Oh, Junie, I wish I could be there—Now I think maybe I could be of some help—There are so many things to be done—What a ridiculous and worthless thing a war is in the light of such a wonderful event. that there will be no war for Damon!—Junie, isn't there anything I can do to help out . . . .

Oh my beautiful darling, I love you more and more and more—Gosh, I'm happy!—Sweet dreams my sweet mother, Love—Rarey.

Capt. George Rarey was killed three months after writing this letter.

Even in the Internet age, many servicemen and women continued to send their letters the old-fashioned way—through the mail. In 1997, 36-year-old Major Tom O'Sullivan was in Bosnia, serving as the officer in charge of the first Armored Division Assault Command Post and, later, as the operations officer of the 4th Battalion, 67th Armor at Camp Colt. O'Sullivan frequently wrote home to his wife Pam and their two children, Tara and Conor, and on September 16, 1996—the day Conor turned seven—O'Sullivan (at far right, with his Bosnian translator) sent a birthday gift he hoped would have special meaning to his son:

Dear Conor,

I am very sorry that I could not be home for your seventh birthday, but I will soon be finished with my time here in Bosnia and will return to be with you again. You know how much I love you, and that's what counts the most. I think that all I will think about on your birthday is how proud I am to be your dad and what a great kid you are.

I remember the day you were born and how happy I was. It was the happiest I have ever been in my life and I will never forget that day. You were very little and had white hair. I didn't let anyone else hold you much because I wanted to hold you all the time . . . .

There aren't any stores here in Bosnia, so I couldn't buy you any toys or souvenirs for your birthday. What I am sending you is something very special, though. It is a flag. This flag represents America and makes me proud each time I see it. When the people here in Bosnia see it on our uniforms, on our vehicles, or flying above our camps, they know that it represents freedom, and, for them, peace after many ears of war. Sometimes, this flag is even more important to them than it is to people who live in America because some Americans don't know much about the sacrifices it represents or the peace it has brought to places like Bosnia.

This flag was flown on the flagpole over the headquarters of Task Force 4–67 Armor, Camp Colt, in the Posavina Corridor of northern Bosnia-Herzegovina, on 16 September 1996. It was flown in honor of you on your seventh birthday. Keep it and honor it always.

Love, Dad.

REDWOODS DEBT FOR NATURE

HON. RICHARD W. POMBO

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, June 14, 2001

Mr. POMBO. Mr. Speaker, the staff report is entitled Redwoods Debt-For-Nature Agenda of the Federal Deposit Insurance Corporation and the Office of Thrift Supervision to Acquire the Headwaters Forest. This report was prepared for the Committee to wrap up some oversight work on the FDIC and Office of Thrift Supervision redwoods debt-for-nature matter started during the last congress. 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 startling part is that the banking claims against Mr. Charles Hurwitz (stemming from his minority ownership of a failed savings and loan) that were to be used a leverage to get Pacific Lumber Company's redwoods, a company owned and controlled by Mr. Hurwitz, were loser claims. By the FDIC's own internal evaluation, there was a 70 percent chance the claims would fail procedurally and more than 50 percent chance of failing on the merits.

The conduct of the bank regulators was so bad that it led a U.S. District Court Judge, the Honorable Lynn Hughes to conclude that the agencies used tools equivalent to the cosa nostra—a mafia tactic—in their pursuit of Mr. Hurwitz and his privately owned redwoods. This staff report gives even more basis to validate the conclusion of the federal judge. No one-whether 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. The redwood scheme grew as the FDIC understood the importance of its—and the OTS'—potential claims as the leverage for the redwoods during an extraordinary 1994 strategy meeting with a Member of Congress—19 months before the claims were even authorized to be filed. The other bank regulator, the OTS, was enlisted by the FDIC right after that meeting. They were hired to pursue the same claims against Mr. Hurwitz administratively as leverage for their claims. FDIC's reason for teaming up with the OTS: to get ''the trees,'' according to the notes of their own staff.

The redwoods scheme was introduced through an intense lobbying campaign by environmental groups, including Earth First! They penetrated the ''independent'' FDIC, the FDIC's outside counsel, the OTS, the Administration, the Department of the Interior, the White House, and Members of Congress. The redwoods scheme was why ordinary internal operating procedures of the FDIC that would have closed the case against Mr. Hurwitz were not followed. The redwoods scheme 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, just a few days before the staff recommendation flipped from ''don't sue'' to ''sue,'' FDIC officials met with the top staff from the Office of the Secretary of the Department of the Interior. Their notes from the meeting concluded by saying, ''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 the critical part of the scheme. The bank regulators were willing advocates who promoted a redwoods exchange for banking claims against Mr. Hurwitz well before the claims were authorized by the FDIC board, well before they were filed, and very well before Mr. Hurwitz raised the notion of redwoods. The evidence of the FDIC's participation in the redwoods scheme contradicts the testimony offered by the witnesses at the December 12, 2000, hearing of the Committee Task Force. 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 contradicts that conclusion.

The cost of bringing these claims that would have been ''closed out'' if it were the normal situation—is nearly $40 million to Mr. Hurwitz. One of two things needs to happen. We need to either have a hearing on this situation or the FDIC and OTS boards need to correct this action and revisit the underlying board actions that authorized the suits in the first place. I would be surprised if the FDIC and OTS board members actually knew what their staffs were doing with the redwoods scheme. I hope they would be surprised, but the evidence is now here for them to see. This is embarrassing to the bank regulators—they need to address it now.

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

Preface

Documentation References

Documentation is referenced in parentheticals throughout the text of this report. References to ''Document A'' through ''Document X'' 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 Comntittee 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.[1] 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 information 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 intense 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,[2] 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 they 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.[3] 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 trumped their own negative evaluation of the merits of their case, become more fully understood.[4] 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 regulators 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 decisionmaking 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 W. 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,''[5] 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.[6]

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 fall. 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 function 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[7] or the FDIC[8] 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 tree. 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.proiects/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 mechanisms.

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 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[9] 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%) 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,[10] 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. Gonzolez, 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[11] 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 a $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. DeHenzie, 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 by 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).[12] 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[13] 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 enticed 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[14] that was much more conducive 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.[15] 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.[16] They also denied that their discovery tactics were improper or for the purpose of ''harassment.''[17] 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[18] met on February 3, 1994, to discuss the potential banking claims targeting Mr. Hurwitz.[19] (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.''[20] (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.[21] 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 and 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 claim (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,[22] 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 a ''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.[23]

There had obviously been a huge public debate going on regarding this forest. We were not part of that[24] but we had lots of communications, others 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 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 implication 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 W. 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 heels 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 heels 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.[25] 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.[26]

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 it 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 ignoiing 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 million'' 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.[27]

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 for 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 got 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 and 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' 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 were 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 Scheme 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 arguments 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.[28] (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 1995.

In February 1995, a host of environmentalists proposed an acquisition of the Headwaters redwood trees to President Clinton, and Leon Panetta (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 using their banking claims—at least three months before FDIC says that Mr. Hurwitz raised the redwood-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 (that 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 noting to do with the litigation against Mr. Hurwitz. Sometime in mid-1994 (but before July 20, 1994)[29], 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 commiittee 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 intragovernment lobbying began indirectly by at least May 19, 1995,[30] 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 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,[31] 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 environmentalist 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.[32] 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.[33] 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.[34] 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.''[35] 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 do its job and cobble together enough evidence supporting a banking claim involving USAT and Mr. Hurwitz. They were not ready to file a complaint 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 issues—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 prefer-red 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 hand 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.

McReyonlds-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[oar]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 there 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 about 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 the Mr. Hurwitz's redwoods[36] 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[37]

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[38]

Have not decided whether to bring case—won't decide for months.[39]

Alan McReynolds—Adm[instration] 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[instration] might trade mil[itary] base[40]

Had call from atty. Appraisal on prop[erty] for $500m. Said they want to make a deal.[41] 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 statute 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 for the 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 limitations]—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 FDCI 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 clams 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 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. (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. (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. 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 the possibility the FDIC/OTS claim, for the redwood forest. They stated that the Administration is seriously interested in pursuing such a settlement.[42] 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 mike it clear that this does not end the matter of Hurwitz's liability for the failure of USAT because of the ongoing OTS investigtion. (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[43] 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 drafts 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 are the only set of meeting notes from that meeting,[44] 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[45]

—Pete Wilson has put together a multi-agency task group

—Calif would put up $ 100 MM of California 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[46]

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 they 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.[47] . . . (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 statement was that if a redwood ''swap became an option, the FDIC would consider it as one alternative and would conscientiously strive to resolve any pertinent issues.'' (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 amenable 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 Stems) (Document DOI C, 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 the lead'' (Document DOI C, page 2). This is a stunning indictment of the political motivation of the FDIC and OTS staff.

There was coordination with Congressional offices (Document DOI D).

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 DOI E).

There were multi-agency meetings that included the White House ONM 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 redwoods 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.[48] 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. McReynolds 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 remarkably candid:

FDIC has no direct claim against Pacific Lumber through which it could successfully obtain or seize the trees or to preserve the Headwaters Forest.

FDIC's claims alone are not likely to be sufficient to cause Hurwitz to offer the Headwaters Forest,[49] 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, Texax negligence—gross negligence business judgment law, and Hurwitz 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. (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 rationale, 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, OMEB, 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 reviewed 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 REDWOODS''

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 now 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:

Tell Mc[Reynolds]—we need exit strategy from Redwoods. NO collusion.

(Record 32)

So, the FDIC was (and still is) saying to the world that their claims have nothing to do with leveraging redwoods, and seven months after they are brought they ''need and exit strategy''? After two years of collusion between FDIC and a half dozen federal agencies, several environmental groups, the White House, and the OTS about a redwood scheme the FDIC wants to talk to McReynolds to ensure that there is ''NO collusion''?

And, by August 8, 1996, Mr. Hurwitz still had not apparently raised the redwoods debt-for-nature issue in the context of settling banking claims. Record 40 at page 2 are questions (and the start of draft answers) from Elizabeth Blaug to Jack Smith. Question number one is, ''Why doesn't the Administration forget the land exchanges and get Hurwitz to settle his debts in exchange for the trees?'' The answer: ''would be inappropriate because of independent status of regulators, pending litigation and administrative proceeding. . . .''

This means what FDIC and OTS had done since February 1994 concerning advancing the redwoods debt-for-nature scheme was inappropriate. In addition, if Mr. Hurwitz had really raised the notion of a redwood for bank claims swap, then this question would have been entirely unnecessary. The answer would have been ''Mr. Hurwitz raised it, the bank regulators and Administration did not, and we are pursuing that option.'' But that was not the case. The fixation on ensuring—even as late as August 1996—that Mr. Hurwitz would ''flrst'' raise the redwoods issue to the FDIC and OTS is quite illustrative of the fact that he had yet to do it and it was a prerequisite to either banking agency engaging on the redwoods scheme—something that they had already done.

Finally, on September 6, 1996, nearly a year after the FDIC suit was filed, the FDIC and OTS got what they wanted—a direct contact from Hurwitz that ''he will propose that the FDIC take certain redwood trees which we will exchange for other marketable property from perhaps Interior.'' (Record 41) The settlement meeting came the following week, and it is the first time Mr. Hurwitz's representatives raised the possibility of settling the banking claims using redwood trees. (Record 41) The settlement proposal was reject by the *Department of the Interior* within a few days, and it was clear that the FDIC and OTS were not even in charge of settling their own claims. (Record 42) This is additional evidence of the political nature of the FDIC lawsuit and OTS administrative action.

Discussions about a redwood swap for banking claims ebbed and flowed through the remainder of 1996, 1997, and 1998, and the law that authorized the outright purchase of the Headwaters Forest was enacted on November 14, 1997. Then, pursuant to that law, the transaction closed on the last day before the authorization and funds expired, March 1, 1999, and the federal government, with the help of the State of California purchased the Headwaters Forest.

This action left the bank regulators without their ''exit strategy'' (Record 32) from the redwoods scheme, and with a U.S. District Court judge that somehow began to see the FDIC and OTS cases and coordination for exactly what they were: strong arm tactics of an ''independent'' agency out of control. In an uncommonly harsh opinion, U.S. District Court Judge Lynn N. Hughes described FDIC tactics of bringing this case as those of the cosa nostra (meaning a tactic of making an ''offer'' that Hurwitz could not refuse). The July 27, 1995, FDIC ATS memorandum somehow ended up on the web page of the Houston Chronicle, and the court allowed discovery on the improper FDIC and OTS coordination and cooperation in the scheme to leverage the redwoods from Mr. Hurwitz.

Conclusion

The OTS case proceeded in the administrative forum, but a decision has still not been rendered. In spite of a late desire by the OTS to keep their claims clean of the redwoods matter, FDIC polluted its and OTS'claim by prompting and paying for OTS to pursue them in the first place as part of the redwoods scheme. OTS also attended several meetings in which details of the redwood swap scheme were discussed well before their claims were noticed or filed, including the critical July 26, 1995, meeting with the FDIC at which DOI and the Administration's desires for the redwoods and need for the banking claims to leverage the redwoods from Mr. Hurwitz were spelled out. The OTS is equally responsible for improper involvement in the redwoods scheme, and the pollution of its claims with a political agenda.

Meanwhile, Mr. Hurwitz has reportedly spent some $40 million to defend himself from a tactics that equate to those of the cosa nostra. Indeed, it is the bank regulators at the FDIC and OTS who shoulder responsibility for advancing a corrupted claim for improper purposes (i.e., to leverage redwoods) that are not authorized by law.

If anyone bears responsibility for corrupting the bank regulatory system—it is the FDIC and OTS legal staff who caved to the redwood desires of the DOI and the Administration. The Directors of the FDIC and OTS should take corrective action and withdraw the authorization for the FDIC lawsuit and the OTS administrative action against Mr. Hurwitz for matters involving USAT. Integrity of the bank regulatory system demands nothing less.

NOTES

[1] Therefore, funds appropriated to of any federal entity cannot be used for any activity that even supports acquisition of more Headwaters Forest. If funds are spent for such activities, then they are not legally spent.

[2] The FDIC action was authorized on August 1, 1995, and filed on August 2, 1995, the final day under the statute of limitations; Notice of the OTS administrative action was filed on December 26, 1995 and the OTS trial began on September 22, 1997.

[3] This occurred when the concept of purchasing the redwoods outright from Mr. Hurwitz was unlikely due to budget constraints.

[4] The first indication that bank regulators became part of the redwoods debt-for-nature scheme was rendered by U.S. District Court Judge Lynn Hughes, who observed that the FDIC and OTS were targeting Mr. Hurwitz in a manner that resembled tactics of the cosa nostra.

[5] The latest example of debt-for-more-nature is contained in Record 1A.

[6] This violated the ''no more'' clause, because federal funds were being spent to acquire additional acreage of the Headwaters Forest. The continued pursuit of redwood trees through debt-for-nature by bank regulators in no way diminishes the highly inappropriate involvement of the bank regulators in participating in the debt-for-nature scheme before the statute was enacted or before the transaction was consummated.

[7] 12 U.S.C. 1462a et.seq.

[8] 12 U.S.C. 1818 et. seq.

[9] Some non-banking claims (e.g. possible securities law claims) were referred to other entities for investigation.

[10] This cooperation was formalized in May 1994 when the FDIC began paying the OTS to advance its claims.

[11] These contacts were: Rep. Gonzolez to Hove (FDIC), November 19, 1993; Rep. Dellums to Hove (FDIC), December 15, 1993; and in 1994, at least seven written Congressional contacts were made to the FDIC or OTS on the debt-for-nature matter. Interestingly, Rep. Dellums wrote to the FDIC about the redwoods swap on the following dates: December 15, 1993, February 9, 1994, May 27, 1994, and September 14, 1995; and it was reported that on Monday, July 18, 1994, Ms. Jill Ratner attended a fundraiser for Re. Dellums in Oakland, California where she discussed the redwoods issue with the Vice President Gore. ''Mr. Gore said, 'I'm with ya,' '' Ratner reported enthusiastically to members of the Bay Area Coalition for the Headwaters Forest after the early-morning fundraiser for Rep. Ron Dellums, D–Oakland, in Oakland'' San Francisco Daily Journal, Friday, July 22, 1994. (Document J)

[12] In addition on November 30, 1993, Jack D. Smith, sent a memo about ''Hurwitz'' to Pat Bak (another FDIC lawyer) about two issues—(1) the Hamburg Headwaters acquisition bill and (2) some materials about a type of claim called a ''net worth maintenance'' claim advising Bak not to ''let the claim fall through the crack!'' The December 21 memo to Hove from Smith notes that FDIC and OTS are coordinating on this claim because the courts will ''not enforce'' them and there will be FDIC/OTS discussions about OTS bringing the net worth maintenance claims.

[13] The FDIC maintains that Mr. Hurwitz raised the issue of redwoods directly with the FDIC in September, August or September, 1996 (after the FDIC lawsuit was filed) and indirectly July 1995, through the Department of the Interior (prior to the lawsuit being authorized and filed by the FDIC). There is serious question whether a bank claims for redwoods swap was raised by Mr. Hurwitz or his lawyers prior to September 6, 1996, a year after the FDIC case was filed. (See discussion infra.)

[14] Such a forum—an administrative law judge at OTS—as opposed to an Article III court would be viewed by bank regulators as more favorable.

[15] FDIC admitted in a later memo that its claim against Hurwitz was not enough to leverage his redwoods because it was for a lower dollar amount than necessary and it was so weak on the merits, which is why the OTS administrative action on the same facts became so important to the scheme. (See, discussion infra at page 41 et. seq. and Record 33.) This is truly an incredible admission of the redwood purpose on the part of FDIC and is an admission of why the FDIC hired the OTS. Clearly it was to pursue a redwoods debt-for-nature scheme.

[16] Bank regulators at the FDIC attempted to do this by saying that they never raised the redwood issue with Mr. Hurwitz. To have done so would be an admission that they intended a redwoods debt-for-nature scheme, but their defense (that Mr. Hurwitz raised it with them first) really not address reach the issue of whether redwoods or a scheme to get redwoods from Mr. Hurwitz had any relationship to their banking claims.

[17] Id. See also, hearing transcript at pages 97–100 for the exchange between Mr. Kroener and the Members of the task force when he was confronted with internal FDIC e mail messages indicating that their lawyers were pursuing discovery for purposes of ''harassing'' Mr. Hurwitz.

[18] Rep. Hamburg had introduced H.R. 2866 that authorized the Forest Service to purchase the Headwaters Forest and designate it as wilderness.

[19] This meeting was preceded on February 2, 1994 with what appears to be a prepatory phone call between staff of Rep. Hamburg and a counsel to Chairman Gonzolez, Amanda Falcon.

[20] A net worth maintenance claim automatically attaches to owners who have 25% or more of a failed bank. Under banking law an owner is required to contribute personal funds to keep the bank solvent in such a case. Where ownership is less than 25%, bank regulators often try to get owners to sign an agreement binding them to personal contributions to keep failing institutions solvent. This is called a net worth maintenance agreement. There was no net worth maintenance agreement between Mr. Hurwitz and the bank regulators.

[21] Later Mr. Isaac explained the impropriety of outside meetings revealed in the ATS memo. The meeting with Rep. Hamburg was unknown at the time, but it is a dramatic example of how much the bank regulators polluted their process with a redwood agenda. Mr. Issac words: ''[O]ne of the things that that Agency has always prided itself on is its independence and its integrity and its freedom from the political process. To meet with environmentalists or anybody else, administration officials or congressional representatives, to talk about litigation that is proposed or is ongoing is something that I think was and is highly inappropriate. I find it shocking that people—people did that, and I've never seen that happen at that Agency before and I'm quite surprised by it.'' (Hearing Transcript, page 45).

[22] This is a very odd characterization, given that government agencies to not generally have authority to represent individuals or other entities. If Ms. Tanoue was saying that Mr. Hurwitz somehow raised the redwoods issue to the FDIC through the Department of the Interior, the characterization is not legitimate for several reasons. First, there is no evidence that the DOI is authorized by law to hold such a representative capacity. Second, the characterization is at odds with the fact that the DOI lawyers had been briefed and lobbied by environmental groups years prior to the DOI raising the issue (if indeed they did). Third, the characterization is at odds with the strategy sessions with Rep. Hamburg that are now known to have taken place. Fourth, the characterization presumes that the DOI ''representatives'' were accurately and truthfully making such an ''offer.'' Absent written proof of such an offer, this characterization is not believable. To the contrary, the written evidence clearly shows that Mr. Hurwitz's representatives were discussing trades of surplus government land for the redwoods at the time.

[23] Mr. Kroener is playing with the facts. See footnote .

[24] (Footnote not part of original) This statement is incorrect, given the notes of the

Rep. Hamburg meeting that show that the FDIC lawyers had willingly promoted their claims as leverage in the redwoods debt-for-nature scheme.

[25] They had no claim because they ''could not find'' a net worth maintenance agreement with Mr. Hurwitz.

[26] When the FDIC finally filed its claim in federal court on August 2, 1995, the federal judge hearing the case, Judge Hughes, said the FDIC and OTS used tools of Cosa Nostra (the mafia) against Mr. Hurwitz, uncommonly strong language to describe actions by any party, let alone the federal government.

[27] Leverage by other agencies—the Department of Labor and the Securities and Exchange Commission was also discussed at the Hamburg meeting. (See meeting note (bates number JS 004216) attached after Record 2A, page 2.) These are Jeff Smith's records.

[28] In light of the existence of this analysis by F. Thomas Hecht, one wonders how FDIC can, with any seriousness, keep saying that their claims and litigation had nothing to do with redwoods or a redwood debt-for-nature scheme. Their outside lawyers were analyzing the very debt-for-nature theories lobbied by the environmental groups and they acted as an early conduit to funnel information to FDIC legal staff. Even if one does agree with the positions of the Rose Foundation or Earth First! on this issue (and this report does not address their advocacy or their right under our Constitutional government to free speech and to petition their government), one must question the response of the FDIC and its outside lawyers to that petitioning. If the FDIC is truly operating under its statutory mandate—which is to recover cash—then the proper response to environmentalists or anyone else should have been, ''We have a statutory mission, and it is not to help the federal government acquire redwood trees or anything else, period.'' Surely, the redwoods agenda should not have permeated the bank regulators' analysis and thinking as it did.

[29] The handwritten memo is not dated, but it refers waiting until the fourth quarter of 1994 to make a decision, so this places the memo in late in the second or third quarter of 1994.

[30] McReynolds, according to his calendar entry, also met on May 16, 1995, with Geoff Webb (DOI) and Julia Levin, with the Natural Heritage Institute. That group had just written a paper for the Rose Foundation on April 19, 1995, entitled ''Federal Inter-Agency Land Transfer Mechanisms.'' (Record 11A) That paper notes that there are ''six federal statutory programs that allow property under control of one Federal agency to be transferred to another Federal agency or into non-federal lands'' and it begins laying out the mechanisms to get Mr. Hurwitz's redwoods into federal ownership.

[31] This date is important. Mr. Kroener's testimony and representations to the Task Force that it was July __ 1995, when DOI raised redwood debt-for-nature on behalf of Mr. Hurwitz. The first-hand involvement between Mr. McReynolds and Ms. Ratner (and the flyover) occurred two months prior to the time when DOI is said to have raised the redwoods debt-for-nature swap on behalf of Mr. Hurwitz with the FDIC and OTS.

[32] This wholesale acceptance of the environmentalist rhetoric about virgin redwoods in itself shows bias. The author of the memo must be misinformed, because the United States and the State of California already owns tens of thousands of acres of virgin redwood stands in California, most of which are parks that will not be logged.

[33] Two of the many examples are (1) the September 26, 1994, 43 page legal analysis how the FDIC could impose a constructive trust over Hurwitz's Pacific Lumber redwoods (Record 13) and (2) the June 29, 1995, letter from F. Thomas Hecht to the FDIC's attorney Jeffrey Ross Williams that forwarded a legal memo about the Headwaters situation and qui tam claims that had been filed related to the forest. (Record 14)

[34] The notes do not say that Mr. Hurwitz or any of his authorized representatives asked DOI to broach a redwoods debt-for-nature deal to swap bank claims for redwoods. The FDIC informed Chairman Young that the chain of events leading to McReynolds call was an 8:00 p.m. July 13, 1995, call to Alan McReynolds ''at his home'' from John Martin, a Hurwitz lawyer, ''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 the Interior.'' (See, October 6, 2000, letter to Duane Gibson, General Counsel, Committee on Resources, from William F. Kroener, III, General Counsel FDIC contained in Appendix 3) This representation in no way says that Mr. Hurwitz (or his lawyer) initiated the discussion of a redwoods debt-for-nature swap with the Department of the Interior. It artfully says Mr. Hurwitz was ''considering'' such a proposal—a proposal more likely initiated by Mr. McReynolds.

In any case, the FDIC's legal relationship on any USAT banking matter was with Mr. Hurwitz, not with the Department of the Interior. Any indirect suggestion by an intermediary, such as Mr. McReynolds, who did not represent Mr. Hurwitz or USAT, does not change that legal relationship or alter the FDIC's responsibility to keep its claims free of political influence—from in and outside of the government. However, there is considerable question whether McReynolds' recollections related to a call from John Martin are accurate. Mr. Martin was discussing (with McReynolds) potential swaps of excess government property, such as military bases, for the redwoods, a subject with which McReynolds had experience. Mr. Martin's notes from his discussions at the time back up his recollection (Record 25).

[35] It is important to note that notes of McReynolds conversation with DeHenzel do not in any way indicate that Mr. Hurwitz or his lawyers had suggested or urged linking a settlement of the USAT banking claims and Mr. Hurwitz's redwoods in a swap, which is what McReynolds later said in sworn testimony.

[36] The Endangered Species Act was preventing Mr. Hurwitz from harvesting redwoods on Pacific Lumber Company's Headwaters land.

[37] (This footnote is not in original). This refers to surplus federal properties that were being considered by the government and Mr. Hurwitz on such a swap involving the redwoods. Mr. McReynolds had been working with Hurwitz lawyer, John Martin on potential swaps involving surplus military government property and redwoods.

[38] (This footnote is not in original). The $400,000 refers to the approximate amount FDIC had paid the OTS to bring its administrative action up to that point.

[39] (This footnote is not in original). This could refer to the fact that FDIC had not decided whether to bring its case, and the staff would recommend at that time that the Board not authorize the suit. Document X verifies that this was the staff recommendation at that time. This could also refer to the fact that OTS has not decided to bring their case.

[40] (This footnote is not in original). Indeed, this is the issue (a swap of redwoods for a surplus military base) that Mr. McReynolds and Hurwitz lawyer, John Martin, had discussed.

[41] (This footnote is not in original). The prior four sentences (notes from what McReynolds said) are very important, however, especially when read in context of footnote 25 and 26 of this report. Those sentences are: ''Adm[inistration might trade mil[itary] base. Had call from atty. Appraisals on prop[erty] for $500m. Said they want to make a deal.'' Indeed, Mr. Hurwitz wanted to make a deal—swapping redwoods for military bases. That was the subject of the ongoing discussion between the attorney who called McReynolds, Mr. John Martin of Patton Boggs, and McReynolds. Mr. Martin was only discussing possible trades of military bases for redwood land owned by Pacific Lumber. (Record 25) Mr. Martin did not deal with issues related to the banking claims and his notes from conversations with McReynolds verify this. The idea of mixing the bank claims—having been floated for years in Congress, in environmental circles including the Rose Foundation, was likely first raised by someone else, and it was McReynolds who had spent time ''flying over Headwaters'' with Rose Foundation Director, Jill Ratner, in May 1995.

[42] (footnote not in original) This confirms the earlier stated conclusion that one of the things that changed on July 21, 1995 was the realization by FDIC lawyers that the Clinton Administration and DOI had adopted and embraced the redwoods debt-for-nature scheme and they wanted it to be successful.

[43] FDIC decisions to file lawsuits are made by the FDIC Board, and the Authority to Sue Memorandum (ATS Memorandum) is the vehicle through which the FDIC staff lays out the case to the board.

[44] These notes appear to be taken by Bryan Veis of the OTS enforcement branch, and they are the only notes of this meeting produced, despite the fact that there were twelve attendees at the meeting—five from the OTS and seven representing the FDIC. (See, Record 26, page 00933). In the view of Committee staff, there appear to be serious omissions from the production of both agencies related to this meeting.

[45] (footnote not in original) So, it was indeed the Administration that wanted the redwoods, and brought them into the discussions.

[46] (footnote not in original) Note that the FDIC has had no direct contact from Mr. Hurwitz about such a proposal to settle the case using redwoods and they did not until September 1996. The FDIC is simply taking the word of the DOI on the issue.

[47] It is extraordinarily difficult to square this evaluation by Mr. Thomas with the discussion in the July 21, 1995, meeting that he attended where it was noted that, ''If we drop suit, will undercut everything.'' (Record 21)

[48] Record 35, page 2 and 3 also confirms this fact.

[49] Record 34 also confirms the thinking of FDIC lawyers that ''it will take more than FDIC claims to get the trees and FDIC remains an important part of exploring creative solutions to the issue.'' This sounds like words from staff of an agency trying to find a purpose, rather than staff of an agency carrying out its statutory purpose. In fact, Record 39, a ''Draft Outline of Hurwitz/Redwoods Briefing'' from Mr. Jack Smith's files, actually states directly how FDIC had strayed from its mission and adopted as its agenda the redwoods debt-for nature scheme: 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.'' The outline also acknowledges that the FDIC, working with CEQ, Interior, other agencies in exploring viability of ''debt for nature settlement.'' (Record 39, page 2) The date on this outline is May 16, 1996.