

# COMMENTS

## LOGGING WITHOUT LAWS: THE 1995 SALVAGE LOGGING RIDER RADICALLY CHANGES POLICY AND THE RULE OF LAW IN THE FORESTS

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## I. INTRODUCTION

On July 27, 1995, Congress passed the “Emergency Salvage Timber Sale Program,”<sup>1</sup> otherwise known as the “Logging Without Laws Rider,” or the “Salvage Rider.” The Salvage Rider, attached to a rescissions bill to ensure little debate and swift passage, marks a radical change in national forest policy and in government based on the rule of law. The Rider was intended to expedite “salvage” logging of dead or dying trees by suspending environmental laws and limiting judicial review. However, the rider has recently been interpreted by the courts to allow logging of healthy old-growth timber without environmental or judicial review as well.

This comment addresses the legislative underpinnings, legal provisions, judicial interpretations, and practical effects of the salvage rider. Sections II and III discuss the development of national forest policy before the rider, Section IV analyzes the rider’s passage and legal provisions, and Section V summarizes early judicial interpretations of the rider. Section VI concludes that the salvage rider marks a distinct break in the movement of national forest policy towards the creation of judicially enforceable standards, management based on good science and citizen participation, and away from unreviewable agency discretion.

## II. THE EVOLUTION OF NATIONAL FOREST POLICY

There are 191 million total acres of National Forest land in the United States today, comprising approximately one tenth of the continent.<sup>2</sup> While 163 million of these acres are located in the western states, the economic and social effects of national forest policy are felt throughout the United States.<sup>3</sup> Over 200 million people visit the national forests each year to hike, fish, ski, and simply enjoy some of the most breathtaking beauty on the planet.<sup>4</sup> However, the national forests have been managed primarily for resource extraction in the form of logging, mining, grazing, hunting, and fishing. The forest industry has come to depend heavily on the national forests; one million homes are constructed from trees grown in the national forests each year.<sup>5</sup> In the rural west,

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1. Emergency Salvage Timber Sale Program, Pub. L. No. 104-119, § 2001, 109 Stat. 240 (1995).

2. PAUL W. HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR II 28 (1994).

3. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER AND THE FUTURE OF THE WEST 116 (1992).

4. *Id.*

5. *Id.*

many small towns are also dependent upon the dollars generated by logging, mining and grazing on the nearby national forests.

Since the establishment of the forest reserve system in 1891,<sup>6</sup> the national forests have been managed first and foremost to ensure a high annual timber harvest. During the 1960s and 70s, however, the public began to pressure Congress to manage the forests with noncommodity resources in mind as well.<sup>7</sup> Comprehensive land planning for multiple uses became required by such major statutes as the National Environmental Policy Act (NEPA),<sup>8</sup> the National Forest Management Act (NFMA),<sup>9</sup> and the Endangered Species Act (ESA).<sup>10</sup> These statutes created law to apply in order to protect water, wildlife, soil, and biological diversity in the face of large annual timber harvests. They also progressively limited the Forest Service's planning and management discretion, and subjected the agency to closer scrutiny from both the public and the courts.

Despite the existence and frequent use of these statutes by environmental plaintiffs, the congressionally appointed Scientific Panel on Late-Successional Forest Systems issued a 1991 report which concluded that the Pacific Northwest cut, which provides almost half of the total cut, would have to be reduced by over half to achieve a "medium to high" probability of sustaining the ancient forests and the species which inhabit them.<sup>11</sup> Despite such recommendations by their own panels, the Republican led 104th Congress voted to suspend decades of environmental regulations with the passage of the 1995 Salvage Rider.<sup>12</sup> The following section is a summary of United States forest policy leading up to the 1995 Salvage Rider.

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6. *Id.* at 122.

7. CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 10 (1987). This book is an expanded edition of Wilkinson & Anderson's seminal article by the same name printed in the *Oregon Law Review* at 64 OR. L. REV. 1 (1985).

8. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370 (1988)).

9. Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1624 (1982) and scattered sections of 16 U.S.C.).

10. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1988 & Supp. III (1991))).

11. WILKINSON, *supra* note 3, at 172.

12. Emergency Salvage Timber Sale Program, Pub. L. No. 104-119, § 2001, 109 Stat. 240 (1995).

A. *The Forest Service's Early Years: Broad Agency Discretion*

In the late nineteenth century, Americans grew increasingly concerned with the rapid destruction of the nation's forests.<sup>13</sup> They watched as logging companies clear-cut the forests of the Great Lakes states and then moved West, leaving behind economically depressed communities, floods, drought, and rivers heavy with silt.<sup>14</sup> Such public concern led to the Creative Act of 1891,<sup>15</sup> which enabled the President to set aside portions of the government's lands as public reservations.<sup>16</sup> The 1891 Act did not provide any type of regulatory program to mandate how the forest reserves were to be managed, however.<sup>17</sup>

The Organic Administration Act of 1897<sup>18</sup> provided the basic charter for Forest Service management of the national forests until the mid-1970s.<sup>19</sup> It also marked the first move toward active federal agency management of the national forests. The Act delegated broad federal authority to the Secretary of the Interior to "insure the objects of such reservations, namely, *to regulate their occupancy and use and to preserve the forests thereon from destruction.*"<sup>20</sup> In addition to the authority to regulate occupancy and use, the agency was given the power to sell timber from the national forests.<sup>21</sup> Finally, the Act allowed the President to create new forest reserves as long as this was done "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."<sup>22</sup>

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13. HIRT, *supra* note 2, at 28.

14. *Id.* at 28-29.

15. WILKINSON & ANDERSON, *supra* note 7, at 17-18; Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103, *repealed by* 90 Stat. 2792 (1976). According to the Act, the purpose of placing forests in reserves was to secure favorable water flow conditions and to furnish a continuous timber supply.

16. HIRT, *supra* note 2, at 29. President Harrison used this new authority immediately. By the time he left office in 1893, 14 million acres of forest were reserved. *Id.*

17. *Id.*

18. Act of June 4, 1897, ch. 2, 30 Stat. 34 (*codified as amended at* 16 U.S.C. §§ 473-482, 551 (1982)).

19. WILKINSON & ANDERSON, *supra* note 7, at 51.

20. Ch. 2, 30 Stat. 35 (current version at 16 U.S.C. § 551 (1982)) (emphasis added).

21. 16 U.S.C. § 476, *repealed by* Pub. L. No. 94-588, § 13, Oct. 22, 1976, 90 Stat. 2958. 16 U.S.C. § 476. The ability of the government to allow timber sales on the national forests was limited by the Organic Act, however. Only "dead, matured, or large growth of trees" could be harvested, and these had to be "marked and designated . . . and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior."

22. 16 U.S.C. § 475 (1988).

In 1898, President Theodore Roosevelt began an aggressive forest management program.<sup>23</sup> Roosevelt greatly expanded the number of acres in the forest reserve system during his presidency, and repeatedly sought the authority to establish wildlife sanctuaries in the national forests.<sup>24</sup> Even in 1903, Roosevelt and others were becoming concerned about overcutting and potential timber shortages.<sup>25</sup> In 1905, the forest reserves were transferred from the Department of Interior to the Department of Agriculture, whose Division of Forestry was led by Gifford Pinchot.<sup>26</sup> Under Pinchot, the Forest Service's authority expanded greatly, as did the volume of timber sales on national forest lands.<sup>27</sup> In the 1911 case *United States v. Grimaud*, the Supreme Court held that the regulation of grazing on national forest lands fell within the broad authority delegated to the Forest Service in the Organic Act.<sup>28</sup> Post-Grimaud decisions have consistently upheld the broad scope of the Forest Service's regulatory power under the Organic Act.<sup>29</sup> The agency's discretion to make decisions pertaining to the national forests remained virtually unfettered until the 1960s.

#### B. World War II and National Forest Policy: The Forest Service Gets Out the Cut

From the time of Pinchot's departure to around 1940, management of the national forests was a relatively smooth and noncontroversial affair.<sup>30</sup> This was due in large part to the small demand

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23. WILKINSON & ANDERSON, *supra* note 7, at 53.

24. *Id.* at 53. Roosevelt increased the forest reserves from 46.4 million acres in 1901 to 194.5 million acres in 1909. *Id.* at 53 n.265 (citing P. GATES, THE HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968 & photo reprint 1979)).

25. *Id.* at 21 n.75.

26. *Id.* at 22.

27. *Id.* at 54. During Pinchot's first two years, timber sales increased by nearly 1000 percent, from 113 million board feet to 1.044 billion board feet. *Id.* at 54 n.270 (citing FOREST SERVICE, U.S. DEP'T OF AGRICULTURE, 1908 ANNUAL REPORT OF THE FORESTER 409, 421 (1909)). Pinchot's agenda for the Forest Service was primarily the dedication of the national forests to productive timber harvesting, as evidenced by the Pinchot Letter and other writings. WILKINSON, *supra* note 3, at 128.

28. 220 U.S. 506 (1911).

29. WILKINSON & ANDERSON, *supra* note 7, at 57. For example, the courts have subsequently upheld the Forest Service's authority under the Organic Act to regulate uses of the national forest through a permitting process in *United States v. Rizzinelli*, 182 F. 675, 677 (D. Idaho 1910), the authority to regulate hardrock mining in national forests in *United States v. Weiss*, 642 F.2d 296 (9th Cir. 1981), and the authority of the USFS to institute game management programs in *Jones v. Freeman*, 400 F.2d 383 (8th Cir. 1968).

30. WILKINSON, *supra* note 3, at 131. The Forest Service also built up capital during this smooth period. *Id.* at 135.

for federal timber, since a large volume of highly profitable timber harvesting could be maintained on private lands.<sup>31</sup> Those cuts that were made on national forest land went relatively unnoticed, averaging around one billion board feet per year, or less than ten percent of an average modern cut of 11 billion board feet per year.<sup>32</sup> The Forest Service built a largely positive institutional image for itself as well, fighting fires in the West and welcoming increasing numbers of visitors to the forests and national parks.<sup>33</sup>

World War II was in large part the catalyst for profound changes in national forest policy, and thus for the forest management controversies which rage today in towns throughout the West and in the halls of Congress. At the time, wood was the main material used for military supplies; it took three trees to equip one American soldier.<sup>34</sup> However, demand for this "critical war material" exceeded supply by six billion board feet in 1942.<sup>35</sup> In response to declining supplies of timber from private lands logged for decades at unsustainable rates, the government increased sales of timber from the national forests, in part through a program which gave local mills contracts with assured margins of profit.<sup>36</sup> Timber sales on the national forests rose 238 percent between 1939 and 1945.<sup>37</sup>

During the twenty years after World War II, Americans began vacationing more in the West, traveling long distances to see the dramatic scenery of Yellowstone, to ski in Sun Valley, or to hike in the Sierra Nevadas.<sup>38</sup> Many vacationers were shocked to find extensive clearcuts adjacent to streams or trails.<sup>39</sup> Forest Service policies were falling increasingly under close public scrutiny.

### C. *The Multiple-Use Sustained-Yield Act of 1960*

The Multiple-Use Sustained-Yield Act of 1960<sup>40</sup> (MUSYA) for the first time expressly authorized the Forest Service to regulate the

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31. *Id.* at 131-32.

32. *Id.* at 132.

33. *Id.*

34. *Id.* at 135.

35. HIRT, *supra* note 2, at 45.

36. *Id.*

37. *Id.*

38. WILKINSON, *supra* note 3, at 137.

39. *Id.*

40. 16 U.S.C. §§ 528-531 (1988).

national forests for recreational uses as well as timber production.<sup>41</sup> The Act changed the legal mandate of the Forest Service, but did little to limit its broad discretion or to provide cognizable standards for judicial review of agency decisions.<sup>42</sup>

MUSYA is considered to be primarily a policy statement of Forest Service land management values, and it lists the five uses for which the national forests are to be managed, *i.e.*, outdoor recreation, range, timber, watershed, and wildlife and fish.<sup>43</sup> MUSYA also requires the Secretary of Agriculture to develop and administer the renewable resources of the national forests for multiple use and sustained yields.<sup>44</sup> MUSYA seems to be a statutory confirmation of the Forest Service's broad discretion to regulate a variety of activities within the national forests.

MUSYA requires that “[i]n the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas.”<sup>45</sup> The United States District Court of Alaska addressed what it means for the Forest Service to give “due consideration” to other values in *Sierra Club v. Hardin*.<sup>46</sup> The court weakened MUSYA significantly by holding that due consideration means merely “some” consideration.<sup>47</sup> With this low barrier of consideration, the Forest Service would have to fail to consider alternate uses altogether to be in violation of MUSYA. The courts effectively removed the legal teeth from the Act with this and other decisions. As the Ninth Circuit wrote in *Perkins v. Bergland*, MUSYA “breathe[s] discretion at every pore.”<sup>48</sup> Other judicial interpretations of MUSYA also show that the Act strengthened the agency’s ability to withstand legal challenges to its authority to regulate the national forests.<sup>49</sup>

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41. WILKINSON & ANDERSON, *supra* note 7, at 62.

42. Jack Tulholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 60 (1994).

43. WILKINSON, *supra* note 3, at 137.

44. WILKINSON & ANDERSON, *supra* note 7, at 60 n.310 (quoting National Forests—Multiple Use and Sustainable Yield: *Hearings on H.R. 10, 572 Before the Subcomm. on Forests of the House Comm. on Agriculture*, 86th Cong., 2nd Sess. 1-4 (1960)).

45. 16 U.S.C. § 529 (1988).

46. 325 F. Supp. 99, 123 n.48 (D. Alaska 1971), *rev’d on other grounds sub nom Sierra Club v. Butz*, 3 Envtl. L. Rep. (Envtl. L. Inst.) 20, 292 (9th Cir. Mar. 16, 1973).

47. *Butz*, 3 Envtl. L. Rep. at 20, 292.

48. 608 F.2d 803, 806 (9th Cir. 1979) (quoting Strickland & Morton, 519 F.2d 467, 469 (9th Cir. 1975)).

49. WILKINSON & ANDERSON, *supra* note 7, at 62. In *McMichael v. United States*, 355 F.2d 283, 285-86 (9th Cir. 1965), for example, the court upheld the power of the agency to prohibit

D. *The National Environmental Policy Act: Congress Begins to Limit Forest Service Discretion*

In the 1960s and early 1970s, Congress placed further restrictions on broad Forest Service authority by enacting several key pieces of environmental legislation.<sup>50</sup> The Clean Water Act,<sup>51</sup> the Endangered Species Acts of 1969 and 1973,<sup>52</sup> and the Clean Air Act<sup>53</sup> are examples of landmark laws passed in this period which impact the way the Forest Service does business. The explosion of environmental laws was a response to a new national awareness of environmental values and issues, and the concomitant birth of the environmental movement as a political force.

Another key piece of environmental legislation, the National Environmental Policy Act of 1969,<sup>54</sup> required the Forest Service and other federal agencies to study environmental effects before undertaking major federal actions.<sup>55</sup> In addition to creating forest plans under NFMA, the forest service must create forest plan environmental impact statements (EISS) under NEPA.<sup>56</sup> Plaintiffs suing over forest plans usually challenge their accompanying EISS as well.<sup>57</sup>

Charles F. Wilkinson and H. Michael Anderson suggest NEPA has had four major effects on Forest Service planning and policy.<sup>58</sup> First, agency and local public participation in forest planning increased significantly.<sup>59</sup> Second, roadless area planning became more scrutinized since an EIS was required for any incursion into a roadless area.<sup>60</sup> Third, NEPA was applied to regulate mining in the national forests.<sup>61</sup> Finally, NEPA was an incentive for the development of more complete Forest

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motorized vehicles in certain parts of the national forests, concluding that MUSYA was an express congressional manifestation of the ability of the Forest Service to regulate for recreational purposes.

50. WILKINSON & ANDERSON, *supra* note 7, at 63.

51. 33 U.S.C. §§ 1251-1387 (1988).

52. 16 U.S.C. §§ 1531-1543 (1988).

53. 42 U.S.C. §§ 7401-7642 (1988).

54. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370 (1988)).

55. 42 U.S.C. § 4332 (C).

56. Tuholske & Brennan, *supra* note 39, at 100.

57. *Id.*

58. WILKINSON & ANDERSON, *supra* note 7, at 33.

59. *Id.*

60. *Id.*

61. *Id.*

Service resource inventories.<sup>62</sup> The Forest Service developed local land use (unit) plans in order to meet NEPA's EIS requirements.<sup>63</sup>

*E. The National Forest Management Act (NFMA): Congress Intervenes to Create Forest Planning Standards and Check Agency Discretion*

After the Multiple-Use Sustained-Yield Act made the Forest Service's multiple use philosophy official in 1960, planning for the future use of the national forests began to expand.<sup>64</sup> The Forest Service developed formal Multiple-Use Planning Guides on both the district and regional levels.<sup>65</sup> The regional guides provided designations, definitions and management guidelines for land zones.<sup>66</sup> The district guides divided the land into zones and discussed how resource uses in each zone could be coordinated.<sup>67</sup> These plans marked the beginning of the agency's attempt to manage problems created by conflicting uses of the national forests.<sup>68</sup>

Criticism of national forest policy grew in the late 1960s and early '70s. Controversies arose over the use of clearcutting as a method of timber harvesting and the landslides and water problems which resulted from it and other Forest Service management practices.<sup>69</sup> Extensive aesthetic and water damage resulting from clearcutting in the Bitterroot National Forest in Montana became the subject of an award winning series in the *Missoulian* newspaper.<sup>70</sup> As a result of this controversy, a commission consisting of faculty and the Dean of the University of Montana School of Forestry concluded "[m]ultiple use management, in fact, does not exist as the governing principle on the

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62. WILKINSON & ANDERSON, *supra* note 7, at 33.

63. *Id.*

64. *Id.* at 31.

65. George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 334 (1990) (citing Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 31-32 (1985)).

66. WILKINSON & ANDERSON, *supra* note 7, at 31.

67. *Id.* at 31-32.

68. *Id.* at 32.

69. WILKINSON, *supra* note 3, at 140. According to the court in *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 205 (5th Cir. 1978), the Forest Service began to implement clear cuts on the national forests around 1964.

70. *Id.* The series, written by Dale Burke, cataloged the problems such unsustainable harvesting had created for many Montanans.

Bitterroot National Forest.”<sup>71</sup> The Forest Service received similar criticism for its management practices throughout the country.<sup>72</sup>

Not only was Congress placing more limits on Forest Service Agency discretion in the ’60s and ’70s with its passage of NEPA, NFMA, the ESA, and other environmental laws, the role of the judiciary in environmental policy was beginning to change as well. As the role of the judiciary in public law disputes began to change, the courts began to take a “hard look” at administrative agency actions.<sup>73</sup> The influential decision of *West Virginia Division of the Isaac Walton League of America, Inc. v. Butz* is an example of this.<sup>74</sup> In holding for the plaintiffs, the court enjoined the clearcutting of hardwoods in West Virginia by actually enforcing the provisions of the often ignored 1897 Organic Act, which stated clearly that the Forest Service could only sell “dead, matured or large growth trees” that had been “marked or designated” before sale.<sup>75</sup> Since the same provision could stop clearcutting around the country, the timber industry lobbied Congress to change the language of the Organic Act.<sup>76</sup>

The National Forest Management Act,<sup>77</sup> or NFMA, was enacted as a compromise between industry and environmentalists, and is essentially a new Organic Act for the Forest Service.<sup>78</sup> NFMA goes further than any law before or since in restricting Forest Service discretion and in mandating a forest planning system. Of critical importance, NFMA contains specific statutory provisions for the court to apply in evaluating agency performance.<sup>79</sup> NFMA was a major breakthrough in forest policy; as Wilkinson & Anderson wrote, “the mystique is gone from federal timber law. The courts have been called in to measure agency performance against new statutory provisions of considerable specificity.”<sup>80</sup>

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71. WILKINSON, *supra* note 3, at 141 (citing Bolle report). This commission was headed by the Dean of the Montana School of Forestry, the renowned Dr. Arnold Bolle. Its study of the Bitterroot National Forest, which came to be known as “The Bolle Report,” was a clear criticism of Forest Service management practices.

72. *Id.*

73. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), the leading Supreme Court opinion on “hard look” judicial review.

74. 522 F.2d 945 (4th Cir. 1975).

75. *Id.* at 948-49.

76. WILKINSON, *supra* note 3, at 143.

77. Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 U.S.C. §§ 1600-1614 (1982) and scattered sections of 16 U.S.C.).

78. WILKINSON, *supra* note 3, at 144.

79. WILKINSON & ANDERSON, *supra* note 7, at 75.

80. *Id.*

NFMA mandates the development of forest land use plans, and establishes a system for doing so.<sup>81</sup> To create a forest unit plan, the Forest Service must first write regulations which follow NFMA's statutory requirements.<sup>82</sup> Next, local forest planners consider public input and create plans in accordance with the regulations. These plans must follow the goals contained in the required Presidential Statement of Policy.<sup>83</sup> The plans are revised at specified intervals.<sup>84</sup> A Montana District Court decision has put some teeth into the binding nature of forest plan standards, which it held "operate as parameters *within which all future development must take place.*"<sup>85</sup>

NFMA requires the agency to follow many specific procedural requirements in creating forest plans. The Forest Service must maintain a continuing inventory of national forest lands and the renewable resources they contain,<sup>86</sup> coordinate with state, local and federal agencies,<sup>87</sup> solicit public participation through public hearings and other means,<sup>88</sup> ascertain that forest plans comply with the multiple use and sustained yield goals of previous legislation, and use an interdisciplinary approach to planning.<sup>89</sup>

Unlike NEPA, NFMA also contains clear and detailed substantive requirements for forest plan contents.<sup>90</sup> Forest plans must comply with NEPA and MUSYA, for example.<sup>91</sup> But it is NFMA's timber harvest standards which embody the Act's most important and protective provisions. In total, NFMA's timber harvest provisions greatly reduce the area from which the Forest Service may legally authorize timber sales.

NFMA regulates where timber may be cut by forbidding harvests on "marginal" lands,<sup>92</sup> lands where logging would destroy biological

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81. Coggins, *supra* note 62, at 336. Three tiered forest planning documents, each the result of a "mega" planning process, are required by NFMA: an assessment every ten years discussing the renewable resources in the national forests, a Program every five years containing proposed planning goals over a 45 year period, and an Annual Report examining the activities which have taken place in the forests in light of the Program objectives. *Id.*

82. *Id.* at 337.

83. *Id.*

84. *Id.*

85. Swan View Coalition, Inc. v. Turner, 824 F. Supp. 923, 935 (D. Mont. 1992) (emphasis added).

86. 16 U.S.C. § 1603 (1988).

87. 16 U.S.C. § 1604(a) (1988).

88. 16 U.S.C. § 1604(d) (1988).

89. 16 U.S.C. § 1604(b) (1988).

90. 16 U.S.C. §§ 1604(g)(1), (e) (1988).

91. Coggins, *supra* note 62, at 340.

92. 16 U.S.C. § 1604(k) (1988). Marginal lands are defined in § 1604(e) as lands where resource protection or reforestation cannot be insured.

diversity,<sup>93</sup> lands where watersheds cannot be protected,<sup>94</sup> and arguably on lands which cost more to log than the agency will earn.<sup>95</sup> The volume of timber which may be harvested cannot exceed the amount which can be removed “annually in perpetuity on a sustained-yield basis.”<sup>96</sup> The method of harvest is regulated by NFMA as well. Clearcuts are not outlawed, but their size is restricted,<sup>97</sup> and they must be “the optimum method . . . to meet the objectives and requirements of the relevant land management plan.”<sup>98</sup>

NFMA’s provisions did not take effect immediately. The Act was implemented through its individual forest plans, which the Forest Service was directed to “attempt to complete” by 1985; doing so proved impossible.<sup>99</sup> NFMA’s management scheme clearly checks agency discretion, creating many substantive and procedural requirements for the Forest Service and consequently more law for the courts to apply in their heightened agency review. The Act protects biological diversity and requires coherent management of the forests for multiple uses. NFMA embodies a protective and far-sighted national forest policy. However, Congress failed to lower the unsustainable allowable timber sale volume limits through the 70s and 80s, thus limiting NFMA’s effectiveness.<sup>100</sup>

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93. 16 U.S.C. § 1604(g)(3)(B) (1988).

94. 16 U.S.C. § 1604(g)(3)(E)(iii) (1988).

95. Coggins, *supra* note 62, at 341 (quoting Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 162-70 (1985)).

96. 16 U.S.C. § 1611(a) (1988). The harvest may exceed this level under the section when necessary to meet multiple use goals embodied in the forest plan. *Id.*

97. 16 U.S.C. § 1604(g)(3)(F)(iv) (1988).

98. 16 U.S.C. § 1604(g)(3)(F)(i) (1988).

99. Coggins, *supra* note 62, at 333. The Forest Service finally produced the forest plans mandated by the 1976 NFMA provisions in 1987-88. *Id.*

100. WILKINSON, *supra* note 3, at 146. Annual national timber sale volume is set under the Resources Planning Act of 1974 (RPA) 16 U.S.C. §§ 1601-1606, a national planning law passed to enhance the USFS’ ability to get long-term appropriations. Under the RPA, the President prepares an annual, nonbinding statement of policy to guide his annual Forest Service budget requests. The statement goes into effect unless Congress modifies or amends it or adopts a resolution disapproving it. WILKINSON & ANDERSON, *supra* note 7, at 38-39. The national average allowable sale quantity has remained around 11 billion board feet from the 1960s through the early ’90s. Wilkinson advocates halving the annual cut, arguing that the national forests can comfortably sustain annual harvests of 5-6 billion board feet. This would eliminate the need for “below-cost” sales which are a net loss to the government, and would also eliminate the necessity of logging near streams, spotted owl nests, on steep slopes, and in other sensitive areas. WILKINSON, *supra* note 3, at 173.

*F. The Endangered Species Act*

The Endangered Species Act of 1973 (ESA)<sup>101</sup> has most recently added another layer of environmental review and protection to national forest management. Under the ESA, celebrated legal battles have arisen over clearcutting of old-growth forests in the Pacific Northwest which jeopardizes the Northern Spotted Owl,<sup>102</sup> and over logging of southern pine, which jeopardizes the Red-cockaded woodpecker.<sup>103</sup>

From one perspective, recourse to the ESA can be viewed as evidence of the failure of the Forest Service to make its decisions in a more balanced and protective fashion. As the Endangered Species Committee argued in its review of forty-four BLM timber sales proposed for exception from the ESA, alternatives readily exist which both supply timber and protect the owl.<sup>104</sup> On the other hand, it was the reality of environmental laws finally having an effect on limiting the volume of timber sales that created the strong reaction to the ESA we are witnessing today, and more specifically, led to the passage of the salvage rider.

*G. Judicial Review of Forest Service Management Decisions before the Salvage Rider*

Throughout the 1980s and '90s, the timber industry has claimed that the laws discussed above make it too easy for environmentalists to stop timber sales by simply going to court and filing an appeal.<sup>105</sup> Most environmental groups and others who challenge timber sales allege that the Forest Service has violated one of the statutes discussed above—the Multiple-Use Sustained-Yield Act (MUSYA), the National Forest Management Act (NFMA), the National Environmental Policy Act (NEPA) or the Endangered Species Act (ESA). While there have been

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101. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (1988 & Supp. III 1991)). For an analysis of the actual operation and effect of the ESA's provisions, see Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277 (1993).

102. For an in-depth discussion of the Pacific Northwest owl wars, see STEVEN LEWIS YAFFEE, *THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY* (1994); Andrea L. Hungerford, *Changing the Management of Public Land Forests: The Role of the Spotted Owl Injunctions*, 24 ENVTL L. 1395 (1994).

103. For a discussion of the ESA litigation surrounding the Red-cockaded woodpecker, see Oliver A. Houck & Christopher Gobert, *Fifth Circuit Symposium on Environmental Law*, 37 LOY. L. REV. 705 (1991).

104. Endangered Species Committee, Notice of Decision, 51 Fed. Reg. 23,405, 23,406 (1992).

105. *Hearings on Timber Salvage Before the House Salvage Timber and Forest Health Task Force*, 104th Cong. (Dec. 19, 1995) (Statement of Rep. Elizabeth Furse, D. Or.).

many citizen group appeals of agency decisions in the '80s and '90s, the narrow scope of judicial review of Forest Service actions and lack of citizen suit provisions in either NFMA or NEPA make it clear that environmental plaintiffs generally face an uphill battle in the courts. As of June 20, 1995, the harvesting of only *three percent* of the timber volume offered by the Forest Service has been delayed by lawsuits.<sup>106</sup>

Although the judiciary's ability to review agency discretion has increased since 1960, the courts are still very deferential. In examining Forest Service action, courts will determine whether the agency took a "hard look" at relevant factors and made a decision that was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>107</sup> Agency actions are given a "presumption of regularity."<sup>108</sup> It is very difficult to prove a decision is arbitrary and capricious. Further, after *Chevron v. Natural Resources Defense Council*, the courts must defer to the forest service's reasonable construction of an ambiguous statute; where the statutory language is clear on its face, the court is the final arbiter and must strike down inconsistent agency interpretations.<sup>109</sup> In short, judicial review of Forest Service timber harvesting decisions is limited due to the deference accorded the agency.

### III. PRELUDE TO THE SALVAGE RIDER

#### A. *Conflicts over Forest Policy in the '80s and '90s*

NFMA and the other laws impacting logging on the national forests made clear steps towards establishing comprehensive, protective management schemes for the Forest Service to implement, as well as providing standards which are judicially enforceable through citizen suits. However, there remained a significant barrier to the resolution of heated controversies over national forest policy throughout the 1980s and early 1990s. Even when the Forest Service followed NFMA and the other laws, it could not come close to meeting the average timber sales which

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106. *Id.*

107. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988); *see also* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

108. *Citizens to Preserve Overton Park*, 401 U.S. at 415.

109. 467 U.S. 837, 842-843 n.9 (1984). *See, e.g.*, Sierra Club v. Espy, 822 F. Supp. 356, 364 (E.D. Tex. 1993), in which the court held that the NFMA provision allowing clearcutting only when consistent with the protection of other resources "could not [have been] more clearly expressed." The agency had authorized the nine timber sales at issue to be 90% clearcut.

Congress set during the '80s and early '90s.<sup>110</sup> Thus, the Forest Service has been faced with two irreconcilable mandates: get out the cut at a consistently high level, *and* comply with environmental laws. The policy response to this dilemma could have taken three forms: reduction of the annual allowable harvest volume, revocation of the laws, or compromise.

President Clinton's Northwest Forest Plan, known as "Option 9," was an attempt to create such a compromise in the most heavily forested region of the country, reducing the overall cut in the region and protecting certain critical areas while releasing timber sales to industry.<sup>111</sup> Dissatisfied with the reduced annual timber harvests under the President's forest plan, the timber industry has lobbied Congress for their preferred solution—the revocation of environmental laws. Since 1984, there have been twelve attempts to persuade Congress to exempt timber sales from environmental laws.<sup>112</sup> The 104th Congress, under the direction of House Speaker Newt Gingrich, finally did so when it passed the Salvage Rider.

#### B. Is There a Health Crisis in the National Forests?

Industry lobbyists and elected representatives have pushed the suspension of NFMA, NEPA, the ESA and other laws to Congress as necessary to solve the 'forest health crisis' in the Western national forests.<sup>113</sup> They have contended that public participation in the review and appeal of forest service decisions must be curtailed in order to "save"

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110. Michael Goodman, *Forest Service Appeals Reform, Searching for Meaningful Review*, 3 N.Y.U. ENVT'L L.J. 137-38 (1994).

111. YAFFEE, *supra* note 99, at 149. Shortly after taking office in 1993, President Clinton convened the Northwest Forest Conference in Portland, Oregon to craft a compromise solution to the controversy raging over logging in the national forests which were home to the spotted owl. As a result of the conference, three interagency working groups were created. The Forest Ecosystem Management Assessment Team (FEMAT) was charged with the task of identifying and studying a range of options for the management of national forest lands in the range of the spotted owl. In doing so, FEMAT was directed by the Clinton administration to "take an ecosystem approach to forest management and . . . address maintenance and restoration of biological diversity" and "maintenance of sustainable levels of renewable natural resources." The final FEMAT report addressed ten options. "Option 9" was most likely created at the end of the process to respond to timber industry pressures. It was chosen by the President, who saw it as a compromise option. It created buffer zones around sensitive riparian areas and created adaptive management areas while yielding more board feet of timber—an average of 1.2 billion board feet per year—than many of the other options. However, both the timber industry and environmental groups were immediately up in arms over the proposal. Timber interests warned that the plan would drastically cut logging jobs in the region, while environmentalists took issue with the opening of certain sensitive areas to salvage logging, as well as limits on their right to judicial review. *Id.* at 141-50.

112. 141 Cong. Rec. S4868-01 (daily ed. March 30, 1995) (testimony of Senator Leahy).

113. *Id.*

the forests by expediting salvage logging. Several western Senators have argued that the large forest fires of the summer of 1994 left behind billions of board feet of dead timber, which would lose its monetary value without rapid harvest, as well as increasing the danger of future forest fires.<sup>114</sup> Senator Larry Craig (R-ID.) and others are of the opinion that “[t]he only way we can deal with this serious problem is to develop and implement equally serious management strategies.”<sup>115</sup> Some scientists have agreed with them, such as Professor Jay O’Laughlin of the University of Idaho.<sup>116</sup> O’Laughlin thinks mortality from root disease is too high in Idaho’s forests, and that “management action” needs to be taken.<sup>117</sup>

Others have strongly denied that there is a health crisis in the forests, maintaining that the timber industry has fabricated the crisis as a pretext for relaxing the laws. John Osborn, a conservationist and physician from Spokane, Washington, labels the industry’s position “[m]anagement by slogan . . . the latest marketing tool used to cut more trees.”<sup>118</sup> Dr. Art Partridge, Professor of Forest Disease and Insect Problems at the University of Idaho (and a colleague of O’Laughlin’s), has done extensive forest health studies over the past thirty years and insists that there is no health crisis.<sup>119</sup> One such 1993 study concluded that less than one percent of the standing trees at over 60 sites in the inland West were diseased or insect-infested.<sup>120</sup> In fact, Partridge finds

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114. Senator Slade Gorton (R-WA.) and Senator Larry Craig (R-ID.) among others testified as to the “forest health crisis” in the West in supporting the salvage rider. Craig testified:

. . . the forests of the inland West are sick. They are the product of 8 years of drought and decades of mismanagement that have resulted in one of the largest fuel buildups, acre by acre, ever in the history of the U.S. Forest Service . . . Last year’s fires burned 4 billion board feet of timber . . . [t]he forest fires we are witnessing are not normal and they are not beneficial to the environment . . . As the process stands now, activists of every stripe find it easy to be obstructionists using appeals, threats, intimidations and false accusations in the media to slow down or stop the agencies’ salvage efforts. It is past time for Congress to step in and clear a procedural path which the agencies can use to make responsible salvage decisions and carry them out.

141 Cong. Rec. S4868-01 (daily ed. March 30, 1995) (statements of Sens. Gorton and Craig).

115. *Id.*

116. Lisa Jones, *Two Views of Forest Health at the University of Idaho: Are the Forests Sick or Well?*, HIGH COUNTRY NEWS, Nov. 13, 1995.

117. *Id.*

118. *The Federal Lands Forest Health Protection and Restoration Act: Hearings on S. 391 Before the Forest and Public Lands Management Subcomm. of the Senate Energy and Natural Resources Comm.*, 104th Cong. (March 1, 1995) (statement of Dr. John Osborn).

119. Jones, *supra* note 113.

120. *Id.* Partridge argued:

these forests to be healthier than they have been any time in the past three decades.<sup>121</sup> Further, disease, insects and fire are part of a necessary cycle in the forest, which returns weak trees to the soil as nutrients.<sup>122</sup> Partridge presented his findings to Congress as it debated salvage bills last winter.<sup>123</sup>

#### IV. THE “EMERGENCY SALVAGE TIMBER PROGRAM”: THE RIDER SUSPENDS ENVIRONMENTAL LAWS AND JUDICIAL REVIEW

##### A. *Legislative History*

On July 27, 1995, Congress passed the “Emergency Salvage Timber Sale Program” by attaching it to the unrelated 1995 Rescissions Act.<sup>124</sup> There were no congressional hearings on the Rider since it was attached to spending measures necessary to keep the federal government operating.<sup>125</sup> The Republican Congress had used this means of passing legislation with significant environmental effects earlier in the year as well, when it suspended enforcement of the Endangered Species Act by amending a military spending measure.<sup>126</sup>

President Clinton initially vetoed the Rescissions Bill on June 7, stating that “suspending all the environmental laws of the country for three years is not the appropriate way” to log the national forests.<sup>127</sup> Mere weeks later, Clinton signed the rider nearly intact despite widespread and sharp opposition to it by citizens and newspaper editorial boards,<sup>128</sup> and despite his campaign promise to manage the national

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When I first started working here, I saw massive root disease. Why didn't they declare an emergency then? Thirty years ago they paid no attention. Now all of a sudden because they want to cut timber, they've got a real problem. It's a hoax . . . This whole salvage thing is nothing but a hoax to get more timber out.

*Id.*

121. *Partridge Exposes Salvage Hoax*, SAVE AMERICA'S FORESTS, Winter 1995-96, at 1, 22.

122. *Id.*

123. *Id.*

124. Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001, 109 Stat. 240 (1995). The Rescissions Bill passed the House by a vote of 275 to 150. Richard D. Siegal, *Deadwood Environmental Politics*, WASHINGTON TIMES, Aug. 31, 1995, at A17.

125. Steve Yozwiak, *Pro-Logging Plan Hidden in Measure; Environmentalists Fear Hike in Cutting*, ARIZONA REPUBLIC, July 22, 1995, at A7.

126. *Id.*

127. Carl Pope, *Lawless Logging*, SIERRA, Nov. 1995, p. 18.

128. Editorial boards across the country, including those near affected national forests, spoke out against the Salvage Program after Clinton vetoed it the first time. “Although Clinton did not make much of the environmental issue, a provision sought by logging interests to allow indiscriminate timber cutting on federal lands would have been sufficient reason to say no.” N.Y.

forests in accordance with science and federal law.<sup>129</sup> Barry Rosenberg, a forest activist and former logger from Northern Idaho, summarized the feelings of many in his testimony before a Senate subcommittee,

[t]here are bills now before Congress that would remove the appeals process in order to expedite the cutting of trees. Those who have severely damaged this nation's public and private forest lands, the Forest Service and the timber industry, are now being placed above the law so they can continue to use the chain saw to "restore" the forests they have destroyed .... All of the current forestry bills rattling around Congress would eviscerate those rights of meaningful public participation that lie at the core of American democracy.<sup>130</sup>

The majority of Congressmen however were convinced by the industry's argument that a health crisis exists in the forests. Congress's stated intent in passing the rider was to expedite the alleged backlog of dead and dying trees before they lost economic value or fueled future forest fires.<sup>131</sup> The Conference Report states "[t]he managers note that the emergency forest health situation from fire, insect infestation and disease has approached epidemic levels. As a result, the backlog of dead and dying trees in the National Forests and other public lands is substantial."<sup>132</sup>

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TIMES, June 9, 1995, at A28. "The (logging) provision was an overly broad response to the serious forest-health problem on federal lands." THE OREGONIAN, June 9, 1995. "President Clinton has done the right thing in vetoing a bill that made the wrong cuts in the budget and left too much leeway for cheating in salvage timber sales in the Northwest." SEATTLE POST-INTELLIGENCER, June 12, 1995. A wide variety of citizens and citizen groups also decried the rider's lawless logging. The Pacific Coast Federation of Fishermen's Associations, the largest association of commercial fishermen on the west coast, wrote Congress, "We oppose the current Congressional effort to approve 'sufficiency language' or to mandate minimum timber harvest levels in the Northwest .... Sufficiency language would simply override all current protections for salmon and other aquatic species." 141 Cong. Rec. S4868-01 (daily ed. March 30, 1995) (editorials included in statement of Sen. Murray).

129. Carl Pope, *Lawless Logging*, SIERRA, November, 1995, p. 18. Pope, executive director of the Sierra Club, accounts for Clinton's "change of heart" as follows. "Since logging without laws runs counter to both ecological reason and financial sense, political expediency is the only explanation for Clinton's flip-flop. The President evidently calculated that the risks of failing to pass the Republicans' spending bill were greater than those of failing the forests." *Id.*

130. *Oversight Hearing on the Administration of the Forest Service's Administrative Appeals Process Before the Forest and Public Lands Subcomm. of the Senate Energy and Natural Resources Comm.*, 104th Cong. (March 8, 1995) (statement of Barry Rosenberg, Director of the Forest Watch Program of the Inland Empire Public Lands Council).

131. H.R. CONF. REP. NO. 1158, 104th Cong., 1st Sess. 134 (1995).

132. *Id.*

There were also many vocal critics of the Rider's necessity and provisions. In Senate debate, Senator Max Baucus (D.-MT.) characterized the rider as "rid[ing] roughshod over the statutes that this country demands be in place to protect water, wildlife, and to maintain the very integrity of our national forests."<sup>133</sup>

Two amendments to the Rescissions Act were proposed but did not pass.<sup>134</sup> Senator Patty Murray's (D.-WA.) amendment would have removed the provision totally suspending environmental laws; it lost by two votes, 46 to 48.<sup>135</sup>

Since the rider has gone into effect, some Representatives have stated publicly that they were misled as to its necessity and consequences. Many Representatives are now involved in an active campaign to repeal the rider.<sup>136</sup> As will be discussed in detail below, the rider has been interpreted by the courts at the insistence of the timber industry to allow the clearcutting of healthy forests as well as salvage sales. Representative Elizabeth Furse (D.-OR.) is the current sponsor of a bill to repeal the rider. She testified to the House Salvage Task Force in December that "[i]t is my firm belief that if someone had stood up on the House floor and said that the timber salvage rider would lead to this, it would never have passed."<sup>137</sup>

#### B. The "Law" of Salvage Logging: The Rider's Provisions

The salvage rider, or the "Emergency Salvage Timber Sale Program," effectively suspends all environmental laws in order for the

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133. 141 Cong. Rec. S4868-01 (daily ed. Mar. 30, 1995) (statement of Senator Max Baucus).

134. *Salvage Rider: Villains and Heroes*, SAVE AMERICA'S FORESTS, Winter 1995-96, at 1, 10-11. The Yates Amendment in the House would have done away with the rider. It was defeated 150 to 275. *Id.*

135. *Id.*

136. *Hearings on Timber Salvage Before the House Salvage Timber and Forest Health Task Force*, 104th Cong. (Dec. 19, 1995) (Statement of Rep. Elizabeth Furse). On December 7, 1995, Representative Furse (D.-OR.) introduced H.R. 2745, the Restoration of Natural Resources Laws on the Public Lands Act. As of Friday, January 19th, the Furse Bill had 85 cosponsors, including seven moderate Republicans. *177th Day of Lawless Logging*, Logging Without Laws Bulletin #25, (Western Ancient Forest Campaign, Washington, D.C.), January 19, 1995. Over 130 organizations and businesses had signed a letter in support of the rider's repeal as of October 24, 1995, when rider opponents met with Kathleen McGinty, the Chair of President Clinton's Council on Environmental Quality. *Repeal the Rider*, SAVE AMERICA'S FORESTS, Winter 1995-98, at 28.

137. *Id.* Furse claims that Congress was misled by the timber industry on six separate issues: (1) that healthy forests would not be logged under the rider, (2) that the rider would make money for the federal treasury rather than costing taxpayer dollars, (3) that the rider would help small landowners, (4) that the rider would not harm threatened wildlife, (5) that the rider would speed up implementation of Option 9, and (6) that the Section 318 provision would facilitate the harvest of only a small number of old sales. *Id.*

Forest Service to expedite “salvage” timber sales on national forests during the emergency period, which ends Sept. 30, 1997.<sup>138</sup> Congress has directed the Forest Service to initiate an “emergency” salvage timber sale program to “achieve, to the maximum extent feasible, a salvage timber sale volume level above the programmed level to reduce the backlogged volume of salvage timber” during the emergency period.<sup>139</sup> In order to expedite and streamline salvage sales, the Secretary of Agriculture is directed to “prepare a document that combines an environmental assessment under section 102(2) of the National Environmental Policy Act of 1969 . . . and a biological evaluation under section 7(a)(2) of the Endangered Species Act of 1973.”<sup>140</sup> Although this document may sound at first like an environmental safeguard, it is almost meaningless because any consideration of environmental effects of a proposed salvage timber sale is “at the sole discretion of the Secretary concerned and to the extent the Secretary considers appropriate and feasible.”<sup>141</sup> As the district court in Montana recently stated in *Inland Empire Public Lands Council v. Glickman*, “[i]n short, the Act leaves the scope and content of the environmental documents and the information prepared, considered, and relied upon to reach a decision to proceed with a salvage timber sale to ‘the sole discretion’ of the Secretary.”<sup>142</sup>

“Salvage” is defined very broadly in the rider, and could possibly be interpreted to include almost any timber sale. The Rider provides “‘salvage timber sale’ means . . . 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.”<sup>143</sup> All salvage sales prepared under the rider must “include an identifiable salvage component.”<sup>144</sup>

It is unclear from the language of the rider whether one insect or fire damaged tree or one stand of such trees would suffice to classify an

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138. Pub. L. No. 104-19, §§ 2001(b)(1), (a)(2), 109 Stat. 241 (1995). An August 18, 1995, letter from the Forest Service’s Washington D.C. office to regional foresters calls for 4.5 billion board feet of salvage timber to be harvested through early 1997 under the rider, over four times the salvage cut for 1994. This does not include the increased volume of green sales logged under section (k) of the rider. Erik Ryberg, *Salvage Logging Means Deep Cuts*, HIGH COUNTRY NEWS, September 4, 1995. Although the rider’s authority expires on Dec. 31, 1996, the Forest Service can award contracts under the rider which extend through Sept. 30, 1997, under section (b)(1).

139. Pub. L. No. 104-19, § 2001.

140. Pub. L. No. 104-19, § 2001(c)(1)(A).

141. *Id.*

142. 911 F. Supp. 431, 433-34 (D. Mont. 1995), *aff’d*, 1996 WL 230042 (9th Cir. May 8, 1996).

143. Pub. L. No. 104-19, § 2001(a)(3) (emphasis added).

144. *Id.*

entire sale as “salvage” and thus exempt it from environmental laws. However, a memo leaked to the Associated Press in 1992 from a Forest Service Presale manager sheds some light on the agency’s attitude towards overly broad classification of sales as salvage.<sup>145</sup> The manager was told by her supervisors that “virtually every sale should include salvage in the name . . . even if a sale is totally green, as long as one board comes off that would qualify as salvage on the Salvage Sale Fund Plan, it should be called salvage.”<sup>146</sup>

The most far-reaching and controversial section of the salvage rider is section (i), the “sufficiency clause,” which provides that salvage sales do not have to meet the requirements of existing environmental laws.<sup>147</sup> It is this section which has earned the salvage program the nickname “logging without laws,” and the most vocal criticism from its opponents. The section states

any timber sale under subsection (d) *shall be deemed to satisfy the requirements of the following applicable Federal laws: . . . (1) The Forest and Rangeland Renewable Resources Planning Act of 1974, (2) The Federal Land Policy and Management Act of 1976, (3) The National Environmental Policy Act of 1969, (4) The Endangered Species Act of 1973, (5) the National Forest Management Act of 1976, (6) the Multiple-Use Sustained-Yield Act of 1960, and (7) [a]ny compact, executive agreement, convention, treaty, and international agreement, and implementing legislation relating thereto.*<sup>148</sup>

Finally, the catchall (8) exempts the salvage sales from “[a]ll other applicable Federal environmental and natural resource laws.”<sup>149</sup> In short, all of the laws which Congress has enacted over the last thirty years to limit agency discretion in forest management need not be complied with in carrying out “salvage sales.” The salvage rider is a radical change in forest policy which negates years of legislation.

The rider does away with meaningful judicial review as well. Section (e) does away with all administrative review of salvage sales.<sup>150</sup>

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145. *Secret Forest Service Memo Exposes Fraudulent Salvage Program*, reprinted in SAVE AMERICA’S FORESTS, Winter 1995-96, at 25.

146. *Id.* (emphasis added).

147. Pub. L. No. 104-19, § 2001(i).

148. *Id.* (citations omitted) (emphasis added).

149. *Id.*

150. Pub. L. No. 104-19, § 2001(e).

Section (f) goes even further. It provides that the standard for enjoining or voiding a salvage sale is whether the sale was “arbitrary and capricious or otherwise not in accordance with applicable law (*other than those laws specified in subsection (i)*).”<sup>151</sup> This is extremely deferential review. It is hard to imagine how a court could find a sale arbitrary in relation to applicable law when nearly every law has been suspended, and there is thus so little law to apply. The environmental laws listed in section (i) may not be used as the basis for a lawsuit, since the rider deems their requirements to be constructively satisfied.<sup>152</sup>

In addition, section (e) of the rider exempts all Option 9 timber sales (those from the President’s forest plan) from administrative review.<sup>153</sup> Section (f) restricts the filing of appeals of timber sales to within fifteen days after the advertisement of the proposed sale.<sup>154</sup> Further, courts are prevented by the rider from issuing injunctions or restraining orders to prevent salvage sales from going forward while an appeal is heard.<sup>155</sup> Judges are also directed in section (f)(5) to make a final decision on any challenge under the rider within 45 days.<sup>156</sup> These provisions in effect mean that salvage timber sales which are challenged in the courts can be logged (and often are) before a judge issues a final order determining their legality.

While the 104th Congress cuts domestic spending in an attempt to lower the budget deficit, it directs the Forest Service in section (c)(6) of the rider that “[s]alvage timber sales undertaken pursuant to this section shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities.”<sup>157</sup> Because the Forest Service often must spend substantial amounts of money to prepare true salvage sales (for road building, etc.), and because dead trees are of minimal commercial value, the rider will end up costing taxpayers substantially more than it earns.<sup>158</sup> The Wilderness Society has estimated that the federal treasury will lose between \$430 million and

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151. Pub. L. No. 104-19, § 2001(f)(4) (emphasis added).

152. Pub. L. No. 104-19, § 2001(i).

153. Pub. L. No. 104-19, § 2001(e).

154. Pub. L. No. 104-19, § 2001(f)(1).

155. Pub. L. No. 104-19, § 2001(f)(3).

156. Pub. L. No. 104-19, § 2001(f)(5).

157. Pub. L. No. 104-19, § 2001(c)(6).

158. *Hearings on Timber Salvage Before the House Salvage Timber and Forest Health Task Force*, 104th Cong. (Dec. 19, 1995) (statement of Rep. Elizabeth Furse).

\$1.5 billion just under the nonsection 318 sections of the rider.<sup>159</sup> The rider thus provides a large subsidy for the timber industry.<sup>160</sup>

Section (k) extends the reach of the rider beyond just salvage logging operations.<sup>161</sup> The rider also directs the Forest Service 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 . . . subject to section 318 of Public Law 101-121."<sup>162</sup> Section 318 refers to a previous rider governing certain sales in western Oregon and Washington in 1990.<sup>163</sup> The only exception to section (k) is found where a threatened or endangered bird species is "known to be nesting within the acreage that is the subject of the sale unit."<sup>164</sup> Where this is the case, the sale unit cannot be released or completed under the rider.<sup>165</sup> However, replacement timber must still be provided.<sup>166</sup> The exact meaning and reach of sales under section (k) is currently being litigated in federal court.<sup>167</sup>

#### V. THE RIDER'S INTERPRETATION IN THE COURTS: A GREEN LIGHT FOR THE TIMBER INDUSTRY

As of the writing of this comment, the courts have handed down relatively few final decisions dealing with the interpretation of the rider for two main reasons: (1) the rider became law only last July and (2) several of the judgments and orders issued by federal courts in the Northwest are on appeal to the Ninth Circuit at this time.<sup>168</sup> Those judges who have handed down such decisions (mostly District Judge Hogan in Oregon) have broadly interpreted the rider's reach. Finally, the number of rider-related decisions will remain small in large part because the rider itself precludes most judicial review of agency salvage logging

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159. *Id.*

160. *Id.*

161. Pub. L. No. 104-19, § 2001(k).

162. *Id.*

163. Patti Goldman, Sierra Club Legal Defense Fund Logging Without Laws Rider Docket, Seattle, WA. (December 8, 1995) [hereinafter *Sierra Club Legal Defense Fund Docket*].

164. Pub. L. No. 104-19, § 2001(k)(2).

165. *Id.*

166. Pub. L. No. 104-19, § 2001(k)(3).

167. *Sierra Club Legal Defense Fund Docket*.

168. Since § 2001(f)(3) of the rider forbids judges from enjoining timber sales pending appeal, many of the controversial sales of old-growth timber will already be logged by the time the appeals court makes a ruling. See Pub. L. No. 104-19, § 2001.

decisions. This section analyzes how the courts have interpreted the rider thus far, and the effect the courts' decisions have had in the forests.

*A. Classification as "Salvage Sale" under the Rider: A Low Hurdle*

Because the rider provides for extremely limited judicial review of agency salvage logging decisions, there are a limited number of legal handles available to plaintiffs challenging a salvage logging sale. A plaintiff may challenge a timber sale under the rider by claiming that the sale has been mistakenly classified as a salvage sale under section 2001(a)(3).<sup>169</sup> Classification as a salvage sale under the rider is very significant, since nonsalvage sales must still comply with all applicable federal environmental laws, while salvage sales are deemed by the rider to satisfy the major environmental laws, and thus do not have to comply with their provisions.<sup>170</sup> The classification is also important in determining the standard of judicial review which will apply; salvage sales can only be enjoined or voided under the rider's provisions if they are "arbitrary and capricious or otherwise not in accordance with applicable law."<sup>171</sup> Thus, sales correctly classified as salvage need only withstand a very deferential review by the courts.

Courts have thus far been unwilling to overturn Forest Service salvage sale classifications under the rider. In *Kentucky Heartwood, Inc. v. United States Forest Service*, the district court held that while the general purpose of the rider is partially to reduce a backlog of salvage timber, there is no limitation in the language of the statute which requires specific salvage sales to be part of a backlog existing when congressional committees issued reports in April 1995.<sup>172</sup> The court refused to conclude that Congress intended to impose any requirements on salvage classifications other than those found in section (a)(3) of the rider, which defines "salvage timber sale," and the time limitations included in the rider.<sup>173</sup>

The court thus found that the sale at issue in *Kentucky Heartwood, Inc.* was a salvage sale which could be conducted pursuant to the rider because (1) the removal of "damaged or downed trees" was an important reason for entry and (2) the sale was conducted during the

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169. Pub. L. No. 104-19, § 2001(a)(3).

170. Pub. L. No. 104-19, § 2001(a)(3).

171. Pub. L. No. 104-19, § 2001(f)(4).

172. 906 F. Supp. 410, 412-13 (E.D. Ky., 1995).

173. *Id.* at 413 (citing Pub. L. No. 104-19, § 2001(a)(3)).

statutory period.<sup>174</sup> The court held that this was all the rider required.<sup>175</sup> Future challenges to agency salvage designations will likely continue to be unsuccessful given the rider's broad definition of salvage.<sup>176</sup> The definition even includes trees which are not yet sick, damaged or dead, but which are "imminently susceptible to fire or insect attack."<sup>177</sup>

#### B. Arbitrary and Capricious Review under the Rider

The only other legal challenge which plaintiffs may make to a pure salvage timber sale (not including section 318 sales) is that the decision to allow the sale was "arbitrary and capricious or otherwise not in accordance with applicable laws (other than those laws specified in subsection (i)" under section (f)(4) of the rider.<sup>178</sup> While several salvage sales have been challenged as arbitrary and capricious, no court has voided a salvage timber sale on this ground as of the writing of this comment.

In *Inland Empire Public Lands Council v. Glickman*, the plaintiff conservation group argued that the Forest Service decision to allow the Kootenai timber sales (located within a grizzly bear recovery zone) to go forward was arbitrary and capricious because it violated the agency's own federal grizzly bear guidelines and was not based on a rational decision made from evidence found in the record.<sup>179</sup> Specifically, plaintiffs argued that the decision to adopt an "Interim Core Management Strategy" to implement the Kootenai sales was arbitrary because it was a significant departure from existing Forest Service grizzly bear management policies and guidelines.<sup>180</sup> The Montana District Court found "substantial and rational support for the plan in the administrative record," and thus held that the agency's action was not arbitrary and capricious.<sup>181</sup> The court stressed that it reviewed the record "[i]n light of

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174. *Id.* at 413.

175. *Id.*

176. Telephone interview with Debbie Sivas of the Inland Empire Public Lands Council (Jan. 1996). Ms. Sivas is one of several attorneys currently challenging salvage sales under the rider in court.

177. Pub. L. No. 104-19, § 2001(a)(3) (emphasis added).

178. Pub. L. No. 104-19, § 2001(f)(4).

179. *Inland Empire Public Lands Council v. Glickman*, 911 F. Supp. 431, 434 (D. Mont. 1995), *aff'd*, 1994 WL 230042 (9th Cir. May 8, 1996).

180. *Id.*

181. *Id.* at 435. The court reviewed the record which included two draft environmental impact statements, two biological assessments, and the Fish and Wildlife Service's concurrences for each sale. It found that the contested "Core Strategy" was based on recent scientific evidence which had considered plaintiffs' road density concerns. *Id.*

the deference accorded to the Secretary under the Rescissions Act.”<sup>182</sup> The court also stressed that “the decision to proceed with the Core Strategy falls squarely within the Forest Service’s expertise in managing the forest and the salvage timber sales.”<sup>183</sup>

It is unlikely that plaintiffs will succeed in challenging salvage sale decisions under the deferential “arbitrary and capricious” review required by the rider. To find an agency decision arbitrary or capricious, courts must find the decision to salvage log arbitrary or capricious *in relation to an existing legal standard*. Under the rider, all major federal environmental laws dealing with timber sales are made inapplicable to agency salvage sale decisions prepared, offered, or awarded during the emergency period.<sup>184</sup> In the Ninth Circuit’s words, “[i]f . . . 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.”<sup>185</sup> Because the agency does not have to follow environmental laws under the rider, or take environmental effects into account at all, plaintiffs will have to argue that the agency’s decisions are arbitrary and capricious in relation to something other than NEPA, NFMA, or one of the other major laws inapplicable under the rider.

In *Inland Empire Public Lands Council*, plaintiffs attempted to argue that this “something else” was existing Forest Service grizzly bear management policy.<sup>186</sup> The court deferred to the agency, finding that the rider gives the Forest Service the sole discretion to consider information and come to a decision whether a sale will meet Forest Plan goals.<sup>187</sup> In short, where Congress has given the agency almost complete discretion to decide when a sale qualifies as a salvage sale, and no environmental laws need be followed in making this decision, arguing that agency action was arbitrary and capricious will be nearly impossible.

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182. *Id.*

183. *Id.*

184. Pub. L. No. 104-19, §§ 2001(i), (b). Under (a)(2) the emergency period ends Sept. 30, 1997.

185. City of Santa Clara, Cal. v. Andrus, 572 F.2d 660, 666 (9th Cir. 1978) (citing Arizona Power Authority v. Morton, 549 F.2d 1231, 1239 (9th Cir. 1977)).

186. Inland Empire Public Lands Council, 911 F. Supp. at 434.

187. *Id.* at 435.

C. *Logging of Healthy Old-Growth under Section (k)*

In its deliberations over passage of the salvage rider, Congress paid scant attention to the provisions set forth in section (k) of the rider.<sup>188</sup> This section has proven to be one of the most disputed and litigated portions of the rider. Section (k)'s terms direct the Forest Service to award, release and permit logging of sales previously offered under "section 318," another rider which governed certain sales offered in western Oregon and Washington in 1990.<sup>189</sup> Judicial interpretation of section (k) has widened the scope of the rider significantly to allow logging in many healthy old-growth forests in the Pacific Northwest.

Immediately after the rider's passage, the timber industry went to federal court in Oregon to argue that section (k) required the government to immediately release *every timber sale contract ever offered in Washington and Oregon* under their original advertised terms.<sup>190</sup> On September 13, 1995, Judge Hogan sided with the timber industry's geographical construction of Section 2001(k) of the salvage rider in his decision of *Northwest Forest Resources Council v. Glickman*.<sup>191</sup> Statutory construction and legislative history led Hogan to the conclusion that section (k)'s provisions apply to all timber sale contracts offered or awarded in all national forests in Oregon and Washington (and all BLM districts in Western Oregon) prior to passage of the salvage rider.<sup>192</sup> The court thus rejected defendants' argument that section (k) applied only to actual 318 sales, and held that it applied to all sales on National Forest land within the section 318 geographical area. Section (k) was thus

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188. Pub. L. No. 104-19, § 2001(k).

189. Pub. L. No. 104-19, § 2001(k)(1). Section 318 is also known as the Northwest Timber Compromise of 1989. It required the release of 1.1 billion board feet of timber in Western Oregon and Washington from sales that contained 40 acres of suitable spotted owl habitat. Under this compromise, another 600 million board feet of timber could not be offered that year. This is the timber the industry seeks to release through section (k). *Sierra Club Legal Defense Fund Docket*.

190. *Northwest Forest Resources Council v. Glickman*, No. 95-6244-HO (D. Or. Sept. 13, 1995).

191. *Id.*

192. *Id.* The administration issued the agency interpretation of section (k) in August of 1995. The agency interpreted the section narrowly to include much less land than did the timber industry, writing "[t]he interpretation of section 2001 (k) as applying to timber sales throughout Washington and Oregon, and to timber sales that were not developed subject to the ecological and procedural criteria provided in section 318 (b)-(j), is wholly inconsistent with the history of the section 318 sales issue." *Id.* at 3. The court held that while an agency interpretation is generally entitled to considerable deference, it is entitled to "no weight" under *Chevron* if the statute and legislative history clearly reveal Congress's intent. *Id.* at 4. The court found that the language of section (k) clearly supported the timber industry's reading, and further that although there was legislative history supporting both sides, that "the weight of the legislative history strongly favors plaintiff's interpretation." *Id.* at 10.

interpreted to be a geographical description rather than a substantive one. On October 17th, Hogan issued an injunction ordering all timber sales offered or awarded in Washington or Oregon between October 1, 1990, and July 27, 1995, to be released.<sup>193</sup> Courts have refused to stay the injunction pending appeal, so many timber sales are being logged before the appellate court reviews the case.<sup>194</sup>

While Judge Hogan has interpreted the intended geographical reach of the rider expansively, he has refused to accept the timber industry's broad interpretation of the temporal reach of the rider. The industry originally sought the release of every sale offered in the two states going back to the creation of the national forest system in 1891 under section (k) of the salvage rider.<sup>195</sup> They argued that the phrase (units) "subject to section 318" placed no time constraints on the reach of section (k).<sup>196</sup> The defendant conservation groups successfully argued that since the section identifies the sales that must be released by referring to section 318, enacted on October 23, 1989, Congress could not have intended for this section to release any sales offered *before* the enactment of section 318.<sup>197</sup> The court held that Congress intended to limit section (k)'s applicability to sales offered after section 318's October 23, 1989, enactment.<sup>198</sup>

The broad interpretation of section (k) in the courts has put some members of Congress on the defensive. Representative Elizabeth Furse (D.-OR.) and others feel the timber industry and its congressional supporters misled Congress during congressional deliberations.<sup>199</sup> Those who pushed the rider through claimed its provisions were necessary to avert a major forest health crisis by allowing dead and dying trees to be

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193. *Sierra Club Legal Defense Fund Docket.*

194. *Id.*

195. Northwest Forest Resources Council v. Glickman, 95-6267 and 95-6384 (consolidated cases) (D. Or., Jan. 10, 1996).

196. *Id.* at 10.

197. *Id.*

198. Northwest Forest Resources Council v. Glickman, 95-6267 and 95-6384 (consolidated cases), (D. Or., Jan. 10, 1996). While the court found that section (k)'s temporal scope was not clear on its face, it was convinced by legislative history that Congress intended to limit the section's reach into the past. The May 16, 1995, Conference Report on the Recissions Act included a section which provided "[t]he bill releases all timber sales which were *offered for sale beginning in fiscal year 1990* to the date of enactment . . ." *Id.* at 12 (citing 141 CONG. REC. H5013-03, H5050 (May 16, 1995) (emphasis added)). Further, the court agreed with defendants that "an infinitely retroactive application of section 2001(k)(1) would lead to absurd results," since it could mandate the release of century-old sales on their originally advertised terms, creating huge industry windfalls. *Id.* at 11.

199. Hearings on Timber Salvage Before the House Salvage, Timber and Forest Health Task Force, 104th CONG. REC. (Dec. 19, 1995) (statement of Rep. Elizabeth Furse).

cut in an expedited manner. Furse and others claim that the section (k) litigation immediately following rider passage indicates that the timber industry clearly intended from the beginning for the rider to release large amounts of healthy old growth timber, previously unreleased due to environmental concerns.<sup>200</sup> The timber industry focused on the necessity of the salvage portions of the rider in its Capitol Hill lobbying, and not on its use as a way to release old growth timber. Ten members of Congress have filed an amicus brief in the Ninth Circuit explaining that they never intended section (k) to have such a broad reach.<sup>201</sup>

There are also serious doubts over whether the industry is in the midst of a timber shortage at all. One Clinton administration spokesman claims that the industry has over half a billion board feet under contract which it has not yet cut because it is waiting for the price of timber to rise.<sup>202</sup>

In addition to claims that the sweep of section (k) has been interpreted to include more healthy timber than Congress intended, conservationists have also attacked the provision on separation of powers grounds. In *Northwest Forest Resources Council*, defendants sought a preliminary injunction against the award and release of seven sales previously canceled by the courts for violating environmental laws.<sup>203</sup> Defendants argued that if section (k) were interpreted to require the release of timber sales *even if they were previously enjoined by the courts in a finally decided case* (or voluntarily withdrawn during litigation),<sup>204</sup> the rider would "constitute a major intrusion by Congress into judicial prerogatives in violation of the constitutional doctrine of separation of powers."<sup>205</sup> They pointed to a recent Supreme Court case which held that "[n]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the

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200. *Id.* As Representative Furse (D.-OR.) testified before the House Salvage Task Force, "We were told over and over that the rider was an emergency measure to remove dead and dying trees to protect the health of our forests. But instead, it is being used to clear-cut healthy forests, some as old as 500 years. In fact, the day after the rider passed, the timber industry rushed to court and convinced Judge Hogan to interpret the rider to require the immediate logging of every timber sale ever offered but not ultimately logged in every national forest in Washington or Oregon—potentially as far back as 1891. It is my firm belief that if someone had stood up on the House floor and said that the timber salvage rider would lead to this, it would never have passed."

201. *Sierra Club Legal Defense Fund Docket.*

202. Paul Larmer, *Cut to the Past: Logging Wars Resume*, HIGH COUNTRY NEWS, October 16, 1995.

203. Northwest Forest Resources Council v. Glickman, No. 95-6267 and No. 95-6384 (consolidated cases) (D. Or., Jan. 10, 1996).

204. *Sierra Club Legal Defense Fund Docket.*

205. *Id.*

[I]legislature itself, in whom no judicial power of any kind appears to be vested.”<sup>206</sup> Thus, Congress may not undo final judicial findings or orders, or it would be usurping the constitutional role of the courts in determining what the law is.

Judge Hogan rejected this separation of powers argument, finding that “[s]ection 2001 (k)’s application to enjoined sales poses no Constitutional problem.”<sup>207</sup> He cited a Supreme Court case which held that “Congress can require the release of specific timber sales which a federal court has preliminarily enjoined so long as Congress changes the substantive law underlying the prior injunction.”<sup>208</sup> The fact that an injunction has become final does not change the result.<sup>209</sup>

The rider provides one exception to the mandatory release of section 318 old growth sales. Section (k)(2) requires that no sale be released or completed “if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.”<sup>210</sup> The meaning of “known to be nesting” has been contested in the courts. The timber industry has tried to limit the reach of the exception by arguing that birds cannot be known to nest in an area unless direct physical evidence of their nesting, such as pieces of eggs shell, is found.<sup>211</sup> Defendants have argued that agencies and scientists spent years determining how to tell whether one such threatened bird, the marbled murrelet, is nesting in old-growth forests, and that the courts should use this widely accepted scientific protocol.<sup>212</sup> On January 19, 1996, Judge Hogan issued an order which threw out the Forest Service protocol for determining murrelet nesting areas.<sup>213</sup> Hogan ruled that

[a]n occupancy determination under the PSG protocol is not necessarily sufficient to sustain a “known to be

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206. *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1456 (1995) (quoting *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 413 (1792)).

207. *Northwest Forest Resources Council v. Glickman*, No. 95-6267 and No. 95-6384 (consolidated cases), at 14 (D. Or., Jan. 10, 1996).

208. *Northwest Forest Resources Council v. Glickman*, No. 95-6267 and No. 95-6384 (consolidated cases), at 14. (citing *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 440-441 (1992)).

209. *Id.* at 15 (citing *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421 (1855)).

210. Pub. L. No. 104-19, § 2001(k)(2).

211. This argument has been made in *NFRC v. Glickman*, No. 95-6267-HO (consolidated case) (D. Or. 1996), *Scott Timber Co. v. Glickman*, No. 95-6267-HO (D. Or. 1995), and *Pilchuck Audubon Society v. Glickman*, No. 95-1234R (W.D. Wash. 1995).

212. *Northwest Forest Resources Council v. Glickman*, No. 95-6267-HO (consolidated case), at 8 (D. Or., Jan. 19, 1996).

213. *Id.*

nesting” determination under section 2001(k)(2). Accordingly, any section 318 sale withheld pursuant to a determination of “occupancy” under PSG protocol standards must be awarded and/or released unless a murrelet nesting determination is made under the section 2001(k)(2) standards articulated in this order.<sup>214</sup>

After Hogan’s ruling, to satisfy the “known to be nesting” requirement and thus invoke section(k)(2), the agency must find that a murrelet is “(1) currently (2) nesting (3) within sale unit boundaries. This finding must be based on the observation of evidence located sub-canopy within sale unit boundaries.”<sup>215</sup> After Hogan’s ruling, it will be much more difficult to prove a bird is “known to be nesting.” For example, evidence such as hearing a bird’s nesting behavior can now stop logging only in the unit of a sale where it was observed, not in an entire stand of trees as the old protocol required.<sup>216</sup> While this order is on appeal to the Ninth Circuit, Hogan’s new “protocol” could require the release of 52 timber sales in Washington and Oregon.<sup>217</sup>

Plaintiffs have challenged the release of timber sales on the Umpqua National Forest in Oregon, a forest covered by President Clinton’s Option 9 forest plan.<sup>218</sup> On December 4, 1995, Judge Hogan again ruled in favor of the timber industry, holding that Option 9 sales offered since the passage of the rider are not subject to environmental challenge in the courts, and further, that Option 9 sales offered before the enactment of the rider must be released and logged under their original contract terms per section (k).<sup>219</sup> Plaintiffs also attempted to argue that since the Administrative Procedures Act (APA) was not included in the section (i) sufficiency language, legal challenges under the APA may still be made to Option 9 and other sales.<sup>220</sup> The court rejected this argument, since the APA is only a vehicle for bringing substantive challenges to court; substantive environmental challenges to the rider are barred by

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214. Northwest Forest Resources Council v. Glickman, No. 95-6267-HO (consolidated case) at 20 (D. Or. Jan. 19, 1996).

215. *Id.* at 20-21.

216. *Sierra Club Legal Defense Fund Docket.*

217. *Id.*

218. Oregon Natural Resources Council v. Jack Ward Thomas, No. 95-6272-HO (D. Or., Dec. 5, 1995).

219. *Id.* at 8. The court interpreted section (i) of the rider (the sufficiency provision) as suspending environmental challenges to Option 9 sales while preserving nonenvironmental challenges to the sales. *Id.*

220. *Id.*

section (i).<sup>221</sup> It is unclear whether such rulings threaten the continuing viability of the President's Forest Plan in its entirety.

#### D. *The Rider's Effects in the Forests*

As discussed above, Congress may not have been fully aware of the potential effects of the salvage rider. However, its effects on harvesting green (healthy) trees in the national forests have proven to be sweeping, as the Forest Service has been forced to release dozens of old-growth timber sales offered but not cut under the 1989 section 318 rider.<sup>222</sup> A list provided by the Forest Service in late 1995 showed that a total of 96 timber sales totaling 670 million board feet, more than half of the harvest allowed annually under Option 9, could be cut under the industry interpretation of section (k) alone.<sup>223</sup> The Forest Service estimates the rider will increase national timber sales by about 21 percent.<sup>224</sup> Hogan's rulings have released substantial amounts of healthy old growth for logging.

The long-term, serious effects of the rider and its interpretation in the courts are exemplified by the Elk Fork and Boulder Krab Timber Sales, both located in the lush rain forests of the Siskiyou National Forest in Oregon. These sales were withdrawn under a court order in 1990, but released for cutting in early January by Judge Hogan under the terms of the rider.<sup>225</sup> The sales will clearcut over 200 acres of forest above a stretch of the Elk River that produces the most salmon per mile of any river in the lower 48 states.<sup>226</sup> The sale area is classified as a roadless, old-growth "Forest Reserve" and "Key Watershed" under the President's Option 9 plan.<sup>227</sup> The ecological effects of logging this area may potentially be devastating. A well known Forest Service fisheries biologist previously warned that the sales could cause debris flow into the

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221. Oregon Natural Resources Council v. Jack Ward Thomas, No. 95-6272-HO, at 8 (D. Or., Dec. 5, 1995).

222. Paul Larmer, *Cut to the Past: Logging Wars Resume*, HIGH COUNTRY NEWS, October 2, 1995.

223. Warren Cornwall, *Civil Disobedience Heats up in Oregon*, HIGH COUNTRY NEWS, October 2, 1995. As Tim Hermach of the Native Forest Council in Oregon was quoted as saying, "Now we have nothing left but the court of public opinion and acts of civil disobedience."

224. David Foster, *Creative Twists in New Battles Against Logging*, CHICAGO TRIBUNE, Mar. 6, 1996, at C8.

225. *President Clinton's Old-Growth Forest Reserve In Prime Salmon Habitat Being Clearcut Now under "Logging Without Laws" Rider*, HEADWATERS PRESS RELEASE, Jan. 17, 1996.

226. *Id.*

227. *Id.*

fisheries, blowdown of many other trees, and loss of marbled murrelet nesting habitat.<sup>228</sup>

In addition to its ecological effects, the rider is also having significant political and social impacts in the forests and communities of the Northwest, which have experienced a large increase in civil disobedience in recent months.<sup>229</sup> Citizens outraged over “salvage” logging taking place in their watersheds have no real legal recourse under the rider, so they are resorting to protests, hunger strikes, and other forms of civil disobedience to express their outrage over the salvage rider’s effects. In this sense, Congress has succeeded in further polarizing the communities of the Northwest. In recent years, while timber policy has certainly been contentious, citizens could take action in the courts, which decided complaints on the merits of the laws on the books. With the rule of law suspended, the Pacific Northwest has returned to a version of “the timber wars.”<sup>230</sup> Dozens of people have been arrested in recent months when protesters have clashed with loggers.<sup>231</sup> The timber industry, on the other hand, favors restricted access to the courts. As a spokesman for the Northwest Forestry Association put it, “[w]hat this legislation did was basically restrict some groups from obstructionist lawsuits.”<sup>232</sup>

Finally, the rider also has serious economic effects. Because so many of the salvage sales are in steep, difficult to reach areas, the Forest Service incurs large costs in sale preparation and road building. At the same time, the salvaged trees themselves are of low economic value. Often, timber companies will not even bid on salvage sales because they yield little or no profit. One example of this occurred in the bidding over the Thunder Mountain timber sale in Washington state. The preparation of this sale is estimated to have cost the federal treasury over

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228. Letter to Mike Lunn, Siskiyou National Forest Supervisor, from Jim Rogers, Friends of Elk River, Jan. 16, 1996. Rogers writes, “I just returned from the Elk Fork and Boulder Krab sales. Timber cutting was taking place in both sales . . . . The sadness I feel, and the rage at the injustice and stupidity of it all is profound.”

229. Warren Cornwall, *Civil Disobedience Heats Up in Oregon*, HIGH COUNTRY NEWS, Oct. 12, 1995. From September 11 to October 2, more than 30 people were arrested in protests against the Sugarloaf logging sale in the Siskiyou National Forest. To counter this, the Forest Service sealed off over 35 square miles around the sale with 24 hour guards. *Id.*

230. As conservationist Mitch Friedman put it, “Congress has slammed shut the courtroom doors.” David Foster, *Creative Twists in New Battles Against Logging*, CHI. TRIB., Mar. 6, 1996, at C8.

231. Cornwall, *supra* note 227.

232. David Foster, *Creative Twists in New Battles Against Logging*, CHI. TRIB., Mar. 6, 1996, at C8 (quoting Chris West, spokesman for the Northwest Forestry Association).

\$200,000.<sup>233</sup> The high bidder, an environmental group who vowed to preserve the area, won the sale with their bid of \$29,000.<sup>234</sup> Even if the Forest Service accepts this *high* bid (which is unlikely), the sale will cost taxpayers over \$171,000 (this figure does not include the costs of destruction of salmon and other wildlife).<sup>235</sup> The Wilderness Society has estimated that the rider will *cost* the federal treasury a total of between \$430 million and \$1.5 billion, because sale cost cannot be taken into consideration under its provisions.<sup>236</sup> This corporate subsidy seems particularly ironic given the deep cuts Congress is making in other domestic programs.<sup>237</sup>

The Clinton administration has professed surprise and distress over the rider's judicial interpretation and the subsequent logging which has been allowed to go forward in several ancient forests.<sup>238</sup> When Judge Hogan released 230 million acres of healthy old growth in the Siskiyou National Forest to the chain saws, the administration filed an emergency appeal, which was promptly denied.<sup>239</sup> As the High Country News reported, "Clinton said this 'extreme expansion' of logging was never authorized by the rescissions bill."<sup>240</sup> He has also recognized the rider's potential to cause "grave environmental damage" and has instructed federal forest managers to continue to use environmental safeguards in preparing timber sales.<sup>241</sup> Most recently, Clinton has endorsed efforts in Congress to repeal the section (k) provisions, which reopened old growth logging in the Pacific Northwest, and has expressed interest in a grant of legislative authority to buy out timber contracts in

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233. John A. Baden, *Forest Amenities in Thunder Mountains*, SEATTLE TIMES, Jan. 31, 1996, at B5 (editorial).

234. *Id.*

235. *Id.* This sale marks the first time an environmental group (the Northwest Ecosystem Alliance) has outbid timber companies for a logging sale. Ironically, although the group's bid would put the most money in federal coffers while preserving the forest, the USFS will most likely reject the bid, since federal regulations mandate that purchasers be "responsible for" cutting the trees. As Baden writes in his editorial, "[t]he Forest Service says it will disqualify purchasers who lack such 'integrity' and 'ethics.'" *Id.*

236. *Hearings on Timber Salvage Before the House Salvage Timber and Forest Health Task Force*, 104th Cong. (Dec. 19, 1995) (statement of Rep. Elizabeth Furse).

237. *Id.*

238. Tim Bullard, *Three in Suits Arrested at Closed-Off Sugarloaf Timber Sale in Oregon*, HIGH COUNTRY NEWS, Nov. 13, 1995. Andy Kerr of the Oregon Natural Resources Council was quoted as saying "We told them this would bite them on the ass."

239. *Id.*

240. *Id.*

241. David Foster, *Creative Twists in New Battles Against Logging*, CHI. TRIB., March 6, 1996, at C8.

sensitive areas such as the South Umpqua River drainage discussed previously.<sup>242</sup>

## VI. CONCLUSION: THE RIDER CHANGES THE MOMENTUM OF HISTORY

From the 1960s until last year, national forest policy became progressively integrated, enforceable in the courts, nondiscretionary, based on sound science, and reliant on citizen oversight. In response to a diminishing timber supply and increased interest in wild places, Congress has passed laws which limit the discretion of the Forest Service, an agency closely linked to the timber industry throughout the twentieth century. The National Environmental Policy Act and the National Forest Management Act in particular have imposed legally binding procedural and substantive requirements on agency decision making, most significantly limiting agency timber harvesting discretion. The laws have also allowed citizens to participate actively in the management of their national forests by commenting on forest plans and challenging agency decisions. The role of the courts changed during this period as well, as judges began to take a closer look at agency decisions. This became increasingly easy to do as laws like NFMA created clearer standards for courts to apply.

The salvage rider marks a radical break in the evolution of natural resource law and forest management. The rider gives federal agencies more discretion to allow timber harvesting than it has had in over thirty years. Under the rider, the government has no legal obligation to take into consideration the environmental effects of salvage operations or of many healthy old-growth timber sales. Further, the rider explicitly exempts the government from the need to follow environmental laws in making its salvage/section 318 logging decisions.

Most significantly, the rider effectively puts an entire category of federal activity beyond judicial review. The exemption of federal agencies from judicial review is an extremely rare and dangerous precedent in a nation based on the rule of law. The rider renders citizen involvement in forest management almost nonexistent because there is no administrative review and extremely limited judicial review. Citizens and courts are almost entirely removed from the picture.

The salvage rider is a significant regression in comprehensive and democratic forest management, and as such is becoming increasingly unpopular among Americans. According to a recent poll, 74% of the

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242. Peter D. Sleeth, *Clinton Points Ax at Salvage Logging Law*, OREGONIAN.

American public is opposed to the salvage rider.<sup>243</sup> Citizens are protesting the rider throughout the West, particularly since it has been interpreted to allow significant harvesting of the few remaining old growth forests. It is likely that "salvage" logging and logging of healthy trees will only increase before the rider expires on Dec. 31, 1996, and before the "emergency" period ends on Sept. 30, 1997.<sup>244</sup>

Due to public sentiment, the rider has become a political hot-button issue. President Clinton has changed sides on the issue; although he signed the rider into law, he professes surprise at its effects and currently supports at least a partial repeal. Representative Elizabeth Furse's House bill to completely repeal the rider had 117 cosponsors as of March 1, 1996.<sup>245</sup> At the same time, Republicans have announced a plan to extend the life of the salvage rider past December of 1996, once again by attaching the proposal to an appropriations bill.<sup>246</sup> The rider will likely remain a contested issue through the 1996 campaign season.

It seems likely that plaintiffs will continue to win few battles in the courts over the interpretation of the "logging without laws" rider. As discussed in Section V, there are very few legal challenges available, and courts have thus far ruled almost exclusively in favor of broad forest service discretion and against limiting the rider's scope. However, several of these decisions will be reviewed on appeal by the Ninth Circuit. The issues may well be moot however, since many of the timber sales at issue will undoubtedly be logged by them.

TRILBY C.E. DORN\*

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243. Brian Broderick, *Environmentalists Release Poll Finding Widespread Opposition to Forest Clearcuts*, BNA NAT'L ENV'T DAILY, February 21, 1996.

244. Pub. L. No. 104-19, §§ 2001(a)(2), (j).

245. *Salvage Logging Law: GOPers Propose Changes and Extension*, GREENWIRE, Mar. 1, 1996. Senator Patty Murray also plans to introduce legislation in the Senate which would continue to allow expedited procedures for salvage logging, but would not allow healthy old-growth to be logged without complying with environmental laws. The bill was reportedly drawn up at the request of President Clinton. *Id.*

246. *Salvage Logging Law: GOPers Propose Changes and Extension*, GREENWIRE, Mar. 1, 1996.

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