security enhancements of critical importance'' or ''significant threats to public health.'' However, existing SDWA programs which provide assistance to water systems have not provided assistance for continuing expenses such as operations and maintenance or personnel expenses. This legislation does not change this long-established public policy.

Finally, Title IV clarifies that EPA has discretion to act under Part D, Emergency Powers, of the Safe Drinking Water Act (SDWA) when the Agency has received information about a specific threatened terrorist attack or when the Agency has received information concerning a potential terrorist attack (but not necessarily a specific, identified threat) at a drinking water facility. In exercising this discretion, the EPA should only rely upon substantial, credible information. EPA should not interpret ''potential terrorist attack'' to mean that there is merely some possibility or statistical probability of a terrorist attack. Neither should EPA interpret a general warning, general announcement or general condition to be sufficient information of a threatened or potential terrorist attack. Specific, credible information is required, and all other elements of section 1431 must be met, including the existence of an imminent and substantial endangerment to the health of persons, that appropriate State and local authorities have not acted to protect the health of persons served by the drinking water system, and that the EPA Administrator has consulted with State and local authorities regarding the correctness of the information regarding both the specific threat and the actions which the State or local authorities have taken. The authority granted to EPA in section 1431 is a limited, case-by-case, contingent emergency power.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC, December 11, 2001.

Hon. DON YOUNG,
Chairman, Committee on Transportation and Infrastructure, Rayburn House Office Building, Washington, DC.

DEAR MR. CHAIRMAN: The Committee on Energy and Commerce has requested that the House take up the Public Health Security and Bioterrorism Response Act of 2001, H.R. 3448. While the bill primarily contains provisions related to the matters in the jurisdiction of the Committee on Energy and Commerce, I recognize that section 135, which amends the Stafford Act (42 U.S.C. §§5121, et seq.), to require release of emergency plans, falls under the jurisdiction of the Committee on Transportation and Infrastructure.

Allowing this bill to move forward in no way impairs your jurisdiction over that provision, and I would be pleased to place this letter and any response you may have in the Congressional Record when the bill is considered on the floor. In addition, if a conference is necessary on this bill, I recognize your right to request that the Committee on Transportation and Infrastructure be represented on the conference with respect to the provision amending the Stafford Act.

Sincerely,

W.J. ''BILLY'' TAUZIN,
Chairman.

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC, December 11, 2001.

Hon. W.J. BILLY TAUZIN,
Chairman, Committee on Energy and Commerce, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your recent letter regarding The Public Health Security and Bioterrorism Response Act of 2001, H.R. 3448. As you know, this bill contains a provision related to matters in the jurisdiction of the Committee on Transportation and Infrasturcture. Specifically, Section 135 of the bill amends the Stafford Act (42 U.S.C. §§5121, et seq.), which is under the jurisdiction of the Committee on Transportation and Infrastructure.

In the interest of expediting consideration of the bill, the Committee will not seek a referral of this legislation and will support your request to schedule floor action on the bill. This action should not, however, be construed as waiving the Committee's jurisdiction over future legislation of a similar nature.

Thank you for your cooperation on this matter.

Sincerely,

DON YOUNG,
Chairman.

TRIBUTE TO BISHOP SAMUEL C. MADISON ON THE 75TH ANNIVERSARY OF THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE'S CONVOCATION, HIS 61ST ANNIVERSARY AS MINISTER, AND 10TH ANNIVERSARY AS BISHOP AND CHURCH LEADER

HON. MELVIN L. WATT

OF NORTH CAROLINA

IN THE HOUSE OF REPRESENTATIVES

Thursday, December 20, 2001

Mr. WATT of North Carolina. Mr. Speaker, I rise today to honor an exemplary leader, Bishop S.C. Madison, who is celebrating the 75th anniversary of the United House of Prayer for All People's Convocation, his 61st anniversary as minister and his 10th anniversary as bishop of the United House of Prayer. Bishop Madison is an exceptional leader who has championed the causes of eliminating poverty, inadequate and unaffordable housing, unemployment, illiteracy, economic disparities and spiritual depravation. The magnitude, depth and substance of his contributions to improve human welfare and social reform have brought him national acclaim.

The leadership of Bishop C.M. Grace, Bishop W. McCollough and Bishop S.C. Madison has had a positive impact on the growth of the United House of Prayer since its earliest existence in tents and storefront locations. Currently, under the leadership of Bishop Madison, there has been expansion to 135 congregations in 26 states. The church's massive, nationwide building program has resulted in construction of over 800 units of low and moderate income housing. These housing complexes are located in New Haven, CT; Washington, DC; Norfolk, VA; Charlotte, NC; Augusta, GA; Savannah, GA; and Los Angeles, CA. More than 100 units have been developed for senior citizens.

The extraordinary success of Bishop Madison has led to numerous honors and awards from national, state, and local organizations. Academic institutions have presented honorary degrees to him acknowledging his outstanding achievements in helping to overcome deplorable conditions that plagued people and cities. He has received Doctor of Humane Letters from the Saturday College of Washington, DC and Bowie State University of Bowie, MD.

Bishop Madison continues to demonstrate outstanding leadership, dispense an abundance of love and philanthropy and support causes for young people and the elderly. Bishop Madison's ministry promotes higher education, exercises business acumen, improves the spiritual fiber of society and maintains the United House of Prayer as a beacon of light for those who need inspiration and a safe haven from the harsh realities of life.

It is my pleasure to stand before the House to pay tribute to Bishop S.C. Madison as he marks 61 years in the ministry and 10 years of service as the outstanding role model and leader of the United House of Prayer for all people.

DEBT-FOR-NATURE AGENDA OF BANK REGULATORS AT THE FDIC AND OTS

HON. JOHN T. DOOLITTLE

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, December 20, 2001

Mr. DOOLITTLE. Mr. Speaker, in the 106th Congress, I chaired a Task Force formed by then-Chairman DON YOUNG to examine whether bank regulators at the FDIC and OTS used their powers to leverage privately owned redwood trees, known as the Headwaters Forest in California, from an individual.

The task force, which included Representatives POMBO, THORNBERRY, BRADY, and RADANOVICH, undertook an 8 month review of the debt-for-redwoods matter. We held one terribly long hearing on the subject on December 12, 2000.

In the 107th Congress, Chairman HANSEN continued work on the subject and dedicated staff to draft a staff report to summarize the evidence of the FDIC and OTS redwoods debt-for-nature scheme and conclusions drawn from the oversight work. The report exposes how banking regulators took on an unauthorized, political agenda of leveraging redwood trees.

A member of the Task Force, Representative POMBO, inserted the text of the staff report into the RECORD on June 14, 2001. Just as important as the report itself, is the collection of evidence and documents, appended to the report. Those documents validate the accuracy of information presented in the report. Today, for the benefit of my colleagues, I have put those appendices into the RECORD. The Financial Services Committee should review this information as they deal with re-authorizing the FDIC and the OTS. These entities are clearly out of control, and I want to summarize why this is so.

Bank regulators at the FDIC and OTS have very specific statutory charges. They are to recover money from the owners of banks and thrifts when the institutions fail. This system keeps depositors whole through federally-backed insurance funds and collects money from the banks' owners if they failed to properly manage the bank. I emphasize, bank regulators are to recover money.

We found boxes of evidence that clearly showed that the bank regulators at the FDIC and OTS deviated from their statutory charge and actually concocted a scheme, in concert with the Office of the Secretary of the Interior, to obtain redwood trees from an owner of the failed bank. The scheme was initiated, promoted, and lobbied by radical EarthFirst!

ecoterrorists. It was embraced by FDIC lawyers and facilitated by FDIC's outside counsel, and it was sanctioned at the highest levels of the agency.

The cornerstone of the scheme was to bring legal and administrative actions that the regulators believed and knew would fail against Mr. Charles Hurwitz, a 24-percent owner of a failed bank called United Savings of Texas. The bank regulators own written analysis of their claims said if the redwoods were not involved, their lawyers would have ''closed out'' the case. That means they would have dropped the case, period.

Instead, the bank regulators and their lawyers synthesized the redwood for bank claims scheme with politicians in Congress and with outside environmental groups. They then met, at a critical juncture, with the Office of the Secretary of the Department of the Interior where the shocking and incredible realization was noted by one participant in the meeting: if we drop the suit we ''undercut everything.''

Even before this startling evidence was uncovered by the task force, a U.S. District Court judge, the Honorable Lynn Hughes compared the tactics of the FDIC and OTS to that of the mafia.

Since the time when the report was placed in the RECORD by Mr. POMBO, the OTS administrative proceeding has been decided by the OTS administrative judge. In a 200 plus page opinion after reviewing 29,000 pages of transcripts and 2,400 pages of exhibits for over seven years, the OTS judge ruled against the agency on every single claim.

This ruling validates the inescapable conclusion that the bank regulators at the OTS and the FDIC still fail to acknowledge: their claims totally lack of merit and were brought for the political reason of obtaining ''the trees''—the redwoods—at no cost to the government. The staff report sets out the evidence supporting this conclusion.

This is an atrocious abuse of governmental power, and one that my colleagues and the agency should understand. For that reason, I have placed the evidence we collected—in its raw form—into the RECORD today.

I am doubly disturbed about what the bank regulators did, because the Committee on Resources and the Congress have the legal authority to decide what land is acquired and what the conditions of the acquisition should be, not banking regulators. Bank regulators clearly brought their claims for the environmentalists, for the Department of the Interior, and for the White House, not in furtherance of banking laws. Their decision was political and the disposition by the OTS judge again proves the point. These documents are even further validation.

When we asked the bank regulators at our hearing if their banking claims had anything to do with redwoods, they said, ''No.'' The staff report documents just how the bank regulators were deeply involved in the redwoods agenda—and how they cooperated to get ''the trees.'' The report shows how they switched their recommendation after meeting with the Department of the Interior. Right before they were to decide whether to pursue the claims, they obviously understood, ''If we drop [our] suit, [it] will undercut everything.'' Those are words are from the notes of a meeting between the FDIC and the Department of the Interior. Those words put the bank regulators squarely inside the redwoods agenda.

The bank regulators were thick into redwoods early in the process. They hired outside counsel based on the supposed expertise to handle a ''unique'' settlement involving the redwoods. Their outside counsel even acted as a conduit between FDIC lawyers and the environmental groups that lobbied for the redwoods.

There is so much evidence detailed in the staff report, which is why I am grateful that my colleague, Representative RICHARD POMBO, put the text of the report into the RECORD on Thursday, June 14, 2001. I want my colleagues to know that copies of the appendices to the report are also public record. The Task Force made them public at the close of its hearing on December 12, 2000. By my motion, they were released:

Mr. DOOLITTLE. . . . We've gone now for 5 hours. We haven't had a lunch break, and we're not going to have time to get into some of the other details. But I think there's enough revealed here that's very troubling, and it needs further examination, and therefore, I make the following motion: I move that all the documents we utilized in today's hearing be included in the hearing record and that all of the documents produced by the Department of the Interior be included as part of today's hearing record; and I furthermore move that any documents not included in the above categories that are necessary to document a staff report or analysis of the situation be released with such staff report. Hearing no objection. . . . So ordered.

Now that they are in the RECORD, my colleagues can see them in the context of the staff report.

CONGRESS OF THE UNITED STATES,
WASHINGTON, DC, JUNE 6, 2001.

Hon. JAMES V. HANSEN,
Chairman, Committee on Resources, House of Representatives.

DEAR MR. CHAIRMAN: Transmitted with this letter is the Staff Report entitled Redwoods Debt-For-Nature Agenda of the Federal Deposit Insurance Corporation and the Office of Thrift Supervision to Acquire the Headwaters Forest that you and Chairman Young requested.

The report composed of evidence, testimony, documents, records, and other material reviewed and analyzed by staff of the Committee on Resources during the 106th and 107th Congress. It follows the work of the Committee Task Force that reviewed the matter through December 2000.

The analysis concludes that there was a redwoods debt-for-nature scheme pursued by the bank regulators at the FDIC and the OTS beginning in at least February 1994. The scheme used almost meritless banking claims against Mr. Charles Hurwitz (stemming from his minority ownership of a failed savings and loan) as leverage for the federal government to obtain a large grove of redwood trees owned by the Pacific Lumber Company, a separate entity that Mr. Hurwitz owned and controlled.

It is clear that the scheme evolved as the FDIC grew to understand the importance of its (and the OTS') potential claims as the leverage for the redwoods during an unprecedented meeting it held in early 1994 with a Member of Congress. At that meeting, the investigation of the claims against Mr. Hurwitz and the redwoods debt-for-nature scheme were discussed in detail, a highly inappropriate action that launched the bank regulators into a hot political issue.

Immediately after the meeting, the goal of obtaining the redwoods was shared by the FDIC with the OTS, and the OTS was then hired by the FDIC to pursue a parallel administrative action against Mr. Hurwitz. The coordinated purpose of that strategy was to provide more leverage to get ''the trees,'' according to the notes of the FDIC lawyers.

The intense lobbying campaign by environmental groups, including Earth First!, directed at the FDIC, its outside counsel, the OTS, the Administration, the Department of the Interior, the White House, and Members of Congress was why ordinary internal operating procedures that would have closed out the case against Mr. Hurwitz were not followed.

The scheme to obtain redwoods overrode the initial internal conclusion that the claims against Mr. Hurwitz were losers for the bank regulators and should not have been bought under the written policy of the agency. In fact, the FDIC met with the top staff from the Office of the Secretary of the Department of the Interior to discuss the scheme just a few days prior to the stunning reversal of the internal staff recommendation not to sue Mr. Hurwitz. The FDIC notes from the meeting say, ''If we drop suit, [it] will undercut everything.'' Of course ''everything'' was the just-discussed scheme to leverage redwoods from Mr. Hurwitz.

The FDIC (and its agent, the OTS) were indeed an integral part of the redwoods debt-for-nature scheme. They willingly injected themselves into the issue through actions such as meetings with politicians and debt-for-nature advocates, internal analysis of debt-for-nature urgings by environmental advocates, and meetings with Department of the Interior officials promoting a redwoods debt-for-nature scheme. They did these things well before their claims were authorized to be filed by the FDIC board, and it became clearer and clearer to the bank regulators that there would be no ''debt'' and therefore no redwoods nature swap, if the claims were not brought or at least threatened.

The evidence of the FDIC's participation in the debt-for-nature scheme is overwhelming and contradicts the testimony offered by the witnesses at the December 12, 2000, hearing of the Committee Task Force that reviewed the matter. That testimony was that banking claims or the threat of banking claims against Mr. Hurwitz involving USAT were not brought as leverage in a broader plan to get the groves of redwoods from Mr. Hurwitz. The weight of the documentation does not buttress that conclusion at all; it contradicts it.

Indeed, these actions of the bank regulators, in particular the FDIC and by extension (then directly) the OTS, are an alarming display of how ''independent'' government agencies are not necessarily independent, have agendas, and do engage in politics when not controlled. What staff of such agencies often seem to forget is that the only authority they have is that which Congress gives to them by law. What staff of these agencies either did not know or forgot is that there is not authority in law for them to pursue the redwoods debt-for-nature scheme that they pursued. These agencies seemed to realize this well after the pursuit began and their claims were polluted with the illegitimate redwoods agenda.

The cost of this improper, illegal engagement—on a loser claim that would have been ''closed out'' if it were the normal situation—is upwards of $40 million to Mr. Hurwitz. If the federal government can conspire and get away with doing this to someone with the capacity and resources to defend himself, then imagine what the federal government can do this to a person who does not have the means or capacity to defend himself or herself.

The U.S. District Court Judge, The Honorable Lynn Hughes, who was assigned the

FDIC case, after learning of just a fraction of what the FDIC and OTS had done to strong-arm Mr. Hurwitz, concluded that the agencies used tools equivalent to the cosa nostra (essentially a mafia tactic). Judge Hughes was absolutely correct, and the documentation in this report provides additional basis that validates Judge Hughes conclusion. No one—whether he or she is a millionaire industrialist or a laborer in a factory—should be subject to the unchecked tools of an out of control ''independent'' agency like the FDIC or the OTS, not in our republic.

The report makes the following conclusion: ''The Directors of the FDIC and OTS should take corrective action and withdraw the authorization for the FDIC lawsuit and OTS administrative action against Mr. Hurwitz for matters involving USAT. The integrity of the bank regulatory system demands nothing less.''

I hope that the information in this staff report assists the Committee.

Sincerely,

DUANE R. GIBSON,
COUNSEL.

CONGRESSIONAL RESEARCH SERVICE,
June 29, 2001.

MEMORANDUM

To: Hon. DON YOUNG.

From: Morton Rosenberg, Specialist in American Public Law, American Law Division.

Subject: Propriety of the Establishment of an Investigative Task Force by a Committee Chairman and the Release and Publication in the Congressional Record of a Staff Report and Documents Gathered by the Task Force, and Related Questions.

You have submitted seven questions that inquire as to the legal propriety or basis for the establishment by the House Resources Committee of a task force and certain actions taken by that task force and its members. Our response is based on the following facts and circumstances which you have provided, which may be briefly summarized.

On August 15, 2000, as Chairman of the House Committee on Resources and acting through the authority vested in you by Rule 7 of the Committee's rules, you established the Task Force on the Headwaters Forest and Related Issues, which had a termination date of no later than December 31, 2000. The purpose of the Task Force was to review and study actions by the Federal Deposit Insurance Corporation (FDIC) and the Office of Thrift Supervision (OTS) which were alleged to have been undertaken by those agencies to improperly exert pressure on private parties so that the federal government could obtain parcels of land in northern California containing groves of redwood trees adjacent to the Headwaters Forest. Those parcels belonged to the Pacific Lumber Company which was owned by Mr. Charles Hurwitz. Mr. Hurwitz was a minority owner of a failed Texas savings and loan bank against whom a civil suit (by the FDIC) and an administrative action (by the OTS) were brought alleging professional liability bonding claims. The legal actions were said to have been brought as leverage to persuade Mr. Hurwitz to swap the redwood parcels for a settlement of these proceedings.

Following a period of preliminary investigation, which included requests for production of documents by FDIC, OTS, and the Department of Interior and private parties, and the issuance of subpoenas for withheld documents, the Task Force held a hearing on December 12, 2000. At the conclusion of the hearing the chairman of the Task Force, Mr. Doolittle, made the following motion, which was adopted by unanimous consent:

I move that all the documents we utilized in today's hearing be included in the hearing record and that all of the documents produced by the Department of the Interior be included as part of today's hearing record; and I furthermore move that any documents not included in the above categories that are necessary to document a staff report or analysis of the situation be released with such staff report.''

On June 6, 2001, a staff report on the Task Force's inquiry was transmitted to the current chairman of the Resource Committee, Mr. James V. Hansen, and to members of the Task Force. Mr. Richard W. Pombo, a member of the Task Force, requested and received permission of Chairman Hansen to publish the staff report in the CONGRESSIONAL RECORD, which occurred on June 14, 2001. See 147 Cong. Rec. E 1123–E1136.

We will respond to your questions in the order submitted. Where questions appeared to be closely related, they are answered together.

1. Was the creation of a task force a valid exercise of Committee Rule 7 authority?

House rules have vested broad powers in committees and their chairs to conduct oversight and investigative proceedings without telling them how they are to do so. House Rule X.2(b)(1) directs that ''Each standing committee . . . shall review and study, on a continuing basis, the application, administration, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that Committee . . . in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated''. House Rule XI.1(b) provides that ''Each committee is authorized at any time to conduct such investigations and studies as it may consider necessary and appropriate in the exercise of its responsibilities under Rule X''. The various House committees and subcommittees have their own rules, procedures and practices. Different inquiries by different committees may follow their own individual paths. Committees may decide among themselves, by precedent or newly devised procedures, how to conduct any particular inquiry. A committee can even adopt rules requiring committee votes before initiating major inquiries, as the House Un-American Activities Committee (HUAC) did in the 1960's, and the House Permanent Select Committee on Intelligence has done in recent years. If such a rule is adopted, ''it must be strictly observed''. Gojack v. United States, 384 U.S. 702, 708 (1966). Both committees had special reasons for adopting such a rule—HUAC's stemming from the controversial nature of its investigations, the Intelligence Committee because of the sensitivity of its inquiries—but the vast majority of committees have not perceived a need to adopt such a rule.

In the instant situation, Rule 7 of the Resources Committee's rules authorizes the Chairman, after consultation with the Ranking Minority Member, ''to appoint Task Forces, or special or select Subcommittees, to carry out the duties and functions of the Committee.'' The Chairman's August 15, 2000 charter of the Task Force vested it with authority ''to carry out the oversight and investigative duties and functions of the Committee'' regarding the Headwaters Forest matter initiated by the Chairman's letter of June 16, 2000. The Task Force's duration was limited to less than six months so that assignment to the Task Force would not count against the limitation on Subcommittee service under House Rule X.5(b)(2)(c). This section of the House Rules also recognizes and contemplates the creation by standing committees of task forces by its definition of ''subcommittee'' to include ''a panel . . ., task force, special subcommittee, or other subunit of a standing committee. . .''

But even without such a rule, the ordinary procedures by which chairmen commence inquiries—through inquiry letters, scheduling of hearings, or staff studies and interviews—are proper without committee votes in advance or minority party participation in their formulation or conduct. In furtherance of the responsibility to engage in continuous oversight under Rule X.2(b)(1), it has been traditionally proper for the chairman of committees and subcommittees to initiate preliminary reviews and studies, i.e., inquiries which in a general sense may be termed ''preliminary investigations'' to be undertaken by the committee and subject to the ultimate control and direction of the committee. It is seen as essential, for example, that a chairman's preliminary inquiry be able to minimize the possibility of the destruction of documents pending their formal incorporation as committee files. In this regard, the courts have held that the legal obligation to surrender documents requested by the chairman of a congressional committee arises at the time of the official request, and have agreed in construing 18 U.S.C. 1505, a statute proscribing the obstruction of congressional proceedings, that the statute is broad enough to cover obstructive acts in anticipation of a subpoena. See, e.g., United States v. Mitchell, 877 F.2d 297, 300–01 (9th Cir. 1979); United States v. Tallant, 407 F. Supp. 878, 888 (D.N.D Ga. 1975).

The Mitchell ruling is particularly pertinent to the question under consideration here. In that case the appeals court upheld a conviction for obstructing an investigation by the House Committee on Small Business. The court said of the obstruction statute that ''[t]o give section 1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed *even when they occur prior to formal committee authorization*.'' 877 F.2d at 301 (emphasis supplied). The court explained the factual background as follows:

Applying these principles to the case at hand, all of the circumstances surrounding this investigation point to the conclusion the appellants' corrupt endeavor was directed towards a legitimate House investigation. *The investigation was instigated by the chair of a House Committee* that unquestionably has jurisdiction over the subject matter of the inquiry. The letter from Congressman Mitchell to the SHA expressly said that ''[t]his Committee is presently conducting an investigation'' and referred to the Small Business Act for its authority to do so. Furthermore, the investigation was handled by the chief investigator of the Small Business Committee on a continuing basis for several months. * * * *[T]his was a congressional investigation. Accordingly, we hold that the investigation instigated by Congressman Mitchell was an investigation by the Small Business Committee* of the House that was protected by § 1505]''. *Id.* (emphasis supplied).

The appeals court quite clearly was approving the notion that a chairman can initiate a proper committee investigation and identifying two classic indicia of a chairman-initiated investigation: the writing of a letter and the handling of the investigation by a committee staffer (the ''chief investigator of the Small Business Committee''). See also, United States v. North, 708 F. Supp. 372, 374 notes 3 and 4 (D.D.C. 1988). United States v. North, 708 F. Supp. 380, 381–82 (D.D.C. 1988).

In sum, the Chairman's creation of the Task Force is well founded in Committee and House rules and congressional practice.

2. Can a Committee on Resources task force generally have the powers and duties of a subcommittee?

3. Did the task force have the power and authority under its charter and the applicable rules to discharge the duties and functions of the committee—such as holding hearings, receiving testimony, compiling staff reports and analyses, and releasing records and documents (into hearing records and publicly to document staff reports)?

A congressional committee is a creation of its parent House and only has the power to inquire into matters within the scope of the authority that has been delegated to it by that body. Thus, the enabling rule or resolution which gives the committee life is the charter which defines the grant and limitations of the committee's power. In construing the scope of a committee's authorizing charter, courts will look to the words of the rule or resolution itself, and then, if necessary to the usual sources of legislative history such as floor debate, legislative reports, past committee practice and interpretations. Jurisdictional authority for a ''special'' investigation may be given to a standing committee, a joint committee of both houses, or a special subcommittee of a standing committee, among other vehicles.

As indicated in the above discussion, House Rules X and X1 clearly vest oversight authority, including the holding of hearings and the issuance of subpoenas, in its standing committees and their subcommittees, and the creation by standing committees of subunits, such as task forces, that would carry out particularized oversight tasks. The Headwaters Forest Task Force was formally established pursuant to Committee Rule 7 and the Task Force's authority was particularly defined in its charter of August 15, 2000: ''[T]o carry out the oversight and investigative duties and function of the Committee regarding the oversight review specified in the June 16, 2000 letter (attached hereto)'' and to ''hold hearings on matters within its jurisdiction'' which are expressly delineated in the charter. Such hearings are made ''[s]subject to the Rules of the House of Representatives and the Rules of the Committee on Resources'' and had to be approved by the chairman prior to their announcement.

In light of this, it is likely that viewing court would find that the Task Force was properly constituted and could validly exercise all the powers of a subcommittee including holding hearings, receiving testimony and documents and making such documents part of the hearing record, directing the preparation of staff reports and analyses, and authorizing the release of such staff reports together with supporting documentary evidence gathered by the Task Force.

4. Regarding the unanimous consent request by Chairman Doolittle on December 12, 2000, is it, coupled with the permission of Chairman Hansen, valid authority to release of the report?

5. Does the unanimous consent request, coupled with the release of the report into the Congressional Record also cover the release of the records contained in the appendices to the report? Generally, is a vote of the Full committee required in order to release such subpoenaed documents and records? Was it in this situation?

Task Force Chairman Doolittle's unanimous consent request adopted at the conclusion of the December 12, 2000 hearing had the effect of making two categories of documents—documents utilized during the hearing and those produced by the Department of Interior—part of the record of the hearing. It also authorized the use of documents received by the Task Force which are not within those two categories to be utilized in the preparation of a staff report where necessary to buttress the analysis and the release of those documents upon the release of the staff report.

Public release of documents gathered in the course of a legitimate committee investigation, including those introduced at a hearing, is well supported by the House rules, committee practice and relevant judicial precedent. Under House Rule XI, 2, ''all committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto.'' There is no restriction on the use of evidentiary material, gathered by a committee and presented in a hearing, unless that ''evidence'' is taken in executive session. In those circumstances the evidence may not be ''used in public sessions without the consent of the committee.'' Rule XI, 2(k)(7). We are advised that the subject material was not received in executive session.

A Committee has a right to utilize the documents it has received in any manner that enables it to perform its legitimate legislative functions. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees have virtually plenary power to compel information needed to discharge their legislative function from executive agencies, private persons, and organizations, McGrain V. Daugherty, 272 U.S. 135, 177 (1927); Watkins v. United States, 354 U.S. 178, 187 (1957); Barenblatt v. United States, 360 U.S. 109, 111 (1959); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975), and with certain constraints, the information so obtained or maybe made public, Doe v. McMillan, 412 U.S. 706, 313 (1973); Doe v. McMillan, 556 F. 2d 713–16 (D.C. Cir. 1977), cert. denied 435 U.S. 969 (1978).

Thus, for example, where a statutory confidentiality or non-disclosure provision barring public disclosure of information is not explicitly applicable to the Congress, the courts have consistently held that agencies and private parties may not deny Congress access to such information on the basis of such provisions. FTC v. Owen-Corning Fiberglass Corp., 626 F2d 966, 970 (D.C. Cir. 1980); Exxon Corp. v. FTC, 589 F.2d 582, 589 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979); Ashland Oil Corp. v. FTC, 548 F.2d 977, 979 (D.C. Cir. 1976); Moon v. CIA, 514 F. Supp. 836, 849–51 (SDNY) 1981). Nor may a court block congressional disclosure of information obtained from an agency or private party, at least when disclosure would serve a valid legislative purpose. Doe v. McMillan, 412 U.S. 306, 312 (1973); FTC v. Owens-Corning Fiberglass, supra, 626 F.2d at 970.

Since none of the documents in question were received in an executive session of the Task Force, no vote of the Task Force or the full Committee was necessary to release them, and all the documents and records of the Task Force were available for inspection by any member of the House. Chairman Hansen's authorization to Mr. Pombo was sufficient (although probably not necessary) to permit him to insert the entire staff report in the Congressional Record.

6. Please review the section in the report entitled ''Use of Records and Documents'' and comment on whether it is accurate and whether it is correct with respect to utilization of allegedly privileged documents by a committee in a staff report under the circumstances contained in this memo.

7. Do litigation privileges apply to constrain release of records in such a staff report by the Task Force or the Committee on Resources in the House? If records are used in a staff report under the circumstances explained in this memo and the use impacts litigation, is there any bar to the utilization or release of records that document a staff report? If documents that are compelled to be produced are produced under a subpoena to a federal entity and such documents are used in hearings or staff reports, is a judicial privilege generally waived by the federal entity?

The Staff Report indicates that FDIC and OTS have suggested that public release of certain documents may jeopardize the agencies' pending civil and administrative proceedings and would also waive judicial litigation privileges that may be available. Neither contention is likely to be upheld by a reviewing court.

With respect to effect of pending civil or criminal litigation on the ability of a congressional committee to conduct an oversight investigation of an agency, the Supreme Court has long held that refusals to provide testimony or evidence based on an ongoing or potential litigation would not be recognized. In Sinclair v. United States, 279 U.S. 263 (1929), the Court upheld the contempt of Congress conviction of a witness in the face of such a contention, holding that neither the laws directing such lawsuits be instituted, nor the lawsuit themselves ''operated to divest the Senate, or the Committee, of power further to investigate the actual administration of the laws.'' 279 U.S. at 295. The Court further explained: ''It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suites.' Id. In other words, those persons having evidence in their possession, including officers and employees of executive agencies, can not lawfully assert that because lawsuits are pending involving the government, ''the authority of the [the congress], directly or though its committees, to require pertinent disclosures'' is somehow ''abridged.'' Id.

The courts have recognized that disclosures at congressional hearings may have the effect of jeopardizing the successful prosecution of civil and criminal cases, but in no instance has any court suggested that this provides a constitutional or legal limitation on Congress' right to conduct an investigation. See, e.g., Delaney v. United States, 195 F. 2d 107, 114 (1st Cir. 1952). Commenting on Congress' power in this regard, Independent Counsel Lawrence E. Walsh, who saw successful prosecutions judicially overturned because of public testimony at congressional hearings, observed that ''[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution rather than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance.'' See Walsh, ''The Independent Counsel and the Separation of Powers,'' 25 Hous. L. Rev. 1,9 (1998). See also ''Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, 4, 23–29, CRS Report No. 95–464A, April 7, 1995 (CRS Report).

Similarly, precedents of the House of Representatives and the Senate, which are founded on Congress' inherent constitutional prerogative to investigate, establish that acceptance of common law testimonial privileges, such as attorney-client or work product privileges, rests in the sound discretion of a congressional committee regardless of whether a court would uphold the claim in the context of litigation. See, CRS Report a pp. 43–56. Indeed, Resources Committee Rule 4(i) specifically provides that: ''Claims of common-law privilege made by witnesses at hearings, or by interviewees or deponents in

investigations or inquiries, are applicable only at the discretion of the Chairman, subject to appeal to the Committee.''

Next, we turn to the question whether publication of the documents received during the course of your investigation will have the effect of waiving any privileges that might otherwise be asserted in any pending or future litigation. Our review of the applicable case law, and the constitutional principles underlying congressional oversight and investigations, lead us to conclude that a reviewing court is not likely to find that disclosure by your Committee, under the circumstances now obtaining, would effect a waiver of any privileges that might be asserted in a related court proceeding.

More particularly, once documents are in congressional hands, the courts have held that they must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of effected parties. FTC v. Owens-Corning Fiberglass Corp., 626 F. 2d 966, 90 (D.C. Cir. 1980); Exxon Corp. v. FTC, 589F. 2d 582, 589 (D.C. Cir. 1978), cert denied, 441 U.S. 943 (1979); Ashland Oil Corp. v. FTC, 458 F. 2d 977, 979 (D.C. Cir. 1976). Nor may a court block congressional disclosure of information obtained from an agency or private party, at least where disclosure would serve a valid legislative purpose. Doe v. McMillan, 412 U.S. 306 (1973); FTC v. Owings-Corning Fiberglass Crop., supra, 626 F. 2d at 970.

It is also well established that when the production of privileged communications is judicially compelled, compliance with the order does not waive the applicable privilege in another litigation, as long as it is demonstrated that the compulsion was resisted. See, e.g., U.S. v. De La Jara, 973 F. 2d 746, 749–50 (9th Cir. 1992) (''In determining whether the privilege should be deemed waived, the circumstances surrounding the disclosure are to be considered. Transamerica Computer, 573 F. 2d at 650.'') Westinghouse Electric Corp. v. Republic of the Philippines, 951 F. 2d 1414, 1427, 1427 n. 14 (3d Cir. 1991) (''We consider Westinghouse's disclosure to the DOJ to be voluntary even those it was prompted by a grand jury subpoena, Although Westinghouse originally moved to quash the subpoena, it later withdrew the motion and produced the documents pursuant to the confidentially agreement. *Had Westinghouse continued to object to the subpoena and produced the documents only after being ordered to do so, we could not consider the disclosure to do so to be voluntary'')* (emphasis supplied); Jobin v. Bank of Boulder (In re M&L Business Machines Co.), 167 B.R. 631 (D. Colo. 1994) (''Production of documents under a grand jury subpoena does not automatically ciliate the attorney-client privilege, much less in an unrelated civil proceeding brought by a non-governmental entity. This is especially true in a case such as this, where the record demonstrates that the Bank has consistently sought to protect its privilege.''). Some courts have even refused to find waiver when the client's production, although not compelled, is pressured by the court. Transamerica Computer Corp. v. IBM, 576 F. 2d 646, 651 (9th Cir. 1978). Similarly another court found that a client's voluntary production of privileged documents during discovery did not effect a waiver because it was done at the encouragement of the presiding judge. Duplan Corp. v. Deering Milliken, Inc., 979 F. supp. 1146, 1163 (S.D.S.C 1974) (finding no waiver ''where voluntary waiver of some communications was made upon the suggestion of the court during the course of the in camera proceedings.'').

Moreover, at least two federal circuits have held that disclosures to congressional committees do not waiver claims of privilege elsewhere. See, Florida House of Representatives v. Dept. of Commerce, 961 F. 2d 941, 946 (11th Cir. 1992); Murphy v. Department of the Army, 613 F. 2d 1151, 1155 (D.C. Cir. 1979).

As we understand it, documents about which FDIC and OTS have raised concerns are ones that were withheld and had to be subpoenaed. On the basis of the above-delineated precedents, the agencies could make a plausible arguments that they raised sufficient resistence to demonstrate that the disclosure was involuntary and thus not a waiver or privilege.

Finally, it may be noted that publication of the staff report and attached documents is ultimately protected by the Speech or Debate Clause of the Constitution, Art I, sec. 6, cl. 1, and that such publication, since it does not contain classified material, is unlikely to be sanctioned under the ethics rules of the House.

The purpose of the Speech or Debate Clause, which provides that ''for any Speech or Debate in either House, (Members} shall not be questioned in any other place,'' is to assure the independence of Congress in the exercise of its legislative functions and to reinforce the separation of powers established in the Constitution. Eastland v. United States Servicemen's *Fund*, supra, 421 U.S. at 502–03 (1975). The Supreme Court has read the clause broadly to effectuate its purposes. Eastland supra; see also, United States v. Swindall, 971 F.2d 1531, 1534 (11th Cir. 1992). The clause protects ''purely legislative activities'', including those inherent in the legislative process. Chastain v. Sundquist, 833 F.2d 311, 314 (D.C. Cir. 1987) (quoting U.S. Brewster, 408 U.S. 501, 512), cert. denied, 487 U.S. 1240 (1988). The protection of this clause is not limited to words spoken in debate. ''Committee reports, resolutions, and the act of voting are equally covered, as are things generally done in a session of the House by one of its members in relation to the business before it.'' Powell v. McCormack, 395 U.S. 486, 502 (1969). Thus, so long as legislators are ''acting in the sphere of legitimate legislative activity,'' they are ''protected not only from the consequences of litigation's results but also from the burden of defending themselves.'' Tenney v. Brandhove, 341 U.S. 367, 376–377 (1951). The clause has been held to encompass such activities integral to the lawmaking process as circulation of information to other Members, Doe v. McMillan, 412 U.S. 306, 311–312 (1973); Gravel v. United States, 408 U.S. 606, 625 (1972), and participation in committee investigative proceedings, and reports. DOE v. McMillan, supra; U.S. Servicemen's Fund v. Eastland, supra; Dombrowski v. Eastland, 387 U.S. 82 (1967); Tenney v. Brandhove, supra.

But the clause does not protect activities only casually or incidentally related to legislative affairs. Thus newsletters or press releases circulated by a Member to the public are not shielded because they are ''primarily means of informing those outside the legislative forum.'' Hutchinson v. Proxmire, 443 U.S. 111 (1979). The key consideration in such cases is the act presented for examination, not the actor. Activities integral to the legislative process may not be examined, but peripheral activities not closely connected to the business of legislating do not get the protection of the clause. Walker v. Jones, 733 F.2d 927, 929 (D.C. Cir. 1984). Thus, dissemination directly to the press of the documents themselves or of staff reports that contain information that describes or quotes from the documents, may not come under the protection of the Clause. But dissemination of staff reports to Members of the Committee and their staff, or the inclusion of such reports, or the documents themselves, in the record of public sessions of the hearings, or the Congressional Record, are functions that are likely to be held ''integral'' to the legislative process and protected by the Clause. Indeed, since Gravel and the revelation of the classified Pentagon Papers on the floor of the Senate by Senator Gravel, the disclosure of less sensitive proprietary matter in legislative forums such as the floor or in hearings is unlikely to be successfully challenged. A review of ethics proceedings in the House since 1978 conducted by the House Committee on standards of official conduct indicates that there have been only two instances involving matter inserted in the Congressional Record. In one, Rep. Thomas L. Blanton (TX) was censured on October 22, 1921 for publishing a document in the Congressional Record that contained ''indecent and obscene language.'' In 1977 a compliant against Rep. Michael J. Harrington (MA) for leaking classified information in the Record was dismissed upon finding that the information had not been properly classified. See Committee on Standards of official conduct, ''Historical Summary of Conduct Cases in the House of Representatives,'' April 1992.

United States House of Representatives
Committee on Resources Staff Report

REDWOODS DEBT-FOR-NATURE AGENDA OF THE FEDERAL DEPOSIT INSURANCE CORPORATION AND THE OFFICE OF THRIFT SUPERVISION TO ACQUIRE THE HEADWATERS FOREST, JUNE 6, 2001

The records, documents, and analysis in this report are provided for the information of Members of the Committee on Resources pursuant to Rule X 2.(a) and (b) of the Rules of the House of Representatives, so that Members may discharge their legislative and oversight responsibilities under such rules. This report has not been officially adopted by the Committee on Resources and may not therefore reflect the views of its members.

PREFACE

Documentation References

Documentation is referenced in parentheticals throughout the text of this report. References to ''Document A'' are references to documents that were incorporated into the hearing record by unanimous consent by the Task Force on Headwaters Forest and Related Matters on December 12, 2000. These documents are contained in the files of the Committee and those that are referred to are reproduced in Appendix 1. Documentation referenced as ''Record 1,'' ''Record 2'' etc. is documentation found in Appendix 2. Much of this documentation was not introduced as part of the hearing record, and it is provided for reference to substantiate key facts referenced in this report. References to ''Document DOI A,'' ''Document DOI B,'' etc. are references to documents that were incorporated into the hearing record by unanimous consent of the Task Force on December 12, 2000. These documents were produced to the Committee from the Department of the Interior. Appendix 4 contains the correspondence between the Committee and the bank regulators.

All documentation referenced in this report and attached in an appendix is necessary to contextually verify the information and conclusions reached in this report on subjects within and related to the jurisdiction of the Committee on Resources. The records, documents, and analysis in this report are provided for the information of Members pursuant to Rule X 2.(a) and (b) of the Rules of the House of Representatives, so that Members may discharge their responsibilities under such rules.

Role of the Committee on Resources: The Headwaters Forest Purchase and Management

Ordinarily, one would think that the Committee on Resources does not regularly interact or have jurisdiction over bank regulators. It is important to understand that

the Committee on Resources has jurisdiction over the underlying law that initially authorized the purchase of the Headwaters Forest by the United States and management of the land by the Bureau of Land Management. That law was enacted in November 1997 and is P.L. 105–83, Title V, 111 Stat. 1610. That legislation was incorporated in an appropriations bill that funded the Department of the Interior.

Several conditions constrained the Headwaters authorization. One of those conditions was that any ''funds appropriated by the Federal Government to acquire lands or interests in lands that enlarge the Headwaters Forest by more than five acres per each acquisition shall be subject to specific authorization enacted subsequent to this Act.'' This clause in the authorizing statute is commonly referred to as the ''no more'' clause, because it prohibits federal money from being used to expand the Headwaters Forest after the initial federal acquisition. This was part of the agreement between the Administration and the Congress when funds were authorized and appropriated for the purchase of the Headwaters Forest. The federal acquisition actually took place on March 1, 1999, the final day of the authorization, at which time all federal activity to acquire additional Headwaters Forest should have been dropped. Thus, the FDIC's lawsuit and the OTS's administrative action should be dropped.

This statute, including the ''no more'' clause, is part of the Committee's basis to compel bank regulators to provide documents and testimony about subjects related to the Headwaters Forest, debt-for-nature, redwoods, and related subjects. The sheer volume of material possessed by the banking regulators on subjects related to the Headwaters Forest, possible acquisition of Headwaters Forest, and redwoods debt-for-nature schemes provide more than adequate basis for the Committee's jurisdiction over these agencies about these subjects. Additionally, the banking regulators have submitted themselves, properly, to the jurisdiction of the Committee.

Use of Records and Documents

The FDIC and the OTS will undoubtedly complain that use of some of the records and documents disclosed in this report will jeopardize their case against Mr. Hurwitz, and that certain litigation privileges or a court seal apply to the documents; however, as stressed above, all documentation in this report and attached in an appendix is necessary to contextually verify the information and conclusions reached in this report. The documentation directly bears on subjects within and related to the jurisdiction of the Committee on Resources.

The records, documents, and analysis in this report are provided for the information of Members. Informing Members has legal basis in Article I of the Constitution and is implied because Members of Congress need accurate information to legislate. Indeed, the Committee has legislated on the Headwaters Forest. Informing members also has legal basis under rule X 2.(a) and (b) of the Rules of the House of Representatives. Members will be better able to discharge their responsibilities under such rules after reviewing the infomation in this report.

Some may believe that litigation privileges might prohibit use of the records not already part of the Task Force hearing records. However, litigation privileges do not generally apply to Congress. They are created by the judicial branch of government for use in that forum. Assertions of any litigation privileges by the FDIC or the OTS or Mr. Hurwitz related to documents that are disclosed in this report may still be made in the judicial forum.

Committee staff has redacted sensitive information (for example information unrelated to redwoods or debt-for-nature and information involving legal strategy) of certain records and documents to preserve the integrity of the judicial and administrative proceedings. It is expected that the FDIC and OTS may erroneously say that disclosure of certain documents and records will undercut their litigation position. While many of the documents and records disclosed may be quite embarrassing to the bank regulators, embarrassment is no basis for keeping the information about the unauthorized redwoods debt for nature scheme secret. Some sunshine will expose the unauthorized redwoods agenda of the bank regulators in this case and sanitize the system in the future.

Background and Summary

On December 12, 2000, the Task Force on Headwaters Forest and Related Matters held a hearing that exposed an evolving redwoods ''debt-for-nature'' scheme undertaken by bank regulators—the Federal Deposit Insurance Corporation (FDIC) and the Office of Thrift Supervision (OTS). Presented at that hearing was substantial documentation and testimony showing how federal banking regulators, swayed by an intensive environmentalist lobbying campaign, willingly became integral to a ''debt-for-nature'' scheme to obtain redwood trees.

In short, banking regulators provided the otherwise unavailable leverage for a federal plan to extort privately owned redwood trees. The leverage used was the threat of ''professional liability'' banking claims against Mr. Charles Hurwitz, a minority owner of United Savings Association of Texas (USAT), a failed Texas savings and loan.

Mr. Hurwitz was a favorite target of certain environmental activists who wished to obtain the large grove of redwood trees in northern California, redwoods that belonged to a company, the Pacific Lumber Company, also owned by Hurwitz. The environmental interests pressured Congress, the Administration, and the banking regulators to bring the banking actions against Mr. Hurwitz and USAT. The idea was that the actions or threat of actions would lever or even force Mr. Hurwitz into transferring redwood trees to the federal government.

The FDIC suit (Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund v. Charles Hurwitz, Civil Action No. H–95–3956) and the OTS administrative action (In the Matter of United Savings Association of Texas and United Financial Group, No. WA 94–01) against Mr. Hurwitz actually became what the environmentalists and political forces sought: the legal actions were the leverage for redwoods.

The bank regulators knew that their actions would be the leverage for such a debt-for-nature transaction. Between late 1993 and when the actions were initiated, the bank regulators became more and more enmeshed with the environmental groups, the Department of the Interior, and the White House in the redwoods debt-for-nature scheme. In the end, they ignored every prior internal analysis indicating that they would lose the USAT suit, so them teamed up and brought it administratively and in the courts.

Ultimately, the FDIC suit and their hiring of OTS to bring the separate administrative action forced Mr. Hurwitz to the negotiation table. The bank regulators, in concert with the Department of the Interior and the White House, actually baited Mr. Hurwitz into raising the redwoods issue first, so it would not appear that the bank regulators were seeking redwood trees. Indeed the bank regulators still try to propogate the fiction that Mr. Hurwitz somehow raised the issue first, but they can point to no document written evidence prior to September 6, 1995, when Mr. Hurwitz finally submitted and broached the possibility of swapping redwoods for bank claims.

After an intense banking regulator effort to get the redwoods that lasted from 1993 through 1998, the federal government and the State of California switched the plan and purchased the redwood land owned by Mr. Hurwitz's company. They did so as authorized by Congress (P.L. 105–83, Title V, 111 Stat. 1610).

After the federal purchase, the residue was: (1) fatally flawed banking claims that lacked merit; (2) bank regulators standing alone having been used politically by the White House and Department of the Interior; (3) a group of environmentalists still screaming ''debt-for-more-nature;'' (4) a federal judge who compared the tactics of the bank regulators to those of hired governments and the ''Cosa Nostra'' (the mafia); and (5) Mr. Hurwitz who was required to spend upwards of $40 million to fight the scheme. In short, the residue was a big mess.

However, not until the oversight review and December 12, 2000, hearing of the Task Force did the banking regulators' redwoods ''debt-for-nature'' motivation, which stumped their own negative evaluation of the merits of their case, become more fully understood. It was clear after the hearing that the ''professional liability'' claims would have been administratively closed—never even brought to the FDIC board by FDIC staff for action—had Mr. Hurwitz not owned Pacific Lumber Company and the Headwaters Forest redwood trees.

Instead, intense political pressure, intense environmental lobbying, and White House pressure to pursue the banking claims as leverage for redwoods outweighed the standard operating procedure to administratively close the USAT case, because there was no USAT case. Two sets of banking regulators—the FDIC and the OTS—became willing instruments and partners in the debt-for-nature scheme as they violated their own test for bringing ''professional liability'' claims. Bank regulators brought the claims against Mr. Hurwitz even though they were more likely than not to fail and were not cost effective.

The banking regulators' own assessment was that their action would have a 70% likelihood of failure on statute of limitation grounds alone. Even if the claims survive the statute of limitation challenges, their own cerebral assessment put less than a 50% likelihood of success on the merits of their claims. These are not the conclusions of the Task Force, although some Members may well agree with them; they are the conclusions of the bank regulators themselves.

Moreover, the bank regulators (OTS and FDIC) held numerous meetings about the redwoods debt-for-nature scheme, and at a critical juncture right before they reversed their recommendation to the FDIC board, they met with DOI. The bank regulators walked away from that meeting knowing that [i]f we drop [our] suit, [it] will undercut everything.'' (Record 21). This is the meeting that most likely ensured that the leverage for the redwoods desired by the DOI and the Clinton Administration would become real through filing legal and administrative actions.

These contacts were far outside of normal operating practice for banking regulator and were described by the former Chairman of the FDIC as ''shocking'' and ''highly inappropriate'' (Hearing Transcript, 43–44).

In addition, the former FDIC Chairman told the Task Force that environmental reference to redwoods does not have ''any relevance whatsoever [on] whether or not you

[the FDIC] sue[s] Charles Hurwitz and Maxxam over the failure of United Savings. Whether they own redwood trees or not is absolutely, totally irrelevant.'' (Hearing Transcript, page 45). This stinging rebuke from a past FDIC Chairman is a fitting assessment of the actions of an agency caught up in a debt-for-nature agenda that was too big, too political, and too unrelated to its statutorily authorized purpose.

While there were many factors that nudged the FDIC, and by association the OTS, into the debt-for-nature scheme—its own outside counsel, the law firm of Hopkins & Sutter—provided early and direct links into the environmental advocates who lobbied and advocated for federal acquisition of the Headwaters Forest through a debt-for-nature scheme. In fact, they were selected over as outside counsel other firms because of their environmental connections and ability to handle a redwoods debt-for-nature swap.

In addition, the predisposition of the legal staff of the FDIC and OTS, the strong desires of Department of the Interior and the White House, the creative lobbying of the Rose Foundation and the radical Earth First! protesters (whose effect was felt and noted in the FDIC Board Meeting discussions during consideration of the USAT matter) all allowed the redwoods debt-for-nature scheme to pollute FDIC and OTS decision-making about the potential claims over USAT's failure. Very little if any documentation provided to the Task Force justified, on a substantive basis, the decision to proceed with the banking actions against Mr. Hurwitz and the other USAT officers and directors.

Redwoods and ''debt-for-nature'' were not part of banking regulators decision-making or thought process early in the investigation of possible USAT banking claims—from December 1988 through about August 1993. The notion was first introduced to the FDIC in November 1993, when the redwoods debt-for-nature proposal sent to them by Earth First! was ''reviewed'' by FDIC lawyers. The first Congressional lobbying of bank regulators promoting redwoods debt-for-nature occurred by letter on November 19, 1993. The first known in-person lobbying of bank regulators by a Member of Congress about potential claims of bank regulators being swapped for redwoods occurred in February 1994. The tainting of any possible legitimate banking claims began with the occurrence of that very unusual meeting.

The documents and records show how the redwoods debt-for-nature notion ultimately permeated bank regulators decisions while they developed and brought their claims against Mr. Hurwitz. As the claims were kept active during fourteen tolling agreements between bank regulators and Mr. Hurwitz as the leverage against him for redwoods using those claims was applied. And when the claims were authorized and then filed on August 2, 1995, the claims became more leverage.

In the end, the evidence is clear that, but for the environmentalists pressure to get redwoods through debt-for-nature and, but for Congressional pressure to get leverage on Mr. Hurwitz to submit and give up his redwoods to the government, the banking claims would not even have been brought.

Interestingly, it was unknown early in that process whether a settlement for potential USAT claims would be viable at all or include redwoods, or whether the government would possibly purchase the redwoods. In any case, the threat of and actual FDIC and OTS claims brought Mr. Hurwitz to the negotiating table. Prior to the claims being filed, the FDIC conspired with the White House and the Department of the Interior about the importance and role of the banking claims to advance the debt-for-nature redwoods agenda. The OTS was present during some of those meetings and was reportedly ''amenable'' to the redwoods debt-for-nature strategy.

Even after the outright federal acquisition, which was by purchase, the call became ''debt for more nature,'' through a continued use of the bank regulators leverage of suits that were in process already. The claims continued to be used by the federal government to lever Mr. Hurwitz for more nature, at that juncture arguably in violation of the authorizing statute.

What remained at the end of the day were filed claims that would not have been brought under ordinary circumstances had Mr. Hurwitz not owned redwoods. The bank bureaucracy, with its reason for bringing the claims in the first place having evaporated, continued the fiction: they continued propagating the false notion that redwoods and debt-for-nature had nothing to do with their bringing the USAT claims. Mr. Hurwitz raised it first, they said, even as the FDIC told Department of the Interior that they needed an ''exit strategy'' from the redwoods issue. If redwoods had nothing to do with bringing or pursuing the claims in the first place, then there would be no need for an ''exit'' strategy from the redwoods issue.

The documentation discovered by Chairman Young and Task Force Chairman Doolittle, which is explained in this report, dispels the notion that Mr. Hurwitz raised the redwoods debt-for-nature first. To the contrary, the federal government, bank regulators included, actually baited Mr. Hurwitz into raising it, and they became uncomfortable when he had not raised it nearly a year after the FDIC suit was filed and months after the OTS suit was brought.

This report synthesizes records and information about the redwoods ''debt-for-nature'' scheme of banking regulators, the information subpoenaed from the FDIC and OTS, and the information collected at the December 12, 2000, hearing of the task force.

Ordinary Role of the FDIC and OTS; Regulate Banks and Recover Money

As a starting point, it is helpful to understand the ordinary and authorized role of bank regulators when financial institutions fail. The FDIC is the independent government agency created by Congress in 1933 to maintain stability and public confidence in the nation's banking system by insuring deposits. The FDIC administers two deposit insurance funds, the Bank Insurance Fund for commercial banks and other insured financial institutions and the Savings Association Insurance Fund for thrifts.

Other than its deposit insurance function, the FDIC is the primary regulator for banks. It supervises, monitors, and audits the activities of federally insured commercial banks and other financial institutions. The FDIC is also responsible for managing and disposing of assets of failed banking and thrift institutions, which is what it did concerning USAT, 24 percent of which was owned by Mr. Charles Hurwitz. In connection with its duties associated with failed banks, the FDIC manages the Federal Savings and Loan Insurance Corporation Resolution Fund, which includes the assets and liabilities of the former FSLIC and Resolution Trust Corporation.

The OTS is the government agency that performs a similar functions to that of the FDIC for thrifts insured through a different insurance fund. The OTS is the primary regulator for thrifts. The responsibilities of the FDIC and OTS overlap in certain instances. The OTS has explained how the two agencies divide those shared responsibilities: the FDIC ''seek[s] restitution from wrongdoers associated with failed thrifts'' and the OTS ''focus[es] on preventing further problems.'' The USAT case is an exception to these stated policies of federal institutions.

Nowhere in the statutes authorizing the OTS or the FDIC is there authority to pursue ''professional liability'' claims or other claims for purposes of obtaining redwood trees or ''debt-for-nature'' schemes. The sole purpose of such actions with respect to failed institutions is to recover funds or cash—not trees and not nature.

The mission of recovering cash was acknowledged by the OTS and FDIC. See, Hearing Transcript, page 63, 64, Ms. Seidman (OTS) answered: ''Our restitution claim is brought for cash.'' Ms. Tanoue (FDIC) answered: ''[T]he FDIC considered all options to settle claims at the encouragement of Mr. Hurwitz and his representative agency, looked at trees, but the preference has always been for cash.'') Indeed, this may be why the FDIC and the OTS have consistently maintained that Mr. Hurwitz was the first to bring the notion of redwood trees to them. It is the only position they can take that is consistent with their underlying authority. This being the case, there should have been few, if any, records concerning redwoods produced to the Committee. To the contrary, the records produced were voluminous—and redwoods were even a topic discussed by the FDIC board when it reviewed whether to bring suit regarding USAT.

Chronological Facts and Analysis Regarding the FDIC and OTS Pursuit of USAT Claims

1986: Mr. Hurwitz Buys Pacific Lumber Company and Its Redwood Groves

Mr. Charles Hurwitz owns Pacific Lumber Company. He acquired it in a hostile takeover on February 26, 1986, using high yield bonds. Pacific Lumber Company owned the Headwaters Forest, a grove of about 6,000 acres of old redwood trees. That property became desired by environmental groups because of the redwood trees.

After Mr. Hurwitz bought Pacific Lumber Company, he and the company became a target of several environmental groups when the company increased harvest rates on its land. Harvests were still well within sustainable levels authorized under the company's state forest plan, but harvest rates were generally greater than prior Pacific Lumber Company management undertook.

Environmentalist publicly framed the Hurwitz takeover of Pacific Lumber Company, as that by a ''corporate raider'' who floated ''junk bonds'' to finance a ''hostile takeover'' of the company to simply cut down more old redwood trees. It is unclear whether framing this issue in such a way had more to do with intense fundraising motivations aligned with certain environmental groups described in the recent Sacramento Bee series about financing the environmental movement (*www.sacbee.com/news.projects/environment/20010422.html*) or more to do with ensuring that trees are not cut.

At this juncture, Mr. Hurwitz and Pacific Lumber Company were targets of environmentalists, but his opponents had little leverage to stop the redwood logging on the company's land other than the traditional Endangered Species Act or State Forest Practices Act mechanism.

1988: Hurwitz's 24% Investment in Texas Savings and Loan is Lost

Mr. Hurwitz also owned 24% of USAT, a failed Texas-based thrift bank. The bank failed on December 30, 1988, just like 557 banks and 302 thrifts failed in Texas between 1985 and 1995 resulting from the broad-based collapse of the Texas real estate market. As a result of the failure, the banking regulators say they paid out $1.6 billion from the

insurance fund to keep the bank solvent and secure another owner. That number has never been substantiated by documentation.

Because Hurwitz owned less than 25% of the bank, and because he did not execute what is known as a ''net worth maintenance agreement,'' he was not obligated to contribute funds to keep the bank solvent when it failed. Such agreements (or obligations when a person owns 25 percent or more of an institution) are enforced through what is known as a ''professional liability'' action brought by bank regulators.

In certain cases, the FDIC and OTS are authorized by law to bring to recover money is for the ''professional liability'' against officers, directors, and owners of failed banks. The idea is to recover restitution—money—it took to make failed institutions solvent. This type of claim was brought against Mr. Hurwitz by the bank regulators at OTS after they were hired to do so by the FDIC. The nature of ''professional liability'' claims are explained well in bank regulator's publication as follows: ''Professional Liability [PL] activities are closely related to important matters of corporate governance and public confidence. . . . [They] strengthen the perception and reality that directors, officers, and other professionals at financial institutions are held accountable for wrongful conduct. To this end, the complex collection process for PL claims is conducted in as consistent and fair a manner possible. Potential claims are investigated carefully after every bank and savings and loan failure and are subjected to a multi-layered review by the FDIC's attorneys and investigators before a final decision is rendered on whether to proceed. . . .'' (Managing the Crisis: The FDIC and the RTC Experience 1980–94, published by FDIC, August 1998, page 266)

Indeed, the bank regulators at the FDIC undertook an investigation of USAT beginning when USAT failed on December 31, 1988, to determine what claims they might have against USAT officers, directors, and owners.

1989-September 1991: Investigation Continues

The investigation of USAT proceeded, and interim reports were issued by law firms investigating potential USAT claims for the FDIC. Environmentalists initiated various non-banking campaigns to block redwoods timber activities of Pacific Lumber Company on their Headwaters land.

October 1991-November 1993: Bank Regulators Find No Fraud, No Gross Negligence, No Pattern of Self-Dealing

By October 1991, the bank regulators determined that there was no ''intentional fraud, gross negligence, or pattern of self-dealing'' related to officer, director or other professional liability issues related to the failure of USAT (Document B, page 7). They also determined that there was ''no direct evidence of insider trading, stock manipulation, or theft of corporate opportunity by the officers and directors of USAT.'' (Document B, page 7). They also determined that there was ''no direct evidence of insider trading, stock manipulation, or theft of corporate opportunity by the officers and directors of USAT.'' (Document B, page 14). Bank regulators said that the USAT ''directors' motivation was maintenance of the institution in compliance with the capitalization requirements and not self gain or violation of their duty of loyalty.'' (Document B, page 17). There being no wrongful conduct, bank regulators concluded that they had no valid basis to pursue banking claims against the owners of USAT to recover money for its failure.

In spite of the determination that there was no basis to file a claim regarding USAT, a determination that was unknown to Mr. Hurwitz or the other potential defendants at the time, the banking regulators and Hurwitz made numerous agreements beginning November 22, 1991, expiring July 31, 1995, to toll the statute of limitations. This gave the bank regulators more time to investigate while they withheld filing of a claim. These agreements are fairly routine in complex cases like USAT.

Beginning in August 1993 while the statute was still tolled, several actions to attempt to acquire the Headwaters Forest were taken in Congress and urged by environmental groups. For example, on August 4, 1993, Rep. Hamburg introduced a bill to purchase 44,000 acres (20 percent) of the Pacific Lumber Company's land and make it into a federal Headwaters Forest. In August 1993, the first contact between the Rose Foundation (the primary environmental proponent of advancing USAT claims against Hurwitz to obtain Pacific Lumber redwoods) and attorneys for the FDIC was made.

As early as November 30, 1993, FDIC attorneys were aware of the Hamburg Headwaters bill and ''materials from Chuck Fulton re: net worth maintenance obligation'' (Record 3A). The handwritten FDIC memo from Jack Smith to Pat Bak notes that the professional liability section ''is supposed to pursue that claim.'' It reminds her not to ''let it fall through the crack!'' And if the claim is not viable, the banking regulators ''need to have a reliable analysis that will withstand substantial scrutiny.'' (Record 3A).

Pressure to advance claims against Hurwitz in connection with the redwoods in a debt-for-nature swap came in a variety of forms to the FDIC. It first came from Congress on November 19, 1993, in a letter to the FDIC Chairman from Rep. Henry B. Gonzalez, Chairman of the House Committee on Banking (Record 2). Numerous written Congressional contacts with the banking regulators, most urging FDIC or OTS to bring claims against Hurwitz occurred in late 1993 when the debt-for-nature scheme was framed and subsequently over the years.

On the same day, Bob DeHenzel, an FDIC lawyer, got an e mail about a ''strange call'' regarding USAT (Record 1). It was received by Mary Saltzman from a Bob Close, who claimed to be ''working with some environmental groups'' and wished to talk to whoever was investigating the USAT matter. He had detailed knowledge about the $532 million claim related to USAT and Charles Hurwitz. He made the comment that ''people like Hurwitz must be stopped.'' He said he was working with an environmental group called EPIC in Northern California. Paul Springfield, an FDIC investigator, documented a conversation he had with DeHenzel that day (Friday, November 19, 1993) about the call from Bob Close. Mr. Springfield verified that the FDIC lawyer, Mr. DeHenzel, was familiar with a Hurwitz connection to forest property: ''He [DeHenzel] had some knowledge of the nature of the inquiry [by Mr. Close] as well as the attorney Bill Bertain disclosed by Close. DeHenzel stated that this group was involved in fighting a takeover action of some company by Hurwitz involving forest property in the northwestern United States. Apparently they are trying to obtain information to utilize in their efforts.'' (Record 1).

Then on November 24, 1993, Mr. DeHenzel, faxed a November 22, 1993, memo he received on November 22, 1993, from the radical group Earth First! to another FDIC staff member. That memo laid out the ''direct connection between the Savings and Loans, the FDIC and the clearcutting of California's ancient redwoods.'' (Document E). The memo introduced the concept that the USAT ''debt'' (which were only potential claims that FDIC internal analysis had already concluded had no basis) should be traded for Pacific Lumber Company redwoods. An excerpt of the memo lays out the scheme: ''Coincidently, Hurwitz is asking for more than $500 million for the Headwaters Forest redwoods. So if your agency can secure the money for his failed S&L, we the people will have the funds to buy Headwaters Forest. Debt-for-nature. Right here in the U.S. That's where you come in. Go get Hurwitz.'' (Document E)

The FDIC apparently took Earth First! seriously. Within one month, the FDIC lawyers reported to the acting chairman in a memo that they were ''*reviewing a suggestion by 'Earth First' that the FDIC trade its claims against Hurwitz for 3000 acres of redwood forests owned by Pacific Lumber, a subsidiary of Maxxam,*'' (emphasis supplied) (Document G, December 21, 1993, Memorandum to Andrew Hove, Acting Chairman, From Jack D. Smith, Deputy General Counsel). The handwritten note on the top of the page indicates that the acting chairman Hove was orally briefed about the USAT situation prior to the memo.

Thus, well before Mr. Hurwitz raised the issue of redwoods and debt-for-nature directly with the FDIC in August or September 1996 with the bank regulators, its lawyers had received written proposals from the radical group Earth First!, and the FDIC was undertaking a review of the proposals. These were proposals making the connection between Hurwitz, the redwoods, and USAT bank claims.

Then in the close of 1993, a press inquiry report to Chairman Hove on debt-for-nature and the redwoods was received and documented from the Los Angeles Times. The press question was whether FDIC lawyers have considered whether ''we could legally swap a potential claim of $548 million against Charles Hurwitz (stemming from the failure of United Savings Association of Texax) for 44,000 acres of redwood forest owned by a Hurwitz controlled company.'' (Record 3B)

The redwoods debt-for-nature scheme had been introduced via these various venues during 1993. At the same time FDIC's own analysis had shown absolutely no basis for a banking claim lawsuit involving USAT. However, it was not until early 1994 when the FDIC and their agent, the OTS, adopted the redwoods debt-for-nature scheme, and it became inextricably intertwined in its USAT bank claims. Ironically, it was political forces that inticed the bank regulators, who are supposed to act on bank claims without political influence, into wholesale and willing adoption of the redwoods debt-for-nature scheme.

1994: Undisclosed Congressional Meetings Lobbying on the Redwoods ''Debt-For-Nature'' Plan

By February 2, 1994, the FDIC attorneys knew the weakness of several of its net worth maintenance claims and it acknowledged that it ''can point to no evidence showing that either UFG or Hurwitz signed a net worth maintenance agreement'' (Record 5, page 6). They acknowledged the weakness in a status memo (Record 5).

As a result, the FDIC teamed up with the OTS to have OTS attempt to construct an ''administrative'' net worth maintenance claim against Mr. Hurwitz and his company that owned the redwoods. They believed (but offered no proof that) ''the actual operating control of [MCO, FDC, and UFG] was exercised by Charles Hurwitz.'' (Record 5, page 9). In short, FDIC did not have a claim, but the OTS may be able to bring an action in an administrative forum that was much more conductive to bank regulators, so the FDIC would hire the OTS.

The net worth maintenance claim was important because if it could be established on the facts (i.e., if Mr. Hurwitz owned 25 percent of USAT or he was somehow in control

of USAT) it could mean he would be liable for that percentage of the USAT loss, which totaled $1.6 billion. In that way the bank regulators could conceivably get into Mr. Hurwitz's assets, including his holding company assets which included the redwoods.

However, in written correspondence and at the Task Force hearing on December 12, 2000—the FDIC and the OTS denied that the litigation concerning USAT and Mr. Hurwitz had anything to do with redwoods. They also denied that their discovery tactics were improper or for the purpose of ''harassment.'' One exchange at the hearing between Mr. Kroener, the FDIC's General Counsel and Chairman Doolittle, however, typifies the response to the question of whether the bank regulators' litigation had anything to do with redwoods or leveraging redwoods:

Mr. DOOLITTLE. . . . Did this litigation or discovery tactic [harassment through discovery] have anything to do with redwoods or the desire to create a legal claim to leverage redwoods?

Mr. KROENER. It did not. . . .

(Hearing Transcript, page 99)

While they have publicly denied any linkage, their own written words show the opposite. There was indeed a scheme involving politicizing bank claims against Mr. Hurwitz. Mr. Kroener's answer and the repeated denials of a linkage is purely wrong.

A superb example of just how wrong Mr. Kroener's answer was is contained in the previously unreleased meeting notes from a February 3, 1994, meeting between FDIC legal and Congressional staff and a U.S. Congressman. The redwoods debt-for-nature linkage was the point of the meeting.

The high ranking FDIC lawyers working on the redwoods case—Mr. Jack Smith, FDIC Deputy General Counsel, and Mr. John Thomas—and a Rep. Dan Hamburg met on February 3, 1994, to discuss to potential banking claims targeting Mr. Hurwitz. (Record 2A).

The fact that the meeting occurred at all—especially that it occurred eighteen months prior to the USAT claim being authorized or filed—and the notes from the meeting evince that leverage for redwoods was promoted by FDIC lawyers. The notes also show that the FDIC knew claims targeting Hurwitz were invalid and probably could not be used as leverage (Record 2A). Highlights of the Spittler (Record 2A, page ES 0509) meeting notes are as follows:

Rep. Hamburg had ''an immediate interest in the case,'' probably because he had a bill pending to purchase the Headwaters, and the proposal from environmentalists in his district to swap the Hurwitz banking claim ''debt'' for redwoods had been generally floated. (Record 8A, The Humboldt Beacon, Thursday, August 26, 1993, Earth First! Wants 98,000; 4,500 Acres Tops, PL Says.)

According to Spittler's notes, which are (Record 2A), Rep. Hamburg said he was ''interested enough over potential filing of the complaint to ask what is about to proceed.'' And Hamburg [r]ealized that this possible avenue would be lost.'' The ''avenue'' he was referring to was applying leverage against Mr. Hurwitz for a redwoods debt-for nature swap, and Jack Smith obviously understood this. According to Spittler's notes, Smith replied, it is ''very difficult to do a swap for trees,'' which means Smith knew that the authority of the FDIC to recover restitution in trees was difficult or impossible.

Smith then told Hamburg about the USAT investigation: ''The investigation has looked at several areas. [One c]laim [is] on the net worth maintenance agreements.'' (Record 2A) The other FDIC attorney present, Mr. John Thomas, acknowledged the fatal flaw of FDIC's claim: ''[There] have been attempts to enforce this, [referring to the net worth maintenance agreement.'' Thomas then said, ''we can't find signed agreement [between] FSLIC [and USAT/Hurwitz]. We never found the agreement.'' (Record 2A) Thomas was absolutely correct—because there never was a net worth maintenance agreement signed by Mr. Hurwitz.

Besides the highly irregular nature of any communication between the FDIC and anyone about a case under investigation this communication is incredible for two reasons. First, it shows the willful manner in which FDIC volunteered to get involved in a political issue and mix potential claims with the redwoods issue. The meeting notes prove that the FDIC lawyers actually secretly briefed a Congressman about the specifics of an ongoing investigation that would become mixed with a political issue.

Second, the timing of the Congressional strategy session was eighteen months before the FDIC board had not even approved filing a claim against Mr. Hurwitz—and its lawyers were then discussing the specifics their investigation of a potential claim in the context of the scheme that would use the potential claim to obtain redwood trees. The highly irregular nature of this early meeting injected a political dynamic to a case still under investigation. This was obvious to former FDIC Chairman Bill Isaac. He testified to the Task Force that the—''discussions that occurred between FDIC staff and people outside the Agency prior to and during litigation were inappropriate. The fact that those discussions occurred exposes the FDIC and the OTS to the charge that the motivation for their litigation was to pressure Charles Hurwitz and Maxxam to give up their private property, the redwood trees owned by Pacific Lumber. . . . [T]heir repeated contacts with parties with whom they have no business discussing this litigation, congressional and administrative officials and environmental groups, leaves them open to whatever negative conclusions one might care to draw.'' (Hearing Transcript, pages 15–16).

Mr. Isaac noted the impropriety later again in the hearing. ''—that really would have shocked me as chairman to see the FDIC staff having meetings with people outside the Agency about the redwood trees, and . . . congressional officials about a possible litigation we're thinking about bringing involving redwood trees; you know, somehow tying these redwood trees into it, and getting that mixed up in our decision as to whether to bring a suit over the failure of a bank.'' (Hearing Transcript, page 44–45).

The content of the meeting between Hamburg, Smith (as opposed to the fact that the meeting even occurred), is even more appalling considering Jack Smith's next comment. According to Spittler's notes, he said ''If we can convince the other side [Hurwitz] that we have claim[s] worth $400 million & they want to settle, could be a hook into the holding company.'' Of course, the ''convincing'' about valid claims was the leverage, and the ''hook'' into the holding company was getting company assets, including redwood trees. This was redwoods debt-for-nature. FDIC was part of the redwoods scheme.

Not only does this show that the idea about debt-for-nature was real to the FDIC lawyers, it shows when they promoted it at a congressional meeting in February 1994, more than 18 months before the FDIC lawsuit against Hurwitz was even authorized by the board and 17 months before, according to Mr. Kroener's testimony, Mr. Hurwitz ''indirectly'' raised the debt-for-nature swap with the FDIC through the Department of the Interior. Contrary to Mr. Kroener's representations to the Task Force, the FDIC legal staff was deeply ensconced in the redwoods debt-for-nature scheme well before Mr. Hurwitz raised redwoods with bank regulators.

The contents of the meeting shows irresponsible ends-driven government, from almost any perspective. Mr. Smith was not even talking about investigating and bringing valid legitimate bank claims. He was only talking about ''convincing'' Mr. Hurwitz that ''we have claims.'' This may even be unethical, because he implied that an invalid, unviable claims (the net worth maintenance claim) may be used as leverage to get redwoods from Mr. Hurwitz.

The FDIC is supposed to be an ''independent agency,'' that is, it is supposed to insulate itself from political pressure and disputes. FDIC legal staff suddenly injected themselves into a political issue of emerging national prominence (redwood trees and debt-for-nature using banking claims), an issue beyond the normalcy of banking recovery actions. The meeting notes show that the FDIC attorneys engaged to promote the issue of a debt-for-nature swap, and that the design was to merely ''convince the other side'' that the FDIC had claims worth $400 million that the agency knew it did not have. This is a sad, sad statement from an ''independent'' government agency, and it is only the early part of the slide for the FDIC.

Buttress what the FDIC lawyers said in the February 1994 meeting to Rep. Hamburg about trees and claims, against what Mr. Kroener and the other bank regulators told the Task Force in sworn testimony.

Mr. POMBO. Ms. Seidman and Ms. Tanoue, the FDIC and the OTS have repeatedly said to the public and the Congress, including this morning, that what the agency wanted from USAT claims was cash, is that correct?

Ms. SEIDMAN. Yes. Our restitution claim is brought for cash. As to any further discussions both relating to the decision to bring the claim that way and subsequent settlement discussions, none of which I took part in, I would defer to Ms. Buck.

Ms. TANOUE. I will also say that the FDIC considered all options to settle claims, at the encouragement of Mr. Hurwitz and his representative agency, looked at trees, but the preference has always been for cash. . . .

At a minimum, Ms. Tanoue is misleading. Eighteen months prior to even having a claim to settle or having a claim authorized or having a claim filed, her agency's top lawyers were sitting in a Congressional office talking about ''convincing the other side'' that ''we have claims worth $400 million'' and getting ''hook'' into a holding company that owns redwoods.

Mr. POMBO. At what point did you start looking at the other options, and you mention trees?

Ms. TANOUE. Much of this discussion occurred before my tenure. I turn to Mr. Kroener for elaboration on that point.

Mr. KROENER. . . . We were first offered trees or natural resources assets by representatives of Mr. Hurwitz indirectly in July of 1995.

There had obviously been a huge public debate going on regarding this forest. We were not part of that but we had lots of communications, other got lots of communications, . . . [and our chairman and general counsel] had responded to inquiries of Congress that were mindful that trees could come into play in our claims, but our claims didn't involve trees; they involved cash. (Hearing Transcript, pages 63–65)

Obviously their claims involved cash, because by law their mission is to replenish the insurance fund with money. Mr. Kroener was wrong when he said their claims did not involve trees, and trees certainly came into play as evidenced by the February 1994 the e Rep. Hamburg-Smith-Thomas meeting. Indeed trees were the motivating force that led

the FDIC to promote net worth maintenance claims to the OTS.

The clear implications of Ms. Tanoue's answer is that Mr. Hurwitz was the first to bring the redwoods into a possible settlement, but we know that FDIC lawyers were scheming in February 1994 with a Member of Congress to get a banking claim ''hook'' into the redwoods holding company owned by Mr. Hurwitz. Mr. Hurwitz was not the one who first brought the redwoods into banking claim issue—the environmental groups, FDIC lawyers, and certain Members of Congress had already done so by that point.

Perhaps Mr. Kroener did not read the meeting notes that he provided to the Task Force about the February 1994 meeting between FDIC lawyers and Rep. Hamburg when he told the Task Force that FDIC claims did not involve trees until July 1995 when Mr. Hurwitz raised the redwoods to the FDIC indirectly through the Department of the Interior. The claims did involve trees—convincing the ''other side'' that there is a $400 million claim and they may ''want to settle,'' which gets the FDIC into the Hurwitz holding company that has the redwood trees.

As to Ms. Seidman, she stated a fact—that the OTS claim was for cash, which is technically all that it could be for. What she omits is that the FDIC had imparted the redwoods debt-for-nature agenda directly to the OTS on the heals of the February 3, 1994, meeting between FDIC and Rep. Hamburg—and the FDIC did so because its claims were too weak and too small to provide enough leverage for the redwoods (See, Record 33, Record 35 and accompanying discussion infra).

It took less than 24 hours following the FDIC-Rep. Hamburg meeting for the FDIC Deputy General Counsel, Jack Smith, to write to Carolyn Lieberman (now Carolyn Buck), the top lawyer at OTS. (Record 6). The letter (1) forwarded legal analysis of the net worth maintenance claim against the Hurwitz's holding company that owned the redwoods; (2) admitted that FDIC had no net worth maintenance claim; (3) prodded OTS to review whether it could administratively bring a net worth maintenance claim; and (4) in an incredible admission of purpose and intent, the letter notified OTS about the redwoods debt-for-nature scheme. The last paragraph of the one page letter reads: ''You should be aware that this case has attracted public attention because of the involvement of Charles Hurwitz, and environmental groups have suggested that possible claims against Mr. Hurwitz should be traded for 44,000 acres of North West timber land owned by Pacific Lumber, a subsidiary of Maxxam. Chairman Gonzales has inquired about the matter and we have advised him we would make a decision by this May. After you have reviewed these papers, please call me or Pat Bak (736–0664) to discuss the next step and to arrange coordination with our professional liability claims.'' (Record 6)

Clearly, this action, immediately after the FDIC strategy meeting with Rep. Hamburg constitutes direct engagement of the FDIC to promote the claim that would become the leverage for the redwood debt-for-nature scheme.

It is worth stressing that the FDIC that wrote this letter on the heals of the Rep. Hamburg meeting is the same FDIC that testified to the Task Force that their litigation did not have anything to do with trees. How could it not when the FDIC told the OTS that it promised Rep. Gonzalez that the agency ''would advise him of its decision'' about an environmental group suggestion ''that possible claims against Mr. Hurwitz should be traded for 44,000 acres of North West timber land owned by Pacific Lumber.''

This is debt for nature. It was real in February 1994. It ultimately overrode the fact that the FDIC knew its claim was weak and it led almost immediately to the FDIC hiring the OTS to promote the net worth maintenance claim against Mr. Hurwitz.

This letter was sent three months prior to FDIC hiring OTS to pursue the net worth maintenance claim that FDIC knew it did not have. Importantly, it was sent immediately after the Rep. Hamburg meeting—the meeting that tied Mr. Hurwitz's holding company's redwood trees to the USAT net worth maintenance claim against Mr. Hurwitz. The FDIC prompted and then paid the OTS to pursue this claim by supposedly using its independent statutory authority.

In effect, the FDIC scheme beginning at least in February 1994, polluted the OTS action. What was a ''hook'' into the ''holding company'' that owned the redwoods for FDIC, was a ''hook'' into the holding company for the OTS. In fact, without the FDIC money (which by 1995 totaled $529,452 and by 2000 totaled $3,002,825), OTS's five lawyers and six paralegals advancing the claims against Mr. Hurwitz would have been unfunded—and probably not advanced the claim. And without the net worth maintenance claim—by far the largest claim—there would be no hook into Mr. Hurwitz, therefore no hook into his redwoods.

It is helpful to understand why Mr. Smith told Rep. Hamburg that it is ''very difficult to do a swap for trees.'' It was very difficult for two reasons. First, the claims would not ordinarily be brought because they would fail on the merits, so it would be difficult to exchange a claim that would not have been ordinarily brought. The bank regulators manual explains their policies from 1980 through 1994 for bringing claims as follows: ''No claim is pursued by the FDIC unless if meets both requirements of a two-part test. First, the claim must be sound on its merits, and the receiver must be more than likely to succeed in any litigation necessary to collect on the claim. Second, it must be probable that any necessary litigation will be cost-effective, considering liability insurance coverage and personal assets held by defendants.'' (Managing the Crisis: The FDIC and the RTC Experience 1980–94, published by FDIC, August 1998, page 266)

Second, the claims would be for restitution, and the FDIC could not accept trees in settlement. The FDIC even admits that they would need ''modest'' legislation to accept trees, which is an admission that their purpose in seeking redwoods is indeed unauthorized.

However, it was political pressure, such as that applied by environmental groups in 1993 and Rep. Hamburg beginning in 1994, that led the willing FDIC (and ultimately its agent, the OTS, after FDIC began paying OTS in May 1994) into ignoring the mission of recovering money on cost effective banking claims.

Instead the FDIC adopted unauthorized missions of providing leverage through lawsuits that are unsound on the merits and would ''convince'' (the word used by Mr. Smith) Mr. Hurwitz that FDIC had a claim of ''$400 milllion'' so that they could get a ''hook into the holding company'' and settle the claim for redwood trees. This was exercise of leverage pure and simple.

February 2 through 4, 1994, were important redwoods debt-for-nature days for the FDIC's legal team. There was the FDIC memo admitting that it had no net worth maintenance claim. Then there was the meeting with Rep. Hamburg about the redwoods scheme. Then there was an odd, but revealing e mail sent by FDIC's congressional liaison, Eric Spittler, to Jack Smith on February 4, 1994, about a conversation he had with Smith on February 3, 1994, the same day as the Rep. Hamburg meeting. The message was about the selection of an outside law firm to act as counsel on the USAT matter: ''Jack, I thought about over conversation yesterday. My advice from a political perspective is that the ''C'' firm [Cravath] is still politically risky. We would catch less political heat from another firm, *perhaps one with some environmental connections*. Otherwise, they might not criticize the deal but they might argue that the firm [Cravath] already got $100 million and we should spread it around more.'' (emphasis supplied) (Document I)

Indeed, ''environmental connections'' were a factor in selection of the outside counsel for the USAT matter. A February 14, 1994, memo about ''Retention of Outside Counsel'' for the USAT matter (Record 15) from various FDIC lawyers to Douglas Jones, FDIC's acting General Counsel, trumpets the ability of the firm ultimately selected, Hopkins & Sutter, to handle a redwood debt-for-nature settlement: ''The firm [Hopkins & Sutter] has a proven record handling high profile litigation on behalf of the [FDIC] and, drawing on its extensive representation of the lumber industry, will be able to cover all aspects of any potentially unique debt for redwoods settlement arrangements.'' (Record 15, page 8).

The FDIC was clearly planning—even in February 1994 with the selection of an outside counsel—for a redwoods debt-for-nature swap as part of a settlement! This was before they even knew if their potential claims were really claims, and before the FDIC Board had authorized filing of any claims. From the FDIC's perspective, an outside counsel law firm with ''environmental connections'' that can ''cover all aspects of any potentially unique debt for redwoods settlement'' is the only choice. (Record 15).

So in February 1994, the FDIC—which denies to this day its litigation against Mr. Hurwitz has any linkage to a redwoods debt-for-nature scheme—selected the outside counsel for the USAT matter because it could handle a debt for redwoods settlement. This firm was an ideal choice for a bank regulator with an agenda to get a ''hook'' into a holding company that has redwood tree assets that might be traded for bank claims—if they can ''convince'' the other side that they have valid claims. Mr. Hurwitz's redwood trees were targeted a year and a half before the bank claims were authorized to be filed and seventeen months before he supposedly raised the issue of redwoods ''first'' with the FDIC.

The FDIC, its lawyers and acting chairman knew of the linkage between bank claims and redwoods, as did their outside counsel, Hopkins & Sutter, which even facilitated numerous contacts, information exchanges, strategy sessions, and meetings during the remainder of 1994 between the bank regulators and environmentalist proponents of a Hurwitz debt-for-nature redwoods swap.

But Ms. Tanoue and Mr. Kroener testified that redwoods had nothing to do with the litigation, hardly an accurate proposition in light of the fact that the FDIC's outside counsel was selected because of their environmental connections and ability to handle a ''unique debt for redwoods settlement.'' (Record 15)

Indeed, Hopkins & Sutter's ''environmental connections'' paid off—to the environmentalists advocating a redwoods debt-for-nature scheme. F. Thomas Hecht, the lead partner at Hopkins & Sutter on the USAT matter, in a memo copied to FDIC attorney's summarized the ''intense lobbying effort [beginning in about March 1994] by certain environmental activists led by the Rose Foundation of Oakland, California[, whose] principal concern has been to conserve an area of unprotected old-growth redwoods in

northern California known as the Headwaters Forest.'' (Document N, page 1)

The memo (Document N, page 3–4) details the following contacts:

''On June 17, 1994, Thomas Hecht met with Jill Ratner of the Rose Foundation in San Francisco for an initial meeting at which Ms. Ratner outlined her groups' concerns.

''On October 4, 1994, Hecht, Jeffrey Williams, Robert DeHenzel and the Rose Foundation and its lawyer participated in a teleconference at which the claims prepared by the Rose Foundation were presented in more detail.

''On January 20, 1995, Dehenzel and Hecht met with Julia Levin of the Natural Heritage Foundation (''NHF''), a group closely associated with the Rose Foundation. The NHF is conducting much of the lobbying effort on behalf of the Rose Foundation and other environmental activists on this issue.

''In addition to these more formal encounters, Williams, DeHenzel and Hecht have each been contacted repeatedly by the Rose Foundation and its attorneys to explore the theories in more depth and to urge the FDIC to take action. In each of these meetings and in subsequent telephone conversations and correspondence, the Rose Foundation and its allies have urged three general approaches to the problem including: (a) the imposition of a constructive trust over Pacific Lumber's redwoods, (b) the seizure of redwoods using an unjust enrichment theory, and (c) obtaining rights to the forest or, at a minimum, an environmental easement, as part of a negotiated settlement. They have also urged Congressional action, filed a Qui Tam proceeding in the Northern District of California and threatened the FDIC with proceedings under the Endangered Species Act.'' (Document N, page 3–4)

This is just a sampling of the many instances where the bank regulators own notes and memos show integration between what were still possible bank claims and the redwoods. All of these occurred beginning 18 months before the USAT claims against Mr. Hurwitz were authorized or filed. Record 8 contains several examples of outside contacts between bank regulators and environmental groups about different mechanisms to leverage redwoods using potential banking claims.

1995: The Federal Government Is Defined—''High Profile Damages Case'' In Which Redwoods Are ''A Bargaining Chip''

The relationship between the possible banking claims and the redwoods is not just implied by the number of meetings or the extensive evaluations by bank regulators and their lawyers throughout 1994, it was directly stated in the March 1995 memo by F. Thomas Hecht, FDIC's outside counsel: ''As their theories have become subject to criticisms, certain counsel for the Rose Foundation have shifted (at least in part) from argument compelling the seizure of the redwoods to urging the development of an aggressive and high profile damages case in which redwoods become a bargaining chip in negotiating a resolution. This, indeed, may be the best option available to the environmental groups; its greatest strength is that it does not depend on difficult seizure theories. This approach would require that both the FDIC and OTS undertake to make the redwoods part of any settlement package.'' (footnote not in original) (Document N, page 8)

Thus, the FDIC's outside counsel explained and evaluated the best course of action for the environmental groups (never mind the FDIC or the government). The fact is that a high profile damage claim where redwoods were leveraged from Mr. Hurwitz—the environmentalist's best option—is exactly how the FDIC proceeded, particularly after the DOI and the White House engaged with the bank regulators. They swallowed the redwoods debt-for-nature scheme—hook, line, and sinker (as the old saying goes)—beginning in 1994 and continuing into 1995, even though their own analysis showed that their potential claims would not stand.

In spite of these facts, the FDIC has consistently insisted since late 1993 that ''there is no direct relationship between USAT and the Headwaters Forest currently owned by Pacific Lumber Company . . . [however], if such a swap became an option, the FDIC would consider it as one alternative . . . '' (Record 28). Indeed, this is exactly what the banking regulators have told the Committee in writing: they have always been open to the idea, but they prefer cash. The documentation outlined above shows that the banking regulators actively pursued a redwoods debt-for-nature agenda using their claims as urged by certain Members of Congress and by environmental groups. However, by this point, the Department of the Interior and the White House had yet to engage. That changed in early of 1995.

In February 1995, a host of environmentalists proposed an acquisition of the Headwaters redwood trees to President Clinton, and Leon Penetta (Chief of Staff) wrote back to them saying that budget constraints would not permit outright acquisition (Record 16A). He suggested that they push a debt-for-nature swap or land exchange instead. That action served to lower expectations for appropriated funds for the redwoods, and focused the proponents on continuing to push the redwoods debt-for-nature scheme.

By April 3, 1995, FDIC lawyers were openly attempting to leverage Mr. Hurwitz into settling claims that were still yet to be filed for redwood trees. The redwoods debt-for-nature scheme was alive and active at the FDIC as indicated by the words in this e mail to Mr. Jack Smith from Mr. Bob DeHenzel: ''Jack: Just a note regarding our brief discussion on Charles Hurwitz and exploring creative options that may induce a settlement involving the sequoia redwoods in the FDIC/OTS case: . . .'' (Record 9)

In these words the FDIC's attorneys were indeed leveraging redwoods by sing their banking claims—at least three months before FDIC says that Mr. Hurwitz raised the redwoods-debt-for nature idea through his ''representative agency'' (presumably the DOI), attorneys, four months before the FDIC board authorized the suit against Mr. Hurwitz, and about five months before the FDIC maintains Mr. Hurwitz raised the redwoods swap idea directly with the bank regulators.

Thus, well before the notion of the redwoods debt-for-nature deal was introduced to the FDIC by Mr. Hurwitz (as the bank regulators religiously maintain) the bank regulators were indeed targeting Mr. Hurwitz's redwoods and using their potential claims as leverage to ''induce'' a settlement. The repeated statements and the sworn testimony of Ms. Seidman, Ms. Tanoue, and Mr. Kroener to the Task Force (the Mr. Hurwitz introduced the redwoods into settlement discussions) is yet another example that directly contradicts what the FDIC lawyers were doing as evidenced by their own writing.

The notes of FDIC attorneys about what they were seeking and why the FDIC and the OTS were cooperating also contradict the testimony of the bank regulators when they say that redwoods had nothing to do with the litigation against Mr. Hurwitz. Sometime in mid-1994 (but before July 20, 1994), FDIC wished to continue studying their claim and ''a possible capital maintenance claim by OTS against Maxxam.'' In illuminating candor, the handwritten memo articulates why the FDIC lawyers wanted to hire the OTS and double team Mr. Hurwitz: ''Why? (1) Tactically, combining FDIC & OTS' claims—if they all stand scrutiny—is more likely to produce a large recovery/the trees than is a piecemeal approach.'' (Record 10, bates number JT 000145)

So, the senior FDIC lawyer, Mr. John Thomas, contemporaneously wrote that their strategy with OTS would be more likely to produce ''the trees.'' But their Chairman, their General Counsel, and the OTS Director repeatedly told the committee that the litigation had nothing to do with trees. Were the FDIC and OTS management and their board members so ill-informed about what their attorneys were seeking to achieve? ''The trees'' is not cash, period.

The other very alarming notion is how integral OTS is to the strategy to ''produce'' ''the trees,'' according to the FDIC attorneys. The strategy to ''combine'' FDIC's weak claims with possible OTS claims on net worth maintenance further explains the February 4, 1994, letter from FDIC's lawyers to OTS's lawyers (Record 6).

It transmitted the net worth maintenance claim to the OTS and introduced the notion that the FDIC was considering a redwoods debt-for-nature swap scheme. The FDIC told OTS that they were about to report to Rep. Gonzalez about the potential for the swap. The implication was that viable claims against Mr. Hurwitz (brought directly by the FDIC or indirectly through the OTS) would allow the FDIC to report back to Mr. Gonzalez that they could help get ''the trees'' because a swap would be more viable. Without the OTS, the FDIC would not have enough leverage to produce ''the trees,'' because by its own analysis, the FDIC claims were losers.

The repeated intra-government lobbying of FDIC and OTS also pushed the bank regulators into the political redwoods debt-for-nature acquisition scheme. This intra-government lobbying began indirectly by at least May 19, 1995, and is first evidenced by notes (Record 11) from a phone call by Ms. Jill Ratner, who runs the Rose Foundation to Mr. Robert DeHenzel. (Record 11 is a copy of Mr. DeHenzel's notes from that conversation.)

The notes (Record 11) indicate that Ms. Ratner told Mr. DeHenzel about the Department of the Interior (DOI) players who are ''very interested in debt-for-nature swap'': Mr. Alan McReynolds, a Special Assistant to the Secretary of the DOI, Mr. Jeff Webb, with DOI congressional relations, Mr. George Frampton, the Assistant Secretary for Fish and Wildlife and Parks at DOI, and Mr. Jay Ziegler, an assistant to Mr. Frampton were all discussed as redwoods debt-for-nature advocates. And Record 11A illustrates that the Rose Foundation had done substantial work regarding various mechanisms to transfer the redwoods to the federal government.

The notes indicate that Mr. McReynolds had flown over Headwaters during the week of May 8, 1995, with Ms. Ratner a primary advocate of various plans to acquire the Headwaters forest. This was the first indication that DOI was engaging on the redwoods debt-for-nature scheme and probably Mr. McReynolds' first exposure to the concept that bank claims could provide the leverage for the redwoods scheme. There is no mention in the notes that Mr. Hurwitz requested DOI to raise the issue of a redwoods swap or look into it: ''Interior is . . . discussions will continue. Webb & Zeigler will continue doing prelim[inary] work to explore whether debt-for-nature would work.'' (Record 11)

By the time that the DOI engaged in May 1995, the FDIC lawyers were well aware of

the ''debt-for-nature' transaction that various environmental groups have been advocating to resolve the claims involving Hurwitz and USAT.'' (Record 12) They were also apparently intimidated by the environmentalists as shown by the two page FDIC memo about a redwoods debt-for-nature letter to FDIC referencing the Oklahoma City bombing and a ''call to defuse this situation'' by doing a swap (Record 12). The following excerpt of the memo shows detailed knowledge about the debt-for-nature scheme and a perceived threat of violence related to environmentalists who had pushed the FDIC into it: ''As you know, the above-referenced investigation has resulted in attracting the attention of organizations and individuals that have interests in environmental preservation. This has arisen as a result of Charles Hurwitz's acquisition (through affiliates) of Pacific Lumber, a logging company in Humbolt County, California, that owns the last stands of old growth, virgin redwoods. It has been widely reported that the company has been harvesting the virgin redwoods in a desperate attempt to raise cash to pay its and its holding company's Maxxam, Inc.'s substantial debt obligations.

''The environmentalist's issues are centered on preserving the old growth redwoods through a mechanism of persuading Hurwitz to settle the government's claims involving losses sustained on the USAT failure by, in part, transferring the redwood stands to the FDIC or other federal agency responsible for managing such forest lands. FDIC has received thousands of letters urging FDIC to pursue such a transaction.''

''The environmental movement, like many others, is not homogeneous and contains extreme elements that that have resorted to civil disobedience and even criminal conduct to further their goals. As a result of the recent tragedy in Oklahoma City, everyone appears more sensitive to the possibility that people can and do resort to desperate depraved criminal acts. Accordingly, we take any references to such conduct, even ones that appear innocent, more seriously.'' (Record 12)

This excerpt shows that FDIC attorneys were (1) probably somewhat intimidated and (2) already well-versed in the debt-for-nature scheme when Ms. Ratner told Mr. DeHenzel who the DOI players supporting the redwoods debt-for-nature scheme were. The FDIC was keen to the motivations and methods of those who fed the scheme to them. Perhaps the intimate knowledge by the FDIC of the interests and desires of the environmental community came through the numerous pieces of correspondence and legal memos from the Rose Foundation to the FDIC through Hopkins & Sutter. The material showing the constant pummeling of FDIC by these advocates (and the willing acceptance by the FDIC and its outside law firm with ''environmental connections'') is too voluminous to reproduce. It is contained in the Committee's files.

With the FDIC primed, the Department of the Interior directly engaged with the FDIC. The first known direct contact was a 5:00 p.m. call on July 17, 1995, from Alan McReynolds to Robert DeHenzel. The notes taken by DeHenzel (Record 16) indicate that McReynolds, a special assistant to the Secretary of the Interior, asked about the ''status of our [FDIC] potential claims and how OTS is organized, etc.'' He needed ''someone to describe our [FDIC] claims and FDIC/OTS roles.'' He said that the DOI is receiving ''calls almost daily from members of Congress and private citizens.'' McReynolds pressed for a meeting that week (the week of July 17, 1995) because of his vacation and travel schedule. At that juncture, DeHenzel's notes say that McReynolds had not spoken to Jack Smith yet.

The following day, DeHenzel consulted about the McReynolds inquiry with ''JVT,'' John V. Thomas, the same FDIC lawyer who attended the Rep. Hamburg meeting in November 1993. Mr. Thomas told him to talk to Jack Smith and Alice Goodman. The notes say that ''JVT's reaction—Smith & Goodman should be there with us'' (Record 16) for the meeting with McReynolds.

Then the unexpected occurred. On July 20, 1995, Mr. Hurwitz refused to extend the statute of limitations tolling agreement with the FDIC (Record 17, See, footnote 1 on page 2). He had last done so on March 27, 1995, and that extension was to expire on July 31, 1995. As a result, any lawsuit by FDIC regarding USAT claims against Mr. Hurwitz were required to be filed by August 2, 1995, just thirteen days later. It was just three days after Mr. McReynolds contacted the FDIC for a meeting about the potential FDIC and OTS actions against Mr. Hurwitz that the FDIC was told that Mr. Hurwitz would not extend the tolling agreement.

The FDIC was unprepared for this action. They had enjoyed six years and eight months of discovery during which they were lobbied by outside groups and Members of Congress on the completely unrelated issue of pursuing the redwoods debt-for-nature swap. However, the agency had failed to be it job and cobble together enough evidence supporting a banking claim involving USAT and Mr. Hurwitz. They were not ready to file a compliant or drop the case on their own volition, even though Mr. Hurwitz provided voluminous records to the agency in the discovery process, records that defined the facts and illuminated issues raised by the FDIC.

As a result, the FDIC was facing two issue—the request for a meeting with the Office of the Secretary of the DOI and the need to address the fact that they did not have the USAT case prepared after more than six years of investigation.

They addressed these issues internally in a July 20, 1995, meeting between ''Mr. Jack Smith, JVT [John V. Thomas, FDIC lawyer], MA [Maryland Anderson, FDIC lawyer], JW [Jeff Williams, FDIC lawyer], and Robert DeHenzel.'' (Record 18)

It is clear from this meeting that the FDIC lawyers were not anxious to recommend a lawsuit against Hurwitz. They did not have a case, because it did not meet their internal standards. Instead they preferred to hinge their action on whether OTS brought the administrative action, the action that they prompted and paid OTS to bring against Hurwitz. This is an odd trigger for an agency that does admits it does not have a case, disavows it seeks redwoods, and is only interested in receiving ''cash.''

Thus, the FDIC lawyers' behavior is somewhat schizophrenic—on the one hand they know their internal policies will not let them bring a suit, but on the other had they want to sue Mr. Hurwitz (and not other potential defendants). They then begin constructing the justification for doing so around the notion that the potential claims against Mr. Hurwitz are somehow special—not ''ordinary.'' They also apparently talk of telling Mr. McReynolds what they will do—evidence of further improper coordination with the DOI outside of normal FDIC operating parameters. Mr. Thomas' notes from the internal FDIC meeting (Record 18) explain:

Re: McReynolds—Kosmetsky-Hurwitz-Tolling

Jack [Smith]—we will not go forward if OTS files a case

—if OTS does not file suit, we still have to decide our case on the merits before tolling expires

*Memo to the GC [General Counsel] to Chairman—update status of case & recommends that we let Kozmetsky out.

If suit against Hurwitz—we sue only him and not others.

Find out if Hurwitz will toll

Write a memo on case status to GC 10 page memo should do it!

continue tolling

sue or let them go

If ordinary case, we do not believe there is a 50% chance we will prevail therefore, we cannot recommend a lawsuit.

McReynolds—handle same as the Hill presentation (Record 18)

Clearly, the thinking coming out of the July 20, 1995, meeting was that the FDIC lawyers were not ready to make a recommendation on the merits of the case. Continued tolling was not an option because Mr. Hurwitz refused to sign a tolling extension, so the options ''sue or let them go'' were the only viable options. If it were an ordinary case the preference at that point would be to close the case out—that is let them go.

FDIC lawyer, Mr. John Thomas' later notes outlining some points for that memo to the General Counsel tell us why this was not the ''ordinary'' case: ''[G]iven (a) visibility—tree people, Congress & press . . . we thought you—B[oard]d—should be advised of what we intend to do—and why—before it is too late.'' (Record 22)

What Mr. Thomas was saying is that the staff intends to close out the case, and if the FDIC board wants to do otherwise before the case is closed (administratively by the staff or by virtue of the statute of limitations running), then the Board must intercede.

Importantly, the FDIC lawyers deviated from ordinary operating procedures because of the intense lobbying campaign for the redwoods debt-for-nature swap. Clearly, the intense lobbying effort by the environmental groups, by their outside counsel, by the DOI, by the White House, and by other federal entities was effective! At that point the bank regulators bought the redwoods scheme, but were unprepared then to totally disregard their what they knew they should do under their rules and guidelines, so the staff punted the issue to the board.

The FDIC had already injected itself into a political issue. Their dilemma was summed up by Mr. Thomas in notes preparing for a discussion on the USAT claims with the board apparently scribed a few days later:

Dilemma (why they [the FDIC Board] get paid the big bucks)—take:

Hit for dismissed suit

Hit for walking based on staff analysis of 70% loss of most/all on S of L [statute of limitations]

(Record 23)

The action by the FDIC of treating this case differently than the ''ordinary'' case and the concerted manipulation of hiring the OTS to pursue parallel claims to be used as leverage sends the strong message: if someone wants to influence bank regulators on an entirely collateral issue, and politically manipulate the bank regulators, they can successfully do it.

All that must be done to use the bank regulators to achieve a collateral issue is to pursue two year public relations campaign aimed at them, swamp the bank regulators with cards and letters about the collateral issue, write and submit various legal briefs for them that link the collateral issue, meet with the bank regulators about the collateral issue, organize congressional letters advocating the collateral issue, hold secret meetings with Members of Congress bout the collateral issue, hold ''protest'' rallies outside of their meetings, and do whatever else it takes so that at the end of the day, bank regulators do not follow ordinary procedures.

Indeed, the redwoods debt-for-nature swap became linked to USAT and Mr. Hurwitz just

as the environmental groups wished. This was not the ordinary case—it was going to the FDIC Board even though the FDIC admitted their case had a 70 percent chance of being dismissed because of the statute of limitations, and was more likely than not of falling on the merits if they were reached.

Apparently, the FDIC legal staff was prepared to tell McReynolds and ''the Hill'' [Congress] the same thing—their course of action described in the July 20, 1995, meeting notes (Record 18). This modified procedure still left the door open for the board to act against staff recommendations and authorize the suit anyway—something that may not have been ideal from Mr. McReynolds perspective, but would still leave open the possibility of the leverage that DOI desired against Mr. Hurwitz.

Then something else changed on July 21, 1995, which was the day following the internal FDIC meeting on their potential claims against Mr. Hurwitz. The change caused the entire approach of the FDIC lawyers to evolve again. What changed was not any new information about the facts of the potential claims against Mr. Hurwitz related to USAT. What changed was not any favorable development in law that strengthened their potential claims against Mr. Hurwitz related to USAT. What changed was not any analysis about the nature or strength of the potential claims against Mr. Hurwitz. All of these things remained the same.

What changed was the realization by the FDIC lawyers, as communicated by a senior DOI official, that (1) the Clinton Administration and the DOI, had adopted and embraced the redwoods debt-for-nature scheme and they wanted the scheme to be successful, and (2) the FDIC's potential banking claims were critical to pulling off that redwoods debt-for-nature scheme. The potential banking claims—the same claims that the FDIC lawyers would have dropped using ''delegated authority''—were the leverage that were critical to making the redwoods debt-for-nature scheme work.

That realization occurred when the FDIC lawyers met with Mr. McReynolds on Friday, July 21, 1995, at 11:00 a.m. (Record 19), just as he had requested on Monday, July 17, 1995. Meeting notes indicate that background about the redwoods and endangered species issues associated with Mr. Hurwitz's redwoods were initially discussed (Record 20). Other background about Governor Wilson's task force and the willingness of California to participate in the deal were discussed, as were Mr. Hurwitz's valuations of the property (Record 20). Apparently, McReynolds laid out some of the basics about the redwood acreage. He was familiar with the issue from first hand experience because he had flown over the redwoods with Jill Ratner during the week of May 8, 1995 (See, Record 11): ''H[urwitz] values 8K [acres] at $500 m. Interior wants to deal it down. H[urwitz] really wants $200m total. Calif. Deleg[ation] is really putting pressure on.'' Dallas/Ft Worth—Base closure.

The FDIC also told McReynolds about the meeting that FDIC lawyers had set for the following Wednesday, July 26, 1995, with the OTS to discuss the USAT matter. They told Mr. McReynolds about the fact that they were doing the memo to the Chairman (the 10 page memo they concluded they needed in their July 20, 1995, meeting amongst the FDIC lawyers, See Record 18). The entry regarding this in Record 20) is reproduced below: ''Wed [July 26] 10:30 mtg w/OTS. Memo for Chairman.'' (Record 20)

Eric Spittler's notes from the July 21, 1995, meeting add helpful details, and they are reproduced below:

$400,000 expenses on OTS

Have not decided whether to bring case—won't decide for months.

Alan Reynolds—Adm[inistration] want to do deal

Gov. Wilson w/DOI had task force of 6 groups

Told to find a way to make it happen

CA will trade $100m in CA [California] timber

Adm[inistration] might trade mil[itary] base

Had call from atty. Appraisal on prop[erty] for $500m. Said they want to make a deal. Don't know how much credence we have from them about a claim. At same time telling them to get rid of claim. He can't cut them down.

If we drop suit, will undercut everything. (emphasis supplied) (Record 21)

So, the FDIC knew—according to the meeting notes—that if the FDIC dropped the suit by letting the statute of limitations run, ''it will undercut everything'' related to the redwoods scheme that was just discussed with McReynolds. In other words, letting the statue of limitations expire—the ''ordinary'' procedure and recommendation of the FDIC lawyers at the time—meant the leverage for the redwoods debt-for-nature deal would evaporate, as would the scheme to get Hurwitz's redwoods. Thus, the notes confirm a redwoods debt-for-nature scheme and that FDIC did not really know whether Mr. Hurwitz believed that the FDIC had a valid claim—further evidence of the fact that the claims were indeed weak substantively and procedurally.

In this context—where the FDIC knew its claims (and the claims it was paying OTS to pursue) were the essential leverage for the redwoods—the FDIC lawyers began drafting the memo. Clearly, the agency was struggling with the fact that dropping the claims was inconsistent with what the DOI and the Administration needed to accomplish the redwoods debt-for-nature swap.

The handwritten outline of Mr. John Thomas (Record 22) reviewed the major points in the contemplated memo to the Chairman. The outline reiterated the linkage between FDIC and OTS, and it reinforced staff conclusion that the USAT claims against Mr. Hurwitz should be left to expire otherwise the court would dismiss them. Mr. John Thomas' outline clearly show that if this case were ''ordinary'' it would be closed. Pressure for redwoods was the justification for informing the Board of the staff's intent to close out the case, and the option of pursuing the case for purposes of leverage was therefore left open. Mr. Thomas' outline, which appears to be composed for the 2:00 p.m. briefing of the Chairman on July 26, 1995, (Record 22) is partially reproduced below—

May recall briefed re OTS—[FDIC is] paying [the OTS]—some months ago.

OTS is making progress, but not ready. Thus, tolling again.

OTS staff hopes to have draft notice of charges to Hurwitz, et al. Aug./Sept.

(Apologize for short fuse)—we thought we would be able to put off a final decision until OTS acted. Hurwitz refused to toll.

Normal matter, we would close out under delegated authority w/o [without] bringing it to your Bd's attention.

However, given

(a) visibility—tree people, Congress & press

(b) [OMITTED]

we thought you-Bd-should be advised of what we intend to do—and why—before it is too late.

* * *

Bottom line: likely to lose on S of L [statute of limitation]—let it go or have ct. dismiss it.

Continue to fund OTS

We'd also write Congress re what & why rather than awaiting reaction

Redwood Swap—

Interior/Calif.

Forest—[military] base—FDIC/OTS claim(?)

(Record 22)

This outline reinforces the approach and dilemma described by FDIC lawyers in their July 20, 1995, meeting. First, there was coordination with the OTS claims to get redwoods. That's because FDIC's possible claims were losers on substantive and procedural (statute of limitations) grounds. Second, ordinary procedures to close out the matter were circumvented due to ''visibility'' from the redwoods debt-for-nature campaign of the ''tree people'' (Earth First! and the Rose Foundation), Congress, and the press. Third, the Department of the Interior's ''Redwood Swap'' was taking shape and FDIC lawyers were beginning to coordinate with DOI staff.

All these factors combined to override the normal course of action, which was to close out the case. Instead, the Board would get the decision. All of this confirmed in John Thomas' own handwritten outline (Record 22), and all of it adding up to show that the redwoods debt-for-nature scheme had a real impact on the approach of the FDIC's lawyers. It had yet to skew the FDIC's final judgment based on early versions of the memo to the Chairman (Document X), but the final version dated July 27, 1995, would reflect skewed judgment.

The memo was drafted, and a version reflecting Mr. Thomas' notes and all of the prior internal staff discussions was produced and dated July 24, 1995. The drafts are Document X, and the final before the reversal is Document X, pages ES 0490–0495. It contains an unsigned signature block. Highlights of this memo are reproduced below and they tell exactly what the FDIC lawyers would advise the FDIC Board: ''We had hoped to delay a final decision on this matter until after OTS decides whether to pursue claims against Hurwitz, et al. However, we were advised on July 12, 1995 that Hurwitz would not extend our tolling agreement with him. Consequently, if suit were to be brought it would have to be filed by August 2, 1995. We are not recommending suit because there is a 70% probability that most or all the FDIC cases would be dismissed on statute of limitations grounds. Under the circumstances the staff would ordinarily close out the investigation under delegated authority. However (evidenced by numerous letters from Congressmen and environmental groups), we are advising the Board in advance of our action in case there is a contrary view.'' (emphasis supplied) (Document X, page ES 0490)

And in discussing the merits, the memo again advised: ''The effect of these recent adverse [court] decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss on statute of limitations grounds. We would also be at increased risks of dismissal on the merits. Because there is only a 30% chance that we can avoid dismissal on statute of limitations grounds, and because even if we survived a statute of limitations motion, victory on the merits (especially on the claims most likely to survive a statute of limitations motion) is uncertain given the state of the law in Texas, we do not recommend suit on the FDIC's potential claims.'' (emphasis supplied) (Document X, page ES 0493–0494)

The memo then discusses the redwood forest matter, an interesting notion given the fact that the FDIC has consistently maintained that the redwoods were not at all connected to their litigation: ''The decision not to sue Hurwitz and former directors and officers of USAT is likely to attract media coverage and criticism from environmental groups and member of Congress. Hurwitz has

a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O [director and officer] claims for the redwood forest. Only July 21, we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus the possibility the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement. This is feasible with perhaps some new modest legislative authority . . . We plan to follow up on these discussions with the OTS and Department of [the] Interior in the coming weeks. . . . When the Hurwitz tolling agreement expires, we would recommend that we update those Congressmen who have inquired about our investigation and make it clear that this does not end the matter of Hurwitz's liability for the failure of USAT because of the ongoing OTS investigation.'' (Record X, pages ES 0493–0494).

It is helpful to understand that there were four major versions of this memo drafted and revised. The drafts of this memo are all typedated July 24, 1995, and they all reference discussions with the Department of the Interior. These drafts are Document X, which was made part of the Task Force hearing record by unanimous consent.

However, one version of this memo contains numerous handwritten changes, including a date that was changed from July 24, 1995, to July 27, 1995 (Document X, pages PLS 000192–000195). The changes amount to the complete and total reversal in approach to the USAT claims related to Mr. Hurwitz. The July 27, 1995 version is the text that was incorporated into the Authority to Sue (ATS) cover Memorandum that was itself dated July 27, 1995. It, with the ATS memo (Document L, EM 00123–00135), went to the FDIC Board, and it recommended the suit against Mr. Hurwitz be brought.

The July 27 final version rolled into the ATS memo also discusses the ''Pacific Lumber-Redwood Forest Matter'' (Document L, page EM 00129). Therein, it notes the July 21, 1995, FDIC meeting with ''representatives of the Department of the Interior [McReynolds], who informed us [the FDIC] that they are negotiating with Hurwitz about the possibility of swapping various properties, plus the possibility of the FDIC/OTS claim, for the redwood forest.'' (Document L, page EM00129). The memo also says that the ''Administration is seriously interested in pursuing such a settlement.''

Note what the memo does not say. It does not say Mr. Hurwitz raised the issue of redwoods and linked them in any way to the banking claims. It says that the Administration is negotiating a swap of possible properties, plus the banking claims. When the bank regulators learned of this (probably from Mr. McReynolds on July 21, 1995), the bank regulators should have been very uncomfortable. They had already voluntarily injected themselves into a political dynamic with other government agencies—one of which had apparently taken their statutory obligation to recover cash by using claims that belonged to the FDIC and were not even brought yet. At this juncture Mr. Hurwitz had not raised the prospect of such a scheme with the FDIC.

The only other intervening event between the July 24, 1995, memo draft and the July 27, 1995, reversal is a meeting on July 26, 1995, at 10:30 a.m. between the FDIC and OTS. Record 26 is the only set of meeting notes from that meeting, and the notes reiterate the discussion between FDIC lawyers and Mr. McReynolds on July 21, 1995. This puts the OTS squarely inside the redwoods debt-for-nature scheme.

The notes are very helpful to show the degree of coordination between the FDIC and OTS about redwoods and the linkage between the potential claims and redwoods. They also show how the FDIC polluted the OTS decision-making with the same political dynamic it had been part of for more than a year. The FDIC staff summed up the situation and briefed OTS about all of the important redwoods developments related to Mr. Hurwitz:

J. Smith'

Hurwitz won't sign tolling agreement with FDIC—need to file lawsuit by 8/12

J. Thomas-chances of success on stat. Limitations is 30% or less

will continue discussions with Helfer

Pressure from California congressional delegation to proceed

Dept. of Interior—Alan McReynolds

Administration interested in resolving case & getting Redwoods

Pete Wilson has put together a multi-agency task group

Calif would put up $100 MM of Californai timberland

Hurwitz wants a military base between Dallas & Fort Worth—Suitable for commercial development

Hurwitz also wants our cases settled as part of the deal

Two weeks ago-Hurwitz lawyer called Teri Gordon at home & told him he should not be turned off by the $500 MM appraisal

What is OTS' schedule? How comfortable is OTS w/ giving info to Interior?

(Record 26)

None of the records reviewed contains any banking law rationale for the reversal in the staff recommendation July 24, 1995, (which was to notify the board that they would close out the potential claim against Mr. Hurwitz by letting the statute of limitations run) and the July 27, 1995, approach (which recommended a lawsuit against Mr. Hurwitz). The only explanation for the reversal is the meeting with Mr. McReynolds where the DOI and Administration's desire for leverage was communicated and understood by the FDIC coupled with the meeting with OTS where bank regulators from both agencies discussed the Administration's desire for the redwoods debt-for-nature scheme to succeed. At this juncture, the thinking was that there would be no money for an appropriation for the Headwaters, so a swap of some sort was the only way to acquire the redwoods.

The FDIC board only saw the July 27, 1995, memo. In their meeting they discussed the redwoods scheme when the discussed bringing the action against Mr. Hurwits (Record 27). As part of his briefing, Mr. John Thomas elaborates on the redwood scheme to the FDIC board:

Mr. THOMAS. This is, of course, a very visible matter. It is visible for something having no direct relationship to this case, but having some indirect relationship. Mr. Hurwitz, through Maxxam, purchased Pacific Lumber. Pacific Lumber owns the largest stand of virgin redwoods in private hands in the world, the Headwaters. That has been the subject of considering—considerable environmental interest, including the picketing downstairs of a year or so ago. It has been the subject of Congressional inquiry and press inquiry. So we assume that whatever we do will be visible.

Interior, you should also be awar—aware, the Department of Interior is trying to put together a deal to the headlines [sic] [Headwaters] trade property and perhaps our claim. They had spoken—they spoke to staff a few days ago about that and staff of the FDIC has indicated that we would be interested in working with them to see whether something is possible. We believe that legislation would ultimately be required to achieve that. But again, if it's the Board's pleasure, we would at least try to find out what's happening and pursue that matter and make sure that nothing goes on we're not aware of—we're not part of. (Record 27, page 11–12)

Later, Chairman Helfer raised the issue of whether bringing suit enhances the prospect of settlement of non-banking issues, that is the redwoods:

Chairman HELFER. . . . does the FDIC's authorization to sue enhance the prospect—the prospects for a settlement on a variety of issues associated with the case?

Mr. THOMAS. It might have some marginal benefit, but I don't think it would make a large difference. I think the reality is that the FDIC and OTS staff have worked together, expect to continue to work together, and so, I don't think it would have a major impact. It might make some difference, but I think particularly any effort to resolve this with . . . a solution that involves the redwoods would be extremely difficult. (Record 27, page 16)

These exchanges in the FDIC board meeting about the redwoods are troubling simply because they occurred. They injected factors that had nothing whatsoever to do with the validity of banking claims against Mr. Hurwitz. The advice and recommendations on July 27, 1995, deviated so widely from the approach of staff that would have ordinarily taken to close the case administratively. They deviated even more from the approach they would have taken before the McReynolds meeting on July 21, 1995, where they came to understand that the Administration needed the leverage for the redwoods swap.

The deviation is likely a result of that meeting, coupled with the OTS meeting on July 26, 1995, where they coordinated on the claims they were paying the OTS to pursue and conspired about the need for leverage to get the redwood claims. The FDIC understood at that point that OTS's claims may not be brought for months (or perhaps at all) and they certainly knew that if ''we drop our suit, [it] will undercut everything.'' (Record 21)

The day following filing of the suit, FDIC lawyers sent a memo to their communications department reiterating the congressional and environmental interest due to the redwoods issue. (Record 28) The memo explained conspiracy with the Department of the Interior and how the department had been negotiating for the redwoods using the FDIC and OTS claims. The memo also indicated that it was the Administration that was ''seriously interested in pursuing such a settlement.'' (Record 28, page 2) In addition, as if the FDIC lawyers knew they were doing something wrong, the memo emphasized that ''All of our discussions with the DOI are strictly confidential.'' (Record 28, page 2)

Then the memo went on to suggest that the FDIC should not disclose these discussions or deviate from the prior public statement about redwoods. Basically that statements was that if a redwood ''swap became an option, the FDIC would consider its as one alternative and would conscientiously strive to resolve any pertinent issued.'' (Record 28, page 2)

The work on a redwoods swap by the FDIC and the Department of Interior then grew as indicated by the volume of notes from meetings where other federal entities were drawn into the scheme. There was an August 2, 1995,

DOI Headwaters acquisition strategy paper drafted by Mr. McReynolds. It reports the FDIC and the OTS ''are amendable to [a debt for nature swap] if the Administration supports it.'' (Document DOI B). This is blatant evidence of just how political the FDIC's July 27, 1995, reversal was.

There was the August 15, 1995, meeting between DOI, FDIC (Smith), and OTS (Renaldi and Sterns) (Document DOIC, page 2) where it was reported that ''FDIC and OTS are wondering why DOI is not being more aggressive with Hurwitz and is permitting [Governor] Wilson's task force to take force to take the lead'' (Document DOIC, page 2). This is a stunning indictment of the political motivation of the FDIC and OTS staff.

There was coordination with Congressional offices (Document DOID).

There was endorsement from the Assistant Secretary of DOI of using the FDIC and yet to be filed OTS claims in exchange for the redwoods (Document DOIE).

There were multi-agency meetings that included the White House OMB and CEQ (Document DOI F and H)

The Vice President was lobbied by Jill Ratner for his support of the redwoods scheme as was the White House (Document DOI G), and bi-weekly conference calls were occurring between the FDIC, the OTS, and the DOI to coordinate on the redwoods scheme by September 1995.

There was the October 1995, memo to the General Counsel of FDIC about a scheduled meeting that was to occur on October 20, 1995 with Vice President Gore about the FDIC and OTS claims and their integral linkage to leveraging redwoods. Mr. Kroener, testified that the meeting never occurred, but the information in the memo is nonetheless illuminating, and it contradicts FDIC's statements that they were not after redwood trees.

The memo verifies that Mr. Hurwitz was not interested and had not raised the notion of a redwood swap for FDIC or OTS claims. The memo says OTS met with Hurwitz's lawyer and ''no interest in settlement has been expressed to OTS.'' (Record 33, page 2). The memo says that FDIC ''has had several meetings and discussions with Hurwitz counsel prior to the filing of the lawsuit. Hurwitz has never, however, indicated directly to the FDIC a desire to negotiate a settlement of the FDIC claims.'' (Record 33, page 2).

This puts to rest the notion that Mr. Hurwitz was or had been interested (or had raised) the notion of a redwoods swap for the OTS or FDIC claim up to that point. Apparently, the FDIC relied on erroneous representations of Mr. McReynolds to the contrary.

Then, in an incredible self-indictment, the FDIC observes that it is ''inappropriate to include OTS'' in the meeting to discuss possible settlement with Hurwitz because the OTS claim was not approved for filing, and discussions may be perceived as ''an effort by the executive branch to influence OTS's independent evaluation of its investigation'' (Record 33, page 2). What exactly, then, did the FDIC think its February 1994 meeting with Rep. Hamburg would do to its independent judgment? What did the FDIC think repeated contacts with environmental groups since 1993 would do? What did the FDIC think that its meetings with Mr. Reynolds right before their staff recommendation changed in July 1995 would do? Why did the FDIC and the OTS meet and have phone briefings with DOI in July, August, September 1996. All of these contacts were just as inappropriate then as they were when FDIC staff wrote the briefing memo for Vice President Gore's meeting. Did the FDIC lawyers take an ethics class sometime between February 1994 and October 1995?

In fact, the FDIC intended to help the Administration force Mr. Hurwitz into trading his redwoods for the FDIC and OTS claims. They wanted to induce a settlement, and their words say it. There meeting with the Vice President was an important meeting, and the memo to Mr. Kroener to prepare for the meeting (Record 33) was remarkable candid: ''FDIC has no direct claim against Pacific Lumber through which it could successfully obtain or seize the tree or to preserve the Headwaters Forest.''

* * * * *

''FDIC's claims alone are not likely to be sufficient to cause Hurwitz to offer the Headwaters Forest, because of their size relative to a recent Forest Service Appraisal of the value of the Headwaters Forest ($600 million); because of very substantial litigation risks including statute of limitations, Texas negligence—gross negligence business judgment law, and Hurwitz role as a de factor director, and the indirect connection noted above, including the risk of Hurwitz facing suit from Pacific Lumber securities holders if its assets were disposed of without Pacific Lumber being compensated by either outsiders, or Hurwitz or entities he controls.'' (record 33, page 3) (emphasis supplied)

Two things are clear after reading this passage. First, FDIC staff intended the claim to operate as an inducement, along with the OTS claim for trees. Second, that there is no other rational, after reading this evaluation, for the FDIC lawyers to have switched their recommendation between July 24 and July 27, 1995—except that they intended all along to help the Administration by playing a part in inducing a settlement.

After reading this passage, one wonders why the FDIC still attempts to propagate the obviously false notion that their claims had nothing to do with redwoods.

There was the October 22, 1995, meeting that included a cast from DOI, OMB, FDIC, DOJ, and the Department of Treasury ''at which we [CEQ] initiated discussions on a potential debt-for-nature swap.'' (Document DOI H) That meeting led to FDIC attorney Jack Smith compiling a lengthy memorandum to Kathleen McGinty, the Chairman of CEQ. The memo reviews issues and answers about the feasibility of various legal mechanisms that might be used to facilitate the redwoods debt-for-nature scheme. (Record 30).

Then in late 1995, Judge Hughes, the U.S. District Court judge who was assigned the FDIC's lawsuit discovered what the FDIC and OTS had done to team up using overlapping authority to harass Mr. Hurwitz (Record 37 and document A) and the banking regulators' redwood debt-for-nature scheme began to be exposed.

At the same time (November 28, 1995) FDIC lawyers met with Katie McGinty (CEQ), Elizabeth Blaug (CEQ), and John Girimundi (DOI) where it was decided that there would be ''no formal contacts until OTS file,'' (Record 38) and it was acknowledged that ''after the administrative suit is filed is time for opening any discussions.'' However, the FDIC had already had several discussions with OTS about the redwoods swap, as had DOI staff beginning in July 1995, even before the FDIC claim was filed.

The notes from meetings between the FDIC and/or the OTS and environmental groups, government agencies, federal departments, the White House, from September 1995 through March 1996. (Record 31)

1996: FDIC Lawyers Cannot Find Their Way Out of the Forest—help, ''we need an exit strategy from the Redwood''

By January 6, 1996, the redwoods scheme had come together as planned. John Thomas reported to Jack Smith in a weekly update. ''United Savings. OTS has filed their notice of charges. The statute has been allowed to run by us [FDIC and OTS] on everyone other than Hurwitz. We have moved to stay our case in Houston, and are awaiting a ruling. . . . and there is question of whether a broad deal can be made with Pacific Lumber.'' (Record 36)

Shortly thereafter, on January 19, 1996, the fact that Mr. Hurwitz had not directly brought the issue of the redwoods into settlement discussions became a problem. OTS apparently refused to join the meetings led by CEQ about Headwaters, and an FDIC lawyer reported the refusal to CEQ: ''I advised Elizabeth Blaug about this yesterday afternoon. I said that if Hurwitz wanted to have global settlements with OTS and FDIC involved, he would have to ask for them.'' (Record 36A)

In other words, the ex parte agency discussions (without Mr. Hurwitz) about FDIC and OTS banking claims were at least improper, and the impropriety was not realized; however, it was too late.

By March 1996, the FDIC and OTS were deeply involved with promoting the redwoods debt-for-nature scheme, but they had still yet to receive any direct communication from Mr. Hurwitz proposing a redwoods swap for their claims. About March 3, 1996, the FDIC attorneys must have begun to realize that the agency should not be involved in the redwoods scheme. He made the following note on what appears to be a ''to do'' list:

APPENDIX 1

DOCUMENT A

United States District Court—Southern District of Texas

FEDERAL DEPOSIT INSURANCE CORPORATION AND OFFICE OF THRIFT SUPERVISION, PLAINTIFFS.

versus

CHARLES P. HURWITZ, DEFENDANT.

CIVIL ACTION H–95–3956

OPINION ON DISMISSAL OF THE OFFICE OF THRIFT SUPERVISION

1. Introduction.

The Federal Deposit Insurance Corporation sued Charles Hurwitz for improprieties as corporate officer that led to the failure of a bank Hurwitz's corporation owned. While the suit was in its preliminary stages, the FDIC procured the Office of Thrift Supervision to use its powers to bring a parallel administrative action against the officer. Over the OTS's objection, this court joined the OTS as an involuntary plaintiff in this suit since it had decided to affect the outcome. Now, the FDIC has amended its pleadings to abandon its claims that duplicate those in the OTS's action; although this is yet another manipulation of the court system by the FDIC, the OTS will be dismissed.

2. Claims.

Charles Hurwitz was a member of the board of three different corporations that had an interest in United Savings Association of Texas. After United's failure in 1988, the FDIC began investigating Hurwitz. Cooperating with the government, Hurwitz signed a succession of agreements to extend the deadline for the government to act. After eight years of investigation by the FDIC and the OTS with no resolution in sight, Hurwitz declined to extend the statute of limitations again. The FDIC sued Hurwitz on a variety of claims arising from the operation of United. When distilled, the claims are that

- Hurwitz failed to maintain the net worth of United, and
- Hurwitz mismanaged United's mortgate-backed security portfolios.

Three months later, the OTS notified Hurwitz that it intended to file an administrative ''notice of charges'' on substantially

the same claims in addition to violations of banking regulations. The court joined the OTS to minimize duplicative and—as it turns out—duplicitous proceedings and to avoid inconsistent findings about the same transactions.

3. Joinder.

The OTS was properly joined as a party. A party may be joined as an involuntary plaintiff when it claims an interest in the subject matter of the suit and its absence would leave another party at risk of incurring multiple or inconsistent obligations, Fed. R. Civ.P. 19(a)(2)(ii).

The government argues that this court may not join the OTS because it lacks jurisdiction. It says that the statute creating the OTS specifically divested district courts of jurisdiction. The statute say that a district court may not issue an order that affects the administrative process. The government, reading its protection from independent examination broadly, says that any action taken by this court in this case will necessarily affect the OTS's administrative proceedings, making it barred. See 12 U.S.C. §1818(I)(1).

The scope of the statutory prohibition of court intervention is limited to actions by the court to impede the issuance or enforcement of a notice or order of the OTS; every determination of law affects the OTS.

The government claims more for its precedents than a reading of them will support. Certainly, none of the cases indicates that a federal court has no authority to join the OTS as an involuntary plaintiff. Compelling the OTS to participate in a case is far different from preventing it from continuing its own case. See Board of Governors of Federal Reserve System v. MCorp Fin. Corp., 502 U.S. 31 (1992); Board of Governors of Federal Reserve System v. DLG Fin. Corp., 29 F.3d 993 (5th Cir. 1994). RTC v. Ryan, 801 F. Supp. 1545 (S.D. Miss. 1992). Only when a court seeks to enjoin, not merely join, might the court exceed its jurisdiction. In fact, federal courts have exercised jurisdiction over the OTS when, as here, the relief sought does not prevent the OTS from pursuing its administrative proceedings. See, e.g., Far West Fed. Bank v. OTS, 930 F.2d 883, 886, 890–91 (Fed. Cir. 1991).

4. One Government.

These two agencies insist that they serve different statutory purposes and should not be compelled to work together. Despite the currently popular usage of the label ''Independent agency,'' no agent can be independent; without a principal, there can be no agent. Here two limited agents of the United States government claim to be wholly unrelated. They are both parts of the executive branch. It is one entity, operating under a restrictive charter and for an ultimate principal.

This bureaucratic shell game is aggravated by each sub-unit's active misrepresentations about the role each has played and the direct, total unity of financial interest. The government lawyers insisted that, although the investigations were perhaps parallel, the two sub-units were acting completely independently from each other. That turns out not to be true.

The FDIC has hired the OTS. The OTS declined to use its resources to pursue these claims, so the FDIC bought it by agreeing to pay its costs. Instead of exercising regulatory judgment about America's interest, the OTS is hammering citizens at the direction of the FDIC.

Although the FDIC knew that an OTS administrative proceeding was imminent, it initiated this suit in federal court. The FDIC and OTS worked in concert on the investigations, and the FDIC funded both investigations. The same parties and the same actions are involved. The money recouped by either agency will go to the FDIC.

Hurwitz is not seeking to enjoin the OTS, directly or effectively, or to ''affect by injunction or otherwise'' the administrative proceedings. Furthermore, this is not Hurwitz's suit. The FDIC initiated this action, knowing that it had bought the initiative of the OTS.

In January 1997, during a pre-hearing conference with the hearing officer, the FDIC and OTS stated ''the bottom line'' is that joining the OTS as a party to this suit ''does not affect [the administrative] proceeding.'' The government has judicially admitted what it now seeks to contradict.

The law does not support the government's position, and it has admitted that joining the OTS as a party in this case does not interfere with the administrative proceeding. The statutory limitation, therefore, does not apply to this case, and this court had jurisdiction to join the OTS as an involuntary plaintiff. See 12 U.S.C. §1818.

5. Amended Complaint.

The FDIC has given up its case against Hurwitz in this court and delivered it to the OTS, getting an administrative forum in Washington and avoiding the public rigor of a court of law. In all important respects, the FDIC's original complaint and the OTS's notice of charges are the same. Both agencies essentially make two complaints: (a) the defendants failed to maintain the net worth of a bank and (b) the bank's mortgage-backed security portfolios were managed improperly. The underlying facts of both complaints are the same. The legal determinations in both would have been redundant. If United stockholders owe no net worth maintenance obligation, Hurwitz owes the government no money regardless of the forum. Further, if Hurwitz is found to have had no operational role in the bank's mortgage-backed securities portfolios, Hurwitz would have no liability to a government agency.

In the amended complaint, the FDIC's claims varnish. The FDIC drops its discussion of the connection between Hurwitz and Drexel—a public relations ploy—and its complaints about the mismanagement of the mortgage-backed securities, allegations occupying two-thirds of its original complaint.

The only claim remaining is a contingent one. The FDIC argues that, if the OTS determines Federated and Maxxam owed a duty to maintain the net worth of the bank, then Hurwitz breached his fiduciary duty to the bank by not compelling them to honor it. The FDIC makes its claim not only contingent on a favorable resolution in the OTS proceeding but also contingent on the OTS's lack of success in ''collect(ing)'' from Federated and Maxxam. The FDIC now abandons entirely the bulk of its claims and abates its remaining claim. Having hired the OTS so it had another forum, the FDIC is content to leave the resolution of liability to the ''independent'' regulatory process.

The OTS will be dismissed not because it was improperly joined, for its joinder was clearly permissible, but because its presence in this suit is no longer relevant. The OTS was joined to prevent duplicative proceedings, wasting precious judicial resources, harassing the respondent citizens, and risking conflicting findings of fact and law. Now that the FDIC has dropped almost its entire case, these risks are no longer present.

7. Conclusion.

The OTS was properly joined. Its presence in this case would not have ''affected by injunction or otherwise'' the ongoing administrative proceeding. The OTS will be dismissed as a party because there is no longer a risk of duplicative proceedings. The FDIC has abandoned its principal case in this court.

Hired governments and systematic falsehood are the tools of cosa nostra not res publica.

Signed October 23, 1997, at Houston, Texas.

LYNN N. HUGHES,
United States District Judge.

DOCUMENT A2

United States District Court—Southern District of Texas

FEDERAL DEPOSIT INSURANCE CORPORATION, PLAINTIFF.

versus

CHARLES E. HURWITZ, ET AL., DEFENDANT.

Civil Action H–95–3956

OPINION ON PRODUCTION OF FEIC REPORT

1. Introduction.

The Federal Deposit Insurance Corporation sued Charles Hurwitz for his acts as corporate officer because a bank the corporation owned failed. In the pretrial discovery, the agency has refused to disclose its document authorizing the lawsuit, commonly called an authority to sue letter. It asserts its privileges not to disclose attorney-client communications or attorney's work preparing the suit. The document must be disclosed.

2. Background.

Hurwitz was a member of the board of three different corporations with interests in United States Association of Texas. After United failed in 1988, the FDIC began investigating Hurwitz. The agency asked Hurwitz to waive his protection under the statute of limitation: he did for seven years. In 1995 he declined to extend the time for the FDIC to bring its charges. The agency sued him in district court in Texas.

Hurwitz asked for access to the agency's authority to sue letter since it is an administrative predicate for the lawyers' acts and might reveal admissible evidence. The agency refused. This court ordered it to disclose the report after it excised the privileged matter. Hurwitz asked for the full report because even the limited disclosure revealed admissions against interest, including active material misrepresentations of fact to the court. The report was produced for court inspection, after the FDIC moved to have another judge read it and rule on the disclosure. The court—having read the report, compared the deletions, considered the legal authorities, and reflected on the record—decides that disclosure is imperative.

3. The Report.

As the expiration of the last waiver approached, the officers prepared a report to the board of directors. The report to the board was written by two officers of the FDIC—a deputy general counsel and an associate director for operations. These officers, signatures are supplemented by the concurrences of the general counsel and director.

The report discussed the factual background, regulatory context, legal positions, public interest, and agency policy, then it requested permission to sue Hurwitz. It recommended a lawsuit and requested authority to sue. Technically the report covers numerous people and companies, but the principal thrust is on Hurwitz individually and Maxxam Corporation, a holding company. For simplicity, Hurwitz is used as a synonym for all the defendants.

4. Attorneys, Clients and Privileges.

A communication is privileged from compulsory disclosure in litigation when:

The client asserts the privilege.

A lawyer acting as the client's lawyer had communicated to the client.

The lawyer communicated legal advice.

The lawyer prepared a legal opinion in anticipation of litigation.

The communication had no unlawful purpose.

See Fed. R. Civ. P. 26(b)(1), (3); Fed. R. Evid. 501; e.g., Rhone-Poulenc Rorer, Inc. v. Home Indem Co., 32 F 3d 851 (3rd Cir. 1994).

5. Operating Lawyers & Counseling Operators.

In traditional analysis, legal counsel is a staff function, but directing operations is an operating function. In a governmental agency sometimes the entire operation looks like staff, but when one of the functions of the agency is collecting claims owned through its defunct insureds, management of receivables and referral to legal counsel are operating decisions. The policy decision whether it is in the public interest to use litigation is ultimately an operating decision.

The authors of this report were both the legal and operations departments. The approvals were by both departments. Neither the assistant director who co-authored the recommendation and request nor the director who concurred was acting as counsel to the board. Rather, they were non-lawyers reporting their findings to the board.

This report is not a lawyer's opinion letter; it is an ordinary internal operating document. The subject of the report is claims and regulatory action, litigation and probable recovery, but that does not make it advice of counsel. Because the FDIC was not very good at its underwriting-review or supervisory-assistance functions, it is now in the liquidation business. Everything about a failed bank is about claims; the FDIC's stock in trade is debits and credits of uncertain value in a litigious society.

A client that obtains its advice in a mixed form—twisting the roles—must be able to disentangle the two strands clearly and reliably, or it loses its privilege as it would with any confusion or accession. The legal analysis in the report was commingled with everything from malicious gossip to historic data.

6. Exclusions.

In disclosing the part of the report that it knew was not privileged, the FDIC excised the parts that it concluded were privileged as an attorney's advice to his client. Having read the whole document, the nature of the excisions demonstrates the agency's bad faith.

The agency cut a personal description of Hurwitz as a ''corporate raider.''

The agency cut an admission that the FDIC had already paid $4 million to its outside counsel and expects to pay another $6 million.

The agency cut the admission that the savings and loan was hopelessly insolvent when it was sold by the FDIC to Hurwitz's company.

The agency cut the OTS's involvement in discussions about ''pursuing these claims.''

The agency cut the regulatory background and general history.

The agency cut the discussion of the wholly unrelated matters about Maxxam's indirect holding of Pacific Coast redwood forests.

The agency cut the discussion of Hurwitz's control of companies. These things have no relation to the legitimate categories of attorney-client confidences. There are some exclusions that were estimates of success and descriptions of defects in the claim, but the bulk of the exclusions were simply a lack of candor.

7. Estoppel & Unitary Government

The FDIC says that it is fully independent from the rest of the government. It makes this argument to avoid the complaint from Hurwitz that he is being attacked by the same the government of the United States in the case and in an action by the Office of Thrift Supervision for the same act. Moments later, the FDIC argues that it is all one government; it must make this argument because it has disclosed its analysis and strategy to the Office of Thrift Supervision, which disclosure destroys the pretense of an attorney-client confidence.

The Office of Thrift Supervision is a mid-level function within the Department of Treasury, it was created by federal law to supervise the operation of savings associations—a function parallel to the FDIC's with banks. Among other things, the director of the OTS has the responsibility to enforce part of the Federal Deposit Insurance Corporation Act.

Another federal statute created the Federal Deposit Insurance Corporation. The FDIC insures deposits of banks and savings associations by charging premiums. Although it has a corporate name, it is merely an agency of the federal government. The president appoints the five-member board of directors of the FDIC. The director of OTS is automatically a member of the FDIC board.

Because its insurance is mandatory under federal statutes, the FDICs revenues are undistinguishable from ordinary taxes. In court it maintained that it was separate from the congressional appropriations process, except for some tens of billions of dollars it used to pay its insurance losses in the eighties.

8. Manipulation of the Legal Process.

The report furthers a misrepresentation to the court. The FDIC has represented to the court that the Office of Thrift Supervision is proceeding entirely separately from this case. The FDIC never disclosed that it had actually hired the OTS to front for it in attacking Hurwitz administratively.

In November of 1996 the FDIC was telling this court that the proceedings were entirely separate, even to the point of trying not to admit that the director of the OTS sits on the FDIC's board. In August, the FDIC's chairman had reported to a congressman: ''We are coordinating the investigation and our claims against Mr. Hurwitz with the Office of Thrift Supervision.''

Not disclosing the report at this juncture would be allowing the FDIC to attempt fraud and, when it fails, to hide behind a privilege earned by responsible conduct.

The FDIC asked this court to have another judge examine the report so that it would not prejudice this court in the progress of this action. For eight years the FDIC has been ''studying'' this complex transaction, and it would like a judge not familiar with it at all to examine the report. That is a transparent dodge. Will the contents of the FDIC report bias the court? A conclusion reached on an impartial consideration of the facts is not prejudice. The FDIC—no less than other litigants—does not get the option to misbehave until caught and then ask for a clean slate elsewhere. A Freudian would say that the FDIC is projecting in its concern about tainted process.

9. The Board Resolves.

After the report was presented to the board of directors of the FDIC, the board adopted the report as its resolution. The board resolution served to authorize this lawsuit. The board could have authorized legal action against Hurwitz by a separately written resolution; and that resolution would have needed to contain no attorney's advice, but the board chose the expedient of adopting as its resolution the whole text of the report, making it a formal statement of public policy.

While the board may not have intended that Hurwitz or the public know of its decision in this form, its practices made its staff legal advice into an operating document, totally unprivileged. The resolution is not a client asking for legal advice nor an attorney giving advice, rather it is the embodiment of a governmental agency's final decision about public business.

An analogy: A report of advice from the general counsel of the senate foreign relations committee to its chairman may be privileged, but if the committee adopts the report as its resolution, no privilege survives. This report is like one that was written jointly by the architect of the capitol and committee counsel and then was adopted by the public works committee.

DOCUMENT B

CONFIDENTIAL ATTORNEY/CLIENT PRIVILEGED COMMUNICATIONS—REPORT AND LITIGATION RECOMMENDATIONS ON DIRECTOR, OFFICER AND PROFESSIONAL LIABILITY CLAIMS ARISING OUT OF THE UNITED SAVINGS ASSOCIATION OF TEXAS RECEIVERSHIP

[Prepared by: Brill, Sinex & Stephenson, a Professional Corporation]

I. BACKGROUND OF INSTITUTION

United Savings of Texas (''USAT'') was closed on Friday, December 30, 1988, upon the determination by the Federal Home Loan Bank Board that the institution was insolvent and had engaged in unsafe and unsound lending practices. The institution failed as a result of excessive growth, substandard underwriting practices and internal controls; poor investment strategies and portfolio management regarding the mortgage-backed securities portfolio; the failure of USAT's holding company, United Financial Group, Inc., to maintain sufficient minimum regulatory capital in USAT; and the severe economic slump in the Houston/Galveston area.

USAT was a state chartered, federally insured savings association located in Houston, Texas. The association was a wholly owned subsidiary of a savings and loan holding company called United Financial Group, Inc. (''UFGI''). UFGI's principal shareholders were corporations controlled by Charles Hurwitz, who has a national reputation as a ''corporate raider.'' UFGI and USAT were managed by virtually the same core group of individuals.

From 1983–1986, as the oil industry declined and the value of real estate in the Houston market slipped, USAT changed its income strategy from traditional real estate based lending to high profile investments in real estate and different types of securities and venture capital projects. In addition, USAT attempted to diversify its real estate portfolio into other areas of Texas (for example, San Antonio, Austin and Fort Worth).

At October 31, 1988, USAT reported negative capital of $272,791,000. At September 30, 1988, USAT reported assets of $4,646,240,000, and total liabilities of $4,849,373,000. An initial review indicates that since June 30, 1987, there had been a market loss in the MBS portfolio of $213,000,000. In addition, the estimated commercial real estate loan losses exceeded $500,000,000. Demand was made by the supervisory agent upon UFGI to honor its agreement to maintain the regulatory net worth of USAT; however, no new capital infusion was made.

Ownership of USAT

On the date it was closed, USAT was solely-owned by UFGI. According to the UFGI stock records, dated September 9, 1988, UFGI was owned by: (1) Cede & Co. (42.3%); (2) Hurwitz-controlled entities (23.29%); and (3) Drexel (9.7%). The Hurwitz-controlled entities consisted of Federated Development Company (''Federated''), MCO Holdings (''MCO'') and Maxxam Group, Inc.

(''Maxxam''). These three organizations, as well as Pacific Lumber, KaiserTech and many others, comprised Hurwitz's domain. The following are brief descriptions of the primary businesses.

MCO held a controlling interest of approximately 45.7% of the outstanding voting stock of Maxxam, according to its 10–K filing for the year ended December 31, 1987. Maxxam owned approximately 13.5% of the outstanding Common Stock and approximately 93.5% of the outstanding Series D Convertible Preferred Stock of UFGI. On March 21, 1988, MCO stockholders approved the merger of MCO with Maxxam. Maxxam is involved in forest products operations, real estate management and development, and aluminum products.

Federated, a New York business trust, owned approximately 9.8% of the outstanding shares of UFGI. It is solely-owned by Hurwitz and certain members of his immediate family and trusts for the benefit thereof. Federated owned approximately 28.2% of MCO's Common Stock and 91.3% of its Class A Preferred Stock.

Acquisition of UFGI by Hurwitz and Creation of USAT

USAT was chartered in 1937 as the Mutual Building and Loan Association, Fort Worth, Texas. In 1946, it became the Mutual Savings and Loan Association. The association was acquired in 1970 by Southwestern Group Financial, Inc., a wholly-owned subsidiary of Kaneb Services, Inc. In 1978, five savings and loan subsidiaries of Southwestern Financial Group, Inc. merged to form United Savings Association of Texas. In 1981, Southwestern Financial Group, Inc. changed its name to United Financial Group, Inc. That same year, Kaneb spun off UFGI by distributing its shares to the holders of its common stock.

Hurwitz began his acquisition in 1982, as reflected by the Joint Proxy Statement and Prospectus, dated March 24, 1983. Federated Reinsurance Corporation, an insurance company licensed under the laws of the State of New York, and Federated Development Company, a New York business trust, filed a joint 13–D statement reporting ownership of more than 5% of the outstanding shares of UFGI Common. On February 18, 1982, PennCorp (the previous parent of First American Financial of Texas) distributed 2.4 million shares of First American Common to its stockholders, in accordance with a special dividend. The remaining 20%, 603,448 shares, was deposited by PennCorp in trust, in connection with a 10-year warrant to purchase the common stock of PennCorp issued to Great American Insurance Company. The Merger Agreement and the Modification Agreement between the parties were executed on August 27, 1982. 13–D amendments filed by Federated, on December 10, 1982, state that it held approximately 53.8% of the MCO Holdings, Inc. total voting power. Federated, MCO and ''certain others'' filed a 13–D amendment to increase their UFGI ownership to 19.25%. Approximately one week later, MCO and American Financial Corporation executed a purchase and sale agreement which set forth the purchase by MCO of 603,448 shares of First American from American Financial Corporation. The Merger Agreement and the Modification Agreement were amended on January 10, 1983.

From November 23, 1982, until March 4, 1983, MCO Holdings acquired 60,200 shares of First American Common on the open market. At the same time, American Financial Corporation owned 20.18% of First American Common. Ten days later, according to an agreement of purchase and sale dated December 27, 1982, MCO Holdings purchased 603,448 shares of First American from American Financial Corporation.

By Bank Board Resolution 83–252, dated April 29, 1983, approval was given to merge First American Financial of Texas into UFGI and merge their subsidiary savings associations into USAT. This approval was conditioned on UFGI stipulating to maintain the regulatory net worth of USAT.

Sale of Branches to Independent American

In 1984, USAT sold several branches to Independent American Savings. When Independent American purchased the branches, it assumed liabilities of $1 billion in deposits. In order for Independent American to do so, USAT issued cash flow bonds in five series, labeled A–E, with coupon rates at 10%. Since the market price was at a yield of 15%, the spread between the two was a ''paper gain'' in fair market value. Although the gain was in paper, it had time value. The total ''paper gain'' was $90 million. The bonds were collateralized by mortgages. As mortgages under the bond paid down, the proceeds of the collateral were paid to the bond.

Following the branch sale to Independent American and the booking of the paper gain, a $32 million dividend payment was made to UFGI. The regulators approved a dividend for a certain percent of the amount, if the institution was profitable. The dividend was maintained in an USAT certificate of deposit.

Change in Real Estate Investment Strategy and Start-Up of Securities Trading Activity

It is apparent that United changed directions in 1982 after it was acquired through a purchase of its holding company, UFGI, by Charles Hurwitz and his related corporations. Prior to that time, United was a traditional savings association making residential and commercial real estate loans, primarily in the Houston market. In an attempt to remedy the problems caused by the Texas real estate depression and cope with the pressures of deregulation and interest rate fluctuation, the association changed its lending policies and began investing in securities. In hindsight, it appears that United's staff was not equipped for a transition from the lending activity of a traditional savings and loan under a regulated industry to a deregulated industry, utilizing high profile commercial lending and securities investments.

David Graham and Gem Childress are examples of this situation. Both were highly respected by the United staff and the thrift industry and had extensive experience in commercial real estate lending. Each held the position of executive vice-president in charge of real estate lending at the time of their departure in July, 1987. A new lending policy was created in 1983 directed toward high profile, glamorous commercial loan transactions, together with sophisticated securities investments. Some of the individuals who fit this high profile image were Jenard Gross, Mel Blum and Stanley Rosenberg. Employees like David Graham and Gem Childress who were oriented toward traditional saving and loan real estate lending were eventually terminated.

While Jenard Gross was considered a part of the high profile group, his knowledge of commercial real estate and his reputation with United staff was very high. He was a real estate developer, but appeared to be well respected by all who came in contact with him.

The high profile direction apparently led United into lending or investment relationships with which it was unfamiliar and not qualified internally to deal with. This is true in regard to loans or investments outside the Houston market. For example, United's staff relied on contacts such as Stanley Rosenberg, apparently a close friend of Charles Hurwitz, for development loans in San Antonio, Texas.

United, its subsidiaries, and its parent, UFGI, were apparently run by a small core group of individuals who participated in all activities. For example, it appears that the senior commercial loan staff was not included in the overall planning or direction of United. Once policy was made, the staff merely presented for approval applications that they felt had merit to the senior loan committee and ultimately the board of directors. Senior lending employees did not appear to have any real insight as to the overall direction of United or its serious financial condition. However, the core group, including Berner, Gross, Crow and Hurwitz, had knowledge of United's serious financial difficulties but continued to approve large commercial transactions in an attempt to generate new income form riskier loans.

United was in a relatively strong financial condition at the end of 1984. Total assets of the association were $3.9 billion, most of which consisted of single family residential home loans and a portfolio of construction and consumer loans of approximately $450 million. Liabilities consisted of branch deposits of $2.3 billion and reverse repos of $59 million. Investment activities were confined to treasuries and a small mortgage-backed securities (''MBS'') portfolio. At the time, in part because of real estate losses, emphasis shifted from real estate loans to securities investments. The various securities activities included equity arbitrage, high-yield securities (''junk bonds'') and MBS. Each of the portfolios is discussed in more detail in the following discussion.

High Yield Securities

Since its inception in 1985, the high yield securities area had four portfolio managers. Originally the portfolio was managed by Joe Phillips and Ron Huebsch. Subsequently, the program was managed by Terry Dorsey, then Eugene Stodart. Junk bonds were executed in United's account(s), with a small portfolio of warrants held by United Financial Corporation (''UFC''). Commercial bonds are debt instruments and were carried as commercial loans. Therefore, USAT could invest directly in junk bonds, but equity securities had to be held by its subsidiary, UFC. The portfolio was generally limited by policy to 11% of the total assets of United, 10% of which were included in the commercial loan section. The portfolio was not hedged with options because 70%–75% were fixed assets. The USAT liquidity investments, which generally consisted of government securities, were also handled by Stodart.

Our review has indicated that the junk bond department carried a modest net profit on the securities it traded. Because USAT booked the bonds at cost, the actual value of the bonds, which would vary from day to day, was not reflected. The estimated unrealized losses for 1987 were $47.9 million. Our focus has been on the trading strategies, the theft of corporate opportunities, and the possibility of insider trading and stock manipulation.

Equity Arbitrage

The equity arbitrage area was managed from inception in 1985 through January 6, 1989 by Ron Huebsch. The trading strategy involved the purchase of stock in a corporation which was undergoing a merger, acquisition, or tender offer. Profit or loss was based on the market movement or sale of the securities. The portfolio consisted of 95%–97% cash and 3%–5% preferred securities, debentures or debt securities. Our review has shown that equity arbitrage activities were profitable for 1985 and 1986, 2.5% and 5.7% respectively. Although equities profited in 1987, the ''market crash'' in October resulted in a $75 million loss over a two day period. Because of the profit prior to October, the

overall net profit or loss for the year was even. While the equity trading was profitable, our reconstruction of equity transactions in 1987 show an additional $26.5 million in unrealized losses.

Mortgage-Backed Securities

Aside from the small portfolio previously held, MBS activity was initiated approximately in early 1985 by United. UMBS was formed in 1987. The MBS portfolio had three managers since inception. Joe Phillips managed the portfolio originally and was replaced by Sandra Laurenson around October 1986. Laurenson resigned prior to February 1988 and was replaced by Dominic Bruno who resigned in January 1989.

Our review to date indicates that two basic MBS phases occurred. The initial program was initiated in 1985. United purchased MBS for use assets and borrowed the funds from various broker/dealers (reverse repos) to finance the securities using the same securities as collateral. The spread between the MBS and the reverse repos was approximately 200 basis points. The maturity of the short-term financing was extended through interest rate swaps and ''dollar rolls.'' When interest rates fell, the securities with higher coupon rates were sold which resulted in a profit. However, when the money realized from the sale of those securities was reinvested, the new securities yielded a lower rate while the cost of funds remained fixed. Thus, the spread was reduced or eliminated dramatically. Regular accounting did not require an adjustment of value of the securities to market and the securities were carried on the books at cost. Therefore, unrealized losses existed as the value of the securities fell. The unrealized loss at that time, based on the market value of the MBS portfolio and hedges, was in excess of $200 million.

In early 1987, the second phase of trading began, which was called risk control arbitrage (''RCA''). RCA is a growth, leveraging strategy which consists of purchasing MBS and its derivatives financed by short-tern liabilities, unusually reverse repos or dollar rolls. Since an interest rate risk exits between the long-term MBS and the short-term financing, hedges in financial futures, financial options, interest rate swaps, caps, collars and repos are utilized.

When interest rates declined in the initial phase described above, the association realized a profit on the assets over the cost of short-term funding. However, when interest rates increased, the association did not realize the losses. In addition, the risk of the lower coupon rate MBSs was not adequately hedged. Without discussing in detail each of the securities and financing types and how each related to the portfolio, the total unrealized loss at year-end for 1988 was in excess of $300 million.

II. DESCRIPTION OF INVESTIGATION

A. Scope of Investigation

The investigation of USAT began on December 31, 1988 with Hutcheson & Grundy (''H&G'') and Brill, Sinex & Stephenson (''BS&S'') acting as joint fee counsel on behalf of FSLIC. Brill, Sinex & Stephnson conducted the investigation arising out of commercial loan transactions, joint ventures and professional liability such as attorneys, accountants and appraisers. H&G investigated directors and officers liability issues arising out of securities transactions, including mortgage-backed securities and junk bond acquisitions by USAT.

The bulk of the investigation performed by H&G and BS&S was conducted in the first half of 1989. Thirty, sixty and ninety-day snapshot reports were issued by H&G and BS&S updating FSLIC on the status of the investigation. The preliminary conclusion from the initial investigation as to officers', directors', and other professionals' liability was that there did not appear to be any intentional fraud, gross negligence, or patterns of self-dealing. The most serious criticism of the officers and directors, in general, was that they exercised poor business judgment and were negligent in the management of the institution.

After mid-1989, several investigations have done forward on a case-by-case basis, and in some instances, litigation was initiated. The separately-handled matters, which will not be addressed in detail in his report, include: the Chapel Creek Ranch litigation, on the investigation of auditors and attorneys arising out of the Couch Mortgage transactions, litigation relating to the executive employee bonus plans, the dispute regarding UFGI's obligation to maintain the regulatory net worth of USAT, and the inter-company receivable due to USAT by UFGI on account of a tax refund.

The following is a summary of the work done by H&G and BS&S in conducting the professional liability investigtin of USAT.

In the initial investigation, we completed the review of offices and the control of files and documents of the association. In addition, an initial review of criticized loan and investment transactions was completed. We reviewed all relevant exam reports and supervising or correspondence, including the examination dated January 19, 1989 from the 10th District Examiners. We analyzed all board, executive, loan, and investment committee minutes. To the extent that other committees were pertinent, those minutes were reviewed. We interviewed all officers of the association down to the senior vice president level and two of the directors. Because of the potential litigation with UFGI, other directors have not consented to an interview. We also interviewed the supervisory agent, examiners, internal auditors and a variety of other United Savings employees. In addition, we met with the former attorneys for the association. These firms, Mayor, Day & Caldwell, and Schlanger, Cook, Cohn, Mills & Grossberg, were generally cooperative in all matters.

We inventoried over 400 lawsuits filed against United Savings and intervened on behalf of the FSLIC in lawsuits where appropriate. Where actions were not filed in federal court, we removed those cases. In each case, we prepared motions to dismiss and for summary judgment and have now achieved dismissal in almost all those cases. We also reviewed the allegations in the various lawsuits to determine if any issues were raised that would reflect on professional liability. We did not discover any issues that appeared to have substantial factual support.

The association had a fidelity bond policy issued by Victoria Insurance Company (''Victoria''). However, the association did not have an errors and omissions policy at the time of closing. As we have previously advised, the fidelity bond was subject to an indemnity agreement between the association and Victoria secured by a letter of credit at the Federal Home Loan Bank—Dallas. Thus, no third party coverage existed and we recommended the execution of a mutual release with Victoria. This release has been executed by the FSLIC and Victoria and the letter of credit at the Federal Home Loan Bank—Dallas securing the indemnity agreement has expired.

We have investigated the outside auditor for United Savings, the national accounting firm of Peat, Marwick & Main (''PM&M''). PM&M, formerly known as Peat, Marwick & Mitchell, had audited United Savings' financial statements from December 31, 1981 through December 31, 1987. We interviewed various individuals in connection with that investigation. In addition, we reviewed certain portions of PM&M's work papers for their audits of United Savings' financial statements for the periods December 31, 1983 through December 31, 1986, as well as selected audit plans of PM&M for those years. We also obtained and reviewed an investigative report conducted by the trustee for Couch Mortgage Company; and, to a lesser extent, we reviewed certain work papers of the national accounting firm of Ernest & Whinney (''E&W''), the independent auditors for Couch Mortgage Company. The results of our investigation of the auditors are contained in a report submitted to the FDIC on September 20, 1991.

FDIC Drexel Task Force

In the fall of 1989, we noted a pattern of activity in the investment area of USAT. This pattern involved the potential use of USAT by Hurwitz and Milken/Drexel as part of a network. On December 19, 1989, we wrote to Thomas Loughran at Finkelstein, Thompson and Lewis and Marta Berkley regarding this matter. At that time, we provided Loughran with various initial organizational documents including: (1) Pacific Lumber initial debt securities purchasers; (2) high-yield securities portfolio review of unrealized losses as of September 19, 1988; (3) directors and officers timeline; and (4) USAT chronology.

In September, 1990, we were contacted by the FDIC Drexel Task Force regarding the securities activity at USAT. Our initial meeting was with Frank Sulger, Gari Powder and Bill Carpenter of Thacher, Proffitt and Wood, Gary Maxwell of Kenneth Leventhal and Company, and Jamey Basham of the FDIC. During the meeting we discussed the possible ponzi scheme, the daisy chain network, and the ''grand conspiracy'' pertaining to the use of financial institutions by the corporate raiders. We also supplied the Task Force with the following: (1) expanded selected names mention list; (2) Drexel Burnham Lambert deal manager products charts; (3) 1986 and 1987 securities portfolio reconstruction charts and the related securities portfolio listings for 1986–1988; (4) possible quid pro quo analysis of Pacific Lumber note purchasers; (5) high-yield securities portfolio review of unrealized losses as of September 19, 1988; (6) high-yield securities purchase recommendation review; (7) interview recaps for Russell McCann, Eugene R. Stodart and Mary Mims; (8) materials regarding Transcontinental Services Group/TSG Holdings, Inc.; and (9) a memorandum regarding the credits chosen for sale in the autumn sales program. Subsequent to the meeting, the following items were given to Jamey Basham: UFGI ownership interests breakdown and chart, directories of USAT files, and a list of files removed from USAT by Berner.

In October, 1990, we were contacted by Cravath, Swaine and Moore. We discussed with Julie North and Veronica Lewis the same issues discussed in our earlier meeting in September. At this time, we provided photocopies of the exhibits to the USAT ''S'' memorandum. We also sent Cravath photocopies of the original documents produced to the Task Force in September. Additional documents provided to the Task Force include: Art Berner biography; a memorandum to Connell and Crow regarding the reasons for certain credits chosen for the autumn sales program; interview recaps for all of the officers/directors interviewed; Charles Hurwitz and related entities flow chart; review of certain UFGI shareholders; UFGI ownership interests; joint proxy statement—UFGI and First American Financial of Texas, Inc.; UFGI proxy statement excerpts, dated March 31, 1987; MCO Holdings, Inc. 1986

10–K excerpts; chronology of UFGI—First American merger; several newspaper articles; interview recaps pertaining to the January 12, 1989, interview of Brenda Bese, Michael Cline and Diane Buckshnis (FHLB–Seattle); Leonard Lepedis report; consent agreement, dated November 7, 1988; Caywood-Christian document evidencing the establishment of a managed account; high-yield and MBS speed call lists; consultant records pertaining to Walter Muller; MCO Holdings, Inc. and Maxxam Group, Inc. excerpts dated February 12, 1987; Drexel ownership interests information; minutes of the meetings of the board of directors of USAT for June 29, 1983, January 25, 1984, August 29, 1984, May 16, 1985, August 15, 1985 and February 19, 1987; Securities Market Oversight and Drexel Burnham hearings before The Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, April 27–28, 1988; summary of minutes of the meetings of the executive committee of UFGI 1987–1988; summary of minutes of the meetings of the executive committee of the board of directors of USAT 1984–1988; summary of the minutes of the meetings of the board of directors of UFC 1983–1988; summary of the meetings of the board of directors of USAT 1983–1987; summary of the minutes of the meetings of the board of directors of UFGI 1985–1987; Corporate Takeovers, hearings before The Subcommittee on Oversight and Investigations of The Committee on Energy and Commerce, House of Representatives, October 5, 1987; Maxxam's answers to questions raised by The Subcommittee on Oversight and Investigations, appendix A; documents entered into the record by The Subcommittee on Oversight and Investigations, appendix B; and possible quid pro quo and Drexel/Milken connection analysis chart.

FDIC Directors and Officers Investigation Unit-Dallas

In May, 1990, we provided Floyd Robinson a set of the original organizational charts pertaining to the securities transactions at USAT. These documents included: selected names mentioned list; materials involving Transcontinental Services Group; possible quid pro quo analysis of Pacific Lumber note purchasers; high-yield securities portfolio review of unrealized losses as of September 19, 1988; USAT and related entities securities transactions reconstructions; and Drexel deal-manager products charts.

In October, 1990, we were contacted by Richard Boehme regarding the USAT D&O investigation being conducted at the FDIC in Dallas. We produced to Mr. Boehme the same documents which were originally produced to the Drexel task force. In addition, we sent the asset review reports, USAT snapshot investigation reports dated January 31, 1989, March 17, 1989, and April 10, 1989, and correspondence, dated September 19, 1989, to Thomas J. Loughran.

The following documents have also been sent to the investigative unit at the FDIC: possible quid pro quo and Drexel/Milken connection analysis chart (sent to Richard Boehme); inventories of the original and photocopied corporate USAT documents located in our office and in off-site storage (sent to Bruce Dorsey); a revised expanded selected names mentioned list (sent to Mike Wysocki); USAT snapshot investigation reports dated January 31, 1989, and March 17, 1989, correspondence, dated December 19, 1989, to Thomas Loughran, correspondence, dated December 19, 1989, to Marta Berkley, correspondence and report on potential auditor's claim arising out of the USAT receivership, dated July 11, 1989, prepared by Brill, Sinex and Hohmann, ''S'' memorandum recommendation, USAT/UFGI time line, segregated time lines for United MBS Corporation, United Capital Management Corporation, United Financial Group Inc., United Financial Corporation and USAT; and memoranda, dated January 24, 1989 and March 7, 1989, from Ami Hohmann regarding utilization of the time lines (sent to Gene Golman).

We have also been contacted by Sandra Northern at the FDIC in Washington who requested and received copies of the following documents: UFGI ownership interests, Hurwitz-related entities flow-chart, Hurwitz asset search report, and excerpts from the Columbia Savings and Loan Complaint, dated December 12, 1990, evidencing allegations relating to Hurwitz and USAT.

B. Completion of the Investigation

In April 1991, the FDIC attorney-in-charge of the professional liability investigation, Robert J. DeHenzel, Jr. requested that we complete the investigation and provide a written report and litigation recommendations. In completing the investigation, we conducted several more interviews, including the former Vice-President and General Counsel of USAT and UFGI, Arthur Berner. We also completed the analysis of the commercial loan and joint venture transactions, most notably by obtaining title company documents on the Park 410 loan transaction. We then reviewed, analyzed and coordinated all data obtained from the earlier investigation to the present. Finally, H&G and BS&S attorneys met to coordinate the results of their respective portions of the investigation and to reach a consensus on conclusions and recommendations.

III.

A. Applicable Standards CLAIMS AGAINST OFFICERS AND DIRECTORS

The standards applicable to the directors of USAT require a showing of gross negligence or worse, a breach of fiduciary duty, violation of statutory duty, or the receipt of an unlawful benefit. The officers are held to the ordinary corporate duty of care and loyalty. Section 212(k) of FIRREA (18 U.S.C. 1821(k)) provides that a director or officer of an institution may be held personally liable for damages for ''gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence), including intentional tortuous conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.''

Under FIRREA, therefore, an officer or director is liable for those standards imposed by the common law of the applicable jurisdiction, or in the absence of a higher standard, gross negligence or worse conduct as defined by state law. The Supreme Court of Texas defines gross negligence as ''that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.'' Williams v. Steves Industries, Inc., 699 S.W.2d 570, 572 (Tex. 1985), quoting, Burk Royalty Co. v. Walls, 616 S.W.2d 911 920 (Tex. 1981). the court went on to say that

''[The] plaintiff may prove a defendant's gross negligence by proving that the defendant had actual subjective knowledge that his conduct created an extreme degree of risk. In addition, a plaintiff may objectively prove a defendant's gross negligence by proving that under the surrounding circumstances a reasonable person would have realized that his conduct created an extreme degree of risk to the safety of others.'' Id. at 573.

Effective August 31, 1987, Texas adopted a statute allowing an institution organized under the Texas Savings and Loan Act, Article 852a of the Texas Revised Civil Statutes, to limit the liability of directors. That statute, Tex. Rev. Civ. Stat. Ann. art. 1302–7.06B (Vernon Supp. 1991), provides:

''The articles of incorporation of a corporation may provide that a director of the corporation shall not be liable, or shall be liable only to the extent provided in the articles of incorporation, to the corporation or its shareholders or members for monetary damages for an act or omission in the director's capacity as a director, except that this article does not authorize the elimination or limitation of the liability of a director to the extent the director is found liable for:

''(1) a breach of the director's duty of loyalty to the corporation or its shareholders or members;

''(2) an act or omission not in good faith that constitutes a breach of duty of the director to the corporation or an act or omission that involves intentional misconduct or a knowing violation of the law;

''(3) a transaction from which the director received an improper benefit, whether or not the benefit resulted from an action taken within the scope of the director's office; or

''(4) and act or omission for which the liability of a director is expressly provided by an applicable statute.''

In February, 1988, USAT, a Texas chartered savings and loan, amended its Articles of Association to track the statute in large part and provide that:

''No director of this Association shall be liable to the Association or its shareholders or members for monetary damages for an act or omission in such director's capacity as a director except for the acts or omissions set forth below:

''1. A breach of the director's duty of loyalty to the Association or its shareholders or members;

''2. An act or omission not in good faith or that involves intentional misconduct or a knowing violation of the law;

''3. A transaction from which the director received an improper benefit, whether or not the benefit resulted from an action taken within the scope of the director's office;

''4. An act or omission for which the liability of the director is expressly provided for by statute; or

''5. An act related to an unlawful stock repurchase or payment of a dividend.

''If the Texas Miscellaneous Corporation Laws Act or other applicable law (herein collectively referred to as the ''Act''), hereinafter is amended to authorize the further elimination or limitation of the liability of directors, then the liability of a director of the Association, in addition to the limitation on personal liability provided herein, shall be limited to the fullest extent permitted by the Act as so amended. No amendment to or repeal of this Article EIGHTH shall apply to or have any effect on the liability or alleged liability of any director of the Association for or with respect to any acts or omissions of such director occurring prior to such amendment or repeal.''

We found no Texas case law addressing the applicability of this statutory liability limitation provision. However, the utilization of the statute by directors who may be the targets of claims is clearly contemplated by the statute. In its original enactment, the 1987 statute stated that the limitation did not apply to acts or omissions occurring before the effective date of the Act. Accordingly, it could be argued that the liability of the directors of USAT is not limited as to acts occurring either before the effective date of the statute (August 31, 1987), or even before the date that USAT amended its Articles to incorporate the limitations (February 1988).

The standards applicable to officers continue to include good faith and prudence in

the performance of their duties which must be carried out with ordinary care and diligence, First State Bank v. Metropolitan Casualty Ins. Co., 79 S.W.2d 835, 839 (Tex. 1935), and which may not be delegated to strangers. Brand v. Fernandez, 91 S.W.2d 932, 939 (Tex. Civ. App.—San Antonio 1935, writ dism'd).

In summary, while officers are held to an ordinary standard of reasonable care, it could be argued that a claim against a director must allege at least gross negligence or breach of fiduciary duty (duty of loyalty), self-dealing (receipt of improper benefit), or violation of a statutory duty.

The defenses commonly raised in actions against directors and officers are application of the business judgment rule, reliance on counsel or consultants or management, lack of causation, contributory negligence, or failure to mitigate. The business judgment rule, a common-law principle recognized in Texas, provides that an officer must discharge his duties with the care of an ordinary prudent man under similar circumstances. Therefore, honest mistakes of judgment are not actionable.

B. Securities Investment and Trading

The directors and senior officers of USAT were primarily people who understood the savings and loan industry in Texas when it was based on the local real estate market. After the collapse of the real estate market and the refocus of the institution on the securities markets, the directors and officers were unprepared to meet the challenge of adequately directing and supervising investments in the incredibly complex and sophisticated securities available and marketed to the savings and loan industry. We focused primarily on those senior officers and directors who had ties to UFGI and Hurwitz, including Gross, Berner, Crow, Heubsch and Munitz. We also looked specifically for evidence of speculative trading, theft of corporate opportunity, insider trading, and stock manipulation. While we did find evidence of speculative trading as outlined below, we found no direct evidence of insider trading, stock manipulation or theft of corporate opportunity by the officers and directors of USAT. We did find evidence that Charles Hurwitz may have used USAT in connection with insider trading or stock manipulation, and those findings have been turned over to the appropriate task force in Washington.

Specifically, our review disclosed evidence of acts and omissions which could form the basis of negligence, breach of fiduciary duty or fraud claims, which are fully outlined in the *Interim Report on the Securities Investigation of United Savings Association of Texas* dated April 29, 1991. First and foremost among those possible claims is the apparent relinquishment of direction and control of the investment policy of USAT to Charles Hurwitz, evidenced by:

1. the statements of Mike Crow, Mike Canant, and Jeff Gray;
2. the views of the financial world at the time;
3. the fact that James Paulin, who established the investment department at USAT, was not a USAT employee, but an employee of Hurwitz controlled Federated, Inc.;
4. the location of the securities trading area as well as the offices of Mike Crow, Financial Vice President, Bruce Williams and Jim Wolfe on the twenty-second floor of MCO Plaza, the same floor which housed Hurwitz, the corporate offices of Federated, Inc., and other Hurwitz controlled entities while other upper level management was located on the sixth floor of MCO and in Phoenix Tower;
5. the employment by USAT of Hurwitz employees and associates, and dual employment of certain officers and key personnel by USAT and UFGI or Hurwitz controlled entities;
6. the lack of control or supervision of the equity arbitrage transactions completed by Ron Huebsch for the USAT subsidiary, United Financial Corporation, and for Maxxam and other Hurwitz controlled entities;
7. the fact that the Investment Committee minutes were created after the fact and were not an accurate reflection of the deliberations or actions of that Committee;
8. the fact that the Investment Committee was a joint USAT and UFGI committee;
9. the Transcontinental Services Group transaction.

To the extent it is acknowledged at all, the officers and directors justify their willingness to consult with Hurwitz on the basis of Hurwitz's expertise in the securities area and his status as the ultimate controlling shareholder. While circumstantial evidence of this delegation is good, the testimony of the witnesses will vary as to the extent of Hurwitz's influence. Given the actual or perceived necessity of turning from traditional investments in real estate to the fast paced, more complicated securities arena and the lack of expertise on the part of the directors, the fact that Hurwitz, who was Chairman of the sole shareholder, was allowed to fill the gap does not seem to pose an extreme degree of risk to the institution or its creditors. Nor does the officers' willingness to rely on available expertise of a party they have every reason to believe has no conflict with the institution necessarily violate the prudent man rule.

Secondly, our review disclosed that the officers and directors approved transactions designed to defeat or evade safety and soundness regulations. Our investigation disclosed that the officers and directors of USAT authorized and directed a profit-taking strategy requiring significant speculative trading, and allowed the accounting department to book the securities as investment accounts rather than trading accounts. Since the securities booked as investments were carried at cost rather than market value, the books of USAT failed to reflect the true value of USAT's assets. Perhaps more importantly, the officers and directors not only authorized but demanded gains trading, i.e., the taking of profits in the portfolios and holding unrealized losses at cost, regardless of future income stream loss, to meet the capital requirements at each quarter end. USAT's outside auditors, Peat Marwick & Mitchell raised concerns about the amount of activity in the investment account, but eventually approved the USAT accounting procedures. The officers and directors have justified the trading activity on the basis of the volatility of the market in which they were investing. Investigation and reconstruction of the trades indicate that as of 1987, there were approximately $74.4 million in net unrealized losses in high-yield and equity portfolios alone. Obviously, as of any particular date, there would be unrealized losses even in a properly managed investment portfolio carried at cost on the books. Determination of actual damages will require the development of an economic model by an economist to determine the proper investment strategy had the institution not been taking profits to maintain capital requirements. In view of the consultation and reliance on outside auditors, it will be hard to prove gross negligence or breach of duty unless there was actual fraud and we have been unable to find such evidence.

Third, the officers and directors failed to establish and follow safe and sound investment policies, failed to properly institute and monitor internal controls on investments and the investment department, and failed to hire and maintain employees with requisite experience and knowledge to handle the complex and risky investments undertaken by the institution. These failures are evidenced by:

1. The gains trading or profit taking activity conducted without regard to ultimate effect on investment portfolio;
2. Post execution approval of transactions and approval without sufficient information as to beneficial owners or control persons;
3. Lack of control or supervision of trading in equity arbitrage area, including daily removal of files;
4. High turnover of employees in each securities area;
5. Employment of inappropriate people without thrift experience, such as Sandra Laurenson, a trader from Solomon Brothers, to manage an investment portfolio;
6. Failure to investigate default rate on given bonds and adequately reserve for losses;
7. Employment of advisors such as Caywood-Christian Capital Management, Walter Muller, and others;
8. Participating in risky mortgage backed securities or derivative transactions without adequate capitalization or funding;
9. Retaining poor investments because sales would require disclosure of losses;
10. Failure to recognize the effect on the market of the monopolies of Solomon Brothers in MBS and Drexel in junk bonds;
11. Investment by officers in companies in which USAT's subsidiary, United Capital Ventures, also held interests.

The proof indicates more than anything else that the directors and senior management found themselves trying to keep the institution afloat and play an entirety new ball game at the same time. While the profit taking strategy is well established, the directors' motivation was maintenance of the institution in compliance with the capitalization requirements and not self gain or violation of their duty of loyalty. The business judgment rule will be the primary defense to this cause of action. It will be difficult to show gross negligence on the part of the directors, and the efforts at control undertaken by the officers may not be far from that which would have been undertaken by reasonably prudent persons faced with the same volatile market.

Finally, we found some evidence of self dealing, or misappropriation of funds. Under the Texas statute, the directors would be liable only for transactions which resulted in ''improper benefits'' to individual directors.

Specific directors who benefitted from questionable payments included Jenard Gross, Barry Munitz and Robert Kuhn. The payments each have some ostensible purpose and the totals for those payments we discovered are small, amounting to approximately $50,000. We do not feel this is a strong claim.

There were also significant salary increases for officers between 1987 and 1988, as well as unusually substantial bonus packages. These increases and bonuses have been justified as necessary to retain the officers for the benefit of the institution and will be discussed later in this report.

We also carefully reviewed the securities transactions to determine if the relationship between USAT and Hurwitz and UFGI resulted in the diversion of USAT opportunities available to other Hurwitz entities. Although Heubsch traded equities for numerous Hurwitz entities and we believe Hurwitz directed certain purchases to further his takeovers, we found no evidence of direct diversion of opportunities. Heubsch often bought the same securities for several Hurwitz companies and when there were differences, they were generally related to the

status of the other investments in the portfolio.

We found that several of the officers and directors had invested in the same entities as USAT's venture capital arm, but there was no evidence that the benefits would have otherwise accrued to USAT. Our investigation did not disclose a sufficient basis for a claim of theft of corporate opportunity.

We also reviewed the relationship between the traders and the securities industry to determine if there were payments, prizes or rewards which could constitute commercial bribery, but the few items we found were insufficient to support a claim.

In summary, the best claims against the directors and officers involve their delegation of their duty to manage and direct to Hurwitz, and the authorization of speculative trading and accounting procedures which did not reflect the true value of the institution. While it is extremely difficult to evaluate these claims at this time, we believe the likely percentage of success on liability issues is in the 40–60% range.

C. Compensation Arrangements

We received the significant salary increases which the officers and directors provided to the officers as well as the substantial bonus arrangements. These compensation arrangements are the subject of separate lawsuits and are not addressed in this report except as evidence of other claims which could be brought.

D. Real Estate Transactions

After investigating transactions which represent 85% of the value involved with substandard loans, no clear trends have emerged to reveal any pattern of self-dealing with respect to real estate lending and joint ventures. Various federal regulations were given particular scrutiny; those regulations include:

12 U.S.C. §84—Loans to a single borrower in excess of 15% of capital;

12 U.S.C. §375a—Limits on loans to executive officers;

12 U.S.C. §375b—Prohibition on preferential loans to directors of subsidiaries and holding companies. Limits on loans to executive officers and shareholders of 10% or more;

12 U.S.C. §1828(j)—Prohibition on preferential loans to officers and directors;

12 CFR §563.9–3—Loans to one borrower;

12 CFR §563.17—Safe and sound management practices;

12 CFR §563.40—Prohibition on affiliated person from receiving fees or other compensation with their procurement of a loan;

12 CFR §563.41—Places restrictions on real property transactions with affiliated person; and

12 CFR §571.7—Deals with conflicts of interests.

The following are summaries of our investigations and recommendations:

1. Park 410. The transactions involving Mr. Stanley Rosenberg were strongly criticized by the FHLB examiners, particularly the Park 410 transaction in San Antonio, Texas. Mr. Rosenberg is related to USAT because he is a shareholder and director of MCO Holding, Inc. which owns the largest single shareholder interest (13.5%) in UFG, the parent company of USAT. M. Rosenberg is a close personal friend of Charles Hurwitz, who is also a shareholder and director of MCO Holding, Inc. and a director of UFG. Mr. Rosenberg can be considered an affiliated person for purposes of conflict of interests (12 CFR §571.7), unearned transactions (12 CFR §563.41). It is our preliminary opinion that Mr. Rosenberg would be an affiliated person who indirectly acting in concert with other shareholders of UFG, the parent company of USAT, controlled the election of directors of USAT. As such, Mr. Rosenberg should not have received unearned fees or participated in transactions in which he would have conflicts of interest.

The Park 410 loan transaction had a number of deficiencies. First the loan was approved by the Senior Loan Committee of USAT even thought e appraisal did not support the full $80 million loan amount. Second, the loan was secured by letters of credit. In addition, the letters of credit were renewable yearly but the note term was for five years. Thus USAT ran the risk that the letter of credit would not or could not be renewed in the future.

Third, Stanley Rosenberg received $400,000 directly from the USAT loan proceeds at closing as a fee for the ''service'' of securing the USAT loan. The fee was not disclosed in the loan application made by the borrower's agent, Gulf Management Resources, Inc. In addition, the loan funds a quarterly management fee ($75,000 per quarter for the first three years of the loan, $50,000 per quarter in the fourth year, and $37,500 per quarter in the fifth year), payable to Gulf Management Resources, Inc., which in turn pays Stanley Rosenberg 25% of that fee, apparently for no present or future services. All of these unearned fees were paid to Mr. Rosenberg in violation of 12 CFR §4563.40, if Rosenberg is in fact an affiliated person.

Fourth, disbursements made at closing were not fully disclosed, as there was no reconciliation of proceeds disbursed directly to borrower and no discussion of disbursement to C.R. McClintock of funds paid directly to Alamo Savings Association by USAT. There was a very large sum of money which C.R. McClintock and/or Alamo Savings and Loan made from selling the land to Park 410 West Joint Venture, which is difficult to tract. Also, the closing statement shows the amount of $2,915 million was disbursed by the title company to Park 410 West Joint Venture, the borrower, for reimbursement of expenses, but it is unknown where these funds then went. There are indications that Mr. Rosenberg may have gotten these funds since his own limited partnership agreement reflected that he had advanced $2.198 million into the initial Park 410 Venture. The documents we reviewed at the title company and Alamo Savings shed no further light on this situation.

Finally, in addition to an extremely deficient file on the collateral and credit information on the loan, the appraisal prepared by Edward Schulz for USAT failed to provide an appropriate analysis of values under the three approaches, violating R41b(3).

The probability of success in respect to Mr. Rosenberg being considered an affiliated person is good, but not necessarily without question. Mr. Rosenberg also has a large personal guaranty in respect to the Park 410 transaction with USAT. A settlement proposal has been made by the borrowers to FDIC to work out the Park 410 loan. At this time, it is not known how much the losses will be on this loan, if any.

2. Gateway Joint Venture. This transaction also involved Stanley Rosenberg but primarily as a Guarantor for the top 25% of this $920,000.00 obligation. The makers on the note were E. John Justenia, Gordon A. Woods and Lee R. Sandoloski, Stanley Rosenberg's son-in-law.

The appraisal of the property which was the collateral used in this transaction appears to have been competently researched and prepared, although slightly optimistic.

The structure of the loan provided for a rate 1.5% over prime with a 24 month term. United was granted a 15% net profits interest, and it was anticipated the loan would roll into a ''mini-perm'' with a five year maturity. The funding of the ''mini-perm'' gave United a 40% net profits interest. In November of 1988 United requested that FHLBB allow refinancing of the subject note since cash-flow was below projected rates for Gateway. The request was granted on December 8, 1988, with the following terms:

1. Extension of note term to January 1, 1991;

2. Per annum interest under note to be 10.5%;

3. Effective December 1, 1988, through December 1, 1990, borrower pays only interest as it accrues;

4. Payment of monthly installment of accrued and unpaid interest in excess of 8.5% per annum may be deferred until maturity; and

5. Borrower to provide operating statements, rent rolls, year-end operating statement and annual audited financial statements.

We understand from USAT that there have been no losses recognized on the Gateway loan.

3. Park 10. This loan, in the amount of $16,000,000.00 was made by way of a non-revolving line of credit loan agreement dated December 17, 1986. The interest rate is Texas Commerce Bank's prime rate plus 1.75% with interest payments to be made monthly. This loan was primarily granted to provide funds for the payment of interest of outside debts. The maker of the note was Park 10 Limited which is a Texas limited partnership. The general partner is Park 10 Corporation which is wholly owned by Neil C. Morgan. Morgan is also the limited partner of Park 10 Ltd.

Morgan executed a Continuing Limited Guaranty which provides that he is personally liable to a maximum of $3,000,000.00 which is declining with each monthly interest repayment. As of this year, Morgan's guaranty has been exhausted. park 10 Ltd. was then placed in bankruptcy with a loan balance due to USAT of in excess of $16 million. However, it is our understanding from USAT that Morgan is making arrangements to satisfy this debt.

Collateral on the loan is ''Park 10 Development''. The repayment of the loan is based solely on the sale of this collateral property.

There does not appear to be any evidence of payments which could be classified as fraudulent transfers, kickbacks, or forms of disguised compensation. The substandard classification of this loan was necessarily based on the liberal structure of the loan, the declining limited personal guarantee of the principal and the lack of a demonstrated market for the collateral property as well as the uncertainty of the timing and source of repayment. The the stock of Yellow Cab. The transaction was apparently structured as a subordinated loan with warrants using a second-tier subsidiary in order to allow USAT to avoid the equity risk investment and loans to affiliates rules contained in 12 C.F.R. Sections 563.9–8 and 563.43. Yellow Cab, at its option, had the right to cause WMI to exercise its warrants in payment of the $2,200,000 loan.

The documentation does not support the concept of a standard loan transaction. Yellow Cab did not have cash flow sufficient to service the debt incurred in acquiring the Eagle stock, no payments are required or even permitted on the $2,200,000 note prior to 1990, and Yellow Cab has the option to cause WMI to convert the warrants to stock at Yellow Cab's option.

The interest rate on the $2,200,000 loan was 15% per annum, and no due date is specified on the note, despite a one-year term which is specified in the Purchase Agreement. The stated purpose of the $2,200,000, according to a memorandum in the file, was to allow WMI to make an equity investment in Equus Transportation, Inc., without violating the

equity risk investment and loans-to-affiliates rules. Equus was perceived as a candidate for an initial public offering of its stock which would allow USAT the opportunity to obtain a ''significantly enhanced return'' on its investment.

Almost from inception, Yellow Cab experienced cash flow problems. In order to meet additional cash flow requirements, WMI loaned Equus an additional $500,000, evidenced by a promissory note dated July 1987 and received warrants to purchase 400,000 additional shares of Equus' common or preferred stock at a purchase price of $1.25 per share. The interest rate on this $500,000 loan was also 15% per annum, and again, no due date was specified in the note. Equus has the right to roll over principal and accrued interest on the first through fourth anniversary dates and, on the fifth anniversary date to the extent that WMI's exercise of the additional warrants, if any, has not fully discharged the $500,000 note, Equus has the right to give WMI a five-year term note bearing interest at 15% per annum, principal and interest of which are to be paid monthly.

USAT's participation in the Yellow Cab transaction appears to evidence poor business judgment at best and possibly gross negligence. USAT performed almost no underwriting or analysis on the loan and the files do not even contain a loan application. USAT's obligation to loan funds to WMI was open-ended and USAT pledged its own assets as collateral for WMI's obligation on the $4 million letter of credit. Corporate formalities were not followed as all employees of WMI were employed and paid by USAT.

We did not uncover, however, any evidence of any insider relationship to the transaction or any self-dealing by officers and directors with respect to the transaction. USAT has not yet provided us with loss figures for this transaction, and the losses may not yet be fully known.

6. Jerald Turboff Transactions. Prior to November 1985, Jerald Turboff had been involved in a number of loan transactions with United Savings Association of Texas which appear to have been made at arm's length and did not result in any losses to USAT. In November 1985, Turboff approached USAT with a business proposal that resulted in four distinct but related transactions. On its face, Turboff's proposal appeared advantageous to both parties; however, because of declining property values and Turboff's cash flow problems, the transactions ultimately resulted in losses for USAT.

The Turboff transactions are described in detail in the BS&S Interim Report. We concluded there that the transactions appeared to have a legitimate business purpose and that no evidence of misconduct was uncovered. USAT's actual losses on these transactions has not yet been determined because they all involved the sale of USAT REO which it eventually got back. Because these were non-income producing properties, we do not believe that the aggregated losses were that significant. Again, these transactions are more easily criticized in hindsight as evidencing poor business judgment.

7. Warwick Towers Venture. The Warwick Towers loans were originated in 1983. An $11,840,500 loan was made by Warwick Towers Venture and guaranteed by the John W. Mecom Company. The Warwick Towers Venture was also the maker on an additional non-recourse loan for $16,995,000. The original loans were made with very poor underwriting analysis and with very favorable terms to the borrower. When the project did not perform as expected, USAT entered into a settlement agreement with the borrower and guarantor, again with little underwriting analysis. USAT released the obligations of the borrower and the guarantor in exchange for an assignment of units in the condominium project and an assignment of a $10 million promissory note payable to the New Orleans Saints. Stanley Rosenberg was one of the guarantors of the $10 million note, but we were unable to discover any other connection Mr. Rosenberg had to the transaction.

The $10 million promissory note was paid, however, USAT lost money on the sale of the condominium units. Concerns have been raised regarding the unusual method by which the units were marketed, involving a sale and lease-back of the units by USAT. However, during the time period in which the units were marketed, 1985–1986, Houston had an extremely soft market for luxury high-rise condominium units.

No wrongdoing or self-dealing was discovered in this transaction, but there were several violation of regulations,

including 12 C.F.R. §563.17 (failure to obtain appraisals prior to making the loan).

8. North Lake (f/k/a Westgate). This was a joint venture of USAT's subsidiary, UFG, and was carried on the general ledger accounts. The date of the loan was August 1, 1984, and the maker on the note was United Financial Corporation. Principal was to be repaid when land was sold.

The stated purpose of the joint venture was to develop tracts of land totalling 272.4 acres located in the northeastern portion of San Antonio, Texas. United Financial Corporation was obligated to fund all principal and interest in this transaction, which was originally estimated to have run $7.5 million on top of $7.5 million needed to service the first, second and third liens against the subject property. An appraisal was prepared by Love & Duggen, M.A.I., of San Antonio, Texas, and indicates that the property had a ''developed'' value of $17,800,000 and an ''as-is'' value of $14,840,000 as of January 13, 1987. No analysis of UFC's credit was revealed in a search of the files and is unlikely to exist, as UFC owns the property 100%.

There is no collateral in the usual sense of the word, as UFC owns 100% of the property. There have been no land sales and therefore no repayment.

Stanley Rosenberg, who served on the board of UFC, is a partner in the law firm that performed $9,500 worth of work on this project; and he is also president of Blazers, Inc., the project's managing partner. The structure of this transaction wherein UFC owns the property calls into play restrictions on real property transactions and loans to affiliated persons addressed in 12 C.F.R. Sections 563.41 and 43.

9. Eagle Hollow. This loan was dated September 16, 1982, and was in the principal amount of $9.7 million. The makers of the note were Eagle Hollow Partners, Ltd., Walter B. Eeds, David C. Hetherington, and The Greystone Group. The term of the note was eight years at an interest rate of 12.75% plus 50% of cash flow and 50% of profits due at sale or time of refinancing. The stated purpose of the loan was to provide a portion of the funds necessary to refinance the acquisition of real property consisting of 10.003 acres which was located 12 miles west of downtown Houston adjacent to Shell Oil Company's facility at Dairy Ashford and Interstate 10. There were to be 351 units in 21 separate buildings with 280,718 net rental square feet. The loan was to be non-recourse except for $2.2 million that was to be guaranteed by Walter B. Eeds and David C. Hetherington jointly and severally. An appraisal was conducted by Edward Schuly & Company on two separate occasions. On January 16, 1981, the property appraised for $10 million. An April 14, 1982, the property appraised for $11,500,000. An appraisal was also ordered for May 1986 but was cancelled at the request of USAT.

10. The Market at Hunting Bayou. This transaction involved two separate loans, approved in February 1985, one for $7,050,000, which was for the retail portion of the Market at Hunting Bayou, and a $2 million loan for an adjacent tract of land. Makers on the note were Larry Schulgen and the Market at Hunting Bayou, Ltd. Guarantors were Larry Schulgen, Leo Womack, George Gilman and Dan Sharp. The $7,050,000 loan was approved for the acquisition of 12.603 acres of land and to develop a shopping plaza. The $2 million loan was approved for the acquisition of 13.41 acres of land and 2.4973 acres of leasehold interest with the term of that lease being 99 years. The land and leasehold interest which were collateralizing the $2 million loan were contiguous to the 12.603 acres previously purchased for the development of the shopping plaza.

The approval of the total loan package of $9,050,000 was subject to an appraisal indicating a maximum loan-to-value ratio of 80%. The original appraisal for USAT was completed by Edward B. Schulz & Company on January 31, 1985. The appraiser, Lot Braley, issued an opinion based on the fair market value of the land and the proposed shopping complex. The appraised value of the land and proposed shopping center was estimated to be $11,300,000. The appraiser's report was issued to USAT; and, based on that report, USAT recommended a loan ratio of 80%. The total loan package of $9,050,000 was proposed by the Senior Loan Committee of USAT and accepted by the Market at Hunting Bayou, Ltd. The construction loan checklist makes reference to the compliance with R. 41b, but this is the only notation of compliance with the Regulations. There was no other mention in any of the Senior Loan Committee reports about the accuracy and/or adequacy of the appraiser's report and compliance with the standard set down in 12 C.F.R. Section 563.17–1a.

At the time the Senior Loan Committee was anticipating an amendment to the project at the Market at Hunting Bayou, it requested an appraisal from Cushman & Wakefield. The appraisal was completed by Paul Smith. On October 18, 1985, he appraised the property and improvements to be valued at $9,820,000. Based on this reduced appraisal value and the increasing softness of the general retail market, the Senior Loan Committee approved the proposal submitted by L. Schulgen to develop the tract into sites for miscellaneous uses such as restaurant pads, office, medical arts center, and to establish release prices based on an allocation of the loan to these proposed sites. At the time of the proposal, the borrowers were negotiating the sale of a 1.15-acre restaurant pad and had received interest in two additional sites.

After the Market at Hunting Bayou filed bankruptcy on August 7, 1986, the bank requested an investigation into the maker and guarantor's financial standing. This investigation was conducted by Pinkerton Investigation Service. The report is dated November 4, 1988. Prior to the financial problems of the Market at Hunting Bayou and in an attempt to keep the loans viable and to give the project a chance to succeed, USAT granted a $180,000 loan on January 6, 1986, to pay delinquent interest on the $2 million loan and accepted a $20,000 promissory to pay the origination fee on the $180,000 loan. After repeated demand letters for satisfaction of the debt and threatened foreclosure against the properties and shopping center, USAT entered into an agreement with the borrowers. There continued to be problems with the loans, and letters continued to be exchanged between USAT and Schulgen.

USAT files indicate that the Market at Hunting Bayou filed bankruptcy in the

Southern District Bankruptcy Division in Houston. The case number is 87–07584–H–11. The plan contemplates that certain payments to other creditors will be made out of the cash flow before distributing net revenues to United Savings. The plan is unclear as to the amount of the debt that will be allowed to USAT. It does not appear from the loan file that these loans were related to any other loans or transactions held by USAT.

11. Woodcreek Apartments Phase II. The date of this loan is shown as being June 5, 1987, with the maker on the note being Woodcreek on the Bayou Phase II Apartments Partnership. There were no guarantors for the note, but the nominees are the general partners, Paul C. Jacobson, Allen P. Jacobson, Gene P. Jacobson, and Evan K. Jacobson. The face amount of the non-recourse note was $1,665,000, and the due date on the principal is June 15, 1997. The stated purpose of the loan was the sale of REO. The Loan Workout Committee for REO sales approved the sale and loan to the partnership on May 7, 1987. The structure of the transaction called for Woodcreek on the Bayou Phase II Apartments Partnership to purchase the property by assuming a note with a remaining balance of $1,665,000 and placing a second lien against the property for $203,000. The terms of repayment provided for interest only in years 1 through 5 and principal and interest in years 6 through 10. Amortization was to be on a 30-year schedule with a balloon payment due at the end of the tenth year. Interest was to be set for 3% in year 1 and increase by 1% in years 2 through 5. Then beginning in year 6, the interest rate would go to 10% and remain at that rate until final payment.

The property was appraised on June 23, 1986, by William L. Behas, M.A.I.—S.R.P.A. of Behas & Associates. The land was valued at $912,235, and the improvements after rehabilitation were appraised to be valued at $1,462,765 for a fair market value of $2,375,000. Rehabilitation of the improvements, however, were expected to total $595,000, leaving a fair market value at the time of the appraisal of $1,780,000. The appraisal was done on behalf of United Savings Association of Texas.

12. Northpoint Square. The date of the loan is July 26, 1987, and the maker on the note is Northpoint Square Apartments Partnership, Paul C. Jacobson, general partner. There were no guarantors for this transaction. The face amount of the note is $3,105,000 and the due date of the principal is June 26, 1997, the last payment being a balloon payment. The loan was approved by the Loan Workout Committee, and the transaction was structured so that Northpoint Square Apartments Partnership would purchase the property for $3,405,000, which included the partnership's promissory note for $3,105,000. The terms of repayment provided for interest only in years 1 through 5, and principal and interest in years 6 through 10. Amortization was to be on a 30-year schedule with a balloon payment due at the end of the tenth year. Interest was to be set for 3% in year 1, and increase by 1% in years 2 through 5. Then beginning in year 6, the interest would go to 10% and remain at that rate until the final payment.

The property was appraised on February 18, 1987, by William Murphy, M.A.I., S.R.P.A., of Murphy, Kirby & Associates and was valued at $2,500,000. An analysis of credit did not appear in the materials provided for our review; but shortly after the sale closed, the partnership fell behind in its payments and remained so until foreclosure in 1988. USAT made loans to various entities which, like the borrower in this instance, were controlled by Allan P. Jacobson, Gene P. Jacobson, Paul C. Jacobson, and Evan K. Jacobson. However, it does not appear that the loan-to-one borrower rule would be violated due to the size of USAT.

13. Cinco Ranch. Cinco/Watson J.V. was formed as a joint venture of United Savings Association of Texas and Dempsey Watson for the purpose of investing in real estate. Cinco/Watson purchased 22 commercial tracts totalling 379.83 acres within Cinco Ranch for a purchase price of $33,345,434. Twenty percent of the total purchase price was paid as a down payment, and a non-recourse note was executed in the amount of $26,676,347. Makers on the note were Cinco/Watson Joint Venture, and the payee was Cinco Ranch Venture. Accrued interest was to be paid on June 10 and December 10 of each year, commencing on June 10, 1985, and continuing through and including June 10, 1990. The purpose of the transaction was to acquire approximately one-half of the commercial reserve tracts within Cinco Ranch. USAT was expecting a profit of $26,482,000 as it shared the joint venture's profits. The joint venture proposed was to be between USAT or an affiliate and Dempsey Watson, with 75% of income gain and loss attributed to USAT and 25% to Watson. Watson was to be liable for his pro rata share up to a maximum liability of $1 million. The memorandum detailing the joint venture also outlined that Watson would manage the day-to-day affairs of the venture but that ultimately all decisions in connection with the venture would be made by USAT. Dempsey Watson's annual management fee was to be $100,000, plus an additional 5% of profits generated by the venture. The interest rate on the note was to be the prime interest rate, plus 2% with a maximum interest rate of 15%.

An appraisal dated March 17, 1986, appears in the files from Murphy, Kirby & Associates. The appraisal was for the market value of the fee simple title to 379.83 acres of vacant land as of February 11, 1986, and a valuation was placed on the property of $40 million.

The loan in this transaction was a non-recourse loan. In a file at the MCO Plaza offices of USAT, it is noted that Dempsey Watson is the son-in-law of Walter Mischer, who is president of the Mischer Corporation, which was one of the joint venturers in Cinco Ranch. No wrongdoing can be presumed from these facts alone, but once again, it reflects USAT's continued involvement with ''high rollers'' within the Houston economy.

14. Remington Partners. Remington Partners acquired the Remington Hotel from Rosewood Hotels, Inc., in 1985. Seventy percent of the purchase money was borrowed from United Savings Association of Texas, which placed a first lien against the hotel. Makers on the note were Remington Partners, a Texas joint venture, William T. Criswell, IV, venturer, Waverly Development Limited Partnership, a venturer, by I.S.R.P. Limited Partnership, by Isaac Stein, sole general partner. The promissory note is in the principal amount of $25,300,000 and was for a term of three years at a fixed rate of 14% interest. Interest payments were to be made the first day of every third month, beginning August 1, 1985, with accrued interest and the principal being due on May 13, 1988.

To further assure that note payments were made, an escrow fund was established in the amount of $9,083,251. This amount represented the interest payments due between May 13, 1985, and May 13, 1988. USAT was allowed to draw upon the escrow fund when each of the interest payments became due.

An appraisal of the Remington Hotel was conducted by Edward B. Schulz & Company. The purchase price of the Remington Hotel was $32 million, and Schulz appraised the property at $33 million. Schulz stated that the appraisal was made in accordance with contemporary appraisal techniques that met the requirements in guideline R. 41b of the Federal Home Loan Bank Board.

The only credit history found in the files were financial statements submitted by the Criswells and Isaac Stein. Bill and Sharon Criswell are principals in Criswell Development Company, which in 1985 ranked among the 25 largest diversified development companies. Isaac Stein was then serving as president of Waverly Associates and managed its investment partnerships. Waverly Development Limited Partnership and Criswell Development Company had been successful in past ventures, including a majority equity interest in the Dorchester Hotel in London.

The Remington Hotel opened in November 1982 and was built by Rosewood Hotels, Inc., in conjunction with the Caroline Hunt Trust Estate at a cost of $48 million. Cost for the building and property totalled more than $65 million. Additional collateral securing the note included a tract of land in Tarrant County, Texas, of 57.9374 acres and stock certificates for 300 shares of National Tubular Systems, Inc., a privately held company controlled by Crest Holdings, Inc., a Cayman Island corporation controlled by Isaac Stein.

The loan performance history on this transaction was excellent until 1988 due to the fact that $9,083,251 were held in escrow by USAT on which to draw the interest payments. Remington Partners, however, did not repay the principal in a timely manner. A lawsuit was filed and then settled out of court on December 21, 1988. Releases on the underlying promissory note and deed of trust were executed by USAT on December 22, 1988.

E. Couch Mortgage

The background of the Couch Mortgage transactions is described in detail in the BS&S Report of September 20, 1991 to the FDIC. The September 20, 1991 Report focuses only on the liability of third parties for the Couch Mortgage losses. A case could certainly be made that the officers and directors of USAT were negligent in entering into and monitoring the Couch transactions. In the course of investigating the Couch transactions, we have found no evidence of wrongdoing or complicity on the part of any USAT officers, directors or employees.

If the FDIC decides to pursue its claims against third parties for the Couch Mortgage losses, then it would seem to be counterproductive to at the same time allege that USAT officers and directors were negligent with regard to the transactions. In fact, it is highly likely that the third parties sued will attempt to raise as a defense the negligence of USAT's officers and directors.

Because of the lack of evidence of affirmative wrongdoing and the much greater likelihood that damages could be recovered from third parties, we do not recommend initiating litigation against officers and directors of USAT for the Couch losses. It is possible that some of those individuals could be joined as third-party defendants if FDIC elects to sue others for the Couch losses.

F. Authorization of Dividend to UFGI

In 1984, USAT sold several branches which resulted in significant increase in capital. According to Mary Mims (''Mims''), operations manager of the treasury department in 1984, the branches were sold because the previous merger created a branch overlapping situation. However, an October 1984 Texas Business article regarding Hurwitz states ''Hurwitz has devised an innovative plan to sell off up to 48 bank branches (including deposit liabilities and all branch properties). If he pulls it off, the deal would augment United's net worth by about $150 million, more than doubling equity in one shot.''

The branches were sold to Independent American Savings. According to Crow, Independent American paid a ''ridiculously high price'' for the USAT branches—15% premium. According to Wolfe, when Independent American purchased the branches, it assumed liabilities of $1 billion in deposits. In order for Independent American to do so, USAT provided it an asset of cash flow bonds with a coupon rate at 10%. Since the market price was at a yield of 15%, the spread between the two was a ''paper gain'' in fair market value. Although the gain was in paper, it had time value. The total ''paper gain'' was $90 million. USAT issued a cash flow bond to Independent American Savings which contained five series, labeled A–E, in the amount of the total customer balances. As mortgages under the bond paid down, the proceeds of the collateral were paid to the bond. Crow stated that the objective of the sale was to build equity. Although the sale did not result in any cash, it created a ''paper gain'' of approximately $90 million.

Following the branch sale to Independent American, a $32 million dividend payment was made to UFGI. The dividend payment was handled by C.E. Bentley, Jim Pledger and Gerald Williams. The regulators approved a dividend for a certain percent of the amount, if the institution was profitable. According to Crow, USAT was profitable in 1985 solely because of the branch sale. The FHLBB was upset because it was not made aware, at the time of the regulatory approval, of the utilization for the capital.

Mims stated in her interview that the treasury department maintained the dividend in an USAT certificate of deposit. She added that had the funds from the branch sale not been available, based on the cash flow at the time, UFGI would have been bankrupt within one to two years after the merger. The funds were utilized by UFGI to begin its equity arbitrage activities and to pay the PennCorp debt from the 1983 merger.

Because this dividend payment was made three years before the institution was closed and because it was approved by the appropriate regulatory agency, we believe it will be difficult to prove gross negligence on the part of the directors. It would be less difficult to prove a lack of prudence on the part of the officers, but we cannot estimate the probability of success on the liability issues at greater than fifty percent (50%). We are also unable to make an assessment of actual damage to the institution from payment of the dividend. Certainly, additional capitalization may have allowed the institution to slow its gains trading activity, but we cannot make an estimate of the possible damages at this time.

IV. CLAIMS AGAINST HURWITZ AND UFGI

A. Corporate Raider Scheme

The primary conclusion we have drawn from our investigation of the securities area is that Charles Hurwitz used USAT as a deep pocket or source of funds for favors to facilitate his own corporate raider activities. We have outlined our theories and the available documentation in prior recommendations, including the *Interim Report* of April 29, 1991. In our investigation we were unable to find evidence of securities transactions which directly benefitted Hurwitz, such as purchases of Hurwitz entities' junk bonds or equities. We do believe, however, that Hurwitz, together with a group of corporate raiders, traded favors and participated in a scheme or conspiracy to manipulate the market and that USAT was used by Hurwitz in whatever way was necessary to make that scheme work. We have been working with the Drexel task force for over a year and have provided them with substantial analyses and documentation, such as the quid pro quo analyses and the names mentioned list providing information on every player in the network, as well as continual updates. It is our understanding that these sorts of claims against Hurwitz will be handled by the task force and this report will make no recommendation on those claims.

B. Dividend to UFGI

It is our understanding that the claim against UFGI for payment of the dividend is being separately handled in negotiations with UFGI.

C. Tax Reform Claim

We understand the tax refund claim is being separately handled in negotiations with UFGI.

D. Lack of Capital Infusion

MCO Holdings indicated in several SEC filings that it and Federated filed an application with the Federal Home Loan Bank Board (''FHLBB'') on June 29, 1983, for approval to acquire more than 25% of the outstanding shares of common stock in order to become savings and loan holding companies. The application was approved by the FHLBB on December 6, 1984, subject to a capital infusion requirement. For as long as MCO and Federated controlled USAT, both entities were to contribute their pro rata share of any additional capital infusion required for USAT to maintain its regulatory net worth. If in excess of 50% of the voting shares of UFGI were acquired by MCO and Federated, they were required to contribute 100% of any additional capital. Subsequent to the application approval, MCO Holdings and Federated held discussions with the FHLBB concerning the possible modification of the condition.

The FHLBB granted MCO and Federated extensions in order to acquire additional shares of UFGI's common stock. The extension was granted so that MCO, Federated and the FHLBB could continue discussions regarding the modification of the capital infusion guarantee. The last extension granted by the FHLBB expired on December 22, 1987. The MCO 10K states that it had no intention to infuse capital into UFGI at the time of the filing. Also, it acknowledges that UFGI agreed to maintain USAT's capital requirements above the minimum level established by the FSLIC. However, it stated that UFGI did not have sufficient assets to contribute capital to USAT in order to maintain its minimum capital requirement.

The Federal Home Loan Bank of Dallas (''FHLB-Dallas'') directed the UFGI Board of Directors, on May 13, 1988, to infuse capital into USAT. Although the directors acknowledged the receipt of the letter, capital was not infused and UFGI did not respond to the letter. On December 8, 1988, the FHLB-Dallas again directed UFGI to infuse additional equity capital into USAT. UFGI did not make such infusion. According to Connell, Hurwitz will assert that he infused approximately $100 million of capital into USAT as a result of the Weingarten Realty transactions.

This claim is being pursued separately by other fee counsel.

E. Advances by USAT for the Benefit of Affiliates

We reviewed the payments made by USAT on behalf of UFGI and other affiliates and found evidence of:

a. payment of salaries and bonuses by USAT when a substantial part of the employee's job included work for UFGI or other Hurwitz entities, such as Ron Heubsch;

b. advances of affiliates' expenses which were carried on USAT's books as receivables but remained unpaid.

There is evidence that UFGI repaid these advances late in 1988 and we were consistently told that repayment was always contemplated. We do not feel that we have strong proof of misappropriation of USAT funds through payment of affiliates' expenses. However, the outstanding amount should be recouped and we understand these claims are being separately handled in negotiations with UFGI.

V. CLAIMS AGAINST THIRD PARTIES

A. Accountants

An investigation of the potential liability of the auditor of USAT was conducted by BS&S. The results of our investigation is included in a Report submitted to the FDIC on September 20, 1991. The Report focused on the liability of USAT's auditor, Peat, Marwick & Mitchell (now known as KPMG Peat Marwick), for general auditing negligence issues, as well as issues relating directly to the Couch Mortgage transactions. That Report also included our opinion on the liability of Couch Mortgage's auditor, Ernst & Whinney (now known as Ernst & Young), for its failure to disclose the ongoing fraud being committed by Couch. Please refer to the September 20, 1991 report for detailed conclusions and litigation recommendations.

B. Lawyers

Potential professional liability claims against attorneys were considered in connection with all of the other investigations mentioned in this report. Attorney liability issues have been addressed in the September 20, 1991 report on Potential Professional Liability Claims, as well as in the Chapel Creek Ranch litigation. In the course of investigating real estate and loan transactions, securities activities, and other director and officer liability issues, the possibility of attorney negligence was explored. Other than what has been discussed in earlier reports, we did not discover any apparent instances of attorney malpractice. USAT utilized a number of different law firms for its legal work, the two who received most work being the Houston firms of Mayor, Day & Caldwell and Schlanger, Cook, Cohen, Mills & Grossberg. No law firm seemed to act as ''general counsel'' for the institution. It appears from USAT's records that Arthur Berner, in-house general counsel for USAT, gave legal advice regarding the most strongly criticized activities of the institution, including the golden parachute employment agreements, the 1988 executive bonus plan, the inter-company receivable between USAT and UFG, and the failure of UFG to infuse additional capital into USAT.

C. Appraisers

Other than the Chapel Creek Ranch litigation and the Couch Mortgage transactions, our investigation has not revealed any apparent problems relating to appraisers involved in loan and real estate investment transactions. There were numerous instances of USAT failing to obtain appraisals in violation of the regulations, and a few instances of appraisals that did not comply with Rule 41b. However, these issues go more to the negligence of officers and directors in approving transactions with insufficient or no appraisals. In summary, other than what has been previously reported, we did not find any appraiser errors or omissions.

D. Real Estate Brokers

USAT entered into contracts with various real estate brokers who were employed to dispose of real estate owned by USAT. These contracts were reviewed, as were the lists of properties on which the realtors earned commissions. No wrongdoing was discovered, although it was noted that many of USAT's deals seemed to be ''broker-driven,'' with the broker dictating the terms of the transaction. Again, this reflects on the negligence of the officers and directors in failing to

maintain and enforce prudent lending practices. No litigation is recommended against brokers.

E. Securities Industry

Early in the investigation we thoroughly reviewed the role of Solomon Brothers in the sale of MBS products to USAT. Mortgage-backed securities were developed and perfected by Lew Ranieri at Solomon Brothers and the firm had a virtual monopoly on the product until 1986 when other firms began to lure its traders away and develop their own programs.

Several people told us that the initial MBS portfolio was sold to United as a sure thing. We were told there was inadequate explanation of the risk. Unfortunately, the written documents do not bear out this claim, and we were unable to find any evidence of misrepresentations or misleading statements other than the self-serving statements of Crow and others. In light of this and the fact that USAT had been sold to a Ranieri partnership, in consultation with the FSLIC attorney at the time, we did not pursue the investigation any further.

We also reviewed the relationship of USAT and Drexel Lambert and Bear Stearnes & Co. The Drexel relationship was referred to the task force as described above and we found no irregularities in the transactions with Bear Stearnes & Co.

VI. SUMMARY AND PROBABILITIES OF SUCCESS

A. Claims Against Officers and Directors of USAT

In summary, we believe the following claims could be made against the directors and controlling officers of USAT:

Gross negligence—failure to institute and require compliance with prudent lending practices; violation of federal regulations relating to lending and investment transactions; failure to implement policies or supervise the securities investment department of the institution; and allowing the institution to. . . .

DOCUMENT E

MEMORANDUM

To: All the good, hardworking employees of the FDIC.

From: The people of the United States of America.

Re: Redwood Forests and Failed S & L's.

Date: November 22, 1993.

You may not be aware that there is a direct connection between the Savings and Loans, the FDIC and the clearcutting of California's ancient redwoods, but there is and we'd like to fill you in and ask for your help. It just so happens that a man named Charles Hurwitz, who took over the Pacific Lumber redwoods in 1985 through a Drexel Burnham junk bond buyout, also was responsible for the collapse of United Savings Association of Texas (USAT). In fact, Drexel-Burnham helped Hurwitz take over 200,000 acres of magnificent redwood forest in exchange for Hurwitz's United Savings buying over billion dollars' worth of Drexel's junk bonds. The bank later failed and the redwoods are still crashing. Your agency did outstanding work in nailing Drexel's Michael Milken on this very scam. The FDIC has even gone so far as to state that Hurwitz's bank owes the taxpayers $548 million for misappropriating depositors' funds. But for some reason, the FDIC hasn't gotten around to issuing criminal or civil charges against Charles Hurwitz for his end of this devil's bargain.

Meanwhile, back in Washington, DC, the U.S. Congress has been kind enough to introduce a bill, the Headwaters Forest Act, which would protect 44,000 acres of redwoods which Hurwitz is currently clearcutting, a process in which every living thing is cut down. All to pay off a junk bond debt! It's great that we're going to protect this land from Hurwitz, but we don't want federal dollars to go into his pocket while he owes the taxpayers $548 million. Coincidentally, Hurwitz is asking for more than $500 million for the Headwaters Forest redwoods. So if your agency can secure the money for his failed S & L, we the people will have the funds to buy Headwaters Forest. Debt for nature. Right here in the U.S. That's where you come in.

Go get Hurwitz. He and people like him have been traitors to this country, ripping apart the very economic and environmental fabric of this country for personal gain. Now our nation is on the verge of collapse, thanks to guys like Hurwitz. For five years your agency has had this $548 million dollar claim against Hurwitz's United Financial Group, the holding company for United Savings Association of Texas. The statute of limitations runs out at the end of 1993. He can actually get away with this robbery if your agency doesn't act soon. Justice delayed is justice denied. After five years of waiting it's time to say: ''Charley Hurwitz, your time is up!''

Here's what you can do: Write and talk to your policy makers at the FDIC, in particular your Chairman, Andrew C. Hove, Jr., and ask them to re-prioritize your case against Hurwitz's United Financial Group. Talk amongst yourselves, too. Offer new, creative strategies of protecting the economy and ecology of this precious land of ours. Write to your Congressional Representative and Senators in Washington, DC and ask them to support the Headwaters Forest Act (HR2866). Lastly, we'd like to invite you to come out to the redwoods and see trees taller than you office building and as wide around as a room in your house. Give us a call at 707/468–1660 in California. We'd love to show you around the magnificent redwood forest, as well as show you the appalling clearcuts Hurwitz is performing. Don't delay. The junk bond traitors must be brought to justice. Debt for Nature and Jail for Hurwitz. Thank you.

NATIONAL AUDUBON SOCIETY,
Washington, DC.

The National Audubon Society strongly supports the Headwaters Forest Act, H.R. 2866, introduced by Dan Hamburg (D–CA) and Pete Stark (D–CA), authorizing the purchase of 44,000 acres of Redwood forest to be added to the Six Rivers National Forest in Northern California. This legislation would acquire the largest unprotected ancient redwoods groves in the world. Home to a great array of species, from mountain lion and black bear to giant salamanders and flying squirrels, the Headwaters Forest is composed of gigantic trees up to 2000 years old. Also found in its interior recesses are several threatened and endangered species including spotted owls, marbled murrelets, goshawk and a host of salmon species.

This land had been managed on a sustainable forestry basis by the Pacific Lumber Co. until a recent takeover by Charles Hurwitz, CEO of Maxxam. In order to pay off junk bonds used to buy off the lands, Maxxam has more than doubled the cut of the ancient redwoods. Over 40,000 acres have been liquidated already. HR 2866 provides for a restoration program and gives full protection to the old growth and wilderness designation for the 3,000 acre Headwater Grove.

Please write your representative today and ask him/her to support HR 2866. Maxxam is beginning to log off this great tract of giant redwoods; Court injunctions have halted logging in the virgin groves, but the stays are only temporary. Unless there is a serious legislative effort to acquire this forest, Hurwitz will assure that all the knowledge and wonder inside this area will be lost forever.

EARTH FIRST!,
Garberville, CA.

Rally Today, Monday at FDIC in DC & NY to Demand that Redwood Raider Hurwitz Pay S & L Debt

CHAIR OF HOUSE BANKING COMMITTEE SENDS LETTER ASKING FDIC TO PURSUE HURWITZ

Animals and activists from the redwood forest will rally outside the Headquarters of the Federal Deposit Insurance Corporation (FDIC), 550 17th Street NW in Washington, DC this Monday, November 22 at 1 pm to insist that an existing $548 million claim against redwood raider Charles Hurwitz's failed S & L be vigorously pursued before the statute of limitations runs out at year's end. A companion rally will take place at the FDIC's public relations department in New York at 452 Fifth Avenue at 10 am. The animals will be delivering a memorandum to FDIC employees, including Chairman Andrew C. Hove, Jr., asking that the man who has been hacking down their ancient redwood homes be indicted for his treachery against the American taxpayers.

In a separate but related development, Rep. Henry Gonzalez (D–San Antonio), Chairman of the House Banking Committee, faxed a letter last Friday to FDIC Chairman Hove, calling on the agency to act on the claim against Hurwitz, which has languished for five years without any criminal or civil action being pursued. Hurwitz, a junk bond raider who tripled the logging rate of the Pacific Lumber Company after his MAXXAM Corporation took it over in 1985 and incurred a $750 million debt, is also responsible for the failure of United Savings Association of Texas (USAT). USAT cost the taxpayers $1.6 billion to bail out in 1988, making it America's fifth largest failed S & L according to Fortune. The $548 million claim stands against USATs holding company, United Financial Group, and stems from the failure of Hurwitz to fulfill an agreement with the FDIC to maintain a minimum net worth of that amount in the bank.

This activity takes place in light of the Headwaters Forest Act (HR 2866) moving smoothly through the House of Representatives. The bill, introduced by California Congressmen Dan Hamburg and Pete Stark, along with over 90 co-sponsors, would authorize the federal government to purchase 44,000 acres of redwood forest. It has the thumbs up from President Clinton. However, Earth First! activists, who originated this issue in 1986 by hiking, mapping, naming and promoting the Headwaters Forest, are concerned that Charles Hurwitz could receive federal dollars for the ancient redwoods before he has paid back his S & L debt to the American taxpayers. ''We seek justice for the American people as well as justice for the forest animals,'' said Darryl Cherney, a Northern California Earth First! organizer who has traveled to Washington to organize this rally. ''Hurwitz's $500 million asking price for Headwaters conveniently approximates his S & L debt. With the legality of the PL takeover and the S & L failure in question our . . .

The Failure of United Savings Association of Texas (USAT): Fact Sheet

1. The FDIC has an outstanding claim against United Financial Group, holding company for the failed USAT, for $548 million dollars. (United Financial Group 10–K Report, year ending Dec. 31, 1992, p. 1 and

Wall Street Journal, ''United Financial Found Liable by FDIC,'' May 22, 1992).

2. Five years have passed since this claim was asserted in 1988, and while the FDIC has extended the statute of limitations through tolling agreements, the current statute of limitations ends on December 31, 1993 (UFG, 10–Q Report, Quarter ending June 30, 1993, p. 6).

3. When it was seized in 1988 by the FDIC, USAT was a wholly-owned subsidiary of UFG, whose controlling shareholders at the time of the collapse were Charles Hurwitz-run companies MAXXAM, MCO, and Federated Development Corp. Also, Drexel Burnham Lambert was a 9% shareholder (Washington Post, ''Thrift Regulations Slipping . . .'' by Allan Sloan, 4/16/91; MAXXAM Prospectus, 1988; and FDIC vs. Milken, 1/18/91, pp. 82–84).

4. From 1985 to 1988, USAT purchased over $1.3 billion worth of Drexel-underwritten junk bonds. During that same period of time, according to an FDIC lawsuit against Michael Milken, ''the Milken group raised about $1.8 billion of financing for Hurwitz's takeover ventures,'' which included the 1985 takeover of Pacific Lumber Company, the world's largest private owner of old growth redwood (FDIC vs. Milken, 1/18/91, pp 82–84).

5. The failure of USAT constituted the fifth largest failed S & L Bailout, as of 1990, costing the taxpayers $1.6 billion (Fortune, Sept. 10, 1990).

6. Hurwitz has been sued by the Securities & Exchange Commission in 1971 for alleged stock manipulation; charged by New York State regulators in 1977 with looting Summit Insurance Co.; sued by investors for alleged fraud in the takover of Pacific Lumber; sued by U.S. Labor Dept. and employees for investing PL's pension fund with now failed-Executive Life Insurance in return for their junk-bond financing of the PL takeover; sued by MAXXAM shareholders for a land swindle in Rancho Mirage, CA; and sued (8 times) by EPIC of Garberville, CA and Sierra Club for violations of California Forest Practices Act; etc., etc., etc. (Wall Street Journal, ''For Takeover Baron, Redwood Forests Are Just One More Deal,'' August 6, 1993).

MAXXAM GROUP INC.

Los Angeles, California, February 11, 1988.

Interest of MCO in MAXXAM

MCO owns a controlling interest in MAXXAM. See ''Information Concerning MAXXAM—Business of Maxxam.''

Interest of MCO in United Financial Group, Inc.

MCO owns 1,104,098 shares of UFG's common stock (approximately 13.5% of the outstanding shares) which is acquired in 1982 and 1983. Federated owns 801,941 shares of UFG's common stock (approximately 9.8% of the outstanding shares). Pursuant to a rights offering made by UFG to the holders of its common stock, MCO and Federated purchased 688,824 and 47,702 shares, respectively (approximately 91.2% and 6.3% respectively, of the outstanding shares), of UFG's Series C Convertible Preferred Stock (''Series C Stock'') in 1984. Each share of Series C Stock was convertible into two shares of UFG common stock at any time after June 15, 1987. Effective May 4, 1987, UFG entered into an agreement with MCO and Federated whereby MCO and Federated exchanged their 736,526 shares of Series C Stock for an equal amount of new Series D Convertible Preferred Stock (''Series D Stock'') issued by UFG. The Series D Stock has the same conversion and other rights as the Series C Stock, except that it is convertible at any time after June 15, 1988. In December 1985, MCO entered into an option agreement with Drexel Burnham with respect to 300,000 shares of the common stock of UFG. In the event MCO does not exercise the option during a 30-day period commencing July 1, 1988, MCO has agreed to grant Drexel Burnham an option to sell such shares to MCO during a 30-day period commencing August 1, 1988. The purchase price in either event is $8.59 per share. MCO paid a fee of $683,000 to Drexel Burnham for the purchase option. Two of UFG's eight directors are also directors of MCO. UFG is a savings and loan holding company and conducts business primarily through its wholly-owned subsidiary, United Savings Association of Texas (''USAT''). In addition, other subsidiaries of UFG provide mortgage lending, reinsurance and venture capital services. The carrying value of MCO's investment in UFG's common stock and Series D Stock was $12.7 million at September 30, 1987. The closing price of UFG's common stock on December 31, 1987 was $7/16 per share.

Federated owns approximately 28.2% of the MCO Common Stock and 91.3% of the MCO Class A Preferred Stock. On June 29, 1983, MCO and Federated filed an application with the Federal Home Loan Bank Board (the ''FHLBB'') for approval to acquire more than 25% of the outstanding shares of common stock of UFG and thereby become savings and loan holding companies. Such application was approved by the FHLBB on December 6, 1984, subject to compliance with several conditions, including that so long as MCO and Federated control USAT, they shall contribute their pro-rate share (based on their holdings of UFG) of any additional infusion of capital that may be necessary for USAT to maintain its regulatory net worth. In addition, if MCO and Federated acquire in the aggregate in excess of fifty percent of the voting shares of UFG, they would be required to contribute one hundred percent of any additional capital that may be required to maintain the regulatory net worth of USAT. Subsequent to the approval of the application, MCO and Federated held discussions with the FHLBB concerning the possible modification of the condition relating to the maintenance of USAT's regulatory net worth.

The FHLBB originally granted MCO and Federated 120 days from December 6, 1984 within which to consummate the acquisition of additional shares of UFG's common stock. This period was extended by the FHLBB in order to provide sufficient time for MCO, Federated and the FHLBB to continue discussions regarding the requested modification of net worth guarantees. The last extension granted by the FHLBB expired on December 22, 1987. Federated and MCO anticipated submitting a new application with updated financial information, while continuing to discuss with the FHLBB the possible modification of the condition relating to the maintenance of USAT's regulatory net worth. Although the instruments governing MCO's indebtedness do not prohibit or restrict MCO from infusing capital into UFG, MCO has no intention of doing that at the present time.

UFG files periodic reports with the Commission and its common stock is traded in the over-the-counter market and reported on the NASDAQ reporting system.

THRIFT REGULATORS SLIPPING AND TRIPPING OVER ONE ANOTHER'S FEET

(By Allan Sloan)

There are days when you wonder whether the federal government's right hand knows what its left hand is doing—or even whether the government has two left feet, which is why it keeps tripping over itself.

Consider, if you will, the federal deposit insurance bureaucracy's schizophrenic dealings with Charles Hurwitz, the Houston-based entrepreneur who controls Maxxam Group, a conglomerate that's into aluminum, redwood and real estate. Although Kaiser Aluminum is Maxxam's biggest holding, Hurwitz is best known for the 1986 takeover of Pacific Lumber, the first major hostile takeover funded by junk bonds. Hurwitz's name is also immortalized in newspaper libraries because he's constantly attacked for allegedly devastating Pacific Lumber's redwood forests to pay off the bonds. But today we're talking about deposit insurance, not trees.

One part of the deposit insurance bureaucracy is hot to sell Maxxam some properties seized from dead savings and loan associations. Another part of the bureaucracy is chasing United Financial Group, a company of which Hurwitz is the biggest stockholder and the former chairman, to recovery part of the $2 billion or so it cost to bail our depositors of a United-owned S&L that failed in 1988.

Let's start with the Resolution Trust Corp., which liquidates dead S&Ls. The RTC, which had bad loans for foreclosed properties up the kazoo, is doing something intelligent by trying to sell them in bulk. Last month, the RTC announced that Maxxam had put in the highest bid, $130.1 million in cash, for a batch of foreclosed properties and stinko loans. The deal is scheduled to close by June 16.

But at the same time that the TRC wants to sell these things to one Hurwitz company, the Federal Deposit Insurance Corp., a sister agency run by the same board that controls the RTC, is trying to collect damages from the United Financial Group, owner of the failed United Savings Association of Texas. Although Hurwitz didn't technically control United Financial or its S&L, he was chairman of United Financial until 10 months before the S&L failed. He remains United Financial's biggest shareholder, which means he had more than a little to say about how the place was run.

The FDIC wants United Financial to fork over some dough because, its says, United Financial agreed to keep the now-defunct United Savings Association of Texas adequately capitalized. United Financial denies that United Savings was closed at a stated cost to the deposit insurance fund of $1.37 billion and an actual cost that's probably much higher.

United offered the FDIC $6.25 million cash and a note that could produce $4 million more. The idea was to make the FDIC go away, reorganize United Financial and use the tax loss created by the seizure of United Savings to shelter income from new and profitable acquisitions. The proposal settlement was canceled by the FDIC, according to United Financial.

In a logical world, you try not to do business with people who have already cost you money. As they say. ''Fool me once, shame on you. Fool me twice, shame on me.'' And in fact, the S&L bailout bill contains a provision that seems to bar anyone who has stiffed deposit insurance funds for more than $50,000 from doing business with the agencies administering the bailout.

However, the law, as interpreted by RTC spokesman Stephen Katsanos, is that anyone who cost the deposit insurance agencies $50,000 or more can't be a contractor to the bailout folks, but it can buy property from them. That apparently includes Hurwitz, ''Absent his being charged with wrongdoing, his money is good,'' Katsanos said. Katsanos said that the RTC knew about Hurwitz's involvement with United Financial, but that was no reason not to take his money.

Maxxam spokesmen were more than a little upset when they heard that I planned to

tie Hurwitz's pending deal with the RTC to the failure of United Savings. One spokesman stressed that Hurwitz owned only 23.3 percent of United Financial and wasn't an officer of the failed S&L. Regulators couldn't possibly have been unhappy with Hurwitz, the spokesman said, because when United Savings was failing, the regulators asked another Hurwitz company—Maxxam—to put in a bid. (A competing bidder won.)

Maxxam spokesman said that the unconventional investments—among them junk bonds and a part ownership in a Houston taxi company—that Hurwitz recommended made money for United Savings. He also said that the S&L failed not because of wrongdoing, but because many of its borrowers lost their jobs and couldn't pay their mortgages. ''This is a human tragedy caused by economic conditions,'' he said.

Interestingly enough, the RTC had a chance to take a $181.5 million Maxxam note containing escape clauses, but opted instead for $130.1 million cash. So, you see, deposit insurance regulators are indeed uncoordinated. But I never said they were stupid.

DOCUMENT F

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, December 3, 1993.

Memo to: Chairman Hove.
From: Alan J. Whitney, Director.
Subject: Significant Media Inquiries and Related Activities, Week of 11–29–93.

REGULATORY CONSOLIDATION: Several news organizatons have asked what the FDIC's position is on the agency consolidation proposal unveiled last week by Treasury. They were told you believed that with Board appointments imminent, it would be inappropriate to take an agency position until the full board is in place.

THRIFT CONVERSIONS: Crain's New York Business, Philadelphia Inquirer and *American Banker* newsletters inquire about the thrift mutual-to-stock conversion policy that the FDIC is currently developing, specifically when our position on this subject will be published. The calls came after *American Banker* ran an article in the Nov. 26 edition reporting on Rep. Gonzalez' legislation to limit thrift management profits from the conversions. We also received several inquiries about our response to Cong. Neal's letter of November 22 to you on the same subject, to which we have not yet responded.

O'MELVENY & MYERS: On Monday, the Supreme Court agreed to hear this case, involving the FDIC's ability to sue attorneys who represented banks that failed. The decision to hear the case prompted a flurry of press inquires about similar cases past and present. We provided some statistical data and limited information about the Jones Day case, which is still active.

FIRST CITY BANCORPORATION: Bloomberg Business News, Houston Bureau, called regarding possible settlement in the First City Bancorporation's claims case. It seems someone is talking, because the reporter asked about a December 14 FDIC Board meeting to discuss the settlement. The reporter wanted to know: If the FDIC committee working on the agreement approves the plan, does that mean the Board will ''rubber stamp'' it? We advised the Board does not rubber stamp anything. *The Houston Chronicle* also made several inquiries about a possible settlement in this case, all of which we answered with the standard response that we do not comment on ongoing litigation.

LOS ANGELES TIMES: Michael Parrish asked whether FDIC lawyers have considered whether we could legally swap a potential claim of $548 million against Charles Hurwitz, (stemming from the failure of United Savings Assn. of Texas) for 44,000 acres of redwood forest owned by a Hurwitz-controlled company. We advised Parrish we're not aware of any formal proposal of such a transaction. However, we noted that a claim can be satisfied by relinquishing title to assets, assuming there is agreement on their value. We didn't go any further with Parrish, but Dough Jones notes that even if Hurwitz satisfied our claim by giving us the redwoods, it wouldn't result in what Earth First! (the folks who demonstrated in front of the main building last month) apparently is proposing, i.e., that we then deed the redwoods property to the Interior Department. That would require some extensive legal analysis and, since any claim we might assert against Hurwitz would be a FRF matter, would likely entail Treasury Department concurrence.

DOCUMENT G

Maxxam, Inc., is a publicly traded company with market capitalization, as of November 16, 1993, of $288 million and total assets of $3.5 billion. We are also reviewing a suggestion by ''Earth First'' that the FDIC trade its claims against Hurwitz for 3000 acres of redwood forests owned by Pacific Lumber, a subsidiary of Maxxam.

DOCUMENT I

Jack, I thought about our conversation yesterday. My advice from a political perspective is that the ''C'' firm is still politically risky. We would catch less political heat for another firm, perhaps one with some environmental connections. Otherwise, they might not criticize the deal but they might argue that the firm already got $100 million and we should spread it around more.

Those are just my unsolicited thoughts.

DOCUMENT L

ATTORNEY CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation
From: Jack D. Smith, Deputy General Counsel; Stephen N. Graham, Associate Director (Operations)
Date: July 27, 1995
Subject: Authority to Institute PLS Suit; Institution: United Savings Association of Texas, Fin #1815; Proposed Defendants: Former directors and officers, de facto director and controlling person Charles Hurwitz.

In addition to presenting the attached authority to sue memorandum for Board action, this memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation of USAT being conducted by the Office of Thrift Supervision (OTS), current tolling agreements, and settlement negotiations with United Financial Group, Inc. (UFG), USAT's first tier holding company.

We were advised on July 21, 1995 that Charles Hurwitz would not extend our tolling agreement with him. Consequently, if suit is to be brought it must be filed by August 2, 1995. We had hoped to delay a final decision on this matter until after OTS decides whether to pursue claims against Hurwitz, *et al.* However, Hurwitz's actions have precluded that possibility. Thus the Board must now decide whether to authorize suit. While we would only sue Hurwitz at this time, rather than dividing the memo and, possibly, having to bring it back to deal with other individuals at a later time, the attached ATS seeks authorization to sue all of the individuals against whom we would expect to assert claims. In addition to the claims asserted against the group of defendants, Hurwitz would be sued individually for failure to cause compliance with certain net worth maintenance (NWM) agreements.

Recommendation: That the FDIC, as receiver of United Savings Association of Texas (USAT), Houston, (with assets of $4.6 billion and loss to the FDIC of $1.6 billion) authorize suit for approximately $300 million in damages against the proposed defendants identified on Exhibit A.

In our view, Hurwitz and the other proposed defendants were grossly negligent. However, we also estimate a 70% probability that most or all of the conventional claims that could be made in the FDIC's case would be dismissed on statute of limitations grounds. Hurwitz's failure to cause compliance with the NWM agreements has a better probability on the statute of limitations issue, but there are numerous obstacles to successful prosecution of that claim. Nonetheless, we believe the litigation risks are worth taking because of the egregious character of the underlying behavior in this case which caused enormous losses, and to further our ongoing efforts to shape the law evolving in this area.

I. Background

USAT was placed into receivership on December 30, 1988. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Hurwitz and ten other former directors and officers of USAT/UFG who were either senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we prepared draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain USAT former officers and directors for losses in excess of $200 million. The recommended claims as then proposed involved significant litigation risk. Most notably, the principal loss causing events occurred more that two years prior to the date of receivership, and were therefore at risk of dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in Dawson, a split of authority in the federal trial courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy at that time was to assert that gross negligence was sufficient to the toll the statute of limitations. After briefings with the Deputies to the Directors and further discussion with the potential defendants, we decided to defer an FDIC decision on whether to assert our claims, in order to further investigate the facts, give time for the Texas law on adverse dominations to take more concrete shape and ascertain the views of OTS. Therefore, the tolling agreements were continued.

II. OTS's Involvement

Prior to deferring a decision on the FDIC's cause of action, we had begun to discuss with OTS the possibility of OTS pursuing these claims (plus a net worth maintenance agreement claim) through administrative enforcement proceedings. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Hurwitz, UFG, as well as USAT's second tier

holding company Maxxam, Inc, a publicly traded company that is largely controlled by Hurwitz. The FDIC is paying OTS's costs in connection with this matter.

The OTS has reviewed extensive documentation and has recently conducted a series of administrative depositions. We have been informed that OTS staff is currently preparing a broad-based draft Notice of Charges against Hurwitz and others, including Maxxam, for substantial restitution for unsafe and unsound practices and for enforcement of a net worth maintenance agreement. Under the terms of our agreement with OTS, FDIC will be the beneficiary of any recovery from the OTS enforcement action through settlement or litigation against the proposed respondents. All the potential respondents in the OTS investigation, including Hurwitz, have signed tolling agreements with OTS which expire on December 31, 1995. OTS staff's current expectation is that they will seek formal approval for this case before the tolling agreements expire on December 31, 1995.

III. Significant Caselaw Developments Have Further Weakened the Viability of Suit by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions, and the failure of Congress to address the statute of limitations problems, have further weakened the FDIC's prospects for successfully litigating our claims in the United States District Court for the Southern District of Texas.

A. Statute of Limitations

In the recent decision of RTC v. Acton, 49 F.3d 1086 (5th Cir. 1995), the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the two year statute of limitations under the doctrine of adverse domination. As a result of this opinion, we cannot rely on an argument that gross negligence by a majority of the Board members is sufficient to toll the statute of limitations. There is very little, if any, evidence of fraud or self-dealing. Most, if not all, of the affirmative acts that would form the basis for an FDIC suit occurred more than two years before USAT failed.

B. The Merits

The law has also moved against us on the merits of the claims. The claims against Hurwitz are more difficult than usual because he was not an officer or director of USAT. We believe that his involvement rose to the level of a de facto director, and for some purposes a control person, but his status presents a notable hurdle.

Texas case law has essentially eliminated liability for negligence in the name of applying a very expansive business judgment rule defense. We believe the conduct here constitutes gross negligence as that term is normally defined. The law of gross negligence in Texas is currently unsettled, but a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet if it is applied to D&O cases. In Transportation Insurance Company v. Moriel, 879 S.W.2d 10 (Tex. 1994), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. That case involved a bad faith claim against an insurer but the language of the opinion is very broad. This new standard, if applied, would make it very difficult, if not impossible, to prove our claims.

The effect of these recent adverse decisions is that there is a very high probability that much or all of the FDIC's conventional claims will not survive a motion to dismiss on statute of limitations grounds. We would also be at increased risk of dismissal, or loss at trial on the merits.

IV. The Pacific Lumber—Redwood Forest Matter

Any decision regarding Hurwitz and the former directors and officers of USAT is likely to attract media coverage and comment from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. On July 21, 1995 we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus possibly the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement. We plan to follow us on these discussions with the Department of Interior in the coming weeks.

If the Hurwitz tolling agreement expires without suit being filed, we would recommend that we update those members of Congress who have inquired about our investigation and make it clear that this does not end the matter of Hurwitz's liability for the failure of USAT because of the ongoing OTS investigation.

Theory of suit: The claims are for gross negligence, breach of fiduciary duty and breach of the duty of loyalty. The claims are:

(1) USAT officers and directors, and Hurwitz as a de facto officer and director, were grossly negligent in failing to act to prevent $50 million of additional losses from USAT's first MBS portfolio. The positions were in place more than two years before failure. Our analysis indicates that they should have begun to cut their losses, and wind down this set of positions, starting two years before failure.

(2) USAT officers and directors, and Hurwitz as a de facto officer and director, were grossly negligent in causing USAT to invest approximately $180 million in its subsidiary, United MBS, leveraging the investment into $1.8 billion of mortgage backed securities (''MSBS'') and losing approximately $97 million, including interest, when USAT had already suffered disastrous results in its first MBS portfolio and was in a critically weakened financial state. Approximately $80 million of the $180 million was advanced within two years of the failure.

(3) Hurwitz, as a de facto officer and director and controlling person of USAT, breached his duties of loyalty to USAT by failing to insist that UFG and Maxxam honor their net worth maintenance obligations. While this breach may have first occurred more than two years before failure, it was a breach that continued and escalated within two years of failure.

Finally, the Park 410 loan, in which USAT lost approximately $57 million, is included in the authority to sue memo for informational purposes. This claim is based both on repeated regulatory warnings and on actual approval, before funding of a grossly imprudent loan that benefitted a Maxxam insider. The claim on this transaction against bank counsel, a long time Hurwitz business associate, is for professional malpractice and breach of fiduciary duty and aiding and abetting breaches of fiduciary duty. We believe that it is a good claim on the merits, but we see no viable basis under existing law for avoiding a statute of limitations defense. Thus, we recommend against asserting this claim.

Assessment of Defenses: We expect business judgment rule and standard of care defenses and serious statute of limitations issues based on recent Fifth Circuit and other Texas case law. Absent a change in the law, there is at least a 70% chance that much or all of the claims relating to mortgage backed securities and derivatives trading will be dismissed based on the net worth maintenance agreements be honored is more likely to survive statute of limitations motions, but raises a series of different merits issues.

Suit Profile: The suit will attract media and Congressional attention because of Hurwitz's reputation in corporate takeovers, and his ownership of Pacific Lumber, which is harvesting redwoods. Environmental interests have received considerable publicity, often suggesting exchanging these claims for trees. The Department of Interior recently informed us that the Administration is seriously interested in pursuing such a settlement.

Timing and cost-benefit analysis: We intend to use Hopkins & Sutter (Chicago/Dallas) and the minority firm Adorno & Zeder (Miami). The estimated cost of litigation by outside counsel is $4 million up to trial, and an additional $2 million through trial. We have incurred outside counsel fees and expenses of $4 million to date. In-house costs to date are approximately $600,000. No insurance coverage appears to be available. The proposed defendants have a combined net worth of approximately $150 million (Exhibit A). If the case survives the statute of limitations challenge, we still face significant adverse caselaw in Texas on the standard of care and the business judgment rule. For these reasons, there is no better than a 50% probability of obtaining a substantial judgment even if we survive statute of limitations defenses in tact it would have an estimated settlement value of $20–40 million.

If suit is authorized we would expect to offer Hurwitz one final opportunity to toll. We would not sue the other proposed defendants during 1995 if they leave their tolling agreement with us and OTS in place.

Contacts: Jeffrey Ross Williams, Counsel, (202) 736–0648; Robert J. DeHenzel, Jr, Counsel, (202) 736–0685, PLS; Betty Shaw, Investigations Specialist, Southwest Service Center, (214) 851–3042.

Concurrence:

Date: July 27, 1995.

WILLIAM F. KROENER III,
General Counsel.
JOHN F. BOVENZI,
Director, DDAS.

EXHIBIT A—PROPOSED DEFENDANTS

Name	Positions	Net Worth
Charles Hurwitz	Director of UFG (11/10/83–2/11/88)	$140MM
	UFG Executive Committee (1983–2/11/88)	
	President and CEO of UFG (8/84–11/14/85)	
	Chairman of the Board of UFG (8/84–11/14/85)	
	UFG/USAT Strategic Planning Committee (1986 and 1987)	
Barry Munitz	Director of USAT (8/26/82–1988)	$3.4MM
	USAT Executive Committee (1982–1988; Chairman, 1985–1988)	
	USAT Executive Compensation Committee (1982–1985)	
	USAT Investment Committee 8/8/86–5/19/87; Chairman, 1986)	
	UFG/USAT Strategic Planning Committee (1986 and 1987)	
	Director of UFG (1983–1988)	
	Chairman of UFG board (1988)	
	Chief Executive Officer and President of UFG (1988)	
	UFG Executive Committee (1983–1988; Chairman, 2/14/85–1988)	
	UFG Investment Committee (1987)	
	UFG Compensation Committee (1983–1988)	
Jenard Gross	Chairman of the Board of USAT (2/14/85–1988)	$7MM
	CEO of USAT (2/14/85 to 1988)	
	President of USAT (1/8/87 to 1988)	
	USAT Executive Committee (1986–1988)	
	USAT Audit Committee (11/10/87–1988)	
	Chairman of USAT Investment Committee (5/8/86–1988)	
	USAT/UFG Strategic Planning Committee (1986–1987)	
	Director of UFG (1985–1988)	
	President and CEO of UFG (11/14/85–1988)	
	UFG Executive Committee (1985–1988)	
Michael Crow	Executive VP (Fin/Adm) and Chief Financial Officer of USAT (12/83–1988)	Unknown
	Senior Executive VP (Fin/Adm) of USAT (1/8/87–1988)	
	USAT Executive Committee (1988)	
	USAT Investment Committee (5/8/86–1988)	
	USAT/UFG Strategic Planning Committee (1986 and 1987)	
	Director of UFG (1988)	
	CFO of UFG (1984–1988)	
	Senior VP of UFG (12/83–1988)	
	Net Worth Total	$150MM
	Available Insurance	$0
	Total Recovery Sources	$150MM

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Chairman Helfer, Vice Chairman Hove, Director Ludwig, Acting Director Fiechter, Mr. Geer, Mr. Mason, Mr. Hood, Mr. Zemke, Mr. Jones, Mr. J. Smith, Mr. Rose, Mr. Thomas, Mr. Graham, Mr. Newton, Mr. Whitney, Mr. O'Keefe, Mr. Taylor, Ms. Anderson, Mr. Monahan.

Memorandum to: Board of Directors, Federal Deposit Insurance Corporation

From: Jeffrey Ross Williams, Counsel, Professional Liability Section

Robert J. DeHenzel, Jr., Counsel, Professional Liability Section

Subject: United Savings Association of Texas Houston, Texas—In Liquidation Request for Authority to Initiate Litigation

I. Introduction

United Savings Association of Texas (''USAT'') presents a graphic picture of what can happen when: two hopelessly insolvent thrifts are combined (resulting in USAT); regulators/insurers (FHLBB, FSLIC and FHLB-Dallas) lack resources to close the thrift; regulatory and general accounting rules allow, if not encourage, financial reporting that does not reflect economic reality, and there is a controlling person (Charles Hurwitz (''Hurwitz'')) who (a) understands the foregoing, (b) can obtain control of the thrift by investing a nominal percentage of his assets ($7.8 million to control $3.3 billion), (c) has substantial personal and corporate incentives to keep USAT open and under his control regardless of its actual condition (e.g., to maintain his ability to buy massive quantities of Drexel junk bonds with no funding concerns or real risk to himself and aid him in obtaining an $8 million bonus from another Hurwitz controlled entity, Maxxam, Inc. (''Maxxam), and (d) could, and did, recruit and motivate enough officers and directors (the ''core group'') for USAT to assure that his goals were promoted despite their cost to USAT—and, ultimately, the American taxpayers.

In addition to self-inflicted wounds, USAT was the victim of a multimillion dollar fraud (by Couch Mortgage), and suffered the effects of holding a portfolio of real estate loans and investments in the collapsing Texas economy.

Under Hurwitz's control, USAT made a large number of, at best, questionable real estate loans, both made and lost money on its junk bonds, and suffered huge losses on two successful attempts to create paper profits through trading mortgage backed securities (''MBS'') *and* instruments that supposedly hedged the MBS.

We recommend three basic claims: the first for $97 million in (net) losses in the second MBS trading scheme, the second for approximately $50 million in additional losses which could have been avoided but were incurred with respect to the institution's first MBS portfolio, and the third for in excess of $150 million for failure to comply with net worth maintenance obligations of USAT. While we believe that some additional claims (involving losses on the first MBS portfolio, a patently imprudent $32 million dividend by USAT, grossly excessive salaries, and commercial lending losses) could pass the Rule 11 test for good faith pleadings, our conclusion based on the facts now known to us is that ultimately we could expect to lose on those additional claims under a gross negligence/Texas business judgment rule standard. Consequently, such additional claims are not recommended. We have also negotiated an agreement in principle with United Financial Group, Inc. (''UFG''), USAT's first tier holding company, to settle a separate tax claim for approximately $9.6 million, which we hope to finalize within the next 90 days.

II. Background

In 1982, Hurwitz, a well-known Houston investor active in leveraged corporate acquisitions, acquired USAT in connection with a merger of two Houston savings and loan holding companies, namely, UFG which owned 100 percent of USAT, and First American Financial of Texas (''First American''). From the outset of the Hurwitz regime, USAT was in serious financial trouble. It struggled with a portfolio of under-performing and non-performing loans; it had the burden of $280 million in goodwill as a non-income producing intangible asset; and it had severe internal control problems. USAT survived only by taking gains from extraordinary and high risk transactions.

Hurwitz's acquisition of USAT obtained for him the financial leverage available in a federally insured deposit institution such as USAT and the assistance it would provide to his takeover activities. He acquired control over USAT's approximately $3.3 billion in assets through entities owned and controlled by him for a $7.8 million investment. Hurwitz's $7.8 million investment constituted *0.2%* of USAT's initial assets; the American taxpayers lost $1.6 billion—*48%* of USAT's initial assets and 200 times Hurwitz's investment. Hurwitz dominated the affairs of both USAT and the holding company, leveraged the institution heavily, and, ultimately, engaged in a series of grossly imprudent transactions—all at little or no risk to himself.

On December 30, 1988 USAT failed. At failure the Association had assets of $4.6 billion; the loss to the FDIC is estimated at $1.6 billion.

This memorandum requests authorization to initiate litigation against Hurwitz and three former directors and officers of USAT. The proposed lawsuit seeks approximately $300 million in losses incurred as a result of gross negligence, breach of fiduciary duties of loyalty and care, knowing participation in and aiding and abetting breach of fiduciary duty and professional negligence. There is no directors and officers' liability policy. The proposed defendants have an aggregate net worth of approximately $150 million.

Absent a change from the current state of the law in the Fifth Circuit on the statute of limitations, there is at least a 70% chance that most or all of the case will be resolved adversely to the FDIC on summary judgment or on a motion to dismiss. If, the claims survive the statute of limitations challenge, the odds of a favorable outcome remain marginal at best because of adverse caselaw on the standard of care and the business judgment rule.

The admittedly high cost, high risk claims against Hurwitz and the former directors and officers outlined in this memorandum may result in a significant recovery. After balancing the merits of the claims, the likely recovery sources, and the fact that the statute of limitations defense may be be tested early in the litigation, thus reducing the likely cost if the litigation is ultimately unsuccessful on that basis, we recommend that these claims be pursued.

III. Theory of the Claims

The proposed litigation consists of three claims which are summarized briefly below and set out in more detail in Section V, *infra*.

A. Claims Against Hurwitz and the Core Group

The claims against Hurwitz and the proposed officer and director defendants will be based upon losses resulting from USAT's decision to engage in two significant transactions, each grossly imprudent: the investment of $180 million in a USAT subsidiary, United MBS (''UMBS''), to facilitate what were billed as risk controlled arbitrage activities (with losses of approximately $97 million) and its failure to act to prevent further losses in USAT's first MBS portfolio (with losses of approximately $50 million). The third claim is against Hurwitz only for failure to maintain the net worth maintenance obligations of USAT.

1. The $180 Million Investment in United MBS

The claims against the proposed defendants for UMBS losses are predicated upon strong warnings from regulators and USAT's outside auditor concerning USAT's securities investments, the defendants' knowledge of USAT's deep financial trouble and USAT's disastrous mismanagement of and demonstrated inability to control its MBS investment portfolio. The theory of the claims against most of the proposed defendants is twofold. First, the USAT Board was grossly negligent in abdicating its supervisory role over the investment affairs of the institution by failing to carefully analyze, approve, and assure adequate controls on the investment in UMBS. Second, certain directors and senior officer members of the Executive Committee, Investment Committee and Strategic Planning Committee (including Hurwitz) were grossly negligent by virtue of their having orchestrated the formation of UMBS, actively directed the investments in UMBS and caused substantial USAT funds to be lost due to UMBS's high risk trading strategies. Hurwitz, as a *de facto* director and an active participant on the Strategic Planning Committee, is liable under both theories. The claims against Hurwitz, in addition to those set forth above, are based on his knowing participation in and aiding and abetting the officers and directors in the breach of their duties.

2. Failure To Prevent Further Losses From USAT's First MBS Portfolio—Joe's Portfolio

The claim against the proposed defendants arising from USAT's first portfolio—Joe's Portfolio—is based on the failure to take action in early 1987 to prevent exposing USAT to further losses. Joe's Portfolio itself has been described by one USAT analyst as a disaster. USAT set up the portfolio without hedging against the risks of declining interest rates and, when interest rates declined, USAT was left with interest rate swap agreements requiring fixed interest payments well in excess of the short term interest rate payments USAT received in return. Rather than recognizing the loss inherent in the swap agreements, USAT engaged in a ''roll down'' strategy, replacing higher coupon MBSs with more stable current coupon issues. The result was that USAT ended up with MBSs yielding substantially less than the rates USAT was required to pay on its swap agreements.

By December 31, 1986, it was obvious that USAT's strategy for Joe's Portfolio made no sense. The portfolio had a negative spread and the low coupon MBSs exposed USAT to substantial risk of loss in the event that interest rates increased. Peterson Consulting has analyzed the portfolio and concludes that USAT should have terminated the swaps and sold the MBSs in January 1987. If it had done so, the ultimate losses USAT suffered as a result of Joe's Portfolio would have been reduced by approximately $50 million.

The same members of the Investment Committee involved with the UMBS claim, as well as Hurwitz, would be defendants on the Joe's Portfolio claim and the legal theories would mirror those on the UMBS claim.

3. Net Worth Maintenance Obligation

By virtue of his position as a de facto officer and director and controlling person of USAT, Hurwitz owed to USAT a duty of loyalty and a duty to protect and care for the interests of the institution. By virtue of his position as a Board member and officer at UFG and MCO (two of USAT's holding companies), and as a director and control person of Federated Development Company (''FDC''), Hurwitz was in a position to cause these entities to honor their net worth maintenance obligations to USAT. Hurwitz intentionally disregarded these duties and, indeed, devoted considerable efforts to helping UFG, MCO and FDC avoid these responsibilities. The loss attributable to his breaches of duty is in excess of $150 million.

* * * * *

While we believe the entire USAT Board was grossly negligent with respect to the UMBS investigation and Joe's Portfolio, we do not and cannot recommend suit against all Board members. Early in the course of the investigation of the case, tolling agreements were entered into with officers and directors who were perceived at the time to be key players. Other officers and directors who were perceived to be of less significance were not presented with tolling agreements. With respect to those individuals with whom we have tolling agreements, the selection of parties as defendants in the UMBS and Joe's Portfolio claims has been governed, principally, by four factors. The first is the degree to which the proposed defendant was involved in the transactions at issue. The second is the knowledge of the affairs of the institution attributable to the proposed defendant. The third is the extent to which the proposed defendant was a member of the Hurwitz ''core group''. The fourth factor is the degree to which pursuing a defendant against whom legitimate claims now exist and is cost effective. The application of those four factors to individual defendants is set forth in Section V infra. Finally, we did not propose suit against certain directors who were not part of the ''core group,'' did not personally benefit, and were otherwise in the same position as others as to whom we had previously allowed the statute of limitations to expire. We believe this result is fair and that it is unlikely to change the economics of the claim.

IV. History and Regulatory Background

A. Hurwitz's Control Over USAT

Charles Hurwitz exercised control over most of the activities of the Association. He was the key decision make at the institution although he had not formal title at USAT. In addition to the control conferred by his stock ownership in UFG, Hurwitz acted as a de facto officer and director of USAT—he was Chairman of UFG, which had virtually no operations independent of USAT, and caused USAT to hold joint USAT/UFG Board meetings, which he attended; he attended certain Senior Loan Committee (''SLC'') meetings (including the Park 410 meetings) and selected Investment and Executive Committee meetings; and he was a member of the UFG/USAT Strategic Planning Committee. Together with other officers and directors of FDC and MCO (the Hurwitz entities which held a substantial stock interest in UFG), Hurwitz devised and approved USAT business strategies. He worked with other MCO/FDC employees to direct USAT's securities investments.

Further, Hurwitz hand-picked certain prior business and social friends for key positions at USAT to carry out his plans for USAT, and hired others, paying them excessive salaries despite their limited experience in the savings and loan industry. The relationships these individuals had with Hurwitz and the salaries USAT paid them compromised their loyalty to the institution. This group of Hurwitz associates—the ''core group''—included Crow, Munitz, Kozmetsky, Gross, Berner, and Huebsch. Each of them held positions not only with USAT but also the holding company, UFG, and with MCO/FDC.

B. The Drexel Connection

A principal motive for Hurwitz's acquisition of USAT was the potential assistance it could provide for his takeover activities. The initial plan called for using USAT as a merchant bank which would directly participate in hostile takeovers. The first such effort was the attempted takeover by MCO, FDC and USAT, of Castle & Cook (''C&C'') in late 1983. The use of federally insured funds in connection with this activity resulted in litigation, unfavorable publicity and criticism from FHLBB regulators. Ultimately, Hurwitz abandoned the C&C takeover and thereafter utilized USAT to support his takeover activities through less direct means.

In 1984, Hurwitz entered into what appeared to be a quid-pro-quo arrangement with Drexel Burnham Lambert, Inc. (''Drexel'') pursuant to which Drexel would assist Hurwitz's takeover activities in exchange for USAT's investment in Drexel underwritten junk bonds. This conclusion is supported by the timing and nature of the trades and financings at USAT and is consistent with Drexel's work with other lending institutions. In 1992, USAT Director and Executive Committee member Barry Munitz stated in an interview that an ongoing relationship with Drexel was important to Hurwitz. According to Munitz, Hurwitz needed to keep USAT open and free from regulatory intervention in order to maintain his ''ticket-to-ride'' with Drexel, and refused to have other entities he owned or controlled acquire a junk bond portfolio because of the risk. We believe that many of the accounting driven gains taken by USAT to artificially maintain net worth were undertaken to avoid regulatory intervention and to ensure that USAT would continue to provide Hurwitz with access to Drexel—even at the cost of operating the institution at a loss. USAT eventually became the eighth largest purchaser of Drexel-underwritten junk bonds among all savings and loans nationwide. By December 1986, 69% of USAT's entire junk bond portfolio, valued at $444 million, was Drexel underwritten.

During this period, Drexel arranged junk bond funding for Hurwitz's takeover activities and USAT purchased junk bonds and other investments from Drexel. From 1984 through 1988, Hurwitz obtained approximately $1.8 billion in junk bond financing through Drexel for his takeover activities, and USAT purchased approximately $1.8 billion of Drexel junk bonds, and other Drexel brokered securities.

Drexel also assisted Hurwitz's efforts to insulate his key entities FDC and MCO from USAT net worth maintenance obligations. In June 1983, FDC and MCO filed an application with the FHLBB to acquire a controlling interest of as much as 35 percent of UFG and thus to become a savings and loan holding company (''SLHC'') for USAT. In December 1984, the FHLBB approved the FDC/MCO application subject to the condition that FDC/

MCO maintain the net worth of USAT. That condition was unacceptable to hurwitz, who engaged in extensive negotiations with the FHLBB to attempt to eliminate or modify that condition. These negotiations continued from December 1984 through at least 1987, but never resulted in an agreement. During their pendency, Hurwitz, nonetheless, appears to have increased FDC/MCO's control over USAT. At December 31, 1984, Drexel appears for the first time as a substantial shareholder of UFG, holding 585,371 shares (or 7.2 percent).

In December 1985, Drexel and MCO entered into an option with respect to 300,000 of the UFG shares held by Drexel. Drexel had a right to put the shares to MCO in 1988 at a premium over market. Drexel also received a substantial option fee for entering into the transaction. Documents produced by MCO's successor, Maxxam, indicate that the transaction was structured to avoid the 25% ownership threshold which would have obligated MCO/FDC to maintain USAT's net worth. The agreement was extended in 1988 for no consideration, to avoid Drexel putting UFG shares to MCO when USAT already had admitted that it failed to meet minimum net worth requirements. Drexel did not exercise its right to put the shares to MCO until 1989, after USAT failed.

C. The Economic Context For The Claims Against Hurwitz and the Core Group

The conduct of the defendants which will be the subject of the proposed litigation must be evaluated in the context of USAT's overall financial condition. From the outset of Hurwitz's involvement with USAT, the institution faced enormous financial challenges. Although its financial statements reported capital in compliance with regulatory requirements, the institution had a non-earning asset—goodwill—on its books arising from the First American merger. This large (more than $280 million) intangible asset exceeded USAT's total reported capital, leaving USAT with no tangible capital on a liquidation basis. Moreover, the need to amortize USAT's goodwill over time created a drag on earnings for the foreseeable future. In addition to the challenge presented by USAT's goodwill, by the mid-1980's the institution also faced the impact of the decline in the Texas real estate market, which threatened earnings from USAT's real estate related assets and subjected the Association to repeated increases in loan loss reserves.

USAT management was well aware of the challenges it faced. A memorandum from USAT's president, Gerald Williams, to Hurwitz, dated April 12, 1985, stated that the ''biggest road block to operational profit improvement'' was the approximately $241 million of non-earning intangible asset of goodwill. A memorandum from USAT's Chief Financial Officer, Michael Crow, dated August 21, 1985, stated that ''we need to put together a slide show . . . for Mr. Hurwitz as to why we cannot make money at United Savings. . . . [explaining] why our profitability is impaired by such things as goodwill amortization, below market mortgage loans etc.''

1. The Branch Sale and $32.6 Million Dividend

With that as prologue, in 1984, USAT sold approximately half of its branch network with the stated intention of moving toward a ''wholesale strategy'' which would rely less on traditional core deposits and home mortgage lending and more on brokered deposits and other ''wholesale'' activities. The branch sale resulted in a reported profit of $81 million. Rather than either offsetting this gain against goodwill (which was presumably based in large part on the franchise value of the branch network) or leaving the additional capital in USAT to absorb future goodwill amortization or operational losses, USAT declared and paid a dividend of $32.6 million to UFG. The Federal Home Loan Bank Board's Supervisory Agent in Dallas expressed ''no supervisory objection'' to the dividend because it fell within the limits of the Bank Board's December 6, 1984 resolution, which provided that UFG would not cause USAT to pay a dividend that exceeded 50% of USAT's net income. The $32.6 million was 50% of profits after USAT's $17 million operation loss was offset against this extraordinary gain.) However, the Supervisory Agent stated that ''this office is very concerned with the Association's practice of selling branch offices to fund upstream dividends, particularly in view of the Association's $17.4 million net operating loss for fiscal year 1984''. The Supervisory agent also stated that ''. . . we will continue to closely monitor the Association's performance and will take action if the Association's earnings and net worth position begin to deteriorate.''

2. Liability Growth in 1985

USAT used the remaining 50% of its branch sale profit (and the resulting increase in net worth) to support additional growth during 1985. As USAT described the situation in mid-1985, the increased net worth from the branch sale provided ''a foundation upon which to build a new United.'' The assets acquired by the ''new United'' principally consisted of mortgage-backed securities (''MBSs'') and ''corporate securities''—most of which were junk bonds. By June 30, 1985, USAT had acquired $489 million of MBSs funded by reverse repurchase agreements and $288 million of ''corporate securities'' funded with brokered deposits.

USAT's growth during the first half of 1985 resulted in an increase in total liabilities in excess of the annualized 25% rate for which prior approval by USAT's Principal Supervisory Agent was required under 12 CFR § 569.13–1(a)(1). USAT failed to obtain prior approval. USAT's liability growth led to a request by the Supervisory Agent on October 22, 1985 that USAT's Board execute a Supervisory Agreement under which the association would be obligated to comply with the liability growth regulation and provide a monthly report concerning liability growth. After extended negotiations, USAT agreed to limit its liabilities on December 31, 1985 to $4.68 billion. USAT's Board adopted a resolution expressing the agreement and a February 18, 1986 memorandum from a FHLBB of Dallas Subvisory Agent to the Bank Board's Director of Enforcement stated that ''United was in compliance at December 31, 1985.''

3. The Mortgage Backed Security Losses

In 1985–1986 USAT engaged in a series of securities transactions which seriously impaired the institution. These transactions illustrated that the institution did not have the desire, intent, or expertise to manage such a securities portfolio properly.

Even under the best of circumstances (i.e., the prospect of earning a net spread of approximately 100 basis points on the MBS portfolio), the MBS investment strategy could not possibly have had a substantial impact on USAT's existing and deepening problems due to its enormous goodwill carry and its escalating losses on its non-performing real estate portfolio. In practical terms, a 100 basis point spread on a $500 million portfolio would yield an annual profit of $5 million. Before economic reality caught up with reported results, USAT has reported extraordinary profits in this portfolio of approximately $70 million through the end of 1986—while the ultimate result from this portfolio was an approximately $190 million loss (approximately $110 million in swap losses and $80 million in MBS losses) to USAT. USAT's goal was simple—make every effort to deflect regulatory concern by generating as much extraordinary profit as possible, while deferring losses, in order to keep the institution alive. Hurwitz's motive in directing this strategy was that so long as the institution survived, it could purchase junk bonds and Drexel could continue to facilitate his other financial objectives.

a. USAT Mortgage Finance

Although USAT may have been in compliance with its liability growth limit at the end of 1985, it achieved this result by moving its growth to subsidiaries for which USAT reported only its investment, not the individual assets and liabilities of the subsidiaries. One of these subsidiaries, USAT Mortgage Finance, Inc., was formed in late 1985 to acquire $500 million of MBSs funded by reverse repurchase agreements. Potential defendants state that USAT formed USAT Mortgage Finance to be a ''finance subsidiary'' with the understanding that its assets and liabilities would not have to be reported on USAT's books. They further assert that USAT quickly learned that the regulatory treatment it anticipated would not be available and therefore sold $350 million of the subsidiary's MBSs, paying off a like amount of reverse repurchase agreement liabilities.

The sale of USAT Mortgage Finance's MBSs resulted in a realized $9.3 million gain in 1985, without which USAT would have incurred a loss for the year. However, in real economic terms, USAT's sale of the MBSs resulted in a loss because USAT had acquired interest rate swaps to extend the duration of the reverse repurchase agreement liabilities. The $9.3 million gain on the MBS sales was matched by a larger unrealized locked in loss ($14.7 million) in the value of the swap agreements. USAT did not recognize the loss inherent in the swap agreements, but instead redesignated the swaps in order to justify deferring the loss, and permit regulation of it over the life of the agreements as payments were made under the swaps. According to the workpapers of USAT's outside auditors, Peat Marwick & Mitchell (''Peat Marwick''), ''the forced sale of securities left an'' ''imbalance'' between the securities portfolio and the swap agreements. USAT explained to Peat Marwick that it had then entered into a ''mirror swap'' with respect to $230 million of the swaps in order to offset some of the imbalanced position. The mirror swap locked in the negative spread that USAT would have to pay over the life of the agreements, provided they were not terminated (and the loss taken) at an earlier date.

USAT's transactions in USAT Mortgage Finance and its accounting enabled USAT to report a gain from the transaction without recognizing the corresponding loss on the interest rate swap agreements. This highly aggressive (and disputed) accounting treatment was approved by Peat Marwick. FDIC retained Peterson Consulting to evaluate the transaction and calculate the loss inherent in the swap agreements. Peterson Consulting concluded that the ''implied market value loss'' on the $230 million mirrored swap agreements was $9.6 million and that, if the remaining $120 million of swap agreements had been terminated, and transaction costs taken into account, a loss of $5.1 million would have resulted. If these losses had been recognized in 1985, they would have caused USAT to report a $1,436,000 loss for the year and to report net worth of $172,129,000, approximately $347,000 below the association's required net worth at the end of the year.

Thus, USAT entered 1986 with the knowledge that it had narrowly avoided reporting a loss for 1985; that in economic terms, it had incurred a loss on its swaps that, if recognized, would have reduced its net worth to slightly less than its regulatory requirement; and that its goodwill and other real

estate problems persisted and meant that, absent extraordinary transactions, in the words of USAT's Chief Financial Officer, ''we cannot make money at United Savings.''

b. The ''Roll Down'' of Joe's Portfolio

In 1985, USAT itself made substantial investments in MBSs in what became known as ''Joe's Portfolio,'' referring to Joe Phillips, USAT's junk bond analyst who during this period also had responsibility for managing the MBS investments. After presentations by various investment banking firms engaged in the business of selling such transactions to savings and loans, USAT acquired MBSs, funded them with reverse repurchase agreements, and entered into interest rate swap agreements to effectively lengthen the maturity and duration of the reverse repurchase liabilities. USAT's description of the program in an October 28, 1985 letter to USAT's Principal Supervisory Agent at the FHLB of Dallas noted that the asset/liability match ''virtually locks in a spread between United's asset yield and funding cost.''

USAT's program was seriously flawed from the beginning. The interest rate swaps locked in a funding cost of approximately 11%, which generated a positive spread when compared with the original MBSs in the portfolio having a yield of slightly over 12%. But the home mortgages underlying the MBSs were subject to prepayment at the option of the mortgagors. Shortly after USAT acquired the MBSs for Joe's portfolio, interest rates plunged, with the five year Treasury rate falling from 10.88% in April, 1985 to 7.14% in April 1986, giving homeowners an incentive to refinance their mortgages. As a result, USAT found that the MBSs were prepaying at a much faster rate than had originally been estimated, depriving USAT of the high yielding assets which were needed to cover the 11% funding cost on the interest rate swaps.

USAT reacted to the accelerating prepayments by attempting to sell the high yielding MBSs at a gain before they prepaid and purchasing replacement MBSs at current coupon rates. The theory of this ''roll down'' strategy apparently was to acquire more stable MBSs that would be less likely to prepay, eroding the assets in the portfolio. However, USAT continued this roll down strategy long after it ceased to make sense. As interest rates declined USAT continued to sell MBSs at a gain and to reinvest in current coupon MBSs, even though the new MBSs yielded less than the locked in funding cost on the interest rate swaps. When interviewed about the events of early 1986, Joe Phillips did not recall that USAT had continued the roll down strategy after it had become futile, but conceded that rolling down to MBSs which yielded a negative spread (after taking into account the gains realized) made no sense.

USAT's decision to roll down to lower coupon MBSs, rather than to ''unwind'' Joe's Portfolio may have been a conscious decision to expose USAT to a risk of even larger losses in the future in order to avoid immediate recognition of the losses inherent in the interest rate swap agreements USAT had entered into in connection with Joe's Portfolio. Had USAT admitted its error in structuring Joe's Portfolio and decided to unwind it, using the proceeds from MBSs to repay reverse repurchase agreement lenders, it would have been left with the adverse interest rate swap agreements alone. There were large imbedded losses in these swaps that would have to have been recognized if they had been terminated.

4. Notice of Significant Problems To The Board Members and Senior Officers

From 1984 through 1986 the officers and directors of USAT were clearly advised by regulators and outside auditors of significant problems at USAT. They took no steps, however, to assert control over the institution. Thus:

The Board as a whole was advised early in USAT's history of significant problems in the Assosciation's real estate portfolio. In January 1985, the entire Board was advised by Texas regulators that (a) scheduled items had grown dangerously and exceeded the Association's net worth ($153.7MM in scheduled items constituting 105% of net worth and 4.4% of assets), (b) the appraisal practices at USAT were suspect, and (c) ''significant'' increases in loss reserves would be forthcoming.

In February 1985, the Board acknowledged receipt of the Texas Savings and Loan Department's warnings concerning the growth of scheduled items at the Association and promised to monitor such matters more closely. Yet, in the same month, the Board, for the first time, delegated loan approval up to $70 million to the SLC in an act of remarkable abdication of control over USAT's real estate lending.

From 1984 through 1986, the Board and the Audit Committee of the Board were repeatedly advised by the Association's outside auditors that the ADC lending was a significant problem at the Association and that the Association's appraisal practices were deficient. Indeed, on the very day the Park 410 loan was approved by the Board, the Audit Committee met with outside auditors and were advised again of problems with the Association's appraisal practices.

Throughout 1985 and 1986 Board packets forwarded to members of the Board for quarterly meetings clearly indicated the growing danger that ADC lending posed to the institution and the rapidly rising rate of foreclosures in the portfolio.

Throughout 1986 the Board was advised by either Peat Marwick or by the Investment Committee (Board members received copies of Investment Committee minutes) that the significant increase in securities trading had yielded serious internal control problems, and that the MBS portfolio was seriously distressed.

Board members were advised in February 1986 that the income of the UFG Group was plummeting and that the accounting gains taken by USAT from MBS trading may not reflect ''real'' results.

The April 1986 Texas Examination and the May 1986 FHLB Examination reported that the institution had significant securities investment problems, a staggering substandard assets problem, and was as much as $20 million below its regulatory capital requirements. These findings were not formally communicated to USAT's Board until 1987, but regulators had periodic discussions with senior management on these items during the summer of 1986.

The claims against Hurwitz and the core group must be viewed against this background. By 1986 it was readily apparent to the officials of USAT that the institution's viability was in doubt. Yet within a four month period in 1986 (May to August) USAT approved major transactions with extraordinary and unacceptable risk. These activities evidence blatant disregard for the officers' and directors' duties to the institution and illustrate the degree to which certain members of the Board deferred to the interests and goals of Charles Hurwitz. Both of the transactions underlying our proposed claima display a common thread—namely, the willingness of USAT's officials to commit substantial resources regardless of obvious long term risk of loss so long as there was a potential for reporting short term gains. The decisions to make the Park 410 loan, to invest in UMBS and the failure to act with respect to Joe's Portfolio each results in substantial losses and cannot be defended as business judgments.

V. Discussion of Claims

A. MBS Transactions

1. Formation and Operation of UMBS

In late 1986 USAT decided to form a subsidiary—UMBS—to engage in what was billed as leveraged MBS ''risk'' controlled arbitrage.'' Either the attempts to hedge the portfolio were grossly deficient *or* there were a series of largely unhedged rolls of the dice *or* UMBS was used to put on a massive—almost $2 billion—straddle. That is, UMBS was set up so that no matter how interest rates moved there would be large gains *and* large losses in its portfolio. UMBS took its profits—to allow USAT to report profits—and let its losses run. The reported profits were approximately $60 million through December 1988, while actual accounting losses at liquidation were approximately $125 million.

USAT invested approximately $180 million in the UMBS, leveraged the investment into a $1.8 billion portfolio of MBSs and ended up losing about $97 million, taking into account the cost of the funds invested. Although we do not recommend naming all the Board members as defendants, we believe the entire Board abdicated its responsibility to adequately supervise USAT when it failed to consider, approve, or control the risk inherent in the $100 million investment in UMBS. The decision by certain directors and officers to invest in UMBS and engage in these activities was grossly negligent. The risk of the UMBS investment was especially obvious and totally imprudent in light of USAT's disastrous experience with its first ''risk-controlled'' MBS portfolio, particularly in light of USAT's weakened financial condition. The decision was a breach of the defendants' fiduciary duties of loyalty because its purpose was to extend the life of USAT for the benefit of Hurwitz's interests regardless of cost or risk. Moreover, once the investment was made, USAT's Investment Committee authorized UMBS to engage in speculative strategies, gambling that large profits could be achieved, without hedging to protect USAT's investment in the event that the strategies failed. The authorization of these strategies was grossly neglient and a breach of the defendants' fiduciary duty of loyalty.

USAT's Board members were advised by Peat Marwick in early 1986 of internal control problems and a steep rise in securities activities. They were also advised through Investment Committee minutes that USAT's MBS trading was in a confused and troubled state. Remarkably, despite this, and in what appears to be another total abdication of responsibility, the Board never considered or voted upon resolutions authorizing the investment of any specific amount in UMBS, much less the $100 million initially invested in UMBS. The failure of Board members Munitz and Gross (who were members of Hurwitz's core group) to act to protect USAT from these investment strategies, to take steps to control USAT's MBS activities and to prevent the initiation of a new, even larger phase of such activities, warrants proceeding against them. Although Kozmetsky was a Board member and a member of Hurwitz's core group, we do not recommend naming him as a defendant.

The formation of UMBS was approved by USAT's Executive Committee at a meeting on August 7, 1986 but there was no recorded discussion at the meeting of the size of the investments to be undertaken by USAT in UMBS. Certain Hurwitz core group members, however, were aware of the magnitude of the UMBS investment by early September. Materials prepared and distributed for a September 15, 1986 Strategy Meeting (attended by Hurwitz, Gross, Munitz, Crow and others)

include a recommendation to increase assets through service corporations which will purchase MBSs and hedge against interest rate risk. The materials mention a $100 million advance to a service corporation (presumably UMBS) and a related asset increase of $1 billion. A memorandum dated October 6, 1986 to Crow, Phillips, Sandy Laurenson (who was hired to manage the UMBS portfolio) and others (with copies to Gross and others) states that a new subsidiary had been established and capitalized at $100 million to be utilized for Sandy Laurenson's new MBS arbitrage activities. Thus, Hurwitz, Gross, Munitz and Crow, as well as lower level officials at USAT, knew by October 6, 1986 that a $100 million investment was contemplated and Hurwitz, Gross, Munitz and Crow must have by then reached the decision to make the investment.

This decision was made at a time when USAT was in extreme financial difficulty. The materials distributed at the September 15, 1986 Strategy Meeting contain projections that, with no changes in interest rates, USAT would lose between $40 million and $60 million in each of the next three years and that USAT had a negative liquidation value of $431.2 million. The materials further concluded that growth and capital were both needed ''to restore the viability'' of USAT and that, before 1987 (when capital rules were to change), growth ''must occur through subsidiaries.'' Shortly before he left USAT, in a memorandum dated November 24, 1986, Gerald Williams wrote to Hurwitz, Gross and Crow stating that USAT's ''base operation'' was losing money at a rate of $77 million a year, up from $40 million in 1985.

We propose to also file suit against Munitz, Gross, Hurwitz and Crow on the theory that the decision to invest in UMBS was grossly negligent given USAT's enormous losses from based operations (making new high risk investments inappropriate), given the adverse financial consequences USAT experienced from its investment in Joe's Portfolio and which were at high risk of being repeated by UMBS, and given the fact that USAT was no longer viable at the time of the investment. Hurwitz, Munitz, Gross and Crow were present at the September 15 strategy meeting when the magnitude of the investment—$100 million—was revealed and presumably approved. De facto director Hurwitz encouraged the UMBS activities and knowingly participated in and aided and abetted the other defendants' violations of their duties.

After UMBS was formed, USAT's Investment Committee supervised the investment, authorizing the various high risk strategies that exposed USAT's investment to loss. Munitz, Gross and Crow were senior executives of USAT and members of the Investment Committee that approved these strategies. The Investment Committee also failed to follow USAT's stated goals for the UMBS investment. USAT's stated goal for the UMBS portfolio, as indicated by an attachment to the November 12, 1986 Investment Committee minutes, was to ''[b]uy high coupon FHLMC's (10's—12's) and hedge assets and financing for 1 to 2 years.'' A formal Statement of Purpose for UMBS indicates that the arbitrage investment had a ''a two year time horizon'' and that GNMA put options would be used to hedge ''the potential cash shortfall if the asset disposal does not cover the liability retirement.'' Despite these statements, Sandy Laurenson, who was hired to manage UMBS, has admitted that USAT did not follow the Statement of Purpose for the subsidiary. Instead, with the full knowledge and approval of the Investment Committee, USAT, through Laurenson, engaged in a leveraged ''roll of the dice'' in her management of UMBS. The principal goal was to take the risks necessary to generate substantial profits which would maintain USAT's capital. That goal was pursued even though it exposed USAT to capital losses when interest rates increased, and jeopardized the positive spread the portfolio was supposed to generate.

Records concerning the operations of UMBS bear out Laurenson's statements. Contrary to the Statement of Purpose, UMBS did not purchase enough GNMA puts options to protect the value of its MBSs in the event that interest rates increased, as they did from April through September 1987. The GNMA puts options UMBS acquired were apparently exercised for a gain of $3.6 million—much less than the loss on the MBSs. The GNMA put options were replaced with additional asset hedges—Treasury note futures options—but they were either acquired too late or in an insufficient amount to offset the loss on the MBS assets. The result of UMBS's inadequate asset hedges was a loss in market value of the assets of UMBS of approximately $140 million. Because the liquidation took place within the approximate time frame outlined by USAT for the investment—2 years—and hedges adequate to protect the value of the MBSs were not in place, USAT incurred losses on its investment in UMBS of at least $64.9 million (plus interest).

The UMBS operation involved enormous risks, which Laurenson understood and which she says she disclosed to members of the Investment Committee and Hurwitz in their weekly meetings. The decision to undertake those risks was reckless and grossly negligent. The result was that, when USAT's investment in UMBS was finally terminated by subsequent management, $172,171,894 of USAT cash was invested in UMBS's operations and USAT recovered only approximately $107,330,000 of cash, resulting in an ''out of pocket'' loss of $64,997,000. If the cost of financing USAT's investment in UMBS at the average rate paid on USAT's deposits is added to this ''out of pocket'' loss, USAT incurred a loss of $97,645,000.

2. Failure to Prevent Further Losses From Joe's Portfolio

The decision to invest in Joe's Portfolio without hedging against the risks of declining interest rates left USAT with interest rate swap agreements requiring fixed interest payments well in excess of the short term interest rate payments USAT received in return. Rather than recognizing the loss inherent in the swap agreements, USAT engaged in its ''roll down'' strategy with the result that USAT acquired MBSs yielding substantially less than the rate USAT was required to pay on its swap agreements. Peterson Consulting has analyzed USAT's portfolio and the roll down strategy and has concluded that, by the end of 1986, USAT had a negative spread on Joe's Portfolio, even taking into account the gains realized from the sales of high coupon MBSs.

Although USAT's internal systems did not produce comprehensive reports reflecting the status of Joe's Portfolio and the risks it presented, numerous internal USAT memoranda reflect the knowledge of senior executives by mid-1896 that Joe's Portfolio had turned into a major problem posing substantial risks for the future. A January 24, 1986 memorandum from Gross to Gerald Williams questioned whether the MBS sales were ''honest to goodness sales that still leave us with the same yield that we had before'' or whether ''we have penalized our profits for the next five to ten years on our portfolio to take that profit.'' Gross wrote to Huebsch and Gerald Williams on February 6, 1986, noting that if you replace a 12½% MBS with an 11½% MBS ''and still have to match it up with the same swaps that you originally had on, it appears to me that you have worsened your position.''

By July 1986, it should have been clear to all of USAT's senior management that something was seriously wrong with Joe's Portfolio. USAT had engaged Smith Breeden as outside consultants to analyze the interest rate sensitivity of USAT. The preliminary conclusion was that USAT had positioned itself so that, whether interest rates increased or decreased, USAT was certain to lose money. Peterson Consulting has reviewed USAT's report of Smith Breeden's analysis and concludes that it demonstrates the failure of USAT's investment, trading and hedging strategies. USAT had produced a portfolio that would generate a negative interest spread and that would lose money whether rates went up or down. According to Peterson Consulting, a successful program would have produced a positive spread while at the same time protecting USAT from loss in the event of significant changes in interest rates.

By virtue of reports from USAT's outside auditors Peat Marwick and performance reports from senior management, by the fall of 1986, the full USAT Board also should have known that something was wrong with USAT's MBS portfolio which merited close attention. In January 1986, the Board of Directors was advised by Peat Marwick that there had been a significant increase in securities trading in 1985. Peat Marwick warned that the increased activity and addition of a trading room had caused deficiencies in internal accounting controls, including (i) policies and procedures with respect to such activity had not been established; (ii) internal trading tickets were not completed properly; and (iii) timely listing of the Association's securities positions were not properly maintained. In October 1986, the Audit Committee was advised by the auditors that the investment in mortgage backed securities at the Association had grown exponentially and that ''significantly'' all MBS securities had been sold and replaced with lower yielding securities ''with slower pre-payment experience to better match the maturities of the Association's liabilities.'' Indeed, through a May 2, 1986 performance report to the Board, the Board was apprised of the fact that the yield on higher coupon mortgage backed securities had deteriorated relative to that of lower coupon mortgage backs because of increasing speed of prepayment on the higher coupon securities. Management informed the Board that, in order to protect unrealized gains on the mortgage backed securities, the Investment Group had sold the higher coupon securities and replaced them with lower coupon securities, thus reducing net interest spreads. By a performance report dated August 5, 1986, the Board was informed that net interest income of $3.6 million fell short of the planned $7.2 million primarily because of the reduced spread on mortgage backed securities. In November and December 1986, performance reports to the Board reported posted losses for October and November of $7.2 million and $16.5 million, respectively, and increase in year to date interest rate swap expenses of $28.7 million and $32.5 million, respectively.

By December 31, 1986, USAT's problems with its swaps and low coupon MBSs were so obvious that Hurwitz and his core group of executives and directors should have addressed them. Peterson Consulting has analyzed the status of Joe's Portfolio as of December 31, 1986 and concludes that steps could have been taken that would have reduced the losses USAT ultimately incurred.

By December 31, 1986, USAT held relatively low yielding MBSs and high cost swaps. By holding the low yielding MBSs, without any

hedges to protect against loss in the event that interest rates increased, USAT exposed itself to losses in the future if interest rates increased. In fact, rates did increase beginning in April 1987, and the ultimate sale of the MBSs from Joe's Portfolio resulted in a loss of $107 million. Even after deducting $12 million of gains USAT extracted from the portfolio after December 31, 1986, and taking into account the spread between the yield on the MBSs and the repos funding them, USAT still lost about $80 million on the MBSs from Joe's Portfolio. If the MBS portfolio had been sold on December 31, 1986, a gain of approximately $9 million would have resulted. Thus, USAT's failure to act on December 31, 1986, increased USAT's MBS losses by about $89 million.

When both the swaps and the MBSs from Joe's Portfolio are taken into account, the net loss incurred by USAT as a result of its failure to liquidate Joe's Portfolio on or about December 31, 1986, was about $51 million. Peterson Consulting has concluded that the swap agreements could have been terminated at a cost of $149 million on December 31, 1986. By not terminating the agreements, USAT ended up making $52 million of net payments on the swaps until they were terminated at a cost of about $59 million, or a total loss after December 31, 1986 of about $111 million. Arguably the failure to terminate the swaps on December 31, 1986 reduced USAT's swap losses by approximately $38 million. Even after taking into account that the swap loss would have been $38 more had USAT liquidated the portfolio and terminated the swaps on December 31, 1986, the MBS loss would have been $89 million less, resulting in net losses of $51 million attributable to USAT's refusal to face up to the problem of Joe's Portfolio.

We propose to assert a claim against Investment Committee members and attendees Hurwitz, Gross, Munitz and Crow for gross negligence for failure to address the problems with Joe's Portfolio on or about December 31, 1986. We will also contend that their failure to address the problem was a breach of their fiduciary duty of loyalty because it was intended to extend the life of USAT by forestalling the regulatory intervention that might have resulted if the swap loss had been recognized on December 31, 1986 or early in 1987. We will allege that Hurwitz is liable as a de facto director and that he aided and abetted the other defendants in the violations of their duties.

2. Net Worth Maintenance: Breach of the Duty of Loyalty Aiding and Abetting Breach of the Duty of Loyalty a. Hurwitz Owed A Duty Of Loyalty To USAT

By virtue of his position as a de facto officer and director and controlling person of USAT, Hurwitz owned to USAT a duty of loyalty and a duty to protect and care for the interests of the institution. By virtue of his position as a Board member and officer at UFG and MCO (two of USAT's holding companies), and as a director and control person of Federated Development Company (''FDC''), Hurwitz was in a position to cause these entities to honor their net worth maintenance obligations to USAT. Hurwitz intentionally disregarded these duties and, indeed, devoted considerable efforts to helping UFG, MCO and FDC avoid these responsibilities.

b. UFG's, MCO's and FDC's Net Worth Maintenance Obligation

In early 1982 Hurwitz began to acquire UFG shares through companies he owned and controlled, including MCO Holdings, Inc. (''MCO'') and Federated Development Company (''FDC'') or by having close colleagues acquire the stock. By mid year, Hurwitz owned effective control of UFG, but held slightly less than 25% of its outstanding shares. In August 1982 UFG agreed to merge with First American Financial of Texas. The Bank Board approved the merger effective April 29, 1983 and First American's insured subsidiary was merged into USAT. As part of the merger, UFG, as USAT's holding company, was required by the Bank Board to enter into an agreement whereby UFG agreed to maintain the net worth of USAT as required by federal regulation. Resolution No. 83–252 of the FHLBB, imposed the following terms, among others, on UFG:

[T]he subject acquisition [is] hereby approved, provided that the following conditions are complied with in a manner satisfactory to the [FHLBB's] Supervisory Agent at the Federal Home Bank of Little Rock (''Supervisory Agent''):

''6. Applicant shall stipulate to the [Federal Savings and Loan Insurance Corporation] that as long as it controls the Resulting Association [United Savings], Applicant shall cause the net worth of the Resulting Association to be maintained at a level consistent with that required by Section 563.13(b) of the Rules and Regulations for Insurance of Accounts, as now, and hereafter in effect, of institutions insured 20 years or longer and, as necessary, will infuse sufficient additional equity capital, in a form satisfactory to the Supervisory Agent, to effect compliance with such requirement.''

On October 31, 1983 USAT and UFG caused to be delivered to the Federal Home Loan Bank a written net worth maintenance commitment. The commitment was signed by the Chairman of the Board of UFG and stated:

''[The] Chairman of United Financial Group, Inc., [does] hereby stipulate that as long as United Financial Group, Inc. controls United Savings Association of Texas, it will cause the net worth of United Savings to be maintained at a level consistent with that required by Section 563.13(b) of the Rules and Regulations for Insurance of Accounts, as now or hereafter in effect, of institutions insured 20 years or longer, and, as necessary, will infuse sufficient additional equity capital, in a form satisfactory to the Supervisory Agent, to effect compliance with such requirement.''

Pursuant to the commitment, UFG agreed that it would infuse equity capital in a form satisfactory to the Supervisory Agent to maintain compliance with regulatory net worth requirements.

On June 29, 1983, MCO and Federated filed an application with the Bank Board for approval to acquire control of USAT through the acquisition of up to 35% of UFG's shares. On December 6, 1984, the Bank Board granted conditional approval of the application of MCO and Federated to acquire control of USAT. The condition the Bank Board imposed on MCO's and Federated's acquisition of control was that; ''for so long as they directly or indirectly control United Savings, [MCO and Federated] shall contribute a *pro rata* share based on their UFG holdings, of any additional infusion of capital . . . that may become necessary for the insured institution to maintain its net worth at the level required by the Corporation's Net Worth Regulation.''

In 1985 MCO entered into an option agreement with Drexel Burnam Lambert Group (''Drexel''), which gave UFG the right to ''call'' and Drexel the right to ''put'' the 7 percent of UFG's stock held by Drexel. When combined with its other holdings, control of this additional stock caused its total holding in UFG to exceed the 25% threshold. We believe that this transaction made the net worth maintenance obligation of the Board's resolution applicable to MCO (a predecessor of Maxxam) and FDC. Our understanding of Maxxam's position is that (1) since neither it nor its predecessor ever signed a separate net worth maintenance agreement it had no such obligation, and (2) because it did not become the legal owner of this Block of stock until after USAT failed, it never exceeded the 25 percent threshold.

c. Hurwitz Dominated USAT, UFG, MCO and FDC

Hurwitz was the controlling force of USAT, UFG, MCO and FDC. He was Chairman of the Board of MCO and it largest stockholder. He was the Chairman of the Board of UFG. He also served as UFS's President and Chief Executive Officer. He was a member of UFG's Executive Committee and the UFG/USAT Strategic Planning Committee. Hurwitz was also a *de facto* director and senior officer of USAT. He functioned as an active member of the Board, if not its *de facto* director and senior officer of USAT. He functioned as an active member of the Board, if not its *de facto* chairman. He directed and controlled USAT's investment activity; he regularly attended Board and Committee meetings; he selected USAT officer and directors; he controlled and dominated virtually all of USAT's activities. No significant decision concerning USAT's affairs was undertaken without his approval.

Hurwitz controlled the affairs of USAT both through direct particpation and through the actions of a core group of USAT officers or directors (''the core group''), which included Barry Munitz (USAT Director), George Kozmetsky (USAT Director), Jenard Gross (USAT 's Chief Executive Officer), Michael Crow (USAT's Chief Financial Officer), Arthur Berner (USAT's Executive Vice President and General Counsel) and Ronald Huebsch (USATs Executive Vice President for Investments). Many members of the core group held positions not only with USAT but also with UFG and MCO. Barry Munitz (''Munitz'') was a director of MCO. He was also a director of UFG from 1983 through 1988 and served on UFG's Executive Committee from 1983 and 1988. He was Chairman of the UFG Executive Committee from February, 1985 through 1988. Jenard Gross (''Gross'') was a member of the UFG Board of Directors from 1985 through 1988. He was President and Chief Executive Officer of UFG during the same time period. Michael Crow (''Crow'') was a director of UFG in 1988 and the Chief Financial Officer of UFG from 1984 through 1988. Arthur Berner (''Berner'') became director of UFG in 1988 and served on UFG's Executive Committee. George Kosmetsky was a director of MCO and UFG. He also served on UFG's Audit Committee.

d. USAT's Net Worth Deficiency

From the outset of Hurwitz's involvement with USAT, the institution was deeply troubled. Under his control, it grew steadily worse. As the institution's financial health plummented and its net worth declined, USAT Board members serving at his request undertook greater and greater risks. Rather than recognize USAT's problems and confront them constructively, Hurwitz, through these USAT officers and directors (a) dramatically increased the liabilities of the Association in violation of federal law, (b) gambled on large, cumbersome real estate projects with no realistic chance of success, and (c) invested in complex financial instruments which investments were manipulated to produce reported profits while in fact generating multimillion dollar losses to USAT.

To avoid being called upon to comply with the obligation of UFG, MCO and FDC to maintain the net worth of USAT, Hurwitz and his colleagues covered up the true state of the Association by a pattern of deceptive financial reporting and balance sheet manipulation. Gains were taken on certain securities transactions, while losses were left

imbedded in the portfolio; subsidiaries were used to skirt liability restrictions; losses on real estate investments were repeatedly understated; and maturity matching credits were manufactured. The effect was to artificially maintain the reported net worth of USAT to protect the assets of UFG, MCO and FDC at the expense of USAT.

Throughout much of 1987 and throughout 1988, even USAT's reported capital did not meet minimum regulatory standards. This resulted, in substantial measure, from the gross mismanagement of USAT for which Hurwitz was responsible. On May 13, 1988, the Bank Board advised USAT and UFG that USAT did not meet its regulatory capital requirements as of December 31, 1987. The Bank Board directed UFG and UFG's Board to infuse capital sufficient to meet those requirements. UFG refused to abide by the written commitment to maintain USAT's net worth. Similarly, MCO failed to infuse additional capital in accordance with its obligation.

Hurwitz took no steps to encourage or compel UFG, MCO or FDC to honor their commitments although he had the power, in fact, to do so. On December 30, 1988, the Bank Board reiterated its request that UFG honor its net worth maintenance obligation. Again, UFG refused; Hurwitz did nothing. As of December 30, 1988, USAT's reported capital was $534 less than the stipulated minimum. UFG is responsible for that full amount, but its ability to respond may have been limited at that time to the $35 to $40 million dollar range. Maxxam's obligation, as interpreted by OTS, is roughly 30 percent of the $534 million, i.e., Maxxam's percentage of UFG's stock times the capital deficiency, or roughly $160 million. Maxxam's current reported capital is in the $140 million range.

As part of his duty of loyalty to USAT, Hurwitz had an obligation to cause UFG, MCO and FDC to make such contributions. As a UFG, MCO and FDC director, officer, and control person, Hurwitz was in a position to take such action. He intentionally refused to do so, thereby breaching his duty of loyalty to USAT. The consequent loss is in excess of $150 million.

VI. USAT's Park 410 Loan [For Information Purposes]

In April 1986, USAT made an $80 million non-recourse loan to an entity which was owned by Stanley Rosenberg, a prominent San Antonio attorney and close friend and business colleague of Charles Hurwitz. The loan was grossly imprudent. It was made without any significant underwriting in a declining real estate market when USAT officials and the borrowers knew that the project was doing poorly and had little chance of success. The loan was also made despite warnings from regulators. For example, in January 1985, the Texas Savings and Loan Department advised the Board and senior management that USAT's lending portfolio was seriously flawed and that scheduled items constituted 105% of net worth. While many of the scheduled items noted in the Texas examination predated the Hurwitz regime, the comments represented a warning to the institution about the fragile nature of its portfolio. Added to these regulatory warnings were repeated comments by USAT's outside auditor, Peat Marwick, prior to the approval of the loan, that USAT's real estate lending was creating substantial problems for the institution, that appraisals in numerous loan files were deficient, and that foreclosures and delinquencies were rising rapidly. USAT's Board and senior officers chose to ignore these warnings, in part, because the making of the loan generated immediate fees, i.e. reported income of $2.5 million, for USAT. The loan was kept from default by interest reserves of $17 million. Hurwitz, the Board, the SLC, and Stanley Rosenberg all share in the culpability for this transaction which caused $57 million in losses to the institution.

1. Potential Defendants

USAT's Board members who served on the SLC were grossly negligent in their failure to supervise USAT properly with respect to its real estate lending practices. In abdication of its responsibility in this known problem area, the Board set a $70 million lending limit for USAT's SLC in the face of repeated warnings from regulators and Peat Marwick that its lending practices and procedures were flawed and, in particular that its ADC lending had severe problems. Given the institution's lending experience, such delegation amounted to a total abdication by the Board of its responsibility to review and supervise the institution's lending activities. Indeed, it appears that the Board allowed the entire real estate lending and investment activity of USAT to operate with nominal internal controls and no oversight. Thus, the Real Estate Investment Committee committed USAT to a substantial initial investment in Park 410 ($35 million), apparently without Board knowledge or approval and in violation of its authority. The SLC increased the commitment to $70 million—$80 million if the Board ratified the decision. Then the Board approved funding $80 million—all without apparent concern that the project was not a bankable credit. The Board was grossly negligent in both its failures of supervision and in actually approving the park 410 loan on terms extremely favorable to Rosenberg based on a cursory presentation by the SLC. Only Board member Winters voted to disapprove the loan.

Officers and directors who served on the SLC will also be charged with gross negligence because they knew about both regulatory criticism and Peat Marwick's warning and that USAT's lending activities (particularly ADC loans) had caused severe losses to the institution. Despite this, the SLC gave the Park 410 transaction only a cursory review and relied instead on the borrower's economic analysis and on a defective appraisal that was delivered orally before funding, but not submitted in writing until after the loan closed. The SLC allowed Hurwitz's influence to compromise its deliberations and the proper exercise of its duties.

Absent statute of limitations problems, FDIC would also propose to sue Stanley Rosenberg for the damages incurred by USAT in the Park 410 loan transaction. Rosenberg was both counsel to USAT and a participant in the transaction. Knowing the significant risks inherent in the loan, he nevertheless facilitated and encouraged USAT to complete the transaction. FDIC would allege that Rosenberg used his conflict position with USAT for his personal benefit and financial gain and that he aided and abetted the officials of USAT in the breach of their fiduciary duties.

2. Narrative Description of the Claim

Park 410 was a 427 acre tract of vacant and unimproved real estate located in western San Antonio near the proposed site for Sea World. This general area had attracted considerable developer interest and many competing office/retail/residential developments were being proposed. Its large size and location made Park 410 a ''high profile'' project of the type in which Hurwitz wanted USAT to be involved.

On October 10, 1984, USAT received a signed, non-binding letter of intent from Park 410 West, Ltd. (''Limited''), a partnership consisting of Alamo Savings (''Alamo'') and developers Robert Arburn and C. R. McClintick, offering to sell USAT the Park 410 property for $42.5 million, with 75% seller-financing on a non-recourse basis. Although USAT's David Graham believed he had reached an agreement with Limited as to the material terms of the transaction, the deal collapsed soon after USAT retained, as its legal counsel, long-time Hurwitz friend (and Maxxam director) Stanley Rosenberg to represent the Association in finalizing the transaction with Limited. On November 20, the same day Limited returned, unexecuted, USAT's letter of intent to purchase the property for $38 million, 80% seller-financed, Rosenberg's law partner Kenneth Gindy began negotiations with Limited's agent to sell the property to a different client of Rosenberg's firm—Gulf Management Resources, Inc. (''GMR''). Indeed, Limited ultimately agreed to sell the property to GMR on terms more favorable to the purchaser and less favorable to Limited than those previously offered by Limited to USAT. Soon thereafter, Rosenberg became GMR's 50% partner in Park 410 West JV (''Joint Venture''), the entity formed to purchase the property.

In the Spring of 1985, and prior to the closing with Limited, USAT accepted Rosenberg's invitation to become his partner and agreed to pay all of Rosenberg's financial obligations to Joint Venture in exchange for half of Rosenberg's 50% interest in Joint Venture. In other words, USAT agreed to fund at least 50% of the projected $65 million acquisition, development and holding costs in exchange for a one-fourth interest in the project. The Real Estate Investment Committee (''REIC'') with Hurwitz in attendance made the investment decision based on little, if any, independent due diligence. Instead, the REIC relied on wildly optimistic profit projections prepared by GMR (Rosenberg's client and partner) and a totally distorted appraisal that gave a cumulative, undiscounted market value of $72.5 million only *if* (and when) the property was subdivided and ready for development. The REIC described the appraisal as being ''on an as is basis'', but the appraisal expressly warned that it ''does not represent the present as is market value of the land,'' such a valuation being ''beyond the scope'' of the appraisal. Hurwitz's influence was evident from the beginning of USAT's involvement with the Park 410 property. Two members of Hurwitz's core group served on the REIC—Gross and Crow.

Outside director James R. Whatley confirmed in his interview that the Park 410 investment decision committing USAT to $35 million was never presented to the Board of Directors. The REIC's authority to commit the institution to an investment, without prior Board approval, was limited to $2.5 million. The Board took no steps to exercise scrutiny over real estate investment decisions or, indeed, to even monitor what the REIC was doing. The fact that a commitment of such magnitude could be made without Board approval or awareness demonstrates the Board's lack of care and its conscious indifference to the need to establish effective internal controls. USAT's indefensible investment in Park 410 set the stage (and perhaps the excuse) for it to more than double its financial exposure in the Park 410 project. In the Spring of 1986, and a few months after closing the purchase from Limited, USAT committed to become the lender for the entire project, with an exposure of up to $80 million dollars.

Graham (the SLC chairman) now admits that the Park 410 project ''got off to a slow start,'' that the project was ''too big, too difficult,'' that there was trouble in the San Antonio real estate market, and that Joint Venture could not get outside funding to develop the project. In the Fall of 1985, Joint

Venture applied to USAT for a $77.8 million loan to pay off the acquisition debt still owed Alamo and McClintick, to provide funds for development and to pay the holding costs of the project (taxes, interest, etc.). Again, Hurwitz was involved from the start. Crow recalls Hurwitz presenting the loan proposal to Graham and Childress. Graham reported directly to Hurwitz, as well as to members of the SLC concerning negotiations in late 1985 and early 1986, and Hurwitz and Rosenberg participated directly in some of the negotiations. Hurwitz also participated in the 12/9/85, 1/6/86 and 3/17/86 SLC meetings where the loan was discussed and ultimately approved. SLC member Jeff Gray recalls it being widely known and understood among senior officials that Hurwitz wanted USAT to make the Park 410 loan.

Despite adverse comments from its Texas regulator regarding its real estate lending problems and in the face of Peat Marwick's repeated warnings in August 1984, February 1985 and October 1985 that ADC loans were a problem for USAT and that real estate markets were declining, the SLC approved the loan on March 17, 1986, and thereby agreed to lend the Joint Venture $80 million, but made its obligation to advance funds beyond $70 million contingent upon first receiving Board approval. Hurwitz and the SLC approved the loan despite knowledge that Joint Venture had been unable to secure financing from any other lender and in the face of significant deterioration of the San Antonio real estate market.

When the SLC approved the loan it had not yet received the appraisal which was intended to be, but was not, in compliance with R41–b. Instead, Hurwitz and the SLC based their analysis and approval on the borrower's (GMR) sales projections and on a distorted preliminary appraisal by a Houston appraiser having no apparent prior experience in San Antonio that gave a cumulative, undiscounted market value of $88 million. GMR's projections assumed sales of more than 65 acres per year, a rate of absorption even higher than its projection of a year earlier and at higher prices. In fact, it would be more than four years before the first acre was sold at Park 410.

The final narrative appraisal sent to USAT after the SLC approved the loan was grossly deficient. It relied upon stale comparables made a year earlier when the market was stronger, failed to quantify or explain adjustments to comparables, failed to consider the impact of the glut of similar projects in the area and failed to contain all three approaches to value. Not surprisingly, both state and federal examiners strongly criticized the appraisal.

The loan closed on April 17, 1986, with USAT making an initial advance of $45.6 million. Three weeks later on May 8, 1986, the loan was approved by USAT's Board of Directors, with Hurwitz, Kozmetsky, Gross and Munitz in attendance. The Board package for this meeting contained the five page loan proposal approved by the SLC. This proposal provided, at best, a cursory analysis of a loan of this size and complexity. The minutes of the meeting reflect no presentation or discussion of the loan prior to Board approval. According to the minutes, outside director Wayne C. Winters voted against the loan because of concerns about the loan amount and the value of the property. According to Graham, while Hurwitz did not force USAT to make the loan, everyone on the SLC and on USAT's Board knew that Rosenberg was a close friend of Hurwitz and that Hurwitz was enamored with putting USAT in play on a big real estate deal in San Antonio.

Hurwitz, the SLC and the Board permitted the loan to be made on terms very favorable to Rosenberg and GMR, but adverse to USAT. If it was going to be involved at all, as the lender of ''last resort'' for the borrowers, USAT could have (and should have) dictated terms which provided maximum protection for the institution. Instead, the loan was non-recourse to the borrower, and guarantees were for only 25% of the loan and took effect only after foreclosure and the declaration of a deficiency. The guarantors were also allowed to credit their personal guarantees for any amounts drawn against their $10 million letters of credit. In addition, various improper disbursements were made (without objection from USAT) out of the loan proceeds, including a $400,000 ''loan fee'' to Rosenberg and an undisclosed management fee to Rosenberg of $62,500 at closing and $75,000 per year thereafter. The transaction allowed the borrowers to avoid or minimize virtually all immediate ''hard dollar'' commitment to the project.

The deficiencies described above and the actions and inactions of USAT's Board and SLC provide ample support to assert claims for gross negligence and breach of fiduciary duty. Clearly the Board's conduct constituted conscious indifference to the financial safety and soundness of the Association, particularly in view of the fact that (i) this was the largest loan ever made by USAT and, in the face of the warnings from Peat Marwick and state regulators, required careful scrutiny (ii) SLC members knew that other lenders had refused to finance the project (iii) the financial projections were wildly optimistic and the appraisals flawed (iv) market conditions were getting worse not better and, (v) USAT could have walked away from its initial ''investment'' in the project for $4.5 million. Instead, the SLC and the Board (in large part because of Hurwitz's influence) chose to commit up to $80 million to a project which they knew or should have known had a high probability of failure.

As noted above, if there were no statute of limitations problem with this claim, FDIC would also propose to sue Stanley Rosenberg for his role in the transaction. Without question, Rosenberg was at the core of Park 410 and influenced many of USAT's actions or inactions through his relationship with Hurwitz. Rosenberg was originally USAT's counsel in the transaction. However, he failed to close a transaction in which USAT, his client, would have had 100% of the benefits in exchange for 100% of the risk. Instead, he negotiated a series of deals which resulted in Rosenberg himself having 25% of the profit potential (plus $462,500 of USAT's cash), another client had a 50% interest in the profits, and Rosenberg's client USAT had 50% of the downside risk but only 25% of the upside potential.

Given his knowledge, Rosenberg should have counseled USAT not to pursue the Park 410 investment. Rosenberg breached his professional duty as an attorney by not warning USAT that it was on the verge of becoming a victim of a potentially illegal Texas land flip (i.e., paying Alamo and McClintick three times what they paid for the property less than a year before), that the market was deteriorating and that no other financial institution would finance the deal. He failed to protect USAT's interests as he was obligated to do. He compounded that breach by enticing and encouraging USAT into a deal that he knew potentially would benefit him by placing USAT at enormous risk. For this he is liable for malpractice and for this same conduct—irrespective of Rosenberg's status as USAT's attorney—he is liable for aiding and abetting USAT officers in the breach of the officers' duties. Rosenberg and his law firm received $462,000 from the loan proceeds and undisclosed management fees.

3. Serious Statute of Limitations on the Parks 410 Loan

Because the Park 410 loan closed in April 1986, more than two years before USAT's failure, there is a serious statute of limitations problem on this claim that we do not believe we can overcome. In light of the Fifth Circuit's opinion in *Dawson,* the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, the failure of Congress to address the statute of limitations problems through legislation, and the Fifth Circuit's recent opinion in *Action,* we do not believe there is a basis under existing law for defeating a statute of limitations motion based on Park 410. Consequently, we do not recommend going forward with claims arising out of Park 410.

VI. Applicable Legal Theories and Defenses

We recommend pursuing these claims with the following legal theories: (A) breach of fiduciary duty of loyalty, (B) gross negligence and breach of fiduciary duty of care, and (C) knowing participation in and aiding and abetting breach of fiduciary duty. Our reasons are summarized below.

A. Breach of Fiduciary Duty of Loyalty

Because of the role that USAT played in maintaining Hurwitz's relationship with Drexel, the financial interest and net worth maintenance exposure that UFG, MCO and FDC had in USAT, and the business relationship with Rosenberg from which the benefitted personally, Hurwitz profited the most from the actionable transactions and stood to lose the most had the plug been pulled on USAT sooner. Similarly, the other proposed individual defendants were so closely tied to Hurwitz and his business interests that they compromised their ability to place USAT's interests ahead of Hurwitz's. Munitz, Gross, and Crow were dual UFG/USAT directors and received generous compensation from USAT. All but Crow had other business connections with Hurwitz that fostered divided loyalties. Munitz was also an officer and/or director of MCO and FDC at various times. Gross had an equity interest in FDC. As a consequence of these relationships, UFG and Hurwitz profited at USAT's expense.

B. Gross Negligence and Breach of Fiduciary Duty of Care

Many of our claims against Hurwitz and the other proposed individual defendants will be based on allegations of gross negligence and breach of fiduciary duty of care. Recent federal court decisions in Texas interpreting Texas law preclude recovery for simple negligence. Therefore, we will have to contend that the defendants were guilty of gross negligence—a more rigorous standard. Although we believe that the decisions to make the Park 410 loan and the UMBS investment, and those with respect to Joe's Portfolio, were grossly negligent, a recent decision by the Texas Supreme Court announced a new standard of gross negligence that—if applied—will make it much more difficult to prove our claims.

C. Knowing Participation in and Aiding and Abetting Breach of Fiduciary Duty

Under Texas law, secondary liability theories, such as knowing participation in or aiding and abetting breach of fiduciary duty, can be used to reach the activities of culpable persons, like Hurwitz or Rosenberg, who were neither officers nor directors of USAT. Hurwitz can be held liable for the breaches of duty of Munitz, Gross, and the others where he had knowledge that the others were breaching their duty to USAT and provided substantial assistance, direction or encouragement. Based on the facts, Hurwitz

should be sued for his knowing participation in breaches of fiduciary duty by the officer and director defendants.

D. Anticipated Defenses

Business Judgment Rule The defendants will contend that the decisions we challenge were business judgments for which they cannot be held liable under Texas law. Recent decisions in federal courts in Texas suggest that the business judgment rule will be applied liberally to protect directors and officers from claims for bad management decisions, even when large losses result. The presence of ulterior motives, such as Hurwitz's relationship with Drexel, his desire to avoid net worth maintenance claims, and his relationship to Mr. Rosenberg would be relevant in our effort to avoid application of the business judgment rule.

The defendants will contend that the decision to invest in UMBS was a reasonable business decision under the circumstances. They will argue that the absence of alternative investments, given the downturn in the Texas real estate market, and USAT's need for earnings, made a leveraged investment in MBS risk controlled arbitrage completely appropriate. They will point out that UMBS had a positive spread and reported profits from its formation until the date a receiver was appointed for USAT, with reported 1986 earnings of $906,398, 1987 earnings of $37,479,283 and 1988 earnings of $20,251,468. They presumably will contest Laurenson's account that the Investment Committee gave its approval for a ''dice roll.'' They will argue that it is inappropriate to evaluate their investment strategy based on the results of a forced liquidation of the portfolio after the receivership appointment, particularly because, if the MBSs had been held for a longer time, they might have been sold at a profit after interest rates declined.

Nonetheless, there is a substantial risk that the decisions we challenge will ultimately be held to constitute business judgments for which we cannot recover losses.

Pre-Insolvency Duty. The defendants will argue that until USAT became insolvent, the fiduciary duties of directors and officers ran only to the institution's equity holders, not to its creditors and depositors. Because USAT was not reporting insolvency at the time of the actions we challenge, the defendants will argue that they had a duty to undertake any and all lawful means to keep the institution open for as long as possible, even if that course of conduct aggravated the losses to the FDIC, depositors and creditors.

We believe that this argument is without merit and that the duties of directors and officers run to the corporation, not to its shareholders. We will contend that directors of financial institutions have very broad fiduciary duties to persons other than the shareholders, including depositors. We will also contend that no director or officer may breach the fiduciary duty of loyalty, regardless of the solvency of the institution. We will argue that the defendants engaged in speculative transactions to extend the life of USAT when the viability of USAT was tenuous, at best, and there was no reasonable expectation that it could continue in business.

Standing/UMBS—The defendants will argue that the FDIC as USAT's Receiver does not have standing to challenge the investment activities of UMBS, a subsidiary. They will argue that the Receiver does not own those claims. The UMBS claims, however, are based upon claims arising out of USAT activity, i.e., USAT's loss of $97 million as a result of the decision to invest $180 million of USAT money in UMBS without proper controls and protection. The Receiver clearly has standing to challenge such decisions. Furthermore, UMBS's day to day investment decisions were controlled and directed by the USAT defendants, thus making the line between the two entities for purposes of investment decision-making non-existent.

Statute of Limitations—The defendants will argue that the statute of limitations has expired on our proposed claims. Texas law requires claims of negligence, grow negligence and breach of fiduciary duty to be commenced within two years of accrual, unless limitations are tolled by equitable principles. In the Dawson case, the Fifth Circuit decided that the statute would not be tolled on an ''adverse domination'' theory unless a majority of the directors were guilty of more than negligence in approving the challenged corporate action, or in failing to discover wrongful conduct by others. The federal trial courts in Texas had split on the actual level of culpability required, with some courts holding that gross negligence by a majority of directors is sufficient to toll the statute and others holding that more culpable conduct, such as fraud, is required. The Supreme Court refused to consider in Dawson whether a federal rule should be adopted under which negligence by a majority of the directors will toll the statute. This question has been answered in the Fifth Circuit by the recent decision in RTC v. Acton, 49 Fd.3 1086 (5th Cir. 1995), holding that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the statute of limitations under the doctrine of adverse domination.

The first $100 million of USAT's equity interest in UMBS was recorded on the books of UMBS in November and December, 1986—more than two years before a receiver for USAT was appointed. After December 30, 1986 and before May 31, 1987, USAT raised its equity contribution in UMBS by a total of $80 million. In March 1987, USAT's equity in UMBS increased from $100 million to $150 million. In May 1987, it increased from $150 million to $180 million. We evaluated whether a claim could be made for USAT investments in UMBS after December 30, 1986—within the Texas two year statute of limitations. We will have to establish that losses resulted from the investments USAT made in UMBS in 1987. Because the net ''out of pocket'' loss on the entire $180,000,000 equity contribution was only $64,997,000, we would have to argue that the last money invested was the first money to be lost. The logic of that position may not be accepted by a court. If it is not, it appears that our claim will fail because, arguably, USAT recovered its entire 1987 investment when UMBS was liquidated and the ''loss'' suffered was a loss of $64,997,000 of the contribution it made before December 30, 1986, prior to the two year statute of limitations.

Regulatory Approval—The defendants also are likely to contend that the regulators knew about or approved USAT's investment activities in MBSs. Regulators did not prohibit MBS investments, but neither did they direct or authorize USAT to do what it did. Moreover, the evidence will show that USAT did not affirmatively disclose (1) the losses inherent in its interest rate swaps from USAT Mortgage Finance in late 1985 or from USAT's ''Joe's Portfolio'' in early 1986, (2) the fact that its ''roll down'' program for ''Joe's Portfolio'' resulted in a negative spread between the income on the MBSs and the cost of the swaps, and that the swap problem could have been handled less expensively and with less risk for USAT, (3) the fact that $100 million was invested in UMBS despite the disastrous experience with ''Joe's Portfolio,'' which could only be understood if one knew about the swap dimension of the problem and (4) the fact that an additional $80 million was invested in UMBS in 1987 after the initial investment had already begun to turn sour.

Hurwitz's Involvement—Hurwitz will assert that he cannot be held liable because he was never an officer or director of USAT. He will also argue that even as a director of UFG, he did not exercise authority or control over USAT and did not knowingly participate in breaches of fiduciary duty by USAT's officers and directors. Because Hurwitz, in fact, was actively involved in virtually every aspect of USAT's business, and especially in the management of its securities portfolio, we have a reasonable chance to overcome this defense.

VII. Cost Effectiveness and Assessment of Proposed Litigation

If approved, a lawsuit against the proposed defendants would be filed in the U.S. District Court for the Southern District of Texas, Houston, seeking approximately $300 million in damages. We propose using the law firm of Hopkins & Sutter and the minority owned firm of Adorno & Zeder. Both firms have Legal Services Agreements with the FDIC and do not exceed any fee cap.

Potential recovery sources include the proposed defendants, who have an aggregate net worth of $150 million. In addition, the bylaws of MCO (now Maxxam), provide for the indemnification of any person who serves as an officer or director of a subsidiary (which would include UFG and possibly USAT) or, at the request of MCO, serves as an officer or director of any other corporation. Thus, Munitz (who was an officer and director of MCO and/or FDC), may be entitled to indemnification from Maxxam for his wrongful acts as a USAT director and officer. Hurwitz may also be entitled to indemnification for his wrongful acts as a director and officer of UFG and because of his activities at USAT as a member of the UFG/USAT Strategic Planning Committee. Maxxam is a publicly traded company with market capitalization, as of March 15, 1994, of $223 million and total assets of $3.2 billion.

The claims described in this memorandum arising out of the misconduct of officers and directors are large and complex. They are also subject to a number of recent adverse decisions by the Fifth Circuit Court of Appeals, the Southern District of Texas and the Texas Supreme Court which restrict substantive liability and FDIC's ability to reach significant claims accruing prior to December 1986. As a consequence, FDIC's Complaint will be vigorously challenged and appears vulnerable to motions to dismiss and motions for summary judgment. There is at least a 70% chance that these claims will be disposed of adversely to the FDIC on such motions relating to the statute of limitations. If, however, the claims survive summary judgment and proceed to jury trial, the odds of a favorable outcome (by settlement or verdict) improve, but do not exceed 50%. These variables make it difficult, if not impossible, to quantify the chances of success overall.

It is estimated that pursuing this matter to trial will cost approximately $4 million in fees and expenses, including expert witness fees, and an additional $2 million in fees and expenses will be incurred through trial. Our downside risk is limited somewhat by the likelihood of an early statute of limitations motion. It is thus likely that we will incur substantially less than the full cost of a trial if we are not going to prevail on the statute of limitations issue. To date we have incurred approximately $4 million in fees and expenses for the investigation by outside counsel, approximately $400,000 by the Office of Thrift Supervision and approximately $600,000 for in-house investigation and in-house attorney costs. Claims of this nature

and magnitude are very difficult to value. That noted, if the case survived statute of limitations defenses, the estimated settlement value would be $20–$40 million.

July 28, 1995

Memorandum to: Catherine L. Hammond, Office of the Executive Secretary.

From: Robert J. DeHenzel, Jr., Counsel, Professional Liability Section.

Subject: Authority to Institute PLS Suit, Institution: United Savings Association of Texas, Fin #1815, Proposed Defendants: Former directors and officers, defacto director and controlling person Charles Hurwitz.

The enclosed memorandum requesting authority to institute a PLS suit is on the Board agenda for Tuesday, August 1, 1995. Because Mr. Bovenzi is out of town and has not had the opportunity to sign, we are not enclosing the original with the distribution today. We anticipate securing his signature on Monday morning, and will then promptly have the original forwarded to your office.

The Deputies to the Directors and the General Counsel are aware that Mr. Bovenzi has not had the opportunity to sign and have no objection to this procedure.

Please call me if you have any questions whatsoever.

JACK D. SMITH
RICHARD ROMERO

RESOLUTION

Whereas, pursuant to authority contained in the Federal Deposit Insurance Act and/or pursuant to applicable state or federal law, the Federal Deposit Insurance Corporation (''FDIC''), acting as conservator or receiver or in its corporate capacity has the authority to bring civil actions for monetary damages against directors or officers, outside professionals, or fidelity bond companies (or their successors, heirs or assigns) of insured depository institutions who fail to fulfill their responsibilities (''professional liability claims''); and

Whereas, the FDIC has investigated and evaluated professional liability claims that it may have arising from the failure or conservatorship of United Savings Association of Texas, Houston; and

Whereas, based on such investigation and evaluation, the Legal Division and the Division of Depositor and Asset Services believe there is a sufficient basis to prosecute such claims; and

Whereas, the Legal Division and the Division of Depositor and Asset Services have recommended that the Board of Directors (''Board'') of the FDIC authorize the filing of a lawsuit seeking damages based on such claims.

Now, Therefore, Be It Resolved, that the Board hereby approves the filing of a lawsuit against former directors and officers Barry Munitz, Jenard Gross and Michael Crow and controlling person Charles Hurwitz, arising out of the failure of United Savings Association of Texas and authorizes the General Counsel (or designee), on behalf of the FDIC, to take all actions necessary or appropriate to prosecute such lawsuit, including any additional litigation necessary to protect or assure the viability or collectibility of the claims to be prosecuted in such lawsuit.

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To: William F. Kroener, III, General Counsel.

Subj: Meeting with Vice President Gore on Friday, Oct. 20, 1995, at 11:00 a.m.

DISCUSSION POINTS

I. Background

1. United Savings Association of Texas, Houston, Texas (''USAT''), was acquired in 1983 by Charles E. Hurwitz. Hurwitz leveraged the institution through speculative and uncontrolled investment and trading in large mortgage-backed securities portfolios, without reasonable hedges, to $4.6 million in assets. Investments lost value and USAT was declared insolvent and placed into FSLIC receivership on December 30, 1988. Loss to the FSLIC Resolution Fund is $1.6 billion.

2. While Hurwitz was a controlling shareholder and de facto director of USAT he acquired, through a hostile takeover and with the strategic and financial assistance of Drexel Burnham Lambert, Inc., Pacific Lumber Company, a logging business based in northern California. As a result, Hurwitz came to control the old growth, virgin redwoods that are the principal focus of the Headwaters Forest.

II. FDIC Litigation

1. On August 2, 1995, FDIC as Manager of the FSLIC Resolution Fund filed a lawsuit against Mr. Hurwitz seeking damages in excess of $250 million.

a. Complaint contains three claims:

* Count 1 alleges breach of fiduciary duty by Hurwitz as de factor director and controlling shareholder of USAT by failing to comply with a New Worth Maintenance Agreement to maintain the capital of USAT;

* Counts 2 and 3 allege gross negligence and aiding and abetting gross negligence in establishing, controlling and monitoring two large mortgage-backed securities portfolios.

2. FDIC has authorized suit against three other former directors of USAT that we have not yet sued; a tolling agreement with these potential defendants expires on December 31, 1995. The court may order FDIC to decide to add them as defendants prior to that date.

3. Status of FDIC Litigation: Pursuant to the Federal Rules of Civil Procedure, the parties—through counsel—have met and exchanged disclosure statements that list all relevant persons and documents that support our respective positions. Moreover, the parties have agreed to a scheduling order that reflects a quick pre-trial period. All discovery is to be concluded by July 1, 1996. The court has set a scheduling conference to discuss all unresolved scheduling issues for October 24, 1995; and a follow-up conference on November 28, 1995.

III. Settlement Discussions

1. FDIC has had several meetings and discussions with Hurwitz' counsel prior to the filing of the lawsuit. Hurwitz has never, however, indicated directly to FDIC a desire to negotiate a settlement of the FDIC's claims.

2. As a result of substantial attention to Pacific Lumber's harvesting of the redwoods by the environmental community, media inquiries, Congressional correspondence, and the state of California, Pacific Lumber has issued various press releases stating it would consider various means of preserving the redwoods.

IV. OTS Investigation

1. Since July 1994, the Office of Thrift Supervision has been investigating the failure of USAT for purposes of initiating an administrative enforcement action against Hurwitz, five other former directors and officers, and three Hurwitz-controlled holding companies. The OTS may allege a violation of the Net Worth Maintenance Agreement and unsafe and unsound conduct relating to the two MBS portfolios and USAT's real estate lending practices. If OTS files its administrative lawsuit, it may allege damages that total more than $250 million.

2. OTS has met with Hurwitz' counsel; no interest in settlement has been expressed to OTS.

3. OTS is likely to formally file the charges within 45 days.

4. Appears to FDIC inappropriate to include OTS representatives in the meeting to discuss possible settlement of its claims against Hurwitz since OTS has not yet approved any suit against Hurwitz or his holding companies and OTS' participation at such meeting may be perceived by others as an effort by the Executive Branch to influence OTS's independent evaluation of its investigation.

V. FSLIC Resolution Fund (''FRF'') Issues

1. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (''FIRREA'') (enacted Aug. 9, 1989), accord special treatment to certain savings & loan associations that failed prior to its enactment. The FRF obtains its funds from the Treasury and all recoveries from the assets or liabilities of all FRF institutions are required to be conveyed to Treasury upon the conclusion of all FRF activities. The statute does not establish a date for the termination of the FRF. FRF fund always in the red due to huge cost of these thrift failures.

2. To date, FRF owes the Treasury approximately $46 billion.

3. FDIC has decided that if Hurwitz offered the redwoods to settle the FDIC claims, we would be willing to accept that proposal. Because any assets recovered from FRF institutions are required to eventually be turned over to Treasury, the trees (i.e. the land conveyance) could conceivably be transferred to Treasury.

4. May need legislation to assist in transfer of land and other details of such a conveyance. The mechanics of such a transfer is not a focus of FDIC's current efforts, which are to persuade Hurwitz of liability and to seriously consider settlement.

VI. Impediments to FDIC Direct Action Against Trees

1. FDIC has no direct claim against Pacific Lumber through which it could successfully obtain or seize the trees or to preserve the Headwaters Forest. Neither Maxxam, Inc. (which owns Pacific Lumber and is controlled by Hurwitz) nor Pacific Lumber are defendants in FDIC's suit. There is no direct relationship between Hurwitz' actions involving the insolvency of USAT and the Headwaters Forest owned by Pacific Lumber. Pacific Lumber was acquired by Maxxam but does not appear to have owned any interest in USAT or United Financial Group, USAT's first-tier holding company. Moreover, neither USAT nor UFG ever owned an interest in Pacific Lumber.

2. FDIC's claims alone are not likely to be sufficient to cause Hurwitz to offer the Headwaters Forest, because of their size relative to a recent Forest Service appraisal of the value of the Headwaters Forest ($600 million); because of very substantial litigation risks including statute of limitations, Texas negligence—gross negligence business judgment law, and Hurwitz's role as a de facto director; and the indirect connection noted above, including the risk of Hurwitz facing suit from Pacific Lumber securities holders if its assets were disposed of without Pacific Lumber being compensated by either outsiders or Hurwitz or entities he controls.

DOCUMENT N

HOPKINS & SUTTER,
CHICAGO, WASHINGTON, DALLAS,
March 24, 1995.

MEMORANDUM

To: File.

From: F. Thomas Hecht.

Re: Environmental Developments.

CC: Jeffrey R. Williams and Robert J. DeHenzel.

Over the past year the FDIC has been subject to an intense lobbying effort by certain

environmental activists led by the Rose foundation of Oakland, California. Their principal concern has been to conserve an area of unprotected old-growth redwoods in northern California known as the Headwaters Forest, currently owned by Pacific Lumber, a wholly owned subsidiary of Maxxam, Inc. Because of the potential FDIC and OTS claims against both Maxxam and Hurwitz, the Rose Foundation and others have urged that the agencies take steps to protect the redwoods. They urge either a negotiated ''debt for nature swap'' in which the agencies' liability claims are traded away for the forest, or litigation to seize the assets of Pacific Lumber. More recently, a Qui Tam was filed in the United States District Court for the Northern District of California by Robert Martel, a free lance journalist and environmental activist, seeking to draw the government into litigation against Maxxam, Hurwitz and Pacific Lumber.

The purpose of this summary is to memorialize our contacts with these groups and to discuss the options they have urged upon the FDIC and OTS.

A. THE HEADWATERS FOREST AND PACIFIC LUMBER

The Headwaters Forest consists of about 44,000 acres of forest ecosystems, including approximately 3,000 acres of old growth redwoods. These are the last vestiges of the virgin redwood forest that once extended for 500 miles across Northern California and into southern Oregon. The Headwaters Forest is also a nesting area for certain endangered species. It is, by general agreement, an extraordinary natural resource. Pacific Lumber owns much of the Headwaters Forest and surrounding areas, including the old growth redwoods. For many years, Pacific Lumber utilized timber harvest techniques which emphasized preservation of much of the old growth redwood acreage. It appears that the company is now committed to harvest the timber more aggressively. This includes clear-cutting at least part of the unprotected redwoods. There are currently pending several lawsuits brought by environmental groups and residents of the area seeking to block some of the harvesting. The results have been mixed. However, most recently the United States District Court for the Northern District of California issued an injunction restraining Pacific Lumber from logging old growth redwoods in the Owl Creek area—about five miles from the Headwaters Forest. After a two week trial the Court held that Pacific Lumber's logging practices represented a threat to the nesting areas of the marbled murrelet. Among other matters, the case raises the issue of the ability of the Endangered Species Act to reach private holdings. Apparently, the decision will be appealed.

B. FDIC CONTACTS WITH THE ROSE FOUNDATION ET AL.

As noted above, the Rose Foundation and other environmentalists have repeatedly urged that the FDIC engage in a ''debt for nature'' swap as part of a negotiated settlement or undertake a course of litigation which would result in the seizure of Pacific Lumber's assets, namely the redwoods. Representatives of the FDIC and Hopkins & Sutter have met with representatives of the environmental groups to hear their presentations and to evaluate their claims. Thus:

On June 17, 1994, Thomas Hecht met with Jill Ratner of the Rose Foundation in San Francisco for an initial meeting at which Ms. Ratner outlined her groups' concerns.

On October 4, 1994, Hecht, Jeffrey Williams, Robert DeHenzel and the Rose Foundation and its lawyers participated in a teleconference at which the claims prepared by the Rose Foundation were presented in more detail.

On January 20, 1995, DeHenzel and Hecht met with Julia Levin of the Natural Heritage Foundation (''NHF''), a group closely associated with the Rose Foundation. NHF is conducting much of the lobbying effort on behalf of the Rose Foundation and other environmental activists on this issue.

In addition to these more formal encounters, Williams, DeHenzel and Hecht have each been contacted repeatedly by the Rose Foundation and its attorneys to explore the theories in more depth and to urge the FDIC to take action. In each of these meetings and in subsequent telephone conversations and correspondence, the Rose Foundation and its allies have urged three general approaches to the problem including: (a) the imposition of a constructive trust over Pacific Lumber's redwoods, (b) the seizure of redwoods using an unjust enrichment theory, and (c) obtaining rights to the forest or, at a minimum, an environmental easement, as part of a negotiated settlement. The have also urged Congressional action, filed a Qui Tam proceeding in the Northern District of California and threatened the FDIC with proceedings under the Endangered Species Act.

1. The Constructive Trust and Unjust Enrichment Theories

The possibility of acquiring Pacific Lumber's redwoods by the imposition of a constructive trust has been the centerpiece of the legal work presented to the FDIC by the Rose Foundation. The constructive trust theory proceeds on the following assumptions: (a) that Hurwitz and Maxxam controlled USAT; (b) that Hurwitz, with USAT's funds, entered into an improper quid pro quo arrangement with Drexel pursuant to which federally insured funds were used to invest in Drexel-underwritten junk bonds, (c) in exchange for USAT's investments, Drexel provided Hurwitz with financial assistance in the hostile takeover of Pacific Lumber; and (d) USAT's investment in the junk bonds caused significant damages to USAT including it insolvency. The argument is that the acquisition of Pacific Lumber was the fruit of certain fraudulent or improper conduct, namely, the quid pro quo arrangement, and that the FDIC, as successor to the failed USAT has standing to impose a constructive trust on Pacific Lumber as a result of the losses sustained.

This is a difficult case. First, although there was obviously a reciprocal course of conduct between Hurwitz and Drexel, it is not at all clear that such a course of conduct (or even a firm agreement) was improper in any legal sense. USAT's investment in junk bonds was authorized by federal regulation and approved by USAT's investment committee. Disclosure could be an issue, but Board minutes and examination reports indicate that both regulators and Board members knew of USAT's investment in Drexel underwritten bonds and knew of Hurwitz's takeover activities as well. Board members and regulators may not have known of the full extent of the quid pro quo and this could be used to develop claims further. This, however, is qualitatively different set of facts than those alleged by the Rose Foundation. Most importantly, the junk bond portfolio was not the cause of USAT's insolvency. Significant other problems dominated the Association including staggering losses from its mortgaged backed securities and related investments, unamortized ''good will'' and the deeply troubled real estate portfolio. What the quid pro quo provides, however, is the context for other USAT misconduct. For example, it helps explain the lengths to which the officers of USAT manipulated the finances of the institution in order to keep the doors of the institution open so that Hurwitz could continue to avail himself of Drexel contacts and resources.

The case law on constructive trusts raises additional concerns. It is not, as argued by the Rose Foundation, a generalized remedy for any wrongful or deceitful conduct. The remedy typically involves equitable imposition of a trust where one who is entitled to certain property (or the *res* of the ''trust''), is deprived of that property by fraud, wrongdoing or false promise. Entitlement to constructive trust is defined, in significant part, by statute in California. Thus: ''One who gains a thing by fraud . . . or other wrongful conduct . . . is an involuntary trustee of the thing gained for the benefit of the person *who would otherwise have had it*.'' Calif. Civil Code §2224 (emphasis added). The case law identifies three preconditions for the imposition of the trust: (a) a discrete, identifiable *res*, (b) an entitlement to the *res* by the plaintiff of which he or she was deprived and (c) wrongful conduct by the defendant. See GHK Associates v. Myer Group, Inc.., 274 Cal.Rptr. 168 (Cal. Ct.App. 1991). The FDIC is not an entity ''who would otherwise have had'' Pacific Lumber or its hardwoods; the FDIC has no entitlement to the assets of Pacific Lumber of which the FDIC was deprived. This seriously impairs any claim for the imposition of a constructive trust over those assets. Nor is it clear what the *res* of such trust should be. To prevail, the Rose Foundation must argue that Pacific Lumber's forests or the company itself is simply a mutated form of USAT's investment in Drexel underwritten projects at the front end of the quid pro quo. But this represents very difficult problem of proof. The FDIC would have to establish a strong, if not direct one-to-one, correlation between USAT investments in Drexel underwritten securities, and the reinvestment of equivalent sums in Maxxam's takeover of Pacific Lumber by the third parties who issued those securities. Thus far in our investigations, such correlations have not been established.

The Rose Foundation and its attorneys, alternatively, argue that because Hurwitz and Maxxam were ''unjustly enriched'' quid pro quo, Pacific Lumber and its holdings should be seized. Unjust enrichment, however, is a factual circumstance—not a cause of action. It may, under appropriate circumstances, justify restitution and the imposition of a constructive trust, but it is not an independent basis for granting relief. Lauriedale Associates Ltd. v. Wilson, 7 Cal. App. 4th 1439, 9 Cal.Rptr. 2d 774 (First Dist. 1992). Unjust enrichment allegations are typically made in support of requests for constructive trust, not as an alternative to them. There is, however, case law which allows disgorgement of profits arising out of a breach of fiduciary duties which describes such profits as ''unjust enrichment''. This appears to be the theory upon which the Rose Foundation relies. See Heckmann v. Ahmanson, 168 Cal.App.3d 119, 214 Cal Rptr. 177 (1985). But in such litigation the profits must be clearly identifiable and closely tracked. As noted above, this would be difficult in this case—unless one assumes that the funds used for junk bond purposes translated dollar for dollar through various third parties at Drexel's behest and then to Maxxam for its acquisition of Pacific Lumber. No one who has looked at these relationships closely is willing to take that position.

2. The Redwoods As Subject of Negotiations

As their theories have become subject to criticisms, certain of the counsel for the Rose Foundation have shifted (at least in part) from arguments compelling the seizure of the redwoods to urging the development of an aggressive and high profile damages case in which the redwoods become a bargaining chip in negotiating a resolution. This indeed, may be the best option available to the environmental groups; its greatest strength is

that it does not depend on difficult seizure theories. This approach would require that both the FDIC and OTS undertake to make the redwoods part of any settlement package. It is a strategy which would attract considerable attention if successful. It is, however, not without serious problems. For example, Maxxam is a publicly held corporation and Pacific Lumber is the only one of its holdings which is profitable. Minority shareholders may be reluctant to allow a substantial portion of the most profitable asset of the company to be traded away to satisfy debt—particularly debt associated with Charles Hurwitz and the operation of USAT. Moreover, Pacific Lumber and Maxxam have only limited ability to transfer funds or assets among one another. Maxxam could settle the case and be precluded from offering up the forests without the consent of Pacific Lumber's lenders. Pacific Lumber's and Maxxam's quarterly and annual reports indicate that lenders have required that the companies to enter into certain agreements restricting inter-company transfers. Any violation of these agreements would create significant additional legal problems for both Maxxam and Pacific Lumber.

This is not to argue that such an approach shouldn't be seriously explored. It is to suggest, however, that the negotiations will be difficult and involves a broad array of participants. It would be a complex transaction involving lenders, government agencies, the targeted principals and, potentially, Maxxam's minority shareholders.

3. The Status of Congressional Action

As the ''debt for nature'' issue attained a certain degree of public exposure, California's Congressional delegation became active in developing legislation which would facilitate such transactions. In August, 1993 California Congressman Dan Hamburg introduced H.R. 2866 which was to have empowered the government to obtain the old growth redwoods by ''donation, purchase or exchange'' but not condemnation. The Headwater Forest would become a designated wilderness area protected from clear cut harvesting. The bill authorized appropriations to affect the acquisition. Senator Barbara Boxer introduced virtually identical legislation in the Senate. The House bill survived hearings before the Agriculture Committee and the Natural Resources Committee without major alteration and was sent to the floor. In September 1994 it passed the House by a significant margin and was sent to the Senate. Initially, Pacific Lumber vigorously opposed the legislation. In mid-autumn, 1994, the Company changed its position and announced it would support the legislation in light of House amendments which clarified the voluntary nature of any such transfer. No hearings were held in the Senate on the House bill or on Boxer's parallel legislation; no vote was taken in the Senate.

In the aftermath of the November, 1994 elections, the prospects for this legislation passing either chamber are now very modest. Congressman Hamburg is no longer present to push the issue. His replacement, Congressman Riggs has not shown any interest in the legislation. The new Chairman of the House Natural Resources Committee, Don Young, apparently takes a dim view of the legislation. Senator Boxer has not re-introduced her bill in the 104th congress. It appears that if there is to be such legislation, it will follow—not precede—a negotiated resolution involving the redwoods.

4. The Qui Tam Action

On January 26, 1995, Robert Martel, as relator, filed an action in the United States District Court for the Northern District of California pursuant to the qui tam provisions of the False Claims Act. The essence of the action closely tracks the theories presented informally to the FDIC by the Rose Foundation and its allies. Martel argues that the deception and/or dishonesty inherent in the quid pro quo program ultimately amounted to a fraudulent depletion of the insurance fund and, therefore, fits within the reach of the False Claims Act. He seeks not only recovery for the fraud but the imposition of a constructive trust over Pacific Lumber and/or the redwoods and to restrain FDIC settlements unless environmental concerns are taken into account. There are two serious problems with the action. First, it fits very poorly within the framework of the False Claims Act which is designed to accommodate claims against persons or entities who submit fraudulent requests for payment. 31 U.S.C. §3729 There is no direct, fraudulently induced payment here. Whether more indirect items qualify remains to be seen. Second, such claims can only be based on public knowledge if the relator is the original source. See U.S. et rel. Gold v. Morrison-Knudsen Company, Inc., F.Supp. . 1994 WL 673690 (N.D. N.Y.) Here, the claims involve exclusively public information and Martel will have difficulty establishing himself as an original source.

Pursuant to the False Claims Act qui tam provisions, the government has 60 days within which to advise the court whether it wishes to intervene and take responsibility for the case or leave the case to the relators. 31 U.S.C. §3730(b)(2). During this time, the case will be kept under seal and held in camera. The defendants have not been served or advised of its existence. The United States Attorney has taken the position, in consultation with the FDIC, that more time is needed before the government can intelligently assess its options in the qui tam setting. Accordingly, papers have been submitted to the Court seeking an extension of an additional 90 days. The relator does not object to the extension.

There are several options available to the government, including:

(a) Intervene and stay the case pending negotiations and/or OTS administrative proceedings.

(b) Intervene and move to dismiss the case, given its failure to meet the requirements of the False Claims Act.

(c) Intervene and amend the Complaint to plead a more coherent case.

(d) Leave the case to the relators.

Whichever option is followed will be a function of discussions between the FDIC and the Department of Justice. These discussions are currently underway at the urging of Williams and DeHenzel. The Office of Thrift Supervision presently seeks little or no contact with the qui tam action. OTS will, however, be kept apprised of the proceedings as it develops its administrative proceedings.

5. The Endangered Species Act (''ESA'')

In a November 18, 1994 letter, Richard De Stefano, on behalf of the Rose Foundation, raised for the first time the possibility that the Endangered Species Act may be used to challenge the FDIC's failure to initiate litigation against Maxxam and Hurwitz. De Stefano argues that since ESA mandates that ''. . . all Federal agencies shall seek to conserve endangered species . . . and shall utilize their authorities in furtherance of the purposes [the Act], 16 U.S.C. §1531(c)(1), the FDIC must take into account the environmental impact on endangered species associated with Pacific Lumber's logging of the redwoods in the agencies decision to sue or not to sue. De Stefano argues, that the decision not to pursue recoveries of the redwoods when there is a legal basis to do so may be a violation of the Act. The cases cited by De Stefano in support of his position involve instances where the link between environmental action and agency action is much more direct See, for example, Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy, 898 F.2d 1410 (9th Cir. 1990) (challenge to Navy's agricultural leasing program which require irrigation as an improper diversion of waters containing endangered species).

It is unlikely that an ESA challenge to an FDIC failure to sue will succeed. First, although failures to act can be reviewable agency action, cases successfully arguing that position typically involve failure of an Agency to abide by clear regulation or law. The Supreme Court has repeatedly held that decisions to sue are discretionary and outside the realm of judicial review. Thus:

''This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. [citations omitted]. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

''The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . . [A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor . . . not to indict—a decision which has long been regarded as the special province of the [decision-market].'' Heckler v. Chaney, 470 U.S. 821, 831–832 (1985).

Moreover, the standard of review in such circumstances is whether agency action is ''arbitrary and capricious''. Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co., 463 U.S. 29 (1983). Given the careful deliberation by the FDIC as to whether to initiate litigation in California, Texas or elsewhere and given the problems associated with any such litigation, the decision not to proceed is simply not arbitrary and capricious. Environmental groups may disagree with the decision (if, indeed, the FDIC determines not to act) but a successful challenge will require much more.

DOCUMENT X

Attorney Client Privilege Attorney Work Product

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel.

Date: July 24, 1995.

Subject: Status of PLS Investigation; Institution: United States Association of Texas, Houston #1815.

This memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation being conducted by the Office of Thrift Supervision (''OTS''), current tolling agreements, settlement negotiations with United Financial Group, Inc., (''UFG'') USAT's first tier holding company, and our decision not to recommend an independent cause of action by

the FDIC against the former officers and directors of USAT and controlling person Charles Hurwitz.

I. Background

As you know, USAT was placed into receivership on December 30, 1988 with assets of $4.6 billion. The estimated loss to the insurance fund is $1.6 billion. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and nine other former directors and officers of USAT/UFG that were earlier senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we presented a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain of the former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk, in that the bulk of the loss causing events occurred more that two years prior to the date of receivership, and were therefore subject to dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in *Dawson*, a split of authority in the federal trial courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy was to assert that gross negligence was sufficient to the toll the statute of limitations. After briefings with FDIC deputies and further discussion with the potential defendants, we decided to defer formal FDIC approval of our claims and continue the tolling agreements.

At about the same time that we deferred formal approval of the FDIC cause of action, we developed a new strategy for pursuing these claims through administrative enforcement proceedings with the OTS. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc, a publically traded company that is significally controlled by Hurwitz.

II. Significant Caselaw Developments Have Further Weakened the Viability of an Independent Cause of Action by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions and the failure of Congress to address the statute of limitations problems has further weakened the FDIC's prospects for successfully litigating our claims in United States District Court for the Southern District of Texas.

In the recent decision of RTC v. Acton, the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the statute of limitations under the doctrine of adverse domination. As a result of this opinion, we can no longer rely on any argument that gross negligence by a majority of the culpable Board is sufficient to toll the statute of limitations. Moreover, there is very little, if any, evidence of fraud or self-dealing that is likely to survive a motion to dismiss on statute of limitations grounds.

Even if we could overcome the statute of limitations problems, a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet. In Transportation Insurance Company v. Moriel, 1994 WL 246568 (Tex.), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. This new standard will make it very difficult, if not impossible to prove our claims.

The cumulative effect of these recent adverse decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss either on statute of limitations grounds or the standard of care. Because there is significantly less than a 50% chance that we can avoid dismissal, it is our decision not to recommend suit on the FDIC's proposed claims.

III. Debt for Nature Swap

Our decision not to sue Hurwitz and the former directors and officers of USAT is likely to attract media coverage and considerable criticism from environmental groups and Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber has attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our claims for trees. We recently met with the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of a debt for nature swap and that the Administration is seriously interested in pursuing such a settlement. We plan to pursue these settlement discussions with the OTS in the coming weeks.

IV. Updated Authority to Sue Memorandum

We have attached an updated authority to sue memorandum for your review and consideration. It sets forth the theories and weaknesses of our proposed claims in great detail. It should be considered for Board approval only if the Board decides, as a matter of public policy, that it wants the Texas courts to decide the statute of limitations and standard of care issues rather than FDIC staff. The litigation risks are substantial and the probability of success is very low, but if the Board were to decide that it wants to go forward with the filing of a complaint, we need to be prepared to file the complaint in the Southern District of Texas, *on or before, Wednesday, August 2, 1995.*

We will be available to discuss this matter on very short notice.

1. USAT officers and directors were grossly negligent in causing USAT to invest approximately $180 million in its subsidiary, United MBS, leveraging the investment into $1.8 billion of mortgage backed securities (''MBS'') and losing approximately $97 million (including interest) when USAT had already suffered disastrous results in its first MBS portfolio and was in a critically weakened financial state. Approximately $80 million of the $180 million was advanced within two years of the failure.

2. USAT officers and directors were grossly negligent in failing to act to prevent $50 million of additional losses from USAT's first MBS portfolio. The positions were in place more than two years before failure. Our analysis is that they should have begun to cut their losses, wind down this set of positions, starting two years before failing fiduciary duty and aiding and abetting breaches of fiduciary duty. We believe that it is a good claim on the merits, but we see no viable basis under existing law for avoiding a statute of limitation. Thus, we recommend against asserting this claim.

ASSESSMENT OF DEFENSES: We expect business judgment rule defenses and serious statute of limitations issues based on recent Fifth Circuit and other Texas case law. Absent a change in the law, there is at least a 70% chance that much or all of the MBS claims will be dismissed based on the statue of limitations. The claim for failing to insist that the net worth maintenance agreements be honored is more likely to minimize statute of limitation motions but raised a . . . .

SUIT PROFILE: The suit will attract media and Congressional attention because of Hurwitz's reputation in corporate takeovers, and his ownership of Pacific Lumber, which is harvesting redwoods. Environmental interests have received considerable publicity often suggesting exchanging these claims for trees. The Department of Interior recently informed us that the Administration is seriously interested in pursuing such a settlement.

TIMING AND COST-BENEFIT ANALYSIS: We intend to use Hopkins & Sutter (Chicago/Dallas) and the minority firm Adorno & Zeder (Miami). The estimated cost of litigation by outside counsel is $4 million up to trail, and an additional $2 million through trail. We have incurred outside counsel fees and expenses of $4.

Attorney Client Privilege Attorney Work Product

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel.

Stephen N. Graham, Associate Director (Operations).

Date: July 24, 1995.

Subject: Status of PLS Investigation, Institution: United Savings Association of Houston, Texas #1815.

This memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation being conducted by the Office of Thrift Supervision (''OTS'') current tolling agreements, settlement negotiations with United Financial Group, Inc., (''UFG'') USAT's first tier holding company, and our decision not to recommend suit by the FDIC against the former officers and directors of USAT and controlling person Charles Hurwitz and other USAT officers and investors. We had agreed to delay a final decision on this matter until after OTS decides whether to pursue claims against Hurwitz. However we were advised on July 21, 1995 that Hurwitz would not extend our tolling agreement with him. Consequently, if suit were to be brought it would have to be filed by August 2, 1995. We are taking that unusual step of advising the board of our conclusion that suit should not be brought.

As you know, USAT was placed into receivership on December 30, 1998 with assets of $4.6 billion. The estimated loss to the insurance fund is $1.6 billion. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and nine other former directors and officers of USAT/UFG that were either senior officers or directors that we perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we prepared a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain of the

former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk. Most notably, the bulk of the loss causing events occurred more that two years prior to the date of receivership, and were therefore at risk of dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in *Dawson*, a split of authority in the federal trial courts in Texas on the level of (basically because we are likely to loose on statute of limitations grounds) because this matter has been—and is likely to continue to be—highly visible. Culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy at that time was to assert that gross negligence was sufficient to the toll the statutes of limitations. After briefings with the deputies to the Directors and further discussion with the potential defendants, we decided to defer FDIC decision on whether to assert our claims and we continued the tolling agreements.

II. OTS's Involvement

At about the same time that we deferred a decision on the FDIC's cause of action, we met with OTS staff to discuss the possibilities of OTS pursing these claims, plus a net worth maintenance agreement claim, through administrative enforcement proceedings. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc, a publically traded company that is largely controlled by Hurwitz. The FDIC is paying OTS's costs in connection with this matter.

The OTS has reviewed extensive documentation and has recently conducted a series of administrative depositions. We have been informed that OTS staff is currently preparing a broad base draft Notice of Charges against Hurwitz and others, including Maxxam, for substantial restitution or unsafe and unsound practices and for enforcement of a net worth maintenance agreement. OTS staff plans to seek formal approval for this case in the relatively near future. Under the terms of our agreement with OTS, FDIC will be the beneficiary of any recovery from the OTS enforcement action through settlement or litigation against the proposed respondent. All of the potential respondents to the OTS investigation have signed tolling agreements with OTC which expire on December 31, 1995.

III. Significant Caselaw Developments Have Further Weakened the Viability of Suit by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions, and the failure of Congress to address the statute of limitations problems, has further weakened the FDIC's prospect for successfully litigating our claims in the United States District Court for the Southern District of Texas.

A. Statute of Limitations

In the recent decision of *RTC v. Acton*, the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the two year statute of limitations under the doctrine of adverse domination. As a result of this opinion, we cannot rely on an argument that gross negligence by a majority of the culpable Board members is sufficient to toll the statute of limitations. There is very little, if any, evidence of fraud or self-dealing that is likely to survive a motion to dismiss on statute of limitations grounds.

A recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet if it is applied to D&O cases. In *Transportation Insurance Company v. Moriel*, 1994 WL 246568 (Tex.), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. The case involved punitive damage issues, but the language in the opinion is sweeping. This new standard if applied would make it very difficult, if not impossible to prove our claims.

The effect of these recent adverse decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss on statute of limitations grounds. We would also be at an increased risk of dismissal on the merits. Because there is significantly less than a 50% chance that we can avoid dismissal on statute of limitation grounds and because victory the * * * we do not recommend suit on the FDIC's potential proposed claims.

III. The Pacific Lumber—redwood forest matter

Our decision not to sue Hurwitz and the former directors and officers of USAT is likely to attract media coverage and criticism from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. On July * * * we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swaping various * * * that the Administration is seriously interested in pursuing such a settlement. We plan to follow up on these settlement discussions with the OTS and Interior in the coming weeks.

V. Updated (Draft) Authority to Sue Memorandum

In light of the complexity of visibility of this matter, and the short time frames, we have attached for your information an updated, draft, authority to sue memorandum. It sets forth the theories (and weaknesses) of our proposed claims in some detail. Whether that memorandum sets out a viable claim on the merits should be considered by the Board if the Board decides that it wants the Texas District court to decide the statute of limitations issue rather than FDIC staff. If the Board were to decide to go forward with the filing of a complaint, we need to file the complaint in the Southern District of Texas, *on or before, Wednesday, August 2, 1995.*

We are available to discuss this matter at your convience.

A. Statute of Limitations

All of the affirmative acts that would form the basis for an FDIC unit occurred more than two years before USAT failed. Thus, the only claims that have any chance of moving a motion to discuss based on statute of limitations are ones based on USAT's failure to unwind some positions in mortgage backed securities and derivative instruments as soon as that should have been done. The statute of limitations risks in this argument are (1) all of the money was originally invested more than two years before failure and (2) if there is a claim based on USAT being late in unwinding these transactions (we think it should have been done by January 1, 1987), there is a real likelihood that they should have unwound them more than two years before failure.

B. The Merits

The law has also moved against us on the merits of the claims. The claims against Hurwitz are more difficult than usual because he was not an officer or director of USAT. We believe that his involvement rose to the level of a defacto director, but that is a notable hurdle.

Texas case law has essentially eliminated liability for negligence in the name of applying a very expensive business judgment rule defense.

We believe the conduct here constitutes gross negligence as that is normally defined. The law in Texas is currently unsettled, but

* * * * *

Attorney Client Privilege Attorney Work Product

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel. Stephen N. Graham, Associate Director (Operations).

Date: July 24, 1995.

Subject: Status of PLS Investigation, Institution: United Savings Association of Texas—Houston, Texas #1815.

This memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation of USAT being conducted by the Office of Thrift Supervision (''OTS''), current tolling agreements, settlement negotiations with United Financial Group, Inc., (''UFG'') USAT's first tier holding company, and our decision not to recommend suit by the FDIC against controlling person Charles Hurwitz and other USAT officers and directors.

We had hoped to delay a final decision on this matter until after OTS decides whether to pursue claims against Hurwitz, et al. However, we were advised on July 21, 1995 that Hurwitz would not extend our tolling agreement with him. Consequently, if suit were to be brought it would have to be filed by August 2, 1995. We are taking the unusual step of advising the Board of our conclusion that suit should not be brought basically because the FDIC is highly likely to lose on statute of limitations grounds because this matter has been—and is likely to continue to be—highly visible. We do not recommend suit.

I. Background

As you know, USAT was placed into receivership on December 30, 1988 with assets of $4.6 billion. The estimated loss to the insurance fund is $1.6 billion. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and ten other former directors and officers of USAT/UFG that were either senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we prepared a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain USAT

former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk. Most notably, the loss causing events occurred more than two years prior to the date of receivership, and were therefore at risk of dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in Dawson, a split of authority in the federal trials courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy at that time was to assert that gross negligence was sufficient to toll the statute of limitations. After briefings with the Deputies to the Directors and further discussion with the potential defendants, we decided to defer an FDIC decision on whether to assert our claims, and we continued the tolling agreements.

II. OTS's Involvement

At about the same time that we deferred a decision on the FDIC's cause of action, we met with OTS staff to discuss the possibility of OTS pursuing these claims (plus a net worth maintenance agreement claim) through administrative enforcement proceedings. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc., a publicly traded company that is largely controlled by Hurwitz. The FDIC is paying OTS's costs in connection with this matter.

The OTS has reviewed extensive documentation and has recently conducted a series of administrative depositions. We have been informed that OTS staff is currently preparing a broad-based draft Notice of Charges against Hurwitz and others, including Maxxam, for substantial restitution for unsafe and unsound practices and for enforcement of a net worth maintenance agreement. OTS staff plans to seek formal approval for this case in the relatively near future. Under the terms of our agreement with OTS, FDIC will be the beneficiary of any recovery from the OTS enforcement action through settlement or litigation against the proposed respondents. All the potential respondents of the OTS investigation have signed tolling agreements with OTS which expire on December 31, 1995.

III. Significant Caselaw Developments Have Further Weakened the Viability of Suit by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions, and the failure of Congress to address the statute of limitations problems, have further weakened the FDIC's prospects for successfully litigating our claims in the United States District Court for the Southern District of Texas.

A. Statute of Limitations

In the recent decision of *RTC v. Acton*, 49 F.3d 1086 (5th Cir. 1995), the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the two year statute of limitations under the doctrine of adverse domination. As a result of this opinion, we cannot rely on an argument that gross negligence by a majority of the culpable Board members is sufficient to toll the statute of limitations. There is very little, if any, evidence of fraud or self-dealing.

All of the affirmative acts that would form the basis for an FDIC suit occurred more than two years before USAT failed. Thus, the only claims that have any chance of surviving a motion to dismiss based on statute of limitations grounds are claims based on USAT's failure to unwind some positions in mortgage backed securities and derivative instruments as soon as that should have been done. The statute of limitations risks in this argument are (1) all of the money was put at risk more than two years before failure, and (2) if there is a claim based on USAT being late in unwinding these transactions (we think it should have been done starting no late than January 1, 1987), there is a real likelihood * * * that they should have unwound them more than two years before failure.

In short, we have an argument for presenting some claims, but that argument is not likely to prevail.

B. The Merits

The law has also moved against us on the merits of the claims. The claims against Hurwitz are more difficult than usual because he was not an officer or director of USAT. We believe that his involvement rose to the level of a de facto director, but his status presents a notable hurdle.

Texas case law has essentially eliminated liability for negligence in the name of applying a very expansive business judgment rule defense. We believe the conduct here constitutes gross negligence as that term is normally defined. The law of gross negligence in Texas is currently unsettled, but a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet if it is applied to D&O cases. In *Transportation Insurance Company v. Moriel*, 879 S.W. 2d 10 (Tex. 1994), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. This new standard, if applied, would make it very difficult, if not impossible to prove our claims (3) further, through legislation Texas has attempted to compare, in essence, 'authorizations in FDIC claims.'

The effect of these recent adverse decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss on statute of limitations ground. We would also be at increased risk of dismissal on the merits. Because there is significantly less than a 50% chance that we can avoid dismissal on statute of limitations grounds, and because even if we survived a statute of limitations motion, victory on the merits (especially on the claims most likely to survive a statute of limitations motion) is uncertain given the state of the law in Texas, we do not recommend suit on the FDIC's potential claim.[4]

IV. The Pacific Lumber—Redwood Forest Matter

Our decision not to sue Hurwitz and the former directors and officers of USAT is likely to attract media coverage and criticism from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. On July 21, we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus possibly the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement. We plan to follow up on these discussions with the OTS and the Department of Interior in the coming weeks.

V. Updated (Draft) Authority to Sue Memorandum

In light of the complexity and visibility of this matter, and the short timeframes, we have attached for your information an updated (draft) authority to sue memorandum. It sets forth the theories (and weaknesses) of our proposed claims in some detail. Whether that memorandum sets out a viable claim on the merits should be considered by the Board if the Board decides that it wants the Texas district court to decide the statute of limitations issue rather than FDIC staff. If the Board were to decide to go forward with the filing of a complaint, we need to file the complaint in the Southern District of Texas, on or before, Wednesday, August 2, 1995.

We are available to discuss this matter at your convenience.

Attorney Client Privilege Attorney Work Product

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel. Stephen N. Graham, Associate Director (Operations).

Date: July 27, 1995.

In addition to presenting the attached authority our memorandum for Board action, this memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation of USAT being conducted by the Office of Thrift Supervision (''OTS''), current tolling agreements, and settlement negotiations with United Financial Group, Inc. (''UFG''), USAT's first tier holding company.

We were advised on July 21, 1995 that Hurwitz would not extend our tolling agreement with him. Consequently, if suit is to be brought it would have to be filed by August 2, 1995. Hurwitz actions have precluded that possibility. Thus the Board must now decide whether to authorize suit. While we would only sue Hurwitz at this time, rather than dividing the memo and possibly, having to bring it back to deal with other individuals, the attached ATS seeks authorization to sue all of the individuals against whom we would expect to assert claims. In our view Hurwitz and the other proposal defendants were grossly negligent. There is a 70% probability that most or all the conventional claims that could be made in the FDIC's case would be dismissed on statute of limitations grounds. An additional claim against Hurwitz has a better probability on the statute of limitations issue, but there are numerous obstacles to successful prosection of that claim. Under these circumstances the Board must decide whether to authorize a case with these high litigations risks.

The attached authority to sue, memorandum is summarized at the end of this cover memorandum.

Background

As you know, USAT was placed into receivership on December 30, 1988. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and ten other former directors and officers of USAT/UFG who were either senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we prepared a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain USAT former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk. Most notably, the principal loss causing events occurred more than two years prior to the date of receivership, and were therefore at risk of dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in Dawson, a split of authority in the federal trial courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy at that time was to assert that gross negligence was sufficient to the toll the statute of limitations. After briefings with the Deputies to the Directors and further discussion with the potential defendants, we decided to defer an FDIC decision on whether to assert our claims, in order to further investigate the facts, give time for the Texas law on adverse domination to take more concrete shape and ascertain the view of OTS. Therefore, the tolling agreements were continued.

II. OTS's Involvement

At about the same time that we deferred a decision on the FDIC's cause of action, we met with OTS staff to discuss the possibility of OTS pursuing these claims (plus a net worth maintenance agreement claim) through administrative enforcement proceedings. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc., a publicly traded company that is largely controlled by Hurwitz. The FDIC is paying OTS's costs in connection with this matter.

The OTS has reviewed extensive documentation and has recently conducted a series of administrative depositions. We have been informed that OTS staff is currently preparing a broad-based draft Notice of Charges against Hurwitz and others, including Maxxam, for substantial restitution for unsafe and unsound practices and for enforcement of a net worth maintenance agreement. Under the terms of our agreement with OTS, FDIC will be the beneficiary of any recovery from the OTS enforcement action through settlement or litigation against the proposed respondents. All the potential respondents in the OTS investigation, including Hurwitz, have signed tolling agreements with OTS which expire on December 31, 1995. OTS staff's current expectation is that they will seek formal approval for this case before the tolling agreements, expire on December 31, 1995.

III. Significant Caselaw Developments Have Further Weakened the Viability of Suit by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions, and the failure of Congress to address the statute of limitations problems, have further weakened the FDIC's prospects for successfully litigating our claims in the United States District Court for the Southern District of Texas.

A. Statute of Limitations

In the recent decision of *RTC v. Acton*, 49 F.3d 1086 (5th Cir. 1995), the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the two year statute of limitations under the doctrine of adverse domination. As a result of this opinion, we cannot rely on an argument that gross negligence by a majority of the culpable Board members is sufficient to toll the statute of limitations. There is very little, if any, evidence of fraud or self-dealing.

B. The Merits

The law has also moved against us on the merits of the claims. The claims against Hurwitz are more difficult than usual because he was not an officer or director of USAT. We believe that his involvement rose to the level of a de facto director, and for some purposes a control person, but his status presents a notable hurdle.

Texas case law has essentially eliminated liability for negligence in the name of applying a very expansive business judgment rule defense. We believe the conduct here constitutes gross negligence as that term is normally defined. The law of gross negligence in Texas is currently unsettled, but a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet if it is applied to D&O cases. In *Transportation Insurance Company v. Moriel*, 879 S.W. 2d 10. (Tex. 1994), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. This new standard, if applied, would make it very difficult, if not impossible, to prove our claims.

The effect of these recent adverse decisions is that there is a very high probability that much or all of the FDIC's conventional claims will not survive a motion to dismiss on statute of limitations grounds. We would also be at increased risk of dismissal, or loss at trial, on the merits.

IV. The Pacific Lumber—Redwood Forest Matter

Any decision regarding Hurwitz and the former directors and officers of USAT is likely to attract media coverage and comment from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. On July 21, we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus possibly the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement.* * * We plan to follow up on these discussions with the OTS and the Department of Interior in the coming weeks. * * * the Hurwitz tolling agreement * * expires, we * * *

DRAFT

Attorney Client Privilege Attorney, Work Product

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel. Stephen N. Graham, Associate Director (Operations)—DAS.

Date: July 24, 1995.

Subject: Status of PLS Investigation, Institution: United Savings Association of Texas—Houston, Texas #1815.

This memorandum reports on the status of the continuing investigation of the failure of United Savings Association of Texas (''USAT''), the separate investigation of USAT being conducted by the Office of Thrift Supervision (''OTS''), current tolling agreements, settlement negotiations with United Financial Group, Inc. (''UFG''), USAT's first tier holding company, and our decision not to recommend suit by the FDIC against controlling person Charles Hurwitz and other USAT officers and directors.

We had hoped to delay a final decision on this matter until after OTS decides whether to pursue claims against Hurwitz, *et al*. However, we were advised on July 21, 1995 that Hurwitz would not extend our tolling agreement with him. Consequently, if suit were to be brought it would have to be filed by August 2, 1995. We are not recommending suit because there is a 70% probability that most or all the FDIC case would be dismissed on statute of limitations grounds. Under such circumstances the staff would ordinarily close out the investigation under delegated authority. However, because of the high profile nature of this case (evidenced by numerous letters from Congressmen and environmental groups), we are advising the Board in advance of our action in case there is a contrary view.

I. Background

As you know, USAT was placed into receivership on December 30, 1988 with assets of $4.6 billion. The estimated loss to the insurance fund is $1.6 billion. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and ten other former directors and officers of USAT/UTF who were either senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we prepared a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain USAT former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk. Most notably, the principal loss causing events occurred more that two years prior to the date of receivership, and were therefore at risk of dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in *Dawson*, a split of authority in the federal trial courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy at that time was to assert that gross negligence was sufficient to the toll the statute of limitations. After briefings with the Deputies to the Directors and further discussion with the potential defendants, we decided to defer an FDIC decision on whether to assert our claims, in order to further investigate the facts, give time for the Texas law on adverse domination to take more concrete shape and ascertain the views of OTS. Therefore, the tolling agreements were continued.

II. OTS's Involvement

At about the same time that we deferred a decision on the FDIC's cause of action, we met with OTS staff to discuss the possibility of OTS pursuing these claims (plus a net

worth maintenance agreement claim) through administrative enforcement proceedings. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc, a publically traded company that is largely controlled by Hurwitz. The FDIC is paying OTS's costs in connection with this matter.

The OTS has reviewed extensive documentation and has recently conducted a series of administrative depositions. We have been informed that OTS staff is currently preparing a broad-based draft Notice of Charges against Hurwitz and others, including Maxxam, for substantial restitution for unsafe and unsound practices and for enforcement of a net worth maintenance agreement. OTS staff plans to seek formal approval for this case in the relatively near future. Under the terms of our agreement with OTS, FDIC will be the beneficiary of any recovery from the OTS enforcement action through settlement or litigation against the proposed respondents. All the potential respondents in the OTS investigation, including Hurwitz, have signed tolling agreements with OTS which expire on December 31, 1995.

III. Significant Caselaw Developments Have Further Weakened the Viability of Suit by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions, and the failure of Congress to address the statute of limitations problems, have further weakened the FDIC's prospects for successfully litigating our claims in the United States District Court for the Southern District of Texas.

A. Statute of Limitations

In the recent decision of *RTC v. Action,* 49 F.3d 1086 (5th Cir. 1995), the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the two year statute of limitations under the doctrine of adverse domination. As a result of this opinion, we cannot rely on an argument that gross negligence by a majority of the culpable Board members is sufficient to toll the statute of limitations. There is very little, if any, evidence of fraud or self-dealing.

All of the affirmative acts that would form the basis for an FDIC suit occurred more than two years before USAT failed. Thus, the only claims that have any chance of surviving a motion to dismiss based on statute of limitations grounds are claims based on USAT's failure to unwind some positions in mortgage backed securities and derivative instruments as soon as that should have been done. The statute of limitations risks in this argument are (1) all of the money was put at risk more than two years before failure, and (2) if there is a claim based on USAT being late in unwinding these transactions (we think it should have been done starting no later than January 1, 1987), there is a real likelihood of a court finding that they should have unwound them more than two years before failure.

In short, we have an argument for pursuing some claims, but that argument is not likely to prevail.

B. The Merits

The law has also moved against us on the merits of the claims. The claims against Hurwitz are more difficult than usual because he was not an officer or director of USAT. We believe that his involvement rose to the level of a de facto director, but his status presents a notable hurdle.

Texas case law has essentially eliminated liability for negligence in the name of applying a very expansive business judgment rule defense. We believe the conduct here constitutes gross negligence as that term is normally defined. The law of gross negligence in Texas is currently unsettled, but a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet if it is applied to D&O cases. In *Transportation Insurance Company v. Moriel,* 879 S.W.2d 10 (Tex. 1994), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. This new standard, if applied, would make it very difficult, if not impossible, to prove our claims.

The effect of these recent adverse decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss on statute of limitations grounds. We would also be at increased risk of dismissal on the merits. Because there is only a 30% chance that we can avoid dismissal on statute of limitations grounds, and because even if we survived a statute of limitations motion, victory on the merits (especially on the claims most likely to survive a statute of limitations motion) is uncertain given the state of the law in Texas, we do not recommend suit on the FDIC's potential claims.

IV. The Pacific Lumber—Redwood Forest Matter

A decision not to sue Hurwitz and the former directors and officers of USAT is likely to attract media coverage and criticism from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. On July 21, we met with representatives of the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus possibly the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement. This is feasible with perhaps some new modest legislative authority because USAT is a FRF institution and therefore USAT recoveries redound to the benefit of the U.S. Treasury. We plan to follow up on these discussions with the OTS and the Department of Interior in the coming weeks. When the Hurwitz tolling agreement expires, we would recommend that we update those Congressmen who have inquired about our investigation and make it clear that this does not end the matter of Hurwitz's liability for the failure of USAT because of the ongoing OTS investigation.

V. Updated (Draft) Authority to Sue Memorandum

In light of the complexity and visibility of this matter, and the short timeframes, we have attached for your information an updated (draft) authority to sue memorandum. It sets forth the theories (and weaknesses) of our proposed claims in some detail. Whether that memorandum sets out a viable claim on the merits should be considered by the Board if the Board decides that it wants the Texas district court to decide the statute of limitations issue rather than FDIC staff. If the Board were to decide to go forward with the filing of a complaint, we need to file the complaint in the Southern District of Texas, on or before, Wednesday, August 2, 1995. If the Board has no objection to the proposed staff action to allow the tolling agreements to expire, the Board need take no formal action.

We are available to discuss this matter at your convenience.

Concur: William F. Kroener, III, General Counsel.

Concur: John F. Bovenzi, Director, DAS.

APPENDIX 2

RECORD 1

To: Robert DeHenzel.

Cc: Ben Groner, James Cantrell.

From: Paul Springfield

Subject: Strange Call—United S&L Houston, TX.

Date: Friday, November 19, 1993.

Bob, yesterday, Mary Saltzman sent an E-mail to Ben Groner and me regarding a call she received from an individual named Bob Close. I will also forward her E-Mail to you. Yesterday afternoon an individual who identified himself as Bob Close called me. His primary question was that he wished to speak to the individual who was investigating the United S&L failure. I asked him the reason for his request and who he was. His reponse was that he was working with some environmental groups and he understood that FDIC had a claim against United for $532 MM (I believe this is the amount stated) and he referred to Charles Hurwitz specifically and to Taxpayers money lost in the institution. Seems like the amount of loss stated was $1.9 Billion. He went on to say that people like Hurwitz needed to be ''stopped''. He also related that he was working with a group in New York identified as ''Wetlands'' and in Northern California a group called ''EPIC''. He gave the name this stood for which I do not recall, but it was environmental something. I asked him what was the source of his information and the purpose of his call. He was vague about the purpose but related the following names as sources of his information.

Attorney; Bob Bertain and Investigator; Bob Martell, both in Northern California. He also gave a telephone number where he could be reached later in the week * * *He indicated this was in Acadia California. He said he was currently in New York. He indicated this was in Acadia California. He said he currently in New York until today and could be reached through James Hansen * * *

Frankly, I do not know whether this individual is some kind of radical Tree Hugger on a mission to save the forest in California or someone seeking to confirm whether FDIC is in process of going after Hurwitz and United. I am a little suspicious, however, as to the motives stated by the individual, in light of the specific dollar figures he related in the conversation but I do not want to come across sounding paranoid. I did not relate to him who was assigned to the Investigation or that I worked in Investigations. Further, I did not ask him how he obtained my name and telephone #.

I do not know whether to ignore this situation or not but I feel certain the individual will call me again since he was my name and in the course of the convervation I related that I would need to look into his request to talk to the Investigator. This was simply a ploy to obtain information from him.

There is a possibility you may wish to speak to this individual to determine whether he may have information that is beneficial to our cause if he is who he says he is. If so, please advise and I will relate this to

him; otherwise, I will do nothing and if he calls I will state that his request to speak to the Investigator cannot be granted. If you wish to discuss this further, call me at * * *

To: Mary Saltzman, Ben Groner.
Cc: Martha F. Boyles-Hance.
From: Paul Springfield.
Subject: United S&L—Strange Call.
Date: Monday, November 22, 1993.
Forwarded by: Paul Springfield.

Forwarded to: James Cantrell.
Forwarded date: Monday, November 22, 1993.
Comments by: Paul Springfield.
Comments: Jim. FYI.

[Original Message]

I had a conversation with PLS attorney Bob DeHenzel, Friday afternoon, 11–19–93, to devise an approach as to the appropriate manner to deal with the inquiry from Dan Close. We determined that Mr. Close was to pose his inquiry in written form and address it directly to DeHenzel. I related this information to Close via another party that answered the telephone # he had left.

DeHenzel indicated he had some knowledge about the nature of the inquiry as well as the attorney Bill Bertain disclosed by Close. DeHenzel stated that this group was involved in fighting a take over action of some company by Hurwitz involving forest property in the northwestern United States. Apparently they are trying to obtain information to utilize in their efforts.

Hopefully, this will close the book, at least from the Investigative perspective. Everyone, have a great holiday.

To: Paul Springfield.
Cc: Ben Groner.
From: Mary Saltzman.
Subject: re: Strange Call-United S&L Houston, Tx.
Date: Monday, November 22, 1993.
Forwarded by: Paul Springfield.

Forwarded to: James Cantrell.
Forwarded date: Monday, November 22, 1993.
Comments by: Paul Springfield.
Comments: Whoops. Sent the wrong one earlier.

Forwarded to: Ben Groner.
Cc: Martha F. Boyles-Hance.
Forwarded date: Monday, November 22, 1993.
Comments by: Paul Springfield.
Comments: Ben, the E-Mail being forwarded seems to indicate where the party obtained my name. You will receive another E-Mail from me that should conclude this matter, at least for now. Thanks.

[Original Message]

Thanks for fielding that one, Paul! I received the first call late on Thursday and checked the institution on DOLLAR$. His comments were too close to be comfortable, and with all the bad publicity we have had in the Scripps Howard papers lately I didn't feel I could pass him off to an ombudsman who might or might not understand the confidentiality of our claims. Anyway, at that hour I felt it was better to pass him directly on to you or to Ben so that you could deal with him. Sounds like you got some information from him. The excitement never ends. Haven't seen you in a while, hope all is well with you. Have a good Holiday. .MMS

RECORD 1A

[From the Trees Foundation, July 17, 2000]

A FINAL PUSH FOR DEBT FOR NATURE

(By the Rose Foundation)

For six years, the Rose Foundation has worked with other activists to save Headwaters Forest through a Debt for Nature land swap. Debt for Nature means resolving hundreds of millions in pending federal claims against Maxxam in exchange for public title to ancient redwoods and other sensitive habitat in the Headwaters Forest area. Rose has researched and documented the factual and legal basis for FDIC and Treasury Department suits against Maxxam and CEO Charles Hurwitz. The suits seek $800+ million restitution for the failure and taxpayer bailout of Maxxam/Hurwitz' Texas Savings and Loan. Maxxam credits Rose with catalyzing the suits. We also led shareholder campaigns for four years to reform Maxxam's corporate governance and forest management practices. In the most recent campaign (which Maxxam presented as ''a referendum on Debt For Nature''), 80% of the shares outside of Hurwitz' control voted for our resolutions, and almost 50% voted to toss out Maxxam's Board in favor of our candidates.

It's now or never for Debt for Nature. The Treasury Dept. is all but concluded. This summer, the judge will make an advisory ruling to the director of the Treasury's banking regulatory division. The director will then issue a restitution order. We believe Treasury has proven its case, and a large restitution order is imminent. Maxxam has many reasons to settle, and to offer forestlands instead of cash:

A huge cash judgment could bankrupt Maxxam.

Some of Maxxam's largest investors tell us that they prefer debt for nature to a cash payment.

Debt for Nature is a win-win. Maxxam could trade forestlands which they can't cut profitably (but are environmentally priceless) in exchange for settling the federal claims and resolving some of Maxxam's most pressing and costly environmental disputes.

But FDIC & Treasury's position is that their mandate is to recover cash, not forest. If they took Headwaters forestlands in lieu of cash, their mandate would be to liquidate the property or demand an equal value exchange from Interior or BLM. An existing law (Coastal Barrier Resources Act) already allows banking regulatory agencies to transfer property they acquire which is adjacent to an existing reserve, to resource management agencies. Rose seeks an amendment which would clarify that the banking agencies could donate such property to resource management agencies—avoiding the unacceptable situation of forcing Interior to liquidate some other holdings in exchange for saving the Headwaters. FDIC (which has acknowledged that it is funding Treasury's case) would be much more aggressive in pursuing a Debt for Nature settlement if they had Congressional approval to donate recovered Headwaters forestlands to Interior. The amendment would also be good policy in its own right—our research has already uncovered four other examples where such a policy would have facilitated public acquisition of properties that Interior was already trying to conserve.

We need to make significant progress in this Congress to show FDIC/Treasury that Debt For Nature is worth considering. We also need to continue to keep the heat on Hurwitz through his stockholders to force Maxxam to agree to a Debt For Nature settlement.

It will not be an easy fight. Several Members of Congress, including House Majority Whip Tom DeLay (R–TX), and Resources Committee Chair Don Young (R–AK), have demanded access to all of FDIC and OTS' sensitive legal research and background information that is crucial to their case. More chilling from a constitutional and public liberty standpoint, Congressman Young is demanding all records of any communications with activists and organizations who support Debt For Nature—including specifically Rose, Trees Foundation, EPIC, Sierra Club, and many others. We believe Congressman Young's actions are a clear abuse of Congressional subpoena authority and a heavy-handed attempt to dissuade citizens from exercising their constitutional right to petition the government regarding issues of concern.

People can contact their Congressional and Senate representatives to ask them to support Debt for Nature and do everything in their power to ease a Debt for Nature swap for the agencies. It could help save the Headwaters today, and other valuable and threatened habitat tomorrow.

RECORD 2

In light of the magnitude of the losses and the FDIC's well considered evaluation of liability, I am particularly concerned that a formal action has not yet been filed. Although the FDIC has not publicly quantified the claim, the UFG's 10-K estimated the claim of $545 million failure to maintain the minimum net worth and failure to remit tax returns alone.

My concern about this matter has been heightened by my colleague Dan Hamburg, who recently introduced legislation to acquire ancient redwood forests owned by Pacific Lumber Company (PALCO). Principals in PALCO who acquired the company in 1985 with Drexel Burnham/Milken high yield bonds were also involved in the UFG/USAT transactions. Evaluation of their liabilities to the Federal government becomes particularly critical as the prospect of payment for property acquisition proceeds.

I would appreciate your earliest possible response.

Sincerely,

HARRY B. GONZALEZ,
Chairman.

THE FAILURE OF UNITED SAVINGS ASSOCIATION OF TEXAS (USAT)

FACT SHEET

The FDIC has an outstanding claim against United Financial Group, holding company for the failed USAT in excess of $548 million dollars. (United Financial Group 10–K Report year ending 12/31/92).

Five years have passed since this claim was asserted in 1988, and while the FDIC has extended the statute of limitations through tolling agreements, the current statute of limitations ends on December 30, 1998. (UFG 10–K Report year ending 12/31/92).

When it was seized in 1988 by the FDIC, USAT was a wholly-owned subsidiary of United Financial Group whose controlling shareholders at the time of the collapse was Charles Hurwitz-run companies MAXXAM, MCO, and Federated Development Corp. Also, Drexel, Burnham, Lambert was a 8% shareholder (Washington Post, 4/16/91, MAXXAM Prospectus, 1988 and FDIC v. Milken).

From 1986 to 1988, USAT purchased over $1.3 billion worth of Drexel-underwritten junk bonds. During that same period of time, according to an FDIC lawsuit against Michael Milken, ''the Milken group raised about $1.8 billion of financing for Hurwitz's takeover venture,'' which included the 1988 takeover of the Pacific Lumber Company, the world's largest producer of old growth redwood. (FDIC v. Milken).

According to Fortune, the failure of USAT constituted the fifth largest failed S&L bailout, as of 1990, costing the taxpayers $1.6 billion. (Fortune, 8/10/90).

RECORD 2A

Meeting with Rep. Hamburg

Hamburg—Wanted to have the meeting. Have an immediate interest in the case. Interested enough over potential filing of complaint to ask what is about to proceed. Realized that this possible avenue would be lost.

Received letter from * * *. Hope to get decision by May '94.

What is status of investigation? What are key factors? Is there specific date by which intend to make decision? What other agencies involved? Who is working on case? Multiple attorneys? Reoccurring learning curve? Interesting to me as to why it takes so long on 5th largest S&L failure in country.

Smith—Failure in Dec. 1988. Very difficult to do a swap for trees. The investigation has looked at several areas. Claim on the net worth maintenance agents.

Thomas—Have been attempts to enforce this. We can't find signed agent before FSLIC. We've never found the agent. Are claims Hurwitz has signed * * * agent to 3/1.

J. Smith—We look for wrongdoing. Some might meet our standards. We look at is it a good case and is it cost efficient. Are looking claims that in most optimistic dreams of it would be.

If can convince other side that we have claim worth $400 million they want to settle. Could be a hook into the holding co.

Copy of testimony and *Dawson* case.

Dept. of Labor.

SEC Kate Anderton—Rep. Hamburg.

2/3/94

Congressman Hamburg; Kate Anderton; Kelsy Meek

Armando,—Tip us off about the law firm don't have $600/hr red flag.

39,000—cut over

5,000 acres—left old growth

Cutting of the groves is limited by endangered species

J. Thomas higher risk than most.

Civil money penalties—have any deposition been taken.

DOL—pension lawsuit Exec. Life against Exec. Life Maxxam

SEC—filings against Maxxam call

RECORD 5

FEBRUARY 2, 1994.

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

Memorandum To: Jack D. Smith, Deputy General Counsel.

From: Patricia F. Bak, Counsel and Robert J. DeHenzel, Jr., Senior Attorney.

Subject: United Savings Association of Texas Net Worth Maintenance Claims.

This memorandum summarizes potential claims by the FDIC and the OTS against United Financial Group, Inc. (''UFG'', for failure to maintain the net worth of United Savings Association of Texas (''USAT'') as required by federal regulation. Based on our review, we conclude that the FDIC has no viable claim against UFG for failure to maintain USAT's net worth pursuant to a net worth maintenance (''NWM'') stipulation. Although a number of federal courts have held that federal banking agencies acting as receivers for failed financial institutions do not have a private right of action for breach of NWM stipulations, the Court of Appeals for the Fifth Circuit has held that such regulatory commitments are enforceable in cease and desist proceedings, even post receivership. Accordingly, the OTS may be able to pursue a NWM claim against UFG for failure to maintain USAT's net worth, pursuant to 12 USC §1818(b)1. This administrative proceeding must be commenced on or before December 30, 1994, within six years of USAT's failure. It is unclear whether OTS has a viable claim against MCO Holdings, Inc. (''MCO'') and Federated Development Corp. (''FDC''), which together owned at least 23% of UFG, although an argument could be made that MCO/FDC functioned as a de facto Savings and Loan Holding Company (''SLHC'') and should be responsible for maintaining USAT's net worth.

I. Background

In 1982, Charles Hurwitz, a well-known Houston investor active in corporate acquisitions and divestitures, formulated a plan to combine two Houston-based savings and loans holding companies, UFG (which owned 100 percent of USAT) and First American Financial of Texas (''First American''). He effectuated the acquisition by acquiring 23.3% of UFG's stock through MCO and FDC, both of which he controlled, for approximately $7.6 million.

The FHLBB approved UFG's merger with First American on April 29, 1983 by Resolution No. 83–252 (the ''Resolution''). First American was merged into UFG and First American's insured subsidiary was merged into USAT. Approval was conditioned upon UFG maintaining the net worth of USAT at regulatory mandated levels and upon USAT not paying dividends exceeding 50 percent of USAT's yearly ''net income.''

The NWM commitment was contained in Paragraph 6 of the Resolution. It provided, in pertinent part, that UFG: ''shall stipulate to the [FSLIC] that as long as it controls [USAT], [UFG] will cause the net worth of [USAT] to be maintained at a level consistent with that required by Section 563.13(b) of the Rules and Regulations of the [FSLIC] . . . . and, as necessary, will infuse sufficient additional equity capital, in a form satisfactory to the Supervisory Agent, to effect compliance with such requirement.''

The Resolution also required UFG to file a certification with the Supervisory Agent, within 30 days of the acquisition, stating the effective date of the acquisition and that the acquisition had been consummate and in accordance with the provisions of all applicable law, and regulations. UFG and Hurwitz deny, and we have been unable to establish that they signed a NWM stipulation or a capital maintenance agreement with the FHLBB.

II. Utilization of USAT to Upstream Dividends to UFG

Hurwitz gained control of USAT for an initial investment of less than $8 million, yet in 1984, he caused USAT to sell off approximately one-half of its retail branch network, and on the basis of profits booked on these sales, USAT issued a cash dividend of $32,687,218 to UFG on March 18, 1985. Initially, this dividend was used to fund parent company operations and without it, UFG would have experienced serious financial problems. In June 1988, some of the remaining proceeds were used to retire a substantial part of UFG's acquisition debt.

The issuance of this dividend to UFG based on a one-time asset sale was imprudent. At the time of the dividend, USAT was unable to generate profit from continuing operations and the reduction in its regulatory net worth as a result of this transaction was likely to require capital infusions. Further, while USAT reported Regulatory Capital of $207 million at the time the dividend was declared, USAT was not reporting itself insolvent only because it had ''goodwill'' of $256 million on its books as a result of USG's acquisition of three other thrifts between 1981 and 1983. Absent goodwill, USAT would have had a negative net worth of $49 million at the time the dividend was paid.

Although regulators expressed ''no supervisory objection'' to the dividend before it was paid, there is evidence that they were misled by USAT. Moreover, beginning in late 1985, when USAT did, in fact, require additional capital, UFG declined to return this dividend to USAT through a capital infusion. When it became certain that the FHLB would demand that UFG contribute additional capital to USAT, Hurwitz obtained FHLBB approval for his plan to use UFG's assets, which included the dividend from USAT, to retire its acquisition debt. He obtained approval by using his purported willingness to contribute capital to USAT via a Southwest Plan transaction involving USAT.

USAT admitted a failure to comply with net worth requirements as of December 31, 1987. On May 13, 1988, the FHLB-Dallas directed UFG to infuse additional equity into USAT sufficient to meet minimum regulatory capital requirements. UFG did not comply. On December 8, 1988, the FHLB-Dallas issued a second written directive to UFG. UFG again refused to comply. On December 30, 1988, FSLIC was appointed receiver of USAT and continued to make net worth demands on UFG, which were not honored.

III. Potential Claims by the FDIC-Receiver

Federal Courts have uniformly held that the FDIC, the RTC and the FSLIC as receiver of failed financial institutions have no implied private or federal common law cause of action to enforce the terms of NWM agreements. *FSLIC v. Savers, Inc.*, No. LR–C–89–529 (E. D. Ark. 1989); *RTC v. Tetco*, 758 F. Supp. 1159 (W. D. Tex. 1990); and *In Re Conner Corp.*, 127 B. R. 775 (E. D. N. C. 1991). All three of these decisions relied upon *FSLIC v. Capozzi*, 855 F.2d 1319 (8th Cir. 1988), vacated on other grounds, 490 U.s. 1062 (1989), which held that implying a private right of action for violation of thrift regulations would not comport with the purposes of the underlying statutory framework; the court deemed those purposes to be prospective rather than compensatory.

In Savers, the court also found that a holding company's net worth maintenance commitment was not enforceable as a private contract because the holding company was required by law to comply with the net worth maintenance regulation, and therefore its commitment to abide by the regulation was not ''bargained for'' consideration which would support a contract.

While the bankruptcy court in *Conner* similarly held that a holding company's promise to maintain the net worth of a savings and loan association did not constitute legal consideration, the court also held that the NWM stipulation did not constitute ''offer and acceptance'' that would give rise to a legally binding contract.

The *Tetco* court did not agree with the Conner and Savers analysis of consideration. The Tetco court did, however, agree with Conner that a NWM condition in a resolution granting deposit insurance was a statement setting forth a regulatory condition, and a net worth stipulation was merely an acknowledgment of regulatory requirements—statements which did not constitute a legally binding contract. The court noted: ''The terms of the net worth agreement and the regulatory approvals were never the subject of negotiations between the parties; their scope and effect were preordained to the letter by the regulators. The Court believes there is no genuine issue of material fact that the parties' intent was to fulfill the prerequisites of a regulatory blueprint. It was not to create independent contractual obligations. 758 F.Supp at 1162.''

The court further concluded that the NWM commitment did not involve ''the type of comprehensive agreement'' that could, independent of the regulations, be said to create existing rights and obligations within the meaning of FIRREA or contract.

Finally, the court held that there is no private right of action to enforce a regulatory net worth maintenance condition, citing Ameribanc Investors Group v. Zwart, 706 F. Supp. 1248 (E.D.Va. 1989) (holding that neither the Bank Holding Act nor the Change in Control Act, 12 U.S.C. §1730(q)(1) create a private right of action for damages caused by

failure to comply with regulatory requirements).

In any event, quite apart from the weight of authority holding that no private right of action for breach of contract exists, as noted above, the FDIC can point to no evidence showing that either UFG or Hurwitz signed a net worth maintenance agreement.

IV. OTS Administrative Proceedings pursuant to 12 USC § 1818(b)(1)

Although the FDIC cannot prevail on a direct claim against UFG for violation of the NWM stipulation, the OTS has the statutory authority to pursue a NWM claim against UFG in an administrative proceeding, pursuant to 12 USC §1818(b)1. See, Akin V. OTS, 950 F.2d 1180 (5th Cir. 1992) holding that NWM agreement is enforceable in cease and desist proceedings, and that attack on the validity of the agreement for lack of consideration must fail in light of Groos National Bank v. Comptroller of the Currency, 573 F.2d 889 (5th Cir. 1978)). In Groos, the court rejected an argument that a supervisory agreement was invalid because of a lack of consideration: ''The statute provides that a cease and desist order may issue upon any violation of an agreement between the agency bank and says nothing of consideration. Nor is there any reason to import the common law of consideration, proper to private contractual relations, into the relationships between a regulatory agency and the entity it regulates. The Comptroller is authorized by statute to exercise extensive controls upon banks; the statute clearly contemplates that agreements may occur between the Comptroller * * * and if the Comptroller does enter such an agreement by way of attaining voluntary compliance, we will not introduce the trappings of common-law consideration to question that agreement. 573 F.2d at 896.''

In Akin, the court noted that under 12 U.S.C. §1818(b), the OTS director has expansive authority to issue cease and desist orders to correct violations of regulations or written agreements between the agency and an institution affiliated party, including the power to seek reimbursement and restitution when a party has been unjustly enriched through the violation. The court noted that by failing to make capital infusions sufficient to cure the net worth deficiency, Akin was able to retain capital which otherwise would have been contributed to the financial institution. In affirming the director's order requiring Akin to pay over $19 million to restore the net worth deficiency of the institution, the court stated: ''Read in its entirety, the statute manifests a purpose of granting broad authority to financial institution regulators. The statute suggest that unjust enrichment has a broader connotation than in traditional contract law. Akin voluntarily entered the Agreement with the FSLIC so that he could retain control over [the financial institution]. He gained the significant personal benefit of retaining and disposing of funds or property which he was otherwise obligated to contribute to [the institution] in compliance with his agreement to be personally liable for net worth deficiencies. Akin has failed to show that the director's conclusion that he was unjustly enriched is arbitrary and capricious. 950 F.2d at 1183.''

The court, in dicta, appears to reject an argument that §1818 enforcement proceedings may only be initiated pre-receivership: ''This interpretation belies congressional intent expressed to adopt broader cease and desist powers with the passage of the FIRREA. The FIRREA included an amendment to * * . (3), providing that the regulatory agency's jurisdiction to institute cease and desist proceedings continued beyond a party's separation from the regulated institution, as long as that party was served with notice within six years of separation from the institution. The amendments also encompassed separation from the institution. The amendments also encompassed separation effected through a closing, such as is the case here, of an institution. 950 F.2d at 1184.''

Finally, the Akin court rejected the argument that post-closing exercise of cease and desist powers would unlawful usurp receivership authority. The court noted that in the absence of clear congressional intent to impose an automatic stay of cease and desist proceedings upon receivership, the court need only look to ''whether the agency's [action] is based on a permissible construction of the statute.'' Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43, 104 S. Ct. 2778, 2781–82, 81 L. Ed. 2d 694 (1984).

A. Involuntary Bankruptcy Petition Filed Against UFG

On November 25, 1992, UFG's preferred shareholders filed an involuntary bankruptcy petition against UFG seeking a reorganization under Chapter 11 of the Bankruptcy Code. If the bankruptcy petition is eventually heard on the merits and the court grants the petition in bankruptcy, the OTS may proceed on the NWM claim, if it deems it appropriate, by filing a motion in the bankruptcy court to require the trustee or debtor-in-possession to make good on UFG's commitment to maintain the regulatory capital of USAT. Section 365(o) of the Bankruptcy Code provides: ''In a case under Chapter 11 of this title, the trustee . . . shall immediately cure any deficit under any commitment by the debtor to. . . the Director of the Office of Thrift Supervision . . . or its predecessors . . . to maintain the capital of an insured depository institution.''

The purpose of Section 365(o) is ''to prevent institution—affiliated parties from using bankruptcy to evade commitments to maintain capital reserve requirements of a federally insured depository institution.'' In re First Corp., Inc., 973 F.2d 243, 246 (4th Cir. 1992). By operation of this section, if the preferred shareholders are successful in their effort to force UFG into Chapter 11, USFP or the trustee would have to turn over assets to OTS in satisfaction of the capital maintenance commitment. If UFG does not make good on that commitment, Chapter 11 relief is not available. See Id. at 247.

If the adverse parties elect to proceed under Chapter 7, the OTS, in any event, should be able to claim a priority over general unsecured creditors as to ''allowed unsecured claims based on any commitment by the debtors to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(8).''

V. Net Worth Maintenance Claim Against MCO/FDC

On December 6, 1984, pursuant to FHLBB Resolution 84–712, MCO and FDC received FHLBB approval to acquire more than 25% of UFG and thereby become a SLHC with respect to USAT. FHLBB approval was conditioned upon MCO/FDC maintaining the net worth of USAT. In late 1987, after extensive negotiations with the FHLBB, MCO/FDC refused to accept these conditions and no agreement was made. However, an argument could be made that MCO/FDC functioned as a *de facto* SLHC with respect to USAT from at least December 31, 1985, by virtue of the following:

(a) their 23% interest in UFG;

(b) Drexel's acquisition, in December 1984, of 7.2% of UFG's common stock—a date which coincides with FHLBB Resolution 84–712;

(c) a December 31, 1985 option agreement between MCO and Drexel, whereby MCO had the right to acquire from Drexel, and Drexel had the right to put to MCO, an additional 3% of UFG common stock;

(d) UFG's issuance to MCO/FDC, in 1985, of UFG preferred stock which was convertible to UFG common;

(e) common officers and directors among MCO, FDC and UFG, and

(f) the actual operating control of all three entities exercised by Charles Hurwitz.

RECORD 3B

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, December 3, 1993.

Memo To: Chairman Hove.
From: Alan J. Whitney, Director.
Subject: Significant Media Inquiries and Related Activities, Week of 11–29–93.

Regulatory Consolidation: Several news organizations have asked what the FDIC's position is on the agency consolidation proposal unveiled last week by Treasury. They were told you believed that with Board appointments imminent, it would be inappropriate to take an agency position until the full board is in place.

Thrift conversions: Crain's New York Business, Philadelphia Inquirer and American Banker newsletters inquired about the thrift mutual-to-stock conversion policy that the FDIC is currently developing, specifically when our position on this subject will be published. The calls came after *American Banker* ran an article in the Nov. 26 edition reporting on Rep. Gonzalez' legislation to limit thrift management profits from the conversions. We also received several inquiries about our response to Cong. Neal's letter of November 22 to you on the same subject, to which we have not yet responded.

O'Melveny & Myers: On Monday, the Supreme Court agreed to hear this case, involving the FDIC's ability to sue attorneys who represented banks that failed. The decision to hear the case prompted a flurry of press inquiries about similar cases past and present. We provided some statistical data and limited information about the Jones Day case, which is still active.

First City Bancorporation: Bloomberg Business News, Houston Bureau, called regarding possible settlement in the First City Bancorporation's claims case. It seems someone is talking, because the reporter asked about a December 14 FDIC Board meeting to discuss the settlement. The reporter wanted to know: If the FDIC committee working on the agreement approves the plan, does that mean the Board will ''rubber stamp'' it? We advised the Board does not rubber stamp anything. The Houston Chronicle also made several inquiries about a possible settlement in this case, all of which we answered with the standard response that we do not comment on ongoing litigation.

Los Angeles Times: Michael Parrish asked whether FDIC lawyers have considered whether we could legally swap a potential claim of $548 million against Charles Hurwitz (stemming from the failure of United Savings Assn. of Texas) for 44,000 acres of redwood forest owned by a Hurwitz-controlled company. We advised Parrish we're not aware of any formal proposal of such a transaction. However, we noted that a claim can be satisfied by relinquishing title to assets, assuming there is agreement on their value. We didn't go any further with Parrish, but Doug Jones notes that even if Hurwitz satisfied our claim by giving us the redwoods, it wouldn't result in what Earth First! (the folks who demonstrated in front of the main building last month) apparently is proposing, i.e., that we then deed the redwoods property to the Interior Department. That would require some extensive legal analysis and, since any claim we might assert against Hurwitz would be a FRF matter, would likely entail Treasury Department concurrence.

RECORD 3A

NOVEMBER 30, 1993.

To: Pat Bak
From: J Smith
Subject: Hurwitz

Here are some materials that have been sent to me.

(1) H.R. 2866—It may have a chance in Congress—talk to Mike DeLoose (sp?) in legis affairs. Passage would put millions more in Hurwitz's pocket.

(2) Materials from Chuck Fulton re net worth maintenance obligation. Evidently, PLS is supposed to pursue that claim. Don't let it fall thru the crack! If it's not viable we need to have a reliable analysis that will withstand substantial scrutiny.

H.R. 2866

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Headwaters Forest Act''.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that:

(1) Redwoods are a significant national symbol and a defining symbol of the State of California.

(2) Old growth redwood trees are a unique and irreplaceable natural resource.

(3) Most of the Nation's old growth forests have been cut. Less than 5 percent of the original 2,000,000 acre Coast redwoods remain standing. The groves that are left are crucial to maintain habitat needed for survival of old-growth dependent species. The Headwaters Forest, for example, is home to one of California's three largest population of marbled murrelets, rare sea birds that nest only in coastal old growth trees; the Northern Spotted Owl; and native salmon stocks that spawn in the Forest's creeks.

(4) The remaining unprotected stands of old growth forests and old growth redwoods are under immediate threat of being harvested without regard to their ecological importance and without following Federal timber harvest guidelines.

(5) Significant amounts of old growth redwoods in the proposed National Forest additions are being cut at a pace that is based on paying high interest rates on poor quality bonds and not at a pace that is based on sound forest management practices.

(b) PURPOSE.—The purpose of this Act is to provide for the sound management and protection of old growth Redwood forest areas in Humboldt County, California, and to preserve and enhance habitat for the marbled murrelet, Northern Spotted owl, native salmon stocks, and other old growth forest dependent species, by adding certain lands and water to the Six Rivers National Forest and by including a portion of such lands in the national wilderness preservation system.

SEC. 3. ADDITION TO SIX RIVERS NATIONAL FOREST.

(a) EXTENSION OF BOUNDARIES.—The exterior boundaries of the Six Rivers National Forest in the State of California are hereby extended to include the area comprising approximately 44,000 acres, as generally depicted on the map entitled ''Six Rivers National Forest Addition proposed'', dated June 1993. Such area shall hereinafter in this Act be referred to as the Six Rivers National Forest Addition. The map shall be on file and available for public inspection in the offices of the Forest Supervisor, Six Rivers National Forest, and in the offices of the Chief of the Forest Service, Department of Agriculture.

(b) ACQUISITION OF LAND.—(1) The Secretary shall acquire lands or interests in land within the exterior boundaries of the Six Rivers National Forest Addition by donation, by purchase with donated or appropriated funds, or by exchange for other lands owned by any department, agency, on instrumentality of the United States. When any tract of land is only partly within such boundaries, the Secretary may acquire all or any portion of the land outside of such boundaries in order to minimize the payment of severance costs. Land so acquired outside of the boundaries may be exchanged by the Secretary for non-Federal lands within the boundaries, and any land so acquired and not utilized for exchange shall be reported to the General Services Administration for disposal under the Federal Property and Administrative Services Act of 1949 (63 Stat. 377). Lands, and interests in lands, within the boundaries of the Headwaters Forest which are owned by the State of California or any political subdivision thereof, may be acquired only by donation or exchange.

(2) The Secretary is authorized to accept from the State of California funds to cover the cost for acquiring lands within the Headwaters Forest, and notwithstanding any other provision of law, the Secretary may retain and expend such funds for purposes of such acquisition. Such funds shall be available for such purposes without further appropriation and without fiscal year limitation.

(c) LAND ACQUISITION PLAN.—The Secretary shall develop and implement, within 6 months after the enactment of this Act, a land acquisition plan which contains specific provisions addressing how and when lands will be acquired under section (b). The plan shall give priority first to the acquisition of lands within the boundaries of the Headwaters Forest Wilderness identified on the map referred to in section 3(a). The Secretary shall submit copies of such plan to the Committee on Natural Resources, the Committee on Agriculture, and the Committee on Appropriations of the United States House of Representatives and to the Committee on Energy and Commerce, the Committee on Agriculture, Nutrition, and Forestry and the Committee on Appropriations of the United States Senate.

(d) AUTHORIZATION OF APPROPRIATIONS.—There are hereby authorized to be appropriated such sums as may be necessary to carry out the purposes of this Act.

SEC. 4. WILDERNESS AREAS.

(a) DESIGNATION.—In furtherance of the purposes of the Wilderness Act (16 U.S.C. 1131–1136), lands in the State of California acquired under section 3 of this Act which are within the areas generally depicted on the map referred to in section 3 as the ''Headwaters Forest Wilderness (Proposed)'' shall be designated as wilderness and therefore as a component of the National Wilderness Preservation System, effective upon acquisition under section 3. Such lands shall be known as the Headwaters Forest Wilderness.

(b) MAP AND DESCRIPTION.—As soon as practicable after the inclusion of any lands in the Headwaters Forest Wilderness, the Secretary shall file a map and a boundary description of the area so included with the Committee on Natural Resources of the House of Representatives and with the Committee on Energy and Natural Resources of the United States Senate. The Secretary may correct clerical and typographical errors in such boundary description and such map. Each such map and boundary description shall be on file and available for public inspection in the Office of the Chief of the Forest Service, United States Department of Agriculture.

(c) BUFFER ZONES NOT INTENDED.—The Congress does not intend that designation of any area as wilderness under this section lead to the creation of protective perimeters or buffer zones around the wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within a wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.

(d) STATE AUTHORITY OVER FISH AND WILDLIFE.—As provided in section 4(d)(8) of the Wilderness Act, nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the State of California with respect to wildlife and fish in any areas designated by this Act as wilderness.

SEC. 5. ADMINISTRATION.

(a) MANAGEMENT PLAN.—The Secretary shall develop, within 1 year after the enactment of this Act, a comprehensive management plan detailing measures for the preservation of the existing old growth redwood ecosystems in the Six Rivers National Forest Addition, including but not limited to each of the following:

(1) Prohibition of sale of timber from lands within the old growth redwood groves as depicted generally on the map referred to in section 3(a). Timber sales in other areas shall be allowed consistent with the purposes of this Act and other applicable Federal laws and regulations.

(2) Measures to restore lands affected by previous timber harvests to mitigate watershed degraduation and impairment of habitat for the marbled murrelet, spotted owl, native salmon stocks, and other old-growth forest dependent species (''Restoration Measures'').

The Management Plan shall be reviewed and revised every time the Six Rivers National Forest Land and Resource Management plan is revised or more frequently as necessary to meet the purposes of this Act.

(b) APPLICABLE LAWS AND POLICIES.—(1) The Secretary, acting through the Chief of the Forest Service, shall administer the lands acquired under section 3(b) in accordance with the Management Plan, this Act, and with the other laws, rules, and regulations applicable to such national forest. In addition, subject to valid existing rights, any lands acquired and designated as wilderness under section 4(a) shall also be administered in accordance with the provisions of the Wilderness Act governing areas designated by that Act as wilderness, except that any reference in such provisions to the effective date of the Wilderness Act (or any similar reference) shall be deemed to be a reference to the date of acquisition of such lands under section 3 of this Act.

(2) To the maximum extent practicable, all work to implement the management plan's Restoration Measures shall be performed by unemployed forest and timber workers, unemployed commercial fishermen, or other unemployed persons whose livelihood depends on fishery and timber resources.

(3) In order to facilitate management, the Secretary, acting through the Chief of the Forest Service may enter into agreements with the State of California for the management of lands owned by the State or purchased with State assistance.

SEC. 6. PAYMENTS TO LOCAL GOVERNMENT.

(a) PILT.—Solely for purposes of payments made pursuant to chapter 69 of title 31 of the United States Code, all lands added to the Six Rivers National Forest by this Act shall be deemed to have been acquired for the purposes specified in section 6904(a) of such title 31.

(b) 10-YEAR PAYMENT.—(1) Subject to annual appropriations and the provisions of subsection (c), for a period of 10 years after acquisition by the United States of lands added to the Six Rivers National Forest by this Act, the Secretary, with respect to such acquired lands, shall make annual payments

to Humbolt County in the State of California in an amount equal to the State of California Timber Yield Tax revenues payable under the California Revenue and Taxation Code (sec. 38101 et seq.) in effect as of the date of enactment of this Act that would have been paid with respect to such lands if the lands had not been acquired by the United States, as determined by the Secretary pursuant to this subsection.

(2) The Secretary shall determine the amounts to be paid pursuant to paragraph (1) of this subsection based on an assessment of a variety of factors including, but not limited to—

(A) timber actually sold in the subject year from comparable commercial forest lands of similar soil type, slope and such determination of appropriate timber harvest levels,

(B) By comparable timber size class, age, and quality.

(C) market conditions,

(D) all applicable Federal, State, and local news and regulations, and

(E) the goal of sustainable, even-flow harvest or renewable timber resources.

(c) CALIFORNIA TIMBER YIELD TAX.—The amount of State of California Timber Yield Tax payments paid to Humboldt County in any year pursuant to the laws of California for timber sold from lands acquired under this Act shall be deducted from the sums to be paid to Humboldt County in that year under subsection (b).

(d) 25-PERCENT FUND.—Amounts paid under subsection (b) with respect to any year shall be reduced by any amounts paid under the Act of May 23, 1908 (16 U.S.C. 500) which are attributable to sales from the same lands in that year.

SEC. 7. FOREST STUDY.

The Secretary shall study the lands within the area comprising approximately 13,620 acres and generally depicted as ''Study Area'' on the map referred to in section 3(a). The study shall analyze the area's potential to be added to the Headwaters Forest and shall identify the natural resources of the area including the location of old growth forests, old growth redwood stands, threatened and endangered species habitat and populations including the northern spotted owl marbled murrelet, commercial timber volume, recreational opportunities, wildlife and fish, watershed management, and the cost of acquiring the land. Within one year of the date of enactment of this Act, the Secretary shall submit a report with the findings of the study to the Committees on Natural Resources, and Agriculture of the United States House of Representatives and the Committees on Energy and Natural Resources, and Agriculture, Nutrition, and Forestry of the United States Senate.

RECORD 6

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, February 4, 1994.

CAROLYN B. LIEBERMAN,
Acting General Counsel,
Office of Thrift Supervision, Washington, DC.

Re: United Savings Association of Texas

DEAR MS. LIEBERMAN: On September 2, 1992 I briefed Tim Ryan, Harris Weinstein and I believe Dwight Smith regarding possible claims stemming from the failure of United Savings Association of Texas (USAT). In conjunction with our investigation of professional liability claims arising out of that failure, our staff has reviewed potential claims against United Financial Group, Inc. (''UFG''), USAT's first tier holding company, for failure to maintain USAT's net worth. Our staff also reviewed the possible liability of MCO Holdings and its successor, Maxxam, Inc. and Federated Development Corp., for failure to maintain USAT's net worth. I am enclosing a copy of this memorandum for your independent review and consideration.

In summary, the staff has concluded that the FDIC has no viable claim against UFG based on an implied private or federal common law cause of action for failure to maintain USAT's net worth. However, the OTS may be able to pursue a NWM claim against UFG and perhaps others for failure to maintain USAT's net worth. It appears likely that any such administrative proceeding must be commenced on or before December 30, 1994, within six years of USAT's failure. See 12 U.S.C. §1818(i)(3).

I would appreciate it if you would review this analysis and provide me with your view and any proposals for further action. You should be aware that this case has attracted public attention because of the involvement of Charles Hurwitz, and environmental groups have suggested that possible claims against Mr. Hurwitz should be traded for 44,000 acres of North West timber land owned by Pacific Lumber, a subsidiary of Maxxam. Chairman Gonzales has inquired about the matter and we have advised him we would make a decision by this May. After you have reviewed these papers, please call me or Pat Bak (736–0664) to discuss the next step and to arrange coordination with our professional liability claims.

Sincerely,

JACK D. SMITH,
Deputy General Counsel.

RECORD 8

Rose Foundation—Conference Call

10/4/94

Tom Hecht * * * Hopkins & Sattler.
Jeff Williams & FTD, * * *

2—3:15 p.m.

Tom Lipp—Esq.

Kirk Byrd—Esq.,—and Dave Williams, Esq.

Jull Radner, Esq.—President—Rose Foundation.

Rick DeStefano, Esq.,—New Mexico—Real Estate & Litigator.

Who is doing what on the investigation? Who makes the decision and how are they made?

Tom Lippe—statutory mandates.

Constructive trust—''there is a lot to be explored there—perhaps it could work.''

Currently three lawsuits pending that are protecting the oldest growth. Areas recently logged are adjacent to the oldest trees. Currently 18 timber harvest plans that include very old growth trees.

EPIC filed & agreed (10/3) a TKO to stop the cutting.

5,000–6,000 acres of virgin old growth left—all in litigation. Some cases are winding down and may be coming back to St. of CA to cause legal defects and allow logging to continue. In this case—logging may be permitted to continue in the next few months. EPIC and Rose are running out of resources to continue to fight the logging.

Habitat conservation plan may take 12 months to get Dept. of Interior/Fish and Wildlife Service to residual growth still very much at risk.

Kathy Lacy—Asst. to Feinstein—can tell us more about Headwater legislation.

We will not discuss theories and hypothical strategies with them.

Any published criteria for the FDIC's Board's deliberation and ultimate decision on how to proceed? No other * * * recommendations of FDIC staff.

MEMORANDUM

To: File.

From: Steve Lambert.

Re: *Points for July 21, 1994 Conference.*

I. BACKGROUND

A. History of old growth redwood preservation—RNP I; RNP II; State Park System; historical role of Pacific Lumber Company (PL) and change in 1986; expert witness ''players''—WTS, HJW, Fleming, NRM (Miles; Rynearson). Primary valuation issues.

B. Current legislation not the first to deal with Hurwitz or with Headwaters/PL (severance tax proposal; elimination of section 631(a) benefits; refinancing).

II. HR 2866

A. *Summary of substance:* Adds 44,000 acres of timberland to the Six Rivers National Forest in Northern California (3,000 acres of virgin old growth, immediately adjacent 1,500 acres to protect the 3,000 acres, plus the rest for wildlife protection.)

In original bill, acquisition by donation, purchase or exchange. In House Natural Resources Committee—but not by condemnation. Authorizes appropriations to effect acquisition and allows acceptance of money from the State of California.

Requires FS to prepare a management plan for the acquired area, which would at least prohibit timber sales from the 3,000 acres and contain measures to restore the lands previously logged. Headwaters would become a Wilderness Area.

B. *Status of Bill:* 132 Cosponsors in House (124 Dem.; 8 Republican).

Of the Co-sponsors, 34 are on one of the Committees dealing with FDIC. 13 of 26 Democrats, including Chrm. Conyers on Gov. Ops. are Co-sponsors (plus 2 Rep. and 1 independent); 16 out of 30 Democrats on Banking, plus one Independent, are Co-sponsors.

8 out of 27 Democrats on Energy and Commerce are Co-sponsors. (Number don't add to total, since some are on two Committees.)

Referred to two committees (House Agriculture and House Natural Resources) in August, 1993. Hearings held in both Natural Resources Committee (October 12, 1993) and in House Agriculture Committee (October 13, 1993).

Reported out of House Natural Resources on May 11, 1994 (amended to add language relating to swap of Headwaters for surplus federal property.)

Bill marked up by House Agriculture Committee late July 13, 1994. Amended for technical corrections, to add language relating to swap of Headwaters for surplus federal property, to add sunset of acquisition authority—10 years, to clarify that until timberland is acquired the owner may have full ''enjoyment'' of the rights of owning the property.)

Ready for action by Rules Committee so that the two versions can be brought to the floor of the House. According to our information, Speaker Foley has a desire not to have this bill considered this year, and has ''placed a hold on the bill''. Kaiser Aluminum, which is a subsidiary of MAXXAM, INC. (87½%), is the largest employer in Speaker Foley's district. Speaker Foley is getting pressure from both sides (the conservationist organizations on the one side; local constituents on the other). Speaker Foley has long enjoyed the support of the conservationist community and has a ''tougher than normal'' race this fall. However, he currently is on the ''outs'' with the national leadership of some conservationist organizations because he recently refused to all a conservationist-supported amendment on the Foreign Operations spending bill for FY 1995. Our information is that until Speaker Foley acts, no ''rule'' will be forthcoming from the Rules Committee.

No companion bill in the Senate. Some indication that California Senators not supportive.

III. S. 2285

A. This bill was introduced on July 14, 1994 by Senator Boxer of California. It is similar, but not identical to the original H.R. 2866.

B. The bill was referred to three Committees (Energy, Environment, and Agriculture). No hearings have yet been scheduled.

IV. MAJOR ISSUES

A. *Money*. FS appraisal (by Jim Fleming, based on HJW volumes) of the 4,500 acres is $500 million. Valuation data presented by Natural Resource Management Corporation (in response to inquiry from Congressman Hansen) would peg it over $600 million for same 4,500 acres. Funding through normal source (Land and Water Conservation Fund) seemingly not ''doable''. Ideas surfaced recently—pay some cash, get some from State of California, use some of the value to pay off ''debt'' to FDIC, pay in part with ''chits'' for excess government assets (like military bases, timber), pay in part by exchanges for other timberland.

B. *Valuation Issues*—many. Include market change (old growth redwood prices soaring—up at least 15% since Fleming appraisal); lack of true comparable sales (no old growth redwood sold ''on the stump''; *effect of regulations (Cal. Bd. of Forestry; Endangered Species Act—marbled murrelets) on amount of ''loggable timber''*. Normal issues relating to volume, quality. Right now seemingly no ''discount'' issue, since FS appraisal included no ''discount for size/volume''.

C. *No Condemnation Authority*—Bill requires a ''willing seller'', and PL not interested in selling more than 4,500 acres, although one account puts the acreage at 7,000 acres. PL would not allow Fleming on more than 4,500 acres. Seemingly interested in exploring sale at fair market value of the 4,500 acres for cash and other creative compensation.

D. *FDIC*—PL public position—there is no tie between Hurwitz/FDIC matter and PL Headwaters. The idea of a ''debt-for-nature'' swap is ''ludicrous'', according to PL. David Barr of the FDIC quoted as down-playing the viability of the plan—''How do we turn those trees into money to distribute to all those creditors.'' H&S role talked about in May 15, 1994 article in the Houston Chronicle.

E. *Politics*—Hamburg in a ''Marginal seat''. Switches back and forth from Democrat to Republican. Recent Democratic primary pitted Hamburg against Bosco (former Democratic congressman from same district on a $15,000/month legal retainer from PL). Hamburg won, but faces stiff Republican opposition in November from another former holder of this seat. Major issue will be ''jobs vs. murrelets''. Seemingly lack of support on Senate side to do anything now. Last year a state ''environmental bond referendum'' defeated. New one to be on ballot in near future. Questionable support from Administration (officially against the current legislation because of money, but in favor of the goal of preserving the trees and willing to work to see what can be done.)

Normal conservationist interest group support for the legislation, except that Save the Redwoods League seems to be opposed. Local government/politician opposition because of effect on jobs/tax base.

IV. QUESTIONS

A. Source of stated Congressional expectations regarding any lawsuit involving Hurwitz and USAT and/or United Financial Group.

B. *Ownership issues*—According to Moody's, end of 1992 MAXXAM ownership shows Hurwitz with 59.9% voting control, with 31.4% of common stock owned by him personally. The Pacific Lumber Company (owner of Headwaters) shown as a wholly-owned subsidiary. Hurwitz the Chairman, President and CEO of MAXXAM, Inc. Directors include: Hurwitz, S.D. Rosenberg, E.G. Levin, and R.J. Crinkshank.

C. Summary of history makes no mention of PL acquisition. Does mention acquisition of 1,104,098 shares of common stock of United Financial Group, Inc. during 1982 and 1983.

MEMORANDUM

To: Jill Ratner, The Rose Foundation.
From: Richard De Stefano.
Date: October 1, 1994.
Re: FDIC Claims Against MAXXAM And Hurwitz: Federal cases applying breach of fiduciary duty and constructie trust principles.

QUESTION PRESENTED

Assuming MAXXAM and Hurwitz are subject to liability under California or Texas law for breach of fiduciary duty to USAT's creditors, and assuming state law authorizes the remedy of constructive trust, do federal court decisions support the imposition by a federal court of a constructive trust over PL for the benefit of FDIC?

CONCLUSION

There is overwhelming authority for imposition of constructive trust by federal court, with dozens of new decisions every few years in complete harmony with the state court cases discussed in earlier memoranda. In fact, while states court constructive trust cases tend to arise in traditional state law domains, such as family law, decedents' estate and real property title disputes, the federal cases cover the spectrum of complicated commercial matters and are factually closer to the subject claims. A federal court will not hesitate to reach MAXXAM and Hurwitz, if their liability is established under state law; will not hesitate to unwind a complex series of transactions such as the quid pro quo described in the statement of facts; and will not hesitate to reach PL and its assets as the fruit of MAXXAM's and Hurwitz's wrongful conduct.

DISCUSSION

1. Whether applying state law or construing federal statutes and regulations, the Federal Court do not hesitate to impose constructive trust as remedies for breach of fiduciary duty, fraud, or unjust enrichment. For example, the Ninth Circuit applied California law in the diversity case *Lund v. Albrecht*, 936 F.2d 419 (9th Cir. 1991), to impose a constructive trust on the excess proceeds of sale of a partnership asset. The partners had agreed to dissolve their partnership, and had agreed on values and disposition of all assets. While the unwinding of the partnership was pending, one partner received an offer on an asset which was substantially higher than the agreed amount, and which he did not disclose to the plaintiff, but kept the secret profit for himself. The *Lund* Court clearly held that even a former partner has fiduciary obligations, and held that a constructive trust is the appropriate remedy for breach of those obligations, rejecting the defendant's argument that damages were adequate. See also *U.S. v. Pegg*, 782 F.2d 1986, upholding a constructive trust remedy for wrongful acquisition or detention of property belonging to another.

The Fifth Circuit is also willing to impose constructive trust in appropriate cases. The Court applied Texas law in *Matter of Carolin Paxson Advertising, Inc.*, 938 F.2d 595 (5th Cir. 1991), and *Matter of Monnig's Dept. Stores, Inc.*, 929 F.2d 197 (5th Cir. 1991). The Fifth Circuit has also clearly embraced fiduciary liability principles as applied to a parent corporation liability for obligations of subsidiary. In *Gibraltar Savings v. L.D. Brinkman Corp.*, defendant holding company was held liable for the loan made to its now-insolvent subsidiary, despite the fact that defendant was not a guarantor, there were other guarantors who settled with the bank, and the subsidy was not insolvent at the time of the loan. Liability was based on defendant's actual control of the proceeds of the loan to the subsidiary which interfered with the sub's ability to repay. It is also clear from the opinion that the Fifth Circuit would have affirmed liability of the individual defendant Lloyd D. Brinkman if he had been held liable below, but the issue of individual shareholder liability was not before the Court.

Applying Illinois law, the Seventh Circuit upheld a constructive trust established by a state court. *In Re Teltroncis*, 649 F.2d 1236 (7th Cir. 1981), was a federal action by Debtor's bankruptcy trustee against the state court receiver. The Debtor's principal had fraudulently advertised watches for sale, collecting about $1.7 million in prepaid orders with no intent to deliver the goods, then absconding with about $1.3 million to parts unknown. There was about $800,000 in the Debtor's account which the Receiver seized per the state court order for the benefit of the defrauded purchasers. The bankruptcy trustee sought in federal court to make those funds part of the estate for all creditors. Held, the funds were not part of the estate but were in a constructive trust for the purchasers.

On the specific question of wrongfully obtained corporate stock as the res of a constructive, see *Matter of First Georgia Financial Corp.*, 120 B.R. 239 (Bkrtcy M.D.GA. 1980). There the Court endorsed the principle of the constructive trust remedy but refused to apply it to the Debtor on the facts. Claimant was the mother of the Debtor's sole principal, who had advanced funds to Debtor which used them to acquire stock. Held, Debtor's taking funds from the claimant was not fraudulent but was a loan from mother. (Here the Court applied Georgia law on the fraud question, but in Bankruptcy cases the remedy of constructive trust is specifically authorized by statute. 11 U.S.C.A. §550.) See also, *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F. 2d 206 (3d Cir. 1990), discussed below, which imposed a constructive trust over corporate stock.

It is clear that federal courts do not require a showing of fraud to justify imposition of a constructive trust, but unjust enrichment is sufficient. *Bush v. Taylor*, 893 F.2d 962 (8th Cir. 1990); *U.S. v. Pegg*, 782 F.2d 1498 (9th Cir. 1986).

Individuals controlling corporations are frequently held liable to the corporation's creditors in federal courts. Both *American Metal Forming Corp. v. Pittman*, 135 B.R. 782 (D. Md. 1992) and *In Re American Motor Club, Inc.* (Bkrtcy E.D.N.Y. 1990) involved constructive trusts over property wrongly acquired for the individual account of controlling persons of corporations, in breach of the fiduciary duties of the individuals to acquire the assets of corporations' accounts, the ''corporate opportunity'' doctrine.

Similarly, a constructive trust will be the remedy where an employee acquires property with funds embezzled from his employer. *MDO Development Corp. v. Kelly*, 726 F. Supp. 79 (S.D.N.Y. 1989).

2. Federal Courts will treat multiple, related transactions as a single transaction, will pierce corporate veils, and will regard the substance of transactions over their form, where equity so requires, in order to impose breach of fiduciary liability and the remedy of constructive trust on controlling persons who wrongfully benefit from complex, inequitable transactions.

In *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F. 2d 206 (3d Cir. 1990), the

individual defendants were principal shareholders of an insolvent corporation (''XYZ'') of which plaintiff was an unsecured creditor. These controlling shareholders induced a secured creditor to foreclose on substantially all XYZ's assets. Through several complex financings involving the same foreclosing creditor, the individuals formed a new corporation, defendant Vantage Steel, which purchased the assets, and opened for business, in the same business as XYZ, and with the individuals in sustantially the same roles. The main issue was the applicability of Pennsylvania's Fraudulent Conveyance statute (*Pennsylvania Uniform Fraudulent Conveyance Act,* 39 Pa. Stat. §§354–357), which generally prohibits transfers of assets or liens on assets either (1) with intent to defraud, or (2) for less than fair consideration and which renders the transferor insolvent. Defendant argued that the statute did not apply to a series of transactions where each step was lawful. The Court held that a group of transactions will be analyzed as a single transaction where equity so requires, and upheld a *constructive trust on the individual defendants' interest in the new corporation,* for the benefit of unsecured creditors of XYZ.

On the issue of ''collapsing'' multiple transactions for fraudulent conveyance analysis, the *Voest-Alpine* Court relied on the landmark Third Circuit decision in *U.S. v. Tabor Court Realty Corp.,* 803 F.2d 1288 (3d Cir. 1986). There the Court unwound a hideously complicated series of transactions comprising a major leveraged buy out (''LBO'') of a financially distressed group of related coal mining companies (''RAYMOND'') by its president, DURKIN, who formed a new buying company (''GREAT AMERICA''). The Court's recitation of facts runs for many pages, employing charts to track the relationships and the dollars involved; for this memo, the facts can be greatly condensed; RAYMOND was privately owned by wealthy individuals who employed DURKIN as a professional manager; the shareholders wanted out, and granted DURKIN an option to purchase all their shares, which option DURKIN assigned to GREAT AMERICA; RAYMOND pledged all its assets, including coal mines and substantial other real property, to SECURED LENDER for a loan of about $8.3 million; RAYMOND used the loan proceeds in part to pay preferred creditors, part as a reserve for interest payments, and lent the balance of about $4 million unsecured to GREAT AMERICA; GREAT AMERICA used the money (and additional funds borrowed against the same assets) to buy all the stock of RAYMOND, paying defendant shareholders about $6 million in cash (plus more debt); SECURED LENDER sold its mortgages to PAGNOTTI, who sold them to McCLELLAN; management could not turn the operations around, and so defaulted; McCLELLAN foreclosed and sold the assets to a group of related companies (''LOREE''—a separate company was formed for each major property, to redeem state and local property tax liens). When the financial dust settled, the former shareholders of RAYMOND got a lot of cash, LOREE got the mines, and the non-preferred creditors of RAYMOND got the shaft.

The largest such obligation of RAYMOND was to the IRS for about $20 million. The U.S. sued everyone involved in each transaction and everyone who received any of the loan proceeds (including the State of Pennsylvania and two Pennsylvania counties, for preferential payments of state employment taxes and county real property taxes) in several related actions which were consolidated for trial and appeal. After a 120-day trial, the District Court unwound the entire deal. (It is not clear from the opinion whether any defendants escaped liability or whether liability was limited to the amount of benefits received in any case.)

The primary issue was the District Court's treatment of all these transactions as a single fraudulent conveyance. In affirming, the *Tabor Realty* Court faced for the first time, and squarely rejected, the defense contention that LBO's were too big, too complex, and too important to big-time corporate finance, ever to be analyzed under fraudulent conveyance law. Although a damages case not involving a constructive trust, *Tabor Realty* is important because it extended traditional equitable principles to very complicated, modern financial transactions, and rejected the arrogant view that some transactions are so big, complicated, and important that they are beyond the reach of equity. The Court's reasoning applies not only to LBO transactions, but to their financial cousins engineered by Milken and Drexel.

It appears beyond doubt that federal courts will apply state law breach of fiduciary duty and unjust enrichment principles, will cut through tiers of related entities and multiple transactions to reach the real controlling persons and others who benefit from wrongful conduct, and will impose constructive trusts in appropriate cases.

THE ROSE FOUNDATION

October 12, 1994.

Tom Hecht,
Hopkins & Sutter, Counsel for the Federal Deposit Insurance Corporation, Chicago, IL.

DEAR TOM, I wanted to thank you again for arranging the October 4 teleconference with Bod DeHenzel and Jeff Williams. I also wanted to thank all three of you for taking the time to allow the Rose Foundation's legal team to present our arguments supporting imposition of a constructive trust on Pacific Lumber, and supporting a petition for injunctive relief halting or severely limiting logging on Pacific Lumber lands during the litigation of the FDIC's claims arising out of the failure of United Savings Associatiation of.

In response to your requests for more specific information on current logging within the greater Headwaters area, or Headwaters Forest Complex:

Jama Chaplin, at the Environmental Public Interest Center (EPIC), in Garberville, California, has agreed to prepare a list of pending and recently resolved litigation affecting Headwaters Forest, which she hopes to fax to your office this week.

Randy Ghent, also of EPIC, is preparing a map that indicates areas affected by the pending and recently resolved court cases, as well as areas that covered by active timber harvest plans (THPs) or by THPs currently pending before the California Department of Forestry (CDF).

The THPs on file with CDF contain some information concerning the character of the affected forest parcels, including, in at least some cases, the estimated number of old growth trees per acre within the parcels. Randy is willing to secure copies of the THPs that he has in his office. As a non lawyer (and someone generally opposed to unnecessary use of wood products), he would, however, like to know whether he should excerpt sections related to the character of the parcels or send the complete THPs, which he described as ''extremely voluminous'' to be copied. Please let me know which you would prefer.

/??????????copy missing

of stock in the savings and loan holding company, United Financial Group (UFG), which was the sole shareholder in the savings and loan, United Savings Association of Texas (USAT) (which percentage comes to well over 25% when the Drexel stock is added to the MAXXAM/Federated stock), MAXXAM nonetheless did not hold USAT stock directly. However, it appears clear from our review of the general corporate case law that so long as MAXXAM (or its predecessor, MCOH) exercised de facto control over the savings and loan it will be regarded as having the same duties and obligations as would be imposed on a controlling shareholder of the savings and loan itself.

If there is law specific to the savings and loan context that contradicts this general principle, we would be very greatful if you could direct us toward it, if it is possible for you to do so without compromising any confidentiality concerns.

Once again, thank you for your time and attention. Please let me know if we can be of service on this matter in any way. I will look forward to hearing from you.

Sincerely,

JILL RATNER,
ROSE FOUNDATION FOR COMMUNITIES AND THE ENVIRONMENT.

THE ROSE FOUNDATION,

October 14, 1994.

BOB DEHENZEL,
FDIC, Washington, DC.

DEAR BOB, I am enclosing summaries of recent and pending cases affecting the Headwaters Forest (as well as a couple of older cases that seemed likely to be of interest). These are abstracted from a draft document that Jama, a volunteer at the Garberville Environmental Public Information Center (EPIC) faxed to me on Wednesday.

I hope this information is helpful.

Randy Ghent, who is also a volunteer with EPIC, is working on a map that will provide a sense of what specific areas are directly affected by the cases summarized.

Thanks again for your interest and attention.

Sincerely,

JILL RATNER,
ROSE FOUNDATION FOR COMMUNITIES AND THE ENVIRONMENT.

October 14, 1994.

TOM HECHT,
Hopkins & Sutter, Counsel for the Federal Deposit Insurance Corporation, Chicago, IL.

Dear Tom, I am enclosing summaries of recent and pending cases affecting the Headwaters Forest (as well as a couple of older cases that seemed likely to be of interest). These are abstracted from a draft document that Jama, a volunteer at the Garberville Enviornmental Public Information Center (EPIC) faxed on me on Wednesday.

I hope this information is helpful.

Randy Ghent, who is also a volunteer with EPIC, is working on a map that will provide a sense of what specific areas are directly affected by the cases summarized.

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ROSE FOUNDATION FOR COMMUNITIES AND THE ENVIRONMENT.

PENDING CASES

MARBLED MURRELET V. PACIFIC LUMBER

This federal suit alleges that Pacific Lumber's (PL's) logging in Owl Creek Grove constitutes a ''take'' in violation of the federal and state Endangered Species Acts, either by significantly disrupting the murrelet's normal behavioral patterns or by actually injuring or killing murrelets.

Procedure: The suit was filed 4/16/93. It originally named as additional defendants

the United States Fish and Wildlife Service (USFWS), Department of Fish and Game (DFG), Bureau of Forestry (BOF), and California Department of Forestry (CDF). On 9/1/93 the federal district court dismissed the Environmental Public Information Center's (EPIC's) claims against all parties except PL. Steve Volker of Sierra Club Legal Defense Fund (SCLDF) is currently appealing this dismissal for EPIC.

During discovery, PL was sanctioned by the Court and ordered to pay EPIC $6,275 for withholding information.

Trial was held August 15–24 and September 6–9, 1994 in San Francisco before Visiting Judge Louis Bechtle. Witnesses testified to PL's falsification of murrelet survey data and to other material misrepresentations by PL.

Status: awaiting ruling, anticipated in January of 1995, may be sooner.

EPIC Attorneys: Mark Harris, Macon Cowles, Susan O'Neill, Charles Steven Crandall, Brian Gaffney, Steve Wolker

EPIC Contacts: Cecelia Lanman, Charles Powell, Josh Kaufman, Jamie Romeo, Laurie Sarachek

EPIC V. CDF (''SEVEN THP'S'')

EPIC challenged CDF's approval of seven Timber Harvest Plans (THPs) in residual old-growth areas of PL's Headwaters Forest area.

Procedure: TRO denied October, 1994.

Trial set for October 31.

EPIC Attorney: Brian Gaffney.

EPIC Contact: Cecelia Lanman.

EPIC V. CDF (''ALL SPECIES GROVE'')

This involves a 186 acre THP in virgin old-growth redwood and fir habitat in PL's Headwaters Forest area, at the confluence of Bell and Lawrence Creeks. PL refused to conduct site-specific wildlife surveys and refused to accept some DFG mitigation.

Procedure: THP 1–90–069HUM approved 5/4/90. EPIC filed Petition 5/4/90, Humboldt Ct. #90CP0341. Judge Nelson issued a Temporary Restraining Order 5/9/90. After trial 6/4/92, on 6/5/92 Nelson denied injunction and writ, holding in essence that the California Environmental Quality Act (CEQA) applies much more narrowly to THPs than the decision in EPIC's first successfully litigated case, EPIC v. Johnson, allows. Sierra Club v. CDF II (Hum. Ct. #90CPO405) was consolidated into this suit. The appeal has been briefed, but no date set for oral argument. For some time, Tom Lippe had believed that Appeals Court was waiting for the Supreme Court to decide Sierra Club v. BOF, which presented very similar issues. That case was decided July 21, 1994.

EPIC Attorney: Tom Lippe, R. Jay Moller, Kenneth Collins

EPIC Contact: Charles Powell

RECENTLY DECIDED

SIERRA CLUB V. BOARD OF FORESTRY

On July 21, 1994, the California Supreme Court unanimously affirmed a Court of Appeal judgment, holding that the California Board of Forestry (BOF) cannot approve a THP that does not include information requested by the CDF regarding the presence in the plan area of old-growth dependent species. Significantly, the Court held that in approving THPs the BOF must comply not only with the provisions of the Forest Practice Act, but also with the more extensive requirements of CEQA, thus affirming the standard previously imposed by the appellate court in EPIC v. Johnson.

The Supreme Court ruled that CEQA does vest CDF with authority to require information to expressly specified in the Forest Practice Act rules if the info requested is necessary to determine whether a THP will have a significant adverse environmental impact. Further, the BOF has implied that CDF has the *obligation* to determine whether a THP incorporates feasible mitigations. It must have information to do so. Therefore, approval of plans without the necessary information is held to violate both CEQA and the Forest Practice Act.

Conclusions by the DFG, the court held, as to *possible* effects of timber harvesting on wildlife *must* be considered by the BOF because *possible* destruction of old-growth dependent species and their habitat from harvesting of old-growth timber can fairly be described as significant and adverse. Thus, the BOF has an *obligation* imposed by CEQA to collect info regarding the presence of endangered species. The Court also rejected the BOF's rational that the extensive surveys to address wildlife effects were not appropriate because of the costs and time commitments such surveys would impose on forest landowners.

According to the evaluation by the DFG, logging these lands could have a significant impact on old-growth dependent species. Because DFG identified a potential significant impact, the Court held that the Registered Professional Forester (RPF) must discuss alternatives in the THP, suggest mitigations, and explain why feasible alternatives were rejected. The Supreme Court upheld CDF's requirement that PL provide wildlife surveys done by recognized wildlife professionals of old-growth dependent species in the THP area and in the general vicinity.

This case involves virgin old-growth redwood and fir in PL's Headwaters Forest area, on Lawrence Creek and Shaw Creek.

Procedure: THPs 1–88–65HUM and 1–88–74HUM, involving a total of 325 acres, denied by CDF 4/18/88 because wildlife information provided by PL determined to be inadequate. The BOF overturned CDF's denial on 6/8/88; EPIC filed petition 6/1/88 (Humboldt Ct. #82371, Judge Buffington). TRO denied 6/28; Appellate Ct. issued stay 7/1 and alternative writ 8/15. After trial 10/5/88, judge returned THPs to BOF for further findings. Trial Court denied Writ on 10/2/89 bases on BOF's finding of no significant impact to species or habitat. Appeal Court reversed and remanded for denial of both THPs on 9/23/91. Petitions for rehearing filed by Pacific Lumber and EPIC. Appellate Court re-decided case on 3/18/92, holding for EPIC. Appellate decision at 92 DAR 3711. California Supreme Ct. granted Pacific Lumber's petition for review. Status: final-California Supreme Ct. unanimous decision for EPIC on July 21, 1994.

EPIC Attorneys: Tom Lippe, Bruce Towner, Richard Jay Moller.

SELECTED CASES OF HISTORIC INTEREST

EPIC V. PACIFIC LUMBER (OWL II)

This THP, which is the same THP involved in *Marbled Murrelet v. Pacific Lumber*, was denied by CDF 1/30/91. CDF acknowledged the area as habitat for one of only three remaining California marbled murrelet populations, and PL refused to provide adequate murrelet surveys and mitigations. The murrelet was at the time a state ''candidate'' species. On appeal BOF approved THP over objections of CDF, DFG, the Attorney General, and their own counsel. At the BOF hearing PL was given 3 hours to speak, and EPIC's Cecelia Lanman was ejected and threatened with arrest for speaking slighly over five minutes.

Procedure: Petition filed 3/26/81, Humboldt Ct. #91CO244, alleging violations of CESA. 8/26/91 Ferroggiaro's Alternave Writ required the Board to reconsider the THP. 3/4/82 BOF re-approved THP with condition of adequate murrelet surveys.

On a weekend in June 1992, PL began logging in Owl Creek without approval of state or federal wildlife agencies, and was stopped only by EPIC's legal action. The cut netted over $1,000,000. EPIC obtained TRO in 9/92.

The murrelet was listed by the state as endangered on 3/12/92, and by the United States Fish and Wildlife Service (USFWS) as threatened on 10/1/92. Immediately, USFWS informed PL that the Owl Creek plan, if executed, would violate the Endangered Species Act. PL once again snuck into the grove, on Thanksgiving weekend of 1992. EPIC obtained an emergency stay from the Appeals Court. In March of 1993, PL removed the timber it had illegally cut in November, netting another million. EPIC filed a federal case on 4/15/93.

This case was eventually dismissed due to the procedural error that EPIC did not contest the BOF ruling within 90 days.

EPIC Attorneys: Julie McDonald, Joseph Brecher.

EPIC Contacts: Cecelia Lanman, Charles Powell.

EPIC V. MAXXAM I

This suit, EPIC's first against Pacific Lumber (PL) and its corporate parent, involved three THPs proposing to clearcut old-growth redwood and/or Douglas fir forests. Two were in the Headwaters Forest area in Little South Fork Elk River and Salmon Creek watersheds, and one at Sulphur Creek of the Mattole.

The suit resulted in a ruling that the CDF had not only ''rubber-stamped'' the THPs, but had intimidated the Department of Fish and Game (DFG) and the Regional Water Quality Control Board staff from making any comments critical of THPs. This suit resulted in a DFG policy shift to review some old-growth plans more carefully.

Procedure: THP 1–87–240 HUM, 1–87–241HUM, 1–87–230HUM approved May/June 1987. EPIC filed Petition 6/4/87 (Humboldt Ct. #79879, Judge Paterson). Status: final 2–4–88: THPs inadequate. PL appealed, but then abandoned its appeal. THP 87–230 later resubmitted and approved, but EPIC lacked resources to sue.

EPIC Attorneys: R. Jay Moller, Tom Lippe, Sharon Duggan, Thomas Petersen.

THE ROSE FOUNDATION,
October 14, 1994.

TOM HECHT,
Hopkins & Sutter, Counsel for the Federal Deposit Insurance Corporation, Chicago, IL.

DEAR TOM, I am enclosing summaries of recent and pending cases affecting the Headwaters Forest (as well as a couple of older cases that seemed likely to be of interest). These are abstracted from a draft document that Jama, a volunteer at the Garberville Environmental Public Information Center (EPIC) faxed to me on Wednesday.

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JILL RATNER,
ROSE FOUNDATION FOR COMMUNITIES AND THE ENVIRONMENT

MEMO

From: Steven C. Lambert (SCL).
To: FTH, RWP.
Date: Wednesday, October 19, 1994 4:42 pm.
Subject: Rose Foundation Letter.

I received through inter-office mail a copy of an October 12th letter to Tom from Ms. Ratner.

In her letter, Jill treats several issues—only one about which I will comment here—her discussion about the timber resource. As I appreciate what she is suggesting (and,

please understand, I'm not certain of the context in which this subject came up in your call with her), she suggests use of satellite photography in order to get an ''accurate picture of the economic and environmental resources at stake''.

I'd like an opportunity to discuss her suggestion with you before someone adopts her proposal. If the agency is interested in valuation information about the Headwaters and other PL holdings, I believe it first should look at valuation work already in the public domain—which was based at least in part on an on-the-ground inventory (called a cruise) of the property being appraised. The recent hearings before the House Committee provide some details about an appraisal conducted for the US Forest Service by Jim Fleming (an MAI from Sacramento, CA)—which I believe used cruise information from an Oakland, CA firm (Hammond, Jensen and Wallen) in valuing the 3000 acres of virgin redwood and surrounding 1,500 acres of residual/cutover/young growth forest in the Headwaters. Another valuation, as I recall accomplished at the request of a Congressman, was accomplished by Gary Rynearson of Natural Resources Management, Inc. it was based on similar volume information, but used State Board of Equalization values/MBF for ''average standards similar to those being appraised.''

You may recall that at our meeting in Chicago I summarized the results of both valuations for Mr. Williams. If you want me to summarize the already-public information in a memo, I'll be happy to do so.

I have some mis-givings, based on past experience, in trying to determine in any precise way, old growth redwood volumes/values by use solely of aerial photography such as she is describing. The only use for such technology of which I am aware relates to massive resource studies, where ''preciseness'' is not felt to be necessary for the purpose of the study. I know of no valuation of redwood based on such photography.

However, if the agency wishes to ''go that route'', then I could suggest several firms to consider. I suggest, though, given what I know about the technology and its use (or lack thereof) for valuation purposes, that we shouldn't be ''recommending'' that the agency rely on the type of photography Ms. Ratner is proposing. Rather, I would suggest that IF the agency needs more information than has already been accomplished for the Forest Service, then it should consider hiring someone in the timber appraisal profession to provide the information/opinions it needs. One note of caution: There aren't very many real qualified firms/individuals left who appraise redwood—because of the dwindling supply in private ownership, their is a dwindling supply of top-notch redwood cruisers/appraisers. As noted above, 3 firms are now ''off-the-market'' —so IF the agency really believes it will need independent valuation information (even if it is ''down the road''), it might be well for them to consider retaining someone now before they, too, are ''gobbled up'' by Pacific Lumber Company, the Forest Service, the State of California or one of the environmental interest groups.

Please let me know if you need anything at this time. Thanks.

RICHARD DESTEFANO,
ATTORNEY AT LAW,
Taos, NM, November 18, 1994.

TOM HECHT,
Hopkins & Sutter, Chicago, IL 60602.

Re: United Savings Association of Texas.
Your client: Federal Deposit Insurance Corporation.
My Client: The Rose Foundation.

DEAR MR. HECHT: I write on behalf of The Rose Foundation in connection with its Headwaters Forest Legal Project, focusing on our efforts to urge the FDIC to seek recovery of the property as a remedy for the looting of United Savings Association of Texas (''USAT''). I participated in preparation of the Rose Foundation's memorandum directed to your colleague, Steve Lambert on September 29, 1994 (''Headwaters Memo''), and in the following conference call. Jim Ratner, Rose Foundation's president, has asked me to follow up on certain points by this letter.

1. Federal cases, generally. My research of California state court decisions and Mr. Camp's review of Texas state court decisions, was incorporated in the legal analysis in the Headwaters Memo. Subsequent research of federal cases strongly supports that analysis. My client has authorized me to provide you with a copy of my federal cases research memo to her dated October 1, 1994, which is enclosed. I conclude there:

''There is overwhelming authority for imposition of constructive trusts by federal courts. . . . A federal court will not hesitate to reach MAXXAM and Hurwitz, if their liability is established under state law; will not hesitate to unwind a complex series of transactions such as the quid pro quo described in the statement of facts; and will not hesitate to reach PL [short reference to Pacific Lumber and other MAXXAM subsidiaries which own and control the Headwaters Forest] and its assets as the fruit of MAXXAM'S and Hurwitz's wrongful conduct.''

2. The quid pro quo. The Rose Foundation contends that Charles Hurwitz and MAXXAM in fact controlled USAT and its investment decisions, and therefore had fiduciary duties to USAT; and that in breach of their fiduciary duties, Hurwitz and MAXXAM entered into an illegal agreement with Michael Milken and Drexel Burnham Lambert (''Drexel''). Pursuant to that illegal agreement, Drexel underwrote a series of junk bond financings on the order of $800 million which enabled MAXXAM to acquire PL and the Headwaters Forest properties, and Hurwitz and MAXXAM caused USAT to invest in over $1 billion worth of very low grade, high risk securities underwritten by Drexel.

As set forth in the Headwaters Memo, these contentions are based on information in the public records, most notably the FDIC's allegations in the federal court action, FDIC v. Milken. In the Headwaters Memo and this letter we assume that the quid pro quo allegations are provable. While we believe the information in the public record is sufficient to establish the existence of a quid pro quo, at least prima facie, we further assume that the FDIC has developed evidence beyond that available to us from public records.

If the quid pro quo is proven, a Court will view investments by USAT as in effect having been directly made in junk bonds issued by MAXXAM, proceeds of which financed acquisition of PL. In essence the transaction constituted an unsecured loan made by USAT to MAXXAM for acquiring PL, which had it been made directly would have been prohibited by applicable Texas S&L regulations (discussed below). Whether these prohibited transactions damaged USAT or not, they unjustly enriched MAXXAM and Hurwitz (see discussion below), and form the basis for a claim to recover the property now via imposition of a constructive trust.

3. Role of Ron Huebsch and others. As detailed in the Headwaters Memo pp. 12–16, Ron Huebsch, Barry Munitz, and other Hurwitz associates were active as officers, directors, and investment advisors for USAT as well as other MAXXAM affiliates. Based on Hurwitz's testimony before the Dingell Committee, it appears that Huebsch was the primary buyer of Drexel-underwritten securities for USAT and other entities, including MAXXAM, MCOH, UFG, and PL. A factual inquiry that we assume the FDIC has pursued would be the method of allocating specific securities purchased by Huebsch among USAT and the others if, as we infer, Huebsch purchased ''centrally'' and then allocated the purchases afterwards. These facts tend to show not only de facto control of USAT by MAXXAM/Hurwitz, but would be another basis of breach of fiduciary duty liability if there appeared to be a tendency to allocate riskier issues to USAT.

4. Causation-in-fact of FDIC damages. MAXXAM may argue that the Drexel, underwritten junk bond investments of USAT were not the cause-in-fact of its demise, and if so it could be argued that the quid pro quo was not a cause of the FDIC's $1.3 billion loss in bailing out USAT depositors. We respond, first, that Louis Ranieri, who took over USAT in 1989, described its investment portfolio as ''80% bologna'', according to the New York Times, February 20, 1989 [Headwaters Memo, pp. 23–24].

Second, we suspect that this defensive argument is premised at least in part on arcane accounting principles that a court would reject. We lack the information, and probably the expertise, to specifically analyze the quality of the junk bond portfolio at the time of USAT's failure, but we assume the defense's argument would include:

that some junk bonds which had taken a huge hit in their market values, were never in default, and were paying premium returns; arguably, these did not cause any financial damage to USAT. To the contrary, we urge that a Court would hold that the market risk, even more than the risk of default, is why investment in low grade bonds is imprudent; and that this loss of asset value and net worth precipitated in substantial part the insolvency of USAT, and the FDIC losses.

that some junk bonds in default were later completely redeemed after their issuers were taken over or reorganized, and caused no loss to USAT. Same response.

If cause-in-fact of USAT's demise is disputed, the issue would be not whether junk bonds caused direct loss of principal and interest to USAT, but whether investment in junk bonds was a substantial factor in the insolvency of USAT. We believe the affirmative is true and provable.

Third, we understand that USAT's portfolio at its collapse included substantial Drexel-underwritten ''mortgage backed securities'', arguably these, as distinguished from junk bonds, were the cause-in-fact of USAT's demise. We urge that it makes no difference what particular investments, made to accommodate Drexel, actually caused the loss. To restate our third response parallel to the second, the issue is not whether quid pro quo investments caused direct financial loss to USAT, but whether the quid pro quo investments were a substantial factor in the insolvency of USAT.

5. Unjust enrichment. FDIC claims arising out of the USAT bailout are not dependent on proof even that the quid pro quo caused USAT's insolvency. FDIC is not a mere creditor of USAT, but now stands in place of USAT. FDIC is not limited to complaining about specific transactions which damaged FDIC's interest, but may assert any right or claim of USAT. Under Texas and California law a fiduciary is liable to his principal for any profits obtained in breach of fiduciary duty, even if the principal is not damaged at all, and federal courts do not hesitate to enforce the state substantive law, nor to impose constructive trust remedies.

Particularly instructive is First Nat'l Bank of La Marque v. Smith, 436 F. Supp. 824

(S.D. Tex. 1977). There, officers and principal shareholders of the plaintiff banks were profiting from insurance commissions and rebates generated in connection with credit life insurance which was required by the bank as a condition for certain loans. Federal and state regulators moved administratively to forbid the practice and to require that the commissions and rebates belonged to the banks and not the individuals. The Court specifically found that the banks were not damaged by the practice, yet ruled against the individuals on the grounds of breach of fiduciary duties to shareholders and depositors and unjust enrichment of the bank officers and principal shareholders. The Court stated:

''An officer, director or controlling owner of any business entity has a fiduciary duty to make certain that the economic rewards accruing from a corporate opportunity inure to all the owners of the enterprise. This obligation is even stronger in the case of a bank, both because of the fiduciary nature of banking and because of the duty to depositors.'' 436 F. Supp. at 830, 831 (emphasis added).

The La Marque Court cites several other cases for the proposition that controlling persons of banks have higher fiduciary duties than with other businesses. On this issue and the unjust-enrichment-without-economic-loss issue, the opinion seems very strongly to support an action by the FDIC against controlling persons of USAT. See also, Lund v. Albrecht, 936 F.2d 459 (9th Cir. [Cal] 1991) (constructive trust imposed on secret profit from sale of a partnership asset); U.S. v. Pegg, 782 F.2d 1498 (9th Cir. [Cal] 1986) (constructive trust for wrongful acquisition and detention of property belonging to the U.S.); Chien v. Chen 759 S.W.2d, 484 (Tex App. 1988) (secret profit by agent who purchased property through ''front man'', so seller was unaware of buyer's true identity as seller's agent and confidant); and Amalgamated Clothing and Textile Workers Union v. Murdock, 861 F.2d 1406 (9th Cir. 1988) (pension officials liable to disgorge from self-dealing despite lack of damage to plan members).

Outside of Texas and California, the rules are the same, that unjust enrichment of a fiduciary without actual damage to the principal, is sufficient for liability. Bush v. Taylor, 893 F.2d 962 (8th Cir. 1990). We have found no authority for the contrary position that damages are essential to a breach of fiduciary duty cause of action, or a constructive trust remedy, in any unjust enrichment scenario.

6. Texas Savings and Loan Regulations. In the Headwaters Memo, we have argued generally applicable principles of fiduciary liability and constructive trust relief, shying away from discussions of ''banking law'' because of our lack of expertise. We have, however, briefly reviewed Rules of the Texas Savings and Loan Department in effect in 1986. 7 Texas Administrative Code, Chapter 65, which seem to provide additional support.

6.1 Regarding the propriety of USAT's investment in Drexel-underwritten securities, §65.21, relating to investments in securities, permitted only conservative investments such as obligations of the U.S., the state of Texas, and Texas municipalities, and savings deposits in institutions insured by your client.

6.2 Throughout the regs, transactions with ''affiliated persons'' are prohibited outright or are limited in scope and require full disclosure to disinterested directors. See, e.g. §65.11 re loans to affiliated persons; and §65.19(5) regarding investments in real property. There is no specific prohibition on investments in securities issued by affiliated persons, but this is because the list of permitted issuers of securities is so limited.

6.3 The regs define ''Affiliated Person'' to include ''controlling person'', not just directors and officers (65.3). This would seem to be exclusively factual, and provable here.

6.4 The regs limit aggregate loans to one borrower (§65.4) to the net worth of the association. If the quid pro quo is viewed as, in substance, an unsecured loan to MAXXAM for acquisition of PL, compare the amounts of purchases of Drexel-underwritten securities in 1985–1987,with the net worth of USAT at year-end for those years:

Year; Purchases; Net Worth:

1985, $280 million, $163 million
1986, 688 million, 249 million
1987, 321 million, 63 million

6.5 Loans to affiliated persons are further restricted, requiring the approval of a majority of disinterested directors at a regular board meeting (§65.11).

6.6 ''One borrower'' is defined to aggregate loans made to affiliated entities where one hold only 10% of the other's stock (§65.3).

7. Full disclosure. If disclosure to the independent directors of USAT or United Financial Group of material facts relating to investment decisions of USAT, is germane to FDIC's potential challenge of those decisions, the disclosure must be complete and meaningful, and extend not just to the superficial facts about a particular investment, but to the existence and extent of the quid pro quo. It seems almost certain that the outside directors of USAT/UFG would contend that they had no knowledge of the quid pro quo, that they did not know that USAT's investments in Drexel-underwritten securities were used to finance MAXXAM's acquisition of PL, and if they had known, would have disapproved, and it also seems likely that these outside directors would be believed, and a Court would find that there was no adequate disclosure.

8. The endangered Species Act (''ESA'') and the mission of FDIC. While the FDIC is primarily focused on recovering money's worth for its loss in USAT, we urge that all federal agencies are mandated to consider the impact of their decisions on endangered species. The Headwaters Forest is habitat for several endangered and threatened species, as detailed in the Headwaters Memo.

The ESA states that ''[I]t is the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and shall utilize their authorities in furtherance of the purposes of this chapter''. 16 U.S.C. §1531(c)(1)(emphasis added), and further requires that:

''. . . all . . . Federal agencies shall, in consultation with the Secretary [of the Interior], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered . . . or threatened species. . . .'' (16 U.S.C. §1536(a)(1).

The ''duty to conserve'' is an affirmative obligation of all federal agencies. Pyramid Lake Paiute Tribe v. U.S. Dept. of the Navy, 898 F.2d 1410. The ESA further provides that:

''. . . each Federal Agency shall . . . insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical. . . .'' (16 U.S.C. 1536(a)(2).

Accordingly we urge that the FDIC decision makers who will decide whether to seek recovery of the Headwaters Forest properties have an affirmative duty to conserve the endangered and threatened species who inhabit the forest, and further that the decision not to pursue recovery of the properties, if there is a reasonable legal basis to do so, may be in violation of the ESA.

9. Conclusion. We believe a federal court will view this case as involving related, illegal transactions, which destroyed USAT and benefitted Hurwitz and MAXXAM; and will hold that Hurwitz and MAXXAM had fiduciary duties to USAT (and therefore to the FDIC), breached those duties, and were unjustly enriched by their breach. The court will not see Hurwitz and MAXXAM as careful to walk just this side of liability, but rather as participants in the looting of a Savings and Loan who are now destroying the Headwaters Forest. We urge the FDIC to take immediate action to restrain logging the Headwaters Forest, and to proceed as swiftly as possible to recover this irreplaceable asset.

Very truly yours,

RICHARD DESTEFANO.

RECORD 8A

[From the Humboldt Beacon, Aug. 26, 1993]

EARTH FIRST! WANTS 98,000; 4,500 ACRES TOPS, PL SAYS

(By Glenn Franco Simmons)

Contrary to many published and televised reports, Congressman Dan Hamburg's bill if passed will affect nearly 60,000 acres—not 44,000 as Hamburg proposed.

Furthermore, Hamburg has proposed another 13,500 acres to be set aside as ''study acres.''

Earth First! has set its goal at 98,000 acres.

''It's too much,'' Bullwinkel said. ''We can't afford to keep setting aside more productive timber land.''

Hamburg has said that much of the land, if his bill succeeds, would still be open to ''sustainable'' logging.

''When has the federal government been able to do any job better than private industry?'' asked Pacific Lumber Co. spokesperson Mary Bullwinkel.

She said PALCO does not believe the federal government can be a better steward of the forests than private timber companies.

What Is The Headwaters?

The freshman congressman's bill calls for the purchase or exchange of 44,000 acres of what appears to be mostly PALCO-owned land in the Headwaters area about 10 to 15 miles northeast of Fortuna, Bullwinkel said.

''The reason they named it the Headwaters Forest,'' Bullwinkel noted, ''is because it's at the headwaters of two streams: Salmon Creek and the Little South Fork of Elk River.''

''The Headwaters bill came from a very radical proposal put together by people who made the Headwaters an issue,'' said Earth First! spokesperson Alicia Little Tree. ''They have been working on it for eight years: Earth First!, E.P.I.C. and other people who have been concerned about the well-being of Headwaters.

''They put together a proposal that calls for not only a debt-for-nature swap, but also an employee-stock-option plan for the businesses to restore the Headwaters . . . that has been decimated by these years of logging by Maxxam.''

The activist said Hamburg picked up on the original proposal that she called ''visionary.''

''Hamburg, who is a first-year congressperson,'' Little Tree said, ''. . . did pretty good to get through the shell of the proposal that he got through, which is about all we could get in a compromise situation.

''I think he has done all he can, and I appreciate his work. He should be congratulated for all he could do.''

Despite having reservations, she said she didn't disagree with Hamburg's proposal.

''I think a lot more is needed to protect the Headwaters,'' she noted, ''because the bill calls for willing sellers. Maxxam clearly stated that (it) is not willing to sell 4,500

acres. Selling Headwaters as a 4,500 acre island doesn't do anything to protect the ancient-redwood ecosystem. It just creates an isolated island of old trees; kind of like a museum, except the trees die from the 'edge effect' and from being so fragmented. It dries out and kills it from the edges in.''

She said examples of the edge effect can be found in Humboldt Redwoods State Park in Southern Humboldt. One example, she said, is just south of Stafford in the first old-growth redwood groves below Visa Point.

''You can just drive past them,'' Little Tree said. ''There are blow downs; they are no longer regenerating.''

PALCO has offered to negotiate for the fair-market-value sale of 4,500 acres of what it considers the Headwaters. About 3,000 acres of that is old growth and the 1,500-acre ''buffer,'' has a mixture of old- and second-growth trees, Bullwinkel said.

The trees are primarily redwood, although there are some Douglas fir.

It will not only be PALCO that is affected by Hamburg's proposal.

''There are private ranches out there,'' Bullwinkel said, ''as well as some Sierra Pacific and Simpson land and back in there.''

No one seems to know what the boundaries of Hamburg's proposal are.

''Well, if you call Hamburg's office, they tell you that they really can't give you a map because they really don't have one because they say it 'is evolving','' Bullwinkel said. ''Then you call the Forest Service and they say they have what they believe are the boundaries.

''But, do they realize how far the boundary of Hamburg's bill is from the boundary of the Six Rivers National Forest? There is this huge gap in there. How are they going to add this land to the national forest?''

Bullwinkel said that at this point, she does not know of any proposals other than the Earth First! proposal that calls for 98,000 acres.

However, she admitted it's a possibility.

''We don't know; there is always a potential that it could grow,'' she said, ''but that would be devastating. The 44,000 acres is devastating enough. Let's talk disaster for Humboldt County. How much more land are we going to take out of production?''

EFI PROPOSAL

Little Tree said Earth First! wants more land set aside than is targeted in Congressman Dan Hamburg's bill to protect animal and plant species.

''A lot of the species that live in the old-growth forest are specifically old-growth species,'' Little Tree said. ''So, if you have this little island, you get a very, very in-bred gene pool and they have no place to spread out.

''Earth First! is calling for a 98,000-acre wilderness complex, but not to lock-up the Headwaters forest but to create buffers and to put people back to work in the woods actually creating healthy ecosystems.

''. . . We are calling for 98,000 acres to preserve the Headwaters grove and the four other old-growth groves that are inside the boundaries of the 'wilderness' complex,'' she continued. '''This would really mean taking it out of the hands of corporate control and putting it in the hands of our community. It would make it so our community can decide what will happen in the woods, so we can create long-term stability in our community.''

Bullwinkel said 98,000 acres is too much.

''Well, that is outrageous—98,000 acres?'' she said. ''I think they are proposing that at this time to make it look more attractive, to make Hamburg's proposal look more like a compromise.''

What about eminent domain, in which the government appropriates and pays ''fair-market value'' for property it deems as needing to be government-owned for the public good? In such cases, landowners have no choice but to ''sell.''

''Ultimately, our goal is to have community control of the acres in which we live and the areas in which we work—community control of the actual work and the actual jobs,'' Little Tree said. ''There shouldn't be anyone who has to pick up and leave or be forced out of the area. And that is exactly what the government is calling for—a short-term mind-set that is going to create a deprived timber industry in which they clear-cut all the trees and (implement) even-aged management.

''I don't think the government can offer us any solutions. The solutions have to come from the community itself, from coming together and creating the solutions . . . The federal government has a lot to do and they are not really that concerned about the integrity of our communities.''

Bullwinkel said eminent domain is always a concern, although she hasn't heard of a concrete proposal.

EARTH FIRST! GOALS

''I would just like to talk about our goals and objectives of this week.'' Little Tree said at a news conference held in Rio Dell on Monday. (See related story on page 1.) ''Many people knew about Headwaters and the Headwaters proposal. It's outrageous that we have to file a bill in Congress to protect the last of the ancient redwoods from a man who stole them in the first place; that we have to buy them from Hurwitz who stole them with a junk-bond bailout.

''. . . We want Hurwitz in jail. . . . We don't want to have to reward Hurwitz for stealing the Headwaters by paying him money.''

Bullwinkel said that demanding the arrest of Hurwitz is ''ridiculous.''

The second demand is an ''exchange.''

''We think it should be a debt-for-nature swap,'' Little Tree said,'' whether he (Hurwitz) should give Headwaters to the public and the money that would go to the purchase of it should go to creating stability and jobs in the community as far as restoration work and creating some sort of sustainable timber economy in our region.''

''When has Earth First! ever brought any jobs to this area?'' Bullwinkel asked in response.

The other demand is ''an immediate moratorium on logging in the Headwaters wilderness complex area.'' Little Tree said.

Although the boundaries of Hamburg's proposal remain in limbo. Bullwinkel said Earth First! is mistaken if it believes that PALCO is logging in what it considers the Headwaters area.

RECORD 9

To: Jack D. Smith@LEGAL OGC Hdq@Washington
From: Jeffrey Williams@LEGAL PLS2@Washington
Subject: USAT/military bases
Date: Monday, April 3, 1995 10:14:39 EDT

Jack: Just a note regarding our brief discussion on Charles Hurwitz and exploring creative options that may induce a settlement involving the sequoia redwoods in FDIC/OTS case: I have reviewed the statutes and regulations regarding the closure and revitalization of military bases and other facilities. The pace of sales has not met the services' expectations and they are desparate to expedite and accommodate interested investors. I spoke with a Department of Defense official on the general means to acquire some property and there are numerous ways. Among them are: (1) preference is given to interest expressed by another federal agency for which the facilities may be transferred without cost (e.g., Army barracks to FDIC, FDIC interest transfers to Hurwitz-entity); (2) second preference is to a local economic redevelopment entity that involves municipal or country agency, which then can transfer to investors; (3) other creative options will be considered. The US government is responsible for environmental clean-up. It seems possible to devise a proposal that may interest Hurwitz and get the cooperation of DOD and local redevelopment group to work with FDIC and Hurwitz to come up with a viable plan, particularly in Texas where Hurwitz would get significant positive public exposure. I obtained from DOD list of all bases that are or will soon be closed that have facilities for sale or lease. I also am reviewing media articles that cover successful transfers of such property to investors and will keep you informed of any interesting developments.

If you have any questions or concerns, please let me know.

J.R. WILLIAMS.

RECORD 10

Easy thing for staff to do would be send the existing draft ATS to the Board and manually file suit. Also easy for entire counsel (remember, they always want to say). That is not what we recommend. We recommend continued work [w/defense counsel—] on (1) the merit of FDICs claim; (2) a possible capital maintenance claim by OTS against MAXXAM.

Why? (1) Tactically, combining FDIC & OTS claims—if they all stand scrutiny—is more likely to produce a large recovery/the trees than is a piecemeal approach; (2) Both sides are learning/developing their case. And I believe that counsel for both sides truly wants and needs a better understanding of the case than we currently have.

9 mos ago, I was prepared to go with a ''straddle'' theory and some other bits and pieces, eg, dividend—not to be confused w/the RICO claim. Villa's submissions have been voluminous & instructive; they have also been advocacing—some ''facts'' have been stretched.

We have paid the case ''back'' to $200 million and we are very closer whether to sue Dr. Kozmetabi at all.

Options: (1) Defer it all, incl. OTS, until (probably) 4th quarter '94; (2) Authorize suit, but hold off filing; (3) Authorize and file around the edges; (4) Sue (or settle) UFG on tax and cognital maintenance, and option 1 or 2 on the rest; (5) Option 2 or 3 except defer on Dr. Kozmetabi.

If this wasn't public, the FDIC would do #1. Know as much-more as usual, but complex and both sides still learning. I think we should do it here—but complaints are likely (whatever we do).

5/19/95 PC—FROM JILL RATHER

Alan McReynolds—Asst to Sec. of Interior—
Jeoff Webb—Sec. Congressional Liaison
Jay Ziegeler—Asst to * * *

Jill did fly over Headwaters w/McReynolds last week. McReynolds—mostly interested in land for land swap. vis-a-vie military/or bases for trees.

McReynolds grew up with Hurwitz & their families still have contact with one another. Did base conversion with at *DOD*.

Levan met w/*McReynolds, Webb & Ziegeler*—this past Tuesday. Intention is that discussion will continue. Webb and Ziegeler will consider doing preliminary work to explore whether or not fax notice would work. There is no clear cutting going on outside of Headwaters but injunction was lifted yesterday.

To: Jill Ratner, Rose Foundation.
From: Natural Heritage Institute.
Re: Federal Inter-Agency Land Transfer Mechanisms.
Date: April 19, 1995.

I. INTRODUCTION

You have asked us to provide you with an analysis of the mechanisms under Federal law by which the Federal Deposit Insurance Corporation (FDIC), as title-holder of the Headwaters Forest, may be authorized to transfer the forest to a Federal, State, local, or private entity rather than disposing of it through sale.

Our research has uncovered six Federal statutory programs that allow property under the control of one Federal agency to be transferred to another Federal agency or into non-Federal hands. These programs may be characterized as either: (1) ''exchange'' programs, under which a Federal land-management agency trades some of its land for non-Federal lands of approximately equal value in order to carry out agency objectives; (2) ''transfer'' programs, under which property no longer required by one Federal agency is simply given to another Federal agency; or (3) ''disposal'' programs, under which Federal property no longer required by *any* Federal agency is transferred to a state, local, or private entity.

It is difficult to determine at this point which of these programs, if any, would best accomplish the Rose Foundation's goals. None of these programs specifically authorizes the precise type of transaction in question here, *i.e.,* the transfer of property acquired by the FDIC in settlement of a legal claim (as opposed to property acquired via normal appropriations and procurement procedures). Furthermore, there are no particular sets of circumstances under which transfers are mandatory under any of these programs. At the same time, none of the statutes or regulations or cases interpreting them specifically prohibits such a transaction. A review of these sources indicates that any decision by an agency to enter into any kind of land-transfer transaction will be, in fact, almost entirely discretionary, regardless of the program. Thus, the primary concern under each program will be to convince the appropriate agency that the transaction in question will serve both the public interest broadly, the agency's interest specifically, and relevant political factors.

Of all the programs analyzed, those involving the disposal of surplus Federal or military real property are probably the best candidates, as they do not categorically require reimbursement to the disposing agency. These programs are more restricted than the others, however, in that only certain agencies may receive surplus real property, and then only for certain enumerated purposes. Under these programs, therefore, an intermediary agency such as the Park Service would initially receive the surplus property for the disposing agency and then later transfer it to the FDIC in exchange for Headwaters with the understanding that Headwaters would be managed only for authorized uses. Thus, the disadvantage to these programs is that they will require an agreement between three parties instead of two, and this disadvantage may ultimately be preclusive. In addition, if pending legislation introduced by Congressman Rohrabacher (R–CA) is passed, it would prohibit the disposal of surplus military property for exchange purposes, thus precluding the type of transfer we are proposing for Headwaters insofar as military property is involved.

It would be imprudent to recommend pursuing one or more programs over all others until exploratory meetings with agency representatives are concluded. Given the discretionary nature of all of the programs, political considerations rather than legal and regulatory fineres will be of paramount concern. With the right amount of political will, however, we believe that Headwaters can be placed in the hands of an appropriate management entity without public expenditure or independent legislation.

II. ANALYSIS

When the FDIC, in its capacity as receiver for a failed institution, takes title to land held by another in satisfaction of a claim against that person arising from wrongdoing related to the failure of a financial institution, the FDIC forwards title to the land to its regional real estate sales division for disposal. Funds from the sale go into the appropriate receivership account to cover administrative costs, and then into the general insurance fund as reimbursement for funds expended in covering the deposits in the failed institution.

There does not appear to be any statutory or regulatory mechanism in place whereby the FDIC may dispose of assets acquired in satisfaction of a claim against a director of a failed institution without any reimbursement whatsoever. Such a transaction may, however, be provided for under internal FDIC policy guidelines, under the general receivership provisions of the bankruptcy laws, or under the FDIC's corporate powers, and further research on this issue may be warranted. The FDIC is authorized to settle claims by accepting property at less than market value, although any such settlement must be approved by the FDIC's board of directors.

The FDIC's primary interest is to restore to the general insurance fund any funds expended in satisfaction of a failed institution's depositors' claims pursuant to a bailout. We may assume, then, that it is immaterial to the FDIC whether one particular piece of property is sold in order to obtain those funds, as opposed to another piece of property, so long as the funds owned are actually recovered. Thus, if a mechanism exists whereby another Federal agency holding land of approximately equal value may exchange that land for land held by the FDIC for sale, the FDIC might raise no objection so long as the two parcels were in fact worth the same amount. Further research is required regarding the FDIC's corporate powers.

Since there are no internal means by which the FDIC may transfer assets it has recovered, via constructive trust or otherwise, to third-party public or private entities without reimbursement, it is necessary to examine the statutory and/or regulatory procedures under which real property held by a Federal agency may be transferred, without cash payment and without independent legislation, to other Federal agencies or to state and local bodies. Such procedures may provide for an exchange of lands between FDIC and another Federal agency, preferably one suited for management and control of Headwaters, whereby FDIC would take title to property belonging to the other agency in exchange for Headwaters. FDIC would then be free to dispose of the land it received in exchange in any manner it sees fit.

Our research has found six statutory procedures that may provide for such an exchange. These procedures are:

1. Transfer of ''excess'' property among Federal Agencies under the Federal Property and Administrative Services Act (FPASA).
2. Disposal of ''surplus'' Federal property to State or local governments under FPASA.
3. Disposal of surplus military property under the Base Closure and Realignment Act of 1990.
4. Disposal of surplus Federal and military property to state fish and wildlife agencies for wildlife conservation purposes under 16 U.S.C. §667b.
5. Land exchange under the Federal Land Policy and Management Act (FLPMA) as amended by the Federal Land Exchange Facilitation Act (FLEFA).
6. Disposal of public lands to state and local agencies or non-profit organizations for park and recreation purposes under the Recreational and Public Purposes Act (RPPA).

Each of these procedures provides for property in the jurisdiction or control of one Federal agency to be transferred either to another Federal agency, a state or local agency, or a private entity without a public sale and without cash payment. Some require compensation in the form of lands of approximately equal value (see section E of this memorandum, infra). Thus, working from the premise discussed in the above introduction, that FDIC would be authorized and willing to exchange Headwaters for land of proximately equal value, any of the programs discussed here could provide the statutory or regulatory basis for such an exchange.

Case law addressing these statutory land-transfer procedures is scant. In general, the few cases involving attacks on an agency's decision to undertake a specific transfer of land have primarily addressed questions of: plaintiffs' standing to sue the agency (*see, e.g., Rhode Island Comm. on Energy v. GSA (II),* 397 F.Supp. 41 (1975)); the validity of an agency's determination that a proposed transfer is in the ''public interest'' (*see, e.g., National Coal Ass'n v. Hodel,* 617 F.Supp. 584 (1985)); the adequacy of transfer-related Environmental Impact Statements required under the National Environmental Policy Act (NEPA) (*see, e.g., Rhode Island Comm on Energy v. GSA (I),* 561 F.2d 397 (1977)); and whether the amount of land acquired was larger than necessary to meet the transferee agency's needs (*see, e.g., U.S. v. 82.46 Acres of Land, etc.,* 691 F.2d 474 (1982)).

Thus, this memorandum focuses on the mechanics of these land-transfer procedures, analyzing the statutes themselves and their administering regulations.

A. Transfer of ''excess'' property under FPASA

The Federal Property and Administrative Services Act (FPASA) (40 U.S.C. §471 et seq.) governs the disposition of property under the jurisdiction and control of a Federal agency that no longer needs it. Under FPASA, when a Federal agency determines that property under its control is not required for its needs and the discharge of its responsibilities, such property is designated ''excess property.'' 40 U.S.C. §472(e). FPASA then imposes a duty on all executive agencies to transfer their excess property to other Federal agencies whenever practicable, 40 U.S.C. §483(b), and, correspondingly, to obtain excess property from other Federal agencies rather than purchasing new property. 40 U.S.C. §483(c); 41 C.F.R. §101–47.203–2.

i. Procedure

Under FPASA, once an agency designates a particular piece of property as ''excess,'' the agency must promptly inform the General Services Administration (GSA) of the property's availability for transfer. Id. at §483(b). GSA maintains records of all Federal property reported as excess. See 41 C.F.R. §101–47.202–3. Also under FPASA, when an agency (or a mixed-ownership Government corporation such as the FDIC) determines that it requires additional property to carry out an authorized program, it must likewise inform GSA. Id. at 483(c); 41 C.F.R. §101–47.203–3. Upon receiving notice from an agency that property is required, GSA will review its records of property reported excess, and its own inventory of excess property, to ascertain whether any such property may be suitable for the needs of the requesting agency.

41 C.F.R. §101–47.203–3 GSA must promptly notify the agency whether any available excess property is suitable. Id.

If after receiving such notice an agency determines that the excess property of another agency will suit its needs, the agency must prepare and submit ''GSA Form 1334, Request for Transfer of Excess Real and Related Personal Property.'' 41 C.F.R. §101–47.203–7(a). Then, upon determining that the requested transfer is ''in the best interest of the Government and that the requesting agency is the appropriate agency to hold the property'' (41 C.F.R. §101–47.203–7(b)), GSA may execute the transfer so long as the transfer is consistent with applicable GSA policy guidelines. 40 C.F.R. §483(a)(1); 41 C.F.R. §101–47.203–7(d), (e).

ii. Reimbursement

When a transfer of excess property is approved, FPASA authorizes GSA, with the approval of the Director of the Office of Management and Budget (OMB), to ''prescribe the extent of reimbursement'' for the transfer. 40 U.S.C. §483(a)(1). Although FPASA allows for transfers without reimbursement in certain situations 41 C.F.R. §101–47.203–7), reimbursement at ''fair market value'' as determined by GSA is required when a mixed-ownership Government Corporation, like the FDIC, is either the transferor or the transferee agency. 41 C.F.R. §101–47.203–7(f).

Although neither FPASA nor the Federal Property Management Regulations specifically provide for reimbursement in-kind in the form of property of equal value, neither do they specifically prohibit it. Given the Congressional intent to enable and facilitate land-exchanges under §484(a), see Section B, *infra,* as well as under other programs, however, a colorable argument exists that FPASA should be interpreted as allowing an agency to transfer its excess property to another agency and receive property of equal value in return. Thus, any excess property currently held by a Federal agency authorized to manage Headwaters should be conveyable to FDIC under 40 U.S.C. §483 in exchange for Headwaters, if the conveyed property is of approximately equal value.

B. Disposal of ''surplus'' property under FPASA

FPASA defines ''surplus'' property as ''any excess property not required for the needs and the discharge of responsibilities of all Federal agencies, as determined by [GSA&].'' 40 U.S.C. §472(g). GSA will generally declare surplus any excess property reported to it pursuant to 40 U.S.C. §483(b), supra, if it determines, after reviewing other agencies' requests for property pursuant to 41 C.F.R. §101–47.203–3, supra, that the property does not match the needs of any other agency. 41 C.F.R. §101–47.204–1. In other words, ''excess'' property is property no longer required by the agency holding it, while ''surplus'' property is property not required by *any* Federal agency.

i. GSA's disposal authority in general

FPASA authorizes GSA to dispose of surplus Federal property by sale, exchange, lease, permit, or transfer for cash, credit, or other property, upon such terms and conditions as it deems proper. *Id.* at §484(a), (c). FPASA further provides that ''[a]ny executive agency entitled to receive cash under any contract covering the lease, sale or disposition of surplus property may in its discretion accept, in lieu of cash, any property determined by the President to be strategic or critical material at the prevailing market price thereof at the time the cash payment or payments became or become due.'' 40 U.S.C. §485(f). These two sections may therefore provide sufficient authority for GSA to transfer another agency's surplus property to FDIC in exchange for Headwaters, if the ''President'' determines that Headwaters constitutes ''strategic or critical material.''

ii. The ''land for parks'' program

Although the authority provided by §§484(a) and 485(f) should be thoroughly considered, a subsequent section of FPASA may ultimately prove more useful. FPASA specifically authorizes GSA to assign to the National Park Service (NPS) for disposal any surplus real property ''as is recommended by the Secretary of the Interior as needed for use as a public park or recreation area.'' 40 U.S.C. §484(k)(2) [hereinafter, ''the Lands to Parks Program'']. Subject to the disapproval of the GSA, NPS may then ''sell or lease such real property to any State, municipality, or political subdivision for public park or recreational use.'' Id. at §484(k)(2)(A).

ii. Procedure under the Lands to Parks Program

The regulations enforcing the Lands to Parks Program provide that whenever GSA determines property to be surplus, GSA will provide notice by mail to all public agencies eligible to receive such property that the property has been declared surplus. 41 C.F.R. §101–47.303–2(b). In particular, a copy of this notice ''shall be furnished to the proper regional or field office of the NPS or the Fish and Wildlife Service.'' 41 C.F.R. §101–47.303–2(d). In the case of real property that ''may be made available for assignment to the . . . Secretary of the Interior for disposal under [the Lands to Parks Program],'' GSA shall inform the appropriate regional office of the NPS three workdays in advance of the date the notice to be given simultaneously by NPS to additional interested public bodies of State and local government. 41 C.F.R. §101–47.303–2(e).

The regional NPS office then reviews such notices and informs interested state and local planners and park and recreation officials of site availability. Attachment B at p. 2. Any state or local agency wishing to acquire the property must notify NPS of their interest. Id. NPS will then work with the agency to develop an application for transfer of the land and forward the application to GSA, recommending its approval. Id.

GSA will advise NPS of any additional information required to process the state or local agency's application to procure the property. 41 C.F.R. §101–47.303–2(h). Upon receipt of the complete application for the property, GSA will consider and act upon it, either granting or denying the transfer. 41 C.F.R. §101–47.303–2(i).

iii. Reimbursement

In fixing the sale or lease value of property so disposed, the Secretary of the Interior must take into consideration ''any benefit which has accrued or may accrue to the United States from the use of such property by any such State, political subdivision, instrumentality, or municipality.'' 40 U.S.C. §484(k)(2)(B). This subsection is interpreted as permitting the Secretary of the Interior to convey such property to eligible State or local agencies without consideration or reimbursement.

c. Disposal of surplus military property

The Defense Authorization Amendments and Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101–510; codified as 10 U.S.C. §2687 note) provides that the Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property and facilities located at a military installation closed or realigned, ''the authority of the [GSA] to dispose of surplus property under [the Lands to Parks Program].'' 10 U.S.C. §2687 note Section 2905(b)(1)(B). The Act further provides that the Secretary of Defense shall exercise this authority in accordance with all the regulations governing the disposal of surplus property propagated under FPASA, viz, the Federal Property Management Regulations, Title 41, Chapter 101 of the Code of Federal Regulations, supra. Id. at Section 2905(b)(2)(A)(i).

Thus, under the Act, the Department of Defense (DoD) is authorized to assign surplus military property to the NPS for disposal to State and local agencies for public park and recreational use in accordance with the Lands to Parks Program. The analysis of GSA's activities under the Lands to Parks Program thus applies equally to DoD's activities under Section 2905 of the Act, and may be incorporated here by reference.

i. Procedure

The regulations governing the disposal of surplus military property appear in Title 32 of the C.F.R. These regulations provide that in exercising the authority delegated to it by GSA to dispose of surplus property, DoD is to follow the same property disposal rules and procedures that the GSA follows, i.e., the Federal Property Management Regulations. 42 C.F.R. §91.7(a)(1). However, the DoD regulations further allow for an ''expedited process'' under which other DoD entities, other Federal Agencies, and providers of assistance to the homeless may identify military property they wish to acquire before the base closes, and forward requests to DoD. Id. DoD will then work with the other DoD Components, Federal Agencies, homeless providers and reuse planners early in the closure process, in order to sort out these requests. Id.

Military Departments must make the notices of availability available to Federal agencies, local redevelopment authorities, and State and local governments. 32 C.F.R. §91.7(a)(6). For a six-month period thereafter, the Military Departments shall consult with the local redevelopment authority and make appropriate final determinations whether a Federal agency has identified a use for, or shall accept transfer of, any portion of the property. 32 C.F.R. §(a)(7). If no Federal Agency requests the property during this period, the property is be declared surplus. Id.

This screening or DoD's excess real property to ascertain whether it matches property requests from other Federal Agencies must be completed within 6 months of the date of approval of the 1995 closures. 32 C.F.R. §(a)(4)(ii). This timeframe is meant to afford Federal Agencies sufficient time to assess their needs, submit initial expressions of interest to the Department of Defense, and apply for the property. 32 C.F.R. §(a)(5). During this period, Agencies sponsoring public benefit conveyances, such as NPS, should also consider the suitability for such purposes. Id. In the Notice of availability, the Military Departments must provide other Federal agencies with as full and complete information as practicable regarding the subject property. Id.; see 41 C.F.R. §101–47.303–2(b). Requests of transfers of property submitted by other Federal Agencies will normally be accommodated. Id. Decisions on the transfer of property to other Federal Agencies shall be made by the Military Department concerned in consultation with the local redevelopment authority. Id.

II. Limitations

The DoD's authority to transfer excess or surplus property to other Federal agencies may, however, be limited by the Act's provision authorizing the DoD to transfer real property located at a closed military installation to the local ''redevelopment authority'' organized to ameliorate the negative economic impacts of the base closure. 10 U.S.C. §2687 note Sec. 204(a)(4)(A). In addition, the transfer must be without consideration ''in the case of any installation located

in a rural area whose closure under this title will have a substantial adverse impact (as determined by the Secretary) on the economy in the communities in the vicinity of the installation and on the prospect for the economic recovery of such communities from such closure.'' Id., at Sec. 204(a)(4)(B)(ii)(A). This may hamper any effort to transfer surplus military property to an agency able to exchange it for Headwaters.

A potentially greater limitation is a rider bill (H.R. 1265) introduced by Congressman Rohrabacher (R–CA) to amend the surplus property disposal provisions of the Defense Authorization Amendments and Base Closure Realignment Act. The bill would prohibit DoD from transferring surplus military property to other Federal agencies unless the agency agrees not to use the property in any property exchange transaction. The bill is currently pending before the National Security Committee, and NHI will continue to track its progress.

iii. Return of lands transferred ''temporarily'' to the Department of Defense by the Department of the Interior

Unrelated to DOD's general authority to dispose of surplus military property, a further section of this regulation provides that any lands that have been transferred from the Department of the Interior to a Military Department for the latter's temporary use ''are to be returned to the Secretary of the Interior'' if they are still suitable for the programs of the Secretary of the Interior. 32 C.F.R. §91.7(a)(9)(i). The Military Department concerned will notify the Secretary of Interior, normally through the Bureau of Land Management (BLM), when withdrawn public domain lands are included within an installation to be closed. 32 C.F.R. §91.7(a)(9)(ii). BLM will then screen these lands within the Department of Interior to determine if these lands are suitable for return to the Department of Interior. 32 C.F.R. §91.7(a)(9)(iii). Thus, it should be ascertained whether BLM has transferred any land in California to DoD on a temporary basis. If so, the decision to return the property to BLM will be nondiscretionary, thus eliminating the need to persuade DoD to dispose of the property in a particular manner. After BLM retakes control of the property, it would be a question of orchestrating a land-exchange under FLPMA (see section E., infra.) Accordingly, NHI will attempt to identify military property in California that is owned by the Secretary of the Interior.

D. Disposal of surplus Federal and military property to state fish and wildlife agencies for wildlife conservation purposes under 16 U.S.C. §667b

Enacted in 1948, 16 U.S.C. §667b, authorizes GSA to dispose of surplus Federal property, both military and non-military, by transferring it to a state agency for wildlife conservation purposes. Specifically, the statute provides that upon request, surplus real property under the jurisdiction of a Federal agency which, in the determination of GSA, may be utilized for wildlife conservation purposes in the state where the property lies, may be transferred to the state's fish and wildlife agency. This differs significantly from the program provided by the Lands to Parks Program, in that such land may be transferred only to a State fish and wildlife agency such as the California Department of Fish and Game, and not to a county or municipality. Furthermore, the property may be utilized only for wildlife conservation purposes and not for parks or recreation purposes.

The Defense Authorization Amendments and Base Closure and Realignment Act authorizes GSA to delegate to DoD, in addition to the authority to dispose of surplus property under the Lands to Parks Program, ''the authority of [GSA] to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with [16 U.S.C. §667b].'' 10 U.S.C. §2687 note Section 7905(b)(1)(B).

The military departments are authorized to convey property that can be utilized for wildlife conservation purposes to the state fish and wildlife agency without reimbursement. 32 C.F.R. §644,439(a). If property is considered by the District Engineer to valuable for wildlife conservation purposes, or if interest has been shown in acquiring the property for that purpose, notice of availability should be given to the agency administering state wildlife resources and to the Federal Fish and Wildlife Service if the property has particular value in carrying out the national migratory bird program. 32 C.F.R. §644.429(b). Any state desiring to make application for property for wildlife conservation will be furnished copies of Application For Real property For the Conservation of Wildlife with accompanying instructions for preparation. In evaluating the application, the responsible District Engineer will request review of the application by the Regional Office of the Fish and Wildlife Service, Department of the Interior, and will obtain that Service's recommendation as to the value of the property for wildlife conservation purposes. 32 C.F.R. §644.429(c)

E. BLM Land Exchanges under FLPMA

The Federal Land Policy and Management Act of 1976 (FLPMA) as amended by the Federal Land Exchange Facilitation Act (FLEFA), 43 U.S.C. §1701 *et seq.*, authorizes the Secretary of the Interior to exchange federally-held public lands for non-federal lands if the Secretary of the interior determines that the public interest would best be served by the exchange. 43 U.S.C. §1716(a). In making this determination, the Secretary is required to consider Federal, state and local needs for ''lands for the economy, community expansion, recreation, food, minerals, and fish and wildlife.'' Id. The Bureau of Land Management (BLM) exercises the Secretary of the Interior's authority under the land exchange provisions of FLPMA. 43 C.F.R. §2200.0–4.

i. The ''equal value'' requirement and ''assembled land exchanges''

FLPMA requires that any lands exchanged under the Act be of equal value, or if they are not equal, that the values be equalized by payment of money to the grantor or BLM as circumstances require. 43 U.S.C. §1716(b). This equalization requirement may be waived, however, if BLM and the other party agree to the waiver, and BLM determines that the exchange will be expedited and that the public interest will be better served thereby. BLM may not waive cash equalization payments where the amount is more than 3% of the value of the federal lands being exchanged, or $15,000, whichever is less. Id.

If the non-Federal land sought to be acquired is worth substantially more than any single parcel of Federal land within the state (or vice versa), the parties may enter into an ''assembled land exchange.'' An assembled land exchange is an agreement under which the parties agree to the consolidation of multiple parcels of land for purposes of one or more exchange transactions. 43 C.F.R. §2200.0–5(f); §2201.1–1. Thus, several parcels of Federal land may be exchanged for a single, valuable parcel of non-Federal land.

FLPMA also provides that if the non-federal land acquired by exchange is situated within the boundaries of an existing National Park, Forest, Wildlife Refuge System, Wild and Scenic Rivers System, Trails System, or Wilderness preservation system, the land will immediately become part of that unit without further action by the Secretary. 40 U.S.C. 1716(c).

ii. Procedure

Land exchanges under FLPMA are administered through guidelines contained in Title 43, Part 2200 of the C.F.R. At the outset, it is important to note that FLPMA land exchanges are entirely within BLM's discretion, and BLM is free to terminate an exchange proposal at any time unless the parties have entered into a legally-binding agreement. 43 C.F.R. 2200.0–6(a). Also, a land exchange may take place only after the appropriate BLM officer determines that it will ''well serve'' the public interest. 43 C.F.R. 2200.0–6(b). In making this determination, BLM must give full consideration to ''the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values.'' BLM must also find that the resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained are not more than the resource values of the non-Federal lands and the public objectives they could serve if acquired. 43 C.F.R. §2200.0–6(b)(1). Once BLM accepts title to the non-Federal lands, the lands become and remain public lands, subject to BLM management. 43 U.S.C. §1715(c).

Exchanges may be proposed by BLM itself, or by ''any person, State, or local government.'' 43 C.F.R. §2201.1. Initial exchange proposals are directed to the authorized officer responsible for the management of Federal lands involved in an exchange. Generally, the parties to an exchange bear their own costs. 43 C.F.R. §2201.1–3. However, if the BLM finds it to be in the public interest, it may agree to bear the other party's costs. Id. A flow-chart describing the entire BLM land exchange process appears as Attachment A to this memorandum.

iii. Three-party land exchanges

BLM regularly organizes what are called ''three-party land exchanges'' of Federal for non-Federal lands. Under a three-party exchange, the non-Federal land in question is sold initially to a third-party, usually a private land trust, for cash. The third-party then holds and manages the land pending BLM's identification of the parcel or parcels of Federal land to be exchanged, a process that can take years. Once the Federal lands are selected, BLM conveys them to the third-party in exchange for title to the non-Federal lands it holds. The third-party then may sell the lands conveyed to it to recover the cost of the initial purchase.

A narrative description of a three-party exchange upheld in the past appears as Attachment C to this memorandum.

iv. Restrictions

Restrictions on BLM land exchanges under FLPMA include: (1) a requirement that the Federal and non-Federal lands exchanged lie within the same state (43 U.S.C. §1716(b); 43 C.F.R. §2200.0–6(d)); (2) a requirement that an environmental analysis under NEPA be prepared after an agreement to initiate an exchange is signed (43 C.F.R. §2200.0–6(h)); and (3) a requirement of conformity with existing land use plans (43 C.F.R. §2200.0–g(g)).

F. U.S. Forest Service Land Exchanges Under FLPMA

In addition to authorizing BLM to enter into land exchanges, FLPMA (43 U.S.C. §1701 et seq.) authorizes the Secretary of Agriculture to exchange lands within the National Forest System (NFS) for non-Federal

lands upon a determination that the public interest will be well served thereby. 43 U.S.C. §1716(a). The substantive provisions of FLPMA, including authorizations and limitations on authority, apply equally and identically to the Secretary of the Interior for public lands and the Secretary of Agriculture for National Forest lands. Thus, the analysis of FLPMA contained in Section E., supra, of this memorandum may be incorporated here by reference.

The Forest Service regulations governing exchanges appear in Title 36, Part 254 of the C.F.R. These regulations mirror the correlative regulations governing BLM land exchanges. The discussion of the latter regulations in Section E. applies equally and may also be incorporated here by reference. One key difference in the exchange procedure, however, is that NFS land exchanges may involve, in additional to outright land exchanges, ''land-for-timber'' (non-Federal land exchanged for the rights to Federal timber), or ''tripartite land-for-timber'' (non-Federal land exchanged for the rights to Federal timber cut by a third party on behalf of the parties to the exchange). 36 C.F.R. §254.1. Initial Forest Service land exchange proposals are directed to the Director of the applicable unit of the NFS. 36 C.F.R. §254.4.

G. The Recreation and Public Purposes Act

The Recreation and Public Purposes Act (RPPA) (43 U.S.C. §868 *et seq.*) authorizes the Secretary of the Interior to dispose of public lands to a State, county, municipality, or non-profit organization for any recreational or public purposes. Before the land may be disposed, however, it must be shown to satisfaction of the Secretary that it is to be used for a definitely proposed project, that the land is not of national significance, nor more than is reasonably necessary for its proposed use. 43 U.S.C. §868(a). No more than 25,600 acres may be conveyed for recreational purposes in any one State per calendar year. 43 U.S.C. §868(b)(i)(C).

Conveyances of lands for recreational purposes shall be made without monetary consideration, while conveyances for any other purpose shall be made at a price fixed by the Secretary of the Interior through appraisal or otherwise, after taking into consideration the purpose for which the lands are to be used. 43 C.F.R. §869–1(a). The Secretary may not convey lands reserved for National Parks, Forests, Wildlife Refuges, or lands acquired for specific purposes. 43 C.F.R. §2741.1(a). Potential applicants should contact the appropriate District Office of BLM ''well in advance of the anticipated submission of an application.'' 43 U.S.C. §2741.3(a). Dependent on the magnitude and/or public interest associated with the proposed use, various investigations, studies, analyses, public meetings and negotiations may be required of the applicant prior to the submission of the application. 43 U.S.C. §2741.3(c).

''Omitted lands'' and unsurveyed islands may be conveyed to States and their local political subdivisions under the Act as well. 43 C.F.R. §2742.1

III. CONCLUSION

As stated in the introduction, it is difficult to ascertain which of these programs, if any, would be best suited to the type of exchange the Rose Foundation seeks to orchestrate. Given the highly discretionary nature of all the programs, ''scoping'' meetings with the necessary agency personnel will be necessary to ascertain the degree of interest at the various decisionmaking levels of both the agency disposing of property, the agency initially receiving the property, and/or the FDIC. Before such meetings take place, we do not recommended that one or more programs be pursued to the exclusion of all others.

Based on legal analysis alone, however, the provision of the Military Base Closure and Realignment Act requiring the return of lands held by the Department of Defense ''on loan'' from the Department of the Interior may be a favorable option in light of the non-discretionary nature of the initial transfer. Under this provision, land *must* be transferred to the Department of the Interior, thus eliminating the need to convince the Defense Department to dispose of the property, in its discretion, in a particular manner in its discretion. As stated above, NHI will attempt to identify military property in California that is owned by the Department of the Interior.

RECORD 12

MEMORANDUM

To: Jack D. Smith, Deputy General Counsel
From: Jeffrey Ross Williams, Counsel, PLS
Date: 15 June 1995
Subj: United Savings Association of Texas, In FDIC Receivership, Investigation of Charles Hurwitz and Others.

We received a letter (from among the hundreds we received in the last 60 days) that discusses the ''debt-for-nature'' transaction that various environmental groups have been advocating to resolve the claims involving Hurwitz and USAT. It contains a reference to the Oklahoma City bombing and a call to ''defuse this situation.'' I want to bring it to your attention.

As you know, the above-referenced investigation has resulted in attracting the attention of organizations and individuals that have interests in environmental preservation. This has arisen as a result of Charles Hurwitz's acquisition (through affiliates) of Pacific Lumber, a logging company in Humboldt County, California, that owns the last stands of old growth, virgin redwoods. It has been widely reported that the company has been harvesting the virgin redwoods in a desperate attempt to raise cash to pay its and its holding company's, Maxxam, Inc.'s, substantial debt obligations.

The environmentalists' issues are centered on preserving the old growth redwoods through a mechanism of persuading Hurwitz to settle the government's claims involving losses sustained on the USAT failure by, in part, transferring the redwood stands to the FDIC or other federal agency responsible for managing such forest lands. FDIC has received thousands of letters urging FDIC to pursue such a transaction.

The environmental movement, like many others, is not homogeneous and contains extreme elements that have resorted to civil disobedience and even criminal conduct to further their goals. As a result of the recent tragedy in Oklahoma City, everyone appears more sensitive to the possibility that people can and do resort to desperate, depraved criminal acts. Accordingly, we take any references to such conduct, even ones that appear innocent, more seriously.

Among the hundreds of letters we received last month is one that contains a reference to the Oklahoma City bombing that I want to bring to your attention. The author does not make any directly threatening statements but appears, at least to me, to have personal knowledge of the deep passions and divisions that various environmental activists harbor on these preservation issues. This is particularly evident when he states, ''Do us all a favor and save the forest and defuse this situation.'' The author's hometown of Sebastopol, CA., happens to be a hot-bed of environmental activism and conflict since the 1960s.

In the event you believe this letter deserves greater scrutiny, it should be referred to the local office of the Federal Bureau of Investigation. I would be pleased to contact them if you deem it appropriate. I can always be reached at 736–0648 to discuss this matter further.

June 15, 1995—Told Wms to advise FBI and Rob Russell.

RECORD 13

THE ROSE FOUNDATION

FOR COMMUNITIES & THE ENVIRONMENT

Please deliver, 43 pages including cover, to Steve Lambert

Please call (510) 658–0702 to report any problems in transmission

To: Steve Lambert, Hopkins & Sutter
From: Jill Rainer, Rose Foundation for Communities and the Environment

Steve:

Thank you for the opportunity to share our analysis of the case for imposition of a constructive trust on the assets of Pacific Lumber in connection with the FDIC's claims against MAXXAM, Inc. We hope the following memorandum will provide a useful starting point for a full and frank discussion of those issues presented.

Most of the lawyers who participated in the preparation of the memo will be available for a phone conference at 1:00 p.m., Pacific time, on Tuesday, the 27th. These include:

Kirk Boyd and Dave Williams, Boyd, Huffman and Williams, (415) 981–5500.

Tom Lippe (counsel for the Environmental Public Information Center), (415) 495–2800.

Peter Camp, of Camp, Von Kallenbach (206) 689–5613.

I can be reached at the Rose Foundation office, at (510) 658–0702.

Rick DeStefano, who has recently joined the team, is unable to attend.

We will be looking forward to talking with you and your colleagues.

INTRODUCTION

The MAXXAM Corporation, through its wholly owned subsidiaries Pacific Lumber Company (Del), Scotia Pacific, and the Salmon Creek Corporation (Collectively ''Pacific Lumber'', or ''PL'', in this memorandum) currently controls and logs an area known as Headwaters Forest in Humboldt County, California. Headwaters Forest is a collection of forest lands that contain the last major unprotected stands of old growth redwood in the world. These stands of ancient trees, many of which are between 1000 and 2000 years old, are remnants of the great virgin redwood forest that once extended more than 500 miles from its southern tip to its northern boundary, blanketing the western coastal range from Big Sur to southern Oregon.

The Rose Foundation contends that MAXXAM's control of Pacific Lumber and the Headwaters Forest properties is unlawful and was wrongfully obtained, as a result of a prohibited transaction which breached of MAXXAM's fiduciary duty as a controlling shareholder of the thrift, United Savings Association of Texas (USAT), and which led to USAT's 1988 failure and bailout by the Federal Deposit Insurance Corporation (FDIC) which cost taxpayers more than $1.3 billion. We believe that the FDIC, as the party injured by the alleged breaches of fiduciary duty, has the authority to seek imposition of a constructive trust on the proceeds of the prohibited transaction and to compel MAXXAM's disgorgement of Pacific Lumber and all its assets.

The FDIC must act quickly to file an action against MAXXAM seeking disgorgement. While the statute of limitations has been extended by agreement in this matter, we respectfully point out that the policies behind the statute of limitations

still hold true: recollections are fading; evidence is being lost; witnesses may soon become unavailable. Of particular concern in this matter is the age of the Texas State bank-examiner who played the central role in reviewing or supervising the review of USAT's records; it is our understanding that he is now more than seventy years old.

In addition, the FDIC must act quickly to protect the value of the res during litigation by positioning for a temporary restraining order and preliminary injunction to prevent any further irreparable harm such as has occurred as a result of recent intensive logging operations. These operations began September 15th and are, in all probability, continuing. The recent logging involves clearcutting residual old-growth in or near environmentally sensitive areas within the 44,000 acre area which is currently the subject of pending acquisition legislation in Congress (HR 2866, which passed in the House of Representatives September 21, 1994 and is currently under consideration in the Senate). We believe that these practices constitute the deliberate destruction and dissipation of irreplaceable assets.

The trees that are currently falling represent an irreplaceable resource. From a purely economic standpoint, the old-growth trees are an order of magnitude more valuable than second growth; one 1000 year old tree is worth more than $100,000 on the timber market. Top grade ''clear redwood'', which comes from the densest heartwood of old growth trees, has long been prized for its durability as well as its beauty. Such wood (when kiln dried) costs about $3.49 per board foot at the local lumber yard. Lower grades of redwood fetch from $.89 per board foot ($2.19 when kiln dried), for wood that is all ''mirch'' or sapwood, to $1.19 a board foot for ''construction heart'' grade, wood that is mostly heartwood, with some defects. A redwood tree must grow for more than 500 hundred years before it can be milled to produce substantial quantities of prime grade clear redwood.

From an environmental standpoint, the trees of Headwaters Forest represent an irreplaceable resource of another kind. The majestic ancient groves of Headwaters Forest represent one of the three remaining California nesting areas for the endangered seabird, the marbled murrelet, which requires closed canopy, virgin groves of old-growth trees for its nesting grounds. Headwaters is also home to spotted owl (listed as endangered by the State of California and as threatened by the Federal Fish and Wildlife Service), and home to the southern seet salamander (under consideration for listing by the Federal Fish & Wildlife Service as threatened; recommended for state listing as ''threatened'' by California Department of Fish & Game). Up to 10% of California's wild Coho Salmon, (which are under consideration for a Federal listing as threatened by the National Marine Fishery Service) spawn in the rivers that give Headwaters its name. The adjacent residual old growth provides buffer zones needed to keep the ancient groves intact and protect the vulnerable species. The 44,000 acre acquisition area, which ties isolated ancient groves together with each other and with other protected areas, incorporates significant residual old-growth as well as second growth and represents the area's best chance for overall habitat recovery.

The Scope of This Memorandum

This memorandum will summarize law and publicly available evidence supporting a imposition of a constructive trust and disgorgement of Pacific Lumber. It will also summarize the facts and law supporting a petition for a temporary restraining order severely limiting logging during litigation. Most of the facts and conclusions asserted in this memorandum must be known to and beyond contradiction by the FDIC, since the FDIC alleged essentially the same facts in the compliant filed in FDIC v. Milken.

There are many issues that are beyond the scope of this memorandum. It does not reach any issues related to the eventual disposition of Pacific Lumber's assets after disgorgement. While the writers believe legal mechanisms exist for transferring property acquired by the FDIC to other government agencies without specific authorizing legislation, the writers currently assume that the pending acquisition bill will create a willing buyer for many of these assets, i.e., the US Forest Service.

This memo does not reach any potential choice of laws issues; where potentially applicable, the writers will discuss both Texas and California law. It does not reach any specific issues of banking law, thrift regulation, or Federal securities law. Nor does it reach any issues related to the FDIC's responsibilities and obligations to the public to recover funds lost in the S&L bailout or to protect public resources.

This memo assumes that the location of the disposal property gives rise to jurisdiction in a Federal Court in the Northern District of California. The writers have not made any attempt to compare the Ninth Circuit and Fifth Circuit case law on relevant issues or to otherwise evaluate the desirability of one forum over another. However, barring any compelling reason to litigate outside of California, we believe that the public interest would be served best by bringing the action within the state most affected by its outcome.

FACTUAL SUMMARY

The factual basis for our argument can be stated quite simply:

(1) MAXXAM controlled and dominated United Savings Association of Texas (USAT), functioning, in actuality, as its controlling shareholder.

(2) Without providing full disclosure to USAT's disinterested directors, MAXXAM, and MAXXAM's CEO, Charles Hurwitz, used MAXXAM's position of trust and confidence as a controlling shareholder, to enter into a prohibited deal with Michael Milken and the firm of Drexel, Burnham, Lambert.

(3) Under the terms of that deal, or *quid pro quo*, MAXXAM caused USAT to purchase large amounts of Drexel under-written securities in return for Drexel arranging the financing for MAXXAM's takeover of Pacific Lumber.

(4) The *quid pro quo* worked very much to the benefit of MAXXAM and to the detriment of USAT in that MAXXAM acquired a valuable, asset-rich company, while USAT was left with over a million dollars of essentially worthless securities.

(5) The preponderance of these worthless Drexel securities in USAT's portfolio precipitated, or at least contributed in very significant part, to USAT's failure, and dictated the size of the FDIC's ultimate $1.3 + billion contribution to the S&L bailout.

(6) Drexel's role in the financing of the PL acquisition was critical to the takeover's success, because MAXXAM's strategy required cash for a 100% tender offer and MAXXAM could not get financing elsewhere.

A brief history of the MAXXAM Corporation

Although the MAXXAM Incorportated (MAXXAM) is publicly held, its fortunes and its business practices are almost inextricably intertwined with those of its controlling shareholder, President, CEO, and Chairman of the Board, Charles Hurwitz. In 1985, Charles Hurwitz owned 3% of the stock of the MAXXAM directly, and controlled 40.6% through related entities and through the ownership of family members, Hurwitz has served continuously on the MAXXAM Group's board since the MAXXAM Group was created as the successor to Simplicity Pattern Corporation in June of 1984.

MAXXAM Group, Inc. (MAXXAM Group of MGI) was created from Simplicity Pattern Corp (SPC) in June of 1984. MAXXAM Group began its corporate existence as a subsidiary of MCO Holdings (MCOII), (another Hurwitz controlled corporation, which acquired the Simplicity Pattern Corporation in 1982.

MAXXAM Group was formed as the result of a complicated set of interrelated transactions. Simplicity Pattern Corporation (SPC) first spun off its actual pattern operations as a production subsidiary, Simplicity Pattern Inc. (SPI). The parent corporation then sold the production subsidiary to another corporation known as the Triton Group Inc. (TGI) which simultaneously merged with yet another company, the Republic Corporation.

In the course of the the deal, Simplicity Pattern's parent corporation changed its name to MAXXAM Group, Inc. and renamed its real estate subsidiary, Twin Fair, which became MAXXAM Properties Inc (MPI). MPI simultaneously merged with Maxxus, another Hurwitz controlled company, Federated Development Company (FDC).

Throughout much of the period we will be discussing, MAXXAM continued to be a subsidiary of MCOH. In 1985, MCOII owned 37.2% of MAXXAM Group Inc. FDC (which, taken together with Hurwitz and his group, maintained 65.2% voting control of MCOH) owned an additional 4.5% of MAXXAM directly. The remaining MAXXAM stock was largely held by institutional investors.

There was also significant overlap of leadership among MCOH, MAXXAM and FDC. All five of FDIC's trustees and five of MCOH's seven directors (four of whom were were common to both MCOH and FDC sat on MAXXAM's ten member board. Charles Hurwitz, George Kozmetsky, Barry Munitz and Ezra Levin served on all three boards, and occupied positions of real leadership within the three organizations.

On September 24, 1986 a MAXXAM Group/MCOH merger was announced, which was completed in April of 1988, when MCOH emerged as the surviving parent corporation, renamed, however, as MAXXAM Incorporated. Through an exchange of stock in the two companies, MAXXAM Group, Inc. became a wholly owned subsidiary of MAXXAM Inc. In other words, MAXXAM succeeded to all of MCOH's interests and assets and to all the interests of MAXXAM Group, Inc., as well. It is entirely possible that, as is common practice, this merger was actually planned long before it was announced; this possibility should be explored in discovery.

In the years immediately prior to its renaming as MAXXAM, MCOH had served as the primary acquisition vehicle for the various Hurwitz related corporations; once acquired, Simplicity and then MAXXAM Group, joined in performing that function for the Hurwitz financial empire. MAXXAM played a significant role in the arguably coordinated acquisition campaigns and alleged green-mail activities of the various related companies in Hurwitz financial empire.

Charles Hurwitz and MAXXAM's Control of United Savings Association of Texas

During all of the relevant times, MAXXAM's CBO Charles Hurwitz and MAXXAM or MCOH exerted actual control over the affairs of United Savings Association of Texas. That control was exerted through and demonstrated by several mechanisms: 1) ownership and control of a substantial bloc of voting stock in the holding company that was the S&L's sole owner, coupled

with ownership of options to acquire more voting stock and ownership of preferred stock which, in time, would have converted to voting stock had Hurwitz considered conversion desirable, 2) control of the boards of directors of the holding company and the S&L, 3) control of the executive committee of the S&L, 4) control of the S&L investment department and investment committee.

Stock Ownership

United Savings Association of Texas (USAT), a Texas state chartered savings and loan, was a wholly owned subsidiary of the savings and loan holding company, United Financial Group (UFG). According to the complaint in FDIC v. Milken, ''In mid-1983, Hurwitz, through two companies he controlled, Federated Development Co. and MCO Holdings, Inc., acquired approximately 23% of UPG.'' In other words, when MAXXAM Group was created in 1984, its parent company, MCOH, already had a substantial interest in UFG, to which MAXXAM succeeded when MAXXAM Group and MCOH merged. In United Financial Group's 198810K report to the SEC, MAXXAM is described as owning, together with an affiliated entity (Federated Development Co.), 23.3% of UFG's common stock.

Drexel held another major bloc, between 7% and 9.7% of UFG stock. Again from the FDIC v. Milken complaint, ''Drexel and Hurwitz were the largest shareholders of UFG during the entire period . . . together controlling more than 30% of UFG's outstanding stock from 1984 until 1988, when USAT failed.'' Since MAXXAM (through Hurwitz) and Drexel (through Milken) conspired to control the S&L for their own benefit and to the detriment of the USAT and ultimately the FDIC, for our purposes Drexel's stock ownership contributed to MAXXAM's contol as well, and the whole should be attributed to MAXXAM.

In addition to the outright ownership of common stock, MAXXAM's predecessor corporation and affiliates held various options and other convertible instruments that increased their ability to control UFG and USAT. In June, 1984, UFG–USAT issued Series C Convertible Preferred Stock. FDC–MCOH bought 97.5% of the issue. The series C was replaced (prior to its conversion date) by series D in June 1987 which was replaced (prior to its conversion date) by Series E, in June of 1988. The tactic of not actually exercising conversion rights but continuing to maintain those rights, was apparently engaged in at the direction of MAXXAM's Chairman of the Board, Charles Hurwitz, in order to prevent activation of net worth guarantees which would have been required by the Federal Home Loan Bank Board (FHLBB) had the percentage of voting stock attributable to MAXXAM's predecessors come to exceed 25% of the outstanding voting stock. In December 1985, MCOH bought a put-call option for 300,000 shares of UFG–USAT from Drexel, further increasing MAXXAM's predecessor's ability to exercise voting control if the need should arise.

At the end of 1985, Drexel's and MAXXAM's interests in USAT were:

	%Common	Total/ option	Total/ conversion
FDC–MCOH	23.3	26.97	41.97
Drexel	9.67	6.0	6.0
Totals	33.0	33.0	47.97

It is important to note that while the percentage of voting stock controlled by MAXXAM and Drexel (or MAXXAM's predecessors and Drexel) remained below 50%, even taking into account the conversion factor, it was never necessary for MAXXAM to control a majority of voting stock in order to exercise de facto control over the savings and loan. Records of UFG stock ownership for the year 1986 show that 43.02% of UFG's voting stock was held in trust by the brokerage firm of Cede and Co. With 43% in trust, and thus in all probability held by non-voting shareholders, MAXXAM (or its predecessor) and Drexel merely needed to control one share more than half of the remaining 57%, in other words to control slightly more than 28.5% of the holding company's voting stock—a test that they met handily.

Control of the Board of Directors

In 1982 Charles Hurwitz first hired Barry Munitz and placed him on the boards of FDC, UFG, MCOH and Simplicity as Hurwitz' representative. As a director of UFC, Munitz apparently was given the task of ensuring that MAXXAM and its predeccesor corporation retained actual control of the savings and loan without overstepping any statutory or regulatory boundaries that would have made such control indisputable. For Munitz, this meant continuing negotiations with the FHLBB to avoid confirming any agreements that would have situated MAXXAM or any of its affiliates as guarantors of the S&L's net worth. It also meant developing UFG–USATs internal decision making structure and board membership to mask the actual control exercised by MAXXAM and its affiliates.

Following the December 1982 merger of UFG/USAT and First American Financial of Houston (FAF) (which created UFG/USAT in the form it was to have from that date until it was seized by the FSLIC in December of 1988), UFG/USAT's directors consisted of three groups with distinct characteristics.

The first group was made up of nine directors who had served on the board of UFG/USAT before the UFG/FAF merger. This group was leaderless and had not developed strong working relationships since the majority of this group had served less than four months prior to date that MAXXAM's CEO, Charles Hurwitz, joined the board in 1983.

The second group, the ten Hurwitz directors, were associates of Hurwitz who could be said to be under the control of MAXXAM and its affiliates. FHLBB rules required that 50% or more the directors be under a corporation or individual's control before that entity could be said to be a control person by this test. Hurwitz avoided establishing this type of conspicuous control of the board, although he succumbed in late 1987 when the exodus from the board overcame planning. The second group's influence increased as it expanded its membership through the addition of corporate officers to the board, and as the first group suffered attrition in late 1985.

This second group, the Hurwitz directors, formed the leadership group within UFG–USAT, controlling UFG's Executive Committee and USAT's investment department from their inception in 1984. In addition to Hurwitz, who served as President and CFO of UFG–USAT in 1985 (i.e., during the period when MAXXAM was amassing its war chest and implementing plans for the Pacific Lumber takeover), this group included George Kozinetsky and Barry Munitz, both of whom also served on MAXXAM, MCO and FDC boards contemporaneously. Munitz chaired UFG–USAT's Executive Committee from its inception until it was disbanded in 1988. This group also included Gerald R. Williams, who was recruited from First City National Bank, a bank in which MAXXAM had invested and with which MAXXAM's predecessor MCO had an oil purchase agreement. Williams served on the UFG–USAT Board from 1984 through January of 1986, and served the board in various capacities at USAT including Executive VP, CEO and President. [g]

The third group, the PennCorp directors, were those associated with PennCorp, which by virtue of owning a substantial portion of preferred stock, placed four directors on the board.

Control of the Executive Committee

In early 1985, UFG–USAT formed an Executive Committee to determine USATs restructuring and investment strategy.

The original members of the executive committee were Hurwitz, Munitz and Williams, along with two representatives of the pre-merger group, C.E. Bentley (UFG/USAT's Chairman of the Board from 1983 until 1985 and President and CEO in 1984) and James R. Whately. Bentley resigned in November of 1985, around the time of MAXXAM's acquisition of Pacific Lumber and when USAT's purchases of Drexel junk bonds were at or near their highest levels. Williams resigned shortly afterward, in January 1986, possibly to prevent a conspicuous imbalance that would have made Hurwitz and MAXXAM's control apparent.

Control of Investment Decisions

Shortly after UFG–USAT formed the Executive Committee to redirect USAT's investment strategy, Ron Heubsch was hired to be the VP of the Investment Department which served the Executive Committee. Heubsch, who had been employed by or associated with Hurwitz since 1969, worked for FDC during the 1984–1985 Pacific Lumber takeover campaign and was reported to have acted as advisor to MAXXAM's investment managers.

As was noted in testimony before the Dingell Committee, Heubsch also conducted arguably coordinated arbitrage operations for MCOH ($35 million) MAXXAM ($70 million) and UFG–USAT ($150–200 million); these arbitrage activities began in 1986 or earlier and continued through 1987 or later. During this period Heubsch also served as Vice President for USAT's investment department.

Under the direction of the Executive Committee and Heubsch, the redirection of USAT's investment strategy was ultimately quite drastic, converting USAT from a traditional savings and loan, with assets consisting primarily of home mortgages, to an investment bank, albeit a highly distorted one, with assets consisting primarily of ultra-high risk corporate securities.

Other Officers and Key Employees

Other key employees of USAT had connections to MAXXAM related companies and to other Hurwitz affiliated entities as well. The First City National Bank's connection to UFG–USAT included the recruitment of other USAT officers such as Michael R. Crow and Bruce F. Williams, who served as Vice President and treasurer, and perhaps James R. Walker, who was recruited from a large Texas bank's holding company and served USAT in marketing and branch administration.

MAXXAM's Acquisition of Pacific Lumber

After MAXXAM sold the Simplicity Pattern operating division, MAXXAM functioned essentially as an investment company; its assets consisted primarily of securities and real estate. Had this situation continued, MAXXAM, as an investment company, would have been subject to stringent reporting requirements. It was, therefore, very much to MAXXAM's advantage to acquire a manufacturing or resource extraction subsidiary. During 1984 Hurwitz began searching for an operating company that MAXXAM could acquire.

According to testimony and documents submitted by Hurwitz in the course of 1988 hearings before Dingell's Oversight and Investigation Subcommittee of the Committee on Energy and Commerce, Bob Quirk of Drexel, Burnham, Lambert, first brought Pacific Lumber to MAXXAM's attention in or

around December of 1984. Quirk, at the request of MAXXAM's Robert Rosen, had prepared a list of forest products companies that were attractive as potential acquisition targets. MAXXAM and Drexel recognized hidden values in Pacific Lumber's 190,000 acres of real property in Humboldt County; the value of the redwood forests, which had not been inventoried by timber crews in more than 30 years, was not accurately reflected in the market price of PL stock. Pacific Lumber's selective harvesting practices had left the company with significant reserves of old growth timber, including significant reserves of old-growth redwood, which distinguished it from other timber companies. Once owned by a liquidator, these trees could be turned into cash, providing impressive profits for a new owner, instead of the more modest income stream generated by the old owners' more conservative harvesting strategies.

Clearly, the focus of the takeover was the land and trees, not the other subsidiaries or assets of PL. All of PL's subsidiaries and assets, including offices, ranch lands, the cutting and welding division and the over-funded pension fund, would be sold for or converted to cash shortly after the merger, to pay down the bank loan portion of the $850 million debt resulting from the takeover.

Only a 100% tender offer would preserve the hidden values in PL for the benefit of MAXXAM once the takeover was completed. For MAXXAM's purposes, it was critical that the value of the forest assets not be revealed to the PL shareholders or telegraphed to the market, since, once recognized, those values would belong to whichever stockholders held PL shares at that time.

The importance of MAXXAM's secretly accumulating the stock and capital required to make a credible 100% tender offer in the planned hostile takeover (in other words, to prepare an offer that PL truly could not refuse) is underscored by the lengths to which Hurwitz and MAXXAM went to keep regulatory agencies and the public in the dark about MAXXAM's interest in PL and accumulation of PL stock. MAXXAM began acquiring PL stock in June of 1985, stopping on August 5, 1985 after accumulation just short of the $15,000,000 worth of shares that would have triggered the notice provisions of the Hart, Scott, Rodino Act (HSR) which requires public notification of stock purchases valued at more than that amount.

On the same day, Ezra Levin's law firm of Kramer, Levin, acting on behalf of MAXXAM, contacted the law firm of Morgan, Lewis, Bockius, who represented the brokerage firm of Jefferies & Co., to discuss a put/call arrangement, which Hurwitz testified his lawyers had indicated was permissible under HSR without making the arrangement or any prior purchases public, even given the size of Hurwitz's prior holdings. While Hurwitz denied that MAXXAM and Jefferies entered into any kind of formal put/call agreement, option arrangement or other contract, the Dingell committee hearings reveal that Jefferies began buying PL stock on August 6 continuing to buy until September 27, 1985 when Jefferies sold 500,000 shares to Hurwitz at more than $4/share less than its value at close of market. Arguably this reflects the same pattern of prohibited stock ''parking'' that led to the subsequent indictment of the Jefferies firm's principal Boyd Jefferies in connection with stock parking for Boesky and others.

MAXXAM's direct stock purchases stopped just short of acquiring a 5% interest in Pacific Lumber. Had MAXXAM acquired a 5% interest or greater, several consequences would have flowed. First of all, securities laws require the filing of a form 13D with the Securities Exchange Commission (SEC) when an individual, corporation or individuals and corporations acting as a group hold stock exceeding 5% of a single corporation's outstanding shares. Second, the Articles of Incorporation of the Pacific Lumber Company had what is known as a ''super majority'' clause. If a raider acquired 5% or more of PL's share's without permission of the PL board, then the raider would need an 80% approval vote of the stockholders if the raider wanted to force a merger. Otherwise, only a simple majority was needed.

On September 30, 1985, MAXXAM revealed its intention to buy 100% of PL's shares and force a merger. At that time, taking into account the PL stock acquired from Jefferies along with the 2.2% that MAXXAM acquired before August 6, MAXXAM publicly claimed ownership of only 994,900 PL shares or 4.58% of PL's outstanding stock, 90,837 shares short of 5%. On October 2, 1985, MAXXAM filed a 14D–1 with a Tender Offer price of $38.50 and filed a disclosure pursuant to HSR.

On October 22, 1985, MAXXAM received permission of the PL Board to buy more than 5% of PL's stock. At that time, the PL Board believed that MAXXAM then held less than 5% of the timber company's outstanding shares, and required MAXXAM to secure approval of only 50% of the shareholders to effect the sought after merger. However, at the time MAXXAM was authorized to effect the merger on a simply majority, Ivan Boesky owned a major block of PL stock under circumstances that suggest that he was holding that stock for MAXXAM's benefit, once again potentially demonstrating the lengths to which MAXXAM would go to secretly accumulate stock and capital for a Pacific Lumber takeover.

Boesky began buying PL stock on September 27, 1985. At the time of MAXXAM's Oct. 2 tender offer, Ivan Boesky had purchased a total of 143,400 shares of Pacific Lumber. Public documents show that on October 22, 1985, Boesky was the largest holder of PL stock, with over 5%. Next was MAXXAM, with slightly less than 1 million shares and slightly less than 5%. Boesky's purchases of PL stock became widely known. At critical moments, Boesky's purchases on the open market may have made any alternative to MAXXAM seem unrealistic and perhaps even less desirable.

A suit on behalf of PL's pre-merger shareholders (in which a $50,000,000 settlement is pending), alleges that Boesky purchased that stock at Milken's request for the purposes of secretly buttressing MAXXAM's position prior to MAXXAM's making its takeover plan public. These allegations reflect material in the SEC and US indictments of Milken and Drexel (based in considerable part on information given them by Boesky) suggesting that Boesky was used by Milken and Hurwitz to help MAXXAM secretly gather control of a larger percentage of PL stock and to help keep potential ''white knights'' out of the PL takeover. The government's case against Milken tells us that, at a minimum, Boesky bought PL shares at Milken's request once the takeover was announced, and that when Boesky sold those shares he gave about half of the profits to Drexel.

How did MAXXAM exploit its position as a controlling shareholder in USAT to takeover Pacific Lumber?

While MAXXAM was able to secure some conventional financing for its takeover effort, MAXXAM could not have raised the $900 million necessary for the 100% tender offer without Drexel's help. Conventional bank financing for the amount required was out of the question, since MAXXAM, even when considered together with Hurwitz and his related companies, had only about $100 million in assets. MAXXAM's history as an organization included a number of poor performances which would have prevented its qualifying for any of the traditional methods of raising large amounts of capital, and, under the circumstances, even the loose regulations of the 80's precluded banks from making commercial loans backed by the kind of collateral MAXXAM could muster. More important, MAXXAM was barred from taking money from its captive S&L, United Savings Association of Texas, even though USAT's assets measured at about $5 billion.

This kind of financing was, however, Milken's specialty; Milken had built a large network of S&Ls, insurance companies, pension funds and corporations dependent on capital infusions provided by Drexel issued junk bonds sold through the market hat Milken and Drexel controlled. This ''junk bond network'' was the source of billions of dollars for Milken and his friends. The network worked both ways, though. To get huge sums of money for takeovers, the raider had to give something back. In MAXXAM's case there was a large pool of capital that MAXXAM controlled but could not tap directly, i.e. the assets of United Savings Association of Texas.

The complaint in FDIC vs Milken alleged: ''Between 1985 and 1988 the Milken group raised about $1.5 billion of financing for Hurwitz takeover ventures. In return, Hurwitz caused USAT to purchase huge amounts of Drexel-underwritten junk bonds. . . .

''The Milken Group placed much of the debt Drexel underwrote for USAT with its network. For example, about $272 million face amount of the $615 million of senior subordinate extendible notes (the ''zero coupon notes'' underwritten by Drexel to finance Hurwitz's takeover of the Pacific Lumber Company (''Pacific Lumber'') in 1986 was purchased by First Executive and various of its subsidiaries, Columbia and GNOC Corporation (''GNOC''), a subsidiary of Golden Nugget, Inc. (''Golden Nugget''). Similarly, the Milken Group placed a significant amount of the senior subordinated extendible notes issued in connection with the Pacific Lumber takeover with S&Ls, including AMCOR, a wholly-owned subsidiary of Lincoln Federal Savings & Loan, Hupter Savings Associations and Pima.''

''*In exchange for these entities purchase of the Pacific Lumber financing, the Milken Group and Hurwitz arranged for USAT to purchase other Drexel-underwritten junk bonds* (emphasis added).''

While the Rose Foundation can't possibly know what additional evidence the FDIC has assembled concerning the MAXXAM/Drexel *quid pro quo*, the evidence in the public record is sufficient to convince the Foundation of the truth of the allegation. For the period beginning in spring of 1985, when MAXXAM first began amassing the capital for its Pacific Lumber takeover, and continuing until December of 1988 when MAXXAM lost control of USAT, there is a clearly observable correspondence between the size of USAT's purchases of Drexel high-risk securities and the size of bond issues underwritten by Drexel for MAXXAM and related entities, which were then placed with others in the Drexel network. (Please see accompanying chart).

These reciprocal transactions can be summarized as follows:

In May of 1985, Drexel underwrote and placed a $150 million bond issue for MAXXAM, of 1985 Drexel underwrote and placed a $35 million bond issue for MCOH. The funds generated by these bond issues allowed MAXXAM and MCOH to purchase the shares of PL stock that Jefferies had accumulated. Correspondingly, on July 1, 1985, USAT recorded purchases of Drexel issued high risk bonds valued at $280 million.

In November of 1985, Drexel underwrote a $450 million bond offering for MAXXAM the proceeds of which were used to acquire more Pacific Lumber stock to complete the capital build-up necessary for MAXXAM's tender offer. Then, in June of 1986, Drexel floated another $430 million in ''Bridge Notes'' for MAXXAM, which allowed MAXXAM to replace the earlier $450 million issuance. On July 1 of 1986, USAT recorded purchases of $688 million worth of Drexel junk bonds, representing the peak of USAT's Drexel bond purchases. Also in July, Drexel underwrote a $575 million bond issue for Pacific Lumber, these ''Reset Notes'' were used to pay off the Bridge Notes; the rest were used for general corporate purposes, which may have included reducing the bank debt incurred in the takeover.

After 1986, USAT's Drexel securities purchase began to taper off, with only about $321 million worth of such purchases recorded in July of 1987. These purchases probably represent USAT's last purchases in connection with the Pacific Lumber deal.

In 1986, junk bonds represented 97.4% of all corporate securities held by USAT. A very high percentage of these were Drexel issues, which had a higher default rate than that of other junk underwriters. USAT's portfolio was described by Louis Ranieri, who took control of the seized S&L in January of 1989, as ''80% bologna.'' Unquestionably, USAT's junk portfolio played a major role in determining the size of the FDIC's $1.3 billion+ financial contribution to the Ranieri group bailout plan for USAT.

Renowned economists George Akerlof and Paul Romer have developed an economic model which demonstrates, in general, the motivation for Milken and Drexel to conspire with someone such as Hurwitz in orchestrating a plan of the type described here. Among other things, Akerlof and Romer demonstrate convincingly that it was possible for Milken and Drexel to use institutions like USAT to ensure full subscription of particularly risky junk bond issues, deferring the ultimate failure of those issues, in order to maintain their short term sales and profits. [George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy For Profit,* NBER Reprint No. 1869 (1993)]. This model provides expert support, as well as an academic economic analysis, of how it was possible for both Drexel and MAXXAM to make a huge amount of money by looting the federal treasury. The model is also interesting because it suggests that Hurwitz may well have planned and expected all along that USG/USAT would fail and the FDIC be forced to foot the bill.

There are a number of additional sources of information concerning the alleged *quid pro quo* and its impact on USAT's financial condition, which, while not part of the public record, are available to the FDIC, and which, to our knowledge, have been ignored up to this time. These include potential testimony by the former chief bank examiner for the State of Texas who supervised the review of USAT's records, as well as testimony and evidence developed in connection with a lawsuit brought by former shareholders of Pacific Lumber arising out of the alleged improprieties in MAXXAM's takeover.

LEGAL ANALYSIS

Questions Presented

1. Whether, under California and Texas law, MAXXAM, INC. (''MAXXAM'') and Charles Hurwitz (''Hurwitz'') as controlling persons of United Savings Association of Texas (''USAT''), are subject to liability to the FDIC for breach of fiduciary duty, arising out of ''junk bond'' financing of the acquisition of Pacific Lumber which conferred substantial benefits on MAXXAM and Hurwitz but rendered USAT insolvent, to the detriment of the FDIC.

2. Whether, as a remedy under California and Texas law, the Courts will impress a constructive trust over Pacific Lumber for the benefit of the FDIC.

Conclusions

1. Under both California and Texas law, MAXXAM and Hurwitz, as controlling persons of USAT, had a fiduciary duty to USAT and its depositors MAXXAM and Hurwitz breached their fiduciary duty to USAT and its depositors by engaging in financing transactions for the acquisition of Pacific Lumber which rendered USAT insolvent, but benefited MAXXAM and Hurwitz. MAXXAM and Hurwitz are liable to the FDIC, which stands in the shoes of USAT and its depositors, and was injured by the wrongful conduct of MAXXAM and Hurwitz.

2. The Courts should impress a constructive trust over Pacific Lumber for the benefit of the FDIC, because MAXXAM and Hurwitz acquired Pacific Lumber with funds misappropriated from USAT, and MAXXAM and Hurwitz were unjustly enriched.

Discussion

1. Controlling shareholders have a fiduciary duty to the corporation and its creditors.

A controlling shareholder or group of shareholders, even if they hold no corporate office, and do not sit on the corporation's Board of Directors, have a fiduciary duty to the corporation and its creditors, not to use unfairly their control of the corporation for their personal benefit to the detriment of the corporation and its creditors. The leading case in California on controlling shareholder liability is Cal. 3d 93, 81 Cal.Rptr. 592 (1969). In Ahmanson, the Supreme Court, in an opinion by Chief Justice Traynor, confirmed existing California law imposing a fiduciary duty on majority shareholders. The Court quoted with approval from the earlier Court of Appeals opinion in Remillard Brick Co. v. Remillard-Dondini, 109 Cal.App. 3d 405, 241 P.2d 66 (1952), which in turn quoted from the U.S. Supreme Court opinion in Pepper v. Litton, 308 U.S. 295., 60 S. Ct. 238;

''* * * 'A director is a fiduciary * * * So is a dominant or controlling stockholder or group of stockholders * * * He who is in such a fiduciary position * * * cannot use his power for personal advantage and to the detriment of stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements * * * Where there is a violation of these principles, equity will undo the wrong * * *' This is the law of California'' 1 Cal. 3d at 108, 109, 81 Cal.Rptr. at 599,600.

In Ahmanson, the Defendants controlled 85% of a closely held savings and loan association, of which Plaintiff was minority shareholder. In order to create a public market for their own stock, the Defendants formed a public company, and contributed their controlling interest in the savings and loan to the public company, thereby freezing out the minority. Plaintiff initiated a class action lawsuit, which was dismissed by the Trial Court based on then-existing law which required a derivative action, and prohibited a direct action, whenever a minority shareholder's grievance was common to all minority shareholders. In reversing the Trial Court, the Supreme Court established a new, direct right of action against majority shareholders, and also took the opportunity to address other issues of the case, including liberalizing the class action certification rules, and a full discussion of the fiduciary duties of majority shareholders.

In fact, Ahmanson was so celebrated for establishing direct actions by minority shareholders, along with liberalizing class action rules, that it is a common, but mistaken belief that California affords better rights and remedies to minority shareholders than to creditors. Actually, the fiduciary duty of controlling shareholders to creditors was well established at the time of Ahmanson, and creditors were never hobbled with a need for a derivative action, but had a direct right of action. The language quoted above from the Ahmanson decision, quoting Remillard, quoting Pepper, shows that all three courts specifically contemplated creditors. See also, Commons v. Schine, 35 Cal.App. 3d 141, 110 Cal.Rptr. 606 (1973) discussed below.

The celebrated procedural innovations of Ahmanson mask the fact that the Ahmanson court also expanded the substantive fiduciary obligations of controlling shareholders. Prior law enforced fiduciary obligations vis-a-vis corporate assets and corporate opportunities, but there was laissez faire attitude with respect to a shareholder dealing strictly in his stock. In the case of a sale of controlling interest for a substantial premium above the per-share market value of minority shares, the excess was considered to be payment for control as such, which was deemed to be an asset of the operation rather than the shareholder. Thus, a fiduciary duty existed with respect to such respect to such control premiums. Otherwise, a majority shareholder's dealings with his shares did not entail fiduciary obligations to minority shareholders.

The Ahmanson Defendants did not receive any control premium, and argued that the lack of public market for the minority savings and loan shares was unaffected by Defendants' conduct. The Court held, however, that the majority shareholders have a fiduciary obligation not to benefit themselves unfairly by virtue of their controlling position, and to share those benefits with the corporation, its minority shareholders, and its creditors.

Texas law imposes a virtually identical obligation upon a controlling shareholder a duty to deal fairly with corporation, its other shareholders and its creditors. This duty is broader than the trust fund doctrine. This broad duty results from the controlling shareholder's inside knowledge of the corporation's affairs and the opportunity such a controlling insider has to manipulate the corporation's affairs for his personal advantage. Tigrett v. Pointer, 5 80 S.W. 2d 3 (Tex.Civ.App.—1978. writ ref'd n.r.e.).

Hurwitz and other common members to the MAXXAM and UFG boards stood in an especially demanding position. Transactions between board of directors of corporations having common members will be guarded as jealously by the law as are personal dealings between director and his corporation. In other words, each director and officer of UPG and MAXXAM must put the interests of the corporation whose hat they wore at the time, ahead of the other corporation, to which they also owned a duty of loyalty. Further, the burden of proving the fairness of the transactions is on the interested directors. Where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their *entire* fairness and where sale is involved, full adequacy of consideration. Crook v. Williams Drug Co., 558 SW 2d 500 (Tex. Civ. App.—1977, writ ref'd n.r.e.). For example, enforcement of contracts between corporations having common membership on their boards of directors is not favored. Reynold-Southwestern Corp. v. Dresser Industries, Inc. 438 SW 2d 135 (Tex. Civ. App.—1969, no writ). [See also Gaither v. Moody, 528 S.W. 2d 875 (Tex. Civ. App. 1975. writ ref'd n.r.e.) holding that at the time of the merger of one corporation with another, a director and major shareholder of a corporation stood in a fiduciary

relationship to *both* corporations.] To the extent the common directors and officers had divided loyalties, and failed to disclose material information relating to the purchase of junk securities, such officers and directors violated their duty to the purchasing corporation (UFG/USAT). The fiduciary obligations of the managers, directors and officers of USAT should be viewed as running toward the shareholders of UFT and the depositors. See, In Re Weslec, 434 F. 2d 195 (5th Cir. 1970).

As a controlling shareholder of UFG/USAT, Hurwitz had a duty to deal fairly with UFG/USAT, its depositors and its other shareholders. Hurwitz' failure, or more likely, intentional refusal, to disclose the terms of the agreement with Milken and Drexel violated this duty. It is a classic example of conflict of interest and misuse of inside information: Hurwitz used his insider's knowledge of UFG's affairs to manipulate UFG/USAT into purchasing Drexel junk bonds to the benefit of Hurwitz and MAXXAM.

It is axiomatic that Hurwitz, as an officer, director, and controlling owner owed a typical fiduciary duty to UFG and USAT. Fagan v. La Gloria Oil and Gas Co., 494 S.W.2d 624 (Tex. Civ. App.—1973, no writ); Dowdle v. Tex. Am. Oil Corp., 503 S.W.2d 647 (Tex. Civ. App.—1973, no writ). this duty requires the officer and director to place the interests of the corporation ahead of their own. The power of Hurwitz' office was required to be exercised solely for the benefit of the corporation, i.e. UFG/USAT, *not* MAXXAM, MCO Holdings, or Hurwitz. Canion Texas Cycle Supply, Inc., 537 S.W. 2d 510 (Tex. Civ. App. 1976, no writ). (Directors of corporation owed to it a duty of loyalty and were bound to in any business which might result in personal benefit to a director or officer, or which might result in a benefit to any other corporation (e.g., MAXXAM) in which they had a personal interest the officers and directors must demonstrate the highest good faith). See Reynolds Southwestern Corp., supra.

Texas not only recognizes this fiduciary duty, but charges the insider to make certain that the economic rewards flowing from corporate opportunities inure to *all* owners of the enterprise. That obligation is even stronger in the case of a bank, both because of the fiduciary nature of banking *and* because of the duty to depositors. First Nat. Bank of La Marque v. Smith, 436 F. Supp. 824 (d. Tex. 1977), aff'd in part, vacated in part, 610 F.2d 1258 (5th Cir.). A corporate fiduciary may not derive a personal benefit in dealing with corporation's fund or its property. Texas Soc. v. Fort Bend Chapter, 590 S.W.2d 156 (Tex. Civ. App.—1979, writ ref'd n.r.e.).

But despite his duties to UFG/USAT (which, it appears, he ignored), Hurwitz, acting on behalf of MAXXAM, was able to leverage UFG/USAT assets into financing MAXXAM's takeover of Pacific Lumber by means of an all cash tender offer. Absent Drexel's junk bond financing of the tender offer, MAXXAM did not have the money to make such an offer. Absent Hurwitz' commitment agreement to cause UFG/USAT to purchase billions of dollars of Drexel junk bonds, Drexel would not have financed the tender offer. Absent UFG/USAT's purchase of billions of dollars of Drexel junk bonds, there could not have been a Pacific Lumber tender offer.

Had there been full disclosure of all material facts surrounding Hurwitz's involvement with Milken and Drexel to the disinterested UFG/USAT directors, including disclosure of the agreement to purchase junk securities in exchange for later financing, would UFG/USAT have purchased billions of Drexel junk? It is highly uhlikely that the disinterested directors, cognizant of their own obligations to UFG/USAT, would have approved the transaction under those circumstances.

The purchases of billions of Drexel junk securities had a direct, and dire, impact on the USAT's financial health. While the precise extent of that impact can only be determined by testimony of those who conducted the critical reviews of the saving's and loan's portfolio and records, it is clear from Akerlof & Romer's review of the literature on the failure rates of Drexel securities, that in the absence of those investments the bailout of USAT been substantially smaller, if it were even necessary at all.

Hurwitz and MAXXAM did not make certain the economic rewards (such as they were) resulting from the prohibited transaction with Milken and Drexel flowed to all owners of UFG and its subsidiary, USAT. To the contrary, Hurwitz engineered the transactions to ensure the benefits flowed to MAXXAM, not UFG, USAT and their depositors and shareholders. To the extent that UFG and USAT's depositors and shareholders took the risk of the sub silentio deal with Drexel, those depositors and shareholders should also have received the rewards.

By causing USAT to invest in the poor quality Drexel-underwritten securities, which destroyed USAT and damaged the FDIC to the tune of $1.3 billion, MAXXAM and Hurwitz breached their fiduciary duty to USAT and its depositors.

2. It is immaterial whether the controlling interest is directly owned, or is indirectly held through affiliated persons or entities.

In Commons v. Schine, 35 Cal. App. 3d 141, 110 Cal.Rptr, 606 (1973), the Defendant controlled a corporation, which in turn controlled a second corporation, which in turn was the general partner of a real estate limited partnership. When the limited partnership got into financial difficulty, the Defendant caused it to liquidate substantial assets and to pay in full a debt to Defendant, which rendered the partnership insolvent, unable to pay its other creditors. Plaintiff, the Bankruptcy Trustee acting for the other creditors, brought the action in state court to recover the payment from Defendant on a theory of breach of fiduciary duty. Notwithstanding that the debt was legitimate, that it was due and payable, and that California law expressly authorizes preferential payments (Civil Code §3432), the Court held the Defendant liable for the entire amount of the payment on a theory of unjust enrichment. The Court was not deterred at all by the Defendant's indirect ownership, but grounded its decision on the fact of control. The Court stated:

''One who dominates and controls an insolvent corporation may not . . . use his power to secure for himself an advantage over other creditors of the corporation. [Citing Pepper v. Litton, supra, and other cases.] The corporate controller-dominator is treated in the same manner as director . . . and thus occupies a fiduciary relationship to its creditors. [Citations] As a guilty fiduciary, he is liable in quasi contract to the extent that he has unjustly enriched himself of his breach [citations].'' 35 Cal.App. 3d at 144, 110 Cal. Rptr. at 608

The fact of domination and control of USAT by Hurwitz and MAXXAM would appear to be provable, and has been already alleged by the FDIC in action referred to in the statement of facts. The fiduciary duty of Hurwitz and MAXXAM to USAT and its creditors would not be blunted by the indirect nature of their control through affiliates and subsidiaries.

3. Both Texas and California Courts have repeatedly impressed constructive trusts over the ill-gotten assets acquired by a fiduciary in breach of his fiduciary duties.

A typical statment of the rule occurs in Mazzera v. Wolf, 30 Cal. 2d 531, 183 P.2d 649 (1947): ''A constructive trust may be imposed when a party acquires properties to which is not justly entitled, by actual fraud, mistake or violation of a fiduciary or confidential relationship.''

The Ninth Circuit Court of Appeals has held that the essence of the constructive trust theory is to prevent unjust enrichment and to prevent a person from taking advantage of his own wrongdoing, and that a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled. United States v. Pegg, 782 F.2d 1498 (1986, 9th Cir).

Imposition of a constructive trust is a typical remedy for breach of fiduciary duty in Texas as well, and has often been applied in the context of breaches of duty by corporate officers and directors. Therefore, assuming, arguendo, that Hurwitz, acting on behalf of MAXXAM, breached both his and MAXXAM's fudiciary duties by self-dealing and failing to disclose all material information to the officers, directors, and shareholders of UFG, a constructive trust can and should be imposed upon their assets concerned, including, but not limited to, the stock of Pacific Lumber.

The equitable remedy of imposition of constructive trust may be awarded for breach of the higher standards of conduct demanded in a fiduciary relationship. Chien v. Chen, 759 S.W.2d 484 (Tex.App.—Austin 1988); Republic of Haiti v. Crown Charters, 667 F.Supp. 839 (imposition of constructive trust is appropriate remedy for breach of fiduciary duty). For example, a constructive trust was imposed on alleged ill gotten profits realized by ERISA fiduciary as a result of fiduciary's alleged breach of duty of loyalty, even though plan participants and beneficiaries had already received actuarily vested plan benefits. Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1 Cir. 1988).

A fiduciary is liable to turn over to the principal any money or property received as a result of the breach of his duty of trust. US v. Goodrich, 687 F.Supp. 567 (MD Fla. 1988) affirmed 871 F.2d 1011 (11th Cir.). Constructive trusts are frequently imposed where the breach of fiduciary duty is committed by a corporate fiduciary, such as a director. Bates v. Cekada, 130 FRD 52 (ED Va. 1990). A corporate fiduciary will not be allowed to retain proceeds arising from a violation of his fiduciary duty. Poe v. Hutchins, 737 SW 2d 574 (Tex.App.—Dallas 1967, writ ref'd n.r.e.).

The general rule of corporate opportunity demands that if an officer or director in violation of his duty acquires gain or advantage for himself, interest so acquired is charged with trust for the benefit of the corporation, In Re American Motor Club, 109 BR 595 (Bankruptcy ED NY 1990). The officers of a closely held corporation, to which the corporation systematically diverted its assets without documents of title or other formalities, failed to demonstrate good faith in their dealings with corporation. The result under Tennessee law was to hold any proceeds from sale of transferred assets in constructive trust for corporation and its creditors. In Re B&L Laboratories, 62 BR 494 (Bankruptcy MD Tenn 1986). Delaware law is similar.

If a corporate officer of director violates his duty to the corporation and acquires gain or advantage for himself, the law charges the interest so acquired with a trust of the benefit of the corporation while denying to the betrayer all benefit and profit. Phoenix Airlines Services v. Metro Airlines, 390 SE 2d 919, 194 (Ga.App. 120, rev'd 397 SE2d 699, 260 Ga 384, on remand 403 SE2d 832, 199 Ga.App. 92 (1989).

MAXXAM and Hurwitz diverted USAT's assets into the Milken system, and benefited from their wrongful conduct by obtaining 100% financing for the takeover of Pacific Lumber. MAXXAM and Hurwitz were unjustly enriched by their wrongful conduct. There is substantial authority, in both California and Texas for imposing a constructive trust over Pacific Lumber for the benefit of the FDIC, as successor to USAT.

4. Given the propriety of imposing a constructive trust over Pacific Lumber for the benefit of the FDIC, injunctive relief is appropriate to protect the res during litigation.

When the FDIC succeeds in litigating its claims against MAXXAM and Hurwitz for breach of fiduciary duty, it will acquire, through constructive trust, equitable rights over Pacific Lumber's assets. In addition to recovering millions of dollars worth of properties for the American taxpayers, it will acquire the Headwaters Forest with its very unique environmental values and issues.

As mentioned above, substantial tracts of old growth are being cut down right now. While cutting was halted over the summer, during the nesting season of the endangered marbled murrelet, that nesting season ended September 15 and Pacific Lumber has resumed cutting at a drastic rate. By winter, many very large and very old trees will be gone and a good deal of old growth habitat and/or buffer will be destroyed.

Where, as here, such dire, irreversible environmental consequences are at issue, especially consequences that impact an endangered species, emergency injunctive relief is particularly appropriate.

Generally, under Federal law, as articulated in the 9th Circuit, injunctive relief should be granted if the moving party can meet one of two tests:

First if:

(1) The moving party will suffer irreperable injury if the injunctive relief is not granted;

(2) The moving party will probably prevail on the merits;

(3) In balancing the equitics, the non-moving party will not be harmed more than the moving party is helped by the injunction; and

(4) Granting the injunction is in the public interest.

Landi v. Phelps, 740 F.2d 710, 712 (9th Cir. 1984), citing William Inglis & Sons Baking Co v. ITT Continental Baking Co., 526 F2d 86, 87 (9th Cir. 1975); or, second, by demonstrating: ''either a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions (on the merits) are raised and the balance of hardships tips sharply in his favor;'' (emphasis in the original)

The Ninth Circuit has stated that the tests are not separate, but ''represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.'' Oakland Tribune v. Chronic Publishing, 762 F. 2d 1374, 1376 (9th Circ. 1985). Under this formulation, the Supreme Court requires that the public interest be considered where the public may be affected. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312; 102 S. Cit. 1798, 1803 (1982); American Motorcyclist v. Watt, 714 F.2d 962, 967 (9th Cir. 1983).

Environmental impacts, and especially impacts involving an endangered species are considered especially important and carry a presumption of irreparability. Save the Yaak Comm. v. Black, 840 F. 2d. 962, 967 (9th Cir. 1988) (presumption of irreparable harm in environmental action alleging NEPA violation); Sierra Club v. Marsh, 816 F. 2d. 1376, 1382–84 (9th Cir. 1987) (presumption of irreparable harm in endangered species action). Indeed, the weight given environmental consequences is so significant and the public interest in environmental protection so strong that courts have held that plaintiffs need only establish either a ''*fair* chance of success on the merits'' or ''the raising of questions serious enough to require litigation.'' Marbled Murrelet v. Babbitt, Case No. C 93 1400–FDMS (unpublished decision) (N.D. CA 1994) p. 6–7 (emphasis in the original). (Text of decision follows under separate cover.)

Applying this standard, let us review the facts we have outlined above. Based solely on information in the public record, it is clear that there are questions raised which are serious enough to require litigation. These questions, including the allegation of a prohibited quid pro quo in which Milken and Drexel conspired to exploit the purchasing ability of USAT to prop up Drexel issues, in return for Drexel securing financing for MAXXAM's acquisition of Pacific Lumber, have been raised in FDIC v. Milken, and related issues were raised in both SEC v. Milken and US v. Milken.

While those cases settled before the strength of the evidence supporting these allegations could be evaluated in court, there is sufficient evidence in the public record to demonstrate that the FDIC has, a the very least, a ''*fair* chance'' of proving that Hurwitz, acting on behalf of MAXXAM, breached that company's fiduciary duties as a controlling shareholder of UFG/USAT, causing MAXXAM to acquire Pacific Lumber as a direct result of those breaches, and that, therefore, imposition of a constructive trust on the proceeds of that transaction is appropriate and that, therefore, ultimately a petition for the disgorgement of Pacific Lumber has, again at the very least a ''*fair* chance of success.'' This evidence includes records of USAT's purchases of Drexel junk bonds equivalent in value to contemporaneous Drexel issues of MAXXAM debt instruments used to finance MAXXAM's Pacific Lumber takeover; it also included Akerlof and Romer's expert analysis of the economic factors that permitted institutions such as USAT to be used (and demonstrate the likelihood that they were used) by Milken to ensure that risky Drexel issues were fully subscribed.

We are also convinced that the FDIC has access to evidence that further documents the alleged breaches of fiduciary duty and their critical role in the PL acquisition, which, when presented to the court will make the probability of the FDIC's ultimate success in this matter even more apparent. Among this evidence is evidence assembled in connection with FDIC v. Milken, SEC v. Milken and US v. Milken. We are also convinced that by exercising its powers of discovery and powers of subpoena, the FDIC can, with diligent effort further develop the evidence required to make success in the matter close to certain.

CONCLUSION

The Rose Foundation believes it has established that a very strong case exists for the claim that the FDIC has equitable rights to the assets of Pacific Lumber. If immediate action is not taken to protect these rights, the taxpayers will lose a potential recovery of some of the 1.3 billion dollar expenditure required to bail out UPG/USAT. Additionally, the FDIC will allow the loss of the last unprotected area of old growth redwood forest in the world, an old growth forest that, as the Rose Foundation has pointed out, is the rightful property of the American people.

The Rose Foundation and its counsel have access only to publicly available information on the conduct of USAT's affairs, and limited resources with which to acquire and analyze that information. As we understand it, the FDIC, on the other hand, has powers of discovery and powers of subpoena, and has access to the resources of one of the nation's largest and best respected law firms, with in-house multi-state legal research facilities. We are convinced that if we can make a good case for the FDIC's, and the U.S. taxpayers', equitable rights in these extraordinary properties, the FDIC can make an even better case. We are interested in discussing how we can work cooperatively to make sure that the best possible case is made, and made quickly, for recovery of these important assets.

There are, as noted above, a number of sources of information concerning MAXXAM's conduct as a controlling shareholder of UPG/USAT, the alleged MAXXAM/Drexel quid pro quo, and its impact on USAT's financial condition, which we believe are available to the FDIC, which, to our knowledge, have been ignored up to this time. While the statute of limitations had been tolled by agreement in this matter, time still tends to erode evidence. Memories are fading; witnesses may become unavailable; records are being lost. We believe that continued unexplained failure to pursue these potential sources of evidence would indicate a true unwillingness on the part of the FDIC to seriously pursue this matter.

First, if the FDIC is to make a case for any claims arising out of USAT's failure, it seems appropriate to immediately subpoena Mr. Art Leiser, the retired chief banking examiner for the Texas State Banking Commission who reviewed and supervised the review of USAT's records during the period from 1982 to 1988. Mr. Leiser is now more than seventy years old, so time is truly of the essence. It also seems appropriate to subpoena all documents and records controlled by Mr. Leiser or the Texas State Banking Commission records that relate to the conduct of USAT's investments and other business during that time, both so that Mr. Leiser can refresh his recollection and so that Mr. Leiser can testify concerning the significance of those documents and records. Because of confidentiality constraints, Mr. Leiser's testimony requires a letter of authorization from Mr. James Pledger, who is the current Texas Savings and Loan Commissioner. Such a letter would almost certainly be issued upon receipt of a subpoena. It is our understanding that despite repeated encouragement to do so, the FDIC has failed to contact Mr. Leiser.

Second, it would seem that the FDIC should immediately subpoena the deposition transcripts and files of Mr. Bill Bertain, an attorney in Eureka, California, who testified before the Dingell Committee on the Pacific Lumber and who is currently representing a group of former shareholders of Pacific Lumber in their case against MAXXAM arising out of alleged improprieties in the takeover. It is our understanding that the MAXXAM/Drexel quid pro quo became a central issue in that case as the case moved toward the currently pending $50,000,000 settlement. Moreover, it our understanding that although both staff attorneys and outside counsel for the FDIC are aware that there is significant overlap between the issues raised in that case and those presented by the claims arising out of the failure of USAT, the FDIC has not made any attempt to subpoena the deposition transcripts or other potential evidence accumulated in connection with that case.

Third, if the FDIC has not already done so, it would seem that the FDIC should immediately depose Charles Hurwitz, Barry Munitz, George Kozmetsky, Ezra Levin, Ron Heubsch and other key officers, directors and employees of USAT, UTG, MAXXAM, MCOH and Federated Development Company.

Among other things, these depositions should be directed toward uncovering strategies employed to obscure MAXXAM and Hurwitz' control of UPG/USAT, and toward developing evidence of the MAXXAM/Drexel quid pro quo.

At the same time that it is pursuing all possible avenues for developing additional evidence, it is vital that the FDIC act as speedily as possible to file an action for breach of fiduciary duty against the MAXXAM corporation, seeking imposition of a constructive trust and disgorgement of Pacific Lumber and moving immediately for interim protection of these extraordinary forest assets, which are in truly imminent danger of irreparable harm as a result of PL's recent, continuing logging onslaught. In this instance, failure to act in a timely fashion could preclude recovery of a national asset of extraordinary and incalculable value.

RECORD 14

HOPKINS & SUTTER,
June 29, 1995.

JEFFREY ROSS WILLIAMS,
Federal Deposit Insurance Corporation, Washington, DC.

DEAR JEFF: Enclosed is the May missive from the Rose Foundation and an ''Addendum'' to the written disclosure statement. In reviewing my *qui tam* materials, I was not sure if you had received this or not. There is not much new here, although the legal argument is somewhat more developed.

Best regards,

F. THOMAS HECHT.

BOYD, HUFFMAN, & WILLIAMS,
SAN FRANCISCO, CA, *May 19, 1995.*

Joann Swanson,
Assistant U.S. Attorney, San Francisco, CA.
STEPHEN J. SEGRETO,
U.S. Department of Justice, Washington, DC.
Re: United States of America, *ex rel.*, Robert Martel v. Hurwitz, et al. Case No. C95 0322 VRW.

DEAR JOANN AND STEPHEN, It has been some time since we have discussed this case and I am anxious to hear how the government's investigation of the legal claims is going. As I have told you before, we have a team of lawyers that have been spending considerable time analyzing the potential causes of action and designing a structure for a qui tam false claims case. When I last spoke with Mr. Segreto, he asked what is the false claim that was made. I responded that there were numerous false claims made regarding net worth. The question then becomes, given that false claims were made regarding net worth, did these false claims result in a payment by the government?

In the case of United States v. McNinch, 356 U.S. 595 (1958), a case involving federally guaranteed loans, the Court held that the mere submission of a false application to a credit institution, which in turn procured FHA insurance of the loan, did not constitute a false claim against the government. The Court stated, ''the conception of a claim against the government normally connotes a demand for money or for some transfer of property.'' However, in footnote 6, the Court expressly left open the question whether the result would be different if there were a default on the loan and a demand upon the government as guarantor. The accompanying legal memo discusses the cases subsequent to McNinch where, as in the case at hand, the government did pay out money as a result of the false claims that were made to obtain or maintain government loan guarantees.

The facts of the Hurwitz case are somewhat unique in that there was no direct demand made for payment under the federal loan guarantee program. Rather, the government, upon inspection of USAT, discovered that there was a ''hole'' in USAT that was a result of the depletion of assets of USAT. Given the size of the hole, the government was left with two choices: one, the government could let USAT go into default and then pay the depositors' claims upon federal guarantees, or two, the government could put money into USAT to fill the hole sufficiently to convince a third party to purchase USAT.

As you know the latter course was taken and the government sold USAT out of receivership to Ranieri. As part of the deal with Ranieri, on or about December 30, 1088, and continuing thereafter, the government paid substantial amounts into USAT. We conclude from the authorities discussed in our legal memo that this pay out, combined with the false statements regarding net worth and the quid pro quo conspiracy, is sufficient to satisfy the claim requirement as described in McNinch, Neifert-White and their progeny. The government should not overlook the use of 31 U.S.C. §3729(3) in this case. There was a conspiracy by Hurwitz and others to make false claims regarding net worth so the government would not catch on while they traded out the assets of the institutions they controlled to one another.

In consideration of the applicable law and the factual circumstances of this case, we hope that upon review of the legal memo the government will be even more inclined to join in this qui tam suit. We look forward to hearing your thoughts on these legal issues.

You will also see enclosed herewith a supplement to the disclosure statement submitted previously. We are providing further details to the original statement with respect to the investigative activities of the relator, in particular his contact to Mr. Art Leiser and the valuable information that Mr. Leiser has. I have spoken with Mr. Leiser and believe that the ''107 forms'' that he and others in his bank examiners' office required to be prepared by USAT show that numerous written false claims were made by Hurwitz and his representatives with respect to USAT's net worth. In my first conversations with Mr. Leiser, he told me that no government officers from the FDIC or any other governmental organization has spoken with him regarding his knowledge of the false claims made with respect to net worth (even after we had submitted the memo from The Rose Foundation which included information from Mr. Martel regarding Mr. Leiser). Later, and more recently, when I spoke to Mr. Leiser, he said that he had been contacted but that the contact was only cursory and that his deposition has never been taken, nor had he been asked to review important documents that were prepared at his direction regarding the net worth of USAT. Hopefully your office is using its investigatory powers under the qui tam stature to contact Mr. Leiser and memorialize through a deposition or other statement the information that he has to offer. Mr. Leiser is an elderly man and his valuable testimony should be secured.

I look forward to talking with the two of you about the government's ongoing consideration of this qui tam suit. As I have said before, and these memos substantiate, we intend to cooperate fully with the government and hope that you will tell us if there is any way that we may be of further assistance.

Sincerely,

J. KIRK BOYD.

BOYD, HUFFMAN & WILLIAMS,
ATTORNEYS AT LAW
Memorandum

To: Joann Swanson, Stephen Segreto.
From: J. Kirk Boyd.
Date: May 19, 1995.
Re: United States of America, *ex rel.*, Robert Martel v. Charles Hurwitz, et al. U.S. District Court, Northern District of California, Case No. C 95–0322 VRW.

The purpose of this memo is to address the question of what false claims were made by the defendants and whether the false claims made are actionable under the False Claims Act. Based upon the analysis below, false claims were made and the payment of government funds for the bailout of the depleted USAT makes these claims actionable under the False Claims Act.

FACTS

Through MAXXAM Inc., Hurwitz, MAXXAM's controlling shareholder, President, CEO, and Chairman of the Board, was also the controlling shareholder of USAT in the 1980s. MAXXAM was formed from mergers of various Hurwitz-controlled corporations in the early 1980s. As outlined in our complaint, Hurwitz controlled USAT (with the help of Drexel) and his claims to the contrary can be easily disproved.

In December 1984, Drexel Burnham Lambert, Michael Milken's firm, brought Pacific Lumber to Hurwitz's attention as a possible takeover target. Hurwitz decided that he wanted to acquire Pacific Lumber since the value of its redwood forests had not been inventoried in more than thirty years and it was significantly undervalued on the market. However, MAXXAM's assets and borrowing potential alone were not enough for Hurwitz to raise the $900 million necessary for a 100% tender offer. Although MAXXAM's captive Savings & Loan, USAT, had assets worth $5 billion, Hurwitz was barred from taking that money directly. He learned this lesson when he tried to use USAT funds directly to take over Castle & Cook but was enjoined by a court in Hawaii.

To avoid the restrictions on his use of federally insured USAT funds for takeover purposes, Hurwitz joined Milken's ''junk bond network'' in order to indirectly tap USAT's assets. This network was comprised of S&Ls, insurance companies, pension funds and corporations that were dependent on capital infusions provided by Drexel-issued junk bonds, and was the source of billions of dollars for Milken and his friends. In order to use this source of cash, Hurwitz had to ante-up by buying junk bonds from Drexel. To do this, he used the large pool of capital, the assets of USAT, that he could not directly tap.

In order to keep a stream of money to others members of the conspiracy who, in turn, would cause money to flow to him, Hurwitz caused USAT to engage in numerous dubious practices to boost its short term profits. He caused USAT to stop making residential real estate loans, sold 71% of the branch offices, inflated deposits by purchasing ''hot money'' deposits (deposits originated by other institutions at unreasonably high interest rates), and sold brokered certificates of deposit at unreasonably high interest rates. In short, Hurwitz stopped operating USAT as a home mortgage lender and began a trade off of its assets for his personal benefit.

With the money that he raised by selling off assets and increasing liabilities from 1985 to 1987, Hurwitz used USAT to purchase over $1.28 billion junk bonds from Drexel. In return, during the same years, Drexel underwrote about $2.2 billion of junk notes, bonds, and debentures to finance corporate acquisitions, such as the takeover of Pacific Lumber, by MAXXAM. The timing of these actions was not a coincidence—they constituted an explicit and illegal deal, a quid pro quo, which had the purpose and effect of transferring USAT's assets to MAXXAM and leaving the FDIC and the U.S. taxpayers holding the empty bag of the looted S&L.

Knowing that USAT was federally insured, and wanting to continue to drain its assets without being put into receivership, Hurwitz misrepresented the net worth of USAT. Furthermore, to hide the effects of these fraudulent investments on USAT, Hurwitz accelerated paper gains and hid losses through unacceptable accounting devices, such as not ''marking to market' securities which had lost market value, but instead carrying them to cost. Ultimately, Hurwitz was able to shuffle enough USAT money into his pockets to buy Pacific Lumber.

FALSE CLAIMS ACT

In *United States v. Neifert-White,* 390 U.S. 228 (1967) the Court affirmed the broad Congressional purpose of the Act, holding that the False Claims Act is a far-reaching remedial statute extending to ''all fraudulent attempts to cause the government to pay out sums of money.'' 390 U.S. at 233. In that case, the Supreme Court held that supplying false information in support of a loan application to a federal agency constituted a ''claim'' within the meaning of the Act. Even though the loan application was not a direct claim for payment of an obligation owed by the government, it nevertheless was ''an action which has the effect of inducing the government to part with money.'' 390 U.S. at 232. In construing the Act, the Court noted ''[d]ebates at the time suggest that the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government. . . . the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.'' *Id.* at 232. Similarly, in this case, Hurwitz's fraud did not consist of a direct claim, but his actions nevertheless ''had the effect of inducing the government to part with money.''

Moreover, the Supreme Court held in *United State ex rel. Marcus v. Hess,* 317 U.S. 537 (1943), that defendants can cause a false claim for payment to be presented to the government by their conduct. In *Hess,* contractors who, through collusive bidding, obtained contracts with municipalities to work on federal Public Works Administration projects, were held liable under the Act because, though paid directly by the municipalities, the project was funded largely by federal government. The Court held that the provisions of the statute, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government. 317 U.S. at 544–45. Like the defendants in *Hess,* the taint of Hurwitz's misrepresentation of net worth and illegal quid pro quo scheme entered into every depositor's potential claim which was the cause for payment into USAT by the FDIC.

The Supreme Court reaffirmed the *Hess* interpretation of the Act in *United States v. Bornstein,* 423 U.S. 303 (1976). The Court held that the False Claims Act gives the government a cause of action against a subcontractor who ''causes'' a prime contractor to submit false claims. The fraud need not have been perpetrated through a direct contract with the government, and the party held liable need not have been the party who submitted the claim to the government.

The theory of liability under the Act in the case at hand is similar to that successfully argued in *United States v. Teeven,* 862 F. Supp. 1200 (D. De. 1992). In *Teeven,* the government brought an action under the False Claims Act against Teeven as Chairman of the Board of the USA Training school. The court agreed with the government's argument that ''by virtue of the Act's construction . . ., it is sufficient for liability to attach that Robert L. Teeven knowingly caused to be presented to the Department of Education false and inflated default claims based on a policy of deliberately failing to pay student refunds.'' 862 F. Supp. at 1221, n.32. Specifically, the government contended that the defendant knew ''that if a student defaulted on his loan and had not been paid a refund that was due, the necessary and foreseeable result would be that the outstanding loan balance for the student would be too high and thus the default claim submitted to the Department of Education would be too high.'' *Id.* In this case, Hurwitz knew that by mistaking USAT's net worth there was a ''hole'' developing in USAT—a hole that would later have to be filled with taxpayers' money—which it was. He also knew that the junk bonds purchased with USAT funds would be worthless or would stop significantly in value and the *foreseeable result* would be USAT's collapse and the depositors' submission of claims to the FDIC.

The *Teeven* court held that Teeven's alleged knowledge and direction of the refund policy was sufficient to make out a claim under the False Claims Act. In so holding, the court rejected the defendant's argument that even if the failure to pay refunds was found to be attributable to him, as a matter of law, it still would not constitute the knowing submission of a false claim. The court wrote: ''Neither the text of the statute nor case law interpreting it, mandate that a Defendant is only liable when he/she has made or caused to be made false statements in connection with a false claim.'' 862 F.Supp. at 1222.

Indeed, 31 U.S.C. §3729(c) defines a ''claim'' including any request or demand for money or other things of value, whether or not under contract, so long as any portion of the money or property requested will either be provided or reimbursed by the United States.[3] According to Congress, the Act is meant to reach any fraudulent attempt to cause the government to pay out money, even if the claim is made against a party other than the government, if the payment of the claim would ultimately result in a loss to the United States S.Rep. No. 345, 99th Cong. 2d. Sess. 10 (1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5266, 5275.

The defendants may argue that based upon the holding in *United States* v. *McNinch,* 356 U.S. 595 (1958), there is no false claims because the government never paid on a claim made against the deposit guarantee. Rather, the government infused capital into USAT so that there would be sufficient capital and claims would not be made.

In *United States* v. *NcNinch,* 356 U.S. 595 (1958), a case involving federally guaranteed loans, the Court held that the mere submission of a false application to a credit institution, which in turn procured FHA insurance of the loan, did not constitute a false claim against the government. In that case, the FHA merely agreed to insure a home improvement loan, and it did not actually disburse any funds. The Court stated: ''The conception of a claim against the government normally connotes a demand for money or for some transfer of public property.'' *Id.* at 599. Although the Court held that a lending institution's application for credit insurance under the FHA program was not a ''claim,'' the Court expressly left open the question whether the result would be different if there had been a default on the loan and a demand upon the government as guarantor:

Since there has been no default here, we need express no view as to whether a lending institution's demand for reimbursement on a defaulted loan originally procured by a fraudulent application would be a ''claim'' covered by the False Claims Act. *Id.* at 599 n.6.

Shortly after the *McNinch* decision, the Court of Appeals for the Third Circuit specifically addressed this question in *United States* v. *Veneziale,* 268 F.2d 504 (3d Cir. 1959), where the government, having guaranteed a loan based on a fraudulent application, was required to pay under its guaranty. The court recognized it was resolving the question left open in *McNinch.*

In the *McNinch* opinion the Supreme Court expressly left open the question whether the additional facts of default on the loan and demand upon the government as guarantor would make a case under the False Claims Act. That question is before us now. *Id.* at 504. The *Veneziale* court held that ''the government, having been compelled to pay an innocent third person as a result of a defendant's fraud in inducing the undertaking, is entitled, to assert a claim against the defendant under the False Claims Act.'' *Id.* at 505. Similarly, this case involves a situation where, based on Hurwitz's false claims regarding net worth which allowed Hurwitz to operate the S&L as a federally insured institution, the government was forced to pay out money to the creditors when the S&L collapsed.

Other circuit courts have agreed that the result of the false claim inquiry is different from *McNinch* when there is a submission of false documents and a need for a the government to pay out as guarantor. For example, *United States* v. *Ekelman & Assocs.,* 532 F.2d 545 (6th Cir. 1976), held that individual defendants were liable for the costs of mortgage defaults after false loan applications were submitted to the government under the VA and FHA loan guarantee and insurance programs. The court reasoned that *McNinch* held that there was no claim because the FHA disbursed no funds. Here, however, the court wrote, ''it is sufficient to note that the instant case involves a false statement made with the purpose and effect of inducing the Government immediately to part with money,'' and that the cause of action arose when the mortgage holder presented a claim to the VA or FHA for payment on the guaranty or insurance.

In *United States* v. *Hibbs,* 568 F.2d 347 (3d Cir. 1977), in holding that a causal connection must be shown between loss and fraudulent conduct, the Third Circuit Court of Appeals cited *McNinch* for proposition that ''the making of a false certificate, standing alone, does not entitle the government to the statutory forfeiture. There must have been a payment.'' *Id.* at 350. In *United States* v. *American Heart Research Found,* 996 F.2d 7 (1st Cir. 1993), in holding that reverse false claims, i.e., when government receives too little money, are ''claims'' within False Claims Act, the First Circuit Court of Appeals agreed with *Neifert-White,* which distinguished *McNinch* on grounds that it involves no payment of government money. *Id.* at 10 n.3.

Lower courts as well have held McNinch to its particular facts in finding that submission of false applications which ultimately cause the government to pay out funds constitute a ''claim'' under the False Claims Act.

Although most of the federally guaranteed loan cases involve two parties, an individual or corporation that submits the false loan application and the bank or credit corporation that approves the loan, *United States ex rel. Lavalley v. First Natl. Bank of Boston,* 1990 U.S. Dist. LEXIS 9913 (D.Mass. 1990), is a case where the bank itself was accused of presenting a false and misleading ''material adverse change report'' to the FmHA which induced the FmHA to guarantee the loans of a corporation that went bankrupt. The government alleged that the bank failed to apprise

the government of its misgivings about the corporation's management and ability to repay the loans, and this fraud was motivated by its special relationship with the construction lender on the project, which it wished to protect from loss on the construction loan. This scenario is similar to the case at hand, where Hurwitz, wishing to protect MAXXAM's takeover projects and knowing that the S&L would most likely collapse, submitted false accounting reports to the government to assure continued federal insurance of the S&L funds.

Attorney-Client Privilege, Attorney Work Product

Addendum to Written Disclosure Statement for the Case of United States of America *ex rel.*, Robert Martel, Plaintiff, v. Charles Hurwitz, Barry Munitz, Maxxam Group, Inc., Federated Development Company, United Financial Group, and Does 1–100, inclusive, Defendants

Provided to the Attorney General of the United States, Department of Justice, Washington, D.C., and the United States Attorney, Northern District of California—May 19, 1995—Read and Approved by Robert Martel

I. BACKGROUND

A. Previous Submission of Disclosure Statement

A qui tam action was filed on January 26, 1995 by the plaintiff-relator Robert Martel on behalf of the United States of America. The compliant was filed under seal in accordance with the procedures for the False Claims Act and a written disclosure statement was submitted at that time. The written disclosure statement included exhibits which provided a detailed explanation of the facts revealing fraudulent activity.

The purpose of this addendum to the written disclosure is to further elaborate upon the history of the realtor and describe how he uncovered false claims by the defendants including their misrepresentations regarding the net worth of United Savings Association of Texas, USAT.

B. Personal History of the Relator

Robert Martel (hereinafter ''relator'') has worked for many years as an investigative journalist. The relator received his degree from St. Mary's College in mathematics and thereafter did graduate work at the University of Santa Clara. He has also studied stocks and bonds transactions, as well as corporate financing, and has been licensed by the National Association of Securities Dealers.

In 1983 the relator started a newspaper called ''The Country Activist.'' The newspaper reported on community issues in northern California, including issues regarding timber harvesting. As both a founder and writer for this newspaper, the relator did investigative work regarding the Pacific Lumber Company and its land holdings in Humboldt County including ancient old-growth forests. The Country Activist published several articles concerning Pacific Lumber forest issues.

As part of the investigative work of the Country Activist, the relator followed the takeover of Pacific Lumber by Charles Hurwitz and Maxxam, Inc. This investigation included interviews with people affected by takeover as well as the review of documentation concerning Charles Hurwitz and the activities of the Maxxam Corporation including its control of United Financial Group (''UFG''), the holding company for the Texas savings and loan, United Savings & Loan of Texas (''USAT'').

In addition to being the founder and a writer for the Country Activist newspaper, the relator was also active in community affairs. The relator, along with others, worked vigorously to place three measures on the ballot for Humboldt County in 1988, including measures that put limitations on offshore drilling off the California coast. These measures were approved by the voters and became law.

In the following year, the relator and others prepared additional ballot measures, one of which pertained to pollution caused by forestry practices in Humboldt County. The political activism of the relator was opposed by Charles Hurwitz and Pacific Lumber. Deliberate efforts were made by Hurwitz and Pacific Lumber to undermine the relator's political activities including threats to advertisers in the relator's newspaper that they would be boycotted by Pacific Lumber if they continued to purchase advertisements. The relator continued to investigate Hurwitz even when he and his advertisers were subjected to anonymous threatening phone calls for his continuing work on forestry issues.

Faced with personal attacks and an advertising boycott by Pacific Lumber, the relator remained undaunted and continued his investigation of Charles Hurwitz. Part of this investigation included looking into Mr. Hurwitz' control of UFG, the holding company for USAT. It was determined through investigation that Charles Hurwitz had abused his control over an insurance company in New York and was forced to pay fines. The investigation also revealed that Charles Hurwitz had close ties to Michael Milken and that Michael Milken had been responsible for assisting Charles Hurwitz in his effort to amass capital for the purchase of UFG, the holding company for USAT. Upon a closer look at USAT, it was recognized by the relator that the goal of Charles Hurwitz in purchasing USAT was to use the assets of USAT to attain his goals as a corporate raider. The relator located documents in Hawaii concerning an attempt by Charles Hurwitz to use the USAT funds to take over Castle & Cooke, a publicly traded company with extensive land holdings. The documents reviewed included a court order enjoining Charles Hurwitz from using the USAT funds (which were federally insured) as capital for corporate raiding.

Knowing of Hurwitz' connections to Milken, the relator also investigated Milken's connections to other savings and loans. It was apparent to the relator that Hurwitz, having been thwarted in his effort to use the funds of USAT directly in his corporate takeover aims, may try to circumvent the court's decision by making an arrangement with someone else to, in effect, launder the USAT money. Upon review of documents obtained through his investigation, the relator determined that Hurwitz had caused the USAT savings and loan to purchase large amounts of bonds from Michael Milken and that Michael Milken, in turn, had caused other entities such as Columbia Savings & Loan and the First Executive Life Insurance Company to purchase bonds issued by Hurwitz in his takeover of Pacific Lumber.

During this investigation it also became apparent to the relator that Charles Hurwitz and the other directors of UFG were depleting USAT to send funds to Milken. Milken, in return, caused others to purchase bonds for Hurwitz's corporate raids such as the takeover of Pacific Lumber. It was discovered that one way Hurwitz and the others went about this was through the improper unstreaming of assets as dividends from USAT to UFG. Another method the relator recognized from his experience as a stockbroker was that assets were being improperly drained from USAT through ''gains trading.'' Hurwitz would cause his investor, Ron Huebsch, to purchase corporate securities from Milken and if gains were recognized, then they would be immediately taken, but if the securities' value declined, they would remain on the USAT books at their purchase price. Through this process Hurwitz and the other defendants were able to deplete the assets of USAT while maintaining a facade that they were satisfying their net worth requirement in order to remain a federally insured savings and loan.

Throughout this period of time the relator was preparing materials for a book on the activities of Charles Hurwitz, Michael Milken and others. In furtherance of this endeavor he went to Texas to talk with the chief bank examiner, Art Leiser, the person in a position to review the assets of USAT and analyze whether Hurwitz and other were making misrepresentations to the government about their net worth. In a private meeting with Mr. Leiser, Mr. Leiser informed the relator that yes, Charles Hurwitz and the directors of USAT had misrepresented the net worth of USAT and that they had been dramatically increasing USAT's liabilities at the same time that they were making these misrepresentations. Further, it was discussed how these misrepresentations allowed USAT to remain in business long after it should have, thereby giving Charles Hurwitz and others the opportunity to further deplete the assets of USAT which would ultimately be repayed by United States taxpayers pursuant to Federal Deposit Insurance guarantees.

Specially, Mr. Leiser explained to the relator that there were monthly reports that he had prepared by his examiners concerning USAT and that these monthly reports included rankings of the status of USAT. Several rankings reflected that USAT were indeed in trouble and that it was not meeting its net worth requirements regardless of the representations that were being made by USAT directors such as Barry Munitz.

Furthermore, the relator also met with other journalists in Houston and upon further study of the stock ownership of UFG, the relator further uncovered that Charles Hurwitz was also misrepresenting to the government the amount of control that he had over UFG. Had Hurwitz admitted that he had more than 25% control over UFG, then his responsibility to maintain new worth requirements would have increased. Under no circumstances did Hurwitz want his net worth requirements to go up * * *

RECORD 15

Memorandum

To: Douglas H. Jones, Acting General Counsel

Through: Jack D. Smith, Deputy General Counsel

From: Marilyn E. Anderson, Senior Counsel; Patricia F. Bak, Counsel; Robert J. DeHenzel, Jr., Senior Attorney

Subject: Retention of Outside Counsel, United Savings Association of Texas

Date: February 14, 1994

This memorandum outlines our search for counsel in this matter, narrows the consideration to two firms, Cravath, Swaine & Moore/Duker & Barrett and Hopkins & Sutter, and sets forth some of the considerations we deem relevant to the selection of counsel to assist the Professional Liability Section in handling the United Savings Association of Texas (''USAT'') directors' and officers' liability litigation. We understand that it will be attached to the recommendation of the Associate and Assistant General Counsel.

Background

USAT failed on December 30, 1988. The projected loss to the insurance fund is $1.6 billion. The Professional Liability Section, as

assisted by outside counsel, has investigated potential claims relating to the failure of the institution and is prepared to request authorization to initiate litigation against a number of former directors and officers of USAT, USAT's holding company, United Financial Group, Inc. (''UFG'') and Charles Hurwitz. Mr. Hurwitz has a national reputation in corporate acquisitions and takeovers. Others among the proposed defendants also are very prominent.

If approved, suit would be based upon claims of gross negligence, breach of fiduciary duties of loyalty and care and knowing participation in the breach of fiduciary duty. During the period from at least 1984 through 1988, USAT paid imprudent dividends to UFG, allowed UFG to wrongfully retain tax refunds belonging to USAT, make a large imprudent loan to a Hurwitz affiliate, and paid excessive compensation to USAT management who were Hurwitz's friends and associates to MCO Holdings, Inc. (''MCO,'' later know as Maxxam) and Federated Development Corporation (''FDC''), entities which collectively owned a significant percentage of and exercised even greater control over UFG. While these transactions alone resulted in losses approximating $100 million, to conceal its growing insolvency, USAT also engaged in imprudent gains trading in mortgage-back securities which resulted in additional losses in the hundreds of millions of dollars.

Almost immediately after USAT's failure, UFG approached the FDIC to try and settle the FDIC's claims against it. Since that time, the Professional Liability Section has engaged in on going discusssions with the potential defendants, which discussions have and continue to include the exchange of information bearing on the merits of the FDIC's claims. The investigation has received considerable Congressional and press attention. There is no insurance in this case and any large recovery is dependent on establishing Hurwitz as a de facto director of USAT, establishing liability against one very wealthy outside director and tapping into a potential indemnification by Maxxam of certain USAT directors.

As noted above, the parties are still exchanging and analyzing information related to the merits of the claims. While it is our hope that we might be able to reach a pre-filing settlement and the proposed defendants have raised the possibility of utilizing some form of alternative dispute resolution, the current tolling agreement which expires on May 31, 1994, will not be extended. We have a significant amount of work which remains to be completed prior to the expiration of the tolling agreement which requires the hiring of lead trial counsel now.

Thomas Manick, now a partner with the Miami firm of Adorno & Zeder, has been intimately involved with the investigation of these claims for over 16 months and has a commanding knowledge of virtually every aspect of the case. The case now requires the addition of a sizable, nationally recognized firm with securities expertise which is familiar with FDIC professional liability issues and procedures.

Firms Considered

The litigation, if approved, will likely be filed in the Southern District of Texas. Virtually all of the qualified firms in Texas were conflicted, forcing us to look to firms headquartered in other major metropolitan areas.

We interviewed three firms: Cravath, Swaine & Moore (New York), along with Duker & Barrett (also New York), Reid & Priest (New York and Washington, D.C.), and Hopkins & Sutter (Chicago and Dallas).

Factors which we considered important in selecting outside counsel to serve as lead counsel handling the USAT Litigation are:

- A respected ''presence'' and proven track record that will carry weight with the proposed defendants and the court,
- Aggressive, clever approach to litigation, with the breadth of resources to handle potentially unique settlement options, perhaps requiring coordination with Congress,
- Familiarity with not only basic legal issues, but exotic securities products and accounting issues/quick study with ability to come up to speed under significant time limitations, including dealing with experts in this highly specialized fielf,
- Local Texas presence; and
- Compliance with Minority/Women Owned Firm Guidelines.

Although we found Reid & Priest to be a highly competent firm, with insightful comments concerning the proposed claims and potential strategies, the firm eliminated itself from consideration based on its stated inability to commit the needed resources to a matter of this magnitude at this time. Our observations of the pros and cons of the remaining firms we interviewed are as follows:

Cravath Swaine & Moore and Duker & Barrett

While we were interested in hiring Cravath Swaine & Moore, and more particularly David Boies of that firm as lead counsel, the proposal made by Mr. Boies and his firm was that we hire both Cravath Swaine & Moore and Duker & Barrett. The Duker & Barrett firm largely consists of former Cravath Swaine & Moore lawyers with whom Mr. Boies has worked while at Cravath and thereafter. Staffing for the case would include David Boies as lead counsel, Bill Duker and Duker & Barrett lawyers and paralegals and lawyers and paralegals from Cravath Swaine & Moore as needed, all for a single fee arrangement.

Pros:

- David Boies, a nationally recognized and highly regarded trial lawyer, who has personally committed to handle all major aspects of the litigation on behalf of the FDIC;
- The firm, based both on Mr. Boies's reputation and the firm's prior participation in the Drexel case on behalf of the FDIC, would likely have an immediate impact on the litigation and perhaps increase the chances of early settlement,
- The firm is widely regarded as aggressive, bright, and creative and has a demonstrated ability to cover all waterfronts in large, highly publicized litigations;
- The firm has broad experience with securities/accounting issues, including having secured highly favorable results on behalf of the FDIC and RTC in the Drexel Litigation;
- The firm has had experience with FDIC issues, procedures and personnel, although not directly with FDIC professional liability staff;
- Mr. Boies knows and has a good relationship with a key player, counsel for Hurwitz, Richard Keeton, for whom he served as successor counsel in the Texaco Litigation; and
- The firm, and Mr. Boies in particular, are familiar withi Mr. Hurwitz and certain of his trading activities through the Drexel Litigation.

Cons:

- Cravath's long-standing and substantial client, Salomon Brothers, although not a target of the FDIC's proposed suit, is at least a witness in such a suit and could be named as a third party by defendants, raising certain potential conflict issues. We are in the process of conducting, but have not yet completed, an evaluation of other potential conflicts as required by the Statement of Policies Concerning Outside Counsel Conflicts of Interest;
- No Texas presence—would have to retain local counsel, probably a Texas MWOLF firm inasmuch as both Cravath, Swaine & Moore and Duker & Barrett lack minority participation from within;
- Certain logistical, management, and coordination issues are raised by the participation of at least three firms, two of which are in New York; and
- The firm's high hourly rates and the previous negative publicity concerning those rates in the Drexel Litigation.

Hopkins & Sutter

Hopkins & Sutter is a large national, Chicago based, firm that has handled vast amounts of FSLIC, and subsequently FDIC and RTC, litigation.

Pros:

- The firm has broad experience with FDIC issues, organization and personnel, particularly with respect to professional liability claims and staff. The firm was outside counsel in the Silverado, FirstSouth, F.A., Gibraltar Savings Association and Texas Bank & Trust Company cases, among others;
- The ''core'' partners who would staff the case—particularly John Rogers—are sharp and very familiar with the issues. Mr. Rogers, a highly regarded trial lawyer, was actively involved in MBS issues on behalf of the FHLBB during the time frame relevant to USAT's activities, as was Hopkins & Sutter partner Michael Duhl, who has already undertaken an analysis of certain tax issues related to UFG on behalf of TAOSS;
- The firm has a Dallas office, is willing to open a Houston office, and is familiar with local practice;
- Past cases have left the Professional Liability Section with an excellent working relationship with the firm on all levels;
- The firm has offered concessions on billing for travel and expenses and also will entertain and has proposed an alternative fee arrangement;
- The firm would be able to provide minority participation from within, with partners and/or associates with FDIC, although perhaps not professional liability, experience;
- The firm has a proven record handling high profile litigation on behalf of the Corporation and, drawing on its extensive representation of the lumber industry, will be able to cover all aspects of any potentially unique debt for redwoods settlement arrangements;
- Potential conflicts have been reviewed by the Outside Counsel Conflict Committee and resolved in a manner which would not preclude the firm's participation in this case; and
- Firm partners who would serve on the trial team know the players, having previously litigated against counsel for certain of the defendants, John Villa of Williams & Connelly.

Cons:

- The firm would not likely bring an immediate, discernible impact upon entry into the case, inasmuch as it is largely perceived as the ''firm of choice'' for the FDIC. The firm is now under the FDIC mandated fee cap and projects that it will remain well under the cap in the future;
- Certain firm members' active participation in MSB issues on behalf of the FHLBB provides special expertise in this area, but at the cost that this history might make it difficult for the firm to bring the independent view necessary to make sound litigation risk assessments; and
- The firm does not have a reputation for the boldness of action or creativity which may enhance FDIC's ability to secure an early recovery in this case.

RECORD 16

7/17/95—*Phone call from——5 p.m.*

Alan McReyolds—202–208–6318, Spec. Asst. to Sec. of Interior—Status of our potential claims—how OTS is organized., etc?

Someone to describe * * * receiving calls our claims and FDIC almost daily from members OTS roles of Congress and private citizens.

his schedule—Nextweek—vacation;—following week—*travel*.

—Would really like to meet this week if at all possible.

—He has not spoken to Jack Smith.

—Would like meeting to take place this week if at all possible because of his vacation and travel schedule.

7/18/95—JOT reaction—1:30 am.

Talk to Jack Smith and Alice Goodman—TUT's reaction—Smith and Goodman should be here with us.

RECORD 17

Memorandum To: Board of Directors, Federal Deposit Insurance Corporation.

From: Jack D. Smith, Deputy General Counsel.

Stephen N. Graham, Associate Director (Operations).

Date: July 24, 1995.

Subject: Status of PLS Investigation, Institution: United States Association of Texas, Houston #1815.

This memorandum reports on the status of the continuing investigation of the failure of United States Association of Texas (''USAT''), the separate investigation being conducted by the Office of Thrift Supervision (''OTS''), current tolling agreements, settlement negotiations with United Financial Group, Inc., (''UFG'') USAT's first tier holding company, and our decision not to recommend an independent cause of action by the FDIC against the former officers and directors of USAT and controlling person Charles Hurwitz.

I. Background

As you know, USAT was placed into receivership on December 30, 1988, with assets of $4.6 billion. The estimated loss to the insurance fund is $1.6 billion. After a preliminary investigation into the massive losses at USAT, the FDIC negotiated tolling agreements with UFG, controlling person Charles Hurwitz and nine other former directors and officers of USAT/UFG that were either senior officers or directors that were perceived as having significant responsibility over the real estate and investment functions at the institution.

In May 1994, after a series of meetings with the potential defendants and the exchange of considerable documents and other information, we presented a draft authority to sue memorandum recommending that we pursue claims against Hurwitz and certain of the former officers and directors for losses in excess of $200 million. The proposed claims involved significant litigation risk, in that the bulk of the loss causing events occurred more than two years prior to the date of receivership, and were therefore subject to dismissal on statute of limitations grounds. In light of the Fifth Circuit's opinion in *Dawson,* a split of authority in the federal trial courts in Texas on the level of culpability required to toll limitations and the Supreme Court's refusal to consider whether a federal rule should be adopted under which negligence by a majority of the directors would toll the statute of limitations, our strategy was to assert that gross negligence was sufficient to the toll the statute of limitations. After briefings with FDIC deputies and further discussion with the potential defendants, we decided to defer formal FDIC approval of our claims and continue the tolling agreements.

At about the same time that we deferred formal approval of the FDIC cause of action, we developed a new strategy for pursuing these claims through administrative enforcement proceedings with the OTS. After several meetings with senior staff of the OTS Office of Enforcement, we entered into a formal agreement with the OTS, who began an independent investigation into the activities of various directors and officers of USAT, Charles Hurwitz, UFG, as well as USAT's second tier holding company, Maxxam, Inc., a publically traded company that is significantly controlled by Hurwitz.

II. Significant Caselaw Developments Have Further Weakened the Viability of an Independent Cause of Action by the FDIC

Although we have continued to investigate and refine our potential claims during the pendency of the OTS investigation, two significant court decisions and the failure of Congress to address the statute of limitations problems has further weakened the FDIC's prospects for successfully litigating our claims in United States District Court for the Southern District of Texas.

In the recent decision of *RTC* v. *Acton,* the Fifth Circuit held that under Texas law, only self-dealing or fraudulent conduct, and not gross negligence, is sufficient to toll the statute of limitations under the doctrine of adverse domination. As a result of this opinion, we can no longer rely on any argument that gross negligence by a majority of the culpable Board is sufficient to toll the statute of limitations. Moreover, there is very little, if any, evidence of fraud or self-dealing that is likely to survive a motion to dismiss on statute of limitations grounds.

Even if we could overcome the statute of limitations problems, a recent decision by the Texas Supreme Court announced a new standard of gross negligence that will be very difficult to meet. In *Transportation Insurance Company v. Moriel,* 1994 WL 246568 (Tex.), the Texas Supreme Court defined gross negligence as constituting two elements: (1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. This new standard will make it very difficult, if not impossible to prove our claims.

The cumulative effect of these recent adverse decisions is that there is a very high probability that the FDIC's claims will not survive a motion to dismiss either on statute of limitations grounds or the standard of care. Because there is significantly less than a 50 percent chance that we can avoid dismissal, it is our decision not to recommend suit on the FDIC's proposed claims.

III. Debt for Nature Swap

Our decision not to sue Hurwitz and the former directors and officers of USAT is likely to attract media coverage and considerable criticism from environmental groups and Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber has attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our claims for trees. We recently met with the Department of the Interior, who informed us that they are negotiating with Hurwitz about the possibility of a debt for nature swap and that the Administration is seriously interested in pursuing such a settlement. We plan to pursue these settlement discussions with the OTS in the coming weeks.

IV. Updated Authority to Sue Memorandum

We have attached an updated authority to sue memorandum for your review and consideration. It sets forth the theories and weaknesses of our proposed claims in great detail. It should be considered for Board approval only if the Board decides, as a matter of public policy, that it wants the Texas courts to decide the statute of limitations and standard of care issues rather than FDIC staff. The litigation risks are substantial and the probability of success is very low, but if the Board were to decide that it wants to go forward with the filing of a complaint, we need to be prepared to file the complaint in the Southern District of Texas, *on or before, Wednesday, August 2, 1995.*

We will be available to discuss this matter on very short notice.

RECORD 18

July 20, 1995—Meeting with T. Smith, JOT, M.A. and JW.

Re: McReynolds—Kozmetsky—Hurwitz—***.

Jack—We will not go forward if CTS ***.

If OTS does not file suit, we will have to decide our case on the merits before tolling expires.

Memo for G.C. to Chairman—

Updates statutes of case and recommends that we let Kormetsky out.

If suit against Hurwitz *** sue only him and not others.

Find out if Hurwitz will talk.

Write a memo on case status to GC.

Ten page memo should do it.

Continue telling *** or let them go.

If ordinary case, we do not believe there is a 50% chance we will prevail. Therefore, we cannot recommend a lawsuit.

McReynolds—handle same as the Hill presentation.

RECORD 19

July 21, 1995, 11:00 McReynolds, Department of the Interior.

July 21, 1995.

8K acres; 3800 core Merelot Bird, Fish & Wildlife.

Habitat conservation plan and cutting plan with MAXXAM. Has til 9/15 to tell us about cutting plans.

M called Allen at home last Thursday at 8 p.m.

Wilson Task Force—creative strategy for acquisition of the 3800.

BLM

Gov's Office—California Resources Agency—California Fish and Game—State Park Bird—California Coastal Conservancy. Six individuals serve on task force. American Lands Conservancy—negotiate sometimes for Interior.

Gov. Wilson—Terry Gordon—various acquisition strategies.

California has sections of timber to trade $100 M.

H values 8K at 500 M. Interior wants to deal it down. H really wants $200 M total.

California delegate is really putting the pressure on.

Dallas/Ft. Worth—Base closure—Wednesday 10:30 meeting with OTS.

Memo for Chairman.

Frances 208–4615; Alan McReynolds 202–208–6308.

RECORD 20

RECORD 21

$400,000 expenses on OTS

Have not decided whether to bring case—won't decide for some months.

Alan McReynolds—Admin. wants to do deal

—Gov. Wilson w/DOI had task force of 6 groups. Told to find way to make it happen

—CA will trade $100 million CA timber

—Admin. might ?? mil. base

Had call from atty. appraisal on prop. for $500m. Said they want to make a deal. Don't know how much credence we have from them about a claim. At same time telling them to get rid of claim. He can't cut them down.

If we drop suit, will undercut everything.

RECORD 22

USAT

May recall briefed re OTS—paying some months ago. OTS is making progress, but not ready. Thus, tolling again. OTS staff hopes to have draft notice of charges to Hurwitz, et al, Aug.–Sept. (Apologize for short fuse)—we thought we would be able to put off a final decision until OTS acted. Hurwitz refused to toll.

Normal matter, we would close out under delegated authority w/o bringing it to your—Bd'S—attention.

However, given (a) visibility—tree people, Congress and press; (b) basis is Texas S of L, we thought you—Bd—should be advised of what we intended to do—and why—before it is too late.

OTS is looking at: 1) Bad loans; incl. park 410; 2) MBS—Joe's portfolio.

UMBS

(3) Maxxam capital maintenance agreement

(4) UFG tax claim, etc, agreement in principal to settle subject to B C+ approval. $9.6m.

If FDIC case—(1) Bad loan—Park 410 (4 yrs); (2) MBS—Joe's portfolio (2½ yrs); UMBS (2–4 yrs).

During last two years law has moved against us in Texas.

S of L: Dawson—2 yrs ago—more than ? Acton— this spring—more than ??? ??—Loose on Park 410.—Loose (most or all) on UMBS;—Likely loose Joe's portfolio 70% most, or all, out..

OTS—No apparent S of L issue (except Kozmetski**)

Merits: Joe's portfolio—not unwinding, starting 1/187 is most likely to survive.

(1) Facts—3 mos earlier, S of L 1+yr later, done

(2) Standard of core—gross neg. Texas—punitive damage case—cited in intentional/knowing * * *

Bottom line: likely to lose on S of L let it go or have ct. dismiss it.

Redwood swap—Interior/Calif; Forests—base—FDIC/OTS claim(?)

Continue to fund OTS; We'd also write Congress re what & why rather than awaiting reaction mechanics: Brief Deputies; Board presentation.

RECORD 23

CONTEXT

Sue by *Aug 2*—Kurwitz, the rest rolled tolling following

Hurwitz, insiders have tolled w/OTS

Proposes: if authority ''one last chance'' for Hurwitz to toll; not sue others

OTS is investigating Draft Notice of charges coming—*staff*

Loans

Joe's Portfolio

UMBS

New worth maintance: [UFG] toll Maxxam

Redwoods—'Headwaters

Press, environmentalists Congress follow Interior trying to find a deal (Legislation to achieve)

Delima (why they get paid the big bucks—take:

Hit for dismissed suit

Hit for walking based on staff analysis of 70% loss if most/all on S & L

Likely cost $4m & $2m.

If out early or S & L *or* able to slow—stay due to OTS, lower. But *no* guarantees.

Very difficult to value: if survives S & L largely in tact

USAT

When last discussed think everyone's hope was OTS *** would avoid the fateful day when our principals had to decide . . . whether to sue on USAT

Hurwitz refusal to toll wrecked that plan.

ATS recommends suit against Hurwitz, some—not all—others tolling with

Also states intention to let go 3 outside directives OTS isn't tolling with

We believe USAT Ds, Os & defacts dir/o Hurwitz were grossly neg in

(1) Lending—Park 410

(2) Joe's Portfolio

(3)UMBS

The problems include:

(A) S of L—Park 410, no reasonable basis under existing law

Joe's . . . when liq—money at UMBS . . . $100m out, $80m to go . . . $50–$60m principal lost

(B) Hurwitz is *defacto* dir

(C) FHLB policies did encourage 'games' w/futures & options acctg

Looked for other g.f. claim

Recommend Hurwitz—defacto D&D & control person, breached duty of loyalty to USAT in failing to cause UFG, MCO federated to honor capital maintance obligations!

Beats S of L

Tough merits case [$150m]

RECORD 25

PATTON BOGGS, LLP,
Anchorage, AK.

To: Joli Pecht
Company: Maxxam
Fax Number: 713–267–3702
Total Pages Including Cover: 3
From: John C. Martin
Sender's Direct Line: 907–263–6032
Date: August 7, 2000
Client Number: 5921.101

Comments: Joli, I found this memo to the file immediately after our conversation. I thought you might be interested to see the memo. (Note that the automatic date on our system changed the date of the memo from July 14, 1995 to today's date.)

I'll look for more documents as time permits in the next few days.

John

PATTON BOGGS, L.L.P.

Memorandum
TO: File/5921.101.
FROM: John C. Martin.
DATE: July 14, 1995.
SUBJECT: Conversation with Allen McReynolds.

I had a telephone conversation with Allen McReynolds concerning the Department of Interior's approach to the Headwaters Forest property matter. We talked about a number of different aspects of the matter. He indicated that (i) the Department of Interior wants to acquire the property, (ii) he does not believe legislation is necessary, (iii) he and others believe that the transaction should be a cash agreement rather than a land exchange, and (iv) he believes the Governor's office should take the lead in negotiations on the subject. The following summarizes the information and comments he provided.

The Department's Desire to Acquire the Property

McReynolds said several times during the course of the conversation that the Department of Interior wants to see the property acquired. He said that the Secretary is very aware of the fact that this is a very important regional issue. He explained that the Department would like to make this a ''bipartisan'' effort.

McReynolds' Role

McReynolds said that he will be the ''point person'' on the project. While he claimed to be new to the problem, he said that he had already visited with the BLM in Washington and California and that he had met with the Governor's office concerning the matter. It was clear that he had read much of the background material on the subject.

McReynolds is in the Secretary's office. He has a good reputation within the Department.

Deference to the Governor's Office

McReynolds said four different times during the conversation that he believes that Governor Wilson's office is properly the lead for negotiations on the matter. He claimed that he does ''not want to insult'' the Governor. He said that Terri Gordon will be the leader of the negotiations. He is very concerned that meetings held in Washington, without Gordon's attendance or at least her assent, will create problems that will make it difficult to come to an agreement. He said that he did not want to ''send a signal'' that this matter is ''political.''

Indeed, he said that the recent meeting among Democratic staffers created potential problems. He was acquired to explain at length the reason for the meeting to Gordon.

The Wednesday Meeting Between Democratic Congressional Staff and McReynolds

McReynolds confirmed that neither the Secretary nor anyone else from Interior, met with members of Congress on Wednesday, July 12th. Instead, the meeting included various staff from a few California members including Brown and Stark. There were no staff members from Boxer or Feinstein's offices.

He said that a letter from the members requesting a meeting prompted the Wednesday meeting. He also said that a comparable request was sent to the Department of Agriculture.

The Department's Negative View of Riggs' Legislation

McReynolds said that BLM dislikes the approach taken in what he described as ''Riggs' bill.'' He muttered words to the effect of, ''we should not exchange old growth forest to get old growth forest.''

The Department's Desire to Acquire the Property Without Legislation

McReynolds said two different times during the conversation that he does not believe that legislation is necessary to acquire the property. He believes that the Department can acquire the property using its administrative authority. More specifically, he said that he believes that property can be sold to accumulate money that could be used in the acquisition. He recognizes that several pieces of property must be sold to raise enough money to pay for the acquisition. He implied that the Governor's office and the California Democratic delegation favor this approach.

While he did not elaborate, he indicated that he believed that a ''three-way deal'' is the appropriate approach. He said that Terri Gordon is working with the American Land Conservancy on the subject.

Potential Meeting

McReynolds said that he would be pleased to meet with us along with Terri Gordon. He suggested that, if we are so inclined, we could set a meeting with Gordon either here or in Sacramento. He suggested that we

schedule the meeting for some time after he returns from his one-week vacation.
CC: Thomas H. Boggs, Jr.
Donald V. Moorehead
Aubrey A. Rothrock

RECORD 26

OTS/FDK Meeting July 26, 1995 at 10:50 a.m.

J. Smith

Hurwitz won't sign tolling agreement with FDIC. Need to file lawsuit by August 2.

J. Thomas—Chance of success on State limitations is 30% or less.

—Will continue discussions with Helfer.

—Pressure from California congressional delegation to proceed

Dept. of Interior—Alan McReynolds

—Administration interested in resolving case and getting ***.

—Pete Wilson has put together a multi-game fish group

—California would put up $100 million of California timberland

—Hurwitz wants a military base The Dalles and find work—suitable for commercial development

—Hurwitz also wants our claims settled as part of the deal

Two weeks ago—Hurwitz' lawyer called Terri Gordon at home and told him he should not be tuned out by $500 million appraisal.

What is OTS' schedule? How comfortable is OTS with giving info to Interior

R. Stearns

Tolling Agreement extended until December 31, 1995 with 30-day kickout beginning September

***

16 witnesses in June including Hurwitz working on 2d draft of NOC

K. Guido

—MBS Case Summary

—We have done a $$ analysis of what we think we can claim in NOC

B. Rinaldi

—Net Worth Case Summary

Negotiating with UFG regarding settlement of net worth claim

Looking at Maxxam

J. Williams

(1) Need copies of Tranx—copies of diskettes

(2) Send documents' exhibits to J. Williams

—Cover letter to Jeff—sharing and assistance under statutue

Duffy—Where is he?

—Need to get together with Duffy and Hargett

USAT/UFG Value of Claims

Net Worth Maintenance Obligations UFG/MAXXAM & Federated [REDACTED] (¶ 76/73).

Reckless Speculation In Mortgage Backed Securities.

Unsafe and Unsound Loans to Affiliated Parties (including Cost of Funds @ 9%). [REDACTED]

Sub Total Cost of Funds from December 31, 1988 to Present (7½% Cof FDIC).

Total Residual Value of Park 410.

OTS/FDIC Meeting on July 26, 1995

Bryan Veis OTS (Enforcement).
Paul Leiman OTS (Enforcement).
Jeffy Williams FDIC Legal.
Ken Guido OTS (Enforcement).
John V. Thomas FDIC PLS.
Rick Stearns OTS (Enforcement).
Jack Smith FDIC.
Bob Dettenzel FDIC PLS.
Marilyn Anderson FDIC PLS.
Thomas Hecht Hopkins & Sutter.
John Rogers Hopkins & Sutter.
Bruce Rinaldi OTS (Enforcement).

RECORD 27

TRANSCRIPT OF A MEETING OF THE BOARD OF DIRECTORS OF THE FEDERAL DEPOSIT INSURANCE CORPORATION HELD IN THE BOARD ROOM, FEDERAL DEPOSIT INSURANCE CORPORATION BUILDING, WASHINGTON, DC (CLOSED TO PUBLIC OBSERVATION—AUGUST 1, 1995; 10:05 A.M.)

At 10:05 a.m. on Tuesday, August 1, 1995, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session in the Board Room of the FDIC Building located at 550 17th Street, NW., Washington, DC, to consider certain matters which it voted, pursuant to subsections 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of Title 5, United States Code, to consider in a meeting closed to public observation.

Ricki Helfer, Chairman of the Board of Directors; Andrew C. Hove, Jr., Vice Chairman of the Board of Directors; Stephen R. Steinbrink, acting in the place and stead of Eugene A. Ludwig, Director (Comptroller of the Currency); Jonathan L. Fiechter, Director (Acting Director, Office of Thrift Supervision); Leslie A. Woolley, Deputy to the Chairman for Policy; William A. Longbrake, Deputy to the Chairman for Finance and Chief Financial Officer; Roger A. Hood, Deputy to the Vice Chairman; Walter B. Mason, Jr., Deputy to the Director (Office of Thrift Supervision); Stephen L. Ledbetter, Special Assistant to the Deputy to the Chairman and Chief Operating Officer; James D. LaPierre, Special Assistant to the Deputy to the Chairman and Chief Operating Officer; James Phillip Battey, Assistant to the Chairman for Public Affairs; Stanley J. Poling, Assistant to the Deputy to the Chairman for Finance; Diane Page, Assistant to the Deputy to the Director (Comptroller of the Currency); William F. Kroener, III, General Counsel; Paul L. Sachtleben, Director, Division of Compliance and Consumer Affairs; Robert H. Hart-heimer, Director, Division of Resolutions; Steven A. Seelig, Director, Division of Finance; John F. Bovenzi, Director, Division of Depositor and Asset Services; Carmen J. Sullivan, Ombudsman; Jerry L. Langley, Executive Secretary; Alice C. Goodman, Director, Office of Legislative Affairs; James A. Renick, Senior Deputy Inspector General; Jack D. Smith, Deputy General Counsel, Litigation Branch, Legal Division; Eric J. Spitler, Deputy Director, Office of Legislative Affairs; John V. Thomas, Associate General Counsel, Professional Liability Section, Litigation Branch, Legal Division; A. David Meadows, Associate Director, Operations Branch, Division of Supervision; Paul M. Driscoll, Associate Director, Operations and Agreement Management Branch, Division of Resolutions; Stephen N. Graham, Associate Director (Operations), Operations Branch, Division of Depositor and Asset Services; Thomas A. Schulz, Assistant General Counsel, Corporate and Special Litigation Section, Litigation Branch, Legal Division; Henry R.F. Griffin, Assistant General Counsel, Resolutions Section, Supervision and Legislation Branch, Legal Division; Jesse G. Snyder, Assistant Director, Office of Supervision and Applications, Operations Branch, Division of Supervision; Gerald B. Stanton, Assistant Director (Assisted Acquisitions (FRF)), Operations and Agreement Management Branch, Division of Resolutions; M. Lauck Walton, Assistant General Counsel, Professional Liability Section, Litigation Branch, Legal Division; Patti C. Fox, Assistant Executive Secretary; John H. Hatch, Assistant Inspector General, Office of Supervision and Resolutions Division Audits, Office of Inspector General; Susan E. Carroll, Special Assistant to the Director, Division of Supervision; John M. Lane, Manager, Special Situations and Applications Section I, Office of Supervision and Applications, Operations Branch, Division of Supervision; John F. Carter, Manager, Special Situations and Applications Section II, Office of Supervision and Applications, Operations Branch, Division of Supervision; Bobby L. Hughes, Chief, Case Management Section, Office of Assisted Acquisitions (FRF), Operations and Agreement Management Branch, Division of Resolutions; Marilyn E. Anderson, Senior Counsel, Professional Liability Section, Litigation Branch, Legal Division; Thomas L. Holzman, Counsel, Corporate and Special Litigation Section, Litigation Branch, Legal Division; Jeffrey R. Williams, Counsel, Professional Liability Section, Litigation Branch, Legal Division; Richard B. Foley, Senior Attorney, Resolutions Section, Supervision and Legislation Branch, Legal Division; Robert J. DeHenzel, Senior Attorney, Professional Liability Section, Litigation Branch, Legal Division; Jeffrey P. Bloch, Senior Attorney, Resolutions Section, Supervision and Legislation Branch, Legal Division; Wendy B. Kloner, Senior Attorney, Corporate and Special Litigation Section, Litigation Branch, Legal Division; Marilyn R. Kraus, Audit Manager, Assistance Agreement Audit Branch, Office of Inspector General; Lars S. Viitala, Senior Tax Accountant, Tax Unit, Office of Assisted Acquisitions (FRF), Operations and Agreement Management Branch, Division of Resolutions; Garfield Gimber, III, Examination Specialist, Planning and Program Development Section, Operations Branch, Division of Liquidation; Mark C. Randall, Ombudsman, San Francisco Region, Division of Depositor and Asset Services; and Regena S. McMillian, Operations Assistant, Record Services Group, Operations Unit, Operations Assistant, Record Services Group, Operations Unit, Operations Section, Office of the Executive Secretary, were present at the meeting.

Chairman Helfer presided at the meeting; Mr. Langley acted as Secretary of the meeting.

PROCEEDINGS

Chairman Helfer: I'm pleased to call this morning's meeting to order. May I have a Sunshine motion?

Vice chairman Hove: Make a Sunshine motion. [I move that the Board of Directors determine that Corporation business requires its consideration of the matters which are to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of this meeting was practicable; that the public interest does not require consideration of the matters which are to be the subject of this meeting in a meeting open to public observation; and that these matters may be considered in a closed meeting pursuant to subsections 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of Title 5, United States Code.]

Chairman Helfer: And a second.

Director Fiechter: Second.

Chairman Helfer: All in favor?

Vice Chairman Hove: Aye.

Director Fiechter: Aye.

Mr. Steinbrink: Aye.

Chairman Helfer: Redacted by Committee on Resources.

Mr. Walton: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Director Fiechter: Redacted by Committee on Resources.

Vice Chairman Hove: Redacted by Committee on Resources.

Mr. Steinbrink: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Mr. Walton: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Vice Chairman Hove: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Director Fiechter: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Vice Chairman Hove: Redacted by Committee on Resources.

Director Fiechter: Redacted by Committee on Resources.

Mr. Steinbrink: Redacted by Committee on Resources.

Chairman Helfer: Redacted by Committee on Resources.

Mr. Walton: Redacted by Committee on Resources.

Chairman Helfer: The—second memorandum with respect to a professional liability suit involves United Savings Association of Houston, Texas. Mr. Thomas.

Mr. Thomas: I will try to be brief but I won't be able to be quite that brief. With me today are Marilyn Anderson, Senor Counsel in section, and Jeff Williams and Bob DeHenzel, who will be called upon if there are hard questions.

Chairman Helfer: Good, we're glad you have help.

Mr. Thomas: Well, after the first one I'm not sure I'll need any.

Vice Chairman Hove: Don't be so sure of that.

Chairman Helfer: You've got to watch those attorneys, don't you?

Mr. Thomas: The memorandum that we have before us today seeks authority to sue Charles Hurwitz as a *de facto* director and officer of United Savings Association of Texas, or USAT, also as a control person of that entity, and it also seeks authority to sue three insiders of USAT. The claim is based on—the case will be based on three claims, the first—(Redacted by Committee on Resources).

Chairman Helfer: So if suit is not in—if we—if we don't authorize suit today and suit is not brought tomorrow, all these claims are lost.

Mr. Thomas: To the FDIC.

Staff has conducted an extensive investigation. We spoke to them a few days ago. I know they intended to speak to Director Fiechter in the interim. I hope they were able to do that. They are preparing a draft notice of charges, but no decision has been made by the director—at least none had been made as of last week, I assume it's still true—on whether to bring all or any portion of that claim.

The Board must decide today whether to bring this claim. The reason we must decide today is that Charles Hurwitz declined to extend the tolling agreement with us. He extended the tolling agreement with OTS, but he did not extend the tolling agreement with the FDIC. So we must sue tomorrow, if we are to sue unless, if suit is authorized, he agrees to a tolling agreement. What we would propose to do, unless the Board believes we should do otherwise, if suit is authorized, we would call Mr. Hurwitz' counsel and advise that we will sue unless we have a tolling agreement in hand by noon tomorrow. We do not know whether he would sign that agreement or not. And we certainly would not—we would urge the board not to approve this on the assumption that he will sign the tolling agreement, but we think there is a realistic possibility that he may. We would make that recommendation because the statute of limitations problems are serious enough. We'd rather not raise them if we can avoid that without injuring our position.

This is, of course, a very visible matter. It is visible for something having no direct relationship to this case, but having some indirect relationship. Mr. Hurwitz, through Maxxam, purchased Pacific Lumber. Pacific Lumber owns the largest stand of virgin redwoods in private hands in the world, the Headwaters. That has been the subject of considering—considerable environmental interest, including the picketing downstairs of a year or so ago. It has been the subject of Congressional inquiry and press inquiry. So we assume that whatever we do will be visible.

Interior, you should also be aware—aware, the Department of Interior is trying to put together a deal to get the headlines [sic] trade property and perhaps our claim. They had spoken—they spoke to staff a few days ago about that and staff of the FDIC has indicated that we would be interested in working with them to see whether something's possible. We believe legislation would ultimately be required to achieve that. But again, if it's the Board's pleasure, we would at least try to find out what's happening and pursue that matter and make sure that nothing goes on we're not aware of—we're not part of.

This is a difficult case. Redacted by Committee on Resources.

Chairman Helfer: Under adverse domination.

Mr. Thomas: Redacted by Committee on Resources.

Chairman Helfer: Are there questions?

Director Fiechter: One comment. I'm told by our Enforcement staff that they will be making a recommendation to me sometime in mid to late September, but don't have one at present, as to how we might proceed.

Vice Chairman Hove: Because I'm curious to know what happens, if we choose not to pursue this, with the OTS claim and—

Mr. Thomas: It—it would have no direct affect on the OTS claims.

Vice Chairman Hove: Okay.

Mr. Thomas: They have tolling agreements in place with—with all four of these gentlemen and those tolling agreements would not be off—are not affected by—by our action one way or the other.

Chairman Helfer: As I understand it, the other three have agreed to tolling agreements—

Mr. Thomas: Right.

Chairman Helfer:—with the FDIC.

Mr. Thomas: And we wound not sue them tomorrow.

Chairman Helfer: Okay. And that it's—to Hurwitz who has not agreed, although he has agreed to a tolling agreement with the OTS.

Mr. Thomas: That's correct.

Chairman Helfer: And therefore, you've asked the Board to take a look at—at all of the—the body of the case and all of the prospective defendants, but would propose to bring suit only against Hurwitz, if he fails to provide the appropriate tolling agreement by noon tomorrow.

Mr. Thomas: Yep. We're—we're seeking authority on the mort—on both the mortgage-backed securities claims to sue all four people so—Redacted by Committee on Resources.

Chairman Helfer: So if suit is not in—if we—if we don't authorize suit today and suit is not brought tomorrow, all these claims are lost.

Mr. Thomas: To the FDIC.

Chairman Helfer: To the FDIC.

Mr. Thomas: Any recov—

Chairman Helfer: The OTS is separate.

Mr. Thomas: That's right. And any recoveries by OTS would come to the FDIC.

Chairman Helfer: Are the—does the FDIC's authorization to sue enhance the prospect—prospects for a settlement on a variety of issues associated with the case?

Mr. Thomas: It might have some marginal benefit but I don't think it would make a large difference. I think the reality is that FDIC and OTS staff have worked together, expect to continue to work together, and so, I don't think it would have a major impact. It might make some difference, but I think particularly any effort to resolve this with—with—a solution that involves the redwoods would be extremely difficult. The FDIC would have to be involved whether we authorize suit or not. And so you—you're talking about a marginal difference.

Chairman Helfer: On the—the—basically, as I understand the—the Fifth Circuit's judgments about Texas law, they essentially say that the statute of limitations begins running at the point at which the conduct took place; that it's complained about, even though those individuals who were in control of the institution and committed the conduct would not have been likely to sue themselves—

Mr. Thomas: That's correct.

Chairman Helfer: —on behalf of the institution. And that the theory of adverse domination is that, during that period when the individuals in control were unlikely to sue themselves because of their misconduct or their gross-negligence as the case may be, that courts in some jurisdictions have recognized the tolling of the statute of limitations. That is, the tolling of the commencement of the period when the statute of limitations will run, until that point at which the institution's no longer under adverse domination.

Mr. Thomas: Right.

Chairman Helfer: But that Texas law has been interpreted to the contrary.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: But as to one of the claims, you believe there is a reasonable argument that you can get beyond that issue.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: But they have a continuing obligation, however, one could argue, on the part of the bank to reexamine these investments on a regular basis. And that's the theory behind all of our judgments about banks having sufficient controls in place to make a judgment about whether their continuing stewardship of the institution can be justified on safety and soundness grounds.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: Given the problems with the adverse domination interpretation of the Fifth Circuit, I take it, it would be—it would be advantageous to salvage some aspects of these—these theories if—if that were possible.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: I'm sorry, what's a Rule 11 motion?

Mr. Thomas: For sanctions for bad faith pleading.

Chairman Helfer: Uh-huh.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: I see. So you're not recommending bringing that claim.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: How much had they lost?

Mr. Thomas: I don't know the answer to the question but it was not a disaster. When they put in the additional $80 million, they were not putting money into an entity that was insolvent or close to insolvent. And because—

Chairman Helfer: Is that the standard for gross negligence?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: Are there any other comments or questions?

Director Steinbrink: I—I had one very general question to get your opinion on. If—if we bring this litigation and—and the courts follow the trend they've been doing and—and slap us, does that in any way impact the OTS's case, in your opinion?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: But that's simply trying the OTS case ahead of the OTS case.

Vice Chairman Hove: Um-huh.

Mr. Thomas: That's—that's right. And—

Chairman Helfer: That's the issue that would be presented.

Mr. Thomas: That's right. It—it would be very unlikely this case would go to trial on the merits before an OTS matter went forward, assuming it's going to go forward before the tolling agreements at the end—the end of this year.

Vice Chairman Hove: How much do we spend in—in this case before we know about the mortgage-backed security issue, John?

Mr. Thomas: There's good news and there's bad news. If we plead it well and argue it well, we may get to spend a lot. If—if—if it goes out on a—on a early motion, then that would control—it would contain the cost. But we're—we're certainly going to try to plead it to keep it in, if we go forward with this. It would—and, if we succeed, it would come down to a fact question for the jury at trial, as to whether the statute of limitations had run before—

Chair Helfer: That's a fact question—

Mr. Thomas: Well, in—

Chairman Helfer: —not a law question?

Mr. Thomas: —in terms of when the actions took place. If—one of the—if—if we can play it out that far. We're not—you know, I think there's a—

Chairman Helfer: Isn't it much more likely that it would be resolved on a motion to dismiss?

Mr. Thomas: Yeah. Or—or a motion for summary to—

Chairman Helfer: If it were going to be resol—

Mr. Thomas: Yes. Or a motion for summary. Well, either one.

Chairman Helfer: Sorry—or a motion—either one, actually.

Mr. Thomas: Yeah. I think that's the likely—

Director Fiechter: What will the outlay be? I mean, I think you mentioned $6 million to go all the way.

Mr. Thomas: I would assume if it—well, if we keep in the claim for failing to have the other institutions honor their net worth maintenance agreements, presumably the litigation would continue for some time. I imagine we're committed to spending at least half a million dollars and quite possibly most or all of $4 million to get to trial, if we go forward.

Chairman Helfer: On that claim.

Mr. Thomas: On—

Chairman Helfer: The question I think was, what about that claim that's resolved on a motion to dismiss or a summary judgment motion?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: (Redacted by Committee on Resources).

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: (Redacted by Committee on Resources).

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: (Redacted by Committee on Resources).

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: (Redacted by Committee on Resources).

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: To summarize, you're recognizing—you—you're recommending that the Board authorize the suit. You are indicating that the pleadings would su—would withstand a Rule 11 motion.

Mr. Thomas: They should. I—I don't warrant that they will, but I warrant that they should. The difference is the District Courts in the Fifth Circuit.

Chairman Helfer: (Redacted by Committee on Resources.)

Mr. Thomas: I'm not going to argue that there is a better than 50 percent chance of recovery in this case. But it is—we—we're not talking about a 5 [percent] or 10 percent case. We think the statute of limitations issue is about 70 percent against us on the mortgage-backed securities claims. We think the claims on the merits are roughly 50/50.

Director Fiechter: So what is the math here? We would have spent $4 million to go to trial, $2 million in trial. And they had a—what is the likely probability of the settlement and the chance that we'll collect?

Mr. Thomas: Well, if you want to multiply the math out, and, unlike most of our cases, I think this is one where they are relatively independent variables; most of them, I think, are highly dependent and when you start multiplying them together, you get a silly result. But here, 35 percent would not be an unrealistic expectation in terms of this—a substantial verdict being returned here. And if we get past the summary judgment motions, our estimate is that the case would have between—(redacted by Committee on Resources)—settlement value. But it is extremely difficult to value a case of this size and a case with these risks, because they're unlike a D&O case where you have $10 million in net worth and a claim for $4 million. There is no market. There—there aren't a lot of cases like this. Those are our best guesses. If—if you work through the math, the low end of that would be—(Redacted by Committee on Resources).

Chairman Helfer: Are there any other comments or questions? May I have a motion to accept the staff's recommendation to authorize the institution of a professional liability suit against certain former directors and officers of United Savings Association of Houston, Texas? Anyone want to make the motion?

Director Fiechter: I take it this is up or down if tomorrow—

Chairman Helfer: Yeah. It's up or down.

Director Fiechter: —it runs.

Chairman Helfer: It's up or down. I think you're saying that there is a high probability that, on one of the claims, the claim will not go forward on statute of limitations grounds. There is a lower probability—there is a high probability that the other claim will go forward despite statute of limitations claims. That the chances of recovery on the merits on the first claim are very high. The chances of recovery on the merits on the second claim are a bit lower. The probability of a high recovery, should the case go forward on the merits, is significant, but that has to be offset against the difficulties with respect to one of the claims on statute of limitations grounds. Have I summarized?

Mr. Thomas: It has to be offset against the statute of limitations risk on the better claim, the more conventional claim, and the difficulties in proving the merits of the—(Redacted by Committee on Resources).

Chairman Helfer: All right. Is there a motion to accept—accept the staff's recommendation to proceed with suit in this case?

Mr. Steinbrink: [No.]

Chairman Helfer: No. From you?

Vice Chairman Hove: [No]

Chairman Helfer: No.

Director Fiechter: [No]

Chairman Helfer: No. Can the chair make a motion?

Mr. Langley: Bill says, yes, the chair can make a motion.

Chairman Helfer: Okay. I'm going to make a motion to pursue this suit in this case. Is there a second to the motion?

Mr. Steinbrink: I've never seen this before.

Chairman Helfer: We still can vote on the merits of this, you all. I think we should have a recorded vote. So I ask for a second to my motion so we can have a recorded vote on whether to institute suit.

Vice Chairman Hove: A question; clarification?

Chairman Helfer: Yeah?

Vice Chairman Hove: Can a motion be seconded and then voted against the motion?

Chairman Helfer: Can the person who seconds the motion vote against it?

Mr. Langley: Yes.

Vice Chairman Hove: I will second.

Chairman Helfer: Yes. All right, all in favor of inst—of the staff's recommendation to authorize suit in this case. Please record that the chair votes, yes. All opposed to instituting suit in this case?

Vice Chairman Hove: Aye.

Director Fiechter: Aye.

Mr. Steinbrink: I think that I would defer to the chair in this case and, in the first request, vote with the chair.

Chairman Helfer: Okay. So that would be a two to two vote and I assume that that would not authorize suit in the case. Is that correct?

Mr. Langley: Right. That's correct.

Chairman Helfer: All right.

Director Fiechter: Well, then, we want to revisit it?

Mr. Steinbrink: Talk some more about it.

Director Fiechter: As I un—

Chairman Helfer: Then I think we have to have a motion to reconsider the matter by someone who voted against.

Director Fiechter: I make the motion that we reconsider it.

Chairman Helfer: And a second.

Mr. Steinbrink: I will second.

Director Fiechter: (Unclear).

Chairman Helfer: All right.

Vice Chairman Hove: A first.

Director Fiechter: Can the Board members voting in favor give me a sense of—

Mr. Steinbrink: Well, I mean—

Director Fiechter: —it's the expenditure of—we're assuming—what, John?—several million dollars to figure out how far we go on this?

Mr. Thomas: Let's—let's talk through that a little bit. We've spent $4 million so far on this matter. And part of that—

Chairman Helfer: I'm sorry, how much?

Mr. Thomas: Four million dollars so far on this matter, approximately.

Director Fiechter: I was told by our staff that we're taking advantage of—of your $4 million—

Mr. Thomas: Yes.

Director Fiechter: —of the—there's value—

Mr. Thomas: There are—there are—

Director Fiechter: —from our perspective.

Mr. Thomas: —there are—three different areas of value for the money that's been spent.—(Redacted by Committee on Resources).

A significant amount of money has been spent over the last year, both in trying to make sure we know where we stand and in working with OTS to—instead of making them relearn everything, give them the information we have in a meaningful, useful way; help them work through what they're doing; pay for the consultants they're using.

We would expect there to be overlap, if both this claim and the OTS claim go forward, par—in parallel, and that's another question. Both whether we would want that to happen, assuming tha—that Hurwitz says, okay, sue me. And we'd have a question of where the courts would—if we say our—we—we'd like to stay this whole matter until OTS's matter is resolved. Suppose at—at the end of the year OTS brings a claim, assuming that for purposes of talking through what will happen, we might very well say we would rather stay our claim and let OTS resolve this instead of having the same case go on two forums. The court might or might not let us do that. It—we would sort of make that argument and if Hurwitz joined in it, we have a better chance. But there's no guarantee we'd be allowed to do that. If that happened, we would hold our costs down. If they go forward in parallel, there will be some significant overlap between the cost of this litigation and cost which we would otherwise—

Chairman Helfer: But we do not know whether the OTS is going to bring suit.

Mr. Thomas: That's correct.

Chairman Helfer: That's the problem with this analysis.

Mr. Thomas: That's correct.

Chairman Helfer: If we knew—

Mr. Thomas: That's part—

Chairman Helfer: —that, we could take that into account.

Mr. Thomas: Yeah, That's part of why I—I didn't go through this discussion earlier—

Chairman Helfer: Um-huh.

Mr. Thomas: —because it is very problematic. Not very problematic; it's an unknown. If we—(Redacted by Committee on Resources).

Chairman Helfer: I guess I don't understand your analysis. We can dismiss with prejudice. We can seek a dismissal with prejudice of our claims at any point—

Mr. Thomas: That's correct.

Chairman Helfer: —at any point that the OTS decided to proceed—

Mr. Thomas: We could certainly do that.

Chairman Helfer: —if it decided to proceed. And—

Mr. Thomas: Yeah.

Chairman Helfer: And how many courts can say, no, you can't dismiss your claim with prejudice. ''With prejudice'' meaning that it resolves the matters for all time and we cannot bring the suit again later.

Mr. Thomas: We—we'd have to—to look at whether there's any case law and I suspect the answer is no. We'd have to take a risk, in terms of dismissal with prejudice, whether that would prejudice our rights for restitution. I don't know the answer to that question. I haven't really addressed the question.

Chairman Helfer: The rights for restitution, however, relate to a contractual agreement with the OTS, don't they?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: There—there is no benefit to proceed with the case either from the court's perspective or from the defendant's perspective, should we seek to dismiss out our claims with prejudice. And—

Mr. Thomas: As long—as long as we're willing to dismiss them with prejudice—

Chairman Helfer: That's point one.

Mr. Thomas: —that's—

Chairman Helfer: Point two, as to the—the—the issue of whether it pre—prejudices our restitution, if we're seeking a dismissal with prejudice because we've become convinced that the statute of limitations problems are overriding and that the claims will be separately pursued and the deposit insurance funds will have the recoveries which they are due on the merits, then I don't understand why that would pre—prejudice the restitution—ability to get restitution as to both claims.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: It obviously would have been helpful to have worked with the OTS all along so that we weren't presented at the point of the running of the statute—of the tolling of the tolling agreements with this dilemma of not knowing whether the merits of the claims are going to be separately pursued.

Mr. Thomas: It—we've been working actively with them for over a year. We had agreed among ourselves that we would—both FDIC and OTS had agreed we would only extend the tolling agreements with people if they agreed to extend them with both. None of us realized until about 10 days ago, 13 days ago, that there was even an issue as to whether Hurwitz was going to sign a tolling agreement, because they had extended them several times. OTS staff ultimately reached what—the only possible conclusion. They were not prepared to—to make a final recommendation, so they had to accept tolling with Hurwitz and not—even though he wouldn't toll with us. They—you know, anything else would have been self-defeating. That's how we got into this and I can only apologize to the Board for it.

Director Fiechter: So can you help me out? Would our agreeing to sue Hurwitz now—that wouldn't necessarily be ''us'' the FDIC, hedging our bet in terms of whether or not OTS decides to sue in two months. You're suggesting that it might complicate—

Mr. Thomas: Sue—

Director Fiechter: —the process if we didn't pursue a parallel effort—

Mr. Thomas: Bri—

Director Fiechter: —for the nest couple of years?

Mr. Thomas: Bringing the suits, I don't think, compromises OTS's ability at all. The only question that I—that I see is one the Chairman raised. If we said, all right, OTS has brought a parallel case. It makes sense to us to stop this. The court won't simply stay it. Hurwitz won't agree to a dismissal without prejudice or to a dismissal without prejudice to OTS as an express preservation of our right to—to restitution in the OTS claim. Then we have the—the question, which is unresolved, whether we could simply dismiss the case with prejudice, save the additional costs, and if—if doing that would—would leave some risk of whether we could collect for restitution. And as I say, I don't believe there are any cases that actually address that issue. I—because I know we talked about it from time to time in other contexts and no one, in any—any of the regulators that I'm aware of has ever seen a case—we haven't seen a case that addresses that issue. Arguments can be made on both sides.

Chairman Helfer: Why does the case get presented if the OTS has a recovery? And we have an agreement with the OTS that they will restore—because we're, after all, currently paying the OTS's cost for pursuing the matter and we have an agreement with the OTS that if there's a recovery we—this recovery will go into the bank insurance comp—funds. Whose—whose—whose right is it to complain?

Mr. Thomas: The—the way it would arise is Hurwitz and the other defendants would argue that OTS's claim is for restitution, the restitution flowing back to the FDIC. And if we have dismissed with prejudice, then they would argue that that covered our right to re—recover at any forum. and I would argue the contrary. But I think that it's—it's not something I—that I could give—

Chairman Helfer: But I thought the FDIC—the OTS—

Mr. Thomas: —you a clear opinion on.

Chairman Helfer: —has a separate right to sue—and a separate—separate injuries to seek recovery on.

Mr. Thomas: They—the restitution claims are really a right to recover money for the benefit of the person who's been injured. And that's—that's really the argument. Is it OTS's right to recover the money and then have it go to the right people? Or is it really the victim's rights and OTS is the entrance through—through which collection is—is achieved. And I don't think there's a—there isn't an answer that I'm aware of.

Chairman Helfer: But I thought our argument all along was that the OTS has a separate right. That this isn't a subterfuge to get around the FDIC statute of limitation problems. That is has separate legal rights and separate injuries that it can seek payment for.

Mr. Thomas: They have separate legal rights, but whether it's a separate injury is a real question. But let me—let me frame the question just a little bit differently. Suppose the FDIC settled with Hurwitz, gave him a general release, and then OTS proceeded against Hurwitz on exactly the same claims and got a restitution order. Would he be able to say, I've already settled with the person who's getting this money. I don't have to pay. That's the question. If you give a—because if we dismiss with prejudice, we'd be putting ourselves essentially in that same position.

Chairman Helfer: And—all right, then let me carry the argument further. What if we didn't institute suit in this case? The OTS brings it and then Hurwitz says, this is a—this is a restitution claim for the deposit insurance funds. The institution that is responsible for managing the funds has—has decided not to bring the claim. Therefore, the OTS doesn't have any right to seek restitution for the deposit insurance fund.

Mr. Thomas: We think that's a lose.

Chairman Helfer: Well, I don't—I—I don't quite understand why you're so sure one may be a winner and this one—you're so sure this one is a loser—

Mr. Thomas: Wh—

Chairman Helfer: —in the Fifth Circuit which has—

Mr. Thomas: Wh—

Chairman Helfer: —not been recently very favorable to the FDIC.

Mr. Thomas: What—that I'm sure about—on the question of what happens if we dismiss with prejudice is I don't know an answer and I don't think there is a definitive answer that says we're okay. I—that—I mean, it's not that I'm confident we would lose that argument, it's that—I—I simply need to alert you. I—I think there is an issue there if we dismiss with prejudice. We'd have to figure out whether that would prejudice our claim and—and that's—that would likely to be a risky issue, because it's unsettled.

Chairman Helfer: I—I just don't understand why our failure to pursue this claim doesn't give rise to that argument to stop the OTS from proceeding to a claim that seeks restitution for the deposit insurance fund.

Mr. Thomas: They can certainly make that argument. I—I don't remember any case that's definitely decided that, but I know it's been argued about. But I don't—

Director Fiechter: Isn't there parallel cases, or cases where we would have pursued it for the benefit of you or the RTC?

Mr. Thomas: The—I don't remember any that actually have gotten to a point where the claim had expired and money was transferred, that weren't settled.

Vice Chairman Hove: John, a point of clarification, are—is this suit from deposit insurance funds or is this for the FSLIC resolution fund?

Mr. Thomas: The FSLIC resolution fund.

Vice Chairman Hove: Thank you. I—it did not make a difference—

Chairman Helfer: But it's still the FDIC as manager.

Vice Chairman Hove: It's still the FDIC, I agree, but I think (unclear)—

Chairman Helfer: No, I appreciate the clarification for the record. Yes.

Mr. Thomas: Yes, it—particularly if there was ever an issue, in terms of resolution of—of this as part of the settlement, with the Int—involving Interior and the redwoods, that—it might make a difference in terms of how complicated the legislation had to be to achieve it. Because it—where you—it's an issue of taxpayer money rather than insurance fund money.

Mr. Steinbrink: Can—can I go back and be a little more basic. And—and—and—and correct me if—if I've got in my mind this—this—this wrong. But we've got a group of individuals here who have cost the FDIC $1.6 billion. We've got a court system that has not ruled in our favor, recently, on certain elements of the case. We've spent 4 million bucks and we may spend 10 million bucks, plus another [$]600,000, if you go all the way through this case. And we've got the possibility—there is never a guarantee in this world—of a 50 percent success rate, perhaps lower but 50 percent, for settlement somewhere in the—(Redacted by Committee on Resources).

Mr. Thomas: Well, the [$]7 [million] to [$]14 [million] is simply multiplying the percentage likely—the success, against that range. That's—

Mr. Steinbrink: And we've got a statute of limitations that expires tomorrow and we've got another federal agency whose pursuing the same actions.

Mr. Thomas: They're investigating.

Chairman Helfer: We don't know that yet.

Mr. Steinbrink: Maybe.

Chairman Helfer: They're looking at it.

Mr. Thomas: They're investigating, yes.

Mr. Steinbrink: Now, is there anything in there that's—that's necessarily wrong?

Mr. Thomas: I think you had an extra $600,000 added on, but other—in our—our cost—

Mr. Steinbrink: (Redacted by Committee on Resources).

Mr. Thomas: Yeah. Yeah. But, no—

Director Fiechter: Am I right, John—

Mr. Steinbrink: And—

Director Fiechter: Oh, sorry.

Mr. Steinbrink: And by—if—if we choose to pursue this case, in your opinion we are not going to harm the OTS's case.

Mr. Thomas: I think that's right.

Mr. Steinbrink: And if you—if we choose to—not to, we probably won't harm the OTS's case.

Mr. Thomas: I think that's correct.

Director Fiechter: But that if we do pursue it, you're not certain whether we, the FDIC, can drop out. Should OTS decide to pursue, we have parallel—

Mr. Thomas: We have a—a reasonable prospect to being able, in one way or another, to drop out. In fact, we probably have a good prospect, but we don't have a guarantee that we can do it.

Chairman Helfer: Can you give me an example of a court that has refused to allow a case to be dismissed with prejudice by the party that sought—

Mr. Thomas: No.

Chairman Helfer: —to bring the case?

Mr. Thomas: No. There's not question we could—if—we can get out.

Chairman Helfer: But you're raising the restitution issue.

Mr. Thomas: Right. Right. Yeah, there's no question—

Chairman Helfer: Whether we would want to.

Mr. Thomas: Right.

Chairman Helfer: So then your issue is, would the court stay the proceeding? If this—do you think it is likely Mr. Hurwitz would want to proceed with both sets of litigation simultaneously?

Mr. Thomas: He shouldn't.

Chairman Helfer: If he had a chance to stay one of the proceedings and not spend the money on one of them, do you think he'd likely take that chance?

Mr. Thomas: He shouldn't. Of course, he shouldn't.

Chairman Helfer: He shouldn't what? I'm sorry.

Mr. Thomas: He should not want to proceed in both forums. I mean, it's—it's not economically rational, as I view the world, but then again, the fact that he didn't sign the tolling agreement is not, in my view, economically rational.

Chairman Helfer: No. I think it—given the difficulty the Board is having deciding to bring suit, it was quite economically rational. He's clearly telling the Board to put up or shut up, don't you think?

Mr. Thomas: Oh, yeah. I—I—I have not discus—I never met Mr. Hurwitz, but I think it's pretty clear that he views this as a matter of calling our bluff, when you boil it down.

Director Fiechter: My views on this were, in part, based on the—just the math, the cost of proceeding versus what we might collect. Are you suggesting there's a reasonably good chance that we could agree to sue today but that, should OTS proceed—decide to pursue this in a couple of months, and as I understand it OTS would have a probably stronger case than the FDIC, that the FDIC could then go slow or ask for a dismissal with prejudice and that the FSLIC Resolution Fund would therefore be no worse off than if the FDIC today decided not to sue.

Mr. Thomas: (Redacted by Committee on Resources.)

Chairman Helfer: For a motion to dismiss?

Mr. Thomas: Motion to dismiss and related—particularly if we get into any kind of discovery.

Chairman Helfer: Yes, but a motion to dismiss, I can see the lower end of the range. A summary judgment motion I can see the higher end of the range, or higher probably.

Mr. Thomas: (Redacted by Committee on Resources.)

Mr. Steinbrink: But the one thing that is certain is that we have people who, in our opinion and the historical opinion of the regulatory agencies, have done things that are unsafe and unsound and have performed acts that we don't think are appropriate and they've cost the FDIC $1.6 billion with these acts—

Mr. Thomas: The—the acts of these individuals during the stew—well, this institution had equity capital of some rather modest amount and if you took out the goodwill in 1983 before Hurwitz bought it, it would have been insolvent. Their acts—their—under their control, this institution went from being marginally insolvent to a [$]1.6 billion loss. Yes.

Chairman Helfer: And you believe those acts constitute gross negligence?

Mr. Thomas: Yes.

Chairman Helfer: Without question. I mean, it's the staff's view that the facts support that these acts were grossly negligent.

Mr. Thomas: In terms of the claims we're—we're discussing here, they lost a lot of money for other things. They were the subject—they were the victim of fraud; they were the victim of bad economy; they were a victim of a lot of other things, but the things we propose to sue on we believe are grossly negligent, yes.

Director Fiechter: On my understanding that the—that to the extent we find that the suit today is redundant and that there is a good probability, but you can't guarantee, given the lack of precedent, that the FDIC could avoid expending funds that duplicate what the OTS might choose to do. But you're hedging in that, if the OTS decides not to pursue in two months, we leave open the option of the FDIC proceeding. I'm willing to go with proceeding on—

Chairman Helfer: My—my understanding is that the staff would have no intention to duplicate litigation or litigation costs with the OTS, to the extent the staff can control that—

Mr. Thomas: Certainly, we're—

Chairman Helfer: —possibility—

Mr. Thomas: —trying to avoid it today and we'll continue to try to avoid it.

Chairman Helfer: And the issue there simply is the court's willingness to stay the proceeding.

Director Fiechter: It's—it's your view that you can't come up with a good reason why they wouldn't be willing to stay.

Chairman Helfer: Well—I'm—I—

Director Fiechter: And I just don't know—

Chairman Helfer: —it—it's—

Director Fiechter: —that much about the—

Chairman Helfer: —dangerous—what is the saying, a fool—''A lawyer seeking to be his own counsel has a fool for a client.'' I recognize that, but I can't help but bring to bear to this matter my own, somewhat limited, experience with litigation and my own reading of more li—more—greater experience at the appellate level in the Fifth Circuit, admittedly with one of the sounder judges of the Circuit, which are not unfortunately ones that we seem to come before. So I have to bring that to bear. Obviously, I don't have the range of experience of Mr. Thomas, so I would have to defer to his advising the Board on legal matters.

Mr. Thomas: Our expectation is that Hurwitz would not want to proceed on two fronts, but there are no guarantees and he is a person who has made it clear that he doesn't always do, in any forum, what other people expect of him. It doesn't make sense to want to spend the money in two places.

Vice Chairman Hove: I guess I—I can appreciate what Steve was pointing out that—that—that there are losses here and—and no question about—some of these people are—are not the kind of people that you'd like to see in the financial services industry and—and that they did some things that weren't appropriate. And I guess we're doing it more on principal—the—the principal of it. But—but the economics of the thing still doesn't make sense. But, in the sense of collegiality, if—if the Chairman is interested in having this go forward, I'm willing to let it go forward.

Chairman Helfer: I believe the court's unwillingness—let me ask one more question, on Texas law. What does Texas law say about adverse domination?

Mr. Thomas: The truth is, the Fifth Circuit wrote on a clean slate, for all practical purposes. There are—the Texas courts' laws—the Texas court cases really don't say much of anything. They simply said, well, this is what we think the Texas courts would do. We asked, in one of our recent cases, to have the Fifth Circuit certify something to the Texas Supreme Court to answer the question. They declined.

Chairman Helfer: That, of course, depends on the panel one gets in the Fifth Circuit. One of the—at least one of the virtues of this case might be to press that issue of how far the adverse domination determination goes and whether one can look to the sta—the continuing conduct after—let me state it differently. If one can look to continuing conduct adverse to the insured institution, even where the act that led to that took place during the period which the court said the

statute of limitations would bar, if that would essentially allow the Fifth Circuit to ameliorate wha—what I personally believe to be a gross disservice to insured institutions not to recognize the principal of adverse domina—adverse domination in this context. So—

Mr. Thomas: I couldn't agree more.

Chairman Helfer: Pardon?

Mr. Thomas: I couldn't agree more.

Chairman Helfer: So I have to say that my concern is we have principals that have caused a $1.6 billion loss. We—to the U.S. taxpayer. We have a judgment that, as to the claims that we would bring, these individuals were not simply negligent but grossly negligent as to the insured institution. And we have the prospect of making claims that might lead a different panel of the Fifth Circuit to make a judgment that would ameliorate some of the grosser adverse aspects of the previous Fifth Circuit decisions. I recognize that, of course, a panel could simply follow suit. What prospect—is there a split in the Circuits on this? Is there two Circuits and they've gone essentially the same way?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: But you're saying there are no Texas Supreme Court decisions on point. So the Fifth Circuit is essentially interpreting state law based on its own judgment about state law.

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: Would there be a prospect that a different panel of the Fifth Circuit might allow certification of the issue?

Mr. Thomas: (Redacted by Committee on Resources).

Chairman Helfer: No, I understand.

Mr. Thomas: —forum either, but it's—

Chairman Helfer: I understand, but that at least—

Mr. Thomas: ——worth a try.

Chairman Helfer: —it sets a clear standard—

Mr. Thomas: That's right.

Chairman Helfer: —of what the state law is—

Mr. Thomas: That's right.

Chairman Helfer: —as opposed to the Fifth Circuit.

Mr. Thomas: And we've had some successes, ''we'' in the RTC. For example, in Maryland, the District Court certified a matter to the Maryland Supreme Court. Everyone thought that we would lose in Maryland and they came back and said, oh, no adverse domination is the law in Maryland; a very favorable decision. We have so—we have circuits going both ways but they again are basically looking at state law.

Chairman Helfer: Okay. There has been a motion to reconsider the previous vote of the Board with respect to the staff's recommendation to authorize the institution of a PLS suit in the matter of United Savings Association of Houston, Texas. Given that motion, I would now seek a new motion in support of the staff's recommendation.

Director Fiechter: I'll so move.

Chairman Helfer: And a second.

Mr. Steinbrink: I'll second it.

Chairman Helfer: All in favor of the motion?

Vice Chairman Hove: Aye.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC.

CERTIFICATION

I, Leneta G. Gregorie, Counsel and Special Assistant to the Executive Secretary, Office of the Executive Secretary, Federal Deposit Insurance Corporation, do certify that the attached is an excerpt taken from the Transcript of a Board of Directors Meeting held on August 1, 1995 (Closed to Public Observation).

(SEAL)

LENETA G. GREGORIE,
Counsel and Special Assistant, to the Executive Secretary.

RECORD 28

Memorandum To: Alan Whitney, Director, Office of Corporate Communications. Alice Goodman, Director, Office of Legislative Affairs.

From: Jeffrey Ross Williams, Counsel, Professional Liability Section. Robert J. DeHenzel, Jr., Counsel, Professional Liability Section.

Subject: *PLS Lawsuit Filed Today Against Charles Hurwitz.*

As you know, yesterday the FDIC Board of Directors authorized the filing of a PLS suit against Charles E. Hurwitz arising out of the failure of United Savings Association of Texas (''USAT''), Houston, Texas. The FDIC's complaint was filed this afternoon in the United States District Court for the Southern District of Texas in Houston. A copy of the complaint is attached for your reference.

The complaint seeks damages against Hurwitz in excess of $250 million and alleges claims for gross negligence, breach of fiduciary duty and breach of the duty of loyalty arising out of his own conduct and for aiding and abetting the conduct of others who served as officers and directors of USAT. The complaint alleges that Hurwitz dominated and controlled USAT as a controlling shareholder, a *de facto* senior officer and director and controlling person.

Count I of the complaint alleges that Hurwitz breached his fiduciary duty of loyalty to USAT by failing to ensure that USAT's net worth was maintained by its parent company, United Financial Group, Inc. (''UFG'') and by its controlling shareholders MCO Holdings, Inc. (''MCO'' now known as Maxxam) and Federated Development Corporation (''Federated''). Count II of the complaint alleges that Hurwitz was grossly negligent and breached his duty of loyalty to USAT in failing to act to prevent additional losses from USAT's first mortgage backed securities portfolio. Count III alleges that Hurwitz was grossly negligent and breached his duty of loyalty to USAT in causing USAT to invest substantial amounts of mortgage backed securities in its subsidiary, United MBS, resulting in substantial losses.

As we informed the Board, this action will be highly visible because Hurwitz and USAT have attracted media coverage and comment from environmental groups and members of Congress. Hurwitz has a reputation as a corporate raider, and his hostile takeover of Pacific Lumber attracted enormous publicity and litigation because of his harvesting of California redwoods. Environmental interests have received considerable publicity in the last two years, suggesting exchanging our D&O claims for the redwood forest. We recently met with representatives of the Department of the Interior (''DOI''), who informed us that they are negotiating with Hurwitz about the possibility of swapping various properties, plus possibly the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement. We plan to follow up on these discussions with DOI in the coming weeks. *All of our discussions with DOI are strictly confidential.*

In response to numerous letters from the environmental community and members of Congress about the possibility of the FDIC pursuing a debt for nature swap, we have started that:

''although such a swap almost certainly would raise numerous difficult questions, if Maxxam could be held liable for USAT's losses, and if such a swap became an option, the FDIC would consider it as one alternative and would conscientiously strive to resolve any pertinent issues.''

If you are asked specifically about this issue, we believe there is no reason to deviate from this position.

Please do not hesitate to contact Jeffrey Williams, at 736–0648, or Bob DeHenzel, at 736–0685 if you have any questions whatsoever.

RECORD 29

8/15/95—Hurwitz

Alan McReynolds and Larry Millinger—Interior 208–6172

Jeff Webb, Interior, Land acqui

K Zeigler, Fish and Wildlife

OTS—Rick Sterns, Bruce Rinaldi

California Delegation wrote Interior for creative suggestions as to how to acquire the redwoods.

Rick—OTS—can't really discuss their claims—policy to be quiet

Alan—Hurwitz lawyers

Terry Gorton—Rep of Calif

Gov's office—Spec Asst to Sec of Natural Resources.

Strategy—a fund of property owned by state to sell or trade—70 to 100 m. feels deal can be cut $150 to 250 m.

Hurwitz' lawyers said the $500 m appraisal should not be an obstacle for price/deal.

Obstacles to logging:

Presidential ambitions of Wilson—complicates matters for Interior.

Interior doesn't have surplus property to put on table.

16 bases in Calif to be closed could chop off a piece or pieces

H told Terri he would take Grand Prairie Tex Naval Air Station.

Should Interior go visit DOJ and see about acquiring property.

Rick says nothing here will influ OTS decision to bring an action.

Rick—FDIC will prob have to go thru a round of motions.

JDS says we would sit at a global settlement table. Dirs briefed—no objection stated.

Alan—fear of sending wrong messg by pursuing this at all.

RTC has approached Interior.

RECORD 30

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, November 6, 1995.

MEMORANDUM TO: Kathleen McGinty, Chairperson, Council on Environmental Quality, Executive Office of the President.

FROM: Jack D. Smith, Deputy General Counsel, Federal Deposit Insurance Corporation.

SUBJECT: Headwaters Forest/Charles Hurwitz, Debt-for-Nature Transaction.

At a meeting in your office on October 22, 1995, you requested an analysis of certain issues pertaining to the viability of obtaining a transfer of the Headwaters Forest from Pacific Lumber (a corporation controlled by Charles Hurwitz) to the United States.

This memorandum states the issues and summarizes the answers. More detailed responses are attached. These responses were prepared by representatives of the Federal Deposit Insurance Corporation, the Office of Management and Budget, and the Department of the Interior.

Issues and Answers

Issue 1: It is feasible for Hurwitz to transfer the Headwaters Forest to the FDIC in exchange for a settlement of the FDIC's lawsuit and/or other assets?

Answer: Yes. While Hurwitz does not directly own the Headwaters Forest, he controls the boards of directors and the business decisions of the corporate entity that owns the land. Hurwitz is the majority stockholder of Maxxam, Inc. which, through its wholly owned subsidiaries, owns the Headwaters Forest. He is also the Chairman of the Board of Directors, President and Chief Executive Officer of Maxxam and through these capacities has controlled the business and financial decisions of Maxxam and its subsidiaries. Most important, the FDIC lawsuit against Hurwitz may well ultimately be a liability of Maxxam because Maxxam's bylaws contractually obligate it to indemnify Hurwitz for liability in connection with acts performed while serving in any capacity on a Maxxam subsidiary such as United Savings Association of Texas or its holding companies. Hurwitz, through his control over Maxxam's and its subsidiaries' boards of directors, has previously influenced the transfer of Pacific Lumber's assets to resolve other liabilities, including lawsuits. Finally, the FDIC's Chairman has stated that in the event the Headwaters Forest is offered to the FDIC as part of a settlement of the FDIC's claims against Hurwitz, the FDIC Board of Directors would consider accepting such assets to resolve the claims against Hurwitz.

Issue 2: It is feasible for FDIC to transfer the Headwaters Forest to the Department of the Treasury?

Answer: The FDIC could legally transfer title to the Headwaters Forest out of the FDIC's FSLIC Resolution Fund (''FRF'') to Treasury, if the FDIC determined that the state of the FRF at the time of transfer were such that the value of the Headwaters Forest was not better retained in the fund for discharge of FRF liabilities. It is unclear whether the FDIC Board of Directors would be able to make the requisite determination in the near term given uncertainties as to contingent liabilities, although a plausible case might be made in favor of such a determination in light of the present condition of FRF's balance sheet. We note, too, that Treasury would have to be willing to receive the Headwaters Forest (if only as part of an instantaneous transfer on to the Department of the Interior or another federal agency), and an interagency memorandum of understanding would therefore seem desirable in order to flesh out this plan. In the event that the FDIC Board were unwilling in the near term to make the requisite determination for a transfer to Treasury, a feasible alternative might be for the FDIC as manager of the FRF to hold the Headwaters Forest, under an interagency agreement whereby it would be managed by the Department of the Interior, until such time as conditions for a determination for outright transfer to Treasury (and then on to Interior) are satisfied.

Issue 3: What legislative mechanisms exist that may facilitate a transfer of the Headwaters Forest to the U.S. Department of the Interior with minimal financial outlay?

Answer: Three legislative authorizations provide a mechanism for an inter-agency transfer of title to the Headwaters Forest to the Department of the Interior. They are The Transfer of Real Property Act; The Coastal Barriers Improvement Act; and The Base Closure and Realignment Act of 1990. Each Act presents particular legal and political considerations that require special consideration.

Issue 4: What would be the likely budgetary impact from an acquisition or transfer of the Headwaters Forest through the FDIC?

Answer: Any budgetary impact, including ''scoring,'' is dependent on the particular structure of the transaction and whether particular legislation is necessary to facilitate the acquisition or transfer of the Headwaters Forest.

Next Steps

It appears appropriate to arrange a meeting as soon as possible to decide upon what, if any, action is appropriate. Hurwitz has recently signaled—both directly and through his personal and corporate representatives—his desire to discuss the Headwaters Forest with representatives of the Government. For example, in a recent newspaper interview (attached), Hurwitz endorsed the possibility of a transfer of the Headwaters forest in exchange for assets of equivalent economic value. Furthermore, in recent discussions with FDIC after the publication of the interview, Hurwitz's lawyers have indicated their client's interest in discussing a resolution of the Headwaters Forest issue. Similar statements have been made by other Hurwitz representatives to the Department of the Interior.

There appears to be little downside in responding to these overtures at an early date. If everyone else agrees, it would be necessary to decide the following:

1. Which person(s) should be authorized to contact Hurwitz;
2. Through which Hurwitz representative (e.g., Maxxam, Pacific Lumber, Hurwitz's defense lawyers) should such contact be made;
3. The substantive authority of the negotiating person or group for its discussions with Hurwitz; and
4. A mechanism for the negotiating person or group to regularly consult and coordinate its discussions with the respective federal agencies and offices that are involved in this effort.

Please let me know if the FDIC can be of further assistance. My phone number is (202) 898–3706 and William F. Kroener, III, FDIC General Counsel, can be reached at 898–3680. Attachments.

[From the Press Democrat, Oct. 22, 1995]

PACIFIC LUMBER: 10 YEARS AFTER

(By Mike Geniella)

SCOTIA.—Ten years after pulling off a nearly $1 billion hostile takeover of Pacific Lumber Co., Texas Financier Charles Hurwitz is seething because his most prized asset remains off-limits.

Hurwitz believes a continuing controversy about Headwaters Forest, the largest stand of ancient redwoods left in private hands—worth $600 million today by company estimates—not only hinders business, but denies him and managers of the 127-year-old North Coast timber giant the recognition he feels they deserve.

''We've stuck around for 10 years. We've reinvested $100 million in new facilities, added more *** and expanded our timber base. We rebuilt *** town after an earthquake and fire,'' said Hurwitz.

''And still we're the bad guys,'' he said. ''My God, the way the critics beat the hell out of this company, you would think we have slaves working there or something,'' complained Hurwitz.

In a rare interview, Hurwitz told The Press Democrat that Pacific Lumber is willing to have an independent party determine a value for Headwaters if that helps bring an end to the North Coast's most tenacious environmental battle.

Andy McLeod, spokesman for Secretary of Resources Douglas Wheeler, welcomed Hurwitz's offer.

''Without doubt, determining a value for the forest is key to finding solutions to the complexities surrounding Headwaters,'' he said.

However, McLeod said the state will not negotiate ''other than directly with the parties involved.''

''Any further discussion on any value for Headwaters will have to be done directly,'' he said.

Epic court fights, regulatory skirmishing and disputes over its value, have kept company chainsaws from cutting Headwaters' 3,000 acres of towering redwoods, some dating back to the time of Christ.

DIFFERENT APPRAISALS

Pacific Lumber contends Headwaters' fair market value is nearly $600 million, but government appraisals have ranged as low as $400 million. Because of normal regulatory constraints surrounding harvesting of old-growth trees, preservation proponents say Headwaters' true value is much less, perhaps around $200 million.

Whatever value may be set, Hurwitz said he doesn't necessarily expect taxpayers to come up with that kind of cash. He once again said he would favor offsetting some of the cost by swapping the big trees for abandoned U.S. government property.

''You know, if I could get someone who was very serious about resolving this, and who had some authority, to sit down with me, I think we could work out a Headwaters solution in half a day,'' said Hurwitz.

Hurwitz warned, however, that a deal needs to be struck soon. He said he believes a Republican majority in Congress, and its zeal for private property rights, creates a better political climate for Pacific Lumber's efforts to either be fairly compensated for Headwaters, or be allowed to log the swath of old trees tucked in the coastal ridges east of Fortuna.

''I want to tell you that this is America, and that this land is zoned for timber cutting,'' said Hurwitz defiantly.

''We are going to move forward. Somebody is going to pay us fair market value, or we're going to cut it. And we're not embarrassed to say that,'' he said. A federal court recently has put on hold company plans to remove dead or dying trees from Headwaters pending trial of the latest in a series of lawsuits filed by the grass-roots group Environmental protection Information Center in Garberville.

DEAL OF CENTURY

Departing from his usual stance of no interviews, Hurwitz spoke for nearly an hour by phone from a Puerto Rico resort being developed by his Houston-based Maxxam Inc. The conglomerate also owns Kaiser Aluminum, and substantial real estate holdings nationwide. The conference call interview included Pacific Lumber President John Campbell, who was a P-L executive before the Hurwitz takeover.

Hurwitz talked freely about controversies that erupted after Pacific Lumber's old board of directors capitulated 10 years ago today, and voted to sell the aristocrat of West Coast timber companies to Maxxam. It became the timber deal of the century because Pacific Lumber's under-valued assets were probably worth closer to $2 billion, according to estimates in some shareholder lawsuits filed to the aftermath of the Hurwitz takeover.

At the time of Hurwitz's takeover, Pacific Lumber was touted by the Sierra Club and Save the Redwoods League for its responsible logging practices. Generations of Humboldt County residents have worked for Pacific Lumber and lived in Scotia, the West's last real mill town. Until the takeover, they were comforted by a paternalistic management that gave them a lifestyle once characterized as ''Life in the Peace Zone.''

Pacific Lumber's buyout by an outsider was a stunning development for hundreds of workers and their families, and a region that depends on the company for its economic well-being. The takeover ignited a decade of environmental activism in the streets and in the courts, and reshaped the face of North Coast politics. Logging controversies have played a role in almost every major election since the takeover.

In the beginning, Hurwitz was largely unknown. At the time, he was a small-time inventor with alleged ties to convicted Wall Street wheeler-dealers Michael Millken and Ivan Boesky, and a failed Texas savings and loan that cost taxpayers $1.6 billion. Today his personal portfolio is worth an estimated $180 million.

After snagging sleepy Pacific Lumber for $800 million during the takeover craze of the 1980s. Hurwitz ordered the cut doubled to meet the company's cash flow needs, and pay up to $90 million a year in interest payments on about $550 million in junk bonds he used to finance the takeover. Hurwitz later was to use early profits from Pacific Lumber's accelerated cut to help fund a takeover of another venerable Northern California industrial giant, Kaiser Aluminum.

As his empire grew, Hurwitz was attacked as a ruthless raider whose targets, including Pacific Lumber, were asset-rich companies. His dealings involving Pacific Lumber came under scrutiny by the Securities and Exchange Commission, the U.S. Labor Department and a congressional oversight committee, none of which took any action. A probe by the Federal Deposit Insurance Corp, into Hurwitz's role in a failed Texas savings and loan resulted in a $250 million claim being filed against him.

ACCUSATIONS NOT TRUE

Hurwitz dismissed his critics.

''Their accusations are just not true, and anybody who will spend the time looking into them will find that out,'' said Hurwitz.

Soon after the Pacific Lumber takeover Hurwitz ordered the sale of a tool company subsidiary of Pacific Lumber for $300 million. He sold Pacific Lumber's former San Francisco headquarters building for another $30 million, moving all corporate operations to Scotia and fueling speculation he intended to dismantle the timber giant and sell all of its assets. Critics predicted Scotia would be a ghost town within 10 years.

Hurwitz said the years have proven the critics wrong.

''We're still here, and we're still growing,'' he said.

Hurwitz said his rogue image is a carryover from the 1980s, ''When everybody who did takeover was cast in a bad light. But contrary to a lot of those kind of people, we're builders. We're happy with our investments.''

Still his reputation persists.

''I warned Hurwitz early on that his takeover of Pacific Lumber would become the absolutely perfect symbol of what everyone doesn't like about American business,'' recalled former Rep. Doug Bosco, D-Sebastopol. After his defeat to Rep. Frank Riggs, R-Windsor, Bosco for a year was paid $15,000 a month by Hurwitz to try to forge a consensus in Congress, where a bill had been introduced for the public acquisition of Headwaters.

Those efforts failed, and so have a series of others in the state Legislature and at the federal level.

Hurwitz said he's disgusted with the political ''circus.'' He recalled in 1988 when he went to Sacramento with Bosco, who was then still a congressman, to meet with key legislative leaders. They asked Hurwitz to agree to a voluntary logging moratorium on Headwaters, an agreement Pacific Lumber stuck to until this year, when Hurwitz said he'd had enough.

NOTHING HAPPENED

''I was told by these guys that they were going to step in and solve this issue,'' said Hurwitz. ''But they didn't do a damn thing. We sat around for two years twiddling our thumbs waiting for something to happen, and nothing ever did.''

Bosco said he no longer has any ties to Hurwitz, or Pacific Lumber. But he said he agrees with Hurwitz that most of the blame for the Headwaters statement is with the political process.

''It should have been resolved in the public arena, but it wasn't,'' said Bosco.

Hurwitz said the bad rap he and Pacific Lumber receive about wanting to log the last of the ancient redwoods in private ownership is unfair.

''I get all these letters every day from high school and junior high kids saying, 'Please don't cut down the Headwaters,''' said Hurwitz.

''I write them back and give them our version of this thing, and then I tell them they should write their senators, write the Congress, and write the president if they want to save the Headwaters,'' he said.

Hurwitz rejected environmentalists' clamor for a so-called ''debt-for-nature'' swap involving a $250 million claim a federal agency has filed against the Houston investor for his alleged role in the collapse of United Savings and Loan Association of Texas.

Hurwitz contended the Federal Deposit Insurance Corporation claims is in the form of a personal lawsuit against him, and cannot be linked to Maxxam or Pacific Lumber operations.

LAND SWAP

The possibility of swapping Headwaters for surplus government property dominated Hurwitz's thoughts during the interview.

Hurwitz cited as an example a closed military base in Texas between Galveston and Houston, where he lives.

''It's 15,000 acres of land, and it's doing nothing but drawing dust and rattlesnakes. Wouldn't it be great if someone like ourselves took it over and built new homes and a shopping center and created new jobs rather than have this land just sit there and do nothing?''

Hurwitz described such a possibility as a ''win-win for everyone.''

''Everyone thinks we're the stumbling block (to a Headwaters solution), and that's just not the case,'' said Hurwitz.

Hurwitz insisted the future is bright for Pacific Lumber.

Pacific Lumber, whose annual sales top $20 million, is not for sale despite Wall Street Journal reports earlier this summer to the contrary, said Hurwitz.

Hurwitz said in fact, Pacific Lumber under Campbell's guidance is looking to the North Coast, and around the globe to expand its timber operations.

''We've been to South America, Africa and even Russia,'' he said.

''We're builders. We don't buy and sell,'' said Hurwitz about Maxxam's investment strategies.

Hurwitz said he likes the timber business. ''Just last week, we had discussions about a potential acquisition within the industry,'' he said. ''We're very much in the growth mode,'' said Hurwitz.

Hurwitz said he's offended that Pacific Lumber has been cast as an environmentally insensitive company under his stewardship.

''What bothers me more than anything else is that people think we're hurting the environment. It's simply not the case. We've hired the best foresters, the best biologists to chart the company's course into the next century,'' said Hurwitz.

Hurwitz and Campbell said Pacific Lumber's timberlands, even after a decade of accelerated cutting, still have the most timber volume per acre than anywhere else in California, and perhaps Oregon and Washington. They said the company will be able to sustain current production and job levels indefinitely by acquiring more timberland, and developing new product lines.

''But that isn't what you hear on the streets, or read in the newspapers,'' said Hurwitz. ''I've had people tell me they went to Scotia expecting to see a Palm Springs; no trees and all sand. They were amazed to see forests everywhere they looked.''

CHARLES HURWITZ

Age: 65

Born: 1940, Kilgore, Texas

College: University of Oklahoma

Career: Started work as a stockbroker for Bache & Co. in 1952 in New York, later San Antonio.

First deal: At age 27, Hurwitz got investors to put up $54 million to launch the Hedge Fund of America. In 1967, it was the second-largest public offering ever on Wall Street.

The Hurwitz Decade:

May 1982: Hurwitz's MCO Holdings and Federated Development buy Simplicity Pattern Co. for $48 million, and later change name to Maxxam.

October 1985: Pacific Lumber board capitulates, and agrees to sell North Coast timber giant to Hurwitz.

May, 1988: Maxxam acquires Kaiser Tech. corporate parent of Kaiser Aluminum for about $930 million.

December 1988: Another Hurwitz Investment—United Savings Association of Texas—fails, eventually costing taxpayers $1.6 billion.

July 1992: Maxxam bids $350 million for a controlling interest in Continental Airlines, but offer rejected.

ISSUE 1. *IS IT LEGALLY FEASIBLE FOR CHARLES HURWITZ TO ARRANGE THE TRANSFER OF MAXXAM'S ASSETS SUCH AS THE HEADWATERS FOREST TO THE GOVERNMENT IN EXCHANGE FOR A SETTLEMENT OF THE FDIC LAWSUIT AND/OR OTHER ASSETS?*

SHORT ANSWER: YES. BY HIS DOMINANT POSITION AS MAXXAM, INC.'S CHAIRMAN OF THE BOARD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AND AS ITS MAJORITY (60%) STOCKHOLDER, HURWITZ CONTROLS MAXXAM AND PACIFIC LUMBER (a wholly owned subsidiary of MAXXAM, INC.) AND THE BUSINESS DECISIONS OF THEIR BOARDS OF DIRECTORS. THROUGH HIS POSITIONS, HURWITZ CAN ARRANGE FOR MAXXAM TO EXCHANGE ITS PROPERTY FOR OTHER ASSETS AND/OR THE DISCHARGE OF MAXXAM LIABILITIES. THE FDIC LAWSUIT AGAINST HURWITZ MAY WELL ULTIMATELY BE A LIABILITY OF MAXXAM BECAUSE MAXXAM'S BYLAWS OBLIGATE IT TO INDEMNIFY HURWITZ FOR LIABILITY IN CONNECTION WITH ACTS PERFORMED WHILE SERVING IN ANY CAPACITY ON A MAXXAM SUBSIDIARY SUCH AS UNITED SAVINGS ASSOCIATION OF TEXAS OR ITS HOLDING COMPANIES. MOREOVER, IF THE OTS BRINGS CHARGES AGAINST MAXXAM DIRECTLY THIS WOULD ALSO BECOME A MAXXAM LIABILITY. (Answer prepared by FDIC).

DISCUSSION ANSWER:

I. Hurwitz's Control of Pacific Lumber

Hurwitz controls Pacific Lumber's corporate activities, including a sale or transfer of its assets, through his equity ownership in and domination of the board of directors of Maxxam, Pacific Lumber's parent corporation.

a. *Hurwitz's Control of Maxxam*

1. *Controlling Stockholder:* Hurwitz and various family interests own a controlling block of stock in Maxxam. Hurwitz and his family currently own and control, directly and through wholly owned personal and family

investment companies and trusts, approximately 60.4 percent of the voting stock interests of Maxxam. Through this majority stock ownership, Hurwitz controls the election of candidates to Maxxam's board of directors and the financial and business decisions of Maxxam and its numerous wholly owned subsidiaries, including Pacific Lumber.

2. *Controlling Director and Officer:* Hurwitz is Maxxam's Chairman of the Board, President, and Chief Executive Officer, and has held these positions since he acquired Maxxam.

b. *Maxxam's Control of Pacific Lumber.* Maxxam is engaged in forest products operations through its wholly owned subsidiary, Maxxam Group, Inc. (''MGI''), and MGI's wholly owned subsidiary, Pacific Lumber Company, which Hurwitz acquired in a hostile tender offer in October 1985. Pacific Lumber owns, either in its own name or through subsidiaries, approximately 189,000 acres of commercial timberlands in Humboldt County in northern California.

1. 179,000 acres of Pacific Lumber's timberlands, including approximately 6,000 acres of virgin old growth redwood and border areas known as the Headwaters Forest, have been transferred to Scotia Pacific Holding Company, a wholly owned subsidiary of Pacific Lumber.

2. Title in the Headwaters Forest was in turn transferred to Salmon Creek Corporation, a wholly owned subsidiary of Scotia Pacific. Salmon Creek's only asset is the Headwaters Forest; it has been reported that the debt and other liabilities undertaken in connection with Hurwitz's acquisition of Pacific Lumber were maintained with Pacific Lumber and were not transferred to Salmon Creek. Moreover, Hurwitz has deliberately avoided pledging any part of the Headwaters Forest timber as collateral for Pacific Lumber's or its subsidiaries' financing arrangements, thereby making a transfer of title to the Headwaters Forest from Salmon Creek to the U.S. relatively easier.

c. *Hurwitz's Ability to Transfer Pacific Lumber's Assets:* Hurwitz has demonstrated his ability to control the actions of the board of directors of Maxxam, Pacific Lumber, and its subsidiaries in connection with the resolution of claims against the assets of Maxxam, Pacific Lumber, and other subsidiaries. Through his domination of Maxxam's board of directors, Hurwitz has influenced the financial and business decisions of Pacific Lumber and its two subsidiaries, Scotia Pacific and Salmon Creek. After the acquisition of Pacific Lumber, numerous lawsuits were filed against Hurwitz, Pacific Lumber, Maxxam, MGI, and others involving Hurwitz's tender offer and hostile takeover of Pacific Lumber. In November 1994, Hurwitz attended a conference in U.S. District Court, Southern District of New York, where the consolidated cases were pending. As a result of that meeting, Hurwitz, acting on behalf of Pacific Lumber, Maxxam, and other Maxxam subsidiaries, agreed to settle the cases for $52 million, with $14.8 million paid by Pacific Lumber, $33 million paid by insurance carriers of Pacific Lumber, Maxxam and MGI, and the balance from other defendants. *See,* Maxxam, Inc. 10–K, December 31, 1994. Moreover, two weeks ago Hurwitz said he could ''work out a Headwaters solution in half a day'' if he could get the government to talk to him.

II. Maxxam May Well Ultimately Be Obligated to Indemnify Hurwitz for FDIC Lawsuit

a. Maxxam's indemnification provisions are contained in the amended Bylaws dated August 1, 1988, and provide indemnity to ''each person who is or was a director or officer [of Maxxam] . . . at any time on or after August 1, 1988, . . . by reason of the fact that he or she is or was a director, officer, employee or agent . . . or is or was at any time serving at the request of [Maxxam], any other corporation . . . or other enterprise in any capacity, against all expenses, liability and loss . . .'' Maxxam refers to these indemnification obligations in connection with a description of the FDIC lawsuit against Hurwitz in its most recent SEC filing, stating that Hurwitz has not yet made a formal claim for indemnification from Maxxam. *See,* Maxxam, Inc. 10–Q, June 30, 1995.

b. Although Hurwitz was not an elected director of United Savings Association of Texas (''USAT''), and Hurwitz—not Maxxam—is a defendant in the FDIC's lawsuit, the suit alleges that Hurwitz was a ''de facto'' director of the thrift through his assertion of actual control over its operations and decisionmaking, that he was an elected board member of United Financial Group (''UFG'') (USAT's first-tier holding company), and was a member of the joint USAT/UFG Strategic Planning Committee.

c. Moreover, the FDIC's suit alleges that Hurwitz breached his fiduciary duty to USAT by placing his and Maxxam's financial interests above the interests of USAT and its depositors by choosing to refuse to cause Maxxam to infuse new capital into USAT, as was required by a capital maintenance agreement with the Federal Home Loan Bank Board, that would have replenished USAT's depleted capital.

d. Maxxam currently possesses sufficient assets to pay a substantial liability, including indemnifying Hurwitz for the amount of a judgment or settlement. Maxxam is a publicly traded company with market capitalization of $233 million and total assets of $3.7 billion. *See,* Maxxam, Inc. 10–Q, June 30, 1995.

III. Related Litigation Which Could be Settled in a Global Settlement With Hurwitz

In addition to the FDIC's lawsuit, there are at least three other lawsuits which have value and could be exchanged in a global settlement involving the Headwaters Forest.

a. In early 1994, Robert Martel, a private citizen, supported and funded by numerous environmental organizations, filed a lawsuit against Hurwitz, Maxxam, and other persons and entities that alleges that Hurwitz illegally used USAT funds for the benefit of himself and Maxxam, and that such transactions diverted money from USAT and resulted in its insolvency. The complaint seeks damages against Hurwitz, Maxxam, and others under the False Claims Act which authorizes a damage award of three times the alleged actual damages of $250 million.

b. The Office of Thrift Supervision, a department of the Treasury, has been investigating the conduct of Hurwitz, other former USAT directors and officers, Maxxam and other USAT holding companies. On November 1, 1995, OTS notified Hurwitz, Maxxam and other potential respondents of its intention to file claims against them in early December 1995. An OTS suit is likely to include a direct claim against Maxxam and may seek monetary damages that exceed $350 million.

c. Pacific Lumber has been unable to reduce the substantial debt Hurwitz burdened it with as a result of his successful takeover effort. The company is in need of cash to service its operations. As harvestable timberland, the virgin old growth redwoods that comprise the Headwaters Forest are among Pacific Lumber's most valuable assets. To date, however, Pacific Lumber has been unable to log these trees, and has suffered financially as a result. In addition to numerous lawsuits filed by various environmental organizations against Pacific Lumber that prevented the logging of the virgin old growth trees over the last few years, a temporary restraining order was recently granted further prohibiting Pacific Lumber from harvesting in the Headwaters Forest. As a result, the cash starved company continues to lose its best source of income.

ISSUE 2: IS IT FEASIBLE FOR FDIC TO TRANSFER THE HEADWATERS FOREST TO TREASURY?

SHORT ANSWER: THE FDIC COULD LEGALLY TRANSFER TITLE TO HEADWATERS FOREST FROM THE FSLIC RESOLUTION FUND (''FRF'') TO TREASURY IF THE FDIC DETERMINED THAT THE STATE OF THE FRF AT THE TIME OF TRANSFER WERE SUCH THAT THE VALUE OF HEADWATERS FOREST WAS NOT BETTER RETAINED IN THE FRF FOR DISCHARGE OF FRF LIABILITIES. A CASE COULD BE MADE IN FAVOR OF SUCH A DETERMINATION AT PRESENT, ALTHOUGH THE FDIC BOARD OF DIRECTORS MIGHT PREFER TO FOSTER ALL FRF ASSETS IN VIEW OF CONTINGENT LIABILITIES. ABSENT SUCH A DETERMINATION, AN ALTERNATIVE MIGHT BE FOR THE FDIC TO HOLD THE HEADWATERS FOREST FOR THE TIME BEING, UNDER MANAGEMENT BY THE DEPARTMENT OF THE INTERIOR. (Answer prepared by FDIC).

DISCUSSION ANSWER:

Assuming a settlement of professional liability claims in which the Headwaters Forest is transferred from a Hurwitz-related company to the FDIC as manager of the FSLIC Resolution Fund (''FRF''), the question becomes how best to then transfer the redwood forest from the FDIC to another agency with an ultimate view toward dedicating it to wilderness purposes for the benefit of the United States. We believe that the most efficient way of doing this—and perhaps the only way with a clear enough legal framework not requiring new legislation—would be for the FDIC to transfer Headwaters out of the FRF to Treasury, utilizing unique authority existing under the FRF enabling statute, and for Treasury thereafter to transfer the forest to the Department of the Interior or other federal agency pursuant to other, more general statutory authority concerning inter-agency transfers of property.

With regard to transfer out of the FRF, it should be noted that section 11A(f) of the FDI Act, 12 U.S.C. §1821a(f), provides that the FRF ''shall be dissolved upon satisfaction of all debts and liabilities and sale of all assets. Upon dissolution any remaining funds shall be paid into the Treasury.'' Treasury is thus, in effect, the residual beneficiary of the FRF—a fund which is supported by appropriated monies from Treasury (*see* section 11A(c) of the FDI Act, 12 U.S.C. §1821a(c)), and which logically (as well as statutorily) should therefore go back into Treasury. To date approximately $46 billion has been appropriated to support the FRF and it is only equitable that any funds remaining be returned to the Treasury. Furthermore, although section 11A(f) by its terms speaks of FRF funds going to Treasury only upon FRF dissolution, the entire statutory framework of the FRF has previously been interpreted to allow the return of FRF funds to Treasury under appropriate circumstances prior to such dissolution. In particular, as stated in another context:

''it may asserted generally that Congress could not have intended for excess funds to remain indefinitely in the FRF in the event that the FDIC as manager were to determine in later years that the amount of such funds exceeded the FRF's needs estimated as of that time—especially since any liabilities unpaid by the FRF as a result of an early transfer to the Treasury would have to be

satisfied by subsequent appropriations for which an authorization of appropriations is provided in §11A(c) of the FDI Act.''

FDIC Memorandum, dated October 5, 1995, from Henry R. F. Griffin, Assistant General Counsel, through William F. Kroener, III, General Counsel, to William A. Longbrake, Deputy to the Chairman & Chief Financial Officer.

Thus, if the FDIC as manager of the FRF were to conclude at any time that the amount of assets in the FRF exceeds the FDIC's then estimate of FRF liabilities, the amount of such excess or any portion thereof could be turned over to Treasury prior to dissolution of the FRF. (We stress, however, that any such early transfer out of the FRF would be within the FDIC's sole discretion.) Furthermore, although the statute speaks in terms of FRF *funds* going back to Treasury, and the previous opinion concerned FRF funds, we do not perceive a legal bar to the FDIC's making an early transfer of FRF assets in kind (such as Headwaters, if it were obtained by the FRF in settlement with (Hurwitz), provided the other conditions for an early transfer were satisfied.

This approach would have the decided advantage, from the FDIC's viewpoint, of avoiding the necessity for the FDIC to liquidate the Headwaters Forest at its fair market value. So long as the FDIC had obtained fair value from Hurwitz and related companies in return for settlement of its professional liability lawsuit (*i.e.*, assuming the estimated value of the Headwaters Forest would exceed the FDIC's settlement value of the case), then the FDIC could hand the property over to Treasury without any question as to whether the FDIC had fulfilled its fiduciary duty of maximizing (Headwaters) value to the FRF. Treasury as ''residual beneficiary'' could itself maximize that value, applying its own policy and other judgments to the matter—presumably by effecting a further transfer to the Department of the Interior or another federal agency for wilderness preservation purposes to the ultimate benefit of the United States.

In short, the FDIC could legally transfer title to the Headwaters Forest out of the FRF to Treasury, if the FDIC determined that the state of the FRF at the time of transfer were such that the value of Headwaters was not better retained in the FRF for discharge of FRF liabilities. We believe that a plausible case for such a determination may be possible at present or in the foreseeable future, given that the FRF currently has assets and appropriated funds in excess of its liabilities. However, there can be no assurance that the FDIC Board of Directors would be willing to make the requisite determination given uncertainties as to contingent liabilities of the FRF. We note, too, that Treasury would have to be willing to receive the Headwaters Forest (if only as part of an instantaneous transfer on to the Department of the Interior or another federal agency), and an inter-agency memorandum of understanding would therefore seem desirable in order to flesh out this plan.

Finally, it is crucial to this approach that Treasury, as residual beneficiary of the FRF and standing in lieu of taxpayers of the United States, will have to make the assessment (in consultation with other appropriate Federal governmental entities) that transferring the Headwaters Forest for the contemplated purposes is, as a policy and legal matter, the right thing to do, all factors considered. This assessment amounts to a judgment call as to the relative value of preserving the Headwaters Forest for wilderness purposes as opposed to settling the claim against Hurwitz for cash in order to reduce the federal deficit to that extent. It is not in any event for the FDIC to make that assessment, although if the assessment is made in favor of Headwaters Forest preservation, the FDIC may assist in its implementation by the means discussed above.

ISSUE 3: *WHAT LEGISLATIVE MECHANISMS EXIST THAT MAY FACILITATE A TRANSFER OF THE HEADWATERS FOREST TO THE U.S. DEPARTMENT OF THE INTERIOR WITH MINIMAL FINANCIAL OUTLAY?*

SHORT ANSWER: THREE LEGISLATIVE AUTHORIZATIONS PROVIDE A MECHANISM FOR AN INTER-AGENCY TRANSFER OF TITLE TO THE HEADWATERS FOREST TO THE DEPARTMENT OF INTERIOR. THEY ARE THE TRANSFER OF REAL PROPERTY ACT; THE COASTAL BARRIERS IMPROVEMENT ACT; AND THE DEFENSE BASE CLOSURE AND REALIGNMENT ACT OF 1990. EACH ACT PRESENTS PARTICULAR LEGAL AND POLITICAL CONSIDERATIONS THAT REQUIRE SPECIAL CONSIDERATION. (Answer prepared by the Department of the Interior).

DISCUSSION ANSWER:

There are three specific legislative authorizations which permit acquisitions of real property through a transfer from Federal Agencies to the U.S. Department of the Interior at no cost, at less than Fair Market Value, or with special considerations. These provisions could possibly assist in the acquisition of Federal properties to support a land exchange with Maxxam Corporation for the Headwaters Forest lands.

The Transfer of Real Property Act (16 U.S.C. §667b)

This statute allows real property, which is no longer required by the agency exercising jurisdiction over the property, to be transferred to state wildlife agencies for wildlife conservation purposes or to the Secretary of the Interior in instances where the property has particular value in carrying out the national migratory bird management program. If the Administrator of General Services determines that such real property is available for conservation purposes then he may, notwithstanding any other provisions of law, transfer said property ''without reimbursement or transfer of funds'' to a state or the Department of the Interior as appropriate.

The Coastal Barrier Improvement Act (Pub. L. 101–591, §10)

Section 10 of the Coastal Barrier Improvement Act, 12 U.S.C. §1441a–3 et seq., provides that certain ''covered'' properties held by the Resolution Trust Corporation (RTC) or the Federal Deposit Insurance Corporation (FDIC) cannot be sold or transferred by those agencies until notice of availability is made in the Federal Register, and the opportunity is given for a Federal Agency or ''qualified organization,'' to submit a serious letter of intent to acquire the property for the purpose of preserving it for wildlife refuge, sanctuary, open space, recreational, historical, cultural, or natural resource conservation purposes. Covered properties include those which the RTC, FDIC or former Federal Savings and Loan Insurance Corporation (FSLIC) have acquired in their corporate capacity and that is either located within the Coastal Barrier Resources System or is undeveloped, greater than 50 acres in size, and adjacent or contiguous to any lands managed by a governmental agency primarily for the preservation purposes stated above. If a Federal agency or qualified organization submits such a letter of intent, the corporation concerned may not transfer the property to any other party for ninety days, unless the letter of intent is withdrawn.

Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510, Section XXIX), as amended

The Base Closure Act authorizes the Department of Defense (DOD) to transfer properties to Federal and state agencies through public benefit conveyances, if the property supports a primary mission of the agency. The Department of the Interior is specifically provided opportunities to acquire base closure property at no cost for any one of three purposes: parks and recreation, wildlife conservation, or historic monuments.

Attached are materials relative to these authorities.

Attachment

§667a. Omitted

Historical Note

Codification. Section, Act June 8, 1940, c. 295.§§1 to 4, 54 Stat. 261, authorized compacts or agreements between or among the States bordering on the Atlantic Ocean with respect to fishing in the territorial waters and bays and inlets of the Atlantic Ocean on which such States border.

Act May 4, 1942, c. 283, §§1 to 4, 56 Stat. 267, granted the consent and approval of Congress to an interstate compact relating to the better utilization of the fisheries (marine, shell, and anadromous) of the Atlantic seaboard and creating the Atlantic States Marine Fisheries Commission.

Act Aug. 19, 1950, c. 763, §§1 to 4, 64 Stat. 467, granted the consent and approval of Congress to an amendment to the Atlantic States Marine Fisheries Compact and repealed limitation on the life of such compact.

§667b. Transfer of certain real property for wildlife conservation purposes; reservation of rights

Upon request, real property which is under the jurisdiction or control of a Federal agency and no longer required by such agency, (1) can be utilized for wildlife conservation purposes by the agency of the State exercising administration over the wildlife resources of the State wherein the real property lies or by the Secretary of the Interior; and (2) is valuable for use for any such purpose, and which, in the determination of the Administrator of General Services, is available for such use may, notwithstanding any other provisions of law, be transferred without reimbursement or transfer of funds (with or without improvements as determined by said Administrator) by the Federal agency having jurisdiction or control of the property to (a) such State agency if the management thereof for the conservation of wildlife relates to other than migratory birds, or (b) to the Secretary of the Interior if the real property has particular value in carrying out the national migratory bird management program. Any such transfer to other than the United States shall be subject to the reservation by the United States of all oil, gas, and mineral rights, and to the condition that the property shall continue to be used for wildlife conservation or other of the above-stated purposes and in the event it is no longer used for such purposes or in the event it is needed for national defense purposes title thereto shall revert to the United States.

(May 19, 1948, c. 310, §1, 62 Stat. 240; June 30, 1949, c. 288, Title I, §105, 63 Stat. 381; Sept. 26, 1972, Pub.L. 92–432, 86 Stat. 723.)

Historical Note

1972 Amendment. C1. (2). Pub.L. 92–432 deleted ''chiefly'' preceding ''valuable for use''.

Transfer of Functions. The functions, records, property, etc., of the War Assets Administration were transferred to the General Services Administration, the functions of the War Assets Administrator were transferred to the Administrator of General Services, and the War Assets Administration, and the office of War Assets Administrator were abolished by section 105 of the Act June 30, 1949.

Effective Date of Transfer of Functions. Transfer of functions effective July 1, 1949, see Effective Date note set out under section 471 of Title 40, Public Buildings, Property and Works.

Legislative History. For legislative history and purpose of Act May 19, 1948, see 1948 U.S. Code Cong. Service, p. 1553. See, also, Act June 30, 1949, 1949 U.S. Code Cong. Service, p. 1475; Pub.L. 92–432, 1972 U.S. Code Cong. and Adm.News, p. 3366.

[From the Federal Register, Vol. 59, No. 20G, October 26, 1994]

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Parts 90 and 91

RINs 0790–AF61 and 0790–AF62

Revitalizing Base Closure Communities and Community Assistance

AGENCY: Department of Defense, DoD.

ACTION: Interim final rule: amendments.

SUMMARY: The interim final rule amendment promulgates guidance required by Section 2903 of the National Defense Authorization Act for Fiscal Year 1994. This guidance clarifies the application process and the criteria that will be used to evaluate an application for property under this section.

DATES: This document is effective October 26, 1994. Any pending written request for economic development Economic Adjustment. Consequently, application submitted by entities other than LRAs will not be considered.

When should an application for an Economic Development Conveyance be made?

First, an LRA must be organized and a redevelopment plan created. The Department of Defense's Office of Economic Adjustment can provide guidance and technical and financial support in these efforts, Once a redevelopment plan has been developed and adopted, the LRA can then submit an EDC application to the Military Department responsible for the property. The application should be submitted by the lRA after consultation with the Military Department which shall establish a reasonable time period for submission of the application.

The LRA always has the option of acquiring property under the FPASA and thus it may not be necessary to complete an application for a EDC within the stated timetables. LRSs can discuss the various transfer options with the Military Department.

How much property should be included in an Economic Development Conveyance application?

The EDC should be used by LRAs to obtain large parcels of the base rather then merely individual buildings. The income received from some of the higher value property should be used to offset the maintenance and marketing cost of the less desirable parcels. In order for this conveyance to spur redevelopment, large parcels must be used to provide an income stream to assist the long-term development of the property.

Why is an application necessary?

This Amendment to the interim final rule prescribes that an application be prepared by an LRA as the formal request for property, to better assist the Military Department in considering requests for property under the Economic Development Conveyance (EDC). This information also will provide the basis for the Military Department to respond to its obligation under Title XXIX, taking into account the best community-based information on the proposed conveyance action. A great deal of information necessary for an application is readily available to the LRA through the community planning process and supported through existing DoD technical and financial resources.

Beyond the standard planning information collected to date. LRAs should incorporate a business and development component into their overall base reuse planning process as a basis for receiving and managing the real property. This supplemental effort will assist LRAs in identifying necessary implementation resources and establish a community-based proposal for the Military Department's consideration. The Military Departments and the Office of Economic Adjustment will continue to work closely with the affected LRA to ensure that an adequate planning effort is undertaken.

What must an application contain?

The application should explain why an EDC is necessary for economic redevelopment and job creation. They application should contain the following elements.

1. A copy of the adopted Redevelopment Plan.

2. A project narrative including the following:

—A general description of property requested.

—A description of the intended uses.

—A description of the economic impact of closure on the local communities.

—A description of the financial condition of the community and the prospects for redevelopment of the property.

—A statement of how the EDC is consistent with the overall Redevelopment Plan.

3. A description of how the EDC will contribute to short- and long-term job creation and economic redevelopment of the base and community, including projected number, and type, of new jobs it will assist in creating.

4. A business and development plan for the EDC parcel, including such elements as:

—A development timetable, phasing plan and cash flow analysis.

—A market and financial feasibility analysis describing the economic visibility of the project, including an estimate of net proceeds over a fifteen-year period, the proposed consideration or payment to the Department of Defense, and the estimated fair market value of the property.

—A cost estimate and justification for infrastructure and other investments needed for the development of the EDC parcel.

—Local investment and proposed financing strategies for the development.

5. A statement describing why other authorities—as negotiated sale and public benefit transfer for education, parks, public health, aviation, historic monuments, prisons, and wildlife conservation—cannot be used to accomplish the economic development and job creation goals.

6. If a transfer is requested for less than the estimated fair market value—with or without initial payment at the time of transfer—then a statement should be provided justifying discount. The statement should include the amount and form of the proposed consideration, a payment schedule, the general terms and conditions for the conveyance, and projected date of conveyance.

7. A statement of the LRA's legal authority to acquire and dispose of the property.

Additional information may be requested by the Military Departments to allow for a better evaluation of the application. LRAs are encouraged to use site information available from the Military Departments, including maintenance and caretaking expenses.

What criteria will be used to make a determination on the application?

After receipt of an application for an EDC, the Secretary of the Military Department will determine whether an EDC is appropriate to spur economic development and job creation and examine whether the terms and conditions proposed are fair and reasonable. The Military Department may also consider information independent of the application, such as views of other Federal agencies, appraisals, caretaker costs and other relevant information.

The following criteria and factors will be used, as appropriate, to determine whether a community is eligible for an EDC and to evaluate the proposed terms and conditions of the EDC, including price, time of payment and other relevant methods of compensation to the Federal Government.

Adverse economic impact of closure on the region and potential for economic recovery after an EDC.

Extent of short- and long-term job generation.

Consistency with the overall Redevelopment Plan.

Financial feasibility of the development, including market analysis and the need and extent of proposed infrastructure investment.

Extent of State and local investment and level of risk incurred.

Current local and regional real estate market conditions.

Incorporation of other Federal agency interests and concerns, and applicability of, and conflicts with, other Federal property disposal authorities.

Relationship to the overall Military Department disposal plan for the installation.

Economic benefit to the Federal Government, including protection and maintenance cost savings and anticipated consideration from the transfer.

Compliance with applicable Federal, State, and local laws and regulations.

What are the guidelines for determining the terms and conditions of consideration?

The individual circumstances of each community and each base mean that the amount and type of consideration may vary from base to base. This amendment gives greater discretion and flexibility to the Military Departments to negotiate with the LRA to arrive at an appropriate arrangement. Due to the circumstances of a particular site, the base's value may be high or low, and the range of the estimated present fair market value may be broad or narrow. Where there is value, the Department of Defense has an obligation under Title XXIX of the National Defense Authorization Act for FY 1994 to obtain consideration within the estimated range of present fair market value, or to justify why such consideration was not realized.

Taking into account all information provided in the EDC application and any additional information considered relevant, the Military Department will contract for or prepare an estimate of the fair market value of the property, which may be expressed as a range of values. The Military Department shall consult with the LRA on valuation assumptions, guidelines and on instructions given to the person(s) making the estimation of value.

As stated above, the EDC application must contain a statement that proposes general terms and conditions of the conveyance, as well as the amount and type of the consideration, a payment schedule, and projected date of conveyance. After reviewing the application, the Military Department has the discretion and flexibility to enter into one of two types of agreements:

1. Consideration within the estimated range of present fair market value, as determined by the Secretary of the Military Department. The Military Department can be flexible about the terms and conditions of payment, and can provide financing on the property. The payment can be in cash or in-kind, and can be paid at time of transfer or at a time in the future. The Military Departments will have the discretion and flexibility to enter into agreements that specify the form and amount of consideration and ensures that consideration is within the estimated range of fair market value at the time of application. Such methods of payment

could include: participation in the gross or net cash flow, deferred payments, mortgages or other financing arrangements.

2. Consideration below the estimated range of fair market value, where proper justification is provided: If a discount is found by the Secretary of the Military Department to be necessary to foster local economic redevelopment and job creation, the amount of consideration can be below the estimated range of fair market value. Again, the terms and conditions of payment will be negotiated between the Military Department and the LRA.

(a). Justification. Proper justification for a discount shall be based upon the findings in the business and development plan contained in the EDC application.

Development economics, including absorption schedules and legitimate infrastructure costs, would provide a basis for such justification. The ability to pay at time of conveyance or to obtain financing would not be a proper justification, since payment terms and conditions can be negotiated.

In negotiating the terms and conditions of consideration with the LRA, the Secretary of the Military Department must determine that a fair and reasonable compensation to the Federal Government will be realized from the EDC. Where property is transferred under an EDC at an amount less than the estimated range of fair market value, the Military Department shall prepare a written explanation of why the consideration was less than the estimated range of present fair market value.

D. Executive Order 12866

It has been determined that these amendments are a significant regulatory action. The amendments to the rule raise novel policy issues arising out of the President's priorities.

E. Regulatory Flexibility Act

This rule amendment is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because the amendment will not have a significant economic impact on a substantial number of small entities. The primary effect of this amendment will be to reduce the burden on local communities of the Government's property disposal process at closing military installations and to accelerate the economic recovery of the relatively small number of communities that will be affected by the closure of nearby military installations.

F. Paperwork Reduction Act

The Rule amendment is not subject to the Paperwork Reduction Act because it imposes no obligatory information requirements beyond internal DoD use.

List of Subjects in 32 CFR Parts 90 and 91.

Community development, Government employees, Military personnel, Surplus Government property.

PART 90—REVITALIZING BASE CLOSURE COMMUNITIES

1. The authority citation for 32 CFR part 90 continues to read as following:

Authority: 10 U.S.C. 2687 note.

§ 90.4 [Removed and Reserved]

2. Section 90.4(a)(1)(iii) is removed and reserved.

3. Section 90.4(b) is revised to read as follows:

§ 90.4 Policy.

* * * * *

(b) In implementing Title XXIX of Public Law 103–160, it is DoD policy to convey property to a Local Redevelopment Authority (LRA) to help foster economic development and job creation when other federal property disposal options cannot achieve such objectives. Conveyances to the LRA will be made under terms and conditions designed to facilitate local economic redevelopment and job creation, and may be made at less than fair market value, with proper justification.

* * * * *

PART 91—REVITALIZING BASE CLOSURE COMMUNITIES—BASE CLOSURE COMMUNITY ASSISTANCE

4. The authority citation for part 91 continues to read as follows:

Authority: 10 U.S.C. 2687 note.

4A. Section 91.4 is revised to read as follows:

§ 91.4 Policy.

It is DoD policy to convey property to a Local Redevelopment Authority (LRA) to help foster economic development and job creation when other federal property disposal options cannot achieve such objectives. Conveyances to the LRA will be made under terms and conditions designed to facilitate local economic redevelopment and job creation, and may be made at less than fair market value, with property justification. This regulation does not create any rights and remedies and may not be relied upon by any person, organization, or other entity to allege a denial of any rights or remedies other than those provided by Pub. L. 103–160. Title XXIX.

(x) Compliance with applicable Federal, State, and local laws and regulations.

(l) Consideration.

(1) For conveyances made pursuant to section 91.7(d). Economic Development Conveyances, the Secretary of the Military Department will review the application for an EDC and negotiate the terms and conditions of each transaction with the LRA. The Military Departments will have the discretion and flexibility to enter into agreements that specify the form, amount, and payment schedule. The consideration may be at or below the estimated fair market value, with or without initial payment, in cash or inkind and paid over time. An EDC must be one of the two following types of agreements:

(i) Consideration within the estimated range of present fair market value, as determined by the Secretary of the Military Department. Payments must be made to ensure consideration is within the estimated range of fair market value at the time of application.

(ii) Consideration can be below the estimated range of fair market value, when proper justification is provided. The amount of consideration can be below the estimated range of fair market value, if the Secretary of the Military Department determines that a discount is necessary for economic redevelopment and job creation.

(2) The amount of consideration paid in the future shall equal the present value of the agreed-upon fair market value or discounted fair market value. Additional provisions may be incorporated in the conveyance documents to protect the Department's interest in obtaining the agreed upon consideration. Also, the standard GSA excess profits clause, appropriately tailored to the transaction, will be used in the conveyance documents to the LRA.

(3) In a rural area, as defined by this rule, any EDC approved by the Secretary of the Military Department shall be made without consideration when the base closure will have a substantial adverse impact on the economy of the communities in the vicinity of the installation and on the prospect for their economic recovery. The Secretary of the Military Department concerned will determine if these two conditions are met based on all the information considered in the application for an Economic Development Conveyance. Specific attention will be placed on the business and development plan submitted as part of the EDC application and the criteria listed in section 91.7(e)(8) will be used.

(4) In those instances in which an EDC is made for consideration below the range of the estimated present fair market value of the property—or if the estimated fair market value is expressed as a range of values, below the lowest value in that range—the Military Department shall prepare a written explanation why the estimated fair market value was not obtained. Additionally, the Military Departments must prepare a written statement explaining why other Federal property transfer authorities could not be used to generate economic redevelopment and job creation.

Dated: October 20, 1994.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

Revision Notes and Legislative Reports

1989 Act. House Report No. 101–54 and House Conference Report No. 101–209, see 1989 U.S. Code Cong. and Adm.News, p. 86.

References in Text

The Housing and Urban Development Act of 1968, as amended, referred to in par. (2), is Pub.L. 90–448, Aug. 1, 1968, 82 Stat. 476, as amended. Title IX of the Housing and Urban Development Act of 1968, as amended, is classified principally to chapter 49 (§ 3931 et seq.) of Title 42, The Public Health and Welfare. Title IV of the Housing and Urban Development Act, which was classified to chapter 48 (§ 8901 et seq.) of Title 42, was repealed, with certain exceptions which were omitted from the Code, by Pub.L. 98–181, Title IV, § 474(e), Nov. 30, 1983, 97 Stat. 1239. For complete classification of this Act to the Code, see Short Title of 1968 Amendment note set out under section 1701 of this title and Tables.

Codifications

Section was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and not as part of the Federal Home Loan Bank Act, which comprises this chapter.

Separability of Provisions

If any provisions of Pub.L. 101–73 or the application thereof to any person or circumstance is held invalid, the remainder of Pub.L. 101–73 and the application of the provision to other persons not similarly situated or to other circumstances not to be affected thereby, see section 1221 of Pub.L. 101–73, set out as a note under section 1811 of this title.

§ 1441a–2. Authorization for State housing finance agencies and nonprofit entities to purchase mortgage-related assets

(a) Authorization

Notwithstanding any other provision of Federal or State law, a State housing finance authority or nonprofit entity may purchase mortgage-related assets from the Resolution Trust Corporation or from financial institutions with respect to which the Federal Deposit Insurance Corporation is acting as a conservator or receiver (including assets associated with any trust business), and any contract for such purchase shall be effective in accordance with its terms without any further approval, assignment, or consent with respect to that contract.

(b) Investment requirement

Any State housing finance authority or nonprofit entity which purchases mortgage-related assets pursuant to subsection (a) of

this section shall invest any net income attributable to the ownership of those assets in financing, refinancing, or rehabilitating low- and moderate-income housing within the jurisdiction of the State housing finance authority or within the geographical area served by the nonprofit entity.
(Pub.L. 101–73, Title XIII, §1302, Aug. 9, 1989, 103 Stat. 548.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1989 Act. House Report No. 101–54 and House Conference Report No. 101–209, see 1989 U.S.Code Cong. and Adm. News, p. 86.

Codifications

Section was enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 and not as part of the Federal Home Loan Bank Act, which comprises this chapter.

Definitions

For definitions of terms used in this section see section 1441a–1 of this title.

LIBRARY REFERENCES

American Digest System

Supremacy of federal law as to banking, see States §18.19.

Encyclopedias

Concurrent of conflicting state legislation, see C.J.S. States §24.

WESTLAW ELECTRONIC RESEARCH

States cases: 360k [add key number].

§1441a–3. RTC and FDIC properties

(a) Reports
(1) Submission
The Resolution Trust Corporation and the Federal Deposit Insurance Corporation shall each submit to the Congress for each year a report identifying and describing any property that is covered property of the corporation concerned as of September 30 of such year. The report shall be submitted on or before March 30 of the following year.
(2) Consultation
In preparing the reports required under this subsection, each corporation concerned may consult with the Secretary of the Interior for purposes of identifying the properties described in paragraph (1).
(b) Limitation on Transfer
(1) Notice
The Resolution Trust Corporation and the Federal Deposit Insurance Corporation may not sell or otherwise transfer any covered property unless the corporation concerned causes to be published in the Federal Register a notice of the availability of the property for purchase or other transfer that identifies the property and describes the location, characteristics, and size of the property.
(2) Expression of serious interest
During the 90-day period beginning on the date that notice under paragraph (1) concerning a covered property is first published, any governmental agency or qualified organization may submit to the corporation concerned a written notice of serious interest for the purchase or other transfer of a particular covered property for which notice has been published. The notice of serious interest shall be in such form and include such information as the corporation concerned may prescribe.
(3) Prohibition of transfer
During the period under paragraph (2), a corporation concerned may not sell or otherwise transfer any covered property for which notice has been published under paragraph (1). Upon the expiration of such period, the corporation concerned may sell or otherwise transfer any covered property for which notice under paragraph (1) has been published if a notice of serious interest under paragraph (2) concerning the property has not been timely submitted.
(4) Offers and permitted transfer
If a notice of serious interest in a covered property is timely submitted pursuant to paragraph (2), the corporation concerned may not sell or otherwise transfer such covered property during the 90-day period beginning upon the expiration of the period under paragraph (2) except to a governmental agency or qualified organization for use primarily for wildlife refuge, sanctuary, open space, recreational, historical, cultural, or natural resource conservation purposes, unless all notices of serious interest under paragraph (2) have been withdrawn.
(c) Definitions
For purposes of this section:
(1) Corporation concerned
The term ''corporation concerned'' means—
(A) the Federal Deposit Insurance Corporation, with respect to matters relating to the Federal Deposit Insurance Corporation; and
(B) the Resolution Trust Corporation, with respect to matters relating to the Resolution Trust Corporation.
(2) Covered property
The term ''covered property'' means any property—
(A) to which—
(i) the Resolution Trust Corporation has acquired title in its corporate or receivership capacity; or
(ii) the Federal Deposit Insurance Corporation has acquired title in its corporate capacity or which use acquired ****
(B) that—
(i) is located within the Coastal Barrier Resources System; or
(ii) is undeveloped, greater than 50 acres in size, and adjacent to or contiguous with any lands managed by a governmental agency primarily for wildlife refuge, sanctuary, open space, recreational, historical, cultural, or natural resource conservation purposes.
(3) Governmental agency
The term ''governmental agency'' means any agency or entity of the Federal Government or a State or local government.
(4) Undeveloped
The term ''undeveloped'' means
(A) containing few manmade structures and having geomorphic and ecological processes that are not significantly impeded by any such structures or human activity; and
(B) having natural, cultural, recreational, or scientific value of special significance.
(Pub.L. 101–591, §10, Nov. 16, 1990, 104 Stat. 2939.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1990 Act. House Report No. 101–657(I) and (II), see 1990 U.S.Code Cong. and Adm.News, p. 4190.

Codifications

Section was enacted as part of the Coastal Barrier Improvement Act of 1990 and not as part of the Federal Home Loan Bank Act, which comprises this chapter.

§1441b. Resolution Funding Corporation established

(a) Purpose
The purpose of the Resolution Funding Corporation is to provide funds to the Resolution Trust Corporation to enable the Resolution Trust Corporation to carry out the provisions of this chapter.
(b) Establishment
There is established a corporation to be known as the Resolution Funding Corporation.
(c) Management of Funding Corporation
(1) Directorate
The Funding Corporation shall be under the management of a Directorate composed of 3 members as follows:
(A) The director of the Office of Finance of the Federal Home Loan Banks (or the head of any successor office).
(B) 2 members selected by the Thrift Depositor Protection Oversight Board from among the presidents of the Federal Home Loan Banks.
(2) Terms
Of the 2 members appointed under paragraph (1)(B), 1 shall be appointed for an initial term of 2 years and 1 shall be appointed for an initial term of 3 years. Thereafter, such members shall be appointed for a term of 3 years.
(3) Vacancy
If any member leaves the office in which such member was serving when
* * *
(B) the successor to the office of such member shall serve the remainder of such member's term.
(4) Equal representation of banks
No president of a Federal Home Loan Bank may be appointed to serve an additional term on the Directorate until such time as the presidents of each of the other Federal Home Loan Banks have served as many terms as the president of such bank.
(5) Chairperson
The Thrift Depositor Protection Oversight Board shall select the chairperson of the Directorate from among the 3 members of the Directorate.
(6) Staff
(A) No paid employees
The Funding Corporation shall have no paid employees.
(B) Powers
The Directorate may, with the approval of the Federal Housing Finance Board authorize the officers, employees, or agents of the Federal Home Loan Banks to act for and on behalf of the Funding Corporation in such manner as may be necessary to carry out the functions of the Funding Corporation.
(7) Administrative expenses
(A) In general
All administrative expenses of the Funding Corporation, including custodian fees, shall be paid by the Federal Home Loan Banks.
(B) Pro rata distribution
The amount each Federal Home Loan Bank shall pay under subparagraph (A) shall be determined by the Thrift Depositor Protection Oversight Board by multiplying the total administrative expenses for any period by the percentage arrived at by dividing—
(i) the aggregate amount the Thrift Depositor Protection Oversight Board required such bank to invest in the Funding Corporation (as of the time of such determination) under paragraphs (4) and (5) of subsection (e) of this section (computed without regard to paragraphs (3) or (6) of such subsection); by
(ii) the aggregate amount the Thrift Depositor Protection Oversight Board required all Federal Home Loan Banks to invest (as of the time of such determination) under such paragraphs.
(8) Regulation by Thrift Depositor Protection Oversight Board
The Directorate of the Funding Corporation shall be subject to such regulations, orders, and directions as the Thrift Depositor Protection Oversight Board may prescribe.
(9) No compensation from Funding Corporation
Members of the Directorate of the Funding Corporation shall receive no pay, allowance, or benefit from the Funding Corporation for serving on the Directorate.
(d) Powers of the Funding Corporation
The Funding Corporation shall have only the powers described in paragraphs (1) through (9), subject to the other provisions of this section and such regulations, orders, ***

ISSUE 4: *WHAT WOULD BE THE POSSIBLE BUDGETARY IMPACT FROM AN ACQUISITION OF THE HEADWATERS FOREST THROUGH THE FDIC?*

SHORT ANSWER: ANY BUDGETARY IMPACT, INCLUDING ISSUES OF ''SCORING,'' IS DEPENDENT ON THE PARTICULAR STRUCTURE OF THE TRANSACTION AND WHETHER SPECIFIC LEGISLATION WAS NECESSARY TO FACILITATE THE ACQUISITION OR TRANSFER OF THE HEADWATERS FOREST.

DISCUSSION ANSWER:

The interagency group has discussed several potential mechanisms for accomplishing the proposed ''debt for nature'' swap. The following discussion addresses the budgetary impact of several possible ways of acquiring the Headwaters Forest, putting aside the question of whether there is substantive authority for FDIC, Treasury, or Interior/USDA to execute any of these transactions under existing law.

First, we have discussed a possible transaction in which the FSLIC Resolution Fund (FRF) would gain title to the land and transfer it to Treasury, possibly considering the value of the land as an ''advance payment'' on funds that will eventually be returned to Treasury when the FRF dissolves. Treasury would then transfer/sell the land to the appropriate agency. If it is determined that the authority to execute this transaction exists under current law, then the transaction cannot be ''scored'' under the Budget Enforcement Act (only legislation may be scored). However, there would be a budget impact. If FRF gained title to the land and did not recover cash for it, FRF would have fewer receipts. In more technical terms, the failure to recover cash for the land would be a foregone receipt to FRF. This foregone receipt increases FRF's outlays, increases total Federal outlays, and increases the deficit. The budget effect is the same regardless of whether the transfer is to Treasury as an intermediary or directly to the Park Service.

Second, there may be a possibility of trading other U.S. government property (such as surplus military property) for the land. This transaction would not necessarily need to involve the FRF, which could receive any settlement of its claims in cash. Again, if no legislation is required, then the transaction cannot be scored under the Budget Enforcement Act. In general, barter transactions are not recorded in the budget. However, if the surplus property that is used in the exchange would have otherwise been sold, the agency which owned the property would be foregoing receipts. These foregone receipts would increase that agency's outlays, increase total Federal outlays, and increase the deficit.

Third, it may be the case that legislation is needed to authorize the transaction or to appropriate funds to complete the debt-for-nature swap. If legislation is needed, then the Congressional Budget Office and OMB would be responsible for estimating the budgetary effect of the transaction. Legislation that increases direct spending (i.e., spending that is not under the control of Congressional appropriators) is scored under the ''pay-as-you-go'' (PAYGO) rules of the Budget Enforcement Act. An example of direct spending legislation that is relevant to the case at hand would be if the legislation directed FDIC to hand over the property to another Federal agency without reimbursement; this legislation would be considered to be direct spending since it forces the FRF to forgo receipts (and therefore increases FRF's outlays and total Federal outlays). Similarly, legislation that requires the exchange of excess Government property that would otherwise have been sold for the Headwaters Forest would also be scored as foregone receipts under the PAYGO rules.

Legislation that simply authorizes an appropriation for an agency (e.g., the Park Service) to buy the property from the FRF (or, for that mater, from an individual) would not be scored, since no resources would actually become available for the purchase until a separate appropriations law is enacted. If an appropriations act provides funding to an agency to purchase the property, then the budget impact would be scored as discretionary.

RECORD 31

ENVIRONMENTAL PROTECTION INFORMATION CENTER,
Garberville, CA.

3,000 core acres—redwoods.

1,700 acres buffer zone.

Calif is now talking downward $50 to 70 million.

CECELIA LANMAN,
Biodiversity Network Project Director.

NATURAL HERITAGE INSTITUTE,
Washington, DC.

3,000 core acres—redwoods.

1,700 acres buffer zone.

Calif is now talking downward $50 to 70 million.

JULIA A. LEVIN,
Staff Attorney.

On or about 11/30/95.

Jill R * * * refer to J. Williams * * *

On or about 12/7/95.

/12/3:00 closed. Alan McReynolds * * * Jill R * * * Maxxan motion to dismiss—get it from Ct—not from us—H manuf. consp. issues.

On or about 2/13/96.

How FDIC holds properties list of high value prop. in Calif./Texas.

10/19/95.

Gore's Chief of Staff—Ann.

Chairperson CEO, Katie McGinty.

Elizabeth Blaug * * * Red Emerson own, Sierra Lumber—buffer zone, Earth firsters chaining themselves to * * *.

Why was the appraisal done?

How much area did it cover?

When was it done?

Did it include the 1000 acres buffer zone?

Kate Anderton * * * New G.C. Save The Redwoods League, Appraisal Valuation January 1, 1993.

1992 Bush received * * * as an appraisal * * * for headwaters. Interior subcommittee said do appraisal Rep. Stark * * *, California/Pacific Lumber did forest cruise (est. Boardfeet). Neither state nor Pacific Lumber paid—so they don't have appraisal. Basis of cruise challengeable.

(1) Get Forest Service to share cruise and appraisal; (2) independent review by forester credible with both environment and industry. Save the Redwoods League Hammon Jennsen Wallen & Associates out of Oakland—well known to work for Pacific Lumber a lot. Appraisal assumed cutting 96 to 97% of all trees on property. Estimate only 3 to 4% set aside to meet California Regulations. Basis of environmentalists attack in hearings. 4,488 acres for bottom line—headwaters grove.

Old growth grove 3,000. Buffer to W, S, little E 15000 (owned by Pacific Lumber) to N buffer is owned by Sierra Lumber.

Department of Energy—oil leases on public lands or BLM.

Defense Lands—DOD

Make it part of 6 Rivers National Forest managed by Agriculture. Options BLM manage, Fish & Wildlife manage as a refuge.

$499 million appraisal—3000 acres headwaters, 1500 acres buffer * * *

10/11/95.

Continued to talk to environmentalists, surrounding landowners

Katie McGinty head of Council.

V.P. met with environmentalist when he was out there.

10/12—Dave Felt. Monty Tuesday.

10/20/95

May. At OMB re Hurwitz/Redwoods.

Assume it would go to Forest Service—only $30 mil in our land acquisition fund—We have no particular interest—very small area to manage/very remote—would be a management problem.

May make more sense to give it to BLM, Park Service might want it.

How much money from the state—$70 m in timber.

Exchanges—a gigantic exchange of land would alienate citizens of neighboring states.

DOD—forestry says consider military Base.

If there there cash, we have higher priorities.

Minority shareholders—suit against Hurwitz.

Can H settle a suit by trading MAXXAM's assets

-Can FDIC do it, what would Treasury have to do.

Further—states interest—whether there are DOD possibilities.

Don't plan on cutting trees—Forest Service said that's why it may be better to send it to Park Service.

Reconvene in about 2 wks.

Budget scorekeeping problem.

Coastal Barrier Improvement Act.

10/31/95—Alan McReynolds, DOD—Steve—Base Closure Cmtee.

Revenue from closed bank goes into Bank Closure Acct—Revenues fund for other closures and improvements. Revenues fund other closure actions including environmental cleanups. A host of other public interest conveyances prisons, hospitals, FAA airport, etc. 100% *public benefit discount.* Homeless, port conveyance—Charlestown, Fish & Wildlife, BLM—

Dept. of Interior had a notion they could claim land and swap it for protected land. Admin. opposes that kind of deal. Community revitalization—in the past just sold em—didn't get proper value—no zoning, no community support—BRAC (Base Reallign and Closure, acct didn't get much money: Better to work with community now. Community based programs Sept. 28, 95' Base closures approves by Cong. Fitzsimmons—Denver. Hurwitz would be able to work with Redev. Auth.—88, 91, 93, 95 Communities want control of the property. Can't bypass the process of Redev. Auth.

If VP wanted to do it, we could structure a way to make it happen. But DOD would lose receipts. Calif. would have to look at outrage of local community. If we need spec. legis, we'll figure that out. Not aware of any harvestable timber land.

Wanda didn't try to help Alan McReynolds.

Can't trade whole Mendencino forest.

Possible—Naval OC Station 36 acres. Anything less than 300 civilians may not be part of BRAC process—may be easier.

Calif deleg. believes S.F. Bay area Harbor. Rep. Brown, Stark, Feinstein.

GSA controls mainly of Bldgs. Gordon has asked his staff to list possib. in Bay area.

Ellington AFB in Texas not a BRAC prop. Naval Station, Ground Prairie B/W Dallas and Arlington Interior might be part of screening process with GSA.

Economic Development conveyance—DOD gets receipts back over time.

2nd Round postings

USAT—RIO conf on environment included a contel to reduce Greenhs gasses by yr. 2000.

Program in Dept of envy to implement. Identify carbon offset projects. Scientific model develop carbon sink capacity—preserve of trees perm. carbon sink—formulas—vehicle for corp—carbon offsets. Political need for U.S. to make progress.

11/28/95—Headwaters mtg. CEQ go GSA route to transfer from Trea to Interior.

''Coastal Barriers Mgt Act''—''12 U.S.C. 1441a–3''—RTC, FDIC property.

KM—extremely accurate reports came back from environmentalists—keep confidentiality.

Physical assets may not ''count as money for scoring''

Treasury cannot give FRF credit for the trees.

If policymakers make decision to accept trees—increases Fed. deficit—Insurmountable issue—there is a hole here if you take trees. Interior disagrees w/FDIC analysis of Coastal Barriers—they think it does work.

Eliz—our group will meet again to sift thru remaining questions. No formal contacts until OTS files.

John G.—we are leaning toward FDIC opening discussions.

Lois—scoring problems were the biggest difficulties.

John G.—after admin suit is filed is time for opening any discussions—prior to that we get back to K.M. to see if there's any reason not to go forward with negotiations.

Alan McReynolds

Investment properties

About 2/26/96 RTC prop—in the past Interior had to pay. Has that changed.

$124m—Oak Valley, Beaumont, Calif, 6700 acres of under land in Riverside Cty.; Kock property—La Quinta, Calif—1200 acres near Palm Springs, Wildlife Refuge Rancho San Diego—already

Buckley—failure to advise clients—Ken Walker. Call admin. atty to talk about case.

Nov/Dec 1995

Jeff Wms—11:40, Thur 60648 Nov 14, 11:00 722 Jackson Place CEQ Conf Rm.

Rick Sterns: Re Judge Hughes

Ross Delston: Parker James, Jack Sherkma. * * * Pat Bak, M. Palen, Ann Shopet. Judge Hughes—use of overlapping auth. Hanass, Thur. order. Carolyn talked to Kim Thur.

1/19/96. Told Alan McReynolds that I had talked to Carolyn Buck after lunch on 7/17/96. I asked whether OTS wanted to be involved in discussions led by CEQ to respond to Hurwitz' suggestion about Headwaters. She said curtly, ''No.'' I asked if she had any objection to FDIC participating—she said that was not for her to decide. I concluded from her manner that she did not intend to express an opinion and didn't want to talk about it anymore so we parted without further discussion. I advised Elizabeth Blauger about this yesterday afternoon. I said that if Hurwitz wanted to have global settlements with OTS and FDIC involved he would have to ask for them just as happened with Ey and Deloitte

---

Why consider giving these other properties, when there 1.6 B in losses.

To: Jack D. Smith@LEGAL OGC Hdq@Washington
From: Jeffrey Williams@LEGAL PLS2@Washington
Subject: re: Meeting with Gore Today (Revised)
Date: Friday, October 20, 1995 9:27:23 EDT

Per my recent voice mail message to you regarding my conversations with a key staffer in Pelosi's office who worked on the Headwaters forest legislation for five years, I now believe it is incorrect to describe the $499 million as the result of an ''appraisal.'' It was not performed by any independent person and was an estimate based on public information prepared by the Forest Service and asserted by the Director of the Forest Service in testimony before the Subcommittee on National Parks & Public Land. The testimony demonstrated that the value was seriously flawed and that those that were involved in calculating the value never saw the land.

He said no one takes the $499 million seriously anymore, particularly since Hurwitz bought PacLumber for $500 million total that included all the company's assets which included a large downtown San Francisco office building and tens of thousands of acres of other land and buildings.

As the 3500 acres has never been formally appraised, you are correct that the time has come to commission such valuation. PacLumber knows the $499 million is too high, that's why, according to Pelosi's staffer, it is using it too its advantage and not challenging it. True value may be half that according to Pelosi's office.

EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, DC, October 25, 1995.

To: Dave Sherman, Forest Service; Allen McReynolds, DOI; Larry Mellinger, DOI; Bruce Beard, OMB; Jack Smith, FDIC; David Long, DOJ; John Bowman, Treasury.
From: Elisabeth Blaug, Associate General Counsel.
Subj: Headwaters Forest Meeting October 26.

Most of you attended a meeting this past Friday at CEQ Chair Katie McGinty's office, at which we initiated discussions on a potential debt-for-nature swap. As you will recall, the DIC recently filed a $250 million suit against Charles Hurwitz for his role in the failure of the United Savings Association of Texas (in addition, there is a private False Claims challenge pending). Mr. Hurwitz is a major stock owner in Maxxam, which acquired Pacific Lumber Company, which owns and logs the Headwaters Forest. Because this forest contains approximately 3,000 acres of virgin redwoods, there is great interest to preserve it. Among a number of options to consider for ensuring this happens is a potential debt-for-nature swap, by which FDIC would seek to acquire Headwaters from Mr. Hurwitz in exchange for release of its claims.

At our meeting last Friday, a number of complex legal issues were raised concerning this proposed swap, which relate in some part to your agency. Essentially, we need to examine if and how there might be a chain of ownership from FDIC to Treasury to a land management agency. Hence, there is a follow-up meeting tomorrow (Thursday) at 10:00 a.m. at FDIC, 550 17th Street, room 3036. We will attempt to identify the legal issues that need to be addressed to determine whether a debt-for-nature swap is feasible. I look forward to seeing you or your designate(s) tomorrow. Please contact me at 395–7420 if you have any questions. The FDIC contact is Jack Smith, Deputy General Counsel, at 898–3706.

RECORD 32

Tell Me—about 3/4/96.

RECORD 33

DRAFT

To: William F. Kroener, III, General Counsel
Subj: Meeting with Vice President Gore on Friday, Oct. 20, 1995, at 11:00 a.m.

DISCUSSION POINTS

I. Background

1. United Savings Association of Texas, Houston, Texas, (''USAT'') was acquired in 1983 by Charles E. Hurwitz. Hurwitz leveraged the institution through speculative and uncontrolled investment and trading in large mortgage-backed securities portfolios, without reasonable hedges, to $4.6 billion in assets. Investments lost value and USAT was declared insolvent and placed into FSLIC receivership on December 30, 1988. Loss to the FSLIC Resolution Fund is $1.6 billion.

2. While Hurwitz was a controlling shareholder and de facto director of USAT he acquired, through a hostile takeover and with the strategic and financial assistance of Drexel Burnham Lambert, Inc., Pacific Lumber Company, a logging business based in northern California. As a result, Hurwitz came to control the old growth, virgin redwoods that are the principal focus of the Headwaters Forest.

II. FDIC Litigation

1. On August 2, 1995, FDIC as Manager of the FSLIC Resolution Fund filed a lawsuit against Mr. Hurwitz seeking damages in excess of $250 million.

a. Complaint contains three claims:

Count 1 alleges breach of fiduciary duty by Hurwitz as de facto director and controlling shareholder of USAT by failing to comply with a Net Worth Maintenance Agreement to maintain the capital of USAT;

Counts 2 and 3 allege gross negligence and aiding and abetting gross negligence in establishing, controlling and monitoring two large mortgage-backed securities portfolios.

2. FDIC has authorized suit against three other former directors of USAT that we have not yet sued; a tolling agreement with these potential defendants expires on December 31, 1995. The court may order FDIC to decide to add them as defendants prior to that date.

3. Status of FDIC Litigation: Pursuant to the Federal Rules of Civil Procedure, the parties—through counsel—have met and exchanged disclosure statements that list all relevant persons and documents that support our respective positions. Moreover, the parties have agreed to a scheduling order that reflects a quick pre-trial period. All discovery is to be concluded by July 1, 1996. The court has set a scheduling conference to discuss all unresolved scheduling issues for October 24, 1995; and a follow-up conference on November 28, 1995.

III. Settlement Discussions

1. FDIC has had several meetings and discussions with Hurwitz' counsel prior to the filing of the lawsuit. Hurwitz has never, however, indicated *directly* to FDIC a desire a negotiate a settlement of the FDIC's claims.

2. As result of substantial attention to Pacific Lumber's harvesting of the redwoods by the environmental community, media inquiries, Congressional correspondence, and the state of California, Pacific Lumber has issued various press releases stating it would consider various means of preserving the redwoods.

IV. OTS Investigation

1. Since July 1994, the Office of Thrift Supervision has been investigating the failure of USAT for purposes of initiating an administrative enforcement action against Hurwitz, five other former directors and officers, and three Hurwitz-controlled holding companies. The OTS may allege a violation of the Net Worth Maintenance Agreement and unsafe and unsound conduct relating to the two MBS portfolios and USAT's real estate lending practices. If OTS files its administrative lawsuit, if many allege damages that total more that $250 million.

2. OTS has met with Hurwitz' counsel; no interest in settlement has been expressed to OTS.

3. OTS is likely to formally file the charges within 45 days.

4. Appears to FDIC inappropriate to include OTS representatives in the meeting to discuss possible settlement of its claims against Hurwitz since OTS has not yet approved any suit against Hurwitz or his holding companies and OTS' participation at such meeting may be perceived by others as an effort by the Executive Branch to influence OTS's independent evaluation of its investigation.

V. FSLIC Resolution Fund (''FRF'' Issues

1. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 (''FIRREA'') (enacted Aug. 9, 1989), accord special treatment to certain savings & loan associations that failed prior to its enactment. The FRF obtains its funds from the Treasury and all recoveries from the assets or liabilities of all FRF institutions are required to be conveyed to Treasury upon the conclusion of all FRF activities. The statute does not establish a date for the termination of the FRF. FRF fund always in the red due to huge cost of these thrift failures.

2. To date, FRF owes the Treasury approximately $46 billion.

3. FDIC has decided that if Hurwitz offered the redwoods to settle the FDIC claims, we would be willing to accept that proposal. Because any assets recovered from FRF institutions are required to eventually be turned over to Treasury, the trees (i.e. the land conveyance) could conceivably be transferred to Treasury.

4. May need legislation to assist in transfer of land and other details of such a conveyance. The mechanics of such a transfer is not a focus of FDIC's current efforts which are to persuade Hurwitz of liability and to seriously consider settlement.

VI. Impediments to FDIC Direct Action Against Trees

1. FDIC has no direct claim against Pacific Lumber through which it could successfully obtain or seize the trees or to preserve the Headwaters Forest. Neither Maxxam, Inc. (which owns Pacific Lumber and is controlled by Hurwitz) nor Pacific Lumber are defendants in FDIC's suit. There is no direct relationship between Hurwitz' actions involving the insolvency of USAT and the Headwaters Forest owned by Pacific Lumber. Pacific Lumber was acquired by Maxxam but does not appear to have owned any interest in USAT or United Financial Group, USAT's first-tier holding company. Moreover, neither USAT nor UFG ever owned an interest in Pacific Lumber.

2. FDIC's claims alone are not likely to be sufficient to cause Hurwitz to offer the Headwater Forest, because of their size relative to recent Forest Service appraisal of the value of the Headwaters Forest ($600 million); because of very substantial litigation risks including statute of limitations, Texas negligence—gross negligence business judgment law, and Hurwitz's role as a de factor director; and the indirect connection noted above, including the risk of Hurwitz facing suit from Pacific Lumber securities holders if its assets were disposed of without *Pacific Lumber* being compensated by either outsiders or Hurwitz or entities he controls.

RECORD 34

To: Jack D. Smith@LEGAL OGC Hdq@Washington
From: Jeffrey Williams@LEGAL PLS2@Washington
Subject: Hurwitz
Date: Wednesday, October 25, 1995 11:51:51 EDT
Certify: N

JACK: I've talking with my DOD contacts in the Base Closures Committee, particularly a guy named Joe Sikes. They are interested in talking with us to educate themselves and us (and other appropriate folks/agencies) on the possibilities and difficulties of including a closed military facility in a transaction with Hurwitz.

He is discussing it with his folks and I think they would be an asset to tomorrow's meeting, making the key point even more clear that it will take more than FDIC's claims to get the trees and that FDIC remains an important part of exploring creative solutions to the issue.

Let me know if they should be invited to the meeting.

MOSEL THOMPSON,
Department Assistant Treasury, 632–2032.

RECORD 35

CONFIDENTIAL/PRIVILEGED COMMUNICATION

ISSUES FOR 10/26 MEETING

I. FDIC Transfer of Assets Obtained in Settlement to Treasury

a. FDIC lawsuit against Hurwitz filed on behalf of the FSLIC resolution Fund (''FRF''), which was created by Financial Institution Reform, Recovery and Enforcement Act of 1989 as successor to Federal Savings & Loan Insurance Fund. The FRF is to be managed by the FDIC and separately maintained and not commingled with any other FDIC properties and assets. 12 U.S.C. sec. 1821a(1).

b. Assets and liabilities of the FRF are not the assets and liabilities of the FDIC and are not to be consolidated with the assets and liabilities of the Bank Insurance Fund or the Savings Association Insurance Fund for accounting, reporting or for any other purpose. Id. at 1821a(3).

c. The FRF is to be dissolved upon satisfaction of all debts and liabilities. Upon dissolution, any remaining funds shall be paid to Treasury. Id. at 1821a(f).

d. There are no creditors of United Savings Association of Texas, including uninsured depositors, that have a priority over Treasury in any assets recovered by FRF. Currently, FRF owes Treasury about $46 billion.

e. Coastal Barrier Improvement Act of 1990 (Pub.L. 101–591) imposes certain restrictions and procedures on the FDIC's ownership and ability to transfer property that is within the statute. 12 U.S.C. sec. 1441a–3. May enhance FDIC's ability to transfer to other Federal agency.

1. Unclear whether Headwaters Forest is within the scope of the Act.

2. Moreover, for the Act to apply to FDIC, title to land must be held by FDIC in its corporate capacity. The lawsuit and any potential recovery is in the capacity of FDIC as Manager of the FSLIC Resolution Fund, and not in FDIC's corporate capacity. FDIC must determine whether and, if so, how, FRF can transfer title of assets to FDIC corporate. If FRF can transfer title to Headwaters Forest to FDIC corporate, and Forest is within scope of the Act, the Act provides mechanism for FDIC to transfer title of assets directly to Interior.

II. Factors that Impede Settlement

a. FDIC has no direct claim against Pacific Lumber through which it could successfully obtain or seize the Headwaters Forest. Neither Maxxam, Inc. nor Pacific Lumber are defendants in FDIC's suit. Neither Pacific Lumber nor Maxxam ever owned any interest in USAT or UFG, its holding company. Hurwitz has not discussed directly with FDIC any settlement of the FDIC's claims; although he has endorsed, through Pacific Lumber's spokesperson and an October 22, 1995, interview published in The Press Democrat of Santa Rosa, California, the concept of a transaction with the Government that would include a land exchange.

b. OTS has been investigating Hurwitz, other former directors of USAT and UFG, Maxxam, and Federated Development Company (a Hurwitz entity that owned part of UFG). We do not know when OTS will commence proceedings against Hurwitz and others.

c. However, FDIC and OTS claims alone are insufficient to exchange with Hurwitz in settlement for the Headwaters Forest.

III. Factors That Could Enhance Likelihood of Settlement

a. New appraisal of Headwaters Forest. Old appraisal may be inadequate in light of recent environmental, economic, and other developments; and Hurwitz suggests need for new appraisal in 10/22/95 interview.

b. Identification of whether and how Treasury can hold and transfer asset to Interior.

c. Identification of other consideration from the Government that may be of interest to Hurwitz.

1. Closed military facility in Texas. Hurwitz already has indicated interest in facility between Houston and Galveston, Texas. FDIC has begun to discuss with Department of Defense Base Closures Committee staff. Interior has apparently identified some possible land.

2. State of California has stated its interest in participating in transaction by providing harvestable timber land valued at between $40–60 million. Need to contact Governor Wilson's office to pursue discussions with us.

3. Evaluation of effect of tax losses to Pacific Lumber and Maxxam for transfer of Headwaters Forest at less than fair market value. Tax losses may be viewed by Hurwitz as advantageous to Pacific Lumber and Maxxam, and may indirectly result in minority shareholders acquiescence to transaction.

4. California congressional delegation has shown significant interest in Headwaters Forest and have been receptive to efforts to conclude a ''debt for nature'' transaction. Delegation may act as liaison between involved parties and may be interested in proposing any legislation needed to facilitate such transaction.

5. No direct discussions have yet occurred between Hurwitz and any involved agency over the Headwaters Forest transaction. His recent interview suggests his interest in such discussions with such representatives.

RECORD 36

To: Jack D. Smith@LEGAL OGC Hdq@Washington
From: John V. Thomas@LEGAL PLS@Washington
Subject: re:
Date: Friday, January 5, 1996 17:21:07 EST
Certify: N

Top 5 (for the top 10 list as well, I hope).

4. United Savings. OTS has filed their notice of charges. The statute has been allowed to run by us on everyone other than Hurwitz. We have moved to stay our case in Houston, and are awaiting a ruling. Two people, Munitz and Gross (I think), have moved to intervene. And there is the question of whether a broad deal can be made with Pacific Lumber.

RECORD 36A

1/19/96.—Told Alan McReynolds that I had talked to Carolyn Buck after lunch on 7/17/96. I asked whether OTS wanted to be involved in discussions led by CEQ to respond to Hurwitz suggestion about Headwaters. She said curtly, ''No''. I asked if she had any objection to FDIC participating—she said that

was not for her to decide. I concluded from her manner that she did not intend to express an opinion and didn't want to talk about it any more, so we parted without further discussion. I advised Elizabeth Blaug about this yesterday afternoon. I said that if Hurwitz wanted to have global settlements with OTS and FDIC involved he would have to ask for them just as happened with EY and Deloitte.

RECORD 37

NOV/DEC 1995

Jeff Wms.—11:40 Thur 60648
Nov 14 11:00
722 Jackson Place, CEQ Conf Rm.
Rick Sterns: Re Judge Hughes, 906–7966.
Ross Delston: Parker Jane, Jack Shetman, 362–2260.
Pat Bak: 60664.
M. Palen: 60363.
Ann Shopek: 212–973–3215.
Judge Hughes—use of overlapping auth Harness
Thur. order
Carolyn talked to Ken Thur.

RECORD 38

11/28/95—Headwaters mtg CEQ go GSA route to transfer from Tres to Interior
''Cystal Barriers mgt Act''—
''12 U.S.C. 1441a–3''—RTC, FDIC property—
KM—extremely accurate reports came back from environmentalists—keep confidentiality physical assets may not count as money for ''scoring.''
Treasury cannot give FRF credit for the trees.
If policymakers make decision to accept trees—increases Fed. deficit—
Insurmountable issue—there is a hole here if you take trees.
Interior disagrees with FDIC analysis of Costal Barriers and they think it does work.
Eliz.—our group will meet again to sift thru remaining questions. No formal contacts until OTS files.
John G—we are leaning toward FDIC opening discussions
Lois—scoring problems were the biggest difficulties.
60342 D.G.
John G—after admin suit is filed it is time for opening any discussions—prior to that we get back to K.M. to see if there's any reason not to go forward with negotiations.

RECORD 39

ATTORNEY-CLIENT/WORK PRODUCT
CONFIDENTIAL COMMUNICATION

DRAFT OUTLINE OF HURTWITZ/REDWOODS BRIEFING

I. Introduction

Significant development involving multi-Agency initiative led by Office of the Vice President to obtain title to last privately owned old growth virgin redwoods and place under protection of Department of Interior's National Park Service. FDIC plays prominent role in this Government initiative.

II. Background—United Savings Association of Texas, Houston, TX

a. USAT failure—December 30, 1988—cost to FSLIC $1.6 billion
b. FDIC as Receiver for USAT
1. Investigation.
2. Litigation.
(i) Status of litigation.
c. OTS—separate statutory enforcement authority
1. ''Arrangement'' with FDIC.
2. Investigation.
3. Administrative enforcement action.
(i) Status of ALJ proceeding.

III. Pacific Lumber Company

a. Maxxam
1. Hurwitz as 60% owner, controlling shareholder of public company.
2. Maxxam's assets (Kaiser Aluminum; Sam Houston Race Track; Real estate subsidiaries; Pacific Lumber).
b. Hurwitz acquisition of Pacific Lumber
1. During Hurwitz's USAT involvement.
2. Relationship with Drexel Burnham Lambert and Michael Milkin.
c. Ownership of Headwaters Forest
1. Northern Spotted Owl and Marbled Murrelet.
c. Hurwitz management and logging policies of Pacific Lumber

IV. Headwaters Forest

a. Description—Northern California, near Eureka; 3,300 acres of Pacific Lumber's 195,000 acres; unlogged, inaccessible, no roads; endangered species; Pacific Lumber's only remaining valuable asset.
b. Previous legislative initiatives—since 1983.
c. Hurwitz's relationship with environmental community—always tense.
1. Numerous picketing; spiking of trees; Earth First! and others.
d. Department of Interior's prior efforts to save Headwaters Forest.

V. FDIC and Headwaters Forest

a. Pacific Lumber not a direct asset of USAT's.
b. Environmental community focused attention of Congress on existence of FDIC's ongoing investigation of USAT's failure.
c. Chairman Helfer indicated in letter to The Rose Foundation that FDIC would consider a proposal that includes the Headwaters Forest in a settlement of claims against Hurwitz if Headwaters asset was offered.

VI. Status of Headwaters Forest Initiative

a. FDIC working with CEQ, Interior, other agencies in exploring viability of ''debt for nature'' settlement. Dated US Dept. of Agriculture, Forest Service appraisal valued Headwaters Forest at $499 million.
b. FDIC made clear to all involved Government principals that settlement value of FDIC [and OTS] lawsuits insufficient to obtain Headwaters Forest, and US will have to find additional assets to provide Maxxam.
c. Under auspices of CEQ and Interior, numerous meetings with Hurwitz exploring the concept that includes a swap of other government-owned properties held by GAO as excess or surplus land, and approved for sale under authority of Department of Defense Base Realignment and Closure Commission.
1. Interior exploring various transactions that include swaps of Pacific Lumber land with other private land owners; providing Hurwitz with timber rights on other government owned land; State of California to provide funds or timber rights on state-owned land.
d. Hurwitz recently agreed to provide Dept. of Interior with access to conduct new, confidential appraisal of Headwaters Forest.
e. Hurwitz also expressed interest in exploring availability of FDIC properties to ''bridge the gap'' between value of Headwaters Forest and lawsuits.
1. FSLIC FRF assets—few potentially valuable properties; scraping bottom of barrel since properties from 1989 and earlier failures.
2. RTC FRF assets—more valuable properties in regions Hurwitz/Maxxam currently conduct real estate operations.
(i) Can FDIC swap assets of similar aggregate value between funds to enhance liquidations of assets and likelihood of resolution of receivership claim?

VII. Recent Developments

1. Hurwitz, on behalf of Pacific Lumber and its subsidiaries, filed ''takings'' cases against the U.S. and State of California alleging that the designation of Headwaters Forest and Owl Creek (both owned by Pacific Lumber) as ''critical habitat'' for the endangered species Marbled Murrelet prevented Pacific Lumber from logging and resulted in substantial lost revenue. The complaint seeks more than $460 million in losses resulting from prohibition on logging on 50,000 acres of Pacific Lumber land. The case is being handled by the Justice Department. The filing of the lawsuit is viewed by Interior and Justice as an attempt by Hurwitz to nullify the FDIC and OTS lawsuits for purposes of the ongoing discussion.

VIII. CEQ's Projected Time Frame

1. Discussions between Hurwitz and Government ongoing; Hurwitz now making site visits to DOD and GSA properties.
2. Interior's land exchange negotiations proceeding with numerous parties.
3. CEQ negotiators *not* discussing FDIC and OTS lawsuits as part of Headwaters Forest transaction; Hurwitz representatives from Patton Boggs law firm indicated their expectation that ''all Government lawsuits'' will be resolved as part of transaction.
4. Hurwitz's counsel in FDIC litigation not raise settlement, but have tangibly slowed pace of suit.
5. Interior projects transactions can close in September 1996.

RECORD 40

CEQ

722 Jackson Place, NW, Washington, DC 20503, Phone (202) 395–5750, FAX (202) 456–6546

FAX TRANSMISSION

Date 8/8/96
To: Jack Smith
Phone Number:
FAX Number: 898–7394
Subject of Material: 4 Questions on Headwaters. Thank you so much, this will really help in clearing up major misperceptions! How quickly can you turn this around? (I ask for so little, don't I?) EB
From: Elisabeth Blaug
No. of Pages (including Cover Sheet) 2
736–0577—Bob D. fax
456–0753—Elizabeth B. fax

QUESTIONS

Q1. Why is the Administration willing to swap land with Charles Hurwitz when his very actions in acquiring Pacific Lumber Company led to lawsuits filed against him by the FDIC and Office of Thrift Supervision? Why doesn't the Administration forget the land exchanges and get Hurwitz to settle his debts in exchange for the trees?
A1. would be inappropriate because of independent status of regulators, pending litigation/administrative proceeding. . . .
Q2. In light of question 1, why can't FDIC or OTS bring up a debt-for nature settlement with Charles Hurwitz?
A2. ??
Q3. Charles Hurwitz's purchase of Pacific Lumber led to a $1.6 billion collapse of a Texas Savings & Loan; that amount is likely more than enough to cover the acquisition of *all* the old growth redwoods on Palco property. Why then is the Administration looking for excess property to exchange?
A3. ??
Q4. If the regulations are not actually seeking $1.6 billion, what monetary damages are they seeking against Hurwitz?
A. ??
1. There is no direct relationship between the Headwaters Forest and the actions of Mr.

Hurwitz with respect to the insolvency of United Savings Association of Texas (''USAT''). Moreover, Pacific Lumber Company is not a defendant in either lawsuit. Although Pacific Lumber was acquired by Maxxam, it does not appear that Pacific Lumber owned any interest in USAT or United Financial Group, Inc. (''UFG''), USAT's first-tier holding company.

The Administration cannot dictate a debt for nature settlement with Mr. Hurwitz because the FDIC and OTS are independent regulatory agencies with separate and distinct statutory and fiduciary responsibilities. The Administration is prohibited by law from directing the outcome of any action commenced by FDIC or OTS in the performance of either agency's official duties.

2. The statutory framework for action commenced by FDIC and OTS require the agencies to seek recovery for losses incurred to the insurance funds and appropriate civil money penalties. The agencies are chartered to recover money, not to establish national parks. They often initiate settlement discussions to recover money or assets which can be converted to money. For example, the OTS has already settled some issues related to the USAT failure for a $9.4 million payment from USAT. Nevertheless, the FDIC is open to any appropriate settlement of its claims including a debt for nature swap should Mr. Hurwitz make such a proposal.

3. Neither the FDIC or the OTS are suing Mr. Hurwitz for $1.6 billion. Although the agencies believe that Mr. Hurwitz' conduct resulted in significant losses to USAT, both suits seek damages and restitution for mismanagement and gross negligence that are directly attributed to specific acts and transactions within the applicable statute of limitations.

4. The FDIC suit against Mr. Hurwitz seeks damages in excess of $250 million. The OTS administrative enforcement proceeding seeks reimbursement for losses to the insurance funds in an unspecified amount to be proven at trial.

RECORD 41

To: John V. Thomas@LEGAL PLS@Washington, Stephen N. Graham@DAS Ops@Washington, Richard T. Aboussie@LEGAL ASIS@Washington, Henry R.F. Griffin@LEGAL ASIS@Washington, Robert DeHenzel@LEGAL PLS@Washington, Jeffery Williams@LEGAL PLS@Washington
Cc: William F. Kroener III@LEGAL OGC Hdq@Washington, Leslie A. Woolley@Washington, Robert Russell Detail@EO@Washington
Bcc:
From: Jack D. Smith@LEGAL OGC Hdq@Washington
Subject: USAT
Date: Friday, September 6, 1996 9:05:59 EDT
Attach:
Certify: N
Forwarded by:

John Douglas called and we are going to have a settlement meeting Monday or Tuesday with Douglas and OTS. Douglas indicates that he will propose that the FDIC take certain redwood trees which we will exchange for other marketable property from perhaps Interior. FDIC would then be able to sell the property it gets from Interior.

Douglas says there are tight deadlines and he wants to try and wind up the negotiations by Wednesday. The FDIC settlement delegation will be the General Counsel, myself, Steve Graham and Jeff Williams. If a realistic proposal is submitted approvals. Therefore, Jeff is blocking out a settlement authorization memo with the terms to be filled in later.

RECORD 42

To: Henry R.F. Griffin@LEGAL ASIS@Washington, Jeffrey Williams@LEGAL PLS@Washington, Robert DeHenzel@LEGAL PLS@Washington, John V. Thomas@LEGAL PLS@Washington
Cc:
Bcc:
From: Jack D. Smith@LEGAL OGC Hdq@Washington
Subject: Headwaters
Date: Monday, September 16, 1996 18:10:50 EDT
Attach:
Certify: N
Forwarded by:

I am advised that the draft settlement proposal we received from Patton Boggs has been discarded by Interior so we need not review it in detail.

As to the Qui Tam case, my understanding is that it will not be part of this deal, and may proceed even if there is a government settlement. We will continue on our separate settlement track only if OTS is able to reach an understanding with Hurwitz about removal and prohibitions.

APPENDIX 3

DOCUMENT DOI–A

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
Washington, DC, January 23, 1995.

MEMORANDUM

To: Anne Shields, Chief of Staff
From: Allen McReynolds, Special Assistant to the Secretary
Subject: Update on Headwaters Forest

I am forwarding three (3) pieces of information which will provide an update on the Maxxam/Pacific Lumber Company—owned Headwaters Forest in northern California.

1. *OTS Filing*. The U.S. Office of Thrift Supervision of the Department of the Treasury filed their lawsuit against United Savings Association of Texas and related Maxxam parties on December 26, 1995. Maxxam's attorneys have requested 60 days in order to respond to the charges; the deadline is February 19. The next step will be for the judge to schedule a hearing to review the charges and responses.

2. *Houston Chronicle Editorial*. Attached is the editorial written by Charles Hurwitz, C.E.O. of Maxxam, which appeared in the Houston Chronicle on January 14. In his editorial, he describes the environmentalists' activities as hostile and inappropriate actions. The Debt-for-Nature swap concept is discussed on page 3.

3. *H.R. 2712—Acquisition of Headwaters Forest*. Congressman Frank Riggs of Eureka introduced a bill on December 5, 1995 for the acquisition of Headwaters Forest through a land exchange and timber exchange on BALM lands in northern California. My contact on the committee tells me that no action has occurred thus far, but that it is likely that this bill will be pushed by Mr. Riggs and his colleagues later this month.

4. *Next Step*. You may recall that the filing by O.T.S. of their suit was the step which would release O.T.S. and F.D.I.C.'s legal staffs to initiate a meeting with Mr. Hurwitz and/or his counsel. I have spoken to O.T.S. attorneys managing this suit, and they continue to insist on an arms-length relationship with any public efforts to acquire Headwaters through a Debt-for-Nature Swap. They are of the opinion that it would disadvantage their chances of a fair and legal proceeding if they were to be engaged in high-level discussions with Administration staff. Thus, that leaves the meeting and any negotiations for an out-of-court agreement to the F.D.I.C. legal team. They called Katie McGinty last week and requested that Interior's attorneys be a part of any meetings and negotiations with Hurwitz/Maxxam arranged to test Maxxam's interest in a global settlement. They argue that F.D.I.C. does not know the asset (Headwaters Forest) or the current efforts by the environmentalists/FWS/State of California to halt timber harvesting on E.S.A. grounds (the marbled murrelet habitat) as well as Interior.

I believe that Katie may contact you about the appropriateness of the Department's involvement to get the meetings off of the ground.

Thank you for your attention to these issues.

Attachments (3).

cc: John Garamendi, George T. Frampton, Jr., Bob Armstrong, Bonnie Cohen, John Leshy, Bob Baum, Jay Ziegler

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DOCUMENT DOI–B

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
Washington, DC, August 2, 1995.

MEMORANDUM

To: George T. Frampton, Jr., Assistant Secretary, Fish and Wildlife and Parks
From: Allen McReynolds, Special Assistant to the Secretary
Subject: California Headwaters Forest Acquisition

Recently, the Secretary received a letter from the Congressional delegation from northern California requesting assistance in the acquisition of a 44,000 acre parcel of timbered lands owned by Maxxam Corporation of Texas (see attached). You may remember that Hamburg and Boxer attempted to appropriate funds in 1994 (see H.R. 2866 attached). Maxxam, owned by Charles Hurwitz of Houston, conducted a leveraged buyout of Pacific Lumber in the late 1980's to acquire 184,000 acres of timber for $900,000,000. You will recognize that these tracts are a part of the habitat for the marbled murrelet (see attached article).

To repay the bonds secured for the purchase, Mr. Hurwitz has stepped up the cutting schedule worked out with P.L.'s former owners. On September 15, 1995, the moratorium on logging the old-growth portion of Maxxam's un-logged tracts will expire. Thus, the Congressional delegation and the environmental community are inquiring if Interior can devise some creative acquisition strategies. They also wrote to the Forest Service, but the Forest Service had no suggestions on how to acquire the property.

I. Acquisition Strategy

In response to the delegation's request, several staff from Interior began to review the possibilities that exist for acquiring the 40,000 acre tract through creative land exchanges. A summary of these follows:

A. Governor's Headwaters Task Force

Governor Wilson created a Headwaters Task Force several months ago to look at strategies for acquiring these acres. Representing Interior are Ed Hasty, BLM State Director, and Phil Detrick, FWS. The Governor's Office has decided to seek State legislation to trade approximately $70,000,000 in lands owned by The California State Lands Commission for Headwaters tracts. The Governor's Office would like for Interior to put lands up for trade to match their strategy. Terry Gorton, the Governor's negotiator, has met with Hurwitz and thinks the acreage could be had for a sum less than the Forest Service's appraisal of $500,000,000.

B. DOI Acquisition by Land Exchange

The California Desert Protection Act and the Natural Communities Conservation Program (NCCP) have consumed all of BLM's lands which were available for disposal in California. Thus, BLM, nor FWS for that matter, has any trading stock within California which is available for such a transaction.

C. Military Base Closure Land Exchanges

The American Lands Conservancy (ALC), also a member of the Governor's Task Force, has reviewed with the Governor's Office the potential of acquiring small acreages at closing military bases in northern California. Hamilton AirField, located in the Bay Area, recently sold a tract for $10,000,000 to a local developer. The Governor would like to capture these funds and others as bases are sold piecemeal across the area. Because of our unsuccessful efforts at El Toro Marine Corps Air Station, we have made it clear that Interior will not front this concept for consideration. It is anticipated that ALC will provide a report to the delegation regarding the opportunities at Bay Area military base closures.

II. Debt for Nature Swap

The Federal Deposit Insurance Corporation and the Office of Thrift Supervision have claims against Charles Hurwitz and United Savings of Texas which they are preparing to pursue (see attached article). The FDIC claims result from mortgage-backed securities trading. The OTS claims result from networth-maintenance claims. The total of these two claims is in excess of the appraised fair market value of the 40,000 acres of old growth redwood timber that the Department is seeking to protect. Thus, there has been some support for a debt-for-nature swap for FDIC and OTS's claims for the 40,000 acres. FDIC and OTS are amenable to this strategy if the Administration supports it.

Attached is a copy of the Complaint and Jury Demand on behalf of the FDIC. The Board of the FDIC approved this action late yesterday. The OTS is expected to take similar action no later than mid-October.

III. Next Steps

Those of us working on this (Jay Ziegler, Tom Tuckman, Geoff Webb, and me) are seeking guidance from you on how to proceed. The possible next steps are as follows:

Request a group meeting (Interior, FDIC, OTS) with the Department of Justice to learn their view on a Debt-for-Nature Swap concept for FDIC and OTS's claims.

Annoint a DOI Team to represent the Department in the negotiations with Hurwitz (should FDIC and OTS wish to have us at the table).

Determine which Interior agency would be the most appropriate for the long-term ownership and restoration of the acreage. (BLM has suggested that they are in the best position to do so. A similar argument can be made for the Park Service. The Forest Service may have notions that they are most appropriate.) Your recommendation early will reduce conflict about expectations.

Determine what Interior's involvement may mean for the Department from a policy perspective.

Thank you for your attention to this project. It appears to represent an opportunity for the Department to resolve longstanding problems on the Headwaters Forest.

Attachments

—March 24, 1995 Letter to Secretary Babbitt
—Headwaters Forest Act, H.R. 2866
—Briefing Paper on the History of the Act
—FDIC Action
—Wall Street Journal Clipping
—The Oregonian Clipping
—BLM Statement on Old Growth Reserve System

cc: Jay Ziegler, Geoff Webb, Tom Tuckman, Larry Mellinger

Following is a list of individuals with whom I have worked in the recent past on projects for the Secretary's Office who I consider very trustworthy. I cannot say that they have a specific background in base conversion sites, but they are certainly well schooled in commercial real estate development, hotel development, and residential development in California.

Bruce Karatz, President, Chairman & CEO, Kaufman and Broad, 10877 Wilshire Boulevard, 12th Floor, Los Angeles, CA 90024, 310/443–8000, 310/443–8090(fax)

Richard M. Ortwein, President, Koll Real Estate Group, 4343 Von Karman Avenue, Newport Beach, CA 92660, 714/833–3030, ext. 249, 714/474–1084 (fax)

William (Bill) D. Sanders, Chairman, Security Capital Group, Inc., 125 Lincoln Avenue, 3rd Floor, Santa Fe, New Mexico 87501, 505/820–8214

TABLE 27—TIMBER FOREST LAND AND HARVESTED BY STATE—FISCAL YEAR 1996 [1]

State or Commonwealth [2]	Timber sold			Timber harvested	
	Sales	Volume (MBF) [4]	Bid value [3] (Actual dollars)	Volume (MBF) [4]	Receipts (Actual dollars)
Alabama	738	58,25516	5,220,330.40	60,244,36	5,490.493.12
Alaska	73	96,221.17	3,193,047.40	223,085.32	12,720,486.11
Arizona	12,949	52,419.49	2,170,611.75	69,106.74	7,446,270.20
Arkansas	2,660	185,103.51	26,013,244.60	151,300.05	18,005,184.88
California	49,576	379,258.44	38,576,576.44	451,087.80	104,815,692.01
Colorado	12,9918	53,941.20	8,138,155.95	95,977.22	9,423,741.94
Florida	111	49,981.98	4,234,629.90	86,472.94	4,306,776.06
Georgia	711	31,016.23	2,820,821.23	28,347.81	2,664,177.27
Idaho	22,380	222,615,72	41,560,133.94	341,691.81	52,130,728.74
Illinois	102	105,00	1,060.00	2,706.85	50,545.45
Indiana	28	901.11	18,032,23	318.81	10,711.33
Kentucky	627	10,593,61	1055,056.30	12,161.61	950,831.40
Louisiana	545	63,634.92	10,207.970.60	64.283.28	7,495,880.81
Maine	10	1,058,00	36,312.80	1,838,32	119,770.03
Michigan	788	156,494,94	9,926,226.26	209,024.84	8,771,130.09
Minnesota	226	134,345,76	9,002,381.02	158,784.20	5,700,740.60
Mississippi	2,187	210,914.00	29,003,000.99	193,481.18	27,144,509,31
Missouri	1,008	49,428.74	5,276,548.68	55,220.06	4,521,709.80
Montana	13,673	129,802.01	22,743,183.11	165,720.79	34,919,522.78
Nebraska	6	9.00	90.00	9.00	90.000
Nevada	1,976	2,398.45	31,964.90	5,185.33	91,550.48
New Hampshire	167	24,061.86	1,305,896.26	18,074.46	806,351.80
New Mexico	15,325	33,125.53	1,063,826.41	50,450.45	1,212,648.08
New York	2	350.00	37,986.04	130.00	1,212,648.08
North Carolina	2	359.00	37,985.04	130.00	15,951.23
North Dakota	31	44.00	440.00	44.00	440.00
Ohio	81	1,506.59	145,7737.84	749.00	15,270.01
Oklahoma	86	13,123.41	2,061,781.43	17,661.37	2,185,716.19
Oregon	31,667	287,530.27	46,025,886.49	890.346.37	190.049.139.70
Pennsylvania	116	48,266,54	19,267,848.09	53,969.00	19,416,426.38
South Carolina	422	42,326,28	4,494,402.00	40,421.87	4,337,908.67
South Dakota	1,975	80,038.14	20.797.208.22	64,769.22	10,233,556.00
Tennessee	3389	10,708.10	682,872.16	17,646,38	1,104,127.42
Texas	271	71,145.50	14,440,168.25	85,313.13	10,571,472.23
Utah	7,193	35,800.38	3,823,404.79	32,032.53	2,031,590.20
Vermont	100	4,240.23	848,496.94	4,779.77	413,084.25
Virginia	2,849	35,161.57	2,720,811.90	49,923.65	3,125,306.77
Washington	9,541	113,490.23	13,777,6336.51	186,719.57	39,451,797,22
West Virginia	453	25,957.23	6,354,919.12	27,547.01	4,522,428.71
Wisconsin	627	96,12.35	5,570,711.41	129,645.84	4,628,848.22
Wyoming	627	98,121,35	5,570,711.41	129.645.54	4,522,448.71
Total	216.272	2,885,261.53	280,736,06	3,985,912.03	616,117,347.02

[1] Excludes nonconvertible products such as Christmas, trees, cones, burls etc.
[2] States no listed had no timber sold or harvested in fiscal year 1996.
[3] Includes reforestations and stand improvement costs and timber salvage. Does not include value of roads or brush disposal.
[4] MBF = thousand board feet.

UNITED STATES DEPARTMENT OF AGRICULTURE: REPORT OF THE FOREST SERVICE, FISCAL YEAR 1995

Conservation Leader . . . sustained health, diversity, and productivity of all forest lands

DUN & MARTINEK LLP,
ATTORNEYS AT LAW,
Eureka, CA, July 17, 1996.

Hon. J. MICHAEL BROWN,
Judge of the Superior Court, Humboldt County Superior Court, Eureka, CA.

Re: Epic v. California Department of Forestry, Humboldt County Superior Court Case No. 96CR0420

DEAR JUDGE BROWN: We just received a copy of your minute order dated July 15, 1996. We have been advised by the Clerk of the Appellate Court that Petitioners applied for a temporary stay from the Appellate Court and were denied. The Appellate Court, according to the Clerk, has denied any and all injunctive relief on this Plan.

It would therefore seem that there is no need for the Superior Court to issue a temporary stay because there will be no stay forthcoming from the Appellate Court.

Workers have been on site since Monday, July 15, 1996.

Please advise immediately as to whether we must now suspend operations until July 22, 1996.

Very truly yours,

DAVID H. DUN.

DOCUMENT DOI–C

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
Washington, DC, August 16, 1995.

MEMORANDUM

To: Jay Ziegler, Geoff Webb, Tom Tuckman
From: Allen McReynolds, Special Assistant—Land Exchanges
Subject: Update on California Headwaters Forest Project

A couple of new developments have emerged in the past several days. The following is an update on these issues:

1. Red Emerson Acreage.

I believe that I shared a letter with you that I received on August 4 from EPIC regarding logging in Headwaters Grove. The letter requests assistance in resolving the conflict of the current logging of S.P.I.'s holdings in the grove, which is permissible under Timber Harvest Plan 1–93–096, and preservation of the watershed protection along the Little South Fork of the Elk River. I left for vacation before looking into the issue so I was unprepared with a response when Perry deLuca of Congressman Stark's office called on Monday requesting assistance. He requested that I call Mr. Red Emerson of Sierra Pacific Industries and question him about any possible opportunity to acquire this land.

In brief, Mr. Emerson and his children are the sole owners of Sierra Pacific Industries. S.P.I. owns over 1,200,000 acres of timber lands in California and 10 sawmills ranging from the Tahoe Basin north and west. Currently, S.P.I. is working on three land exchanges with BLM and the Forest Service across northern California to consolidate checkerboard holdings. At Little South Fork (about which EPIC is concerned), there are 9,600 acres under ownership personal of Mr. Emerson, not S.P.I. He has a 56% ownership; his partner has a 44% stake. The acreage is timbered by second and third growth. He would be willing to either sell or exchange the acreage if we wish to do so. However, he did state that, in his opinion, the land has no resource value because it does not contain any old growth attributes.

I shared this information with Mr. deLuca. The Congressman intends to call Mr. Emerson to follow up and explore options. Also, the staff will investigate if Mr. Emerson's holdings were included in Hamburg's Headwaters legislation. I will call Ed Hasty and attempt to learn more about BLM's relationship with Mr. Emerson and whether we have a resource evaluation of these holdings.

2. Telephone Conference Call With OTS and FDIC.

Yesterday afternoon we held a telephone conference call with staff of the Federal Deposit Insurance Corporation and Office of Thrift Supervision to share information. Participating in the call were Richard Sterns and Bruce Renaldi of OTS, Jack Smith of FDIC, Larry Mellinger and me of DOI. Also invited but not joining in were Tom Jensen of CEQ, Jay and Geoff.

The OTS staff were reluctant to share their work on a claim against Hurwitz/Maxxam because of the appearance that Interior might be attempting to influence policy at OTS. We applauded them for that foresight and did not press for information. They did state that OTS has not filed a claim yet; however, if they decide to file, it will be soon. As soon as that decision is made, they offered to notify DOI and FDIC. I requested that they continue to seek information from us should it be useful.

The FDIC reminded all of us that their claim against Maxxam is ''owned'' by FSLIC's Resolution Account. This account has $48B already on deposit from claims. Therefore, it might be viewed positively by Congress for Treasury to accept redwood forest property in lieu of cash payment and, then, redirect title of the acreage to DOI.

The OTS staff would not comment on such a strategy for their claim against Maxxam.

There was some interest in the notion that the delegation would request acreage at northern California military base closures to offer as land swaps to Hurwitz. No matter how much caution I expressed on this topic, the FDIC and OTS staff encouraged support. I explained that the American Lands Conservancy would probably present a proposal to the delegation soon, but that DOI would not be a party to it.

I shared the conversation that I had recently with Terry Gorton of Governor Wilson's office. FDIC and OTS are wondering why DOI is not being more aggressive with Hurwitz and is permitting Wilson's Task Force to take the lead. Based on this, perhaps we should revisit DOI's position and our participation in the negotiations. Because Patton/Boggs attorneys are reaching out to DOI for a meeting, DOI could meet with them for exploratory purposes.

3. Meeting with Justice.

You will recall that Tom Epstein encouraged DOI staff to meet with Justice officials to insure no potential conflict on DOI's side of this issue. Larry Mellinger visited with Jack Smith at some length about this. He learned that FDIC does not intend for Justice to represent them on this case. Most likely, OTS will also keep their claim internally also. Therefore, Mr. Smith wonders if DOI really needs to be concerned about this. Larry has offered to confer with Bob Baum and John Leshy and relate their sense of whether a meeting or concern is warranted.

Thanks for your attention. Please call me if you want further elaboration on any of these points.

cc: Larry Mellinger, Solicitor's Office

DOCUMENT DOI–D

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
Washington, DC, August 23, 1995.

MEMORANDUM

To: George T. Frampton, Jr., Assistant Secretary, Fish and Wildlife and Parks
From: Allen McReynolds, Special Assistant—Land Exchanges
Subject: Headwaters Forest Acquisition

In the past several weeks, the staff at Interior have continued to receive telephone calls from the Northern California delegation encouraging Interior to pursue strategies for acquisition of the old growth acreage owned by Charles Hurwitz and the Maxxam Corporation. Among those considered, the Debt-for-Nature Swap strategy is the concept which their telephone calls focus on most.

Today, Congressman Stark's staff forwarded copies of the letters which they are generating for their colleagues in the Northern California delegation to forward to the F.D.I.C. In addition, the LA Times notified their office today that it will publish an editorial (see attached) on the subject penned by Mr. Stark and Mr. Brown as early as tomorrow or Monday.

While we continue to downplay our role in these efforts with the delegation's staff, they continue to call upon us to play a leadership role. I sense that because Interior might own any land acquired through negotiations, they feel that Interior should be orchestrating the solution. My impression is that there is an expectation by the delegation that Interior is the most appropriate agency to negotiate the Federal Government's case with Maxxam, instead of the F.D.I.C. or O.T.S. or even Justice. In fact, the delegation may soon expect Interior to arrange a meeting with Maxxam—a rather bold move.

I would enjoy an opportunity to visit with you about this issue at your earliest convenience to avoid any confusion about the pressure that we are receiving and can expect to continue to receive.

Thank you for your attention.

Attachments: Update on Project, Analysis of Red Emerson's Property, U.S. Forest Service Report, LA Times Editorial, Delegation Letter to F.D.I.C.

cc: Tom Tuchmann, Jay Ziegler, Geoff Webb

TALKING POINTS OF HEADWATERS FOREST

Headwaters Forest is a 3,000 acre stand of old growth redwood forest, near Humboldt, CA. Pacific Lumber Company and its subsidiaries, which is owned by MAXXAM, Inc, owns Headwaters, and the additional 195,000 acres of timberland which surround Headwaters. Headwaters was appraised several years ago at $499 million. Many believe the figure is inflated, due to other circumstances, including injunctions in connection with marbled murrelet habitat, which until recently precluded any logging of Headwaters.

Charles Hurwitz is a major owner in MAXXAM; the FDIC and Office of Thrift Supervision both filed lawsuits (now pending) in the hundreds of millions of dollars against Hurwitz and MAXXAM, alleging, among other things, a connection between the failure of United Savings Association of Texas, a MAXXAM subsidiary, and the purchase of Pacific Lumber.

Headwaters is of great importance to Californians (particularly northern California), including Governor Wilson. Over the last 6–8 months or so, the Democratic congressional delegation (individually and collectively) and environmentalists have called on the Administration to acquire Headwaters.

In February Katie McGinty and John Garamendi met with Hurwitz and his Washington representative, Tommy Boggs. Several ideas for Headwaters acquisitions or conservation were discussed, including a land swap, which could potentially incorporate a ''debt-for-nature'' piece in which pending litigation against Hurwitz could be settled.

In April a confidentiality agreement was signed between the Department of Justice and Hurwitz's representatives; subsequently representatives from CEQ, FDIC, Departments of Justice and Interior, and White House Counsel have been meeting with Hurwitz and his representatives to identify potential government surplus properties which could be part of the deal. Hurwitz has expressed particular interest in Treasure Island, and several military bases in California and Texas. California tentatively offered to throw into the ''pot'' the timber rights to LaTour state forest, in the Sierra Range north of Redding.

In recent weeks several key decision have occurred: (1) 9th Circuit ruled timber salvage can now take place on Headwaters; logging can proceed on September 15, the last day of the marbled murrelet mating season; (2) However, the lifting of the Endangered Species Act moratorium means the marbled murrelet will be listed in the next couple weeks. Hurwitz must prepare a timber harvest plan and a Habitat Conservation Plan before logging.

Last week Hurwitz filed a takings claim against the U.S. Fish and Wildlife Service, arguing the ESA is reducing the value of his property. The lawsuit inexplicably values Headwater at only $166 million. An appraisal until now be acquired by Department of Justice, which was previously being initiated by the Bureau of Land Management and California.

Katie McGinty and John Garamendi convened an interagency meeting yesterday to discuss strategies in light of the lawsuit. Discussions between Hurwitz and Administration representatives have ceased pending a hard look at key issues, including a Department of Justice review of the litigation aspects, and a meeting between Hurwitz and Garamendi is scheduled, in order to ascertain Hurwitz's intent.

DOCUMENT DOI–E

NOTE TO GEOFF, JAY, AND TOM: I visited briefly with George yesterday as he was running out of town to go on vacation about Headwaters. He said that he had quickly looked over my memo and had a few thoughts about it. First, he was comfortable that we would continue to look for options to purchase the property, including the FDIC and OTS lawsuits. He does not have a problem with us attending meetings to pursue the Debt-for-Nature Swap concept as long as we do not attempt to take the lead on such a proposal. Second, he feels that the Debt-for-Nature Swap has such a low likelihood of success that he would encourage us to not invest a great deal of time on it. Having said that, he hoped that the situation would not have moved much while he was on vacation.

Attached is a copy of the letter that I received from EPI yesterday. I know little about our relationship with Sierra Pacific Industry and its subsidiary Elk River Timber. What suggestions do you all have about our response?

ALLEN.

DOCUMENT DOI–F

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,

Washington DC, September 25, 1995

Memorandum For: Katie McGinty, Council on Environmental Quality, T.J. Glauthier, Office of Management and Budget

From: Assistant Secretary for Fish & Wildlife & Parks

Subject: Proposed Meeting.

News media and congressional attention will likely focus on the Headwaters Grove in Northern California this week as Pacific Lumber (Maxxam Corp.) is likely to gain court approval for its a timber salvage operation there. The U.S. Fish and Wildlife Service and State Fish and Game biologists have been working closely with P–L at their request to ensure that this harvest program will not cause the ''take'' of marbled murrelets which would trigger enforcement under the Endangered Species Act. This particular salvage operation involves only the removal of fallen trees (primarily through helicopter logging) and does not encompass any cutting of standing trees. Nonetheless, we anticipate substantial protests in the forest and the surrounding area. (Approximately 2,000 environmental protesters organized a demonstration outside of a marbled murrelet critical habitat hearing last week in Eureka, CA.)

Since it is very unlikely that there will be ''take''—based on the willingness of P–L to work with State and Federal biologists—we are in a position where we need to carefully weigh our options for future actions relating to the Headwaters. The Wilson Administration has maintained a public position that they are very interested in acquiring the Headwaters Forest, but to date have not been able to structure a purchase or land exchange package that attracts much interest from Maxxam. Since two of these suits (FDIC and False Claims challenge) have been publicly filed within the last few weeks, I believe that we have reached a juncture where we need to consider whether it is prudent to utilize this legal leverage in the context of a Headwaters acquisition strategy.

Two recent lawsuits have been filed against Maxxam and Hurwitz arising out of the failure of his United States Association of Texas:—A $250 million claim by the FDIC; and an even larger private lawsuit under the False Claims Act seeking restitution for federal taxpayers in the billions of dollars.

In light of increased calls for a ''debt for nature swap in which the federal government would seek to acquire Headwaters in exchange for release of the FDIC claims (see yesterday's San Francisco Chronicle editorial, attached), I think we need to consider whether the Administration can and should take coordinated action to evaluate and possibly consider such an approach.

I propose that one of you convene interested Federal parties including the U.S. Forest Service, FDIC, Office of Thrift Supervision, U.S. Fish and Wildlife Service, CEQ, DOJ and OMB to analyze options that might be available to us. Given the crescendo of public attention that is ahead of us, I suggest we try to do this ASAP albeit consistent with your incredibly busy schedules.

GEORGE T. FRAMPTON, *Jr.*

Attachment.

DOCUMENT DOI–G

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,

Washington, DC, September 26, 1995.

MEMORANDUM

To: George T. Frampton, Jr., Assistant Secretary, Fish and Wildlife and Parks

From: Allen McReynolds, Adm, Special Assistant—Land Exchanges

Subject: Update on Headwaters Forest Project

The following is a brief update on the activities of the local environmental groups and Congressional delegation to bring attention to the Headwaters Forest Project.

A. Congressional Delegation

1. *Letter to Panetta*. Five members of the Delegation forwarded a letter (see attached) to Leon Panetta yesterday requesting the Administration's support for a Debt-for-Nature Swap for Pacific Lumber Company's holdings at Headwaters Forest.

2. *Support of Vice President*. Jill Ratner, President of The Rose Foundation of San Francisco, met with the Vice President last week in California to request his support for a Debt-for-Nature Swap.

3. *F.D.I.C. and O.T.S.* As you know, we have engaged in bi-weekly telephone conference calls with staff handling the cases at the F.D.I.C. and the Office of Thrift Supervision. FDIC's case was filed in August; OTS has not specified when they would file their claims.

4. *Policy Support*. The Delegation continues to call me almost every day to inquire what we have done to move this along within the previous 24 hours. They continue to press Interior to take a more proactive approach with the Administration about a policy call of using Headwaters Forest as a negotiable asset for F.D.I.C. claims against Maxxam.

5. *Federal Assets*. We have agreed to review the list of possible Federal assets that can be made available to purchase lands from Pacific Lumber.

B. State Legislature

1. *State Legislation*. The Headwaters Bill sponsored by Scher was killed in the Senate by Governor Wilson's staff last week. The Governor had requested authorization to exchange up to $70M of timber for Pacific Lumber holdings at Headwaters. Because the Bill did not spell out specific sources and authorization amounts, it has been said that the Governor was embarrassed by the legislation, and, therefore, directed that it be killed.

2. *Letter to Pacific Lumber*. As a followup to the Bill's demise, Doug Wheeler wrote a letter to Pacific Lumber's Chairman requesting a meeting to review creative strategies for acquisition between the State and Maxxam/Pacific Lumber. It is our understanding that the State has no assets to make readily available for a proposal such as this. In short, the Governor's staff continue to want to score a victory here but have no specific assets or acquisition strategies.

C. Local Environmental Groups

1. *E.P.I.C. Lawsuit*. The San Francisco Federal District Court lifted the seal on the lawsuit (see attached) initiated by E.P.I.C. against Charles Hurwitz and Maxxam. The suit calls for claims under the False Claims Act and spells out specific wrong doing in structuring the use of United Savings Association of Texas to purchase Pacific Lumber. There are strong references to Ivan Boesky and Michael Milken and insider trading influences.

2. *Demonstrations*. The local environmental groups, including E.P.I.C., and EarthFirst, continue to host weekly demonstrations. They hope that Interior will roll out a specific program soon so that efforts can turn more friendly.

3. *Court Hearing*. This Thursday a court hearing is scheduled to review the merits of the harvest plan submitted by Sierra Pacific Lumber on their acreage adjacent to Pacific Lumber's holdings. The recovery plan calls for aerial reconnaissance (helicopters) and other technologically advanced ways of removing the fallen trees from within the murrelet habitat.

4. *Elk River Timber Company*. The Elk River holdings total 9,600 acres of land adjacent to Pacific Lumber and Sierra Pacific's holdings. The property owners are Red Emmerson and Jim Lehar, two local investors. E.P.I.C. has requested our support to acquire these acres as they are a critical linkage and habitat sources. Mr. Emmerson has expressed interest by telephone to me in conducting a land exchange with Interior/FS, but I need direction to proceed. BLM does not own any land that we want to dispose of in this region of California. Forest Service does have lands which could be appropriate.

Thank you for your attention. I look forward to the opportunity to visit with you about the options which we have been analyzing for interior's role in this project.

cc: Jay Ziegler, Tom Tuchmann, Geoff Webb

DOCUMENT DOI–H

EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY,
Washington, DC, October 25, 1995.

To: Dave Sherman, Forest Service, 205–1604; Allen McReynolds, DOI 208–2681; Larry Mellinger, DOI 208–3877; Bruce Beard, OMB, 395–6899; Jack Smith, FDIC, 898–7394; David Long, DOJ, 514–0280; John Bowman, Treasury, 622–1974

From: Elisabeth Blaug, Associate General Counsel

Subj: Headwaters Forest Meeting October 26

Most of you attended a meeting this past Friday at CEQ Chair Katie McGinty's office, at which we initiated discussions on a potential debt-for-nature swap. As you will recall, the FDIC recently filed a $250 million suit against Charles Hurwitz for his role in the failure of the United Savings Association of Texas (in addition, there is a private False Claims challenge pending). Mr. Hurwitz is a major stock owner in Maxxam, which acquired Pacific Lumber Company, which owns and logs the Headwaters Forest. Because this forest contains approximately 3,000 acres of virgin redwoods, there is great interest to preserve it. Among a number of options to consider for ensuring this happens is a potential debt-for-nature swap, by which FDIC would seek to acquire Headwaters from Mr. Hurwitz in exchange for release of its claims.

At our meeting last Friday, a number of complex legal issues were raised concerning this proposed swap, which relate in some part to your agency. Essentially, we need to examine if and how there might be a chain of ownership from FDIC to Treasury to a land management agency. Hence, there is a follow-up meeting tomorrow (Thursday) at 10:00 a.m. at FDIC, 550 17th Street, room 3036. We will attempt to identify the legal issues that need to be addressed to determine whether a debt-for-nature swap is feasible. I look forward to seeing you or your designate(s) tomorrow. Please contact me at 395–7420 if you have any questions. The FDIC contact is Jack Smith, Deputy General Counsel, at 898–3706.

DOCUMENT DOI–I

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SOLICITOR,
Washington, DC, December 1, 1995.

MEMORANDUM

To: Bob Baum

From: Larry Mellinger

Subject: Headwaters—Alternative Methods for DOI Management

In addition to the methods in which the Headwaters Forest could possibly be transferred from the Treasury Department to Interior, which were outlined in the FDIC memorandum to Kathleen McGinty, dated November 6, 1995, there are two other practical statutory means by which Interior could administer the Headwaters forest, should either FDIC or Treasury acquire the property as part of a debt-for-nature transaction.

The Refuge Administration Act

The Refuge Administration Act contemplates the inclusion of areas within the National Wildlife Refuge System which are established pursuant to a cooperative agreement with any state of local government, any Federal Department or agency, or any other governmental entity (16 U.S.C. §668dd(a)(3)(B)). Further, provisions of this subsection allow the specific terms of such a cooperative agreement to direct the course of any future disposition of the property subject to the agreement, notwithstanding other restrictions governing the transfer of lands within the System.

Presumably such a cooperative agreement for the management of Headwaters could be entered into between DOI and the Treasury Department or FDIC, assuming FDIC at least falls within the definition of a ''governmental entity.'' While management of Headwaters by the FWS, through a cooperative agreement would probably be the most simplified process for attaining DOI management of the area, the FDIC or Treasury would retain underlying jurisdiction over the lands.

The Antiquities Act of 1906

The Antiquities Act of 1906 (16 U.S.C. §431) provides: ''The President . . . is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.''

President Jimmy Carter declared two such National Monuments by Presidential Proclamation on December 1, 1978. The Yukon-Charley National Monument encompassed 1,720,000 acres, while the Yukon Flats Monument encompassed 10,600,000 acres. Within such proclamations the President has the discretion to set forth responsibility for management of the National Monument. Thus, presumably, regardless of whether Headwaters was under the jurisdiction of FDIC or the Treasury Department, the President could declare it a National Monument, under the administration of the Secretary of the Interior. Such Presidential proclamations are not subject to the provisions of the Federal Land Policy and Management Act, 43 U.S.C. §1701, nor are they subject to NEPA, since NEPA does not apply to Presidential action.

DOCUMENT DOI–J

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY,
Washington, DC, March 26, 1996.

MEMORANDUM

To: John Garamendi, Deputy Secretary

Allen McReynolds, Special Assistant to the Secretary

Subject: Exchange Issues on Headwaters Project

You recently stated that you have reason to believe that Charles Hurwitz and Maxxam Corporation officials will most likely want a global settlement through the negotiation process for Headwaters Forest. By that, you were referring to the inclusion of a settlement for both the FDIC and Office of Thrift Supervision (OTS) lawsuits in the negotiations for the land acquired.

This process raises certain legal and financial questions regarding the ability of the Administration to include settlement of these two lawsuits within the current negotiations. In the past several months, the issues relating to the FDIC lawsuit were analyzed by the headwaters multi-agency working group and a formal response was prepared (see attached). The OTS was not willing to participate in open discussions with the working group so none of the issues regarding the OTS lawsuit are known at this time. Restated briefly, the answers are as follows:

Question 1. Is it feasible for Hurwitz to transfer the Headwaters Forest to the FDIC in exchange for a settlement of the FDIC's lawsuit and/or other assets? Yes. Hurwitz, through his control over Maxxam's and its subsidiaries' boards of directors, has previously influenced the transfer of Pacific Lumber assets to resolve other liabilities. The FDIC's Chairman has stated that in the event the Headwaters Forest is offered to the FDIC as part of a settlement of the FDIC's claims against Hurwitz, the FDIC Board of Directors would consider accepting such assets to resolve the claims against Hurwitz. (Page 3, Issue 1)

Question 2. Can the F.D.I.C. transfer Headwaters Forest to Interior under existing authorities, without legislation? Yes. The F.D.I.C. could legally transfer title to the Headwaters Forest from the FSLIC Resolution Fund (FRF) to Treasury if the F.D.I.C. determined that the state of the FRF at the time of transfer were such that the value of Headwaters was not better retained in the FRF for discharge of FRF liabilities. A case could be made in favor of such a determination at present, although the FDIC Board of Directors might prefer to foster all FRF assets in view of contingent liabilities. Absent such a determination, an alternative might be for the FDIC to hold the Headwaters Forest for the time being, under management by the Department of the Interior. (Page 8, Issue 2)

Question 3. What legislative mechanisms exist that may facilitate a transfer of the Headwaters Forest to the U.S. Department of the Interior with minimal financial outlay? Three (3) legislative authorizations provide a mechanism for an inter-agency transfer of title to the Headwaters Forest to the Department of the Interior. The three original citations have since been analyzed and two different authorities have been found to provide better legal authority. The three authorities now considered appropriate are the Transfer of Real Property Act (16 U.S.C. 667b); Federal Property and Administrative Services Act (40 U.S.C. 484); and the Surplus Property Act of 1944 (50 U.S.C. App. 1622g). (Page 12, Issue 3)

Question 4. Can Interior accept Pacific Lumber assets from Treasury/F.D.I.C. without triggering a ''scoring'' claim? Any budgetary impact, including ''scoring,'' is dependent on the particular structure of the transaction and whether particular legislation is necessary to facilitate the acquisition or transfer of the Headwaters Forest. (Page 14, Issue 4)

Attached for your consideration is the full response drafted by F.D.I.C. and full citations involved in resolving the legal, legislative, and financial obstacles involved.

Enclosure.

DOCUMENT DOI–K

LAW OFFICES OF THOMAS N. LIPPE,
San Francisco, CA, June 5, 1996.

To: Robert Baum, Department of Interior

Your Fax No: 202–208–3877
From: Thomas N. Lippe

CONFIDENTIALITY NOTE

The documents accompanying this cover sheet contain information from the law offices of Thomas N. Lippe which may be confidential or privileged. The information is intended to be for the use of the individual or entity named on this transmission sheet. If you are not the intended recipient. Be aware that any disclosure, copying, distribution or use of the contents of this faxed information may be prohibited. If you have received this facsimile in error. Please notify us by telephone immediately so we can arrange for the return of the original documents to us.

Other: Fax does not include map; Original with enclosed map to follow in the mail.

Date: June 5, 1996.

Case: HD–ACQ.

LAW OFFICES OF THOMAS N. LIPPE,
San Francisco, CA, June 5, 1996.

By Facsimile and By mail: (202) 208–3877

Robert L. Baum,

Associate Solicitor for Division of Conservation & Wildlife, Solicitor's Office, Department of Interior, Washington, DC.

DEAR BOB: I am writing on behalf of the Headwaters Forest Coordinating Committee to follow up on your meeting with Julia Levin on May 31, 1996. I understand from Julia that you expressed a high degree of disappointment and frustration with your meeting with the HFCC representatives, including myself, in Burlingame on May 15, 1996. We are puzzled by this since your characterization of our discussions at that meeting does not reflect many of the most important elements of our communications. Therefore, in order to avoid any ambiguity or misunderstanding, we are writing now to memoralize the most important elements of what we said at the meeting.

The Headwaters Forest Coordinating Committee (HFCC) is composed of representatives of the following organizations: Bay Area Coalition for Headwaters Forest (BACH), Earth First!, Environmental Protection Information Center (EPIC), Forests Forever, Mendocino Environmental Center (MEC), Rose Foundation for Communications and the Environment, Sierra Club, Trees Foundation.

The HFCC has in turn selected the five individuals you met with (i.e., Cecelia Lanman, Kathy Bailey, Jill Ratner, Doug Thron and myself) to represent the HFCC in discussions with the Administration and in any negotiations with Pacific Lumber Company.

These organizations have been working for many years, through litigation, community education, government and private acquisition, etc., to protect the ecology and biodiversity of the redwood region of California. As a result, the organizations are recognized by the national environmental community as the most knowledgeable about what is required to achieve meaningful protection for this dwindling resource.

All of these organizations and their members very much appreciate the Administration's interest in exploring the possibility of federal acquisition of privately owned redwood forests for conservation purposes. Both you and John Garamendi have, quite understandably, inquired of the HFCC organizations how they would view certain acquisition scenarios. The HFCC's response to this query at our May 15, 1996 meeting, which has apparently caused your current frustration, is as follows:

1. The federal government should explore acquiring the approximately 57,000 acres of private redwood forest land that is roughly equivalent to the area identified in HR 2866 (103rd Congress). This area is composed of: (a) approximately 44,000 acres of land, most of which has been designated as critical habitat for the marbled murrelet by the U.S. Fish & Wildlife Service and which belongs primarily to Pacific Lumber Company (approximately 33,000 acres) and other companies (approximately 11,000 acres including approximately 6,300 acres of Elk River Timber Company land); and (b) a 13,000 acre area north of the critical habitat area, which is identified in HR 2866 as a Coho Salmon Study Area. The HFCC is mapping the precise boundaries of these areas.

2. Federal acquisition should not be accompanied by any ''sufficiency language'' relating to any timber owner's compliance with environmental laws or restricting judicial review of logging elsewhere.

3. The federal government should seek interim protection for these areas by (a) informing Elk River Timber Company that it is considering acquiring Elk River's land north of the Headwaters Grove; and (b) insisting that Pacific Lumber Company cease logging in the old growth groves within the Palco owned areas described above.

4. The federal government should contact and share with the HFCC appraisals of the following areas:

(a) The areas described in (a) and (b) of paragraph 1 above,

(b) The 33,000 acre area described in Palco's federal inverse condemnation complaint,

(c) All of the old-growth groves that are depicted on the enclosed map as being within the critical habitat area.

5. Federal land acquisition should be accompanied by forest worker retraining measures.

6. Federal acquisition should not be accomplished by trading other old growth forest lands.

7. The HFCC will assist with identifying surplus federal property that may be suitable for a land swap; but the Department of Interior should share its information on these properties with the HFCC to enable us to assist.

8. The HFCC has established a process to attempt to reach consensus on how to respond to any eventual land acquisition. We believe that it is now premature to attempt to define what is feasible or realistic and that such determinations must depend on the information gained from the appraisals and surplus property surveys described above. In addition, the federal government's reluctance to discuss, either with us or with Maxxam, the possible settlement of the FDIC and OTS lawsuits (the so-called ''debt for nature'' swap) also makes any meaningful assessment of what is feasible impossible at this time.

We believe that if the federal government pursues acquisition with the intent of maximizing ecological conservation, limited by actual financial and political constraints, and with open communication and sharing of information with the HFCC (within legal constraints), that the end result of this process will be understood and supported by the environmental community in California and nationwide.

Given these considerations, it is unrealistic for the Administration to expect support, now, for a proposal which may fall far short of what could be accomplished after all the facts are in. In addition, the existing murrelet listing and recent designation of murrelet critical habitat, as well as the forthcoming coho listing by your Department highlight the need to take affirmative steps now to protect these species, which HFCC's approach to designed to accomplish.

In conclusion, we hope the Administration will work with us to acquire a significant portion of the old growth redwood ecosystem in California, an accomplishment that would be historic in scope. Toward this end, Julia will contact John Garamendi's office to arrange a meeting with us soon as possible.

Thank you for your careful consideration of this.

Very truly yours,

THOMAS N. LIPPE.

Enclosure.

cc: Cecelia Lanman, Doug Thron, Jill Ratner, Kathy Bailey, Julie Levin

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DOCUMENT DOI–L

UNITED STATES DEPARTMENT OF THE INTERIOR, OFFICE OF THE DEPUTY SECRETARY,
Washington, DC, July 8, 1996.

MEMORANDUM

To: Jim Brookshire, Bob Baum
From: John Garamendi
Subject: Weekend Discussions with Hurwitz and Boggs

Friday night I attended Boggs' barbecue at his home, and talked to him and to Maxxam's Corporation Vice President from Washington. I laid out our four demands. They were not responsive, and it was obvious that they had no instructions to negotiate. From the discussion, it was clear that Charles Hurwitz had two concerns. The first was that we are not serious and that we are just stringing him out. The second is that our appraisal will be so far off the mark that no deal can be made, and that the properties that we are putting forth are not good. These concerns seemed to be the reasons that they did not want to do the four demands.

I finally told them that if they did not believe that we were serious, then Charles Hurwitz should phone me on Saturday. By the time we returned home, Mr. Hurwitz had phoned. We talked later Saturday afternoon. Mr. Hurwitz confirmed my suspicions as related above. He went on and on about the properties not having real value because entitlements were not assured. He dismissed Yerba Buena and Treasure Island as worthless. The same was said about all other properties that he had heard about. He demanded to have the appraisal and the list before deciding what to do about the demands.

I said, ''no, we would not negotiate and litigate at the same time.'' He needed to decide which he would do . . . the four demands would have to be met, I said. I suggested that the following steps occur:

1. Charles Hurwitz meets our demands;

2. On receipt of the confirming letters, we will give him a complete list of properties;

3. We will enter into discussions with him on the value of Headwaters with the goal of agreeing to a value; and,

4. We will then determine how to pay the price with land swaps, etc.

He said he'd get back to us on Monday.

Later Saturday evening he called again and asked to have all of the State of California properties at Lake Tahoe put on the table. I said I'd think about it.

Sunday, Mr. Boggs phoned and asked me to think about the wording of a letter he would send me on Monday. Here it is: they would meet the four demands with modifications. I think the letter will come in like this.

A stay of the takings case until September 15, with extensions if mutually agreeable;

An agreement not to log until ''x'' date;

Three-party agreement on confidentiality; and,

No double dealing.

You are to review the letter and determine if it meets our minimum requirements. If not, then call Mr. Boggs and suggest improvements. Call me in Alaska to review the letter if it meets minimum requirements.

Do not proceed on showing or discussing any property deals Mr. Hurwitz or his people.

Do order an appraisal of the Emerson property. I want that piece in place as soon as possible.

Good luck to us all.

DOCUMENT DOI–M

QUESTIONS REGARDING HEADWATERS GROVE, JULY 19, 1996

1. Please provide an area map showing the property's location. Describe the Headwaters Grove property and its physical surroundings. What other areas surround it that involve Pacific Lumber?

2. What is the significance of the marbled murrelet and other threatened/endangered species for the property? What ESA or other potential development limitations from Federal or State law affect the Grove and surrounding area? What current limitations affect the property?

3. Explain the takings lawsuit that Maxxam has filed. What are the grounds for the lawsuit? What is the status of the suit? Is the claim credible?

4. Provide a history/chronology of the negotiations to exchange the Grove from Maxxam and its predecessors. When and how did Maxxam become involved? What volume of timber (green or salvage) has been cut from the Grove and surrounding area owned by Pacific Lumber thus far?

5. What are all the elements of the DOI proposed exchange? Does the exchange involve the FDIC? IRS? Forest Service? Other agencies? Are tax incentives or FDIC/OTS claims involved?

6. Have formal appraisals on the property involved in the exchange been done? What is the basis for the Maxxam estimates? DOI's?

7. Does DOI contemplate needing legislation for this deal to occur, or do necessary authorities exist? If so, list these authorities and how they apply.

8. What is the timetable for a transaction? What is the significance of September 15th? What legal options are involved for the Federal Government in terms of protecting the property (specifically with regards to the ESA)? Does Maxxam believe it has leverage in this transaction and if so, what are the circumstances that leads it to believe that?

9. What have been the public positions on a Headwaters exchange by Maxxam, DOI, State of California, and other national and local groups?

10. Have the FDIC/DOJ/IRS been involved in DOI's discussions with Maxxam? Have these agencies been involved in separate discussions with Maxxam?

DOCUMENT DOI–N

SIERRA CLUB CALIFORNIA,
Philo, CA, August 21, 1996.

Re: Headwaters Forest
Assistant Secretary JOHN GARAMENDI,
U.S. Department of the Interior,
Washington, DC

DEAR ASSISTANT SECRETARY GARAMENDI: I am writing you on behalf of the Headwaters Forest Coordinating Committee. We thank you for your willingness to continue the negotiations which will lead to protection for Headwaters Forset. We appreciate that the issue is complex and the potential price tag is large.

To assist you in defining areas which we believe to be priorities for protection, the Headwaters Forest Coordinating Committee met last week. We all agree that acquisition or permanent protection at this time for the following areas would constitute a significant step toward protection for Headwaters Forest, the sixty thousand acre area which is our primary concern. By listing these priorities we do not intend to imply that these steps would constitute full and complete protection for the Headwaters ecosystem. Rather we are attempting to make suggestions for a feasible starting point. Our priorities for protection are:

All the virgin old-growth groves within the USFWS-designated murrelet critical habitat area and their adjacent residual old-growth groves.

Within the critical habitat area, the residual old-growth groves which are ''occupied.''

A buffer on the north of the main grove consisting of the 3700 acres designated as murrelet critical habitat within the Elk River Timber property.

A minimum 300 foot buffer around every occupied grove.

Watercourse protection within the 60,000 acre Headwaters Forest and the remainder of the Elk River Timber Company (approximately 5400 acres) similar to the Standards and Guidelines for Management of Habitant for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl, published jointly by Interior and other departments in April 1994.

No limitation on the application of the Endangered Species Act or other modification of current law applicable to the Headwaters area.

We are in the process of producing another map which outlines these areas. Until it is complete we hope the following information will be useful.

ACREAGE OF OCCUPIED MURRELET NESTING GROVES

All the virgin old-growth groves within the USFWS-designated murrelet critical habitat area, adjacent residual old-growth groves, and other residual old-growth groves which are ''occupied'' by marble murrelets:

Although we would like to clearly identify these habitat categories, the acreage figures which Pacific Lumber has provided in its draft murrelet HCP appear to be unrealistically low when compared with the timber type map which it has provided EPIC as part of the exemption litigation. According to the HCP, the company claims:

4768: Virgin occupied nesting within critical habitat area (includes main grove)

1346: Residual occupied nesting within critical habitat area

6114 acres: Total occupied nesting habitat within critical habitat area.

The PL draft HCP also claims that there are 1550 acres of occupied nesting habitat outside the designated critical habitat area.

During discovery associated with EPIC's federal exemption litigation, Pacific Lumber has provided a map which shows timber types and stand densities on its property. This map shows that there are significant areas of residual timber adjacent to the virgin nesting groves. Murrelet surveys in this acreage have not been systematic, although murrelet occupied behavior has been observed in residual stands.

Using PL's timber type map, we estimate that there could be as much as 17,113 acres occupied by murrelets in the 60,000 Headwaters Forest, including the stands where surveys have demonstrated occupancy north of the designated critical habitat area. However, this figure does not include the 1550 acres mentioned above that PL has identified as occupied, which is located south of Headwaters, outside the critical habitat area. Of the 17,113 figure, approximately 14,000 acres fall within the critical habitat boundary. It is crucial to keep in mind that only about 5000 acres of either figure is virgin.

(An additional uncertainty which we are attempting to clarify is whether some of the residual groves identified on the timber type map have already been logged. Although their map is dated March 1996 we believe updating the map may result in modification of the information it portrays.)

TIMBER VOLUME PER ACRE IS HIGHER IN MAIN GROVE THAN IN THE OTHER VIRGIN GROVES

The question of valuation immediately comes to mind. Therefore, we asked Dr. Robert Hrubes, an independent consulting forester, to analyze the Pacific Lumber maps to determine whether there was any quantifiable difference between the timber stand characteristics in the main grove compared to the other virgin groves. He concluded that there was a very significant difference. According to Hrubes, the PL maps indicate that the size of the trees is larger and the density of the canopy is heavier in the main grove than in the other groves, indicating a likely greater timber volume and value. You will receive his report by August 23.

TIMBER VOLUME AND VALUE IN RESIDUAL STANDS IS 10–15% OF VIRGIN GROVES

Pacific Lumber itself has used and published at least two rules of thumb to estimate the relative timber volume of residual stands compared to virgin groves. In its recent suit Pacific Lumber v. United States, on page 16, paragraph 31, line 10–12 the company states: ''About 10 acres of residual old growth is required to produce the volume that would be produced from one acre of virgin old growth.''

Another estimate of relative value was provided in Timber Harvest Plan 89–793 Hum, the last THP submitted (never approved) which proposed full scale logging within the main grove. This THP proposed logging 77% of the stand volume in 399 acres of the grove to produce 49.5 million feet of logs. In its analysis of alternatives, Robert Stevens, PL's Head Forester at the time, states on page 60: ''If TPL Co. is prevented from logging its virgin timber, it will have no choice except to replace this old growth timber volume with trees from previously logged stands. Producing 49.5 million feet of logs would require 2,500 acres or more to be logged.'' The 399 acres of virgin timber from the main grove proposed for logging by THP 793 is 15% of the 2500 acres minimum which Stevens estimates would provide alternative old growth timber for harvest. Thus the company has provided over a seven year period two similar estimates of relative value: The company believes its residual timber stands contain between 10 and 15% of the volume of a virgin stand.

WATERCOURSE PROTECTION FOR FISH AND WILDLIFE

One of our top priorities is watercourse protection within the 60,000 acre Headwaters Forest and the residual portion of the Elk River Timber Company similar to the Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl, published jointly by Interior and other departments in April 1994. When reviewing the Standards and Guidelines it is important to keep in mind that they were designed to provide important habitat for a broad variety of species not limited to fish.

Standards and Guidelines specifies a no cut zone on each side of a fish-bearing (Class I) watercourse measured along the ground (slope distance) equal to two site potential trees or 300 feet, whichever is greater. Without reviewing company information, site potential tree size can only be estimated. I have estimated 250 feet per tree, which would yield 500 feet each side. However it is also difficult to estimate ground-slope distance from a map so I have used the 300 foot standard (total 600 feet on both sides of watercourse) applied to the (horizontal) map distance. Greater precision will obviously be needed before finalizing any agreement.

Measuring by hand the watercourses within the 60,000 acre Headwaters Forest as indicated on U.S.G.S. topographical maps has yielded the estimate that there are 334,950 linear feet of Class I, blue-line watercourses. This is the equivalent of 63.44 miles. I applied the 600 foot standard to this figure, divided by the number of square feet in an acre (43,560), and determined that proposed Class I no-cut watercourse zones would total approximately 4612 acres: 600′ × 334,950′ = 200,970,000 sq.ft/43,560 = 4612 acres.

Although I originally believed that the distance of Class II (presence of water-dependent non-fish life) streams could equal as much as four times the distance of Class I streams (which I reported separately regarding Elk River Timber Company), additional time spent mapping has led me to conclude that twice the distance is a closer estimate, and still likely to be high.

The Standards and Guidelines for Class II is one site-potential tree or 150 feet no cut zone each side of the watercourse. Using the same logic as outlined above, I have used the 50 foot standard. Applying 50% of the Class I zone to twice the distance yields the same number. Therefore I believe protection for Class II streams would likely be no more than an additional 4612 acres.

Without close inspection it is impossible to feel confident about estimating the distance of Class III (ephemeral) streams. However, I still believe that as a working assumption we can guesstimate that there are twice as many Class III (ephemeral) streams as Class II. The Standards and Guidelines for Class III are one site potential tree or 100 foot no-cut zone each side of watercourse. However, we have chosen to depart from the Standards and Guidelines in this instance and simply ask for a 50 foot equipment exclusion zone on each side of all Class IIIs with retention of at least 50% overstory and understory canopy within that zone. Over the estimated 254 miles of Class III, an equipment exclusion zone totaling 3076 acres should be applied.

Class I=4612 ac
Class II=4612 ac
Total=9224 ac no harvest watercourse protection zones
Class III=3076 ac equipment exclusion with 50% canopy retention

PRE-EXISTING WATERCOURSE CONSTRAINTS MUST BE ANALYZED

Existing California Board of Forestry regulations require 50% of the stream canopy to be retained for Class I streams and a Watercourse and Lake Protection Zone (WLPZ) ranging from 75–150 feet depending on sidehill slope. Class II zones are smaller. Equipment exclusion zones for Class III streams with or without canopy standards are often specified in current THPs. Protection measures are likely to increase when coho salmon are listed this year.

THP 96–059 Hum on the neighboring Elk River Timber property included mitigation measures beyond standard rule prescriptions including: retention of approximately 75% of the existing conifer overstory in the Class I WLPZ and a 150 foot WLPZ. The value of purchasing a riparian corridor should take existing regulatory constraints and operational practices into consideration.

Additionally, it will be necessary to conduct an evaluation of the existing harvestable timber volume in the proposed watercourse protection zones. A significant proportion of the proposed no-cut zones will have very little immediately merchantible timber remaining.

CONCLUSION

We continue to believe that protection for the full 60,000 acre Headwaters Forest should be achieved as soon as possible. We hope that our effort to prioritize the need to protect specific habitat features within Headwaters Forest will be helpful in you negotiations with Pacific Lumber Company. We remain willing to provide information to support your efforts.

Sincerely,

KATHY BAILEY,
State Forestry Chair, on behalf of the HFCC.

DOCUMENT DOI–O

FOIA REQUEST

1. GSA July memo to Hurwitz/notebook.
2. Forest Service maps, memo to Dep. Secy.
3. Base Closure.
4. BLM Lands Humboldt, Trinity, Mendocis.
5. GSA printout.
6. Oil & gas.

Look for memos, etc. in file re: surplus property.

APPENDIX 4

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC.

MEMORANDUM AND STAFF REPORT

To: Chairman John Doolittle, Members of the Headwaters Task Force
From: Committee on Resources Staff
Date: January 5, 2000
Re: Documents regarding

Pursuant to the motion of Chairman Doolittle at the December 12, 2000, hearing, the attached documents are included in the record of the hearing. The motion was as follows: ''I move that all the documents we utilized in today's hearing be included in the hearing record and that all of the documents produced by the Department of the Interior be included as part of today's hearing record; and I furthermore move that any documents not included in the above categories that are necessary to document a staff report or analysis of the situation be released with such a staff report.''

There was no objection to the motion. The attached documents (A–X) and certain DOI labeled and unlabeled documents, along with all documents produced by the Department of the Interior, are therefore part of the official record of the Committee on Resources, Task Force on Headwaters Forest and Related Issues. Committee records are available for public dissemination. Consequently, they, along with the Stenographic Minutes of the hearing (and the official printed transcript when available) were part of the official Task Force hearing record and were publically available at the close of the hearing.

The staff reaches the following conclusions regarding the information gathered by the Task Force:

(1) The record and information produced at the hearing (and the attached documents) support the conclusion that the debt-for-nature agenda was a large, if not integral part of the rationale for proceeding with the FDIC professional liability action against Charles Hurwitz for the USAT failure.

(2) The debt-for-nature agenda was first advanced through the outside counsel of the FDIC (Hopkins & Sutter) which coordinated numerous meetings and other communications for environmental interest groups and foundations about obtaining redwoods owned by one of Charles Hurwitz's companies through ''leverage'' that would be exercised via a ''high profile'' lawsuit.

(3) The debt-for-nature agenda to obtain redwoods had nothing to do with legitimate banking rationales for bringing the FDIC legal action regarding USAT.

(4) The FDIC debt-for-nature agenda was advanced by the Office of Thrift Supervision action (filed approximately 4 months after the FDIC action) when the FDIC paid the OTS to pursue its administrative action in a forum more favorable to the banking regulators.

(5) The FDIC and the OTS repeatedly insisted in writing that Charles Hurwitz was the first to raise the issue of a ''global settlement'' involving debt-for-nature and redwoods with them. This notion is contrary to the bulk of evidence presented at the hearing. The record shows that months prior to Mr. Hurwitz broaching the redwoods as part of a settlement involving the banking claims, the FDIC secretly plotted to ensure that Mr. Hurwitz was baited into ''first'' raising the issue with the banking regulators.

(6) The records also show a much broader government-wide effort involving the CEQ, the OMB, the DOI, and the banking regulators to create ''leverage'' through filing banking claims and to use ''leverage'' of the banking claims to obtain redwoods, precisely as outlined by early 1993 communications from the eco-terrorist group Earth First! and other ''environmental'' interest groups.

(7) The records show three days prior to the July 27, 1995, ATS memo, the staff would have used ''ordinary'' procedures to close out the case against Mr. Hurwitz regarding USAT, but pressure from Members of Congress and environmental special interest groups were cause enough to bring the matter of pursuing Mr. Hurwitz for USAT claims before the FDIC board of directors. That memo was finalized in draft, but never signed or sent.

(8) The FDIC board of directors discussed the topic of the redwoods and meetings between FDIC staff and Department of Interior staff about the debt-for-nature scheme at their board meeting when determining whether to bring the action against Mr. Hurwitz. Those subjects were consequently a factor in the board's determination to proceed with the action involving USAT against Mr. Hurwitz.

The staff makes the observation records examined by the task force document the conclusions above. The staff makes the additional observation that more material documenting these conclusions, including the wider government agenda to obtain the redwoods owned by Mr. Hurwitz using banking claims by the FDIC and OTS as leverage, is available in the committee records.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, December 8, 2000.

Mr. William F. Kroener, III
General Counsel, Federal Deposit Insurance Corporation, Washington, DC

DEAR MR. KROENER: Thank you for your December 7, 2002, letter about the December 12, 2000, hearing of the Task Force on the Headwaters Forest and Related Issues. You raise misplaced concerns about the hearing and possible use of records by the Task Force in furtherance of very legitimate oversight activities authorized under the U.S. Constitution and the Rules of the United States House of Representatives.

Please refer to page two of the June 16, 2000, letter from Chairman Young to Chairman Tanoue, which outlines a parameter of the oversight project: the FDIC's ''advancement of claims against private parties to ultimately obtain additional parcels of the Headwaters Forest owned by the Pacific Lumber Company.'' This issue is not at all (or should not be) part of the underlying banking claim of the FDIC (or the OTS). In fact, the issue of redwoods, debt-for-nature, and the Headwaters Forest should have no

place in FDIC, or OTS investigations, proceedings, claims, court filings, or even internal communication—yet production of such material from your agency was massive.

The banking laws certainly do not authorize agendas associated with redwoods, debt-for-nature, or expansion of the Headwaters Forest. In fact, other Acts of Congress prohibit any expenditure whatsoever related to acquiring lands or interests in lands from Pacific Lumber's land base to enlarge the Headwaters Forest redwood grove. The letter also explains the authority to conduct this oversight project, and it explains the background of this issue so that it is very clear to everyone. Indeed, it is a duty of Congressional committees to ''review and study on a continuing basis the application, administration, and effectiveness of laws * * *'' and ''any conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation.* * *'' (House Rule X 2.(b))

This is precisely what the Task Force will do. The June 16, 2000, letter to Chairman Tanoue from Chairman Young makes this clear and cites the applicable provisions of law and rules that define our oversight. Your agency was informed six months ago about the thrust of the oversight project.

Merely because ongoing litigation ''relates'' to a matter under review by a Task Force is not legal justification that forecloses Congress' ability to determine and test facts by using records in a Congressional review or hearing. It will certainly be no excuse for failing to answer questions at our hearing. Often Congressional Committees hear that notion when records are embarrassing to a Federal agency for one reason or another, rather than when records are subject to a valid claim of privilege in a court.

If litigation or potential litigation were a bar to Congressional oversight, Congress would rarely be able to conduct any oversight. You must also be aware that because records are compelled to be produced to a Committee, means that an otherwise legitimate privilege that shields them from discovery in a court of law is not automatically lost. Your concern, therefore, about possible disclosure of ''sensitive'' or ''confidential'' records related to ongoing litigation is overstated, especially in light of the tangential nature of the primary subject of our oversight to the underlying banking claims brought by the FDIC (and OTS). The Constitutionally authorized oversight functions of Congress to collect information for oversight make your concern even less valid.

Furthermore, with respect to the ATS memorandum to which you refer, it has been publically available for months on the Houston Chronicle web site (*http://www.chron.com/content/chronicle/special/hurwitzdocs/*), so it is a stretch to think that your Chairman would be held in contempt of court for being compelled to discuss the contents of such a document at a Congressional hearing. This is particularly true given the fact that the record was independently subpoenaed and produced to the Committee outside of the court proceedings, and your Chairman is compelled by subpoena to testify at the hearing. While answers to specific questions may prove to be very embarrassing to the FDIC and OTS, Chairman Tanoue will be expected to answer questions concerning that record and other records should such questions be asked.

I hope that this clears up the concerns that you raised. Thank you for your attention to this matter.

Sincerely,

JOHN T. DOOLITTLE.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, December 7, 2000.

HON. JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter responds to your recent letters and subpoena to Chairman Tanoue for her appearance and testimony before a meeting of the Task Force, previously scheduled for November 13, 2000, which is now scheduled for December 12, 2000. According to your letter of November 8, 2000, the hearing will relate to the FDIC's pending litigation against Charles E. Hurwitz arising out of the 1988 failure of United Savings Association of Texas (USAT).

The FDIC has produced a large number of documents to the House Committee on Resources in response to its previous request and the subpoena duces tecum issued on June 30, 2000. As we previously informed Chairman Young, our prior productions include sensitive, highly confidential material that is covered by attorney client and/or attorney work product privileges in the ongoing litigation against Mr. Hurwitz, including documents that Mr. Hurwitz and his representatives are not entitled to review through the court proceedings. We have identified the documents containing confidential information with a stamp bearing the designation ''CONFIDENTIAL.''

Among the documents provided to the Committee is the FDIC's Authority To Sue memorandum, which remains under a court seal, pursuant to two orders of the United States Court of Appeals for the Fifth Circuit. Because of these two court orders, the FDIC, as a party to the litigation, could be subject to contempt of court by discussing the specific contents of the authority to sue memo publicly. Therefore, the FDIC will not be able to answer specific questions about the conclusions and recommendations contained in the sealed document itself. However, we believe we can assist the Task Force to fulfill its oversight responsibilities and respond to any questions about the decision to bring the case without referring to the sealed document by discussing the unredacted portions of the Board's deliberations, the underlying facts, the case law and the agency's standards for bringing suit.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

WILLIAM F. KROENER, III,
General Counsel.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, December 7, 2000.

CAROLYN J. BUCK,
Chief Counsel, Office of Thrift Supervision, Department of the Treasury, Washington, DC.

DEAR MS. BUCK: Thank you for your December 6, 2000, letter requesting that you be substituted as a witness for Director Seidman at the hearing regarding debt-for-nature and the Headwaters Forest scheduled for December 12, 2000.

I understand Ms. Seidman's role in the administrative proceeding (*In the Matter of United Savings Association of Texas et al.*, OTS Order No. AP 95–40 (December 26, 1995)). I understand the sensitivity you expressed related to the Director's participation in our hearing; however, Ms. Seidman has other responsibilities as the Director of the OTS. She is responsible for the matters including conduct of employees in the OTS, the office's interface with the FDIC on the Headwaters matter (the FDIC has paid the OTS to pursue the claims), and the general policies concerning pursuance of claims like those against USAT.

Indeed, a primary thrust of the inquiry (which examines debt-for-nature and Headwaters) should have nothing to do with the legitimate pursuit of the administrative proceeding against USAT. Therefore, it is inconceivable that the inquiry could adversely influence ''due process and fairness'' for the respondent (USAT or any of its prior owners), the concern you expressed.

It was explained by Chairman Young in the letter to the Director initiating the oversight review that Congress acting through the Committee on Resources (and now through a duly authorized Task Force), has the authority to conduct the inquiry. The House Ethics Manual to which you refer acknowledges the plenary authority of Congress and its Committees to conduct this oversight review concerning the Headwaters. The ethics manual states: ''No other statute or rule restrains Members of Congress from communicating with agency decision-makers.'' The ultimate form of communication in a formal sense will be at the hearing that we have scheduled.

Therefore, Director Seidman's attendance is required at the hearing. You and appropriate staff should be available to assist her with answers to Task Force Questions that she may not have the detailed knowledge and background to answer. While the Director may not have been involved with the filing of the OTS charges because she came to the agency subsequently , she still has ultimate responsibility for OTS actions, so I expect your staff to be available to assist here in providing needed information to the Task Force. Thank you.

Sincerely,

JOHN T. DOOLITTLE,
Chairman.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,
Washington, DC, December 6, 2000.

Hon. JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues, Committee on Resources, House of Representatives, Washington, DC.

DEAR CHAIRMAN DOOLITTLE: This responds to your December 5, 2000, letter to Director Ellen Seidman, which references your November 6, 2000, letter and the November 4, 2000, subpoena for her appearance and testimony before a meeting of the Task Force, acting on behalf of the Committee on Resources.

As I stated in my June 23, 2000, and August 24, 2000, letters to Chairman Young of the Committee on Resources (copies enclosed), the Office of Thrift Supervision (OTS) has substantial concerns that the Task Force's inquiry could compromise the pending adjudicatory proceeding brought by the agency, pursuant to 12 U.S.C. §1818, against Mr. Charles Hurwitz and Maxxam Corporation concerning their involvement with the former United Savings Association of Texas (USAT). This proceeding is now in the post-trial stage before an administrative law judge (ALJ), who will submit a recommended decision to Director Seidman. After a further opportunity for the parties to submit briefs, Director Seidman will issue the final decision in the case.

The subpoena to Director Seidman, which calls for her to testify concerning such matters as the reasons why the OTS brought the administrative action, and OTS's objectives in the litigation, has the real potential of interfering with her ability to decide the case on the basis of the record presented at trial to the ALJ. In so doing, the actions of the Committee and the Task Force may be

later viewed as having deprived the parties to the administrative proceeding of due process and fairness and could result in the final administrative determination in this proceeding being nullified by a court of law. *See, e.g., Pillsbury Co. v. FTC*, 354 F.2d 952, 963–64 (5th Cir. 1966); *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978); *cf.*, The Ethics Manual of the House of Representatives, pages 244–45.

Apart from legal concerns, we note that Director Seidman was not involved in the agency's filing of the charges in the case (which occurred two years before her appointment). To maintain her impartiality as final decision-maker, she has not been involved in reviewing or presenting the evidence in the case, and has not participated in settlement discussions. Therefore, it would be unlikely that she would have any information relevant to the Task Force's inquiry regarding the debt for nature campaign concerning the Headwaters Forest referred to in your December 5, 2000, letter.

To avoid compromising the Director's role as adjudicator, OTS proposes to substitute my appearance and testimony as the Chief Counsel for the agency. While we continue to believe that the inquiry creates the potential for interfering with the administrative proceeding, and should be postponed until after the Director issues a final decision in the case, the substitution of witnesses will lessen the potential for serious harm.

Sincerely,

CAROLYN J. BUCK,
Chief Counsel.

Enclosures.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 8, 2000.

MR. BILL ISAAC,
Sarasota, FL.

DEAR MR. ISAAC: The Committee on Resources, Task Force on Headwaters Forest and Related Issues, will hold an oversight hearing on the subjects listed in my November 6, 2000, letter to you. The time and date of the hearing will be announced later, so your appearance pursuant to the subpoena that was issued for your testimony on Monday, November 13, 2000, will be delayed until the time set for the re-scheduled hearing. So that you may properly prepare for that hearing, I offer you the following information.

This hearing will focus on your agency's role and involvement in the debt for nature campaign concerning the Headwaters Forest. Any comments you might have with respect to this subject would be appreciated, as would your written testimony. It is my understanding that your organization has experience with this subject matter and has information that would be most helpful to the Committee.

Your oral testimony should not exceed five minutes and should summarize your written remarks. You may introduce into the record any other supporting documentation you wish to present in accordance with the attached guidelines. You should bring appropriate staff with knowledge of the subject matter of the hearing who can assist you with answers required by the Task Force. I reserve the right to place any witness under oath. If you are sworn in, you may be accompanied by counsel to advise on the witness' rights under the Fifth Amendment to the Constitution.

The Rules of the Committee on Resources and of the U.S. House of Representatives require that all witnesses appearing before the committee must to the greatest extent practicable include with his or her written testimony a current resume summarizing education, experience and affiliations pertinent to the subject matter of the hearing. In addition, to the extent practicable, each nongovernmental witness must disclose the amount and source of Federal grants or contracts received with the current or prior two fiscal years. If the witness represents an organization, he or she must provide the same information with regard to the organization. The information disclosed must be relevant to the subject matter of the hearing and the witnesses representational capacity at the hearing. Witnesses are not required to disclose federal entitlement payments such as social security, medicare, or other income support payments (such as crop or commodity support payments). In order to assist in meeting the requirement of the rule, we have attached a form which you may complete to aid in complying with this rule. Should you wish to fulfill the disclosure requirement by submitting the information in some other form or format, you may do so.

In order to fully prepare for this hearing, 25 copies of your testimony along with your disclosure should be submitted to Debbie Callis, Deputy Chief Clerk, Committee on Resources, Room 1328 Longworth House Office Building, *no later than 48 hours prior to the date of the scheduled hearing.* In addition, consistent with the Americans with Disabilities Act, if your staff requires any reasonable accommodations for a disability to facilitate your appearance, please contact the Clerk mentioned above. Should you or your staff have any questions or need further information regarding the substance of the hearing, please contact Duane Gibson, General Counsel, Oversight and Investigations on (202) 225–1064.

Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

Attachments.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 8, 2000.

HON. DONNA A. TANOUE,
Chairman, Federal Deposit Insurance Corporation, Washington, DC

DEAR MS. TANOUE: The Committee on Resources, Task Force on Headwaters Forest and Related Issues, will hold an oversight hearing on the subjects listed in my November 6, 2000, letter to you. The time and date of the hearing will be announced later, so your appearance pursuant to the subpoena that was issued for your testimony on Monday, November 13, 2000, will be delayed until the time set for the re-scheduled hearing. So that you properly prepare for that hearing, I offer you the following information.

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Your oral testimony should not exceed five minutes and should summarize your written remarks. You may introduce into the record any other supporting documentation you wish to present in accordance with the attached guidelines. You should bring appropriate staff with knowledge of the subject matter of the hearing who can assist you with answers required by the Task Force. I reserve the right to place any witness under oath. If you are sworn in, you may be accompanied by counsel to advise on the witness' rights under the Fifth Amendment to the Constitution.

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Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

Attachments.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 8, 2000.

Hon. ELLEN SEIDMAN,
Director, Office of Thrift Supervision, Washington, DC.

DEAR MS. SEIDMAN: The Committee on Resources, Task Force on Headwaters Forest and Related Issues, will hold an oversight hearing on the subjects listed in my November 6, 2000, letter to you. The time and date of the hearing will be announced later, so your appearance pursuant to the subpoena that was issued for your testimony on Monday, November 13, 2000, will be delayed until the time set for the re-scheduled hearing. So that you may properly prepare for that hearing, I offer you the following information.

This hearing will focus on your agency's role and involvement in the debt for nature campaign concerning the Headwaters Forest. Any comments you might have with respect to this subject would be appreciated, as would your written testimony. It is my understanding that your organization has experience with this subject matter and has information that would be most helpful to the Committee.

Your oral testimony should not exceed five minutes and should summarize your written remarks. You may introduce into the record any other supporting documentation you wish to present in accordance with the attached guidelines. You should bring appropriate staff with knowledge of the subject

matter of the hearing who can assist you with answers required by the Task Force. I reserve the right to place any witness under oath. If you are sworn in, you may be accompanied by counsel to advise on the witness' rights under the Fifth Amendment to the Constitution.

The Rules of the Committee on Resources and of the U.S. House of Representatives require that all witnesses appearing before the committee must to the greatest extent practicable include with his or her written testimony a current resume summarizing education, experience and affiliations pertinent to the subject matter of the hearing. In addition, to the extent practicable, each nongovernmental witness must disclose the amount and source of Federal grants or contracts received with the current or prior two fiscal years. If the witness represents an organization, he or she must provide the same information with regard to the organization. The information disclosed must be relevant to the subject matter of the hearing and the witnesses representational capacity at the hearing. Witnesses are not required to disclose federal entitlement payments such as social security, medicare, or other income support payments (such as crop or commodity support payments). In order to assists in meeting the requirement of the rule, we have attached a form which you may complete to aid in complying with this rule. Should you wish to fulfill the disclosure requirement by submitting the information in some other form or format, you may do so.

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Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 6, 2000.

Mr. BILL ISAAC,
Sarasota, FL.

DEAR MR. ISAAC: The House Committee on Resources, acting through the Task Force on the Headwaters Forest and Related Issues, is pursuing an inquiry into matters related to the Headwaters Forest (which is managed by the Bureau of Land Management and was purchased pursuant to Title V of P.L. 105–83). Those matters include (1) the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of land near or adjacent to the Headwaters Forest owned by the Pacific Lumber Company; (2) the potential impact of advancement of such claims to expand the Headwaters Forest; and (3) the matters outlined in a June 16, 2000, letter initiating an oversight review concerning the Headwaters Forest. The subject mater of the inquiry falls under the jurisdiction of this Committee pursuant to Articles I and IV of the U.S. Constitution, Rules X and XI of the Rules of the House of Representatives, and Rule 6(a) of the Rules of the Committee on Resources. A copy of the rules is enclosed. Note Rule 4(f) regarding the swearing of witnesses, which is my policy for hearings. Therefore, you may bring a counsel to advise you of any constitutional rights if you desire.

Because of your agency's role in the matter, you may possess information that will be helpful in the deliberations of the Task Force and the Committee. Therefore, you will be receiving a subpoena for your appearance and testimony before a meeting of the Task Force. The subpoena schedules your appearance for November 13, 2000, at 10:00 AM. The nature of this subpoena is continuing, so the date and time may change after final schedules for the post-election session of the House are known. Committee staff will inform you in advance should scheduling changes be necessary.

We very much appreciate your cooperation with this inquiry and the production of records to date. The matters under review are very important, and your assistance may prove to be indispensable. Should you have any questions about your appearance and testimony, please contact Mr. Duane Gibson, General Counsel, Oversight and Investigations, at 202–225–1064.

Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 6, 2000.

Hon. ELLEN SEIDMAN,
Director, Office of Thrift Supervision, Washington, DC.

DEAR MS. SEIDMAN: The House Committee on Resources, acting through the Task Force on the Headwaters Forest and Related Issues, is pursuing an inquiry into matters related to the Headwaters Forest (which is managed by the Bureau of Land Management and was purchased pursuant to Title V of P.L. 105–83). Those matters include (1) the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of land near or adjacent to the Headwaters Forest owned by the Pacific Lumber Company; (2) the potential impact of advancement of such claims to expand the Headwaters Forest; and (3) the matters outlined in a June 16, 2000, letter initiating an oversight review concerning the Headwaters Forest. The subject matter of the inquiry falls under the jurisdiction of this Committee pursuant to Articles I and IV of the U.S. Constitution, Rules X and XI of the Rules of the House of Representatives, and Rule 6(a) of the Rules of the Committee on Resources. A copy of the rules is enclosed. Note Rule 49f) regarding the swearing of witnesses, which is my policy for hearings. Therefore, you may bring a counsel to advise you of any constitutional rights if you desire.

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Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

SUBPOENA DUCES TECUM (HEARING)

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To The Honorable Ellen Seidman, Director, Office of Thrift Supervision

You are hereby commanded to be and appear before the Committee on Resources, Task Force on the Headwaters Forest and Related Issues of the House of Representatives of the United States, of which the Hon. John Doolittle is chairman, in Room 1324 of the Longworth Building, in the city of Washington, on November 13, 2000, at the hour of 10:00 AM, then and there to produce the things identified on the attached schedule and to testify touching matters of inquiry committed to said Committee; and you are not to depart without leave of said Committee.

To authorized staff of the Committee on Resources or the U.S. Marshals Service to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 4th day of November, 2000.

DON YOUNG, *Chairman.*

Attest: Jeff Trandahl, Clerk.

SCHEDULE OF RECORDS

All records not priorly produced pursuant to the subpoena and Schedule of Records dated 30 June 2000 issued to you by Chairman Don Young.

All records created in response to this subpoena and the subpoena dated 30 June 2000 issued to you by Chairman Don Young.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 6, 2000.

Hon. DONNA A. TANOUE,
Chairman, Federal Deposit Insurance Corporation, Washington, DC

DEAR MS. TANOUE: The House Committee on Resources, acting through the Task Force on the Headwaters Forest and Related Issues, is pursuing an inquiry into matters related to the Headwaters Forest (which is managed by the Bureau of Land Management and was purchased pursuant to Title V of P.L. 105–83). Those matters include (1) the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of land near or adjacent to the Headwaters Forest owned by the Pacific Lumber Company; (2) the potential impact of advancement of such claims to expand the Headwaters Forest; and (3) the matters outlined in a June 16, 2000, letter initiating an oversight review concerning the Headwaters Forest. The subject matter of the inquiry falls under the jurisdiction of this Committee pursuant to Articles I and IV of the U.S. Constitution, Rules X and XI of the Rules of the House of Representatives, and Rule 6(a) of the Rules of the Committee on

Resources. A copy of the rules is enclosed. Note Rule 4(f) regarding the swearing of witnesses, which is my policy for hearings. Therefore, you may bring a counsel to advise you of any constitutional rights if you desire.

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Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

SUBPOENA DUCES TECUM (HEARING)

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To the Honorable Donna Tanoue, Chairman, FDIC

You are hereby commanded to be and appear before the Committee on Resources, Task Force on the Headwaters Forest and Related Issues of the House of Representatives of the United States, of which the Hon. John Doolittle is chairman, in Room 1324 of the Longworth Building, in the city of Washington, on November 13, 2000, at the hour of 10:00 AM, then and there to produce the things identified on the attached schedule and to testify touching matters of inquiry committed to said Committee; and you are not to depart without leave of said Committee.

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DON YOUNG, *Chairman.*

Attest: Jeff Trandahl, *Clerk.*

SCHEDULE OF RECORDS

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HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, November 6, 2000.

Hon. DONNA A. TANOUE,
Chairman, Federal Deposit Insurance Corporation, Washington, DC.

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Sincerely,

JOHN T. DOOLITTLE,
Chairman, Task Force on Headwaters Forest and Related Issues.

SUBPOENA DUCES TECUM (HEARING)

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To The Hon Donna Tanoue, Chairman, FDIC

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DON YOUNG, *Chairman.*

Attest: Jeff Trandahl, *Clerk.*

SCHEDULE OF RECORDS

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OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,
Washington, DC, October 6, 2000.

DUANE GIBSON,
General Counsel, Oversight and Investigation, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. GIBSON: Set forth below are the OTS's responses to the questions contained in your letter to me dated October 3, 2000.

1. *Question:* ''Did Mr. Hurwitz, Maxxam, Pacific Lumber Company or any representative of this individual or these companies ever raise with OTS or any of its representatives the notion of a debt-for-nature swap related to Headwaters?''

OTS Response: Yes.

Question: ''On what date did Mr. Hurwitz, Maxxam, Pacific Lumber Company or any representative of this individual or these entities *first* raise the debt-for-nature [swap] related to Headwaters? When was the subject subsequently raised?''

OTS Response: According to our records, the first debt-for-nature proposal made by Mr. Hurwitz's representatives to the OTS was on August 13, 1996. See OTS Doc. 00546 (notes of OTS Deputy Chief Counsel for Enforcement Richard Stearns, dated August 13, 1996, of a telephone conversation with Mr. Tommy Boggs). Our records reflect the subject was subsequently raised by representatives for Mr. Hurwitz and MAXXAM on the following dates:

September 6, 1996, OTS Doc. 00547–49 (letter from Mr. John Douglas, counsel for Mr. Hurwitz, to Richard Stearns and FDIC Deputy General Counsel Jack Smith, dated September 6, 1996).

September 10, 1996, OTS Doc. 00550–51 (meeting notes prepared by Richard Stearns, dated September 10, 1996).

September 24, 1996, OTS 00556–60 (handwritten notes taken by OTS Associate Chief Counsel Bruce Rinaldi of a meeting held on September 24, 1996), and OTS Doc. 00561–63 (typewritten notes of the same meeting prepared by Mr. Rinaldi on the following day).

August 27, 1997, OTS Doc. 00567–68 (typewritten notes prepared by Mr. Rinaldi of telephone conversations with Richard Keeton and J.C. Nickens, attorneys for Mr. Hurwitz and MAXXAM, August 27, 1997).

February 17, 1998, OTS Doc. 00899–904 (Letter from MAXXAM Senior Vice President and Chief Legal Officer Byron L. Wade to FDIC and OTS, dated February 17, 1998, with attached draft Memorandum of Agreement); and

October 27, 1998, OTS Doc. 00906–11 (typewritten notes of settlement discussion between OTS and counsel for Mr. Hurwitz and MAXXAM, prepared by Mr. Rinaldi, October 27, 1998).

Although the first time Mr. Hurwitz's representatives raised a proposed debt-for-nature settlement of the OTS's potential claims with the OTS was in August 1996, see above, the OTS was informed in July 1995 by the FDIC that Mr. Hurwitz, MAXXAM, and Pacific Lumber Company, and the United States Department of the Interior, for the sale of a portion of the Headwaters Forest to the federal government. See OTS Doc. 00929–33 (handwritten notes of a meeting between OTS and FDIC representatives, July 26, 1995).

3. *Question:* ''Who *first* raised the subject of [a] a debt-for-nature [swap] related to Headwaters raised?''

OTS Response: The first time a representative of Mr. Hurwitz raised a debt-for-nature swap with OTS was when Mr. Tommy Boggs, a Washington lobbyist and attorney who represented Mr. Hurwitz and MAXXAM, raised a debt-for-nature settlement of OTS's potential claims with Richard Stearns, OTS Deputy Chief Counsel for Enforcement.

4. *Question:* ''What was the context in which it was raised? In what medium was it

first raised (e.g., in writing, by phone, in person)?''

OTS Response: The context in which Mr. Boggs raised a debt-for-nature swap on August 13, 1996, was his proposal to include a settlement of OTS's potential claims as part of the negotiations then underway between Mr. Hurwitz, MAXXAM, and Pacific Lumber Company, and the United States Department of the Interior, for the sale of a portion of the Headwaters Forest to the federal government. Mr. Boggs raised this matter in a telephone call to Richard Stearns.

I hope this fully responds to the questions contained in your letter.

Sincerely yours,

CAROLYN J. BUCK,
Chief Counsel.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, October 6, 2000.

DUANE GIBSON,
General Counsel, Oversight and Investigations, House of Representatives, Committee on Resources, Washington, DC.

DEAR MR. GIBSON: This letter responds to your letter of October 3, 2000, requesting the Federal Deposit Insurance Corporation to respond to specific questions and provide supporting documentation regarding the ''debt-for-nature'' discussions between the FDIC and Charles Hurwitz.

1. *Question:* Is the quote of Mr. Kroener cited in the August 17, 2000 American Banker accurate?

FDIC Response: A story in the August 17, 2000 American Banker included a quotation from me that stated, ''The so-called debt-for-nature swap was first offered by Mr. Hurwitz's counsel, not the FDIC. While the FDIC has said it remained open to any appropriate settlement, including a debt-for-nature swap, it has also told Mr. Hurwitz's lawyers that the FDIC's preference is for a cash payment.'' This quotation is an accurate statement.

2. *Question:* On what date did Mr. Hurwitz, Maxxam, Pacific Lumber Company or any Representatives of this individual or these entities *first* raise the debt-for-nature related to Headwaters? When was the subject subsequently raised?

FDIC Response: Although the debt-for-nature swap concept had been the subject of press stories and letters to the FDIC by members of the public and Congress for some time, there had been no discussion of this issue between FDIC and Mr. Hurwitz or his representatives. In fact, the FDIC was pursuing a substantial all-cash settlement which it proposed to Mr. Hurwitz's attorney in a letter dated July 16, 1993.

On or about July 13, 1995, John Martin of the law firm Patton Boggs, on behalf of Mr. Hurwitz and Maxxam, called Allen McReynolds, Special Assistant to the Secretary of Interior, at his home at 8 p.m., urging him to contact the FDIC to begin a dialogue to resolve the FDIC's claims as part of a larger land transaction involving the Headwaters Forest that was being considered by Mr. Hurwitz and the Department of Interior. Mr. McReynolds followed up this request by calling the FDIC and met with staff of the FDIC Legal Division on July 21, 1995. It was during this meeting that the FDIC first learned of Mr. Hurwitz's interest in including FDIC claims as part of the larger Headwaters negotiations. After the FDIC suit was filed in August 1995, the feasibility of Mr. Hurwitz's proposal was discussed in several meetings between the FDIC, the Council on Environmental Quality, the Department of Interior and others.

In addition, after the filing of the FDIC's lawsuit on August 2, 1995, Mr. Byron Wade, then General Counsel of Maxxam, made a number of calls over several months to FDIC Counsel Jeffrey Williams attempting to persuade the FDIC to include settlement of its claims as part of the larger government negotiations regarding the Headwaters Forest. On August 12, 1996, Mr. Thomas Boggs of the law Patton Boggs, representing Mr. Hurwitz, met with me and Deputy General Counsel Jack Smith and proposed to settle the FDIC and the Office of Thrift Supervision claims as part of an agreement to trade the Headwaters Forest for other government property, contingent on favorable tax rulings from the Internal Revenue Service. At that meeting, Mr. Boggs indicated that Mr. Hurwitz expected to minimize the financial impact of a settlement on Maxxam by obtaining favorable tax advantage. I advised Mr. Boggs that his proposal was unacceptable because it did not provide sufficient value to the FDIC.

On September 6, 1996, the FDIC received a letter from Mr. John Douglas of the law firm of Alson & Bird, also representing Mr. Hurwitz, requesting a settlement meeting with the FDIC and OTS to discuss a proposal that certain timber acreage by contributed to the FDIC and OTS to settle our pending claims as part of a larger Headwaters deal. At the meeting on September 11, 1996, Mr. Douglas proposed giving the FDIC and OTS land in settlement of pending claims. On this and several other occasions representatives of Mr. Hurwitz indicated that they could offer more value of the FDIC in trees than cash. Also on September 11th, the FDIC received a ''Draft of Proposed Headwaters Forest Exchange Agreement'' from Patton Boggs that proposed settlement of all FDIC claims as part of the larger government Headwaters exchange agreement. On September 12, 1996, the FDIC received a letter from Mr. Douglas specifically authorizing the FDIC to discuss this proposal with other agencies, including ''representatives of the White House, the Department of the Treasury, the Department of Interior, the Department of Agriculture and the Justice Department [who] may all be involved in such discussions.''

All proposals that linked the FDIC and OTS cases with separate negotiations Mr. Hurwitz was having with the federal government over the Headwaters Forest were rejected by the FDIC and OTS, despite Mr. Hurwitz's insistence that the FDIC/OTS claims be resolved as part of the overall agreement. The FDIC declined to participate in the negotiations regarding the Headwaters Agreement and its implementing legislation to transfer the Headwaters Forest to the U.S. government. Mr. Hurwitz eventually dropped his demand that the Headwaters Agreement contain a resolution of the FDIC and OTS claims. The acquisition of much of the Headwaters Forest was authorized by Congress in November 1997.

On February 17, 1998, Byron Wade on behalf of Maxxam, sent a letter to the FDIC proposing a settlement of all OTS and FDIC claims by transferring old growth redwoods to the FDIC. On February 19, 1998, the FDIC responded by restating its longstanding position that FDIC's preference was to receive a cash payment. In March 1998, the FDIC informed Mr. Hurwitz's attorneys that the FDIC could not accept old growth redwoods to resolve the FDIC claims without additional legislation. His attorneys proposed ideas to solve the problem, but eventually that effort dissolved.

In summary, the possibility of a debt-for-nature swap involving the FDIC was initiated and pursued by representatives of Mr. Hurwitz beginning with an indirect contact in July 1995 and continuing into 1998. The effort dissolved in 1998 and since then there has been no further discussion of the debt-for-nature option between the parties.

3. *Question:* Who *first* raised the subject of debt-for-nature related to Headwaters on behalf of Mr. Hurwitz? To whom was the subject of debt-for-nature related to Headwaters raised?

FDIC Response: As stated in our response to Question 2, John Martin with the law firm of Patton Boggs first raised the subject of a debt-for-nature settlement on behalf of Mr. Hurwitz and Maxxam indirectly with the FDIC in a telephone call to Allen McReynolds, on or about July 13, 1995. Mr. McReynolds subsequently raised the subject with the FDIC during a meeting on July 21, 1995. This is confirmed by the depositions under oath of Mr. McReynolds and Mr. Robert DeHenzel, an attorney for the FDIC.

4. *Question:* What was the context in which it was raised? In what medium was it first raised (e.g. in writing, by phone, in person)?

FDIC Response: As stated in our response to Questions 2 and 3, the subject of a debt-for-nature settlement of FDIC's claims was initially raised in an after hours telephone call to the home of Mr. McReynolds by John Martin of the law firm of Patton Boggs, on behalf of Mr. Hurwitz and Maxxam. The context of this and following communications was an effort by representatives of Mr. Hurwitz to include settlement of the FDIC's claims as part of a negotiated transfer by Mr. Hurwitz and Maxxam to the U.S. Government.

I have enclosed copies of relevant documents already produced to the Committee in response to your subpoena that support this response. Please do not hesitate to contact me if you have any further questions.

Sincerely,

WILLIAM F. KROENER, III
General Counsel.

Enclosures.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, October 3, 2000.

WILLIAM F. KROENER III,
General Counsel, Federal Deposit Insurance Corporation, Washington, DC.

CAROLYN J. BUCK,
Chief Counsel, Office of Thrift Supervision, Washington, DC.

DEAR MR. KROENER AND MS. BUCK: On June 16, 2000, Chairman Young opened the oversight review described in a letter to Ms. Tanoue, and Ms. Seidman, and assigned me as the lead staff investigator for the project. On behalf of Chairman Young and Task Force Chairman Doolitte, thank you for providing the records that you have sent to date. I want to update you on the status of the oversight project. We are now reviewing the material that you provided, and will have follow-up questions for certain individuals soon. The Task Force for this oversight project has expanded. Enclosed you will find a letter that added Representative George Radanovich as a member. I thought you would like to have a copy.

In commenting about the ''debt-for-nature'' as it relates to Headwaters and the FDIC and OTS matters, Mr. Kroener was quoted in the August 17, 2000, American Banker as follows: ''The so-called debt-for-nature swap was first offered by Mr. Hurwitz's counsel, not the FDIC.'' In discussions with OTS, I was told the same thing attributed to Mr. Kroener in American Banker. This information and verification of it is important to the oversight review, so the Chairman requests prompt answers (*by Friday October 6, 2000*) to the questions contained in this letter, *along with all supporting documentation that verifies the answer from the perspective of the FDIC and the OTS.*

1) (FDIC only) Is the quote of Mr. Kroener cited above accurate? If not, what did Mr.

Kroener say in his comments to the American Banker?

2) (OTS only) Did Mr. Hurwitz, Maxxam, Pacific Lumber Company or any representatives of this individual or these companies ever raise with OTS or any of its representatives the notion of a debt-for-nature swap related to Headwaters?

3) On what date did Mr. Hurwitz, Maxxam, Pacific Lumber Company or any representatives of this individual or these entities *first* raise the debt-for-nature related to Headwaters? When was the subject subsequently raised?

4) Who *first* raised the subject of debt-for-nature related to Headwaters on behalf of Mr. Hurwitz? To whom was the subject of debt-for-nature related to Headwaters raised?

5) What was the context in which it was raised? In what medium was it first raised (e.g. in writing, by phone, in person)?

Please provide all documentation supporting answers to these questions (for example, copies of meeting notes or an affidavit verifying the answers).

If you have any questions, please contact me at 225–1064. Thank you.

Sincerely,

DUANE GIBSON,
General Counsel, Oversight and Investigations.

cc: The Honorable John Doolittle.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, September 20, 2000.

Hon. GEORGE RADANOVICH,
House of Representatives, Washington, DC.

DEAR GEORGE: On August 15, 2000, the Task Force on Headwaters Forest and Related Issued of the Committee on Resources was established. At that time, I appointed Representatives Doolittle, Pombo, and Brady to serve on the Task Force, along with yet to be designated minority members.

I know that you have been to the Headwaters Forest and are interested serving on the Task Force as well. I expect that the bulk of review being undertaken by the Task Force to be accomplished during the last three months of this year, and it is likely to include at least one hearing at some juncture. Because of your interest in this subject, your experience concerning the Headwaters, your desire to serve on this special panel, and your willingness to participate in studying this matter at a future hearing, I hereby appoint you to be a Member of the Task Force.

Sincerely,

DON YOUNG,
Chairman.

cc. The Honorable George Miller.
The Honorable John Doolittle.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, September 11, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The letter is in further response to the subpoena duces tecum received by the Federal Deposit Insurance Corporation on July 6, 2000 seeking production of copies of documents regarding the Headwaters Forest, a possible ''debt for nature swap'' and pending litigation regarding the FDIC and Mr. Charles E. Hurwitz arising out of the failure of United Savings Association of Texas (USAT).

The enclosed documents were identified pursuant to the subpoena issued by the Committee. Although these documents were identified and copied in response to the subpoena, we believe that they were inadvertently omitted from the several boxes of documents produced by the FDIC on July 7, 2000. We regret the mistake that delayed the production of these documents to the Committee.

This document production should satisfy our obligations under the subpoena. As with our prior document productions to the Committee, the enclosed documents include sensitive, highly confidential material that is covered by attorney client and/or attorney work product privileges in the ongoing litigation against Mr. Hurwitz, including documents that Mr. Hurwitz and his representatives are not entitled to review through the court proceedings. The FDIC does not waive any privileges belonging to the FDIC or any other agency as a result of providing these documents to the Committee pursuant to the subpoena.

In addition, we are producing documents under the subpoena that are especially sensitive. These documents state the FDIC's internal valuation of the case for settlement purposes. Because disclosure of this information would be extremely harmful to the FDIC's litigation and settlement position, we are providing the full document for the Committee's review, but have redacted the actual valuation. This will allow the Committee to review any material in the document regarding the stated subjects of the investigation while ensuring against an inadvertent release of this highly sensitive information. If the Committee has any concerns about the redactions, we will permit the Committee staff to inspect the unredacted versions in our offices.

As we stated in our prior correspondence, the FDIC would strongly object to the dissemination of privileged and confidential documents to parties other than Committee Members and staff. We have identified the documents containing confidential information with a stamp bearing the designation ''CONFIDENTIAL.'' The failure of USAT cost the American taxpayer approximately $1.6 billion and the inappropriate release of these documents could significantly harm the FDIC's ability to litigate this matter and redue damages otherwise recoverable to reimburse taxpayers for the losses arising out of this failure.

If you have any questions regarding this production of documents, please do not hesitate to contact Eric Spitler of the FDIC's Office of Legislative Affairs at (202) 898–3837.

Sincerely,

WILLIAM F. KROENER, III,
General Counsel.

Enclosures
cc: Honorable George Miller.

Attachments Omitted and Included in an Appendix Where Necessary

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,
Washington, DC, August 24, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

Hon. GEORGE MILLER,
Ranking Minority Member, Committee on Resources, House of Representatives, Washington, DC.

Re: U.S. House of Representatives, Committee on Resources Task Force on the Headwaters Forest and Related Issues of the Committee on Resources

DEAR CHAIRMAN YOUNG AND CONGRESSMAN MILLER: The Office of Thrift Supervision (''OTS'') recently received a copy of the above-referenced task force charter that authorizes an investigation into the alleged ''Office of Thrift Supervisions's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of land near or adjacent to the Headwaters Forest owned by the Pacific Lumber Company.'' The claims referred to involve a pending administrative proceeding initiated in 1995 by the OTS, *In the Matter of United Savings Association of Texas et al.*, OTS Order No. AP 95–40 (December 26, 1995), against Charles E. Hurwitz and others in connection with the 1988 failure of United Savings Association of Texas (USAT).

According to Chairman Young's memorandum, dated August 15, 2000, that accompanied the task force charter, several members of the Resources committee requested that the Committee conduct oversight ''on attempts to break the Headwaters Forest agreement by adding more acreage to the forest through a debt for nature swap.'' As detailed in the documentation provided by OTS pursuant to the Committee's June 30, 2000, subpoena, the OTS matter is an administrative proceeding brought by a federal banking regulatory agency to address violations of the banking laws. The proceeding was initiated nearly two years *prior* to the passage of the Public Law 106–180 (the ''Headwaters Forest Legislation'') and, thus, its initiation could not ''run contrary to the Headwaters acquisition statute.'' In addition, the pending OTS administrative proceeding was known to Charles Hurwitz (a respondent in the proceeding), and to the Pacific Lumber Company, at the time the Headwaters Forest agreement was approved by Congress. The legislation does not mention the OTS proceeding nor purport to resolve the OTS's claims against Mr. Hurwitz. This contrasts to the legislation's express reference to at least two then pending legal actions in the United States Court of Federal Claims and the California Superior Court.

Additionally, the documentation that the OTS has already turned over to the Committee in response to its June 30, 2000, subpoena shows that the OTS case was brought to address violations of banking laws. The subject of a debt for nature swap was first injected into this matter when counsel for Charles Hurwitz proposed transferring timberland to the OTS as a means of settling the claims for restitution asserted by this agency. OTS has consistently responded to these proposals by stating that it prefers that any settlement include cash payments by respondents.

In my letter to the Resource Committee dated June 23, 2000, responding to the Committee's request for documents, OTS advised the Committee of our concern that the release of confidential information regarding the OTS administrative proceeding ''might compromise our pending adjudicatory process.'' The Committee's chartering of a task force to investigate the OTS proceeding has heightened that concern. There is the potential that the actions by the Committee may be later viewed as having deprived the parties to the administrative proceeding of due process and fairness and could result in the final administrative determination in this proceeding being nullified by a court of law. *See, e.g., Pillsbury Co.* v. *FTC.*, 354 F.2d 952, 963 (5th Cir. 1966); *Koniag Inc.* v. *Andrus*, 580 F2d 601, 610 (D.C. Cir.) *cert. denied*, 439 U.S. 1052 (1978).

As I explained in my June 23, 2000, letter, the OTS enforcement action against Charles E. Hurwitz is still pending before this agency. At the present time, all evidence has been presented to the trier of fact and the matter is under advisement before an Administrative Law Judge (''ALJ''). Once the ALJ renders his recommended decision, the matter will go before the Director of the OTS for further briefing by the parties and a final agency determination. To avoid any

claims of unfairness or denial of due process, we urge the Committee to forbear from carrying out its proposed investigation at least until the Director has issued a final agency decision in this matter. This would allow the Committee a full opportunity to investigate, without risking an unintended interference with the ongoing OTS administrative proceeding.

Thank you for your consideration of this request.

Sincerely,

CAROLYN J. BUCK,
Chief Counsel.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, August 16, 2000.

Hon. BRUCE BABBITT,
Secretary, Department of the Interior, Washington, DC.

DEAR MR. SECRETARY: The legislative, oversight, and investigative responsibilities under Rule X and Rule XI of the Rules of the United States House of Representatives, Rule 6(b) of the Rules for the Committee on Resources (the Committee), 106th Congress, and Article I and Article IV of the United States Constitution, require that the Committee on Resources oversee and review the laws, policies, and practices, and operation of the Department of the Interior (the Department), the public domain lands and resources managed by the Department, and any other entity that relates to or takes action to influence departments or matters and laws within the Committee's jurisdiction under rule X(*l*).

This jurisdiction extends to Title V of P.L. 105–83 concerning the legislation that authorized the acquisition of the Headwaters Forest (land that is now managed by the Bureau of Land Management) from Pacific Lumber Company. We cooperatively worked on this legislation and agreed on the terms of Title V, which embodied the agreement to acquire Headwaters. The law extends to any future additions of related parcels of the Headwaters Forest from Pacific Lumber Company, including additions through ''debt for nature.'' Members of this Committee, including me, approved of the inclusion of this legislative language in the Department of Interior and Related Agencies Appropriations Act, 1998.

The oversight outlined in this letter is being conducted through the Task Force on the Headwaters Forest and Related Issues, which commences today, under the authority of Rule 7 of the Rules for the Committee on Resources.

Oversight Matters Under Review. We have initiated and now expanded an oversight review of the Department of the Interior's involvement in the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of the Headwaters Forest owned by the Pacific Lumber Company. This advancement runs contrary to the Headwaters acquisition statute referenced above. The advancement may be at the behest of militant elements of the extreme environmental community. The advancement is being undertaken via a 1995 civil suit (and any subsequent OTS administrative action) filed by the FDIC in the United States District Court for the Southern District of Texas against Mr. Charles E. Hurwitz in connection with the 1988 failure of the United Savings Association of Texas (USAT). The oversight review includes these subjects.

We have several Department records in our possession that relate to the matters under review, and we are alarmed about the apparent deep involvement between members of your staff and the banking regulators in pursuing and continuing to pursue the above-referenced actions to leverage yet more Headwaters ''nature'' for a questionable and uncertain ''debt.''

We find disturbing that the Department of the Interior documents that are now available in the press clearly state that there is ''support for a debt-for-nature swap for the FDIC and OTS claims . . .'' and we are alarmed with what your Special Assistant, Mr. Allen McReynolds reports about the interaction between the Department and the banking regulators. He unequivocally stated that, ''FDIC and OTS are amendable to this strategy [the debt for nature acquisition strategy] if the Administration supports it.'' The admission of coordination with banking regulators and backdoor lobbying may be common practice for your department. However, your department, and perhaps others, appears to have influenced the judgement of banking regulators, who were ''amenable'' to creating a debt that could be swapped for nature.

Request for Records. As this oversight inquiry has evolved, the need for departmental records related to the subject of the oversight review has become increasingly apparent. The Committee and the Task Force require the prompt production of all departmental records by the FDIC and OTS that relate to the matter under review as outlined above. In addition, the attached Schedule of Records specifies certain records or categories of records that are also requested and must be produced pursuant to the authority and under deadlines in this letter. The schedule also contains the definition that applies to the term ''records.''

Interviews. In addition to the information listed above, this inquiry may include a request to interview you and those in the employ of the Department who have knowledge of the matters under review.

Deadline. We request that you strictly comply with the deadlines for production which are as follows: response to this letter by August 22, 2000, and delivery of the records 4:00 p.m., Friday, August 25, 2000, to the attention of Mr. Duane Gibson, 1324 Longworth House Office Building. We also request that you provide *two* sets of all records requested.

Lead Investigator. This review will be led at the staff level by Mr. Duane Gibson, the Committee's General Counsel for Oversight and investigations. We request that your staff contact him (202–225–1064) after your receipt and review of this letter. Mr. Gibson can assist with any questions. Thank you for your cooperation with this review of matters under the jurisdiction of this Committee. Please be aware that the Committee has the authority to compel production of the records that are requested should they not be produced by the deadline listed above. We hope that we will not need to employ this authority. We anticipate your cooperation, just as we cooperated to write the statute and appropriated the funds to purchase the Headwaters Forest.

Sincerely,

DON YOUNG,
Chairman, Committee on Resources.

JOHN T. DOOLITTLE,
Chairman, Task Force on the Headwaters Forest And Related Issues.

cc: Members, Committee on Resources

SCHEDULE OF RECORDS

HEADWATERS FOREST ADDITIONS AND DEBT FOR NATURE

1. All records related to or referring to any contact between any employee of the Department of the Interior (including the Office of the Secretary and the Bureau of Land Management) and the FDIC or OTS (or any employee of the OTS or FDIC) that relates to or mentions the Headwaters Forest or ''debt for nature.''

2. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention ''debt for nature,'' the Headwaters Forest, or the Pacific Lumber Company, including but not limited to any records relate to obtaining additional parcels of land referred to as of the Headwaters Forest, which were or are owned by the Pacific Lumber Company.

3. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention (or are to or from) the Rose Foundation, the Turner Foundation or any other grant-making organization *and* that in any way relate to strategies or legal theories for acquisitions or potential acquisitions of the Headwaters Forest or the concept of ''debt for nature''.

4. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention (or are to or from) Earth First! North Coast Earth First!, Bay Area Coalition on Headwaters, Circle of Life Foundation, The Trees Foundation, The Humboldt Watershed Council, The National Audubon Society, and/or the Sierra Club.

5. All records to, from, or referring to Mr. Allen McReynolds that also relate to or refer to the Headwaters Forest, the FDIC or the OTS, or debt for nature.

6. All records to, from, or referring to Ms. Kathleen (Katie) McGinty that also relate to or refer to the Headwaters Forest, the FDIC or the OTS, or debt for nature.

7. All records referring or related to a meeting that occurred on October 22, 1995, in which the Council on Environmental Quality Chairperson attended and that also relate to or refer to the Headwaters Forest, the FDIC or the OTS, or debt for nature.

8. All records to or from anyone in the Office of the Secretary that also relate to or refer to the Headwaters Forest and the FDIC or the OTS.

9. All records that relate to or refer to any contact or communication between any employee of the Department of the Interior and Mr. Bruce Rinaldi, Mr. Ken Guido, Mr. Robert DeHenzel, or Mr. Jeff Williams.

10. All records showing or related to any contact or communication between anyone employed by, assigned to, or associated with the Department of the Interior and anyone employed by, assigned to, or associated with the White House (including the Council on Environmental Quality), The Office of the Vice President that relate in any way to the FDIC or OTS claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention, refer to, or relate to ''debt for nature,'' the Headwaters Forest, or the Pacific Lumber Company.

Definitions

For purposes of this inquiry, the term ''record'' or ''records'' includes, but is not limited to, copies of any item written, typed, printed, recorded, transcribed, filmed, graphically portrayed, video or audio taped, however produced or reproduced, and includes, but is not limited to any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all computer entries, accounting materials, memoranda, minutes, diaries, telephone logs, telephone message slips, electronic messages (e-mails), tapes, notes, talking points, letters, journal entries, reports, studies, drawings,

calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, disks, briefing materials and notes, cover sheets or routing cover sheets or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation and shall also include redacted and unredacted versions of the same record. The term includes records that are in the physical possession of the Department of the Interior and records that were formerly in the physical possession of the Department, as well as records that are in storage.

Furthermore, with respect to this request, the terms ''refer'', ''relate'', and ''concerning'', means anything that constitutes, contains, embodies, identifies, mentions, deals with, in any manner that matter under review.

''FDIC'' means Federal Deposit Insurance Corporation.

''OTS'' means Office of Thrift Supervision.

''Department'' means Department of the Interior.

MAXXAM means MAXXAM Inc., Pacific Lumber Company, and United Savings Association of Texas.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, August 15, 2000.

Task Force on the Headwaters Forest and Related Issues of the Committee on Resources

Authority

Pursuant to Rule 7 of the Committee on Resources (Committee), the Chairman of the Committee is authorized, after consultation with the Ranking Minority Member, to appoint task forces to carry out certain duties and functions of the Committee. The Chairman hereby appoints the Members listed below to the Task Force on the Headwaters Forest and Related Issues to carry out the oversight and investigative duties and functions of the Committee regarding the oversight review specified in the June 16, 2000, letter (attached hereto), subject to the terms and conditions listed below.

Members

Republicans—Doolittle (Chairman), Pombo, Thornberry, Brady, and Young (ex officio).

Democrats—Three Members of the Committee recommended by the Ranking Minority Member and Miller (ex officio).

Duration

The Task Force will commence on August 16, 2000, and will terminate on December 31, 2000, or on an earlier date that the Chairman of the Committee may designate. With a duration of less than six months, the task force will not count against the subcommittee limit under Rule X, clause 5(b)(2) of the Rules of the House of Representatives.

Jurisdiction

The Task Force shall review and study the following matters related to the Headwaters Forest (which is managed by the Bureau of Land Management and was purchased pursuant to Title V of P.L. 105–83): (1) the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of land near or adjacent to the Headwaters Forest owned by the Pacific Lumber Company; (2) the potential impact of advancement of such claims to expand the Headwaters Forest; and (3) the matters outlined in the attached June 16, 2000, letter initiating an oversight review concerning the Headwaters Forest.

Hearings

Subject to the Rules of the House of Representative and the Rules of the Committee on Resources, the Task Force may hold hearings on matters within its jurisdiction. The Chairman of the Committee shall approve all hearings prior to their announcement.

Staff

The Chairman of the Committee shall designate professional and support staff to assist the Task Force in carrying out its duties and functions. Consistent with the Rules of the House of Representatives, persons employed by personal offices of Members may not serve as staff to the Committee and its subdivisions. The Ranking Minority Member may also designate staff to assist the Task Force.

Travel

All travel by Members and staff of the Task Force shall be authorized pursuant to Rule 12 of the Committee and other applicable rules and guidelines and shall be limited to funds allocated by the Chairman of the full Committee for that purpose. Committee funds may not be used to pay for travel by persons not employed by the Committee and all travel shall conform with applicable rules of the House of Representatives and the Committee.

Rules

A task force is a subdivision of the Committee and shall comply with all applicable rules and guidelines of the House of Representatives, the Committee on Resources, and the Committee on House Oversight. The activities of the Task Force are subject to addional directon and supervision as the Chairman of the Committee may from time to time impose.

DON YOUNG,
Chairman.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, August 15, 2000.

To: Members, Committee on Resources
From: Don Young, Chairman
Re: Task Force

Several Members have requested that the Committee conduct oversight on attempts to break the Headwaters Forest agreement by adding more acreage to the forest through a debt for nature swap. I initiated an oversight review of this matter in June, and today I created a task force to further study the issues outlined in the oversight review. A copy of the task force charter is attached. The task force will be chaired by John Doolittle. Republican Members of the task force are listed in the charter, and I have reserved three slots for Democrat Members to be named by Mr. Miller. The task force will operate much like a subcommittee and may hold hearings as needed to examine the issues for the oversight review.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, August 14, 2000.

Hon. GEORGE MILLER,
Committee on Resources, Longworth HOB, Washington, DC.

DEAR GEORGE: On July 26, 2000, your staff was notified that I was considering establishing a task force to examine the issues and subjects raised in the June 18, 2000, letter that launched an oversight review about matters related to the Headwaters Forest. Our staffs discussed the task force and oversight project prior to the August recess, and my staff requested that you name three Members to the Task Force. To date I have not received your selection of minority members. I intend to proceed with this task force, and will leave three positions open for Members that you select. Should you have any questions, recommendations, or names of Members who wish to serve on the task force, please ask that your staff direct them to me through Mr. Duane Gibson (5–1064). Thank you.

Sincerely,

DON YOUNG,
Chairman.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,
Washington, DC, August 1, 2000.

DUANE GIBSON, Esq.,
General Counsel, Oversight and Investigations, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. GIBSON: Set forth below are OTS's responses to your questions, which were e-mailed to Kevin Petrasic on July 21, 2000.

1. ''What is the total budget of OTS for the past five years?''

Year	*Budget*
1999	$154,313,750
1998	147,253,450
1997	144,948,050
1996	148,758,100
1995	170,300,500

2. ''What is the OTS authorizing statute? Please send a copy.''

12 USC 1462a, 1464. A copy is attached.

3. ''How many cases are being pursued by the OTS for the FDIC in each of the last five years?''

The OTS does not pursue cases for the FDIC. By way of background, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. Pub. L. 101–73 (August 9, 1989), created the OTS as the primary federal regulator of savings associations and authorized the OTS to pursue administrative enforcement actions against individuals and entities to safeguard the thrift industry, its depositors and the federal deposit insurance funds. 12 U.S.C. 1464 and 1818. One of the remedies available to the OTS and other banking regulators in these administrative enforcement proceedings is to obtain restitution for losses suffered by an insured depository institution. 12 U.S.C. 1818(b)(6). If the OTS succeeds in recovering restitution, it is returned to the institution.

When a savings association fails, the OTS must appoint the FDIC as receiver for the institution. 12 U.S.C. 1464(d)(2). As the appointed receiver, the FDIC ''steps into the shoes'' of the failed institutions to manage its assets. 12 U.S.C. 1821. The OTS would then pay any restitution recovered in its administrative enforcement action to the FDIC as receiver.

Whether an institution is open or being run by FDIC as receiver, those running the institution may advise OTS of possible violations of law that may warrant action by OTS. As part of its investigation, OTS will obtain information from the institution and then make an independent determination under OTS's statutory authority whether to bring any enforcement action.

As receiver, FDIC has separate legal authority to pursue private legal actions for recovery of damages on behalf of the institution, its creditors and shareholders. The OTS's statutory authority to pursue enforcement actions is separate from the FDIC's authority as receiver. The federal courts have consistently recognized this distinction between OTS's administrative enforcement authority and the FDIC's authority as receiver to bring suit in federal court. *See, e.g., Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Akin v. OTS*, 950 F.2d 1180, 1185 (5th Cir. 1992). As in the

USAT matter, the courts have held that the two agencies may pursue separate, but concurrent, legal proceedings in furtherance of their separate legal responsibilities. *See Resolution Trust Corp. v. Ryan*, 801 F.Supp. 1545 (S.D.Miss. 1992).

With this as background, the OTS has issued fifteen orders in enforcement proceedings in the last five years (plus the first half of this year) that resulted in restitution obtained and paid to the FDIC as receiver, as follows:

Year	Institution	Amount
2000 (to date)	One order	$3,169,115
1999	Three orders	1,197,000
1998	Three orders	1,319,000
1997	No orders.	
1996	Four orders	29,050,000
1995	Four orders	3,600,000

4. ''How many independent of the FDIC are being pursued?''

As explained above, all OTS enforcement actions are independent of the half of this year) by the OTS, either through administrative proceedings or consent settlements, are:

Year	*Number of Enforcement Orders*
2000 (to date)	37
1999	42
1998	44
1997	80
1996	92
1995	132

5. ''How many lawyers and non-lawyers are working on the OTS/FDIC case against USAT?''

There are not OTS lawyers or non-lawyers working on the FDIC USAT case. It is an entirely separate case pending in federal court in Houston, TX, in which the OTS is not a party. Maxxam Corporation filed a motion to add OTS as an involuntarily plaintiff in that action, but Maxxam's motion was denied by the federal court in 1997.

During the trial of the OTS's USAT administrative case, OTS had five lawyers assigned full-time to the case. They were assisted by between two and six paralegals at different times. The respondents were represented by more than 20 attorneys who appeared in the case of their behalf. These attorneys were assisted by attorneys, paralegals and support staff from the four major law firms representing respondents.

6. ''How much has the FDIC reimbursed the OTS for that work broken down by year?''

FDIC has reimbursed the OTS for legal fees and out-of-pocket expenses in the USAT administrative action as follows:

Year	*Amount*
1995	$529,452
1996	455,895
1997	435,867
1998	663,403
1999	857,182
2000	61,026
Total	3,002,825

To date, the OTS has recovered $10,876,426.98 in restitution in the USAT administrative action, which has been paid to the FDIC, through settlements with United Financial Group, Inc., the holding company for USAT, and with five individual former officers and directors of USAT.

7. ''How has the FDIC been involved with the OTS on the USAT case?''

The FDIC is not a party in the USAT administrative action brought by OTS. The FDIC has shared information and documents that the OTS has requested to prepare its case, and the two agencies have consulted on legal theories and other matters.

The respondents in the case have executed a joint defense agreement pursuant to which they shared information with each other, coordinated discovery and motions, presented joint briefs and memoranda of law and shared counsel. In addition, Maxxam Corporation has agreed to pay legal expenses on behalf of several of the respondents.

8. ''Where in terms of dollar amount does the USAT case fall compared to other cases?''

OTS seeks $821,319,405 in restitution in the case, which is the largest dollar amount sought by OTS in a litigated case. The next largest case involved Lincoln Savings and Loan Association, Irvine, CA case, where the OTS obtained $600 million, through orders and settlements against several respondents, to be paid to the FDIC as receiver for the failed institution. In numerous other cases, including San Jacinto Savings, Bellaire, TX, Columbia Savings, Beverly Hills, CA, and General Bank, Miami, FL, OTS has obtained more than $500 million through orders and settlements to be paid to the FDIC.

9. ''How is the $1.6 billion figure derived for the USAT case?''

This is not the amount sought by OTS in the case. The $1.6 billion figure is the cost to the federal deposit insurance fund from paying of depositors due to the collapse of USAT.

Sincerely yours,

CAROLYN J. BUCK,
Chief Counsel.

Attachment.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, July 7, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR CHAIRMAN YOUNG: As requested in your June 20, 2000 letter as the Chairman of the House Committee on Resources, and the June 20, 2000 subpoena by the Committee on Resources, we are providing the Committee with the enclosed material. It is my understanding that pursuant to conversations between Committee staff and staff of the Federal Deposit Insurance Corporation, the Committee has requested that two copies of the documents be produced to the majority, and one to the minority. We are enclosing two copies of responsive documents with this letter, and will provide an additional copy directly to Ranking Minority Member George Miller.

An index to the documents and privilege log is also enclosed. We are not withholding any responsive document, regardless of whether it is privileged. Where privileged documents are provided, they are so identified and marked, and the applicable privileges are identified in the accompanying index and log.

In delivering these records, it is our intention to preserve any and all privileges or exemptions from disclosure under the Freedom of Information Act or other laws, rules and regulations for those documents marked as privileged should they be requested by any person other than the Congress of the United States acting in its official capacity. We appreciate the efforts of the Committee and its staff to maintain the strict confidentiality of these documents.

Sincerely yours,

PATRICIA M. BLACK,
Counsel to the Inspector General.

LOG OF PRIVILEGED DOCUMENTS PRODUCTION TO THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES, JULY 7, 2000

Bates numbered pages	Date of documents	Description of documents	Privilege
000000–000018	October 13, 1998	Hurwitz Motion to Remove Confidentiality Designation of FDIC Board Meeting Materials (Under Seal)	Deliberative Process.
000019–000034		Federal Deposit Insurance Corporation's Opposition to Hurwitz's Motion to Remove Confidentiality Designation	
000035–000053	May 11, 1998	Hurwitz's Request for Disposition of Motions Affecting Disclosure of the ATS Memo	
000054–000070	May 8, 1998	Hopkins & Sutter Letter Re: FDIC V. Hurwitz	
000071–000074	November 15, 1995	Clements, O'Neill, Peirce, & Nickens Letter Re: Federal Deposit Insurance Corporation, as manager of FSLIC Resolution v. Charles E. Hurwitz, Civil Action No. H–95–3956, United States District Court for the Southern District of Texas, Houston Divison	
000075–000097	November 16, 1995	FDIC as a manager of the FSLIC Resolution Fund v. Charles E. Hurwitz—Hearing Transcript	
000098–000104	October 10, 1997	FDIC v. Charles E. Hurwitz—Order to Produce	
000105–000152	September 30, 1997	Hurwitz's Memorandum in Support of His Motions For Sanctions and Dismissal	
000153–000185	October 19, 1997	FDIC's Memorandum in Response to Hurwitz's Motion for Sanctions and Dismissal	
000186–000189	Cross-Walk of Issues Raised By Congressman DeLay Regarding USAT Litigation To Objectives Outlined in OCRE's Evaluation Proposal.	Attorney Work Product Deliberative Process.	
000190–000196	April 19, 1999	Memo from Schulz to Kroener, Subject: OIG Investigation of the Hurwitz Case	Attorney Client Privilege Attorney Work Product Deliberative Process
000197–000200	February 3, 1999	Letter to Tanoue and Gianni re: Hurwitz from Congressman DeLay	
000201–000215	March 10, 1999	Executive Summary—Authorization of Expenditures	Attorney Client Privilege Attorney Work Product Deliberative Process.
000216–000219	March 2, 1999	Letter from Chairman Tanoue and Response to an Inquiry from the Honorable Tom DeLay	
000220–000222	April 8, 1999	Draft Letter to Congressman DeLay from Gianni re: Hurwitz	Deliberative Process.
000223–000258		DeLay Allegation Spreadsheet (with notations)	Attorney Client Privilege Attorney Work Product Deliberative Process.
000259–000268	May 5, 1999	Memorandum—Motions in the Hurwitz litigation raising issues that the Office of Inspector General proposes to investigate (Under Seal).	Attorney Client Privilege Attorney Work Product Deliberative Process.
000269–000271		Hurwitz Case Summary	Attorney Client Privilege Attorney Work Product.
000272–000276		Preliminary Comparison of Key Provisions in FDIC/PLS Guidelines With the July 27, 1995 Authority to Institute PLS Memo Prepared for the USAT Litigation.	Attorney Client Privilege Attorney Work Product Deliberative Process.
000277–000284		Evaluation Action Plan	Attorney Client Privilege Attorney Work Product Deliberative Process.
000285–000286	February 23, 1999	FY2000 FDIC Inspector General VA–HUD Appropriations Subcommittee The Honorable Tom DeLay Questions for The Record	

LOG OF PRIVILEGED DOCUMENTS PRODUCTION TO THE COMMITTEE ON RESOURCES, U.S. HOUSE OF REPRESENTATIVES, JULY 7, 2000—Continued

Bates numbered pages	Date of documents	Description of documents	Privilege
000287–000291	March 25–26, 1999	Record of March 25, 1999 Meeting with OIG Counsel Regarding Modified Approach to United Savings Association of Texas (USAT) Evaluation.	Attorney Client Privilege Attorney Work Product Deliberative Process.
000292–000295		Summary of Review of Issues Raised by Congressman DeLay	Attorney Client Privilege Attorney Work Product Deliberative Process.
000296–000299		Inventory of Legal Documents Received 2/24/99 from Bob Dehenzel	Attorney Work Product Deliberative Process.
000300–000309	May 5, 1999	Memorandum to File from Dehenzel re: Motions in the Hurwitz litigation raising issues that the Office of Inspector General proposes to investigate.	Attorney Work Product.
000310–000317	Undated Draft	Action Plan	Deliberative Process.
000318–000329		Congressman DeLay Allegation Spreadsheet (without notations)	
000330–000333		Evaluation Proposal I	Attorney Client Privilege Attorney Work Product Deliberative Process.
000334–000341		Evaluation Proposal II	Attorney Client Privilege Attorney Work Product Deliberative Process.
000342–000345	February 3, 1999	Letter to Tanoue and Gianni re: Hurwitz from Congressman DeLay	
000346–000347	September 30, 1998	Letter to Congressman Bentsen from Tanoue	
000348–000349	October 18, 1996	Letter to Congressman Gonzalez from Tanoue	
000350–000351		Auditor's Plan	Deliberative Process.
000352–000365	Various	News Articles	
000366–000384	August 1, 1995	Minutes of the Board of Directors	Attorney Client Privilege Attorney Work Product Deliberative Process.
000385–000389	June 1998	Case Review Summary	Attorney Client Privilege Attorney Work Product.
000390–000391		4th Quarter 98 Top Ten	Attorney Client Privilege Attorney Work Product.
000392–000394	June 17, 1997	Memorandum to David Einstein from Jeffrey Williams re: United Savings Association of Texas, FDIC v. Hurwitz and Related Matters.	Attorney Work Product.
000395–000400		FDIC Briefing Outline	Attorney Client Privilege Attorney Work Product.
000401–000411	February 4, 1994	Letter to Carolyn Lieberman from Jack Smith	Attorney Work Product Deliberative Process.
000412–000425	March 10, 1999	Executive Summary—Authorization of Expenditures United Savings Association of Texas Houston, Texas, FIN#1815	Attorney Client Privilege Attorney Work Product Deliberative Process.
000426–000433	September 12, 1995	Letter to Chairman Helfer from Kroener	Attorney Client Privilege Attorney Work Product Deliberative Process.
000434–000437	October 20, 1995	Gore Meeting Draft Discussion Points	Attorney Work Product.
000438	October 20, 1995	Headwater Meeting Attendees	
000439	October 25, 1995	Headwaters Forest Meeting October 26	Deliberative Process.
000440–000444	October 25, 1995	Headwaters Forest Meeting October 26	Deliberative Process.
000445–000446	October 26, 1995	USAT Meeting Attendee List	
000447–000474	November 7, 1995	Memorandum from Jeffrey Williams, Subject: USAT/Charles Hurwitz	Deliberative Process.
000475	November 28, 1995	Attendee List	
000476		Attendee List	
000477	February 9, 1998	Memorandum to Jeff Williams from John Garamendi Subject: Headwaters	
000478–000481	October 9, 1998	PLS Top 10 Report	Attorney Work Product.
000482–000483	January 19, 1999	PLS Top Ten	Attorney Work Product.
000484–000486		Discussion Points Concerning the Qui Tam Action	Attorney Work Product Deliberative Process.
000487		Essential Points	Attorney Work Product.
000488–000489	June 28, 2000	Assignment Status Report	Privacy Act Material.
000490–000491	June 21, 2000	E-mail re: Congressional Document Request	
000492–000493	June 17, 1999	Record of Meeting with Congressman DeLay on FDIC's Litigation Against Charles Hurwitz	
000494–000495	May 4, 1999	E-mail from Pat Black/Steve Beard re: Evaluation 99–003E	Attorney Client Privilege.
00496	March 31, 1999	E-mail from Beard re: Additional Documents from Legal	
000497		Draft Inventory of other USAT documentation not received on 2/24/99, 3/4/99 and 3/23/99 from the FDIC Legal Division as of 3/24/99	
000498–000505		Draft Inventory of Documentation Received 2/24/99, 3/4/99, and 3/23/99 from FDIC Legal Division: 3 Accordion Files. As of 3/24/99.	Attorney Client Privilege Attorney Work Product Deliberative Process.
000506–000513		Evaluation Action Plan	Attorney Work Product Deliberative Process.
000514–000518	March 29, 1999	Draft USAT/Hurwitz Timeline	
000519–000523	March 25–26, 1999	Record of Meeting with OIG Counsel Regarding Modified Approach to USAT Evaluation	Attorney Client Privilege Attorney Work Product Deliberative Process.
000524–000530		Evaluation Action Plan	Deliberative Process.
000531–000538		Draft Inventory of Documentation Received 2/24/99, 3/4/99, and 3/23/99 from Bob DeHenzel, Counsel, Legal Division: 3 Accordion Files. As of 3/24/99.	Attorney Client Privilege Attorney Work Product Deliberative Process.
000539–000542		Evaluation Proposal	Deliberative Process.
000543–000544	March 24, 1999	Draft letter to Congressman Delay from Gianni (unsigned)	Deliberative Process.
000545	March 23, 1999	E-mail Additional documents from Legal	
000546–000547		Letters to the Editors the Washington Post	
000548–000551		Evaluation Proposal	Deliberative Process.
000552–000553		E-mail from Tom Ritz—USAT Documents	Deliberative Process.
000554–000559		Draft Inventory of Documentation Received 2/24/99 and 3/4/99 form Bob DeHenzel, Counsel, Legal Division: 2 Accordion Files. As of 3/18/99.	Deliberative Process.
000560–000562	March 17, 1999	Draft USAT/Hurwitz Timeline	
000563–000566		Evaluation Proposal	Deliberative Process.
000567–000569	March 16, 1999	E-mail from Beard—Subject: My comments on the proposal	Deliberative Process.
000570–000572		USAT 99–003 Evaluation Plan	Deliberative Process.
000573–000588	Various	Various E-mails	Deliberative Process.
000589–000592		Evaluation Proposal	Deliberative Process.
000593–000606	Various	Various E-mails	

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Washington, DC, July 7, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter is in response to the subpoena duces tecum received by the Federal Deposit Insurance Corporation on July 6, 2000 seeking production of copies of documents regarding the Headwaters Forest, a possible ''debt for nature swap'' and pending litigation regarding the FDIC and Mr. Charles E. Hurwitz arising out of the failure of United Savings Association of Texas (USAT).

This document production should satisfy our obligations under the subpoena. The enclosed documents include sensitive, highly confidential material that is covered by attorney client and/or attorney work product privileges in the ongoing litigation against Mr. Hurwitz. In many cases, the production includes documents that Mr. Hurwitz and his representatives are not entitled to review through the court proceedings. The FDIC does not waive any privileges belonging to the FDIC or any other agency as a result of providing these documents to the Committee pursuant to the subpoena.

As we stated in our prior correspondence, the FDIC would strongly object to the dissemination of privileged and confidential documents to parties other than Committee Members and staff. We have identified the documents containing confidential information with a stamp bearing the designation ''CONFIDENTIAL.'' The failure of USAT cost the American taxpayer approximately $1.6 billion and the inappropriate release of these documents could significantly harm the FDIC's ability to litigate this matter and reduce damages otherwise recoverable to reimburse taxpayers for the losses arising out of this failure.

We are producing two sets of documents to the Committee under the subpoena that are especially sensitive. These materials are segregated from the rest of the production. The first set includes documents that state the FDIC's internal valuation of the case for settlement purposes. Because disclosure of this information would be extremely harmful to the FDIC's litigation and settlement position, we are providing the full document for the Committee's review, but have redacted the actual valuation. This will allow the Committee to review any material in the document regarding the stated subjects of the investigation while ensuring against an inadvertent release of this highly sensitive information. If the Committee has any concerns about the redactions, we will permit the Committee staff to inspect the unredacted versions in our offices.

The second set of documents includes materials that have been placed under court seal in the litigation, or are naturally implicated by the Court's order. These documents are placed in a separately marked box.

Finally, there are some oversized maps, an audio tape of music from an environmental group and two tapes of two voice mail messages left by Mr. Hurwitz's counsel that we have been unable to duplicate within the timeframe of the subpoena because of their

unique nature. These materials are available to the Committee for Inspection at our offices or we can make arrangements to have them copied if that is the Committee's preference.

If you have any questions regarding this production of documents, please do not hesitate to contact Eric Spitler of the FDIC's Office of Legislative Affairs.

Sincerely,

WILLIAM F. KROENER, III,
General Counsel.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, June 29, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter is in further response to your June 16, 2000 request for copies of documents regarding the Headwaters Forest, a possible ''debt for nature swap'' and pending litigation between the Federal Deposit Insurance Corporation and Mr. Charles E. Hurwitz arising out of the failure of United Savings Association of Texas (USAT).

Your staff has requested that we detail our efforts to identify responsive documents. Upon receipt of the Committee's request, the Senior Deputy General Counsel sent a copy of the request by e-mail to all current employees who have participated in the litigation and might have responsive documents. Copies of the Committee's requests also were provided to the FDIC's Executive Offices and to Division and Office Directors who were asked to forward the e-mail to any employees they believed might have responsive documents in their possession. Employees were asked to respond to the e-mail within 24 hours and to provide copies of any responsive documents to the Legal Division within 48 hours. Any employees who did not respond to the initial e-mail were contacted directly and directed to provide documents. The Legal Division has been reviewing the documents for responsiveness and identifying any issues regarding attorney-client and attorney work product that might have an impact on the FDIC's ongoing litigation.

On Friday, June 23, 2000, the FDIC made an initial production of responsive non-privileged documents to the Committee. The FDIC is continuing to search for material responsive to the Committee's request and is today making a second production of responsive non-privileged documents. As Chairman Tanoue stated in her June 23 letter to the Committee, the FDIC's search has identified documents that are covered by attorney-client and/or attorney work product privileges in the current ongoing litigation with Mr. Hurwitz. Following our expression of concern that voluntarily responding to the Committee's request for privileged documents could significantly harm our legal position in the ongoing litigation, Mr. Duane Gibson of your staff indicated that the Committee will provide a subpoena for these documents.

The FDIC is deeply concerned that the dissemination of privileged, confidential and sensitive material to parties outside of the Corporation could significantly injure our ability to litigate this matter and reduce damages otherwise recoverable to reimburse taxpayers for losses arising out of the failure of United Savings Association of Texas. It is our understanding that the documents requested by the Committee are for the official business of the Committee, but that there is no formal protocol that governs the dissemination of requested material. The FDIC would strongly object to the dissemination of privileged and confidential documents to parties other than Committee Members and staff.

Finally, the enclosed material includes documents regarding settlement discussions in the ongoing litigation. Although this material is considered sensitive and confidential, counsel for Mr. Hurwitz and Maxxam were contacted and did not object to the release of this material in response to the Committee's request. In addition, pursuant to instructions from Mr. Gibson, the enclosed production includes a representative sample of the postcards, petitions and letters received by the FDIC regarding this matter. The FDIC generally did not respond to these types of communications. Responses, if any, to correspondence from outside parties regarding this litigation, including responses to Members of Congress, are being provided in these voluntary productions. In addition, with regard to responsive documents that may be in the possession of the FDIC Office of Inspector General (OIG), we have shared the Committee's request with the OIG and it is our understanding that the OIG will communicate with your staff directly regarding any responsive OIG documents in their possession.

If you have any questions regarding this production of documents, please do not hesitate to contact Eric Spitler of the FDIC's Office of Legislative Affairs.

Sincerely,

WILLIAM F. KROENER, III,
General Counsel.

OFFICE OF THRIFT SUPERVISION,
DEPARTMENT OF THE TREASURY,
Washington, DC, June 23, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

Dear CHAIRMAN YOUNG: This is in response to your June 16, 2000 information request concerning allegations of a ''debt for nature'' swap involving the Headwaters Forest. We are engaged in a search for the documents requested and with this letter are delivering copies of a portion of the responsive documents to your office. Pursuant to agreement with Mr. Duane Gibson of your staff, we are providing a sample of the postcards and letters from the public; the full complement is available for your review, if you desire.

As we have explained to Mr. Gibson, the Office of Thrift Supervision (OTS) is in the midst of a formal adjudicatory enforcement proceeding pursuant to 12 U.S.C. 1818 against Mr. Charles Hurwitz and Maxxam Corporation concerning their involvement with United Savings Association of Texas (USAT). A lengthy administrative trial was held before an administrative law judge (ALJ). The ALJ is now reviewing the evidence presented and post-trial briefs to prepare a recommended decision for the Director of OTS. After the ALJ submits his recommended decision to the Director, the parties will have the opportunity to file briefs with the Director concerning her final decision in the matter. If the Director decides to order an enforcement action against Mr. Hurwitz or Maxxam, they have the right to file an appeal with the U.S. Court of Appeals.

Because an enforcement proceeding is still pending before the agency, we have significant concerns about protecting the confidentiality of certain documents which are responsive to your request. These documents fall into two categories: 1) material relating to settlement discussions between Mr. Hurwitz and Maxxam, and 2) internal OTS memoranda about OTS' claims in this proceeding. As to the first category, counsel for Mr. Hurwitz and Maxxam and OTS signed a confidentiality agreement concerning settlement discussions. We have requested of their counsel, and have received, a non-objection to releasing documents about those discussions to the Committee.

Because we expressed reservations about our ability to protect the privileged nature of these documents by voluntarily responding to the Committee's request for documents, Mr. Gibson indicated that we can expect to receive a subpoena.

We are concerned that dissemination of confidential and sensitive documents outside the agency might compromise our pending adjudicatory process. For that reason we asked that a document handling protocol be in place to maintain their confidentiality by limiting access to Members of Congress and their staff. Mr. Gibson advised us that the Committee does not have a general document protocol but that all record requests from the Committee are for the official business of the Committee. For the record, we note our objection to any publication or release of these documents beyond Members of the Committee and the staff.

The second category of documents involves confidential internal OTS memoranda concerning the bases for its investigation and claims that resulted in the adjudicatory proceeding. As we explained to Mr. Gibson, these are extremely sensitive internal communications and, for the time being, we are near agreement on another means of conveying any possibly relevant information that may be in those documents.

You had indicated in your letter that the Committee might wish to interview OTS employees. If that is necessary, we ask that you contact our Office of Congressional Affairs to arrange the interviews. If you have any questions, please contact Kevin Petrasic, Director of Congressional Affairs at (202) 906–6452.

Sincerely,

CAROLYN J. BUCK.

cc: Rep. George Miller

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, June 23, 2000.

Hon. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This letter is in further response to your June 16, 2000, request for copies of documents regarding the Headwaters Forest, a possible ''debt for nature swap,'' and pending litigation between the Federal Deposit Insurance Corporation and Mr. Charles E. Hurwitz arising out of the failure of United Savings Association of Texas.

Since receiving the Committee's request for documents, the FDIC has initiated an aggressive search for responsive documents. With this letter, I am transmitting the FDIC's first submission of documents responsive to the Committee's June 16, 2000, request. As we stated in our letter of June 20, we anticipate that additional documents will be identified during the week of June 26 when we have the opportunity to review the files of key individuals involved with this matter who have been on leave since receipt of the Committee's request, including the General Counsel. We will promptly copy and transmit to the Committee responsive documents that are identified in this continuing search. In addition, we have identified documents that are covered by attorney-client and/or attorney work product privileges. Therefore, the FDIC respectfully requests a subpoena from the Committee for the production of these documents in order to protect our privileges in the current litigation.

In addition to the documents included in this production, the FDIC has in its possession several boxes of postcards, letters, and petitions from sources outside the FDIC regarding subjects identified in the Committee's request. While the FDIC did not respond to these incoming documents and they

do not contain any FDIC analysis or input, we believe that they are covered by the Committee's request. Because copying these voluminous documents will involve considerable time and expense, we would propose to make them available immediately to the Committee for inspection at our offices.

If you have any question regarding this production of documents, please do not hesitate to contact Eric Spitler or our Office of Legislative Affairs at (202) 898–3837.

Sincerely,

DONNA TANOUE,
Chairman.

Enclosures.

cc: Honorable George Miller.

FEDERAL DEPOSIT INSURANCE CORPORATION,
Washington, DC, June 20, 2000.

HON. DON YOUNG,
Chairman, Committee on Resources, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your recent letter requesting certain documents regarding the Federal Deposit Insurance Corporation's pending litigation against Mr. Charles E. Hurwitz. As you know, the FDIC's suit against Mr. Hurwitz arises out of the 1988 failure of United Savings Association of Texas (USAT), a savings and loan failure that cost the American taxpayer more than $1.6 billion.

Although the FDIC rejects the Committee's allegations that the basis for the suit against Mr. Hurwitz is an attempt to obtain additional parcels of the Headwaters Forest, the FDIC intends to cooperate with the Committee's investigation. The Committee has made a broad request for documents related to this matter and asked that they be produced by Friday, June 23, 2000. The FDIC is dedicating significant resources to the Committee's request and we expect to be able to produce the bulk of the documents on that date. However, it is anticipated that some documents will not be identified by the deadline. For example, a few key staff involved with this matter have been on leave since the request was received and a search of their files cannot be completed until they return the week of June 26. With regard to any documents that are not produced by June 23, 2000, the FDIC will provide documents to the Committee as quickly as they can be identified and copied.

With regard to prospective interviews of FDIC employees, we request that such interviews be arranged through the FDIC's Office of Legislative Affairs. If you or your staff have any questions regarding this matter, please contact Eric Spitler of the FDIC's Office of Legislative Affairs (202) 898–3837.

Sincerely,

DONNA TANOUE,
Chairman.

To: Carolyn Buck

This may help you, Carolyn. Call if you have any questions. Duane.

We are concerned that dissemination of certain sensitive documents outside the agency might compromise our pending adjudicatory process. For that reason we ask that you maintain the confidentiality of sensitive documents we identify by limiting access to Members of the Committee and their staff. Mr. Gibson has advised us that the Committee does not have a general document protocol, but that all record requests from the Committee are for the official business of the Committee. The information in documents is generally used for informing members of the Committee. The persons with general access to the sensitive documents are staff working on the Committee oversight project and Members of Committee. Mr. Gibson also said that at some point the documents may become public if used, for example, in a memorandum to the Chairman or in hearings. Mr. Gibson also indicated that if the Chairman receives any prior notification of why an agency views a document as sensitive, that the Chairman gives it substantial weight and factors it into decision-making on release or excerpted release of the sensitive document.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RESOURCES,
Washington, DC, June 16, 2000.

Hon. DONNA A. TANOUE,
Chairman, Federal Deposit Insurance Corporation, Washington, DC.

Hon. ELLEN SEIDMAN,
Director, Office of Thrift Supervision, Washington, DC.

VIA FAX FOR PERSONAL ATTENTION OF ADDRESSEES

DEAR CHAIRMAN TANOUE and DIRECTOR SEIDMAN: The legislative, oversight, and investigative responsibilities under Rule X and Rule XI of the Rules of the United States House of Representatives, Rule 6(b) of the Rules for the Committee on Resources (the Committee), 106th Congress, and Article I and Article IV of the United States Constitution, require that the Committee on Resources oversee and review the laws, policies, practices, and operation of the Department of the Interior (the Department), the public domain lands and resources managed by the Department, and any other entity that relates to or takes action to influence departments or matters and laws within the Committee's jurisdiction under Rule X(*l*). This jurisdiction extends to Title V of P.L. 105–83 concerning the legislation that authorized the acquisition of the Headwaters Forest (land that is now managed by the Bureau of Land Management) from Pacific Lumber Company. It extends to any future additions of related parcels of the Headwaters Forest from Pacific Lumber Company, including additions through ''debt for nature.'' Members of this Committee, including me, drafted and negotiated this law and approved of its inclusion in the Department of Interior and Related Agencies Appropriations Act, 1998.

Oversight Matters Under Review. I have initiated an oversight review of the Federal Deposit Insurance Corporation's (FDIC) and the Office of Thrift Supervision's (OTS) advancement of claims against private parties to ultimately obtain additional parcels of the Headwaters Forest owned by the Pacific Lumber Company. This advancement runs contrary to the Headwaters acquisition statute referenced above, contrary to FDIC's mission to oversee the nation's financial system, contrary to the interests of the federal department under the jurisdiction of my committee that would manage such additional Headwaters holdings. The advancement may be in coordination with militant elements of the extreme environmental community. The advancement is being undertaken via a 1995 civil suit (and any subsequent OTS administrative action) filed by the FDIC in the United States District Court for the Southern District of Texas against Mr. Charles E. Hurwitz in connection with the 1988 failure of the United Savings Association of Texas (USAT). The oversight review includes these subjects.

I am aware that the FDIC conducted a seven-year investigation of USAT's failure prior to the filing of the suit. I review the FDIC's conclusion that claims against Mr. Hurwitz were unwarranted and understand that it issued a report finding ''* * * no direct evidence of insider trading, stock manipulation or theft of corporate opportunity by the officers and directors of USAT.'' The report also said that: ''* * * the directors and senior management found themselves trying to keep the institution afloat and play an entirely new ball game at the same time. While the profit taking strategy is established, the directors' motivation was maintenance of the institution in compliance with the capitalization requirements and not self gain or violation of their duty of loyalty * * * The preliminary conclusion from the initial investigation as to officer's, director's and other professionals' liability was that there did not appear to be any intentional fraud, gross negligence, or patterns of self-dealing.''

The Federal District Court Judge in the FDIC v. Hurwitz case required the FDIC to produce its authority to sue (''ATS'') memorandum. In analyzing the probability of success, the ATS memorandum concluded that the suit against Mr. Hurwitz was unlikely to survive summary judgment and, even if it did, would have only a ''marginal-at-best'' chance of succeeding on its merits. As noted above, the FDIC's outside counsel agreed with this analysis and its conclusions. Nevertheless, in violation of the FDIC's own internal policy guidelines governing the initiation of litigation, the FDIC ultimately decided to file suit.

I find particularly disturbing the fact that the ATS memorandum specifically references what appears to be the only possible motive behind the FDIC's decision to bring this suit. The ATS memorandum acknowledges that Mr. Hurwitz is the Chairman, Chief Executive Officer, and indirectly the largest stockholder of MAXXAM Inc., a publicly held company, which owns The Pacific Lumber Company (''Pacific Lumber''). Pacific Lumber owned, among other things, an approximately 5,000 acre tract of old growth redwood forest in northern California commonly referred to as the ''Headwaters Forest.'' Beginning in 1994, private sector environmental activists began to lobby the Congress and the Administration furiously to ensure that as much of the Headwaters Forest as possible, if not all of it, remain unharvested by the company.

Environmental activists—predominantly Earth First!—also began an extensive campaign to use the FDIC and the Office of Thrift Supervision (OTS) and to employ their litigation powers to create a threat of liability that would force MAXXAM to surrender its ownership of the Headwaters Forest in exchange for dismissal of the USAT claims. Such a swap would apparently, in the eyes of environmental advocates and their supporters, enable public acquisition of the Headwaters Forest and other surrounding lands without having to buy them for market value from Pacific Lumber or MAXXAM. This concept came to be known as a ''debt-for-nature'' swap (even though the alleged ''debt'' was merely the threat of what the FDIC's ATS memo concluded was a marginal-at-best lawsuit.)

I understand that in a lobbying campaign, hundreds of letters were sent directly to the highest levels of the FDIC and OTS encouraging the agencies to file suit against MAXXAM to ''create'' a debt that could be ''swapped'' for the Headwaters Forest. In fact, the ATS memorandum advised FDIC senior management that the Clinton Administration was ''seriously interested'' in pursuing a ''debt-for-nature'' swap and warned that the agency would come under severe criticism from the environmental community if it did not proceed against Mr. Charles Hurwitz and MAXXAM.

I have very serious concerns over the notion that the FDIC somehow has the authority, let alone ''the power and duty to protect forest assets * * * and endangered and threatened species'' as the extremist activists told your office. I am not aware of FDIC or OTS authority or jurisdiction in these areas. However, the Committee on Resources does have the constitutional and jurisdictional authority under the Rules of the House of Representatives involving the Headwaters Forest, management of the Headwaters Forest, federal additions to the Headwaters Forest, and threatened and endangered species.

In addition, as is evidenced in the following excerpt from a letter from an Earth First! activist to the Federal District Court Judge overseeing the FDIC's case against MAXXAM, the environmental community publicly claimed credit for manipulating the FDIC and OTS into pursuing the ''debt-for-nature'' course related to Headwaters: ''As the initiator of the so-called 'Debt-for-nature' campaign, I have decided to write you prior to your making your final ruling around this case. *The campaign to encourage the FDIC to sue Charles Hurwitz and the MAXXAM Corporation was and is designed to stand up on its own, regardless of whether a debt for nature swap ensues* . . . I have heard it argued that the FDIC only filed this suit to cave into pressure from citizens. Well may I ask, de facto, what is wrong with pressure from citizens? (emphasis added) This is a strikingly candid admission and certainly supports the conclusion that the pressure exerted was successful in prompting the FDIC to file a suit that its internal policies would otherwise not have authorized.

Since the initiation of the litigation by the FDIC and the OTS, the Federal and State of California governments have purchased the Headwaters Forest. With the federal acquisition, the issue was laid to rest. The purchase was accomplished through legislation authored by Members of the Committee on Resources, and is a subject within the jurisdiction of the Committee. The management of the Headwaters Forest is also within the jurisdiction of the Committee. The legislation and agreement reached when Congress adopted Title V of P.L. 105–83 contemplated no additions to the Headwaters Forest over five acres. However, the extreme elements within the environmental movement, the FDIC, and the OTS continue to pursue what appears to be an orchestrated agenda and cases against MAXXAM and Mr. Charles Hurwitz to apparently create a ''debt'' to be ''swapped'' for additions to the Headwaters Forest owned by Pacific Lumber. This idea is contrary to the agreement reached by Congress and the Administration, contrary to the law, and contrary to the mission of the FDIC.

As a result, I have initiated this oversight review and make the following request for records in furtherance of the review.

Request for Records. The review requires the prompt production of all records by the FDIC and OTS that relate to the matter under review as outlined above. In addition, the attached Schedule of Records specifies certain records or categories of records that are also requested and must be produced pursuant to the authority and under deadlines in this letter. The schedule also contains the definition that applies to the term ''records.''

Interviews. In addition to the information listed above, this inquiry may include a request to interview you and those in the employ of the FDIC and OTS who have knowledge of the matters under review. In addition, should the need for hearings arise, you and staff at the FDIC and OTS may be asked to testify before the Committee.

Deadline. I request that you strictly comply with the deadlines for production which are as follows: response to this letter by June 20, 2000, and delivery of the records 4:00 p.m., Friday, June 23, 2000, to the attention of Mr. Duane Gibson, 1324 Longworth House Office Building. I also request that you provide two sets of all records requested.

Lead Investigator. This review will be led at the staff level Mr. Duane Gibson, the Committee's General Counsel for Oversight and Investigations. I request that your staff contact him (202–225–1064) after your receipt and review of this letter. Mr. Gibson can assist with any questions. Thank you for your cooperation with this review of matters under the jurisdiction of this Committee. Please be aware that the Committee has the authority to compel production of the records that are requested should they not be produced by the deadline listed above. I anticipate your cooperation so that I will not need to employ this authority.

Sincerely,

DON YOUNG,
Chairman.

SCHEDULE OF RECORDS—HEADWATERS FOREST ADDITIONS AND DEBT FOR NATURE

1. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention ''debt for nature,'' the Headwaters Forest, or the Pacific Lumber Company, including but not limited to any records relate to obtaining additional parcels of land referred to as of the Headwaters Forest, which were or are owned by the Pacific Lumber Company.

2. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention (or are to or from) the Rose Foundation (including Ms. Jill Rattner), the Turner Foundation or any other grant-making organization *and* that in any way relate to strategies or legal theories for acquisitions or potential acquisitions of the Headwaters Forest or the concept of ''debt for nature.''

3. All records that relate in any way to the FDIC or OTS advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention (or are to or from) Earth First!, North Coast Earth First!, Bay Area Coalition on Headwaters, Circle of Life Foundation, The Trees Foundation, The Humboldt Watershed Council, The National Audubon Society, and/or the Sierra Club.

4. All records of any FDIC Board deliberations, and any OTS deliberations, in which the decision to proceed with litigation against or claims against Mr. Charles Hurwitz and/or MAXXAM was considered or discussed.

5. All records related to any contact between the FDIC or OTS (or any employee of the OTS or FDIC) and any group or individual or group that relates to or mentions the Headwaters Forest.

6. All records that relate in any way to the Federal Deposit Insurance Corporation's (FDIC) Office of Thrift Supervision's (OTS) advancement of claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention ''debt for nature'' or the Headwaters Forest *and are* to, from, or involve Mr. Bruce Rinaldi, Mr. Ken Guido, Mr. Robert DeHenzel, or Mr. Jeff Williams.

7. All records showing or related to any contact or communication between anyone employed by, assigned to, or associated with the FDIC or the OTS and anyone employed by, assigned to, or associated with the White House (including the Council on Environmental Quality), The Office of the Vice President, The Department of the Interior, the Forest Service, or the Bureau of Land Management that relate in any way to the FDIC or OTS claims against Mr. Charles Hurwitz and/or MAXXAM *that also* in any way mention, refer to, or relate to ''debt for nature,'' the Headwaters Forest, or the Pacific Lumber Company.

DEFINITIONS

For the purposes of this inquiry, the term ''record'' or ''records'' includes, but is not limited to, copies of any item written, typed, printed, recorded, transcribed, filmed, graphically portrayed, video or audio taped, however produced, and includes, but is not limited to any writing, reproduction, transcription, photograph, or video or audio recording, produced or stored in any fashion, including any and all computer entries, accounting materials, memoranda, minutes, diaries, telephone logs, telephone message slips, electronic messages (e-mails), tapes, notes, talking points, letters, journal entries, reports, studies, drawings, calendars, manuals, press releases, opinions, documents, analyses, messages, summaries, bulletins, disks, briefing materials and notes, cover sheets or routing cover sheets or any other machine readable material of any sort whether prepared by current or former employees, agents, consultants or by any non-employee without limitation and shall also include redacted and unredacted versions of the same record. The term includes records that are in the physical possession of the FDIC or the OTS (as the case may be) and records that were formally in the physical possession of the FDIC or the OTS (as the case may be), as well as records that are in storage. Furthermore, with respect to this request, the terms ''refer'', ''relate'', and ''concerning'', means anything that constitutes, contains embodies, identifies, mentions, deals with, in any manner the matter under review.

''FDIC'' means Federal Deposit Insurance Corporation.

''OTS'' means Office of Thrift Supervision.

MAXXAM means MAXXAM Inc., Pacific Lumber Company, and United Savings Association of Texas.