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Timber - Other Litigation: Idaho
Conservation v. Thomas
(Thunderbolt) [1]

**U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
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FROM: Monica Medina (202)514-0750 fax 514-0557

MESSAGE: Idaho Conservation League 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The Memorandum Decision and Order of the district court (Honorable Edward J. Lodge), dated December 11, 1995, is unpublished and is reproduced at Tab 49 of Idaho Conservation League's Excerpt of Record ("ER").

STATEMENT OF JURISDICTION

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

B. Jurisdiction of the Court of Appeals. -- The district court entered a final judgement on December 11, 1995 (ER 49). The judgement disposed of all of the claims raised by Idaho Conservation League ("ICL"). Thus, jurisdiction of this Court is based on 28 U.S.C. Section 1291.

C. Timeliness of Appeal. -- ICL filed notice of appeal on December 18, 1995, within thirty days of the final decision and order of the district court in accordance with the Rescissions Act, Pub. L. 104-19, Section 2001(f) (7).

STATEMENT OF ISSUES

1. Whether the district court correctly found that the Forest Service's decision to proceed with the Thunderbolt salvage sale in accordance with the Rescissions Act was not arbitrary and capricious because (1) the Forest Service was entitled to rely upon the opinion of its own experts even though experts from other agencies disagreed; (2) the 1994 wildfires gave the Forest Service cause to alter its management plan for the South Fork Salmon River; and (3) the sale would raise sufficient funds to pay for those

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the Forest Service's preparation and the judicial review of decisions regarding the salvage of dead or damaged timber so that the economic value of such timber will not be lost through deterioration caused by protracted delays. The Forest Service's actions with respect to the Thunderbolt Sale easily meet the Rescission's Act's requirements. The stated purpose of the Thunderbolt Sale was, among other things, to recover the economic value of dead and imminently dead trees as a means of financing certain ecosystem restoration and sediment reduction projects in the Thunderbolt Sale area.

B. Statutory Framework. -- On July 27, 1995, the President signed into law the 1995 Rescissions Act, Pub. L. 104-19. Section 2001 of that Act sets out a program that directs expedited preparation and award of timber harvesting contracts on Federal lands throughout the United States. The Act attempts to increase the flow of available timber for harvesting in three ways. First, to improve the health of forests by removing dead and dying trees, Congress established expedited procedures for the release of salvage timber sales on a nationwide basis. Section 2001(b). Second, Congress directed the Secretaries to award timber sales on an expedited basis on Federal lands described in the April, 1994 "Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl" (the "Northwest Forest Plan"). Section 2001(d)¹

¹ The authority provided by Section 2001(b) and (d) extends through December 31, 1996. Section 2001(j).

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Third, Section 2001(k) of the Act pertains to the release and harvesting of certain timber sales that Congress had previously authorized in Section 318 of Public Law No. 101-121, also known as the Northwest Timber Compromise of 1989. But see NFRC v. Glickman, Civ. No. 95-6244 (D. Or. September 10, 1995), appeal pending, 9th Cir. No. 95-36042.

Section 2001(b), the provision most relevant to this appeal, authorizes the Secretary to proceed with salvage timber sales in accordance with the provisions of the Act. A "salvage timber sale" is defined as a sale "for which an important reason for the entry includes the removal of dead, damaged or down trees." Section 2001(a)(3). Section 2001(c) provides expedited procedures for these salvage sales. Thus, the Secretary² is directed 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).

Section 2001(f)(4) authorizes extremely limited judicial review of salvage timber sales. First, the court's decision is to be based on review of the administrative record only. Second, the court reviews the decision to proceed with the sale to determine whether it is "arbitrary and capricious or otherwise not in

² The "Secretary concerned" is defined as the Secretary of Agriculture for suits involving the National Forest System. Section 2001(a)(4).

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accordance with applicable law." Section 2001(f)(4). Finally, none of the other laws specified in subsection (i) is an "applicable law" for the purposes of judicial review. Section 2001(f)(4).

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) 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). 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

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arbitrary and capricious standard of Section 2001(f)(4).

C. Statement of Facts. --

1. The History of Environmental Degradation Of This Area. --

The Thunderbolt Sale area is located in the South Fork Salmon River ("SFSR") drainage in the Boise and Payette National Forests ("BNF" and "PNF" respectively) located in central Idaho. The SFSR was historically the single largest producer of summer chinook salmon in the Columbia River Basin. (AR 39, at I-3). Early in the 20th century, the SFSR 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, SFSR salmon populations 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 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 SFSR 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 This Sale. -- In 1994, wildfires of historic proportions made the already bad situation in

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the SFSR drainage area much worse. Fueled by a ten-year drought, hot and windy weather, and large areas of dead, dying and overcrowded trees, wildfires burned over 150,000 acres in the SFSR drainage. (Id.) The Thunderbolt wildfire alone burned 18,827 acres. (Id., at I-3).³ Only four trees per acre within the harvest area have any live foliage left and could possibly survive. (AR 40, at ROD-2). The wildfires accelerated sediment problems and resulted in a changed condition to the SFSR basin landscape unforeseen in the Boise and Payette Forest Plans. (AR 39, at I-1). The magnitude and extent of the wildfires experienced in the summer of 1994 were significantly greater than what was anticipated by the Forest Service for the entire BNF in its 1990 Forest Plan. (Supp. AR 204, at II-56).⁴ The 1988 Forest Plan for the PNF anticipated an average of only 1,844 acres to burn annually -- i.e. one-tenth of the acreage burned by the Thunderbolt wildfire alone. (Supp. AR 202, at II-94).

In quick response to the immediate impacts of the wildfires, the Forest Service formed the Thunderbolt Landscape Assessment Team ("LAT") to assess how the fires affected various resources, and to determine what management actions could be taken to meet the Forest

³ Historically, fire is second only to roads as the largest sediment producer to stream systems. (Supp. AR Tab 30, at V-59, V-61).

⁴ The Forest Service will refer to materials not included in ICL's Excerpts of Record as "Supp. ER **" and materials not included in ICL's Excerpts of Administrative Record as "Supp. AR **" respectively. Documents not excerpted in a separate volume for the Court (due to length) will be referred to as "AR Dkt **" as in ICL's Brief.

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Plan goal of restoration of salmon and trout populations. By December, 1994, the Forest Service completed a draft of the Thunderbolt Wildfire Landscape Assessment, which examined the landscape design, constraints and opportunities in the aftermath of the fires, and recommended projects. (Supp. AR 126, at 004543-4558).

The Forest Service, using the LAT's Assessment, proposed the Thunderbolt Wildfire Recovery Project, designed, in part, to sell salvage timber in the Boise and Payette National Forests. From the beginning, the purpose of the Thunderbolt Sale 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 financing the ecosystem restoration and sediment reduction projects.

(AR Tab 39, at I-6). The need for the proposed action is "to move the existing post-fire condition toward the target landscape condition as identified through an ecosystem assessment of the landscape." (Id.). The Forest Service then formed an interdisciplinary team ("ID Team") to analyze and coordinate the Thunderbolt Project proposal. (AR Dkt 193).

3. Extensive Study, Interagency Coordination And Public Involvement In Preparing The Sale. -- The Forest Service then decided to prepare an Environmental Impact Statement ("EIS") for the Thunderbolt Project. The Forest Service ID Team coordinated with National Marine Fisheries Service ("NMFS"), the Environmental Protection Agency ("EPA") and the U.S. Fish and Wildlife Service

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("FWS") early, extensively and throughout the Thunderbolt Project EIS development process.

In addition, the Forest Service encouraged public involvement. In early December, it sent scoping letters to the general public, agencies, and organizations describing the proposal, identifying public meetings, and soliciting comments. (Supp. AR 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 mid-December, the Forest Service held public meetings and held a special scoping meeting for ICL at ICL's request because its representatives were unable to attend previously scheduled public meetings. (Supp. AR 9-10). In addition, the Forest Service heard from the public through letters, petitions and telephone calls. (Supp. AR 11-12).⁵

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. (AR Dkt ____). 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

⁵ 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. (AR Dkt 30). This substantial study included an analysis of, inter alia, the processes that 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. (Supp. AR 21, at 000416).

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bull trout, steelhead, redband, and westslope cutthroat trout.⁶ (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. (Supp. AR 20).

Concurrently, in order to ensure the scientific merit of the material presented in the DEIS, the Forest Service in February, 1995 gathered a Federal interagency science panel. Included on the panel were representatives from the Forest Service, EPA and FWS, who were to review the soils/watershed and fisheries analysis process. (AR 39, at I-13). The first panel could not reach consensus on the Thunderbolt Project, so 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. (AR 27, at 000657). The Science Panel was to determine "if there was a better

⁶ 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. (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)). Pub. L. 104-19 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). Pub. L. 104-19 Section 2001(c)(1)(B).

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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 Science Panel Report concluded 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. (Supp. AR Tab 22, at 000420; AR 25, at 000585).

The Forest Service incorporated the results of the recommendations of the Science Panel into the Final EIS. (AR 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. (Supp. 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, AR 40, at ROD-4).

4. Disagreement Over the Impact Of The Proposed Thunderbolt Sale On Salmon And Their Habitat. -- The Forest Service received

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comments on the Draft EIS from the FWS and EPA, but received no official comments from the NMFS.⁷ 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. (Supp. AR 24, at 000525-528). The Forest Service responded to all other comments on the DEIS in the FEIS as well. (AR 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, and in the long term, that reductions in management-induced sediment and erosion as a result of project implementation would likely benefit the species and its habitat. (AR Dkt. 29, App. E at 56). NMFS, the federal agency with jurisdiction over these anadromous fish under the ESA, 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. (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

⁷ NMFS never separately commented on the Draft EIS, but rather faxed a draft biological opinion ("BO") to the Forest Service on August 3, 1995. (Supp. Ar. 25, at 000580). A BO is the document that NMFS prepares pursuant to the ESA stating its opinion as to whether an agency action is likely to jeopardize the continued existence of an endangered or threatened species. 16 U.S.C. 1536(a)(2).

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prudent alternatives, but the two agencies failed to come to agreement. (Supp. 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. (Supp. AR 25, at 000617-622).

7. The Rescissions Act And The Final Decision. -- In the midst of the interagency consultation process, Congress passed the Rescissions Act, in an attempt to expedite the Forest Service's salvage timber program. 1995 Rescissions Act, Pub. L. 104-19, Section 2001. The Conference Report, adopted by both the House and the Senate, describes the purpose of the salvage provisions:

[Given] the emergency forest health situation from fire, insect infestation and disease has approached epidemic levels . . . the managers have included in the bill language to provide all necessary tools to expedite environmental processes, streamline, [sic] administrative procedures, expedite judicial review, and give maximum flexibility to the Secretary concerned in order to provide salvage timber for jobs, to improve forest health, and prevent forest fires.

H. Conf. Rep. 104-124 at 134 (daily ed. May 16, 1995) (Addendum __). In order to facilitate compliance with the Rescissions Act, the relevant agencies entered into a Memorandum of Agreement ("MOA") to streamline procedures for environmental analysis and inter-agency consultation. (Addendum __). Under the terms of the MOA, the resolution of interagency disputes would take place at the regional level. Thus, on August 11, 1995, the Forest Supervisors of the BNF and PNF requested elevation of the interagency disagreement to the regional level. (AR 25, at 000618).

Unable to resolve the dispute after a full month of discussions, on September 11, 1995 the Regional Forester

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unilaterally elevated the disagreement to the national level for resolution. (Supp. 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. (Supp. AR 34-35 at 000916-934). On September 29, 1995, the Assistant Administrator of NMFS, Rolland Schmitten, decided to defer to the Forest Service with regard to the decision to proceed with the Thunderbolt Project. (Supp. 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. (Supp. AR 28, at 000707). On October 5, 1995, the PNF and BNF Forest Supervisors signed and issued the ROD. (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.

(AR 40, at ROD-2). The Thunderbolt Sale challenged here -- a part of the larger Thunderbolt Project -- would yield approximately 14 million board feet of timber on approximately 3,237 acres. (AR 40, at ROD-1). Originally, the Sale would have yielded 32 million board acre feet, but due to delays created by the extensive analysis and extended decision-making process, less than half that amount remains merchantable. (Id.). The Forest Service will plant

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conifers and/or shrubs on 2,300 acres of the harvest area, of which 1,214 acres are landslide prone Riparian Habitat Conservation Areas. (Id.) This Sale requires minimal construction. Most of the timber will be harvested by helicopter, and thus two helicopter landings may need to be constructed, but only about 50 feet of spur roads will be built in order to harvest the timber for this sale. Id.

On October 13, 1995, the Forest Service advertised the Thunderbolt Sale, and the winning bid was \$1,050,710. (Supp. E.R. 34, Declaration of Richard E. Ferneau, attached as Exhibit 3.)

D. The District Court Opinion. -- The district court, in an unpublished opinion, completely rejected ICL's claims. Idaho Conservation League v. Thomas, No. CV 95-0425-S-EJL (D. Id. December 11, 1995). The court held that the Forest Service's decision to proceed with the Thunderbolt Salvage Sale was not arbitrary and capricious under the Rescissions Act because (1) the Forest Service was entitled to rely upon the opinion of its own experts even though experts from other agencies disagreed (ER 49, at 19); (2) the 1994 wildfires caused the Forest Service to alter its management plan for the South Fork Salmon River (Id., at 22); and (3) the Thunderbolt Sale would raise sufficient funds to pay for restoration projects in the Payette and Boise National Forests (Id., at 25). In addition, the court held that the Secretary of Agriculture did not have to authorize personally the Thunderbolt salvage sale. (Id., at 28). Finally, the court granted the Forest Service's motion to strike most of ICL's extra-record exhibits, and

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limited its review for the most part to the administrative record compiled by the Forest Service for the Thunderbolt Sale decision. (Id., at 29-30).

This appeal followed.

SUMMARY OF ARGUMENT

1. ICL's attacks on the Thunderbolt Sale must fail under the Rescissions Act, Section 2001(b), (c), (f), and (i). The Forest Service's decision to proceed with the Thunderbolt salvage sale was based on years of study and thorough scientific analysis, and was in complete accordance with the specific statutory directives contained in the Rescissions Act to expedite such sales. 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 does not comply with the ESA and other environmental laws -- a view ICL shares. In short, ICL'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.

2. The text of the Rescissions Act gives the Secretary of Agriculture unilateral authority to control the sale of salvage timber. The Act does not, however, require the Secretary personally to make the final agency decision approving the

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Thunderbolt salvage sale. The Secretary has properly delegated his authority to manage and supervise National Forest lands in general, and specifically to make the decision at issue here, in accordance with Agency rules and procedures. The Forest Service possessed the authority necessary to proceed with this sale without the direct imprimatur of the Secretary of Agriculture.

3. The district court properly limited its review to the Agency's record, i.e., to documents which were before the Forest Service at the time the decision was made to proceed with the Thunderbolt salvage sale. ICL's attempt to supplement the record with documents that the Forest Service did not possess when it made its decision for the purpose of attacking the credibility of that decision was correctly rebuffed.

STANDARD OF REVIEW

A. The General Standards. -- This Court reviews the grant of summary judgment de novo. Douglas County v. Babbit, 48 F. 3d 1495, 1501 (9th Cir. 1995). The district court's order striking the extra-record materials is reviewed by this Court for abuse of discretion. Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F. 2d 989, 997 (9th Cir. 1993).

B. The Standard of Review Under the Rescissions Act. -- Section 2001(f)(4) of the 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 laws specified in subsection (i))." The Act places several major limitations on the

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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 may not consider compliance with 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." Sierra Club v. U.S. Forest Service, Civ. No. 94-6245, transcript at 18 (D. Or. Sept. 6, 1995). (Addendum __).

ICL claims (Br. 24) that an "arbitrary and capricious" decision is one which modifies longstanding policies without explanation, one for which the offered explanation runs counter to the evidence, or for which no rational connection exists between

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the facts found and the choices made. ICL relies on familiar case law interpreting the Administrative Procedure Act ("APA"). However, the Rescissions Act changes the legal framework in ways that greatly reduce the applicability of the usual APA standard. ICL likens (Br. 23-24) the Forest Service to a "monster" that acted with "unfettered discretion" and states that arbitrary and capricious review is the sole safeguard of the public interest since the Rescissions Act "temporarily suspended the statutory checks on the Forest Service." But what ICL seeks to do in this case is, in fact, to re-write the Rescissions Act to require that agency actions comply with environmental laws that specifically were waived by the Act. As is evident from the provisions of the Rescissions Act, Congress has decided that endangered and threatened species need not be given the ESA's full protection from impacts that may result from salvage sales since it has (1) left the decision of whether such effects are even analyzed to the "sole discretion" of the Secretary, and (2) deemed the sales sufficient as to the requirements of the ESA. Rescissions Act, Section 2001(c)(1)(A), (i). See Kentucky Heartwood, Inc. v. U.S Forest Service, 906 F. Supp. 410, 414 (E.D. Ky. 1995). The courts cannot ignore the standard set by the Rescissions Act in favor of the APA standards.

Moreover, even under routine APA review, the Forest Service's decision would nevertheless be treated with great deference. 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

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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 (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).

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ARGUMENT

I. THE FOREST SERVICE'S DECISION TO PROCEED WITH THE THUNDERBOLT SALVAGE SALE IS ENTIRELY PROPER UNDER THE RESCISSIONS ACT.

A. The Forest Service Is An Expert On Forest Management And Its Decision To Proceed Is Amply Supported In The Agency Record.

ICL attempts to argue that there was no one with expertise regarding the environmental impacts of the Thunderbolt Sale who concluded that the Sale should go forward, and denigrates the Forest Service's expertise in this area because (in ICL's view), the Forest Service is the agency responsible for the degradation of the SFSR. (Br. 27-28). However, both of these claims are wrong.

The Forest Service is the agency that for decades has managed all the National Forests. As such, the Service is expert in forest management and the impacts that such forest management may or may not have on natural resources including fisheries. However, even the Forest Service is unable to control Acts of God, such as fires, droughts, rain, snow, and wind, which have significantly contributed to the degradation of the SFSR drainage. The Forest Service employed its expertise in the analysis of the Thunderbolt Project, and the resulting decision is not arbitrary or capricious.

ICL's argument, in essence, is that the Forest Service should have deferred to the opinions of other agencies. Even if that were usually so, ICL fails to recognize that the legal framework changed with the passage of the Rescissions Act. In the case at hand, NMFS deferred to the Forest Service's judgment with regard to the decision on whether to proceed with the sale. (Supp. AR 25, at 000647). NMFS' final decision in this case was to permit the

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Forest Service to carry out the Thunderbolt project notwithstanding NMFS' own objection. The Forest Service decided to proceed with the Thunderbolt Project in reliance upon its own experts, as it is permitted to do not only under the Rescissions Act, but also under settled principles of administrative law. See supra at pp. 17-20.

The Forest Service 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. (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.

(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

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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 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 Forest Service also conferred with and relied on the expertise of Dr. Walter F. Megahan, who is the preeminent expert on the effects of silvicultural practices on erosion, sedimentation and landslides in the granitic bedrock of the Idaho Batholith. (Supp. ER 34, Declaration of Dr. Walter F. Megahan, attached as Exhibit 3). The Forest Service is entitled to rely upon the expertise of Megahan, and "when examining this kind of scientific determination . . . , a reviewing court must generally be at its most deferential." Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983). Such deference is particularly appropriate where, as here, the analysis of the impacts of helicopter salvage logging on sedimentation in the Idaho Batholith falls squarely within the Forest Service's area of expertise, and particularly the expertise of those scientists (e.g. Dr. Megahan) it relied upon.

Dr. Megahan believes "properly designed and executed timber salvage activities on these soils would not cause a worse problem and might improve conditions because the breakup of the hydrophobic soil layers assists in reducing runoff and because the logging

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slash placed on the soil surface reduces erosion." (Id., at ¶ 5). Dr. Megahan found that the Forest Service used reliable models and was very conservative in its use of worst case scenarios, which still resulted in an extremely low probability of impacts. (Id.) Dr. Megahan endorsed the Thunderbolt Project because, in his expert opinion, this project is one where

the risk of introducing sediment into the streamcourses is very low . . . because the logging is by helicopter, which is very light on the land, there will be minimal road construction, and the location of the landings and road was carefully assessed using the sediment delivery models . . . [and] the Forest Service use of the models was very conservative and protective of the resource.

(Id. at ¶ 7). The Idaho Department of Health and Welfare, Division of Environmental Quality similarly acknowledged its approval of the project. (Supp. AR 26, at 000653). This approval carries great weight as to water quality issues because the State implements the requirements of the Clean Water Act, 33 U.S.C. Sections 1251 et seq. Friends of the Earth v. Hintz, 800 F.2d 822, 828 (9th Cir. 1986).

The Draft BO lists five reasons why FWS believed the Thunderbolt Project is likely to have an adverse effect on listed salmon. (AR 25, at 000603-604). The Forest Service specifically addressed each of those concerns. (Supp. AR 25, at 000617-622). ICL nonetheless claims (Br. 29) that the Forest Service mechanically rebutted the concerns of disagreeing agencies without giving real consideration to the underlying issues.⁸

⁸ In fact, Chapter V of the FEIS contains 125 pages of responses to comments from the general public and other federal agencies (AR 39, at Chapter V).

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To the contrary, even pursuant to NEPA and the ESA, the Forest Service is required to respond to such comments, as it did here; however, the agency is not required to change its approach or perform additional analysis simply because another agency says it should. Friends of the Earth v. Hintz, 800 F.2d at 825 (fact that FWS, NMFS, and EPA determined that Corps grant of permit would destroy wetlands did not render Corps' issuance of the permit arbitrary or capricious); California v. Block, 690 F.2d 753, 773 (9th Cir. 1982) ("an agency is under no obligation to conduct new studies in response to issues raised in the comments"); Roanoke River Basin Ass'n. v. Hudson, 940 F.2d 58, 64 (4th Cir. 1991) ("The Corps of Engineers should consider the comments of other agencies, but it need not defer to them when it disagrees"); Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 567, 571 (S.D. Ohio 1982) ("FEIS need not reconcile opposing [EPA, DOI and other] comments"); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984) ("required only to consider other agencies' comments"); Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987) ("ESA does not give the FWS the power to order other agencies to comply with its requests or to veto their decisions"). A more stringent requirement cannot attach under the Rescissions Act, where the documents are deemed by Congress to satisfy the requirements of NEPA and the ESA.

Prior to the passage of the Rescissions Act, the Forest Service consulted extensively with other agencies in an effort to comply with all the laws that were then applicable. Even after the

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Act passed, the Forest Service continued a dialogue for as long as it was productive. In a situation such as this, where Congress was conducting immediate oversight of the implementation of the Rescissions Act and criticizing the Forest Service for moving too slowly on salvage sales, there was not an infinite amount of time to work through the inevitable scientific disagreements between agencies with different statutory agendas and constituencies. But the disagreements themselves are not sufficient to render the agencies' conclusions arbitrary and capricious. See Greenpeace Action v. Franklin, 14 F.2d 1324, 1333 (9th Cir. 1993); see also Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). NMFS and EPA were reluctant to endorse a project that departed from the previous standards and guidelines, which were jointly developed as a result of lengthy meetings and dialogue. (AR 24, at 000510, AR 25, at 000606-607). The Forest Service's reason for involving agencies such as NMFS and EPA even after the Act passed was to promote informed decision making. However, ICL'S argument, citing comments from other agencies, assumes that greater information will eradicate uncertainty from assessments of extremely complex inter-relationships between physical changes to the environment and the web of species comprising the ecosystem. To adopt that view would place agencies in a perpetual state of "analysis paralysis," and its premise has been roundly rejected by this Court. See Greenpeace Action, 14 F.3d at 1336.

Given the extensive analysis performed and the support of experts contained in the record, it is not true that "everyone with

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expertise on the risks to salmon, water quality, and stream ecology" concluded that this sale should be halted (Br. 27), as ICL claims. Rather, the disagreement among the agencies fostered a high level of analysis and promoted an informed decision-making process by the Forest Service. In making its final decision, which lay solely within the Forest Service's authority to manage the National Forests, the Service relied on the reasonable opinions of its own qualified experts and decided to proceed. Based upon all of the evidence in the record, the Forest Service made a reasoned decision. There is no merit to ICL's contention that the Thunderbolt Sale decision lacks any expert analysis to support it.

B. The Forest Service Departed From Previous Management Policies And Standards For Good Reason.

ICL argues that the 1994 wildfires gave the Forest Service no reason to revise its Forest Plans for the PNF and BNF. First, according to ICL (Br. 32), the wildfires are "irrelevant" because they did not make the prospects for fish habitat better, but rather made them worse. ICL claims (Br. 33) that the fires were no force majeure to the Forest Service's plans, and are merely being used as an excuse for the Thunderbolt Sale.⁹

The Thunderbolt wildfire of 1994 inexorably altered the conditions on the ground in the SFSR watershed. (AR 39, I-3). The FEIS describes the enormous magnitude of the 1994 wildfires --

⁹ The draft biological opinion also makes the statement that "events in recent years such as the Savage, Chicken, and Thunderbolt Fires are clearly not outside the range of disturbances envisioned in the [forest plans]," but does not cite the forest plans or forest plan EISs to support this conclusory remark. (ICL Br. 32-33, quoting AR 25, at 000593).

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including the Chicken, Thunderbolt and portions of the Corral and Blackwell wildfires -- which burned over 150,000 acres in the South Fork Salmon River drainage of the Boise and Payette National Forests. (AR 39, at I-1). Only four trees per acre within the harvest area have any live foliage left and could possibly survive. (AR 40, at ROD-2). The magnitude of these fires was significantly greater than those considered in the forest plans. (Supp. AR 202, at II-95; Supp. 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. (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 Project 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.; AR 40, at summary-3).

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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. (Supp. 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.

ICL claims (Br. 33) that "[n]o other agency saw the need to change the goalposts in the middle of the game." However, the dispositive facts here are that the wildfires did change the playing field, and the Forest Service saw the need to alter its management in order to adapt to that change. The Forest Service's decision is well-justified on the record, and clearly passes muster under the standard set by the Rescissions Act.

C. The Thunderbolt Sale Will Provide Funds For Restoration Projects -- A Rational Basis To Proceed With The Sale.

ICL claims (Br. 36) the Thunderbolt salvage sale will not raise enough money to fund restoration projects, and is, therefore,

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arbitrary and capricious.¹⁰ In fact, the salvage sale is "a means of financing activities related to" the objectives to "improve long term fish habitat, rehabilitate existing sediment sources, improve hydrologic conditions of affected watersheds" (AR 39, at I-3). Timber sale receipts are not the only means by which commitments made in the ROD will be funded. The Final EIS states that for the selected alternative

[f]unding sources for sediment reduction projects, reforestation, timber salvage, post-harvest landing management, noxious weed eradication, and contour felling would be derived from stumpage receipts. Stumpage receipts include purchaser credits for road reconstruction activities, Knutson-Vandenberg (KV) cooperative funds for sale area improvement, brush disposal deposits, and erosion control cooperative funds. In addition, some Congressionally appropriated funds may be used to fund trailhead development and monitoring and/or supplement tree planting.

(AR 39, at IV-58). The multiple funding mechanisms are complicated, but do result in the accomplishment of all projects committed to in the ROD for this particular decision.

The high bid received for the Thunderbolt salvage sale was \$1,050,710. (Supp. ER 34, Ferneau Declaration attached as Exhibit 3). Of that sum, the Forest Service is obligated to return 25 percent of the gross receipts to the county as payment in lieu of taxes, i.e. \$262,677. The remaining \$788,033 is available for restoration projects described in the ROD to be performed by the Forest Service or the purchaser. Thus, \$299,369 of Purchaser

¹⁰ Plaintiffs rely, in part, on figures from the FEIS. The FEIS discloses that the economic analysis is provided to show a relative difference between alternatives and actual value of any alternative could fluctuate unexpectedly and increase or decrease the total value (AR 39, at IV-56).

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Credit funds will finance existing road-related sediment reduction projects, \$336,274 of Knutson-Vandenberg ("KV") Plan¹¹ funds will be used to implement additional sediment reduction projects identified in the ROD. The balance of \$152,390 remains to be used, at the discretion of the responsible officials, to implement other non-essential KV projects not committed to in the ROD, to be returned to U.S. Treasury or the Salvage Sale Fund, or to finance a portion of the reforestation efforts. (Supp. ER 34, see pie chart attached to Declaration of Keith Dimmett, attached as Exhibit 4).

The Purchaser Credit portion of the timber sale receipts (\$299,369) will be used through Purchaser Credit to implement a portion of the sediment reduction projects identified in the ROD. (Id., Exhibit 4; Supp. AR 198, at 005996, 006068-6070). This means that the purchaser performs the road work prescribed in the contract, and, in return, receives a credit for the value of that work toward the total timber sale contract bid amount. In this case, \$299,369 worth of sediment reduction projects to ameliorate existing sediment problems on existing roads will be completed by the purchaser. The money will not pass through the U.S. Treasury, but will be applied directly to the forest improvement instead.

¹¹ KV funds can be used for sale area improvements. The KV projects are either essential or non-essential. Originally, in 1939, KV funds were reserved for reforestation, which is considered essential. The uses of KV funds have been expanded to include sale area improvements for wildlife and watershed, which are considered non-essential. All the projects contemplated by the Thunderbolt Project are sale area improvements for watershed, recreation or noxious weed eradication, and thus, are deemed non-essential.

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The Purchaser Credit road improvements contemplated involve rehabilitating existing sediment sources and providing resource protection. They are not necessary to facilitate timber harvest. (AR 39, at V-73).

The KV Plan funds (\$366,274) will be used to implement additional sediment reduction projects identified in the ROD. ICL relies (Br. 36-37) on Exhibits C and D to argue that the Forest Service numbers do not add up. But ICL's accounting is mistaken. Exhibit D describes eight proposed KV projects that are listed in order of priority. Exhibit C makes clear, however, that "[t]hose items committed [sic] to in the ROD will take priority." The ROD committed to items one, two, and four on the KV lists (AR 40, at ROD-1, ROD-4, and Attachment A). Those projects, and the overhead costs associated with them, will be accomplished with the \$336,274 available from the salvage sale.

The remaining commitments in the ROD not funded by Purchaser Credit or KV Plan money will be funded through appropriated money. This includes the reforestation required by the Rescissions Act and the Goat Creek Trailhead. Rescission Act, 2001(c)(8). The Rescissions Act provides that the Forest Service "may use salvage sale funds otherwise available" to conduct salvage sales pursuant to the Act. Id., Section 2001(b)(3). The revenue to cover the costs incurred to date, such as the cost of the NEPA analysis and litigation, were generated by past salvage sales and derived from the Forests' pooled Salvage Sale Fund. (Supp. ER 34, see pie chart attached to Declaration of Keith Dimmett, attached as Exhibit 4).

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It is ironic that ICL argues that the Thunderbolt sale will not generate sufficient revenue to proceed. The ROD discloses that delay in implementation of this sale had already caused about half of the original timber volume to become unmerchantable due to impacts from weather; as the administrative process dragged on, the estimated revenues from the salvage sale declined. (AR 40, at ROD-1). It is for this very reason that Congress enacted the Rescissions Act to expedite the preparation, sale and judicial review of salvage sales--in order to recover the remaining value of salvage timber before it is lost.

ICL further argues (Br. 39) that there was no financial reason to proceed with the Thunderbolt Sale because, according to ICL, alternative funding was nearly in place for Thunderbolt restoration projects. As evidence of these alternative funding arrangements, ICL relies on draft letters that the court below struck from the record in this case because they were not properly part of the administrative record. (See Argument III, supra.) ICL cites draft letters between the Forest Service and NMFS (ER 19 Exh. O, P, and Q) that were circulating in mid-September, 1995, at the time the Forest Service elevated the decision on the Thunderbolt Project to the national level.

What these documents show, however, is simply the importance to the Forest Service of getting this restoration work accomplished -- however it might be financed. In the administrative record, the Forest Service repeatedly states that it is extremely concerned about existing sedimentation problems and the resultant decline in

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fish populations in the SFSR drainage. (AR 39, at I-1; Supp. AR 204, at IV-75). Therefore it is not surprising that the Forest Service may have been attempting (according to these documents) to find inter-agency funding for restoration projects in the SFSR drainage. In the end, any Forest Service efforts to secure such funding would be appropriate, and commendable. They do not undermine the Service's decision to assure the funding for significant restoration projects with revenue from the Thunderbolt Sale.

In sum, from the outset, the Forest Service intended to use funds from the Thunderbolt salvage sale

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 financing the ecosystem restoration and sediment reduction projects.

(AR 39, at I-6). The Rescissions Act directs the Agency to reforest each parcel of land harvested under a timber salvage sale as expeditiously as possible. Rescissions Act, Section 2001(c)(8). In following its own plan and the directives of the Rescissions Act, the decision of the Forest Service to proceed with the Sale in order to generate monies to fund such beneficial projects is entirely reasonable -- not arbitrary and capricious.

II. THE RESCISSIONS ACT DOES NOT REQUIRE SECRETARY GLICKMAN PERSONALLY TO MAKE THE DECISION TO PROCEED WITH ANY SALVAGE SALE.

ICL briefly argues (Br. 40) that the Rescissions Act makes the Secretary of Agriculture personally accountable for such decisions

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as jeopardizing species, and deviating from forest management plans. In ICL's view, Secretary Glickman must make these decisions himself and sign these documents in his own hand. ICL's argument is based on the strange premise that Congress, which ordered expedited salvage sales, has required each of them to proceed only upon the personal approval of the Secretary. This reading of the Rescissions Act is absurd on its face. ICL's argument, moreover, violates well-founded rules of statutory construction, transcends common sense notions of the Secretary's charge under the Act, and is not supported by any dependable legislative history.

The Rescissions Act provides that

[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 considers appropriate and feasible, consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species, and to the extent the Secretary concerned, at his sole discretion, considers appropriate and feasible, be consistent with any standards and guidelines from management plans applicable to the National Forest . . . on which the salvage timber sale occurs.

Pub. L. No. 104-19 Section 2001(c)(1)(A) (emphasis supplied). The first rule of statutory interpretation is that a statute is interpreted and applied according to its plain meaning. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Thus, nothing in the language of Section 2001(c)(1)(A) expressly requires the Secretary personally to review and authorize 2001(b) salvage sales.

If such a level of personal attention were to be required, there are several reasons why one might expect Congress to say so

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in no uncertain terms. First, any Cabinet-level department head's ability to delegate authority under this and other environmental statutes is inherent to effective and efficient operation of the statute. Ashwood Manor Civic Ass'n v. Dole, 619 F. Supp. 52, 65 (E.D. Penn.), aff'd 779 F.2d 41 (3d. Cir. 1985). Indeed, to "allow[] delegation permits, and may effectively cause, a more thorough examination by the decisionmaker." Id.

Where, as is usual, the statute involved does not explicitly address delegation of authority, the federal courts look to the underlying intent and purpose of the statute to determine if delegation is proper. Ashwood Manor, 619 F. Supp. at 65; see also Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782 (9th Cir. 1986) (reviewing purpose of statute to determine if subdelegation is authorized). In this case, it is clear that ICL's position would frustrate the underlying purpose of the Rescission Act, Section 2001(b). The Senate Conference Report, adopted by both the House and Senate, describes the underlying purpose of the Act's salvage provisions as follows:

[T]he emergency forest health situation from fire, insect infestation and disease has approached epidemic levels.
* * * [T]he managers have included bill language to provide all necessary tools to expedite environmental processes, streamline[] administrative procedures, expedite judicial review, and give maximum flexibility to the Secretary concerned in order to provide salvage timber for jobs, to improve forest health, and prevent forest fires.

(H. Conf. Rep. 104-124 at 134 (daily ed. May 16, 1995) (Addendum B) (emphasis added). To require the Secretary personally to review and sign off on all timber salvage sales would defeat, or at least

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substantially impede, each of these congressional purposes.

To bolster its contrary argument, ICL relies (Br. 41-42) on a one-time remark by Senator Lieberman, 141 Cong. Rec. S10465 (July 21, 1995) (Addendum B). But such a comment made on the floor by one legislator, on the day of passage, is not a reliable indication of Congress's intent. Floor statements commonly represent only the views of the individual making them. E.g., Davis v. City and County of San Francisco, 976 F.2d 1537 (9th Cir. 1992). Accordingly, this floor remark should be allowed to impact the Secretary's ability to delegate authority, which is essential to accomplishment of the Rescission Act's purposes -- as clearly expressed by the Conference Report.

In this case, the Secretary of Agriculture has delegated to the Assistant Secretary for Natural Resources and Environment the authority to "[p]rotect, manage, and administer the national forests, national forest purchase units, national grasslands, and other lands and interests in lands administered by the Forest Service, which collectively are designated as the National Forest System." 7 C.F.R. § 2.19(b)(2). The Assistant Secretary has delegated the same authority down to the Chief of the Forest Service. 7 C.F.R. § 2.60(a)(2). Accordingly, the Chief is vested with the authority to carry out the provisions of the Rescissions Act as part of the delegation of authority to "[p]rotect, manage, and administer the national forests." 7 C.F.R. § 2.60(a)(2).

In exercise of his duly delegated authority, on October 2, 1995, the Chief of the Forest Service directed the issuance of the

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ROD, and implementation of the Thunderbolt Project. (Supp. AR 28, at 000707).

III. THE COURT PROPERLY EXCLUDED EXTRA-RECORD MATERIALS BECAUSE THE RESCISSIONS ACT REQUIRES THAT JUDICIAL REVIEW BE LIMITED TO DOCUMENTS BEFORE THE FOREST SERVICE WHEN ITS DECISION WAS MADE.

The Rescissions Act provides courts the authority to grant certain relief from agency action regarding salvage timber sales "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 . . . " Pub. L. 104-19, Section 2001(f)(4). This is consistent with settled law in APA review, where the "focal point for judicial review [of an informal agency decision] 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); Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985); see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (review of agency decisions "is to be based on the full administrative record that was before the [decisionmaker] at the time he made his decision.").

Here, ICL has submitted some documents that could not have been before the Forest Service when the Thunderbolt decision was made, simply because they were never sent to or received by the Forest Service until this litigation. For example, Exhibit B appears to be the NMFS working draft of a biological opinion that was never finalized, as evidenced by the header "PREDECISIONAL ESA DOCUMENT - DO NOT RELEASE OR CITE" displayed across the top of each

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page.¹² The only biological opinion before the Forest Service was a draft biological opinion that was sent August 4, 1995. (AR 25, at 000582-000612.) ICL argues (Br. 43) that the draft biological opinion is "relevant" and "required under the Endangered Species Act." Whatever the relevance this internal draft might otherwise have, Exhibit B was not presented to or considered by the Forest Service in making its decision and therefore is not part of the record.

Similarly, Exhibits G and H appear to be a memorandum and briefing statement that are internal to the FWS, Exhibit M appears to be a memorandum internal to the EPA, and Exhibit Q is a letter from NMFS's regional office to the EPA, FWS and NMFS's headquarters (with no indication that a copy was sent to the Forest Service). Exhibit J appears to be phone notes of an EPA employee, and Exhibit L appears to be a draft of a letter to the Forest Service that was never signed or sent. Documents that are internal to another agency cannot be considered to be before the Forest Service as the decisionmaker, and, therefore, are not part of the record and should be excluded.

¹² The first page ICL submitted as Exhibit B is a letter dated September 29, 1995 from Rolland A. Schmitt of the National Marine Fisheries Service to Jack Ward Thomas, Chief of the Forest Service. This letter is found in the administrative record. (Supp. AR 25, at 000647.) This letter does not refer to the September 22 version of the draft BO that ICL claims is part of the record. Nor does this letter show that there are any enclosures or attachments to it. Moreover, the September 22 draft BO is preceded by an unsigned (and unsent) cover letter that does refer to the enclosure of this version of the draft BO. An examination of the documents ICL submitted as Exhibit B makes clear that this version of the draft BO was not sent to the Forest Service.

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Review is also limited to the record as it existed when the agency made its decision. Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 718 (9th Cir. 1994). Exhibits A and N are both post-decisional, and therefore, were not relied upon by the decisionmaker.¹³ These exhibits also must be excluded as immaterial because they were not part of the record before the agency.

Finally, Exhibits E and O appear to be draft documents that were never finalized, outlining the agreements and disagreements among the agencies. As such, they were not relied upon by the decisionmaker, and more importantly, they do not add any evidence of disagreement not otherwise reflected in the record. Accordingly, the district court properly refused to consider them part of the record for the purposes of judicial review under the Rescissions Act.

ICL also filed the Amended Declaration of Cindy Deacon Williams. Ordinarily, where judicial review is confined to the administrative record, "neither party is entitled to supplement that record with litigation affidavits or other evidentiary material that was not before the agency." Edison Elec. Inst. v. OSHA, 849 F.2d 611, 618 (D.C. Cir. 1988). Consistent with principles limiting review to the administrative record, courts typically do not allow parties challenging agency action to introduce witness testimony in support of their claims. See

¹³ The Declaration of Cindy Deacon Williams is also post-decisional. (ER 26).

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Friends of the Payette v. Horseshoe Bend Hydroelectric Co., No. 988 F.2d 989, 997 (9th Cir. 1993) (affirming district court decision to exclude testimony of witnesses); Friends of the Earth v. Hintz, 800 F.2d 822, 827-29 (9th Cir. 1986) (affirming district court decision to quash deposition subpoena and limit review to administrative record).

The Rescissions Act expressly mandates record review, which must look only at the record created by the Forest Service to date, not on "post hoc rationalizations" for the action. Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1453 n. 18 (9th Cir. 1984), cert. den. sub nom Yamasaki v. Stop H-3 Ass'n, 471 U.S. 1108 (1985) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) and Camp v. Pitts 411 U.S. 138, 142 (1973)). It is not appropriate "for either party to use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." Ass'n of Pacific Fisheries v. EPA, 615 F.2d 794, 811-12 (9th Cir. 1980) (emphasis added). The Williams Declaration is certainly not part of the administrative record; indeed, it was prepared only for this litigation, and was properly excluded from consideration below.

Finally, the district court's exclusion of the Williams Affidavit cannot be thought unfair to ICL.¹⁴ ICL had ample

¹⁴ Extra-record testimony should not be admitted for the first time in court, when the plaintiff had an opportunity to submit it in the agency proceedings. See Havasupi Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991), cert. denied, 112 S. Ct. 1559 (1992) (written testimony not accepted because plaintiff had opportunity to offer it during EIS process); Friends of the Payette, 998 F.2d at 997 (9th Cir. 1993) (affirming district court decision to

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opportunity to raise its concerns and submit evidence during the administrative process. In fact, the Forest Service set aside a special meeting time for ICL because they were unable to attend other scheduled public meetings. (Supp. AR 10.)

Pursuant to the Rescissions Act, Congress has directed that the scope of judicial review be limited to the administrative record. The district court properly exercised its discretion to exclude extra-record materials.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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exclude testimony of witnesses, particularly where most of the concerns addressed had already been raised during the comment period).

U.S. COURTS

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CAMERON S. BURKE
CLERK IDAHO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE, and
THE WILDERNESS SOCIETY,

Plaintiffs,

vs.

JACK WARD THOMAS, in his official
capacity as Chief of the United
States Forest Service; DAN
GLICKMAN, in his official capacity
as Secretary of the U.S. Department
of Agriculture; and UNITED STATES
FOREST SERVICE, an Agency of the
U.S. Department of Agriculture,

Defendants.

and

INTERMOUNTAIN FOREST INDUSTRY
ASSOCIATION,

Defendant-Intervenor,

Case No. CV 95-0425-S-EJL

MEMORANDUM DECISION
AND ORDER

This action is brought pursuant to §2001(f) of the 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act ("Rescissions Act"), Pub. L. No. 104-19. The plaintiffs, Idaho Conservation League and The Wilderness Society, seek a permanent injunction preventing the Forest Service¹ from proceeding with the Thunderbolt timber salvage sale ("Salvage Sale"). The Salvage Sale is a component of the Thunderbolt Wildfire Recovery Project, as described in the Forest Service's October 5, 1995, Record of Decision (ROD).

The plaintiffs' primary claim is that the decision to proceed with the Salvage Sale was arbitrary and capricious and should be enjoined as authorized by § 2001(f). Additionally, the plaintiffs claim that § 2001(c)(1)(A) of the Rescissions Act requires that the Secretary of the Department of Agriculture, Dan Glickman, personally participate in timber salvage sale decisions, and that Secretary Glickman's failure to do so renders the Salvage Sale unlawful and invalid.

Currently pending before the court are plaintiffs' Motion for Summary Judgment, the Forest Service's Cross Motion for

¹ The plaintiffs named as defendants U.S. Forest Service Chief Jack Ward-Thomas; the Secretary of the Department of Agriculture Dan Glickman, and the United States Forest Service. These defendants are referred to collectively as "the Forest Service."

Summary Judgment, and the Forest Service's Motion to Strike Extra-Record Documents. For the reasons explained below, the plaintiffs' motion is denied, and the Forest Service's cross motion is granted, and the Forest Service's Motion to Strike in part granted and in part denied.

I. BACKGROUND.

A. The Salvage Sale.

The challenged Salvage Sale is located within the South Fork Salmon River drainage, in the Boise and Payette National Forests. This drainage lies within the geological formation known as the Idaho Batholith, an area characterized by steep, highly dissected topography and shallow soils. The drainage is environmentally significant as it provides critical habitat for endangered species of salmon. Since the 1950's, however, the drainage has suffered severe degradation due to erosion and stream sedimentation caused by mining, grazing, logging, and associated road building.

In recognition of the existing sedimentation problems and the resultant decline in fish populations, the Forest Service has determined that the primary management emphasis for the drainage is the restoration of harvestable populations of

naturally reproducing salmon and trout. To this end, the Forest Service collaborated with other federal and state agencies, tribal councils, and private industry, to establish management goals and strict criteria to reduce sedimentation and improve water quality. The Forest Service already has spent millions of dollars toward these goals to help restore the dwindling salmon populations. Nonetheless, the drainage remains highly vulnerable to erosion, and the fisheries resource within it remains at substantial risk.

2. The Thunderbolt Wildfire Recovery Project.

The Salvage Sale that the plaintiffs seek to enjoin is a component of the Thunderbolt Wildfire Recovery Project ("Recovery Project"). The challenged Salvage Sale proposes to log dead and imminently dead trees on 3,237 acres within this sensitive drainage, and includes logging on landslide prone riparian slopes and inventoried roadless areas. However, all trees removed will be yarded by helicopter. With the exception of 50 feet³ of temporary road spurs, no new road construction would occur. The harvest will occur through 1996 to capture optimum timber value.

³ Prior to the modifications, the ROD permitted construction of 120 feet of temporary road spurs. However, as modified, only 50 feet of such construction will be required.

The stated purpose of the Salvage Sale is to finance the recovery projects called for in the Thunderbolt Wildfire Recovery Project ("the Recovery Project"). These projects include implementation of sediment reduction projects on specific roads and planting trees and shrubs on about 2,300 acres within the sale area, including planting on 1,214 acres of landslide-prone Riparian Habitat Conservation Areas (RHCAs).

The Recovery Project was the Forest Services' response to the massive wildfires of 1994 that burned 150,000 acres within the South Fork Salmon River watershed. The Thunderbolt wildfire itself burned 18,827 acres, including about 5,935 acres that burned at high intensity. Following the wildfires, the Forest Service completed the Thunderbolt Wildfire Landscape Assessment which examined all resources across the large fire landscape and assessed how the Thunderbolt Wildfire had affected those resources. Based on the recommendations contained in that assessment report, the Forest Service proposed the Thunderbolt Wildfire Recovery Project, the stated purposes of which are as follows:

to improve long term fish habitat, rehabilitate existing sediment sources, improve hydrologic conditions of affected watersheds, protect long term soil productivity,

promote regenerations of trees on burned areas, and recover the economic value of fire-killed and imminently dead trees as a means of financing the ecosystem restoration and sediment reduction projects.

AR Vol. 6, Tab 39, at I-6.

In March of 1995, the Forest Service issued its Draft Environmental Impact Statement (DEIS) and biological assessments for endangered species of fish and wildlife, as required by Section 7 of the Endangered Species Act, (ESA), 16 U.S.C. § 1536(a)(2), and biological evaluations for sensitive plant, wildlife and fish species, including bull trout, steelhead, redband and westslope cutthroat trout, in compliance with National Environmental Policy Act, (NEPA), 42 U.S.C. §§ 4321, *et seq.* The Project's proposed alternative, particularly the component that proposed the Salvage Sale to finance recovery actions, drew harsh and substantial criticism from the other federal agencies having jurisdiction over the resource: the Environmental Protection Agency (EPA), the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wild Service (USFWS) and the Idaho Department of Fish and Game. In the unanimous opinion of these agencies, the

³ The Reassessments Act, which superceded these laws for timber salvage sales, was not signed into law until July 27, 1995.

environmental risks posed by using salvage logging to finance restoration projects were too great to render the Project acceptable.

The EPA recommended against the Project, noting that the proposed action was inconsistent with collective agency decisions and resource protection goals for the South Fork Salmon River watershed. The EPA concluded that the logging sale would further aggravate the already critically degraded habitat for threatened salmon. NMFS also strongly opposed the Project, concluding that the Recovery Project, and the logging activity in particular, will likely jeopardize the continued existence of the endangered salmon and will likely result in the destruction or adverse modification of their critical habitat. The USFWS similarly opposed the salvage sale on the ground that it would likely result in adverse impacts to fish and wildlife. The USFWS opined that the proposed salvage actions would generate additional sediment in the already-impacted watershed, negating or delaying the benefits from the restoration actions. The Idaho Department of Fish and Game also criticized the proposal to use logging to fund restoration projects.

In response to these concerns, the Forest Service convened a panel⁴ (the "Science Panel") consisting of experts from within the Forest Service to review the scientific merit of the material presented in the DEIS on sediment yield, sediment routing, and fisheries habitat. The charter of the Science Panel was to determine "if there was a better scientific basis for the decision and make recommendations to ensure that decisionmakers have information based on the best scientific analysis and data available." The Science Panel concluded that the Forest Service had used the best analytical methods available for estimating erosion and sediment delivery. However, the Science Panel was unable to conclude that the analysis performed could support the DEIS' prediction for long term improvement in spawning and rearing habitat of anadromous fish. In this latter regard, the Science Panel's Final Report identified six specific recommendations to address its concerns. The Science Panel's Final Report was completed and distributed to the EPA, NMFS, and the USFWS in late June, 1995.

⁴ Initially, a federal interagency science panel ("the Blue Ribbon Panel"), which included representatives from the Forest Service, EPA and the U.S. Fish and Wildlife Service (but not NMFS), met to review the science applied in the soils and fisheries analysis process. However, this panel could not reach consensus on a final report.

The Forest Service considered and responded to the Panel's recommendations, and circulated its responses to the EPA, NMFS and the USFWS. The Forest Service also revised its DEIS to incorporate the additional data and analysis requested, as reflected in the Final Environmental Impact Statement (FEIS). The Science Panel reviewed the changes made between the DEIS and the FEIS and, on September 1, 1995, concluded in a memorandum that the revisions in the FEIS had addressed the panel's major recommendations. On September 12, 1995, the Forest Service released its FEIS. On October 5, 1995, the Forest Service issued its record of decision (ROD), indicating that it planned to proceed with the Salvage Sale under a modified version of the recommended alternative. On October 13, 1995, the Forest Service advertized the Salvage Sale.

The plaintiffs timely filed this legal challenge to the Salvage Sale within 15 days of the Sale's initial advertisement, as required by section 2001(f)(1) of the Rescissions Act. Pursuant to the expedited briefing schedule proposed by the parties and ordered by the court, the parties filed cross motions for summary judgment. Over the plaintiff's objection, the court granted permissive

intervention to Intermountain Forest Industries Association. The court also denied the Forest Service's motion to limit review and permitted limited discovery by the plaintiffs. The court reserved its ruling on the Forest Service's motion to strike plaintiffs' extra-record documents.

On December 1, 1995, the court heard oral argument on the parties' summary judgment motions. Pursuant to section 2001(f)(5) of the Act, this court is required to issue its final decision within 45 days, or by December 11, 1995. Having considered the administrative record and the written and oral submissions by the parties, the court hereby issues the following memorandum decision.

C. The Rescissions Act.

Subsequent to the Forest Service's proposal to conduct the Salvage Sale, but prior to its decision to proceed with it, Congress passed the Rescissions Act which the President signed into law on July 27, 1995. The Rescissions Act sets forth expedited procedures pursuant to which the Secretary of the Department of Agriculture (Secretary) must prepare, advertise, offer, and award all contracts for salvage timber sales. As evidenced by the streamlined and expedited procedures for these sales, Congress' purpose in enacting the

Rescissions Act was to harvest the backlog of dead and dying trees in the National Forests and other public lands. See also Conference Report to H.R. 1158, H.R. 104-124, 104th Cong., 1st Sess. (1995).

Paragraph (c) (1) of the Rescissions Act requires that for each timber salvage sale, the Secretary of Agriculture must prepare a document that combines the environmental assessment (EA) called for in 102(2) of NEPA, and the biological evaluation (BA) required by section 7(a) (2) of the ESA.

However, such documents need consider the Salvage Sale's environmental impacts only to the extent which the Secretary, in his sole discretion, deems appropriate and feasible.

§2001(c) (1) (A). Similarly, the Secretary has sole discretion to determine the extent to which the document of his decision is consistent with any standards or guidelines from otherwise applicable forest management plans.

Paragraph (c) (4) of the Act provides that the Secretary of Agriculture "shall design and select the specific salvage timber sales to be offered on the basis of the analysis contained in the document or documents prepared pursuant to paragraph (1) to achieve, to the maximum extent feasible, a salvage sale volume level above the program level." (Emphasis

added). However, the scope and content of such documents, and the information prepared, considered, and relied upon to reach a decision, rest within the sole discretion of the Secretary. §2001(c)(1)(A). Finally, the documents and procedures required by the Rescissions Act are expressly deemed to satisfy all otherwise applicable federal environmental and natural resource laws, including NEPA, NFMA, and the ESA. See §2001(i).

II. JUDICIAL REVIEW.

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, 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 environmental impacts,

the scope of review permitted by the Rescissions Act is extremely narrow.

In the instant case, the plaintiffs' challenge rests on two claims: Their first claim is that the Forest Service's decision to proceed with the Salvage Sale was arbitrary and capricious under §2001(f)(4) of the Rescissions Act. In particular, the plaintiffs argue that the sale should be enjoined because: (1) the decision is contrary to the advice of other agencies; (2) the decision deviates from longstanding policies and standards for managing the watershed without a rational explanation for such deviation; and (3) the Salvage Sale will not raise enough revenue to fund restoration projects.

The plaintiffs' second claim is that § 2001(c)(1)(A) of the Rescissions Act requires that the Secretary of the Department of Agriculture, Dan Glickman, personally authorize the Salvage Sale, and that because he did not, the Salvage Sale is unlawful. The court will address these issues in turn.

A. Was the Decision "Arbitrary and Capricious"?

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." Mr. 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 FCC 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).

1. The Agency Decision Contradicts Expert Advice.

In the instant case, the plaintiffs contend that the Forest Service's decision should be deemed arbitrary and capricious because it contradicts the expert advice of NMFS, the EPA, the USFWS, and the Idaho Department of Fish and Game. As noted above, all of these agencies strongly recommended against logging in the area, concluding that such action would further aggravate already degraded habitat recognized as critical to threatened salmon. It is clear, however, the Forest Service is an expert on the forest management and the impact that management may or may not have on natural resources. Thus, notwithstanding substantial interagency disagreement, the Forest Service was entitled to rely on the opinions and analysis of its own experts. Marsh, 490 U.S. at 378. Moreover, as noted above, the Rescissions Act expressly grants the Secretary sole discretion over the information considered and relied on to reach his decision. See §2001(1). Thus, the fact that other qualified experts oppose the

proposed sale, by itself, does not render the decision arbitrary and capricious. See Friends of the Earth v. Hinz, 800 F.2d 822, 825 (9th Cir. 1986).

The plaintiffs argue that the decision nonetheless should be deemed arbitrary and capricious because the Forest Service failed to explain why it rejected NMFS' conclusion that the Salvage Sale "is likely to jeopardize the continued existence of Snake River spring/summer chinook salmon and result in the destruction or adverse modification of their critical habitat."

The basis of NMFS' conclusion that the Salvage Sale will jeopardize endangered salmon and their habitat is set forth in the Draft Biological Opinion for the Thunderbolt Wildfire Recovery Project (BiOp). In the BiOp, NMFS states its belief that the Salvage Sale is likely to incrementally contribute to sediment, impair the process of large woody debris recruitment, potentially trigger a landslide by removal of live trees, and increase the probability of a fuel spill in the South Fork and its major tributary streams. A review of the record, however, demonstrates that the Forest Service addressed each of these concerns, either in the initial DEIS or else later, in the FEIS.

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For example, one of NMFS' primary concerns is with the Forest Service's decision to allow harvest on landslide-prone slopes. In NMFS' view, such activity will increase the potential for landslides to deposit sediment in channels where endangered fish spawn, rear and overwinter. At the root of this concern is that removal of live but "imminently dead" trees from these areas will decrease evapotranspiration and increase soil moisture, which in turn will increase the likelihood of landslides. The Forest Service specifically addressed this issue, but reached a different conclusion as to the risks presented by the proposed Sale. The Forest Service's discussion of the issue, and the basis for its conclusion, is expressly incorporated into its record of decision:

Our concern over harvesting on landslide prone RHCA's centered on whether large woody debris (LWD) recruitment to streams would be significantly altered, and if removing trees with some live foliage would increase the probability of a landslide occurring. The analysis concluded that harvest activities will not significantly reduce the probability of a landslide occurring. The analysis concluded that harvest activities will not significantly reduce LWD recruitment due to full retention of trees within streamside RHCA's (300 ft slope distance either side of fish-bearing perennial streams, 150 ft along nonfish-bearing perennials, and 100 ft along intermittent streams). Headwater portions of the streams will be considered intermittent streams and protected

similarly. Any debris slide occurrence on landslide prone RHCA's will be limited in size and frequency and would have to travel through the streamside RHCA's in order to deliver LWD to the stream system. Additional inventory of fire-damaged trees on landslide prone areas was completed in June. Eighty-nine percent of the trees identified for harvest have no live foliage remaining. Only four trees per acre that are scheduled for harvest have some live crown remaining (generally less than 10 percent). Based on the monitoring results of tree mortality after the 1989 Lowman Wildfire and the accuracy of the regression formula validated by that monitoring, four trees per acre may possibly live. However, the regression formula was shown to accurately predict death or survival 83 percent of the time. We have instructed personnel to prepare the timber sale contract in such a way that any tree meeting the definition of fire-killed and with live foliage remaining, would take priority for snag retention over a tree without live foliage. This will mitigate any concern in our estimation. Several research scientists (Walt Megahan, Allen Barta, and others) familiar with landslide phenomena in the Idaho Batholith concluded that helicopter will not change the probability of a landslide occurring.

AR Vol. 7, Tab 40 at 4.

The court has reviewed the FEIS and the referenced portions of the Administrative Record and concludes 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.

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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. The expert analysis referenced in the ROD and relied on by the Forest Service provides the rational connection to the Forest Service's decision to proceed, and convinces the court that the decision was not arbitrary and capricious.

2. The Agency Departed from Longstanding Policy.

Next, the plaintiffs assert that the Forest Service's decision to proceed with the Salvage Sale is arbitrary and capricious because it deviates from longstanding and carefully crafted agency and inter-agency policies and standards for managing the watershed, without any rational explanation for such deviation. The Forest Service readily concedes that the proposed Salvage Sale, which will log from landslide prone

Riparian Conservation Habitat areas, is inconsistent with established management policies for the watershed. Indeed, but for the Rescissions Act,⁵ the Salvage Sale could not be implemented without amending the Land Resource Management Plans (LRMPs) for the Boise and Payette National Forests.

However, the Forest Service specifically considered the existing management standards and guidelines of the LRMPs when it decided to go forward with the timber sale. It acknowledges that the LRMPs limit ground disturbing activities, such as helicopter logging, until the interim objective of providing habitat sufficient to support fishable populations of salmon and trout is met. Because the interim objective has not been met, the Salvage Sale would not be consistent with the LRMPs. However, in deciding to go forward with the restoration projects and the salvage sale, the Forest Service explained that "[m]uch of the more than 150,000 acres that burned were contiguous areas adjacent to the river," and that the impacts from these fires "resulted in a changed

⁵ Under § 2001c(1) (A) of the Rescissions Act, the Secretary is given sole discretion to determine whether the document of his decision is consistent with any standards and guidelines from management plans applicable to the National Forest lands on which the proposed salvage sale is to occur.

However, subsection 2001(1) expressly precludes such amendment: "Compliance with this section shall not require or permit any administrative action, including... amendment ... in or for any land management plan ... because of implementation ... of activities authorized or required by this section...." (Emphasis added).

condition to the South Fork Salmon River basin that was unforeseen in the Boise and Payette Forest Plans." FEIS I-3.

The plaintiffs reject this explanation, claiming that the 1994 wildfires did not come as a surprise to the Forest Service. To support their position, the plaintiffs cite to the NMFS BiOp which states that the 1994 wildfires that burned in the South Fork Salmon River drainage of the Boise and Payette National Forests were within the range of disturbances envisioned in the environmental impact statements for the Boise and Payette National Forest LRMPs.

The court has reviewed the LRMPs for those forests and concludes that the analysis contained therein supports the Forest Service's position. The analysis for the Boise National Forest shows that except for fires in 1986 and 1987, which burned 35,593 and 50,962 acres, respectively, forest fires historically have burned less than 1,000 acres each year. See AR Vol. 27, Tab 204 at II-56. Although the LRMP for the Payette National Forest does not indicate the historical range, it does reflect that forest fires annually burn an average of 1,844 acres. See AR Vol. 25, Tab 202, at II-95. Upon this record, the court has little difficulty deferring to the Forest Service's view that the 150,000 acres that burned

in 1994 resulted in a changed condition not foreseen in the forest plans. Accordingly, the court cannot conclude that the Forest Service's decision to alter its management to adapt to that change was arbitrary and capricious.

3. Using the Salvage Sale to Fund Recovery Projects.

Finally, the plaintiffs argue that the decision is arbitrary and capricious because the Salvage Sale will not raise enough revenue to fund the restoration projects deemed critical by the Forest Service in the FEIS or required by § 2001(c)(8) of the Rescissions Act.⁶

The Forest Service has stated that the objective of the Salvage Sale is "to recover the economic value of dead and imminently dead trees as a means of financing activities related to" its paramount objectives to "improve long term fish habitat, rehabilitate existing sediment sources, improve hydrologic conditions of the affected watersheds . . ." AR, Vol. 6, Tab 39, at I-3.

⁶ The Rescissions Act provides that salvage timber sales "shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities." §2001(c)(8). The plaintiffs contend that where, as here, the Forest Service's only justification for the salvage sale is the generation of funding for restoration projects, costs and revenues must be considered. Because the court concludes that the Forest Service's decision to use the Salvage Sale to fund restoration is not arbitrary and capricious, the court need not decide whether Rescissions Act would prohibit a contrary ruling.

The Forest Service expressly recognized that because of the delay-caused loss of merchantable timber volume, the Salvage Sale would not generate enough revenue to implement all the restoration projects contemplated in the FEIS. Thus, ROD reflects that the Forest Service reduced the acreage on which the restoration projects would be implemented. The Forest Service maintains that the Sale will raise sufficient revenue to fund those committed-to projects.

In the FEIS, the Forest Service states that funding for the restoration projects

would be derived from stumpage receipts. Stumpage receipts include purchaser credits for road reconstruction activities, Knutson-Vandenberg (KV) cooperative funds for sale area improvement, brush disposal deposits, and erosion control cooperative funds. In addition, some congressionally appropriated funds may be used to fund trailhead development and monitoring and/or supplement tree planting.

AR, Vol. 6, at IV-58.

In its ROD, the Forest Service estimated that the sale value of the Salvage Sale would be one million dollars. The high bid actually received was \$1,050,710. The exhibits submitted by the Forest Service explain how the Forest Service expects these funds, and other available funds, to fund the committed-to projects.

Of the gross receipts, the Forest Service is obligated to return 25 percent to the counties as payment in lieu of taxes, or \$262,677. Additionally, \$299,369 of the Purchaser Credit⁷ funds will finance existing road-related sediment reduction projects. Of the KV Plan funds will be used to implement additional sediment reduction projects identified in the ROD, with the balance of \$152,390 available,⁸ at the discretion of the responsible officials, to implement other nonessential KV projects not committed to in the ROD. The remaining commitments in the ROD not funded by Purchaser Credit or KV Plan money will be funded through appropriated money. This includes reforestation required by the Rescissions Act.

The plaintiffs point out that the Salvage Sale revenues are insufficient to cover the costs of preparing the Salvage Sale, including the NEPA analysis and litigation. The Forest Service explains that the funds used to cover such costs were generated by past salvage sales and derived from the Forest

⁷ "Purchaser Credit" means that the purchaser performs the road work prescribed in the contract, and, in return, receives a credit for the value of that work toward the total timber sale contract bid amount. In this case, \$299,369 worth of sediment reduction projects ameliorate existing sediment problems on existing roads will be completed by the purchaser.

⁸ These remaining funds may also be returned to the U.S. Treasury of Salvage Sale Fund or else be used to finance a portion of the reforestation efforts.

Service's pooled Salvage Sale Fund, as expressly permitted by §2001(b)(3) of the Rescissions Act.

The court has reviewed the financial information and calculations submitted by the parties, and the information contained in the FEIS, ROD, and the Forest Service's declarations and discovery responses in particular. Based on that review, the court is persuaded that using the anticipated revenues from the Salvage Sale, together with the financing identified in the ROD, the Forest Service will be able to fund the specific projects to which it committed in the ROD. Accordingly, the court finds that the Forest Service's decision to use the Salvage Sale to finance the restoration projects was not arbitrary and capricious.

Having determined that the Forest Service's decision to proceed with the Salvage Sale was not arbitrary and capricious, the court next turns to the plaintiffs' claim that Secretary Glickman's failure to personally participate in the decision renders the decision unlawful.

B. Must Secretary Glickman Personally Authorize the Sale?

The Plaintiffs claim that § 2001(c)(1)(A) of the Rescissions Act requires the Secretary of the Department of Agriculture, Dan Glickman, to personally authorize the Salvage

Sale, and that because he did not, the decision to proceed with the Salvage Sale is unlawful and must be voided. In response to this claim, the Forest Service asserts that the Secretary's authority to manage and supervise forest lands has been duly delegated to the Assistant Secretary pursuant to 7 CFR § 2.19(b), which is further delegated to the Forest Chief pursuant to 7 CFR § 2.60(a)(2). Therefore, the Forest Service argues, the Secretary is not required to personally authorize each salvage timber sale.

The plaintiffs concede that such delegation normally is allowed. They argue, however, that in enacting the Rescissions Act, Congress intended that the Secretary be personally accountable for timber salvage sales which adversely affect endangered species or which deviate from existing forest plans, standards and guidelines for managing the forests.

To support their interpretation, the plaintiffs rely on a remark by 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. Although I do not think this is a sufficient fix to this legislation, I do think it is essential for the administration to faithfully

execute this authority in order to prevent serious abuse of the legal exemptions in this provision.

141 Cong. Rec. S10465 (July 21, 1995) (remarks of Senator Lieberman) (emphasis added). Relying on this remark, the plaintiffs argue that the Rescissions Act's reference to "the Secretary" means Secretary Glickman himself, and that such authority may not be delegated.

However, the court agrees with the Forest Service that the Senator's remark, made on the floor on the day the Act passed, is not necessarily indicative of legislative intent. As discussed in Davis v. City and County of San Francisco, 967 F.2d 1536, 1553-54 (9th Cir. 1992), the floor statements made by individual members of Congress have limited value in interpreting the intent of Congress as a whole. The court finds that the Senator's comment is insufficient to change the Secretary's ability to delegate his authority.

The Rescissions Act's obvious intent and purpose, as evidenced by the provisions enacted by Congress and signed into law by the President, is to facilitate and expedite salvage timber sales in the national forests and on other public lands. To require that Secretary Glickman personally

accomplish what is mandated by the Rescissions Act' would severely thwart, if not negate, this purpose. Moreover, allowing delegation, generally permits, and may effectively cause, a more thorough examination by the decisionmaker.

Accord Ashwood Manor Civic Ass'n v. Dole, 619 F.Supp. 52 (E.D. Penn.), aff'd, 779 F.2d 41 (3rd Cir. 1985). For these reasons, the court concludes that the Rescissions Act does not restrict the Secretary's ability to delegate his authority. Accordingly, the plaintiffs' claim that Secretary Glickman was required to participate personally in the decision is rejected.

III. MOTION TO STRIKE

The Forest Service has moved to strike all extra-record documents submitted and referenced by the plaintiffs in their motion for summary judgment. Specifically, the Forest Service seeks an order striking Exhibits A-E, G, H, J, L-O and Q, which are attached to the Declaration of Kristen L. Boyles in

⁹ The Rescissions Act requires that the Secretary "prepare, advertise, offer, and award contracts" and "design and select the specific salvage timber sales to be offered." The Act does not limit the secretary's participation to those proposed sales that threaten endangered species or violates an otherwise applicable Forest Plan.

Support of ICL's Motion for Summary Judgment,¹⁰ and the Amended Declaration Cindy Deacon Williams.

The Forest Service contends that most of plaintiffs' exhibits were never sent to or received by the Forest Service, and thus could not have been considered by the decision maker. The plaintiffs maintain that although they obtained most of these documents from agencies other than the Forest Service, such papers were in existence prior to the date the Forest Service issued its final decision to proceed with the Salvage Sale.

The court has reviewed the exhibits in question and the arguments presented by both counsel. The court agrees with the Forest Service that the documents which were authored by agencies other than the Forest Service and which were not sent¹¹ or released to the Forest Service should be stricken as such writings were not before the decision maker at the time of the decision. Accordingly, the court finds that the

¹⁰ Exhibits F and I are found in the administrative record. The Forest Service concedes that Exhibits K and P should have been made part of the administrative record, but were inadvertently omitted in compiling the record in an expedited fashion.

¹¹ The court is unable to find that Exhibit L, an unsigned letter to the Forest Service which the Forest Service denies having received, was sent to the Forest Service.

Forest Service's motion to strike should be granted with respect to Exhibits A, B, E, G, H, J, M, L, N, O and Q.¹²

Exhibits C and D come from the Forest Service itself and reflect the costs implementing the decision. The court finds that such documents should be included in the record as they more fully explain the agency's decision to use the Salvage Sale as a means of financing recovery projects. Hence, the motion to strike is denied with respect to Exhibits C and D.

The Forest Service also seeks to strike the Amended Declaration of Cindy Deacon Williams. The plaintiffs have offered Ms. Williams' expert declaration to show the irreparable harm posed by the Salvage Sale, and argue that such evidence is necessary for this court's consideration of the requested injunctive relief. Under the applicable standard of review in this case, the court may grant a permanent injunction only if it is determined that the decision to proceed with the challenged Salvage Sale was arbitrary and capricious or otherwise not in accordance with applicable. Because this court has ruled against the

¹² Exhibit Q, a letter from NWS to other agencies, indicates that a copy was forwarded to the Forest Service. The Forest Service indicates, however, that the letter was not received by it. In either case, the court finds that the document does not add any evidence of disagreement not otherwise in the record and accordingly will order it stricken.

plaintiffs on the merits of the complaint, and because the Rescissions Act expressly precludes issuance of an injunction pending appeal, the issue of irreparable harm is now irrelevant. Accordingly, the Forest Service's motion to strike is granted with respect to the Amended Declaration of Cindy Deacon Williams.

ORDER.

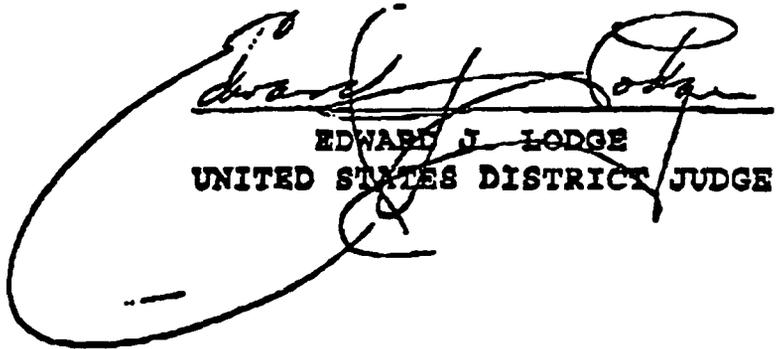
Based on the foregoing,

IT IS HEREBY ORDERED that the Motion for Summary Judgment and Injunctive Relief filed by plaintiffs Idaho Conservation League and The Wilderness Society (Dkt. No. 18) is DENIED.

IT IS FURTHER ORDERED that the Cross Motion for Summary Judgment filed by defendants Thomas, Glickman, and the U.S. Forest Service (Dkt. No. 33) is GRANTED.

IT IS FURTHER ORDERED that the defendants' Expedited Motion to Strike Extra-Record Documents (Dkt. No. 27) is GRANTED IN PART, AND DENIED IN PART, as set forth in the above memorandum decision.

Dated this 11th day of December, 1995.



EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
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NUMBER OF PAGES: 6

DATE: November 24, 1995

FROM: Paula Clinedinst, Paralegal, (202) 272-4698

MESSAGE: Idaho Conservation League v. Thomas, 95-6384

Attached is an order issued Wednesday from Judge Hogan denying the government's Motion to Limit Review to the Administrative Record and ordering defendants to respond to discovery requests by 11/28/95.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

THE IDAHO CONSERVATION LEAGUE,
and THE WILDERNESS SOCIETY,

Plaintiffs,

vs.

JACK WARD THOMAS, in his official
Capacity as Chief of the United
States Forest Service; DAN
GLICKMAN in his official capacity
as Secretary of the U.S.
Department of Agriculture; and
UNITED STATES FOREST SERVICE, an
agency of the U.S. Department of
Agriculture,

Defendants.

Case No. CV 95-425-S-EJL

ORDER

Pending before the court is defendants' Motion to Limit Review to the Administrative Record and for Protective Order Barring Discovery. (Dkt. No. 11). Appended to the motion are plaintiffs' interrogatories and requests for production, served on the defendants on November 3, 1995. The defendants assert that discovery is irrelevant in this case, and that the court's scope of review should be confined to the administrative record that has been submitted. For the reasons below, the motion is denied.

As pointed out by the plaintiffs, the discovery requests fall into two distinct categories: (1) questions concerning Secretary Glickman's participation in the decision to authorize the Thunderbolt sale; and (2) questions concerning the restoration funds to be generated by the Thunderbolt sale. The first category relates to the plaintiffs' claim that Secretary Glickman did not expressly authorize the project, in violation of Section 2001(c)(1)(A) of the Rescissions Act. This claim presents a question of law for the court and is not subject to the arbitrary and capricious standard set forth in Section 2001(f)(4). Thus, the defendant's argument that the court is bound by the standards of section 2001(f)(4) is without merit.

The second category, consisting of three questions and a corresponding request for production, focuses on the ability of the Thunderbolt sale to generate funds for restoration projects, and whether the defendants considered alternative sources of funding. These questions relate to the plaintiffs' claim that the agency's decision to authorize the Thunderbolt project was arbitrary and capricious.

The court observes that judicial review of agency action generally is limited to review of the administrative record. Friends of the Earth v. Hines, 800 F.2d 822, 828 (9th Cir.1986). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Florida Power & Light Co. v. Lorion, 470 U.S. 729, 105 S.Ct. 1598, 84 L.Ed.2d 643

(1985). As such, 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. See *id.* at 743-44, 105 S.Ct. at 1607 (quoting Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973)).

However, in carefully circumscribed instances, the court may allow supplementation of the record or allow a party challenging agency action to engage in limited discovery. Supplementation of an administrative record is the exception, not the rule. See San Luis Obispo Mothers For Peace v. Nuclear Regulatory Commission, 751 F.2d 1287, 1324 (D.C.Cir.1984).

In Public Power Council v. Johnson, 674 F.2d 791 (9th Cir.1982), the Ninth Circuit recited four generally recognized circumstances where supplementation or discovery may be justified: (1) when the record needs to be expanded to explain agency action; (2) when the agency has relied upon documents or materials not included in the record; (3) to explain or clarify technical matter involved in the agency action; and (4) where there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision makers.

Moreover, and of particular relevancy here, the Johnson court noted an additional exception, that review of matters beyond the administrative record may be appropriate where special review procedures are prescribed by Congress. See Johnson, 674 F.2d at 794-95. In Johnson, court noted its

original jurisdiction under 16 U.S.C. § 839(e)(5)(1988), which "streamlined judicial review to facilitate further the urgent reallocation of power." *Id.* at 795. Thus, the court allowed limited discovery of matters outside the administrative record, observing:

We have a short period to review the merits of partitioners' claims. We must avoid any delay arising from incomplete allegations or a subsequent need to remand to the agency or to expand the record. By permitting discovery, we facilitate expeditious review of the agency's contract offers, as the merits panel will be provided with fully-developed contentions and a complete record, should it deem resort to the supplemental material appropriate for its decision. The panel on the merits is free to strike any portion of the record, but we must at this stage insure there will be a full presentation of the issues to it.

Id. at 794-95 (emphasis added).

Subsequently, the Ninth Circuit relied on *Johnson* to uphold a district court's decision to consider matters outside of the administrative record in a timber sale challenge brought under the limited and expedited judicial review of timber sales offered under § 318 of the Department of Interior and Related Agencies Appropriations Act of 1989.¹ See National Audubon Society v. Forest Service, 4 F.3d 832 (9th Cir. 1993). There, the court reasoned:

Certainly, § 318 does not provide the district court with specific authority to examine evidence outside the administrative record like Dr. Ness's affidavit. However, given the limited scope and applicability of § 318, especially its accelerated judicial review

¹ Section 318(g)(1) of that Act requires judicial review be conducted to determine whether the challenged action "was arbitrary, capricious or otherwise not in accordance with law...". Stat. at 749.

procedures, see § 318(c)(1), we believe that, ruling on a § 318 challenge, the district court must be able to examine such evidence to "insure there will be a full presentation of the issues to it."

Id. at 842 (quoting *Johnson*, 674 P.2d at 795) (emphasis added).

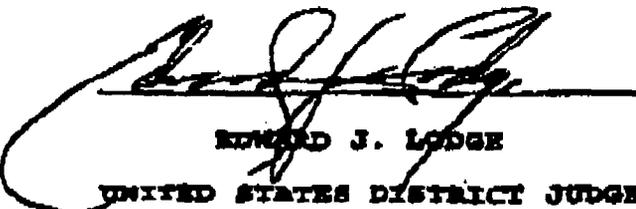
In the instant case, the plaintiffs contend that the defendants failed to adequately examine factors critical to the need for, or ability of, the Thunderbolt sale to generate funds for restoration projects. Following the reasoning of the Ninth Circuit in *National Audubon*, quoted above, the court similarly concludes that the limited scope and accelerated judicial review procedures of the Reversions Act justify the limited discovery requested by the plaintiffs in this case. Accordingly, the court will deny defendants' motion to limit review and for protective order.

Therefore,

IT IS HEREBY ORDERED that the defendants' Motion to Limit Review to the Administrative Record (Dkt. No. 11) is DENIED.

IT IS FURTHER ORDERED that the defendants shall have until Tuesday, November 28, 1995, to respond the plaintiffs' interrogatories and requests for production.

Dated this 23rd day of November, 1995.


EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

U.S. DEPARTMENT OF JUSTICE
 ENVIRONMENT AND NATURAL RESOURCES DIVISION
 GENERAL LITIGATION SECTION
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NUMBER OF PAGES TO BE TRANSMITTED (including cover) ~~45~~ 46+

FROM: Stephanie Parent (202)272-4056; fax 272-5815

MESSAGE: Idaho Conservation League v. Thomas (Thunderbolt salvage). Attached is Plaintiffs' SJ Reply Brief. Our Reply must be filed by November 30, 1995.

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF IDAHO

12 IDAHO CONSERVATION LEAGUE; and)
 13 THE WILDERNESS SOCIETY,)

14 Plaintiffs,)

15 v.)

16 JACK WARD THOMAS, in his official)
 17 capacity as Chief of the United)
 18 States Forest Service;)
 19 DAN GLICKMAN, in his official)
 20 capacity as Secretary of the U.S.)
 21 Department of Agriculture; and)
 22 UNITED STATES FOREST SERVICE, an)
 23 agency of the U.S. Department of)
 24 Agriculture,)

25 Defendants.)

Civil No. 95-425-S-EJL

ICL'S OPPOSITION TO
 DEFENDANTS' CROSS MOTION
 FOR SUMMARY JUDGMENT AND
 REPLY IN SUPPORT OF
 MOTION FOR SUMMARY
 JUDGMENT AND INJUNCTIVE
 RELIEF

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7	7 C.F.R. § 2.19(b)(2)	18
8	7 C.F.R. § 2.60(a)(2)	18

1 **Thunderbolt: a vehement threat or censure**

2 - Webster's New Collegiate Dictionary (1974)

3 INTRODUCTION

4 This case involves a grave decision to proceed with a timber
5 salvage sale which will jeopardize threatened fish and their
6 critical habitat, further degrade a watershed already harmed by
7 human activity, and make it impossible for the watershed to meet
8 water quality standards for a long time. The gravity of the
9 decision to proceed with the Thunderbolt salvage sale is
10 underscored by two undisputed facts. First, in deciding to
11 proceed with Thunderbolt, the Forest Service directly defied
12 overwhelming expert agency views that the negative effects of the
13 salvage sale and the risks posed by the salvage sale were simply
14 too great. Second, the decision to proceed with the Thunderbolt
15 salvage sale deviates from the core longstanding prescription
16 that land management agencies and scientific experts determined
17 were necessary for the watershed: that no logging activities,
18 salvage or green tree, should occur until the sediment levels in
19 the South Fork Salmon River have decreased.

20 The central question then is what level of analysis,
21 explanation, and accountability is required for a decision that
22 flies in the face of other expert agencies and past agency
23 policies? Does a paper shuffle, the simple receiving and filing
24 of contrary views, and a cursory, almost flippant decision to
25 disregard the experts and past policies suffice? Or must an
26 agency be held accountable for its decisions by providing
27 reasoned justifications for defying the experts and changing the
rules? And if an agency justifies going so far afield by

1 articulating a laudable reason for deviation, must the agency
2 rationally connect that reason with actual facts? Specifically,
3 must there be a basis for believing that the funds raised by the
4 Thunderbolt salvage sale will be available for additional
5 restoration, beyond repairing the damage done by the logging
6 itself?

7 Finally, when the law in question, the 1995 Emergency
8 Supplemental Appropriations for Disaster Relief and Rescissions
9 Act, Pub. L. No. 104-19 ("Rescissions Act"), charges a Cabinet
10 level official with the responsibility for considering adverse
11 environmental effects, risking harm to threatened or endangered
12 species, or deviating from forest plans, may the agency proceed
13 with a sale that collides with all these principles without an
14 involvement by the Secretary?

15 With these questions in mind, plaintiffs Idaho Conservation
16 League and The Wilderness Society (collectively "ICL") oppose the
17 Forest Service's cross-motion for summary judgment. Under the
18 logging rider to the 1995 Rescissions Act, the Forest Service's
19 decision to proceed with the Thunderbolt salvage sale is
20 arbitrary and capricious and in violation of the rider itself.
21 ICL respectfully asks the Court to permanently enjoin the
22 Thunderbolt salvage sale.

23 ARGUMENT

24 I. THE MEANING OF ARBITRARY AND CAPRICIOUS REVIEW

25 Under § 2001(f)(4) of the Rescissions Act, this Court may
26 set aside the Thunderbolt salvage sale if the decision to proceed
27 with the sale was "arbitrary and capricious or otherwise not in
accordance with applicable law...." This standard mirrors the

1 arbitrary, capricious, or contrary to law standard under the
2 Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq. -- a
3 familiar standard in the federal courts.

4 The APA was enacted on the heels of the New Deal, in
5 response to the remarkable growth in both the number and
6 authority of federal agencies. To check the enormous delegated
7 power wielded by the agencies, the APA mandated basic fairness
8 and rationality in agency decision-making. As the Supreme Court
9 noted, "unless we make the requirements for administrative action
10 strict and demanding, expertise, the strength of modern
11 government, can become a monster which rules with no practical
12 limits on its discretion." Burlington Truck Lines, Inc. v.
13 United States, 371 U.S. 156, 167 (1962) (quotation omitted)
14 (emphasis in original).

15 To cage the monster of unfettered agency discretion, the APA
16 renders agency action unlawful if the agency has failed to
17 consider all relevant factors, has "offered an explanation for
18 its decision that runs counter to the evidence before the
19 agency," or has not articulated "a rational connection between
20 the facts found and the choice made." Motor Vehicle Mfrs. Ass'n
21 v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see
22 also Natural Resources Defense Council v. EPA, 966 F.2d 1292,
23 1297 (9th Cir. 1992).

24 In reviewing an agency decision, courts are not to "supply a
25 reasoned basis for the agency's action that the agency itself has
26 not given." Bowman Transp., Inc. v. Arkansas-Best Freight
27 System, Inc., 419 U.S. 281 (1974). Instead, "the agency's path
[must] reasonably be discerned." Id. at 286. As the Supreme

1 Court in Bowen v. American Hosp. Ass'n, 476 U.S. 610 (1986)
2 explained:

3 Agency deference has not come so far that we will
4 uphold regulations whenever it is possible to "conceive
5 a basis" for administrative action. To the contrary,
6 the "presumption of regularity afforded an agency
7 fulfilling its statutory mandate," is not equivalent to
8 "the minimum rationality a statute must bear in order
9 to withstand analysis under the Due Process Clause."
10 Thus, the mere fact that there is "some rationale basis
11 within the knowledge and experience of the
12 [regulators]," under which they "might have concluded"
13 that the regulation was necessary to discharge their
14 statutorily-authorized mission, will not suffice to
15 validate agency decisionmaking. Our recognition of
16 Congress' need to vest administrative agencies with
17 ample power to assist in the difficult task of
18 governing a vast and complex industrial Nation carries
19 with it the correlative responsibility of the agency to
20 explain the rationale and factual basis for its
21 decision....

22 Id. at 627-28 (citations omitted). These admonitions apply with
23 equal force to judicial review of agency decisions that do not
24 involve promulgation of regulations. Additionally, a court must
25 decide whether the agency has made a clear error of judgment.

26 Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402,
27 416 (1971).

28 Although the arbitrary and capricious standard of review is
29 narrow, see Marsh v. Oregon Natural Resources Council, 490 U.S.
30 378 (1989), the standard "does not shield agency action from a
31 thorough, probing, in-depth review." Northern Spotted Owl v.
32 Hodel, 716 F. Supp. 479, 482 (W.D. Wash. 1988) (citation
33 omitted). As one appellate court explained:

34 There is no inconsistency between the deferential
35 standard of review and the requirement that the
36 reviewing court involve itself in even the most complex
37 evidentiary matters; rather, the two indicia of
38 arbitrary and capricious review stand in careful
39 balance. The close scrutiny of the evidence is
40 intended to educate the court. It must understand

1 enough about the problem confronting the agency to
2 comprehend the meaning of the evidence relied upon and
3 the evidence discarded; the questions addressed by the
4 agency and those bypassed; the choices open to the
5 agency and those made. The more technical the case,
6 the more intensive must be the court's effort to
7 understand the evidence, for without an appropriate
8 understanding of the case before it the court cannot
9 properly perform its appellate function.

10 Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976).

11 Finally, "even though an agency decision may have been
12 supported by substantial evidence, where other evidence in the
13 record detracts from that relied upon by the agency we may
14 properly find that the agency rule was arbitrary and capricious."
15 American Tunaboat Ass'n v. Baldrige, 738 F.2d 1013 (9th Cir.
16 1984) (citing Bowman Transp., 419 U.S. at 284 (agency decision
17 supported by substantial evidence may still be arbitrary and
18 capricious)).^{1/}

19 **II. THE FOREST SERVICE'S DECISION TO PROCEED WITH THE
20 THUNDERBOLT SALVAGE SALE IS ARBITRARY AND CAPRICIOUS.**

21 **A. In The Face Of Nearly Unanimous Scientific Opinion, The
22 Forest Service Proceeded With The Thunderbolt Salvage
23 Sale And Failed To Articulate A Rational Connection
24 Between The Facts Found And The Choice Made.**

25 The Forest Service contends that its decision to proceed
26 with the Thunderbolt salvage sale was not arbitrary and
27 capricious, even though it contradicted the expert advice of the
National Marine Fisheries Service ("NMFS"), the Environmental

1/ The Forest Service's citation to Sierra Club v. United
States Forest Service, No. 94-6245 (D. Or. Sept. 6, 1995), see
Forest Service Memo. at 17 n.10, is irrelevant. This order
dismissed a case originally brought under a substantive
environmental law when the court held that the Rescissions Act
applied to the salvage sale at issue; neither the case nor the
order involved review under the Rescissions Act. The order does
state the arbitrary and capricious standard of review, which is
no surprise given that the logging rider expressly dictates that
standard. See § 2001(f)(4).

1 Protection Agency ("EPA"), the U.S. Fish and Wildlife Service
2 ("FWS") and the Idaho Department of Fish and Game.

3 The Forest Service is faced with, and has been faced with,
4 tremendous expert agency opinion against the Thunderbolt salvage
5 sale. The record before the Forest Service is remarkable not
6 only for the sheer volume of federal agency expert analysis of
7 the Thunderbolt salvage sale, but also for the uniformly scathing
8 assessment of the sale by the expert agencies. Under an
9 arbitrary and capricious standard, the Forest Service cannot
10 ignore this expert assessment, nor can it dismiss these views
11 without a thorough, reasoned analysis.

12 Recognizing these basic parameters, the Forest Service tries
13 to paint a picture of probing, balanced analysis of the expert
14 opinions given on Thunderbolt. See Forest Service Memo. at 21-
15 24. On closer examination, these conclusory assertions amount to
16 much ado about nothing.

- 17 • The Forest Service asserts that comments were analyzed and
18 responses prepared, see Forest Service Memo. at 23, without
19 citation to the administrative record or a tie to any
20 particular comments or issues.
- 21 • The Forest Service states that the contrary views of the
22 other agencies were adequately confronted and addressed.
23 See Forest Service Memo. at 23. A closer look at the cited
24 portions of the administrative record, however, shows that
25 the responses consist of restating the agency's previous
26 position and referring back to old documents with no new
27 explanation or material. See, e.g. FEIS at V-113 (AR 39)
(response to EPA comments); Letter to Dr. Jacqueline Wyland,

1 NMFS, from Boise and Payette Forest Supervisors (AR 25 at
2 617-22) (response to NMFS August 4, 1995 jeopardy biological
3 opinion).

4 • The Forest Service points to its own Science Panel, see
5 Forest Service Memo. at 23, but neglects to mention that the
6 panel only addressed the methods used in the DEIS and not
7 the overall risks of the project. Even with this narrow
8 focus, the Science Panel "was unable to conclude that the
9 analyses performed could support the conclusion of long-term
10 improvement in spawning and rearing habitat of anadromous
11 fish...." Final Report, Thunderbolt Wildfire Science Panel,
12 June 23, 1995 (AR 27 at 656).

13 • The Forest Service refers to "lengthy meetings," see Forest
14 Service Memo. at 23, but the reference is to the meetings
15 that led to the previous standards and guidelines, not to
16 the Thunderbolt salvage sale which violates those standards
17 and guidelines.

18 • The Forest Service highlights its reliance upon the work of
19 Dr. Walter F. Megahan. See Forest Service Memo. at 21-22.
20 However, the cites in the Administrative Record are to the
21 bibliography for the Upper South Fork Salmon River and
22 Johnson Creek Watershed Analysis (AR 30) and Watershed
23 Literature Cites and References (AR 98) which list
24 scientific works by Dr. Megahan on the varying topics of
25 sedimentation, hydrology, and erosion. None of these
26 documents specifically address the Thunderbolt salvage sale,
27 and it is impossible to tell from the titles what the

1 conclusions of these references are.^{2/}

2 • The reference to Dr. Megahan's opinion about the Thunderbolt
3 salvage sale is found in typed notes of a meeting between
4 various agencies in May 1995, before either NMFS or the EPA
5 put its concerns about Thunderbolt in writing. (AR 193 at
6 5953). The anonymous typed notes show the deep concerns of
7 the various agencies about the project. After what seems to
8 be a discussion of wildfires and soils, the notes attribute
9 to Dr. Megahan the following comment: "[s]cience has
10 advanced, models are good, risk is low." It's hard to know
11 what this means, but surely this cryptic notation cannot
12 refute the reasoned concerns expressed by NMFS, EPA, and
13 other agencies. Nor can it be considered an endorsement of
14 the Thunderbolt salvage sale as the Forest Service claims.
15 See Forest Service Memo. at 22.

16 The Forest Service has gone through the motions; it has
17 received and duly filed the expert views, held meetings, and
18 prepared reams of paper on the sale. What the Forest Service has
19 not done is explain why it rejected NMFS conclusion that:

20 the Thunderbolt Project is likely to jeopardize the
21 continued existence of Snake River spring/summer
22 chinook salmon and result in the destruction or adverse
23 modification of their critical habitat. ... Because the
24 Thunderbolt Project is not consistent with the
25 protection and restoration measures in the[]
26 programmatic and watershed-specific documents, and
27 because NMFS is unable to identify an alternative
28 approach to the action that affords listed salmon an

2/ Indeed, Ms. Cindy Deacon Williams, in her expert declaration submitted earlier to this Court, mentions a case study by Dr. Megahan that "suggests that Best Management Practices ("BMPs") for timber harvest are not nearly as effective at reducing erosion as forest managers claim." Declaration of Cindy Deacon Williams at ¶ 18.

1 equal or greater likelihood of ensuring salmon survival
2 and recovery, NMFS is unable to identify a Reasonable
and Prudent Alternative...."

3 Biological Opinion, Thunderbolt Wildfire Recovery Project, dated
4 August 4, 1995 at 24-26 (AR 25 at 607-09); see also Biological
5 Opinion, Thunderbolt Wildfire Recovery Project at 31-32 (Exh. B
6 to Declaration of Kristen L. Boyles in Support of ICL's Motion
7 for Summary Judgment). The Forest Service points to no
8 explanation of its reasoned consideration and rejection of these
9 views, as well as the views of EPA.

10 In a last ditch defense, the Forest Service asserts that the
11 Rescissions Act changes the legal framework in a way that excuses
12 the dearth of agency analysis. Presumably, the Forest Service is
13 seeking to benefit from the fact that Thunderbolt cannot be
14 challenged under the Endangered Species Act, 16 U.S.C. § 1531 et
15 seq. Even under the Endangered Species Act, however, the Forest
16 Service is not bound by the findings of a biological opinion from
17 NMFS or FWS. See Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th
18 Cir. 1987). Instead, an agency's decision to proceed despite a
19 contrary biological opinion is arbitrary and capricious.

20 [C]ourts give great deference to the expertise of the
21 FWS [or NMFS] on these issues, and an agency that
22 attempts to proceed with an action in the face of a
critical FWS [or NMFS] biological opinion will almost
certainly be found to have acted arbitrarily and
capriciously and contrary to law.

23 Lone Rock Timber Co. v. U.S. Dep't of Interior, 842 F. Supp. 433,
24 437 (D. Or. 1994). Similarly, EPA's expertise in the steps
25 needed to attain water quality objectives for severely degraded
26 waters, like the South Fork Salmon River, cannot be shunted aside
27 and discounted without explanation.

1 Perhaps recognizing the lack of such an analysis to explain
2 how the Forest Service is justified in proceeding with
3 Thunderbolt over strenuous objections and strong evidence, the
4 Forest Service accuses ICL of demanding that the Forest Service
5 eradicate ecological uncertainty and states that ICL has engaged
6 in analysis paralysis. See Forest Service Memo. at 24. To the
7 contrary, plaintiffs simply seek the type of rational
8 decisionmaking that Congress has demanded of all federal
9 decisionmakers. The Forest Service must provide some meaningful
10 assessment of the effects of this sale on the physical
11 environment and the web of species that depends on it or offer a
12 rational connection between the overwhelming evidence in the
13 record and the decision to proceed with the sale.

14 The comments from NFMS, EPA, and the other agencies raise
15 red flags about the rationality of proceeding with the
16 Thunderbolt salvage sale. The Forest Service must confront the
17 objections from these expert agencies; it did not.

18 B. By Deciding To Proceed With The Thunderbolt Salvage
19 Sale, The Forest Service Contradicted Its Own Carefully
20 Crafted Policies And Standards With No Rational
21 Explanation.

22 The Forest Service concedes that its decision to proceed
23 with the Thunderbolt salvage sale deviates from longstanding and
24 carefully crafted agency and inter-agency policies and standards
25 for managing the South Fork Salmon River watershed. Recognizing
26 that agencies cannot deviate from longstanding policies at will,
27 the Forest Service's memorandum contends, in an extraordinary
example of circular reasoning, that the decision to proceed with
Thunderbolt does not actually violate the forest plans because

1 the Forest Service amended the forest plans to allow Thunderbolt
2 to proceed. See Forest Service Memo. at 29. In the Record of
3 Decision, the Forest Service bluntly admits that "the proposed
4 activities are not consistent with the Forest Plans." Record of
5 Decision ("ROD") at 13 (AR 40 at 000950).

6 The Forest Service spent years developing the South Fork
7 guidelines, and also developed the "South Fork Salmon River
8 Restoration Strategy" to identify and prioritize restoration
9 projects in the watershed. See FEIS at I-11; South Fork Salmon
10 River Restoration Strategy (AR 138); Declaration of Dale A.
11 McCullough at ¶ 6-8 (filed concurrently) (describing committees
12 created by the Forest Service to study and address South Fork
13 Salmon River management). The Forest Service incorporated the
14 South Fork guidelines into its forest plans for the Boise and
15 Payette National Forests. Boise Land and Resource Management
16 Plan (AR 27); Payette Land and Resource Management Plan (AR 25).
17 The Forest Service drafted and adopted PACFISH, but the
18 Thunderbolt salvage sale is inconsistent with PACFISH. Aug. 4,
19 1995 Biop. at 14.

20 Now, the Forest Service has reversed its position on the
21 proper management of the South Fork Salmon River without
22 explanation. "An agency's view of what is in the public interest
23 may change, either with or without a change in circumstances.
24 But an agency changing its course must supply a reasoned
25 analysis." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 47 (quotations
26 omitted); see also American Tunaboat, 738 F.2d at 1016 (decision
27 of agency arbitrary and capricious where it ignored comprehensive
database that was the product of many years of effort by trained

1 professionals that was used by the agency to carry out its legal
2 responsibilities).

3 The Forest Service does not even present an adequate
4 analysis of what did or did not go into the decision to amend the
5 forest plans. The ROD states that the Thunderbolt salvage sale
6 represents an important changed condition that the forest plans
7 did not foresee. See ROD at 4. This assertion is flatly
8 contradicted by other evidence in the record. See August 4, 1995
9 Biop. at 10 ("The events in recent years such as the Savage,
10 Chicken, and Thunderbolt Fires are clearly not outside the range
11 of disturbances envisioned in the LRMP EISS.... The LRMP
12 Consensus Group considered the potential for such disturbances as
13 they crafted the cautious step-wise management approach....").
14 The ROD also states that the forest plans must be amended because
15 otherwise the Thunderbolt salvage sale will violate them. See
16 ROD at 13. This, of course, is no reason at all.

17 No other agency saw the need to change the goalposts in the
18 middle of the game. To the contrary, NMFS stressed the need to
19 strictly adhere to the South Fork guidelines:

20 NMFS believes the only scientifically defensible
21 approach to avoid jeopardizing listed salmon in the
22 South Fork is close adherence to the South Fork LRMP
23 guidelines, consistency with PACFISH and NMFS' related
24 biological opinions, and adherence to NMFS' Proposed
25 Recovery Plan.

26 Aug. 4, 1995 Biop. at 26-27. Without explanation for its sudden
27 deviance from its own carefully crafted policies for the South
Fork Salmon River, the decision to proceed with the Thunderbolt
salvage sale is arbitrary and capricious and should be set aside.

1 c. Proceeding With The Thunderbolt Salvage Sale To Raise
2 Revenue To Fund Restoration Projects (The Sole Reason
3 Given By The Forest Service For The Salvage Sale) Is
4 Arbitrary And Capricious Because Thunderbolt Will Not
5 Raise Enough Money.

6 Presumably even the Forest Service would admit that the
7 Thunderbolt salvage sale should not go forward if it were not
8 being proposed to raise money for restoration projects. In other
9 words, the Forest Service rationale hinges on its pursuit of
10 Thunderbolt to fund restoration above and beyond that needed to
11 mitigate the harm caused by the logging.

12 The Forest Service itself, not ICL, has framed the debate
13 over funding. By deciding to proceed in order to fund
14 restoration, see Forest Service Memo. at 20, the Forest Service
15 has elevated the role of restoration; it must have an adequate
16 factual basis for concluding that the sale would, in fact, fund
17 the projects deemed essential by the Forest Service.

18 The Forest Service contends, without citation to the
19 administrative record or other documents, that the revenues
20 generated by the Thunderbolt salvage sale will fund the
21 restoration projects in the South Fork Salmon River area.
22 Although ICL is hindered by the Forest Service's refusal to
23 answer discovery questions about revenues and funding,^{2/} the
24 information from the Forest Service, much of which was presented
25 to other federal agencies in the Forest Service's push to obtain

26 _____
27 ^{2/} On November 22, 1995, the Court denied the Forest Service's
 motion to limit review to the administrative record and for a
 protective order barring discovery. Pursuant to that order, the
 Forest Service will serve discovery responses on plaintiffs'
 counsel by fax on November 28, 1995 -- after this brief is due.
 If necessary, plaintiffs may ask the Court for leave to file a
 short supplemental memorandum updating the briefing after they
 receive the discovery responses.

1 approval for the Thunderbolt salvage sale, strongly suggests that
2 Thunderbolt will not generate revenue for any restoration
3 projects -- the sole reason given by the Forest Service for going
4 ahead with the salvage sale.

5 The Forest Service now admits that Thunderbolt cannot
6 generate enough funds to pursue critical projects throughout the
7 South Fork Salmon River watershed. See Forest Service Memo. at
8 26. In the administrative record, however, it is clear that the
9 Forest Service tried to rally support for Thunderbolt by listing
10 restoration projects throughout the watershed. See List of Ten
11 Restoration Projects (AR 24 at 524) (attached to letter in
12 response to EPA comments from David D. Rittenhouse, Forest
13 Service to Charles Clarke, EPA, dated July 28, 1995); see also
14 Upper South Fork Salmon River and Johnson Creek Watershed
15 Analysis at Chapter VII (AR 30) (watershed restoration
16 prioritization). At that time, the Forest Service was silent
17 about restrictions imposed by the Knutson-Vangenburg Plan; it is
18 only in legal briefs to the Court that the agency now backpedals.

19 More importantly, the Forest Service's numbers just don't
20 add up. According to the Final Environmental Impact Statement,
21 Alternative D (before modification) was anticipated to generate
22 \$2,800,000. Of that amount, the county must receive 25% or
23 \$700,000. The Forest Service estimated the costs to prepare and
24 administer the project at approximately \$500,000. That leaves
25 \$1,600,000 to spend on restoration projects. The Forest Service
26 approximated planned restoration costs under Alternative D to be
27 \$2,300,000, leaving the Forest Service \$700,000 in the hole after
the entire project is completed.

1 That rosy scenario, however, has now changed, and so have
2 the calculations. Based on the Modified Alternative D discussed
3 in the ROD, the Forest Service received the minimum acceptable
4 bid on the sale of \$1,050,710. Thunderbolt Salvage Prospectus
5 (AR 197 at 5980). Twenty-five percent of that amount, or
6 \$262,677.50, will go to the county. ROD at 5. If the
7 preparation and implementation costs are assumed to be the same
8 as outlined in the FEIS (\$500,000) that leaves the Forest Service
9 only \$288,032.50 to spend on restoration projects. This is
10 simply not enough money to fund the proposed restoration
11 projects. Alternative C, the salvage sale alternative in the
12 FEIS with the closest resemblance to Modified Alternative D,
13 estimates \$1,300,000 to be spent on restoration. The restoration
14 costs for Alternative F are \$600,000; Alternative F is the
15 alternative with no salvage sale component and therefore no need
16 to restore and mitigate for harm caused by logging. If the
17 Forest Service proceeds with restoration and mitigation, the
18 agency will lose at least several hundred thousand dollars

19 These calculations come from the FEIS and the ROD. However,
20 an even clearer picture of the monetary loss posed by the
21 Thunderbolt salvage sale comes from other Forest Service
22 documents concerning Modified Alternative D. The starting point
23 is again the minimum acceptable bid of \$1,050,710. See
24 Thunderbolt Salvage Prospectus. Again, the county receives 25%,
25 or \$262,677.50. See ROD at 5. However, according to the Salvage
26
27

1 Sale Fund Plan (Exh. D to Boyles Decl.),⁴ the total costs for
2 the Thunderbolt salvage sale are estimated to be \$1,179,635.52.
3 Using these numbers from the Forest Service itself, the agency
4 loses \$391,603.02 before any restoration or mitigation work is
5 even started. The total costs for restoration and mitigation
6 projects are estimated at \$1,009,829. See Sale Area Improvement
7 and K-V Collection Plan (Exh. D to Boyles Decl.). These numbers
8 show a total loss to the Forest Service of \$1,401,432.02.

9 Other variables make the deficit even greater. First,
10 according to the Thunderbolt Salvage Prospectus (AR 197 at 5980),
11 the Forest Service will return \$285,689 to the purchaser for the
12 construction/reconstruction of roads, increasing the loss to the
13 Forest Service by that amount.

14 Second, the Forest Service estimates that it will spend
15 \$195,400 on road sediment reduction projects. See Sale Area
16 Improvement and K-V Collection Plan; Non-Essential KV Projects,
17 Listed in Order of Priority (Exh. C to Boyles Decl.). Upon close
18 examination, it appears that this sum will not even fund the
19 sediment reduction projects committed to in the ROD. For

20
21 4/ The Forest Service's motion to strike ICL's exhibits
22 (including exhibits C and D) is presently pending before the
23 Court. The Court already denied the Forest Service's motion to
24 limit review to the administrative record. Additionally,
25 exhibits C and D are Thunderbolt salvage sale documents dated
26 prior to the ROD, and these documents were sent by the Forest
27 Service to ICL pursuant to a Freedom of Information Act ("FOIA")
request. These documents were clearly a part of the Forest
Service's decisionmaking process for the Thunderbolt salvage
sale, and the Forest Service did not consider them privileged in
any way. The documents address restoration projects, their
funding, and the costs of implementing the Thunderbolt salvage
sale. These documents are highly relevant, particularly since
discovery responses on this issue have not yet been produced.
See National Audubon Soc'y v. Forest Service, 46 F.3d 1437, 1447-
48 (9th Cir. 1993).

1 example, the ROD envisions obliterating 0.6 miles of road from
2 Roaring Camp to a specified intersection and 0.3 miles from a
3 helicopter pad to Goat Creek. ROD at 12. The KV Projects List
4 discusses only the 0.3 mile obliteration and presumably bases the
5 cost projection on this curtailed scope of work. Other
6 restoration projects show similar discrepancies between the work
7 promised in the ROD and the work on which the cost estimates were
8 made. In short, even the \$195,400 amount for road sediment
9 reduction projects is probably too low for the work committed to
10 in the ROD.

11 III. CONTRARY TO THE RESCISSTONS ACT, SECRETARY GLICKMAN DID NOT
12 MAKE THE DECISION TO PROCEED WITH THUNDERBOLT.

13 As discussed in ICL's opening memorandum, § 2001(c)(1)(A) of
14 the Rescissions Act makes the Secretary personally accountable
15 for vital decisions that deviate from what would normally be
16 required under various environmental laws. These decisions
17 include jeopardizing threatened or endangered species and
18 deviating from forest plans, standards, and guidelines, and the
19 Thunderbolt salvage sale presents both these scenarios. Because
20 the logging rider eliminates citizen enforcement of most
21 environmental laws with respect to salvage sales, see § 2001(i),
22 the personal accountability of the Secretary is one of the only
23 safeguards to prevent abuse of discretion.

24 Senator Lieberman made Congress's intention in requiring the
25 Secretary's personal involvement clear:

26 The timber provision that finally passed contains a
27 change over previous language to expand the role of the
Secretary of Agriculture to require his signature in
order to implement new sales. Although I do not think
this is a sufficient fix to this legislation, I do
think it is essential for the administration to

1 faithfully execute this authority in order to prevent
2 serious abuse of the legal exemptions in this
3 provision.

4 141 Cong. Rec. S10465 (July 21, 1995) (remarks of Senator
5 Lieberman).

6 Despite this clear requirement, ICL can find no mention of
7 Secretary Glickman's involvement in the Thunderbolt decision in
8 the administrative record. In its memorandum, the Forest Service
9 essentially admits that Secretary Glickman did not personally
10 make any decisions regarding Thunderbolt by stating that "the
11 Secretary of Agriculture need not personally be involved in any
12 decisions made pursuant to the Rescissions Act." Forest Service
13 Memo. at 30. Contrary to the intent of Congress in the logging
14 rider, it appears that Secretary Glickman did not make any
15 decisions about the Thunderbolt salvage sale.^{3/}

16 The Forest Service points out that the Secretary of
17 Agriculture has delegated authority to the "Assistant Secretary
18 for Natural Resources and Environment" and that the "Assistant
19 Secretary for Natural Resources and Environment" has delegated
20 authority to the Chief of the Forest Service. See 7 C.F.R. §
21 2.19(b)(2); 7 C.F.R. § 2.60(a)(2). This delegation and re-
22 delegation of authority is allowed under normal circumstances.
23 However, the passage of the logging rider has made the
24 circumstances anything but normal. Otherwise applicable federal
25 environmental laws are rendered unenforceable, § 2001(1), and no

26 S/ Through discovery, ICL asked the Forest Service to detail
27 Secretary Glickman's decision-making involvement. As with the
issue of restoration funding discussed above, plaintiffs may ask
the Court for leave to file a brief supplemental memorandum when
the discovery responses are received.

1 administrative appeals are allowed, § 2001(e). Judicial review
2 has been heavily circumscribed, both procedurally, § 2001(f)(1),
3 (5), (7), and substantively, § 2001(f)(3),(4). The Secretary's
4 personal involvement ensures that the wishes of President Clinton
5 will be carried out. See Letter from President Clinton to The
6 Honorable Newt Gingrich (June 29, 1995) ("I do appreciate the
7 changes that the Congress has made to provide the Administration
8 with the flexibility and authority to carry this program out in a
9 manner that conforms to our existing environmental laws and
10 standards.") (Exh. AA to Second Declaration of Kristen L. Boyles,
11 filed concurrently).

12 The Forest Service argues that the Rescissions Act does not
13 require an affirmative decision by the Secretary. See Forest
14 Service Memo. at 28-29. The Forest Service's reasoning seems to
15 be that the Secretary can somehow exercise his sole discretion in
16 considering adverse environmental effects, harm to threatened or
17 endangered species, and consistency with forest plan standards
18 and guidelines without being involved in the decision at all.
19 This position makes no sense. How can the Secretary decide
20 whether and to what extent a sale will violate a forest plan or
21 harm a threatened species if he is completely unaware of the
22 matter? Secretary Glickman must exercise his sole discretion,
23 which he did not, or else the Forest Service has violated the
24 Rescissions Act itself.^{6/}

25
26 ^{6/} In a cryptic case citation, the Forest Service may be
27 suggesting that the "sole discretion" language triggers the APA
exception for action committed to agency discretion by law. See
Forest Service Memo. at 29, citing Webster v. Doe, 486 U.S. 592
(1988). However, the Rescissions Act, not the APA, creates the
cause of action here and expressly provides the standard for