



# United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240

In Reply Refer To:

FWS/AES/DCHRS/014872

NOV 4 2003

## Memorandum

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

From: Director *Steve Williams*

Subject: Update Concerning "No Surprises" Litigation

This memorandum supersedes my October 9, 2003, memorandum providing direction on how to proceed in the face of the September 30, 2003, order from Judge Sullivan granting plaintiffs' motion for summary judgment in the Spirit of the Sage Council v. Norton case (Civil Action No. 98-1873). My October 9 memo focused upon avoiding any violation of Judge Sullivan's order and, accordingly, directed you to cease issuing any incidental take permits under the authority of section 10(a)(1)(B) until further notice. Having now considered, in consultation with legal counsel in the Solicitor's Office and the Department of Justice, options that allow for permits to issue pending further direction from the Court, I am providing the following updated direction.

Effective immediately, Regions may issue new incidental take permits, permit amendments, renewals, and transfers, provided the following language is included in the terms and conditions of any permit and implementing agreement issued by the Service under the authority of section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended:

"In the event that any judicial decision or determination, including without limitation the decision from the District Court for the District of Columbia in *Spirit of the Sage, et al v. Norton, et al, 98-CV-1873 (D.D.C. 2003)*, may hold that the Department of Interior's "No Surprises" assurances rule (or similar successive rule) is vacated, unenforceable or enjoined for any reason or to any extent, **[insert reference to the appropriate No Surprises assurances provision in the permit, implementing agreement, Habitat Conservation Plan, etc.]** shall be enforceable only to the degree allowed by any such decision or determination; provided that the remainder of the **[permit, implementing agreement, HCP, etc.]** shall remain in full force and effect to the maximum extent permitted by law. In the event that the "No Surprises" assurances rule may be vacated, unenforceable or enjoined by such decision or determination but is later reinstated, this **[insert reference to No Surprises assurances provision]** shall

likewise be automatically reinstated and apply to the entire term of this HCP. If, in response to any such judicial decision or determination, the “No Surprises” assurances rule is revised, this [insert reference to No Surprises assurances provision] shall be automatically amended in a manner consistent with the revised rule so as to afford the maximum protection to the APPLICANT consistent with the revised rule.”

This direction will remain in effect until further notice. Once the final order and opinion are received, I will revisit this issue to determine whether additional direction is needed.

Please direct any questions regarding this issue to Patrick Leonard, Chief, Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants.