition to bewildering us, your intention to introduce legislation in this area leaves us surprised. So far, the only piece of legislation in the natural resources and environmental area that your Administration has introduced was the Superfund proposal brought forward in the 103rd Congress. Even that measure was not reintroduced in this Congress. Thus, your forthcoming forestry proposal will be only the second environmental initiative advanced under your leadership. Given the pressing problems in other areas of environmental concern (eg, the Endangered Species Act, Clean Water Act, the Farm bill) we are surprised at the selection of this issue as a top priority, but we nevertheless agree that a legislative proposal may be superior to the Administration's current approach which violates the law. We believe that the courts that have reviewed the Administration's performance to date would concur.

Therefore, we stand ready to entertain your legislative proposal and are willing to discuss an early hearing date in the relevant Committee or Committees of jurisdiction. We do request, however, that your proposal be accompanied by an accurate estimate of financial damages to the government associated with cancelling any contracts. Your proposal should also include provisions for determining which agency budgets should be reduced to offset the damage claims. We would also appreciate your thoughts on whether the federal government has any obligations to the affected counties to make up for lost revenues to schools.

The President
November 6,1995
Page Three

At the end of the day, we will likely not agree on the outcome of this dispute. But even as an initial matter, we would not recommend contract cancellations and federal revenue losses as a viable proposal.

Sincerely,

Wes Cooley

Charles H. Taylor

Helen Chenoweth

Walter B. Jones, Jr.

Wally Herger

Jack Metcalf

Frank Riggs

Richard Pombo

Jim Longley

Mark Neumann

Frank V. Tejeda

The President
November 6, 1995
Page Three

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Wes Cooley R/OR
Cooley

Charles H. Taylor R/NC
Taylor

Helen Chenoweth R/ID
Chenoweth

Walter B. Jones, Jr. R/NC
Jones

Wally Herger R/Ca
Herger

Jack Metcalf R/WA
Metcalf

Frank Riggs R/Ca
Riggs

Richard Pombo R/Ca
Pombo

Tom Campbell R/Ca
Radanovich

Jim Longley R/Me
Longley

Larry Craig R/ID
Craig

Conrad Burns R/Mt
Burns

Slade Gorton R/WA
Gorton

Frank H. Murkowski R/AK
Murkowski

Name	Date	
Steven Reich	6/4/99	Counsel