



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240

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**JAN 28 2004**

## Memorandum

To: Regional Directors, Region 1, 2, 3, 4, 5, 6, and 7  
Manager, California/Nevada Operations Office

From: Director *Steve Williams*

Subject: No Surprises Litigation Update

This memorandum updates my November 4, 2003, memorandum providing direction on issuing incidental take permits under section 10(a)(1)(B) of the Endangered Species Act in light of the recently released opinion and order in Spirit of the Sage Council v. Norton. Judge Sullivan's memorandum opinion can be viewed online at <http://www.sagecouncil.com/No%20Surprises%20Decision.pdf>. In the opinion and order, Judge Sullivan vacated the "permit revocation rule" and remanded it to the Service for further consideration. In addition, Judge Sullivan found that the "No Surprises rule" is so intertwined with the "permit revocation rule" that it must also be remanded for consideration as a whole with the PRR. However, the court made no further inquiry into or conclusions about the substantive validity of the No Surprises rule. The court also did not rule on the validity of the provision that exempts incidental take permits from the general permit revocation provision at 50 CFR 13.28(a)(5).

On December 24, 2003, the plaintiffs filed a motion requesting the court to clarify or amend its order. Plaintiffs asked the court to compel the Service to complete rulemaking on the remanded issues within 180 days. Plaintiffs also requested that the court amend its order to make the general permit revocation standard at 50 CFR 13.28(a)(5) applicable to incidental take permits until the Service adopts a new regulatory standard for revoking incidental take permits. Finally, plaintiffs asked the court to prohibit the agencies from issuing new incidental take permits with No Surprises assurances until the rulemaking on remand is completed. The government filed a response opposing this motion on January 9, 2004.

Based on advice from the Solicitor's Office, you may continue issuing, renewing, amending, or transferring permits under the authority of section 10(a)(1)(B) of the Endangered Species Act, and those permits should include the No Surprises assurances. However, in light of the pending motion before the court, the language and direction from the November 4, 2003, memorandum, addressing possible severability must still be included with any new, renewed, amended, or transferred permits.

The court's order vacated the "permit revocation rule," but it is the position of the Government that the Service retains statutory authority, under both sections 7 and 10 of the **ESA**, to revoke incidental take permits that are found likely to jeopardize the continued existence of a covered species. If we choose to re-establish a permit revocation rule, it will be done through notice and comment rulemaking. Incidental take permits remain exempt from the general permit revocation standard in 50 CFR 13.28(a)(5).

Please contact Endangered Species: Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants if **you** have any questions regarding this issue.