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For 23 BLM Sales

JUN 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, et al., Plaintiffs, v. BRUCE BABBITT, in his official capacity as Secretary, United States Department of Interior, Defendant, NORTHWEST FOREST RESOURCE COUNCIL, et al., Defendants-Intervenors.	Civ. No. 87-1160-FR PAS' OPPOSITION TO NFRC MOTION TO MODIFY INJUNCTION

INTRODUCTION

NFRC has moved the Court to modify its permanent injunction in this case to allow 23 BLM timber sales in spotted owl habitat to be logged. The injunction would need to be modified because, despite the fact that the defendant has filed a new plan and EIS with the Court, it does not intend to apply that plan and EIS to these sales, which were rushed out in the eleventh hour prior to a temporary restraining order issued by this Court. The BLM sold these particular 23 sales between the December 23, 1991, Ninth Circuit decision in Portland Audubon Society v. Lujan, 952 F.2d 297, 303-305 (9th Cir. 1991) (reversing this Court's dismissal of PAS' complaint) and the January 30, 1992, temporary restraining order this Court issued prohibiting logging or other land disturbing activities on these sales and prohibiting BLM from proceeding with other prospective sales in owl habitat. PAS successfully sought a TRO against these sales (and subsequently obtained preliminary and permanent injunctions against them) because at the time these 23 sales were auctioned and awarded, BLM had no environmental impact statement that adequately addressed the effects of the sales on the northern spotted owl. See Portland Audubon Society v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), aff'd, 998 F.2d 705 (9th Cir. 1993).

PAS opposes NFRC's motion to modify the injunction in this case now to allow these 23 sales to proceed because, unlike other sales, the defendant does not intend to modify or alter the sales to comply with the standards and guidelines of the government's new FSEIS and plan for managing late-successional and old-growth forests within the range of the northern spotted owl. See 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) (hereinafter the "ROD"); Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl (February

1994) (hereinafter the "FSEIS") (copies of both the ROD and FSEIS previously have been filed with the Court).

Even setting aside the issue of whether this new plan and EIS comply with the law, a point PAS does not in any way concede, see Seattle Audubon Society v. Espy & Babbitt, No. C92-479WD, Supplemental Complaint (filed May 19, 1994) -- copy attached as Exhibit A), these 23 sales are distinct from other sales because these 23 sales were rushed out and sold in an attempt to beat the issuance of a TRO the defendant knew this Court was likely to impose, and with full knowledge that plaintiffs were seeking a TRO. Now, because these sales were sold (in violation of NEPA) before they were enjoined, the defendant intends to treat them differently than "new" sales, and not modify them to make them consistent with the new plan. Rather, defendant intends to allow them to go forward based on the EISs and plans which this Court found flatly violated NEPA. In short, these 23 sales were illegal when they were sold in January of 1992, yet the defendant intends to allow them to go forward without curing their defects.[1/]

1/ PAS does not oppose efforts the BLM may make to modify these sales to comply with the requirements of the government's new habitat management plan -- the plan that even the government agrees any other timber sales enjoined by this Court's rulings will meet before they proceed.

Nor, consistent with the position PAS has taken in the Seattle Audubon Society case in which the BLM is now a defendant, does PAS otherwise oppose the dissolution of the injunction in this case, provided BLM complies with the notice requirements for timber sales in suitable owl habitat imposed by the Court in that case, see Seattle Audubon Society v. Espy & Babbitt, No. C92-479WD, Order Dissolving Injunction and Setting Schedule for Summary Judgment Motions at 5 (filed June 6, 1994) (copy attached (continued...)

Under these circumstances, there is simply no basis for allowing these sales to proceed. NFRC's motion to modify the injunction in this case to allow these 23 sales to be logged should be denied.

BACKGROUND

I. THE 23 BLM TIMBER SALES ADDRESSED IN NFRC'S MOTION WERE SOLD IN VIOLATION OF THE LAW

On December 23, 1991, the Ninth Circuit ruled that PAS could amend its complaint to allege that the decision to proceed with BLM timber sales in spotted owl habitat violated NEPA. 952 F.2d at 303-305. Prior to the Ninth Circuit's ruling, this Court had denied PAS' request to amend its complaint and proceed with litigation of the merits of its NEPA claim. See Portland Audubon Society v. Lujan, No. C87-1160-FR, Order Denying Motion to File Amended Complaint (D. Or. July 18, 1991). For its part, while PAS' appeal was pending, BLM had proceeded with the auction and award of a number of timber sales in suitable owl habitat.

Immediately following the Ninth Circuit's December 23rd ruling, however, PAS moved for issuance of the Ninth Circuit mandate to confer jurisdiction on this Court so PAS could renew its longstanding request for an injunction against BLM timber sales in spotted owl habitat. PAS also notified the BLM of its plan to seek an injunction against further timber sales in owl

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1/ (...continued) as Exhibit B), and any other requirements the Court may impose there. If these sales were allowed to proceed without first being modified to comply with the new plan, there would have been no point in enjoining them in the first instance.

habitat and BLM confirmed to PAS that no additional sales would occur between December 23, 1991 and January 3, 1992.

On January 23, 1992, the court of appeals issued its mandate and PAS immediately moved for a TRO before this Court. The Court granted PAS' request for a restraining order on January 30, 1992. Notwithstanding plaintiffs' notification to BLM that it would seek injunctive relief against additional BLM timber sales in suitable owl habitat, and notwithstanding this Court's 1989 ruling that such sales violated NEPA, Portland Audubon Society v. Lujan, 712 F. Supp. 1456, 1485 (D. Or. 1989), affirmed in part, reversed in part, 884 F.2d 1233 (9th Cir. 1989, cert. denied, 110 S. Ct. 1470 (1990), between January 3, 1992, and this Court's January 30, 1992, TRO, BLM awarded contracts for logging 26 timber sales in suitable spotted owl habitat. See Fifth Affidavit of William L. Bradley, Table 1 (filed February 5, 1992).[2/] In order to correct BLM's blatant disregard of its clear legal duties, and to prevent the BLM from being rewarded for so hastily putting out sales that were clearly illegal,[3/] PAS sought a restraining order against those BLM timber sales sold between January 1, 1992, and the date of the TRO, as well as an order prohibiting future additional sales. The Court granted PAS

2/ Of these 26 timber sales, three involved access right-of-ways. PAS subsequently agreed to release these sales from the Court's injunction. See Stipulation Regarding Scope of Injunction (filed June 2, 1992).

3/ Evidence available to PAS at the time it applied for a TRO indicated that, in fact, the BLM had actually stepped-up its efforts to sell these timber sales before PAS could present its case to this Court. See Declaration of Richard A. Stahl in Support of Motion for TRO and Preliminary Injunction at 2 & n.1 (filed January 28, 1992).

this relief and halted all logging of the 26 timber sales sold between January 1 and January 30, 1992. See Temporary Restraining Order (filed Jan. 30, 1992).

Thereafter, these sales remained enjoined by orders of this Court. See Portland Audubon Society v. Lujan, No. C87-1160-FR, Order Granting Preliminary Injunction (filed February 26, 1992); Portland Audubon Society v. Lujan, 795 F. Supp. at 1510. The Court also subsequently re-affirmed its 1989 ruling that BLM timber sales in owl habitat violated NEPA. 795 F. Supp. at 1500-1501. Accordingly, there can be no doubt that the 23 timber sales addressed in NFRC's current motion were sold in violation of the law.

II. BLM'S SUBSEQUENT EFFORTS TO COMPLY WITH THE LAW

Following this Court's ruling that BLM had violated NEPA, and the Court's injunction requiring compliance with this statute before BLM could proceed with the 23 timber sales at issue here or other new sales in suitable owl habitat, and similar rulings in Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1484, and 1494 (W.D. Wash. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993), the BLM and other government agencies proceeded to develop a new plan for managing late-successional and old-growth forests within the range of the northern spotted owl. In February, 1994, these planning efforts produced a Final Supplemental Environmental Impact Statement and thereafter, on April 13, 1994, a new Record of Decision adopting a plan for managing late-successional and old-growth forests on federal lands within the owl's range. See FSEIS and ROD.

This new plan and FSEIS is now the subject of litigation in Seattle Audubon Society v. Espy & Babbitt, No. C92-479WD, Supplemental Complaint (filed May 19, 1994).

III. CURRENT STATUS OF THE 23 BLM TIMBER SALES

To the best of plaintiffs' knowledge, the 23 timber sales addressed by NFRC's motion have not been modified to comply with the requirements of the government's new plan for managing late-successional and old-growth forests within the range of the northern spotted owl. Indeed, several of the sales are located within late successional reserves established under the government's new plan where additional logging of owl habitat is prohibited. Other sales are located in riparian reserves and key watersheds that also are protected under the government's new plan, and sales in such areas require extensive additional planning before proceeding. The defendant is in fact proceeding with such additional planning and modification with respect to all new sales, but because these 23 sales were actually sold in 1992 (in a deliberate effort to get under the wire before this Court's TRO), the defendant does not intend to conform them to the new plan. The only analysis for or justification of these sales is set forth in the BLM EISs and plans that this Court has ruled were illegal. The reasons for the Court's injunction with respect to these sales, therefore, still apply.

ARGUMENT

NFRC asks the Court to modify its injunction in this case to allow 23 BLM timber sales in suitable owl habitat to be logged. The Court previously ruled that these sales were illegal.

Portland Audubon Society v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), aff'd, 998 F.2d 705 (9th Cir. 1993). NFRC offers no legal basis for allowing these sales to proceed now when there has been no effort to modify the sales and cure the defects which led to an injunction against them.

As explained above, these sales were sold in haste before this Court could issue a TRO halting further BLM timber sales in suitable owl habitat. But for the date on which these sales occurred, they are no different from any of the other timber sales in spotted owl habitat which this Court enjoined until the government took action to comply with NEPA. While the government has now published an FSEIS and ROD,[4/] the government has made no effort to modify these 23 sales to conform to the requirements of its new habitat management plan. Indeed, so far as PAS has been able to determine, none of the 23 sales meet the requirements they would have to meet in order to comply with the new ROD.

To the extent that NFRC or the government may seek to argue that these illegal sales can proceed even without modification to comply with the government's new habitat management plan because the plan assumes these sales will be logged, NFRC and the government are wrong. They cannot have it both ways -- the government cannot adopt a new plan and then continue to sell timber sales under an old plan that this Court has ruled is illegal. Indeed, the ROD for the government's new plan states

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4/ As noted above, plaintiffs have challenged the legality of the new FSEIS and ROD. See Seattle Audubon Society v. Espy & Babbitt, No. C92-479WD, Supplemental Complaint (filed May 19, 1994).

explicitly that it "does not provide final authorization for any timber sale." ROD at 13. This being so, the only final authorization for <u>these</u> sales is the decisions made pursuant to plans and EISs the Court has rejected for violating NEPA. 795 F. Supp. 1489.

There simply is no arguably valid authorization for these sales in the absence of modification to comply with the requirements of the government's new habitat management plan and a new decision to proceed with the sales based on the modifications. And, in fact, except for these 23 sales, the government has or will modify <u>all</u> other sale enjoined by this Court to comply with the new plan before they are allowed to proceed. There is no legal basis for creating an exception for these sales.

The government erred when it attempted to sell these 23 timber sales in January of 1992 despite court rulings that made it clear the sales were illegal. That error should not now be compounded or rewarded by allowing these sales to be logged when they still violate the law and have not been reviewed for compliance with the government's new plan for managing suitable owl habitat.[5/]

5/ To the extent NFRC asserts that these sales are different simply because they were sold, the point makes no difference. The BLM retains the right under its timber sale contracts to suspend, modify, or terminate the contracts altogether in order to comply with the law. And the issue before the Court is not whether to enjoin the sales, but rather whether to <u>release</u> the sales from the existing injunction.

CONCLUSION

NFRC's motion to modify or clarify this Court's injunction should be denied.

DATED: This 23rd day of June, 1994.

Respectfully submitted,

MICHAEL AXLINE
Attorney for Plaintiffs

TODD TRUE
Attorney for Plaintiffs

U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Pam Sands

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FROM: Peter D. Coppelman

NO. OF PAGES: (INCLUDING COVER PAGE) 4

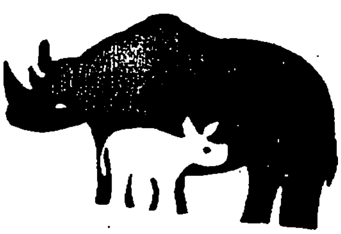
TO: Will Stelle, Jim Pipkin, Roger Nesbit, Kris Clark, Ron Swan
Dave Gayer

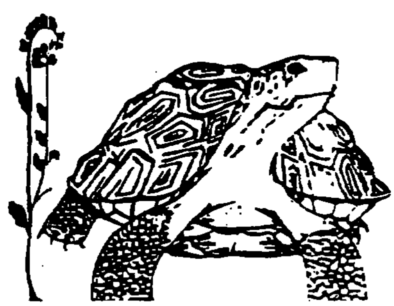
TELEPHONE NO:

FAX NO:

MESSAGE: Attached is a memo from our Wildlife Section regarding the need for BLM to reinitiate consultation on the 23 sales (70MMBF) that are currently at issue in Portland Audubon Society. We need to discuss ASAP.

PLEASE NOTIFY SENDER IMMEDIATELY IF YOU HAVE ANY PROBLEMS RECEIVING THESE PAGES.





DETERMINED TO BE AN ADMINISTRATIVE

MARKING INITIALS: NJ DATE: 2/15/18

Memorandum

Subject	Date
Reinitiation of Consultation on 70 MMBF	June 28, 1994

To
Peter D. Coppelman
Deputy Assistant Attorney General
Environment & Natural Resources Division

From
James C. Kilbourne
Chief
Jean E. Williams
Attorney
Wildlife & Marine Resources Section

As you know, we have raised the question of whether BLM should reinitiate consultation under the ESA on the 23 FY 1991 sold awarded sales which were enjoined in PAS. 50 CFR 402.16, requires reinitiation whenever "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." This issue was raised by Todd True of SCLDF also in a recent conversation he had with the General Litigation Section on this topic. You have asked for our assessment of the litigation risks involved in this matter.

We believe that the most serious litigation risk in this scenario is the possibility of having to defend against a challenge alleging that reinitiation was necessary on the sales without an actual agency decision containing a biological finding regarding that issue. The question of whether reinitiation is required -- whether FEMAT, other information developed in this process including the owl demographic analyses, or the action of issuing the ROD, results in effects on owls from these sales not previously considered -- is basically a biological question which must be answered by the BLM biologists, with the concurrence of the FWS. In order to adequately defend against a reinitiation claim, we believe that an exchange of memoranda between the agencies is necessary, just as occurred regarding whether reinitiation was required on Alternative 9 in view of the changes from the FSEIS to the ROD and certain additional analysis. Such an exchange should describe the issues considered and analyze whether reinitiation is required. Without this record basis, the agency's position will be nothing more than a legal argument, with no agency decision due deference.

We also note that there are litigation risks associated with what we understand to be BLM's position, i.e., that reinitiation is not required even if there were an exchange of memoranda supporting this position. We see two issues: 1) whether the ROD's establishment of new management guidelines for spotted owl habitat gives rise to effects not previously considered by changing key management assumptions on which the earlier effects analysis was based; and 2) whether any of the actions leading up to the ROD, including development of the FEMAT report, constitute new information requiring reinitiation.

BLM has provided us with the current biological opinions for these sales -- the 1990 and 1991 consultations on spotted owls, and the 1993 reinitiated consultation on murrelets -- and it appears that the agency intends for us to examine these documents and answer the above questions. However, as noted, we believe that the answers to these questions must be addressed in the first instance by the agency biologists, particularly with regard to the second question.

In any event, and though made without benefit of the agency's analysis, these are our views on the litigation risks that would remain should BLM and FWS exchange memoranda concluding that reinitiation is unnecessary. The first question is whether the decision to implement a new conservation strategy results in effects not previously considered. The operative (1990-1991) biological opinions note the absence of an adequate conservation strategy and urge implementation of the Interagency Scientific Committee's (ISC) Conservation Strategy. The opinions do not contemplate the effects of management under the ROD vis-a-vis these sales. The ROD states that certain timber sales awarded prior to September 1993 (which would include these) were adjusted to meet certain criteria. Arguably, while these changes may not be "new information," they may have modified the sales resulting in effects not previously considered which is another trigger for reinitiation. We believe from the documents we have that four sales were examined under these criteria, but not modified. It may well be that any changes made did not result in effects not previously considered, but if that is the case, it should be explained by BLM. As a practical matter, because Alternative 9 is generally considered as protective or more so than was the strategy in effect at the time of the original biological opinions and there is no indication the sales themselves have been substantially altered, BLM's determination not to reinitiate consultation to consider effects of the ROD on these sales is probably reasonable. One argument to make (but one which would have to be cleared by FWS and explained by the agencies to give it any force) would be that the reinitiation standards only apply to changes in effects that could have negative impacts. However, such an interpretation is inconsistent with the requirement that consultation is required for both beneficial or potentially adverse impacts.

We are more concerned about defending a decision not to reinitiate consultation in the face of the various scientific work leading up to the ROD. Even before the ecosystem approach began, in December, 1992, the FWS completed the final draft owl recovery plan, which was not available when the biological opinions were issued (1990 and 1991). Arguably both the owl recovery plan and the FEMAT report are merely new strategies for owl management based on the same information (i.e., the ISC), but this does not account for the fact that the respective reports contain somewhat different data and analyses.

We are most concerned about the owl demographic analysis -- the Anderson and Burnham analyses and the McKelvey model results -- which postdated the ISC's work, and were not considered by the FWS when it issued the 1990-91 opinions. It is difficult to understand how this information would not be new information revealing effects from the sales on owls "in a manner or to an extent" not previously considered. It seems more likely that the information would trigger reinitiation, but that in all likelihood any new effects on owls from the sales in light of the new information would not be adverse effects. Thus, there would be no change in the ultimate biological opinion.

If BLM determines that reinitiation is required, we note that the regulation requires "reinitiation of formal consultation," which of course requires the Service to prepare a biological opinion in accordance with the provisions of 50 CFR 402.14. We could argue that the reference to "formal consultation" is not intended to render inapplicable the exception to formal consultation for actions that are not likely to adversely affect listed species or critical habitat. Thus, reinitiated consultation could involve only the exchange of letters contemplated by that exception. However, if formal consultation was required on the action for the original consultation, reinitiation, even just to examine those effects of the action revealed by the new information, is arguably required to be formal consultation also.

In any event, whether in the form of an exchange of letters detailing why reinitiation is not required or in the form of consultation after a decision to reinitiate, we recommend that BLM's biologists be asked to provide their opinion on these issues with FWS's concurrence or opinion as appropriate.

U.S. Department of Justice

Environment and Natural Resources Division

FOIA SBU

Washington, D.C. 20530

Reinitiation of Consultation on 70 MMBF

June 28, 1994

Peter D. Coppelman
Deputy Assistant Attorney General
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James C. Kilbourne
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2012-0269-F

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