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Timber - Other Litigation: ONRC v.  
USFS

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ENVIRONMENT & NATURAL RESOURCES DIVISION  
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**MESSAGE:**

A mostly favorable decision just received from the 9th Circuit addressing ONRC's challenge to four timber sales in the Umpqua. Two sales were found to be within the scope of Section 2001(k) (1) and the other two sales were Section 2001(d) sales.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OREGON NATURAL RESOURCES  
COUNCIL; UMPQUA WATERSHEDS,  
Plaintiffs-Appellants,

v.  
JACK WARD THOMAS; UNITED  
STATES FOREST SERVICE;  
Defendants-Appellees,  
DOUGLAS TIMBER OPERATORS;  
HUFFMAN AND WRIGHT LOGGING  
COMPANY,  
Defendants-Intervenors-Appellees.

No. 95-36256  
D.C. No.  
CV-95-06272-MRH  
OPINION

Appeal from the United States District Court  
for the District of Oregon  
Michael R. Hogan, District Judge, Presiding

Argued and Submitted  
March 4, 1996--Portland, Oregon

Filed July 31, 1996

Before: Stephen Reinhardt, Alex Kozinski and  
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Kozinski;  
Concurrence by Judge Reinhardt

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COUNSEL

Patti A. Goldman and Laura S. Ziemer, Sierra Club Legal Defense Fund, Seattle, Washington, for the plaintiffs-appellants.

Robin Michaels, Anne S. Almy and Albert M. Ferlo, Jr., United States Department of Justice, Washington, D.C., for the defendants-appellees.

Mark C. Rutzick and Alison Kean Campbell, Mark C. Rutzick Law Firm, Portland, Oregon, for the defendants-intervenors-appellees.

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OPINION

KOZINSKI, Circuit Judge.

We consider whether review of certain timber sales is available under the Administrative Procedure Act.

I

Plaintiffs Oregon Natural Resources Council and Umpqua Watersheds, Inc. are environmental organizations trying to block four sales of timber by defendant Jack Ward Thomas, Chief of the United States Forest Service.<sup>1</sup> Plaintiffs' chal-

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<sup>1</sup> We upheld Chief Thomas's authority to sell the timber as the subdelegatee of the Secretary of Agriculture in *Inland Empire Public Lands Council v. Glickman*, No. 95-36272, Slip op. 5631, 5639, 1996 WL 230042, \*4 (9th Cir. May. 8, 1996) (citing 7 C.F.R. SS 2.19(b)(2), 2.60(a)(2)).

lenge to two of the sales, Watchdog and Roughneck, has effectively been resolved against them by our recent decision in Northwest Forest Resource Council v. Glickman, Nos. 95-36038, 95-36042, 1996 WL 290592 (9th Cir. May 30, 1996).<sup>2</sup> We therefore consider in detail only plaintiffs' claims against the two remaining sales, Pinestrip and Snog. Defendant-intervenor Huffman & Wright Logging Co., Inc. was the high bidder on the Snog sale. Defendant-intervenor Douglas Timber Operators, Inc. is a forest products trade association representing the interests of its members and, in particular, of Boise Cascade Co., the high bidder on the Pinestrip sale.

The Pinestrip and Snog sales are both located in the Upper North Umpqua River Basin in southwestern Oregon, an area "famous for its stunning scenery and its clear, jade-green rushing water." Opening Br. of Plaintiffs-Appellants at 6. Congress has designated over 30 miles of the North Umpqua as a "wild and scenic river." See 16 U.S.C. S 1274(a)(95). The North Umpqua also "supports one of the most outstanding native salmonid fisheries on the west coast." Opening Br. of Plaintiffs-Appellants at 6. The Pinestrip and Snog sales also both involve timber growing on land subject to President Clinton's Northwest Forest Plan, commonly referred to as "Option 9."<sup>3</sup> Plaintiffs describe Option 9 as "a comprehensive . . . scheme to manage old growth and late successional for-

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<sup>2</sup> Plaintiffs' challenge to the Roughneck and Watchdog sales assumed that subsection 2001(k)(1) of the 1995 Rescissions Act, see n.4 infra, applied only to timber sale contracts made pursuant to the terms of section

318 of Public Law 101-121. See Opening Br. of Plaintiffs-Appellants at 28-30. We rejected this interpretation of subsection 2001(k)(1) in Northwest Forest Resource.

<sup>3</sup> By "Option 9" or "President Clinton's Northwest Forest Plan," we mean the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl adopted in the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (April 13, 1994). Compare Am. Comp., CR 23 P 1 with Br. of the Federal Appellees at 3.

ests from the Canadian border to northern California in order to maintain the viability of the northern spotted owl and other species associated with old growth." Opening Br. of Plaintiffs-Appellants at 5 n.1.

According to the amended complaint, the Pinestrip and Snog sales will reduce "viable populations of native aquatic and amphibious species" and "degrad[e] . . . aquatic resources," in violation of the National Forest Management Act, 16 U.S.C. S 1604(g) (3), and its implementing regulations, 36 C.F.R. S 219, et seq. CR 23P 17.c. Plaintiffs also claim the sales don't comply with Option 9, which is binding under the NFMA, 16 U.S.C. S 1604(i), and its implementing regulations, in particular 36 C.F.R. SS 219.10(e). CR 23 PP 1, 18.b.

The amended complaint further alleges that the sales are "arbitrary" and "capricious" under APAS 706(2) (A), because the Forest Service hasn't obtained "information necessary to ensure that viable populations of aquatic and amphibious species will be maintained [despite the sales], and to ensure that the watershed will not be seriously adversely affected [by the sales]." CR 23 P 17.d.; see also id. PP 1, Prayer for Relief C. The amended complaint doesn't allege that any statute, apart from the APA, required the agency to obtain this information. Plaintiffs' opening brief in this appeal alleged the sales were also "arbitrary and capricious" because the Forest Service found the sales would not have significant environmental impacts, without explanation and despite a contrary finding by the Service's own expert, Opening Br. of Plaintiffs-Appellants at 25-26, and because the Forest Service has failed to carry out mitigation measures it said it would take in connection with the sales, id. at 26-27.

On cross-motions for summary judgment, the district court dismissed plaintiffs' case based on the 1995 Rescissions Act and the APA.<sup>4</sup> Plaintiffs naturally appeal.

## II

[1] The Rescissions Act seeks "to provide harvestable timber to the people who live and work in the region of option 9." S. Rep. No. 17, 104th Cong., 1st Sess. 122 (1995).<sup>5</sup> Thus, Rescissions Act S 2001(d) provides that "[n]otwithstanding any other law . . . the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts" on Option 9 land. Subsection 2001(i) of the Act provides:

The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of . . . any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

. . .

(5) The National Forest Management Act

. . .

. . .

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<sup>4</sup> By "the 1995 Rescissions Act," we mean the FY 1995 Emergency Supplemental Appropriations for Disaster Relief and Rescissions Act, Pub. L. No. 104-19, 1995 U.S.C.C.A.N. (109 Stat.) 240 (to be codified at 16 U.S.C. S 1611).

<sup>5</sup> The Act also seeks "to assist the [Clinton] administration in its commitment to conduct aggressive forest health operations." *Id.* This purpose is evident in the Act's "salvage timber sale" provisions, see, e.g., Rescissions Act SS 2001(a), (b), (c), which are only indirectly implicated in this appeal, see pp. 9342-9344 & n.10 *infra*.

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

The Rescissions Act doesn't require any documents or procedures for Option 9 timber sales.<sup>6</sup> The effect of subsection 2001(i), therefore, is to render sufficient under the environmental laws whatever documents and procedures, if any, the agency elects to use for an Option 9 sale. The upshot is that, under Rescissions Act SS 2001(d) and 2001(i), defendants' decision to proceed with the Pinestrip and Snog sales, and all documents and procedures connected with those sales, were entirely consistent with all federal environmental and natural resource laws.<sup>7</sup> Plaintiffs' challenges to the sales based on the NFMA and its implementing regulations therefore fail.

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<sup>6</sup> At least not unless the Option 9 sale also happens to be a "salvage timber sale," Rescissions Act S 2001(c), which the Pinestrip and Snog sales are not, see id. S 2001(a)(3) (defining "salvage timber sale" as: "a timber

sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.").

<sup>7</sup> Plaintiffs argue that we shouldn't interpret subsection 2001(i) as extending legal sufficiency to the documents and procedures underlying an agency's decision to "operate" a sale. Opening Br. of Plaintiffs-Appellants at 30-31 n.14; Reply at 12 n.2. Subsection 2001(d), they observe, only requires the agency to expeditiously "prepare, offer and award" sales. It follows, according to plaintiffs, that "it is appropriate to

limit section 2001(i) legal sufficiency to the documents and procedures leading to those actions and not to extend it to the agency's decision to operate the sale." Opening Br. of Plaintiffs-Appellants at 31 n.14. We reject this argument, as the language of subsection 2001(i) extends legal sufficiency to documents and procedures underlying the decision to "operate" a sale, and allowing environmentally-based challenges to the operation of Option 9 sales would frustrate one of the Rescissions Act's primary purposes: to enable the logging of timber on Option 9 land. See pp. 9339-9340 supra.

Plaintiffs all but concede as much. See Opening Br. of Plaintiffs-Appellants at 20-21; Reply Br. of Plaintiffs-Appellants at 4. The "overriding thrust" of their case, they explain, is that the Pinestrip and Snog sales are "arbitrary and capricious" under APA S 706(2)(A), even assuming no other law applies. Reply Br. of Plaintiffs-Appellants at 2. The district court rejected this argument based on the Rescissions Act and APA S 701(a)(2). The latter statute forbids judicial review of agency action "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C.S 701(a)(2). The district court explained that, as its name suggests, "the APA is merely a vehicle for carrying substantive challenges to court." CR 106, 7. As plaintiffs couldn't point to any "independent, substantive body of law," *id.* at 8, that confined defendants' discretion to go forward with the sales, their decision to sell the timber was "committed to agency discretion" under section 701(a)(2). The district court therefore dismissed the case for lack of subject matter jurisdiction. *Id.* (citing *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir. 1978)).

[2] Plaintiffs contend that this analysis renders meaningless Rescissions Act S 2001(f)(1), to the extent it provides that "a timber sale . . . under subsection (d) . . . shall be subject to judicial review." Plaintiffs could be right only if the Rescissions Act insulates subsection 2001(d) timber sales from any judicial scrutiny other than the possibility of "arbitrary and capricious" review under APA S 706(2)(A). So long as the Rescissions Act allows for legal challenges to subsection 2001(d) sales on some basis other than APA S 706(2)(A), subsection 2001(f)(1) of the Rescissions Act wouldn't be

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8 Subsection 2001(f)(1) provides:

[A] timber sale to be conducted under subsection (d) . . . shall be subject to judicial review only in the United States district court for the district in which the affected Federal lands are located. Any challenge to such sale must be filed in such district court within 15 days after the date of the initial advertisement of the challenged sale.

meaningless, even if APA "arbitrary and capricious" review were not available. By its terms, subsection 2001(i) merely extends legal sufficiency to the documents and procedures for subsection 2001(d) sales, under the federal environmental and natural resource laws; it does not foreclose challenges based on other laws. Defendant-intervenors point out that challenges would still be available based on "federal contracting laws such as . . . a claim alleging a failure to include required labor or non-discrimination provisions in a contract; a claim for violations of log export restrictions, small business set-aside provisions . . . and other non-environmental laws." Opposition Br. of Defendant-Intervenor Appellees at 15.

[3] We agree with the district court, moreover, that subsection 2001(d)'s direction to expedite the preparation, offer and award of Option 9 sales "[n]otwithstanding any other law" is best interpreted as requiring the disregard only of environmental laws, not all laws otherwise applicable to Option 9 sales. We have repeatedly held that the phrase "notwithstanding any other law" is not always construed literally. See *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 1348 (9th Cir. 1993); *In re Glacier Bay*, 944 F.2d 577, 582 (9th Cir. 1991); *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 588-89 (9th Cir. 1987). In *Glacier Bay*, for example, we found that the phrase in one statute, "notwithstanding the provisions of any other law," was not dispositive of whether other statutes applied, because a different section of the first statute arguably made the others statute applicable. See 944 F.2d at 582.

More so than in *Glacier Bay*, other subsections of the Rescissions Act suggest Congress did not intend the phrase "notwithstanding any other law" to require the agency to disregard all otherwise applicable laws. Thus, subsection 2001(b)(1) provides that "[t]he preparation, advertisement, offering, and awarding of . . . contracts [for salvage timber sales] shall be performed . . . notwithstanding any other provision of law" (emphases added). Yet subsection 2001(f)(4)'s

standard of review for legal challenges to salvage timber sales provides:

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

(emphasis added). Were subsection 2001(b)'s phrase "notwithstanding any other provision of law" given the broadest possible interpretation, subsection 2001(f)(4)'s allowance for legal challenges to salvage timber sales based on non-environmental laws would be nugatory.

[4] Following *Glacier Bay*, and "[m]indful . . . of the common-sense principle of statutory construction that sections of a statute generally should be read to give effect, if possible, to every clause," *Heckler v. Chaney*, 470 U.S. 821, 829 (1985), we decline to adopt the broadest possible interpretation of "notwithstanding any other provision of law" in subsection 2001(b). Instead, we harmonize subsection 2001(b) with subsection 2001(f)(4) by interpreting subsection 2001(b) as superceding only the federal environmental and natural resource laws.<sup>9</sup> We further see no reason to believe that Congress intended the phrase "notwithstanding any other law" in subsection 2001(d) to be interpreted differently than the parallel language in subsection 2001(b). Indeed, subsec-

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<sup>9</sup> Plaintiffs also argue that subsection 2001(d)'s "notwithstanding any other law" phrase gives defendants so much discretion that it runs afoul of the non-delegation doctrine. But the non-delegation doctrine applies to conferrals of legislative power, while subsection 2001(d) merely authorizes an agency to sell federal property.

tion 2001(i) extends legal sufficiency to the documents and procedures for subsection 2001(d) sales, only under the federal environmental and natural resources laws. We therefore conclude that "notwithstanding any other law" in subsection 2001(d) also directs the disregard only of the federal environmental and natural resource laws, with respect to Option 9 sales. Subsection 2001(f)(1)'s provision for judicial review of Option 9 sales is therefore not superfluous, even if "arbitrary and capricious" review is unavailable under section 706(2)(A) independent of another statute.

[5] Plaintiffs also argue that Rescissions Act S 2001(f)(4) shows "arbitrary and capricious" review is consistent with the Rescissions Act's suspension of the federal environmental and natural resource laws. Opening Br. of Plaintiffs-Appellants at 21. As already discussed, subsection 2001(f)(4) requires a court to review a "salvage timber sale" to determine whether the sale is "arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i))." Plaintiffs' reliance on subsection 2001(f)(4) overlooks the fundamental reason why "arbitrary and capricious" review can't occur under the APA if there's no law to apply: Section 706(2)(A) merely provides "[t]he standards to be applied on review. . . . But before any review at all may be had, a party must first clear the hurdle of S 701(a)." Heckler, 470 U.S. at 828.10

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10 The Forest Service and Chief Thomas recognize that there can be no "arbitrary and capricious" review under APAS 706(2)(A) independent of another statute. But they ask us to hold that subsection 2001(f)(4) provides a standard of review, not only for "salvage timber sales" as its text indicates, but for other timber sales as well. We decline this invitation to rewrite section 2001(f)(4). The result that Option 9 timber sales aren't subject to arbitrary and capricious review, except to the extent allowed by the APA, is not "demonstrably at odds with the intentions of [the Rescissions Act's] drafters," United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989): It does not bring subsection 2001(f)(4) into conflict with any other subsection of the Rescissions Act, nor with the Act's manifest intent to eliminate environmental challenges to Option 9 timber sales.

[6] Plaintiffs contend that decisions to sell Option 9 timber aren't "committed to agency discretion" under section 701(a)(2), because they're "typically well-suited to judicial review" and they "traditionally have been reviewable." Opening Br. of Plaintiffs-Appellants at 22. While we have held that these are relevant considerations in a section 701(a)(2) analysis, *Beno v. Shalala*, 30 F.3d 1057, 1067-68 (9th Cir. 1994), it's well-settled that the touchstone of reviewability under section 701(a)(2) is whether there's "law to apply," *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971). As the Supreme Court has repeatedly explained, APA "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 113 S. Ct. 2024, 2030-31 (1993) (quoting *Heckler*, 470 U.S. at 830) (emphasis added). Here, there is no "relevant statute," as plaintiffs' "arbitrary and capricious" claim purports to stand free of any other law.<sup>11</sup>

Plaintiffs also point to *Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29 (1983). There, the Court stated:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the prob-

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<sup>11</sup> This suggests another problem with plaintiffs' free-standing APA "arbitrary and capricious" claims. To have standing under APA S 702, a claimant must show he "suffer[ed] legal wrong because of agency action, or [was] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C.S 702 (emphases added); see also III Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, S 16.9 at 53 (3d ed. 1994) (APA S 702 "require[s] reference to other statutes -- agency organic acts -- to determine whether a petitioner has standing to obtain review of an action to which the APA applies."). As plaintiffs' "arbitrary and capricious" claims don't invoke any other statute, plaintiffs have no standing to raise them under section 702.

lem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43. These criteria don't show there can be "arbitrary and capricious" review under APA S 706(2)(A) independent of another statute; they merely define what is arbitrary and capricious assuming judicial review is available. Cf. Heckler, 470 U.S. at 828. To the extent the Motor Vehicle Mfrs. criteria are relevant here, they work against plaintiffs: Had the Forest Service decided not to go forward with Pinestrip and Snog for environmental reasons, defendant-intervenors could well have prevailed in a suit challenging that decision as arbitrary and capricious under APA S 706(2)(A) on the ground that an independent statute, the Rescissions Act, forbade the agency to consider environmental factors. See, e.g., Rescissions Act SS 2001(d), (i).

[7] Plaintiffs suggest that "arbitrary and capricious" review could be conducted under APA S 706(2)(A), independent of another statute, under the last three criteria set forth in Motor Vehicle Mfrs. See Opening Br. of Plaintiffs-Appellants at 25; Reply Br. at 11. Whether an agency has overlooked "an important aspect of the problem," however, turns on what a relevant substantive statute makes "important." In law, unlike in religion or philosophy, there is nothing which is necessarily important or relevant. In Motor Vehicle Mfrs., for example, the agency's failure to consider adopting a rule requiring car makers to install airbags in new cars was arbitrary and capricious, as the agency's own data showed this would have saved thousands of lives a year, and the National Highway Transportation Safety Act required the agency to make rules enhancing auto safety at reasonable cost. Moreover, where there is no law to apply for purposes of section 701(a)(2), it is legally irrelevant whether an agency has made a "finding" that is "contrary to the evidence before it" or that's "so implausible that it couldn't be ascribed to a difference in view

or the product of agency expertise." The court could remand for a new finding but, if there's no law to apply, the agency would be perfectly free to conform its finding to the evidence before it or give a more plausible explanation, yet reach the same ultimate decision it made given the old finding. Section 706 itself requires that a reviewing court take "due account . . . of the rule of prejudicial error." See also *Kolek v. Engen*, 869 F.2d 1281, 1286 (9th Cir. 1989). But factual errors without law to apply necessarily are harmless.<sup>12</sup>

Plaintiffs' remaining arguments need not detain us long. They observe that subsection 2001(i) and, under our interpretation, subsection 2001(d), only excuse Option 9 sales from complying with the federal environmental and natural resource laws, not the APA. Plaintiffs therefore argue that Option 9 sales remain subject to "arbitrary and capricious" review under the APA despite the Rescissions Act. This argu-

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<sup>12</sup> Our decision in *Inland Empire*, 1996 WL 230042, illustrates this point. Plaintiffs there challenged salvage timber sales as arbitrary and capricious under Rescissions Act S 2001(f)(4). See 1996 WL 230042, at \*1-2. The argument was that the sales would have an adverse effect on a species of grizzly bears designated as "threatened" under the Endangered Species Act. *Id.* at \*1. We rejected the claim on alternative grounds: first, that the Forest Service had considered all the factors plaintiffs identified as endangering the grizzly bear and plausibly concluded that the sales wouldn't hurt the bears, *id.* at \*2-3; second, and more importantly, that under Rescissions Act S 2001(c)(1)(A), the Forest Service "did not need to consider the effect on the grizzly bear," 1996 WL 230042, at \*2. Subsection 2001(c)(1)(A) provides:

A document embodying decisions relating to salvage timber sales . . . shall, at the sole discretion of the Secretary concerned and to the extent the Secretary concerned considers appropriate and feasible, consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species.

(emphasis added). Under subsection 2001(c)(1)(A), it wouldn't have mattered whether the Forest Service had "erred" by not considering all the factors plaintiffs identified, because "[t]he Forest Service had discretion to disregard entirely the effect on the grizzly bear." 1996 WL 230042, at \*2.

ment fails because it's circular. It assumes section 706(2)(A) can provide "law to apply" under section 701(a)(2). But, as explained above, review is unavailable under section 706(2)(A) unless there's law to apply under section 701(a)(2). See 5 U.S.C. S 701(a)(2); Heckler, 470 U.S. at 828.

Lastly, plaintiffs argue that, while the Rescissions Act greatly expanded agency discretion with respect to Option 9 sales, section 706(2)(A) provides for review for "abuse of discretion," 5 U.S.C. S 706(2)(A). This argument overlooks the Supreme Court's reconciliation of section 701(a)(2) with section 706(2)(A) in Heckler, 470 U.S. at 830. There the Court explained that review is unavailable under section 701(a)(2) where the court would have "no meaningful standard" to apply, precisely because there's no way to say an agency has abused its discretion without reference to such a standard. Id.

We thus conclude that the district court properly dismissed plaintiffs' claims; its judgment is therefore AFFIRMED. The Opposition Brief of Defendants-Intervenors-Appellees, which was "Received Only," because it was late, is ordered FILED.

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REINHARDT, Circuit Judge, concurring:

I concur in the result. However, I see no reason to attempt to decide the abstract question whether there can ever be a violation of the APA in the absence of an independent statute that supports the violation. Here, the alleged APA violation is rooted in the environmental concerns that Congress has barred from consideration by the Rescissions Act and constitutes nothing more than an effort to assert prohibited environmental claims in another form. Ingenious as the plaintiffs' argument

is, we have no choice but to reject it. That is all that we need,  
or should, say or do in this case.1

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1 As to the challenges to the Watchdog and Roughneck sales, which the majority concludes are resolved adversely to appellants by our decision in Northwest Forest Resource Council v. Glickman, 95-36028, I prefer the government's analysis: Those sales are simply not subject to the Act.

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the end

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U.S. DISTRICT COURT  
DISTRICT OF OREGON  
S. J. ...

SIERRA CLUB  
LEGAL RESOURCE FUND  
DEC 0 5 1995  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES )  
COUNCIL and UMPQUA WATERSHEDS, )  
INC., )

Plaintiffs, )

v. )

JACK WARD THOMAS in his )  
official capacity as Chief of )  
the United States Forest Service; )  
and UNITED STATES FOREST SERVICE, )

Defendants, )

and )

DOUGLAS TIMBER OPERATORS, INC. )  
and HUFFMAN & WRIGHT LOGGING CO., )  
INC., )

Defendant-Intervenors. )

Case No. 95-6272-HO

ORDER

Plaintiffs challenge the United States Forest Service's decision to offer or award four timber sales in the Umpqua National Forest. Plaintiffs assert that the Forest Service's decision violates the National Forest Management Act (NFMA), the Administrative Procedure Act (APA), and Forest Service

106

regulations. Defendants argue that two of the sales are immune from this challenge by virtue of the 1995 Interior Appropriations and Rescissions Act (the Rescissions Act) and that the decision to offer and award the other two sales should be upheld under the APA's "arbitrary and capricious" standard. Defendant-intervenors argue all four sales are immune from challenge under the Rescissions Act.

#### FACTS

The four challenged sales are the Roughneck, Watchdog, Pinestrip, and Snog sales. The Roughneck and Watchdog sales were awarded in 1994, before the July 27, 1995 enactment of the Rescissions Act. The Pinestrip and Snog sales were advertised and offered after July 27, 1995. The Pinestrip and Snog sale units are within the geographic area defined in the President's Northwest Forest Plan, also known as Option 9.

#### DISCUSSION

##### 1. Roughneck and Watchdog

Defendant-intervenors contend these sales are immune from plaintiffs' challenge under section 2001(k)(1) of the Rescissions Act. That provision provides:

(k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED TIMBER SALE CONTRACTS. --

(1) AWARD AND RELEASE REQUIRED. -- Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district

2 - ORDER

of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745).

Pub. L. 104-19, 109 Stat. 194 § 2001(k)(1) (1995).

In National Forest Resource Council v. Glickman, Civ. No. 95-6244, this court ruled that section 2001(k)(1) covers not only actual section 318 sales but all sales on National Forest System or Bureau of Land Management land within the section 318 geographical area that were offered or awarded prior to July 27, 1995. Defendant-intervenors contend that section 2001(k)(1) applies to the Roughneck and Watchdog sales because both were offered prior to July 27, 1995. Because section 2001(k)(1) requires the Secretary to "permit [these sales] to be completed" "[n]otwithstanding any other provision of law," defendant-intervenors assert that plaintiffs' challenge is barred.

Defendants take the position that section 2001(k) does not bar plaintiffs' challenge to the Roughneck and Watchdog sales. They argue section 2001(k)(1) only applies to sales offered or awarded prior to July 27, 1995, which were "somehow held up" or enjoined as of that date. Oral Argument on November 28, 1995, statement of Robin Michael, attorney for defendant; see also, Defendants' Opposition to Defendant-intervenors' Motion for Summary Judgment (#65) at 2-4. In support of this argument, defendants point to the plain language of section 2001(k) and (k)(1). Plaintiffs join this argument and also argue that section 2001(k)(1) only applies to actual section 318 sales despite this court's contrary

3 - ORDER

holding in NERC v. Glickman.

The plain language is the starting point of statutory interpretation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Section 2001(k)(1) requires "all timber sale contracts offered or awarded" before July 27, 1995, to be released "notwithstanding any other provision of law[.]" As this court held in Glickman, section 2001(k)(1) is not limited to section 318 sales. Nor does section 2001(k)(1) contain language restricting application to sales "somehow held up" or enjoined as of July 27, 1995. The purpose of section 2001 is to facilitate timber sales by suspending legal challenges, and there is no indication that this purpose only extended to legal disputes arising prior to July 27, 1995. Section 2001(k)(1), therefore, requires the release of the Roughneck and Watchdog sales "[n]otwithstanding any other provision of law."

## 2. Pinestrip and Snog

Defendant-intervenors and defendants agree that sections 2001(d) and (i) of the Rescissions Act bar plaintiffs challenges to the Pinestrip and Snog sales, both Option 9 sales offered after July 27, 1995. Section 2001(d) provides:

(d) DIRECTION TO COMPLETE TIMBER SALES ON LANDS COVERED BY OPTION 9. --

Notwithstanding any other law . . . the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts on [Option 9 land].

Defendants and defendant-intervenors submit that this provision, combined with section 2001(i), immunizes both the

administrative decision to offer or award a sale and the "operation," or harvesting, of the sale unit from environmental review.

Plaintiffs apparently concede that section 2001(d) bars challenges to the decision to offer and award timber sales but contend that section 2001(d) preserves challenges to timber sale "operations." Plaintiffs observe that section 2001(d) does not reference "operations," as in other subsections. See, e.g., sections 2001(f) and (i).

The premise of this argument is that plaintiffs are challenging the "operation" of the Pinestrip and Snog sales and not the administrative decision to offer or award the sales. If plaintiffs were suing to enjoin the industrial operation of these sale units, the appropriate defendants would be Boise Cascade and Ruffman & Wright logging companies, the high bidders on the Pinestrip and Snog sales, respectively. The documents on record, however, show that the challenge here is based on the administrative record, the Administrative Procedure Act, administrative regulations, and NFMA provisions governing administrative decision-making. Plaintiffs are challenging an administrative decision, not private operation.

Assuming arguendo that plaintiffs are challenging the operation rather than the preparation, offer, or award of the Pinestrip and Snog sales, plaintiffs' interpretation belies Congressional intent. The purpose of section 2001 is, for better or worse, to facilitate the harvesting of timber.

5 - ORDER

S.Rep. No. 17, 104th Cong., 1st Sess. 122 (1995) (purpose of section 2001 is "to provide harvestable timber to the people who work in the region of Option 9"). Immunizing the preparation, offer, award, and release of timber sales from environmentally-based challenges while permitting such challenges to proceed against the "operation" of the sale unit would obstruct this purpose. Section 2001(d) does not permit environmentally-based challenges to the "operation" of otherwise immunized sales.

Defendants and defendant-intervenors also point to section 2001(i), which provides:

(i) EFFECT ON OTHER LAWS. -- The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any salvage timber sale subject to subsection (b) and any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

\* \* \*

(5) The National Forest Management Act of 1976 . . .

\* \* \*

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

Defendants and defendant-intervenors observe that section 2001 requires no documents or procedures for Option 9 sales and argue that any procedures or documents used to implement Option 9 sales must be deemed to satisfy the NFMA and any other environmental law.

Plaintiffs contend that since section 2001(i) only covers

documents required by section 2001, any documents or procedures not required by section 2001 are subject to environmental review. Under plaintiffs' interpretation, therefore, section 2001(i) provides that the procedures required for Option 9 sales shall be deemed to satisfy all environmental laws but does not require any procedures for Option 9 sales, thereby subjecting all Option 9 sale procedures to environmental review.

Under plaintiffs' interpretation, section 2001(i) would have no effect on Option 9 sales. However, it is highly unlikely that Congress intended section 2001(i) to be inapplicable to Option 9 sales since section 2001(i) expressly references section 2001(d), which includes Option 9 sales. In addition, such an interpretation would obstruct section 2001(d)'s directive that the Secretary prepare, offer, and award Option 9 sales "notwithstanding any other law." The only reasonable construction of section 2001(i) is that it suspends environmental challenges while preserving non-environmental challenges to Option 9 sales.

Finally, plaintiffs argue that even though the Rescissions Act may suspend environmental laws, it preserves challenges based on the APA. Plaintiffs note that the sufficiency language of section 2001(i) does not include the APA. However, the APA is merely a vehicle for carrying substantive challenges to court. As noted above, sections 2001 (d) and (i) bar environmental challenges to Option 9

sales, thereby giving the agency complete discretion, insofar as environmental laws are concerned, in offering and awarding Option 9 sales.

The APA precludes review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In the Ninth Circuit Court of Appeals' words:

If . . . no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction.

City of Santa Clara, Cal. v. Andrus, 572 F2d 660, 666 (9th Cir. 1978).

Thus, absent an independent, substantive body of law, the APA does not provide reviewable subject matter.

#### CONCLUSION

Section 2001 of the Rescissions Act bars plaintiffs' environmentally-based challenges to the Watchdog, Roughneck, Pinestrip, and Snog sales. Accordingly, defendants' and defendant-intervenors' motions for summary judgment (# 32, 45 and 50) are granted, and plaintiffs' motion for summary judgment (#37-1) is denied. This case is dismissed for lack of subject matter jurisdiction.

The following motions are denied as moot:

- Plaintiffs' Motion for Preliminary Injunction (#37-2)
- Plaintiffs' Motion for Permanent Injunction (#37-3)
- Plaintiffs' Motion to Enforce Automatic Stay (#57)
- Plaintiffs' Motion to Expedite Motion to Enforce

8 - ORDER



## U.S. Department of Justice

## Environment and Natural Resources Division

General Litigation Section

Washington, D.C. 20530

December 7, 1995

## MEMORANDUM

TO: Peter D. Coppelman  
Principal Deputy Assistant Attorney General

FROM: Ellen M. Athas  
Robin N. Michael

RE: Order of December 6, 1995 in ONRC v. USEFS

**JUDGE MICHAEL HOGAN'S DECISION IN ONRC v. Thomas**

**Background:** The Oregon Natural Resources Council ("ONRC") case involves Rescissions Act challenges to the Forest Service's decision to proceed with four timber sales in Oregon's Umpqua National Forest. These sales include two Northwest Forest Plan sales and two other sales that were awarded prior to the enactment of the Rescissions Act which have not been suspended or delayed. The plaintiff challenged these sales under the National Forest Management Act, as implemented through the Administrative Procedures Act, and did not raise the Rescissions Act at all. Industry intervened in the action, with Mark Rutzick, counsel for NFRC, representing the defendant-intervenors, Douglas Timber Operators.

A hearing on motions and cross motions for summary judgment was held before Judge Michael R. Hogan, on November 28, 1995, in Eugene, Oregon. On December 5, 1995, the Court ruled, granting Federal defendants' and defendant-intervenors' motions for summary judgment to allow these four sales to go forward. In doing so, however, the Court held that all four sales were subject to Section 2001 of the Rescissions Act, and the holding expands the sales subject to Section 2001(k).

**The Arguments:** Although the arguments addressed all four sales, the important issue is the treatment of the Roughneck and Watchdog sales, two sales awarded prior to the Rescissions Act and moving forward without delay. Defendant-intervenors maintained that Section 2001(k)(1) applied to these two sales and effectively barred plaintiffs' environmental claims. In

contrast, the Federal defendants argued that Section 2001(k) (1) did not apply, because these pre-enactment sales had not been held up and were in the process of being completed. We had two theories. First, the plain language of subsection (k) of the statute provides that the Secretary is to "act to award, release, and permit to be completed, . . . all timber sale contracts offered or awarded . . ." It does not apply to sales which do not require further action by the Secretary to proceed. Second, the legislative history of the Act does not support defendant-intervenors' interpretation that the application of 2001(k) (1) includes sales which have not been suspended or held up.

To underscore our argument regarding legislative history, we presented a chart to the Court which showed that 1.080 billion board of timber would be effected by defendant-intervenors' interpretation of (k) (1). However, Congress itself contemplated only 375 million board feet of timber to go forward under subsection (k). Finally, we argued that defendant-intervenors' reliance on the Court's decision in NFRC v. Glickman to support their interpretation was misplaced, because the issue in that case involved an interpretation of the geographic scope of 2001(k) and not its [application to sales in the process of being completed.]

In spite of these arguments, Judge Hogan adopted defendant-intervenors' interpretation of 2001(k) (1) and granted their motion for summary judgment. In so ruling, Judge Hogan chiefly relied upon his previous decision in NFRC v. Glickman and reiterated that "[s]ection 2001(k) (1) requires 'all timber sales offered or awarded' before July 27, 1995, to be released 'notwithstanding any other provision of law[]'". ONRC decision at 4. Based upon this interpretation, Judge Hogan found that Section 2001(k) (1) did not contain language restricting its application only to sales which had been delayed or held up in some manner. Id.

**Effect of Judge Hogan's Ruling:** The effect of Judge Hogan's ruling in ONRC, as it relies upon his ruling in NFRC v. Glickman, is arguably the following. First, as indicated by the chart which we presented to the Court at the hearing, this ruling could increase the number of sales subject to section 2001(k) (1) by including sales within the geographic area of Oregon and Washington which had been previously awarded and are in the process of being completed. The ruling could bar the Secretary from modifying these sales to comply with changes in environmental laws or amendments to the Forest Plan. Note, however, that unlike Judge Hogan's previous and perhaps forthcoming rulings, this ruling does not immediately order us to release any new timber sales that we would prefer to withhold.

} put in summary?

Second, the ruling muddies the distinction between (d) and (k) sales. Thus, all the sales prepared under the Northwest

Forest Plan prior to July 1995 may now be subject to subsection (k) and the restrictions of that portion of the statute. If there are contracts that were modified to comply with the Forest Plan (we need to find this out from the Forest Service), the land management agencies may now be required to return to the original terms and conditions of earlier contracts. In addition, these sales could require replacement timber if modified, and that replacement timber would then be barred from counting toward the allowable sale quantity.

Finally, under the review of subsection (k) issues, it could be argued that the Secretaries now have 45 days to act to award, release and permit to be completed the "new" subsection (k) sales, although what this may mean in the real world is difficult to determine.

We caution that the full effects of this particular ruling are not necessarily knowable at this time. Much will depend on the mileage Mark Rutzick tries to get out of this interpretation, and future steps he may take, if any, to further expand the ever-expanding universe of 2001(k) sales.

||?  
 ↓  
 If you couldn't go back to orig. sale - e.g. bec of murre-lts.

To: Susan

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U.S. ATTORNEY  
EUGENE ORE.

DEC 05 AM 7:45

U.S. DISTRICT COURT  
EUGENE, OREGON

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES )  
COUNCIL and UMPQUA WATERSHEDS, )  
INC., )

Plaintiffs, )

v. )

JACK WARD THOMAS in his )  
official capacity as Chief of )  
the United States Forest Service; )  
and UNITED STATES FOREST SERVICE, )

Defendants, )

and )

DOUGLAS TIMBER OPERATORS, INC. )  
and HUFFMAN & WRIGHT LOGGING CO, )  
INC., )

Defendant-Intervenors. )

Case No. 95-6272-HO

ORDER

Plaintiffs challenge the United States Forest Service's decision to offer or award four timber sales in the Umpqua National Forest. Plaintiffs assert that the Forest Service's decision violates the National Forest Management Act (NFMA), the Administrative Procedure Act (APA), and Forest Service

regulations. Defendants argue that two of the sales are immune from this challenge by virtue of the 1995 Interior Appropriations and Rescissions Act (the Rescissions Act) and that the decision to offer and award the other two sales should be upheld under the APA's "arbitrary and capricious" standard. Defendant-intervenors argue all four sales are immune from challenge under the Rescissions Act.

#### FACTS

The four challenged sales are the Roughneck, Watchdog, Pinestrip, and Snog sales. The Roughneck and Watchdog sales were awarded in 1994, before the July 27, 1995 enactment of the Rescissions Act. The Pinestrip and Snog sales were advertised and offered after July 27, 1995. The Pinestrip and Snog sale units are [within the geographic area defined in the President's Northwest Forest Plan,] also known as Option 9.

#### DISCUSSION

1. Roughneck and Watchdog - 871 sales

Defendant-intervenors contend these sales are immune from plaintiffs' challenge under section 2001(k)(1) of the Rescissions Act. That provision provides:

(k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED TIMBER SALE CONTRACTS. --

(1) AWARD AND RELEASE REQUIRED. -- Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district

of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745).

Pub. L. 104-19, 109 Stat. 194 § 2001(k) (1) (1995).

In National Forest Resource Council v. Glickman, Civ. No. 95-6244, this court ruled that section 2001(k) (1) covers not only actual section 318 sales but all sales on National Forest System or Bureau of Land Management land within the section 318 geographical area that were offered or awarded prior to July 27, 1995. Defendant-intervenors contend that section 2001(k) (1) applies to the Roughneck and Watchdog sales because both were offered prior to July 27, 1995. Because section 2001(k) (1) requires the Secretary to "permit [these sales] to be completed" "[n]otwithstanding any other provision of law," defendant-intervenors assert that plaintiffs' challenge is barred.

Defendants take the position that section 2001(k) does not bar plaintiffs' challenge to the Roughneck and Watchdog sales. They argue section 2001(k) (1) only applies to sales offered or awarded prior to July 27, 1995, which were "somehow held up" or enjoined as of that date. Oral Argument on November 28, 1995, statement of Robin Michael, attorney for defendant; see also, Defendants' Opposition to Defendant-intervenors' Motion for Summary Judgment (#65) at 2-4. In support of this argument, defendants point to the plain language of section 2001(k) and (k) (1). Plaintiffs join this argument and also argue that section 2001(k) (1) only applies to actual section 318 sales despite this court's contrary

holding in NERC v. Glickman.

The plain language is the starting point of statutory interpretation. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Section 2001(k)(1) requires "all timber sale contracts offered or awarded" before July 27, 1995, to be released "notwithstanding any other provision of law[.]" As this court held in Glickman, section 2001(k)(1) is not limited to section 318 sales. Nor does section 2001(k)(1) contain language restricting application to sales "somehow held up" or enjoined as of July 27, 1995. The purpose of section 2001 is to facilitate timber sales by suspending legal challenges, and there is no indication that this purpose only extended to legal disputes arising prior to July 27, 1995. Section 2001(k)(1), therefore, requires the release of the Roughneck and Watchdog sales "[n]otwithstanding any other provision of law."

## 2. Pinestrip and Snog

Defendant-intervenors and defendants agree that sections 2001(d) and (i) of the Rescissions Act bar plaintiffs challenges to the Pinestrip and Snog sales, both Option 9 sales offered after July 27, 1995. Section 2001(d) provides:

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Defendants and defendant-intervenors submit that this provision, combined with section 2001(i), immunizes both the

administrative decision to offer or award a sale and the "operation," or harvesting, of the sale unit from environmental review.

Plaintiffs apparently concede that section 2001(d) bars challenges to the decision to offer and award timber sales but contend that section 2001(d) preserves challenges to timber sale "operations." Plaintiffs observe that section 2001(d) does not reference "operations," as in other subsections. See, e.g., sections 2001(f) and (i).

The premise of this argument is that plaintiffs are challenging the "operation" of the Pinestrip and Snog sales and not the administrative decision to offer or award the sales. If plaintiffs were suing to enjoin the industrial operation of these sale units, the appropriate defendants would be Boise Cascade and Huffman & Wright logging companies, the high bidders on the Pinestrip and Snog sales, respectively. The documents on record, however, show that the challenge here is based on the administrative record, the Administrative Procedure Act, administrative regulations, and NFMA provisions governing administrative decision-making. Plaintiffs are challenging an administrative decision, not private operation.

Assuming *arguendo* that plaintiffs are challenging the operation rather than the preparation, offer, or award of the Pinestrip and Snog sales, plaintiffs' interpretation belies Congressional intent. The purpose of section 2001 is, for better or worse, to facilitate the harvesting of timber.

S.Rep. No. 17, 104th Cong., 1st Sess. 122 (1995) (purpose of section 2001 is "to provide harvestable timber to the people who work in the region of Option 9"). Immunizing the preparation, offer, award, and release of timber sales from environmentally-based challenges while permitting such challenges to proceed against the "operation" of the sale unit would obstruct this purpose. Section 2001(d) does not permit environmentally-based challenges to the "operation" of otherwise immunized sales.

Defendants and defendant-intervenors also point to section 2001(i), which provides:

(i) EFFECT ON OTHER LAWS. -- The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any salvage timber sale subject to subsection (b) and any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

\* \* \*

(5) The National Forest Management Act of 1976 . . .

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

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Under plaintiffs' interpretation, section 2001(i) would have no effect on Option 9 sales. However, it is highly unlikely that Congress intended section 2001(i) to be inapplicable to Option 9 sales since section 2001(i) expressly references section 2001(d), which includes Option 9 sales. In addition, such an interpretation would obstruct section 2001(d)'s directive that the Secretary prepare, offer, and award Option 9 sales "notwithstanding any other law." The only reasonable construction of section 2001(i) is that it suspends environmental challenges while preserving non-environmental challenges to Option 9 sales.

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sales, thereby giving the agency complete discretion, insofar as environmental laws are concerned, in offering and awarding Option 9 sales.

The APA precludes review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In the Ninth Circuit Court of Appeals' words:

If . . . no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction.

City of Santa Clara, Cal. v. Andrus, 572 F2d 660, 666 (9th Cir. 1978).

Thus, absent an independent, substantive body of law, the APA does not provide reviewable subject matter.

#### CONCLUSION

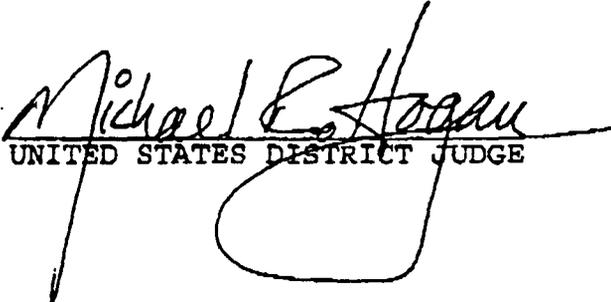
Section 2001 of the Rescissions Act bars plaintiffs' environmentally-based challenges to the Watchdog, Roughneck, Pinestrip, and Snog sales. Accordingly, defendants' and defendant-intervenors' motions for summary judgment (# 32, 45 and 50) are granted, and plaintiffs' motion for summary judgment (#37-1) is denied. This case is dismissed for lack of subject matter jurisdiction.

The following motions are denied as moot:

- Plaintiffs' Motion for Preliminary Injunction (#37-2)
- Plaintiffs' Motion for Permanent Injunction (#37-3)
- Plaintiffs' Motion to Enforce Automatic Stay (#57)
- Plaintiffs' Motion to Expedite Motion to Enforce

- Automatic Stay (#59)
- Defendants' Motion to Strike Extra-record Documents (#67)
- Plaintiffs' Motion to Clarify Minute Order of 10/13/95 (#81)
- Defendant-Intervenor's Motion for Leave to File Reply Memorandum (#84)

DATED this 4<sup>th</sup> day of December 1995.

  
UNITED STATES DISTRICT JUDGE

6-1647

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

FAX NUMBER (202) 272-6817, 6815, 5775  
CONFIRMATION NUMBER (202) 272-8056

PLEASE DELIVER TO:

To: Don Barry 208-4684  
Bob Baum 208-3877  
Dinah Bear 456-0753  
Tom Jensen  
Ted Boling 514-4231  
Peter Coppelman, 514-0557  
Lois Schiffer,  
Jim Simon  
Greg Frazier 720-5437  
Mike Gippert, 690-2730  
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Jim Sutherland(503) 465-6582  
Tom Tuchmann (503) 326-6254  
Sue Zike (503) 326-7742

NUMBER OF PAGES:

DATE: November 17, 1995

FROM: Robin Michael  
Ellen Athas

MESSAGE: Attached is a copy of Judge Hogan's ruling in  
ONRC v. USFS.

DEC 6 '95 14:19 FROM US ATTY EUGENE ORE

PAGE.001

To: Susan

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DEC 08 -5 AM 7:45

U.S. ATTORNEY  
EUGENE ORE.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES )  
COUNCIL and UMPQUA WATERSHEDS, )  
INC., )

Plaintiffs, )

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JACK WARD THOMAS in his )  
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ORDER

Plaintiffs challenge the United States Forest Service's decision to offer or award four timber sales in the Umpqua National Forest. Plaintiffs assert that the Forest Service's decision violates the National Forest Management Act (NFMA), the Administrative Procedure Act (APA), and Forest Service

DEC 6 '95 14:13 FROM US ATTY EUGENE ORE

PAGE.002

regulations. Defendants argue that two of the sales are immune from this challenge by virtue of the 1995 Interior Appropriations and Rescissions Act (the Rescissions Act) and that the decision to offer and award the other two sales should be upheld under the APA's "arbitrary and capricious" standard. Defendant-intervenors argue all four sales are immune from challenge under the Rescissions Act.

#### FACTS

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#### DISCUSSION

##### 1. Roughneck and Watchdog

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DEC 6 '95 14:14 FROM US ATTY EUGENE ORE

PAGE.003

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Plaintiffs contend that since section 2001(i) only covers

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PAGE.007

documents required by section 2001, any documents or procedures not required by section 2001 are subject to environmental review. Under plaintiffs' interpretation, therefore, section 2001(i) provides that the procedures required for Option 9 sales shall be deemed to satisfy all environmental laws but does not require any procedures for Option 9 sales, thereby subjecting all Option 9 sale procedures to environmental review.

Under plaintiffs' interpretation, section 2001(i) would have no effect on Option 9 sales. However, it is highly unlikely that Congress intended section 2001(i) to be inapplicable to Option 9 sales since section 2001(i) expressly references section 2001(d), which includes Option 9 sales. In addition, such an interpretation would obstruct section 2001(d)'s directive that the Secretary prepare, offer, and award Option 9 sales "notwithstanding any other law." The only reasonable construction of section 2001(i) is that it suspends environmental challenges while preserving non-environmental challenges to Option 9 sales.

Finally, plaintiffs argue that even though the Rescissions Act may suspend environmental laws, it preserves challenges based on the APA. Plaintiffs note that the sufficiency language of section 2001(i) does not include the APA. However, the APA is merely a vehicle for carrying substantive challenges to court. As noted above, sections 2001 (d) and (i) bar environmental challenges to Option 9

sales, thereby giving the agency complete discretion, insofar as environmental laws are concerned, in offering and awarding Option 9 sales.

The APA precludes review when 'agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a)(2). In the Ninth Circuit Court of Appeals' words:

If . . . no law fetters the exercise of administrative discretion, the courts have no standard against which to measure the lawfulness of agency action. In such cases no issues susceptible of judicial resolution are presented and the courts are accordingly without jurisdiction.

City of Santa Clara, Cal. v. Andrus, 572 F2d 660, 666 (9th Cir. 1978).

Thus, absent an independent, substantive body of law, the APA does not provide reviewable subject matter.

#### CONCLUSION

Section 2001 of the Rescissions Act bars plaintiffs' environmentally-based challenges to the Watchdog, Roughneck, Pinestrip, and Snog sales. Accordingly, defendants' and defendant-intervenors' motions for summary judgment (# 32, 45 and 50) are granted, and plaintiffs' motion for summary judgment (#37-1) is denied. This case is dismissed for lack of subject matter jurisdiction.

The following motions are denied as moot:

- Plaintiffs' Motion for Preliminary Injunction (#37-2)
- Plaintiffs' Motion for Permanent Injunction (#37-3)
- Plaintiffs' Motion to Enforce Automatic Stay (#57)
- Plaintiffs' Motion to Expedite Motion to Enforce

Automatic Stay (#59)

- Defendants' Motion to Strike Extra-record Documents (#67)
- Plaintiffs' Motion to Clarify Minute Order of 10/13/95 (#81)
- Defendant-Intervenor's Motion for Leave to File Reply Memorandum (#84)

DATED this 4<sup>th</sup> day of December 1995.

*Michael E. Hogan*  
 UNITED STATES DISTRICT JUDGE

To: Susan

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U.S. DISTRICT COURT  
EUGENE, OREGON

U.S. ATTORNEY  
EUGENE ORE.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES  
COUNCIL and UMPQUA WATERSHEDS,  
INC.,

Plaintiffs,

v.

JACK WARD THOMAS in his  
official capacity as Chief of  
the United States Forest Service;  
and UNITED STATES FOREST SERVICE,

Defendants,

and

DOUGLAS TIMBER OPERATORS, INC.  
and HUFFMAN & WRIGHT LOGGING CO,  
INC.,

Defendant-Intervenors.

Case No. 95-6272-HO

ORDER

Plaintiffs challenge the United States Forest Service's decision to offer or award four timber sales in the Umpqua National Forest. Plaintiffs assert that the Forest Service's decision violates the National Forest Management Act (NFMA), the Administrative Procedure Act (APA), and Forest Service

111

regulations. Defendants argue that two of the sales are immune from this challenge by virtue of the 1995 Interior Appropriations and Rescissions Act (the Rescissions Act) and that the decision to offer and award the other two sales should be upheld under the APA's "arbitrary and capricious" standard. Defendant-intervenors argue all four sales are immune from challenge under the Rescissions Act.

#### FACTS

The four challenged sales are the Roughneck, Watchdog, Pinestrip, and Snog sales. The Roughneck and Watchdog sales were awarded in 1994, before the July 27, 1995 enactment of the Rescissions Act. The Pinestrip and Snog sales were advertised and offered after July 27, 1995. The Pinestrip and Snog sale units are within the geographic area defined in the President's Northwest Forest Plan, also known as Option 9.

#### DISCUSSION

1. Roughneck and Watchdog

Defendant-intervenors contend these sales are immune from plaintiffs' challenge under section 2001(k)(1) of the Rescissions Act. That provision provides:

(k) AWARD AND RELEASE OF PREVIOUSLY OFFERED AND UNAWARDED TIMBER SALE CONTRACTS. --

(1) AWARD AND RELEASE REQUIRED. -- Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act, the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district

DEC 6 '95 14:14 FROM US ATTY EUGENE ORE

PAGE.003

of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745).

Pub. L. 104-19, 109 Stat. 194 § 2001(k)(1) (1995).

In National Forest Resource Council v. Glickman, Civ. No. 95-6244, this court ruled that section 2001(k)(1) covers not only actual section 318 sales but all sales on National Forest System or Bureau of Land Management land within the section 318 geographical area that were offered or awarded prior to July 27, 1995. Defendant-intervenors contend that section 2001(k)(1) applies to the Roughneck and Watchdog sales because both were offered prior to July 27, 1995. Because section 2001(k)(1) requires the Secretary to "permit [these sales] to be completed" "[n]otwithstanding any other provision of law," defendant-intervenors assert that plaintiffs' challenge is barred.

Defendants take the position that section 2001(k) does not bar plaintiffs' challenge to the Roughneck and Watchdog sales. They argue section 2001(k)(1) only applies to sales offered or awarded prior to July 27, 1995, which were "somehow held up" or enjoined as of that date. Oral Argument on November 28, 1995, statement of Robin Michael, attorney for defendant; see also, Defendants' Opposition to Defendant-intervenors' Motion for Summary Judgment (#65) at 2-4. In support of this argument, defendants point to the plain language of section 2001(k) and (k)(1). Plaintiffs join this argument and also argue that section 2001(k)(1) only applies to actual section 318 sales despite this court's contrary

holding in NERC v. Glickman.

The plain language is the starting point of statutory interpretation. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Section 2001(k)(1) requires "all timber sale contracts offered or awarded" before July 27, 1995, to be released "notwithstanding any other provision of law[.]" As this court held in Glickman, section 2001(k)(1) is not limited to section 318 sales. Nor does section 2001(k)(1) contain language restricting application to sales "somehow held up" or enjoined as of July 27, 1995. The purpose of section 2001 is to facilitate timber sales by suspending legal challenges, and there is no indication that this purpose only extended to legal disputes arising prior to July 27, 1995. Section 2001(k)(1), therefore, requires the release of the Roughneck and Watchdog sales "[n]otwithstanding any other provision of law."

2. Pinestrip and Snog

Defendant-intervenors and defendants agree that sections 2001(d) and (i) of the Rescissions Act bar plaintiffs challenges to the Pinestrip and Snog sales, both Option 9 sales offered after July 27, 1995. Section 2001(d) provides:

(d) DIRECTION TO COMPLETE TIMBER SALES ON LANDS COVERED BY OPTION 9. --

Notwithstanding any other law . . . the Secretary concerned shall expeditiously prepare, offer, and award timber sale contracts on [Option 9 land].

Defendants and defendant-intervenors submit that this provision, combined with section 2001(i), immunizes both the

administrative decision to offer or award a sale and the "operation," or harvesting, of the sale unit from environmental review.

Plaintiffs apparently concede that section 2001(d) bars challenges to the decision to offer and award timber sales but contend that section 2001(d) preserves challenges to timber sale "operations." Plaintiffs observe that section 2001(d) does not reference "operations," as in other subsections. See, e.g., sections 2001(f) and (i).

The premise of this argument is that plaintiffs are challenging the "operation" of the Pinestrip and Snog sales and not the administrative decision to offer or award the sales. If plaintiffs were suing to enjoin the industrial operation of these sale units, the appropriate defendants would be Boise Cascade and Huffman & Wright logging companies, the high bidders on the Pinestrip and Snog sales, respectively. The documents on record, however, show that the challenge here is based on the administrative record, the Administrative Procedure Act, administrative regulations, and NFMA provisions governing administrative decision-making. Plaintiffs are challenging an administrative decision, not private operation.

Assuming *arguendo* that plaintiffs are challenging the operation rather than the preparation, offer, or award of the Pinestrip and Snog sales, plaintiffs' interpretation belies Congressional intent. The purpose of section 2001 is, for better or worse, to facilitate the harvesting of timber.

S.Rep. No. 17, 104th Cong., 1st Sess. 122 (1995) (purpose of section 2001 is "to provide harvestable timber to the people who work in the region of Option 9"). Immunizing the preparation, offer, award, and release of timber sales from environmentally-based challenges while permitting such challenges to proceed against the "operation" of the sale unit would obstruct this purpose. Section 2001(d) does not permit environmentally-based challenges to the "operation" of otherwise immunized sales.

Defendants and defendant-intervenors also point to section 2001(i), which provides:

(i) EFFECT ON OTHER LAWS. -- The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any salvage timber sale subject to subsection (b) and any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following applicable Federal laws (and regulations implementing such laws):

\* \* \*

(5) The National Forest Management Act of 1976 . . .

\* \* \*

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

Defendants and defendant-intervenors observe that section 2001 requires no documents or procedures for Option 9 sales and argue that any procedures or documents used to implement Option 9 sales must be deemed to satisfy the NFMA and any other environmental law.

Plaintiffs contend that since section 2001(i) only covers

documents required by section 2001, any documents or procedures not required by section 2001 are subject to environmental review. Under plaintiffs' interpretation, therefore, section 2001(i) provides that the procedures required for Option 9 sales shall be deemed to satisfy all environmental laws but does not require any procedures for Option 9 sales, thereby subjecting all Option 9 sale procedures to environmental review.

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DATED this 4<sup>th</sup> day of December 1995.

*Michael E. Hogan*  
UNITED STATES DISTRICT JUDGE

Name	Date
<i>Steven Reish</i>	<i>6/8/99</i>

*Council*

Name	Date
Steven Reich	6/8/99

Counsel

PHOTOCOPY  
PRESERVATION