



WHITE

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BUSINESS AS USUAL

A Case Study of

Environmental and Fiscal Malpractice
on the
Eldorado National Forest

February 27, 1996

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About PEER

Public Employees for Environmental Responsibility (PEER) is an association of resource managers, scientists, biologists, law enforcement officials and other government professionals committed to upholding the public trust through responsible management of the nation's environment and natural resources. PEER advocates sustainable management of public resources, promotes enforcement of environmental protection laws, and seeks to be a catalyst for supporting professional integrity and promoting environmental ethics in government agencies.

PEER provides public employees committed to ecologically responsible management with a credible voice for expressing their concerns.

PEER's objectives are to:

1. **Organize** a strong base of support among employees with local, state and federal resource management agencies;
2. **Inform** the administration, Congress, state officials, the media and the public about substantive issues of concern to PEER members;
3. **Defend** and strengthen the legal rights of public employees who speak out about issues of environmental management; and
4. **Monitor** land management and environmental protection agencies.

PEER recognizes the invaluable role that government employees play as defenders of the environment and stewards of our natural resources. PEER supports resource professionals who advocate environmental protection in a responsible, professional manner.

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About This Report

This is the story of the mismanagement of the Eldorado National Forest and the subsequent cover-up by the U.S. Forest Service.

This PEER White Paper was prepared from a review of the official investigation of this case, U.S. Forest Service Report of Investigation #801-0354. This White Paper reproduces exhibits and excerpts from this official investigation.

The Report of Investigation is now sealed from public view by a protective order in a civil case involving a claim by a timber company against the federal government (*Wetsel-Oviatt Lumber Company v. United States*, No. 389C [Fed. Cl.]) entered Aug. 16, 1995.

The protective order was sought by the Department of Justice, representing the Forest Service, to prevent disclosure of the report to the public. In seeking the protective order, the Justice Department asserted several grounds for the claim that the report was "privileged" from release, including (a) that the report was an internal document used in decision making, (b) that it was an investigatory report compiled for law enforcement purposes, and (c) that release of the document could facilitate retaliation against confidential sources and whistleblowers.

Despite these claims of privilege, the Forest Service Washington, D.C., Office released the report under the Freedom of Information Act to the staff of Public Employees for Environmental Responsibility on the very

day that the protective order was being entered in the court case out in California.

This past fall, the Forest Service requested that the documents be returned to the agency. PEER refused the request. On Jan. 17, 1996, in a memo to all employees, Forest Service Chief Jack Ward Thomas announced a new policy that no documents be released to the public if "prospective or current litigation ... may be affected by release of the records" unless the release is specifically approved by the Office of General Counsel of the U.S. Department of Agriculture. This new policy may be at variance with the Freedom of Information Act and certainly flies in the face of President Clinton's Oct. 4, 1993, directive on executive branch openness.

Two years earlier, incoming Chief Thomas pledged, in his first official act, that during his tenure "We will:

- Obey the law.
- Tell the truth.
- Implement ecosystem management.
- Develop new knowledge, synthesize research, and apply it to the management of natural resources.
- Build a Forest Service organization for the 21st century.
- Trust and make full use of our hard-working, expert workforce."

PEER is proud to serve conscientious public employees who took Chief Thomas at his word.

Jeff DeBonis
PEER Executive Director

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I. Executive Summary

U.S. Forest Service managers who committed environmental violations that will cost the taxpayers tens of millions of dollars through mismanagement of timber sales on the Eldorado National Forest have been promoted and commended while the officials who reported the violations have been stripped of their responsibilities.

Gross lack of accountability is the rule and not exception within the Forest Service; a tale like this is occurring every day in our nation's public resource agencies. This is business as usual.

"Screw Up and Move Up"

In January 1994, managers of the Eldorado National Forest (located in northern California, bordering Lake Tahoe) were forced to suspend 24 timber sales that had already been let for contract to logging companies. This was the largest withdrawal of contracted sales (totaling more than 110 million board feet) in the history of the United States.

As a result of the sale withdrawals, American taxpayers are facing up to \$30 million in claims for breach of contract from the affected timber companies. In January 1996, the Forest Service paid \$400,000 to settle the first three claims from the six affected timber companies. Other claims are being filed and still others are in litigation. The costs to taxpayers are rising daily from the lawyers' fees and other expenses generated by the claims that are in litigation now.

This unprecedented wholesale withdrawal of sales was necessitated by failure of Eldorado managers to prepare accurate environmental documentation required by law before National Forest timber may be offered for sale. Nearly two years of unproductive investigation by the U.S. Attorney for the Eastern District of California, the U.S. Department of Agriculture, and the Forest Service, itself, into who was responsible for the situation has further swelled the taxpayer's tab

by, at least, an additional million dollars. The Eldorado National Forest (ENF) has spent still another \$3 million preparing new environmental reviews for the suspended sales.

Despite a referral for criminal prosecution of both the ENF Supervisor and the Timber Management Officer and admissions by Forest Service officials that federal environmental laws were broken, no action was taken against any of the responsible employees. In fact, just the opposite occurred:

► Rex Baumbach, the Timber Management Officer for the ENF, was promoted from GS-13 to GS-14 and moved to the Washington Office as a "specialist for timber sale contract administration" for the national timber program. Baumbach explained to a local activist that people in the Forest Service timber program are never punished, those who "screw up, move up."

► John Phipps, the Forest Supervisor, was commended and remains in charge of the Eldorado National Forest.

► The resource staff on the Eldorado who repeatedly reported the problems with the suspended sales are being stripped of responsibilities through a "reorganization."

Little Ado About Much

Despite the glaring problems with the ENF timber sales, the Forest Service initiated no investigation of the situation. Instead it took a "whistleblower" complaint to the USDA Office of Inspector General (OIG) to prompt an official review. Rather than conduct an independent review, however, OIG referred the matter back to the Forest Service to investigate itself.

Early in the investigation, the U.S. Attorney for the Eastern District of California considered criminal prosecution of ENF managers for conspiracy to violate environmental statutes and for making false official statements in preparing the sales. Ultimately, the U.S. Attorney's office declined to prosecute.

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The Assistant U.S. Attorney who communicated the decision stressed that this declination was not meant to exonerate the Forest Service managers but was meant to free the agency to take administrative action against those responsible.

The Forest Service Special Agent who conducted the investigation either missed or omitted the "smoking gun" memo from the timber manager in 1991. In that memo, the timber manager admitted he knew that the environmental documentation for the timber sales was inadequate from the beginning.

The Special Agent's investigation did uncover:

- ▶ An ENF District Ranger who admitted that she and her colleagues felt "immune" from the National Environmental Policy Act and other environmental laws;
- ▶ Numerous witnesses (both from within and outside the Eldorado, including the attorney assigned by the USDA Office of General Counsel to assist ENF on timber issues) whose sworn statements indicate that environmental specialists were "intimidated," "harassed," "attacked" and subjected to "relentless pressure" for raising concerns that would possibly impede timber sales; and
- ▶ Eldorado managers repeatedly stating that the top priority was meeting timber targets even though those targets were "unreal" and that expertise was not heeded if it would impede "getting the cut out."

The Buck Doesn't Stop Anywhere

On Jan. 26, 1994, the Deputy Chief and top-level staff of the Forest Service were briefed on the situation by top Eldorado staff. The ENF managers argued that the sales had to be canceled or modified, despite the tremendous financial liability entailed, because the sales had been prepared illegally and would violate several key environmental laws if consummated.

The investigative report bounced around the Forest Service Washington, D.C., Office for the next year. On July 1, 1994, the head of the Forest Service's timber program wrote that the ENF manager, Baumback, was simply "doing his job to keep the timber program on track [I]t is no different than [sic] the

strong advocacy made by other staff for their programs" Six months later, Deputy Forest Service Chief Gray Reynolds concluded, "[W]e are unable to determine if an administrative violation occurred or clearly place culpability."

Report Becomes an Official Secret

In early August 1995, the Forest Service, after consultation with the USDA Office of General Counsel, deemed the investigation to be "closed" and released the investigation report to members of the public who had requested it under the Freedom of Information Act. On Aug. 16, the Department of Justice obtained a protective order from Judge Lawrence Margolis of the U.S. Court of Federal Claims in one of the breach of contract suits against the Forest Service (*Wetsel-Oviatt Lumber Company v. United States*, No. 389C (Fed. Cl.)) sealing the investigative report from disclosure to the public.

Lessons Unlearned

The three-year ordeal within the Eldorado National Forest has produced no reform of its timber management program, no reform of its environmental planning efforts, and no reform of internal communication or personnel practices.

The only change in the aftermath of this expensive debacle was to strip the resource staff of compliance responsibilities so that, in the words of the ENF Supervisor's reorganization proposal, these responsibilities will "be non-functional" and their application "neutralized."

The timber program on the Eldorado National Forest remains paralyzed by these recent events, but the forest is under renewed political pressure from the local congressman, John Doolittle, to begin an ambitious program of salvage logging. The 24 canceled sales are still being re-evaluated and eventually may be offered again for sale but only at a fraction of their original volume.

II. The Unfolding Fiasco

In the early 1980s, the U.S. Forest Service (USFS) designated approximately 37 parcels of Eldorado National Forest land as "timber sales," areas of land designated for timber harvest. Each of these sales was designated a "green" timber sale because the timber in question would be harvested from living trees. Prior to awarding these sales, the USFS was required by law to first perform extensive ecological reviews on the land, to determine the effects of the logging — particularly any adverse effects that might cause irreparable damage to the environment. The required review (called environmental assessment, or EA) includes an assessment by wildlife biologists, archeologists, geologists, hydrologists, botanists and soil scientists of the effects of the removal of timber on the land. The EAs have to be completed before a timber sale can legally be put out to bid. An EA typically takes approximately one to two years to complete, and an approved EA must be in existence prior to a decision notice being signed. The decision notice is the final document that declares logging on the land will cause no significant impact on the environment.

All 37 timber sale decision notices were approved.

Prior to these sales being harvested, however, the Regional Forester for Region 5 (California) imposed a moratorium on the use of herbicides pending completion of an environmental impact statement on such use. These sales required the use of herbicides to assure regeneration. In addition, the forest was affected by a serious drought (and resultant insect damage to the weakened trees). Because of the moratorium and large amount of salvage wood (dead and dying trees) created by the drought, 24 of these sales were not put out for bid, but were instead shelved, and the timber companies were allowed to harvest the salvage wood instead.

Every year, each National Forest was given a "timber production target" to meet.

Within existing laws and regulations, the Forest attempts to prepare and sell a certain amount of timber to satisfy the demand of lumber companies. Each Forest is budgeted largely upon the amount of timber it promises to produce and has produced in the past. Failure to meet the "target" can result in a reduced budget for the following year.

The Years Pass

The surplus of salvage wood created by the drought allowed the Eldorado to meet its target for timber available for logging for several years. Not until the early 1990s did the USFS begin to consider again these shelved 24 sales, some of which had been prepared more than 10 years prior to that date. It was decided that these 24 sales should be put out for bid to satisfy the Eldorado's timber target.

However, the very events that made salvage timber available for so many years had also significantly altered the forest. The EAs completed in the 1980s were no longer satisfactory, since the findings were based upon conditions that no longer existed.

According to National Environmental Policy Act (NEPA) regulations and Forest Service policy, the EAs for the sales should have been reviewed and revised to reflect new information and changed circumstances.

Unless there is no environmental impact, NEPA requires more than just a file or paper review when a sale is re-evaluated. All prior information about the sale must be examined and altered to meet current environmental conditions within the area affected by the sale.

Despite the fact that the EAs were not updated, eight of the 24 sales were awarded prior to 1991. As later determined by the Eldorado Forest level review team, none of these eight should have been released, since logging on seven would cause significant impacts on sensitive wildlife populations and logging on the eighth would disturb an already critically threatened watershed level.

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The Decision

At this time, the Eldorado National Forest was in the middle of a shift in management. The former Forest Supervisor, Jerald Hutchins, left in mid-1991, and no one had yet been selected to take his place. Instead, Bob Smart was appointed as Acting Forest Supervisor at the time the decision was made to use the rest of the shelved timber sales. At about this same time, the USFS sent a copy of the revised NEPA regulations, to be implemented in September 1992, to all field offices for review.

Rex Baumback was the Timber Management Officer and also had authority to sign timber sale contracts. Baumback made the initial decision to move forward with the 24 sales. Baumback was immediately made aware of the inadequacies of the EAs for the sales by an interoffice memo, dated Aug. 16, 1991, from Pat Ferrell, Timber Management Officer, Placerville Ranger District (a district within the Eldorado National Forest). She warned that, because of the recent policy regarding the California Spotted Owl, a sensitive species, the EAs would have to be reconsidered should the Eldorado choose to put those timber sales designated as nesting habitat out to bid. Should the EAs be reviewed, she warned, they would not meet current standards of NEPA.

From: Timber Mgmt: R05F0D56A
Date: Aug 16, 91 9:17 AM

WE WILL BE EXTREMELY VULNERABLE TO TOTALLY RE-DOING OUR EA'S IF WE HAVE TO ISSUE NEW DN'S FOR THE OWL ANALYSIS, DESPITE WHAT THE RO SAYS ABOUT LIMITING THE SCOPE OF THE APPEALS TO THE SUPPLEMENT. MOST OF OUR EA'S DO NOT MEET TODAY'S STANDARDS AND SOME HAVE ALREADY BEEN CHALLENGED (ALBEIT NOT SUCCESSFULLY SO FAR) ON THEIR ADEQUACY. IF WE ARE PUT IN A POSITION TO REDO EA'S OR RESPOND TO A MULTITUDE OF APPEALS, THEN WE WILL BE UNABLE TO PRODUCE VOLUME FOR SALE IN 92. I DON'T THINK THE RO UNDERSTANDS THIS VERY WELL. PAT

District Ranger Raymond LaBoa also informed Baumback that the sales should be reviewed, given their age. Baumback refused to release the sales to LaBoa for review.

Baumback and the District Rangers proposed the use of these 24 timber sales to the management team (which included Baumback and the District Rangers) in a routine meeting on Aug. 20, 1991. At this meeting, and at a later team meeting, the Resource Officer expressed concerns about the use of the 24 sales, stating that all the original EAs had not been completed, and that those that had been completed were now inadequate and out of date. The management team decided that the authority to re-examine and possibly reissue EAs rested with the District Rangers, who chose not to re-examine the EAs in question.

In December 1991, the Environmental Coordinator made a formal presentation reminding the management team of NEPA requirements regarding new information and changed circumstances after a decision has been issued, particularly as these requirements applied to the old timber sales. One month later, Janice Gauthier, Regional NEPA Coordinator, in a meeting that was supposed to include the entire Eldorado management team but was only attended by wildlife and timber staff, re-emphasized the need to make new decisions as a result of new information or changed circumstances.

Guard Changes, But Decision Doesn't

John Phipps became the new Forest Supervisor for the Eldorado National Forest in April 1992. On April 20, 1992, the Resource Officer and the Environmental Coordinator met with Phipps and discussed with him the resurrected timber sales, explaining their concern for the lack of compliance with NEPA. The Resource Officer, Peggy O'Connell, told Phipps that the District Rangers had been on notice that the timber sale EAs were not adequate, but that the Rangers had chosen not to re-examine the sales for fear of public review and appeal. One more timber sale (North Union) had already been awarded at this point.

Phipps asked Beth Paulson, NEPA Coordinator, to draft a letter for his signature outlining a monitoring program in which she could review the Forest NEPA documents while delegating authority to District Rangers to sign future decision notices. Phipps did not, however, ask either Paulson, or anyone from the resource staff, to review any of the old sales.

Contracts Go Out

On April 27, 1992, a letter was sent to all District Rangers, signed by Phipps, stating that "it is generally not appropriate to redo or revisit environmental analysis (EA) decisions for completed EAs to reflect changing standards of analysis and new direction." This letter was in direct contradiction to the direction Phipps should have taken, considering both the concerns voiced at the April 20 meeting and existing NEPA regulations regarding new information and changed circumstances. Phipps later admitted that this letter had been drafted by Rex Baumbach for Phipps' signature.

On May 7, 1992, the Resource Officer and the Environmental Coordinator approached Phipps and questioned him about this letter. They warned Phipps that the letter would be interpreted by the District Rangers to mean that new EAs were not necessary for the old timber sales, and they urged Phipps to withdraw the letter. Phipps did not agree to do so, and the letter was never withdrawn.

This same month, the second timber sale (Cox Canyon) was awarded. In August 1992, three more sales (Shanty, Lyons, and Barney) were awarded.

Phipps distributed Paulson's draft monitoring program to the District Rangers, then discussed the program during a meeting on Sept. 8, 1992. Although Paulson's draft outlined the USFS revised policy and procedures for NEPA compliance, to be published soon in the *Federal Register*, the District Rangers expressed displeasure with Paulson's memo, and became increasingly belligerent as Phipps failed to control the meeting. As the meeting disintegrated, Phipps announced that he was withdrawing the monitoring program, but

called for greater interaction between the District Rangers and Paulson.

Ten days later, the USFS gave notice in the *Federal Register* that it was adopting the revised policy for implementation of NEPA, essentially identical to the policy described by Paulson. Several weeks later, Phipps sent a short e-mail to all the District Rangers, in which he reminded them that, since "NEPA requires new scientific information be considered in the analysis process," they should be sure to consider California Spotted Owl policy guidelines as new information. He did not address the numerous other environmental concerns with the old timber sales.

In September 1992, two more sales (Gold Corner and Sturdevant) were awarded. In October 1992, another sale (Iowa) was awarded.

Questions Surface

At this same time, Erin Noel of Forest Alert, a local environmental group, was attempting to obtain information regarding several of the planned timber sales from the Amador Ranger District. The contact person refused to give her this information, so she contacted the Supervisor's Office at the Eldorado National Forest and obtained the documents from Beth Paulson. After examining these documents, Noel and John Tecklin of Forest Alert, Craig Thomas of Friends Aware of Wildlife Needs (FAWN), and Linda Blum, a concerned activist, noted that the EAs for the sales did not consider the changed circumstances on the forest and new scientific information and that, therefore, the sales would violate environmental regulations. They contacted Phipps' office on Nov. 16, 1992, and explained their concerns with the sales. Phipps agreed to a meeting on Nov. 30, but would not agree to stay operations on the sales prior to the meeting. The Hornblende Cable sale had been awarded on Nov. 3, and the Martin sale had been awarded on Nov. 6, 1992. After the telephone contact, but prior to the meeting, he awarded two more sales (Forebay and West Panther Cable).

The results of the Nov. 30 meeting are documented in a Dec. 4 letter from Phipps to Noel. In the letter, Phipps agreed that all 1992

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review process. For example, Harasek began a campaign to advertise yet another timber sale that had inadequate and incomplete environmental analysis. In a meeting with Harasek, Baumbach and Resource Office Peggy O'Connell, when O'Connell warned against doing so, Harasek responded that he wanted to advertise the sale as "bait" for the environmental groups, stating that if the case went before an environmentally friendly judge, the Forest Service could simply back down.

On Nov. 4, 1993, Harasek advertised this new timber sale. Five days later, Craig Thomas of FAWN sent a letter to Phipps asking why this sale was being advertised in contradiction to Phipps' agreements in his earlier letters. However, Phipps was participating in a "Committee to Reinvent the Forest Service" in Washington, D.C., and was therefore not in the office. The letter was forwarded to Acting Supervisor Robert Harris, who instructed Harasek to retract the sale advertisement.

suspension of contracted timber sales in the history of the Forest Service occurred "not with a bang but with a whimper."

Suspension

By early 1994, two official investigations into the situation at the Eldorado were well underway (see next section). Supervisor Phipps was temporarily detailed to another assignment. On Jan. 26, Acting Forest Supervisor Robert Harris came to the Washington Office to make a presentation to the Forest Service Chief. Harris was told that the Chief was not available but that he could meet with Deputy Chief David Unger and other top staff. According to the text of his presentation, Harris stated that only after "several environmental organizations brought to the attention of the Forest what they saw as the need to consider new information and changed circumstances" in 1992, was the Forest aware of problems with the sales. Harris stated that the Forest could incur damage claims of at least \$24 million due to this error. Harris also stated that 23 of the 24 sales lacked adequate environmental documentation and would require new decisions.

The Washington Office accepted Harris's conclusions which meant that the suspension of all 24 sales would, in essence, become a cancellation since new EAs would take at least a year to complete. Thus, the largest

III. Little Ado About Much: The Official Investigation

On March 31, 1993, the USDA Office of Inspector General (OIG) Hotline desk received an anonymous complaint stating that the Eldorado National Forest had ramroded clearance for timber sales with environmental documentation that was more than a decade old in order to sell them right away, that green timber was being sold at much lower salvage prices in order to facilitate the sales, and that the Eldorado had approved illegal clear cutting of Forest Service timber.

On Nov. 29, 1993, a second anonymous complaint accused Baumbach of approving the sale of timber knowing that there were problems with the sales, at a cost of \$1 million for the reconsideration and another \$30 million should the timber have to be bought back.

On Jan. 12, 1994, a third anonymous complaint was filed. This addendum stated that one timber purchaser, Wetsel-Oviatt, had filed a \$4.5 million claim against the Eldorado National Forest for breach of contract.

Self-Investigation

On April 4, 1993, OIG opened a case file on the anonymous allegations but referred the matter back to the USFS to investigate itself. The case was assigned to Wayne Crowder, Resident Special Agent, Modoc National Forest. Special Agent Crowder framed his investigation to examine only the allegations that Baumbach arranged for illegal clear cutting of timber and facilitated fraud by timber purchasers. He did not address the accusation that the Eldorado allowed the sale of \$30 million in timber, knowing the sales were inadequately reviewed, and he did not address FAWN's March 3 letter of complaint, although he earlier stated that it would be a "focal point" in the investigation and included the complaint as Attachment 1 in his report. Thus,

the investigation was framed to avoid the central issues on the Eldorado.

Culpability Without Pain

On Jan. 29, 1994, an article, "U.S. Suspends Twenty-Four Eldorado Timber Sales," was published in the *Sacramento Bee*. This article came to the attention of the U.S. Attorney's Office (USAO) in Sacramento. After inquiries, the case was officially referred to the USAO on April 4, 1994, for "prosecutive determination of possible charges of 18 U.S.C. 371, Conspiracy, and 18 USC 1001, False Statements."

After reviewing the case, the U.S. Attorney advised the Regional Forester that serious violations of law by Forest Service officials has occurred. The USAO declined to prosecute given the lack of an obvious motive for these violations, but refused to issue a written statement declining prosecution (i.e., declination). The rationale for not issuing a written declination was spelled out verbally to Crowder who, in turn, communicated it to his superiors in Washington:

From: Wayne Crowder
Postmark: Sep 15, 94 9:23 AM
To: Bernard J. Karam: WO

I JUST SPOKE WITH STEVE LAPHAM, AUSA [Assistant U.S. Attorney], EASTERN DISTRICT, WHO ADVISED ME THAT THEIR OFFICE WAS DECLINING CRIMINAL PROSECUTION [sic] OF THIS CASE. HE FURTHER ADVISED THAT THEY WOULD NOT BE ISSUING A WRITTEN DECLINATION BECAUSE, IN LIGHT OF THE GRAVITY OF THIS CASE, THEY DID NOT WANT TO GIVE THE APPEARANCE OF "EXONERATING" THE SUBJECTS. HE SAID THAT IF ANYONE IN THE AGENCY HAD A PROBLEM WITH THIS HE WOULD BE GLAD TO DISCUSS IT PERSONALY [sic]. HE ALSO SAID WE

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MAY RELEASE THE REPORT ADDENDUM
TO WHOM EVER [sic] WE WISH.

The declination by the USAO then freed the Forest Service to take whatever administrative action was appropriate without fear of complicating a pending criminal investigation. After the USAO declined the case, Crowder's investigative report was finalized and forwarded to the Forest Service Chief for administrative review.

The investigative report forwarded by Crowder omitted key correspondence indicating that Baumbach, the timber management staff and the District Rangers were aware as early as 1991 that the sales documentation was defective and would not stand up to scrutiny. The report did include OGC Counsel Gipsman's Jan. 30, 1992, memorandum about intimidation of agency scientists but drew no conclusions about its contents. These matters apparently were beyond the scope of Crowder's inquiry.

Buck Doesn't Stop Anywhere

Despite the millions of dollars that would be lost from the cancellation of two dozen contracted timber sales and the mounting embarrassment entailed, the Forest Service evidenced no intention of taking any disciplinary or corrective action. The Chief and his top staff had apparently decided on a no-fault solution when the sales were officially suspended following the briefing by Acting Eldorado Supervisor Harris on Jan. 26, 1994. Harris, in fact, argued that the sales had to be cancelled because they were illegal. According to Harris's briefing statement:

Based on our current analysis, we believe that if we are litigated by environmental organizations, we would most likely lose because the sales sold in 1992 either (1) do not conform to substantive NFMA standards to manage wildlife habitat to maintain viable populations of species that are well-distributed in the planning area (Eldorado National Forest); (2) may not comply with the Clean Water Act; [or] (3) are not

consistent with the Eldorado National Forest Land and Resource Management Plan direction for seral stage diversity, management indicator species, and streamside management zones. The sales also did not follow the procedural requirements of NFMA, NEPA, or Forest Service NEPA procedures and did not comply with the public notice and administrative appeal opportunity provided by Forest Service regulations.

Harris's statement was included in Special Agent Crowder's investigative file which went to the Washington Office for review. In a letter dated July 1, 1994, Acting Associate Deputy Chief William McCleese concluded, "Based upon the information in this report we find no evidence of administrative violations related to the National Forest Management Act" McCleese went further and commended Phipps, saying, "He was not negligent, and in fact he was diligent in collaborating with the public and his employees." As to Baumbach, McCleese stated:

He was providing staff advice and doing his job to keep the timber program on track. While his actions might seem biased toward his program area, it is no different than the strong advocacy made by other staffs for their programs during the timeframes of the allegations.

Like a bureaucratic hot potato, the investigative report was sent back to the USFS Law Enforcement and Investigations Director Allen Trujillo. The U.S. Attorney was still looking at the case and the AUSAs had more questions. So Crowder was assigned to compile a supplemental report. Immediately following the USAO declination to prosecute in September 1994, Crowder's original report and the "addendum" were again sent back to the Washington Office for review and action. The addendum included a note memorializing the harsh language used by the USAO in declining the case.

The matter finally ended up on the desk of Deputy Chief Gray Reynolds. In a Jan. 4, 1995, letter Reynolds wrote: "Based on the information provided in the original report and Addendum #1, we are unable to determine if an administrative violation occurred or clearly place culpability."

Reynolds letter closed the Forest Service investigation. On Feb. 23, the case file was sent back to the USDA OIG.

Report Becomes an Official Secret

In March 1995, the USDA OIG began receiving requests under the Freedom of Information Act (FOIA) for the investigative report. The OIG refused these requests on the grounds that the matter was still an ongoing investigation. A number of the requestors, including PEER, appealed this denial; they argued that the case was in fact closed. By that summer, the FOIA appeals became eligible for direct challenge through a civil complaint filed with the U.S. District Court. After some additional communications concerning PEER's intent to litigate the matter, the case was declared closed, and the Forest Service released the investigative report to PEER on Aug. 17, 1995.

In the meantime, the six timber companies whose contracted sales with the Eldorado National Forest were suspended began preparing claims against the agency. One company, Wetsel-Oviatt, filed an action in the Court of Federal Claims seeking compensation for revenue lost because of the Eldorado's breach of contract. The materials contained in Crowder's investigative report was highly relevant to the company's claim, and the report was requested by the company as part of its discovery against the Forest Service. The Forest Service was legally represented in the litigation by the Department of Justice. The Justice Department moved to prevent disclosure of the report to the public in the course of the litigation. Justice sought and obtained a protective order from the judge presiding over the case. In seeking the protective order, Justice asserted that the report was "privileged" from release on several

grounds: (1) the report was an internal document used in decision making and thus subject to the deliberative process privilege; (2) the report is an investigatory report compiled for law enforcement purposes and subject to the Privacy Act; and (3) the release of the report could facilitate retaliation against confidential sources or whistleblowers in violation of the Inspector General Act.

The protective order was granted the same day that the investigative report was released to PEER. The USDA Office of General Counsel, who authorized the release, asserted no similar claims of privilege.

On Oct. 4, 1995, the Forest Service Deputy Chief for Administration Kathleen Connelly, in a letter to PEER's counsel, requested that the investigative report be returned, citing the protective order. PEER refused the request, noting that PEER was not bound by the protective order and questioning the assertions of privilege that led to the issuance of the order.

On Jan. 17, 1996, in a memo to all employees, Forest Service Chief Jack Ward Thomas announced a new agency policy that no document be released to the public if "prospective or current litigation ... may be affected by release of the records." Under the new policy, all such record requests have to be approved by the USDA Office of General Counsel before the records may be released. As justification for the new policy, the Thomas memo noted, "There may be a protective order entered by a court that prohibits the public disclosure of certain records."

This new Forest Service policy appears to conflict with the Freedom of Information Act, which contains no such "prospective litigation" exemption for the release of public records and will likely spawn court challenges. Chief Thomas's memo also is at variance with an executive branch "commitment to openness" directive issued by President Clinton on Oct. 4, 1993.

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IV. Lessons Unlearned

The Forest Service has estimated its financial liability from the suspension of the 24 Eldorado sales to the affected timber companies as ranging from \$16 million to more than \$30 million. In its January 1992 briefing to the Chief's Office, Eldorado officials estimated that its payouts to the companies "would be at least 24 million dollars."

To date, Wetsel-Oviatt Lumber is the only company that has filed a breach of contract suit against the Forest Service; the company is citing \$4.5 million in damages. In December 1995, the Forest Service paid \$400,000 to three of the companies, Michigan-Cal, Sierra Pacific Industries and Wetsel-Oviatt to settle some undisclosed claims arising out of the Eldorado withdrawals. The other lumber companies affected are awaiting the outcome of the Wetsel-Oviatt lawsuit before filing claims of their own.

Where Are They Now?

John Phipps is still the Forest Supervisor on the Eldorado National Forest. District Ranger Craig Harasek opted for an early retirement during the investigation. Rex Baumbach was promoted shortly after this incident, and he accepted a transfer to the Washington Office. Baumbach was raised a pay grade from a GS-13 to a GS-14 and is now a Specialist for Timber Sale Contract Administration for the national timber program.

A Failure to Communicate

Special Agent Crowder's investigation heightened tensions among the staff of the Eldorado National Forest. In the wake of the investigation, many line officers on the forest expressed mistrust of the staff who raised the issues that led to the suspension of sales. The resource staff wrote of an escalation of "harassment and retaliation."

In an attempt to refloat the forest's shattered timber program, the Eldorado undertook

a more than \$3 million review process for all pending decisions. Because of this review, the suspended sales may eventually reappear at dramatically reduced volume and without the negative environmental consequences of their earlier incarnations.

Beginning in spring 1994 and continuing through fall 1995, Supervisor Phipps developed an internal reorganization that further diluted the authority of the resource staff to review proposed sales. By the advent of 1996, the reorganization had been completed and, that staff had been effectively stripped of functional autonomy.

Business as Usual

What happened on the Eldorado National Forest is but an extreme example of the way business is conducted throughout the Forest Service. Despite proclaiming its "reinvention," the Forest Service has undergone no discernible transformation. The agency's continuing timber orientation is reflected daily in its promotions, its targeted reorganizations, and its selection of disciplinary actions.

Even under its new Chief, the Forest Service has yet to honor its own internal whistleblowers. The term "combat-ologist" was coined to describe embattled Forest Service biologists, hydrologists, botanists and other resource staff who are harassed by their own chain of command for trying to inject scientific information into forest decision making. That "combat-ologist" term still applies to many resource specialists working in, or recently retired from, the Forest Service on forests like the Eldorado.

The path to positions of authority within the Forest Service (the current Chief, notwithstanding) still runs through its timber programs. Timber interests still drive the Forest Service, and line managers are removed only when they threaten to interfere with timber or other extraction targets. Timber managers and line officers are never

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punished for exceeding timber quotas, letting loggers cut green timber in salvage sales, or letting them build too many roads.

The purge of John Mumma, the Regional Forester for the Northern Region (Montana and the Idaho Panhandle), in 1991 for protesting timber quotas that were illegally high and the removal of Forest Supervisors Ernie Nunn and Curt Bates from that same region in 1993 sent an unmistakable message throughout the agency's line officers. In 1996, the same message is still being sent but with a slightly different rhetorical coating.

The best articulation of the mindset governing the agency was perhaps inadvertently made by Frank Mosbacher, the spokesman for the Eldorado National Forest, in a 1993 article that appeared in a local paper (*The Mountain Democrat*). When asked how his agency could justify the huge cost to taxpayers caused by the decision to cancel the contracted sales, he stated, "In some cases, we have no options other than to follow the law."