

SIERRA CLUB v. UNITED STATES FOREST SERVICE: THE NINTH CIRCUIT BROADLY CONSTRUES THE SALVAGE TIMBER RIDER

I. OVERVIEW

In 1991, an arson fire burned over 9,000 acres of the Northern Spotted Owl Habitat Conservation Area.¹ Responding to the tragedy, the United States Forest Service (USFS) proposed the Warner Fire Recovery Project (the Project) to recover the spotted owl habitat.² To construct firebreaks and rid the forest of fuel for future fires, the Project included proposed sales of approximately nine million board feet of salvage timber³ in the Project area.⁴ The Sierra Club challenged the Warner Creek sales in the U.S. District Court for the District of Oregon.⁵ The Sierra Club contended that the sales were in violation of the National Environmental Policy Act (NEPA).⁶

While the litigation was pending, Congress passed the Rescissions Act⁷ which included the Emergency Salvage Timber Sale Program (Salvage Timber Rider).⁸ The USFS argued in the district court that the Salvage Timber Rider applied to the challenged sales because the sales were still “in preparation” even though they had not been advertised.⁹ The USFS also argued that the initial sale was legal because the sale was too small to have the negative environmental effect of which the Sierra Club complained.¹⁰ The district court granted summary

1. See *Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 611 (9th Cir. 1996).

2. See *id.*

3. See Trilby C. E. Dorn, Comment, *Logging Without Laws: The 1995 Salvage Logging Rider Radically Changes Policy and the Rule of Law in the Forests*, 9 TUL ENVTL. L.J. 447, 448 (1996) (salvage timber is “dead or dying trees,” though the definition has been broadly interpreted to include the clearing of “healthy old-growth timber”).

4. See *Sierra Club*, 93 F.3d at 611-12.

5. See *id.* at 612.

6. 42 U.S.C. §§ 4321-4370d (1994). Among the Act’s purposes is “promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . .” *Id.* § 4321.

7. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act (Rescissions Act), Pub. L. No. 104-19, 109 Stat. 194 (1995).

8. *Id.* § 2001, 109 Stat. 240 (1995), amended by Pub. L. No. 104-34, § 101(c) [Title III, § 316], 110 Stat. 1321-202 (1996); Title I renumbered by Pub. L. No. 104-140, § 1(a), 110 Stat. 1327 (1996) (codified as amended in 16 U.S.C.A § 1611 (West Supp. 1996)).

9. See *Sierra Club*, 93 F.3d at 612.

10. See *id.*

judgment in favor of the USFS on all counts.¹¹ The Sierra Club appealed, arguing that the unadvertised sale was no longer in preparation¹² and therefore not controlled by the Salvage Timber Rider.¹³ The Sierra Club also argued that the initial sale violated NEPA despite its diminutive size.¹⁴ The district court's judgment was affirmed by the United States Court of Appeals for the Ninth Circuit, which held that the unadvertised sale of salvage timber was in preparation and therefore authorized by the Salvage Timber Rider, while the first sale was authorized by the Salvage Timber Rider regardless of NEPA. *Sierra Club v. United States Forest Service*, 93 F.3d 610 (9th Cir. 1996).

II. BACKGROUND

The plane of environmental law was forever altered with the enactment of NEPA.¹⁵ In enacting NEPA, Congress sought to instill the "use [of] all practicable means" to improve the Nation's environment to position the Nation for the future.¹⁶ NEPA was intended to further environmental protection by mandating that all federal agencies prepare an environmental impact statement (EIS)¹⁷ when constructing their programs.¹⁸ While an EIS mandates that an agency consider the consequences of its actions, questions historically have arisen as to whether an agency can avoid NEPA's EIS process in emergency situations.¹⁹ One reasonably asks whether a full EIS is rational and

11. *See id.*

12. Emergency Salvage Timber Sale Program, § 2001(b)(3) (providing that "[a]ny salvage timber sales in preparation on the date the enactment of this Act [July 27, 1995] shall be subject to the provisions of this section.").

13. *See Sierra Club*, 93 F.3d at 612.

14. *See id.*

15. 42 U.S.C. §§ 4321-4370d (1994).

16. *Id.* § 4331.

17. The "detailed statement" which "responsible officials" must produce for "major Federal actions" must cover:

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id. § 4332(C).

18. *See* Robert Orsi, Comment, *Emergency Exceptions From NEPA: Who Should Decide?*, 14 B.C. ENVTL. AFF. L. REV. 481, 482, 490-92 (1987).

19. *See id.* at 483-84.

necessary when “safe, healthful . . . surroundings”²⁰ are endangered by an emergency, such that producing a full EIS prior to action would prove hazardous to the environment.²¹ Despite questions of agency authority to avert NEPA, Congress has exempted parties from EIS requirements when agency goals are parallel to NEPA’s goals²² or when a program would be delayed or stopped by NEPA.²³

Beyond the landmark ramifications of NEPA, several other federal statutes have played and continue to play key roles in forest management. The Multiple-Use Sustained-Yield Act of 1960 (MUSYA)²⁴ recognized recreation as a proper use of the national forests.²⁵ MUSYA’s general policy statement recognized five uses of the forests: outdoor recreation, range, timber, watershed, and wildlife and fish.²⁶ As to the administration of national forests, MUSYA mandated “due consideration” of the “relative values of the various resources in particular areas.”²⁷ The courts have interpreted “due consideration” as a low standard, which merely requires “some” consideration of alternative resource uses.²⁸

The Endangered Species Act of 1973 (ESA)²⁹ granted the Secretary of Interior authority to take action “to preserve and promote the continued existence of native wildlife threatened with extinction.”³⁰ Inherently requiring that the federal government care for the forests, the ESA declares that “all Federal departments and agencies” must seek to conserve endangered and threatened species.³¹ However, the ESA does

20. 42 U.S.C. § 4331.

21. *Id.* §§ 4331-4332.

22. See Orsi, Comment, *supra* note 18 at 494 & n.102 (discussing such situations as the EPA’s duties under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1994)).

23. See *id.* at 494, 495 & nn.103-104 (referring to work stoppage on the Alaska pipeline, citing *Earth Resources Co. v. FERC*, 617 F.2d 775 (D.C. Cir. 1980)).

24. 16 U.S.C. §§ 528-531 (1994).

25. CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 137 (1992).

26. 16 U.S.C. § 528.

27. *Id.* § 529.

28. See *Sierra Club v. Hardin*, 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).

29. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-1544 (1994)).

30. FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 12.04[7][a], at 12-178 (Release No. 39, 1996).

31. 16 U.S.C. § 1531(c).

allow Federal agencies to exercise discretion in implementing its mandates³²

The National Forest Management Act of 1976 (NFMA)³³ was a Congressional attempt to maintain the multiple-use and sustained-yield mandates of MUSYA, while concurrently increasing protection of the forests in light of clear-cutting.³⁴ NFMA strives for its goal of protection by, among other things, mandating specific procedures which allow public participation in the “development, review, and revision of land management plans.”³⁵ NFMA was implemented gradually because it altered forest management to such a degree that it virtually comprised a new Organic Act.³⁶

More recently, Congress enacted the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, and appended Section 318 (The Northwest Timber Compromise) as a rider to the text.³⁷ The Northwest Timber Compromise set criteria regarding live timber sales in the national forests of Oregon and Washington.³⁸ The Compromise was a response by Congress to litigation enjoining timber sales³⁹ and to the Fish and Wildlife Service’s recommendation to list the northern spotted owl as a threatened species.⁴⁰ Congress’s objective was to allow the USFS to sell 7.7 billion board feet of Pacific Northwest timber during fiscal year 1989-1990 while protecting the northern spotted owl and “the most ecologically significant” old growth forests.⁴¹ In *Robertson v. Seattle Audubon Society*, the Supreme Court held the Northwest Timber Compromise constitutional as to its change of the pre-existing state of the law.⁴²

32. 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, 358 (1993).

33. Pub. L. No. 94-588, 90 Stat. 2949 (codified as amended at 16 U.S.C. §§ 1600-1614 and scattered sections of 16 U.S.C. (1994)).

34. See WILKINSON, *supra* note 25, at 144.

35. 16 U.S.C. § 1604(d).

36. See WILKINSON, *supra* note 25, at 144-45.

37. Pub. L. No. 101-121, § 318, 103 Stat. 745 (1989).

38. *Id.*; see also *Section 318 Timber Sales and Implementation of Section 2001(k) of the FY 1995 Rescissions Act (Pub. L. No. 104-19)* (visited Sept. 24, 1996) <<http://www.fs.fed.us/land/sal1.htm>> [hereinafter *Section 318 Timber Sales*].

39. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 432-33 (1992).

40. See John Klein-Robbhaar, *Judicial Review of Forest Service Timber Sales; Environmental Plaintiffs Gain New Options Under the Oregon Wilderness Act*, 35 NAT. RES. J. 201, 209-10 (1995).

41. See *Section 318 Timber Sales*, *supra* note 38; see also Northwest Timber Compromise, § 318(a)(1), 103 Stat. 745.

42. *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 427, 437-39 (1992).

In 1995, Congress passed the Rescissions Act and, in so doing, appended the Salvage Timber Rider.⁴³ The Rescissions Act primarily provided emergency aid to victims of various tragedies, such as the Oklahoma City bombing, and cut government spending.⁴⁴ Understandably, the Salvage Timber Rider was positioned in the Act to slip through Congress as quietly as possible.⁴⁵ Though the Salvage Timber Rider was enacted, debate and controversy actually did, and continue to, envelop it.⁴⁶ Issues of particular contention were those of wildlife conservation⁴⁷ and the taking of green timber.⁴⁸ The Salvage

43. See Dorn, Comment, *supra* note 3, at 448, 463.

44. See Pub. L. No. 104-19, 109 Stat. 194 (1995); See Dorn, Comment, *supra* note 3, at 463.

45. See 141 CONG. REC. H6636 (daily ed. June 29, 1995) (statement of Rep. Livingston). Representative Livingston of Louisiana stated:

I would say to the gentleman that whatever negotiations are going on, to the best of my knowledge, affect or are involving a letter of clarification of intent on the timber issue and have nothing whatsoever to do with the substance of this bill, and, frankly I do not anticipate that the lack of finality with respect to that letter of clarification should have any impact on the results of these deliberations on the floor.

46. See, e.g., Tom Kenworthy, *Forests' Benefit Hidden in Tree Debate; Friends, Foes of Timber Salvage Plan Claim the Same Goal*, WASH. POST, Apr. 18, 1995, at A1. As to the Salvage Timber Rider, Tim Lillebo of the Oregon Natural Resources Council stated, "I don't call that forest health, I don't call that fire prevention, I call that logging." *Id.* Thomas M. Bonnicksen, a forestry professor at Texas A & M University offered that, "The real danger is not doing anything." *Id.*; Editorial, *A Clear-Cut Mistake on Timber Harvesting*, S.F. CHRON., July 23, 1996, at A16 ("The plan—one of the worst environmental acts of the 104th Congress—is being seriously abused. . . . But over the next six months, more than 200 salvage sales are planned in California. If approved before December 31, those sales can go forward for months or even years under the shield of the plan approved by Congress last year.").

47. See 141 CONG. REC. H6639-40 (daily ed. June 29, 1995) (statements of Reps. Furse and Young) Representative Furse of Oregon stated that

[W]e have plans in place in Oregon and Washington to restore salmon habitat. . . . We have an obligation to the fishermen and fisherwomen in our communities who have worked hard and given up an enormous amount.

Id. Mr. Young of Alaska said:

To have someone say they are going to affect the fisheries, have you ever seen where the area has been burned and the soil has been eroded because the structure has been diluted because of fire? That is going to affect the fisheries? Nonsense and you know that.

This is an attempt to destroy by opposition to this bill the infrastructure of the logging industry, which is important to this community. This bill needs to be passed because we are salvaging something in fact that is a waste today.

Id. at 6640.

48. See *id.* at H6639 (statements of Rep. Dicks and Rep. Williams). Mr. Williams said "As the gentleman knows, the original rescissions bill allowed the harvest under this section of both dead, dying, diseased timber and green timber. Is the green timber still in this?" *Id.* Representative Dicks of Washington replied: ". . . any time you do a salvage sale, there is going to be some green sales at the periphery of the sale. But they will do that and try to minimize the taking." *Id.*

Timber Rider effectively exempts salvage timber sales from NEPA, and practically all other environmental law requirements, until the emergency period ends December 31, 1996, termination date,⁴⁹ while granting the USFS broad control⁵⁰ in the preparation, advertisement, offer, and award of contracts using a set of expedited procedures.⁵¹

Much of the language in the Salvage Timber Rider is at issue in the noted case, thus warranting a brief consideration. Subsection (b) provides for completion of salvage timber sales,⁵² including those "in preparation" on July 27, 1995, the date of enactment of the Rescissions Act.⁵³ Subsection (f)(1) provides for time and place of filing for what little, if any, judicial review is recognized.⁵⁴ Subsection (k) affords the

Representative Williams responded: "[U]nder the gentleman's understanding then there would only be green timber harvested in an ancillary way, with the main purpose to get salvage. To which Representative Dicks replied: "That is correct. . . ."

49. Emergency Salvage Timber Sale Program, § 2001(f) ("The authority provided by subsections (b) and (d) shall expire on December 31, 1996. The terms and conditions of this section shall continue in effect with respect to salvage timber sale contracts offered under subsection (b) . . . until the completion of performance of the contracts.").

50. *Hearings on Implementation of Section 2001 of PUB. L. 104-19 Before the Senate Comm. On Energy and Natural Resources*, 104th Cong. (visited Sept. 24, 1996), <http://www.fs.fed.us/land/glick.htm>>(1996). Secretary of Agriculture Dan Glickman noted that

Congress passed an emergency program providing unprecedented legal protections to certain timber sales. The Act does not allow the public to appeal Forest Service decisions on timber activities, it does not allow normal judicial review, and it deems every sale in compliance with environmental laws. . . . At the same time, the emergency salvage program gave me the discretion to determine the sales needing immediate, emergency removal. It is critical that the Forest Service offer sales that are indeed truly emergency.

51. Emergency Salvage Timber Sale Program § 2001(b)(1); *see also* *Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 612 (9th Cir. 1996). The following Section 2001(b)(1) language is at issue in the noted case:

(1) SALVAGE TIMBER SALES.—Using the expedited procedures provided in subsection (c), the Secretary concerned shall prepare, advertise, offer, and award contracts during the emergency period for salvage timber sales from Federal lands described in subsection (a)(4). . . . The preparation, advertisement, offering, and awarding of such contracts shall be performed utilizing (c) and notwithstanding any other provision of law, including a law under the authority of which any judicial order may be outstanding on or after the date of the enactment of this Act [July 27, 1995].

Id.; *see also* Dorn, Comment, *supra* note 3, 448, 465-69.

52. Emergency Salvage Timber Sale Program § 2001(b)(1).

53. *Id.* § 2001(b)(3).

54. *Id.* § 2001(f)(1); *see also* *Sierra Club*, 93 F.3d at 613. The following Section 2001(f)(1) language is at issue in the noted case:

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

USFS 45 days after enactment of the Salvage Timber Rider to award and release Northwest Timber Compromise timber, or to provide timber of like kind and value if the sale cannot be released for any reason, such as the known nesting of a threatened or endangered species in the subject area.⁵⁵

Several other sections of the Salvage Timber Rider are of interest for purposes of administrative law. Subsection (c) provides for expedited procedures for emergency salvage timber sales,⁵⁶ which include the submission of semi-annual implementation reports to the appropriate committees of Congress.⁵⁷ Under Subsection (c)(1)(A), the Secretary of Interior or Agriculture must produce a sale documentation which combines an environmental assessment under NEPA and a biological evaluation under the ESA.⁵⁸ The weight of the joint document is questionable in that elsewhere in the Salvage Timber Rider Congress preempted the legal effect of both NEPA and the ESA.⁵⁹ Subsection (c)(8) mandates “expeditious” reforestation.⁶⁰ One can only guess at the meaning of such an amorphous standard. Subsection (b) timber sales are not subject to administrative review,⁶¹ but instead are subject to a variation of the arbitrary and capricious standard of judicial review.⁶²

advertisement of the challenged sale. The Secretary concerned may not agree to, and a court may not grant, a waiver of the requirements of this paragraph.

Emergency Salvage Timber Sale Program § 2001(f)(1).

55. Emergency Salvage Timber Sales Program § 2001(k)(1); *see also Sierra Club* 93 F.3d at 614. The following Section 2001(k)(1) language is at issue in the noted case:

(1) AWARD AND RELEASE REQUIRED.—Notwithstanding any other provision of law, within 45 days after the date of the enactment of this Act [July 27, 1995], the Secretary concerned shall act to award, release, and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sales contracts offered before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121.

Emergency Salvage Timber Sales Program § 2001(k)(1).

56. Emergency Salvage Timber Sales Program § 2001(c).

57. *Id.* § 2001(c)(2).

58. *Id.* § 2001(c)(1)(A) (citing NEPA, 42 U.S.C. § 4332(2)); *see also id.* § 2001(c)(1)(A)(citing the ESA, 16 U.S.C. § 1536(a)(2)).

59. *Id.* § 2001(i).

60. *Id.* § 2001(c)(8).

61. Emergency Salvage Timber Sale Program § 2001(e).

62. *Id.* § 2001(f)(4). The courts can review and provide a remedy if “it is determined by review of the record that the decision to prepare, advertise, offer, award, or operate such sale was arbitrary and capricious or otherwise not in accordance with applicable law (other than those laws specified in subsection (i))” *Id.* However; subsection (i) exempts salvage sales from many laws, including NEPA, MUSYA, the ESA, and NFMA. The observant person immediately questions what law, if any, is effective.

Nonetheless, judicial review may be a misnomer—arbitrary and capricious is itself a low threshold to overcome, and coupled with exemption of the relative field of environmental laws, one is left to question if and to what extent judicial review actually exists. Under Subsection (h), no agency rules are needed to implement or carry out the Salvage Timber Rider.⁶³

Judicial analysis of the Salvage Timber Rider has produced interesting results. Of significance is the Ninth Circuit's decision that Section 2001(k)(1) applies to Northwest Timber Compromise geographic areas for fiscal year 1989-1990 and all subsequent years up to the Salvage Timber Rider's enactment⁶⁴ Thus, old growth forests are fair game for logging under the Salvage Timber Rider. As mentioned above, judicial review under the Salvage Timber Rider is ostensibly an arbitrary and capricious standard of review.⁶⁵

Inland Empire Public Lands Council v. Glickman afforded the Ninth Circuit an opportunity to clearly articulate the statutory limits regarding review.⁶⁶ The court noted that review of salvage timber sales is extremely limited.⁶⁷ The court must review salvage timber sales under an arbitrary and capricious standard, yet no federal environmental law is applicable.⁶⁸

Judicial review is significant as one attempts to ascertain a statute's meaning, application, or ambit of effect. In cases, such as the noted case, which turn on the purely legal question of statutory construction, courts employ review *de novo*.⁶⁹ If Congress has spoken directly to the issues before the court, no further inquiry is required.⁷⁰ However, if the statute is silent or ambiguous, the court must determine

63. *Id.* § 2001.

64. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 834-36 (9th Cir. 1996).

65. *See* Emergency Salvage Timber Sale Program § 2001(f)(4).

66. 88 F.3d 697 (9th Cir. 1996).

67. *Id.*

68. *See id.* at 701. The court noted that

[r]eview of salvage timber sales is thus limited in that '(1) review is based on the administrative record only; (2) the standard of review is arbitrary and capricious or otherwise not in accordance with applicable law; and (3) the sale is not subject to any federal environmental or natural resources law.'

Id. (quoting *Kentucky Heartwood, Inc. v. United States Forest Serv.*, 906 F. Supp. 410, 412 (E.D. Ky. 1995)).

69. *See In Re Mitchell*, 977 F.2d 1318, 1320 (9th Cir. 1992).

70. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

whether the agency's interpretation is permissible.⁷¹ If a statute is ambiguous, the court may consider legislative history or administrative interpretation to determine whether the agency's actions are permissible.⁷² In statutory construction, statutes are interpreted as a whole with every word given meaning in a manner so as not to render "other provisions of the same statute inconsistent, meaningless, or superfluous."⁷³ Further, words used more than once are given the same meaning.⁷⁴ A useful doctrine in navigating statutory language is the doctrine of *noscitur a sociis*, which states that a word is known by the company it keeps.⁷⁵ A term should also be construed "in accordance with its ordinary or natural meaning."⁷⁶

III. THE COURT'S DECISION

In accord with its administrative law precedent,⁷⁷ the Ninth Circuit commenced its disposition by presenting the statutory language.⁷⁸ Section 2001(b)(1),⁷⁹ the salvage timber sales provision, and Section 2001 (b)(3),⁸⁰ the clause applying the Salvage Timber Rider to sales in preparation, were directly at issue in the court's analysis.⁸¹ In determining that sales in preparation included sales not yet advertised, the court used the doctrine of *noscitur a sociis*,⁸² and considered the underlying commercial continuum in which the statutory language resides.⁸³ The court determined that since preparation is the first step, directly preceding advertisement,⁸⁴ "Congress intended 'preparation' to embody the activity necessary to reach the next stage—advertisement."⁸⁵ The court further stated that no gap or buffer served as a segue between stages.⁸⁶ The sale was prepared until it was officially advertised.⁸⁷

71. *See id.* at 843.

72. *See id.* at 844-45.

73. *See Boise Cascade Corp. v. United States Envtl. Protection Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991).

74. *Id.*

75. *See Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995).

76. *See United States v. Alvarez-Sanchez*, 511 U.S. 360 (1994).

77. *See In Re Mitchell*, 977 F.2d 1318, 1320 (9th Cir. 1992).

78. *Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 612 (9th Cir. 1996).

79. Emergency Salvage Timber Sale Program, § 2001(b)(1).

80. *Id.* § 2001(b)(3).

81. *Sierra Club*, 93 F.3d at 612.

82. *See Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1069 (1995).

83. *Sierra Club*, 93 F.3d at 613.

84. *Id.*

85. *Id.*

86. *Id.*

While the court upheld the judgment of the court below it disapproved of the district court's reasoning.⁸⁸ The Ninth Circuit found no need to review the sale in that the "plain import" of Section 2001(f)(1) provided that the window of time during which sales could be challenged was from the time of advertisement until fifteen days after that date.⁸⁹ The court reasoned that, given the language of Subsection (f)(1), the district court should have dismissed the claim for want of jurisdiction.⁹⁰

The initial sale was already prepared, advertised, and offered at the time the Rescissions Act was enacted.⁹¹ While the court again agreed with the district court's judgment for the defendant, it also again disagreed with that court's reasoning.⁹² The Ninth Circuit stated that the question of whether the initial sale violated NEPA was moot because the Salvage Timber Rider disposed of the issue without requiring NEPA analysis.⁹³ Section 2001(k)(1) grants a 45 day period from the date of the Rescissions Act's enactment during which Northwest Timber Compromise offers predating the Salvage Timber Rider are given effect.⁹⁴ The Warner Creek area at issue is in a Northwest Timber Compromise covered region.⁹⁵ Thus, the court reasoned that section 2001(k)(1) controlled.⁹⁶

IV. ANALYSIS

The Ninth Circuit construed the language of the Salvage Timber Rider to validate any potential sales not yet advertised at the time of the Rescissions Act's enactment.⁹⁷ Noticeably, the court never analyzed the statutory history or administrative interpretation of the Salvage Timber Rider. The court must have viewed the statute as unambiguous.⁹⁸ The business continuum construct the court employs seems reasonable in that preparation logically gives way to advertisement, advertisement to offer, and offer to award. Yet the Sierra Club's argument that a time gap exists

87. *Sierra Club*, 93 F.3d at 613.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Sierra Club*, 93 F.3d at 613.

92. *Id.*

93. *Id.* at 613-14 (citing *Wilson v. United States Dept. of Interior*, 799 F.2d 591, 592 (9th Cir. 1986)).

94. *See id.* at 614 (citing Emergency Salvage Timber Sale Program § 2001(k)(1)).

95. *Sierra Club*, 93 F.3d at 613.

96. *Id.* at 614.

97. *Id.* at 613.

98. *See supra* notes 71-73 and accompanying text.

between preparation and advertisement is not entirely meritless.⁹⁹ The court follows the *Alvarez-Sanchez* rule of construing a term “in accordance with its ordinary or natural meaning.”¹⁰⁰ However, the court arguably offers insufficient explanation as to why “in preparation” unequivocally includes all time up to advertisement.¹⁰¹ One could plausibly argue that ready for sale, yet unadvertised timber is beyond the stage of preparation. In some cases timber may rot in such a buffer time period. The court would categorize such timber as in preparation, while a potential purchaser would likely perceive it as neglected and therefore not in preparation for advertisement and eventual sale. It then follows that the Sierra Club, while “not convincing,” was not irrational in construing the statute as it did.¹⁰² The court’s analysis holds, however, (though the court arguably could have further expressed its reasoning) in that the statute plainly states that advertisement is beyond preparation, so the only method for advancing beyond preparation is to advertise.¹⁰³

The court affirmed the judgment of the court below as to the sale in preparation, but again, the change in reasoning may be stronger with further analysis.¹⁰⁴ Section 2001(f)(1) of the Salvage Timber Rider requires that challenges to salvage timber sales pursuant to subsection (b) must be filed in district court “within 15 days after the date of advertisement.”¹⁰⁵ The court simply stated “that by the plain import of this section” a challenge must be filed subsequent to advertisement.¹⁰⁶ While such reasoning is understandable, the court left holes in its argument.

The language is not as clear as the court suggests. The court could have construed Section 2001(f)(1) to allow challenges to be filed anytime prior to advertisement, but not more than 15 days post-advertisement.¹⁰⁷ The possibility exists that one could be aware prior to advertisement of the government’s congressionally mandated intent to sell salvage timber. With such awareness applied to the open statutory language, one would be armed to produce as valiant a challenge as would someone who waited until advertisement. The primary difference between the actions of these two hypothetical persons is that one person

99. *Sierra Club*, 93 F.3d at 613.

100. *See id.* (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994)).

101. *Id.*

102. *See id.*

103. Emergency Salvage Timber Sale Program § 2001(b)(1).

104. *Sierra Club*, 93 F.3d at 613.

105. *Id.*; *see also* Emergency Salvage Timber Sale Program § 2001(f)(1).

106. *Sierra Club*, 93 F.3d at 613.

107. Emergency Salvage Timber Sale Program § 2001(f)(1).

would await public notice, while the other would infer the situation. Yet perhaps the possibility of such an inference is why the court chose the analysis it did—too many inferences, particularly those which are weak, may lead to a burden on the courts and an infringement on judicial economy. Nonetheless, the court's plain import is one of its perception, and perhaps should have been made clearer through more thorough analysis.¹⁰⁸

The court finally turned to the initial advertised and offered sale, at which time it again affirmed the judgment, but not the reasoning, of the court below.¹⁰⁹ The court stated that NEPA need not be considered because Section 2001(k)(1) of the Salvage Timber Rider states that sales covered under the Northwest Timber Compromise, as in the initial sale in question, are to be completed within 45 days after the Rescission Act's enactment.¹¹⁰ Unlike the court's analysis regarding the unadvertised sale, nothing, given the state of the law, in the court's disposition appears inherently weak.

V. CONCLUSION

The noted case involves a highly electrified, political conflict over the sale of salvage timber, yet the Ninth Circuit laconically disposes of the claims under the rubric of statutory construction. The court's decision leads one to ponder whether the court is politically supporting the executive branch and the logging industry by regarding unadvertised sales to be in preparation and subsequently constructing a narrow window of challenge. While the court could be mistaken in its legal interpretation, one must not forget the words of Chief Justice Marhsall: "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹¹¹ Thankfully, even Chief Justice Marshall's immortal words may have narrow import as to the noted case in that the preemptive confusion produced by the Salvage Timber Rider, as well as the political angst it infused by graying the lines between government, law, and politics, became an historical asterisk on December 31, 1996.¹¹² Then, except for existing contracts, NEPA and its colleagues once again became the law. In 1997, the broad language of the Salvage Timber Rider, which authorizes the felling of green timber, is replaced by the

108. *Sierra Club*, 93 F.3d at 613.

109. *Id.*

110. *Id.* at 614 (citing Emergency Salvage Timber Sale Program § 2001(k)(1)).

111. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

112. See Emergency Salvage Timber Sale Program § 2001.

prior laws which offer some degree of protection for the forests and their inhabitants. Nonetheless, the passing of the Salvage Timber Rider cannot erase the lasting effects wrought by the Salvage Timber Rider's regressive exemption of environmental laws, its related quashing of judicial review, and its broad mandate to the government to "salvage" the national forests. The foundation has been laid for many trees to fall in the future as long term contracts can be memorialized through December 31, 1997. The Salvage Timber Rider also stands as precedent for future Congresses that might wish to enact deferential and regressive environmental statutes. The Salvage Timber Rider presents a lasting question: Will Congress ever again preempt NEPA and thereby risk causing a political furor, veiled in statutory construction, equivalent to that caused by the Salvage Timber Rider? If Congress does so, the Salvage Timber Rider, including its language, effect, and all judicial interpretation of it may be dusted off and given new life as a model of legal thought and statutory construction.

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