

NLWJC- Kagan

Counsel - Box 012 - Folder 002

Timber - Other Litigation: Idaho  
Sporting Congress Thunderbolt II



**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

INLAND EMPIRE PUBLIC LANDS  
COUNCIL; THE ECOLOGY CENTER;  
ALLIANCE FOR THE WILD ROCKIES,  
INC.,

*Plaintiffs-Appellants,*

v.

DAN GLICKMAN, Secretary of the  
United States Department of  
Agriculture; UNITED STATES FOREST  
SERVICE; UNITED STATES FISH AND  
WILDLIFE SERVICE,

*Defendants-Appellees,*

and

INTERMOUNTAIN FOREST INDUSTRY  
ASSOCIATION,  
*Defendant-Intervenor-Appellee.*

No. 95-36272  
D.C. No.  
CV-95-00133-CCL  
OPINION

Appeal from the United States District Court  
for the District of Montana  
Charles C. Lovell, District Judge, Presiding

Argued and Submitted  
March 13, 1996—San Francisco, California

Filed May 8, 1996

Before: Herbert Y.C. Choy, Robert R. Beezer, and  
Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Choy



**SUMMARY**

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**Natural Resources and Energy/Wildlife and Habitat/  
Environmental Law**

The court of appeals affirmed a district court judgment. The court held that the United States Forest Service was not arbitrary and capricious in pursuing salvage timber sales in a national forest, where, among other things, the Forest Service explained that fires triggered its new policy.

After fires in the Kootenai National Forest, appellee the Forest Service aimed to conduct salvage timber sales under the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Antiterrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995 (Rescissions Act). The Forest Service prepared Biological Assessments (BAs) that concluded that the sales were not likely to adversely affect the Cabinet/Yaak Ecosystem grizzly bears, a threatened species under the Endangered Species Act. Appellee the United States Fish and Wildlife Service (FWS) concurred that the sales were unlikely to adversely affect the grizzly bears. The Forest Service awarded contracts.

Appellants Inland Empire Public Lands Council, The Ecology Center, and Alliance for the Wild Rockies, Inc. (collectively, Inland Empire) sued, seeking a permanent injunction prohibiting appellee the Secretary of Agriculture from proceeding with the Kootenai sales. The district court granted the Secretary's cross-motion for summary judgment, motion to dismiss, and motion to strike extra-record materials. Inland Empire appealed, contending, among other things, that the Forest Service's new "core area" strategy would inadequately protect the grizzly bear population.

[1] The Rescissions Act provides for extremely limited judicial review and exempts salvage timber sales from all fed-

eral environmental and natural resource laws. [2] In this case, the Forest Service did not need to consider the effect on the grizzly bear. [3] But, even so, the BAs discussed all of the factors that Inland Empire identified as endangering the grizzly bear—habitat effectiveness, road densities, bear distribution, opening size, and movement corridors. [4] The Forest Service also explained that the fires triggered the new policy. [5] Nothing required the Secretary to adopt all of the specific recommendations of a report upon which he relied. [6] The Forest Service was not arbitrary and capricious in pursuing the Kootenai sales.

[7] The Secretary need not personally authorize salvage timber sales.

[8] Inland Empire lacked standing to claim FWS acted arbitrarily and capriciously in concurring with the sales. The Forest Service did not need FWS's concurrences to proceed with the sales.

[9] Under the Rescissions Act, judicial review is limited to "a review of the record." [10] The district court did not abuse its discretion in striking certain extra-record materials.

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#### COUNSEL

James S. Angell, Sierra Club Legal Defense Fund, Bozeman, Montana; Patti A. Goldman, Sierra Club Legal Defense Fund, Seattle, Washington, for the plaintiffs-appellants.

Alberto M. Ferlo, Jr. and Sandra B. Zellmer, United States Department of Justice, Environment and Natural Resources Division, Washington, D.C., for the defendants-appellees.

Patrick D. Madigan, Rosholt, Robertson & Tucker, Boise, Idaho, for the defendant-intervenor-appellee.

**OPINION**

CHOY, Circuit Judge:

Inland Empire Public Lands Council, The Ecology Center and Alliance for The Wild Rockies (collectively "Inland Empire") appeal the summary judgment in favor of Secretary of Agriculture Dan Glickman, the United States Forest Service and the United States Fish and Wildlife Service ("FWS") (collectively "the Secretary"). We affirm.

**I. Factual and Procedural Background.**

In August 1994, a lightning storm ignited over 200 fires in the Kootenai National Forest in northwest Montana, burning 55,000 acres. The Forest Service aims to conduct salvage timber sales of roughly 36 million board feet in the North and South Fork areas of the Kootenai National Forest, under § 2001(a)(3) of the Emergency Supplemental Appropriations for Additional Disaster Assistance, for Antiterrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 1995 U.S.C.C.A.N. (109 Stat.) 240, 241 (to be codified at 16 U.S.C. § 1611).

Pursuant to § 2001(c)(1)(A), the Forest Service prepared Biological Assessments ("BAs"), which concluded that the sales were not likely to adversely affect the Cabinet/Yaak Ecosystem grizzly bears, a threatened species under the Endangered Species Act. After a round of discussions between the Forest Service and FWS, FWS concurred that the sales were unlikely to adversely affect the grizzly bears. The Forest Service issued Decision Notices and invitations to bid on the sales in October 1995, and awarded contracts on December 19, 1995.

Inland Empire filed this action on November 3, 1995, seeking a permanent injunction prohibiting the Secretary from

proceeding with the Kootenai sales. The parties, including Appellee-Defendant-Intervenor Intermountain Forest Industry Association, have complied with an expedited briefing schedule, and submitted the matter on cross-motions for summary judgment. On December 18, 1995, the district court denied Inland Empire's motion for summary judgment and injunctive relief and granted the Secretary's cross-motion for summary judgment, motion to dismiss, and motion to strike extra-record materials. Inland Empire timely appeals.

## II. Analysis.

### A. Standard of review.

[1] The Rescissions Act provides for extremely limited judicial review. Section 2001(f)(4) provides:

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

Subsection (i) exempts salvage timber sales from all federal environmental and natural resource laws. § 2001(i). Review of salvage timber sales is thus limited in that "(1) review is based on the administrative record only; (2) the standard of review is arbitrary and capricious or otherwise not in accordance with applicable law; and (3) the sale is not subject to any federal environmental or natural resources laws." *Kentucky Heartwood, Inc. v. United States Forest Serv.*, 906 F. Supp. 410, 412 (E.D. Ky. 1995).

We review a grant of summary judgment de novo. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

B. The Forest Service's decision to conduct the Kootenai sales was not arbitrary and capricious.

An agency's decision is arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "This inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Inland Empire argues that the Kootenai sales fail this review because the Forest Service's new "core area" strategy will inadequately protect the grizzly bear population. Inland Empire argues that the core area strategy incorporates several dangerous changes: (1) applying the road density limitation only to each Bear Management Unit, rather than to each smaller Bear Analysis Area; (2) allowing exceptions to the forty-acre opening size and 600-foot movement corridor restrictions; and (3) allowing exceptions to the seventy-percent habitat effectiveness standard.

[2] The Forest Service did not need to consider the effect on the grizzly bear. Section 2001(c)(1)(A) provides:

A document embodying decisions relating to salvage timber sales proposed under authority of this section shall, *at the sole discretion of the Secretary concerned and to the extent the Secretary concerned*



*considers appropriate and feasible*, consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species . . . .

(Emphasis added). The Forest Service had discretion to disregard entirely the effect on the grizzly bear.

[3] The Forest Service did consider the effect on the grizzly bear, and concluded that the sales are "not likely to adversely affect the grizzly bear or its habitat." BA for North Fork at 19; BA for South Fork at 16. The BAs discussed all the factors which Inland Empire identifies as endangering the grizzly bear—habitat effectiveness, road densities, bear distribution, opening size and movement corridors—and reached a different conclusion. The Forest Service reached this conclusion because the core strategy (1) retained adequate space and distribution of bears; (2) maintained very limited motorized access; (3) rehabilitated thirty-nine miles of roads; and (4) did not interfere with the beneficial effects which fires typically have on grizzly bear forage. BA for North Fork at 19.

Similarly, FWS recognized Inland Empire's concerns, but concluded that "the proposed project is not likely to adversely affect the threatened grizzly bear." FWS Concurrence for North Fork at 1; FWS Concurrence for South Fork at 1. In a July 27, 1995 letter to the Forest Service, FWS concluded that the plan is "*not likely to jeopardize*" grizzly bear survival because (1) the best scientific data is insufficient to allow FWS to quantify the mortality risk; (2) the bear population has increased slightly in recent years; (3) bear reproduction is occurring; and (4) human-caused and overall mortality has decreased over the last twelve years. This conclusion is not "so implausible that [the agency's decision] could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43.

[4] Inland Empire argues that the Forest Service fails to rationalize its change in bear protection policy. "Whatever the

ground for the departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action . . . ." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). The Forest Service has explained that the 1994 fires triggered the new policy. The fire damage necessitated new priorities for timber salvage and wildlife protection, as Congress recognized in passing the Rescissions Act. To balance these needs, and after extensive consultation with FWS, the Forest Service decided to adopt the core area strategy. BA for South Fork at 12.

[5] Inland Empire argues that the core area strategy does not incorporate all of the specific recommendations of the Interagency Grizzly Bear Committee Taskforce Report, upon which the Forest Service relied. Secretary Glickman, however, has sole discretion over the information considered to reach a decision, and sole discretion to determine whether the decision complies with existing applicable forest management plans and guidelines. § 2001(c)(1). Nothing requires Secretary Glickman to adopt all of the specific recommendations of a report upon which he relies.

[6] Given the Forest Service's rational explanations for its actions and our limited scope of review, the Forest Service was not arbitrary and capricious in pursuing the Kootenai sales.

C. Secretary Glickman need not personally authorize the Kootenai sales.

Inland Empire argues that the "sole discretion" language in the Rescissions Act requires that Secretary Glickman personally authorize all salvage timber sales. To support this interpretation, Inland Empire points to the remarks of Senator Lieberman made on the Senate floor: "The timber provision that finally passed contains a change over previous language to expand the role of the Secretary of Agriculture to require

his signature in order to implement new sales.” 151 Cong. Rec. S10465 (July 21, 1995). The floor statements of an individual member of Congress who did not sponsor the bill, however, have limited value in interpreting congressional intent. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118-19 (1980).

[7] “Without express congressional authorization for a sub-delegation, we must look to the purpose of the statute to set its parameters.” *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986). Requiring Secretary Glickman to personally authorize every salvage timber sale would contradict the purpose of the Rescissions Act, which is to expedite such sales. Moreover, “delegation generally is permitted where it is not inconsistent with the statute.” *National Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez*, 857 F. Supp. 85, 91 (D.D.C. 1994); see generally *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (holding that “[e]xpress statutory authority for delegation is not required, and Congress did not specifically prohibit delegation under this statute.”) (citation omitted). If not forbidden by the Rescissions Act, the delegation is clearly proper; Secretary Glickman properly delegated authority to an Assistant Secretary, who subdelegated authority to the Forest Service Chief. See 7 C.F.R. §§ 2.19(b)(2), 2.60(a)(2). We agree with the United States District Court for the District of Idaho that the Secretary need not personally authorize salvage timber sales. See *Idaho Conservation League v. Thomas*, No. CV 95-0425-S-EJL, 1995 WL 789239 at \*10 (D. Idaho Dec. 11, 1995).

D. The district court properly dismissed Inland Empire’s claim against FWS.

[8] Inland Empire alleges that FWS acted arbitrarily and capriciously in concurring with the Kootenai sales. Inland Empire lacks standing, however, to assert this claim. To establish standing, a plaintiff must show that it is “‘likely,’ as



opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). The Forest Service did not need the concurrences of FWS to proceed with the sales; "notwithstanding substantial interagency disagreement, the Forest Service was entitled to rely on the opinions and analysis of its own experts." *Idaho Conservation League*, 1995 WL 789239 at \*5. Inland Empire fails to show that an order setting aside the FWS concurrences would redress its injury in any way.

In addition, the claim fails on its merits. As noted above, FWS considered all of Inland Empire's concerns, and rationally explained its conclusions.

E. The district court did not abuse its discretion in striking Inland Empire's supporting exhibits and declarations.

Inland Empire asserts that the district court improperly struck several extra-record materials: two expert declarations regarding grizzly bear survival; four Forest Service and FWS documents and two papers on grizzly bear management, upon which the Forest Service did not rely; and several FWS documents upon which FWS relied in reaching its concurrences. We review for abuse of discretion a district court's decision to exclude extra-record evidence. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993) (per curiam).

[9] The Rescissions Act limits judicial review to "a review of the record." § 2001(f)(4). This parallels the long-standing rule that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). This circuit has only allowed extra-record materials (1) if necessary to determine "whether the agency has considered all relevant factors and has explained

its decision," (2) "when the agency has relied on documents not in the record," or (3) "when supplementing the record is necessary to explain technical terms or complex subject matter." *Friends of the Payette*, 988 F.2d at 997. A fourth circumstance occurs "when plaintiffs make a showing of agency bad faith." *National Audubon Soc. v. U.S. Forest Serv.*, 46 F.3d 1437, 1447 n.9 (9th Cir. 1994).

[10] The Forest Service considered all the relevant factors. Likewise, the Forest Service did not directly or indirectly consider Inland Empire's materials. The record contains only those materials before the Forest Service at the time of its decision. In addition, Inland Empire's materials are not necessary to explain technical terms or complex subject matter; the documents in the administrative record are not overly technical, nor does Inland Empire explain how its materials are any less complex. Finally, Inland Empire makes no allegation of agency bad faith. The district court did not abuse its discretion in striking Inland Empire's extra-record materials.

### III. Conclusion.

We AFFIRM the denial of Inland Empire's motion for summary judgment and injunctive relief and AFFIRM the grant of the Secretary's cross-motion for summary judgment, motion to dismiss, and motion to strike extra-record materials.



## U.S. Department of Justice

## Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 13, 1996

	FAX NUMBER:	PHONE NUMBER:
TO: Dinah Bear	202 456-0753	202 395-5754
Tom Jensen		
Elena Kagan	202 246-1647	
Tom Tuchmann	503 326-6254	
Bob Baum	202 208-3877	202 208-4344
David Gayer		6172
Don Berry	202 208-4684	
Nancy Hayes	202 208-5242	202 208-3801
Ann Kennedy	202 720-5437	202 720-3631
Chris Nolan	202 395-4941	202 395-3448
Ruth Saunders		
Karen Mouritsen	202 219-1792	202 208-4444
Kris Clark		
Terry Garcia	202 482-4893	202 482-4080
Mike Gippert	202 690-2730	202 720-2063
Jay McWhirter		
Tim Obst		
Joe Stringer	801 625-5465	
Dale Torgerson	801 625-5277	
Deborah Hill	208 334-1414	
Jim Harvard	202 260-8393	202 260-1003

DATE: March 13, 1996

NUMBER OF PAGES TO BE TRANSMITTED (including cover): 50

FROM: Monica Medina (202)514-0750 fax 514-0557

MESSAGE: Idaho Sporting Congress v Thomas (on of the Thunderbolt salvage cases). Attached is our Answering Brief that must be filed on Friday. Please fax any comments you may have to me by 5 p.m. tomorrow. Thanks.

**OPINION BELOW**

The Memorandum Decision and Order of the district court (Honorable Edward J. Lodge), dated January 8, 1996, is unpublished and is reproduced at Government's Excerpts of Record ("ER") at \_\_\_\_.

**STATEMENT OF JURISDICTION**

A. District Court Jurisdiction. -- Jurisdiction of the district court is based on 28 U.S.C. Section 1331 and on Section 2001(f) of the 1995 Rescissions Act, Pub. L. 104-19, 109 Stat. 240 (the "Rescissions Act") (Addendum \_\_).

B. Jurisdiction of the Court of Appeals. -- The district court entered a final judgement on January 8, 1996 (ER 2). The judgement disposed of all of the claims raised by Idaho Sporting Congress ("ISC"). Thus, jurisdiction of this Court is based on 28 U.S.C. Section 1291.

C. Timeliness of Appeal. -- ISC filed notice of appeal on January 16, 1996, within thirty days of the final decision and order of the district court in accordance with Section 2001(f)(7) of the Rescissions Act.

**STATEMENT OF ISSUES**

1. Whether the district court properly determined that the Administrative Procedure Act cannot be invoked for judicial review of the challenged projects because the Rescissions Act provides for judicial review and the remedy that ISC requests.

2. Whether the district court properly found that the Forest Service's decision to proceed with the challenged projects was not arbitrary and capricious under the Rescissions Act.

- 2 -

3. Whether the district court correctly held that the decision to proceed with the challenged salvage sales was consistent with Presidential directive and therefore valid.

4. Whether the district court correctly concluded that the Forest Service did not breach its duties under the public trust doctrine.

#### STATEMENT OF THE CASE

A. Nature of the Case. -- This is a challenge to the offer and award of salvage timber sales under the provisions of Section 2001(b) of the Rescissions Act. The Chief of the Forest Service approved the sales in October, 1995, based on a determination that the salvage timber sales, which are part of three post-fire projects developed by the Forest Service on the Payette and Boise National Forests<sup>1/</sup> in Idaho, fell within the expedited timber salvage program established in Section 2001(b) of the Rescissions Act. 1995 Rescissions Act, Pub. L. 104-19, Section 2001. (Addendum A) Idaho Sporting Congress ("ISC") filed suit to enjoin all salvage logging operations on the two forests, alleging that the Forest Service's decision to proceed with the Sales: (1) violated the "public trust doctrine"; (2) violated a Presidential directive implementing the Rescissions Act; and (3) was arbitrary

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<sup>1/</sup> The three projects are the Thunderbolt Wildfire Recovery Project, the Main Salmon Post-fire Project, and the Lower South Fork Salmon River Post-fire Project. The Thunderbolt project includes the Thunderbolt salvage sale. The Main Salmon project includes the Lower Elkhorn, Fall/Carey, Jenkins, and Elkhorn Basin salvage sales. The Lower South Fork project includes the Big Flat and Pony Creek salvage sales. The Thunderbolt salvage sale is also in litigation before this court, Idaho Conservation League v. Thomas, Civ. No. 95-36293.

- 4 -

H. Conf. Rep. 104-124 at 134 (daily ed. May 16, 1995) (Addendum \_\_\_). Section 2001(c) provides expedited procedures for these salvage sales. The Act directs the Secretary, as part of the process for developing the sales, to "prepare a document that combines an environmental assessment under section 102(2) of the National Environmental Policy Act of 1969 ["NEPA"] and a biological evaluation under section 7(a)(2) of the Endangered Species Act of 1973 ["ESA"]." Section 2001(c)(1)(A). The scope and content of sales documents are within the Secretary's "sole discretion." Section 2001(c)(1)(C). The Act also expressly allows the Secretary to use documents prepared prior to its enactment. Section 2001(c)(1)(B). Finally, in reviewing these documents, the Secretary need only consider, "to the extent appropriate and feasible," (1) the environmental effects of salvage sales; (2) the effects of such sales on endangered or threatened species; or (3) the consistency of salvage sales with the standards and guidelines contained in Forest Plans. Section 2001(c)(1)(A).

In Section 2001(f), Congress established a limited right to judicial review of salvage sales.<sup>4/</sup> First, any judicial review of a timber sale is limited to a review of the administrative record only. Section 2001(f)(4). Second, the court reviews the decision to proceed with the sale to determine whether it is "arbitrary and capricious or otherwise not in accordance with applicable law." Section 2001(f)(4). In determining whether a

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<sup>4/</sup> The Act prohibits administrative challenges to salvage sales. Section 2001(e).

- 5 -

sale is in accordance with "applicable law," the Act makes an exception for the Endangered Species Act and the National Environmental Policy Act and others listed in subsection (i). Thus, a court may not invalidate a sale due to its failure to comply with those laws. In addition, the Act requires that any challenge to a salvage timber sale must be brought within 15 days of the date the sale is advertised. The reviewing court must issue a final decision regarding a challenged salvage sale within 45 days of the date the challenge was brought. Section 2001(f)(1) and (5). An appeal must be filed within thirty days of the district court's decision. Section 2001(f)(7).

Section 2001(i) provides that, with respect to all the activities related to a salvage timber sale (including "preparation, advertisement, offering, awarding and operation"),

The documents and procedures required by this section shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

(3) The National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

(4) The Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(5) The National Forest Management Act of 1976 (16 U.S.C. 472a et seq.); \* \* \* and

(8) All other applicable Federal environmental and natural resource laws.

Taken together, these provisions of the Rescissions Act provide two bases for review of federal agencies' decisions to proceed under the Act. First, the federal agency must correctly determine that the sales fit within the parameters of the Act: (1)

- 6 -

that they are salvage timber sales under Section 2001(a)(3); (2) that the sales fall within the emergency period defined by Section 2001(a)(2); and (3) that the sales are not found on excluded federal lands described in Section 2001(g)(2).<sup>5/</sup> Second, the federal agency must comply with the requirements for documents and procedures set forth in Section 2001(c). The court undertakes its review of these two elements on the administrative record under the arbitrary and capricious standard of Section 2001(f)(4).

Four days after the Act went into effect, on August 1, 1995, the President issued a memorandum to the Secretaries of Agriculture, Interior, and Commerce and the Administrator of the Environmental Protection Agency, directing each of them to move forward expeditiously to implement the timber-related provisions of the Rescissions Act in an environmentally sound manner.<sup>6/</sup> (Addendum \_\_). The President stated his intent to carry out the objectives of the relevant timber-related activities authorized by the Rescissions Act. (Id.) In order to facilitate compliance with the Rescissions Act and the President's Directive, the Departments of Interior, Agriculture and Commerce and the Environmental Protection Agency then entered into a Memorandum of Agreement

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<sup>5/</sup> These excluded areas include, (1) Federal lands included in National Wilderness Areas, (2) roadless areas designated for wilderness study in Colorado or Montana, and (3) any area on Federal land on which timber harvesting is prohibited. Section 2001(g).

<sup>6/</sup> In his memo, the President stated "I do not support every provision [of the Rescissions Act], most particularly the provision concerning timber salvage." (Addendum \_\_). Ironically, he noted his concern that the timber salvage provisions could lead to litigation. (Id.).

- 7 -

("MOA") to streamline procedures for environmental analysis and inter-agency consultation. (Addendum \_\_). The purpose of the MOA was to reaffirm the commitment of the Agencies to continue to comply with existing environmental laws while carrying out the objectives of the Rescissions Act.

C. Statement of Facts. --

1. The History Of Environmental Degradation In The Area Of The Timber Sales. -- The Salvage Sales are located in the Boise and Payette National Forests in central Idaho. These Forests surround the Salmon River and its tributaries. The Salmon River and its tributaries were historically one of the largest producers of summer chinook salmon in the Columbia River Basin. (TB AR 39, at I-3).<sup>1/</sup> Early in the 20th century, the Salmon River produced tens of thousands of chinook salmon, steelhead and other resident fish, which contributed to productive marine and freshwater fisheries from central Idaho to as far away as Alaska. (Id., at I-10). Over the last 35 years, salmon populations in the Salmon River have plummeted. (Id.) There are many causes of this decline -- fish mortalities at mainstem Columbia and Snake River hydroelectric projects and the degradation of habitat by mining, livestock grazing, logging and building more than 1,000 miles of access roads

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<sup>1/</sup> This brief will refer to the Administrative Record of the Thunderbolt Sale of the Thunderbolt Project as "TB AR \*\*" and to the Administrative Record of the Lower Elkhorn Sale of the Main Salmon Project as "MS AR \*\*." Excerpts of the administrative record will be labelled and bound as TB AR and MS AR for the Court's ease of reference. Documents not excerpted in a separate volume for the Court (due to length) will be referred to as "AR Dkt \*\*."

- 8 -

in the drainage. (Id.) All this degradation was further exacerbated by heavy rain-on-snow weather in the mid-1960's, which resulted in severe, widespread erosion and sedimentation. (Id.) Due to the long-existing sedimentation problems and the resultant decline in fish populations, the Forest Service places an emphasis in the South Fork Salmon River drainage area on "restoration of harvestable, robust, self-sustaining populations of naturally reproducing salmon and trout." (Id., at I-1).

2. The 1994 Wildfires As Impetus For The Sales. -- In 1994, wildfires of historic proportions made the already bad situation in the South Fork Salmon River and Main Salmon drainage areas much worse. Fueled by a ten-year drought, hot and windy weather, and large areas of dead, dying and overcrowded trees, wildfires burned over hundreds of thousands of acres of forestland in Idaho and Montana. The four fires which covered the Salvage Sales areas at issue here were the Corral, Blackwell, Chicken and Thunderbolt wildfires. (MS AR 37, at 1-1). In total, nearly 300,000 acres of the Payette National Forest burned in these fires. (Id.) The Thunderbolt wildfire alone burned 18,827 acres. (TB AR 39, at I-3). Only four trees per acre within the Thunderbolt harvest area have any live foliage left and could possibly survive. (TB AR 40, at ROD-2). The wildfires also accelerated sediment problems and changed conditions in the South Fork Salmon River basin landscape in a way that was unforeseen in either the Boise or Payette Forest

- 9 -

Plans.<sup>2/</sup> (TB AR 39, at I-1). For example, the magnitude and extent of the 1994 wildfires were significantly greater than the fires anticipated over the ten year planning period analyzed in the 1990 Boise National Forest Plan. (TB AR 204, at II-56). Similarly, the 1988 Forest Plan for the Payette Forest anticipated an average of only 1,844 acres to burn annually -- i.e. one-tenth of the acreage burned by the Thunderbolt wildfire alone. (TB AR 202, at II-94). In response to these unprecedented fires, the Forest Service formed interdisciplinary scientific teams, called Landscape Analysis Teams, for each of the four fires. These teams were to study how the fires had affected the natural resources in the Forests, and to recommend ways to address ecosystem concerns caused by the fires. (MS AR 37, at 1-1). The projects described below were the outgrowth of the work of those Teams.

3. The Thunderbolt Wildfire Recovery Project. -- The Thunderbolt Project consists of the Thunderbolt salvage sale and various restoration activities to be funded by the sale and through general revenues of the Forest Service.<sup>2/</sup> From its inception, the express purpose of the Thunderbolt project has been

to improve the long term fish habitat, rehabilitate existing sediment sources, improve hydrologic conditions of affected watersheds, protect long term soil productivity, promote re-vegetation of trees on burned acres, and recover the economic value of dead and imminently dead trees as a means of

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<sup>2/</sup> Historically, fire is second only to roads as the largest sediment producer to stream systems. (TB AR 30, at V-59, V-61).

<sup>2/</sup> The facts recited herein regarding the Thunderbolt Project are the same as the facts at issue in another case pending before this Court, Idaho Conservation League v. Thomas, Civ. No. 95-36293.

- 10 -

financing the ecosystem restoration and sediment reduction projects.

(TB AR 39, at I-6). The Thunderbolt salvage sale was designed as the means "to move the existing post-fire condition toward the target landscape condition as identified through an ecosystem assessment of the landscape." (Id.).

a. Extensive Interagency Coordination To Develop The Draft EIS. -- For months prior to the passage of the Rescissions Act, the Forest Service had coordinated with interested federal agencies regarding the proposed Thunderbolt Wildfire Recovery Project. The Forest Service developed an Environmental Impact Statement ("EIS") for the project. Throughout the EIS process, the Forest Service extensively coordinated with National Marine Fisheries Service ("NMFS"), the Environmental Protection Agency ("EPA") and the U.S. Fish and Wildlife Service ("FWS").

The Forest Service encouraged public involvement in the process. In early December, 1994, it sent scoping letters to the general public, agencies, and organizations describing the proposal, identifying public meetings, and soliciting comments. (TB AR Dkt. 1-5). It also published the Notice of Intent to prepare an EIS in the Federal Register, and posted notices in local newspapers and on radio. (Id.) In addition, the Forest Service heard from the public through letters, petitions and telephone calls. (TB AR Dkt. 11-12).<sup>10/</sup>

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<sup>10/</sup> In March, 1995, at the same time that it was preparing the Draft EIS, the Forest Service completed a comprehensive watershed analysis of the affected areas. (TB AR Dkt 30). This substantial study included an analysis of, inter alia, the processes that

- 11 -

The Forest Service then issued its Draft EIS in March, 1995, documenting the analysis of the impacts of the Thunderbolt Project proposal and alternatives to the proposal. (TB AR Dkt. 29). The Forest Service also prepared biological assessments ("BAs") for endangered wildlife and fish species and biological evaluations ("BEs") for sensitive plant, wildlife and fish species, including bull trout, steelhead, redband, and westslope cutthroat trout.<sup>11/</sup> (Id., at Appendices A-E). Each of these documents was included as an appendix to the DEIS. The Forest Service mailed copies of the DEIS with appendices to the agencies in March, 1995 and requested concurrence on the BAs from FWS and NMFS. (TB AR 20).

b. Additional Environmental Review by the Science Panel. --

In addition to the ordinary review of its analysis of environmental

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deliver sediment to channels, the effects management has on these processes, the types of potential water quality impacts associated with human activities in the watersheds, and the effects of these on stream temperature and habitat conditions for fish and other aquatic organisms (Id., at Chapter V). The Forest Service transmitted the Watershed Analysis to NMFS, FWS and EPA on April 11, 1995. (TB AR 21, at 000416).

<sup>11/</sup> BA's are prepared pursuant to the ESA "for the purpose of identifying any endangered species or threatened species which is likely to be affected" by the agency action. 16 U.S.C. Section 1536(c)(1). BE's are prepared pursuant to Forest Service guidance to review all programs and activities in sufficient detail to determine the potential effects on Forest listed sensitive species Forest Service Manual 2672.4. Sensitive species are identified by the Regional Forester due to concerns for viability because of current or expected downward trends in population numbers and/or habitat, or a lack of knowledge on population distribution and/or habitat. (TB AR 39, at III-17). The Rescissions Act requires the preparation of a document that combines an environmental assessment ("EA") under NEPA (42 U.S.C. Section 4332(2)) and a BE under the ESA (16 U.S.C. 1536(a)(2)). Section 2001(c)(1)(A). However, the Secretary may use documents prepared prior to the date of enactment to satisfy the requirements of Section 2001(c)(1)(A). Section 2001(c)(1)(B).

- 12 -

issues raised by the Project, and in order to ensure the scientific merit of the material presented in the DEIS, the Forest Service in February, 1995 convened a Federal interagency science panel. The panel, which included representatives from the Forest Service, EPA and FWS, was to review the soils/watershed and fisheries analysis process for the Project. (TB AR 39, at I-13). When the first panel failed to reach consensus on the Thunderbolt Project, the Forest Service convened a second Science Panel (the "Science Panel"), which included fisheries experts from the Forest Service, to review the scientific merit of the material presented on sediment yield, sediment routing, and fisheries habitat in the DEIS. (TB AR 27, at 000657). This second Science Panel was to determine "if there was a better scientific basis for the decision and make recommendations to ensure that decision makers have information based on the best scientific analyses and data available." (Id.).

The second Science Panel issued a report concluding that the Forest Service "used the best analytical methods available for estimating erosion and sediment delivery." (Id.) The Report also contained six recommendations to address some concerns it noted regarding the long-term improvement in spawning and rearing habitat of anadromous fish. (Id., at 000657, 000674-675). The Forest Service distributed the Science Panel Report to the EPA, NMFS and FWS. (TB AR 22, at 000420; TB AR 25, at 000585).

The Forest Service incorporated the results of the recommendations of the Science Panel into the Final EIS. (TB AR

- 13 -

Dkt. 39). The leader of the Science Panel, Thomas W. Hoekstra, reviewed the changes made by the ID Team in response to the Science Report recommendations and concluded again that the analyses and data used by the Forest Service for estimation of soil erosion and sediment movement were the best that were technically available. (TB AR 27, at 000679). He also concluded that the revisions addressed the major recommendations, and that the process used by the Forest Service "in the development, review, and revision of the EIS is a model that is analogous to that used in scientific peer-reviewed documents . . . to assure the highest quality technical product possible." (Id., see also, TB AR 40, at ROD-4).

The Forest Service received comments on the Draft EIS from the FWS and EPA. The Forest Service provided an initial response to the EPA comments, including a copy of a letter from Mr. Hoekstra of the Science Panel, which responded to EPA's concerns. (TB AR 24, at 000525-528). The Forest Service responded to all other comments on the DEIS in the FEIS as well. (TB AR Dkt. 39, at V-11-125).

The Forest Service determined in its BA for endangered fish species that the Thunderbolt Project is not likely to adversely affect Snake River spring/summer chinook salmon or its critical habitat in the short term. The BA also concluded that, in the long term, reductions in management-induced sediment and erosion as a result of project implementation would likely benefit the species and its habitat. (TB AR Dkt. 29, App. E at 56). NMFS, the federal agency with jurisdiction over these anadromous fish under the ESA,

- 14 -

disagreed with the Forest Service's determination in the BA and faxed a draft BO on August 3, 1995. The Draft BO found that the Thunderbolt Project proposal was likely to jeopardize the continued existence of the species and found that it could not identify any reasonable and prudent alternatives to the Project. (TB AR 25, at 000609). On August 8, 1995, representatives from the Forest Service and NMFS met to try to resolve conflicts and discuss possible reasonable and prudent alternatives, but the two agencies failed to come to agreement. (TB AR 25, at 000613). On August 11, 1995, the Forest Service responded to NMFS and addressed all the biological and environmental issues in the Draft BO. (TB AR 25, at 000617-622).

c. Resolution of Interagency Disputes. -- Under the terms of the MOA, the resolution of interagency disputes would take place in the first instance at the regional level. Thus, on August 11, 1995, the Forest Supervisors of the Boise and Payette National Forests requested elevation of the interagency disagreement to the regional level. (TB AR 25, at 000618). Unable to resolve the dispute after a full month of discussions, on September 11, 1995 the Regional Forester unilaterally elevated the disagreement to the national level for resolution. (TB AR 28, at 000705). The MOA provides that at the national level, appropriate representatives of the Forest Service, the Bureau of Land Management, NMFS, FWS, and EPA will review the evidence and make a binding decision. On September 12, 1995, the Forest Service distributed the FEIS to the other agencies. (TB AR Dkt. 34-35). On September 29, 1995, the

- 15 -

Assistant Administrator of NMFS, Rolland Schmitten, decided to defer to the Forest Service with regard to the decision to proceed with the Thunderbolt Project. (TB AR 25, at 000647).

On October 2, 1995, the Chief of the Forest Service directed the issuance of the Record of Decision ("ROD"), and implementation of the Thunderbolt Project. (TB AR 28, at 000707). On October 5, 1995, the Payette and Boise Forest Supervisors signed and issued the ROD. (TB AR 40). The Forest Service selected the plan, known as Alternative D, that

provides for the greatest attainment of the project's objectives of improving long term fish habitat by rehabilitating existing sediment sources, improving hydrologic conditions of affected watersheds, protecting long term soil productivity, and promoting regeneration of trees on burned areas.

(TB AR 40, at ROD-2).

As originally designed, the Thunderbolt sale would have yielded 32 million board acre feet of timber. However, due to the time needed for the extensive analysis and extended decision-making process, more than half of the timber deteriorated and became unmerchantable. (Id.). As currently designed, the sale will yield approximately 14 million board feet of timber distributed over approximately 3,237 acres. (TB AR 40, at ROD-1). The Forest Service will plant conifers and/or shrubs on 2,300 acres of the harvest area, including 1,214 acres designated as Riparian Habitat Conservation Areas, which are landslide prone. (Id.) The timber will be harvested by helicopter, and thus will require minimal

- 16 -

construction.<sup>12/</sup> On October 13, 1995, the Forest Service advertised the Thunderbolt Sale, and the winning bid was \$1,050,710.

4. The Main Salmon Post-Fire Recovery Project. -- The purpose of the Main Salmon Post-Fire Recovery Project is to "salvage timber, reforest salvage areas, improve water quality and fish habitat, repair and improve recreational trails, and enhance wildlife." (MS AR 37; at 1-1). The Main Salmon project includes four timber salvage sales, with a total of approximately 46 million board feet of timber to be offered for sale.<sup>13/</sup> Conventional logging methods will for the most part be used to harvest timber in these sales.

From the outset, the Forest Service solicited public involvement in planning the Main Salmon Project. Beginning in October, 1994, the Forest Service sent out a newsletter and sponsored a series of lectures on the information learned by the Landscape Assessment Team. (MS AR 36, at 003328). Scoping documents were mailed to interested parties in February, 1995.

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<sup>12/</sup> The decision authorizes construction of four helicopter pads and 320 feet of road; however, only two helicopter landings and about 50 feet of spur road must be built in order to harvest the timber required to be removed for this sale. The remaining landings and spur road need only be constructed if the contractor decides to harvest an optional component of this sale, which is not likely to happen because that timber is greatly deteriorated. Id.

<sup>13/</sup> The four sales are the Lower Elkhorn, the Fall/Carey, the Jenkins, and the Elkhorn Basin salvage sales. (MS AR 36). The Forest Supervisor scratched the French Creek sale, originally considered for the Main Salmon project. (Id.) Of these sales, only one, the Lower Elkhorn sale, was advertised prior to the date when ISC filed this lawsuit.

- 17 -

(Id.) Public meetings were held as well. (Id.) On June 1, 1995, the Forest Service published the Draft EIS for the Main Salmon Project, and gave the public 45 days to comment. (Id.)

At the same time, inter-agency consultation regarding the Main Salmon Project took place. On July 11, 1995, the FWS concurred with the Forest Service's BA, which concluded that the Main Salmon Project may, but is not likely to adversely affect threatened or endangered species. (MS AR 10-X, at 000591). NMFS and the EPA expressed their concerns about the Project to the Forest Service. (MS AR 31, at 002397; MS AR 10-F, at 000364). All the agencies took a one-day field trip to the site and then met to discuss the Project. (MS AR 10-G, 10-H). The Forest Service responded to all the comments received from EPA, the FWS and NMFS, and the general public. (MS AR Dkt. 32). On October 5, 1995, after repeated requests from the Forest Service to conclude consultations, NMFS sent a letter to the Regional Forester containing a summary of interagency agreements regarding the Main Salmon project, and ending NMFS' formal consultations. (MS AR 10-A, at 000335).

The Forest Supervisor of the Payette National Forest signed the decision notice ("DN") for the Main Salmon Post-Fire Project on October 11, 1995. (MS AR 36, at 3353). The Forest Supervisor Selected Alternative E, which includes four sales -- the Lower Elkhorn, the Fall/Carey, the Jenkins, and the Elkhorn Basin salvage sales -- as well as planting conifer seedlings, constructing new roads, constructing temporary roads, improving existing roads, closing existing roads upon completion of the timber haul, and

- 18 -

maintaining a wildlife movement corridor. (Id., at 003317-18). The DN also discusses the French Creek area, where the project will not include any salvage harvesting, but will include prescribed burning of several hundred acres. (Id.) Only one of the salvage sales had been advertised -- the Lower Elkhorn on October 12, 1995. None of the other salvage sales included in this Project had been advertised prior to ISC filing its complaint in this case.

D. This Litigation And The District Court Opinion. -- ISC filed its complaint in this case on October 25, 1995, alleging that the Forest Service had: (1) exceeded its authority under the Administrative Procedure Act ("APA"); (2) continually engaged in ecologically destructive activities; and (3) violated the public trust by failing to preserve the trust resources. ISC sought to enjoin permanently the Forest Service's salvage logging Project activities in the Boise and Payette National Forests and to cancel any salvage sales contracts made pursuant to the Thunderbolt, Main Salmon and Lower South Fork Salmon Projects. Both sides moved for summary judgement.

The district court, in an unpublished opinion, completely rejected ISC's claims. Idaho Sporting Congress v. Forest Service, No. CV 95-419-S-EJL (D. Id. January 8, 1996). The district court held (ER 38, at 4) that only two of the seven sales challenged by ISC were ripe for review under the Rescissions Act -- the Thunderbolt and the Lower Elkhorn sales -- because these were the only sales that the Forest Service had advertised within the 15 days prior to the time ISC filed suit. Then, finding (Id., at 7)

- 19 -

that the scope of judicial review under the Rescissions Act is "extremely narrow," the court determined that the Forest Service's decision to proceed with the two sales was proper. Specifically, the court held that the Forest Service was not arbitrary and capricious in deciding proceed with the Thunderbolt and the Lower Elkhorn sales (*Id.*, at 10-12) because it was entitled to rely on its own experts and had amply documented the reasons for its decision in the Administrative Record. Moreover, the court held (*Id.*, at 16) that the Forest Service's decision to permit these two sales was consistent with the President's directive implementing the Rescissions Act. Finally, the court held (*Id.*, at 19) that in deciding to permit salvage logging, the Forest Service did not breach its duty to preserve public trust resources.<sup>14/</sup>

This appeal followed.

#### SUMMARY OF ARGUMENT

1. ISC's claims can only be considered by this Court under the Rescissions Act. Its challenge of the five salvage sales that have not yet been advertised, in the guise of a challenge to "projects," is merely an attempt to circumvent the clear language of the Rescissions Act limiting judicial review to those challenges brought within fifteen days of initial advertisement of a sale.

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<sup>14/</sup> The court also struck ICL's Exhibits F, G, K-R, T, and W as outside the administrative record because they were not before the Forest Service when it made its decision to proceed with the Thunderbolt and Lower Elkhorn sales. In this appeal, ISC attempts to rely (ISC's Tab 14) on Exhibit K, however, ISC does not appeal the district court's decision to strike that exhibit. Therefore, this Court should not consider that document in deciding this appeal.

- 20 -

Thus, this Court may only consider ISC's challenges to the Thunderbolt and the Lower Elkhorn salvage sales. The Administrative Procedure Act does not apply to any of these sales because there is an adequate remedy at law under the Rescissions Act.

2. ISC's attacks on the Thunderbolt and Lower Elkhorn sales as arbitrary and capricious must fail under the Rescissions Act, Section 2001 (b), (c), (f), and (i). Judicial review of the Forest Service's decision is narrowly circumscribed by the Act. Moreover, the Rescissions Act expressly states that salvage sale documents are deemed to satisfy the ESA and other environmental laws. The Forest Services' decision cannot be found arbitrary and capricious simply because certain other agencies opined that it might not comply with the ESA and other environmental laws -- a view ISC shares. ISC's claims relating to the arbitrary and capricious nature of the Forest Services' decision are, in essence, thinly disguised ESA and NEPA claims, which cannot succeed under the terms of the Rescissions Act. Because the Rescissions Act displaces these environmental laws, the district court properly granted the Forest Service's motion for summary judgment.

3. The Forest Service's decision to proceed with the Thunderbolt and Lower Elkhorn sales was in complete conformance with the President's instructions to the relevant agencies on how to implement the Rescissions Act. The President's directive, moreover, by its terms, does not create legal rights, nor does it

- 21 -

alter the legal requirements of the Rescissions Act. The district court properly held that these sales were valid.

4. The Forest Service did not violate state law in determining that it could proceed with the Thunderbolt and Lower Elkhorn sales. The Forest Service faithfully executed the Thunderbolt and Lower Elkhorn decisions in compliance with the Rescissions Act, and therefore did not violate its public trust responsibilities.

#### STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. Douglas County v. Babbitt, 48 F. 3d 1495, 1501 (9th Cir. 1995).

#### ARGUMENT

I. THE RESCISSIONS ACT GOVERNS JUDICIAL REVIEW OF ALL TIMBER SALVAGE SALES AND THUS THE DISTRICT COURT PROPERLY DISMISSED ISC'S APA CLAIMS AND ITS CLAIMS AS TO THE FIVE SALES NOT RIPE FOR REVIEW UNDER THE ACT.

##### A. Introduction.

On appeal, ISC seeks to challenge salvage timber projects rather than individual project sales. ISC argues (Br. pp. 5-11) that even though the Rescissions Act limits judicial review to individual sales, the APA affords an alternative means of review of the projects. As we discuss below, ISC's argument has no merit. The Rescissions Act provides for judicial review of sales based on the record for sales, and is extremely precise about the timing of challenges to sales. The APA allows review only where no other means is available under law. Therefore, the Rescissions Act must control in this case.

- 22 -

B. The Rescissions Act Does Not Permit Judicial Review Of Project Decisions.

ISC admits (Br. 5-6) that the Rescissions Act sets procedures for the judicial review of salvage sales, but does not provide for review of wildfire recovery projects. Thus, ISC seeks this Court to review under the APA the Forest Service's decision to proceed with three wildfire recovery "projects," which just happen to encompass seven salvage sales. In this way, ISC can argue (Br. 7-8) that its challenges of final decisions to proceed with the projects are ripe under the APA, 5 U.S.C. Section 701 et seq. According to ISC (br. 7), this reading of the Rescissions Act and the APA is entirely consistent with the goals of the Rescissions Act because it will eliminate unnecessary delays in seeking review of individual sales and will discourage duplicative lawsuits pertaining to the same projects but different sales involving common issues of law and fact.

ISC's claims can only be considered by this Court under the Rescissions Act. Its challenge of the five salvage sales that have not yet been advertised, in the guise of a challenge to "projects," is merely an attempt to circumvent the clear language of the Rescissions Act limiting judicial review to those challenges brought within fifteen days of initial advertisement of a sale. ISC's reading ignores the plain language of both the Rescissions Act and the APA.

The Rescissions Act specifically states "[a]ny challenge to [a salvage timber] sale must be filed . . . within 15 days after the date of initial advertisement of the challenged sale." Section

- 23 -

2001(f)(1) (emphasis supplied). Congress clearly intended that sales be challenged on a sale by sale basis, thereby making such challenges more difficult. Congress created a window of opportunity of 15 days to bring any challenge to a specific salvage sale.<sup>15/</sup> The language found in this provision of the Rescissions Act could not be more clear, and that plain language must be given effect. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (the first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning).

Moreover, the only actions reviewable under the APA are "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court . . . ." Section 704. In this case, the Rescissions Act specifically makes agency action regarding salvage sales reviewable. Section 2001(f). That review is provided with certain limitations and restricts the relief sought to permanent injunction, modification of, or voiding of the salvage sale.<sup>16/</sup> Section 2001(f)(4).

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<sup>15/</sup> The Big Flat salvage sale was advertised on October 26, 1995, one day after ISC filed its Complaint on October 25, 1995. For this reason, ISC's claim with regard to that sale is not properly before this Court because the challenge was not brought during the 15-day window created by Congress. Moreover, the Big Flat sale has been withdrawn, and is therefore not before this Court.

<sup>16/</sup> The APA further provides that "[n]othing herein (1) affects other limitations on judicial review . . . ; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." § 702.

- 24 -

ISC wants to challenge the three project decisions as final agency actions under the APA, but ignores the fact that the APA only provides for review of final agency action "for which there is no adequate remedy in a court." Section 704. The relief ISC seeks (Br. 8) is for this Court to review "approved projects prior to such time as the individual sales therein are advertised." The relief, however, is inconsistent with the plain language of the Act. ISC is clearly provided a remedy for salvage sale grievances under Section 2001(f)(4) of the Rescissions Act. Therefore, because ISC is not without adequate remedy, the APA does not create an additional cause of action to review such final agency actions. The procedures for judicial review outlined in the Rescissions Act apply to all seven challenged sales in this case.

C. The District Court Properly Dismissed ISC's Claims Regarding Five Of The Salvage Sales Because Those Sales Are Not Ripe For Review Under The Rescissions Act. -- ISC's entire argument pertaining to five of the seven salvage sales at issue is premised on review under the APA. As discussed *supra*, the APA is not applicable, and the judicial review provisions of Section 2001 require that any challenge to a salvage sale must be brought within 15 days of initial advertisement of the sale. Section 2001(f)(1). ISC filed its complaint in this case on October 25, 1995, and filed its amended complaint on November 7, 1995. Thus, any sales not initially advertised before the filing of the amended complaint cannot be properly challenged pursuant to Section 2001.

- 25 -

Only the Thunderbolt, Lower Elkhorn, and the Big Flat were initially advertised at that time. Therefore, ISC's challenge with respect to the remaining unadvertised sales is not ripe for review. In addition, the Big Flat sale was advertised, but received no bids and was subsequently withdrawn. Therefore, the Big Flat sale is not ripe for review for the same reasons those sales not yet advertised are not ripe for review. There is no controversy under the Rescissions Act, and there will not be one until such time as the Big Flat salvage sale may be advertised again.

In effect, Congress has legislated that Section 2001 sales which have not yet been advertised do not have an immediately threatened effect, and are thus not ripe for review. The jurisdiction of federal courts is limited to concrete cases or controversies "ripe" for review by Article III of the U.S. Constitution. See Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982). The Supreme Court has characterized ripeness as having a "twofold aspect," Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967), requiring courts to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. The "concrete" effects necessary for judicial review do not exist unless agency action has an actual or immediately threatened effect. Id. at 152. See Lujan v. National Wildlife Federation, 497 U.S. 871, 891-92 and n.3 (1990). Judicial intervention prior to the advertisement of individual salvage sales

- 26 -

would also frustrate Congress's intent that the Secretary be authorized to expedite sales subject to Section 2001.

For these reasons, ISC's claims as to any salvage sales which have not been advertised are not ripe for judicial review and were properly dismissed by the district court. Though it is clear that ISC would like to avoid the application of Section 2001 to its claims, it is equally clear that the Rescissions Act governs challenges to these salvage sales, whether they have been advertised yet or not.

II. THE FOREST SERVICE'S DECISION TO PROCEED WITH THE THUNDERBOLT AND LOWER ELKHORN SALES WAS REASONABLE AND AMPLY SUPPORTED IN THE ADMINISTRATIVE RECORD.

A. The Standard Of Review Is Extremely Narrow Under The Rescissions Act. -- ISC argues (Br. 22-23), citing case law interpreting the APA, that the standard of review to be applied in this case is the is the standard that is ordinarily applied under the APA. ISC claims (Br. 23) that an "arbitrary and capricious" decision is one which modifies longstanding policies without explanation, one for which the agency fails to consider negative responses to a project and acts solely on the basis of "questionable" empirical studies.

However, the Rescissions Act changes the legal framework in ways that greatly reduce the applicability of the usual APA standard. Section 2001(f)(4) of the Rescissions Act authorizes highly circumscribed judicial review to determine whether an agency decision on a salvage sale "was arbitrary or capricious or otherwise not in accordance with applicable law (other than those

- 27 -

laws specified in subsection (i))." The Act places several major limitations on the scope of judicial scrutiny. First, a court may not address the "scope and content" of the EA and BE, which are left to the Secretary's "sole discretion." Rescissions Act, Section 2001(c)(1)(C). Second, a court may not review the extent to which a document embodying decisions relating to salvage sales considers environmental effects or is consistent with the Forest Plan's standards and guidelines, because that is also within the Secretary's "sole discretion." Rescissions Act, Section 2001(c)(1)(A). Finally, the Court must "deem satisfied" NEPA, ESA, or any other natural resource or environmental laws. Rescissions Act Section 2001(i). What remains is a very narrow review of whether the "decision to prepare, advertise, offer, award or operate the sale was arbitrary and capricious or otherwise not in accordance with applicable law." Rescissions Act, Section 2001(f)(4).

The standard of review under the Act is "extremely deferential." Kentucky Heartwood, Inc. v. U.S Forest Service, 906 F. Supp. 410, 414 (E.D. Ky. 1995). Under this "extremely deferential standard of review . . . a challenger must go a long way to have a decision overturned." Id. ISC simply ignores the judicial review provisions in favor of traditional review of agency action under the APA. ISC's argument must fail because it asks this Court to repeal, in effect, the limited scope of judicial review that Congress provided for these sales.

- 28 -

B. The Forest Service Included In The Administrative Record Ample Scientific Evidence Supporting Its Decision. -- Under routine APA review, the Forest Service's decision would withstand arbitrary and capricious review. The court's role is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Thus, "[t]he ultimate standard of review is a narrow one: the court is not empowered to substitute its judgment for the agency's." Id. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (review under the arbitrary and capricious standard is "searching and careful" but "narrow," and court may not substitute its judgment for that of agency).

This deferential approach is "especially appropriate where the challenged decision implicates substantial agency expertise." Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 1993) (citing U.S. v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990)). See FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813-814 (1978) (where the agency's particular technical expertise is involved, the court must be particularly zealous in guarding the agency's discretion); Baltimore Gas & Electric v. NRDC, 462 U.S. 87, 103 (1983). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378

- 29 -

(citing Overton Park, 401 U.S. at 416). The court is to "defer to the agency's interpretation of equivocal evidence, so long as it is reasonable." Central Arizona Water Conservation Dist. v. U.S. EPA, 990 F.2d 1531, 1539 (9th Cir. 1993), cert. denied, 114 S. Ct. 94 (1993).

ISC clearly disagrees with the scientific findings and conclusions of the Forest Service in support of its decision to proceed with the salvage sales. It is well established that a mere disagreement among experts is not enough to overturn an agency's decision. ISC goes far beyond this usual allegation and makes the outrageous and totally unfounded claim (Br. 24) that the Forest Service "engaged in spin control to the point of obtaining a fraudulent memorandum from the team leader of the [scientific] panel, Thomas Hoekstra." ISC also (Br. 24) assaults Mr. Hoekstra's character and credibility, arguing that he committed "a gross misrepresentation of the truth (a.k.a., 'li[ed]')" in his statements on the record. ISC's claims have no place in this proceeding. There is absolutely no evidence that the Forest Service misrepresented the facts or "lied." ISC's baseless claims should be stricken. What the record does demonstrate is that the Forest Service went above and beyond its legal obligations, even prior to the passage of the Rescissions Act, to ensure that there was sound science to back up its decisions in this case. The only gross misrepresentations belong to ISC with regard to the depth of support in the record for the Forest Service's decision.

- 30 -

1. The Thunderbolt Project. -- With respect to the Thunderbolt Project, the Forest Service, as discussed in the Statement of Facts (pages \*\*\*, supra), completed an analysis of the entire watershed, assessed the impacts the project would have in the DEIS, and in particular, assessed the impacts the project would have on endangered fish species. (TB AR Dkt. 29). As issues and concerns were raised by the other agencies, the Forest Service convened the Science Panel to

review the scientific merit of the material presented on sediment yield, sediment routing, and fisheries habitat in the Draft Environmental Impact Statement (DEIS) for the Thunderbolt Wildfire Recovery Project on the Boise and Payette National Forests. The panel was to determine if there was a better scientific basis for the decision and make recommendations to ensure that decision makers have information based on the best scientific analyses and data available.

(TB AR 27, at 000657). The Science Panel concluded that the Forest Service "used the best analytical methods available for estimating erosion and sediment delivery." (Id.)

The Science Panel did find room for improvement in the Draft EIS. The final report identified the reasons why the Panel was unable to support the conclusion of long-term improvement in spawning and rearing habitat and made recommendations for addressing these concerns. (Id., at 000657-658). The Forest Service addressed the panel's major recommendations, and reflected the additional analysis and changes in the FEIS. The Science Panel reviewed the changes made between Draft and Final EIS and concluded:

(1) the revisions have addressed the major recommendations-- estimating sediment production associated with the fire and

- 31 -

placing sediment production associated with the action prescriptions within this context; (2) additional sources of data were used to derive these estimates; (3) the forests could not address instream transport in a quantitative manner due to lack of methods/science; and (4) the analysis focused on the subwatersheds of most importance.

(Id., at 000679). The Science Panel was comprised of Forest Service personnel, including two fisheries scientists from the Rocky Mountain Research Station. (TB 27, at 000656).

Moreover, when NMFS issued its draft biological opinion on potential adverse consequences to fish from the salvage sales, the Forest Service painstakingly rebutted NMFS's opinion. It did so even though the draft biological opinion was issued after the effective date of Section 2001. (TB AR 25, at 000619). A Forest Service Fisheries Biologist, Steven J. Kozel,<sup>12/</sup> analyzed the NMFS draft opinion and determined that the Project is not likely to adversely affect Snake River spring/summer chinook salmon or its critical habitat in the short term. (TB AR 29, App. E at 56). Most significantly, Kozel also found that in the long term, reductions in forest-management (human) induced sediment and erosion as a result of project implementation would likely benefit the species and its habitat. (TB AR 29, App. E at 56). The analysis, determination and rationale for this determination is found in the Forest Service's Biological Assessment ("BA") of Endangered Fish Species. (TB AR 29, App. E). Kozel also worked

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<sup>12/</sup> See List of Preparers contained in the Draft Environmental Impact Statement ("DEIS") and in the Final EIS, listing Steve Kozel as a Fisheries Biologist and listing the participation of Tim Burton, also a Forest Service Fisheries Biologist (TB AR 29 at pp. V-1, V-2; AR 39 at pp. V-1, V-2).

- 32 -

with Dr. David Burns, a Forest Service Fisheries Biologist, to resolve concerns regarding the analysis and documentation in the BA and Watershed Analysis. (TB AR 72, at 001770-001789). It is simply untrue that Dr. Burns has been unwilling to support the Thunderbolt Project, as ISC alleges (Br. 24). In his final comments on the Thunderbolt Project, Dr. Burns states

[p]rovided that the FEIS is edited to make corrections estimates of risk, etc., then there should be plenty of material in the entire project record for a line officer to make a reasoned choice among alternatives taking into account the uncertainties involved.

(TB AR 72, at 001789). Also, fisheries in the sales area are discussed in the "Affected Environment" and "Environmental Consequences" sections of the DEIS and FEIS, which were prepared by an interdisciplinary team, including Kozel and Tim Burton, another Forest Service Fisheries Biologist. (TB Dkt. AR 29 at pp. III-26 through III-34, IV-24 through IV-31, V-1, V-2; Vol. 6, Tab 39 at pp. III-43 through III-54, IV-38 through IV-46, V-1, V-2).

2. The Main Salmon Project. -- Similarly, on the Main Salmon Project, the Forest Service completed a Biological Assessment ("BA") for the Main Salmon Post-Fire Project Preferred Alternative, which documents that the alternative "is not likely to adversely affect chinook salmon." (MS AR 36, at 003350; MS AR 43, at 003582). The Forest Service addressed the FWS's concerns and found that the Preferred Alternative does not violate PACFISH<sup>18/</sup> or roadless area expectations of the NMFS Biological Opinion simply

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<sup>18/</sup> PACFISH is the current management guidelines for activities in anadromous watersheds. (MS AR 35, at 003051).

- 33 -

because it did not perform a watershed analysis per se. Instead, the Preferred Alternative amends the standards and guidelines in the Payette National Forest Plan to allow road construction stream crossings and approaches. (MS AR 8, at 000314; MS AR 36, at 003346-47).

In addition, the Forest Service performed an extensive landscape analysis and an intensive site-specific analysis in the project EIS. The Landscape Analysis provided a detailed and comprehensive examination of biological and ecological relationships at the watershed and subwatershed levels and examined inherent erosion hazards, sediment delivery, streamflow, water yield, management disturbances, ecological linkages, and other factors. (MS AR 33, at 002619-2807). All of this was further examined at the site-specific level in the Draft and Final EIS. (MS AR 35, at 003047, 003054-56, 003036, 003075-80, 003117-40, 003274-75, 003277, 003280-92, 003303; MS AR 36, at 003317-18, 003329-35, 003342-48, 003350-51; MS AR 37, at 2-26, 2-33 to 35, 2-42 to 59, 3-37 to 61, C-2 to 3, C-5, and Appendices D and F).

The Forest Service's Decision Notice documents its finding that the Main Salmon Post-fire Project poses a low risk of adverse effects on listed salmon because of the adherence to harvest buffers, the exclusion of timber harvest and road construction in areas susceptible to high erosion rates or instability, the harvest of only dead and imminently dead trees, the location of new roads limited mainly to areas of relatively flat ground without steep sideslopes, and extensive road-related watershed improvements. (MS

AR 8, at 000315; MS AR 17, at 001009-11, 001012; MS AR 30, at 002158; MS AR 35, at 003022-23, 003051, 003062, 003134-35, 003138-40; MS AR 36, at 003346-51; MS AR 37, at 2-1 to 2, 2-30, 2-41, 3-54 to 56, 3-59 to 61). The project does not reduce Riparian Habitat Conservation Area widths or change or retard attainment of riparian management objectives as they are described in the Payette National Forest Plan. (MS AR Vol 1, Tab 8 at 000315; Vol. 7, Tab 35 at 003051, 003062, 003072; Vol. 7, Tab 36 at 003346-47; Vol. 7, Tab 37 at pp. 2-30, 2-41, 3-51; Vol. 9, Tab 43 at 003528).

ISC alleges (Br. 25) that the Forest Service did not rely upon the expertise of any fisheries biologists. This claim is without merit and unsupported by the administrative record. Forest Service Fishery Biologists Richard D. Uberuaga and David C. Burns completed a Biological Assessment ("BA") for the Preferred Alternative, which documents that the alternative "is not likely to adversely affect Snake River spring/summer and fall chinook salmon nor result in adverse modification of critical habitat." (MS AR Vol. 9, Tab 43 at 003558, 003582). Forest Service Fisheries Biologist Eric R. Veach prepared a biological evaluation ("BE") for Bull Trout, Westslope Cutthroat Trout and Steelhead Trout and determined the proposed action will not decrease the viability of these sensitive species or lead to their listing under the Endangered Species Act (MS AR Vol. 9, Tab 39 at 003435, 003459). The administrative record also contains an extensive discussion of fish habitat (MS AR Vol. 3, Tab 17). Fisheries are discussed in the "Affected Environment and Environmental Effects" chapter of the DEIS, which were prepared by

- 35 -

an interdisciplinary team, including Uberuaga, a Forest Service Fisheries Biologist (MS AR Vol. 7, Tab 35 at 003130-3140, 003251). Finally, the Forest Service's Decision Notice also documents its finding that the Main Salmon Post-fire Project poses a low risk of adverse effects on listed salmon (MS AR Vol. 7, Tab 36 at 003350).

The Forest Service is entitled to rely upon its own experts in this determination. This deferential approach is "especially appropriate where the challenged decision implicates substantial agency expertise." See supra at 33. This specifically includes reliance on the Forest Service's own fisheries experts, as it did here. Thus, even under the typical APA review of agency action, ISC's claims must fail.

C. The Forest Service Had Good Reason To Amend Its Forest Plans For The Payette and Boise National Forests And Depart From Previous Management Policies And Standards. -- Similarly, ISC's argument (Br. 23) that the Forest Service's decision to proceed with the Thunderbolt And Elkhorn sales represents an "about-face" from long-standing policy regarding the Payette and Boise National Forests, must be rejected. The primary and most obvious shortcoming of ISC's argument is the failure to recognize the impact of wildfires of historic proportion that raged through Idaho in 1994. The 1994 wildfires dramatically altered the conditions on the ground in the South Fork Salmon River watershed. (TB AR 39, I-3). The FEIS describes the magnitude of the 1994 wildfires -- including the Chicken, Thunderbolt and portions of the Corral and Blackwell wildfires -- which burned over 150,000 acres in the South

- 36 -

Fork Salmon River drainage of the Boise and Payette National Forests. (TB AR 39, at I-1). Only four trees per acre within the harvest area have any live foliage left and could possibly survive. (TB AR 40, at ROD-2). The magnitude of these fires was significantly greater than those considered in the forest plans. (TB AR 202, at II-95; Supp. TB AR 204, at II-56).

In the Final EIS and in the ROD, the Forest Service in great detail explained its departure from previous standards and guidelines in deciding to proceed with the Thunderbolt Sale. In the ROD, the Forest Service states that although the decision to amend the Forest Plans did not come easily, the Service had exercised careful scrutiny and had a solid rationale for the amendments. (TB AR 40, at ROD-4). First and foremost was the undisputed fact that additional fire-induced sedimentation will occur. (Id.) Second, was the fact that the Forest Service lacked appropriated funds to implement restoration projects. According to the Service, "prudent use of monies generated by this project can be used to rehabilitate long-standing, chronic sedimentation sources and lessen the fire-induced impacts to aquatic resources." (Id.) The Forest Service therefore concluded that the Forest Plan amendments, which simply added the Thunderbolt and Main Salmon Post Wildfire Projects to the list of activities to be implemented by the Plans, were not significant because they did not change the goals and objectives of the existing Plans. (Id.; TB AR 40, at summary-3).

- 37 -

Moreover, all forest plans -- including those for the Payette and Boise National Forests -- are subject to amendment and periodic revision. Indeed, effective forest management requires response to changing conditions. Forest planning is an adaptive management process which remains flexible in order to be most responsive to changing conditions in the landscape situation and anticipates amendments to the plans. See 16 U.S.C.1604 (f)(4). The Forest Service is constantly adapting its management plans to better fit the desires of the public, the changing conditions of the forest due to drought, fire, storms and human-induced impacts, and changing science. (TB AR 203, at R-3). For example, if during the planning stages for a project, Forest Service or independent research shows a more protective way to build roads or provide for wildlife, the Forest Service adapts. Likewise, the Forest Service must adapt its management to the occurrence of natural events such as the Thunderbolt wildfire.

For the foregoing reasons, the Forest Service has satisfied the Rescissions Act's highly deferential review in designing and approving the challenged sales. Indeed, the Forest Service took measures above and beyond the requirements of the Act. Accordingly, this Court must uphold the district court's decision that the Forest Service was not arbitrary and capricious in going forward with the Thunderbolt and Lower Elkhorn salvage sales.

U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
GENERAL LITIGATION SECTION  
601 PENNSYLVANIA AVENUE, N.W.  
WASHINGTON, D.C. 20004

FAX NUMBER 305-0506, -0267, -0429  
CONFIRMATION NUMBER (202) 305-0504

PLEASE DELIVER TO:

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Bob Baum 208-3877  
Dinah Bear 456-0753  
Ted Boling 514-4231  
Peter Coppelman, 514-0557  
Lois Schiffer,  
Jim Simon  
Al Ferlo 514-4240  
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Don Knowles (503) 326-6282  
Karen Mouritsen 219-1792  
Roger Nesbit (503) 231-2166  
Chris Nolin 395-4941  
Jim Sutherland (503) 465-6582  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742

NUMBER OF PAGES: 22

DATE: January 16, 1996

FROM: Lisa Holden, (202) 305-0474

MESSAGE: Idaho Sporting Congress v. U.S. Forest Service (Thunderbolt Sale). Attached is a Memorandum Decision and Order issued on January 10, 1996 granting federal defendants' motion for summary judgment and to dismiss this action. Judge Lodge of the District of Idaho found that the Forest Service did not act in an arbitrary or capricious manner in offering the Thunderbolt timber sale, and further found no violations of the public trust doctrine or APA.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

IDAHO SPORTING CONGRESS, INC., Plaintiff.	)	
	)	
vs.	)	Case No. CV 95-0419-S-BJL
	)	
U.S. FOREST SERVICE, Defendant.	)	MEMORANDUM DECISION AND ORDER
	)	
and	)	
	)	
INTERMOUNTAIN FOREST INDUSTRY ASSOCIATION, Defendant-Intervenor.	)	
	)	

Plaintiff Idaho Sporting Congress ("ISC") filed a complaint seeking declaratory and injunctive relief with respect to the Forest Service's decision to conduct salvage logging within and around the Main Salmon River and South Fork salmon River drainages, in the Boise and Payette National Forests. The challenged logging activities consist of seven proposed salvage timber sales described in three post-fire projects. Two of the

challenged timber sales, the Thunderbolt Salvage Sale and the Elkhorn Salvage Sale, have been advertised and are ripe for review under §2001(f) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, ("Rescissions Act"), Pub. L. No. 104-19.

Currently pending before the court are ISC's Motion for Summary Judgment, the Forest Service's Motion to Dismiss and Cross Motion for Summary Judgment, and the Forest Service's Motion to Strike Extra-Record Documents. Having reviewed the relevant administrative records, the pleadings, motions, and memoranda submitted by the parties, the court finds the claims and arguments have been adequately briefed, and that oral argument is unnecessary and would further delay resolution of the plaintiff's claims. The court also notes that all parties have requested that the pending matters be decided without oral argument. Accordingly, the court issues the following memorandum decision based on the written record before it.

#### Judicial Review.

Preliminarily, the court will address the Forest Service's contention that of the challenged logging activities, only two timber sales, the Thunderbolt and Lower

MEMORANDUM DECISION AND ORDER - Page 2

Elkhorn, are ripe for judicial review. The Forest Service asserts that ISC's claims with respect to the five remaining salvage timber sales must be dismissed. The court agrees.

The logging activities that the plaintiff seeks to enjoin consist of seven individual salvage timber sales, which are components of three post-fire projects that the Forest Supervisors of the Payette and Boise National Forests have selected for implementation: the Thunderbolt Wildfire Recovery Project (ROD dated October 5, 1995); the Main Salmon Post-Fire Project (ROD dated October 11, 1995); and the Lower South Fork Salmon Post-Fire project (ROD dated October 11, 1995).

The Thunderbolt Wildfire Recovery Project calls for one salvage timber sale, the Thunderbolt Salvage Sale, which was advertised on October 13, 1995. The Main Salmon Post-Fire Project includes four salvage timber sales. Of these proposed sales, however, only one, the Lower Elkhorn, has been advertized. The Lower South Fork Salmon Post-Fire Project calls for two salvage sales. One has not yet been advertized. The other, the Big Flat sale, was advertized on October 26, 1995, but was withdrawn on December 6, 1995.

There is no dispute in this case that the salvage sales at issue are governed by the Rescissions Act. The judicial review provisions of the Rescissions Act require that

any challenge to such sale must be filed in such district within 15 days after the date of initial advertisement of the challenged sale. The Secretary may not agree to, and a court may not grant, a waiver of the requirements of this paragraph.

§2001(f) (1).

ISC filed its Complaint on October 25, 1995, and its Amended Complaint on November 7, 1995. Both complaints seek an injunction against all salvage sales in the three post-fire projects. However, as indicated above, only the Thunderbolt, the Lower Elkhorn, and the Big Flat sales had been initially advertised. The other four sales, which had not been advertised at the time ISC filed its complaints, were not then ripe for review under the Rescissions Act. Additionally, the Big Flat sale has been withdrawn, and thus, with respect to that sale, there is no present controversy under the Rescissions Act. Accordingly, the court concludes that only the Thunderbolt and Lower Elkhorn sales are subject to review under the Rescissions Act.

Plaintiff ISC maintains, however, that although only two sales are subject to review under the Rescissions Act, the

MEMORANDUM DECISION AND ORDER - Page 4

post-fire recovery projects authorizing the unadvertised sales may nonetheless be challenged as final agency actions under the APA. ISC suggests that by proceeding with the challenges to all of the sales, the court will further the Rescissions Act's purpose of expediting judicial review. Further urging the court, ISC argues that with respect to the timber sales authorized in the Main Salmon Post-Fire Project, judicial economy will be served by reviewing the advertised and unadvertised sales in the same action, since the underlying administrative record is common to all of them.

As noted by the Forest Service, however, the only actions reviewable under the APA are "[a]gency action made reviewable by statute a final agency action for which there is no adequate remedy in a court . . . 5 U.S.C. § 704 (emphasis added). Here, §2001(f)(1) of the Rescissions Act specifically makes agency action regarding salvage sales reviewable. That review, however, may be had only after the proposed sale has been advertised. Furthermore, relief is restricted to a permanent injunction of, or the modification or voiding of,

the challenged salvage sale. The APA does not permit different or additional relief.<sup>1</sup>

Here, the relief sought by ISC -- the permanent injunction of all salvage timber sales in the Boise and Payette National Forests -- is relief expressly provided for by the Rescissions Act, and thus, ISC is not without remedy in a court. Thus, the APA does apply to provide an additional cause of action for judicial review. The Forest Service's motion to dismiss ISC's challenges to any unadvertised salvage timber sales therefore should be granted. Accordingly, the court's review shall be limited to the Thunderbolt and Lower Elkhorn timber salvage sales.

#### Review Under the Rescissions Act.

Judicial review under the Rescissions Act is very limited. The district court is granted authority to permanently enjoin, order modification of, or void an individual salvage sale "if it is determined by a review of the record that the decision to prepare, advertise, offer,

<sup>1</sup> The APA expressly states that "[n]othing herein (1) affects other limitations on judicial review ...; or (2) confers authority to grant relief if any other statute ... expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

limited  
review

award, or operate such sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i).” 2001(f)(4). Because the Act specifically exempts the decision from otherwise applicable resource laws, and in view of the wide latitude granted to the Secretary to consider a sale’s environmental impacts, the scope of review permitted by the Rescissions Act is extremely narrow.

An agency decision may be deemed arbitrary and capricious if the agency fails to consider all relevant factors, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971), or if the agency has “offered an explanation for its decision that runs counter to the evidence before the agency” or has failed to articulate “a rational connection between the facts found and the choice made.” Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Natural Resources Defense Council v. EPA, 966 F.2d 1292, 1297 (9th Cir. 1992). Review under the arbitrary and capricious standard is searching and careful, but narrow, and the court may not substitute its judgment for that of the agency. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

A deferential approach is "especially appropriate where the challenged decision implicates substantial agency expertise." Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568, 1571 (9th Cir. 93) (citing U.S. v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990)). See RCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813-14 (1978) (where the agency's particular technical expertise is involved, the court must be particularly zealous in guarding the agency's discretion). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378 (citing Overton Park, 401 U.S. 416).

With these standards in mind, the court addresses ISC's claims.

1. Were the Decisions to Proceed with the Salvage Sales Arbitrary and Capricious?

In its motion for summary judgment, ISC asserts that the Forest Service's decision to go forward with the Thunderbolt and Lower Elkhorn salvage sales was arbitrary and capricious

because it is contrary to long standing policy and the weight of the scientific evidence in the record.

a. The Thunderbolt Salvage Sale.

With regard to the Thunderbolt salvage sale, the court notes that the plaintiffs in the related case of Idaho Conservation League v. Thomas, Civ. No. 0425-S-EJL, ("ICL v. Thomas"), raised the identical issues. After a thorough review of the administrative record documenting the Thunderbolt Wildfire Recovery Project, this court on December 11, 1995, issued a memorandum decision concluding that the Forest Service's decision to proceed with the salvage sale was not arbitrary and capricious.

In ICL v. Thomas, as in this case, the plaintiffs argued that the Forest Service's decision should be deemed arbitrary and capricious because it contradicted the expert advice of the National Marine Fisheries Service, the Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Idaho Department of Fish and Game. All of those agencies strongly recommended against logging in the area and concluded that such action would further aggravate the already degraded habitat recognized as critical to threatened salmon. This court noted, however, the Forest Service is an expert on the

forest management and the impacts that management may or may not have on natural resources. The court concluded that notwithstanding substantial interagency disagreement, the Forest Service was entitled to rely on the opinions and analysis of its own experts. The fact that other qualified experts oppose the proposed sale, by itself, did not render the decision arbitrary and capricious. ICL v. Thomas, Memorandum Decision, at 15-16 (December 11, 1995).

After reviewing the administrative record underlying the Thunderbolt decision, the court concluded:

that the Forest Service adequately considered the issues raised by NMFS. Accordingly, the court concludes that NMFS' Biological Opinion and the concerns and recommendations contained therein, does not render the Forest Service's decision arbitrary and capricious.

Nor can the court conclude that the criticism, opinions and recommendations from the other agencies, however strong, render the Forest Service's decision arbitrary and capricious. The analysis of the impacts of helicopter salvage logging on sedimentation in the Idaho Batholith clearly falls within the Forest Service's area of expertise. Thus, the Forest Service clearly was entitled to rely on the opinions and studies of its own experts. While it properly considered the commenting agency's opposing views, the Forest Service was free to disagree with those views and to rely on its own expertise.

Id. at 18-19.

Plaintiff ISC submits that, contrary to this court's determination in ICL v. Thomas, all of the qualified experts

found that the Thunderbolt salvage sale will likely have an adverse impact on endangered salmon species and their designated habitat. ISC states further that the administrative record is devoid of any scientific evidence or qualified expert opinion to support the Forest Service's conclusion that salvage logging would not have an adverse impact on the salmon.

A review of the record for the Thunderbolt sale shows that ISC's contention is without merit. The Draft Environmental Impact Statement ("DEIS") was prepared by an interdisciplinary team of experts, including Forest Service fisheries biologist Steven J. Kozel. Also, fisheries biologist Dr. Tim Burton participated in the preparation of the DEIS and Final EIS. Additionally, the Biological Assessment ("BA") of Endangered Fish Species supports Kozel's determination that the Thunderbolt Project, including the salvage logging component, is not likely to adversely affect the endangered salmon or their critical habitat in the short term, and in the long term, the species were likely to benefit from implementation of sediment-reducing projects. Moreover, the fisheries resources are specifically discussed in the "Affected Environment" and "Environmental Consequences"

sections of the DEIS and FEIS, which were prepared by the interdisciplinary team.

Additionally, the Forest Service convened the "Science Panel" to review the scientific merit of the material presented in the DEIS on sediment yield, sediment routing, and fisheries habitat. This Science Panel was comprised of Forest Service personnel, included two fisheries scientists from the Rocky Mountain Research Station. The Forest Service considered and responded to the Science Panel's recommendations and revised its DEIS to incorporate the additional data and analysis requested, as reflected in the FEIS. After reviewing the changes made between the DEIS and the FEIS, the Science Panel concluded in a memorandum that the revisions in the FEIS had addressed the panel's major recommendations.

Finally, and specifically rebutting NMFS' draft biological opinion, Forest Service scientists analyzed existing studies which showed that helicopter logging would not change the probability of a landslide occurring on the sensitive riparian slopes.

Based on its review of the record, the court again concludes that the expert analysis referenced in the Record

of Decision, the DEIS, and the FBIS for the Thunderbolt Wildfire Recovery Project, provide the rational connection to the Forest Service's decision to proceed with the Thunderbolt salvage sale. Therefore, the court concludes that the decision was not arbitrary and capricious.

b. The Lower Elkhorn Salvage Sale.

With respect to the Lower Elkhorn salvage sale, ISC makes the same claim that all the scientific evidence indicates salvage logging in the watershed will jeopardize the continued existence of the endangered salmon, and that the record contains no opinion from a qualified fisheries expert to support the Forest Service's contrary conclusion.

As pointed out in the Forest Service's brief, the administrative record makes clear that Forest Service fisheries biologists Richard D. Oberuaga and David C. Burns completed the EA for the preferred alternative for the Main Salmon Post-Fire Project, which included the Lower Elkhorn salvage timber sale. The EA adequately documents the Forest Service's conclusion that the proposed logging activities are not likely to adversely affect the endangered salmon or result in adverse modification of their critical habitat.

Additionally, Forest Service fisheries biologist Eric R. Veach

prepared a Biological Evaluation ("BE") for other sensitive but not listed fish species and determined that the proposed action would not decrease their continued viability or lead to their listing under the Endangered Species Act. Also, the chapters of the DEIS that specifically discuss the fisheries were prepared by an interdisciplinary team that included fisheries biologist Richard Uberuaga.

Having reviewed the administrative record underlying the Forest Service's decision to proceed with the Lower Elkhorn sale, the court concludes that there is adequate scientific information, albeit from the Forest Service's own experts, to support the conclusion that the Lower Elkhorn timber salvage sale poses a low risk of adverse effects on the endangered salmon. Accordingly, the Forest Services' decision to proceed with the sale will not be deemed arbitrary and capricious under the Reversions Act.

**2. Is the Decision to Allow Salvage Logging Inconsistent with Presidential Directive and therefore Invalid?**

ISC next argues that the Forest service's decision to allow salvage logging in the Main Salmon River and South Fork Salmon River drainages must be set aside on the ground that the decision exceeds the limited authority delegated to the

agency with respect to implementing the Rescissions Act. ISC asserts that because President Clinton directed the Forest Service to apply current environmental standards to the timber salvage program, any action that violates such standards also violates the federal constitution and must be set aside.

To support its position, ISC cites to the Presidential Memorandum to the Secretaries of the Interior, Agriculture and Commerce and to the Administrator of the Environmental Protection Agency, dated August 1, 1995 ("Presidential Memorandum"). In the memorandum, the President states that although he did not support the timber salvage provisions of the Rescissions Act, the Act did "preserve our ability to implement the current forest plan standards" and "provides sufficient discretion for the Administration to protect other resources." Thus, the President directed the agency heads to move forward expeditiously to implement these timber-related provisions in an environmentally sound manner, in accordance with my Pacific Northwest Forest Plan, other existing forest and land management policies and plans, and existing environmental laws, except those procedural actions expressly prohibited by Public Law 104-13.

Presidential Memorandum.

Having reviewed the Record of Decision underlying the decision to proceed with the Thunderbolt salvage sale, and the

Record of Decision underlying the Lower Elkhorn sale, the court notes that with the exception of the specific "one-time" amendments to the Forest Plans, which the Forest Service concluded to be warranted by the changed conditions caused by the 1994 fires, the Forest Service determined that it had complied with the existing forest management policies and plans and with the substantive provisions of environmental laws. While the plaintiff properly may challenge the Forest Service's determination for arbitrariness or capriciousness, it may not assert substantive environmental laws to have the decision set aside, as such challenges have been prohibited by the Rescissions Act, signed into law by the President.

Because ISC has failed to demonstrate the premise of its claim -- that the Forest Service acted in disregard of the President's directive -- ISC's claim that the decision is constitutionally invalid likewise must fail.

**3. Does the Decision to Allow Salvage Logging Violate the Forest Service's Public Trust Duties?**

Plaintiff ISC also claims that the Forest Service breached its obligation to preserve public trust resources. ISC alleges that the Forest Service has disregarded its duties to preserve the forests and streams from destruction, to

secure favorable water flow, and to administer the forests for outdoor recreation, watershed, and wildlife and fish purposes. ISC asserts that under the broader review applicable to trust law principles, the Forest Service's decision to allow logging within the Main Salmon River and South Fork Salmon River drainages must be set aside.

The Forest Service, joined by defendant-interveners Intermountain Forest Industry Association, has moved to dismiss ISC's public trust claim. They assert that because the Rescissions Act expressly directs how the Forest Service is to manage the public trust with respect to salvage logging, the Forest Service's compliance with such directives necessarily discharges its public trust responsibilities.

The court has reviewed the authority cited by the parties to support their respective positions. However, the court finds the reasoning of Sierra Club v. Block, 622 F.Supp. 842 (D. Colo. 1985) to be particularly persuasive in this case. In Sierra Club, the plaintiff alleged, in addition to its APA and Wilderness Act claims, that the Forest Service violated the public trust by its failure to claim federal reserved water rights in a federal wilderness area. The Colorado district court dismissed the claim, explaining:

MEMORANDUM DECISION AND ORDER - Page 17

Under the "public trust doctrine," which is a common law concept, "[a]ll the public lands of the nation are held in trust [by the government] for the people of the whole country." . . . Consistent with the right to use the lands for public purposes, the government has the duty to under this doctrine to protect and preserve the lands for the public's common heritage . . .

However, "it is not for the courts to say how that trust shall be administer. That is for Congress to determine." Light v. United States, 220 U.S. 523, 537, (1911). Where Congress has set out statutory directives, as in the instant case, for the management and protection of public lands, those statutory duties "compris[e] all the responsibilities, which defendants must faithfully discharge." Sierra Club v. Andrus, 487 F.Supp. 443, 449 (D.D.C. 1980), see also Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 435 U.S. 1 (1981). Further, resort to the "public trust" doctrine as an additional remedy in this case is unnecessary given the duties already imposed by the Wilderness Act.

Sierra Club, 622 F.Supp. at 866.

As noted by ISC, Congress established the National Forest System "to improve and protect the forest . . . for the purpose securing favorable conditions of water flow" and to "preserve" the forests from "destruction." However, Congress also intended "to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." See 16 U.S.C. § 475. With the enactment of the Rescissions Act in 1995, Congress specifically directed the Forest Service to "prepare, advertise, offer and award" salvage timber sales so as to achieve, "to the maximum extent feasible, a salvage

timber volume above the program level," and that "[t]he preparation, advertisement, offering, and awarding shall be performed . . . notwithstanding any other provision of law." §2001(b)(1), (c)(4) (emphasis added).

Based on the reasoning of Sierra Club v. Block, this court concludes that, with respect to salvage timbers sales, the directives set forth in §2001 of the Rescissions Act comprise all of the responsibilities that the Forest Service must faithfully discharge. Thus, absent a violation of the Rescissions Act, which has not been established in this case, the Forest Service cannot be deemed to have breached its public trust duties. ISC's public trust claim therefore is dismissed.

#### Motion to Strike.

The Forest Service also has moved, pursuant to Fed. R. Civ. P. 12(f), for an order striking all extra-record documents submitted and referenced by ISC with its motion for summary judgment. Specifically, the Forest Service asks the court to strike Exhibits F, G, K-R, T and W, arguing that because these documents were never received by the Forest Service, and thus could not have been considered by the

decision maker, they should not be considered by the court in this action.

The court observes that judicial review of agency action generally is limited to review of the administrative record.

Friends of the Earth v. Hintz, 800 P.2d 822, 828 (9th Cir.1986). The task of the reviewing court is to apply the appropriate standard review to the agency decision based on the record the agency presents to the reviewing court.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985).

Although the court may allow supplementation of the record in carefully circumscribed circumstances, see National Audubon Society v. Forest Service, 4 F.3d 832 (9th Cir. 1993), ISC has failed to demonstrate that conditions giving rise to any such exception are present in this case. Accordingly, the court finds that the Forest Service's motion to strike should be granted, and that Exhibits F, G, K-R, T and W shall be stricken from the record and excluded from the court's consideration.

## ORDER.

Based on the foregoing memorandum decision, and being fully advised in the premises herein,

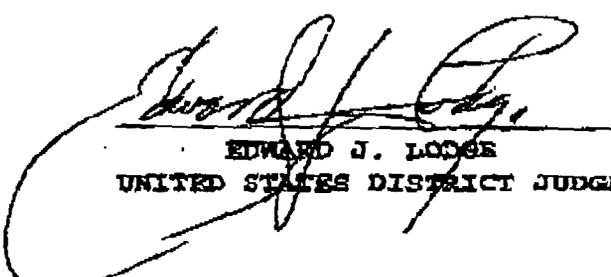
IT IS HEREBY ORDERED that plaintiff Idaho Sporting Congress' Motion for Summary Judgment (Dkt. No. 9) is DENIED;

IT IS FURTHER ORDERED that defendant United States Forest Service's Motion to Dismiss and alternative Motion for Summary Judgment, (Dkt. No. 22), joined by defendant-intervenor Intermountain Forest Industry Association, are GRANTED as set forth above.

IT IS FURTHER ORDERED that defendant Forest Service's Motion to Strike Extra-Record Documents (Dkt. No. 20) is GRANTED with respect to Exhibits F, G, K-R, T and W.

IT IS FURTHER ORDERED that plaintiff Idaho Sporting Congress' Motion for Decision Without Hearing (Dkt. No. 11) is GRANTED.

Dated this 8<sup>th</sup> day of January, 1996.

  
EDWARD J. LODGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

IDAHO SPORTING CONGRESS,	)	
INC.,	)	
Plaintiff,	)	Case No. CV 95-0419-N-EJL
	)	
vs.	)	ORDER
	)	
U.S. FOREST SERVICE,	)	
	)	
Defendant.	)	
_____	)	

On December 7, 1995, the court held a telephone status conference on the above-encaptioned matter for the purpose of addressing the requirements and timing for decision under §2001(f) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, ("Rescissions Act"), Pub. L. No. 104-19.

The Rescissions Act requires that salvage timber sales "shall be subject to judicial review only in the United States district court" for the district in which the sale is located. §2001(f) (1). The Act further requires the court to "render its final decision relative to any challenge within 45 days from the

date such challenge is brought, unless the court determines that a longer period of time is required to satisfy the requirement of the United States Constitution . . . "§2001(f)(5) (emphasis added).

In this case, the Idaho Sporting Congress filed its original complaint on October 25, 1995, challenging certain timber salvage sales on the National Forest lands. However, the complaint specifically alleged that the action was filed pursuant to the provisions of the Administrative Procedures Act. No mention was made of the Rescissions Act and the Summons demanded an Answer within sixty days. Plaintiff's Amended Complaint, filed on November 7, 1995, also did not allege the controlling provisions of the Rescissions Act in any obvious way. It was not until November 29, 1995, upon the filing of the plaintiff's Motion for Summary Judgment and Motion to Waive Oral Argument, that the court was formally alerted to the fact that the plaintiff's action was subject to the Rescissions Act and the deadline for issuing a final decision imminent.

Pursuant to the Rescissions Act's provision requiring a decision on the merits within forty-five days of the complaint, and assuming the plaintiff's challenges were properly filed on October 25, 1995, the deadline for issuing a decision would have been December 8, 1995.

At the status conference, counsel for the Forest Service advised the court that it had not yet prepared an administrative record for all of the challenged sales, apparently owing to confusion over whether the plaintiff had filed proper

challenges to the sales under the Rescissions Act.<sup>1</sup> The Forest Service indicated that it would be able to prepare such records by December 14, 1995. During the status conference, the court observed that without the administrative record, the court would be unable to conduct the review required to evaluate the merits of the plaintiff's claims. The court additionally found that, under the circumstances, the Forest Service would not have an adequate opportunity to be heard on the plaintiff's claims by December 8. Based on these facts and circumstances, the court found that the parties' rights to due process, as guaranteed by the United States Constitution, could not be satisfied unless the time for final decision was extended. Accordingly, and pursuant to Section 2001(f)(5), the court determined that a longer period of time is required to satisfy the requirement of the United States Constitution. The court further ordered that the parties comply with an expedited briefing schedule, and that all briefing be completed and submitted to the court no later than December 22, 1995, with the court's decision to be issued promptly thereafter. Desiring to formalize its determination by written order,

IT IS HEREBY ORDERED that, as permitted by § 2001(f)(5) of the Rescissions Act, the time for final decision on the merits of the plaintiff's claims is extended beyond December 8, 1995, to allow the defendant an adequate time to respond to the plaintiff's claims and to allow the court to give fair

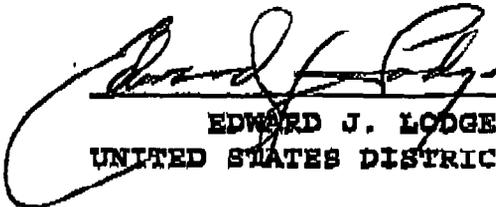
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<sup>1</sup> The Forest Service also advised the court, and the plaintiff concurred, that not all of the sales challenged in the complaint had been advertised, and that such sales were not yet ripe for review under the provisions of the Rescissions Act.

consideration to such claims, as required by the Due Process Clause of the Fifth Amendment to the United States Constitution.

IT IS FURTHER ORDERED that the Forest Service's response to the plaintiff's motion for summary judgment and/or in support of any cross motions it may file, shall be due on December 15, 1995; the plaintiff's reply and response shall be due on December 19, 1995; and the Forest Service's reply shall be due on December 22, 1995. Copies of all briefing shall be served by fax not later than 5:00 MT, on the date such brief is due. The parties are required to fax courtesy copies to chambers at the following number: (208) 334-9229. All memoranda shall be limited to twenty (20) pages in length.

Dated this 12<sup>th</sup> day of December, 1995.



EDWARD J. LODGE  
UNITED STATES DISTRICT JUDGE

D. Bernard Zalcha, J.D.  
ATTORNEY AT LAW  
760 Warm Springs Ave., Suite J  
P.O. Box 982  
Boise, ID 83701-0982  
Phone: (208) 342-0077  
FAX: (208) 342-0019

OCT 25 1995  
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*Pamela J. Rocco*

U.S. DISTRICT COURT  
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UNITED STATES DISTRICT COURT  
IN AND FOR THE STATE OF IDAHO

\*\*\*\*\*

IDAHO SPORTING CONGRESS, INC.,	)	Case No. CIV 95-419-N-BLW
	)	
Plaintiff,	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
	)	
v.	)	
	)	
U.S. FOREST SERVICE	)	
	)	
Defendant	)	

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Plaintiff, complaining of Defendant, alleges:

1. PARTIES

1.1. Plaintiff is Idaho Sporting Congress, Inc. ("ISC"), a non-profit conservation organization of approximately one thousand (1000) members, duly organized and existing under Idaho law. ISC is comprised of hunters, fishers, hikers, and other citizens dedicated to the protection of the environment generally and the recreational values contained in the Boise and Payette National Forests, specifically. This action is brought by ISC on behalf of its members who reside near, and use and enjoy, the natural resources of the Boise and Payette National Forests.

1.2. Defendant UNITED STATES FOREST SERVICE, part of the United States Department of Agriculture, is the federal agency responsible for the management and preservation of the Boise and Payette National Forests.

1.3. Defendant is also the architect for the Foothills Salvage Logging Model, applied to the Boise River Wildfire Recovery Project, and the projects at issue in this action.

## 2. JURISDICTION AND VENUE

2.1. Jurisdiction of this Court is invoked under Title 28, United States Code ("USC"), § 1331(a), as it involves the declaration and interpretation of the Plaintiff's rights secured by the Ninth Amendment of the Constitution of the United States, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and under the due process clause of the Fifth Amendment of the Constitution of the United States, "... nor shall any person... be deprived of life, liberty, or property without due process of law..."

2.2. This is also a proceeding for Declaratory Judgement under Title 28, USC, Sections 2201 and 2202, declaring the rights and legal relations of the parties to the matter in controversy, specifically:

2.2.1. That the Boise and Payette National Forests are national natural resources, and as such are held in trust for the benefit of the People of the United States by the Government of the United States, and specifically by the U.S.F.S.;

2.2.2. The right of all the people of the United States in and to the full benefit, use and enjoyment of the unique values of the Boise and Payette National Forests, without unnecessary and/or unreasonable diminution or degradation resulting from any

of the activities of the U.S.F.S. or its successors in interest, sought to be restrained herein.

2.2.3. That the degradation and/or potential destruction of national natural resources within the Boise and Payette National Forests by the U.S.F.S.s or their successors in interest violates the rights of the Plaintiff, and others similarly situated, guaranteed under the Ninth Amendment of the Constitution of the United States and protected by the due process clause of the Fifth Amendment of the Constitution of the United States.

2.3. This action arises in part under and alleges violations of the Administrative Procedures Act ("APA"), 5 USC Sections 701 et seq. There is a present and actual controversy between the parties.

2.4. Plaintiff is also seeking an award of costs and attorney's fees pursuant to the Equal Access to Justice Act, 28 USC § 2412.

2.5. Venue is properly vested in this Court pursuant to 28 USC § 1391(e).

### 3. STATEMENT OF FACTS

3.1. In its previous salvage logging operations in the Boise National Forest, including the Foothills Wildfire Recovery Project and the Boise River Wildfire Recovery Project, the U.S.F.S. has exhibited a pattern and practice of bad faith non-compliance with laws, regulations, and its own policies and previous commitments to the public.

3.2. The Foothills Wildfire Recovery Project involved numerous incidences of tree cutting in Stream Protection Zones, overcutting, tree cutting in wildlife exclusion areas, green tree cutting, failures to leave wildlife snags, authorization of log landings in areas not designated for logging on contract maps, construction of unauthorized log landings by contractors, logging

outside of timber sale designated boundaries, changes of yarding methods, and relocation of a timber sale boundary after the fact to include extensive logging in a drainage area outside of the designated contract area.

3.3. According to the FEIS for the Boise River Wildfire Recovery Project, "Approximately 80 miles of existing road would undergo minor reconstruction (storm-proofing) to... reduce long term sedimentation."

3.4. Subsequent to issuance of the FEIS for the Boise River Wildfire Recovery Project, U.S.F.S. changed the definition of storm-proofing so as to include maintenance and road-opening, and so as to not require light or minor road reconstruction.

3.5. U.S.F.S. has issued no separate road contracts in the implementation of the Boise River Wildfire Recovery Project for the purpose of accomplishing "minor reconstruction (storm-proofing)" to reduce long term sedimentation.

3.6. In the FEIS for the Boise River Wildfire Recovery Project, U.S.F.S. maintained that "Watershed conditions are expected to improve by implementing the action alternatives," and that the Project "would result in a direct reduction in potential sediment delivery," and that the Project "would likely improve bull trout recruitment, growth, and survival in the long-term by reducing existing sediment production, improving in-stream habitat, improving riparian habitat, removing barriers to fish migration, and reducing bull trout/brook trout interactions."

3.7. In fact, as found by this Court, during the implementation of the Boise River Wildfire Recovery Project, there has been serious and irreparable injury to the North Fork of the Boise River, and a significant bull trout fishery was completely destroyed.

**3.8. During the implementation of the Boise River Wildfire Recovery Project, there has also been serious and irreparable injury to the Bear and Crooked Rivers, including the destruction of bull trout fisheries.**

**3.9. As a result of a three to five year storm event, numerous roads in the Boise River Wildfire Recovery Project area blew out in several places, resulting in the discharge of sediment to the streams.**

**3.10. The road blow-outs in the Boise River Wildfire Recovery Project area contributed to the irreparable injury to the North Fork of the Boise River, Crooked River, and Bear River and to the destruction of a significant bull trout fishery.**

**3.11. U.S.F.S.'s failure to storm-proof approximately 80 miles of roads in the Boise River Wildfire Recovery Project area with light or minor road reconstruction contributed to the failure of those roads and to the irreparable injury to the streams that resulted from the three to five year storm event.**

**3.12. U.S.F.S. has decided to initiate further salvage logging operations on the South Fork of the Salmon River and on the Main Stem of the Salmon River.**

**3.13. U.S.F.S.'s salvage logging in the Salmon River drainage basin will be substantially similar to and modelled after the Boise River Wildfire Recovery Project.**

**3.14. The overall management goal for the South Fork Salmon River drainage is to restore harvestable, robust, self-sustaining populations of naturally reproducing salmon and trout.**

**3.15. Both the Boise and the Payette Forest Plans limit management activities, including salvage logging, within the South Fork Salmon River drainage until the interim objective of providing habitat sufficient to support fishable populations of naturally spawning and rearing salmon and trout by 1997 is met.**

**3.16. Recovery of the in-channel conditions of the South Fork Salmon River has remained virtually static since 1984, and the interim objective for this River has not been met.**

**3.17. Salvage logging in the South Fork Salmon River drainage basin is inconsistent with the Forest Plans for the Boise and Payette National Forests.**

**3.18. Salvage logging in the South Fork Salmon River drainage basin is in contravention of the South Fork Salmon River Five-Year Enhancement Plan FY '90-'94 Special Initiative developed by the Payette and Boise National Forests.**

**3.19. Salvage logging in the South Fork Salmon River drainage basin is in contravention of the goals of the Clean Water Act, specifically the goal of achieving "...water quality which provides for the protection and propagation of fish, shellfish and wildlife..."**

**3.20. Deviating from standards and guidelines included in the Boise and Payette National Forest Plans for the purpose of salvage logging undermines the legitimacy of using the forest planning process to meet resource protection and multiple agency objectives, and is therefore not in the public interest.**

**3.21. Salvage logging in the South Fork Salmon River drainage basin is inconsistent with collective agency decisions and resource protection goals in the SFSR watershed as identified in the Boise and Payette National Forest Plans.**

**3.22. U.S.F.S. convened an internal USFS Thunderbolt Wildfire Recovery Project Science Panel, which panel was unable to conclude that the project would result in long-term improvement in spawning and rearing habitat of anadromous fish in the South Fork Salmon River.**

**3.23. Contemplated salvage logging operations in the South Fork Salmon River drainage basin will not adequately protect the fishery, and would in fact further aggravate the already**

critically degraded habitat for the Federally endangered chinook salmon in the South Fork and In Johnson Creek.

3.24. Salvage logging in the South Fork Salmon River drainage basin is in contravention of consensus opinions reached by representatives of the forest products industry, Idaho Department of Fish and Game, conservation organizations, Indian tribes, concerned citizens, ranchers, outfitters and guides, and local residents.

3.25. Salvage logging in the South Fork Salmon River drainage basin is inconsistent with sound science for the protection of ecosystem and aquatic resources, and is likely to result in the destruction of said resources.

3.26. The decision to further log and degrade the South Fork Salmon River drainage basin was made in bad faith and, if allowed to proceed, would result in a breach of the U.S.F.S.'s public trust duties relating to the national natural resources contained in the Boise and Payette National Forests.

3.27. On information, responsible agencies as the National Marine Fisheries Service, Fish and Wildlife Service, and Environmental Protection agencies have not approved these projects.

3.28. Without such involvement and assurance, it is highly likely that the proposed projects will not protect the public interest in the areas' resources.

3.29. Information confirms that "Logging in the upper (Elkhorn Creek) [Main Salmon Project] watershed has caused some soil slippage and mudflows . . . The soils of the watershed are extremely fragile and exhibit a very high erosion potential."

3.30. Logging Elkhorn and French Creeks with the Foothills and Boise River projects, as the model will most likely result in undisclosed damage to area streams.

#### **4. CLAIMS FOR RELIEF**

##### **4.1. FIRST CLAIM: VIOLATION OF PUBLIC TRUST**

**4.1.1.** Plaintiff realleges and incorporates herein the allegations in sections 1 through 3.

**4.1.2.** It is the Plaintiff's contention that the facts set forth in this complaint clearly establish a pattern and practice on the part of the U.S.F.S. to sacrifice the public's interest in continued recreation in the Boise and Payette National Forests to the more parochial interests of private companies, in willful disregard of its duties to preserve the forests and streams from destruction, to secure favorable conditions for water flow, and to administer the forests for outdoor recreation, watershed, and wildlife and fish purposes.

**4.1.3.** Plaintiff further maintains that this pattern and practice of ecologically destructive activities and misleading the public has risen to such a heightened level of disregard for the recreational values of the Boise and Payette National Forests as to amount to a clear breach of the federal government's public trust duties; namely, to preserve the trust resources and to protect them against unnecessary loss, dissipation or diminution, and to act with diligence, fairness and faithfulness in carrying out its obligations and duties to the public.

##### **4.2. SECOND CLAIM FOR RELIEF: VIOLATION OF ADMINISTRATIVE PROCEDURES ACT**

**4.2.1.** Plaintiff realleges and incorporates herein the allegations contained in sections 1 through 3.

**4.2.2.** U.S.F.S.'s decision to allow further salvage logging in the Boise and Payette National Forests is "arbitrary, capricious, an abuse of discretion, [and] not in

accordance with law... [and] in excess of statutory jurisdiction, authority, or limitations" within the meaning of 5 U.S.C. § 706(2).

### **5. PRAYER FOR RELIEF**

**WHEREFORE, Plaintiffs respectfully pray that this Court:**

**5.1. Declare that:**

**5.1.1. The Boise and Payette National Forests are and contain national natural resources, held in trust by the federal government for the benefit of the people of the United States, including Plaintiff;**

**5.1.2. Plaintiff is entitled to the use and benefit of the unique national natural resources contained in the Boise and Payette National Forests without unreasonable and/or unnecessary degradation or diminution in value by actions of U.S.F.S.;**

**5.1.3. The degradation of the Boise and Payette National Forests as alleged herein and including the potential destruction of aquatic resources is unnecessary and/or unreasonable, and constitutes a violation of U.S.F.S.'s Public Trust duties guaranteed under the Ninth Amendment of the Constitution of the United States and protected by the due process clause of the Fifth Amendment of the Constitution of the United States; and,**

**5.1.4. The U.S.F.S. has violated its statutory duties and/or exceeded its statutory authority under the APA.**

**5.2. Issue a permanent injunction ordering U.S.F.S. and all those acting in concert or participating with it to refrain from any salvage logging operations in the Boise and Payette National Forests, and to cancel any and all sales and contracts made pursuant to the Thunderbolt Wildfire Recovery Project, the Main Salmon Post-fire Project, and the Lower South Fork Salmon River Post-fire Project.**

5.3. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow Plaintiff its costs herein;

5.4. Award Plaintiff reasonable attorney's fees and costs recoverable under the Equal Access to Justice Act, 28 USC § 2412(d) and any other applicable law; and,

5.5. Award Plaintiff such other and further relief as this Court may deem proper.

RESPECTFULLY SUBMITTED this \_\_\_ day of October, 1995.

**BERNARD ZALEHA LAW FIRM**



**Bernard Zaleha  
Attorney for Plaintiff**