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Environment and Natural Resources Division

File under Forest Plan "Timber Sales"

Office of the Assistant Attorney General

Washington, D.C. 20530

FAX NUMBER (202) 514-0557
(FTS) 368-0557

CONFIRMATION NUMBER (202) 514-2701
(FTS) 368-2701

FROM: Lois J. Schiffer and Peter Coppelman

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TO: Katie McGinty / James Pipkin / Patty Beneke

TELEPHONE NO:

FAX NO: 456-2710 / 219-1220 / 219-1792

MESSAGE:

basic problem infects all sales

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Washington, D.C. 20530

September 13, 1994

* ATTORNEY-CLIENT PRIVILEGED *

MEMORANDUM

To: Katie A. McGinty
Director
Office on Environmental Policy
The White House

James Pipkin
Counsel to the Secretary
Department of the Interior

Patty J. Beneke
Associate Solicitor
Division of Energy & Resources
Department of the Interior

From: Lois J. Schiffer
Acting Assistant Attorney General

Peter D. Coppelman
Deputy Assistant Attorney General

Re: Spotted Owls: BLM's Sold Sales

This memorandum outlines the background, recent developments, litigation risk assessment and options for addressing the BLM sold sales that remain under suspension. A decision on this is needed as soon as possible.

Background

The PAS Injunction. Auction and award of BLM sales were enjoined by Judge Frye in Portland Audubon Society v. Babbitt. The court enjoined all sales "not awarded prior to 1992", and the injunction remained in place "until the BLM submits to this court a Supplemental Environmental Impact Statement or its functional equivalent which examines new information on the effects of logging on the northern spotted owl subspecies as required by NEPA." (Judgment, Jan. 5, 1994). Included in that injunction were the BLM's 70 MMBF of sold and awarded sales, which represent the only sold and awarded sales enjoined by any court. These decision notices to go forward with these sales were based on the old SEIS, which the court found inadequate for failing to consider new information.

The ROD and FSEIS. The ROD specifically states that all "sales awarded prior to the effective date of this Record of Decision are not altered by this Record of Decision." (ROD, at 13). That is based on the assumption that, at the time of award, "these timber sales were consistent with the planning documents then in effect, complied with the Endangered Species Act and other laws, and the environmental effects of these sales were considered as part of the baseline for the biological opinion for the Final SEIS." (ROD, at 13). Sales in key watersheds were also subjected to a screening process. (ROD, at 13-14). The SEIS' aquatic group assumed, for purposes of their analyses, that all sold sales were harvested stumps. The SEIS' terrestrial group's assumptions are less clear.

Lifting the PAS Injunction. On May 20, 1994, the Record of Decision became effective. Tom Lee, the Assistant United States Attorney who has handled the Portland Audubon Society v. Babbitt matter for the BLM, filed the FSEIS and Notice of Satisfaction of Final Judgment on that date. That filing satisfied the injunction in that case before Judge Frye and concluded the Portland case. Attorneys for industry, however, sought to force BLM to lift the suspension, and moved the court to clarify or modify its injunction to release the 23 sales comprising the 70 MMBF. We opposed any clarification or modification as unnecessary based on our view that the injunction was no longer in effect. The Sierra Club Legal Defense Fund, however, opposed industry's motion because the sales allegedly: (1) fail to comply with the standards and guidelines of the new FSEIS and Plan; (2) continue to violate NEPA; and (3) the ROD improperly assumes that these sales will be logged. We responded to these allegations and stated that there was no requirement to modify these sales in the court's injunction and Sierra Club's claims are entirely new claims that belong in a new civil action.

So we were then prep'd to go fwrd w/ the sales, right?

Why did industry have to sue us?

Current Status of 70 MMBF. The sales are located in matrix lands, key watersheds, adaptive management areas and late-successional reserves. These sales were formally suspended by BLM when the injunction was entered, and the suspension remains in place today. Based on new information on the northern spotted owl, additional ESA consultation will be needed on 7 of the 23 sales. Therefore, at this time, the issue is whether to lift the suspension on the remaining 16 sales.

Why?

ramifications for whole Forest Plan??

Recent Developments. During the past few months, these sold sales have become the subject of attorney and press inquiries. Attorneys for timber industry groups, including Mark Rutzick, have called asking when the suspension will be lifted. Members of the press have also asked questions about when these harvest activities will go forward.

In addition, Todd True, Sierra Club Legal Defense Fund, has stated that his clients have a problem with these sales. He has asked three questions about the sales: (1) do they conform with the standards and guidelines of Option 9; (2) has consultation taken place based on new information since the 1991 biological opinion on these sales; and (3) has NEPA been followed?

thought these 16 were OK???

In response to these specific concerns, BLM took steps to remedy any ESA and NEPA problems. There has been an exchange of memoranda with the Fish and Wildlife Service to address ESA issues. Also, a new memorandum to the file has been written to address NEPA concerns. Unfortunately, as set forth below, these efforts may not be adequate to prevail if these sales are challenged, which is a virtual certainty.

<u>ESA Issues.</u> The ESA issue we face is whether reinitiation of consultation on the 16 sales is required under 50 C.F.R. 402.16. This regulation requires reinitiation of consultation 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."

In previous discussions with BLM on this issue, we have urged BLM to address, in writing, whether reinitiation is required. We further advised that, if BLM determines, after examining the relevant facts -- i.e., what information was before the FWS when it issued its biological opinion for these sales in 1991 and whether there is new information that reveals effects not previously considered -- that reinitiation is not required, it should obtain FWS's concurrence in that determination. BLM's memorandum of July 29, 1994, and the FWS's reply memorandum of August 24, 1994, identifies the relevant biological issues and satisfies these concerns from a procedural standpoint. However, we continue to have significant concerns about the substance of these documents.

Our main concern in terms of new information is the scientific work done in conjunction with the FSEIS, in particular the owl demographic analysis. The BLM memorandum considers this information and notes the primary findings, but only states in very conclusory fashion that "[w]ith the exception of the information on acceleration of population loss, these data were further validation and quantification of the knowledge and understanding the USFWS utilized in 1991 in formulation of the biological opinions. . . ." Inasmuch as the demographic analysis and results were not in existence in 1991, this statement simply does not explain what the FWS had before it that encompassed this work. It also does not explain why this analysis and results only provide "further validation" of what we already knew, as opposed to information resulting in effects on listed species in a manner or to an extent not previously considered.

Further, with regard to the "information on acceleration of population loss," which BLM seems to concede was not within the "knowledge and understanding" of FWS in 1991, the BLM memorandum states that this information "provided insight into the trajectory" of the decline in owl populations, but that these results and the results in general "did not raise any new areas of concern or impacts that were not anticipated and accounted for by the USFWS in analysis of the effects of the timber sales. . . ." Again, this is a very conclusory statement without explanation as to why this information was within the parameters of knowledge and information previously considered. BLM seems to be confusing what may well be the ultimate outcome of reinitiation -- that this information does not reveal effects which would result in a finding of jeopardy to the species and change the ultimate outcome of the 1991 biological opinion -- with the issues relevant to determining whether reinitiation is required. In other words, the issue is what was considered, not whether the new information would change the ultimate outcome.

One final point is that the regulation on reinitiation states that "reinitiation of formal consultation is required" if any of the triggering provisions are met. We believe the exception to formal consultation for actions that will not be likely to adversely affect species or critical habitat should apply, and that if BLM determined this to be the case, it would not be required to proceed with formal consultation and obtain a biological opinion. However, there is an argument that on its face the reinitiation requirement can only be satisfied with formal consultation, typically a much more time-consuming process. See, 50 CFR 402.14 (setting forth requirements for a biological opinion).

NEPA Issues. The difficult NEPA issue is whether the previous NEPA documents, prepared in 1990-1991, are sufficient to permit these sales to go forward without new documentation. The ROD provides that they should, but the record may not contain a sufficiently detailed study of these sales and their environmental effects to satisfy NEPA. Therefore, the risk of going forward with these sales and their current NEPA analyses is substantial not only on the individual sales, but to the Forest Plan itself.

In an attempt to bolster our NEPA position, we requested additional documentation on the sales. A memo to the file on all 23 sold and awarded timber sales from Elaine Zielinski, dated July 29, 1994, sets forth some additional background, but still leaves substantial litigation risks in place. The memo summarizes several factors to support why no further NEPA analysis is considered necessary. It sets forth that only one of the sales is in a Late Successional Reserve. It includes descriptions of the riparian buffers in place, and concludes that the conservation objectives of the Forest Plan would not be significantly impaired by harvesting the one LSR sale. The three-page memo also addresses the special screening accomplished for sales in key watersheds. The facts set forth in the memorandum are certainly helpful in defending the rationale for going forward with the sales. Our risk, however, is that we failed to analyze all these factors in a NEPA process, and thereby excluded the public from all meaningful participation. Instead, we rely upon old environmental assessments, which tier to a superceded EIS. This procedural risk remains substantial.

Isn't it true the new ROD & EIS did declare that phase ok & was subject to public comment.

Options

Option 1. BLM does nothing further on these sales and lifts the suspension immediately.

Advantages: Easiest option that might, if successful, permit some timber harvest.

Disadvantages: High litigation risks, with potential risks on the entire defense of the ROD.

Option 2. Maintain the suspension in place, announcing that we are reviewing these sales even further. Coordinate with the Fish and Wildlife Service to review the sales with greater specificity. Coordinate with BLM to do additional NEPA review.

Advantages: Provides some NEPA and ESA defenses if sales were challenged by environmental plaintiffs and avoids a direct challenge to the ROD at current time.

Disadvantages: This could delay harvests substantially, and any new NEPA decision could give rise to new appeals and challenges. Timber groups may file actions for contract damages.

Option 3. Announce a lifting of the suspension for a future date following the completion of the case before Judge Dwyer.

Advantages: Provides some guarantee of timber in the foreseeable future. Insulates the Forest Plan from being litigated based on these sales.

Disadvantages: No sound reasoning for extending any notice beyond 30 days exists. Timber groups may file actions for contract damages.

Option 4. Cancel these sales.

Advantages: This would insulate the ROD from immediate challenge on these sales and avoid litigation risk to the Plan from the environmental plaintiffs.

Disadvantages: This would invite an industry challenge and the need to compensate purchasers for the lost volume. It would also represent a substantial departure from the Record of Decision.