Oregon Natural Resources Council v. Thomas; Another "Meritorious" Timber Lawsuit Fails: Do Substantive Riders Warrant an Exception to the Plain Language Rule?

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NOTE

OREGON NATURAL RESOURCES COUNCIL
V. THOMAS; ANOTHER "MERITORIOUS"
TIMBER LAWSUIT FAILS: DO SUBSTANTIVE
RIDERS WARRANT AN EXCEPTION TO THE
PLAIN LANGUAGE RULE?

"We consider what would appear to be
a relatively straightforward question
of statutory interpretation
with fairly profound consequences."¹

I. INTRODUCTION

On July 27, 1995, President William J. Clinton signed into
law the Emergency Supplemental Appropriations for Addition­
al Disaster Assistance, for Anti-Terrorism Initiatives, for Assis­
tance in the Recovery from the Tragedy That Occurred at
Oklahoma City, and Rescissions Act.² Although the Rescis­
sions Act was primarily an appropriations bill,³ it contained
several provisions aimed at expediting the award of timber

¹. Opening quote written by Ninth Circuit Judge Michael Hawkins in North­
west Forest Resource Council v. Glickman, 82 F.3d 825, 828 (9th Cir. 1996)
(NFRC). See infra Part II.C.1.
sions Act or the Act).
³. An appropriations bill is a measure before a legislative body authorizing
the expenditure of public moneys and stipulating the amount, manner and purpose
of the various items of expenditure. BLACK'S LAW DICTIONARY 102 (6th ed. 1990).
harvesting contracts. These provisions authorized the nationwide release of salvage timber sales, expedited the award of timber sales covered in the President's Northwest Forest Plan, and released previously authorized timber sales.

The Act prohibited administrative review and provided for only limited judicial review of salvage timber and Option 9 sales. According to the rider's sponsors, these provisions "were developed ... to limit the opportunity for frivolous lawsuits...." Frivolous lawsuits, however, do not stop timber

4. NFRC, 82 F.3d at 828. These provisions, collectively known as the Emergency Salvage Timber Sale Program, were codified at 16 U.S.C.A. § 1611 (West Supp. 1996). The cases summarized throughout this note generally refer to the timber provisions as § 2001, pursuant to the session laws. Sections 1611 and 2001 are otherwise identical and this note will refer only to the codified section.

The timber provisions were contained in a "rider" which was attached to the Rescissions Act. "The term 'rider' refers to substantive legislation given a 'ride' on an appropriations bill." Michael Axline, Salvage Logging: Point and Counterpoint: Forest Health and the Politics of Expediency, 26 ENVTL. L. 613, 613 n.2 (1996). Both the House and Senate have rules prohibiting the attachment of substantive legislation to appropriations bills, but those rules are frequently waived. Id. (citing Linda M. Bolduan, Comment, The Hatfield Riders: Eliminating the Role of Courts in Environmental Decision Making, 20 ENVTL. L. 329 (1990)). See infra Part V.A. In addition to its formal title, the timber provisions have also been called the "salvage logging rider," the "logging without laws rider," the "mother of all riders," the "salvage rider," and the "1995 rider." These terms are interchangeable and most appear at least once in this note.

5. 16 U.S.C.A. § 1611(b) (West Supp. 1996); see discussion infra Part II.A.1.

6. § 1611(d). The President's Northwest Forest Plan is commonly referred to as "Option 9," hence these sales are known as "Option 9 sales." See discussion infra Part II.A.2.

7. NFRC, 82 F.3d at 828. These previously authorized sales are known as "section 318 sales" and are authorized pursuant to § 1611(k). See discussion infra Part II.A.3.

8. § 1611(e), (f).


   . . . 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.

   Id. at 461 n.114 (quoting 141 CONG. REC. S4868-01 (daily ed. March 30, 1995) (statement of Sen. Larry Craig)). However, as of June 20, 1995, lawsuits had delayed harvesting of only three percent of the timber volume offered by the United States Forest Service. Trilby C. E. Dorn, Comment, Logging Without Laws: The
In reality, meritorious lawsuits, which challenge timber sales that are being conducted in violation of the law, do stop timber sales. It is these meritorious lawsuits that have been effectively halted by the Emergency Salvage Timber Sale Program.

Section II of this note provides a brief background to the Rescissions Act, outlines the Act's provisions and examines the Ninth Circuit Court's decisions interpreting these provisions prior to Oregon Natural Resources Council v. Thomas. Section III sets forth the facts and procedural history of ONRC II, the most recent meritorious lawsuit to fall victim to the provisions of the Rescissions Act. Section IV examines the Ninth Circuit Court's analysis and holding in ONRC II. Section V argues that although the Ninth Circuit's decision in ONRC II was correct under current standards, the result was fundamentally wrong. Section V also examines the rules prohibiting the attachment of substantive riders to appropriations bills, the effect of such riders on public participation, and the multiple misrepresentations made by sponsors in the course of soliciting support for the salvage rider. Finally, section V proposes a new standard to be applied by the courts when interpreting the provisions of a substantive rider attached to an appropriations bill in violation of House and Senate rules. Section VI concludes that the congressional rules prohibiting the attachment of riders to appropriations bills should not be waivable. Alternatively, if those rules are waived, the courts must look beyond the plain language of the subsequently enacted statute when interpreting its provisions. Section VII then briefly sum-

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10. Axline, supra note 4, at 614 n.5.
11. Id.
12. Id.
13. 92 F.3d 792 (9th Cir. 1996) (ONRC II) (Reinhardt, J., concurring). The cases discussed infra in Parts II.C.1-3 include Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996); Inland Empire Public Lands Council v. Glickman, 88 F.3d 697 (9th Cir. 1996); and Northwest Forest Resource Council v. Pilchuck Audubon Society, 97 F.3d 1161 (9th Cir. 1996).
14. Judge Hawkins also wrote, "It is not our role to determine the wisdom of [the salvage rider], only its meaning." NFRC, 82 F.3d at 828.
marizes three additional cases decided by the Ninth Circuit subsequent to ONRC II.\textsuperscript{15}

II. BACKGROUND

Since the establishment of the forest reserve system in 1891, the national forests have been managed primarily to ensure a high annual timber harvest.\textsuperscript{16} In response to growing public concern during the 1960s and 70s, Congress passed several statutes which required comprehensive land planning for multiple uses.\textsuperscript{17} These statutes required that the forests also be managed to protect animals, plants, soil, water and biological diversity.\textsuperscript{18}

In 1995, representatives of the timber industry asked Congress for relief from the increasing number of restrictive environmental laws.\textsuperscript{19} Although lawmakers were sympathetic, they knew they were unlikely to succeed in granting such relief by openly attacking the publicly accepted laws.\textsuperscript{20} Ultimately, they hid their proposal in a popular initiative and then attached it to the first available "must-sign" legislation.\textsuperscript{21} As a result, the 1995 Rescissions Act was passed, complete with its unrelated Emergency Salvage Timber Sale Program provision, and the Republican-led 104th Congress succeeded in suspending decades of environmental regulations.\textsuperscript{22}

\begin{thebibliography}{99}
\bibitem{15} The cases are Idaho Sporting Congress, Inc. v. United States Forest Service, 92 F.3d 922 (9th Cir. 1996); Sierra Club v. United States Forest Service, 93 F.3d 610 (9th Cir. 1996); and Southwest Center for Biological Diversity v. Glickman, 100 F.3d 1443 (9th Cir. 1996).
\bibitem{16} Dorn, supra note 9, at 449.
\bibitem{18} Dorn, supra note 9, at 499.
\bibitem{19} Margaret Kriz, Timber!, NAT'L J., Feb. 3, 1996, at 252. Since 1984, the timber industry has attempted to persuade Congress to exempt timber sales from environmental laws at least twelve times. Dorn, supra note 9, at 461.
\bibitem{20} Kriz, supra note 19.
\bibitem{21} Id.
\bibitem{22} Dorn, supra note 9, at 499.
\end{thebibliography}
A. THE 1995 RESCISSIONS ACT AND THE SALVAGE RIDER

The salvage rider was strategically attached to the 1995 Rescissions Act, an appropriations bill that provided emergency funding for anti-terrorist initiatives and disaster assistance, including assistance in the recovery from the tragic bombing of the federal building in Oklahoma City, Oklahoma.\(^{23}\) The rider’s sponsors knew that President Clinton opposed the rider because he had previously vetoed a rescissions bill containing similar language.\(^{24}\) They correctly predicted, however, that the President would be forced to sign the revised Rescissions Act containing the emergency relief bill, despite its inclusion of the rider.\(^{25}\)

The President signed the Act, giving life to the salvage rider, on July 27, 1995.\(^{26}\) Although frequently modified by the word “salvage,” the rider actually authorized three distinct categories of timber sales: 1) salvage timber sales, 2) Option 9 sales, and 3) Section 318 sales.\(^{27}\)

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\(^{24}\) President Clinton initially vetoed the Rescissions Bill on June 7, 1995, stating that suspending all of the country’s environmental laws was not the appropriate way to log the national forests. Dorn, supra note 9, at 463.

\(^{25}\) Axline, supra note 4, at 630. Carl Pope, the executive director of the Sierra Club, stated “[t]he President evidently calculated that the risks of failing to pass the Republicans’ spending bill were greater than those of failing the forests.” Dorn, supra note 9, at 464 n.129 (quoting Carl Pope, Lawless Logging, SIERRA, Nov. 1995, at 18).

\(^{26}\) See § 1611(a)(2). The rider designated an emergency period during which salvage timber sales were to be conducted according to expedited procedures § 1611(b)(1). “The term ‘emergency period’ means the period beginning on the date of the enactment of this section [July 27, 1995] and ending on September 30, 1997.” § 1611(a)(2). However, a subsequent provision in the rider states, “[t]he 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) and timber sale contracts under subsection (d) until the completion of performance of the contracts.” § 1611(j).

\(^{27}\) See § 1611(b), (d), (k).
1. Salvage Timber Sales

Salvage timber sales are the first category of sales authorized by the rider.\(^{28}\) Section 1611(b) directs the Secretaries\(^{29}\) to prepare, advertise, offer and award salvage timber sales contracts from lands within the National Forest System and federal lands under the jurisdiction of the Bureau of Land Management (BLM).\(^{30}\) The rider defines the term 'salvage timber sale' as "a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged or down trees, or trees affected by fire or imminently susceptible to fire or insect attack."\(^{31}\) However, the term also includes the removal of associated trees, as long as any such sale includes an identifiable salvage component.\(^{32}\) This means that healthy trees may be sold under the provisions governing salvage sales, as long as the sale contains a salvage component.\(^{33}\)

Section 1611(c) provides for expedited procedures for the preparation of salvage timber sales.\(^{34}\) Pursuant to this section, the Secretary concerned must prepare a document that combines an environmental assessment under the National Environmental Policy Act (NEPA) and a biological evaluation under the Endangered Species Act (ESA).\(^{35}\) The preparation

\(^{28}\) § 1611(b).

\(^{29}\) The statute uses the term "the Secretary concerned." § 1611(a)(4) indicates "the Secretary concerned" means (A) the Secretary of Agriculture, with respect to the lands within the National Forest System; and (B) the Secretary of the Interior, with respect to Federal lands under the jurisdiction of the Bureau of Land Management." § 1611(a)(4).

\(^{30}\) § 1611(b)(1).

\(^{31}\) § 1611(a)(3).

\(^{32}\) Id.

\(^{33}\) Axline, supra note 4, at 632. In fact, the Forest Service has reclassified a number of healthy sales as salvage sales to take advantage of the statutory provisions of the Rescissions Act. Id. at 633 (citing Wilderness Soc'y, Reclassifying Timber Sales Under the Logging-Without-Laws Rider (1995) (summarizing sales that have been reclassified from "healthy" to "salvage" since the adoption of the salvage logging rider)).

\(^{34}\) § 1611(c).

of the document is a mere formality, however, as the statute states that the Secretaries retain sole discretion to consider the environmental effects of the salvage timber sale and the effect, if any, on threatened or endangered species.\textsuperscript{36} In addition, the Secretaries need only do so to the extent they consider appropriate and feasible.\textsuperscript{37} Furthermore, the scope and content of the documentation and information prepared, considered and relied on is also subject to the sole discretion of the Secretaries.\textsuperscript{38}

The rider, advanced under the guise of promoting forest health, does not require the Secretaries to report to Congress on how salvage sales are enhancing the health of the forests.\textsuperscript{39} Instead, the Secretaries are required to report to Congress on the volume of salvage timber sold pursuant to the rider.\textsuperscript{40} In addition, the rider declares that salvage timber sales will not be precluded because the costs of the sale are likely to exceed the revenues derived from it.\textsuperscript{41} Moreover, the

\textit{Id.} (emphasis added). The combined document is called an “EA/B.E.” \textit{But see} Southwest Center for Biological Diversity v. United States Forest Service, 100 F.3d 1443 (9th Cir. 1996) (upholding the district court’s finding that failure to prepare a combined EA/B.E. was not a per se violation of the Rescissions Act).

In addition, § 1611(c)(1)(B) provides that in lieu of preparing a new document, the Secretary concerned may use a document prepared pursuant to NEPA before the date of enactment of the Act, a biological evaluation written before such date, or information collected for such a document or evaluation. § 1611(c)(1)(B).

\textsuperscript{36} § 1611(c)(1)(A).
\textsuperscript{37} Id.
\textsuperscript{38} § 1611(c)(1)(C).
\textsuperscript{39} Axline, supra note 4, at 624.
\textsuperscript{40} Id. at 624-25; § 1611(c)(2).
\textsuperscript{41} § 1611(c)(6). Ironically, the salvage rider “rode” on an appropriations bill that purported to reduce the deficit, yet it contained a provision directing the Forest Service and the BLM to sell salvage timber regardless of the cost to the government. Axline, supra note 4, at 617. The Wilderness Society conservatively estimated that the salvage logging rider would cost taxpayers $330 million. \textit{Id. But see infra} note 196 (suggesting the cost is probably much higher).

In addition to the fact that many of these sales are unprofitable, the costs of federal timber are heavily subsidized. Axline, supra note 4, at 619. Current federal subsidies come in several forms: 1) federal timber prices often do not reflect the administrative or road costs of selling and removing the timber; 2) export restrictions allow domestic mills to bid for federal timber free from foreign competition; 3) salvage timber sales pursuant to the rider are exempt from the Competition in Contracting Act of 1984; 4) the price of federal timber does not reflect the costs imposed on other national forest values; and 5) sale prices do not include the costs borne by plant and animal species and their habitats. \textit{Id.} at 619-22 and accompanying notes.
Secretary concerned may conduct salvage timber sales "notwithstanding any decision, restraining order, or injunction issued by a United States court before the date of enactment of [the Act]."  

2. Option 9 Sales

The salvage rider also authorizes a category of timber sales known as Option 9 sales. These are sales made on the federal lands described in Option 9, the land management plan alternative selected in the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl. The Secretaries are required to expeditiously prepare, offer and award Option 9 sales and are authorized do so notwithstanding any other law, decision, restraining order or injunction issued by a United States court prior to the date of enactment of the Act.

a. Administrative and Judicial Review of Salvage Timber and Option 9 Sales

Neither salvage timber sales nor Option 9 sales are subject to administrative review. In addition, the rider provides for

42. § 1611(c)(9).
43. § 1611(d).
44. Id.; see The Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species within the Range of the Northern Spotted Owl adopted in the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents within the Range of the Northern Spotted Owl (April 13, 1994). In 1993, President Clinton convened the Northwest Forest Conference in Portland, Oregon to draft a compromise solution to the wars being fought over logging in the national forests that were home to the endangered spotted owl. Dorn, supra note 9, at 461. As a result of that conference, the Forest Ecosystem Management Assessment Team (FEMAT) was created. Id. FEMAT's purpose was to identify and study a range of options for the management of national forest lands in the range of the northern spotted owl. Id. The final FEMAT report contained ten options. Id. President Clinton chose Option 9, which reduced the amount of timber cut on federal lands and provide greater protection for ancient forests than had previously been provided. Axline, supra note 4, at 633.
45. § 1611(d).
46. § 1611(e). This is critical because the complex, technical nature of environ-
only limited judicial review of these sales. A challenge to a proposed sale must be brought in the U.S. district court where the affected lands are located, within 15 days after the date of the initial advertisement of the challenged sale. Courts may not issue restraining orders, preliminary injunctions or injunctions pending appeal with respect to any decision to prepare, advertise, offer award or operate a salvage timber or Option 9 sale. However, the courts may enjoin permanently, order modification of, or void an individual salvage timber sale if it is determined, by a review of the record, that the decision to prepare, advertise, offer, award or operate such sale was "arbitrary and capricious." This is an exacting standard given the deference afforded to agency action. In the case of the salvage rider, it is hard to imagine how a court could find a sale arbitrary and capricious in relation to applicable law when nearly all applicable law has been suspended.

mental law makes courts reluctant to interfere with agency expertise unless there is a clear abuse of power. Paul Maynard Kakuske, Comment, Clear-Cutting Public Participation in Environmental Law: The Emergency Salvage Timber Sale Program, 29 Loy. L.A. L. Rev. 1859, 1872 (1996) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865-66 (1984)). Given the deference found at the judicial level, the best opportunity to participate in or challenge a proposed timber sale usually occurs at the administrative level. Id. at 1872. The rider, however, prohibits administrative review of salvage timber and Option 9 sales and thus forces challengers into the judicial arena where the only standard of review available is "arbitrary and capricious." § 1611(e), (f)(4). Unfortunately, it is unlikely that challengers will succeed under arbitrary and capricious review because a court must find the decision arbitrary and capricious in relation to an existing legal standard. Dorn, supra note 9, at 471. Section 1611(i) arguably removes all existing legal standards, leaving a court with nothing against which to measure the lawfulness of the agency action. Id. at 472; see § 1611(i).

47. § 1611(f)(1)-(7).
48. § 1611(f)(1).
49. § 1611(f)(3). In effect, this provision means that by the time a judge issues a final order determining the legality of a sale, the trees may already be logged. Dorn, supra note 9, at 468.
50. § 1611(f)(4).
51. See supra note 46.
52. See § 1611(i).
b. **The Effect of Other Laws on Salvage Timber and Option 9 Sales**

The most controversial provision contained in the Act is § 1611(i) entitled "[e]ffect on other laws[.]") Section 1611(i) states "[t]he documents and procedures required by this section for the preparation, advertisement, offering, awarding and operation of any [salvage timber and Option 9 sale] shall be deemed to satisfy the requirements of the following applicable federal laws (and regulations implementing such laws):" 1) the Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA);54 2) the Federal Land Policy and Management Act of 1976 (FLPMA);55 3) the National Environmental Policy Act of 1969 (NEPA);56 4) the Endangered Species Act of 1973 (ESA);57 5) the National Forest Management Act of 1976 (NFMA);58 6) the Multiple-Use Sustained-Yield Act of 1960

53. § 1611(i). This section has also been called the "sufficiency clause." Dorn, supra note 9, at 467.
56. 42 U.S.C.A. §§ 4321-4370d (West 1994 & Supp. 1996). In the context of forest management, NEPA requires that an Environmental Impact Statement (EIS) be prepared for timber sales in excess of one million board feet when such sales would significantly affect the quality of the human environment. § 4332(C); 40 C.F.R. § 1508.4 (1996); see The Found. for Global Sustainability Inc.'s Forest Protection and Biodiversity Project v. McConnell, No. 2:93CV69, 1993 U.S. Dist. LEXIS 11207, at *4 (W.D. N.C. June 2, 1993) (stating "salvage which removes 1,000,000 board feet or less of merchantable wood products and which requires one mile or less of low standard road construction has no significant impact on the human environment, and therefore may be categorically excluded from those projects requiring an EA or an EIS"). An EIS must also discuss possible impacts and assess viable alternatives. Kakuske, supra note 46, at 1870. In addition, [in the context of public participation, NEPA plays two critical roles. First, because an EIS contains a legal sufficiency requirement, it provides the public with an opportunity to challenge either the absence or inadequacy of the EIS in court. . . . Second, and most importantly, NEPA provides for extensive public involvement in the preparation, scope and review of the EIS. Id. (citations omitted).

NEPA's public involvement and information disclosure requirements allow the public to apply political pressure to poorly conceived timber sales. Id. at 1871. This type of pressure has proven to be very successful and, as a result, has motivated state public disclosure laws such as California's Proposition 65. Id.
(MUSY);7 any compact, executive agreement, convention, treaty, and international agreement, and implementing legislation; and 8) all other applicable federal environmental and natural resource laws.60

3. Section 318 Sales

The third and final category of timber sales authorized by the salvage logging rider involves sales offered or awarded before the rider's date of enactment in any unit of the National Forest System or district of the BLM subject to section 318 of Public Law 101-121.61 “Notwithstanding any other provision

vest provisions reduce the area from which the Forest Service may legally authorize timber sales. Dorn, supra note 9, at 457. NFMA forbids harvests on lands 1) designated as “marginal,” 2) where logging would destroy biological diversity, 3) where watersheds cannot be protected, and 4) where the costs of the sale exceed revenues. Id. In addition, the amount harvested cannot exceed the amount which can be removed “annually in perpetuity on a sustained-yield basis.” Id. at 457-58. Finally, although the Act does not forbid clearcuts, it restricts their size and provides that they must be “the optimum method . . . to meet the objectives and requirements of the relevant land management plan.” Id. at 458.

60. § 1611(i) (emphasis added).
61. § 1611(k)(1). To date, this provision of the rider has received the most attention in court. Axline, supra note 4, at 634. This can be attributed, in part, to the fact that much of the section 318 timber is located in habitat which is critically important to threatened or endangered species. Id. at 614 n. 11. Prior to 1990, court orders prohibited logging in these areas, due to the presence of the northern spotted owl. Id. Then, in 1990, a rider attached to an appropriations bill removed the courts’ jurisdiction. Id.; see Department of Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, 318(f)(1), 103 Stat. 701, 749 (1989). That rider, formally entitled the Northwest Timber Compromise of 1989, is commonly referred to as “section 318.” Dorn, supra note 9, at 472 n.189.

Section 318 mandated “aggregate timber sale levels” for timber harvests cut from National Forest Service and BLM lands in Oregon and Washington during fiscal years 1989 and 1990. § 318. The aggregate timber sale level for the Forest Service was seven billion seven hundred million board feet of net merchantable timber, of which five billion eight hundred million was to come from the thirteen national forests in Oregon and Washington known to contain northern spotted owls. § 318(a)(1). From its administrative districts in Western Oregon, the BLM was required to meet an aggregate timber sale level of one billion nine hundred million board feet. § 318(a)(2). A board foot is an industry unit of measure equal to the cubic contents of a piece of lumber 12" x 12" x 1". WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 244 (1993).

Section 318 reduced the amount of timber that the Forest Service and the BLM had to sell from ten billion board feet to 9.6 billion board feet of net merchantable timber. Bolduan, supra note 4, at 383. The rider provided for one level of administrative review, as well as expedited judicial review. Id. at 384. Section 318 prohibited restraining orders or preliminary injunctions, but provided for per-
of law," these sales must be awarded "with no change in origi­
nally advertised terms, volumes, and bid prices."62 Although
the rider states that section 318 sales will not be released if
any threatened or endangered bird species is known to be
nesting within the acreage that is the subject of the sale unit,
it also provides that, should this be the case, the Secretaries
must provide the purchaser with an equal volume of timber, of
like kind and value, and subject to the terms of the original
contract.63

B. THE CLINTON ADMINISTRATION'S POSITION ON THE RESCIS­
SIONS ACT

Upon signing the Rescissions Act into law, President
Clinton stated:

To be sure, I do not support every provision of
this bill. For instance, I still do not believe that
this bill should contain any of the provisions
relating to timber. But, the final bill does con­
tain changes in the language that preserve our
ability to implement the current forest plans
and their standards, and protect other resources
such as clean water and fisheries. . . . I have
directed the Secretaries of the Interior, Agricul­
ture, Commerce, the Administrator of the Envi­
ronmental Protection Agency, and other Federal
agencies to carry out timber salvage activities
consistent with our forest plans and existing
environmental laws.64

62. § 1611(k)(1).
63. § 1611(k)(2),(3).
64. Statements by President William J. Clinton Upon Signing H.R. 1944, 31
The directive referred to in the President's statement resulted in an interagency Memorandum of Agreement in which the Secretaries and the Administrator agreed to "comply with previously existing environmental laws except where expressly prohibited by [the Rescissions Act]." This Memorandum of Agreement only applied to salvage sales however, and it was not enforceable at law.

The deluge of lawsuits began almost immediately after the President signed the Act into law. The first action was brought by the timber industry, which sought a clarification of the scope of sales affected by the phrase "subject to section 318," found in § 1611(k)(1) of the rider. The district court's decision in that case, and the Ninth Circuit's subsequent denial of an emergency motion for an injunction pending the appeal of that decision, prompted the following statement from the President: "My administration's agreement with Congress on this issue was significantly different from the interpretation upheld this week by the courts... My administration will actively pursue a legislative remedy to correct this extreme result." Subsequently, on February 24, 1996, the President called for a repeal of the salvage logging rider.

Most recently, Vice President Gore summarized the Administration's position by stating that signing the salvage logging rider was, indeed, our biggest mistake and it never
would have happened except for a miscalculation on our part about the magnitude of what was wrong with the provision. We were genuinely surprised . . . by the court decision[s] which vastly expanded the scope of something we thought could be muted by administrative action. We knew it was not good policy. But it was [an] example[] of one thing imbedded in a huge, overall measure that had to pass.71

C. NINTH CIRCUIT DECISIONS TO DATE INTERPRETING THE RESCISSIONS ACT

To date, most of the provisions of the rider have been litigated.72 In its decisions, the Ninth Circuit has ruled almost exclusively in favor of the timber industry, upholding broad Forest Service discretion and refusing to limit the rider's scope.73

1. Northwest Forest Resource Council v. Glickman

Section 318 sales were the subject of the first Ninth Circuit decision interpreting the provisions of the Rescissions Act. In Northwest Forest Resource Council v. Glickman,74 the court was asked to define the categories of timber sales the Secretaries were required to release pursuant to § 1611(k)(1).75 The

72. See infra Parts II.C., VII.
73. Dorn, supra note 9, at 482.
74. 82 F.3d 825 (9th Cir. 1996) (NFRC).
75. Id. at 828. § 1611(k)(1) states:
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 sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 746[.])

§ 1611(k)(1) (emphasis added).
Northwest Forest Resource Council (NFRC) argued that the phrase "subject to section 318," contained in § 1611(k)(1), described only section 318's geographical boundaries, but did not include its chronological limits. According to NFRC's interpretation, § 1611(k)(1) required the Secretaries to release not only the sales that had occurred in fiscal years 1989 and 1990, but all subsequent sales occurring through the enactment of the Rescissions Act in July, 1995. In contrast, the Secretaries argued that the reference to section 318 imposed both geographical and temporal limits on the scope of § 1611(k)(1), thus limiting the releases to those sales which occurred in fiscal years 1989 and 1990.

Based on the structure of § 1611(k)(1), the plain and ordinary meaning of the words it contained and several long-standing principles of statutory interpretation, the court concluded that the language of § 1611(k)(1) was clear and that the phrase "subject to section 318" defined only the geographical reach of the statute. The Ninth Circuit affirmed both the district court's order adopting NFRC's interpretation of § 1611(k)(1) and its permanent injunction directing the Secretaries to release all timber sale contracts offered or awarded between October 1, 1990 and July 27, 1995.

A devastating blow to environmentalists, the case did not end with the clarification of the scope of section 318 sales. NFRC was in fact a consolidation of two cases arising out of

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76. NFRC is a timber industry trade association. NFRC, 82 F.3d at 828.
77. Id. at 829. Section 318's geographical boundaries included "the national forests of Oregon and Washington . . . [and the BLM] administrative districts in western Oregon." § 318(a)(1), (2). The section specifically exempted certain portions of those areas containing northern spotted owls. § 318(b)(3), (5). Section 318 was limited chronologically to "fiscal years 1989 and 1990." § 318(a)(1), (2).
79. NFRC, 82 F.3d at 831. Under the Secretaries' interpretation, they were required to release an estimated 410 million board feet of net merchantable timber. Id. at 828. NFRC's interpretation would require the release of an additional 246 million board feet, or a total of 656 million board feet. Id.
80. Id. at 834.
81. Id. at 839.
the same set of events. In the second appeal, Oregon Natural Resources Council and several other environmental organizations (collectively ONRC) challenged the district court's refusal to allow their intervention in NFRC's lawsuit against the Secretaries. NFRC opposed ONRC's motion to intervene arguing that ONRC's interests in the enforcement of environmental laws were irrelevant because § 1611(k)(1) nullified those laws. The Ninth Circuit held that ONRC had not demonstrated a "significantly protectable interest" in the lawsuit to merit intervention because § 1611(k)(1), with its phrase "notwithstanding any other provision of law," explicitly preempted the environmental laws ONRC sought to protect.

2. Inland Empire Public Lands Council v. Glickman

Almost immediately after issuing its decision in NFRC, the Ninth Circuit confirmed precisely how deferential arbitrary and capricious review could be in a case involving salvage timber sales. In Inland Empire, the Inland Empire Public Lands Council (the Council) filed an action seeking a permanent injunction prohibiting the Secretary from proceeding with salvage timber sales of approximately 36 million board feet in the Kootenai National Forest in northwest Montana. The Forest Service was conducting these sales pursuant to the provisions contained in the Rescissions Act and had prepared Biological Assessments (BAs) as required by that Act. The BAs concluded that the sales were not likely to adversely affect the Cabinet/Yaak Ecosystem grizzly bear, a threatened species under the ESA. The Council argued that the agency's decision was arbitrary and capricious because the Forest Service's

82. Id. at 828.
83. Id.
84. NFRC, 82 F.3d at 830 n.5. NFRC opposed ONRC's motion to intervene for two additional reasons: NFRC claimed that (1) ONRC's interests would not be impaired by the lawsuit; and (2) ONRC's interests would be adequately represented by the Secretaries. Id.
85. Id. at 837. In effect, this decision mandates the same results for section 318 sales as the sufficiency clause does for salvage timber and Option 9 sales.
87. Id. at 700.
88. Id. See § 1611(c)(1)(A).
89. Id.
new ‘core area strategy’ would inadequately protect the grizzly bear population.\textsuperscript{90} In upholding the agency’s decision, the Ninth Circuit unequivocally stated that, under the Rescissions Act, “[t]he Forest Service did not need to consider the effect on the grizzly bear. . . . [It] had discretion to disregard entirely the effect on the grizzly bear.”\textsuperscript{91}

The Council also argued that 1) the Forest Service had failed to rationalize its change in bear protection policy, and 2) the core area strategy did not incorporate all of the specific recommendations of the Interagency Grizzly Bear Committee Taskforce Report, upon which the Forest Service relied.\textsuperscript{92} The Ninth Circuit dismissed both of those arguments. First, the court found that the Forest Service’s explanation, that recent fires had triggered the new policy, was sufficient.\textsuperscript{93} Second, the court determined that § 1611(c)(1) gave the Secretary the sole discretion over the information considered to reach a decision, and the sole discretion to determine whether that decision complied with existing applicable forest management plans and guidelines.\textsuperscript{94}

Alternatively, the Council argued that the “sole discretion” language contained in § 1611(c)(1) required the Secretary of Agriculture to personally authorize all salvage timber sales.\textsuperscript{95} Disagreeing, the Ninth Circuit noted that Secretary Glickman had followed the delegation procedures which the Secretary of

\begin{itemize}
\item \textsuperscript{90} Id. at 701. Specifically, the core area strategy “1) appl[ied] the road density limitation only to each Bear Management Unit, rather than to each smaller Bear Analysis Area, 2) allow[ed] exceptions to the forty-acre opening size and 600-foot movement corridor restrictions, and 3) allow[ed] exceptions to the seventy-percent habitat effectiveness standard.” Id.
\item \textsuperscript{91} Inland Empire, 88 F.3d at 701 (emphasis added). The Court also reiterated that the Rescissions Act provided for extremely limited judicial review. Id. Review of salvage timber sales is thus limited, the court stated, 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 laws.” Id. (quoting Kentucky Heartwood, Inc. v. United States Forest Serv., 906 F. Supp. 410, 412 (E.D. Ky. 1995)).
\item \textsuperscript{92} Id. at 702.
\item \textsuperscript{93} Id. In August 1994, a lightning storm ignited over 200 fires in the Kootenai National Forest. Id. at 700. Fifty-five thousand acres were burned. Id.
\item \textsuperscript{94} Id. at 702.
\item \textsuperscript{95} Id. In this case, the sales had been authorized by the Chief of the United States Forest Service, Jack Ward Thomas.
\end{itemize}
Agriculture traditionally used, and that requiring the Secretary to personally authorize every salvage timber sale would contradict the stated purpose of the Rescissions Act, which was to expedite such sales.96

Finally, the Council argued that the district court improperly struck several extra-record materials.97 In response, the Ninth Circuit stressed that § 1611(f)(4) of the Rescissions Act limited judicial review “to a review of the record.”98 Therefore, unless one of the recognized exceptions was present, extra-record materials would not be considered.99


Finding their attacks on individual provisions of the rider to be ineffective, environmentalists shifted their focus to the constitutionality of the statute as a whole. The question of whether the provisions of the rider were constitutional was addressed in Northwest Forest Resource Council v. Pilchuck Audubon Society.100 In Pilchuck, there were in fact five issues before the court.101 The district court had held that 1) the provisions of the rider were constitutional, 2) the rider applied to timber sales enjoined or canceled prior to its passage, 3) timber sales offered in violation of their authorizing statutes were within the scope of § 1611(k)(1),102 4) the rider required

96. Inland Empire, 88 F.3d at 702.
97. Id. Specifically, “the district court struck two expert declarations regarding grizzly bear survival, four Forest Service and FWS documents and two papers on grizzly bear management, upon which the Forest Service did not rely, and several FWS documents upon which FWS relied in reaching its concurrence.” Id.
98. Id. The court also stated that the Ninth Circuit would only consider extra-record materials when (1) they were necessary to determine whether the agency has considered all relevant factors and had explained its decision, (2) the agency had relied on documents not in the record, (3) supplementing the record was necessary to explain technical terms or complex subject matter, or (4) plaintiffs made a showing of agency bad faith. Id. at 703-04.
99. Id.
100. 97 F.3d 1161 (9th Cir. 1996) (Pilchuck).
101. Id. at 1162.
102. The section directs:

Notwithstanding any other provision of law, within 45 days after the date of enactment of this act [July 27, 1995], the Secretary concerned shall act to award, release,
the sales to be reoffered to all previous bidders, and 5) the Secretaries use of PSG protocol\(^{103}\) to determine when marbled murrelets were “known to be nesting” violated the rider’s provisions.\(^{104}\)

First, appellants argued that the rider was unconstitutional because it violated the separation of powers doctrine by permitting Congress to resurrect sales that had been enjoined by federal courts.\(^{105}\) The Ninth Circuit quickly disposed of this argument stating that the rider would only violate the separation of powers doctrine if it directed certain findings in pending litigation without changing any underlying law.\(^{106}\) The Ninth Circuit found that the lower court had correctly applied the test stated in Robertson v. Seattle Audubon Society, and therefore the rider was constitutional.\(^{107}\)

The Ninth Circuit also affirmed the district court’s ruling and permit to be completed in fiscal years 1995 and 1996, with no change in originally advertised terms, volumes, and bid prices, all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318 of Public Law 101-121 (103 Stat. 745) [not classified to the Code]. . .

\(\text{§ }1611(k)(1)\) (emphasis added).

103. The PSG Protocol is the scientifically accepted method of determining the “presence or probable absence” of marbled murrelets in a particular forest stand. Pilchuck, 97 F.3d at 1167 (citing Marbled Murrelet v. Pacific Lumber Co., 880 F. Supp. 1343 (N.D. Cal. 1995)). Listed as a threatened species since 1992, the marbled murrelet is prone to elusive behavior which makes it extremely difficult to determine when it is nesting based purely on physical evidence. \textit{Id.} at 1169. Using the Protocol, a stand of trees is determined to be a nesting stand based on a statistical analysis involving such evidence as: “(1) detection of an active nest or recent nest by a fecal ring or eggshell fragments; (2) . . . birds flying in, out or through the canopy; or (3) birds circling directly over or under the canopy.” \textit{Id.}

104. \textit{Id.} at 1164. According to \(\text{§ }1611(k)(2)\), “[n]o sale unit shall be released or completed under this subsection if any threatened or endangered bird species is known to be nesting within the acreage that is the subject of the sale unit.” \(\text{§ }1611(k)(2)\) (emphasis added). Other than the “known to be nesting” language, Congress provided no guidance for determining which timber sales were exempt from \(\text{§ }1611(k)(2)\) and compensated for under \(\text{§ }1611(k)(3)\). Pilchuck, 97 F.3d at 1168.

105. Pilchuck, 97 F.3d at 1165.

106. \textit{Id.}

that the rider applied to all previously enjoined or canceled timber sales, but reversed the determination that sales offered in violation of their authorizing statutes were also within the scope of the rider. The court stated that, while it could find nothing in § 1611(k)(1) that would make a valid sale out of a sale which was not valid under its authorizing statute, the definition of the word “offered” combined with the plain language of the rider could not exclude the release of validly offered sales that were subsequently enjoined or canceled.

Next, the Ninth Circuit examined the Secretaries argument that § 1611(k)(1) did not require them to seek out unsuccessful bidders in cases where the original high bidders were unwilling, unable, or unqualified to take advantage of the renewed offer. The court noted that both the Forest Service and the BLM had statutes and regulations which gave them the discretion to refuse to award a sale where the high bidder was ineligible. The court then stated its unwillingness to find an implied repeal of those statutes and regulations, particularly when that repeal would be based on an appropriations act, and reversed the determination of the lower court.

Finally, the Ninth Circuit also reversed the lower court’s determination that the Secretaries’ use of the PSG protocol violated the provisions of the rider. The Secretaries argued that the PSG protocol was consistent with § 1611(k)(1)’s requirements. The timber industry insisted, however, that a “known to be nesting” determination could only be based on physical evidence. The district court rejected both parties’ arguments and formulated its own interpretation of “known to be nesting.” The Ninth Circuit began by noting that the rider itself was ambiguous. In addition, the legislative his-

108. Pilchuck, 97 F.3d at 1164.
109. Id. at 1166.
110. Id.
111. Id.
112. Id.
113. Pilchuck, 97 F.3d at 1170.
114. Id. at 1168. See supra note 102-03.
115. Pilchuck, 97 F.3d at 1168.
116. Id.
117. Id.
The Ninth Circuit concluded that the district court had erred by not deferring to the Secretaries' interpretation, that interpretation being reasonable based on the language of the rider and the time frame for implementation.\(^{119}\)

The decisions in NFRC, Inland Empire and Pilchuck set the stage for the sweeping interpretation of § 1611(i) and its effect on Option 9 sales that followed in Oregon Natural Resources Council v. Thomas.\(^{120}\) For the fourth time, the decision was a victory for the timber industry.

III. FACTS AND PROCEDURAL HISTORY

In ONRC II, two environmental organizations, the Oregon Natural Resources Council and Umpqua Watersheds, Inc. (collectively ONRC), tried to block four timber sales by Jack Ward Thomas, Chief of the United States Forest Service.\(^{121}\) The four challenged sales were the Roughneck, Watchdog, Pinestrip, and Snog sales.\(^{122}\) The Ninth Circuit only considered ONRC's claims against the latter two sales.\(^{123}\) The Pinestrip and Snog sales were located in the Upper North Umpqua River Basin in southwestern Oregon, over 30 miles of

118. Id. at 1167.
119. Id. at 1168-1170.
120. 92 F.3d 792 (9th Cir. 1996) (ONRC II) (Reinhardt, J., concurring).
121. Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 794 (9th Cir. 1996) (ONRC II) (Reinhardt, J., concurring). In Inland Empire Public Lands Council v. Glickman, 88 F.3d 697 (9th Cir. 1996), the Court upheld Chief Thomas' authority to sell timber as the subdelegatee of the Secretary of Agriculture. Id. at 794 n.1. See supra Part II.C.2.
122. Oregon Natural Resources Council v. Thomas, No. 95-6272-HO 1995 U.S. Dist. LEXIS 19567, at *2 (D. Or. filed Dec. 5, 1995) (ONRC). The Roughneck and Watchdog sales were awarded in 1994, before the enactment of the Rescissions Act. Id. The Pinestrip and Snog sales were advertised and offered after the date of enactment. Id. ONRC's challenge to the Roughneck and Watchdog sales was effectively resolved against them by the Ninth Circuit Court's decision in Northwest Forest Resource Council v. Glickman, 82 F.3d 825 (9th Cir. 1996) (holding the phrase "subject to section 318" in § 1611(k)(1) of the 1995 Rescissions Act included only section 318's geographical limits, not its chronological limits, thereby authorizing timber sales offered or awarded after fiscal years 1989 and 1990 through the enactment of the Rescissions Act). ONRC II, 92 F.3d at 794. See supra Part II.C.1.
123. ONRC II, 92 F.3d at 794.
which had been designated as wild and scenic river. In addition, these sales also involved timber growing on land subject to President Clinton's Northwest Forest Plan, commonly referred to as Option 9.

ONRC argued that the Pinestrip and Snog sales would degrade aquatic resources and reduce viable populations of native aquatic and amphibious species in violation of the National Forest Management Act (NFMA). In addition, ONRC alleged that the sales did not comply with Option 9, which was binding on the Forest Service under NFMA. Finally, ONRC maintained that the sales were "arbitrary and capricious" under Administrative Procedure Act (APA) § 706(2)(A) for three reasons. First, the Forest Service did not obtain informa-

124. Id. Congress has declared "that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C.A. § 1271 (West 1985) (emphasis added). See 16 U.S.C.A. § 1274(a)(95) (West Supp. 1996) (designating "the 33.8-mile segment from the Soda Springs Powerhouse to Rock Creek in the following classes: (A) the 25.4-mile segment from the Soda Springs Powerhouse to the Umpqua National Forest boundary as a recreational river; to be administered by the Secretary of Agriculture; and (B) the 8.4-mile segment from the Umpqua National Forest boundary to its confluence with Rock Creek as a recreational river; to be administered by the Secretary of the Interior.").

125. ONRC II, 92 F.3d at 794. See supra note 44.

126. ONRC II, 92 F.3d at 794. See National Forest Management Act, 16 U.S.C.A. § 1604(g)(3) (West 1985); 36 C.F.R. § 219 et seq. (1996). Section 1604 (g) directs the Secretary of Agriculture to promulgate regulations that set out the process for the development and revision of land management plans, guidelines and standards prescribed by the Act. § 1604(g). "The regulations shall include . . . (3) specifying guidelines for land management plans developed to achieve the goals of the Program which . . . (B) provide for the diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives, . . . (C) insure research on and . . . evaluation of the effects of each management system to the end that it will not produce substantial and permanent impairment of the productivity of the land[.]

127. ONRC II, 92 F.3d at 794-95. Specifically, ONRC alleged a violation of 16 U.S.C.A. § 1604(i) and 36 C.F.R. § 219.10(e). Section 1604(i) states, in part, "[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." § 1604(i).

128. ONRC II, 92 F.3d at 795. Section 706 is entitled the "scope of review." 5 U.S.C.A. § 706 (West 1996). It states "to the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or ap-
tion necessary to ensure a) that the sales would not affect the maintenance of viable populations of aquatic and amphibious species, and b) that the sales would not seriously, adversely affect the watershed.\textsuperscript{129} Second, the Forest Service found that the sales would not have a significant environmental impact despite evidence to the contrary by its own experts.\textsuperscript{130} Finally, the Forest Service failed to complete mitigation measures it committed to in connection with the sales.\textsuperscript{131}

The district court dismissed ONRC's case based on the provisions of the salvage rider contained in the 1995 Rescissions Act and the APA.\textsuperscript{132} ONRC appealed this decision to the Ninth Circuit Court of Appeals.\textsuperscript{133} The Ninth Circuit affirmed the district court's decision concluding that Option 9 sales, pursuant to the rider, were not subject to federal environmental and resource law challenges and that there could be no "arbitrary and capricious" review under APA § 706(2)(A) independent of another statute.\textsuperscript{134}

IV. THE COURT'S ANALYSIS

In deciding whether review of Option 9 timber sales was available under the Administrative Procedure Act, the Ninth Circuit began by looking at the section of the rider entitled "Effect on other laws."\textsuperscript{135} The court noted that the effect of the plain language of § 1611(i) was to render sufficient, under the environmental laws, any documents and procedures the

\textsuperscript{129}ONRC II, 92 F.3d at 795 (citing CR 23\textsuperscript{17.-d}). ONRC did not allege that any statute other than the APA required the Forest Service to obtain this information.\textsuperscript{Id.}
\textsuperscript{130}Id. (citing Opening Br. of Plaintiffs-Appellants at 25-26).
\textsuperscript{131}Id. (citing Opening Br. of Plaintiffs-Appellants at 26-27).
\textsuperscript{132}Id.; ONRC, 1995 U.S. Dist. LEXIS 19567.
\textsuperscript{133}ONRC II, 92 F.3d at 795.
\textsuperscript{134}Id. at 796, 797 n.10. In ONRC II, Judge Reinhardt wrote a concurring opinion declining to decide whether there can ever be a violation of the APA in the absence of an independent statute that supports the violation. ONRC II, 92 F.3d at 799.
\textsuperscript{135}Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 795 (9th Cir. 1996) (ONRC II) (Reinhardt, J., concurring); § 1611(i); see supra Part II.A.2.b.
agency elected to use for an Option 9 sale. 136 As a result, ONRC’s challenges to the sales based on NFMA and its implementing regulations failed. 137 The court rejected ONRC’s argument that legal sufficiency should only be extended to documents and procedures used to “prepare, offer and award” sales, but not to those underlying an agency’s decision to “operate” a sale, 138 noting that the language of § 1611(i) explicitly extended legal sufficiency to documents and procedures underlying an agency’s decision to operate a sale. 139 Furthermore, “allowing environmentally-based challenges to the operation of Option 9 sales would frustrate one of the rider’s primary purposes: to enable the logging of timber on Option 9 land.” 140

The court then considered “the overriding thrust” of ONRC’s case. 141 ONRC argued that the Pinestrip and Snog sales were “arbitrary and capricious” under APA § 706(2)(A), even assuming no other law applied. 142 In affirming the district court’s decision, the Ninth Circuit looked not to § 706(2)(A), but to § 701(a)(2). 143 The latter section forbids judicial review of agency action “to the extent that . . . agency action is committed to agency discretion by law.” 144 The court explained that “the APA is merely a vehicle for carrying substantive challenges to court.” 145 As ONRC could not point to any independent, substantive body of law that confined the Forest Service’s discretion to go forward with the sales, their decision to sell the timber was committed to agency discretion under § 701(a)(2) and therefore, not reviewable. 146

136. ONRC II, 92 F.3d at 795.
137. Id. at 796.
138. Id. at 795-96 n.7. The premise was that ONRC was challenging the “operation” of the sales, and not the administrative decision to offer and award the sales. ONRC, 1995 U.S. Dist. LEXIS 19567, at *6.
139. “The documents and procedures required by this section for the preparation, advertisement, offering, awarding, and operation of any timber sale under subsection (d) shall be deemed to satisfy the requirements of the following. . . .” § 1611(i) (emphasis added).
140. ONRC II, 92 F.3d at 795-796 n.7.
141. Id. at 796.
142. Id. For the language of § 706(2)(A), see supra note 128.
143. ONRC II, 92 F.3d at 796.
144. Id. (quoting § 701(a)(2)).
145. Id.
146. Id.
ONRC then argued that the court's analysis rendered meaningless § 1611(f) of the rider to the extent that it provided for judicial review.\textsuperscript{147} Disagreeing, the court stated that ONRC would only be correct if the rider insulated Option 9 sales from \textit{any} judicial scrutiny.\textsuperscript{148} Since § 1611(i) only extended legal sufficiency to documents and procedures for Option 9 sales under federal environmental and natural resource laws, it did not foreclose challenges based on other laws.\textsuperscript{149} The Ninth Circuit also agreed with the district court that the best interpretation of § 1611(d)'s requirement to expedite the preparation, offer and award of Option 9 sales \textit{"[n]otwithstanding any other provision of law"} required the disregard of \textit{environmental} laws only, not \textit{all} laws otherwise applicable to Option 9 sales.\textsuperscript{150} The court pointed out that language located elsewhere in the statute also suggested that this was Congress' intent.\textsuperscript{151}

ONRC also argued that § 1611(f)(4) supported the idea that review under the APA was consistent with the rider's suspension of federal environmental and natural resource laws because it allowed a court to prevent a salvage timber sale if it determined that \textit{"the decision to prepare, offer, award or operate the sale was arbitrary and capricious[.]"}\textsuperscript{152} In response, the Ninth Circuit reiterated that § 706(2)(A) only provided the standard to be applied on review, but before a party could

\textsuperscript{147} Id. Section 1611(f)(1) states that salvage timber and Option 9 sales are subject to judicial review only in a United States district court for the district in which the affected Federal lands are located, and only if such a challenge is filed within 15 days after the date of initial advertisement of the challenged sale. § 1611(f)(1).

\textsuperscript{148} \textit{ONRC II,} 92 F.3d at 796.

\textsuperscript{149} Id. The defendant intervenors suggested that "challenges would still be available based on federal contracting laws, such as . . . a claim alleging a failure to include required labor or non-discrimination provisions in a contract, a claim for violations of log export restrictions, small business set-aside provisions . . . and other non-environmental laws." \textit{Id.} (citing Opposition Br. of Defendant-Intervenor Appellees at 15.)

\textsuperscript{150} Id. Citing several examples, the Court stated that it had repeatedly found that the phrase "notwithstanding the provisions of any other law" is not always construed literally. \textit{Id.} It should be noted, however, that this interpretation renders the sufficiency clause in 1611(i), specifically 1611(i)(8), duplicative, contradicting a long standing principle of statutory interpretation: that sections of a statute should be read to give effect, if possible, to every clause.

\textsuperscript{151} Id. at 797; \textit{see} § 1611(f)(4).

\textsuperscript{152} \textit{ONRC II,} 92 F.3d at 797. \textit{See} § 1611(f)(4).
obtain any such review, it would first have to clear the § 701(a) hurdle. 153

Finally, ONRC contended that decisions to sell Option 9 timber were not committed to agency discretion because they were “typically well-suited to judicial review” and they “traditionally ha[d] been reviewable.” 154 Although the Ninth Circuit acknowledged that those were relevant considerations in a § 701(a)(2) analysis, 155 the court restated its position that review under § 701(a)(2) was dependent upon whether there was a law to apply. 156 In this case, there simply was no underlying law.

V. CRITIQUE

It would be difficult to claim that any of the Ninth Circuit Court’s decisions interpreting the rider were incorrect. The plain language of the statute does indeed support most of those decisions. But there is a more fundamental level upon which the wisdom of those decisions should be measured. The members of Congress represent the people of the United States. Yet, the passage of the salvage rider ran contrary to the express will of those people. This is evidenced by the more than sixty thousand communications, including letters, faxes, e-mail messages and phone calls, the White House received asking President Clinton to veto the bill based on its inclusion of the salvage logging rider. 157 The President also received almost 1000 pieces of wood carrying similar messages. 158 On the day he signed the Rescissions Act into law, the President received an additional 350,000 petitions from Americans demanding that U.S. forests, wilderness and other public lands be protect-

153. ONRC II, 92 F.3d at 797 (citing Heckler v. Chaney, 470 U.S. 821, 828 (1985)).
154. Id. at 798 (citing Opening Br. of Plaintiffs-Appellants at 22).
155. Id. (citing Beno v. Shalala, 30 F.3d 1057, 1067-68 (9th Cir. 1994)).
156. Id. (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).
158. Id.
ed. Subsequently, a recent poll reported that 74 percent of Americans are opposed to the salvage rider. The executive director of the American Ocean Campaign aptly stated, "it is disturbing that the voices of thousands of Americans ... will be muted by the sickening roar of chainsaws in our national forests." Clearly, Congress failed to act in accordance with the will of the people when it passed the Rescissions Act.

A. THE PROHIBITION ON RIDERS

Lack of public support for the salvage rider aside, there are several other reasons why it should be invalidated. First and foremost, both the House of Representatives and the Senate have rules prohibiting the attachment of substantive provisions to spending bills. The House Rules prohibit any amendment to a general appropriation if it changes existing law. Similarly, the Senate Rules prohibit the Committee on Appropriations from reporting an appropriations bill that contains amendments which propose new or general legislation. Attaching the Emergency Salvage Timber Sale Program to the 1995 Rescissions Act clearly violated the rules of both Houses. Nonetheless, the rider's sponsors were able to use their positions to influence other members of Congress to waive the House rules prohibiting such riders. The Senate

159. Id.
160. Dorn, supra note 9, at 481 (citing Brian Broderick, Environmentalists Release Poll Finding Widespread Opposition to Forest Clearcuts, Nat'l Env't Daily (BNA) (Feb. 21, 1996)).
162. Axline, supra note 4, at 637. The Supreme Court reviewed the reasons behind the rules banning substantive riders in appropriations bills in Tennessee Valley Authority v. Hill, 437 U.S. 153, 190-91 (1978). Id. at 638.
163. Id. (citing CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ONE HUNDRED SECOND CONGRESS, 101ST CONG., rule XXI(2) (1991)).
164. Id. at 637-38 (citing COMMITTEE ON RULES & ADMIN., U.S. SENATE, 102D CONG., SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, rule 16.2 (1992)). In addition, rule 16.4 provides "[n]o amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received. . ." Id. at rule 16.4. (emphasis added).
165. See supra notes 163-64 and accompanying text.
rules were simply ignored. 167

In addition to the rules discussed above, senators are also required to refer substantive matters to the appropriate oversight committees for their review. 168 In the case of the salvage rider, however, the appropriate congressional committees never reviewed or debated the rider’s merits.169 In fact, the accelerated process for appropriations bills allowed the sponsors of the rider to avoid answering questions about the fiscal and environmental impacts of the rider.170 Appropriations bills almost always bypass the critical components of the legislative process, those designed to reveal misrepresentations and erroneous interpretations based on ambiguous language.171 Riders subsequently attached to these bills bypass important committee hearings and other opportunities for debate. 172

Moreover, the rider attached to the 1995 Rescissions Act was written by a committee which lacked the proper jurisdiction and the requisite experience in writing environmental laws.173 It was written “behind closed doors, where the public interest is most apt to be compromised by special interest pleading.”174 It is truly ironic that the branch of government
charged with making the rules which govern the conduct of others is apparently not bound by the rules which govern its own conduct. Private citizens cannot enforce House and Senate rules and must rely on the lawmakers to police themselves.\textsuperscript{175} For this reason alone, these lawmakers should be required to adhere to the House and Senate rules and those rules should not be waivable.

The effect of attaching the salvage rider to the Rescissions Act, and thereby shielding it from appropriate committee hearings, was to reserve decisions concerning the use of \textit{public} forest lands to the Forest Service and the BLM.\textsuperscript{176} While these agencies may have expertise in the area of timber sales, “they are also bureaucratic hierarchies with relatively restricted missions and associated routines.”\textsuperscript{177} More importantly, these agencies are headed by officials who are not accountable to the people.\textsuperscript{178} Normally the administrative and judicial review processes would remedy this situation. In the case of the salvage rider, however, the plain language of the statute eliminated those options.\textsuperscript{179}

\section*{B. \textsc{The Effect on Public Participation}}

Since 1970, federal law has encouraged broad public par-

\textsuperscript{175} Axline, \textit{supra} note 4, at 638.
\textsuperscript{176} \textit{Cf.} Bolduan, \textit{supra} note 4, at 371 (explaining the effect of allowing previous riders to avoid committee hearings).

Senator Hatfield has thus moved forest management in the [1990s], back to a 1930s New Deal ideal of environmental decision making. According to [the] New Deal theory, agency experts should make decisions insulated from both central and political control and judicial oversight. Only agency expertise could “creatively regulat[e] a complex social problem in the public interest.”

\textit{Id.} (citations omitted).
\textsuperscript{177} \textit{Id.} at 373.
\textsuperscript{178} \textit{See} Kakuske, \textit{supra} note 46.
\textsuperscript{179} § 1611(e), (f).
Participation in the development of environmental policy. Similarly, Congress and the courts have encouraged private citizens to participate in the enforcement of those standards once they have been promulgated. Generally, administrative review of agency decisions has been readily available and judicial review has been limited only by constitutional considerations such as standing and ripeness.

The rider contained in the 1995 Rescissions Act represented a significant departure from existing environmental policy. The rider flatly prohibited administrative review and arguably prohibited judicial review. The rider did not contain its own citizen-suit provision and it specifically exempted salvage timber and Option 9 sales from enforcement by any other existing citizen-suit provisions with its broad declaration that these sales automatically complied with all federal environmental and natural resource laws. It is not surprising that, having essentially lost the political and legal arenas, many environmentalists feel they "have nothing left but the court of public opinion and acts of civil disobedience."

180. Kakuske, supra note 46, at 1860 (citing ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION 716 (1992)). Public participation can build credibility for proposals, help identify issues through diversity of opinion and expertise, enhance public understanding, and reduce costs and delays by resolving conflicts without resort to litigation. Id. at 1864.


182. Kakuske, supra note 46, at 1860.

183. Id. at 1861.

184. § 1611(e), (f).

185. § 1611(i); see supra note 181.

As one commentator argues, "Congress should not [be able to] undermine the will of the people by indirectly attacking the substance of popular environmental laws via manipulations of the procedural provisions for public participation."\textsuperscript{187} Both Congress and the public should have the opportunity to thoroughly debate any restrictions on public participation in environmental legislation.\textsuperscript{188} In addition, impacts on the public's ability to voice its concerns at both the administrative and judicial level should be minimized.\textsuperscript{189}

C. MISREPRESENTATION

In addition to their disregard for congressional rules and their effort to stifle public participation, the salvage rider's sponsors seriously misrepresented the riders' impacts when they presented it to their colleagues.\textsuperscript{190} Representative Elizabeth Furse (D-Or.) circulated a memorandum to her colleagues on December 19, 1995, identifying six ways in which Congress was misled by the sponsors of the salvage logging rider.\textsuperscript{191} The list begins with the sponsors' assurances that the rider was an emergency measure to remove dead and dying trees.\textsuperscript{192} The rider has subsequently been used, however, to

\begin{enumerate}
  \item 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.\textsuperscript{Dorn, supra note 9, at 464 (quoting Oversight Hearing on the 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)).}
  \item Kakuske, supra note 46, at 1862.
  \item Id.
  \item Axline, supra note 4, at 631.
  \item Id. at 631 n.121 (citing Rep. Elizabeth Furse, Furse Takes Lead in Repealing Timber Salvage Rider, Press Release (Dec. 7, 1995)). Representative Furse has gathered more than 100 co-sponsors for a bill repealing the salvage rider. Id.
  \item Id. The salvage logging rider addresses three categories of timber sales.
\end{enumerate}
clear-cut healthy forests. Second, the sponsors claimed the rider would create revenue for the U.S. Treasury. On the contrary, the rider will end up costing taxpayers billions of dollars. Third, the sponsors told members of Congress the rider would help small businesses and landowners when, in reality, the rider will actually damage the property rights of private timberland owners by driving down timber prices. Fourth, the sponsors insisted the rider would not harm threatened fish and wildlife. If that were the case however, it would not have been necessary to suspend the laws that previously protected them. Fifth, the sponsors assured Congress the rider would speed implementation of President Clinton’s Forest Plan. Instead, the rider has undermined the plan by requiring the cutting of old growth reserves which the Forest Plan was designed to protect. Finally, the sponsors stated that the rider’s section 318 sales provision would only speed the harvest of a small number of old sales. The Ninth Cir-

§ 1611(b), (d), (k). Only one category involves salvage sales, and the definition of salvage under that category is broad enough to encompass healthy trees. § 1611(a), (b). The other two categories involve the sale of healthy trees. § 1611(d), (k).

193. Axline, supra note 4, at 631 n.121.
194. Id. According to the Wilderness Society, the rider will cost the federal treasury an estimated $430 million to $1.5 billion. Dorn, supra note 9, at 479 (citing Hearings on Timber Salvage Before the House Salvage Timber & Forest Health Task Force, 104th Cong. (Dec. 19, 1995) (statement of Rep. Elizabeth Furse).
195. Axline, supra note 4, at 631 n.121.
196. Id.
197. For detailed lists of sales offered pursuant to the rider that will have devastating impacts on ecosystems, see Western Ancient Forest Campaign, A Report to Congress and the American People on the Forest Health Rider (Jan. 5, 1996) and Headwaters, Timber Sale Victims of the Logging Without Laws Rider (Nov. 30, 1995). Axline, supra note 4, at 629 n.108.
198. Id. at 631 n.121.
199. Id. at 629 n.108.
200. Id. at 631 n.121. While some deliberations took place regarding the salvage provisions contained in the rider, Congress paid little attention to the provisions set forth in subsection (k) based on representations regarding its scope made by the rider’s sponsors. Dorn, supra note 9, at 472. Mere hours after President Clinton signed the Rescissions Act into law, however, several of the rider’s sponsors sent a letter to the Secretaries stating:

We want to make it clear that subsection (k) of the salvage legislation applies within the geographic area of National Forest units and BLM districts that were subject to Section 318 . . . and within that geographic area requires the release of all previously offered or awarded timber sales, including Section 318 sales as well as sales
cuit has since interpreted the rider as applying to every timber sale offered between October 1, 1990 and July 27, 1995 in Oregon or Washington.201

In addition to the misrepresentations explained by representative Furse, Senator Gorton also repeatedly assured Congress that immediate legislative action was necessary to “avoid catastrophic wildfires and to promote forest health.”202 Subsequently, Senator Gorton admitted that “[t]he salvage legislation [was] about one thing and one thing only, and that [was] jobs.”203 The riders sponsors also claimed the salvage rider was necessary to offset job losses within the timber industry caused by reductions in federal timber supplies.204 The sponsors blamed these reductions on the enforcement of various environmental laws.205 However, the enforcement of the nation’s environmental laws was only one of the many factors

offered or awarded in other years (such as Fiscal Years 1991-1995) that are not subject to Section 318. The reference to Section 318 in subsection (k)(1) defines the geographic area that is subject to subsection (k). . . . You can expect our active oversight of your implementation of the measure. . . . We expect each of you to provide us with written assurances that your agencies intend to implement Section [1611] in accordance with the direction provided in this letter.

Axline, supra note 4, at 635 (quoting Letter from Senators Slade Gorton (R-Wash.), Frank Murkowski (R-Alaska), & Larry Craig (R-Idaho), and Representatives Don Young (R-Alaska), Charles Taylor (R-N.C.), and Pat Roberts (R-Kan.), to Secretary of Agriculture Dan Glickman and Secretary of the Interior Bruce Babbitt (July 27, 1995)). In addition, immediately after the rider’s passage, the timber industry filed a lawsuit asking the court to declare that the language in subsection (k) mandated the release of a similar group of sales. Dorn, supra note 9, at 473; see supra Part II.C.1. When the district court judge subsequently decided in favor of the timber industry, seventeen members of Congress filed an amicus brief in the Ninth Circuit declaring they did not intend subsection (k) to have such a broad reach. Axline, supra note 4, at 632.

201. Axline, supra note 4, at 631 n.121.
202. Id. at 626 (quoting Letter from Senator Slade Gorton (R-Wash.) to Members of the Interior Subcommittee of the Senate Appropriations Committee (Mar. 20, 1995)). Many scientists, scholars, and environmentalists have strongly denied the existence of a “forest health crisis.” Dorn, supra note 9, at 462.
203. Axline, supra note 4, at 626 n.80 (quoting Furse Seeks Logging Law Repeal, OREGONIAN, Dec. 8, 1995, at B3.)
204. Kriz, supra note 19 (“people in my state have been suffering because of a lack of timber supply,” Gorton said.).
205. As a result, § 1611(i) was included in the Rescissions Act to exempt salvage timber and Option 9 sales from all federal environmental and natural resource laws.
leading to the decline in timber industry jobs. Advances in milling technology, the diversion of logs from mills to export markets, and an overabundance of timber from nonfederal sources have all contributed much more to the loss of jobs.

Moreover, Senator Gorton stated that the rider “provide[d] the Forest Service and Bureau of Land Management with the necessary authority to conduct salvage timber sales to remove dead, dying, bug infested and burned timber on federal lands nationwide.” The Forest Service and the BLM, however, already had the authority to offer salvage sales independent of the salvage logging rider. Finally, Senator Gorton claimed that if the previously awarded sales covered by § 1611(k) were not released, the federal government would be subject to damage claims of “well over $100 million.” This statement was disingenuous because Forest Service and BLM timber sale contracts contain cancellation provisions that may be invoked when necessary for environmental reasons.

Outraged by the numerous misrepresentations made by the rider’s sponsors, on December 7, 1995, Representative Furse introduced H.R. 2745, the Restoration of Natural Re-

206. Axline, supra note 4, at 616-17, 622.
207. Id.
208. Id. at 626 (quoting Letter from Senator Slade Gorton (R-Wash) to Members of the Interior Subcommittee of the Senate Appropriations Committee (Mar. 20, 1995)).
209. Id. The National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994), already authorizes the Forest Service to conduct salvage sales. Id. at 626 nn. 81-83. The BLM has adopted similar regulations at 43 C.F.R. § 5473.4(d) (1995). Id.
210. Gorton & Kays, supra note 9, at 644.
211. Axline, supra note 4, at 634 n. 141. A 1994 Forest Service memo stated the government would need $152 million to compensate loggers whose timber contracts had been set aside in Oregon and Washington. Kriz, supra note 19. However, $34 million was the figure estimated by the Congressional Research Service. Id.
source Law on the Public Lands Act. As of July 9, 1996, H.R. 2745 had 147 co-sponsors. Unfortunately, no action was taken on H.R. 2745 prior to the close of the 104th Congress. The bill is not likely to be reintroduced as the provisions of the rider will have expired by December 31, 1996.

D. 'PLAIN LANGUAGE' AND LEGISLATIVE INTENT IN THE CONTEXT OF RIDERS

Statutory interpretation begins with the plain language of the statute. In the case of the salvage rider, it has also tended to end there. The courts have found the language in the rider to be clear. In those instances where it has been necessary to look beyond the plain language of the rider's provisions, the court has found that the congressional intent regarding those provisions was also clear. But in reaching their decisions, the courts have relied on language crafted to serve special interests and congressional intent that was based on misrepresentation.

The courts have also relied heavily on statements made by the rider's sponsors. While there may not be any doubt regarding the sponsors' intent however, the Ninth Circuit has noted that "expressions of individual legislators' intent do not necessarily prove congressional intent." In the case of the salvage rider, there is substantial doubt as to what Congress intended. It is true that the timber amendments did initially

212. Dorn, supra note 9, at 465 n.136; Restoration of Natural Resources Laws on the Public Lands Act of 1995, H.R. 2745, 104th Cong. (1995) [hereinafter H.R. 2745]. The bill would 1) amend federal law to repeal the Emergency Salvage Timber Sale Program, and 2) direct the Secretaries to suspend all activities being conducted pursuant to the authority provided by that program until it is determined that the activity complies with all applicable environmental and natural resource laws. H.R. 2745. Shortly after Furse introduced H.R. 2745, she received a letter, written by an Oregon timber union official, warning her that her bill was "counterproductive to her current reelection campaign." Kriz, supra note 19.

213. H.R. 2745.


215. Bolduan, supra note 4, at 359 (citing Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 306 (9th Cir. 1989)).
enjoy broad support from both Democrats and Republicans. But given the congressional support for bill designed to repeal the provisions of the rider, it can be inferred that the initial support of many of the members of Congress was based on the misrepresentations made by the rider's sponsors.

Misrepresentations aside, if members of Congress continue to waive House and Senate rules, their substantive riders should not be allowed to hide behind the shield of the plain language rule. Instead, the general rule for judicial interpretation should be a presumption of invalidity for any substantive rider attached to an appropriations bill in violation of House and Senate rules, whether validly waived or not. The presumption would be rebuttable, but in making its decision, the court would be required to examine all the circumstances surrounding the enactment of the rider into law. Those circumstances would include any misrepresentations made by the rider’s sponsors, the content and scope of the rider’s provisions, including any suspension of current laws, and the degree to which the proper committees and the public have been excluded from the process. Undoubtedly, the best rules are the ones that are already in place, and if a new rule of judicial interpretation is not forthcoming, members of Congress simply should not be allowed to waive the existing rules prohibiting the attachment of substantive riders to appropriations bills.

VI. CONCLUSION

Fortunately, by the time this note is published, the salvage logging rider will have expired. However, the contents of this note are still highly relevant for at least three reasons. First, although the rider expires on December 31, 1996, the Forest Service can award contracts under the rider which extend through September 30, 1997. Second, some members of Congress are actively seeking an extension of the rider, by attaching yet another rider to a future appropriations bill.

216. Kriz, supra note 19.
217. Id.
218. § 1611(b)(1).
219. Dorn, supra note 9, at 482 (citing Salvage Logging Law: GOPers Propose Changes and Extension, GREENWIRE, Mar. 1, 1996). In 1996, legislation was introduced in the Senate to extend the provisions of the salvage logging rider for 10
Third, the salvage logging rider was not the first example, nor will it be the last, of the damage that can be done when certain members of Congress are allowed to waive or ignore House and Senate rules.220

House and Senate rules should not be waivable. If members of Congress are allowed to waive these rules, their efforts should not be rewarded by allowing the laws they create to hide behind the shelter of the plain language rule. When substantive riders are attached to appropriations bills, they should be subject to a presumption of invalidity that can only be overcome by examining all of the circumstances surrounding the rider from its conception to its application. This presumption would be almost as difficult a barrier for members of Congress to overcome as ‘arbitrary and capricious’ review is for persons challenging the riders. Since “[r]iders that originate in the dark of night are unlikely to look attractive in the light of day,”221 exposure to “the light” in the form of a presumption of invalidity would likely make the practice of attaching substantive riders to appropriations bills much less desirable. As a result, the legislative process might once again serve the public interest, not special interests.

VII. POSTSCRIPT

A. IDAHO SPORTING CONGRESS, INC. V. UNITED STATES FOREST SERVICE

Soon after deciding ONRC II, the Ninth Circuit had another opportunity to visit arbitrary and capricious review of salvage timber sales. In Idaho Sporting Congress, Inc. v. United States Forest Service,222 the Idaho Sporting Congress (ISC)
alleged that, with respect to three forest projects and seven associated timber sales, the Forest Service had violated the Rescissions Act, the Administrative Procedure Act, a presidential directive, an interagency Memorandum of Agreement concerning the implementation of the Rescissions Act, and the public trust doctrine. The court first held that because § 1611(f) of the Rescissions Act provides a specific mechanism for judicial review and offers a remedy, if appropriate, for every salvage timber sale, the APA is not applicable to

224. In his directive the President stated:
   I intend to carry out the objectives of the relevant timber-related activities authorized by Public Law 104-19 (the Rescissions Act). I am also firmly committed to doing so in ways that, to the maximum extent allowed, follow our current environmental laws and programs. Public Law 104-19 gives us discretion to apply current environmental standards to the timber salvage program, and we will do so. With this in mind, I am directing each of you . . . to move forward expeditiously to implement these timber-related provisions in an environmentally sound manner, in accordance with my Pacific Northwest Forest Plan, other existing forest and land management policies and plans, and existing environmental laws, except those procedural actions prohibited by Public Law 104-19.
   . . . I am directing that you enter into a Memorandum of Agreement . . . to make explicit the new streamlining procedures, coordination, and consultation actions that I have previously directed you to develop and that you have implemented under existing environmental laws.
ISC, 92 F.3d at 926.
225. The Memorandum of Agreement stated:
   THE PARTIES AGREE TO
   1. Comply with previously existing environmental laws except where expressly prohibited by Public Law 104-19, notably in the areas of administrative appeals and judicial review. In particular, the parties agree to implement salvage sales under Public Law 104-19 with the same substantive environmental protection as provided by otherwise applicable environmental laws and in accordance with the provisions of this MOA.
   2. . . . Adhere to the standards and guidelines in applicable Forest Plans and Land Use Plans and their amendments and related conservation strategies . . .
Id. at 926; Memorandum of Agreement on Timber Salvage Related Activities Under Public Law 104-19, between United States Department of Agriculture, United States Department of the Interior, United States Department of Commerce, United States Environmental Protection Agency (Aug. 9, 1995).
226. ISC, 92 F.3d at 924.
timber sales covered by the Rescissions Act. The court then held that the sales did not violate the Rescissions Act because they were not arbitrary and capricious. In addition, based on its holding in Inland Empire Public Lands Council and the plain language of the Rescissions Act, the court had no authority to review the Presidential directive or the Memorandum of Agreement. Finally, because it lacked the authority to review salvage timber sales covered by the Rescissions Act under any other environmental law, the court could not consider ISC’s claim that the Forest Service breached its duty to protect the public resource trust.

B. SIERRA CLUB v. UNITED STATES FOREST SERVICE

The scope of the language of the salvage timber sales provision was then litigated in Sierra Club v. United States Forest Service. In Sierra Club, the court was required to determine when “preparation” of a salvage timber sale ends for purposes of the Rescissions Act. The action was a NEPA challenge to several proposed salvage timber sales in the Warner Creek area of Oregon. After plaintiffs filed their complaint, Congress passed the Rescissions Act, eliminating the need to comply with NEPA when developing salvage timber sales. The Act applied to all salvage timber sales “in preparation” on the date of enactment. On the date that the Act went into effect, the Warner Creek sales were at two different stages: a small portion of the timber had already been advertised and offered, although not yet released, and the remainder of the timber had completed the necessary reporting procedures but had not yet been advertised. With regard to the advertised sales, the court found that § 1611(b) did not apply, but that § 1611(k) mandated the release of those sales

227. Id. at 925.
228. Id. at 927-28.
229. 93 F.3d 610 (9th Cir. 1996) (Sierra Club).
230. Id. at 611. § 1611(b)(3) states: “Any salvage timber sale in preparation on the date of the enactment of this Act [July 27, 1995] shall be subject to the provisions of this section.” § 1611(b)(3) (emphasis added).
231. Sierra Club, 93 F.3d at 611.
232. Id.
233. § 1611(b)(3).
234. Sierra Club, 93 F.3d at 612.
and rendered plaintiff's NEPA claim moot. 235 With regard to the unadvertised sales, the court found that Congress gave "preparation" a special and specific meaning for the purposes of the Act alone, and that meaning could be gleaned through the use of the term elsewhere in the statute. 236 Accordingly, the court held that § 1611(b) broadly applied to all salvage timber sales which had not yet been advertised on the date of the enactment, including the unadvertised sales at issue in the case. 237

C. SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY v. GLICKMAN

Finally, 42 days prior to the expiration of the salvage rider, the Ninth Circuit decided Southwest Center for Biological Diversity v. Glickman. 238 In Southwest Center, the Center filed an action claiming that a proposed salvage timber sale in the Coronado National Forest violated the Rescissions Act because the Biological Assessment and Evaluation (BA&E) prepared by the Forest Service did not comply with the Act's requirements. 239 In addition, the Center argued that conclusions contained in, and stemming from, the BA&E were arbitrary and capricious and that extra-record documents had been erroneously struck by the district court. 240

The Forest Service had designated 69 of 27,500 acres burned in a 1994 forest fire as suitable for salvage. 241 A BA&E conducted by a Forest Service biologist concluded that the sale would have no effect on the Mexican Spotted Owl, an endangered species. 242 This conclusion was in direct conflict with an internal Fish and Wildlife Services policy. 243 Based on the "no effect" determination, and despite the conflict, the
Forest Service categorically excluded the salvage sale from any further environmental assessment under NEPA. 244

In affirming the lower court's decision, that failure to prepare an EA/BE was not a per se violation of the Rescissions Act, the Ninth Circuit looked first to the adequacy of the Forest Service's documentation. 245 Finding that, in some cases, NEPA allowed for the issuance of a categorical exclusion in place of an EA and that the proposed sale met the criteria, the Ninth Circuit held that the BA&E met the demands of the Rescissions Act. 246 The court stated that “sections of a statute generally should be read to give effect, if possible, to every clause,” and that where a statute is ambiguous, “the question for the court is whether the agency's answer is based on a permissible construction of the statute.” 247 The court concluded that it must defer to the Secretary's decision that a document other than a combined EA/BE could be used to satisfy the Act's requirements, provided the document complied with NEPA and the ESA. 248

The Ninth Circuit next reviewed the Forest Service's conclusions. The Center argued that the Forest Service's disregard of the Fish and Wildlife Service's Mexican Spotted Owl policy constituted a failure to consider an important aspect of the problem and was thus arbitrary and capricious. 249 Despite the Forest Service's commitment to the Memorandum of Agreement, the Ninth Circuit found that the Forest Service had no obligation to consider other agencies' views because the Memorandum was not legally binding. 250 The court also cited its previous decision in Inland Empire for its conclusion that the Secretary had discretion to disregard the effect of a salvage sale on an endangered species. 251
Finally, the Ninth Circuit upheld the exclusion of a letter from the Regional Forester to the Forest Supervisors detailing “interagency consultation procedures required for compliance with the ESA in salvage timber sales under the Rescissions Act,” because it was issued one month after the approval of the proposed sale.\textsuperscript{252} Similarly, several maps and declarations were struck because the information they contained was duplicated elsewhere in the record.\textsuperscript{253}

\textit{Julie A. Coldicott\textsuperscript{*}}

\textsuperscript{252} \textit{Southwest Center}, 100 F.3d at 1449.

\textsuperscript{253} \textit{Id.}

\textsuperscript{*} Golden Gate University, School of Law, Class of 1998. Thanks to Naomi Comfort and Cliff Rechtschaffen for their comments and suggestions. Special thanks to Amber Bell for never questioning and always believing. All my love to my husband, Jack Barnett, whose support and patience are an unending source of inspiration. This note is dedicated to Justice and Jagger, two of the best reasons to preserve what remains of the old-growth forests in the Pacific northwest.

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