3. An order restraining the Respondent and its servants, agents, licensees or contractors from carrying out or consenting to carrying out of the said activities or encouraging, authorising, approving or otherwise permitting the said activities in the said Compartments of Chaelundi State Forest.

4. Such further or other orders as the Court deems fit.

5. Costs.

The Applicant also claims by way of interlocutory relief:

(a) An order until further order restraining the Respondent, BY ITSELF BY and its servants, agents, licensees or contractors from carrying out or consenting to carrying out of the said activities or encouraging, authorising, approving or otherwise permitting the said activities in the said Compartments of Chaelundi State Forest.

Date: Signed: ..... BRUCE WOOLF Solicitor

To the Respondent: **FORESTRY COMMISSION OF NEW SOUTH WALES**
95 Castle Hill Road
WEST PENNANT HILLS NSW 2120

A Callover will take place before the registrar at the time and place specified below OR

The hearing of (or the applicant's claim for interlocutory relief in) these proceedings will take place before the Court at the time and place specified below.

If there is no attendance before the Court or the Registrar, as the case may be, by you or your counsel or solicitor, or agent authorised by you in writing, the hearing or Callover may take place and orders may be made in your absence.

Time: am on the day of 19

Place: The Land and Environment Court of New South Wales
Level 6, American Express Tower
388 George Street (cnr King Street)
SYDNEY NSW 2001

.....
Registrar

DRAFT 2

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

No. 40169 of 1991

JOHN ROBERT CORKILL
Applicant

FORESTRY COMMISSION OF N.S.W.
First Respondent

G.L. BRIGGS & SONS LIMITED
Second Respondent

DUNCAN HOLDINGS LIMITED
Third Respondent

ALLEN TAYLOR & CO LIMITED
Fourth Respondent

AFFIDAVIT

HAROLD EDWIN PARNABY
Deponent

Sworn: th August, 1991

WOOLF ASSOCIATES

Solicitors, 10th Floor,

82 Elizabeth Street,
SYDNEY. N.S.W. 2000
Phone: 02 221 8522
Facsimile: 02 223 3530
DX: 1558

Ref: Mr BRUCE WOOLF

I, HAROLD EDWIN PARNABY OF 89 Denison Street, Camperdown in the State of New South Wales do solemnly, sincerely and truly affirm and declare as follows:

1. I am a Scientific Officer with the Mammal Department of the Australain Museum. I am a specialist in bat fauna and I have extensive experience in general mammal surveys during the last 18 years in Australia, New Guinea and the Solomon Islands. Between 1981 and 1983 I was employed by the NSW National Parks and Wildlife Service 'Five Forests Study' in the south east New South Wales to study the impact of woodchip operations on bats. Between 1984 and 1985 I was employed as a consultant for the NSW National Parks and Wildlife Service to evaluate the national significance of the rainforest bat fauna of New South Wales and to survey sclerophyll and rainforest bat fauna in the National Parks and nature reserves of north eastern New South Wales. I was a consultant to the Victorian Government to review forestry impacts on bats during the Ferguson inquiry into the timber industry and I was employed by the Victorian Department of Conservation, Forests and Lands to study the potential impacts of sivicultural practices on bats in tall sclerophyll forests. In 1989 I was awarded a Doctorate of

FORESTRY COMMISSION, N.S.W.

DISTRICT OFFICE

INVERELL

No. D.O. 416

L.O. 1400

SKD:SD

Koala Management

R.O. 1704 H.O. 1512

Koala's are very uncommon in the forests of the Inverell area and in any case our major product, Cypress pine logs, are not koala habitat.

Occasional koalas are seen on leasehold lands and in streamside eucalypts on forest land. If a koala is seen it is invariably left alone and care is taken to avoid disturbance by logging close by.

The approach seems reasonable for application over better koala habitat sites.

S.K. Dodds
DISTRICT FORESTER

13th November, 1989

Regional Forester
Glen Innes

Philosphy for a thesis titled "Systematics of the Long-eared bat Genus Nyctophilus". I have had extensive experience in species taxonomy of south eastern Australian bats.
A detailed curriculum vitae is annexed hereto and marked "A".

2. In response to a request by John Corkill, I have examined the relevant parts of the Environmental Impact Statement titled "Proposed Hardwood Operations - Compartments 180, 198 and 200 Chaelundi State Forest" (the EIS) and the Report on the EIS Determination published by the Forestry Commission of NSW, and have familiarised myself with the harvesting plans for Compartments 180, 198 and 200 of the Chaelundi State Forest ("the Forest"). With respect to the proposed roading and logging in the forest, I make the following comments:

The EIS and the submissions on the EIS and the EIS report do not provide any data on the bat fauna other than listing the five species trapped by Mr Hinse.

In addition to the five bat species recorded by Mr Hines, it is reasonable to expect the following 17 bat species to occur in these compartments of the Chaelundi State Forest based on known habitat occurrences and distribution in adjoining regions:

*Chalinolobus gouldii	Gould's Wattled Bat
C. dwyeri	Large Pied Bat
*Eptesicus pumilis	Small Eptesicus
*E. troughtoni	Troughton's Eptesicus
*Nyctophilus gouldi	Gould's Long-eared Bat
*N. geoffroyi	Lesser Long-eared Bat
*Falsistrellus tasmaniensis	Great Pipistrelle
*Scoteanax rueppellii	Greater Broad-nosed Bat
*Scotorepens orion	Broad-nosed Bat
Miniopterus schreibersii	Bent-wing Bat
Myotis adversus	Large-footed Bat
*Phoniscus papuensis	Dome-headed Bat
*Nyctinomus australis	White-striped Bat
*Mormopterus loriae	Little Northern Mastiff-bat
*Taphozous flaviventris	Yellow-bellied Sheathtail Bat
Pteropus scapulatus	Little Red Flying Fox
Pteropus poliocephalus	Grey-headed Flying Fox

I have marked with an asterisk those species which are hollow dependent, that is they dependent on tree hollows for ...

Some 70 % of hollow dependent mammal species that can reasonably be expected to occur in these compartments will be bat species, i.e. 15 hollow dependent bat species compared to 7 other hollow dependent mammal species.

In addition, 4 of the sp recorded by Mr Hines are also hollow dependent

16/23

16/23 23/160

GLEN INNES

D.O. 309

SJT:CGC

KOALA MANAGEMENT
GLEN INNES DISTRICT
R.O. 1704

To my knowledge, there has been no sightings of koalas on State Forests of this District in at least the last 10 years. The closest sightings were at Washpool National Park, around 10 years ago, and also reports from drier, woodland freehold areas west of Glen Innes.

1) No routine procedures are applied in the field in this District with respect to koalas. However, any sightings, whether by contractors, employees or the public would soon come to our notice.

2) Given the very small chances of discovering koalas on State Forests of this District, I would suggest continuation of the informal, but reasonably effective surveillance currently in place.

Management practices undertaken within this District including selective logging for sawlogs are unlikely to significantly affect any koala populations, should they be discovered.

S.J. TOMS,
DISTRICT FORESTER.

14th December, 1989.

Regional Forester,
GLEN INNES.

Based on my experience I consider all bat species which roost in hollows in the Chaelundi area (some 15 species) can be expected to be hollow dependent species, particularly in view of the results of several recent radio tracking studies which indicated preferential roosting by a number of species in hollows of large eucalypts (Lunney et al. 1986; Lunney et al. 1988; Taylor and Savva 1988; K. Cherry, Department of Conservation and Environment, Victoria, pers. comm.).

The EIS states (pg 129 para 2):

> "Bats's requirements for hollows within the mature forest will be maintained. Therefore, species dependent on resources found in mature forest will not be disadvantaged by the proposal."

This statement is untenable. It ignores for example, potential impacts on the insect food resource. It also takes no account of the impacts of structural changes to the forest stands on the foraging abilities of different species of bat which are known to vary widely in their flight characteristics and maneavearability, some species being unable to forage in denser timber stands.

The EIS does not adequately address potential impacts of timber harvesting or roading operations on the bat fauna. Further, the EIS Report states page 24 para 3:

> "The EIS recognises the presence of bats but contends that the impact of operations is unlikely to cause significant impact."

Based on what is known of the diverse ecological requirements of different bat species, this statement is totally unjustifiable, has little factual basis and is unscientific.

The EIS Report states (pg 10 para 4):

> "Bats are likely to be affected similarly to other tree dwelling mammals.. "

This statement is absurd (Presumably it refers to other hollow dependant mammal species). ...

There is limited knowledge available concerning most essential aspects of the life history of each bat species. As insectivorous bat species are likely to have diverse ecological requirements, a substantial safety margin must be incorporated in any plan to reduce impacts of forestry operations. In my opinion the following information about each vulnerable species is an essential pre-requisite to the description and assessment of likely impacts on bat species of forestry operations and of the steps which can be taken to avert or mitigate such impacts:

ARMIDALE

JCB:SPS D.O. REF: 349

Koala Management

R.O. Ref: 1704

The Armidale District has at least one colony of Koalas on State Forest.

There are no immediate plans for logging the area, and therefore no routine procedures have been developed.

In recognition of the need for some modification of harvesting, the area has been zoned 1.1.6 of Preferred Management Priority maps.

J.C. Brandis,
District Forester.

17th November 1989.

The Regional Forester,
GLEN INNES.

a) Roosting requirements of each species.

A population of a given bat species will probably require many and varied roost sites in the one area. Roost requirements will differ at different times of the year, or at different stages in the reproductive cycle for each sex and for adults as compared to young animals. For example adult females are likely to aggregate in an all female maternity colony. The microclimate of such a maternity roost is likely to be critical. For example, temperature is known to substantially influence growth of young. Most species are likely to go into torpor during the winter and the type of roost selection in the cold winter months might be quite different to that in summer. Social structure will also influence roost requirements. It is known that adult males and females are likely to roost in single sex colonies, at least at certain times of the reproductive cycle. A number of species are known to change roosts regularly, even every few nights, possibly so as to avoid predators. Lunney et al. (1988) found in a study of Gould's Long-eared Bat that an individual would utilise a number of different roosts in a restricted area of about 1 km. Apart from the physical suitability of a hollow in terms of its internal dimensions, entrance size and height above ground, the extent of daily exposure of the roost tree to direct sunlight and the proximity of roosts to essential resources such as water and feeding grounds will probably be important. Tidemann and Flavel (1985) found that the majority of maternity roosts of several species studied were within a few hundred metres of permanent or semi-permanent water. If logging operations reduce the number of hollows, bats will probably compete with other types of animals such as possums and gliders for tree hollows. Tolerance to co-habitation with other species and indeed other bats, must be studied to determine whether there will be competition between species with significant adverse effects on any particular species.

Distances moved by individuals

The impact of disturbance on bat species will vary according to the mobility of different species of bat. The relevant distances include nightly movements from roost to forage areas, from one roost site to another and seasonal movements and regional altitudinal movements to follow changes in the insect food resource. This should include a study of the differences between adults and juveniles, males and females.

Foraging Behaviour and Diet of Each Species

The degree of dietary specialistion and the different flight patterns of each species are important. Overseas studies of temperate zone insectivorous bats indicate that dietary requirements of females are different during pregnancy and lactation. If those requirements cannot be obtained from

CHAELUNDI E.I.S.
COMPOSITE LIST.

DICOTYLEDONS.

FAMILY	SPECIES	COMMON NAME	HABIT	OCCUR	TYPE 2/3	TYPE 6/23	TYPE 3/11	TYPE 33	TYPE 7	TYPE 15	TYPE 142/163	TYPE 168	TYPE 163a
Sapindaceae	Diploglottis australis	Tamarind	T	C	+	-	+	-	-	-	-	-	-
Sapindaceae	Sarcopteryx stipata	Steelwood	T	C	+	+	+	-	-	-	-	-	-
Sapotaceae	Planchonella australis	Black Apple	T	C	+	-	+	-	-	-	-	-	-
Solanaceae	Solanum densevestitum	Hairy Nightshade	S	VC	-	-	-	-	+	-	+	+	-
Solanaceae	Solanum inaequilaterum (sporadotrichum)	Few-thorned Nightshade	S	VC	-	+	+	-	-	-	-	-	-
Sterculiaceae	Argyrodendron actinophyllum	Black Booyong	T	C	-	+	+	-	-	-	-	-	-
Sterculiaceae	Brachychiton acerifolius	Flame Tree	T	R	-	-	-	-	-	-	-	-	-
Urticaceae	Dendrocnide excelsa (Laportea gigas)	Giant Stinging Tree	T	C	-	-	+	-	-	-	-	-	-
Verbenaceae	Clerodendrum tomentosum	Hairy Clerodendron	T	R	-	-	-	-	+	-	-	-	●
Winteraceae	Tasmannia (Drimys) insipida (dipetala)	Tasteless Pepper Bush	S	VC	-	-	+	-	-	-	-	-	-
Araliaceae	Cephalaralia cephalobotrys	Climbing Parax	[illegible]	C	-	+	-	-	-	-	-	-	-
Bignoniaceae	Pandorea pandorana	Wonga Wonga Vine	V	VC	+	+	-	-	-	-	-	-	-
Celastraceae	Celastrus subspicatus	Large Staff Climber	V	VC	-	-	-	-	-	-	-	-	-
Cunoniaceae	Aphanopetalum resinosum	Gum Vine	V	C	-	+	-	-	-	-	-	-	-
Dilleniaceae	Hibbertia dentata	Twining Guinea-flower	V	C	-	-	-	-	-	-	-	-	-
Dilleniaceae	Hibbertia scandens (volubile)	Snakevine	V	VC	-	-	-	+	+	+	+	+	+
Fabaceae	Glycine clandestina	Twining Glycine	V	VC	-	-	-	-	-	+	+	+	-
Fabaceae	Hardenbergia violacea	False Sarsaparilla	V	VC	-	-	-	-	-	+	+	+	-
Fabaceae	Kennedia rubicunda	Soldier Vine	V	VC	-	-	-	-	-	+	+	+	-
Menispermaceae	Stephania japonica var. discolor	Tape Vine	V	C	+	-	+	-	-	-	-	-	-
Monimiaceae	Palmeria scandens	Anchor Vine	V	VC	+	+	+	-	-	-	-	-	-
Pittosporaceae	Billardiera scandens	Common Apple-berry	V	C	-	-	-	-	-	+	+	+	+
Ranunculaceae	Clematis aristata	Traveller's Joy	V	C	-	-	+	-	+	+	-	-	-
Rosaceae	Rubus moorei	Greenleaf Bramble	V	C	+	+	+	-	+	-	-	-	+
Rosaceae	Rubus parvifolius	Native Raspberry	V	VC	-	-	-	-	-	-	+	-	-
Rubiaceae	Morinda jasminoides	Jasmine Morinda	V	C	-	-	+	-	+	-	-	-	●
Vitaceae	Cissus antarctica	Simple Water Vine	V	VC	+	+	+	+	+	-	+	-	-
Vitaceae	Cissus hypoglauca	White-leaved water vine	V	VC	+	+	+	+	-	+	-	+	+

forest areas because of the impact on the insect resource of logging operations, then long term population survival of a particular species may be jeopardized. Different bat species differ markedly in their flight and hunting behaviour. Some species lack manoeuverablility and require open vegetation. Young regrowth forest may be too dense for such species thereby affecting their foraging and social activities.

REFERENCES

7. The articles referred to above are as follows:

Lunney, D., Barker, J. and Priddel, D. 1985. Movements and day roosts of the Chocolate Wattled Bat Chalinolobus morio in a logged forest. Australian Mammalogy 8: 313-317.

Lunney, D., Barker, J., Priddel, D. and O'Connell, M. 1988. Roost selection by Gould's Long-eared Bat, Nyctophilus gouldi, in logged forest on the south coast of New South Wales. Australian Wildlife Research 15: 375-384.

Taylor, R.J. and Savva, N.M. 1988. Use of roost sites by four species of bats in State Forest in South-eastern Tasmania. Australian Wildlife Research 15:637-645.

Tidemann, C.R. and Woodside, D.P. 1978. A collapsible bat-trap and a comparison of results obtained with the trap and with mist nets. Australian Wildlife Research 5: 355-362.

Affirmed and declared at)
Sydney in the state of)
New South Wales this)
9th day of August, 1991.) .....
Deponent

Before me:

.....
Solicitor/Justice of the Peace

add Tidemann + Flavel

FORESTRY COMMISSION, N.S.W.

DchMPD.20/12.

FORESTRY OFFICE
REGIONAL OFFICE,
GLEN INNES.

BJF/DLR

21 DEC 1989

No. R.O. Ref/1704

L.O. 1400

PROUDLY PRINTED IN AUSTRALIA

KOALA MANAGEMENT
H.O. REF/1512 MPD

In the spirit of your request dated 8th November, 1989, reports which detail what steps each individual District takes toward koalas are attached.

Generally koalas are more commonly found on the forest fringe where woodland like conditions, rather than mature high forest, exist. Of the dozen or so "bears" I've seen they all, except two, have been in individual trees or groups of trees, not undisturbed high forest.

In summary, our policy is to leave trees with koalas in alone, at least in the short term. If a colony is identified we make special emphasis protection for that area. No colony has been found in plantation clearing areas.

BJF

B.J. FURRER,
REGIONAL FORESTER.

20th December, 1989

M.P.D.

The Secretary,
FORESTRY COMMISSION.
ATTN: MR. MILLS, MPD

Mills 8/2/1

Two bat species with Schedule 12 listing can reasonably ~~to~~ be expected to occur in the Chaelundi area based on their habitat preferences and distribution in adjoining areas of New South Wales. These are the Dome-headed Bat, listed as "Vulnerable and Rare" on Schedule 12 and the Large Footed Myotis which is listed as of "Special Concern".

Based on my experience I consider all bat species which roost in hollows in the Chaelundi area (some 16 species) can be expected to be hollow dependent species, particularly in view of the results of several recent radio tracking studies which indicated preferential roosting by a number of species in hollows of large eucalypts (Lunney et al. 1985; Lunney et al. 1988; Taylor and Savva 1988; K. Cherry, Department of Conservation and Environment, Victoria, pers. comm.).

The EIS states (pg 129 para 2):

> "Bats's requirements for hollows within the mature forest will be maintained. Therefore, species dependent on resources found in mature forest will not be disadvantaged by the proposal."

This statement is untenable. It ignores for example, potential impacts on the insect food resource. It also takes no account of the impacts of structural changes to the forest stands on the foraging abilities of different species of bat which are known to vary widely in their flight characteristics and maneavearability, some species being unable to forage in denser timber stands.

The EIS does not adequately address potential impacts of timber harvesting or roading operations on the bat fauna. Further, the EIS Report states page 24 para 3:

> "The EIS recognises the presence of bats but contends that the impact of operations is unlikely to cause significant impact."

Based on what is known of the diverse ecological requirements of different bat species, this statement is totally unjustifiable, has little factual basis and is unscientific.

There is limited knowledge available concerning most essential aspects of the life history of each bat species. As insectivorous bat species are likely to have diverse ecological requirements, a substantial safety margin must be incorporated in any plan to reduce impacts of forestry operations. In my opinion the following information about each vulnerable species is an essential pre-requisite to the description and assessment of likely impacts on bat species of forestry operations and of the steps which can be taken to avert or mitigate such impacts:

13.6.3 Responsibility for Implementing the EMP

107. The manager of the Jervis Bay Armament Complex will be a civilian who is responsible to the Naval Support Commander in Sydney. The Complex Manager has a small headquarters staff who will act as senior advisers on administrative and operational activities. In addition to the civilian manning of the Wharf and Depot operations, there will be a complement of Naval Police for security and firefighting duties and Naval personnel for operation of wharf cranes, tugs and workboats.

108. The Complex manager will be responsible for all armament operations including, all environmental controls on the armament transport from Sydney to Jervis Bay. The Jervis Bay locations include the Depot, the Wharf and their link road.

109. Functions reporting to the Complex manager which are of relevance to the EMP are:

- Armament Transport
- Armament Supply
- Shipping Control
- Public Safety Control
- Engineering Support
- Telecommunications
- Medical and Facilities Support.

a) Roosting requirements of each species.

A population of a given bat species will probably require many and varied roost sites in the one area. Roost requirements will differ at different times of the year, or at different stages in the reproductive cycle for each sex and for adults as compared to young animals. For example adult females are likely to aggregate in an all female maternity colony. The microclimate of such a maternity roost is likely to be critical. For example, temperature is known to substantially influence growth of young. Most species are likely to go into torpor during the winter and the type of roost selection in the cold winter months might be quite different to that in summer. Social structure will also influence roost requirements. It is known that adult males and females are likely to roost in single sex colonies, at least at certain times of the reproductive cycle. A number of species are known to change roosts regularly, even every few nights, possibly so as to avoid predators. Lunney et al. (1988) found in a study of Gould's Long-eared Bat that an individual would utilise a number of different roosts in a restricted area with roosts being less than about 1 km apart. Apart from the physical suitability of a hollow in terms of its internal dimensions, entrance size and height above ground, the extent of daily exposure of the roost tree to direct sunlight and the proximity of roosts to essential resources such as water and feeding grounds will ~~probably~~ be important. Tidemann and Flavel (1987) found that the majority of maternity roosts of several species studied were within a few hundred metres of permanent or semi-permanent water. If logging operations reduce the number of hollows, bats will probably compete with other types of animals such as possums and gliders for tree hollows. Tolerance to co-habitation with other species and indeed other bats, must be studied to determine whether there will be competition between species with significant adverse effects on any particular species.

I accept those observations in the formulation of my opinion

in my opinion

in addition to knowledge of maternity roosts

I accept that observation ~~upon~~ my own

before comments like those quoted from the EIS can be authoritatively made.

Distances moved by individuals

From my accumulated professional knowledge I consider that

The impact of disturbance on bat species will vary according to the mobility of different species of bat. The relevant distances include nightly movements from roost to forage areas, from one roost site to another and seasonal movements and regional altitudinal movements to follow changes in the insect food resource. This should include a study of the differences between adults and juveniles, males and females.

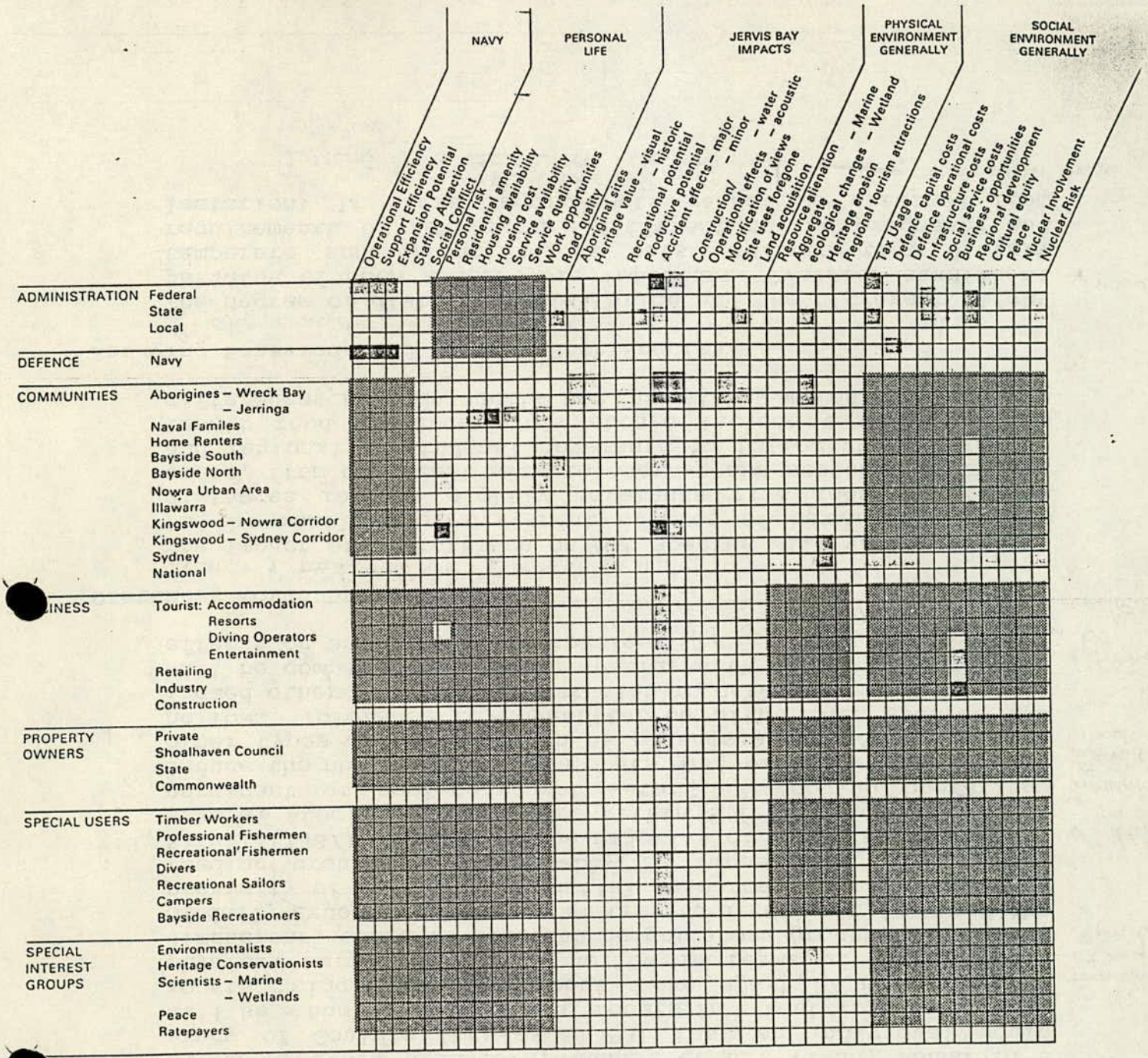
Foraging Behaviour and Diet of Each Species

I also consider that

The degree of dietary specialistion and the different flight patterns of each species are important. Overseas studies of temperate zone insectivorous bats indicate that dietary requirements of females are different during pregnancy and lactation. If those requirements cannot be obtained from

* names?

I accept those ~~studies~~ observations as accurate and ~~conclude~~ agree with those opinions.



LEGEND

POSITIVE IMPACTS

MAJOR

MODERATE

MINOR

NEGATIVE IMPACTS

MAJOR

MODERATE

MINOR

NO INTERACTION

1. Recovery of capital from the sale of Newington will offset cost of relocating to Armament Complex (in part)
2. Higher economic use of State Forest land.
3. Regional development potential moderate due to low potential of Armament Complex.
4. Notional loss: potential for National Park reduces but this ambition unreal.
5. Reduces potential for Marine Reserves.
6. Higher cost of Armament Wharf at Cabbage Tree Point to secure lower environmental impacts and improve certainty of outcome.
7. Permanent conservation of Wetland/coastal lands adjoining Camara Creek would preserve the utility of the Green Point area for traditional uses.

Fig 13.5.1
INCIDENCE OF ENVIRONMENTAL EFFECTS OF ARMAMENT COMPLEX RELOCATION

forest areas because of the impact on the insect resource of logging operations, then long term population survival of a particular species may be jeopardized. Different bat species differ markedly in their flight and hunting behaviour. Some species lack manoeuverablility and require open vegetation. Young regrowth forest may be too dense for such species thereby affecting their foraging and social activities.

REFERENCES

7. The articles referred to above are as follows:

Lunney, D., Barker, J. and Priddel, D. 1985. Movements and day roosts of the Chocolate Wattled Bat Chalinolobus morio in a logged forest. Australian Mammalogy 8: 313-317.

Lunney, D., Barker, J., Priddel, D. and O'Connell, M. 1988. Roost selection by Gould's Long-eared Bat, Nyctophilus gouldi, in logged forest on the south coast of New South Wales. Australian Wildlife Research 15: 375-384.

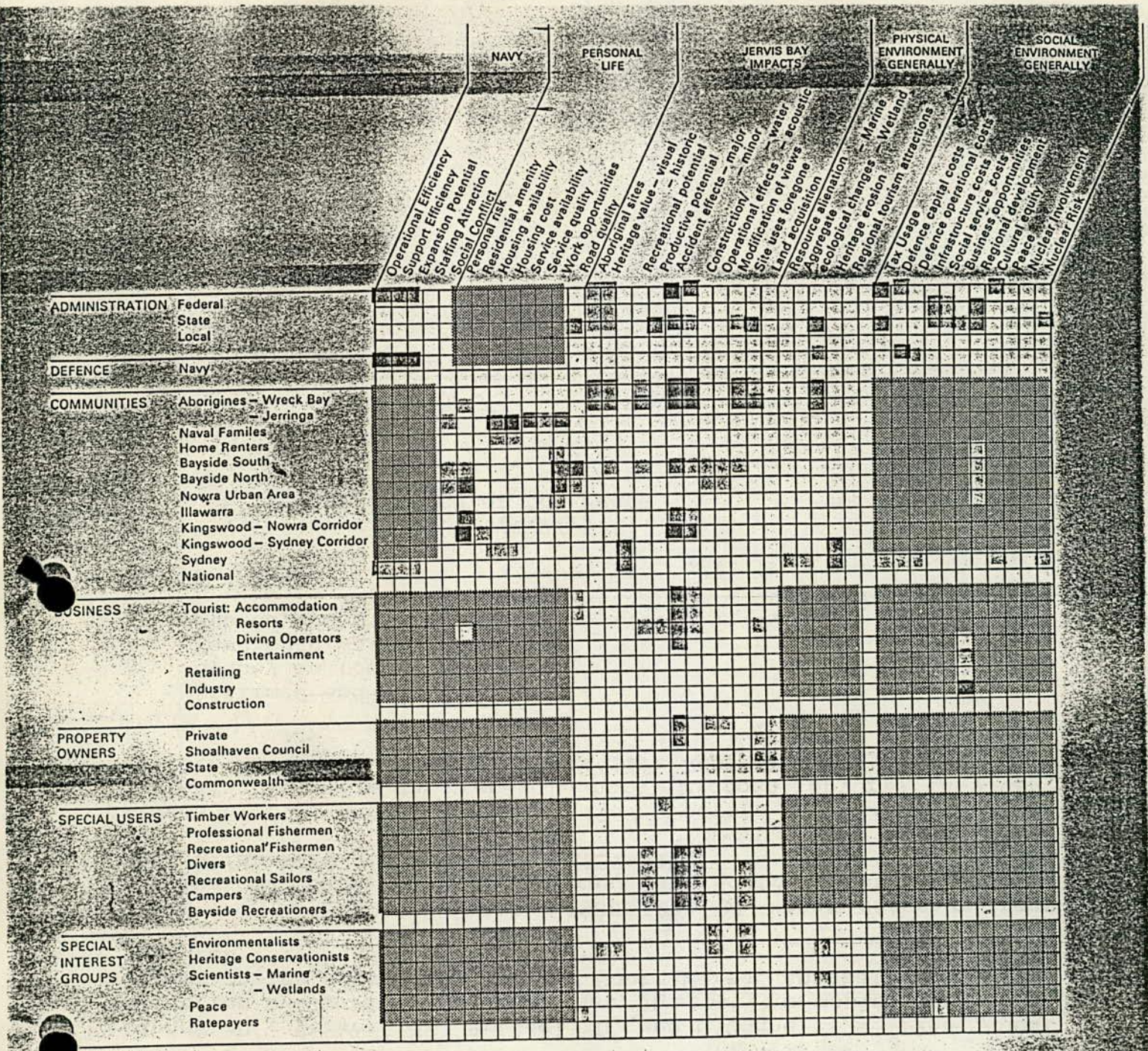
Taylor, R.J. and Savva, N.M. 1988. Use of roost sites by four species of bats in State Forest in South-eastern Tasmania. Australian Wildlife Research 15:637-645.

Tidemann, C.R. and Flavel, S.C. 1987. Factors affecting choice of diurnal roost site by tree-hole bats (Microchiroptera) in south-eastern Australia. Australian Wildlife Research 14: 459-473.

Affirmed and declared at)
Sydney in the state of)
New South Wales this)
9th day of August, 1991.) .....
Deponent

Before me:

.....
Solicitor/Justice of the Peace



LEGEND

POSITIVE IMPACTS

- MAJOR
- MODERATE
- MINOR

NEGATIVE IMPACTS

- MAJOR
- MODERATE
- MINOR
- NO INTERACTION

1. Recovery of capital from the sale of Newington will offset cost of relocating to Armament Complex (in part)
2. Higher economic use of State Forest land.
3. Regional development potential moderate due to low potential of Armament Complex.
4. Notional loss: potential for National Park reduces but this ambition unreal.
5. Reduces potential for Marine Reserves.
6. Higher cost of Armament Wharf at Cabbage Tree Point to secure lower environmental impacts and improve certainty of outcome.
7. Permanent conservation of Wetland/coastal lands adjoining Camara Creek would preserve the utility of the Green Point area for traditional uses.

Fig 13.5.1
INCIDENCE OF ENVIRONMENTAL EFFECTS OF ARMAMENT COMPLEX RELOCATION

Philosphy for a thesis titled "Systematics of the Long-eared bat Genus Nyctophilus". I have had extensive experience in species taxonomy of south eastern Australian bats.
A detailed curriculum vitae is annexed hereto and marked "A".

2. In response to a request by John Corkill, I have examined the relevant parts of the Environmental Impact Statement titled "Proposed Hardwood Operations - Compartments 180, 198 and 200 Chaelundi State Forest" (the EIS) and the Report on the EIS Determination published by the Forestry Commission of NSW, and have familiarised myself with the harvesting plans for Compartments 180, 198 and 200 of the Chaelundi State Forest ("the Forest"). With respect to the proposed roading and logging in the forest, I make the following comments:

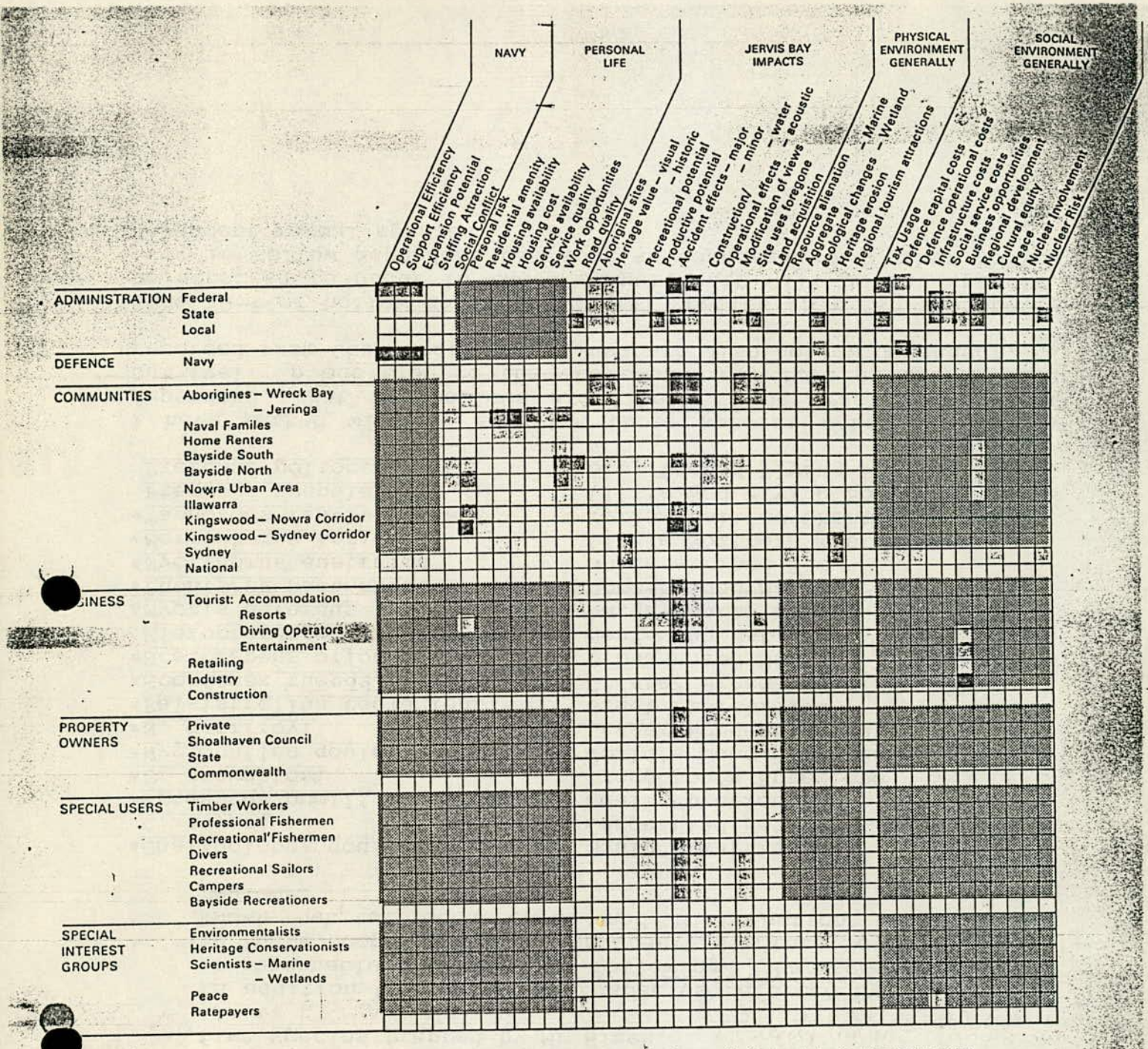
The EIS and the submissions on the EIS and the EIS report do not provide any data on the bat fauna other than listing the five species trapped by Mr Hines, as recorded in his submission on the EIS which I have seen and his affidavit both of which I have read and accept as fact.
In addition to the five bat species recorded by Mr Hines, it is reasonable to expect, based upon my considerable experience in the field and my review of museum records and the uncontroversial literature concerning the habitat and distribution which I accept as true, the following 17 bat species to occur in these compartments of the Chaelundi State Forest ~~based on known habitat occurrences and distribution in adjoining regions:~~

*Chalinolobus gouldii	Gould's Wattled Bat
C. dwyeri	Large Pied Bat
*Eptesicus pumilis	Small Eptesicus
*E. troughtoni	Troughton's Eptesicus
*Nyctophilus gouldi	Gould's Long-eared Bat
*N. geoffroyi	Lesser Long-eared Bat
*Falsistrellus tasmaniensis	Great Pipistrelle
*Scoteanax rueppellii	Greater Broad-nosed Bat
*Scotorepens orion	Broad-nosed Bat
Miniopterus schreibersii	Bent-wing Bat
*Myotis adversus	Large-footed Myotis
*Phoniscus papuensis	Dome-headed Bat
*Nyctinomus australis	White-striped Bat
*Mormopterus loriae	Little Northern Mastiff-bat
*Taphozous flaviventris	Yellow-bellied Sheathtail Bat
Pteropus scapulatus	Little Red Flying Fox
Pteropus poliocephalus	Grey-headed Flying Fox

I have marked with an asterisk those species which are hollow dependent, that is, hollows are likely to be crucial for their survival. In addition to the above species, four of the species recorded from Chaelundi by Mr Hines are also hollow dependent.

~~Some 70 %~~ Two thirds of hollow dependent mammal species that can reasonably be expected to occur in these compartments will be bat species, i.e. 16 hollow dependent bat species compared to 7 other hollow dependent mammal species.

64
25 16 0
100



LEGEND

POSITIVE IMPACTS

- MAJOR
- MODERATE
- MINOR

NEGATIVE IMPACTS

- MAJOR
- MODERATE
- MINOR
- NO INTERACTION

1. Recovery of capital from the sale of Newington will offset cost of relocating to Armament Complex (in part)
2. Higher economic use of State Forest land.
3. Regional development potential moderate due to low potential of Armament Complex.
4. Notional loss: potential for National Park reduces but this ambition unreal.
5. Reduces potential for Marine Reserves.
6. Higher cost of Armament Wharf at Cabbage Tree Point to secure lower environmental impacts and improve certainty of outcome.
7. Permanent conservation of Wetland/coastal lands adjoining Camara Creek would preserve the utility of the Green Point area for traditional uses.

Fig 13.5.1
INCIDENCE OF ENVIRONMENTAL EFFECTS OF ARMAMENT COMPLEX RELOCATION

subsection (a) [enacting subsec. (c) (2) of this section] shall take effect January 1, 1981."

Endangered Species Scientific Authority; Interim Performance of Functions of Commission. Section 6(b) of Pub.L. 96–159, provided that until such time as the Chairman, Members, and Executive Secretary of the International Convention Advisory Commission are appointed, but not later than 90 days after Dec. 28, 1979, the functions of the Commission be carried out by the Endangered Species Scientific Authority as established by Ex.Ord. No. 11911, formerly set out as a note under section 1537 of this title, with staff and administrative support being provided by the Secretary of the Interior as set forth in that Executive order.

Legislative History. For legislative history and purpose of Pub.L. 96–159, see 1979 U.S. Code Cong. and Adm. News, p. 2557. See, also, Pub.L. 97–304, 1982 U.S. Code Cong. and Adm. News, p. 2807.

Cross References

Authorization of appropriations, see section 1542 of this title.

Code of Federal Regulations

Endangered species convention, see 50 CFR 23.1 et seq.

Notes of Decisions

1. Injunction

Injunction barring Endangered Species Scientific Authority and the Fish and Wildlife Service from authorizing export of bobcats until guidelines were issued satisfying requirements the Court of Appeals set out in previous decision was properly vacated where Congress, in subsequent amendment by section 5(a)(1) of Pub.L. 97–304 to subsec. (c) of this section, overruled the court's prior decision, thereby removing the basis for the injunction. Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority, 1984, 725 F.2d 726, 233 U.S.App.D.C. 199.

§ 1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of plants listed pursuant to section 1533 of this title, it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(b) Species held in captivity or controlled environment

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a)(1) of this section shall not apply to—

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

(1) It is unlawful fo
States to engage in any
the Convention, or to
sions of the Conventi
thereof.

(2) Any importation
(A) such fish o
to section 1533
Convention,
(B) the taking a
to the provisions
ments of the Con
(C) the applicat
section have been
(D) such impor
activity,

be presumed to be an
chapter or any regulat

(1) It is unlawful fo
exporter of fish or wil
(A) are not listed pursu
or threatened species,
animal consumption o
States or on the high s
having obtained permi

(2) Any person requ
subsection shall—
(A) keep such
importation or ex
the subsequent d
wildlife, or plants
(B) at all reaso
sentative of the Se
of business, an op
wildlife, or plants
graph (A) of this
(C) file such re

(3) The Secretary sh
appropriate to carry o

It is unlawful for any
than shellfish and fish
section 1533 of this ti
imported for purposes

(c) Violation of Convention

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if—

(A) such fish or wildlife is not an endangered species listed pursuant to section 1533 of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

(d) Imports and exports

(1) It is unlawful for any person to engage in business as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants without first having obtained permission from the Secretary.

(2) Any person required to obtain permission under paragraph (1) of this subsection shall—

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, or plants made by him and the subsequent disposition made by him with respect to such fish, wildlife, or plants;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his places of business, an opportunity to examine his inventory of imported fish, wildlife, or plants and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

(3) The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

(e) Reports

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to section 1533 of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters

under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

(f) Designation of ports

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to section 1533 of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of section 668cc–4(d) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

(g) Violations

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

(Pub.L. 93–205, § 9, Dec. 28, 1973, 87 Stat. 893; Pub.L. 95–632, § 4, Nov. 10, 1978, 92 Stat. 3760; Pub.L. 97–304, § 9(b), Oct. 13, 1982, 96 Stat. 1426.)

Historical Note

References in Text. This chapter, referred to in subsec. (a)(1)(G), (2)(E), (c)(2), (e), and (f)(1), in the original read "this Act", meaning Pub.L. 93–205, Dec. 28, 1973, 81 Stat. 884, as amended, known as the "Endangered Species Act of 1973", which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables volume.

Section 668cc–4(d) of this title, referred to in subsec. (f)(2), was repealed by Pub.L. 93–205, § 14, Dec. 28, 1973, 87 Stat. 903.

1982 Amendment. Subsec. (a) (2) (B). Pub.L. 97–304, § 9(b) (1), added subpar. (B). Former subpar. (B) was redesignated (C). Subsec. (a) (2) (C)–(E). Pub.L. 97–304, § 9(b) (1), redesignated subpars. (B), (C), and (D) as (C), (D), and (E), respectively.

Subsec. (b) (1). Pub.L. 97–304, § 9(b) (2), substituted "The provisions of subsections (a) (1) (A) and (a) (1) (G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activi-

ty. With respect to any act
subsections (a) (1) (A) and (a)
section which occurs after a
days from (i) December 28, 1
date of publication in the Fed
a final regulation adding such
species to any list published p
section (c) of section 1533 of
shall be a rebuttable presumpti
or wildlife involved in such ac
to the exemption contained
tion" for "The provisions of th
not apply to any fish or w
captivity or in a controlled e
December 28, 1973, if the pe
holding are not contrary to t
this chapter; except that this
not apply in the case of any
held in the course of a comm
With respect to any act pro
section which occurs after a
days from December 28, 1973
a rebuttable presumption th
wildlife involved in such act

Exemption as providing except
Issuance of protective regulati
Penalties and enforcement, se
Permits and hardship exempti
Taking of resident endangere
section 1535 of this tit

Designated ports, see 50 CFR
Endangered species regulation
Establishment of ports for im
24.1 et seq.
Importation, exportation, and
Importation of antiques comp
seq.
Whaling provisions, see 50 C

Customs Duties ⇐22.
Fish ⇐13.
Game ⇐7.

Complaint 12
Compliance with section 2
Constitutionality 1
Construction of dams and res
on habitat 6
Impact on habitat
Generally 5
Construction of dam an
Injunction 13
Jurisdiction 11

he high seas for recreation-
laration or report as the
ent of this chapter or to

jurisdiction of the United
States any fish or wildlife
A) are not listed pursuant
or threatened species, and
l co mption or taken in
s or the high seas for
or ports designated by the
itating enforcement of this
tary of the Interior, with
er notice and opportunity
e ports and change such
r such terms and condi-
rtation or exportation at
or safety of the fish or
s discretion, he deems it
is subsection.

the Interior under the
if such designation is in
a port designated by the
until such time as the

risdiction of the United
commit, or cause to be

b.L. 95–632, § 4, Nov. 10,
982, 96 Stat. 1426.)

(2) (C)–(E). Pub.L. 97–304,
esignated subpars. (B), (C), and
), and (E), respectively.

(1). Pub.L. 97–304, § 9(b)
l "The provisions of subsections
(a) (1) (G) of this section shall
ny fish or wildlife which was
ty or in a controlled environ-
December 28, 1973, or (B) the
blication in the Federal Register
ation adding such fish or wild-
any list published pursuant to
of section 1533 of this title:
such holding and any subse-
or use of the fish or wildlife
course of a commercial activi-

ty. With respect to any act prohibited by subsections (a) (1) (A) and (a) (1) (G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to subsection (c) of section 1533 of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection" for "The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, if the purposes of such holding are not contrary to the purposes of this chapter; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from December 28, 1973, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on December 28, 1973".

Subsec. (b) (2) (A). Pub.L. 97–304, § 9(b) (3), substituted "The provisions of subsection (a) (1) of this section shall not apply to" for "This section shall not apply to" in the provisions preceding cl. (i).

1978 Amendment. Subsec. (b). Pub.L. 95–632 designated existing provision as par. (1) and added par. (2).

Effective Date. Section effective Dec. 28, 1973, see section 16 of Pub.L. 93–205, set out as an Effective Date note under section 1531 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93–205, see 1973 U.S. Code Code. and Adm.News, p. 2989. See, also, Pub.L. 95–632, 1978 U.S.Code Cong. and Adm.News, p. 9453; Pub.L. 97–304, 1982 U.S.Code Cong. and Adm.News, p. 2807.

Cross References

Exemption as providing exception on taking of endangered species, see section 1536 of this title.
Issuance of protective regulations, see section 1533 of this title.
Penalties and enforcement, see section 1540 of this title.
Permits and hardship exemptions, see section 1539 of this title.
Taking of resident endangered or threatened species, cooperative agreements with States, see section 1535 of this title.

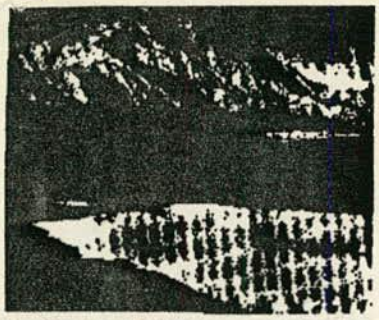
Code of Federal Regulations

Designated ports, see 50 CFR 221.1 et seq.
Endangered species regulations concerning terrestrial plants, see 7 CFR 355.1 et seq.
Establishment of ports for importation, exportation, and reexportation of plants, see 50 CFR 24.1 et seq.
Importation, exportation, and transportation of wildlife, see 50 CFR 14.1 et seq.
Importation of antiques composed of an endangered or threatened species, see 19 CFR 10.1 et seq.
Whaling provisions, see 50 CFR 230.1 et seq.

Library References

Customs Duties ⇐22.
Fish ⇐13.
Game ⇐7.
C.J.S. Customs Duties § 30.
C.J.S. Fish § 28 et seq.
C.J.S. Game §§ 1, 5.

Notes of Decisions



Sunrise, Mt. McKinley *Ansel Adams*

SIERRA CLUB
LEGAL DEFENSE FUND, INC.

Defenders of the Environment

216 First Ave. South, Suite 330 Seattle, Washington 98104 (206) 343-7340 FAX (206) 343-1526

NORTHWEST OFFICE

Victor M. Sher
Todd D. True
Staff Attorneys

Adam J. Berger
Rebecca E. Todd
Associate Attorneys

Andy Stahl
Resource Analyst

Lisa H. Lange
Office Manager

SAN FRANCISCO OFFICE

2044 Filimore Street
San Francisco, CA 94115
(415) 567-6100

ROCKY MOUNTAIN OFFICE

1631 Glenarm Place
Suite 300
Denver CO 80202
(303) 623-9466

WASHINGTON, DC OFFICE

1531 P Street, N.W.
Suite 200
Washington, DC 20005
(202) 667-4500

ALASKA OFFICE

325 Fourth Street
Juneau, AK 99801
(907) 386-2751

MID-PACIFIC OFFICE

212 Merchant Street
Suite 202
Honolulu, HI 96813
(808) 599-2436

FLORIDA OFFICE

111 S. M. L. King, Jr. Blvd.
P.O. Box 1329
Tallahassee, FL 32302
(904) 681-0031

LOUISIANA OFFICE

400 Magazine Street
4th Floor
New Orleans, LA 70130
(504) 522-1394

TO: Tim Robertson
FROM: Andy Stahl AS
RE: Helpful Cases
DATE: August 15, 1991

The Seattle Audubon Society v. Robertson case is not yet reported. Here, we would cite it as Seattle Audubon Society v. Robertson, Civil No. C89-160WD (W.D. Wa., Order of [date]). I expect that it will be published as soon as the appeals to the Circuit Court are resolved. I'm sending both the summary judgment order and the injunction order because the injunction order is beautifully written.

A warning about the two Portland Audobon Society decisions. This is a situation where, according to the court, Congress foreclosed our ability to enforce the environmental laws. If the two decisions (written by the same three-judge panel) on this "jurisdictional" issue appear inconsistent, that may be because they are. The amusing one-liner about spotted owl deaths associated with logging is found at 884 F.2d 1240 (2nd column near the bottom).

P.S. For Canada, call Greg McDade or Mark Haddock at (604) 685-5618.

NOTIFIED
YES
NO/REASON
TIME

the judgments and to dismiss the entire case for lack of jurisdiction.

REVERSED AND REMANDED.

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defense Council, Inc., Plaintiffs-Appellees,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant,

and

Northwest Forest Resources Council, Defendant-Intervenor-Appellant,

and

Huffman and Wright Logging Company; Freres Lumber Company, Inc.; Lone Rock Timber Company, Inc.; Scott Timber Company; Clear Lumber Manufacturing Corp.; Yoncalla Timber Products, Inc.; and Cornett Lumber Company, Inc., Defendants-Intervenors-Appellants.

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defenses Council, Inc., Plaintiffs-Appellants,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant-Appellee,

and

Northwest Forest Resources Council; Association of O & C Counties; Benton County, Defendants-Intervenors-Appellees.

Nos. 88-3854, 88-3855 and 88-3787.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted July 19, 1988.

Decided Jan. 24, 1989.

Environmental groups brought action challenging Bureau of Land Management's sale for harvesting of old-growth fir timber. United States District Court for the District of Oregon, Helen J. Frye, J., granted defendants' motion to dismiss, and appeal was taken. The Court of Appeals, Goodwin, Chief Judge, held that section of 1988 continuing budget resolution concerning federal jurisdiction over plans to log old-growth fir timber did not withdraw district court's jurisdiction over environmental groups' action.

Reversed in part, affirmed in part and remanded.

1. Federal Courts ⇐218

Section of 1988 continuing budget resolution concerning federal jurisdiction over plans to log old-growth fir timber did not withdraw district court's jurisdiction over environmental groups' challenge to Bureau of Land Management's sale for harvesting of several tracts of old-growth based on claim that logging would destroy habitat of northern spotted owl, threatening species with extinction. National Environmental Policy Act of 1969, §§ 2-209, as amended, 42 U.S.C.A. §§ 4321-4347; 43 U.S.C.A. § 1181; Federal Land Policy and Management Act of 1976, §§ 102-603, Migratory Bird Treaty Act, §§ 2-12, 16 U.S.C.A. §§ 703-711; Fish and Wildlife Improvement Act of 1978, § 3(h)(2), (3), 16 U.S.C.A. § 712.

2. Federal Civil Procedure ⇐331

Intervenors' economic interest in insuring continued supply of timber from Bureau of Land Management lands was not sufficient to permit intervention as to environmental groups' claims under National Environmental Policy Act challenging BLM's sale for harvesting of tracts of old-growth timber. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.; National Environmental Policy Act of 1969, §§ 2-209, as amended, 42 U.S.C.A. §§ 4321-4347.

Victor M. Sher, Sierra Club Legal Defense Fund, Inc., Seattle, Wash., Michael Axline, Western Natural Resources Law Clinic, Eugene, Or., for plaintiffs-appellants-cross-appellees.

Martin W. Matzen, Dept. of Justice, Wash., D.C., and Thomas C. Lee, Asst. U.S. Atty., Portland, Or., for defendant-appellee.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Or., for defendants-intervenors-appellees-cross-appellants.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for defendants-intervenors-appellees.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, Chief Judge, SCHROEDER and PREGERSON, Circuit Judges.

GOODWIN, Chief Judge:

Plaintiff environmental groups appeal the dismissal under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) of their action against defendant Donald Hodel, Secretary of Interior, and others. Certain intervenors also challenge the district court's denial of their motion to intervene on one of the plaintiffs' claims. We reverse in part and remand for trial.

The plaintiffs oppose the logging of old-growth fir timber. The Oregon director of the Bureau of Land Management (BLM) is in the process of selling for harvesting a large number of tracts of old-growth timber located in seven management districts. Plaintiffs sued to prevent logging these timber sales. Their main argument is that logging will destroy the habitat of the northern spotted owl, thereby threatening the species with extinction. For the purposes of Rule 12 review, we are required to assume the truth of the alleged facts.

The complaint sought declaratory and injunctive relief based upon the logging plan's alleged violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1982), the Oregon and California Lands Act, 43 U.S.C. § 1181 (1982), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1982), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (1982).

Plaintiffs do not seek relief under the Endangered Species Act because the United States Fish and Wildlife Service has refused to declare the Northern Spotted Owl an endangered species. This refusal has been challenged in other litigations by some of the same plaintiffs. *See Northern Spotted Owl (Strix Occidentalis Caurina)*

v. *Donald Hodel*, (W.D. Wash. No. C88-573Z, November 17, 1988). [1988 WL 149253].

Plaintiffs seek an injunction to halt all timber sales that included old-growth Douglas fir trees more than 200 years old and growing within 2.1 miles of known spotted owl habitat sites. Maps of proposed timber sales reveal that some 289 of the old-growth fir timber stands offered for sale fall within the requested injunction.

The Northwest Forest Resources Council (NFRC), eight Oregon counties, and various individual contractors (the Huffman & Wright Group) were allowed to intervene as defendants with respect to certain of the plaintiffs' claims.

While this appeal has been pending, we granted in part the plaintiffs' emergency motion for a temporary injunction. During the summer of 1988, selected logging operations were allowed to continue, but the logging of several other sales was enjoined. The question that remains to be decided is whether plaintiffs can continue this litigation.

Statutory Withdrawal of Jurisdiction

[1] The district court held that section 314 of the 1988 continuing budget resolution withdrew the court's jurisdiction to consider the plaintiffs' claim.

Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Resolution, H.J.Res. 395, § 314, Pub.L. No. 100-202, 101 Stat. 1329-254, 133 Cong.Rec. H 12468 (daily ed. Dec. 21, 1987) (emphasis added). (The above section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Pub.L. No. 100-446).

The plaintiffs argue that the quoted section of the continuing resolution does not withdraw jurisdiction to hear this case. The section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans", while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. We find it anything but clear.

Plaintiffs argue in effect that each sale which includes spotted owl habitat is a "particular activity" subject to challenge. Defendants argue, on the other hand, that each of the seven regional "existing plans" is a comprehensive and carefully coordinated management plan of scheduled sales preceded in each of the seven districts by environmental impact statements, and, by express legislative intent, made immune from challenge.

The management plans are designed to provide a steady flow of old growth timber from the federal inventory to the sawmills and other manufacturers in the Oregon counties containing BLM old growth timber. Defendants argue that the challenge of virtually all of the planned sales under the guise of challenging "particular activities" is a transparent effort to avoid the clear intent of section 314 by nibbling away at the management plans, sale by sale.

The sales are indeed separate transactions. They are also part of an existing plan of disposal of federal timber in the region. Thereby hangs the problem in this case.

"We begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986); *see Love v. Thomas*, 858 F.2d 1347 (9th Cir.1988) (observing that "we construe prohibitions against judicial review narrowly"). *See Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563, 565 (9th Cir.1984) (observing that "[p]reclusion of judicial review ... usually will not be found absent a clear command of the statute").

The language in section 314 upon which the district court relied is "that there shall be no challenges to any existing plan ... solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan...." Here the key words seem to be "solely" and "information available subsequent to the completion of the existing plan."

The plan to sell substantially all the marketable old growth fir timber remaining under BLM management was an "existing plan" when this litigation was commenced. The environmental implications of the plan had been fully studied between 1979 and 1983. The studies had evaluated the impact upon wildlife, including owls. It was and is no secret that the northern spotted owl disappears when its habitat is destroyed by logging. The plan was nonetheless approved and was being executed. This litigation threatened to delay the proposed sales, at considerable expense to the impacted counties, industrial purchasers, and the communities that rely upon the timber industry for their livelihood.

The defendants went to their senators and representatives, and section 314 was the result. The environmental impact studies made in 1983 during the preparation of the plan had not been challenged in court. They had been challenged in administrative proceedings. After the sales were advertised in 1987, the plaintiffs discovered more information about the northern spotted owl. Bird experts generally agreed that the continued logging of old growth fir would probably exterminate the species in the logged off areas. The owl habitat problem had been treated in the impact statements, but had not been deemed by the BLM to be a sufficient reason to abort the plan. New information generated both inside and outside the federal government reinforced the plaintiffs' opposition to the timber sales, but did not cause the BLM to change its position.

There is little doubt about the intent of the sponsors of section 314. The sponsors intended to stop this particular lawsuit and to permit the sales to go forward without further delay. It is equally clear that the plaintiffs intended to stop the logging, by any legal means available. Actual "legislative" intent of congressional sponsors is not seriously debated in this case.

The legal problem that the court faces is to determine whether, following principled methods of statutory construction, Congress expressed the intent of the section's sponsors in such a way as to withdraw the jurisdiction of the district court to try this lawsuit.

The district court characterized this action as an action brought "on the sole basis of new information concerning the northern spotted owl." The plaintiffs argue that the district court erred in characterizing a "sole basis" because the court did not take

account of a number of other theories relied upon by the plaintiffs.

Plaintiffs allege that new information shows a violation of the Migratory Bird Treaty Act. The district court did not refer to this statute in holding that plaintiffs' claim is based upon "information available subsequent" to the completion of the existing plan. That holding solves only part of the problem.

For example, plaintiffs contend that the logging will constitute a taking of habitat and thus a taking of protected birds under the Act. Plaintiffs say that this migratory bird claim does not depend upon "new information." We express no opinion on the merits of this argument. The district court has not yet considered it. But a claim somewhat similarly framed was recently recognized as at least reviewable in *Palila v. Hawaii Dept. of Land*, 852 F.2d 1106 (9th Cir.1988) (finch-billed Palila habitat harmed by grazing sheep).

The plaintiffs also challenge the Secretary's interpretation of the Oregon and California Lands Act (OCLA). Because they challenge decisions about owl habitat made before the plans at issue were adopted, that part of the claim does not appear to be based on new information, and therefore, whatever its merits, is not subject to Rule 12(b) dismissal on its face as being based on new information.

Contrary to the district court's conclusion, the plaintiffs' complaint does not allege "that the plan in its entirety is outdated" or "solely ... that the plan does not incorporate information available subsequent to the completion of the existing plan." Section 314. Instead, the plaintiffs seek, on a variety of grounds, to enjoin specific timber sales that have been authorized pursuant to the plans. It is true that the complaint relies on information published after the "existing plan" was completed. However, fairly construed, the complaint does not rely solely upon new information.

The plaintiffs contend that the controlling language of section 314 is that "[n]othing shall limit judicial review of particular activities on these lands" and that "any and all particular activities to be carried out under existing plans may ... be challenged." *Id.* The district court has not yet passed upon the question whether timber sales are "particular activities".

The defendants argue that because the plaintiffs seek to enjoin every planned sale that includes old-growth timber within a 2.1-mile radius of an owl habitat, the attack is essentially an attack on the whole plan. It does have that effect. The plaintiffs argue, however, that the challenge of a number of particular sales is a challenge of "particular activities," the right to which is guaranteed by the express terms of the statute. With this set of competing views of the language of the statute as applied to the more or less undisputed facts, the district court opted to end the case by the first door out—resort to the "sole basis" clause. It is not that easy.

Legislative History

The defendants point to fragments of the legislative history of section 314 that indicate that Congress intended to preclude judicial review in this very case. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453–54, 81 L.Ed.2d 270 (1984) (stating that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved"). Parts of the legislative history, such as comments by individual sponsors and committee reports, support the defendants' claim.

There is no doubt that the BLM has been instructed to sell, and that the logging industry desires to buy, as much old growth fir timber as can be reached by existing technology. The record contains abundant evidence of local Congressional support for the marketing plan. However, expressions of individual legislators' intent do not necessarily prove congressional intent. See *TVA v. Hill*, 437 U.S. 153, 189–91, 98 S.Ct. 2279, 2299–2300, 57 L.Ed.2d 117 (1978). Substantial doubt about the congressional intent exists.

The district court opinion quoted from and relied on the Senate committee report. We have examined that report, and also the conference report.

The conference committee report explains changes to the Senate report and says the statute means that "existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, *unless the claim includes information as to substantive concerns related to the new information. Any particular activities, such as individual timber sales, may continue to be challenged as always*". Conference Report No. 498, 100th Cong., 1st Sess. at 925 (emphasis added). This language tends to support the plaintiffs.

The plaintiffs assert that their newly discovered information about the loss of habitat and the resulting loss of bird population is a substantive concern. The district court has only indirectly passed upon this question. The plaintiffs also argue that they are not challenging the marketing plan solely on the basis of the alleged obsolescence of the 1983 environmental studies nor solely on the acquisition of new information, but on the additional ground that the plan violates a number of other specific statutory provisions. When looking at the complaint as a whole it is difficult to avoid the conclusion that it challenges particular sales (activities) on grounds that remain available under the express terms of the very statute upon which the defendants rely. Accordingly, we must hold that the Section 314 savings clauses require the district court to decide how to apply the law to particular sales.

Express or Implied Repeal

Section 314 precludes resort to the judicial review provisions of the Administrative Procedure Act for challenges to the existing plan solely on the basis that the plan does not incorporate new information. The only way to find further elements of plaintiffs' claims precluded would be if section 314 had repealed the relevant statutes as they apply to the entire subject of the litigation.

Plaintiffs characterize defendants as arguing, in effect, that section 314 brought about either the express or implied repeal of the judicial review provisions of the Administrative Procedure Act as applied to the Oregon BLM timber sales plans. Section 314 does not use the word "repeal" and mentions no other statutes. Obviously there can be no express repeal without reference to the "repealed" statute. *Sutherland Stat. Const.* § 23.07 (4th ed.).

If the defendants were to fall back to an argument that there is an implied repeal of NEPA, the Migratory Bird Act, and other statutes as they may pertain to judicial review of timber sales under the challenged plans, the implied repeal argument would run afoul of *TVA v. Hill, supra*. That case squarely rejected a contention that a continuing appropriation for a dam constituted an implied repeal of the Endangered Species Act as it related to construction of the Tellico Dam. Nothing in Section 314 implies the repeal of any law.

In attempting to distinguish *TVA v. Hill* and the entire question of implied repeal, the defendants claim that in *TVA v. Hill*, unlike our case, no statutory language whatsoever exempted the dam project from the requirements of the Endangered Species Act; only legislative history called for such exemption. Defendants also assert that the Supreme Court's opinion leaves no room for doubt that the Court would have sustained the exemption *if* the exemption could have been found in the words of the statute. 437 U.S. at 189–91, 195, 98 S.Ct. at 2299–2300, 2302. That may be true. But the statute before us contains no words that exempt timber sales from challenge. The statute merely precludes judicial review when the only basis upon which the plaintiffs seek review is that the plan did not incorporate newly discovered information (about owls) not available to the BLM when the plan was adopted.

At a trial, both sides may be able to show that owl habitat degradation was known before or after the plan was adopted. Such proof would shed light on the "new information" problem. However, that would not answer the last "provided how-

ever" clause of the section. That clause forces the decision maker to decide whether the challenge is to the plan or to particular activities. That decision must be made in the first instance by the trial court.

Plaintiffs' Motion

The plaintiffs have asked us to consider the merits of their motion for summary judgment. The district court has not yet had the opportunity to consider the motion, and we decline to conduct an independent search of documents and reports to rule on a summary judgment motion.

We vacate the temporary injunction that was granted pending appeal, without prejudice to the plaintiffs' effort to obtain site specific injunctive relief from the district court if plaintiffs can establish a likelihood of success on the merits of their challenges of particular sales. We express no opinion upon the ultimate right to injunctive relief.

Cross Appeal

[2] On cross-appeal, NFRC and the Huffman & Wright Group (intervenors) argue that the district court erred in refusing to permit them to intervene as defendants as to the plaintiffs' NEPA claim. The district court found that the intervenors were not entitled to intervention of right on the NEPA claim because they lacked "an interest relating to the property or transaction which is the subject of the action," as required by Fed.R.Civ.P. 24(a)(2). On appeal, the plaintiffs do not challenge the district court's decision to allow intervention as to the other claims.

In our circuit,

> [a]n order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir.1986) (quoting *U.S. v. Stringfellow*, 783 F.2d 821 at 826), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

The only remaining question is whether the intervenors have satisfied the second prong of the intervention test, the "interest" requirement, because no one denies that they have an economic interest in ensuring a continued supply of timber from BLM lands.[1]

> We have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest.... We agree with the D.C. Circuit that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" ... The "interest test" is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir.1980) (citations omitted).

The district court relied upon the analysis of *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir.1982) (per curiam), in holding that the intervenors could not intervene as to the plaintiffs' NEPA claim.

In *Wade*, the Seventh Circuit rejected the attempt of a corporation, four families, and assorted city and county governments to intervene as defendants where the plaintiffs had challenged a proposed bridge and expressway project as violative of several federal statutes, including NEPA. *See id.* at 184–85. The *Wade* court found that the proposed intervenors did not possess the "direct, significant legally protectable interest in the property or transaction" required for intervention under Fed.R.Civ.P. 24(a)(2). *Id.* at 185.

> The only interest involved is of the named defendants, governmental bodies.... [T]he only focus that the ongoing litigation ... can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants.

Id.

The intervenors argue that we should not follow *Wade* because it was based upon an unduly restrictive view of the "interest" test. However, the footnote relied upon by the intervenors suggests that the "interest" test will not be satisfied where a holding "will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors." *Id.* at 189 n. 6. This accords with our circuit doctrine that Fed.R.Civ.P. 24(a)(2) requires no "specific legal or equitable interest," *County of Fresno*, 622 F.2d at 438, as modified by the Supreme Court's statement that the rule does require a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971).

We reject the intervenors' argument that *Wade* is inconsistent with two of our cases. In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526–28 (9th Cir.1983), we found that the intervenor environmental groups, which had asserted "environmental, conservation and wildlife interests," had an adequate interest in the litigation to intervene on behalf of the defendant government officials where the plaintiffs had challenged the government's attempt to create a bird preserve. In *County of Fresno*, 622 F.2d at 437–38, we found that an organization of small farmers could intervene as defendants against a challenge to federal reclamation laws because the organization's members were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured." The intervenors' claim here, unlike those made in *Sagebrush Rebellion* and *County of Fresno*, has no relation to the interests intended to be protected by the statute at issue—in this case, NEPA. Hence, *Wade* does not conflict with our circuit's precedents.

The district court correctly followed *Wade* in holding that the intervenors lack an adequate interest relating to the plaintiffs' NEPA claims where NEPA provides no protection for the purely economic interests that they assert. Although the intervenors have a significant economic stake in the outcome of the plaintiffs' case, they have pointed to no "protectable" interest justifying intervention as of right. *Donaldson*, 400 U.S. at 531, 91 S.Ct. at 542. We therefore affirm the district court's denial of the intervenors' motion to intervene as of right on the plaintiffs' NEPA claims. Upon remand, the intervenors are of course free to request the district court's permission to submit amicus briefing on the NEPA claims.

We reverse the judgment dismissing the action and remand for further proceedings. We vacate the stay pending appeal, without prejudice to any appropriate renewed efforts by the plaintiffs to obtain such tempo-

1. The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. *See Cook v. Boorstin*, 763 F.2d 1462, 1470–71 (D.C.Cir.1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527–29 (9th Cir.1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68–69 & n. 21, 106 S.Ct. 1697, 1706–07, n. 21, 90 L.Ed.2d 48 (1986) (observing that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. However, the standing requirement is at least implicitly addressed by our requirement that the applicant must "assert[ ] an interest relating to the property or transaction which is the subject of the action." *County of Orange*, 799 F.2d at 537 (quoting *Stringfellow*, 783 F.2d at 826).

rary remedies, if any, as the district court may deem necessary and proper. We affirm the district court's denial of the motion by NFRC and the Huffman & Wright Group to intervene as defendants on the plaintiffs' NEPA claims.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

NO PARTY TO RECOVER COSTS.

UNITED STATES of America, Plaintiff–Appellee,

v.

John CONSIGLIO, aka Giovanni Consiglio, Defendant–Appellant.

No. 88–5117.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 11, 1989.

Decided Jan. 24, 1989.

Defendant charged with conspiracy to possess and distribute cocaine moved to compel Government to release seized funds to enable him to retain defense counsel in his criminal trial. The United States District Court for the Southern District of California, J. Lawrence Irving, J., denied motion, and defendant appealed. The Court of Appeals, Brunetti, Circuit Judge, held that order was not final, appealable order.

Dismissed.

1. Criminal Law ⇐1023(2)

Order denying narcotics defendant's motion for release of seized funds to enable him to retain defense counsel at his criminal trial was not final, appealable order; alleged denial of defendant's constitutional right to counsel was reviewable on appeal of potential conviction. 28 U.S.C.A. § 1291; U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1023(3)

To fall within collateral order doctrine, order must conclusively determine disputed question, it must resolve important issue completely separate from merits of action, and it must be effectively unreviewable on appeal from final judgment.

Michael Pancer, San Diego, Cal., for defendant-appellant.

Roger W. Haines, Jr., Asst. U.S. Atty., San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California.

Before ALARCON, BRUNETTI and THOMPSON, Circuit Judges.

BRUNETTI, Circuit Judge:

[1] On August 21, 1987, the appellant was arrested and charged with conspiracy to possess and distribute cocaine after he allegedly delivered $69,680 to an undercover DEA agent for the purchase of six kilograms of cocaine. The funds were seized and the government initiated a civil *in rem* action against the funds pursuant to the forfeiture provisions of 21 U.S.C. § 881. The appellant filed a motion to compel the government to release $50,000 of the seized funds to enable him to retain defense counsel in his criminal trial. The district judge denied the motion under the fourth circuit's reasoning in *In re Caplin & Drysdale*, 837 F.2d 637 (4th Cir.1988), *cert. granted*, —— U.S. ——, 109 S.Ct. 363, 102 L.Ed.2d 352 (1988), which held that the sixth amendment right to counsel does not include the right to retain counsel with funds that are subject to statutory forfeiture. We are unable to reach the merits of this appeal because the ruling on the motion being appealed from is not a final order under 28 U.S.C. § 1291, and the collateral order exception does not apply. Accordingly, the appeal is dismissed because the panel is without jurisdiction to consider this matter.

[2] 28 U.S.C. § 1291 limits appellate jurisdiction to "final decisions of the district courts." The collateral order doctrine provides an exception to section 1291 when its application "would practically defeat the right to any review at all." *Cobbledick v. United States*, 309 U.S. 323, 324–25, 60 S.Ct. 540, 540–41, 84 L.Ed. 783 (1940). To fall within the collateral order doctrine three conditions must be met: (1) the order must "conclusively determine the disputed question," (2) it must "resolve an important issue completely separate from the merits of the action," and (3) it must be "effectively unreviewable on appeal from a final judgment." *See Flanagan v. United States*, 465 U.S. 259, 265, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984). Because the appellant's claim is grounded in the sixth amendment right to counsel, the third component of the collateral order doctrine is not satisfied in this appeal. *Id.* at 268, 104 S.Ct. at 1056; *United States v. Greger*, 657 F.2d 1109, 1113 (9th Cir.1981).

The panel is without jurisdiction to consider the merits of this appeal.

DISMISSED.

Frank K. KOTARSKI, Plaintiff–Appellant,

v.

V.L. COOPER, A.E. Navarro, W.J. Tinston, J.H. Kirkpatrick, Naval Air Rework Facility, Capt. P.A. Monroe, in his official capacity, Defendants–Appellees.

No. 84–5673.

United States Court of Appeals, Ninth Circuit.

Jan. 27, 1989.

Federal employee brought *Bivens* action alleging that his superiors violated his constitutional rights by demoting him from a probationary superior position. The United States District Court for the Southern District of California, William B. Enright, J., dismissed the action with prejudice, and employee appealed. The Court of Appeals, 799 F.2d 1342, reversed and remanded, and employer's petition for writ of certiorari was granted. The United States Supreme Court, 108 S.Ct. 2861, vacated and remanded. The Court of Appeals, Canby, Circuit Judge, held that a *Bivens* damage remedy was unavailable to the employee.

Affirmed.

1. United States ⇐50.10(4)

Bivens damage remedy for alleged violation of constitutional rights was not available to civilian employee of Navy. 5 U.S.C.A. § 1101 et seq.

2. United States ⇐50(1)

If Congress has designed program that provides what it considers adequate remedial mechanisms for constitutional violations, *Bivens* actions should not be implied. 5 U.S.C.A. § 1101 et seq.

Frank K. Kotarski, San Diego, Cal., in pro per.

Richard A. Olderman, Dept. of Justice, Washington, D.C., for defendants-appellees.

On Remand from the United States Supreme Court.

Before NELSON, CANBY and HALL, Circuit Judges.

CANBY, Circuit Judge:

This case has been remanded by the Supreme Court for our reconsideration in light of its recent decision in *Schweiker v. Chilicky*, —— U.S. ——, 108 S.Ct. 2460, 101 L.Ed.2d 370 (1988). When the matter was last before us, we held that the district court erred in dismissing Kotarski's *Bivens* claim because he had no meaningful remedy for violations of his constitutional rights. *Kotarski v. Cooper*, 799 F.2d 1342 (9th Cir.1986). The Supreme Court granted

damages. The plaintiffs are merely receiving more money than they *might* have in different circumstances. If all of the defendants had settled for a sum larger than the trial verdict, the one satisfaction rule would not be violated. There is little conceptual difference between that and only some of the defendants settling for a larger amount.

In the second place, it is not entirely clear that the one satisfaction rule applies in these circumstances. The rule is based in common law; it is not statutorily mandated. *U.S. Industries*, 854 F.2d at 1236. Contribution, on the other hand, is a statutory deviation from the common law. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634, 101 S.Ct. 2061, 2063, 68 L.Ed.2d 500 (1981). We are not convinced that the efficient and equitable administration of this statutorily mandated right must yield to the logic of a general rule.

V

[3] Having decided upon the proper approach for partial pretrial settlements and bar orders, we must now determine whether the order issued by the district court in this case was proper.

The district court held a Rule 23 hearing fashioned on the requirements of California Code of Civil Procedure § 877.6. Many courts have commented on the similarity between a Rule 23 hearing and hearing pursuant to section 877.6. *E.g., In re United Energy Corp. Solar Power Modules Tax Shelter Investment Securities Litigation*, Fed.Sec.L.Rep. (CCH) ¶ 94,376, at 92,466 (C.D.Cal.1989); *Kirkorian v. Borelli*, 695 F.Supp. 446, 454 (N.D.Cal.1988). To that extent, the district court did not err.

The district court issued a bar order. As discussed above, that is resonant with the purposes of the securities laws.

The district court's order, however, fell short of the requirements we have discussed above. Although the district court's order limited nonsettling defendants' ability to seek further contribution from the settling defendants, it did not limit the subsequent exposure of the nonsettling defendants. The limit must be the nonsettling defendants' actual percentage of liability for the amount of total damages determined at trial.[19] Therefore, we remand the order to the district court so that, subject to the agreement of the settling parties, it may refashion its order as we have instructed.

VI

Finally, Prudential–Bache argues that it is protected by certain contractual indemnity clauses. We have previously held that such clauses are invalid because they are against the policy of section 77k(f). *Stewart v. American Int'l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir.1988). The district court was correct in holding these clauses invalid.

VII

The principles of compensation and contribution are in tension with the goals of full disclosure and settlement in actions under the securities laws. We believe that the most efficacious and equitable method of resolving this tension is by adopting a rule allowing only proportional liability if a contribution bar is entered as part of a pretrial partial settlement. In the absence of any guidance from Congress, such a rule becomes part of the federal common law.

The parties will bear their own costs on this appeal.

AFFIRMED in part, REMANDED in part.

19. Additionally, prevailing parties will be entitled to attorney's fees. Nonsettling defendants will not be liable for costs or fees solely attributable to legal services rendered by attorneys for plaintiffs or settling defendants in effecting a partial settlement.

PORTLAND AUDUBON SOCIETY; Headwaters; The Wilderness Society; Sierra Club, Inc.; Siskiyou Audubon Society; Central Oregon Audubon Society; Kalmiopsis Audubon Society; Salem Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defense Council; Lane County Audubon Society; Oregon Natural Resources Council, Plaintiffs–Appellants,

v.

Manuel LUJAN, Jr., in his official capacity as Secretary, United States Department of Interior, Defendant–Appellee,

and

Northwest Forest Resource Council; Huffman and Wright Logging Company, et al.; Association of O & C Counties, et al.; Douglas County Forest Products, et al., Defendants–Intervenors–Appellees.

No. 89-35337.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 17, 1989.

Decided Sept. 6, 1989.

Environmental groups brought action challenging Bureau of Land Management's sale for harvesting of old-growth fir timber. Upon remand, 866 F.2d 302, the United States District Court for the District of Oregon, Helen J. Frye, J., 712 F.Supp. 1456, granted Bureau's motion for summary judgment, and groups appealed. The Court of Appeals, Goodwin, Chief Judge, held that: (1) groups' claims under the National Environmental Policy Act (NEPA) were prohibited, and (2) the court improperly held that groups' non-NEPA claims were barred by the doctrine of laches.

Affirmed in part, and reversed and remanded in part.

1. Health and Environment ⇐25.10(6.4)

If environmental impact statement for timber management plan adequately addresses cumulative environmental impact, any challenge to individual sale will be limited to site-specific concerns. Department of the Interior and Related Agencies Appropriations Act, 1989, § 314, 16 U.S.C.A. § 1604 note.

2. Health and Environment ⇐25.15(3.2)

Section 314 of 1988 continuing budget resolution, which prohibited judicial challenge to existing timber management plans but allowed judicial challenge to particular Bureau of Land Management activities on case-by-case, site-specific basis, precluded judicial review of claim that new information required supplemental environmental impact statement for sales of old-growth timber in habitats of northern spotted owl in states of Oregon and Washington; claim was not site-specific. Department of the Interior and Related Agencies Appropriations Act, 1989, § 314, 16 U.S.C.A. § 1604 note.

3. Federal Courts ⇐813

When district court has invoked laches, reviewing court must determine whether district court properly found lack of diligence by party against whom defense is asserted, and prejudice to party asserting defense.

4. Health and Environment ⇐25.15(5)

District court improperly invoked doctrine of laches to hold that environmental groups were precluded from asserting claim that Bureau of Land Management violated Oregon and California Lands Act and Federal Land Policy and Management Act, by requiring that all lands suitable for timber production be managed for maximum timber production legally possible; court did not make specific finding of prejudice to government. Migratory Bird Treaty Act, § 2 et seq., 16 U.S.C.A. § 703 et seq.; Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.; 43 U.S.C.A. § 1181.

5. Equity ⇐70

In regard to claim of laches, indispensable element of lack of diligence is knowledge, or reason to know, of legal right, assertion of which is "delayed."

tiffs-appellants.

Martin W. Matzen, Dept. of Justice, Washington, D.C., for defendant-appellee Manuel Lujan, Jr.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for defendants-intervenors-appellees The Ass'n of O & C Counties, et al.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Or., for defendants-intervenors-appellees The Northwest Forest Resource Council, et al.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, Chief Judge, SCHROEDER and PREGERSON, Circuit Judges.

GOODWIN, Chief Judge:

On remand from this court's decision in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir.1989), the district court took testimony, examined exhibits, reviewed the applicable law, and concluded that section 314 of Pub.L. No. 100-446, 102 Stat. 1774, 1825 (1988), barred plaintiffs' National Environmental Protection Agency (NEPA) claim. The district court also concluded that plaintiffs' other claims were untimely. Plaintiffs were seeking to enjoin the removal of timber from certain government-owned lands pursuant to current Timber Management Plans (TMPs) and their respective annual allowable harvest targets. After staying further logging pending this expedited appeal, we have reviewed the record, the briefs and arguments, and we affirm the district court's proceedings.

The Timber Management Plans

From 1979 to 1983, the Bureau of Land Management (BLM) adopted ten-year plans for each of its districts in western Oregon. These Timber Management Plans (TMPs) were received in evidence as exhibits. Each was the result of a lengthy process that included the preparation of an Environmental Impact Statement (EIS) as required by the NEPA, 42 U.S.C. § 4332. Each EIS considered the environmental impacts of possible timber management alternatives, including "maximum timber production," "no change [from present management]," "no herbicide," "emphasis on protection of natural values," "habitat diversity," as well as management alternatives which would compromise among these concerns.

Among the numerous environmental impacts studied under each alternative was the depletion of northern spotted owl habitat and the resulting predicted decline in the number of owls on BLM lands.

Each TMP adopts one of the alternatives proposed in the EIS, though perhaps with slight modifications. The TMPs designate commercial forest land under BLM management in the district for one of several uses. For example, the Roseburg District TMP, adopted September 30, 1983, sets aside 82 percent of the commercial forest land area for "intensive timber management." Another 9 percent is to be managed for "modified area control," which allows some timber harvest while protecting some old-growth timber and visual corridors.[1] An additional 9 percent of the land is in riparian areas, because it is fragile and incapable of supporting sustained yield timber management, or because the land is reserved for endangered species habitat or for recreation.

Although the TMPs do not designate specific timber sale boundaries, or require that BLM sell any particular acre of timber, they effectively decide the land use allocation of the forest and set the "annual allowable harvest" for each district. BLM timber sales are carried out in accordance with the plans. Each timber sale requires an Environmental Assessment which is "tiered" to the EIS for the TMP. In other words, when BLM sells an individual timber sale, it does not revisit the difficult trade-offs and decisions that were made in the TMP, deciding what land is to be designated for "intensive timber management." The Environmental Assessment considers site-specific concerns about how the sale is to be undertaken in accordance with BLM management practices: where roads are to be built, how the site is to be prepared, how to mitigate the environmental impact of the sale by reducing erosion, muddying of nearby waters, or an overly visible, unsightly cut.

In 1986, BLM decided to replace all of the current western Oregon TMPs with new, coordinated plans by the end of the decade. The EISs for the next generation of plans are currently being prepared and, if all goes according to schedule, should be completed in 1990. *See Portland Audubon Society v. Lujan*, 712 F.Supp. 1456, 1460-61 (D.Or.1989).

The Northern Spotted Owl

The northern spotted owl is heavily dependent on old-growth timber for its habitat. The owl is considered an "indicator species" for old-growth forest, meaning that the presence and number of northern spotted owls give an accurate indication of the health of the old-growth forest and the presence of other old-growth dependent

Almost no old-growth forest remains on private lands in western Oregon. Most of the remaining old-growth timber is on federal land managed by the Forest Service and BLM. BLM lands account for approximately one-fifth of the remaining old-growth timber.

During preparation of the 1979-1983 EISs and TMPs, the preparers recognized that the TMPs called for accelerated harvesting of much remaining old-growth timber, and that the number of nesting pairs of spotted owls would decline as this harvesting took place. The EISs and TMPs reflect this concern, and attempt to make provisions for the preservation of a specified number of owl pairs.

In the mid-1980s, several studies expressed concern for the long-term viability of the northern spotted owl species. Dr. Russell Lande of the University of Chicago completed a much-debated study on the likely extinction of the owl. The National Audubon Society commissioned an independent report which concluded that extinction is a possibility because of the owl's dependence on old-growth forest and its low rates of reproduction even in undisturbed forest.

At the request of environmental groups, including plaintiffs in this litigation, BLM prepared an Environmental Assessment in order to determine whether, in light of new information about the owl, supplemental EISs should be prepared for the TMPs. BLM provided interim protection for owl sites pending completion of the Environmental Assessment. The Spotted Owl Environmental Assessment was completed on February 3, 1987. It concluded that any new information about the owl was too preliminary to support preparation of a supplemental EIS, and that the impacts of planned timber sales on spotted owl habitat were no worse than had been predicted under the original EISs. On April 10, 1987, BLM issued its decision not to prepare a supplemental EIS on the owl, finding that a

1. Land that will support a sustainable annual yield of 20 cubic feet of timber per acre is considered "commercial forest land."

"Intensive timber management" in Pacific Northwest old-growth forests includes clearing the land of centuries old trees, replacing these with uniform-age new growth, and then forest management to culminate in harvesting in 40 to 80 year cycles depending on the growth characteristics of each "second growth" forest.

"Visual corridors" refers to the practice of leaving a corridor of uncut trees along a highway so that an unsightly clear cut is not visible to the automobile driver.

Plaintiffs remind us that the TMPs do not designate any particular timber sales, or require that any particular timber be cut. The nature of timber harvesting does not lend itself to specific designations until market access, fire, insect invasion and other factors are taken into account. *See, e.g., Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417 (9th Cir. 1989) (timber sale necessitated by bark beetle infestation which followed violent storm). A particular stand of timber can be cut only once every 40 to 80 years, and the ten-year TMPs do not determine which exact stand of timber will be cut in which year. The plans do, however, determine which areas will be devoted to timber production and which to other uses.

supplemental EIS would not serve any purpose because

> [t]he conclusions of the [Spotted Owl Environmental Assessment] indicate that by the time BLM completes new resource management plans for western Oregon, more spotted owl habitat will be available than had been predicted to survive in the EISs, and substantial options for protecting the spotted owl population on BLM lands can be addressed in the new [resource management plans] and related EISs at that time. The analysis also shows that 913,000 acres of unsold old growth and mature timber now in existence on BLM lands in western Oregon will be reduced by no more than 9% by October 1990, leaving 91% of that particular habitat that exists today available for planning options for the [resource management plans] scheduled for completion in 1990.

Portland Audubon Society appealed this decision to the Interior Board of Land Appeals and requested immediate stay of timber sales near identified spotted owl nests. The Interior Board of Land Appeals eventually, on February 28, 1988, upheld the decision not to prepare a supplemental EIS. Meanwhile, on October 19, 1987, plaintiffs had filed this action alleging violations of NEPA, the Oregon & California Lands Act (OCLA), 43 U.S.C. § 1181, the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 et seq., and the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703 et seq.

The district court entered judgment for defendants on April 20, 1988, after granting defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6), on the ground that judicial review of plaintiffs' claims was barred by section 314 of the 1987 interior continuing budget resolution. *See* Continuing Resolution, H.R.Res. 395, § 314, Pub.L. No. 100-202, 101 Stat. 1329, 1329-254. That section was reenacted without change in 1988 as section 314 of Pub.L. No. 100-446, 102 Stat. 1825.[2] The district court relied on legislative history, particularly the 1987 Senate Report, S.Rep. No. 100-165, 1st Sess. 11-12 (1987), indicating that sponsors of section 314 intended to bar this very lawsuit. The district court characterized this as an action brought "on the sole basis of new information concerning the northern spotted owl." The district court did not discuss whether this suit was one challenging particular activities to be carried out under the existing plans, which challenge section 314 expressly permits.

PAS I

We reversed and remanded. *Portland Audubon Society v. Hodel*, 846 F.2d 302 (9th Cir.1989) (*"PAS I"*). We found the language of section 314 "anything but clear" and cautioned that the court must examine the language of the statute and assess whether, following principled methods of statutory interpretation the withdrawal of jurisdiction bars each of plaintiffs' claims.

Section 314 prohibits challenges to a BLM plan "solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan." At the same time it allows challenges to "any and all particular activities to be carried out under existing plans."

With regard to the NEPA claim, the district court had not considered whether this suit is a challenge to the plans barred by section 314, or a challenge to "particular activities" to be carried out under the plans. Because the plaintiffs attack numerous sales, the NEPA claim has the effect of an attack on the plan, yet it is phrased in terms of particular activities: plaintiffs seek to enjoin several hundreds of timber sales planned within 2.1 miles of owl sites. We did not resolve the "particular activities" issue, noting that the district court had not addressed whether timber sales are "particular activities" under section 314. We remanded so that the district court could make that determination.

Remand

On remand and after further factual development, the district court held that plaintiffs' non-NEPA claims were barred by the equitable doctrine of laches. *Portland Audubon Society v. Lujan*, 712 F.Supp. at 1482-84. The district court noted that the OCLA and FLPMA claims, 43 U.S.C. §§ 1181, 1701 et seq., challenge the Oregon BLM Director's 1983 Forest Resources Policy Statement (FRPS) requiring that all lands suitable for timber production be managed for timber and wood product production, to the extent possible under the requirements of law. *Id.* Similarly, according to the district court, the MBTA claim, 16 U.S.C. § 703, is based on "predictions of the demise of the spotted owl made in the [EISs] issued between 1979 and 1983." *Id.* The court concluded that

> the [Administrative Procedure Act] does not provide a basis for a challenge by [plaintiffs] to administrative decisions made over five years ago and upon which the BLM has operated without objection." In sum, since [plaintiffs] failed to pursue its claims under OCLA, FLPMA and the MBTA in a timely manner; they are not subject to this court's review under the APA.

Id. at 1484.

On remand of the NEPA claim, the court held that BLM's decision not to prepare a supplemental EIS in 1987 was not subject to judicial review in these proceedings. The court held that the suit was a challenge to the plans and not to "particular activities to be carried out under existing plans," and further, that the NEPA claim was based upon "new information." The court held the NEPA claim barred and granted summary judgment to BLM. *Id.* at 1485-89.

After unsuccessfully seeking a stay pending appeal in the district court, plaintiffs appealed and sought a stay pending appeal in this court. After considering the voluminous motion papers filed by all sides, we granted the stay and expedited the appeal, with briefing limited to the issues considered in the opinion of the district court.

Section 314

The district court's finding that plaintiffs' NEPA claim is based on "new information" is not contested in this appeal. Instead, the argument is focused on whether plaintiffs challenge the plans or "particular activities to be carried out under the existing plans."

Plaintiffs' NEPA claim is not phrased as a *direct* challenge to the existing plans. This does not, however, end the inquiry. If it did, we would not have remanded the case in order for the district court to determine how to apply the "particular activities" language to plaintiffs' NEPA claim.

The district court reads section 314 as barring any challenge to a sale unless a plaintiff can demonstrate new information "site-specific" to that timber sale. Plaintiffs argue that they have met even this test: they have identified specific sales that include old-growth timber in close proximity to an owl nest. Their new information is, they say, specific to each of these sales and their challenge thus has no bearing on BLM's other sales unless they also contain owl habitat.

In describing plaintiffs' claim as an attack on the plans, the government and the district court both begin with the text of section 314, as well as the legislative history of section 314. The district court attempted to "give meaning to the statute as a whole and avoid rendering any part of the statute inoperative or insignificant." *Portland Audubon Society v. Lujan*, 712 F.Supp. at 1488. The court interpreted section 314's language that "[t]he Forest Ser-

2. Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of existing lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

vice and [BLM] ... may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans" as expressing the affirmative intent of Congress to "prevent those kinds of disruptions to existing [TMPs] that preclude a smooth transition from one planning period to another." *Id.* This may be true, but a congressional intent that there be a "smooth transition from one planning period to another" is not specific enough to serve as a jurisdictional bar or to indicate how we should interpret the jurisdictional withdrawal provision contained in the latter part of section 314.

We do not find the above-quoted language of section 314 very helpful. The entire sentence reads:

> Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending completion of new plans.

This sentence, when read in its entirety, does not seem to be part of section 314's jurisdictional bar, but more likely was intended to excuse the Forest Service and BLM from failure to complete their new plans on schedule. Section 6(c) of the NFMA, 16 U.S.C. § 1604(c), requires the Forest Service to complete its new plans by September 30, 1985. While the statute does not cite any deadline that similarly constrains BLM, BLM did decide in 1986 that it would replace the current western Oregon plans in 1990. Were a plan to become invalid or subject to challenge "on its face" if it becomes "outdated"—in the same manner as an expired driver's license or passport—no timber sales or other actions could be tiered to the plan EIS, and the management scheme would collapse in chaos. We cannot say whether, in the absence of section 314, the Forest Service plans would have become void after September 31, 1985.[3] Assuming that Congress intended, in a continuing budget resolution, to declare that the plans had not expired or become "outdated," language addressing the timing of transition to new plans does not help determine whether these plaintiffs, in this case, are challenging the plans or "particular activities."

[1, 2] We agree, however, with the district court and the government that the 1988 legislative history gives some support to the BLM interpretation of section 314 as barring this claim. The conference committee report provides that section 314 "is not intended to preclude case-by-case timber sale appeals in site-specific instances." H.R. Conf.Rep. 862, 100th Cong., 2d Sess. 76 (1988). The Senate Report explains further, however, that a challenge to a particular sale may be barred if it is in effect an indirect challenge to a plan.

> Legal challenges to particular activities, such as individual timber sales, are specifically exempted from this prohibition against legal challenges to existing plans so long as the challenge to the particular activity is not in effect an indirect challenge to an existing plan.

S.Rep. No. 100-410, 100th Cong., 2d Sess. 122-123 (1988). These committee reports suggest that, in the context of decisions about timber harvesting, the "particular activities" language in section 314 refers to individual timber sales and protest procedures available under 43 C.F.R. § 5000 et seq.[4] Because the environmental assessments that accompany individual timber sales are tiered to the EISs for the larger plans, so long as the EIS for the plan adequately addresses cumulative environmental impacts, any challenge to an individual sale will be limited to site-specific concerns.[5] Plaintiffs' NEPA claim is not such a challenge.

We need not consider in this litigation which "particular activities" other than those related to timber sales remain open to challenge, as plaintiffs do not challenge any non-timber-related activities. We also need not consider whether section 314 would bar a challenge that raises cumulative concerns in the context of an individual sale. That issue is raised with regard to Forest Service timber sales in another case currently pending before us, *Oregon Natural Resources Council v. Mohla*, No. 89-35350.

As we remarked in *PAS I*:

> The defendants argue that because the plaintiffs seek to enjoin every planned sale that includes old-growth timber within a 2.1-mile radius of an owl habitat, the attack is essentially an attack on the whole plan. It does have that effect. The plaintiffs argue, however, that the challenge of a number of particular sales is a challenge of "particular activities."

866 F.2d at 306. Similar arguments are made here. On this appeal plaintiffs claim support from the fact that they challenge less than 30 percent of planned timber sales; a challenge to 30 percent of one kind of "particular activity" authorized by the plans is not a challenge to the underlying plans, say plaintiffs. Looking at the same facts, the government argues that the relief demanded by plaintiffs is so broad that it would effectively vacate the BLM plans. The government points out that the injunctions plaintiff seeks would make it impossible for BLM to approach, much less meet, its annual allowable harvests under the plans. In attempting to define the statutory meaning by looking only at the relief this lawsuit demands, however, both plaintiffs and BLM go astray.

The answer to this quandary lies not in the scope of relief sought by plaintiffs, but in the underlying nature of plaintiffs' grievance. Plaintiffs challenge BLM's decision not to prepare a supplemental EIS in 1987. This was, they argue, a violation of NEPA. "NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA ... [focuses] government and public attention on the environmental effects of proposed agency action. 42 U.S.C. § 4321." *Marsh v. Oregon Natural Resources Council*, — U.S. —, 109 S.Ct. 1851, 1859, 104 L.Ed.2d 377 (1989). NEPA "insure[s] that ... environmental amenities and values may be given appropriate consideration in decisionmaking" by requiring that an EIS be prepared in every "recommendation or report on proposals for ... major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Plaintiffs' challenge does not make sense unless it is connected to some underlying federal action or substantive decision.

Here, if plaintiffs were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans and prepare a supplemental EIS, addressing concerns about the northern spotted owl. A supplemental EIS cannot be entirely divorced from some underlying substantive federal decision: a decision either to continue with the action that followed preparation of the original EIS or to modify that action. In this case, a supplemental EIS would consider the possible land use

3. This case does not challenge Forest Service resource plans or timber sales, and we do not reach the question of section 314's effect on the Forest Service. The language and history of section 314 is not identical for the BLM and the Forest Service.

4. We reject plaintiffs' argument that *Pierce v. Underwood*, — U.S. —, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), prevents us from considering legislative history accompanying the 1988 reenactment, without change, of section 314. *Underwood* considered the meaning of the term "substantially justified" in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA was reenacted, without change, in 1985. The House committee report suggested a meaning of "substantially justified" which contradicted "the almost uniform appellate interpretation" prior to the reenactment. The Court relied upon the rule that a reenactment without change "generally includes the settled judicial interpretation." 108 S.Ct. at 2551 (citation omitted). The Court remarked that, "[q]uite obviously, reenacting precisely the same language would be a strange way to make a change." *Id.* Further, in *Underwood* the House committee authoring the 1985 report did not draft the language in question, and the committee report urged adoption of an "unadministerable" standard, "out of accord with prior usage."

Here, the 1988 legislative history does not contradict any prior judicial interpretation, and Congress did not reenact the same language in order to make a change.

5. A recent decision from the District of Oregon involving a challenge to an individual sale describes the "tiering" process. See *Headwaters, Inc. v. Bureau of Land Management*, Civil No. 89-6016, (amended opinion and order, May 23, 1989).

alternatives of designating more or less old-growth forest for "intensive timber management" or reserving it for spotted owl habitat. A supplemental EIS would, plaintiffs hope, result in a BLM decision to modify its land use decisions. Those land use decisions, however, were made in the TMPs. The TMPs designate certain land for "intensive timber management." The decision to designate old-growth forest for "intensive timber management" was made with the knowledge that owl habitat would be sacrificed in the clear cuts and conversion to second-growth forest. That intentional trade-off of owls for economic gain was precisely the land use decision which is being challenged by plaintiffs.

We hold that section 314 precludes this kind of claim.

There is a presumption in favor of judicial review of administrative actions. *See Block v. Community Nutrition Inst.*, 467 U.S. 340, 350–51, 104 S.Ct. 2450, 2456–57, 81 L.Ed.2d 270 (1984). It was that presumption which, in *PAS I*, required us to remand in order for the district court to apply the specific language of section 314 to plaintiffs' claims, to determine if, in fact, plaintiffs' claims rely solely on "new information" and whether they challenge the plans or "particular activities." The presumption in favor of review is overcome, however, where there is "persuasive reason to believe" that Congress intended to preclude judicial review, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967), or a clear statutory command, *Moapa Band of Paiute Indians v. Dep't. of Interior*, 747 F.2d 563, 565 (9th Cir.1984). Here, there exists not only persuasive evidence of congressional intent, but an explicit statutory command precluding review.

Plaintiffs have had ample opportunity to put forward an alternative interpretation of section 314 which would give meaning to the prohibition on challenges to the BLM plans. They present arguments, addressed above, explaining that the NEPA claim does not challenge the plans. They do not, however, provide any satisfactory explanation of what exactly would be a challenge to the plans under their interpretation of section 314. They present us no alternative interpretation that would allow us to give meaning to Congress' enactment, as is our duty, and yet would allow their NEPA claim to survive section 314. The district court correctly held that section 314 bars the NEPA claim.

Non-NEPA Claims

Plaintiffs also claim violations of the Oregon & California Lands Act, 43 U.S.C. § 1181, the Federal Lands Policy and Management Act, 43 U.S.C. §§ 1701 et seq., and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq. The district court granted summary judgment to BLM on each of these claims. These claims did not challenge the 1987 BLM decision not to prepare a supplemental EIS addressing the spotted owl. Instead, plaintiffs' complaint charges that BLM violated the OCLA and FLPMA by adopting a Forest Resources Policy Statement (FRPS) in 1983 requiring that all lands suitable for timber production be managed for the maximum timber production legally possible, and that destruction of old growth forest on BLM lands kills spotted owls, constituting a "taking" in violation of the MBTA.

In *PAS I*, we found that even if these claims could be construed as challenges to the plans, "fairly construed, the complaint does not rely solely on new information." 866 F.2d at 306. The OCLA and FLPMA claims challenge a BLM policy adopted prior to completion of many of the TMPs. The MBTA claim challenges the destruction of owl habitat planned in the TMPs. Indeed, as discussed in BLM's 1987 Spotted Owl Environmental Assessment, each TMP makes a region-wide decision, analyzed in the EIS, to trade owls for timber. The predicted destruction of owl habitat and resulting owl deaths are not new information. It was precisely this reasoning which allowed BLM to conclude that no supplemental EIS would be required.

The district court held that "the APA does not provide a basis for a challenge by [plaintiffs] to administrative decisions made over five years ago and upon which the BLM has operated without objec-

tion.... [Plaintiffs] failed to pursue [their] claims under OCLA, FLPMA, and the MBTA in a timely manner." *Portland Audubon Society v. Lujan*, 712 F.Supp. at 1484.

We have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation.

> Laches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress' environmental policy. Furthermore, citizens have a right to assume that federal officials will comply with applicable law and to rely on that assumption.

Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir.1982) (citations omitted). This approach has found unanimous support in the other circuits.[6] The district court failed to confront these precedents, and the government fails to distinguish them. All of the concerns expressed in *Preservation Coalition* are present here. The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce. The forests will be enjoyed not principally by plaintiffs and their members but by many generations of the public, as well as by owls.

[3, 4] When the district court has invoked laches, a reviewing court must determine whether the district court properly found (a) lack of diligence by the party against whom the defense is asserted, and (b) prejudice to the party asserting the defense. *Preservation Coalition*, 667 F.2d at 854; *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir.1980). Here, the district court did not make a specific finding of prejudice or provide any explanation of how it considered the government to have been prejudiced. Other than noting that plaintiffs had not brought court challenges under the OCLA, FLPMA and MBTA until 1987, the district court did not indicate that plaintiffs had shown a lack of diligence.

The government argues that plaintiffs' claims should have been presented earlier, during the planning process that resulted in the TMPs. Plaintiffs respond that while the legal basis for their non-NEPA claims may have been available sooner, the motivation for this litigation came from the later revelation that the northern spotted owl may be endangered. Soon after receiving predictions of the owl's eventual demise in 1985 and 1986, they asked BLM to reexamine its planned destruction of owl habitat. Following BLM's refusal to prepare a supplemental EIS, they filed an administrative challenge, raising the same non-NEPA claims they now pursue.

[5] An "indispensable element of lack of diligence is knowledge, or reason to know, of the legal right, assertion of which is 'delayed'." *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir.1975). As plaintiffs argue, the first case of which we are aware that acknowledges the right of citizens to enforce the MBTA through the Administrative Procedure Act was decided in 1987. *Alaska Fish & Wildlife Fed'n v. Dunkle*, 829 F.2d 933, 938 (9th Cir.1987), *cert. denied*, — U.S. —, 108 S.Ct. 1290, 99 L.Ed.2d 501 (1988). Plaintiffs cannot be said to have lacked diligence in not pursuing the MBTA claim earlier.

Even if plaintiffs had lacked diligence, however, the government has not demonstrated that it will suffer any prejudice if a court hears the merits of plaintiffs' non-NEPA claims. This is not a case where a dam or nuclear power plant has already been built, where a plaintiff has "sandbagged" a defendant by bringing a late challenge.

6. *Park County Resources Council v. United States Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir.1987); *Concerned Citizens on I-190 v. Secretary of Transp.*, 641 F.2d 1, 7–8 (1st Cir.1981); *Save Our Wetlands, Inc. v. United States Army Corps of Eng'rs*, 549 F.2d 1021, 1026 (5th Cir.), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977); *City of Rochester v. United States Postal Serv.*, 541 F.2d 967, 977 (2d Cir.1976); *Minnesota Pub. Int. Res. Group v. Butz*, 498 F.2d 1314, 1324 (8th Cir.1974); *Envtl. Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164, 1182–83 (6th Cir.1972); *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1329–30 (4th Cir.), *cert. denied*, 409 U.S. 1000, 93 S.Ct. 312, 34 L.Ed.2d 261 (1972).

In this expedited appeal, we have not requested briefing on the merits of plaintiffs' non-NEPA claims. We express no opinion on the merits, on whether any other procedural defense may be available to defendants and intervenors, or whether these remaining claims would justify preliminary injunctive relief. We remand so that the district court can consider these matters in further proceedings.

We AFFIRM summary judgment in favor of the government on the NEPA claim and REVERSE and REMAND plaintiffs' non-NEPA claims. The injunction pending appeal is vacated on the date of the filing of this opinion.

No party to recover costs in this court.

Sheri LIPSCOMB, By and Through her next friend, Carolyn DeFEHR; Autumn Scalf, and William Scalf, by and through their next friend Gloria Self, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

Dan SIMMONS, individually and in his official capacity as Acting Director, Department of Human Resources of the State of Oregon; and Jess Armas, individually and in his official capacity as Acting Assistant Director, Department of Human Resources of the State of Oregon and Acting Administrator, Children's Services Division, Department of Human Resources of the State of Oregon, Defendants-Appellees.

No. 87-4079.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 7, 1988.

Decided Sept. 7, 1989.

Children in foster care brought action challenging Oregon statutory scheme by which foster children living with relatives did not receive state funds, while children living with strangers received such funds. The United States District Court for the District of Oregon, Helen J. Frye, J., rendered judgment for State and children appealed. The Court of Appeals held that State's funding scheme violated substantive due process.

Reversed and remanded.

1. Constitutional Law ⇐274(5)

Constitutional right to associate with family members is protected by due process clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐82(10)

Fundamental right of children to live with close relatives extended to situation in which children sought to live with their aunt and uncle.

3. Constitutional Law ⇐82(10)

State burdens constitutional right to associate with family members when it adopts policies that prevent family members from living together.

4. Constitutional Law ⇐274(5)
Infants ⇐226
Social Security and Public Welfare ⇐194.30

State of Oregon violated substantive due process by denying foster care funding to children living with close relatives while providing such funding to children in foster care with stranger; children had constitutionally protected liberty interest in being placed with fit relatives and state had affirmative obligation to assist them in exercising that liberty interest. ORS 418.625(2); U.S.C.A. Const.Amend. 14.

5. Infants ⇐226

By removing children from their parents' custody, making them wards of state and placing them in foster care programs, state established special relationship with

such children and thereby assumed special obligation to assist children in exercising their constitutional rights.

Emily Simon and Mark Kramer, Simon Kramer & Fithian-Barrett, Portland, Or., for plaintiffs-appellants.

Rives Kistler, Asst. Atty. Gen., Salem, Or., for defendants-appellees.

Appeal from the United States District Court for the District of Oregon.

Before HUG, FLETCHER and NELSON, Circuit Judges.

PER CURIAM:

Oregon, like every other state, sometimes removes children from their parents' custody because of abuse or neglect. The State often places these children temporarily in foster homes, either with relatives or others. The state and federal governments provide funds to defray the costs of caring for these children. The federal scheme, Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-676 (1988), provides funds for many foster children, without regard to whether the people with whom the children are placed are relatives. *See Miller v. Youakim*, 440 U.S. 125, 99 S.Ct. 957, 59 L.Ed.2d 194 (1979).

Oregon has a separate system for funding the foster care of children who are not eligible under Title IV-E. The State assists only children who are placed with foster parents who are not related to them, however. *See* Oregon Revised Code (O.R.C.) 418.625(2). Children who are placed with relatives may qualify for federal assistance through Aid to Dependent Children. These payments are lower than either the state or federal foster-care payments and are unavailable to many children.

The named appellants, Sheri Lipscomb and Autumn and William Scalf, are three children residing in Oregon. Sheri Lipscomb suffers from multiple handicaps. All three children were taken by the State from abusive and negligent parents and have close rela[illegible] who now wish to care for them. Sheri's aunt and uncle, who do not have medical coverage or private medical assistance for Sheri, and who do not receive state foster care payments or medical benefits on her behalf because they are related to Sheri, are afraid that they will be forced to give Sheri up because of their inability to pay for her medical bills. Autumn and William Scalf's aunt and uncle, who provided a foster home for the children, were forced to give up the children because the State did not provide the children with foster care assistance, and the aunt and uncle were concerned that they would be financially unable to meet the children's needs. The State then placed the Scalf children with unrelated foster parents and now provides the children with foster care benefits and related medical coverage. The parties stipulate that Oregon's denial of state foster care benefits to children who are also ineligible for Title IV-E benefits in some cases has prevented families from providing foster homes to related children who are in the State's custody. The parties also stipulate that other children, like Autumn and William Scalf, have had to leave the homes of relatives who were acting as foster parents because the relatives believed that they could not properly provide for the children without assistance. Some of these children have been placed with nonrelatives and others remain without foster parents in the care of the State.

Sheri Lipscomb and Autumn and William Scalf sue on behalf of al needy and dependent children who have been removed from their homes by the State and placed in foster care, and who have been denied state-funded foster care benefits and medical assistance solely because they are related to their foster parents. They challenge as unconstitutional the Sate's denial of foster care funds to children whose relatives act as foster parents. The district court granted summary judgment to the defendants, finding that Oregon's statute did not violate the equal protection clause. Plaintiffs timely appeal. We reverse.

Standard of Review

We review the propriety of summary judgment de novo. *See Blau v. Del Monte*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEATTLE AUDUBON SOCIETY, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

NO. C89-160WD

CONSOLIDATED WITH

WASHINGTON CONTRACT LOGGERS ASSOCIATION, et al.,

Plaintiffs,

v.

F. DALE ROBERTSON, et al.,

Defendants.

NO. C89-99(T)WD

ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND FOR DISMISSAL

I.

INTRODUCTION

The history of these cases, and of the earlier rulings made by this court and the court of appeals, is summarized in the Order on Motions Heard December 5, 1990 (Dkt. # 757). Sections I and II

of that order, at pages 1-9, are incorporated by reference in this introduction.

The December 18 order ruled that twelve fiscal year 1990 timber sales advertised by the Forest Service could not be awarded because the agency had failed to comply with applicable laws. In particular, the agency had failed to have in place "plans for units of the national forest system" that "incorporate the standards and guidelines" required by 16 U.S.C. § 1604(c), one of which requires the agency to assure the viability of all native vertebrate species, including the northern spotted owl. 16 U.S.C. § 1604(g) and 36 C.F.C. § 219.19. The order enjoined the Forest Service from awarding the sales "until such time as it shows compliance with the environmental statutes." Id. at 17. The agency was given leave to argue a newly-raised contention that its alleged compliance with the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., would eliminate any duties in regard to the owl under the NFMA. That argument has been made and is rejected in today's order. On February 15, 1991, the Forest Service appealed to the court of appeals from the December 18 order. To expedite matters, this court recommends that any appeal from today's order be consolidated with the appeal taken on February 15.

The following motions are now ready for decision:

1. The motion of plaintiffs Seattle Audubon Society, et al. ("SAS"), for summary judgment declaring that the proposal of defendants F. Dale Robertson, et al. ("Forest Service"), to log

northern spotted owl habitat without complying with certain statutes is contrary to law. The statutes claimed to be applicable are the National Forest Management Act ("NFMA"), 16 U.S.C. § 1600 et seq.; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703 et seq. SAS seeks an injunction requiring the Forest Service to adopt standards and guidelines to insure the spotted owl's viability pursuant to NFMA; to prepare environmental impact statements pursuant to NEPA; and to obtain permits required by MBTA.

2. The Forest Service's cross-motion for summary judgment on essentially the same issues. This motion seeks a ruling that the notice published in the Federal Register on October 3, 1990, advising that the agency was vacating the December 1988 Record of Decision ("ROD") initially challenged herein, and stating that it would "conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations," constituted lawful agency action. The Forest Service contends that action taken under the notice will not violate NFMA, NEPA, or MBTA, and seeks dismissal of SAS's claims to the contrary. The agency seeks to vacate the order of December 18, 1990, supra, enjoining it from awarding twelve specified sales until it complied with the applicable environmental statutes.

3. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes, and the Forest Service's cross-motions asserting that no case or

controversy on that subject exists because the ROD has been withdrawn, and seeking dismissal of SAS's claims involving the ROD on that basis.

4. The Forest Service's motion to dismiss the complaint of plaintiffs Washington Contract Loggers Association, et al. ("WCLA"), because that complaint challenged only the now-withdrawn ROD and no case or controversy now exists.

5. SAS's motion for summary judgment under NFMA, NEPA, and MBTA as to five sales that were enjoined earlier under the temporary standards set by Congress for fiscal year 1990, or were withdrawn by the Forest Service after a challenge was filed, and are not currently proposed. The temporary standards are found in section 318 of the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, § 318, 103 Stat. 701, 745-50 (1989) ("section 318"). The Forest Service seeks a ruling that the question as to the five sales is moot.

Following oral argument on these motions on January 17, 1991, the parties were granted leave to file additional materials, and the record was completed with supplemental filings on February 11, 1991.

On February 26, 1991, the Honorable Thomas S. Zilly of this court ruled, in a separate case, that the United States Fish and Wildlife Service ("FWS") has acted contrary to law in failing to designate critical habitat for the northern spotted owl as a threatened species under the ESA. Order Granting Plaintiffs'

Motion for Summary Judgment and Motion to Compel Designation of Critical Habitat, Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al. (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126). The court in that case ordered the FWS to file by March 15, 1991, a written plan for completing its critical habitat review, and to publish its proposed plan within forty-five days thereafter. Id. at 20.

II.

STANDARD OF REVIEW

There are no genuine issues of material fact for trial as to the motions listed above, and they may be decided on summary judgment. Fed. R. Civ. P. 56.

The court in reviewing a challenged administrative action determines whether the action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or was taken without observance of procedures required by law. Friends of Endangered Species v. Jantzen, 760 F.2d 976, 980-81 (9th Cir. 1985); 5 U.S.C. § 706. The standard is narrow and presumes the agency action is valid, Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976), but does not shield agency action from a "thorough, probing, in-depth review." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971).

The focal point for judicial review is the administrative record in existence, not a new record made initially in the reviewing court. Asarco, Inc. v. EPA, 616 F.2d 1153, 1159 (9th

Cir. 1980). The court may, however, consider evidence outside the administrative record for certain limited purposes, e.g., to explain the agency's action or to determine whether its course of inquiry was insufficient or inadequate. Love v. Thomas, 858 F.2d 1347, 1356 (9th Cir. 1988), cert. denied, 490 U.S. 1035 (1989); Animal Defense Counsel v. Hodel, 840 F.2d 1432, 1436 (9th Cir. 1988).

III.

THE FOREST SERVICE'S DUTIES UNDER NFMA ARE NOT CANCELLED AS TO SPECIES LISTED UNDER ESA

A. Statement of the Issue

The amended court of appeals decision of October 30, 1990, made clear that the general environmental statutes continue to apply to the Forest Service in its planning and awarding of timber sales in the national forests. Seattle Audubon Soc'y v. Robertson, 914 F.2d 1311 (9th Cir. 1990). Congress may amend those statutes, but it failed to do so when it adopted section 318 as a temporary measure. The requirements of section 318 are in addition to those already in existence. Id. at 1316. In the present motions the Forest Service argues that its duties under NFMA and NEPA, insofar as they involve the spotted owl, are cancelled by another statute. In this instance the agency relies on EPA. The notice published by the Forest Service in the Federal Register on October 3, 1990, stated in part:

> On April 2, 1990, the Interagency Scientific Committee released its findings and recommendations in a report entitled "A Conservation Strategy for the Northern Spotted Owl." On June 22, 1990, the Fish and

> Wildlife Service listed the northern spotted owl under the Endangered Species Act as threatened throughout its range, 55 FR 26114.
>
> * * *
>
> Listing of a species under the Endangered Species Act constitutes a determination by the Fish and Wildlife Service that the species is in danger of extinction and therefore does not have a viable population, as defined at 36 CFR 219.19, in the area in which it is listed. As a consequence of the listing of the northern spotted owl, the Forest Service's regulatory authority for planning and management of the habitat of the northern spotted owl is superseded by the requirements of the Endangered Species Act. . . .
>
> Taking consideration of the statutory requirements and scientific analysis referenced above, the 1988 Record of Decision, and all direction therein, is vacated. The SOHAs established in compliance with the Record of Decision direction are, therefore, also vacated, as well as any previous decisions concerning management of spotted owl habitat. As a result, all final Forest Plans are therefore amended to incorporate this vacation and return the SOHAs established in compliance with the 1988 Record of Decision to the land classifications of the adjacent lands as established in the respective final Forest Plans. Pending enactment of new legislation, any applicable action by the Endangered Species Committee, adoption of a recovery plan by the Fish and Wildlife Service, or the results of further biological consultation between the Forest Service and the Fish and Wildlife Service, the Forest Service will conduct timber management activities in a manner not inconsistent with the Interagency Scientific Committee recommendations, which are more than sufficient to assure compliance with the Endangered Species Act during this interim period.

55 Fed. Reg. 40412, 40413.

The Forest Service argues that this notice commits it to comply with EPA, and that EPA, once a species is listed, relieves it of its duties under NFMA and other statutes. SAS argues that the Forest Service's duties under the statutes are concurrent, and that the agency has failed to meet its obligations under NFMA and NEPA as to timber sales proposed in accordance with the notice.

C. **Discussion**

The Forest Service's argument that its duties under EPA displace those imposed upon it by NFMA and NEPA is refuted by the statutes themselves and the agency's own established practices in applying them.

ESA provides "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). The program is activated when FWS lists a species of wildlife as endangered or threatened. An endangered species is one "which is in danger of extinction throughout all or a significant portion of its range . . . ." 16 U.S.C. § 1532(6). A threatened species is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20).

ESA requires each federal agency to

> insure that any action authorized, funded, or carried out [by it] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or modification of habitat of such species . . . .

Id. § 1536(a)(2). If an agency proposes an action that may affect an endangered or threatened species it must, before proceeding further, consult with FWS. Id. § 1536(a), (b). Once the agency has initiated consultation, it may not make "any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures . . . ." Id. § 1536(d).

The result of the consultation is a "biological opinion" from FWS -- a document which advises whether the proposal complies with ESA. Id. § 1536(b)(3), (4). In the biological opinion, FWS must decide if the proposed action jeopardizes the species' continued existence or adversely modifies or destroys critical habitat. Id. § 1536(b)(3)(A). If it does, the opinion must recommend prudent and reasonable alternatives to avoid those consequences. Id.

The Forest Service argues that it is complying with the ESA as to the spotted owl. The argument was advanced before the February 26, 1991, ruling in No. C88-573Z, where the court held:

> Upon the record presented, this Court finds the [Fish and Wildlife] Service has failed to discharge its obligations under the Endangered Species Act and its own administrative regulations. Specifically, the Service acting on behalf of the Secretary of the Interior, abused its discretion when it determined not to designate critical habitat concurrently with the listing of the northern spotted owl, or to explain any basis for concluding that the critical habitat was not determinable. These actions were arbitrary and capricious, and contrary to law. 5 U.S.C. § 706.

Order Granting Plaintiffs' Motion for Summary Judgment at 19, Northern Spotted Owl (Strix Occidentalis Caurina), et al., v. Lujan, et al. (No. C88-573Z W.D. Wash.) (Feb. 26, 1991) (Dkt. # 126).

In view of that ruling, the Forest Service is arguing, in effect, that its duties are discharged by complying with the directives of another agency which itself is failing to meet its statutory duty. But the argument that NFMA and NEPA cease to apply once a species has been listed cannot be sustained in any event.

NFMA, passed three years after ESA, directs the Secretary of Agriculture to promulgate regulations to provide for diversity of plant and animal communities in order to meet overall multiple-use objectives. 16 U.S.C. § 1604(g)(3)(B). To that end, a regional guide is required for each administratively designated Forest Service region to provide standards and guidelines for forest planning. 36 C.F.R. 219.8(a). Regional foresters establish policy and approve all forest plans in their regions. Id. § 219.10(a). Forest supervisors prepare and implement forest plans. Id. § 219.10(a)(2). A minimum requirement is that

> [f]ish and wildlife shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.

§§ 219.13, 219.19. A viable population is "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." Id. § 219.19. To insure viability, habitat must be provided to support at least a minimum number of reproductive individuals. Id.

The duty to maintain viable populations of existing vertebrate species requires planning for the entire biological community -- not for one species alone. It is distinct from the duty, under the ESA, to save a listed species from extinction.

Under NFMA, species whose population changes are believed to reflect the impact of logging and other activities, and to measure wildlife viability, are selected as "indicator species." Id. § 219.19(a)(1). The northern spotted owl is an indicator species.

The Forest Service argues that while NFMA requires it to "maintain viable populations," ESA's purpose is to return threatened or endangered species to the point where their populations are viable. The agency thus contends that NFMA applies only to non-viable species, and that once a species becomes threatened or endangered ESA alone defines the Forest Service's duties.

However, NFMA was enacted three years later than ESA, and nothing in its language or legislative history suggests that Congress intended to exclude endangered or threatened species from NFMA's procedural and substantive requirements. The regulations under NFMA explicitly address endangered and threatened species. They do not suggest that ESA alone governs, or imply any conflict between the two statutes.

The record shows that the Forest Service has understood at all times that NFMA continues to apply after a species is listed under ESA. The regulations under NFMA impose the following requirement, among others, on management planners:

> Habitat determined to be critical for threatened and endangered species shall be identified, and measures shall be prescribed to prevent the destruction or adverse modification of such habitat. Objectives shall be determined for threatened and endangered species that shall provide for, where possible, their removal from listing as threatened and endangered species through appropriate conservation measures, including the designation of special areas to meet the protection and management needs of such species.

Id. § 219.19(a)(7) (emphasis added).

An illustration of the agency's recognition that NFMA and ESA apply concurrently is provided by its recent decision to proceed

with the Erika timber sale in the Gifford Pinchot National Forest. The relevant documents were signed in December 1990 and January 1991. The decision notice states that the Erika sale is "not inconsistent with the Interagency Scientific Committee's recommendations" although "suitable spotted owl habitat will be harvested in this project." The finding of no significant impact states that the spotted owl "will be protected according to current guidelines," although none are identified beyond the Federal Register notice. The environmental assessment analyzes the spotted owl both as a threatened species and a management indicator species, and notes that "one forest objective is to maintain viable populations of these [indicator] species." See Declaration of Todd D. True in Support of SAS' Motion for Leave to File Supplemental Exhibit, Exh. A (Feb. 4, 1991) (Dkt. # 811). These documents plainly recognize both that ESA and NFMA apply to the Forest Service's management of the spotted owl.

Similarly, in the Land and Resource Management Plan for the National Forests of Mississippi the agency designates the red-cockaded woodpecker, a federally listed endangered species under ESA, see 50 C.F.R. § 1711(h), as a management indicator species under NFMA pursuant to section 219.19. See Declaration of Richard A. Stahl, Ex. D (Nov. 29, 1990) (Dkt. # 734).

The Forest Service Manual provides, in the section on "Wildlife, Fish and Sensitive Plant Habitat Management":

> Incorporate consideration of wildlife, fish, and sensitive plant resources in forest plans as required by the National Forest Management Act, implementing regulations at 36 CFR 219, and direction at FSM 1920. Specifically:

* * *

4. Determine habitat and management requirements for the recovery of threatened, endangered, and sensitive species.

5. Develop minimum management requirements for the maintenance of viable populations.

Forest Service Manual 2600, § 2621.1(4)(5) (U.S.D.A. Forest Service June 1, 1990) (emphasis added) (Dkt. # 812, Exh. B).

The Forest Services argues that its own interpretation of the statute should govern. See Pyramid Lake Paiute Tribe v. United States Dep't of Navy, 898 F.2d 1410, 1414 (9th Cir. 1990). However, an agency cannot exempt itself from duties plainly imposed by law; it cannot decide that only one of two statutes governs its activities when the laws themselves, and the implementing regulations, clearly show that both apply. See Quinivan v. Sullivan, 916 F.2d 524, 526-27 (9th Cir. 1990). Moreover, if agency interpretation is determined by agency practice rather than by an argument raised in court, it is clear that the Forest Service has understood at all times that its duties under NFMA and EPA are concurrent.

The listing of the northern spotted owl as a threatened species did not relieve the Forest Service of its obligations under NFMA or NEPA.

IV.

THE FOREST SERVICE'S NOTICE WITHDRAWING THE 1988 RECORD OF DECISION DOES NOT CONSTITUTE COMPLIANCE WITH THE NFMA'S PROCEDURAL REQUIREMENTS

The Forest Service contends that the Federal Register notice vacating the ROD, stating that the agency would act in a manner

not inconsistent with the ISC recommendations, and announcing that the agency's regulatory authority for the planning and management of spotted owl habitat is superseded by the ESA, is lawful agency action. This argument depends, first, on the proposition that the Forest Service is bound by the notice to conform to the ISC report. The Forest Service has argued to this court:

> Significantly, the Federal Register notice has the same legal consequence as a regional guide. The requirement to comply with the ISC's strategy is mandatory . . . .
>
> The upshot is that while the notice adopted the ISC's strategy in a different way than contemplated by the regulations under NFMA, the notice still binds the agency in the same manner as a regional guide. . . .

Reply Memorandum in Support of Defendants' Motion for Summary Judgment at 5 (Jan. 15, 1991) (Dkt. # 786).

However, the Forest Service has argued the opposite in the Eastern District of California. In opposing a motion for a preliminary injunction in Northcoast Environmental Center, et al., v. Paul Barker, et al., No. S-90-1250-EJG, it told the court:

> Plaintiffs allege that the Forest Service is now bound by the ISC conservation strategy. In making this argument, plaintiffs take the language out of context and completely ignore the major thrust of the announcement . . . .
>
> * * *
>
> Plaintiffs' sole theory for relief, that the ISC conservation strategy has now become a part of the Forest Service regional guide pursuant to 36 C.F.R. 219.4(b)(2), is expressly repudiated by the very language of the notice of decision itself.

Northcoast Environmental Center, et al., v. Paul Barker, et al. (S-90-1250-EJG E.D. Ca. 1990) (Dkt. # 822).

Counsel for the Forest Service in the present case did not represent the agency in the Northcoast case.

The agency has tried to mitigate this conflict by submitting a memorandum from its deputy chief to a regional forester expressing "concerns about the manner in which you are proceeding" in Northcoast, and stating:

> [O]ur position as reflected in all legal filings should be that the Forest Service is bound by the direction in the October 3, 1990, Federal Register notice, and that all timber management activities must comply with the ISC recommendations.

SAS's Supplemental Memorandum Re Forest Service Documents Submitted at Oral Argument on January 17, 1991, Exh. B (Jan. 25, 1991) (Dkt. # 800).

However, a statement by one agency executive to another as to what should be expressed in legal filings does not amount to a legal commitment that binds the agency. At best, the Forest Service's expressed views reflect a split of opinion in its ranks over whether it has bound itself to follow the ISC recommendations.

The basic question, however, is whether the Forest Service's expressed commitment to award further sales in a manner "not inconsistent with" those recommendations could in any event be held a lawful substitute for the procedural steps required by NFMA.

NFMA requires the Forest Service to develop regulations specifying guidelines for land management plans in order to provide for diversity of plant and animal communities. 16 U.S.C.

§ 1604(g)(1), (3)(B). The regulations require each region to develop a regional guide. 36 C.F.R. 219.8(a). The regional guides must contain standards and guidelines for forest planning. Id.

The process for adopting the regional guides is spelled out in detail in the regulations. Draft and final environmental impact statements must be prepared for the proposed standards and guidelines. Id. § 219.08(c). Public participation in the process is mandated. Id.; see also 16 U.S.C. § 1604(d) ("The Secretary shall provide for public participation in the development, review, and revision of land management plans . . . ."). The Forest Service Chief's approval or disapproval of the proposed guide must be publicly documented. 36 C.F.R. § 219.08(d).

Once adopted, the regional guide may be amended. If the proposed amendment would result in a significant change in the guide, the procedures required for developing the guide must again be followed to amend it. Id. § 219.08(f). Similar procedures are mandated at the forest planning level. See id. § 219.10.

The Forest Service argues that the notice adopting the ISC recommendations is "a set of guidelines and standards" with the "same legal consequences as a regional guide."

The difficulty with this argument -- aside from the agency's ambivalence over whether it has bound itself -- is that it assumes an administrative agency has the power to omit procedures required by law when it believes they would be unnecessary or inconvenient.

NFMA mandates a thorough process with participation by the public, the government, and the scientific community. The aim is to ensure both an informed public and an informed agency. See 36 C.F.R. § 210.6(a)(1), (2). The Forest Service here did not follow any of the procedures required before publishing the notice and announcing that it would act "not inconsistently" with the ISC report.

The ISC report is widely regarded as thorough, careful, and scientifically credible. But an agency cannot substitute its announced intention to follow a report -- even a prestigious one -- for the procedures required by law.

Nor can the statutory requirements be ignored because some conservation organizations urged the Forest Service last year to adopt the ISC recommendations. It does not appear that they urged adoption without public hearing or comment. Their statements tend to show they believed still more should be done. For example, in a letter to the Secretaries of Agriculture and Interior, nine environmental groups wrote that the "ISC strategy cannot withstand any further balancing or compromise. It should, in fact, be strengthened, not weakened . . . ." Declaration of Allan Brock in Support of Defendants' Motion for Summary Judgment, Exh. M (Dec. 5, 1990) (Dkt. # 740). In a separate letter to the Secretary of Agriculture, the National Audubon Society stated:

> [T]he ISC recommendations represent far less than the optimal approach to protecting the species, as these recommendations were skewed by economic and political considerations. The ISC plan, therefore, involves sizable risk that a viable population of owls will not be maintained.

Id., Exh. I.

But in any event neither the authors of such letters nor the Forest Service had the power to waive, in behalf of other organizations or the public, the procedures mandated by law.

The impetus to amend the 1988 ROD came from section 318. That statute directed the agency to review and revise the ROD, and in doing so to consider any new information, including the ISC report. The review, and any changes to the ROD, were to be completed and in effect by September 30, 1990. Section 318 did not change the hearing and impact statement procedures required by NFMA to make such an amendment. The Forest Service argues that where a statute imposes a deadline an impact statement is not required if the agency cannot prepare it within the time set for the decision. Flint Ridge Development Co. v. Scenic Rivers Ass'n of Ok., 426 U.S. 776, 788 (1976). The law, however, is that the agency must comply to the fullest extent possible; the provision may not be used as a means of avoiding compliance with the directives of NEPA. Id. Here, the Forest Service has not shown that it could not have completed the EIS by, or at least close to, the appointed time. Most importantly, it has offered no reason why the process was never even begun. At a minimum the process could have been well along by the date set by Congress for completion. The agency had no basis for failing even to attempt compliance with the statutes.

V.

THE NEPA REQUIREMENTS ARE ADOPTED BY NFMA

In amending a regional guide in any significant way, the Forest Service is required by NFMA to follow NEPA procedures:

> If the change resulting from the proposed amendment is determined to be significant, the Regional Forester shall follow the same procedure for amendment as that required for development and approval of a regional guide.
>
> * * *
>
> A regional guide shall be developed for each administratively designated Forest Service region. . . . Regional guides shall provide standards and guidelines for addressing major issues and management concerns which need to be considered at the regional level to facilitate forest planning.
>
> * * *
>
> A draft and final environmental impact statement shall be prepared for the proposed standards and guidelines in the regional guide according to NEPA procedures.

36 C.F.R. § 219.8(f), (a), (c) (emphasis added).

The published notice withdrawing the 1988 ROD, stating that the Forest Service would proceed not inconsistently with the ISC report, and amending the forest plans accordingly, plainly amounted to a "significant" proposed amendment. Therefore, draft and final environmental impact statements were required. Since this requirement is contained in NFMA itself, it is not necessary to decide whether NEPA would be applicable but for the NFMA adoption of the same procedures. See 16 U.S.C. § 1604(g)(1).

VI.

MBTA DOES NOT APPLY

MBTA makes it illegal to "pursue, hunt, take capture, kill, attempt to take, capture, or kill . . ." any migratory bird or

"any part, nest, or egg of any such bird" by any means or in any manner, 16 U.S.C. § 703, except as may be permitted by a valid permit issued pursuant to regulations, 50 C.F.R. 21.11. The northern spotted owl is a migratory bird as defined by the regulations. 50 C.F.R. 10.13.

Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take" is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under ESA, to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" under ESA means

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

SAS asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," State of Missouri v. Holland, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, Andrus v. Allard, 444 U.S. 51, 62 (1979).

But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass"

and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes "significant habitat modification or degradation" illegal. The court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties. This is illustrated by the exception, from the prohibition on taking migratory birds, for the regulated hunting of migratory game birds. See 50 C.F.R., Part 20.

SAS points out that the taking of migratory birds is prohibited "at any time, by any means or in any manner," 16 U.S.C. § 703. But the cases regarding MBTA violations do not support the kind of application urged here. See, e.g., United States v. FMC Corp., 572 F.2d 902 (2nd Cir. 1978) (killing of migratory birds by dumping wastewater); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Ca.), aff'd on other grounds, 578 F.2d 259 (9th Cir. 1978) (deaths of birds resulting from misapplication of pesticides).

The parties disagree as to whether a private party may obtain judicial review of agency action challenged as violative of MBTA in the first place. While the answer is not entirely clear, the court concludes that, in a proper case, jurisdiction would exist under MBTA, APA (5 U.S.C. § 702), and 28 U.S.C. § 1331. See Merrell v. Thomas, 807 F.2d 776, 782 n.3 (9th Cir.), cert. denied,

484 U.S. 848 (1987). But the challenge brought here cannot succeed because the Forest Service's action in awarding timber sales would not involve a "taking" of migratory birds within the meaning of MBTA.

VII.

THE QUESTION WHETHER THE 1988 ROD VIOLATED NFMA AND NEPA IS MOOT IN VIEW OF THE AGENCY'S WITHDRAWAL OF IT

The Forest Service's notice published at 55 Fed. Reg. 40412 withdrew the December 1988 ROD in its entirety. Nothing has been substituted in its place. The agency has not adopted a new or amended ROD.

SAS has moved nevertheless for summary judgment that the discarded ROD is in violation of the environmental statutes. It must be kept clearly in mind that the motion is addressed to the ROD as an administrative measure. The same standards, modified to increase the size of protected areas, were adopted by Congress as to fiscal year 1990 sales in section 318: "All other standards and guidelines contained in the Chief's Record of Decision are adopted." Section 318(b)(3). That enactment of ROD standards as temporary statutory law is not challenged by SAS's motion. SAS argues, however, that with the expiration of section 318 the ROD must now be tested for legality under the general environmental statutes.

The Forest Service has agreed that, if the question were reached on the merits, the answer would have to be that the ROD fails to comply with applicable law. There is now no dispute that

the ROD would fail to maintain a viable population of northern spotted owls. The agency argues, however, that the question should not be reached because no case or controversy exists, the ROD having been withdrawn.

On this point the Forest Service is correct. Under Article III of the constitution the courts are "to decide actual controversies . . . and not to give opinions upon . . . abstract propositions." Mills v. Green, 159 U.S. 651, 653 (1895). If the question to be adjudicated is mooted by later developments, no justiciable controversy is presented. Flast v. Cohen, 392 U.S. 83, 95 (1968). Here the ROD has been withdrawn in its entirety by the Forest Service, and as matters now stand it cannot and will not be a basis for agency action. Accordingly, the question whether the discarded ROD would violate environmental statutes is academic; it need not and should not be decided. See Racine v. United States, 858 F.2d 506 (9th Cir. 1988).

VIII.

DISMISSAL OF WCLA'S COMPLAINT

WCLA in its complaint has challenged the 1988 ROD as unlawful, but has not sought relief based on other Forest Service action. The Forest Service now moves for dismissal on the ground that no case or controversy exists in view of the withdrawal of the ROD. WCLA has not opposed the motion. The motion is granted and WCLA's complaint is dismissed without prejudice. The briefs and arguments of WCLA's counsel have been valuable throughout this

litigation. As to any future issues in the case, amicus curiae briefs from counsel may be filed.

IX.

SAS'S MOTION RE FIVE SALES EARLIER ENJOINED OR WITHDRAWN

SAS has moved for summary judgment under NFMA, NEPA, and MBTA as to five timber sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed. The Forest Service has responded that the question is moot. The sales involved are the Garden, Nita, and South Nita sales (enjoined), and the First and Last sales (withdrawn after a challenge was filed). Nothing in the record suggests that the Forest Service plans to go forward with these sales. There is accordingly no case or controversy as to them. SAS's motion is denied without prejudice to its renewal should the Forest Service advertise or otherwise proceed with any of these five sales.

X.

SUMMARY OF RULINGS

The rulings now made may be summarized as follows:

1. The motion of SAS for summary judgment declaring unlawful the Forest Service's proposal to log northern spotted owl habitat without complying with NFMA is granted. The agency's failure to date to comply, or begin compliance, with NFMA requirements is arbitrary and capricious, and not in accordance with law. The same motion in regard to NEPA is moot since NFMA directs that the NEPA procedures be followed. The motion in regard to MBTA is denied since that statute is inapplicable. The Forest Service's

cross-motions on the same subjects are denied in part and granted in part accordingly.

2. SAS's motion for summary judgment determining that the December 1988 ROD violates the environmental statutes is denied because the ROD has been withdrawn. The Forest Service's cross-motion for a determination that no case or controversy exists is granted, and SAS's claims seeking relief as to the now-discarded ROD are dismissed without prejudice.

3. The Forest Service's motion to dismiss WCLA's complaint, on the ground that no case or controversy presently exists, is granted, and that complaint is dismissed without prejudice.

4. SAS's motion for summary judgment as to five sales that were enjoined earlier under section 318, or were withdrawn by the Forest Service, and are not currently proposed, is denied without prejudice because no case or controversy is now presented.

XI.

HEARING AS TO INJUNCTIVE RELIEF

Oral argument as to what injunctive relief, if any, should be ordered in light of the foregoing rulings, and as to whether any basis exists to amend the December 18, 1990, order enjoining the award of twelve timber sales, will be held at 8:00 a.m. on March 12, 1991. Counsel should plan on having twenty minutes per side. Counsel from outside the district, or who cannot be present, may take part by telephone. No additional briefs are to be filed in advance of the hearing.

The clerk is directed to send copies of this order to all counsel of record.

Dated: March 7, 1991.

William L. Dwyer
United States District Judge

Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991) (Dkt. # 824). On the basis of that order plaintiffs Seattle Audubon Society, et al. (collectively "SAS") have moved for a permanent injunction prohibiting the sale of logging rights in additional spotted owl habitat areas until the Forest Service complies with NFMA and its regulations by adopting standards and guidelines to assure that a viable population of the species is maintained in the forests. The Forest Service proposes a different injunction, one that would permit, in the interim, additional sales in owl habitat if they are consistent with the recommendations of the Report of the Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl ("ISC Report") issued in April 1990. Intervenors Washington Contract Loggers Association, et al. (collectively "WCLA") support the Forest Service's proposal. The two sides agree that the court should set a date for the Forest Service to adopt a plan to assure the owl's viability.

The court granted WCLA's request for an evidentiary hearing on the scope of injunctive relief, and all parties' request for pre-hearing discovery. See Charlton v. Estate of Charlton, 841 F.2d 988, 989 (9th Cir. 1988). An order issued April 1, 1991, specified the subjects for the hearing. Order Setting Evidentiary Hearing re Injunctive Relief (Dkt. # 867). The hearing began on April 30 and ended on May 9, 1991. All parties presented evidence, rested their cases, and gave oral argument through counsel. The evidence admitted, the arguments and briefs, and the proposed findings submitted by counsel have been fully considered.

LegalTrac database

SPOTTED OWL

1. Northern spotted fever? (On Conservation ...) (protection of spotted owl) (from Sacramento Union) (editorial) 4 col in. v104 The Los Angeles Daily Journal June 12 '91 p6 col 1

2. The mighty owl lobby. (On Conservation ...) (protection of the spotted owl) (from Orange County Register) (editorial) 2 col in. v104 The Los Angeles Daily Journal June 12 '91 p6 col 1

3. Trees v. people: 'wise use' groups mobilize against environmentalists. by Jon Christensen il 24 col in. v104 The Los Angeles Daily Journal June 12 '91 p6 col 3

4. Politics and preservation: the Endangered Species Act and the northern spotted owl. by Mark Bonnett and Kurt Zimmerman v18 Ecology Law Quarterly Feb '91 p105-171

5. Ancient forests, spotted owls, and the demise of federal environmental law. by Victor M. Sher v20 Environmental Law Reporter Nov '90 p10469-10470

6. Loggers must not be sacrificed. (On the Spotted Owls ...) (from the Davis Enterprise) (editorial) 4 col in. v103 The Los Angeles Daily Journal August 30 '90 p6 col 1

7. On spotted owls ... forests worth more than jobs. (from the Washington Post) (editorial) 8 col in. v103 The Los Angeles Daily Journal August 30 '90 p6 col 1

8. Issue needs further study. (On Spotted Owls ...) (from the Sacramento Bee) (editorial) 6 col in. v103 The Los Angeles Daily Journal August 30 '90 p6 col 1

9. Man vs. owl? Lawsuits over timber cutting have obscured the key issue: exporting raw logs to Japan puts Americans out of work. by John B. Judis il 36 col in. v103 The Los Angeles Daily Journal August 30 '90 p6 col 3

10. Timber companies can't see the forest for the trees. by J.A. Savage il Business and Society Review Summer '90 p44-47

LegalTrac database

DARTER

1. In the wake of the snail darter: an environmental law paradigm and its consequences. (from 19 University of Michigan Journal of Law Reform 805, 1986) by Zygmunt J.B. Plater v19 Land Use and Environment Law Review Annual '88 p389-446
HEADINGS AVAILABLE

2. In the wake of the snail darter: an environmental law paradigm and its consequences. (Symposium: Environmental Law) by Zygmunt J.B. Plater v19 University of Michigan Journal of Law Reform Summ '86 p805-862
HEADINGS AVAILABLE

3. It's alive! (snail darter) (from the Wall Street Journal) (editorial) 4 col in. v97 The Los Angeles Daily Journal July 12 '84 p4 col 1
HEADINGS AVAILABLE

4. Reflected in a river: agency accountability and the TVA Tellico Dam case. (A Symposium: The Tennessee Valley Authority) by Zygmunt J.B. Plater il v49 Tennessee Law Review Summ '82 p747-787
HEADINGS AVAILABLE

5. The wake of the snail darter: insuring the effectiveness of Section 7 of the Endangered Species Act. by Eric Erdheim v9 Ecology Law Quarterly Summ '81 p629-682
HEADINGS AVAILABLE

Dr DAVID READ (063 332373 d.1.)
SCHOOL of APPLIED SCIENCE,
CHARLES STURT UNIVERSITY,
MITCHELL CAMPUS
PANORAMA AVENUE, BATHURST 2795

WORKS FOR Dr DAVID GOLDNEY
CHARLES STURT UNIVERSITY, MITCHELL CAMPUS BATHURST
Ph 063 311022 sw

++
N.E.F.A.
North East Forest Alliance

C/- NSW Environment Centre, 39 George St, The Rocks. 2000. Ph 02 2474 206; Fx 02 2475 945
++

15th August, 1991.

Senator Paul Maclean,
Australian Democrat,
Senate Chamber,
Parliament House,
Canberra. 2600.

per fax no. 06 277 3235

< URGENT - FOR THE SENATOR'S PERSONAL ATTENTION >

Dear Senator Maclean,

Re: Sections 45D and 45E of Trade Practices Act

I write to request your support in amending the above Act to delete ss. 45D and 45E as refer to penalties which may flow against groups or individuals who engage in secondary boycotts against a trading company.

The North East Forest Alliance (NEFA) is a community based public interest organisation which has been pursuig the protection of the forest resources, particularly 'old growth' forests, in the state's north east. To that end we have engaged in legal, political and direct non-violent actions to prevent the destruction of unique areas of our natural heritage. We have enjoyed tremendous support and assistance from your colleague Mr Richard Jones MLC in these campaigns.

Our current campaign is focussed on the Chaelundi SF, 50 kms north of Dorrigo and due west of Woolgoolga, which has been scheduled for roadworks and logging by the discredited and confrontationist Forestry Commission of NSW (FCNSW), despite the requests of the NSW National Parks and Wildlife Service (NPWS) which is yet to complete its assessment of the areas wilderness values as part of the Guy Fawkes River Wilderness.

As part of our campaign action, NEFA established and maintained a blockade of the disputed forest for a period of 4 months. On the 19/7/1991 FCNSW issued a media release advising that its works would commence the following week, and consequently NEFA moved its blockade to 'red alert'. In the weeks since then there have been some 252 arrests, and a protracted non-violent struggle to prevnet access to the Compartment 180, 198 and 200.

...2/.

DRAFT SUBPOENA

CAVANAGH

[as for Murray? and Shields combined]

+ All research papers etc..... [as in para 1 shields]
relating to the Powerful Owl and the Sooty owl and their Habitat in Chaelundi State Forest.

****
*** ACTIVITY REPORT ***
****

TN #	MODE	CONNECTION TEL	CONNECTION ID	START TIME	USAGE T.	PAGES	RESULT
*4790	AUTO RX G3		G3	08/07 16:08	01'48	2	OK
*4791	AUTO RX G3	02 2512034	G3	08/07 16:51	12'47	19	NG 19 #005
*4792	AUTO RX G3	02 2512034	G3	08/07 17:05	05'05	7	OK
*4793	AUTO RX G3	2622416	LIQUOR UNION NSW	08/07 17:16	08'38	15	OK
*4795	AUTO RX G3	8939861	PLOWMAN SOLCTR	08/08 09:20	02'56	4	OK
*4796	AUTO RX G3		G3	08/08 09:35	00'53	1	OK
*4797	AUTO RX G3	02 295651	G3	08/08 09:39	00'48	1	OK
*4798	AUTO RX G3	602 6256	G3	08/08 10:29	02'00	2	NG 2 #005
*4799	AUTO RX G3	602 6601	G3	08/08 10:34	00'42	1	OK
*4800	AUTO RX G3	61 43 236565	G3	08/08 10:49	01'15	2	OK
*4801	AUTO RX G3	61 2 2865593	N.P. B.D.O.SYD	08/08 11:35	04'49	8	OK
*4802	AUTO RX G3	2336430 2321374	G3	08/08 12:17	05'42	10	OK
*4804	AUTO TX G3	8914323	G3	08/08 12:44	00'48	1	OK
*4805	AUTO RX G3	61 2 9233590	BHP ENGINEERING	08/08 12:50	04'07	8	OK
*4806	AUTO TX G3	036466925	G3	08/08 12:59	00'47	1	OK
*4807	AUTO RX G3	5401072	G3	08/08 13:04	01'25	2	OK
*4808	AUTO RX G3		G3	08/08 13:10	01'13	2	OK
*4809	AUTO RX G3		G3	08/08 15:35	01'16	2	OK
*4810	AUTO RX G3	5401072	G3	08/08 15:39	00'47	1	OK
*4811	AUTO RX G3	5401072	G3	08/08 15:41	01'00	1	OK
*4812	AUTO RX G3	61 2 5887795	G3	08/08 16:04	06'54	12	OK
*4813	AUTO RX G3	61 2 8871598	BUTTERWORTHS	08/08 16:14	02'15	2	OK
*4814	AUTO RX G3	61 2 3895192	LYONS & LYONS	08/08 16:17	04'05	9	OK
*4815	AUTO RX G3	61 2 3602975	G3	08/08 16:24	00'50	1	OK
*4816	AUTO RX G3	025994250	G3	08/08 16:29	01'22	2	OK
*4817	AUTO RX G3	61 2 8196145	G3	08/08 16:44	03'09	4	OK
*4818	AUTO RX G3	02 2302945	G3	08/09 08:54	04'10	6	OK
*4819	AUTO RX G3	61 2 2901405	G3	08/09 09:24	04'11	8	OK
*4820	AUTO RX G3	067729575	G3	08/09 09:31	01'58	3	OK
*4821	AUTO RX G3	067729575	G3	08/09 09:34	03'47	7	OK
*4822	AUTO RX G3	067729575	G3	08/09 09:43	01'16	2	OK
*4823	AUTO RX G3		G3	08/09 10:02	01'15	2	OK
*4824	AUTO RX G3		G3	08/09 10:52	01'29	2	OK
*4825	AUTO RX G3	089811253	G3	08/09 11:10	00'47	1	OK
*4826	AUTO RX G3	61 2 3895192	LYONS & LYONS	08/09 11:18	01'33	3	OK
*4827	AUTO RX G3	61 2 669 6361	COOLEY & COOLEY	08/09 11:21	01'38	3	OK
*4829	AUTO RX G3	02 8862223	G3	08/09 12:42	01'53	2	OK
*4830	AUTO RX G3	602 6256	G3	08/09 16:00	01'20	2	OK
*4832	AUTO RX G3	602 6256	G3	08/09 16:52	00'42	1	OK
*4833	AUTO RX G3	02 2624920	G3	08/09 17:06	00'59	2	OK

DRAFT SUBPOENA

DENNIS John MURRAY.

SCHEDULE

1. All reports notes, documents and records correspondence and memoranda, diaries, time sheets, logs, message pads, travel logs, surveys, draft surveys, draft reports, and notes and memoranda concerning Pre-logging biological surveys completed by you or ~~your~~ persons acting under your direction concerning Chaelundi State Forest between 1 January 1988 to date.

Compartments
178
179
180
181
195
198
and 200

[then as for shields] para 1.

~~(Receipts & invoices Wildlife training in his affidavit)~~

3. All receipts, invoices, vouchers, documents and records, recording the times spent and amounts of monies disbursed ~~in~~ and ~~relation to~~ all records, ~~details~~ notes and memoranda and manuals relating to ~~Concerning~~ the "Training Wildlife" and ~~Spoil~~ Erosion Control referred to in your affidavit ~~dated~~ sworn 13 August 1991.

****
*** ACTIVITY REPORT ***
****

TN #	MODE	CONNECTION TEL	CONNECTION ID	START TIME	USAGE T.	PAGES	RESULT
*4790	AUTO RX G3		G3	08/07 16:08	01'48	2	OK
*4791	AUTO RX G3	02 2512034	G3	08/07 16:51	12'47	19	NG 19 #005
*4792	AUTO RX G3	02 2512034	G3	08/07 17:05	05'05	7	OK
*4793	AUTO RX G3	2622416	LIQUOR UNION NSW	08/07 17:16	08'38	15	OK
*4795	AUTO RX G3	8939861	PLOWMAN SOLCTR	08/08 09:20	02'56	4	OK
*4796	AUTO RX G3		G3	08/08 09:35	00'53	1	OK
*4797	AUTO RX G3	02 295651	G3	08/08 09:39	00'48	1	OK
*4798	AUTO RX G3	602 6256	G3	08/08 10:29	02'00	2	NG 2 #005
*4799	AUTO RX G3	602 6601	G3	08/08 10:34	00'42	1	OK
*4800	AUTO RX G3	61 43 236565	G3	08/08 10:49	01'15	2	OK
*4801	AUTO RX G3	61 2 2865593	N.P. B.D.O.SYD	08/08 11:35	04'49	8	OK
*4802	AUTO RX G3	2336430 2321374	G3	08/08 12:17	05'42	10	OK
*4804	AUTO TX G3	8914323	G3	08/08 12:44	00'48	1	OK
*4805	AUTO RX G3	61 2 9233590	BHP ENGINEERING	08/08 12:50	04'07	8	OK
*4806	AUTO TX G3	036466925	G3	08/08 12:59	00'47	1	OK
*4807	AUTO RX G3	5401072	G3	08/08 13:04	01'25	2	OK
*4808	AUTO RX G3		G3	08/08 13:10	01'13	2	OK
*4809	AUTO RX G3		G3	08/08 15:35	01'16	2	OK
*4810	AUTO RX G3	5401072	G3	08/08 15:39	00'47	1	OK
*4811	AUTO RX G3	5401072	G3	08/08 15:41	01'00	1	OK
*4812	AUTO RX G3	61 2 5887795	G3	08/08 16:04	06'54	12	OK
*4813	AUTO RX G3	61 2 8871598	BUTTERWORTHS	08/08 16:14	02'15	2	OK
*4814	AUTO RX G3	61 2 3895192	LYONS & LYONS	08/08 16:17	04'05	9	OK
*4815	AUTO RX G3	61 2 3602975	G3	08/08 16:24	00'50	1	OK
*4816	AUTO RX G3	025994250	G3	08/08 16:29	01'22	2	OK
*4817	AUTO RX G3	61 2 8196145	G3	08/08 16:44	03'09	4	OK
*4818	AUTO RX G3	02 2302945	G3	08/09 08:54	04'10	6	OK
*4819	AUTO RX G3	61 2 2901405	G3	08/09 09:24	04'11	8	OK
*4820	AUTO RX G3	067729575	G3	08/09 09:31	01'58	3	OK
*4821	AUTO RX G3	067729575	G3	08/09 09:34	03'47	7	OK
*4822	AUTO RX G3	067729575	G3	08/09 09:43	01'16	2	OK
*4823	AUTO RX G3		G3	08/09 10:02	01'15	2	OK
*4824	AUTO RX G3		G3	08/09 10:52	01'29	2	OK
*4825	AUTO RX G3	089811253	G3	08/09 11:10	00'47	1	OK
*4826	AUTO RX G3	61 2 3895192	LYONS & LYONS	08/09 11:18	01'33	3	OK
*4827	AUTO RX G3	61 2 669 6361	COOLEY & COOLEY	08/09 11:21	01'38	3	OK
4829	AUTO RX G3	02 8862223	G3	08/09 12:42	01'53	2	OK
4830	AUTO RX G3	602 6256	G3	08/09 16:00	01'20	2	OK
4832	AUTO RX G3	602 6256	G3	08/09 16:52	00'42	1	OK
4833	AUTO RX G3	02 2624920	G3	08/09 17:06	00'59	2	OK

POLICE
COMMISSIONER.

1. All documents etc... recording or relating to advice by or on behalf of F.C. of the period during which c. 180, 198 & 200 CSF were planned or expected to be Logged.

2. All doc etc recording or relating to any request by F.C.

3. ail .... by or on behalf of any persons, co, partnerships or businesses intending to log or construct roads in the said compartments.

DRAFT SUBPOENA.

FORESTRY COMMISSION OF NEW SOUTH WALES

SCHEDULE

1. The following ~~All~~ files, references, and regional files, ~~research papers and other publications relating to~~ [see annexure].

in relation to the Chaelundi State Forest area/region

2. All forest type maps ~~concerning~~ of the Guy Fawkes National Park and Chaelundi State Forest adjacent to the compartments 180, 198, and 200.

3. All reports, notes, documents and records correspondence and memoranda, diaries, time sheets, logs, message pads, travel logs, ~~personal~~ surveys, draft surveys, draft reports, vouchers, internal reports and notes and memoranda concerning pre-logging biological surveys completed upon the Chaelundi State Forest compartments 178, 179, 180, 195, 198 and 181 between 1 January 1988 to date.

ACTIVITY REPORT

RECEPTION OK

TN #	4833
CONNECTION TEL	02 2624920
CONNECTION ID	G3
START TIME	08/09 17:06
USAGE TIME	00'59
PAGES	2

2

FCNSW SUB

4. All ~~copies of~~ research papers and other publications fauna policies in relation to the following ~~matters~~ :-

(i).

5. All ~~copies of~~ internal reports, file documents + records, correspondence and memoranda concerning fauna policy compliance pursuant to sections 98 and 99 of the National Parks and Wildlife Act 1974 in the compartments 180, 198 & 200 Chaelundi State Forest from 1 January 1988 to date.

6. All internal reports etc..... [as in 5] concerning applications by any persons, companies, partnerships, or businesses, for licences pursuant to s. 120 of NPW Act 1974 from 1 January 1988 to date

7. C. Mackowski thesis UNE

TRANSACTION SCHEDULE

MODE	TRANSMISSION
TN #	4835
PAGES	3
CONNECTION TEL	2213238

F.C. NSW.

- All Maps showing distribution of old growth forests in north-east NSW, as prepared for Premiers old-growth strategy or other purposes

(i) ~~Researches~~ in State Forests File 1492

(ii) File 596 Fauna and Flora Reserves

~~(iii) Chaelundi S.F. Management Plan.~~

(iv) C.S.F. Management Map and Fire history map. PMP Map

~~(v) Final Harvesting Plans for Chaelundi S.F.~~

~~(vi) All copy timber licences authorising harvesting in Chaelundi S.F. from 1 January 1987 to date.~~

(vii) Wildlife Conservation Policy Statement

(viii) Policy statements

(a) Integrated Harvesting in Hardwood Forests

(b) Native Forest Preservation.

(c) Indigenous Forest Policy

(ix) File. No 14094 - List of Birds on State Forests for Management Plans and Environmental Impact Statements

(x) Forestry Commission File No 2032 - Review of Unlogged Forest in NSW

(xi) File No 7892 - Environmental - Road Construction

(xii) File No 84122 - Forest Types & Environmental Factors Research - Research Plan F4.

ACTIVITY REPORT

TRY RECEPTION AGAIN ##292

TN #	4836
CONNECTION TEL	02 296788
CONNECTION ID	G3
START TIME	08/12 11:03
USAGE TIME	01' 22
PAGES	2

(xiii) File No 1512 - Koala Management - New South Wales

(xiv) File No. 11382 - koala Distribution in NSW State Forests.

(xv) File No. 11815 - Koala Steering Council

(xvi) Koala Management Planning - Chaelundi State Forest.

(xvii) Koala Management Planning - General - Chaelundi State Forest ~~General~~

(xviii) File No 67379 - Road Surveys - General

(xix) File No 45013 - Wildlife - Forest Research - General.

(xx) File No 11342 - Wildlife.

(xxi) File No 3853 - Wildlife - Policy and Management

(xxii) File No 11251 - Ecological Surveys - Wildlife on State Forest - General.

Forestry Commission of NSW Fire Management Manual

para 4 ~~(xxiii)~~ Birds
Flora and Fauna
Habitat Trees
Koalas
Reptiles
Marsupials
~~Mammals~~ Amphibians

Port Macquarie Regional Files

File No 1054 - Fire Behaviours and effects (studies)

File No. 1090 Dynamics of Growth Tallowwood and Blue Gum

PTO.

ACTIVITY REPORT

RECEPTION OK

TN #	4838
CONNECTION TEL	
CONNECTION ID	G3
START TIME	08/12 11:16
USAGE TIME	00'41
PAGES	1

Claim Privilege

File No 6174 - Environmental Matters - Legal including complaints from Environmentalists

File No 11851 - Environmental Impact Study - Erosion Matters - Standard Erosion Mitigation Conditions.

DRAFT SUBPOENA

JAMES MICHAEL SHIELDS

1. All research notes, reports, unpublished documents, documents subject to publication or in press but not published, surveys, and pre-logging reports, surveys, researches in relation to compartments 178, 179, 180, 181, 198 and 200 of the Wauchope in 1959 Chaelundi State Forest from 1 January 1988 to date.

2. Document entitled "The Effects of Logging On Bird Populations in South Eastern New South Wales"

3. Documents surveys researches published or unpublished of wildlife in the Guy Fawkes National Pk from which the opinion expressed in para 4 of your Affidavit sworn 13 August 1991 and filed in those proceedings is based. Your opinion that "it is similar to areas of the adjacent National Park."

4. All documents relating to timed searches referred to in paragraph 6 of the affidavit sworn 13 August 1991

ACTIVITY REPORT

TRANSMISSION OK

TN #	4835
CONNECTION TEL	2213238
CONNECTION ID	G3
START TIME	08/12 09:41
USAGE TIME	01'32
PAGES	3

DRAFT SUBPOENA

NATIONAL PARKS & WILDLIFE SERVICE

SCHEDULE

1. All current licences or permits issued or under consideration to issue by the Service pursuant to s120 of the NAW Act 1974. in relation to the Compartments 180 198 and 200 of Chaelundi State Forest which licences authorise the taking or killing of protected fauna or endangered fauna in the said compartments

2. All files records documents correspondence or memoranda in relation to licences issued or under consideration to issue pursuant to s120 of the National Parks and Wildlife Act 1974.

3. All files, correspondence and memoranda, ~~and~~ records and documents, notes, records of convictions relating to prosecutions under Sections 98 and 99 of the National Parks & Wildlife Act from 1 January 1988 to date.

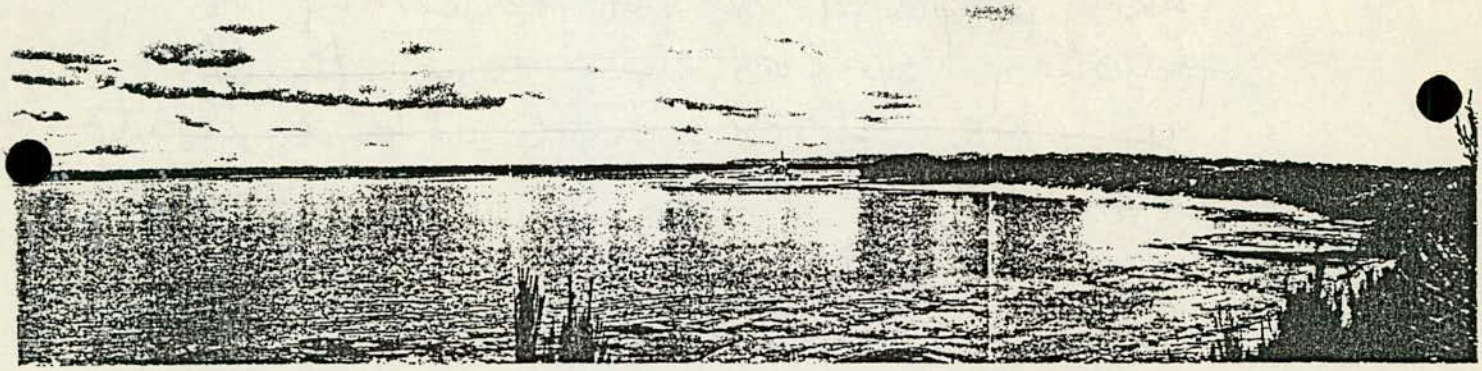
ACTIVITY REPORT

RECEPTION OK

TN #	4834
CONNECTION TEL	
CONNECTION ID	G3
START TIME	08/12 09:14
USAGE TIME	04' 00
PAGES	7

all reports, notes documents and records correspondence and memoranda diaries, time sheets, logs, message pads, travel logs, surveys, draft surveys, draft reports, vouchers, internal reports, vouchers, internal reports ~~and~~, notes and memoranda concerning biological surveys undertaken, whether finally completed or not concerning the following species ~~in compartments 180, 195 and 200 in Chatsworth State Forest~~

(a) Powerful Owl
Masked Owl
Sooty Owl
Spotted-tailed Quoll
Long-nosed Potoroo
Hastings River Mouse
Parma Wallaby



ARTIST'S IMPRESSION OF PROPOSED ARMAMENT WHARF

Figure 12.3.4
CABBAGE TREE POINT ARMAMENT WHARF
VIEW NORTHWEST FROM MONTAGU POINT

IN THE LAND & ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 40208 of 1990

JOHN CORKILL

Applicant

FORESTRY COMMISSION OF NSW

Respondent

NOTICE TO PRODUCE

Filed by:

HILLMAN & WOOLF
Solicitors
82 Elizabeth Street
SYDNEY NSW 2000
DX: 1558 SYDNEY
PH: 221 8522
FAX: 223 3530
REF: BSW 2489/0

To the Respondent:-

The Applicant requires you to produce at the Court at 9.00 am on 19 October, 1990 the following documents for the purposes of evidence:

"EIS" means the Environmental Impact Statement for proposed forest operations in the Washpool Area (1980). "DEP" means the Department of Environment and Planning.

1. Original and copy letter from the DEP to the Respondent dated 31 August 1981 relating to the EIS.
2. Copy letters from the Respondent to the DEP dated 3 November 1981 and 6 November 1981 relating to the EIS.
3. The "readily available data at the time of preparing the EIS" referred to under paragraph 3(iv) of the letter of 3 November 1981 from the Respondent to the DEP ("the said letter").
4. Indexes, contents, tables, or summaries of or published research papers based wholly or inpart upon:
   (a) "its data base for areas being, or proposed to be logged";

(b) "a vast amount of "base-line" data covering State Forests of N.S.W." which "allows a reasonably predictable analysis to be made concerning impacts";

(c) "the Commission's research into N.S.W. forest soils generally" which had indicated by 1981 that "logging operations of the type proposed for Washpool will not impair the soil nutrient balance to the extent of affecting forest recovery";

(d) the "broad data base on soils of similar type and parent material to allow relatively accurate assessment of impact from logging";

as referred to under paragraph 3(iv) of the said letter.

5. The "information or data resulting from" forest research concerning monitoring logging effects which have been incorporated into the Casino West Management Plan since 3 November 1981 as referred to under paragraph 5 of the said letter.

6. The research referred to in Answer 18 of the letter dated 6 November 1981 "which has shown that canopy retention to this level will maintain a viable rainforest structure".

7. Coffs Harbour Regional Office files 1502, 1560, 957, 1949, 423, 557, 2637, 1504, 300, 2713, 2129.

8. Port Macquarie Regional Office file 511.

Dated: 16 October 1990

.....
Solicitor for the Applicant

TO: THE FORESTRY COMMISSION OF NSW (Respondent)
c/ H.K. Roberts
State Crown Solicitor
8-12 Chifley Square
SYDNEY NSW 2000
DX: 19 SYDNEY

IN THE LAND & ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 40208 of 1990

JOHN CORKILL

Applicant

FORESTRY COMMISSION OF NSW

Respondent

NOTICE TO PRODUCE

To the Respondent:-

The Applicant requires you to produce at the Court at 9.00 am on 19 October, 1990 the following documents for the purposes of evidence:

1. All records of communication, correspondence and file notes recording the requests for and the provision of the information referred to in paragraph 1 of the Affidavit of Anthony Eric Ireland sworn 15 October, 1990 herein.

2. Indexes (on) lists of files currently held in Head Office, Coffs Harbour Regional Office, Wood Technology and Forest Research Division and Casino District Office of the Respondent.

3. All instructions, rules or policies of the Respondent relating to the opening, maintenance, closing, keeping and/or destruction of:

   (i) files;
   (ii) documents; or
   (iii) research data;

   in force at any time from 1 January 1980 to date.

Dated: 16 October 1990

.....
Solicitor for the Applicant

Filed by:

HILLMAN & WOOLF
Solicitors
82 Elizabeth Street
SYDNEY NSW 2000
DX: 1558 SYDNEY
PH: 221 8522
FAX: 223 3530
REF: BSW 2489/0

TO: THE FORESTRY COMMISSION OF NSW
(Respondent)
c/ H.K. Roberts
State Crown Solicitor
8-12 Chifley Square
SYDNEY NSW 2000
DX: 19 SYDNEY

IN THE LAND & ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 40208 of 1990

TO: The Proper Officer
Forestry Commission of NSW
Forestry House
95 York Street,
SYDNEY NSW 2000

THE COURT ORDERS THAT you shall attend and produce this Subpoena and the documents and things described in the Schedule:-

(a) before the Court

JOHN CORKILL

Applicant

(b) at Level 6,
American Express Tower,
388 George Street
(cnr King Street)
SYDNEY NSW 2001

(c) on 18th day of September 1990 at 9.00 am or, if notice of a later date is given to you, the later date at am and until you are excused from further attending; but -

FORESTRY COMMISSION OF NSW

Respondent

(i) you need not attend or produce any document or thing on any day unless reasonable expenses have been paid or tendered to you.

(ii) instead of so attending, you may produce this Subpoena and the documents and things described in the Schedule to a clerk of the Court at the above place by hand or by post, in either case so that the clerk receives them no later than two days before the first date on which you are required so to attend, specified for attendances.

SUBPOENA FOR PRODUCTION

TIME FOR SERVICE ABRIDGED TO 4pm on 12/9/90
ORDER
M. J. CONNELL
REGISTRAR.

(iii) you need not comply with this Subpoena if it requires your attendance at a place in Sydney and is served on you after the last day for service shown below.

Filed by:

per

HILLMAN & WOOLF
Solicitors
82 Elizabeth Street
SYDNEY NSW 2000
DX: 1558 SYDNEY
PH: 221 8522
FAX: 223 3530
REF: BSW 2489/0

THE SEAL OF THE LAND AND ENVIRONMENT COURT
NEW SOUTH WALES

SCHEDULE

In this Schedule, the expression "North Washpool" refers to Compartments numbers 686-694 inclusive, 697-699 inclusive in Washpool State Forest No. 355 and Compartment numbers 679, 695, 696, 700-713 inclusive in Billilimbra State Forest No. 815 and the expression "forestry activities" refers to logging, harvesting, roading, burning and associated activities conducted by or on behalf of the Respondent or with its consent or knowledge.

1. Draft and final harvesting, roading and burning plans and maps for North Washpool from 1 September, 1980 to date.

2. Logging history maps and/or plans for North Washpool.

3. Draft and final Management Plans for the Casino West Management Area from July 1979 to date.

4. Draft and final Environmental Reviews for forestry activities in North Washpool from 26 October, 1982 to date.

5. Studies, reports, notes, correspondence, memoranda and other records concerning research on North Washpool (including the collection and/or analysis of data) relating to:

(a) flora
(b) vertebrate fauna
(c) invertebrate fauna
(d) avifauna
(e) aquatic fauna
(f) hydrology
(g) rainfall
(h) climate
(i) wind speed and direction
(j) geology and soil types
(k) erosion potential
(l) water quality
(m) archaeology
(n) anthropology
(o) visual amenity
(p) recreational use
(q) impact of forestry activities
(r) proposals to mitigate impacts of forestry activities
(s) fire management
(t) fuel management
(u) fuel loads
(v) ground truthing of forest type maps

used in the preparation of the 1980 EIS entitled "Proposed Forest Operations in the Washpool Area."

6. Original and copy timber licences and correspondence relating to allocation of quotas and recovery of ex-quota logs for North Washpool from 26 October 1982 to date.

7. All working documents used 1 January 1985 to date to assess volumes of hardwood and rainforest timber available for harvesting in the Coffs Harbour Region in any of the years 1985 to 1995 inclusive.

SOURCES

— what is an assessment? C.P.

8. ? All assessments from 1 January 1985 to date of hardwood and rainforest timber volumes available for harvesting in the Coffs Harbour Region in any of the years 1985 to 1995 inclusive. see 7. As for 7 - all sorts of reports, potentially

9. Documents recording or *referring to approvals (including consents, licences or permissions) by the Respondent for forestry activities in North Washpool from 26 October, 1982 to date. Most - in Regional office? - what do they mean?

10. Documents recording or referring to decisions by the Respondent to carry out forestry activities in North Washpool from 26 October, 1982 to date. what do they mean? some in H.O.

11. Documents recording or referring to final decisions by the Respondent to undertake and/or approve of the undertaking of forestry activities in North Washpool from 26 October, 1982 to 2 February, 1986. see 10 *too wide to be valid

Determination, exhibit 4 to Woolfe; licences; what else?

12. Correspondence, reports, notes, memoranda, submissions and other records relating to:

all three offices

(a) timber quotas allocated to Big River Timber Company Pty Ltd ("BRT"); 6 answers it — produced allocations only. DONE

(b) volumes and types of timber extracted by BRT and Forests from which the timber was extracted from 26 November, 1982 to date. too wide to be relevant

where from? Annual Reports would show all.

irrelevant - see issue 3(b) - no change in activity. Covered by 6.

6-7 Districts x 2 contractors = 14 approx

a morning's work at least.

brief statement in affidavit 3(b) (part of proposed activity)

very large job - at least 2 Dist Offices or possibly Region.

Rod

* what for? We've produced all licences available. Don't have to keep for more than 2 years.

DATED: 12/9/90

BY THE COURT REGISTRAR

Late day for service: 4pm on 12/9/90

Issued at the request of BRUCE STEPHEN WOOLF

Applicant's Solicitor.

NOTE THAT:-

1. if you do not comply with this Subpoena you may be arrested;

2. if, by paragraph (c)(ii), you are permitted to produce this Subpoena and other documents and things to a clerk of the Court at 388 George Street, Sydney you may produce them to the Clerk by hand at the office counter, level 6, at the place or by posting them to:

   Exhibits Clerk
   Land & Environment Court of
   New South Wales
   GPO Box 3365
   SYDNEY NSW 2001

   in accordance with paragraph (c)(ii);

3. in paragraph (c)(ii), "days" means days other than Saturdays, Sundays, and other holidays;

4. documents and things produced by you in accordance with this Subpoena may be returned by post to you at your address shown in the Subpoena but you may in writing on or attached to the Subpoena request that they be posted to you at another address given to you;

5. any questions relating to the requirements of this Subpoena should be directed not to the Court but to the person who requested the issue of this Subpoena.

1. Drafts - maybe on files maybe destroyed.
Final - Lanning 20 or more
- roading
- burning - probably none, Dist do plans.
Maps - with HPs, plus Lat others!

DIST. Time to get finals? 3 days min.

2. Logging history maps. Days & copy +
working documents. dispatch time,

DIST. Time to locate?

✓ 3. MP's supplied. Drafts, amendments destroyed.

4. No ER's since 82. EIS.

5. Impossible to estimate how long.
unless defined.
10 or more years ago!!

✓ 6. ~ supplied

7. Potentially enormous. 3 places.
All working documents!!

Impossible to estimate!

8. Assessments - as for 7
potentially enormous - what is
an "assessment" - CP.
started defined examples!

9. recorded approvals - permissions
& consents decisions, ~~approvals~~
recorded how? Scale at DO, RO, HO etc.
would include tithe l., apsil., housing
plans? ...? roading plans?
referring thereto would include submissions,
initial proposals, -- documents?

10 Time to locate? a week at least.
urgent high priority demands a all staff!

~~10.~~ ~~Surely included in 9.~~
recording decisions - miles of them.
referring to " - even more

~~11.~~
Time to locate? recorded decisions impossible to estimate?
Others - more impossible.

11. Surely included in 9?

12. a) Affidavits supplied
(b) At least a half day's work for
MD.

Subpoena packet
No 1516

IN THE LAND & ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 40208 of 1990

JOHN CORKILL

Applicant

FORESTRY COMMISSION OF NSW

Respondent

May be on EIS file in court.

NOTICE TO PRODUCE

To the Respondent:-

The Applicant requires you to produce at the Court at 9.00 am on 19 October, 1990 the following documents for the purposes of evidence:

"EIS" means the Environmental Impact Statement for proposed forest operations in the Washpool Area (1980). "DEP" means the Department of Environment and Planning.

1. Original and copy letter from the DEP to the Respondent dated 31 August 1981 relating to the EIS. supplied. Can't find original.
2. Copy letters from the Respondent to the DEP dated 3 November 1981 and 6 November 1981 relating to the EIS. can't find → letter supplied can't find original
3. The "readily available data at the time of preparing the EIS" referred to under paragraph 3(iv) of the letter of 3 November 1981 from the Respondent to the DEP ("the said letter"). depends on clear letter
4. Indexes, contents, tables, or summaries of or published research papers based wholly or inpart upon:
   (a) "its data base for areas being, or proposed to be logged";

Filed by:

HILLMAN & WOOLF
Solicitors
82 Elizabeth Street
SYDNEY NSW 2000
DX: 1558 SYDNEY
PH: 221 8522
FAX: 223 3530
REF: BSW 2489/0

(b) "a vast amount of "base-line" data covering State Forests of N.S.W." which "allows a reasonably predictable analysis to be made concerning impacts";

(c) "the Commission's research into N.S.W. forest soils generally" which had indicated by 1981 that "logging operations of the type proposed for Washpool will not impair the soil nutrient balance to the extent of affecting forest recovery";

(d) the "broad data base on soils of similar type and parent material to allow relatively accurate assessment of impact from logging";

depends on above letter

as referred to under paragraph 3(iv) of the said letter.

5. The "information or data resulting from" forest research concerning monitoring logging effects which have been incorporated into the Casino West Management Plan since 3 November 1981 as referred to under paragraph 5 of the said letter. depends on above letter

6. The research referred to in Answer 18 of the letter dated 6 November 1981 "which has shown that canopy retention to this level will maintain a viable rainforest structure". checking, some delay.

7. Coffs Harbour Regional Office files 1502, 1560, 957, 1949, 423, 557, 2637, 1504, 300, 2713, 2129. All annexed except 2713 - no such file.

8. Port Macquarie Regional Office file 511.
Contested, being sent by Commission. Only a file dealing with some policies relevant to arguments with summons.

Dated: 16 October 1990

.....
Solicitor for the Applicant

TO: THE FORESTRY COMMISSION OF NSW (Respondent)
c/ H.K. Roberts
State Crown Solicitor
8-12 Chifley Square
SYDNEY NSW 2000
DX: 19 SYDNEY

Above notes made after discussion with Brian Booker 12.05 p.m. 19/10/90

IN THE LAND & ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 40059 of 1991

JOHN CORKILL

Applicant

FORESTRY COMMISSION OF NEW SOUTH WALES

Respondent

SUBPOENA FOR PRODUCTION

TO: **The Commissioner**
Forestry Commission of NSW
95 York Street
SYDNEY NSW 2000

THE COURT ORDERS THAT you shall attend and produce this Subpoena and the documents and things described in the schedule:-

(a) before the Court

(b) at Level 6,
American Express Tower,
388 George Street
(cnr King Street)
SYDNEY NSW 2001

(c) on 19th day of April 1991 at 9.00 am or, if notice of a later date is given to you, the later date at am and until you are excused from further attending; but -

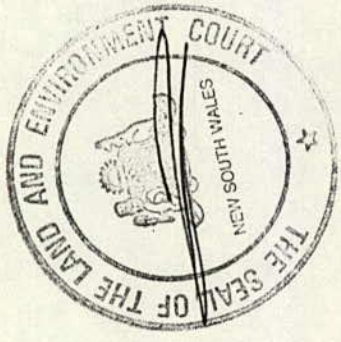
(i) you need not attend or produce any document or thing on any day unless reasonable expenses have been paid or tendered to you;

(ii) instead of so attending, you may produce this Subpoena and the documents and things described in the Schedule to a clerk of the Court at the above place by hand or by post, in either case so that the clerk receives them no later than two days before the first date on which you are required so to attend, specified for attendances.

(iii) you need not comply with this Subpoena if it requires your attendance at a place in Sydney and is served on you after the last day for service shown below.

Filed by:

WOOLF ASSOCIATES
Solicitors
82 Elizabeth Street
SYDNEY NSW 2000
DX: 1558 SYDNEY
PH: 221 8522
FAX: 223 3530
REF: BSW 3003/1



SCHEDULE

In this Subpoena, except where otherwise stated, references to files, documents, plans, maps, reports or records include files, documents, plans, maps, reports and records located at the Urunga District Office, the Port Macquarie Regional Office, Coffs Harbour Research as well as Head office and the Divisions of the Forestry Commission of New South Wales .

"the Forests" mean Way Way State forest and Yarrahappini State Forest.

1. All logging history maps for the Forests.

2. All original and copy draft and final harvesting plans for the Forests from 1 January 1986 to date.

3. The "management maps showing logging progress" referred to at page 33 of the Management Plan for the Macksville Management Area (1978, as amended) relating to the Forests.

4. All draft and/or final annual management reports for the Macksville Management Area for the years 1985 to date.

5. Draft and/or final Preferred Management Priority maps and plans for the Forests.

6. Original and copy logging reports for all logging in Compartments 493, 496 and 497 of Way Way State Forest and Compartment 75 of Yarrahappini State Forest ("the logged compartments") between 1 January 1987 to date.

7. Original and copy, draft and final Environmental Reviews for logging roading and burning activities in the Forests from 1 September 1980 to date.

8. The Compartment History Register referred to at paragraph 2.4.8-1 of the Macksville Management Plan for Compartments 483, 484, 485, 488, 489, 490, 491, 492, 493, 496, 497, 498 and 499 of the Way Way State Forest and Compartments 75 and 76 of the Yarrahappini State Forest, and all other registers, files, maps and documents recording the logging history for those compartments.

9. All copy timber licences authorising harvesting in the Forests at any time from 1 January, 1987 to date.

10. All copy quota notifications for timber to be extracted from the Forests, whether or not the quota could be satisfied from any other Forest or Forests, from 1 January 1987 to date.

11. All documents, maps or plans recording all matters affecting or likely to affect the environment which were examined and/or taken into account by the Forestry Commission of New South Wales in its consideration of approvals granted to log and of roading and/or burning activities at any time after 1 January 1986 in the logged Compartments.

12. All documents, maps or plans recording all matters affecting or likely to affect the environment which were examined and/or taken into account by the Forestry Commission of New South Wales in its consideration of approvals granted from 1 January 1986 to date to log Compartment 75 of Yarrahappini State Forest and Compartments 483, 484, 485, 488, 489, 490, 491, 492, 498 and 499 of Way Way State Forest.

13. All documents recording the reasons for and/or the matters taken into consideration in reaching the decision or decisions that logging, roading and burning would not be likely to significantly affect the environment in the Compartments referred to in paragraph 8 above.

14. All documents concerning research relating to:

(a) flora
(b) fauna
(c) climate
(d) geology
(e) soil types
(f) erosion potential
(g) water quality
(h) archaeology
(i) anthropology
(j) ground truthing of forest type maps
(k) the impact of pre-logging and post-logging burning
(l) environmental impact of logging and/or roading

of the Forests

(i) from 1 January, 1987 to date;
(ii) at any time, where the said research was taken into account by the Forestry Commission of New South Wales in the course of considering the decisions referred to in paragraph 13 above or the examinations referred to in paragraphs 11 and 12 above.

15. The Management Planning Division files on the Macksville Management Area.

16. Urunga District Office files for the Forests.

17. Original letter of 19 September, 1990 from Perry & Smith to the Forestry Commission of New South Wales relating to the Forest.

18. All maps and documents showing the extent or path of the October 1989 wildfire in the Forests.

DATED: 10.9.91

BY THE COURT REGISTRAR

Last day for service: 10.9.91
Issued at the rqeuest of BRUCE STEPHEN WOOLF
Applicant's Solicitor.

NOTE THAT:-

1. if you do not comply with this Subpoena you may be arrested;

2. if, by paragraph (c)(ii), you are permitted to produce this Subpoena and other documents and things to a clerk of the Court at 388 George Street, Sydney you may produce them to the Clerk by hand at the office counter, level 6, at the place or by posting them to:

   Exhibits Clerk
   Land & Environment Court of
   New South Wales
   GPO Box 3365
   SYDNEY NSW 2001

   in accordance with paragraph (c)(ii);

3. in paragraph (c)(ii), "days" means days other than Saturdays, Sundays, and other holidays;

4. documents and things produced by you in accordance with this Subpoena may be returned by post to you at your address shown in the Subpoena but you may in writing on or attached to the Subpoena request that they be posted to you at another address given to you;

5. any questions relating to the requirements of this Subpoena should be directed not to the Court but to the person who requested the issue of this Subpoena.

Your search request has found 140 STORIES through Level 1.

To DISPLAY these STORIES press either the KWIC, FULL, CITE or SEGMTS key.
To MODIFY your search request, press the M key (for MODFY) and then the TRANSMIT
key.

For further explanation, press the H key (for HELP) and then the TRANSMIT key.
.fu

LEVEL 1 - 1 OF 140 STORIES

Los Angeles Times

August 6, 1991, Tuesday, Home Edition

SECTION: Part A; Page 4; Column 4; National Desk

LENGTH: 482 words

HEADLINE: U.S. REDUCES PLANNED SPOTTED OWL HABITAT

BYLINE: From Associated Press

DATELINE: WASHINGTON

BODY:
The government Monday scaled back by more than 25% the amount of Northwest
forest land it says must be protected to save the threatened northern spotted
owl from extinction.

But Mark Rey, executive director of the American Forest Resource Alliance,
said the Fish and Wildlife Service's new proposal covering 8.2 million acres
.np

"would still constitute the largest land grab in the nation's history."

Even with the smaller designated land base, the service estimated that by
1995 the region will have about 33,000 fewer timber-related

of court or some combination of all three. The need for "orderly governance" is also suggested by the observation at p 67 of the reasons that the most stoical banker could not fail to be alarmed by the statement in Parker & Parker's letter of 26 December that unless NAB withdrew the payment stoppage notice it would cause the liquidation of BCH and most if not all of its subsidiaries.

In this court the banks could not decide whether the purpose, or part of the purpose, of the receivership was to have something in the nature of an insolvency administration. Mr Hulme said that it was not and that the orders of 29 December and 9 February were intended simply to prevent the defendants from making wrongful payments or entering into or carrying into effect improper transactions: the orders were intended to operate like injunctions. But according to p 9 of Pt H of the respondents' written submission:

"The appointment of a receiver by the court preserved the assets of the BBH group for all creditors, and preserved the BBH group from the greater prejudice of individual receivership in each brewing subsidiary coupled with uncoordinated action by individual creditors, including (very likely) the appointment of different provisional liquidators to individual members of the BBH group."

There is another matter which supports the view that the learned judge regarded his order of 29 December, or his orders of 29 December and 9 February, not as resembling interim or interlocutory injunctions but as orders for the administration of a group of insolvent companies. The reasons which his Honour gave on 5 January make no reference to the balance of convenience and no reference to the loss which the defendants are likely to sustain in consequence of the order. The only mention of anything of this kind to be found in the reasons given on 9 February is at p 221, where his Honour says this:

"As to the fifth complaint, that is that I was not informed of the harm which would be caused to the BBH group as a consequence of the appointment of receivers and managers, I find it is groundless. I was fully aware of the consequences of any order I made in the matter, just as I was fully aware of the consequences of NAB's action as spelt out in the two letters from Parker & Parker."

This is not said by way of discussing whether the discretion should have been exercised in favour of making the original order notwithstanding the possible damage to the defendants or by way of discussing whether that order should be allowed to continue in operation having regard to that consideration. It appears only in the course of discussion of the submission that the original order should be set aside for non-disclosure, the suggestion being that probable harm to the defendants had not been disclosed. There is at p 225 mention of the contention that the receivership threatens the existence of the Bond companies, but only in the context of a comment on failure to call witnesses. If his Honour was regarding his orders of 29 December and 9 February as akin to interim or interlocutory injunctions, as orders to protect the position of the plaintiffs pending the making of some further interlocutory application or the trial of an action, then it is extraordinary that there was on 9 February no discussion, indeed no extensive discussion, having regard to the very great length of the reasons for decision, of the considerations affecting the exercise of the discretion

including in particular probable damage to the defendants from the making of the order sought. If, on the other hand, his Honour had been distracted by the "orderly governance" submission into thinking that a creditor of a company whose solvency was in question could have the affairs of that company and its subsidiaries administered by a court appointed receiver for the benefit of all creditors if that was a convenient form, or the most convenient form, of insolvency administration, then the failure to have regard to possible damage to the defendants and to other considerations affecting the discretion is more understandable.

Even if, contrary to our view, equity would in the past and will now on the application of an unsecured creditor appoint a receiver of a company in financial difficulties as a form of administration, an exercise of discretion would still be required, and the court would have regard to the damage to be done to the company concerned by the order. This his Honour failed to do.

The failure to have regard on 9 February to the damage that might be done to the Bond companies by the receivership is also suggested by the failure to require, or to consider whether the court should require, the usual undertaking as to damages, either simply for the future or both for the future and for the past. The failure to consider whether that undertaking should be insisted upon is itself a serious error. Again, as on 29 December, so on 9 February, the learned judge failed to have regard to the intrinsically drastic nature of an order whereby receivers and managers will dispossess the owner and the remarkably drastic nature of the order appointing receivers of the whole undertaking and all the assets of a group of companies engaged in trade. And as happened on 29 December his Honour appears to have overlooked the fact that BBS Securities was not a covenantor and that no breach of contract was alleged against it. If on 9 February his Honour regarded as the purpose of the receivership the prevention of the defendants — one would have to exclude BBS Securities — from disposing of assets otherwise than in accordance with the terms of the loan and credit agreement (and we refer in this regard to p 125 of the reasons) it was necessary for him to consider whether a remedy less drastic and less harmful or potentially harmful to the defendants would meet the case and accordingly to have regard to the remedy of injunction. But the only reference to this alternative is in the passage already cited from p 217 of the reasons, where, after mentioning the possible course of seeking the appointment of a provisional liquidator, his Honour said:

"On the other hand, injunctive relief would not have remedied the breaches of the loan and credit agreement; nor would it have prevented the cross-defaults and liquidation which the Bond companies foresaw."

We have some difficulties with this passage. We do not read the words "injunctive relief would not have remedied the breaches of the loan and credit agreement" as directed to the prevention of future breaches. The more natural meaning is that past or existing breaches will not be remedied. Had it been intended to express a finding that an injunction was likely not to be obeyed (and Mr Hulme did not invite us to read the words in this way) we would have expected some statement of reasons in support of that finding. But neither an injunction nor a receivership would remedy past or existing breaches. To say that an injunction would not have prevented the cross-defaults and liquidation which the Bond companies foresaw was

jobs than was projected under forest management plans in effect in the spring of 1990.

The agency said that federal timber harvest levels in Oregon, Washington and Northern California will fall below 2 billion board feet -- less than half the levels established in those 1990 plans.

The Fish and Wildlife Service announced that it was proposing the removal of 3 million acres of private land from its earlier recommendation that 11.6 million acres be designated as the owl's critical habitat.

Also, it pulled out about 400,000 acres of state and tribal lands that were in the previous proposal -- dropping the proposed habitat to 8.2 million acres across the three states.

"The service believes that federal and state land should be the principal focus of the owl critical habitat designation," the agency said.
.np

Environmentalists said the reduction was acceptable because it affects mainly private lands that already have been heavily logged and are home to relatively few of the remaining 3,000 pairs of owls.

"This is probably a good step forward for the future protection of the owl," said Rindy O'Brien of The Wilderness Society. "While it drops out private lands, there is not much old growth left on private lands. By dropping it out, you still are preserving the core federal lands."

Timber industry leaders said that the revised proposal would do little to soften the economic blow to the Northwest. The industry has projected that such dramatic logging cutbacks would cost the three states more than 100,000 jobs.

"Once again, U.S. Fish and Wildlife Service bureaucrats and biologists have released a proposal that would devastate the economy of the

correct, but the appointment of a receiver, unlike the grant of an injunction, was very likely to have consequences of that kind. His Honour seems to have thought, we note again, that the receivership was the most satisfactory form of insolvency administration and (this appears to be the implication) that once the court appointed receivers and managers winding up orders were unlikely.

Whatever is to be made of this difficult passage in the reasons, we think that it, coupled with the absence of any other discussion of the remedy of injunction, shows a failure properly to consider the important question whether in all the circumstances an injunction would not meet the case.

If an ex parte application is made for a receiver the judge will consider whether an injunction will suffice and if satisfied that in all the circumstances an injunction will suffice and should be granted he will grant it. The learned judge was obliged to consider, both on 29 December and on 9 February, whether he should on 29 December have appointed receivers despite the existence of the less extreme remedy. And on 9 February one of the questions was whether, putting to one side criticisms of the order of 29 December and of what had taken place on that day, on the whole of the material it was appropriate to allow the receivership to continue when the less drastic remedy was available. But it should be emphasised that the banks did not in January fall back on the position that if the receivers had to go their regime should be replaced by injuunctions. Consistently with this approach, the banks have not asked this court, if the appeal succeeds, to substitute injunctions for receivership.

In another respect the reasons given on 9 February show error. For by their silence on the point they suggest that his Honour failed altogether to have regard to the undertakings that had been given concerning the sale to BRL of the Australian brewing assets of the BCH group. At p 125 his Honour said:

"If NAB has an interest in the brewing assets sufficient to entitle it to an injunction restraining the Bond companies from disposing of those assets other than in accordance with the loan and credit agreement as it undoubtedly has, then in my opinion it has an interest in them sufficient to entitle it to the appointment of a receiver and manager if it can be demonstrated that those assets are in jeopardy."

It is clear that his Honour regarded the amended agreement for the sale of the Australian brewing assets announced to the stock exchange on 28 December as striking at the whole basis on which the banks had provided finance to BBH: see pp 214-15 of the reasons. On 9 January BRL and Manchar gave undertakings to the court, recorded in an order made on that day, that they would not pending the trial of the action or further order:

(a) exercise any right under the agreement for the sale of the Australian brewing assets dated 28 December 1989 to waive any requirement of the consent of NAB to the sale of those assets;

(b) give a notice contemplated by cl 2.1 of that agreement without 48 hours' prior notice to the banks;

(c) exercise any right under the share sale agreement of 28 May 1989 to waive any requirement of the consent of NAB to the sale of the shares without 48 hours' prior notice to the plaintiffs.

By the time of these undertakings, although BRL remained a partly owned subsidiary of BCH, its board had been reconstituted, and it is

important to note that neither at the hearing in January nor in this court (where the matter was raised with him) did Mr Hulme suggest that the reconstituted board could not be trusted to observe its undertakings given to the court.

His Honour's failure, which we would infer, to take into account these undertakings is another error. It is perhaps to be explained on the basis that the learned judge, considering receivership to be a suitable, or the most suitable, form of administration for the defendants, regarded the undertakings as irrelevant.

His Honour having fallen into error in the ways we have mentioned in considering whether to set aside his earlier order, it is for us to determine that application to set aside. We have earlier said why we think that the ex parte order of 29 December should not have been made and that this conclusion does not necessarily mean that the order is to be set aside. We have gone on to give reasons why, in our view, even if on the whole of the material in January a case for a receivership was made out, the original order should have been set aside, as against merely moderated. But we are in addition of the view that on the whole of the material in January a case for a receivership was not made out. We can state our reasons for this important conclusion quite briefly. His Honour's findings concerning breaches of the loan and credit agreement have been challenged before us, and we have heard much argument on this. One question in particular that has been agitated is whether his Honour was wrong in concluding, despite the evidence of Willis, that it was strongly arguable that side-streaming and upstreaming of funds had continued since 15 November 1989.

The reasons for decision of 9 February discuss the effect of the notice given by the banks on 29 December requiring immediate payment but we say nothing about this. After discussing at some length, and rejecting, the suggestion that only a proprietary interest in the applicant will in general support the appointment of a receiver, the reasons go on to consider, at great length, in a section extending over 86 pages, what breaches of the loan and credit agreement were committed and what breaches still existed on 29 December and the significance of those breaches. These questions have been the subject of detailed submissions in this court. We are not going to summarise his Honour's provisional findings or the contentions of the parties.

When we, considering the matter for ourselves (error on the part of the learned judge being shown) ask what case there was on 9 February for the appointment of a receiver, we are for the moment concerned with whether the appointment was an appropriate order for the protection of the banks' rights. No case has ever been sought to be made of dissipation of assets so as to raise the possibility of a Mareva receivership. This being so, what may be done by way of the protection of rights does not include the preservation of assets simply with a view to their being available, directly or indirectly, to satisfy any judgment the banks may obtain. The banks' case must be that they have the benefit of a number of contractual promises from the defendants, or the defendants other than BBH Securities, and that a receivership is necessary for the protection or enforcement of those rights. The principal significance of past and present breaches is the light which they throw on the probability of future breaches and on whether the controllers of the companies concerned might be expected to comply with

Pacific Northwest,
placing tens of thousands of hard-working men and women on public assistance
programs," said Kirk Ewart of the Northwest Forest Resource Council in Portland,
Ore.

Marvin Plenart, director of the Fish and Wildlife Service's regional office
in Portland, emphasized that logging is restricted, but not prohibited, within
critical habitat areas. Any cutting wi.thin such areas must first be approved
np

by the service.

The new proposal ccvers about 3.8 million acres in Oregon, 2.7 million acres
in Washington and 1.8 million acres in California.

The service declared the owl a threatened species in June, 1990, citing
excessive logging as the primary threat to its survival.

TYPE: Wire

SUBJECT: OWLS; HABITATS; ENVIRONMENT -- NORTHWESTERN UNITED STATES; LUMBER
INDUSTRY; ENDANGERED SPECIES; FISH AND WILDLIFE SERVICE (U.S.)

.nd

LEVEL 1 - 2 OF 140 STORIES

Los Angeles Times

August 2, 1991, Friday, Home Edition

SECTION: Business; Part D; Page 7; Column 1; Financial Desk

LENGTH: 270 words

injunctions. Having considered the evidence, the findings and the arguments of counsel we are not persuaded that a case is made out for the drastic remedy of a receiver. Without going into details we think that in general his Honour tended to take too strong a view on the significance of breaches.

The question for us, for present purposes, is whether, on the findings of fact except in so far as these have been successfully assailed, there is such a danger of future breaches of covenant proved as made it appropriate in all the circumstances to appoint receivers and managers. We find it unnecessary to determine whether his Honour was wrong in concluding that it was strongly arguable that side-streaming and upstreaming had continued since 15 November 1989, for even on his Honour's finding here we would not ourselves be satisfied that an injunction would not meet the case. We say this despite the highly unfavourable view formed by the learned judge of the behaviour of some at least of those who controlled the Bond group. We would regard the danger of the carrying into effect of the agreement for the sale of the Australian brewing assets as not sufficient in all the circumstances, including the undertakings, to warrant even an injunction, but if any relief was to be given an interlocutory injunction was sufficient. The right conferred on the banks in November 1989 to have Peat Marwick Hungerfords monitor and review the day to day activities and affairs of the BBH group is important here.

In any event, if any case for the interim or interlocutory appointment of receivers and managers of the undertakings and assets was made out, the usual undertaking would have to be exacted, and justice would require that the undertaking attach to the original appointment was well as to any order modifying the original order. The argument on the appeal has proceeded on the basis that the respondents are not willing, in order to keep the receivers in possession, to give an undertaking as to damages which will protect the appellants against the consequences of the orders of 29 December and 9 February. To preserve the receivership without a satisfactory undertaking as to damages is unthinkable.

The learned judge was very critical of certain transactions and of the way in which the appellants had conducted their case. He referred in particular to the sum of $1.2 billion which was said to have been lent and which was converted into a deposit for the purpose of the agreement to sell the Australian brewing assets to BRL, to the Ong transaction and to the amount of $21m in respect of which the respondents say that a book entry records a fictitious transaction. The Ong transaction is also said by the banks to be fictitious. His Honour thought it highly likely that the entry relating to the $21m made in BBH's ledger in December 1989 recorded no genuine transaction and was an attempt by BBH to conceal the true extent of the "upstreaming" breaches. We see no reason to disagree with the provisional view which his Honour formed about this matter or with his conclusion that the affair reflected very badly on those concerned if his provisional view was right. We prefer to say nothing about the Ong transaction and the supposed $1.2 billion loan. We approach this case on the assumption that in view of a number of matters his Honour was entitled to think that those who controlled the BCH group included persons in high positions who could not be trusted. The matters relied on by his Honour

question of the existence of audited consolidated accounts and the evidence given about that, the view formed on the credibility of certain witnesses and the view taken of the failure to call other witnesses and the alleged failure of the defendants to place financial information before the court.

The question whether those in control of the BCH group can be trusted is an important one when consideration is being given to any undertakings offered and to the availability of the alternative remedy of injunction. It has been emphasised by the respondents and our failure to deal with it at greater length does not mean that we are not conscious of its importance. But, even assuming (as we do) that the learned judge was right in the adverse view he formed on the transactions and other matters, we are not prepared to say, considering the matter for ourselves as we must do in view of the errors that have been established, that the extreme remedy of receivership was appropriate as against the lesser remedy of properly framed injunctions, accompanied of course by an undertaking in damages from the banks. It is to be borne in mind that a system of monitoring had been in force since 15 November. That could have continued, supported by an order of the court if necessary. Mr Hulme has not contended that the injunction would be an unsatisfactory remedy because of the complexity of the covenants or possible difficulties in knowing whether a given act would be in breach of covenant.

Since the receivership order ought to have been set aside on grounds unrelated to the identity of the receivers, nothing need be said about the dismissal by his Honour of the application made by the appellants for the removal of the receivers on the ground that it could not be maintained that they were, and would be seen to be, entirely independent of the parties to the litigation.

Solicitors for the first to sixth appellants: *Phillips Fox.*

Solicitors for the ninth appellant: *Ebsworth & Ebsworth.*

Solicitors for the respondents: *Mallesons Stephen Jaques.*

Solicitors for Cede & Co: *Arthur Robinson & Hedderwicks.*

Solicitors for the US Trust Co of New York: *Corrs.*

Solicitors for the receivers and managers: *Freehill Hollingdale & Page.*

A G DIETHELM
SOLICITOR

HEADLINE: BUSH BACKING LABOR-INDUSTRY BILL ON LOGGING

BYLINE: From Associated Press

DATELINE: WASHINGTON

BODY:
The Bush Administration for the first time Thursday threw its conditional support behind a Northwest timber bill, a labor-industry proposal that would free the government from some environmental restrictions when logging national forests.
.np

Deputy Assistant Agriculture Secretary John Beuter and Bureau of Land Management Director Cy Jamison told a Senate panel that the legislation strikes an appropriate balance between ecological and human needs.

They said, however, that President Bush continues to oppose one provision that would provide tens of millions of dollars in economic relief to unemployed loggers and millworkers.

Legislation containing special assistance to workers who lose their jobs in the timber industry is not needed and would set a bad precedent," Beuter said.

The bill is strongly opposed by environmentalists because it would make it easier to log federal lands inhabited by the threatened northern spotted owl.
The bill under consideration by the Senate Energy and Natural Resources subcommittee on public lands, national parks and forests was crafted by the AFL-CIO, the Brotherhood of Carpenters and Joiners and timber industry members of the American Forest Resource Alliance.

It is sponsored by Republicans Bob Packwood of Oregon and Slade Gorton of Washington in the Senate and Rep. Jerry Huckaby (D-La.) in the House.
.np

ACTIVITY REPORT

RECEPTION OK

TN #	4661
CONNECTION TEL	068 42 2203
CONNECTION ID	G3
START TIME	07/23 16:51
USAGE TIME	07' 10
PAGES	12

The Bush Administration had refrained from backing any of the nearly dozen pieces of timber legislation that Congress members have proposed over the past two years.

The bill would alter the Endangered Species Act to allow for expedited exemptions for logging.

TYPE: Wire

SUBJECT: LEGISLATION -- UNITED STATES; BUSH, GEORGE; LUMBER INDUSTRY -- UNITED STATES; ENVIRONMENT -- NORTHWESTERN UNITED STATES; LUMBER INDUSTRY -- LABOR RELATIONS; UNEMPLOYMENT

.nd

LEVEL 1 - 3 OF 140 STORIES

Los Angeles Times

July 25, 1991, Thursday, Southland Edition

SECTION: Part A; Page 29; Column 1; National Desk

LENGTH: 453 words

HEADLINE: SCIENTISTS GIVE CONGRESS 14 PLANS FOR SAVING OWL

BYLINE: By from Associated Press

DATELINE: WASHINGTON

BODY:

A scientific panel Wednesday gave Congress a wide range of options for saving the northern spotted owl, but it warned that there is "no free lunch" when balancing economic activity and environmental protection in the oldest forests

Solicitors for the plaintiffs: *Mallesons Stephen Jaques.*

Solicitors for the first, second, third, fourth, fifth and sixth defendants: *Phillips Fox.*

Solicitors for the seventh and eighth defendants: *Blake Dawson Waldron.*

Solicitors for the ninth defendant: *Ebsworth & Ebsworth.*

R WEBB
COMPANY LAW
WRITER

BOND BREWING HOLDINGS LTD & ORS v NATIONAL AUSTRALIA BANK LTD & ORS

SUPREME COURT OF VICTORIA – APPEAL DIVISION

KAYE, MURPHY and BROOKING JJ

21-23, 26-28 February, 14 March 1990 – Melbourne

Receivers – Appointment – By court – Whether receivership may be used as form of insolvency administration.

Practice and procedure – Ex parte application – Duties of applicant.

Practice and procedure – Appointment of receiver – Undertaking as to damages.

The BBH group of companies appealed against an order appointing receivers and managers made by Beach J on 29 December 1989, and the same judge's refusal to vacate those orders on 9 February 1990, reported at (1990) 1 ACSR 405.

Held, allowing the appeal:

(i) The appointment of a receiver, like any other equitable remedy, is to be had only where the remedies obtainable at law are inadequate to meet the ends of justice. The inadequacy of legal remedies is a condition for the proper exercise of equitable jurisdiction rather than the foundation of the jurisdiction itself.

(ii) There is no principle that a receiver may be appointed only on the application of a person who asserts some proprietary interest in the property concerned. What the applicant must show is that he has some legal or equitable right which will be protected or enforced by the making of the order sought and that no other available remedy is adequate for that purpose.

(iii) The court will not appoint a receiver as a means of establishing a regime for the administration of the affairs of an insolvent or financially embarrassed company where the company resists the appointment.

Re Swallow Footwear Ltd (1956) 222 LT 229; *Harris v Beauchamp Bros* (1894) 1 QB 801, applied.

(iv) Where the company itself applies, or where a friendly creditor applies, a receiver should not be appointed, or at all events should not be appointed unless the court is satisfied that the creditors, or at least a very substantial body of them, support the application. A company should not be allowed to use a receivership obtained by a friendly creditor to delay or defeat its assets. Any order should always be expressed to be without prejudice to the rights of any prior secured creditor.

(v) However it is otherwise where a company applies for a receiver to safeguard assets which it is incapable of safeguarding itself. Assets are not in jeopardy for this purpose simply because secured creditors intend to exercise their rights with regard to the assets.

(vi) Where there is a danger that the company will dissipate its assets a Mareva injunction may be granted and in a strong enough case of that kind a receiver may be appointed. But that is a limited exception to the general rule that the court will not, by injunction or by the appointment of a receiver, require a company to give security for the claim of an unsecured creditor.

Lister & Co v Stubbs (1900) Ch D 1, followed.

Jackson v Sterling Industries Ltd (1987) 162 CLR 612; 71 ALR 457, referred to.

of the Pacific Northwest.
.np

The four scientists on the panel, which was commissioned by two House committees to make recommendations on protecting the owl, offered 14 options. Most called for dramatic logging cutbacks in order to offset years of excessive timber harvests in the region's national forests.

They concluded that existing management of the region's national forests places the threatened owl, the marbled murrelet and other old-growth wildlife at the risk of extinction.

"We looked hard and we don't think there is an alternative that provides abundant timber harvests and species protection," said John Gordon, dean of the School of Forestry and Environmental Studies at Yale University.

"We don't think there is any free lunch," he said at a news conference.

One of the choices would cut back Northwest logging to less than one-fourth of traditional levels, to as low as 750 million board feet a year, and provide protection for troubled salmon runs in the Columbia River Basin as well as the threatened spotted owl.

That approach would cost the region a minimum of 60,000 jobs from the 1985-89 average, with much more unemployment possible if the prescribed protection was
.np

extended to private lands as well as federal forests, said K. Norman Johnson, a forest management professor at Oregon State University.

At the "high timber yield" end of the range of choices, logging could continue at near traditional levels, as high as 5 billion board feet annually,

(vii) An ex parte application for a receiver should not be granted except in case of emergency. On such an application the court should consider whether an interlocutory injunction would suffice, and whether the usual undertaking as to damages should be required.

Obiter: There is much to be said for the view that on an ex parte application for an interim injunction counsel should raise with the judge, in order to avoid the danger of oversight, the question whether an undertaking in damages is appropriate, even though counsel may wish to contend that for some extraordinary reason the undertaking should not be exacted.

(viii) In the instant case:

(a) the primary judge apparently acted in order to impose an administration in isolvency, which was a wrong exercise of the power to appoint a receiver, or at least he had failed to distinguish between preventing transfers of funds in breach of contract and imposing an administration, which would itself be appealable error;

(b) the respondents had acted unfairly by deliberately failing to give effective notice to the appellants and then seeking an oppressive order ex parte;

(c) the judge had failed to consider the likely damage which would flow to the appellants, and the usual undertaking as to damages should have been required;

(d) an ex parte order of this kind should not have been expressed to operate pending further order;

(e) if any relief was to be given in the circumstances, an interlocutory injunction would have been sufficient.

Appeal

This was an appeal from orders appointing receivers and managers to the appellant companies made ex parte on 29 December 1989 and from a decision refusing an application to vacate or rescind those orders made on 9 February 1990. The Full Court allowed the appeal on 28 February and published its reasons on 14 March 1990.

A J Meyers QC and *N J Young* for the first to sixth appellants.

S K Wilson for the ninth appellant.

S E K Hulme QC, R Finkelstein QC, J H Karkar QC, R M Garratt and *P E Anastassiou* for the respondents.

P R Hayes QC and *R A Brett* for Cede & Co and US Trust Co of New York.

P J O'Callaghan QC and *A W Sandbach* for the receivers and managers.

Cur. adv. vult.

Kaye, Murphy and **Brooking JJ.** Shortly after 4pm on Friday 29 December, just before the long weekend, on an application made without effective notice to the companies concerned, the Bond Brewing group, part of the Bond Corporation group, were placed in receivership on the application of a syndicate of 16 banks who were owed about $800m. The order is perhaps the most momentous ex parte order ever made in an Australian court, resulting as it did in the immediate loss to the companies

of their powers to manage and control their own businesses and affairs. In the result the control of assets worth, it may be, billions rather than mere hundreds of millions of dollars changed hands. The receivers and managers were to be in possession until further order. And they had very wide powers, including what was (on one view) an unlimited power to sell assets. At the first opportunity afforded them, on Tuesday 2 January, the companies asked the judge who had made the order to set it aside. The hearing of this application took almost the whole month. It was unsuccessful, and on 9 February in a lengthy considered decision his Honour required the receivers to give security, varied their powers in some respects and in effect directed that the receivership continue pending the trial of the action that the banks had in the meantime commenced or further order. An application by the Bond companies to remove the receivers on the ground of unsuitability was also refused, but the summons was used by his Honour to make the variations to his earlier order which we have mentioned. The Bond companies appealed to this court, which on 28 February allowed the appeal without giving reasons. Those reasons we now give. It is important that our reasons for decision be published as soon as possible and in the interests of expedition we refrain from giving the long summaries of facts and submissions which might otherwise be expected. An adequate summary would be of great length. The learned judge's reasons occupied 232 pages and much of this was devoted to the chronicling of events. We use his Honour's abbreviations in general in referring to the companies. We shall on occasions oversimplify. Our own reasons for decision will to a large extent presuppose familiarity with the undisputed facts forming the background to the application for receivers.

Some short and necessarily imperfect summary of the financial arrangements giving rise to this litigation is nevertheless desirable. The six defendants to the action form part of the Bond Brewing Holdings group, which itself forms part of the Bond Corporation Holdings group. The firstnamed defendant, BBH, is a mere holding company, its principal assets being the shares in the brewery companies and in BBI. The companies which conduct the breweries are Castlemaine, Tooheys and Swan, the second, third and fourthnamed defendants. The fifthnamed defendant, BBI, has been described as engaged in various trading and entrepreneurial activities. The sixthnamed defendant, BBH Securities, is the conduit through which money flows from the four operating companies (the brewery companies and BBI) to BBH and vice versa. The second to sixthnamed defendants are all wholly owned subsidiaries of the firstnamed defendant, BBH.

In 1986 BBH wished to rearrange its affairs by means of a facility of A$880m obtained from a group of banks and an issue of US$510m unsecured notes (described in the evidence as "junk bonds") in the United States. The plaintiffs in the action are the presently interested banks together with National Nominees, which as trustee for the banks had many powers under the instruments about to be mentioned. What is described in the jargon of today as a "financing package" was arranged in the sum of about A$1.6 billion, comprising a "senior debt facility" of A$880m from the banks, a "zero coupon" note issue yielding up to A$280m, and the subordinated note issue (the "junk bonds") in the sum of US$510m. The "senior debt facility" of A$880m from the banks was made up of a funding

at the cost of as few as 2,000 jobs, the committee said.

"The first four or five options violate the daylights out of the Endangered Species Act," said Rep. Sid Morrison (R-Wash.). "I get the feeling what we've been thinking all these years is true. We have some tough decisions to make."

Rep. George Miller (D-Martinez), chairman of the House Interior Committee, said he hopes that Congress can adopt some solution this year.

Environmentalists responded favorably, and timber industry leaders disapproved.

"In the mad rush to protect owls, murrelets, salmon, ecosystems and other life forms, we are forgetting one particular species -- Homo sapiens," said Mark Rey, executive director of the American Forest Resource Alliance.
.np

Jim Blomquist of the Sierra Club said the report should serve as a "wake-up call for Congress."

The scientists were asked to look at the issue by the Agriculture Committee, which has jurisdiction over national forests, and the Merchant Marine and Fisheries Committee.

TYPE: Wire

.nd

facility of A$600m from the banks themselves to BBH and a "direct pay" letter of credit facility of up to A$280m whereby the banks gave security by means of letters of credit for the repayment of moneys to be obtained by BBH by way of an issue in the United States of "zero coupon" notes, that is, notes which instead of bearing interest were issued at a discount. The banks have in fact been called upon to pay and have paid under these letters of credit. The action concerns attempts by the banks to recover the moneys which they had made available both under the funding facility and under the letters of credit. The total amount outstanding on 29 December 1989 was in the region of A$800m, in three different currencies.

There was no shortage of agreements to give effect to these complicated arrangements, and some of them should be mentioned. There is a loan and credit agreement dated 21 November 1986 (and later thrice amended), by which the banks agreed to make available to BBH the "senior debt facility" in the amount of A$880m. The parties to that agreement are BBH as borrower, Castlemaine, Tooheys, Swan and BBI as the covenantors, the banks, NAB as agent for the banks and National Nominees as the Security Trustee. Under that agreement all credit is to be extended to BBH: no credit is given to the three operating brewery companies or BBI nor, although they are the covenantors, do they covenant to make any payment to the banks. The borrower, BBH, is to use the proceeds of all accommodation granted to it and the zero coupon notes and the US$510m unsecured notes to make loans to BBH Securities on condition that that company in turn uses the funds to provide financial accommodation to the three brewery companies and BBI by the discounting by BBH Securities of commercial bills drawn by those four companies and accepted by BBH. Neither by the loan and credit agreement nor by any other agreement is any security in the conventional sense in terms granted to the banks to secure repayment.

Although the loan and credit agreement imposed obligations on BBH Securities it was not a party to the agreement, but this apparent oversight was cured by one of the amending agreements, which brought it in as a party.

The loan and credit agreement obliges BBH to repay the principal outstanding by instalments, beginning in 1991. It is also obliged to repay the principal immediately upon receipt of a declaration by NAB that all moneys owing are immediately due and payable. Notice of such a declaration may be given once an event of default (as defined) has occurred. Notice was in fact given during the morning of 29 December 1989.

The loan and credit agreement contains a number of covenants on the part of the three operating brewery subsidiaries and BBI. BBH Securities does not give these covenants. More will be said about them in a moment.

We have mentioned that by the loan and credit agreement BBH was to make loans to BBH Securities on condition that that company use the funds to provide financial accommodation to the three brewery companies and BBI. A series of bill acceptance and discount agreements (called in some of the documents operating subsidiary credit agreements) were entered into between BBH, BBH Securities, the Security Trustee and the companies to which the accommodation was to be given. Pursuant to these the moneys obtained by BBH under the loan and credit agreement were passed on to the four operating subsidiary companies. In association with these bill

acceptance and discount agreements deeds of charge were entered into by the four operating subsidiary companies by which they granted to BBH fixed and floating charges securing payment to BBH of moneys due by them to it under the bill acceptance and discount agreements. Those deeds of charge empowered BBH, when the security became enforceable, to appoint a receiver in the usual way, and by them BBH irrevocably appointed National Nominees its agent to exercise the power to appoint a receiver. Thus while the banks did not in the conventional sense themselves take any security for the accommodation which they granted to BBH they insisted that BBH itself take a conventional security in respect of the moneys advanced to the operating companies and themselves took power through National Nominees to control the enforcement of that conventional security.

Each bill acceptance and discount agreement entitled National Nominees, as Security Trustee, to terminate the facility at any time and require immediate payment by the covenantor to BBH of the face value of all outstanding bills provided that the banks had required immediate payment by BBH.

The debt due to the American holders of the long-term and high interest bearing unsecured notes in the sum of US$510m was subordinated to that of the Australian banks. The numerous agreements executed as part of the scheme included a BBH creditors priority deed which effected this subordination. This was made between United States Trustee Company of New York, BBH and National Nominees. It may be noted that this deed not only effected the subordination but also provided for a payment stoppage notice to BBH and the trustee for the United States bond holders. It was agreed that if one-third of the creditor banks in value gave a payment stoppage notice BBH would not pay interest due under the bonds, and that if notwithstanding such a notice payment was made by BBH to the trustee the trustee should hold the money in trust for the banks. An interest payment of US$30m was due to the bond holders on 1 December 1989 but a payment stoppage notice was given on 23 December and this interest was not paid by BBH. By the BBH creditors priority deed, all the rights of the bond holders are subordinated to the prior payment of the banks' debt on the dissolution or winding up of BBH and if BBH is wound up any distributions which the trustee for the bond holders receives are to be held by it on trust for the banks.

It should also be mentioned that there was a prior borrowing of about A$135m by Swan under a debenture trust deed of 15 December 1983 and that this debt was not subordinated to the debt of the banks.

In addition to the BBH creditors priority deed there was a BBH group creditors priority deed, which subordinated to the rights of the banks under the loan and credit agreement the rights of BCH and other members of the BCH group in respect of sums owed to them by BBH.

While the banks have not been given priority over the holders of the debentures issued by Swan in 1983, the banks have thus been given priority over the US bond holders and over members of the BCH group and so, the trade creditors being relatively small, the banks have priority over virtually all creditors except the Swan debenture holders.

We have stated the effect of the documents in broad and simple terms.

The banks sought to protect their position by means of the subordination already mentioned and the taking of the power to control through National

Los Angeles Times

July 14, 1991, Sunday, Bulldog Edition

SECTION: Part A; Page 10; Column 1; Advance Desk

LENGTH: 1055 words

HEADLINE: NATIONAL FORESTS CELEBRATE CENTENNIAL;
ENVIRONMENT: MODERN RANGERS FACE NEW PRIORITIES FOR LAND'S USE. THE 100-YEAR
TENSION BETWEEN LOGGERS AND PRESERVATIONISTS CONTINUES.

BYLINE: By JEFF BARNARD, ASSOCIATED PRESS

DATELINE: GRANTS PASS, Ore.

BODY:
When the first national forests were created in 1891, conservationists were worried that the unchecked westward march of cut-and-run timber barons would leave the nation without lumber, water or wildlife.
.np

This year, the U.S. Forest Service celebrates the centennial of the lands under its care -- and environmentalists still are worried. Logging in the national forests continues, and they say wildlife is imperiled.

"It is so bitter, and so ironic," said Brock Evans, National Audubon Society vice president for national issues. "They are liquidating it all slower in the Forest Service, with a lot more bureaucracy, but they are liquidating it nonetheless. The arguments are all the same."

The echo of the century-old battle is particularly loud in the Pacific Northwest, home to the biggest timber producers in the national forest system and the northern spotted owl, which has turned the timber industry upside down since it was declared a threatened species last year.

"Eighty years ago, we didn't understand what we were doing

Nominees the exercise by BBH of the power to appoint a receiver under the debentures given to it by the four operating companies. The third way in which they tried to protect their position was by the taking of the covenants contained in the loan and credit agreement. These include complicated covenants of the kind commonly called "negative pledges", in which lenders have in recent years often placed their faith instead of taking conventional security, sometimes to their regret. For recent experiences have shown lenders that all the covenants in the world are no substitute for good old fashioned security.

By cl 24.1(a) of the loan and credit agreement BBH and the covenantors (the covenantors being the four operating companies) each undertook to furnish to NAB within 120 days of the close of its financial year copies of audited accounts and by cl 24.1(d) each of them undertook that it would within 60 days after each 30 September give a certificate to NAB that no event of default or potential event of default as defined had occurred since the last certificate and that since the last certificate there had been no default or event which with the giving of notice or lapse of time would become a default under any indenture, and that all ratios and financial covenants had been complied with. They also undertook duly and punctually to pay all taxes payable: cl 24.1(f). The substance of other provisions relied on by the banks may be taken from the allegations in the statement of claim:

"(e) Each of BBH and the covenantors undertook to the agent and each participant for itself and on behalf of its subsidiaries, inter alia, as follows:

(i) in the case of each covenantor, it and its subsidiaries would not create, permit or suffer to exist any security interest (as defined) over all or any of its assets except for certain liens and charges described therein: cl 24.2(b)(i);

(ii) in the case of BBH, it would not acquire or purchase or sell or otherwise dispose of any property, whether real or personal: cl 24.2(d)(iii);

(iii) in the case of BBH, it would not enter into contracts or agreements (whether oral or written) relating to any matter or thing whatsoever other than the relevant documents (as defined) or an indenture (as defined) or any documents or agreement to be entered into under any of them or any other document approved by the agent providing for the refinancing or any financial accommodation to be provided under any of them: cl 24.2(d)(iv);

(iv) in the case of each covenantor, it and its subsidiaries would not make any loans or advances or extend any form of financial accommodation or make any payments of whatever nature to BBH or to any person except for certain payments described therein: cl 24.2(g);

(v) BBH would not issue any further shares and the consolidated subsidiaries of BBH would not issue any further shares other than to BBH or a wholly owned subsidiary of BBH; cl 24.2(i);

(vi) in the case of BBH, it would not until the expiration of a period of two years from the date of the loan and credit agreement make any of the restricted payments described in cl 24.2(k)(i) to (iv) except the payments described in cl 24.2(k)(v) to (xii); and after the expiration of the said period of two years, it would not make a restricted payment other than a payment of the type referred to in cl 2 of the fifth schedule to the loan and credit agreement unless the conditions specified in cl 1 of the fifth schedule were satisfied: cl 24.2(k);

(vii) in the case of BBH and each covenantor, it and its subsidiaries would not amend its memorandum or articles of association: cl 24.2(m)."

The appellants accept this as a broadly accurate statement of the effect of the provisions in question subject to a qualification concerning payments in the ordinary course of business. Both at first instance and on appeal the covenants contained in cl 24, some of which are paraphrased in the extract just cited from the statement of claim, were described as concerned in part to prevent "upstreaming" and "side-streaming". Upstreaming is the passing of money up through the BBH group to the parent, BCH. Side-streaming is the passing of money sideways to BBI from other members of the BBH group. The covenants, among other things, restrict the passing of money upwards and the passing of money sideways in this sense: they do not prohibit it.

The banks say the collection of agreements shows an intention that, while they were not secured creditors in the conventional sense, their position was to be much more advantageous than that of the ordinary unsecured creditor.

The ex parte order appointing receivers was made the day after an announcement to the stock exchange concerning the sale of Bond Brewing assets and we now trace as briefly as possible the history of events so far as the sale of brewing assets is concerned. To say that by the end of 1989 the BCH group had for some time had financial problems is to do no more than state a notorious fact. Assets sales in order to reduce debt were under consideration at least for a good part of 1989. The BCH group had not only its Australian breweries but also breweries in the United States. A sale agreement dated 29 May 1989 was entered into between BCH and Bond Corporation North America as vendors, Manchar Holdings Pty Ltd (a wholly owned subsidiary of Bell Resources Ltd) as purchaser and BRL as guarantor. The agreement took the form of a sale of shares and included the sale by BCH of all its shares in BBH. By cl 4.1 completion of the sale and purchase of both the shares in BBH and the shares in BBH(US) was made subject to a "condition precedent" that a number of approvals to the sale and purchase had been obtained and remained in force. These included the consents of the banks.

There exists a novation and amendment agreement which bears date 30 June 1989 and is in relation to the share sale agreement dated 29 May 1989, but nothing need be said about this. Two further agreements were executed, each dated 19 September 1989, for the purposes of what has been called the Lion Nathan purchase of the Australian Brewing assets. The first of these is the brewery sale suspension agreement. This is made between the parties interested in the Manchar purchase. By it the parties to the agreement dated 29 May 1989 agree that they will take no steps to complete that purchase prior to 31 January 1990 or the date of termination of the

would lead to the gray wolf's extinction from Oregon, to the grizzly bear's extinction from Oregon. The difference now is we are able to study and understand the results of our management a lot better than before," said Andy Stahl of the Sierra Club Legal Defense Fund in Seattle, a leader in court battles to protect the owl.

The forest centennial, being celebrated across the country this summer, dates from March 3, 1891, when Congress passed the Forest Reserve Act.

.np

Within three weeks, President Benjamin Harrison created the Yellowstone Park Timberland Reserve, 1.2 million acres around 19-year-old Yellowstone National Park. It was followed the same year by the White River Plateau Timberland Reserve in Colorado. More reserves followed in 1892 in Alaska, Washington, Oregon, California, New Mexico and Colorado.

Though it drew little attention at the time, historians now point to the act as a turning point in the national policy on public land: Instead of selling it or giving it away, the government began to hold land in reserve.

The act was born of a mood that began to develop in 1864, when George Perkins Marsh wrote in his book "Of Man and Nature" that too much logging in his native Vermont had damaged the landscape and hurt fish and wildlife.

To feed a growing nation, 190 million acres of forest were cleared for farms between 1850 and 1910, equivalent to all the lands now in the national forest system.

"The villain of the modern world, the automobile, took a huge amount of pressure off our forests, because we don't have to feed all those horses," said Doug MacCleery, a Forest Service assistant director of timber management.

Brewco acquisition agreement, whichever first occurs. The Brewco acquisition agreement is the second agreement dated 19 September 1989. A company (Brewco) was to acquire the Australian brewing assets of the BCH group — the transaction was to take the form of a sale of shares — and the issued capital of Brewco was to be held as to 50 per cent by the New Zealand company, Lion Nathan, and as to 50 per cent by BRL. By cl 4.1 of the Brewco acquisition agreement it was made subject to a condition precedent that the consents of the banks be obtained. A master agreement dated 19 September 1989 was entered into between Lion Nathan, BRL and others for the establishment of a joint venture between Lion Nathan and BRL in relation to the Australian brewing assets of the BCH group.

On 28 December, the day before the appointment of the receivers, BRL announced to the Stock Exchange that it had on 22 December given notice to BCH and Lion Nathan of intention to terminate the master agreement at the expiration of 14 days from that date. On the expiration of the 14 days, the announcement continued, the original arrangements of 29 May 1989 involving BRL and Bond would revive. The announcement continued:

"Following discussions in relation to these brewing assets and the deposit of $1.2 billion BRL has entered into an amended agreement for the purchase of the Australian brewing assets of the Bond Corporation Holdings Ltd group. The purchase price is $2 billion. Payment will be made through the assumption by BRL of the debt owed in respect of the Australian brewing assets which Bond has agreed to reduce prior to completion through application of the proceeds of asset sales now under way.

...

"Bond had indicated to BRL that it may be possible to complete the transaction by 1 May 1990. However, successful completion in such a period will obviously depend on the co-operation by the bankers and creditors of Bond Brewing Holdings Ltd.

"BRL recognises the important position of the various members of the syndicate led by National Australia Bank Ltd. BRL will now be seeking to meet with syndicate members to discuss ways in which BRL can co-operate with those creditors to enable their interests to be protected while BRL proceeds with its acquisition."

The draft statement of claim placed before his Honour when the application was made alleges the provision of financial accommodation pursuant to the loan and credit agreement, the undertakings or covenants that we have earlier mentioned, breaches of those covenants and the existence, and exercise by the plaintiffs on 29 December, of a power to declare all moneys owing under the loan and credit agreement to be immediately due and payable. The prayer claims against BBH a declaration of indebtedness and judgment in the amount of the indebtedness. Damages are claimed against all defendants. In addition the prayer claims an order, interlocutory and final, appointing a receiver and manager to protect, collect, get in and receive the assets of each defendant.

The draft statement of claim alleges, correctly, the incorporation of BBH Securities and that it became a party to the loan and credit agreement. It alleges, correctly, that the covenants on which the plaintiffs rely are covenants by BBH and the four operating companies and consistently with this it alleges breaches of the covenants on the part of those companies. It

contains no allegation of any actual or apprehended wrong on the part of BBH Securities; indeed, the allegation of apprehended breaches made in para 33 expressly excepts that company. On the face of the pleading there is no basis whatever for the claim for damages made against it. Paragraph 34 of the draft says this:

"The said breaches of the loan and credit agreement by the defendants have substantially diminished and continue substantially to diminish the funds and assets of each defendant and the ability of the plaintiffs to recover payment of the said amount from BBH, and have adversely affected the ability of BBH to perform its obligations under the loan and credit agreement, its financial condition and business and the security of the plaintiffs, and consequently the funds and assets of BBH stand in considerable jeopardy."

When the writ was filed on 2 January 1990 a number of paragraphs (36 to 43) were added to the draft statement of claim. These paragraphs introduced the US$510m note issue, its subordination by the BBH creditors priority deed, the payment stoppage notice given to the trustee on 23 December, intimations to the banks by BCH and the defendants on 26 and 28 December that liquidations would result if that notice was not withdrawn and the making of an application on 29 December in Western Australia for the winding up of BCH. It is hard to know what to make of paras 36 to 43 of the statement of claim, which are absent from the draft. Some of them may be objectionable as pleading evidence instead of facts, but that is the least of the problems which they raise. Their only relevancy can, it seems, be as allegations made in support of the claim for a receiver and the allegations are presumably put forward on the basis that a probability or danger that one or more of the defendants will go into liquidation or fail bears on whether a receiver of its assets should be appointed.

In the course of the application some reference was made to the question whether the Bond companies had been notified of it. Evidently counsel said that a notice had been "sent off" and that the banks' legal advisers "did not expect it to arrive in time". This notice was in fact a letter sent by facsimile transmission at about 2.30 pm on 29 December by the banks' solicitors in Melbourne to Messrs Parker & Parker, the Perth firm acting for BBH. (We give Melbourne times throughout.) The letter said that application would be made to the Supreme Court of Victoria as soon as convenient to that court for the appointment of receivers and managers of the six companies in question and concluded, "We expect that application to be heard this afternoon". The letter was not marked "Urgent" and having regard to the number and nature of letters sent by solicitors to each other nowadays by facsimile transmission the mere fact that a letter is sent in this way is hardly an indication of urgency. The sending of the letter was not preceded, accompanied or followed by a telephone call to Messrs Parker & Parker. When the letter arrived the partner concerned was at the office of BCH and he did not receive it until he returned to his own office some time after 3pm. Unsuccessful attempts were then made by Parker & Parker to speak to those who had the conduct of the matter in the banks' solicitors' office and immediately after that Parker & Parker telephoned their Melbourne agents and arranged for them to go as a matter of urgency to the Supreme Court. Later Parker & Parker were informed that their agents could not accept the

"Almost a third of agricultural lan.d was devoted to feeding horses and mules.[H
p

Once that pressure was taken off, we didn't need to clear it."

The Forest Reserve Act came at a pivotal time: two years after the Oklahoma land rush turned loose the Sooners in lands once set aside for Native Americans, and two years before Frederick Jackson Turner told the Columbian Exposition in Chicago that the American frontier was gone, erased by settlement.

Western politicians fought unsuccessfully to cut back the President's new preservation powers, afraid they were being robbed by liberal Easterners of timber, grazing lands and minerals they had earned by trekking across the nation.

Under President Teddy Roosevelt, an avid outdoorsman, the growth of national forests accelerated. One political cartoonist at the time drew Roosevelt as a barber shaking his Forest Reserve Tonic on the sparsely timbered pate of Uncle Sam, and remarking: "It's getting thin on top."

The U.S. Forest Service was created in 1905 to run the preserves and now oversees 156 national forests, 19 national grasslands and 71 experimental forests covering 191 million acres.
.np

Norman Maclean described working on what was then the Selway Forest in Montana during the Service's early days in his short story, "USFS 1919: The Ranger, The Cook and a Hole in the Sky."

"It was a world of strings of pack horses or men who walked alone -- a world of hoof and foot and the rest done by hand," he wrote.

instructions owing to a conflict of interest. Further efforts were made by Messrs Parker & Parker, which need not now be related, and the upshot was that both the representative of a freshly instructed firm of Melbourne solicitors and counsel instructed by Parker & Parker by telephone arrived independently at the Supreme Court at about 4.25pm shortly after the order had been made and the judge had risen.

The order made on 29 December 1989 bears evidence of hasty preparation by the banks' advisers both as regards clerical or similar errors and as regards matters of more substance. We mention the clerical and other minor errors for the support they give to the view that the banks' advisers were so anxious to obtain the immediate signature of the judge to an order that it was put before him without even a fairly quick reading which should have purged it of some at least of those mistakes. On no view was the matter so urgent that a few minutes could not have been spared to check the order before it was handed up. So far as minor errors are concerned, the order wrongly records that there is a proceeding that has been commenced by writ and misstates the number of the Order of the Rules of Court pursuant to which it is authenticated. Paragraph 1 of the order, the paragraph which makes the appointment, refers to a "summons or motion" that did not exist and was not contemplated. The paragraph conferring powers concludes with the words "it being the intention that such powers are met (*sic*) withou (*sic*) lilmitation (*sic*) to the other". Subparagraph (p) empowers the receivers to dispose of property of the companies but subpara (y) seems to require the approval of the court to a sale of property of the companies. The order appears to require that the former power be not read down by reference to the latter. One would in addition have to consider s 324A(2) of the Companies (Vic) Code, which has the effect of empowering a receiver of property of a corporation to dispose of that property for the purpose of attaining the objectives for which he was appointed; this power is subject to any provision of the court order making the appointment, being a provision that limits the receiver's powers.

The order refers in more places than one to the subsidiaries of the companies and in this regard it is not confined to wholly-owned subsidiaries. Although subpara (p) empowers the receivers to dispose of property of the companies, subpara (y) refers to the possible sale of property of the companies or any of their subsidiaries.

While r 39.03 of the Rules of Court requires the party obtaining the appointment of a receiver to serve a copy of the order on the receiver there is no corresponding requirement with regard to a person of whose property a receiver is appointed. The order does not require service of a copy of itself or of the unsworn affidavit of Willis or of the affidavit of Willis, once it has been sworn, on the defendants. The order does not record the undertaking which was taken by his Honour from the plaintiffs to have the unsworn affidavit sworn in substantially the same form.

A draft statement of claim was handed up to his Honour, but the order does not refer to any undertaking on the part of the plaintiffs to file a writ or institute other proceedings, nor was any such undertaking given in fact. The order is highly unusual in that, having been made ex parte, it is expressed to operate, not for the shortest possible time until a specified day or until the hearing and determination of an interlocutory application, but until further order. It is also most unusual in that, being an ex parte order, it gives the

applicants their costs against the defendants, by providing in para 6 that the costs of the application be costs in the receivership. This means that they must be paid out of the assets of the defendants, who are to be mulcted in costs without having had the opportunity of being heard on that or any other question.

The order is in our experience unique, in that it is akin to an injunction obtained without notice to the defendants which combines these three features: it operates not until a specified date in the very near future or the determination of an application in the very hear future, but simply until further order; it grants ordinary litigants relief akin to that of an injunction without being supported by the usual undertaking notwithstanding the danger to the defendants of calamitous loss; and it gives the applicants their costs out of the defendants' pockets in any event.

The hearing of the application began shortly after 2.15 pm. It was over by soon after 4 pm, when his Honour signed a form of order, five pages long, handed up by counsel. At about 4.25 pm counsel for the defendants arrived at court, to find that his clients were already in receivership. He asked that his Honour sit again at once but was informed that any further application should be made to his Honour on the following Tuesday.

The application was supported by an unsworn affidavit 64 pages long, accompanied by half a dozen thick volumes of proposed exhibits; some additional documents were referred to by counsel in the course of the application. No authorities were cited. The application, a hostile one by certain unsecured creditors of one company for the appointment of receivers and managers to the undertakings of that company and its five wholly owned subsidiaries, those companies having very valuable assets and being part of one of the largest groups of companies in Australia — raised difficult questions of law concerning the power to appoint receivers and its right exercise, called for an understanding of the relationships and agreements between many different entities and required, if an order was in contemplation, consideration of such matters as alternative remedies and damage to the defendants. How did the balance of convenience incline? The application being ex parte, further principles came into operation and demanded attention. Was such a case made out as warranted ex parte relief and in particular this most drastic form of ex parte relief? What was the degree of urgency? When could notice first have been given to the defendants of the intention to apply? Would any damage that the defendants might sustain from the mere appointment of receivers and managers be irreparable? Should the usual undertaking as to damages be exacted? Given that an appointment was to be made, just what was its basis? How long should the order run? Was a writ to be filed and was the appointment to endure until the determination of an interlocutory application in that action? How were the defendants to be given notice of the order and of the basis on which it was made? If the appointment was to stand pending further order, should liberty to apply to set it aside be expressly reserved? Were the powers given to the receivers no wider than the purpose of the appointment and its probable or possible duration rendered appropriate? Were those powers internally consistent? What of the powers under s 324A(2) of the Companies (Vic) Code? Should security be ordered and if so in what amount? What of costs? Were they to be reserved and if so in what proceeding would a judge later deal with them?

"Nowadays you can scarcely be a lookout without a uniform and a college degree, but in 1919 not a man in our outfit, least of all the ranger himself, had been to college. They still picked rangers for the Forest Service by picking the toughest guy in town. . . . As for uniform, our ranger always wore his .45 and most of our regular crew also packed revolvers, including me."

The main jobs of Maclean and his colleagues were running off timber poachers, building trails and fighting forest fires that some years scarred 50 million acres.

Today's rangers are a different breed. They use computers, four-wheel drive vehicles and a library of environmental laws to seek a delicate balance among competing interests under a creed known as multiple use.

.np

Last year, 263 million people visited national forests from Alaska to Puerto Rico to camp, hunt, hike and fish. The forests also contain 47% of the nation's softwood timber, 200 species of plants and animals protected by the Endangered Species Act, and 80% of the nation's wilderness.

The harvesting of the national forests is not new, though these lands did not become a big contributor to the nation's timber supply until after World War II. They now account for 23% of the nation's lumber and plywood.

Responding to the growing public concern for the environment, the Forest Service has begun reordering its priorities, pushing recreation and wildlife higher and timber lower. The agency had been planning to sell less timber from national forests even before the spotted owl controversy.

That the dispute even exists is a tribute to the founders of the national forests, said John Hendricks, coordinator of the centennial celebration.

"Irrespective of how the Forest Service is managing the

Were the proposed receivers suitable persons? What of the receivers' remuneration? Was there justification shown for departing from the Practice Note (then to be found in (1989) VR 138)? If there was to be a departure, was it appropriate in a hostile proceeding to give the receivers carte blanche, as the draft order on one view proposed ("the scale from time to time charged by Peat Marwick Hungerfords")? Did those words go so far as to mean "the scale from time to time charged in this particular matter", which would seem to obliterate the distinction between authorised and actual charges?

All these and other questions demanded his Honour's attention on that December afternoon. The plaintiffs were evidently pressing for an immediate order on the basis that every hour mattered; but it was unreasonable to expect the learned judge to familiarise himself with the facts and to consider and determine all these questions in the space of one and three quarter hours, even with the assistance of experienced senior counsel in summarisng the facts.

The appointment of a receiver is one of the oldest remedies of the Court of Chancery, and a very useful remedy it is. But its very efficacy means that a corresponding caution must attend its employment. Where a receiver is sought to protect property of which no one is in actual possession, no one will be ousted by the appointment and probably no great harm will be done. But where the subject matter is in the defendant's hands he may suffer an irreparable wrong by being dispossessed and of course this danger will weigh with a judge from whom the remedy is sought. The appointment of a receiver which is to be, so to speak, at the expense of the defendant's possession and without his consent is a step never to be taken without proper consideration of the defendant's position. (*Owen v Homan* (1853) 4 HLC 997 at 1032-3; 10 ER 752; compare the views expressed a little earlier by a'Beckett J in *Marquis of Ailsa v Watson* (1846) 1 Shad 77 at 78 and *Atkins v Smith* (1851) 5 Shad 103 at 104-5). Where a receiver is sought, not merely of a particular asset of the defendant, but of all his assets, particular caution is required and where, as in the present case, the receiver is to possess himself of and to manage the assets and undertaking of a collection of companies which, whether they are solvent or not, are in a very large way of business, very great circumspection is required. Of course in a strong enough case the court might, without warning to a trading company, divest it of control of its undertaking and assets. But it must always be borne in mind that the appointment of a receiver in such a case authorises an irresistible invasion and that even if the army of occupation is withdrawn after only a short time things may never be the same again. Rights of property and the company's privacy are violated. Only the most pressing need can warrant such an invasion without notice. Quite apart from the taking out of the companies' hands of control of their assets and the management of their businesses, there was in the present case the added consideration (which will not infrequently be present where a receiver is appointed to a company) that the making of the order might well have most serious legal consequences for the companies of for related companies having regard to the terms of securities given by them. And in addition to the legal consequences there was the commercial consideration that, as *Picarda, Receivers and Managers* p 4 has observed, the receiver is often seen

not as the company doctor but as the undertaker, so that a blow is struck to the standing and credit of the defendants.

In the present case the order sought, although interim or interlocutory, was one with extremely grave consequences for the defendants. Putting to one side a winding up order, which will in the normal course ultimately result in a company's being given its quietus, we cannot for the moment think of an order of greater consequence to a company than one which, until further order, robs it of its control over its own assets and business.

No court will make such an order unless convinced of its necessity. A case for some kind and degree of interlocutory relief may be made out which falls short of this extremely drastic remedy; for example, the court may not be satisfied — and it is of course for the applicant to persuade the court that nothing less than what he seeks will do — that in all the circumstances it should do more than grant an injunction. At times the court will be induced to refuse the remedy of a receiver by undertakings offered by the defendant.

Applications for the appointment of a receiver made without any, or any adequate, notice to the defendant, like applications for an interim injunction made in similar circumstances, are, or should be, granted sparingly. While our impression is that in Victoria the practice has in recent years not been as strict in this regard as formerly, we think that the tendency should be arrested. It is all too common nowadays — we are for the moment speaking generally, not of this particular case — to find applications for interim injunctions made without notice where informal notice could have been given or where the application could equally well be made on the following day on informal notice to the defendant, and to find ex parte orders made which are to endure a good deal longer than the minimum time needed to give notice to the defendant of a further application. To return to the present case, the order was sought without any effective notice to the defendants, who thus had no opportunity of putting forward evidence or argument or of offering undertakings. In those circumstances it was necessary for the applicant to show a most powerful case of apprehended injury in order to induce a judge to make an order of such great consequence on the Friday afternoon as opposed to entertaining an application on notice during the long weekend (for the Court of Chancery, as Lord Eldon said, is ever open and never adjourned: *Crowley's Case* (1818) 2 Swans 1 at 48; 36 ER 514) or on the following Tuesday.

It is scarcely necessary to cite authority for the view that ex parte applications for a receiver ought not to be granted except in the case of emergency, but cite it we do: *Lucas v Harris* (1886) 18 QBD 127 at 134 per Lindley LJ; *Re Patrick* (1888) 32 *Sol Jo* 798; *Re Potts; Ex parte Taylor* (1893) 1 QB 648 at 662 per Bowen LJ; *Minter v Kent Sussex and General Land Society* (1895) 72 LT 186; *Tilling Ltd v Blythe* (1899) 1 QB 557 at 558 per A L Smith LJ. The circumstances must be extraordinary: *Re Connolly Brothers Ltd* (1911) 1 Ch 731 at 742-3; *Edgar v Muscovitch* (1914) 36 ALT 162. Where an ex parte order was obtained by the proprietor of the Burmese hairy family appointing a receiver of circus horses, ponies and paraphernalia Lindley LJ, who thought the application bordered on the ridiculous, said he had never known a case that rendered an ex parte order for the appointment of a receiver necessary: *Piperno v Harmston* (1886) 3 TLR 219. According to Fry LJ, in the practice of the Court of Chancery the ex parte appointment of a receiver was almost unknown: *Walbrook & Co v*

national forest
system," he says, "the fact is that 100 years ago, we were given the options
that we have today, to discuss and explore whether we want more wilderness,
whether we want more land for endangered species, more recreational options. It
would all be moot if it had gone into private ownership."
.np

And he poses a simple question: "Can you imagine someone setting aside almost
200 million acres today?"

GRAPHIC: Photo, This 1914 U.S. Forest Service photo shows telephone setup in
Herber Canyon, Utah, used to summon aid. Associated Press

TYPE: Wire

.so

DATE: AUGUST 12, 1991
LIBRARY: NEXIS
FILE: LAT

Your search request is:
SPOTTED OWL AND LOGGING

Number of STORIES found with your search request through:
LEVEL 1... 140

If you want

Jones & Lewis (1887) 3 TLR 609 at 610. It is also worth noting what a'Beckett J had to say in *Marquis of Ailsa v Watson* (1846) 1 Shad 77 at 78. It has been laid down in the United States that before a receiver will be appointed without notice it must be a case of imperious necessity and one where protection cannot be afforded the plaintiff in any other way: *Hawkins v Aldridge* 211 Ind 332; 109 ALR 1205; and cases there cited. Rule 39.02(2) of the Rules of Court recognises that in an urgent case a receiver may be appointed on an ex parte application, but this bald and permissive provision leaves open the question whether a sufficient case of emergency has been shown to warrant the particular order sought.

The drastic nature of the power to appoint a receiver is emphasised in the decisions mentioned in 65 *Amer Juris* 2d para 20, where authority is cited for the propositions that the power is a drastic, harsh and dangerous one and should be exercised with care and caution, that receivership is a drastic course allowed only under pressing circumstances and granted only with reluctance and caution and that the appointment of a receiver is an extraordinary and drastic remedy, to be exercised with utmost care and caution and only where the court is satisfied there is imminent danger of loss if it is not exercised.

Section 573 of the Companies (Vic) Code empowers the court in certain circumstances to appoint a receiver on the application of the NCSC. This power has been said to be one that should be exercised only after great scrutiny and in extraordinary circumstances: *Corporate Affairs Commission v Glauber Co Ltd* (1985) 3 ACLC 492; *Corporate Affairs Commission (NSW) v Austral Oil Estates Ltd* (1985) 10 ACLR 1 at 4-5. Similar views have been expressed concerning the power to appoint a receiver given by s 155 of the Futures Industry (Vic) Code: *Corporate Affairs Commission (NSW) v Lombard Nash International Pty Ltd* (1986) 11 ACLR 566 at 571.

There has been a good deal more discussion of considerations bearing on the exercise of the discretion to appoint a receiver in the United States of America than elsewhere. According to 65 *Amer Juris* 2d para 20 the effect of the authorities is as follows:

"A court in exercising its discretion to appoint or refuse a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies. This discretion is to be exercised with great caution and circumspection, after full consideration of the facts of a particular case and the interests of all parties concerned, for a reason strongly appealing to the judge to whom the application is made.

"The appointment of a receiver should be denied where it is likely to do irreparable injury to others, or where greater injury will probably result from the appointment than if none were made."

Where an injunction or similar relief is sought against a person without notice to him the court should always bear in mind the words of Lord Langdale MR in *Earl of Mexborough v Bower* (1843) 7 Beav 127 at 131; 49 ER 1011:

"... nothing can be more true than this, if parties come and ask for an injunction ex parte, the court looks minutely to the time in which they have permitted the matter complained of to proceed, and will not allow them to obtain an injunction in the absence of the other party, when they have

themselves, for some time, acquiesced. It is quite reasonable that that should be so, because the granting of an injunction ex parte is the exercise of a very extraordinary jurisdiction, the effect of which, in every case in which it is asked, is most alarming; therefore the time at which the plaintiff first had notice of the existence of the subject of complaint, is looked to with the greatest care and jealousy, in order to prevent an improper order being made against a party in his absence ... ."

Megarry J has gone so far far as to say this: "Ex parte injunctions are for cases of real urgency, where there has been a true impossiblity of giving notice of motion": *Bates v Lord Hailsham* (1972) 1 WLR 1373 at 1380. This statement was probably not intended to be absolute, as his Lordship's later words ("unless perhaps the plaintiff had had an overwhelming case on the merits") seem to accept. While the applicant will find it very difficult to persuade the court, in a strong enough case an ex parte injunction can properly be granted although the applicant could have given notice of the application but has failed to do so. But the useful modern practice, well known in this State, of hearing in opposition to an application the party sought to be enjoined, who has been given informal notice (*Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd* (1972) 1 WLR 1213) makes it more difficult for an applicant to show that he has not had time to give the opposite party such notice of the application, formal or informal, as would have enabled him to be heard. In the present case, where the sufficiency of the informal notice actually given to enable the defendants at least to appear before the judge was to be measured not in days but in hours if not in minutes (for they arrived only a few minutes too late) it was for the judge to consider very closely when and by what means and in what terms informal notice had been given to the Bond companies or their solicitors — its insufficiency was conceded before him — and to consider very closely whether the plaintiffs could not have given notice earlier and to consider very closely whether there was such extreme urgency as to require the grant of immediate relief in the absence of the defendants. The notice given was so short, and the application was over so quickly, that the failure of the defendants to appear could not be taken as showing that they had no wish to do so; indeed counsel for the banks told his Honour that the notice given was too short to be effective. It was almost inconceivable that the defendants would not seek to resist the appointment of receivers and do what they did in fact — hasten to court with all possible speed to be heard in opposition. In a matter of such moment, unless his Honour was satisfied that the matter would not brook even a few hours' delay, he could and should have declined to make an order then and there. If he was not to sit on the Friday evening he might, for example, have adjourned the hearing until the following morning and directed that Parker & Parker be at once informed by telephone of this and that a copy of the unsworn affidavit be sent at once by facsimile transmission to that firm accompanied by a letter offering to deliver forthwith to any solicitors in Melbourne nominated by Parker & Parker a copy of the unsworn affidavit, either during the afternoon or if necessary during the evening. This would have enabled counsel for the defendants to appear on the Saturday morning with some idea of the case made against their clients. If counsel had then asked for a day or two to consider the plaintiffs' material and prepare that of the defendants, his Honour could have considered again, this time in the light of the

Subpoena to [to be served today early + / returnable tomorrow]

The Commissioner

Forestry Commission of New South Wales.

[address]

schedule

1. All original harvesting Plans for the compartments 180, 198 and 200 of the Chaelundi State Forest from 1 march 1988 to date.

2. Copies of all ~~timber~~ licences, any other current authority or consents or ~~possessions~~ concessions or bases ~~of tree~~ for roadworks or logging in compartments 180, 198 and 200 of Chaelundi State Forest from 1 March 1988 to date.

3. All records, documents, files, correspondence or memoranda, reports, statements in relation to ~~concerning~~ ~~or dealing with~~ the presence of any fauna in the compartments 180, 198, and 200 of Chaelundi State Forest from 1 March 1988 to date.

4. Copies of all records and documents (including computer documents) relating to the calculation of the amount of royalty payments ~~by~~ holders of ~~relevant~~ timber licences, products licences, or forest material licences or any other concession, lease, or licence or by any other body to any other body pursuant to ~~The Forestry Act 1916~~ in relation to Chaelundi State Forest from March 1988 to date

5. ---- in relation to the Coffs Harbour region from March 1990 to date.

[redacted]

Subpoenaed to

National Parks and Wildlife
Service of New South Wales

same as in Heritage matter Corkill v Hope FORS

CURRICULUM VITAE

GORDON HOWELL ORIANS

Born: July 10, 1932, EauClaire, Wiconsin

Married: June 25, 1955 to Elizabeth Ann Newton

Children: Carlyn Elizabeth - born May 28, 1957
Kristin Jean - born June 15, 1959
Colin Mark - born January 2, 1962

Education:

Bay View High School, Milwaukee, Wisconsin	9/46 - 6/49
Monroe High School, Monroe, Wisconsin	9/49 - 5/50
University of Wisconsin, Madison, Wisconsin (Bachelor of Science in Zoology)	9/50 - 6/54
University of Oxford, England	9/54 - 6/55
University of California, Berkeley, California (PhD in Zoology)	9/56 - 7/60

Scholarships and Assistantships:

U.S. Government Fulbright Fellow, Oxford Univ.	9/54 - 6/55
National Science Foundation Fellow	7/58 - 7/60
John Simon Guggenheim Memorial Fellow	9/73 - 8/74

Employment:

Assistant Professor of Zoology, University of Washington	1960 - 1964
Associate Professor of Zoology, University of Washington	1964 - 1968
Professor of Zoology, University of Washington	1968 - present
Director, Institute for Environmental Studies, University of Washington	1976 - present

Professional Associations:

American Association for the Advancement of Science
American Institute of Biological Science
American Ornithologists' Union
American Society of Naturalists
Animal Behavior Society
Cooper Ornithological Society
Ecological Society of America
Federation of American Scientists
International Society of Ecology (INTECOL)
International Society for Tropical Ecology
Planning Association of Washington
Society for the Study of Evolution
Western Bird Banding Association

Leadership Positions in Professional Societies:

Past-President, Western Section, Ecological Society of America
Vice-President, Ecological Society of America, 8/75 - 8/76

Editorial Positions:

Editorial Board, Oecologia, 1969-1973
Editorial Board, Behavioral Ecology and Sociobiology, 1980-present
Reviewer of manuscripts for Science, American Naturalist, Ecology, Auk, Condor, Evolution, Canadian Journal of Zoology, Animal Behavior
Editorial Board, Science, 1986-present
Editor-in-Chief, Northwest Environmental Journal, 1984-present

Other Professional Activities:

Washington State Department of Ecology - charter member of the Washington State Ecological Commission, 1970-1975. The only professional ecologist on the Commission. Wrote first policy statement for the Commission.

Washington State Department of Game - helped found the Nongame Wildlife Advisory Board to the Director, 1979; served as the first Chairman of the Board (1979-1981); continued to serve as a member of the Board until 1985.

American Ornithologists' Union - member of the Condor Advisory Committee which has provided scientific review and oversight for the Condor Recovery Program.

U.S. Environmental Protection Agency - charter member of the Ecology Advisory Committee (EAC) of the Science Advisory Board, 11/74 - 11/75; Chairman of EAC and member of the Executive Committee of the Science Advisory Board, 11/76 - 11/79.

National Academy of Sciences - National Research Council
Member, Assembly of Life Sciences (now Commission on Life Sciences), 1/77 - 6/83. Represented Ecology and environmental concerns.

Member of the committee, chaired by Peter H. Raven, Missouri Botanical Garden, on "Research Priorities in Tropical Biology."

Chairman, Committee on Applications of Ecological Theory to Environmental Problems, 3/83 - 3/86. This committee prepared two publications on the applications of ecological theory, concepts and knowledge to a variety of environmental problems. One book, entitled Ecological Knowledge and Environmental Problem-Solving: Concepts and Case Studies was published in March, 1986. The second, dealing with the pervasive problem of cumulative environmental effects, will be published later in the spring of 1986, in cooperation with the Canadian Environmental Assessment Research Council.

World Wildlife Fund, USA - member Scientific Advisory Board, 1979 - present.

International Scientific Activities:

UNESCO - served as Team Leader for Chapter 6, Animal Palaeography and Autecology, for the 1978 report Tropical Forest Ecosystems. A State of Knowledge Report. Published jointly by UNESCO-UNEP, and FAO.

Viet Nam - March 1969. Investigated ecological effects of the war, particularly of the herbicide spraying. Wrote papers and chapters of books on this work.

Japan - research during the spring of 1979. Lectured on ecology at Kyoto University and Nagoya University at that time and again at Nagoya University in September, 1982.

Kenya - research during the autumn of 1978 and winter of 1982. Lectured on behavioral ecolcgy at the University of Nairobi.

Sweden - lectured for a week in a graduate course in behavioral ecology organized by the Nordic Council for students throughout Scandinavia, Solbaka Conference Center, September, 1984.

Latin America and Spain: have lectured (in Spanish) on ecological and environmental topics in many different countries:

University of Puerto Rico, Rio Piedras, P.R., April 1969 (two weeks of lecturing).

Instituto Venezolano de Investigaciones Cientificas, Caracas, Venezuela. Have lectured in graduate ecology courses twice.

Universidad de los Andes, Mérida, Venezuela. Have lectured twice for two weeks each to graduate ecology courses, 1981, 1985.

Universidad Nacional Autonoma de México, Mexico City.

Universidad Católica de Chile, Santiago, Chile. Lectured and participated in a workshop on uses of ecological information for management of renewable resources. Also lectured on behavioral ecology at the annual reunion of Chilean biologists at Viña del Mar.

Universidad de Rio de Janeiro, Brasil. Lectured on behavioral ecology, September, 1973.

Universidad Nacional de Córdoba, Córdoba, Argentina. Delivered an intensive two-week advanced ecology course to 26 Argentine graduate students, selected country-wide by the Argentine Ecological Society, September, 1973.

Universidad Integrada, Estación Experimental Agropecuaria, Balcarce, Argentina. Taught one week of an intensive two-week course in behavioral ecology to 20 Argentine graduate students selected country-wide, October, 1985.

Universidad Centroamericana, Managua, Nicaragua. Lectured on tropical ecology, March, 1986.

Universidad de Barcelona, Barcelona, Spain. Lectured on behavioral ecology and met with graduate students, April, 1981.

Awards:

Brewster Award, American Ornithologists' Union, 1976.

Elected Foreign Member, Royal Netherlands Academy of Arts and Sciences, 1983.

PUBLICATIONS: Arranged by major topical categories. Books are marked *.

Behavioral Ecology. This has been the most intensive area of my research concentration. My efforts have been directed primarily toward problems of habitat selection, mate selection and mating systems, selection of prey and foraging patches (foraging theory), and the relationships between ecology and social organization. The primary subjects of study have been blackbirds of the Family Icteridae, a group of birds noted for the diversity of their social systems. My publications include theoretical papers as well as tests of theories carried out by means of experimental manipulations and comparative analyses of interspecific patterns. These studies have also stimulated some of my efforts in other areas, as will be indicated subsequently.

1961. Orians, G.H. Social stimulation within blackbird colonies. Condor 63:330-337.

1961. Orians, G.H. The ecology of blackbird (Agelaius) social systems. Ecological Monographs 31:285-312.

1962. Orians, G.H. Natural selection and ecological theory. American Naturalist 96:257-263.

1963. Orians, G.H., and M.F. Willson. Comparative ecology of Red-winged and Yellow-headed blackbirds during the breeding season. Proceedings of the Sixteenth International Congress of Zoology 3:342-346.

1963. Orians, G.H., and G. Collier. Competition and blackbird social systems. Evolution 17:449-459.

1964. Orians, G.H., and M.F. Willson. Interspecific territories of birds. Ecology 45:736-745.

1964. King, C.E., and G.H. Orians. Shell selection and invasion rates of some Pacific hermit crabs. Pacific Science 18:297-306.

1965. Hamilton, W.J., III, and G.H. Orians. The evolution of brood parasitism in altricial birds. Condor 67:361-382.

1966. Orians, G.H. Food of nestling Yellow-headed Blackbirds in the Caribou Parklands, British Columbia. Condor 68:321-327.

1969. Orians, G.H. Age and hunting success in the Brown Pelican (Pelecanus occidentalis). Animal Behavior 17:316-319.

1969. Orians, G.H. On the evolution of mating systems in birds and mammals. American Naturalist 103:589-603.
(has been reprinted in two collections of readings in behavioral ecology)

1970. Brown, J.L., and G.H. Orians. Spacing patterns in mobile animals. Annual Review of Ecology & Systematics 1:239-262.

1971. Orians, G.H. Ecological aspects of behavior. In: Farner, D.S. and J.R. King (eds.). Avian Biology, Volume 1., pp. 513-546. New York, Academic Press.

1972. Orians, G.H. The adaptive significance of mating systems in the Icteridae. Proceedings of the Fifteenth International Ornithological Congress, pp. 389-398.

1972. Orians, G.H. The strategy of the niche. In: Marvels of Animal Behavior, National Geographic Society, Washington, D.C. pp. 169-188.

*1973. Charnov, E.L., and G.H. Orians. Optimal Foraging: Some Theoretical Explorations. 160 pages. Department of Biology, University of Utah.

1974. Orians, G.H. Discussion of ecoethological aspects of reproduction. In: Breeding Biology of Birds, National Academy of Sciencies, Washington, D.C. pp. 27-29.

1976. Charnov, E.L., G.H. Orians, and K. Hyatt. Ecological implications of resource depression. American Naturalist 110:247-259.

1977. Orians, G.H., C.E. Orians, and K.J. Orians. Helpers at the nest in some Argentine blackbirds. In: Stonehouse and C. Perrins (eds.). Evolutionary Ecology. pp. 137-151. Macmillan

1977. Orians, G.H., L. Erckmann, and J.C. Schultz. Nesting and other habits of the Bolivian Blackbird. Condor 79:250-256.

1979. Orians, G.H., and N.P. Pearson. On the theory of central place foraging. In: D.V. Horn, R.D. Mitchell, and G.R. Stairs (eds.). Analysis of Ecological Systems. pp. 155-177. Ohio State University Press.

*1980. Orians, G.H. Some Adaptations of Marsh-nesting Blackbirds. Princeton Monographs in Population Biology. Princeton University Press.

1980. Optimal foraging and evolution of discriminatory abilities. In: A. Kamil and T. Sargent (eds.). Foraging Behavior: Ecological, Ethological and Psychological Approaches. Garland STPM Press, N.Y. pp. 389-405.

1980. Patterson, C.B., W.J. Erckmann, and G.H. Orians. An experimental study of parental investment and polygyny in male blackbirds. American Naturalist 16:757-769.

1983. Ewald, P.W., and G.H. Orians. Effects of resource depression on use of inexpensive and escalated aggressive behavior: Experimental tests using Anna Hummingbirds. Behav. Ecol. Sociobiol. 12:95-101.

1985. Orians, G.H. Allocation of reproductive effort by breeding blackbirds, family Icteridae. Revista Chilena de Historia Natural 58:19-29.

Population Dynamics: This research has been oriented toward exploring the dynamical consequences of the rules developed in the field of behavioral ecology, particularly those relating to foraging behavior and habitat selection. I have used this material extensively in lecturing in Latin America and some of it has been published in Spanish.

1956. Orians, G.H., and F. Kuhlman. Red tailed Hawk and Horned Owl populations in Wisconsin. Condor 58: 371-385.

1958. Orians, G.H. A capture-recapture analysis of a shearwater population. Journal of Animal Ecology 27:71-86. (with a statistical appendix by P.H. Leslie).

1960. Orians, G.H. Autumnal breeding in the Tricolored Blackbird. Auk 77: 379-398.

1962. Orians, G.H. Review. Animal populations and environment. Ecology 43:779-780

1963. Orians, G.H. Notes on fall-hatched Tricolored Blackbirds. Auk 80:552-553.

1969. Orians, G.H., and H.S. Horn. Overlap in foods and foraging among four species of blackbirds in the Potholes of central Washington. Ecology 50:930-938.

1973. Orians, G.H. The Red-winged Blackbird in tropical marshes. Condor 75: 28-42.

1974. Orians, G.H. (book review) Growth by Intussusception by E.S. Deevey. Limnology and Oceanography 18:347-348.

1974. Orians, G.H. (ed.). Tropical population ecology. In: Farnworth, E.G., and F.B. Golley (eds.). Fragile Ecosystems. Springer-Verlag, New York. pp. 5-65.

1980. Orians, G.H. Interacción poblacional en función de su significación adaptativa y evolutiva. Boletín de la Sociedad Venezolana de Ciencias Naturales 137:127-207.

Plant-Herbivore Interactions: Ecologists have long recognized that herbivores consume very small amounts of the biomass of green plants annually in most environments. Many different ideas have been proposed to explain this pattern, among which is the possible role of chemical defenses of plants against grazing. My laboratory has been involved with research on this topic for over a decade. Much of that work has been published by other investigators, particularly Dr. David Rhoades who was first a graduate student and subsequently an independent investigator in my laboratory.

1960. Pitelka, F.A., and G.H. Orians. Range management for the animal ecologist. Ecology 41:406. Review.

1967. Orians, G.H., and S.P. Gessel. Rodent damage to fertilized Pacific Silver Fir in western Washington. Ecology 48:694-697.

1974. Orians, G.H., and D.H. Janzen. Why are embryos so tasty? American Naturalist 108:581-592.

1975. Cates, R.G., and G.H. Orians. Successional status and the palatability of plants to generalized herbivores. Ecology 56:410-418.

1982. Wheelwright, N.T., and G.H. Orians. Seed dispersal by animals: contrasts with pollen dispersal, problems of terminology, and constraints on coevolution. American Naturalist 119:402-413.

Community Ecology: The powerful recent developments in behavioral ecology have many implications for concepts at other levels of ecology, particularly the structure of communities. This topic has been increasingly occupying my attention and is one in which I expect to carry out a great deal of future research. My involvement was, in part stimulated by participation in the U.S. International Biological Program project on Convergent Evolution, in which we compared various aspects of community structure in the warm deserts of Arizona and Catamarca, Argentina.

1969. Orians, G.H. The number of bird species in some tropical forests. Ecology 50:783-801.

1974. Orians, G.H. Bird species living together: actually and in theory. A review of M.L. Cody, Competition and the Structure of Bird Communities. Science 185:1158-1159.

1976. Orians, G.H. Stability, diversity, and maturity in natural ecosystems. In: Unifying Concepts in Ecology. Proceedings of the First International Ecological Congress. The Hague, Netherlands, September, 1974.

1980. Orians, G.H. Micro and macro in ecological theory. Bioscience 30:79.

1981. Orians, G.H. Aggregations: curse and necessity. In: The National Research Council/1980. Issues and Current Studies, pp. 57-66.

In Press:

Orians, G.H. Site characteristics favoring invasions. In: H.A. Mooney (ed.). The Ecology of Invasions into North America. Springer-Verlag.

Orians, G.H. Cumulative Perspectives. A Keynote Address delivered at the CEARC - NAS/NRC Cumulative Impacts Workshop, Toronto, Ontario, February 5, 1985. (To be published in the proceedings of the workshop.)

Human Ecology: This research has its roots in my general concern with issues of environmental quality and in my work on habitat selection among birds. I was stimulated to explore the use of the approach to the study of habitat I had developed with birds on aspects of human behavior. This research has led me into cooperation with phsychologists, geographers, planners, and landscape painters. This work is still in its early stages of development. I have

to date published only one paper on human habitat selection, but a second one is in press and another under review. I currently have a joint research project with Dr. Judith Heerwagen of the Department of Landscape Architecture at the University of Washington, to carry out a number of experiments with human subjects, testing their responses to habitat features.

1970. Orians, G.H., and E.W. Pfeiffer. Ecological effects of the war in Vietnam. Science 168:544-554.

1971. Holling, C.S., and G.H. Orians. Toward an urban ecology. Bulletin of the Ecological Society of America 52(2):2-6.

1977. Orians, G.H. Natural selection, human energy expenditure, and competition. In: Fazzolare, R.A. and C.B. Smith (eds.). Energy Use Management. Pergamon Press, N.Y. pp. 847-852.

1980. Orians, G.H. Habitat Selection: General theory and applications to human behavior. In: Lockard, J.S. (ed.). Evolution of Human Social Behavior. Elsevier, N.Y. pp. 49-66.

In Press:

Orians, G.H. An ecological and evolutionary approach to landscape aesthetics. In: E.C. Penning-Rowell (ed.). Symposium on Meanings and Value in Landscape.

Coevolution: My interest in coevolution was stimulated by our work on the Convergent Evolution project in Arizona and Argentina. Research on this topic continues, but it is a minor part of my concerns.

1968. Orians, G.H. A Review: Ecological development in polar regions, a study in evolution. Limnology and Oceanography 13:566-568.

*1977. Orians, G.H., and O.T. Solbrig. Convergent Evolution in Warm Deserts. A synthesis volume covering the results of a US/IBP project in Arizona and Argentina. I wrote two chapters and served as coordinator for a third. Dowden, Hutchinson and Ross, Stroudsberg, PA.

1983. Orians, G.H., and R.T. Paine. Convergent evolution at the community level. In: D.J. Fautuyma and M. Slatkin (eds.). Coevolution, pp. 431-458. Sinauer Associates, Sunderland, MA.

Communication: Animal social systems are held together by elaborate communication signals among their members. My work on behavioral ecology has naturally led to some research on communication signals, particularly those of blackbirds. This is currently a topic of intensive research, in association with a postdoctoral fellow, L.D. Beletsky, who is working in my laboratory. This work has been oriented toward understanding the relationship between the type of social system a species has and the kind and number of its social signals. We have also discovered an interesting communication

system, based on call switching, in red-winged blackbirds and are currently studying its properties. No such system has previously been identified among vertebrates.

1968. Orians, G.H., and G.M. Christman. A comparative study of the behavior of Red-winged, Tricolored, and Yellow-headed Blackbirds. University of California Publications in Zoology 84:1-85.

1983. Orians, G.H. Notes on the behavio r of the Melodius Blackbird (Dives dives). Condor 85:453-460.

1985. Beletsky, L.D., and G.H. Orians. Nest associated vocalizations of female Red-winged Blackbirds. Zeitschrift f. Tierpsychol. 69:329-339.

1985. Beletsky, L.D., B.J. Higgins, and G.H. Orians. Communication by changing signals: call switching in Red-winged Blackbirds. Behavioral Ecology and Sociobiology 18:221-229.

Plant Ecology: My work on convergent evolution between Arizona and Argentina led to my working together with Dr. Otto Solbrig on some models of the adaptations of plant form to arid climates. I am also working on gap dynamics in tropical forests.

1977. Orians, G.H., and O.T. Solbrig. A cost/income model of leaves and roots with special reference to arid and semi-arid areas. American Naturalist 111:677-690.

1977. Solbrig, O.T., and G.H. Orians. The adaptive characteristics of desert plants. American Scientist 65:412-421.

1982. Orians, G.H. The influence of tree-falls in tropical forests in tree species richness. Tropical Ecology 23:255-279.

General Biology and Miscellaneous: As is the case with all scientists, some of my work does not fit neatly into any clear category. Among my efforts of this type are general textbooks which I have written and miscellaneous works on distribution and general biology of various organisms.

1957. Orians, G.H., and E. Orians. A contribution to the ornithology of the Vesteralen Islands. Saertrykk Av Sterna Bd., 2: H.4.

1962. Kohn, A.J., and G.H. Orians. Ecological data in the classification of closely related species. Systematic Zoology 11:119-127.

*1969. Orians, G.H. The Study of Life. (An introductory biology text). Allyn and Bacon, Inc., Boston. 941 pp.

1969. Orians, G.H., and D.R. Paulson. Notes on Costa Rican birds. Condor 71:426-431.

1969. Orians, G.H., D.R. Paulson, and C.F. Leck. Notes on the birds of Isla San Andres. Auk 86:755-758.

1974. Orians, G.H. A diversity of textbooks: ecology comes of age. Science 181:1238-1239.

1978. Orians, G.H. On the status of Xolmis dominicana. Auk 95:411.

*1983. Purves, W.K., and G.H. Orians. Life: The Science of Biology. Sinauer Associates and Willard Grant.

1985. Orians, G.H. Animals. In: T.P. Snyder (ed.). The Biosphere Catalogue, pp. 76-86. Synergetic Press, Fort Worth, Texas.

1985. Orians, G.H. Oriole (2). In: B. Campbell and E. Lack (eds.). A Dictionary of Birds, pp. 412-413. T. & A.D. Poyser, Ltd., Calton, Staffordshire, England.

1985. Orians, G.H. American Blackbirds. In: C.M. Perrins and A.L.A. Middleton (eds.). The Encyclopedia of Birds, pp. 414-415. Facts on File Pubs., New York.

*1985. Orians, G.H. Blackbirds of the Americas. (Illustrations by Tony Angell) University of Washington Press, Seattle. 163 pp.