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Klamath Tribes v. US

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
 601 PENNSYLVANIA AVENUE, N.W.
 WASHINGTON, D.C. 20004
 FAX NUMBER (202) 305-0429, -0506
 CONFIRMATION NUMBER (202) 305-0503

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NUMBER OF PAGES: 4

DATE: June 25, 1996

FROM: Geoff Garver (305-0481), Sandi Zellmer (305-0427), Ellen Athas

MESSAGE: NFERC v. Glickman -- Attached is the Klamath Tribes' notice of filing the 9th Circuit's June 14 decision, on Rescissions Act issues. In footnote 1, the Tribes note that Pilchuck Audubon Soc'y has filed a motion to clarify the 9th Circuit's opinion to broaden the scope of the 9th Circuit's ruling that § 2001(k)(1) does not apply to sales that were not validly offered under section 318 (i.e., the Garden, Nita, South Nita and Cowboy sales on the Umpqua NF). The Tribes argue that this ruling should apply to the Blue Ford sale, which is not a § 318 sale but was found in an administrative appeal not to comply with NEPA. We are considering whether to file a response to the notice of filing.

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13 Attorneys for Plaintiff

14 IN THE UNITED STATES DISTRICT COURT
 15 FOR THE DISTRICT OF OREGON

16 THE KLAMATH TRIBES,
 17 Plaintiff,

18 v.

19 UNITED STATES OF AMERICA, UNITED
 20 STATES FOREST SERVICE, DAN
 21 GLICKMAN, Secretary of Agriculture,
 22 and ROBERT WILLIAMS, Acting
 23 Regional Forester, United States
 24 Forest Service, Region 6,

25 Defendants,

26 v.

27 BOISE CASCADE CORPORATION,

Defendant-Intervenor.

Civ. No. 96-381-HA

NOTICE OF FILING

For the convenience of the Court, the Klamath Tribes hereby
 file a copy of the recent Ninth Circuit Court of Appeals decision
 in Northwest Forest Resource Council v. Glickman, Nos. 96-35106,
 96-35107, 96-35133, 96-35132 (9th Cir. June 14, 1996). This

1 decision interprets §§ 2001(k)(1) and (2) of the 1995 Rescissions
2 Act. Two aspects of the Ninth Circuit's decision affect the
3 pending motion for preliminary injunction in this case.

4 First, the court of appeals held that the Rescissions Act
5 does not require the Forest Service to offer timber sales to
6 other bidders if the high bidder rejects the sale. Slip op. at
7 6953. In this case, the John Lodgepole timber sale was rejected
8 by the high bidder. Under the Ninth Circuit's analysis, the
9 Rescissions Act does not require the Forest Service to release
10 the John Lodgepole timber sale for logging.

11 Second, the court of appeals held that timber sales which
12 were not validly offered are not revived by the Rescissions Act.
13 Slip op. at 6950. As the Court is aware, there are significant
14 questions as to whether the Blue Ford timber sale was ever
15 validly offered -- either because it violated a federal
16 environmental law or because of irregularities in the sale
17 decision, advertisement, auction, and award process. See Notice

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1 of Filing and Clarification of Blue Ford Sale Maps (dated May 9,
2 1996). Under the Ninth Circuit's analysis, if Blue Ford was not
3 validly offered, the Rescissions Act does not revive it.^{1/}

4 DATED this 20th day of June, 1996.

5 Respectfully submitted,

6 *Kristen L. Boyles*

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25
26 ^{1/} Plaintiffs-appellants Pilchuck Audubon Society et al. have
27 filed a motion to clarify this portion of the Ninth Circuit's
ruling to ensure that all timber sales that were invalidly
offered -- not just the four specifically named in the opinion --
are covered by the Ninth Circuit's reasoning.

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NUMBER OF PAGES: 7

DATE: April 22, 1996

FROM: Geoff Garver (305-0481), Ellen Athas

MESSAGE: Attached is the U.S. reply on the motion to transfer Klamath Tribes v. U.S. to Judge Hogan.

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7
 8 IN THE UNITED STATES DISTRICT COURT
 DISTRICT OF OREGON

9	THE KLAMATH TRIBES,)	
)	
10	Plaintiff,)	
)	Civil No. 96-381-HA
11	v.)	
)	
12	UNITED STATES OF AMERICA,)	FEDERAL DEFENDANTS'
	et al.)	REPLY TO PLAINTIFF'S
13)	OPPOSITION TO MOTION
	Defendants.)	TO TRANSFER
14)	
15)	

16 The plaintiff Tribes oppose the defendants' motion to
 17 transfer on the improbable theory that this case, involving eight
 18 sales under section 2001(k)(1)¹ of the 1995 Rescissions Act, has
 19 no meaningful connection to the cases in the Eugene Division in
 20 which Judge Hogan issued injunctions requiring these eight sales
 21 to proceed under section 2001(k)(1). Far from substantiating
 22 that theory, the Tribes' opposition to the motion to transfer
 23 demonstrates more than ever that, because the relief the Tribes

24
 25 ¹ Only six of these sales remain at issue. One is
 26 completely logged, and one will not be awarded because none of
 the original bidders accepted the sale.

1 request would yield inconsistent injunctions, this case should
2 not proceed without further action by Judge Hogan.

3 The defendants agree that section 2001(k)(1) can be
4 interpreted so as to provide the defendants, in appropriate
5 cases, the flexibility to rely on the original terms of section
6 2001(k)(1) timber sale contracts, including modification,²
7 suspension, and termination clauses, as part of contract
8 completion. However, the defendants to date have not found that
9 the six specific section 2001(k)(1) sales that remain at issue
10 here warrant the use of such terms. The defendants would do so,
11 if at all, only after filing appropriate papers in the Eugene
12 Division. In such case, the role of section 2001(k)(1) in this
13 case would come before Judge Hogan, and thus, despite the Tribes'
14 claims of inconvenience, the defendants' motion to transfer
15 should be granted.

16 1. The Six Sales at Issue Remain Subject to Section 2001(k)(1).

17 Contrary to plaintiffs' statements, the eight section
18 2001(k)(1) sales at issue in this case are subject to section
19 2001(k)(1). Section 2001(k)(1) does not abrogate the Tribes'
20 treaty rights,³ but the sales are subject to both section

21
22 ² All of the Tribes' examples of sales that were modified
23 without seeking clarification or modification of Judge Hogan's
24 orders were modified by mutual agreement with the sale
25 purchasers. Thus, there was no need to notify the court.

26 ³ The United States has a unique government-to-government
relationship with the Tribes that requires the United States to
give special consideration to the Tribes' treaty rights, which
(continued...)

1 2001(k) (1) and the treaty rights. However, because, as set forth
2 in the defendants' opposition to the Tribes' motion for
3 preliminary injunction, these individual sales do not violate the
4 Tribes' treaty rights, the defendants do not intend to modify or
5 terminate the sales on treaty grounds. Thus, as the defendants
6 have repeatedly informed Judge Hogan in compliance reports they
7 continue to file regarding section 2001(k) (1) sales, the harvest
8 of the six sales at issue is proceeding pursuant to Judge Hogan's
9 standing orders and injunctions interpreting section 2001(k) (1).

10 2. The Need to Avoid Inconsistent Rulings Overrides Other
11 Factors Relating to Transfer.

12 The Tribes, citing only cases involving requests for inter-
13 district, inter-state transfers of cases,⁴ focus on the relative
14 convenience to the Tribes of Portland as compared to Eugene,
15 which is considerably closer to the Winema and Fremont National
16 Forests -- the site of the Tribes' former reservation lands and
17 the source of the vast majority of the documents in the
18 administrative record. While convenience to the parties is

19 _____
20 ³(...continued)

21 remain intact despite the management of the Winema and Fremont
22 National Forests for multiple uses. In opposing the Tribes'
23 motion for preliminary injunction, the defendants contend that
24 they properly considered the Tribes' treaty rights in moving
25 forward with the section 2001(k) (1) sales at issue in this case.

26 ⁴ See e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508
(1947) (motion to transfer from New York to Virginia); Piper
Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981) (motion to
transfer from California to Pennsylvania); Lou v. Belzberg, 834
F.2d 730, 739 (9th Cir. 1987) (motion to transfer from California
to New York).

1 clearly a factor under 28 U.S.C. § 1404(a) and Local Rule 105-2,
2 it is obviously less significant to an intra-district, inter-
3 division transfer than to the long-distance, inter-state
4 transfers at issue in the cases the Tribes cite. In addition,
5 the convenience to the parties is less important in an
6 administrative record case such as this. Thus, the court should
7 give little weight to the relative convenience of Portland and
8 Eugene to the parties and transfer this case to Judge Hogan, in
9 whose division it should have been filed in the first place,
10 based primarily on the near certainty that Judge Hogan will have
11 to confront issues in the case anyway.

12 Judge Hogan, who has handled a number of issues under
13 section 2001(k)(1), has not addressed the effect of section
14 2001(k)(1) on treaty rights. Nonetheless, Judge Hogan's
15 injunctions appear to be unavoidable in this case. If the Tribes
16 were to succeed in obtaining a preliminary injunction, the
17 defendants would have to file appropriate papers with the Eugene
18 Division before proceeding. This division and the Eugene
19 division are equally capable of addressing the treaty issues in
20 this case. However, Judge Hogan is uniquely positioned to
21 address the complex questions that are likely to arise, in light
22 of the Tribes' claims, regarding the effect of his injunctions on
23 the sales at issue. It is therefore well within the court's
24 discretion under section 1404(a) and Local Rule 105-2 to conserve

25

26

1 judicial resources by transferring the case to Judge Hogan
2 forthwith.

3
4 Dated: April 18, 1996

Respectfully submitted,

5
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NUMBER OF PAGES: 35

DATE: April ⁵/₇, 1996

FROM: Ellen Athas, Geoff Garver & Sandi Zellmer

MESSAGE: Klamath Tribes draft PI opposition brief

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11 THE KLAMATH TRIBES,)	
)	
12 Plaintiff,)	
)	Civil No. 96-381-AS
13 v.)	
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14 UNITED STATES OF AMERICA,)	FEDERAL DEFENDANTS'
15 et al.)	OPPOSITION TO MOTION FOR
)	PRELIMINARY INJUNCTION
16 Defendants.)	
)	

18 I. INTRODUCTION

19 II. BACKGROUND

20 A. Historical background

21 1. Treaty of 1864

22 In 1864 the Klamath Tribe entered into a treaty with the
 23 United States in which it relinquished its aboriginal claim to a
 24 vast expanse of land along the northwest coast in return for a
 25 reservation of approximately 800,000 acres in south-central

1 Oregon. Treaty between the United States of America and the
2 Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians,
3 Oct. 14, 1864, 16 Stat. 707. See United States v. Adair, 723
4 F.2d 1394, 1397-98 (9th Cir. 1983) (discussing historical
5 background of treaty).

6 Article I of the treaty gave the Klamath the exclusive right
7 to hunt, fish and gather on their reservation.

8 The tribes of Indians aforesaid cede to the United States
9 all their right, title and claim to all the country claimed
10 by them . . . : Provided, That the following described tract,
11 within the country ceded by this treaty, shall, until
12 otherwise directed by the President of the United States, be
13 set apart as a residence for said Indians, [and] held and
14 regarded as an Indian reservation It is further
15 stipulated and agreed that . . . the exclusive right of
16 taking fish in the streams and lakes, included in said
17 reservation, and of gathering edible roots, seeds, and
18 berries within its limits, is hereby secured to the Indians:
19 Provided also, That the right of way for public roads and
20 railroads across said reservation is reserved to citizens of
21 the United States.

22 Treaty of 1864 with the Klamath Tribes, Article 1. See Kimball
23 v. Callahan, 493 F.2d 564, 566 (9th Cir.), cert. denied, 419 U.S.
24 1019 (1974) (Kimball I).

25 2. Termination Act and incorporation of land into the
26 Winema and Fremont National Forests

27 In 1954, Congress passed the Klamath Termination Act, Act of
28 Aug. 13, 1954, c. 732, §1, 68 Stat. 718 (codified at 25 U.S.C. §§
564-564w (1976)). A majority of the Tribe gave up their interest
in tribal property for case in accordance with the Act, and to
meet the cash obligation, the United States purchased (and then
sold?) much of the former Klamath Reservation. See Adair, 723

1 F.2d at 1398. The remaining reservations lands were later
2 condemned by the government to complete implementation of the
3 Act. Id.

4 Large forested portions of the former Reservation became
5 part of the Winema National Forest, 25 U.S.C. §§ 564w-1(d), 564w-
6 2 (1976), and the Fremont National Forest [cite].

7 3. Management of former reservation as national forests
8 (multiple use mandate)

9 The Forest Service manages the National Forest System lands
10 pursuant to, inter alia, the National Forest Management Act
11 ("NFMA"), 16 U.S.C. §§ 1600, et seq. No single resource or use,
12 including the wildlife resource, may be viewed as dominating the
13 others; instead, each resource is a factor which must be
14 considered as a component of comprehensive forest planning in
15 accordance with multiple-use sustained-yield principles of
16 NFMA.¹

17 The origins of the Forest Service's authority to manage the
18 National Forests on a multiple-use basis can be traced back
19 nearly 100 years, before the genesis of the agency itself. In
20 1897, Congress enacted a statute calling for the predecessor

21
22 ¹ Forest management is achieved through use of forest
23 planning, which is a continuous and ongoing process as intended
24 under NFMA. NFMA and its regulations provide for developing and
25 adopting regional guides and land and resource management plans
26 ("forest plans" or "LRMPs") which establish multiple-use goals
27 and objectives for the planning unit. 36 C.F.R. §§ 219.8-.11.
28 Forest plans also put in place management area prescriptions and
standards and guidelines for future project level decisionmaking.

1 agency of the Forest Service "to improve and protect" federal
2 forests. Act of June 4, 1897, ch. 2, 30 Stat. 34-36 ("Organic
3 Act") (codified as amended at 16 U.S.C. §§ 473-82 and 551). To
4 carry out this mission, the agency was vested with wide-sweeping
5 authority to make rules "to regulate [the Forests'] occupancy and
6 use and to preserve the forests therein from destruction." Ch.
7 2, 30 Stat. 35 (current version at 16 U.S.C. § 551). The Organic
8 Act is still in effect in slightly modified form. 16 U.S.C. §§
9 473-82 and 551.

10 In 1960, Congress enacted the Multiple Use and Sustained
11 Yield Act ("MUSY"), which made express the Forest Service's
12 authority to manage the National Forests for multiple uses as the
13 agency deems will best meet the needs of the American people and
14 make the most judicious use of the forest resources under its
15 jurisdiction. 16 U.S.C. §§ 528-531. The concepts of multiple-
16 use and sustained-yield remain vital in the land management
17 planning of the Forest Service, as NFMA incorporates that concept
18 from MUSY.²

19 NFMA constitutes a statutory framework pursuant to which the
20 Secretary of Agriculture is to plan for the management of
21 National Forest lands. 16 U.S.C. § 472a. The statute provides
22

23 ² Notably, Congress did not alter or replace the terms of
24 MUSY in enacting NFMA. Rather, Congress made the multiple-use
25 sustained-yield mandate the cornerstone of Forest Plan
26 development, maintenance and revision. 16 U.S.C. §1604(e), (f).
27 See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1511 (9th
28 Cir. 1992) (NFMA incorporates requirements of MUSY and NEPA).

1 for public participation in the forest planning process at
2 various steps throughout the planning process. 16 U.S.C. §
3 1604(d). NFMA also provides that land and resource management
4 planning is to provide for multiple uses and sustained yield of
5 the various forest resources on a coordinated basis. 16 U.S.C. §
6 1604(e). It further directs the Secretary to use a systematic,
7 interdisciplinary approach to forest planning so as to achieve
8 integrated consideration of physical, biological, economic, and
9 other sciences. 16 U.S.C. § 1604(b).³

10 NFMA requires that regulations be promulgated that specify
11 forest planning guidelines. 16 U.S.C. § 1604(g)(3). In
12 promulgating such regulations, the Forest Service, pursuant to
13 the direction of NFMA, appointed a committee of scientists "to
14 provide scientific and technical advice and counsel on proposed
15 guidelines and procedures." 16 U.S.C. § 1604(h).

16 Among the guidelines were those which "provide for the
17 diversity of plant and animal communities based on the
18 suitability and capability of the specific land area in order to
19

20 ³ Subsequent to the passage of NFMA, courts continue to
21 hold that the Forest Service "has wide discretion to weigh and
22 decide the proper uses within any area" of the national forests.
23 Big Hole Ranchers Ass'n v. United States Forest Service, 686 F.
24 Supp. 256, 264 (D. Mont. 1988). See also National Wildlife Fed'n
25 v. United States Forest Service, 592 F. Supp. 931, 938 (D. Or.
26 1984). As stated by the Fifth Circuit, "The NFMA is a set of
27 outer boundaries within which the Forest Service must work.
28 Within its parameters, the management decision belongs to the
agency and should not be second-guessed by a court." Texas Comm.
on Natural Resources v. Bergland, 573 F.2d 201, 210 (5th Cir.),
cert. denied, 439 U.S. 966 (1978).

1 meet overall multiple-use objectives." See 16 U.S.C. §
2 1604(g)(3)(B). In accordance with this statutory provision, the
3 Forest Service promulgated the fish and wildlife resource
4 regulation, one of thirteen regulations designed to integrate
5 various forest resources. 36 C.F.R. §§ 219.14 - 219.26.

6 The opening section of the NFMA fish and wildlife resource
7 regulation states that "fish and wildlife habitat shall be
8 managed to maintain viable populations of existing native and
9 desired non-native vertebrate species in the planning area." 36
10 C.F.R. § 219.19. The regulations further direct that forest
11 planning must "recogni[ze] that the National Forests are
12 ecosystems and their management for goods and services requires
13 an awareness and consideration of the interrelationships among
14 plants, animals, soil, water, air and other environmental factors
15 within such ecosystems." 36 C.F.R. § 219.1(b)(3). Finally,
16 consistent with NFMA, the regulations expressly incorporate the
17 direction that forest planning shall provide for multiple uses
18 and sustained yield of the goods and services produced by the
19 National Forest System in a way that maximizes long-term net
20 public benefits in an environmentally sound manner. 36 C.F.R. §
21 219.1(a)(1).

22 Because of the enormous complexity and dynamic nature of the
23 ecosystems managed under NFMA, there is no specific or precise
24 standard or technique for satisfying diversity requirements, and
25 "the Forest Service has wide discretion to weigh and decide the
26

1 proper uses within any area of the national forests." ONRC v.
2 Lowe, 836 F. Supp. 727, 733 (D. Ore. 1993) (citing Big Hole
3 Ranchers Ass'n v. U.S. Forest Service, 686 F. Supp. 256, 264 (D.
4 Mont. 1988)).⁴ For example, numerous courts have recognized
5 that NFMA does not create a concrete standard for diversity of
6 species. See id.; Sierra Club v. Robertson, 784 F. Supp. 593,
7 609 (W.D. Ark. 1991); Sierra Club v. Robertson, 810 F. Supp.
8 1021, 1027-28 (W.D. Ark. 1992), aff'd, 28 F.3d 753 (8th Cir.
9 1994); Seattle Audubon Society v. Moseley, 798 F. Supp. 1484,
10 1489-90 (D. Wa. 1992); Sierra Club v. Marita, 845 F. Supp. 1317
11 (E.D. Wis. 1994), aff'd, 46 F.3d 606 (7th Cir. 1995); Krichbaum
12 v. Kelley, 844 F. Supp. 1107 (W.D. Va. 1994); Sierra Club v.
13 Robertson, 845 F. Supp. 485 (S.D. Ohio 1994). Accordingly,
14 "common sense and agency expertise must be applied" in
15 effectuating the multiple resource management mandate, and the
16 agency's decisions regarding the proper allocation of those uses
17 is entitled to deference. Moseley, 798 F. Supp. at 1490; ONRC v.
18 Lowe, 836 F. Supp. at 733.

19 4. The Kimball v. Callahan litigation and consent decree

20 The question of whether and to what extent the Tribes'
21 treaty hunting and fishing rights on their former reservation
22 survived termination of the reservation under the Klamath

24 ⁴ In the ONRC case, this Court rejected a challenge to the
25 Winema Forest Plan, and held that the Plan complied with NFMA's
26 requirement to provide habitat for sensitive species. Id. at
27 734.

1 Termination Act was addressed in Kimball v. Callahan, 493 F.2d
2 564 (9th Cir.), cert. denied, 419 U.S. 1019 (1974) (Kimball I)
3 and Kimball v. Callahan, 590 F.2d 768 (9th Cir. 1979) (Kimball
4 II). Kimball I established that, upon termination of the
5 reservation, members of the Tribes retained a once-exclusive, but
6 now non-exclusive, treaty right to hunt, fish and trap on their
7 former reservation, free of state fish and game regulations.
8 Kimball I, 493 F.2d at 569-70. In Kimball II, the court held
9 that the state of Oregon has authority to regulate the Tribes'
10 treaty hunting, fishing and trapping rights on their former
11 reservation lands for conservation purposes, and the court
12 remanded the case for determination of the scope of the State's
13 regulatory authority. Kimball II, 590 F.2d at 778. The United
14 States participated in Kimball II as *amicus curiae*. Id. at 777.

15 On remand, the district court entered a consent decree
16 approving a Settlement Agreement among the Kimball II parties and
17 the United States, as *amicus curiae*, that settled the outstanding
18 issues. Kimball v. Callahan, Civil No. 73-155, Final Consent
19 Decree and Order (D. Or. May 13, 1981), AR at 0001 (17 pages).
20 The Settlement Agreement provides that its purpose

21 is to promote the sound and efficient management and
22 conservation of fish and wildlife resources within the areas
23 comprising the former Klamath Indian Reservation to ensure
24 future use of these resources by both Klamath Indians and
25 non-Indians. . . . More specifically, it is the purpose of
26 this Agreement to establish a cooperative management and
27 regulatory system through defining: 1) the management and
28 regulatory responsibilities of the parties; 2) the scope and
nature of the tribal treaty rights; 3) the extent of the
State's power to, and the conditions under which it may

1 regulate treaty hunting, fishing and trapping for
2 conservation purposes; 4) the remedies of the parties, and
3 5) the continuing jurisdiction of the Court.

3 Settlement Agreement, at 2-3 (emphasis added).

4 The Settlement Agreement includes a provision relating to
5 habitat management on the former reservation. Specifically, it
6 states:

7 The protection and enhancement of fish and wildlife habitat
8 is essential to the continued welfare of these resources.
9 The parties therefore agree to cooperate as fully as
10 practicable in the exchange of information regarding
11 activities which could substantially alter habitat and
12 thereby affect fish and wildlife resources on the
13 reservation. This section applies to activities or proposed
14 activities affecting habitat which take place within or
15 outside the reservation boundaries . . . which could
16 significantly affect fish and wildlife resources within
17 those reservation boundaries; provided however, that the
18 parties have no obligation to obtain each other's consent
19 prior to adopting or implementing policies or positions on
20 any such activities.

14 Settlement Agreement, at 9. The Settlement Agreement does not
15 further define the scope or extent of habitat protection required
16 under its terms.

17 To implement its terms, the parties to the Kimball Consent
18 Decree established a Technical Advisory Committee (TAC), with
19 membership from the Winema and Fremont NFs, ODF&W and the Klamath
20 Tribe. AR at 0005. See also AR at 0171b. The issue of most
21 concern among the TAC members was identified early on as mule
22 deer management. See AR at 0007-0010. TAC members agreed at the
23 outset that mule deer populations were "too low" and noted that
24 the decline was due to "numerous factors," including bad weather,
25 habitat condition, competition, illegal harvest, land use

1 conflicts and legal harvest levels. AR at 0010; see also AR at
2 0029-33.⁵ Among other things, the TAC adopted a Mule Deer
3 Habitat Model for assessing mule deer habitat effectiveness and
4 impact on mule deer habitat of forest management activities. AR
5 at 0075-95; see also AR at 0028; 0040-63; 0150-0163. On the
6 Spring of 1989, the parties signed a Memorandum of Understanding
7 regarding the use of the Mule Deer Habitat Model in evaluating
8 project proposals. AR at 0167-69. The Forest Service has used
9 the Mule Deer Habitat Model consistently in evaluating the
10 impacts of forest management activities on mule deer. See, e.g.
11 AR at 1781 ("The deer model, used to assess habitat suitability
12 before and after management activities, has been developed and
13 reviewed by biologists from the Forest Service, Klamath Tribe,
14 and Oregon Department of Fish and Wildlife.").

15 The federal government has relied on the Kimball consent
16 decree to guide the management of the Winema and Fremont National
17 Forests. The Forest Service has interpreted the consent decree
18 as "creating a special relationship [with the Tribes] that merits
19 special consideration and consultation with the Klamath Tribes
20 when those rights and responsibilities are involved." Winema
21 Forest Plan ROD, at 7, AR at 0172(7). In addition, the Bureau of
22 Indian Affairs has interpreted the Consent Decree to mean that

24 ⁵ It is noteworthy that the ODF&W attributed low mule deer
25 population in part on legal harvest by the Tribes of does, which
26 is particularly problematic when deer populations are depressed.
AR at 0031.

1 [t]he Tribes interest in the fish and wildlife resources
2 within the reservation not only secures the right to hunt
3 and fish but also the right to expect a taking. The concept
4 of a right of taking carries with it the need to have the
5 habitat and game population maintained such that a
6 harvestable population is sustained.

7 Letter from Portland Area Director, BIA, to John Butruille,
8 Regional Forester (Dec. 8, 1989), AR at 0171a-0171b.⁶

9 5. The Fremont and Winema Forest Plans

10 The Winema and Fremont Forest Plan RODs discuss the impact
11 of forest management activities on the Tribes' treaty rights.
12 The Winema Forest Plan ROD includes provisions for inviting the
13 participation of the Tribes in resource management activities
14 generally and specifically provides for close coordination with
15 the Tribes with respect to management activities affecting mule
16 deer and their habitat. Winema Forest Plan ROD, at 7, 10-11, AR
17 at 0172(7, 10-11). The ROD notes the participation of the Tribes
18 in its preparation, commits to ongoing coordination with the
19 Tribes and concludes that the selected management alternative "is
20 combatible with and complementary to the goals of other agencies
21 and the Klamath Indian Tribe." Winema Plan ROD, at 36.

22 With respect to mule deer issues, the Winema Plan ROD notes
23 that although mule deer populations were at high levels in the

24 ⁶ Although the Tribes rely heavily on this letter, it falls
25 significantly short of concluding that forest management
26 activity, let alone any particular timber sale, amounts to a
27 violation of either the Kimball Consent Decree or the Tribes'
28 treaty rights. Indeed, although the letter refers to sales for
which appeals were pending, the letter was sent in December 1989,
well before any of the sales at issue in this case were appealed.

1 1950s and 1960s, thereafter "a decline occurred in populations
2 all over the west" and the decline has continued in the Klamath
3 Basin. Winema Plan ROD at 10, AR at 0172(10). The ROD states:

4 The Forest Service believes that the reasons for the decline
5 can be attributed to several factor. These factors include:
6 agricultural and housing development on much of what was
7 critical winter range; forage decline, primarily in
8 bitterbush, because of age and conifer encroachment; animal
9 loss due to heavy hunting pressure form sport hunting and
10 year-round treaty right subsistence harvest, and poaching;
11 road kill . . . ; predation; . . . harassment becauseof high
12 road densities; and naturally low ptoential for forage
13 production and scarcity of water.

14 Id. As the ROD notes, many of these factors are beyond the
15 control of the Forest Service. Id. The ROD further acknowledges
16 uncertainty as to the link between mule deer habitat and
17 population. Id.

18 The Fremont Forest Plan ROD also ackowledges the Tribes'
19 treaty rights. Specifically, it states:

20 Hunting and fishing are equally important to the tribal
21 people. Such opportunities are dependent, to a large
22 extent, on management of the Forest. The Plan which I have
23 selected for the Forest will meet many of the hunting and
24 fishing needs of the Klamath Tribe and is consistent with
25 the ODF&W herd management objectives for big game on winter
26 and summer ranges, and ODF&W objectives for fisheries
27 management. This Forest Plan also directs Forest Fish and
28 wildlife biologists to coordinate with the Klamath Tribe to
better identify fish and wildlife species important to the
Tribe, and to better identify management needs for these
species.

Fremot Plan ROD, at 26.

The Tribes appealed the Winema Plan, stating: "As a result
of the Forest Service's failure to adequately analyze and
disclose the potential impacts of implementation of the Plan, it

1 is difficult to determine whether the plan will result in a
2 violation of the substantive obligations owed to the Tribe under
3 the treaty and federal government's trust responsibility." Winema
4 Forest Plan Notice of Appeal, at 10, AR at 0206. Likewise, the
5 Tribe claimed in appealing the Fremont Forest Plan that "[t]e
6 information in the Plan is so lacking as to preclude the Tribe
7 from determining in some instances whether the plan will result
8 in a substantive violation of the Tribe's treaty rights."
9 Fremont Forest Plan Notice of Appeal, at 4, AR at 0166(4).

10 On October 13, 1993, the Reviewing Officer upheld the Winema
11 Forest Plan on appeal. The decision affirming the Winema Plan
12 concludes that "[i]n the development of the Forest Plan and FEIS,
13 the basic requirements established by the manual and regulations
14 for coordinating with the Klamath Tribe and addressing treaty
15 rights were met." AR at 0630. Further, the decision noted that
16 the Tribes would have an opportunity "to participate in future
17 decisions on management activities, especially those that may
18 affect treaty rights and resources of importance to the tribe
19 through involvement in project planning, monitoring and
20 evaluation." Id. The decision reaffirmed the Forest's
21 obligation not to act unilaterally with respect to treaty
22 resources, in that "the Tribe's view of the hunting, fishing,
23 gathering, and trapping activities protected by the treaty must
24 be solicited, discussed, and considered." Id. at 0631. With
25 respect to mule deer habitat, the decision concluded that "[t]he
26

1 Forest Plan includes goals and objective for management of mule
2 deer habitat tha taddress the Klamath Tribe's interests and
3 treaty rights." Id. at 0639.

4 The Fremont Forest Plan was affirmed on appeal on June 25,
5 1995. AR at 0692. In upholding the Plan, the Reviewing Officer
6 noted that "it is incumbent on the Forest Service to carry out
7 the intent of a treaty in a manner that protects and maintains
8 tribal rights or privileges while maintaining a responsibility to
9 all national forest users and complying with existing laws and
10 regulations." AR at 0692(5). Further, the Reviewing Officer
11 found that while the Tribes retain treaty fishing, hunting and
12 other rights, "there is no language specifying species population
13 levels or guaranteed harvest levels." AR, at 0692(6). The
14 Reviewing Officer concluded that the management objectives in the
15 plan to sustain or increase species populations "should provide
16 the opportunity for the Tribes to exercise their reserved treaty
17 rights." Id. In regard to mule deer, the Reviewing Officer
18 concluded that the Plan established management goals, objectives,
19 standards and guidelines to insure protection of mule deer
20 habitat consistent with the Tribes' rights. AR at 0692(27).
21 Further, he noted that "[t]he adequacy of the standards and
22 guidelones for mule deer habitat management willbe subject to
23 further evaluation durign project level analysis and monitoring
24 and evaluation." Id.

1 In addition to the Forest Plans, the Winema and Fremont NFs
2 on September 16, 1991, adopted a policy regarding management
3 responsibilities related to the Tribes' treaty rights. AR at
4 0418-26. In this policy, the Forests recognized their special
5 relationship with the Tribes and affirmed their "obligation to
6 consult, cooperate and coordinate with the Klamath Tribe in
7 making resource decisions, according to the terms of the Consent
8 Decree." AR at 0423. However, the Forests also affirmed that
9 "the Forest Service [does not relinquish or share] responsibility
10 for administrative or resource management decision-making with the
11 Tribe." Id. With respect to the Tribes' treaty hunting rights,
12 the Forests acknowledged their responsibility to "[manage] habitat
13 to support populations necessary to sustain Tribal use and non-
14 Indian harvest," including "consideration of habitat needs for
15 any species hunted or trapped by tribal members" Id.

16 B. The Timber Sales at issue

17 The Tribes' motion targets eight timber sales: the Willy,
18 Nelson, Yoss Ridge, Cinder, Bill, John and John Lodgepole sales
19 on the Winema National Forest and the Blue Ford sale on the
20 Fremont National Forest.

21 1. The Willy sale: Logging is completed

22 The Willy sale on the Winema National Forest was awarded to
23 Boise Cascade Corporation on November 14, 1995, pursuant to
24 section 2001(k)(1) and Judge Hogan's October 17, 1995,
25 injunction. Castenada Decl. at ¶ 6. Logging of the Willy sale
26

1 has been completed, although some piling of logging residue and
2 road maintenance remain to be completed. Id.

3 Winema National Forest staff sought the views of the Tribes
4 early in the planning process for the Willy sale. On July 19,
5 1990, Don Gentry, representing the Tribes, wrote a letter to the
6 Forest expressing concerns with the sale in general, including
7 concerns about the impacts on mule deer. AR at 0999-1000. In
8 the Fall of 1990, the Forest met at least twice with the Tribes,
9 and the Klamath Tribal Chairman expressed his view that the only
10 alternative for the Willy sale that appeared acceptable to the
11 Tribe was the no action alternative. AR at 1035-1037; 1074-1079.
12 After meeting with the Tribe, the Forest acknowledged the need to
13 gather additional information on sites important to the Tribes
14 and to consider changes to the proposed sale to accommodate the
15 Tribes' concerns. AR at 1079.

16 The Acting Forest Supervisor issued a Decision Notice and
17 Finding of No Significant Impact (FONSI) for the sale on August
18 16, 1991. AR at 1205-1212. The FONSI concluded that the
19 selected alternative accounted for the Tribes' cultural
20 traditions by not allowing harvesting operations from May 1 to
21 November 30, the period during which the Tribe uses the sale
22 area. AR at 1205, 1208. Further, it found that the alternative
23 would improve mule deer summer habitat and leave blocks of uncut
24 timber for mule deer and other species. Id. Thus, the Acting
25
26
27

1 Forest Supervisor concluded that the sale would have no
2 significant impact on mule deer. AR at 1210.

3 On October 4, 1991, the Tribes appealed the FONSI and
4 requested a stay of the sale, claiming violation of the Tribes'
5 treaty rights, NEPA and the National Forest Management Act. AR at
6 1041. On November 6, 1991, the Deputy Regional Forester, in his
7 capacity as Reviewing Officer for the sale decision, stayed award
8 of the sale until 15 days after his final decision on the appeal.
9 AR at 1360. On October 25, 1995, relying on Judge Hogan's
10 injunction October 17, 1995, the Deputy Regional Forester
11 dismissed the Klamath Tribe's appeal of the Willy sale. AR at
12 1368. The Forest Service awarded the sale to Boise Cascade on
13 November 14, 1995. AR at 1369.

14 2. The Nelson sale will not be awarded

15 The Nelson sale on the Winema National Forest, unlike the
16 other seven sales at issue in this case, will not be awarded.
17 The apparent high bidder, who would have been entitled to the
18 sale under section 2001(k)(1), was not qualified to be awarded
19 the sale. Castenada Decl. at ¶ 10. All of the other original
20 bidders were notified that the sale was available and none was
21 interested in the sale. Id. Accordingly, the Nelson sale is no
22 longer at issue in this case.

23 3. The Yoss Ridge and Cinder sales: Tribes' appeals
24 dismissed under October 17 injunction

25 The Tribes' appeals of the Yoss Ridge and Cinder sales on
26 the Winema National Forest were pending when section 2001 was

1 enacted and, as with the Willy sale, were dismissed pursuant to
2 Judge Hogan's October 17, 1995, injunction. AR at 1992, 3219.

3 As with the Willy sale, the Forest Service sought the
4 participation of the Tribes early in the planning process for the
5 Yoss Ridge sale, see AR at 1429-34; 1439, and the Tribes were
6 consulted regularly during preparation and environmental
7 assessment of the sale. See AR at 1489, 1506-07, 1538-39. On
8 December 6, 1990, the tribes wrote the Forest with their concerns
9 regarding, inter alia, the effect of the apparent preferred sale
10 alternative on mule deer habitat and the Tribes' preference of a
11 different alternative with the same impact on mule deer hiding
12 cover, but less impact to old growth habitat. AR at 1541-44;
13 see AR at 1549-55; 1619-27 (description of alternatives).

14 The Forest finalized the EA for the Yoss Ridge sale on June
15 28, 1991. AR at 1778. The EA noted that mule deer habitat
16 suitability in the sale area would increase as a result of the
17 sale, and that impacts to mule deer from road construction would
18 be more than compensated by road closures. AR at 1778(III-3);
19 see also AR at 1516-17. The Acting Forest Supervisor selected
20 Alternative 6, with modifications that reduced the amount of old
21 growth harvest and eliminated or reduced the size the harvest in
22 stands in which the EA found harvest could adversely impact mule
23 deer. AR at 1779; see AR at 1778 (II-7, III-3). The road
24 closures and timber unit size reductions were made in light of
25 the Tribes' concerns regarding mule deer habitat. AR at

1 1778(III-3). The Acting Forest Supervisor concluded in a FONSI
2 that, as mitigated, the sale would have no significant impacts.
3 AR at 1781-83. Indeed, a primary reason for selecting
4 alternative 6 was that it "will increase the mule deer habitat
5 suitability index from 0.19 to .20 directly after harvest and to
6 .31 ten years after harvest." AR at 1781.

7 On August 30, 1991, the Tribes appealed the Yoss Ridge
8 EA/FONSI, on the ground that sale would violate their treaty
9 rights, NEPA and NFMA. The Tribes' appeal was pending when
10 section 2001 was enacted. On October 25, 1995, relying on Judge
11 Hogan's injunction October 17, 1995, the Deputy Regional Forester
12 dismissed the Klamath Tribe's appeal of the Yoss Ridge sale. AR
13 at 1368. The Forest Service awarded the sale to Boise Cascade
14 Corp. on November 14, 1995. Castenada Decl. at ¶ 5.
15 Approximately 4.8 million board feet of a total of 7.1 million
16 board feet have been logged. Currently, no logging is taking
17 place on the sale, and logging is not expected to resume before
18 July 15, 1996, pending road construction and maintenance. Id.

19 The Tribes expressed interest in participating in planning
20 for the Cinder sale in a March 29, 1991, letter, well in advance
21 of the preparation of an EA and decision on the sale. AR at
22 2749-50; see also AR at 3065. The EA for the Cinder sale and
23 several related sales was finalized in July 1992, AR at 3054, and
24 on August 17, 1992, the Forest Supervisor issued a Decision Notice
25 and FONSI concluding that the sales, including the Cinder sale,

1 would have no significant impacts on the environment. AR at
2 3098-3100. The EA for the sales found that, based on the Habitat
3 Suitability Index under the Mule Deer Habitat Model, all of the
4 "action alternatives" would result in mule deer habitat as good
5 as or better than would result under the "no action" alternative.
6 AR at 3076-77.

7 The Forest Conservation Council appealed the EA/FONSI for
8 all the sales on September 3, 1992, see AR at 3113, and on
9 September 18, 1992, the Deputy Regional Forester stayed the award
10 of the Matt sale, and apparently the Cinder sale as well, pending
11 the outcome of the appeals. AR at 3135. On September 30, 1992,
12 the Tribes also appealed the sales, claiming the sales violated
13 their treaty rights, NEPA and NFMA.⁷ AR at 3144 et seq. The
14 Tribes' appeal was pending when section 2001 was enacted. On
15 October 30, 1995, relying on Judge Hogan's injunction October 17,
16 1995, the Deputy Regional Forester dismissed the Klamath Tribe's
17 appeal of the Cinder sale.⁸ AR at 3219. The Forest Service
18 awarded the sale to Scott Timber Co. on November 14, 1995. AR at
19 3220; Castaneda Decl. at ¶ 3. Logging of 1 million board feet,

21 ⁷ On October 5, 1992, the Oregon Natural Resources Council
22 also appealed the EA/FONSI for the sales. AR at 3138 et seq.

23 ⁸ The three other sales analyzed along with the Cinder sale
24 were never offered, and on November 9, 1995, the Winema National
25 Forest Supervisor withdrew the decision to implement those sales.
26 AR at 3225. It is noteworthy that the Forest Service concluded
27 in the EA/FONSI that the four sales that included the Cinder sale
28 would not have a significant impact even if combined, let alone
considered on their own.

1 out of a total of 5.3 million board feet, has been completed on
2 the sale. Castaneda Decl. at ¶ 3. No logging activity is
3 currently taking place on the sale, and logging is not expected
4 to resume until Winter 1996-97. Id.

5 4. The Blue Ford Sale was appealed and modified

6
7 5. The Bill, John and John Lodgepole sales: Tribes'
8 appeals denied prior to award of the sale

9
10 **III. ARGUMENT**

11 **A. Standard for Preliminary Injunction**

12 In the Ninth Circuit, a preliminary injunction "is
13 appropriate if the moving party demonstrates either (1) a
14 probability of success on the merits and a possibility of
15 irreparable injury, or (2) serious questions going to the merits
16 and the balance of hardships tipping sharply in its favor."
17 Pratt v. Rowland, 65 F.3d 802, 805 (9th Cir. 1995). Under the
18 second of these tests, the moving party must also demonstrate a
19 "fair chance of success on the merits." Senate of the State of
20 Cal. v. Mosbacher, 968 F.2d 974, 977 (9th Cir. 1992). In cases
21 involving the public interest, the court "must also consider
22 whether the public interest favors the plaintiff." Fund for
23 Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); see also,
24 Caribbean Marine Services Co. v. Baldrige, 844 F.2d 668, 674
25 (9th Cir. 1988). However, "[i]f the law is entirely against the
26 position of the requesting party," none of the tests for

1 preliminary injunctive relief will permit the issuance of a
2 preliminary injunction. Senate of the State of Cal. v Mosbacher,
3 968 F.2d at 978.

4 B. No Likelihood of Success on the Merits

5 1. The Scope and Standard of Review

6 This case is governed by the judicial review provisions of
7 the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 et seq.
8 Although the Tribes did not plead jurisdiction under the APA, the
9 APA provides the only basis for reviewing the Tribes' claims.
10 Specifically, because the jurisdictional statute on which the
11 Tribes solely rely, 28 U.S.C. § 1362, does not not waive
12 sovereign immunity, the only waiver of sovereign immunity
13 available to the Tribes is the waiver in the section 702 of the
14 APA. Assiniboine and Sioux Tribes v. Bd. of Oil and Gas
15 Conservation, 792 F.2d 782, 791-92 (9th Cir. 1986). Further, the
16 Tribes focus on the Forest Service's action in awarding and
17 proceeding with the eight timber sales at issue in claiming a
18 violation of their treaty rights. Accordingly, the judicial
19 review provisions of the APA apply. Review should be limited to
20 the administrative record,⁹ and the defendants' decision that

21 _____
22 ' The Tribes have attached eleven declarations with a total
23 of 51 exhibits to their motion for preliminary injunction. Much
24 of this information is contained in the administrative record.
25 Although consideration of these attachments may be appropriate in
26 connection with the motion for preliminary injunction, the
27 defendants reserve the right to seek to limit the record for
28 review on the merits to materials that are in fact part of the
administrative record underlying the timber sales at issue. See
(continued...)

1 the timber sales at issue will not violate the Tribes' treaty
2 rights should be set aside only if found to be "arbitrary,
3 capricious, an abuse of discretion, or otherwise not in
4 accordance with law; . . . [or] in excess of statutory,
5 jurisdiction, authority, or limitations, or short of statutory
6 right." 5 U.S.C. § 706(2)(A), (C). Cf. Schappy v. Hodel, 911
7 F.2d 1312, 1316-17 (9th Cir. 1990) (applying this standard of
8 review to the Department of Interior's construction of Indian
9 treaty rights).

10 2. Treaty rights survive enactment of 2001(k)

11 Congress' intention to abrogate Indian treaty rights must be
12 clear and plain. Absent explicit statutory language, the Supreme
13 Court has been "extremely reluctant to find congressional
14 abrogation of treaty rights." United States v. Dion, 476 U.S.
15 734, 739 (1986). See Washington v. Washington Commercial Fishing
16 Vessel Assn., 443 U.S. 658, 690 (1979). To find that abrogation
17 has resulted, the court must find that "Congress actually
18 considered the conflict between its intended action on the one
19 hand and Indian treaty rights on the other, and chose to resolve
20 that conflict by abrogating the treaty." Dion, 476 U.S. at 739-
21 40. See Adair, 723 F.2d at 1412 (citing Menominee Tribe v.

22
23 ⁹(...continued)

24 Animal Defense Council v. Hodel, 840 F.2d 1432, 1436 (9th Cir.
25 1988), amended, 867 F.2d 1244 (9th Cir. 1989) (noting the well-
26 established rule in the Ninth Circuit that, with narrow
27 exceptions, review of agency decisions must be limited to the
28 administrative record).

1 United States, 391 U.S. 404, 413 (1968), and discussing Kimball
2 I, 493 F.2d at 568-69, court held that Klamath Termination Act,
3 which provides that "nothing . . . shall abrogate any water
4 rights of the tribe and its members," did not preclude assertion
5 of reserved water rights for tribal fishing uses; court found
6 that it could not impute to Congress the intention to abrogate
7 fishing rights guaranteed in the 1864 treaty).

8 In the absence of explicit statement, "the intention to
9 abrogate or modify a treaty is not to be lightly imputed to
10 Congress." Dion, 476 U.S. at 739 (citing Menominee Tribe v.
11 United States, 391 U.S. 404, 413 (1968)). See Western Shoshone
12 National Council v. Molini, 951 F.2d 200, 203 (9th Cir. 1991)
13 (citing Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809,
14 823 (8th Cir. 1983)). If no plain statement regarding abrogation
15 is found on the face of the statute, intent to abrogate treaty
16 rights must be found from "clear and reliable evidence in the
17 legislative history" of the statute. Dion, 476 U.S. at 739.

18 In Dion, the Court found that Congress had in fact intended
19 to abrogate treaty rights to use eagle feathers in the Bald Eagle
20 Protection Act. Based on that Act's explicit provision allowing
21 the use of feathers for the religious purposes of Indians if
22 Indians applied for and were granted a permit, the Court found
23 intent to abrogate "strongly suggested on the face of the Act."
24 Id. at 740. The legislative history of that Act, which showed
25 Congress' concern that the extensive use by American Indians in

1 the past had contributed to the decline in eagle populations,
2 supported this interpretation. Id. at 741-43.¹⁰

3 Unlike the express permit provision and clear legislative
4 history in Dion, the only provision which could arguably be read
5 to implicate treaty rights in Section 2001(k) is the introductory
6 provision of that section, which states that certain sales will
7 go forward "notwithstanding any other provision of law." Under
8 the law of Dion, this provision is not "clear evidence that
9 Congress actually considered the conflict between its intended
10 action on the one hand and Indian treaty rights on the other, and
11 chose to resolve that conflict by abrogating the treaty." See
12 U.S. v. Oregon, 787 F. Supp. 1557, 1573 (D. Or. 1992) [check];
13 Confederated Tribes of the Umatilla Indian Reservation v.
14 Alexander, 440 F. Supp. 553, 555-56 (D. Or. 1977).

15 Further, there is nothing in the legislative history of the
16 Rescissions Act which references an intent to abrogate tribal
17 hunting and fishing treaty rights. In fact, there is no mention
18 of American Indians in the legislative history at all.¹¹

19
20 ¹⁰ The Department of Interior supported the bill but noted
21 that use of eagle feathers was important to numerous tribes.
22 [cite] The Committee Report explained that a large number of
birds had been killed to obtain feathers for Indian religious
uses, and that steps needed to be taken to protect eagle
populations. [cite]

23 ¹¹ Section 2001(i), which is applicable to salvage sales
24 and Option 9 sales, but does not mention subsection (k) sales,
25 provides that sales documents are deemed to satisfy ". . . any
treaty, and international agreement." Even if subsection (i)
were applicable here, its plain language provides further
26 (continued...)

1 Accordingly, Section 2001(k) does not displace the Klamath's
2 treaty rights.

- 3 3. The Tribes' treaty rights entitle them to no more
4 fishing and hunting use than is necessary to
5 support a "moderate living," but only to the
6 extent fish and wildlife resources are available

7 The most relevant statement of the Tribes' treaty hunting
8 and fishing rights is set forth in United States v. Adair, 723
9 F.2d 1394 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984).
10 In Adair, the Ninth Circuit found that the 1864 Klamath Treaty
11 confirmed to the Tribes "a continued water right to support its
12 hunting and fishing lifestyle." 723 F.2d at 1414. Specifically,
13 the court held that the Tribes' water right guaranteed the Tribes
14 "the amount of water necessary to support its hunting and fishing
15 rights as currently exercised to maintain the livelihood of Tribe
16 members, not as those rights were once exercised by the Tribe in
17 1864." Id. at 1414-15. Further, the court explained that, under
18 this standard, the Tribe were entitled to a level of fishing and
19 hunting use that would provide them with a "moderate living."
20 Id. at 1415.

21 The extent to which a non-exclusive treaty fishing and
22 hunting right to which the "moderate living" standard applies

23 ¹¹(...continued)
24 evidence that Congress was considering international treaties and
25 intended to abrogate only those. In addition, the legislative
26 history of the Rescissions Act shows that this provision was
27 added to respond to concerns regarding application of NAFTA, GATT
28 and other international commitments. 141 Cong. Rec. H6638 (June
29 29, 1995); S10,465 (July 21, 1995).

1 carries with it a right to qualitative habitat protection is
2 unsettled, particularly outside the context of a quantitative
3 water right.¹² In United States v. Washington, 759 F.2d 1353
4 (9th Cir.), cert. denied, 474 U.S. 994 (1985), the Ninth Circuit
5 vacated the district court's judgment that

6 the right to take fish necessarily includes the right to
7 have those fish protected from man-made despoilation, so
8 that the treaties impose . . . a duty to refrain from
9 degrading or authorizing the degradation of the fish habitat
10 to an extent that would deprive the treaty Indians of their
11 moderate living needs.

12 759 F.2d at 1355.

13 However, the court also vacated, after rehearing, its
14 earlier rejection of the district court's standard in favor of
15 the view that the tribal treaty fishing rights at issue meant
16 that "the State must take reasonable steps to mitigate adverse
17 impact on the fisheries, but has no absolute and unconditional
18 duty under the treaty to maintain or increase existing harvest
19 levels." United States v. State of Washington, 694 F.2d 1374,
20 1386 (9th Cir. 1983), vacated, 759 F.2d 1353 (9th Cir.), cert.
21 denied, 474 U.S. 994 (1985). The court vacated its earlier
22 ruling in order to avoid announcing a legal rule that, because of
23 the absence of concrete facts in a particular case, would be

24 ¹² The Tribes' water, although it may require precise
25 quantification to be administered, is clearly absolute against
26 junior water rights. Specifically, the Tribes have absolute
27 authority to prevent diminution of their water right by uses
28 having a later priority date. However, the principles
guaranteeing this right against future encroachment derive from
state water law, and not from the Tribes' treaty rights.

1 "imprecise in definition and uncertain in dimension." 759 F.2d
2 at 1357.

3 The issue of the extent to which tribal treaty fishing
4 rights include a right to habitat protection arose again in Nez
5 Perce Tribe v. Idaho Power Co., 847 F. Supp. 791 (D. Idaho 1994).
6 Although it acknowledged that the Ninth Circuit's initial ruling
7 in United States v. Washington was vacated, the court nonetheless
8 adopted the Ninth Circuit's reasoning in the vacated opinion.
9 Specifically, the court held that "Indian tribes do not have an
10 absolute right to the preservation of [fish habitat] in their
11 original 1855 condition, free from all environmental damage
12 caused by the migration of increasing numbers of settlers and the
13 resulting development of the land." 847 F. Supp. at 808.
14 Further, the court, relying on Washington v. Washington State
15 Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979),
16 concluded that the non-exclusive treaty fishing right at issue,
17 while entitling the tribe a "moderate living" to the extent their
18 due share of fish from the available fishery permitted, did not
19 guarantee that a certain number of fish would be available or
20 that there could be no decline in the fish population. 847 F.
21 Supp. at 810. The only limitations on degradation of habitat for
22 game species that the court recognized were those that the Ninth
23 Circuit recognized in its vacated opinion: the treaty rights 1)
24 entitled the tribe to require reasonable steps to be taken to

1 protect the fisheries habitat from decline¹³ and 2) could
2 preclude development activity that would discriminate
3 specifically against the tribal treaty rights. Nez Perce, 847 F.
4 Supp. at 809-10.

5 The court should be guided by the standard in Nez Perce in
6 applying the "moderate living" in this case. For purposes of
7 this standard, the treaty fishing and hunting rights at issue
8 here are no different than the treaty rights at issue in Nez
9 Perce. Although they survived the 1954 Klamath Termination Act,
10 they are no longer exclusive or appurtenant to reservation land.
11 Moreover, as explained below, the Tribes' rights must be viewed
12 in the light of Congress's decision to allow the Forest Service
13 to manage the Tribes' former reservation lands as national
14 forests.

15 The Kimball Consent Decree on which the Tribes rely is
16 consistent with the standard set forth in Nez Perce.
17 Specifically, while one of its goals is to define "the scope and
18 nature of the tribal treaty rights" in regard to the issues it
19 addresses, the Consent Decree only requires the parties to
20 "cooperate as fully as practicable in the exchange of information
21 regarding activities which could substantially alter habitat and
22 thereby affect fish and wildlife resources on the reservation."
23

24
25 ¹³ The court's standard placed a concurrent obligation on
26 the tribe to take reasonable steps to prevent degradation of
27 treaty resources. 847 F. Supp. at 809-10.

1 Kimball Consent Decree, AR at 0001, at 9.¹⁴ The Consent Decree
2 establishes no obligation on the parties to obtain each other's
3 consent prior to "adopting or implementing policies or positions"
4 on activities that could significantly affect fish and wildlife
5 habitat important to the Tribes' treaty rights. Id.

6 Read in light of the Nez Perce standard, the Kimball Consent
7 Decree does not preclude Forest Service actions that have impacts
8 to fish and wildlife habitat, where the Forest Service cooperates
9 reasonably with the Tribes and, if necessary, takes "reasonable
10 steps" to prevent undue degradation when actions are likely to
11 "significantly affect" or "substantially alter" fish or wildlife
12 resources. Further, consistent with the BIA's view that "[t]he
13 Tribes' interest in the fish and wildlife resources within the
14 reservation not only secures the right to hunt and fish but also
15 the right to expect a taking," the defendants do not contend that
16 they could allow complete destruction of fish and game habitat on
17 the Tribes' former reservation.

18 As shown below, the Tribes are unlikely to succeed in
19 showing that sales at issue here either extinguish "the right to
20 expect a taking" or that, in approving them, the Forest Service
21 failed to reasonably consult with the Tribes or take steps to
22 prevent undue habitat degradation. Further, the sales do not
23 discriminate against the tribal fishing or hunting rights, vis-a-

24
25 ¹⁴ The consent decree appears to equate the term
26 "substantially alter" with the term "significantly affect." See
Kimball Consent Decree, AR at 0001, at 9.

1 vis the hunting and fishing privileges of non-Indians. The
2 reasonableness of the Forest Service's actions is particularly
3 evident in light of the competing resource uses for which the
4 Forest Service manages the Fremont and Winema National Forests.

5 4. The Tribes' treaty rights must be viewed in the light
6 of the Forest Service's other mandates for the Winema
and Fremont National Forests

7 While there is no clear evidence that Congress intended to
8 abrogate the treaty rights through the 1954 Termination Act and
9 the consequent sale of reservation lands, at that time, as well
10 as in 1961 and 1973 when portions of the lands were purchased by
11 the United States to later become the Winema and Fremont Forests,
12 it was understood that the forest lands would be managed under
13 the multiple use mandates of the 1897 Organic Act and the 1960
14 MUSY. Thus, treaty rights exist, but they must be exercised in a
15 manner consistent with those mandates.

16 Just as the State may regulate the take of fish or game if
17 necessary to conserve the species, U.S. v. Washington, [S.Ct.
18 cite]; Kimball [cite], the Forest Service, in accordance with the
19 obligations imposed on it by NFMA and MUSY, must be allowed to
20 balance the uses of multiple resources on forest lands and to
21 permit some habitat modifications as necessary so that the non-
22 wildlife resources, including timber, may be utilized....

23 The Tribes effectively seek in this action to dictate the
24 level of timber harvesting and other forest management activity
25 on their former reservation until they are satisfied that mule
26

1 deer populations are at the proper -- but undeterminable --
2 level. Especially in light of the Forest Service's clear mandate
3 to manage the Winema and Fremont NFs for multiple uses, the
4 Tribes' treaty rights cannot and do not reach that far.

5 5. Whatever habitat protection the treaty rights
6 guarantee, if any, award of these sales does infringe
7 those rights

8 a. The Tribes have the burden of showing that their
9 treaty rights have been violated

10 The Tribes allege violations of treaty rights and the trust
11 responsibility. Beneficiaries asserting breach of trust bear the
12 burden of showing that a trust exists and that it has been
13 breached, and that their injury is caused by the breach. Rogers
14 v. United States, 697 F.2d 886, 890 (9th Cir. 1983); Rogers v.
15 United States, 877 F.2d 1550, 1555, 1560 (9th Cir. 1989).

16 Similarly, Tribes alleging violation of treaty hunting rights
17 bear the initial burden of proving that the Forest Service's
18 actions proximately cause the habitat to be degraded such that
19 the species will be significantly [I added the adjective; it may
20 be going too far] impaired or diminished. See U.S. v. State of
21 Washington, 759 F.2d 1353, 1367 (9th Cir. 1985) (Nelson and
22 Skopil, J., dissenting in part) (citing district court opinion at
23 506 F. Supp. 187, 208 (W.D. Wash. 1980), aff'd in part and
24 vacated in part, 759 F.2d 1353 (9th Cir.), cert. denied, 474 U.S.
25 994 (1985)). See also U.S. v. Suquamish Indian Tribe, 901 F.2d
26 772, 775 (9th Cir. 1990); Lummi Indian Tribe, 841 F.2d ____, 318
27 (9th Cir. ____) [check cite]; No Oilport! v. Carter, 520 F. Supp.

1 334, 372 (D. Ore. 1981). The Tribes have not met that burden
2 here.

3 b. The records for the individual sales show that the
4 sales will not have a significant impact on treaty
resources

5 C. The Tribes will not be irreparably harmed

6 1. The Tribes allowed harvesting to be completed on one
7 sale, the Willy, and for significant progress to be
8 made on three others, the Bill, Cinder and Yoss Ridge
sales, before they sought relief.

9 The Tribes' delay until March 1996 to seek preliminary
10 injunctive relief belies their claim of injury. Since enactment
11 of the Rescissions Act, tribal representatives have regularly
12 contacted the Forest Service for information on sales affected by
13 the Act. Castaneda Decl. at ¶ 11. As early as September 11,
14 1995, the Tribes knew that award of the Winema NF sales was
15 impending. Id. at ¶ 12. Further, on October 31, 1995, the
16 Winema NF telefaxed a to the Tribes a document that notified them
17 that the Forest had sent to the purchasers letters of intent to
18 award the seven Winema NF sales at issue. Id. at ¶ 13. On
19 November 1, 1995, prior to award of any of these sales, the
20 Winema NF met with tribal representatives to discuss the sales
21 and to inform the Tribe that the Forest Service could attempt to
22 negotiate modifications to the sales to account for the concerns
23 of the Tribes. Id. at ¶ 14. Likewise, the Fremont NF informed
24 the Tribes on November 7, 1995, still prior to award of any of
25 the sales, that award of the Blue Ford sale was imminent.

1 Despite knowing prior to award that the sales at issue would
2 be awarded imminently, the Tribes did nothing until March 1996 to
3 stop them from being awarded or, in the case of the Willy, Yoss
4 Ridge, Bill and Cinder sales, from being partially or completely
5 logged. Castaneda Decl. at ¶ 3-6. At the very least, the Tribes
6 could have attempted to intervene in the litigation pending
7 before Judge Hogan that led to the injunctions that require the
8 defendants to proceed with the sales. If the sales are now
9 enjoined, the Forest Service faces potential liability that would
10 not have existed had the Tribes sought relief prior to award of
11 the sales.¹⁵

- 12 2. The records show that these sales will not have a
13 significant effect on wildlife and fisheries resources,
14 and may even enhance habitat for species of concern to
15 the Tribes
- 16 3. To the extent their treaty rights are violated, they
17 can try to get money damages
- 18 4. Section 2001(k)(1) was intended to promote the
19 expedited award and release of sales such as these
20
21
22

23
24 ¹⁵ The defendants do not concede here that they would, in
25 fact, be liable for contract damages in the event the sales are
26 temporarily or permanently enjoined. However, once a sale is
27 awarded, the potential for contract liability in the event a sale
28 is suspended or cancelled is far greater than before.

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9
 10 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

12 THE KLAMATH TRIBES,)

13 Plaintiff,)

14 v.)

15 UNITED STATES OF AMERICA, UNITED)
 STATES FOREST SERVICE, DAN)
 16 GLICKMAN, Secretary of Agriculture,)
 and ROBERT WILLIAMS, Acting)
 17 Regional Forester, United States)
 Forest Service, Region 6,)

18 Defendants.)

Civ. No. 96-381-HA

OPPOSITION TO DEFENDANTS'
MOTION TO TRANSFER

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7 723 F.2d 1394 (9th Cir. 1983), cert. denied
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9 (1983) 6

9 Van Dusen v. Barrack,
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STATUTES

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2 28 U.S.C. § 1404(a) 5

3 Fiscal Year 1995 Emergency Supplemental

4 Appropriations for Disaster Relief and

5 Rescissions Act, Pub. L. No. 104-19, 109 Stat.

6 240 ("Rescissions Act") passim

MISCELLANEOUS

7

8 61 Fed. Reg. 14,618-21 (April 3, 1996) 17

9 15 Wright, Miller & Cooper, Federal Practice &

10 Procedure § 3851 (2d ed. 1986) 9

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1 QUESTION TO BE DECIDED

2 Whether this case should be transferred to another Division
3 where defendants have made no showing of inconvenience, this is
4 the Klamath Tribes' historic choice of forum, this forum is more
5 convenient for the Tribes, the actions arose in this forum, and
6 there are no pending proceedings in the other forum?

7 INTRODUCTION

8 The motion to transfer is highly unorthodox. It is based on
9 none of the traditional factors considered by courts in deciding
10 whether a transfer is warranted.

11 First, the motion overlooks the sound reasons for the
12 Tribes' selection of this forum. For decades, the Klamath Tribes
13 have chosen this forum as the most appropriate and convenient
14 forum in which to litigate actions affecting the Tribes' Treaty
15 rights. The core governmental decisions and shortcomings
16 challenged in this action occurred in Portland, Oregon at the
17 Forest Service regional level or in Washington, D.C. Further, it
18 is far more convenient and less expensive for Tribal leaders,
19 staff, and legal counsel to litigate this case in Portland rather
20 than in Eugene or Medford. The federal defendants have put forth
21 no evidence (nor could they) showing that the Eugene Division
22 would be a more convenient forum for litigation of this case.

23 Second, the transfer motion is peppered with erroneous
24 characterizations of the Treaty rights issue -- which is
25 fundamental to the Tribes' subsistence and cultural well-being --
26 as the same as and subsumed within the very different statutory
27 claims decided by the Eugene Division in litigation involving

1 different parties, factual claims, and legal issues. Defendants'
2 Transfer Brief at 5, 6, 9. As the federal defendants' opposition
3 to the pending motion for preliminary injunction demonstrates,
4 the law and facts underlying the Tribes' claims have nothing in
5 common with the legal issues presented to and decided by the
6 Eugene Division.

7 The Klamath Tribes have filed this lawsuit to stop the
8 federal defendants' ongoing violations of the Tribes' Treaty
9 rights to hunt and fish on their former reservation. More
10 specifically, despite the U.S. Forest Service's repeated
11 acknowledgement that it must manage the Klamath Tribes' former
12 reservation lands to ensure the availability of sufficient fish
13 and wildlife resources to meet the Tribes' subsistence needs, the
14 federal defendants are undertaking timber harvests that will
15 severely deplete these critical Treaty resources and are
16 proceeding with these timber sales without conducting meaningful
17 consultations with the Tribes. The federal defendants
18 acknowledge that this issue has never been presented to or
19 decided by any other Court.

20 The federal defendants also recognize that the Fiscal Year
21 1995 Emergency Supplemental Appropriations for Disaster Relief
22 and Rescissions Act, Pub. L. No. 104-19, 109 Stat. 240
23 ("Rescissions Act"), "does not displace the Klamath's treaty
24 rights." Defendants' Opposition to Motion for Preliminary
25 Injunction at 32. Neither that statute nor its legislative
26 history evinces an intent to abrogate Indian Treaty rights. Id.
27 at 30-32.

1 Nonetheless, the federal defendants seek a transfer of this
2 case solely because the Eugene Division has decided unrelated
3 questions of statutory construction under the Rescissions Act.
4 Since that statute is irrelevant to the issues in this case, the
5 fact that another Division has construed that statute does not
6 support a transfer, particularly when the orders cited in the
7 motion to transfer are on appeal to the Ninth Circuit, and thus
8 there are no pending proceedings before that Division.

9 Finally, since none of the traditional factors warranting a
10 transfer applies, the federal defendants pulled a new ground out
11 of thin air. The federal defendants claim that this case should
12 be transferred based on a hypothetical risk of inconsistencies
13 between orders that might be issued in this case and two district
14 court orders dealing with unrelated issues that are now on
15 appeal. To the Tribes' knowledge, no Court has ever transferred
16 a case to avoid inconsistent rulings in the absence of a pending
17 proceeding in the transferee forum. Even if it were appropriate
18 to transfer a case without ongoing litigation in the transferee
19 forum, such a transfer would be inappropriate here because the
20 risk of inconsistent orders is implausible and is belied by the
21 language of the orders themselves, by the issues decided in them,
22 and by the statute and contracts on which they are based.

23 BACKGROUND

24 The Klamath Tribes have brought this lawsuit to protect the
25 resources on which their Treaty hunting and fishing rights
26 depend. As explained more fully in the Tribes' memorandum in
27 support of their motion for a preliminary injunction, the Tribes

1 have Treaty rights to hunt, fish, and gather within the former
2 Klamath reservation. Kimball v. Callahan, 493 F.2d 564 (9th Cir.
3 1974), cert. denied, 419 U.S. 1019 (1974); Kimball v. Callahan,
4 590 F.2d 768 (9th Cir.), cert. denied, 444 U.S. 826 (1979).
5 During the 1950s and 1960s termination process, most of the
6 reservation lands were sold to the United States and are now
7 managed by the U.S. Forest Service as parts of the Winema and
8 Fremont National Forests. As a result, the United States-managed
9 lands are the only lands on which Tribal members may exercise
10 such rights.

11 Tragically for the Tribes, the Forest Service has embarked
12 on an intensive timber harvest program that has destroyed
13 wildlife habitat and led to precipitous declines in populations
14 of mule deer and other wildlife that have provided a large
15 portion of the Tribes' subsistence. Tribal members are no longer
16 able to provide for their subsistence through the exercise of the
17 Treaty rights. Not only has this deprived the Tribes of
18 essential subsistence resources, but it has also undermined their
19 ability to live and pass on their unique culture.

20 The heart of this case is the Tribes' Treaty rights. To
21 decide this case, a Court will be guided by the 1864 Treaty
22 between the Klamath Tribes and the United States, Ninth Circuit
23 precedent confirming the Tribes' Treaty rights to hunt and fish
24 within the former reservation, and judicial precedent elaborating
25 on the United States' Treaty and trust responsibilities to
26 protect the resources on which such Treaty rights depend. In
27 addition, the Court will need to assess the declining state of

1 the Treaty resources, including the mule herds within the former
2 reservation, the effects of past and planned logging on habitat
3 for mule deer and other wildlife, and the federal defendants'
4 failure to engage in meaningful consultations with the Tribes and
5 to ensure that the sales will protect Treaty resources.

6 The Rescissions Act is irrelevant to a determination of
7 whether the federal defendants have violated their Treaty and
8 trust obligations. Indeed, the federal defendants agree with the
9 Tribes that the Rescissions Act "does not displace the Klamath's
10 treaty rights." Defendants' Opposition to Preliminary Injunction
11 at 32.

12 ARGUMENT

13 28 U.S.C. § 1404(a) authorizes transfers of cases "[f]or the
14 convenience of the parties and witnesses, in the interest of
15 justice." See also Local Rule 105-2(c). Under Section 1404(a),
16 the burden is on the moving party to show that the convenience of
17 the witnesses and parties and the interests of justice warrant
18 transfer of a case. Commodity Futures Trading Comm'n v. Savage,
19 611 F.2d 270, 279 (9th Cir. 1979); Byron v. Rajneesh Found.
20 Int'l, 634 F. Supp. 489, 494 (D. Or. 1985) (Panner, J.) ("the
21 burden of showing that an action should be transferred is on the
22 moving party"); Ius v. Butcher, 680 F. Supp. 343, 349 (D. Or.
23 1987) (Frye, J.) (same).

24 The federal defendants cannot meet their burden. Their
25 motion gives no weight whatsoever to the Tribes' choice of forum.
26 All of the traditional factors considered by the courts weigh
27 heavily against transferring this case. Accordingly, the

1 transfer motion resorts to hypothesizing implausible
2 inconsistencies between the relief sought here and the nuances in
3 orders issued elsewhere that are now on appeal.

4 I. PLAINTIFFS' CHOICE OF FORUM

5 The federal defendants' motion entirely overlooks the long-
6 established principle of § 1404(a) that "unless the balance is
7 strongly in favor of the defendant, the plaintiffs' choice of
8 forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert,
9 330 U.S. 501, 508 (1947). As the Supreme Court has reflected,
10 "there is ordinarily a strong presumption in favor of the
11 plaintiff's choice of forum, which may be overcome only when the
12 private and public interest factors clearly point towards trial
13 in an alternative forum." Piper Aircraft Co. v. Reyno, 454 U.S.
14 235, 255 (1981).

15 The Klamath Tribes have traditionally selected this forum to
16 adjudicate their Treaty rights, preferring not to litigate these
17 issues in the local community where they are most controversial
18 and likely to lead to adverse publicity and harassment of Tribal
19 members. Second Declaration of Jeff Mitchell, Tribal Chairman ¶¶
20 1, 7 (April 8, 1996). This is the forum that has heard all
21 Klamath Treaty rights cases, apart from those that had to be
22 brought in the Court of Claims. See, e.g., Oregon Dep't of Fish
23 & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985); United
24 States v. Adair, 723 F.2d 1394 (9th Cir. 1983), cert. denied, sub
25 nom Oregon v. United States, 460 U.S. 1015 (1983); Kimball v.
26 Callahan, 493 F.2d 564 (9th Cir. 1974), cert. denied, 419 U.S.
27 1019 (1974); Kimball v. Callahan, 590 F.2d 768 (9th Cir.), cert.

1 denied, 444 U.S. 826 (1979). Indeed, the final consent decree
2 and order entered in the Kimball v. Callahan litigation continues
3 to govern the respective roles of the federal and Tribal
4 governments with respect to the fish and wildlife resources
5 within the former reservation. Exhibit 9 to First Declaration of
6 Elwood H. Miller, Jr. (March 1996).

7 Indeed, in a recent case still pending in this Division, the
8 Tribes have challenged the construction of an earthen dam, which
9 unearthed Paiute burial sites. Two of the defendants twice asked
10 this Court to transfer the case to Medford, alleging that the
11 actions arose in Lane County and that it would be more convenient
12 to try the case there. The Tribes opposed that motion, and based
13 on the complaint's allegations that the federal defendants'
14 actions occurred in Portland, the federal defendants agreed that
15 Portland was a proper forum. Federal Defendants' Opposition to
16 Transfer in Klamath Tribes v. U.S. Army Corps of Engineers, Civil
17 No. 95-975-MA (D. Or. Aug. 30, 1995) (Exhibit 1 to Second
18 Mitchell Declaration). In minute orders, Judge Marsh denied the
19 two motions to transfer. Klamath Tribes v. U.S. Army Corps of
20 Engineers, Civil No. 95-975-MA (D. Or. Sept. 6, 1995 & Oct. 12,
21 1995) (Exhibits 2 & 3 to Second Mitchell Declaration).

22 As in that case, the actions and omissions giving rise to
23 this lawsuit occurred in Portland at the Forest Service regional
24 office level or higher. For that reason, they have advocated at
25 the regional and national levels for greater protection of Treaty
26 rights in the management of the former reservation lands.
27 Declaration of Don Gentry ¶¶ 20-26 (March 1996); Second Mitchell

1 Declaration ¶¶ 2-3. Similarly, it is the regional office that
2 granted the Tribes' appeal of one of the sales at issue and that
3 dismissed without deciding the Tribes' appeals of four of the
4 other timber sales. Exhibit 5 to Gentry Declaration. And it is
5 at the regional and national levels that the decision was made to
6 proceed with these sales without ensuring that Treaty resources
7 would be protected. Exhibits 18-19 to Gentry Declaration. Under
8 Local Rule 105-2(a), this case was properly filed in Portland.
9 While it could also have been filed in Medford or Washington,
10 D.C., it could not have been brought in Eugene.

11 The Tribes chose this forum not only because it is their
12 historic choice of forum for resolving adjudicating their Treaty
13 rights, but also because it is a more convenient forum for them.
14 While Eugene may be geographically closer to the forests, it is
15 more convenient for Tribal members to travel to Portland. First,
16 Tribal leaders and staff regularly have business in Portland
17 where the Bureau of Indian Affairs and the Fish and Wildlife
18 Service have their regional offices. Second, it is often cheaper
19 for Tribal members to travel to Portland because there are direct
20 flights and airplane tickets are cheaper. Second Mitchell Decl.
21 ¶¶ 4-5. Third, the Tribes' counsel are located in Portland and
22 Seattle, and it will, therefore, cost the Tribes much less to
23 litigate this case in Portland. Id. ¶ 6. While expenses of
24 counsel are ordinarily not a significant factor, some courts will
25 consider the cost of counsel as it bears on the cost of the
26 litigation to the parties. See Blumenthal v. Management
27 Assistance Inc., 480 F.Supp. 470, 474 (N.D. Ill. 1979). The

1 Tribes have limited funds available for litigation. In fact,
2 they are eligible for free legal services from the Legal Services
3 Corporation. Id. ¶ 5. Because of the relative disparity in the
4 financial resources of the parties, the additional expense to the
5 Tribes of litigating this case in Eugene strongly disfavors a
6 transfer of this proceeding. See Goldstein v. Rusco Industries,
7 351 F.Supp. 1314, 1318 (E.D.N.Y. 1972) (in considering
8 convenience, the court "cannot overlook the relative means of the
9 parties"); Grubs v. Consolidated Freightways, 189 F.Supp. 404,
10 410 (D. Mont. 1960) (in considering convenience for the purposes
11 of transfer "the ability of the respective litigants to bear the
12 expenses of trial in a particular forum may be considered").

13 The plaintiff's choice of forum is accorded "great weight."
14 Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987), cert. denied,
15 485 U.S. 993 (1988). Here, sovereign rights are at stake, and
16 the Tribes' decision to litigate its sovereign rights in this
17 forum should be accorded great weight and respect.

18 II. THE FEDERAL DEFENDANTS' HAVE NOT MET THEIR BURDEN OF SHOWING
19 THAT TRANSFER IS APPROPRIATE AND THE STANDARD § 1404(a)
20 FACTORS WEIGH HEAVILY AGAINST TRANSFER.

21 Courts generally will not order a transfer unless the §
22 1404(a) factors strongly favor litigation of the case elsewhere.
23 Pacific Car & Foundry Co. v. Pence, 403 F.2d 949, 954 (9th Cir.
24 1968). None of the standard § 1404(a) factors supports a
25 transfer here.

26 A. Portland Is A More Convenient Forum.

27 Convenience is the most important factor in a motion to
transfer. 15 Wright, Miller & Cooper, Federal Practice &

1 Procedure § 3851 (2d ed. 1986); Decker Coal Co. v. Commonwealth
2 Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). As the Ninth
3 Circuit stated in Decker, 805 F.2d at 843, "[t]he defendant must
4 make a strong showing of inconvenience to warrant upsetting the
5 plaintiff's choice of forum." All of the factors set forth in
6 Decker for determining the relative convenience of a forum favor
7 litigating this case in Portland. As stated above and detailed
8 in the Second Mitchell Declaration, Portland is a far more
9 convenient forum for the Tribes. In contrast, the federal
10 defendants have made no assertion that litigating this case in
11 Portland will cause them any inconvenience whatsoever. Given
12 that the defendants assert that this case will be resolved
13 without a trial, U.S. Br. at 11-12, and that its attorneys are in
14 Washington D.C., litigating this case in Portland would cause
15 them no inconvenience.^{1/}

16 B. A Transfer Will Not Promote Judicial Economy.

17 The interest of justice factor is designed to prevent
18 concurrent litigation of the same or related claims in two
19 courts. Since there is no ongoing litigation elsewhere to which
20 this case could be consolidated, a transfer would not promote
21 judicial economy.

22 In Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26
23 (1960), the Supreme Court considered transfer in "a situation in
24

25 ^{1/} While the Tribes disagree that this case may be resolved on
26 the basis of an administrative record, they agree that evidentiary
27 proceedings are likely to be minimal, and that the Decker factors
pertaining to the ease of compelling witnesses to testify and
access to proof are largely irrelevant.

1 which two cases involving precisely the same issues are
2 simultaneously pending." The Supreme Court has also considered
3 the feasibility of consolidation a significant factor in a
4 transfer decision. Van Dusen v. Barrack, 376 U.S. 612, 622
5 (1964); see also A.J. Industries, Inc. v. U.S. District Court of
6 Central District of California, 503 F.2d 384, 398 (9th Cir.
7 1974).

8 It is, therefore, not surprising that all of the cases cited
9 by defendants concerning transfers to promote judicial economy
10 involved transfers of a case to a court where related litigation
11 was pending so that the two cases could be coordinated and
12 possibly consolidated. See cases cited in U.S. Brief at 6-7, 10.
13 The federal defendants cited no case involving a transfer to
14 promote judicial economy where no related litigation was pending
15 in the other forum, and the Tribes' counsel have found none.

16 No judicial economies would be obtained by a transfer of
17 this case because all dispositive motions previously before the
18 Eugene Division in other cases have been decided by the district
19 court and are on appeal to the Ninth Circuit. Northwest Forest
20 Resource Council v. Glickman, No. 95-6244-HO (Oct. 17, 1995 &
21 January 17, 1996), appeals pending, Nos. 95-36042, 96-35106 & 96-
22 35123 (9th Cir. argued January 8, 1996 and scheduled for argument
23 May 7, 1996). Indeed, the federal defendants concede that no
24 proceedings are pending in the Eugene Division and a transfer
25 would not facilitate coordinated litigation. Defendants'
26 Transfer Brief at 11 n.5.

27 The federal defendants also mistakenly assert that the

1 Eugene Division is familiar with the issues in this case. This
2 case does not have issues of fact or law in common with the
3 litigation that has been resolved by the Eugene Division.

4 The central issue in this case concerns the Tribes' Treaty
5 rights. To decide the Treaty rights issues, the Court will need
6 to review the 1864 Treaty, the Ninth Circuit cases construing the
7 Treaty rights, the Kimball v. Callahan consent decree, and an
8 extensive body of case law regarding Indian Treaty rights, the
9 United States' trust responsibility, and the standards governing
10 statutory abrogation of Treaty rights. In addition, the Tribes'
11 Treaty rights claim hinges on the declining populations of mule
12 deer and other wildlife, the adverse effects of past and planned
13 logging on wildlife habitat, and the Forest Service's failure to
14 take actions to protect Treaty resources.

15 None of the litigation in the Eugene Division involved
16 Treaty rights. In fact, the only case involving a Rescissions
17 Act timber sale that implicated Treaty rights was heard in
18 Portland, and the federal defendants never sought to transfer
19 that case to Eugene. See Native Americans for Enola v. U.S.
20 Forest Service, Civil No. 95-1306-MA, Opinion & Order (D. Or.
21 Feb. 28, 1996), appeal pending, No. 96-35260 (9th Cir.). In
22 addition, in their opposition to the Tribes' motion for a
23 preliminary injunction (at 12-16, 34-36), the federal defendants
24 rely heavily on the forest plan for the Winema National Forest,
25 which was challenged in an unrelated case in this Division that
26 is now on appeal. Oregon Natural Resources Council v. Lowe, 836
27 F. Supp. 727 (D. Or. 1993), appeal pending, No. 93-36025 (9th Cir.).

1 In contrast, the Eugene Division has decided only certain
2 unrelated issues arising under the Rescissions Act -- a statute
3 that the federal defendants concede does not abrogate Treaty
4 rights. Defendants' Opposition to Preliminary Injunction at 30-
5 32. The Eugene Division decided the geographic and temporal
6 reach of Section 2001(k)(1) and whether that provision applies to
7 sales cancelled before the Rescissions Act was enacted or for
8 which the high bidder is ineligible. See Northwest Forest
9 Resource Council v. Glickman, No. 95-6244-HO (D. Or. Sept. 13,
10 1995 & January 17, 1996) (Exhibit 1 to Tribes' Opposition to
11 Motion to Transfer & Exhibit B to Motion to Transfer). In
12 addition, the Eugene Division never reviewed the administrative
13 records for individual timber sales, and the adverse
14 environmental impacts of particular sales were irrelevant to the
15 orders issued by the Court, which form the bulk of the federal
16 defendants' defense to the Tribes' claims in this case. See
17 Defendants' Opposition to Preliminary Injunction at 17-28, 37-
18 38.^{2/}

19 Since the Eugene Division is not familiar with the legal or
20 factual underpinnings of this case, and no proceedings are
21 pending there, judicial economy would not be served by a
22 transfer.

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26
27 ^{2/} In this case, the federal defendants have produced voluminous
administrative records for the particular timber sales at issue.
U.S. Transfer Brief at 11. No such administrative records were
produced in the litigation before the Eugene Division.

1 C. An Implausible Risk of Inconsistent Orders Does Not
2 Support a Transfer.

3 This is a highly unusual motion to transfer. The defendants
4 offer no support based on the traditional § 1404(a) factors, and
5 those factors weigh heavily in favor of litigating this case in
6 Portland. Instead, defendants seek a transfer is to avoid an
7 implausible risk of inconsistent rulings. Undersigned counsel
8 have found no case in which a case has been transferred under §
9 1404(a) solely because there was a hypothetical risk of
10 inconsistent orders, without the existence of pending judicial
11 proceedings in the transferee forum.

12 Even if this could be an independent ground for a transfer,
13 it is inapplicable here because the risk of inconsistent rulings
14 is implausible. More particularly, the suggestion that
15 inconsistent rulings may occur is based on: (1) an artificial
16 expansion of the Eugene Division's orders to encompass issues
17 that were never decided by that Court; and (2) a failure to
18 recognize the flexibility built into those orders that would
19 prevent an irreconcilable conflict in any event. For both these
20 reasons, the Eugene Division's orders are unlikely to conflict
21 with any relief granted in this case.

22 1. The Eugene Division's Orders Do Not Decide The
23 Issues In This Case.

24 First, the Eugene Division has never decided or even
25 considered the issues presented in this case. Indeed, defendants
26 concede that the statute that formed the basis of those orders is
27 inapplicable to timber sales affecting the Tribes' Treaty rights.
Defendants' Opposition to Preliminary Injunction at 32.

1 Second, the Eugene Division never specifically identified or
2 assessed the eight sales at issue in this case. Thus, the
3 October 17, 1995 order identifies no particular timber sales that
4 must proceed. While the January 17, 1996 order specifically
5 identifies 19 sales that must be awarded or released, none of the
6 sales at issue in this case is identified in that order.

7 It is the defendants that have identified the eight sales at
8 issue in this case in their reports to the Eugene Division
9 describing the sales that they believe meet that description. In
10 essence, the federal defendants take the position that their
11 unilateral statements to the Court have converted a descriptive
12 court order into a mandate to log the eight timber sales at issue
13 in this case regardless of their effects on the Tribes' Treaty
14 rights.

15 In sum the statute at issue in the Eugene Division
16 litigation does not abrogate Treaty rights, and it is the federal
17 defendants' unilateral reports to the court that have implicated
18 the eight sales at issue in this case, not the terms of the
19 Eugene Division's court orders. Therefore, there is little or no
20 risk that any relief issued in this case will result in
21 inconsistent court rulings.

22 2. The Eugene Division's Orders And Section
23 2001(k)(1) Are Sufficiently Flexible To Prevent
24 Any Conflict With The Relief Sought In This Case.

25 The two orders issued by the Eugene Division merely
26 determined which categories of timber sales are subject to
27 Section 2001(k)(1). The Eugene Division never decided the
particular steps that must be taken with respect to those sales, ✓

1 apart from awarding or releasing them. Indeed, the Eugene
2 Division's orders use the language of 2001(k)(1), which
3 incorporates the original contract terms into its mandates.

4 Section 2001(k)(1) directs the award and release of certain
5 timber sales "with no change in originally advertised terms."
6 Similarly, the October 17, 1995 order directs the Secretary to ✓
7 award, release, and permit to be completed certain timber sales
8 "with no change in the originally advertised terms. . . ."
9 Exhibit A to Transfer Motion at 2. The January 17, 1996 order,
10 likewise, recognizes that the original contract terms temper the
11 mandate to proceed with the sales. Exhibit B to Transfer Motion
12 at 24 (Section 2001(k)(1) held inapplicable to sales that are
13 "impossible to award on their originally advertised terms").

14 The originally advertised terms for the timber sales at
15 issue here include the Forest Service's right to cancel or modify
16 the sale to comply with court orders or to prevent environmental ✓
17 degradation or harm to cultural resources. See, e.g., Applicable
18 Standard Provisions for Blue Ford Sale on Fremont National Forest
19 (Exhibit 1 to Second Declaration of Patti Goldman (April 10,
20 1996)); Second Goldman Declaration ¶ 2. Indeed, the timber sales
21 contracts contain explicit clauses that permit contract
22 cancellations or modifications on these bases. Id.

23 Section 2001(k) itself recognizes that some timber sales
24 covered by its terms may not be able to go forward. Thus,
25 Section 2001(k)(3) provides that "[i]f for any reason a sale
26 cannot be released and completed under the terms of this
27 subsection," the Secretary shall provide the purchaser

1 replacement timber. The Secretary of Agriculture recently
2 promulgated a regulation acknowledging and expanding its
3 authority to provide replacement timber for Section 2001(k)
4 sales. 61 Fed. Reg. 14,618-21 (April 3, 1996) (to be codified 36
5 C.F.R. § 223.85) (Exhibit 2 to Second Goldman Declaration).

6 If the sales at issue in this case cannot proceed because of
7 their effects on Treaty resources, the sales can be modified or
8 cancelled pursuant to the original contract terms. Indeed, the
9 Forest Service has already modified one of the sales at issue to
10 protect cultural resources. Second Declaration of Elwood H.
11 Miller, Jr. ¶¶ 3-11 (April 9, 1996); Declaration of Bob Castaneda
12 ¶ 14 (April 4, 1996); Administrative Record 1371h-1371i (Exhibit
13 2). Another sale has been modified to leave a stream bank buffer
14 as required by the Inland Native Fish Strategy Environmental
15 Assessment. See Letter to Huffman & Wright Corpt. from Chiloquin
16 Ranger Station (Jan. 2, 1996) (Administrative Record 3629
17 attached as Exhibit 2).

18 Since Section 2001(k) does not abrogate Treaty rights, that
19 statute is inapplicable to the eight sales at issue in this case
20 and the Eugene Division's orders are of little or no moment. To
21 the extent that there might be some potential inconsistency
22 between a ruling in this case and the Eugene Division's orders,
23 however, both Section 2001(k) and the Eugene Division's orders
24 are sufficiently flexible to accommodate the Treaty rights.

25 Thus far, neither the Forest Service nor the Eugene Division
26 has construed the Eugene orders to be unduly rigid. First, the
27 Forest Service modified the Willy timber sale contract to protect

*fit under
K.?*

1 cultural resources and apparently saw no need to seek an
2 amendment of the Eugene Division's order to permit that contract
3 modification. Second Miller Decl. ¶ 3-11; Castaneda Decl. ¶ 14;
4 Administrative Record 1371h-1371i. Second, the Forest Service
5 will not be proceeding with the Nelson sale, one of the sales at
6 issue in this case, under Section 2001(k) because no bidder has
7 accepted the sale. Castaneda Decl. ¶ 9. No one has contended
8 that abandoning that sale violates the Eugene Division's October
9 17, 1995 order. Third, the Eugene Division has excused the
10 Forest Service from proceeding with three remarked sales but has
11 not modified its earlier October 17, 1995 order to reflect that
12 fact. These developments attest to the flexibility embodied in
13 both Section 2001(k) and the Eugene Division's order. Therefore,
14 any hypothetical conflict with the relief sought in this case is
15 implausible.

16 If the federal defendants believe that any relief issued in
17 this case is inconsistent with their obligations under the Eugene
18 Division's orders, they may then seek a stay from the Ninth
19 Circuit. That is a more appropriate forum to resolve any such
20 issue given that this case is likely to be appealed and that the
21 Eugene Division's orders are on appeal and thus no longer before
22 the district court.

23 ///

24 ///

25 ///

26

27

Klamath Tribes v. United States (D.Oregon)

Opposing counsel: Ed Goodman (Native American Program, Oregon Legal Services) and Patti Goldman (Sierra Club Legal Defense Fund)

Claims: The Tribe claims that by planning and acting to award certain Section 2001(k) (1) and salvage timber sales, the U.S. and the Forest Service are violating the United States' trust responsibility to protect the Klamath Tribes' treaty rights to hunt and fish on former Klamath Tribe reservation lands now managed as the Winema and Fremont National Forests.

Timber sales at issue:

Eight Section 2001(k) (1) sales: The Tribe alleges that the Forest Service has acted to award 8 Section 2001(k) (1) sales on the former reservation. These are the BLUE FORD, WILLY, YOSS RIDGE, CINDER, NELSON, BILL, JOHN and JOHN LODGEPOLE sales.

Salvage timber sales: The complaint only alleges that the Winema and Fremont National Forests are planning many salvage timber sales in a manner that will not protect the Tribe's treaty rights.

Status of sales under prior court rulings:

The Forest Service is currently under injunction to award all eight Section 2001(k) (1) sales at issue.

- * The JOHN, YOSS RIDGE, WILLY, BILL and CINDER sales were all awarded in November, 1995, pursuant to Judge Hogan's September 13 and October 17 orders. These sales were also the subject of ONRC v. Lowe, No. 92-1121AS (D. Oregon).
- * The BLUE FORD sale was also awarded in November, 1995, pursuant to Judge Hogans orders. The Tribe alleges that it had reached agreement with the Forest Service on certain modifications but the sales was offered on its original terms under Section 20901(k) (1).
- * The JOHN LODGEPOLE and NELSON sales were "next high bidder" sales subject to Judge Hogan's January 10 order. The JOHN LODGEPOLE sales was awarded on March 12. The NELSON sale had not been awarded as of March 15, but notice was sent to the original bidders in January.

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9

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF OREGON

12 THE KLAMATH TRIBES,)
 13)
 Plaintiff,)
 14)
 v.)
 15)
 UNITED STATES OF AMERICA, UNITED)
 16 STATES FOREST SERVICE, DAN)
 GLICKMAN, Secretary of Agriculture,)
 17 and ROBERT WILLIAMS, Acting)
 Regional Forester, United States)
 18 Forest Service, Region 6,)
 19)
 Defendants.)

Civ. No. _____

COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF

20

21 INTRODUCTION

22 1. The United States is violating its trust responsibility
 23 to protect the Klamath Tribes' Treaty Rights to hunt and fish in
 24 forest lands owned and managed by the United States. Relying on
 25 Section 2001(k) of the 1995 Emergency Supplemental Appropriations
 26 for Disaster Relief and Rescissions Act, Pub. L. No. 104-19
 27 ("Rescissions Act"), defendant U.S. Forest Service is proceeding

1 with certain old timber sales that will harm the Klamath Tribes'
2 Treaty Rights. The Forest Service is also relying on the
3 Rescissions Act to limit applicable environmental standards,
4 opportunities for public input, and challenges to salvage timber
5 sales as defined in that Act. A federal statute may abrogate
6 Treaty Rights and the United States' trust responsibility only if
7 it does so clearly and expressly, which the Rescissions Act does
8 not do. Accordingly, this action seeks a declaration that
9 Section 2001 of the Rescissions Act may not be applied to the
10 public forest lands on which the Klamath Tribes' Treaty Rights
11 depend. This action also seeks an injunction prohibiting logging
12 that affects the resources of the former Klamath Reservation
13 unless and until the United States ensures, in consultation with
14 and with the concurrence of the Klamath Tribes on a government-
15 to-government basis, that the resources on which the Klamath
16 Tribes' Treaty Rights depend will be protected.

17 JURISDICTION

18 2. Because this action is brought by a federally recognized
19 Indian Tribe, and it arises under a Treaty between the Klamath
20 Tribes and the United States, this Court has jurisdiction
21 pursuant to 28 U.S.C. § 1362.

22 PARTIES

23 3. Plaintiff Klamath Tribes are a federally recognized
24 Indian Tribe located within the jurisdiction of the U.S. District
25 Court for the District of Oregon.

26 4. Defendant United States of America entered into an 1864
27 Treaty with the Klamath Tribes. The United States owns and

1 manages the Klamath Tribes' former Reservation lands on which the
2 Tribes' Treaty hunting, fishing, and gathering rights depend.
3 The United States has a trust responsibility to protect the
4 resources on which rights reserved by the Klamath Tribes in that
5 Treaty depend.

6 5. Defendant United States Forest Service is an agency of
7 the United States Department of Agriculture that is charged with
8 management of the national forest system, including the Winema
9 and Fremont National Forests, where most of the former Klamath
10 Reservation lands are located. The United States Forest Service
11 has a trust responsibility to protect the resources on which
12 rights reserved by the Klamath Tribes in that Treaty depend.

13 6. Defendant Dan Glickman is sued in his official capacity
14 as Secretary of the United States Department of Agriculture of
15 which the United States Forest Service is a part. He must ensure
16 that the United States fulfills its trust obligations to protect
17 the Klamath Tribes' Treaty rights.

18 7. Defendant Robert Williams is the Acting Regional
19 Forester for the United States Forest Service, Region 6. He is
20 the official responsible for overseeing the management of the
21 Winema and Fremont National Forests, including the resolution of
22 forest plan and timber sale appeals. Region 6 has its office in
23 Portland, Oregon.

24 BACKGROUND

25 I. THE KLAMATH TRIBES' TREATY RIGHTS TO HUNT, FISH, AND 26 GATHER ON THE FORMER RESERVATION LANDS

27 8. The Klamath Tribes have hunted, fished, and foraged in
south-central Oregon for thousands of years. Historically,

1 hunting, fishing, trapping, and gathering played a central role
2 in the Tribes' subsistence, culture, spiritual framework, and
3 overall way of life. The Tribes maintained a balance between
4 harvesting natural resources for subsistence and ceremonial
5 purposes and harboring those resources for the future.

6 9. In 1864, the Klamath Tribes entered into a Treaty with
7 the United States, ceding title to over twenty million acres of
8 their aboriginal land extending from central Oregon through
9 northern California, from the Cascades crest to the edge of the
10 Great Basin desert. The Tribes agreed to cede title to these
11 lands based on the promises in the Treaty that the Tribes would
12 have exclusive use and possession of over a million acres of land
13 that they reserved in south-central Oregon. The Tribes also
14 reserved exclusive hunting, fishing, and gathering rights on the
15 reserved lands that came to be known as the Klamath Reservation.

16 10. During the next century, the Tribes relied on the
17 Reservation lands designated in the Treaty to provide for the
18 subsistence, cultural, and spiritual needs of Tribal members.
19 The Reservation lands and waters provided adequate habitat to
20 sustain robust and resilient populations of wildlife, fish, and
21 plant life, which Tribal members used to provide for their
22 livelihood, their cultural and spiritual needs, and their overall
23 well-being.

24 11. The Klamath Termination Act of 1954, 25 U.S.C. §§ 564-
25 564x, terminated the federally recognized status of the Klamath
26 Tribes and transferred ownership of most of the former
27 Reservation lands to the United States. These lands comprise the

1 bulk of the Winema National Forest and part of the Fremont
2 National Forest.

3 12. In spite of the loss of their Reservation, the Tribes
4 retain Treaty Rights to hunt, trap, and fish within the former
5 Reservation.

6 13. A 1986 federal statute -- the Klamath Restoration Act,
7 25 U.S.C. § 566 -- provided federal recognition to the Klamath
8 Tribes and restored the government-to-government relationship
9 between the Klamath Tribes and the United States.

10 II. THE DECLINE OF THE RESOURCES ON THE FORMER RESERVATION
11 LANDS

12 14. At the time the Klamath lands were transferred to the
13 United States, Klamath Tribal members were able to satisfy a
14 substantial portion of their subsistence needs through hunting.

15 15. The termination process deprived the Klamath Tribes of
16 control over the former Reservation and the resources on which
17 their Treaty hunting, fishing, and gathering rights depend.

18 16. The Forest Service has managed the former Reservation
19 lands for multiple uses, placing a particular emphasis on
20 resource extraction uses, such as logging and associated
21 roadbuilding.

22 17. The nature and quality of the habitat on the former
23 Reservation lands has changed significantly since termination.
24 At the time of termination, the Reservation harbored extensive
25 old-growth stands of ponderosa pine. These ponderosa pine stands
26 have declined precipitously both in terms of quantity and
27 quality, in large part, due to logging. Many of the logged areas
have failed to regenerate. Many areas that have regrown provide

1 poorer mule deer habitat than the stands that were cut.

2 18. Over the past three decades, the natural and wildlife
3 resources on the former Reservation have declined significantly.
4 The former Reservation supports smaller, less resilient
5 populations of fish and wildlife than it did before termination.
6 Some species are gone. Many other populations of fish and
7 wildlife have plummeted.

8 19. Many old-growth dependent species are important to the
9 Tribes for cultural, ceremonial, and spiritual purposes. For
10 example, the pileated woodpecker and the pine marten figure
11 prominently in Klamath religious beliefs and ceremonies.
12 Populations of many old-growth dependent species, including the
13 pileated woodpecker and the pine marten, have declined
14 significantly, making it more difficult to pass on these
15 religious beliefs and engage in traditional ceremonies.

16 20. Historically, Tribal members hunted and fished for a
17 variety of species. Many of these species have declined
18 significantly, and some have become extinct on the former
19 Reservation. Several game species that are important to the
20 Klamath Tribes have been proposed for listing under the
21 Endangered Species Act.

22 21. Mule deer play a central role in Klamath culture and
23 religious beliefs. Fathers and grandfathers teach their sons
24 Klamath values through hunting. For example, the first kill is a
25 rite of passage through which a boy establishes his position in
26 the family structure as a provider and his commitment to sharing
27 his good fortune with others. These and other core Klamath

1 values are passed on and reinforced through hunting.

2 22. When the Klamath lands were transferred to the United
3 States, many Tribal members relied substantially on mule deer to
4 provide for their families' subsistence.

5 23. Deer populations throughout the western United States
6 reached an unusual high in the early 1960s and then crashed and
7 followed a general downward trend through the mid-1970s.
8 Although most deer populations throughout the United States have
9 recovered, the herds on which the Tribes principally depend have
10 failed to recover. In these herds, fawn survival has been and
11 remains below what is needed to maintain and enhance the herd
12 sizes.

13 24. The herds are now too small to provide for the
14 subsistence needs of Tribal members. Many hunters now take only
15 one or two deer per year. A number of Tribal members no longer
16 hunt or they significantly limit their hunting because it is
17 often futile.

18 25. Tribal hunting, trapping, fishing, and gathering still
19 play an important role in the Tribes' culture and way of life,
20 but now they provide for only a portion of the Tribes'
21 subsistence needs.

22 26. The failure of the mule deer herds to thrive is often
23 significantly related to poor habitat quality. Fawn survival is
24 dependent on the availability of good quality habitat for
25 foraging and cover.

26 27. Some herds that have a significant portion of their
27 range within the former Reservation have failed to recover, in

1 part, because of logging on former Reservation lands over the
2 past two to three decades.

3 28. Well-planned forest management can improve the quality
4 and quantity of mule deer habitat. If the former Reservation
5 lands are managed to avoid further harm to mule deer habitat and
6 to promote recovery of already damaged habitat, the carrying
7 capacity of the land will increase and the mule deer herds will
8 grow larger and become more resilient.

9 III. THE UNITED STATES' ACKNOWLEDGEMENT OF ITS
10 RESPONSIBILITY TO PROTECT KLAMATH TREATY RESOURCES

11 29. The United States acknowledges that it has an ongoing
12 obligation to protect and defend Tribal Treaty Rights.

13 30. The United States and the other federal defendants
14 acknowledge that they have a duty to protect Klamath Treaty
15 Rights and that this duty is particularly critical because the
16 United States controls virtually all the lands on which these
17 Rights may be exercised. As part of this duty, the United States
18 and the other federal defendants acknowledge that they must
19 protect the resources within the former Klamath Reservation,
20 including by ensuring that species populations on which the
21 Tribes depend will be sustained or increased to provide the
22 Tribes an opportunity to exercise their reserved Treaty Rights.

23 31. The United States recognizes that it has an obligation
24 to maintain a government-to-government relationship with
25 federally recognized Tribal Governments generally and with the
26 Klamath Tribes specifically. The United States acknowledges that
27 it must fulfill its obligation to protect Klamath Treaty Rights
in concert with the Tribes through this government-to-government

1 relationship.

2 32. Over the Tribes' objections, the Forest Service has
3 deferred consideration of the effects of its forest management on
4 Treaty Rights to its decisions concerning particular timber
5 sales.

6 33. Over the Tribes' objection, the Forest Service has
7 relied principally on its regular timber sale planning process as
8 the mechanism for considering and obtaining the Tribes' input
9 regarding the effects of timber sales on Treaty Rights.

10 34. In response to public comments submitted by the Tribes,
11 the Forest Service has rarely reduced or abandoned planned
12 activities on the ground that proceeding with them will harm or
13 fail to protect Treaty Rights.

14 35. The most effective mechanism for the Tribes to have
15 their concerns addressed has been the appeal process. On several
16 occasions, only after the Tribes' filed an administrative appeal
17 did the Forest Service engage in consultations and modify a
18 timber sale in conjunction with the Tribes. The Tribes have
19 appealed numerous timber sales, including those at issue in this
20 case. In each of these appeals, the Tribes have challenged the
21 Forest Service's failure to consult effectively with the Tribes
22 and failure to protect and safeguard the resources on which the
23 Tribes' Treaty Rights depend.

24 IV. THE PERTINENT RESCISSIONS ACT LOGGING PROVISIONS

25 36. On July 27, 1995, the Rescissions Act became law.
26 Section 2001 of the Rescission Act calls for the award, release,
27 and logging of particular old timber sales under their original

1 terms. It also truncates statutory environmental standards,
2 administrative appeal rights, and judicial review for salvage
3 timber sales advertised prior to December 31, 1996.

4 A. The Rescissions Act's Release of Old Timber Sales.

5 37. Section 2001(k)(1) of the logging rider provides:

6 Notwithstanding any other provision of law, within 45
7 days after the date of enactment of this Act, the
8 Secretary concerned shall act to award, release, and
9 permit to be completed in fiscal years 1995 and 1996,
10 with no change in originally advertised terms, volumes,
11 and bid prices, all timber sale contracts offered or
12 awarded before that date in any unit of the National
13 Forest System or district of the Bureau of Land
14 Management subject to section 318 of Public Law 101-121
15 (103 Stat. 745). The return of the bid bond of the
16 high bidder shall not alter the responsibility of the
17 Secretary concerned to comply with this paragraph.

18 38. Under this provision, the covered sales must be
19 awarded, released, and logged "with no change in originally
20 advertised terms, volumes, and bid prices," even if those terms
21 violate statutory or regulatory environmental standards. The
22 only exception is for nesting areas for threatened or endangered
23 bird species.

24 39. Nothing in the legislative history of this provision
25 referred to Indian Treaty Rights generally or to Klamath Treaty
26 Rights specifically. There is no indication in the legislative
27 history that Congress intended or understood that this provision
might have any effect on Treaty Rights.

40. Under this provision, the Forest Service has taken
actions to award eight timber sales on the former Reservation.
Logging is underway on several of the sales and is imminent on
the remaining awarded sales. These sales are going forward in
addition to other timber sales.

1 41. The Blue Ford sale is on a portion of the Fremont
2 National Forest that consists of former Reservation lands. The
3 Forest Service advertised this sale in 1991, and the Tribes
4 appealed, raising, inter alia, violations of the trust
5 responsibility and the sale's adverse effects on mule deer and
6 old-growth habitat. Region 6 found merit in the appeal on the
7 ground that the Forest Service had not adequately considered the
8 sale's effects on the mule deer herds on which members of the
9 Tribes depend for subsistence hunting. The Forest Service came
10 to an agreement with the Tribes to modify the sale to meet the
11 Tribes' concerns. On November 30, 1995, however, the Forest
12 Service awarded the sale in the precise form that it had
13 previously found wanting.

14 42. The remaining seven sales being awarded or pursued
15 under Section 2001(k) are on the former Reservation lands in the
16 Winema National Forest. The Tribes had appealed all seven sales
17 because of their effects on former Reservation resources. Prior
18 to enactment of the Rescissions Act, the Forest Service had not
19 decided the appeals on the Willy, Yoss Ridge, Cinder, and Nelson
20 sales. In October and November, 1995, Region 6 dismissed the
21 Klamath Tribes' appeals on these sales and allowed the sales to
22 proceed without any consideration of their effects on the Tribes'
23 Treaty Rights. Region 6 denied the Tribes' appeal of the Bill
24 sale in a cursory, one-page letter that did not fully address the
25 Tribes' Treaty Rights.

26 43. The Forest Service granted the Tribes' appeal on the
27 John and John Lodgepole sales as embodied in a 1987 record of

1 decision. After granting the appeal, the Forest Service modified
2 the sales, in consultation with the Tribes, to mitigate their
3 effects on Treaty Rights identified at that time. These sales
4 were advertised in revised form in August 1991. The Forest
5 Service has not considered the effects of those sales on Treaty
6 Rights in light of the information that has been developed and
7 the Tribal concerns that have been raised since that time.

8 44. The Forest Service has awarded or is trying to award
9 these sales under the Rescissions Act and is permitting logging
10 without consulting with the Tribes and without ensuring, with the
11 concurrence of the Tribes, that the sales will protect Treaty
12 Rights.

13 45. The Tribes' Treaty Rights will be impaired by further
14 degradation of mule deer habitat and foregone opportunities to
15 promote recovery of the herds. These sales will harm the
16 resources on which the Tribes' Treaty Rights depend. These sales
17 will destroy old-growth habitat and high quality mule deer
18 habitat. These harms will occur in addition to the extensive
19 past degradation of old-growth and mule deer habitat on the
20 former Reservation. These sales, both individually and
21 collectively, will adversely affect mule deer habitat and the
22 herds and will foreclose and make it more difficult to institute
23 effective management strategies to promote the recovery of mule
24 deer habitat and the herds.

25 B. The Rescissions Act's Salvage Provisions.

26 46. The Rescissions Act limits the statutory and regulatory
27 standards and procedures that govern salvage timber sales through

1 December 31, 1996. Under the Act, a salvage timber sale is
2 broadly defined to include any sale where the removal of dead,
3 damaged, or down trees, trees affected by fire, or trees
4 imminently susceptible to fire or insect attack. Associated
5 trees may be removed as part of a salvage sale under the Act.

6 47. The Rescissions Act limits the environmental analysis
7 and documentation required for salvage timber sales and gives the
8 Secretary of Agriculture sole discretion to determine what
9 environmental effects to consider.

10 48. The Rescissions Act eliminates the administrative
11 appeal process and reduces the opportunity for public input in
12 the development of salvage sales.

13 49. The Rescissions Act prohibits court challenges to
14 salvage timber sales based on violations of federal environmental
15 and natural resources statutes or regulations.

16 50. The Rescissions Act expedites judicial review, limits
17 the grounds on which a timber sale may be set aside, and limits
18 the available remedies.

19 51. Nothing in the Rescissions Act's legislative history
20 indicates that Congress intended to abrogate any Indian Treaty
21 Rights.

22 52. The Winema and Fremont National Forests are planning
23 many salvage sales under the Rescissions Act. In the past, the
24 Forest Service has provided less protection to wildlife habitat
25 in salvage sales than it has provided with respect to other
26 timber sales.

27 53. The Rescissions Act eliminates the appeal process which

1 has been the most effective mechanism for Tribal participation in
2 the development of timber sales to ensure that Treaty Rights are
3 protected. The Forest Service has not developed any new
4 mechanism to ensure that it, in consultation with and with the
5 concurrence of the Tribes on a government-to-government basis,
6 will protect the Klamath Tribes' Treaty Rights.

7 54. By proceeding with salvage sales without ensuring that
8 those sales will avoid harm to and protect habitat for mule deer
9 and other species on which the Tribes depend, there is a serious
10 risk that those resources will be irreparably harmed.

11 55. Proceeding with salvage timber sales that will affect
12 Treaty Rights without consulting effectively with and obtaining
13 the concurrence of the Tribes will irreparably harm the Tribes'
14 Treaty Rights and rights as a sovereign.

15 CAUSES OF ACTION

16 COUNT ONE

17 BY AWARDING AND PERMITTING LOGGING OF SALES WITHIN THE
18 FORMER RESERVATION UNDER SECTION 2001(k) OF THE
19 RESCISSIONS ACT, THE UNITED STATES HAS VIOLATED ITS
TRUST RESPONSIBILITY TO THE TRIBES AND THE TRIBES'
TREATY RIGHTS.

20 56. The Klamath Tribes have Treaty Rights to hunt, fish,
21 trap, and gather on the former Reservation lands.

22 57. The United States has pervasive control over the
23 Tribes' Treaty Rights because it owns and manages the lands and
24 resources on which those rights depend.

25 58. The United States, including the United States Forest
26 Service, has a trust responsibility to ensure, in consultation
27 with and with the concurrence of the Tribes on a government-to-

1 government basis, that the United States' management of the
2 former Reservation lands and resources will protect the Klamath
3 Tribes' Treaty Rights.

4 59. A federal statute may abrogate Treaty Rights and the
5 United States' trust responsibility only if it does so clearly
6 and expressly. Section 2001(k) of the Rescissions Act does not
7 clearly and expressly abrogate the Klamath Tribes' Treaty Rights
8 or the United States' trust responsibility.

9 60. Section 2001(k) of the Rescissions Act may not be
10 applied to the public forest lands on which the Klamath Tribes'
11 Treaty Rights depend.

12 61. The United States and the other federal defendants have
13 not ensured, in consultation with and with the concurrence of the
14 Tribes on a government-to-government basis, that the eight sales
15 within the former Reservation that the Forest Service has awarded
16 or is trying to award under Section 2001(k) of the Rescissions
17 Act will protect the Klamath Tribes' Treaty Rights.

18 62. By failing to engage in effective consultations with
19 the Tribes and failing to obtain their concurrence concerning the
20 sales being awarded and logged under Section 2001(k), the United
21 States and the other federal defendants have violated the United
22 States' trust responsibility to the Tribes and the Tribes' Treaty
23 Rights and acted contrary to law in violation of the
24 Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

25 63. The eight sales within the former Reservation that
26 defendants have awarded or are trying to award under Section
27 2001(k) of the Rescissions Act will harm and impede recovery of

1 the resources on which the Tribes' Treaty Rights depend. By
2 permitting logging that will cause such harm, the United States
3 and the other federal defendants have violated the United States'
4 trust responsibility to the Tribes and the Tribes' Treaty Rights
5 and acted contrary to law in violation of the Administrative
6 Procedure Act, 5 U.S.C. § 706(2)(A).

7
8 COUNT TWO

9 THE RESCISSIONS ACT'S SALVAGE PROVISIONS CANNOT BE
10 APPLIED TO ABROGATE THE KLAMATH TRIBES' TREATY RIGHTS
11 OR THE UNITED STATES' TRUST RESPONSIBILITY.

12 64. The Klamath Tribes have Treaty Rights to hunt, fish,
13 trap, and gather on the former Reservation lands.

14 65. The United States has pervasive control over the
15 Tribes' Treaty Rights because it owns and manages the lands and
16 resources on which those Rights depend.

17 66. The United States and the other federal defendants have
18 a trust responsibility to ensure, in consultation with and with
19 the concurrence of the Tribes on a government-to-government
20 basis, that its management of the former Reservation lands and
21 resources will protect the Klamath Tribes' Treaty Rights.

22 67. A federal statute may abrogate Treaty Rights and the
23 United States' trust responsibility only if it does so clearly
24 and expressly. The Rescissions Act does not clearly and
25 expressly abrogate the Klamath Tribes' Treaty Rights or the
26 United States' trust responsibility.

27 68. The Rescissions Act's salvage provisions may not be
applied to the public forest lands on which the Klamath Tribes'
Treaty Rights depend.

1 Klamath Tribes' Treaty Rights;

2 D. Enjoin defendants from awarding, releasing, or
3 permitting completion under Section 2001(k) of the Rescissions
4 Act of any timber sale contracts within the former Reservation
5 unless and until they ensure, in consultation with and with the
6 concurrence of the Tribes on a government-to-government basis,
7 that the sales will protect the Klamath Tribes' Treaty Rights;

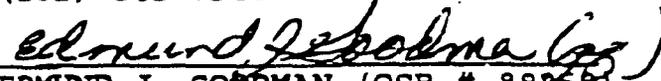
8 E. Enjoin defendants from proceeding with salvage timber
9 sales under the Rescissions Act without ensuring, in consultation
10 with and with the concurrence of the Tribes on a government-to-
11 government basis, that the sales will protect the Klamath Tribes'
12 Treaty Rights;

13 F. Award plaintiff its attorneys' fees, costs, expert
14 witness fees, and disbursements in this action; and

15 G. Grant such other relief as the Court deems proper.

16 Respectfully submitted,

17 
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Dated: March 13, 1996

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